IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2024-404-003344
[2026] NZHC 2716

IN THE MATTER OF	a contract of insurance between the first plaintiff and the first defendant dated 12 February 2013
BETWEEN	MAINZEAL PROPERTY AND CONSTRUCTION LIMITED (In liquidation) First Plaintiff
	ANDREW JOHN MCKAY and REES GRAHAM LOGAN Second Plaintiffs
AND	QBE INSURANCE (INTERNATIONAL) PTY LIMITED First Defendant
	QBE INSURANCE (AUSTRALIA) LIMITED Second Defendant

Hearing:	29 October 2025
Appearances:	S Hunter KC, B Brown and M Handford for the Plaintiffs A Challis and M Martin for the Defendants
Judgment:	7 September 2026

JUDGMENT OF TRACEY WALKER J

This judgment was delivered by me on 7 September 2026 at 4 pm
pursuant to r 11.5 of the High Court Rules 2016

Registrar/Deputy Registrar

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Solicitors:
Mayne Wetherell, Auckland
McElroys, Auckland

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Introduction

[1] This proceeding concerns the extent of the defendants' liability under a Directors and Officers Liability and Company Reimbursement Insurance Policy (the Policy) issued by the first defendant but for which the second defendant assumed all outstanding obligations (QBE).[1]

[2] The first plaintiff (Mainzeal) is a company duly incorporated under the laws of New Zealand. It was placed in liquidation on 28 February 2013. The second plaintiffs are the liquidators of Mainzeal.

[3] The Supreme Court ordered the directors of Mainzeal to pay Mainzeal $39.8 million in compensation plus interest.[2] The four directors were Insured Persons under the Policy. Mainzeal asserted a statutory charge over the insurance money. QBE paid just under 20 million to Mainzeal in response to the Supreme Court judgment (Indemnity Payment). Now a contest arises as to whether QBE has discharged the full extent of its liability.

[4] This is the second of two proceedings brought by the liquidators of Mainzeal.[3] The judgment in the first proceeding, issued contemporaneously with this judgment, determined the question of whether Mainzeal must account for goods and services tax (GST) on the Indemnity Payment.[4] The issues to be determined now are whether:

(a) QBE must pay a further amount (plus GST) under cl 5.1 of the Policy in respect of Mr Yan's role as non-executive director or is entitled to rely on the exclusion in cl 3.7 of the Policy.

(b) QBE must indemnify Mainzeal for any GST it is liable to pay under s 5(13) of the Goods and Services Tax Act 1985 (GST Act) upon

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1 It is generally unnecessary for present purposes to distinguish between the first and second defendants.

2 *Yan v Mainzeal Property and Construction Limited (in liq)* [2023] NZSC 113, [2023] 1 NZLR 296 [SC judgment]. The liabilities of Dame Jenny Shipley and Messrs Clive Tilby and Peter Gomm were each limited to $6.6 million plus interest.

3 Hereafter I refer to Mainzeal and the liquidators as the liquidators save where the context requires otherwise.

4 *Mainzeal Property and Construction Limited (in liq) v Commissioner of Inland Revenue* [2026] NZHC 2715.

> receiving an indemnity payment from QBE. This would include GST on any additional payment under cl 5.1.

[5] The parties proceeded on an agreed statement of facts and issues and a supplementary agreed statement of facts. They have also both led expert evidence on practical aspects of the GST regime. Richard Shine, the first defendant's general counsel, gave evidence of QBE's typical practice when litigation between an insured and third party is settled, or a judgment is issued requiring the insured to pay compensation to a third party. Allan Bullot, a tax specialist, gave evidence as to whether, and if so how, the Indemnity Payment could have been made so that a GST liability would not arise for Mainzeal. Neil Russ, also a tax specialist, gave evidence in response. The briefs of evidence were taken as read for reasons of expediency but all three witnesses presented for cross-examination.

Background

[6] The first defendant (QBE International) is a company duly incorporated under the laws of New South Wales, Australia, and having its registered office at Level 18, 388 George Street, Sydney.

[7] QBE International was registered under the name "QBE Insurance (International) Limited" from on or about 26 January 1982 until on or about 4 August 2016.

[8] The second defendant (QBE Australia) is a company duly incorporated under the laws of New South Wales, Australia, and having its registered office at Level 18, 388 George Street, Sydney.

[9] QBE Australia is registered in New Zealand as an overseas company under pt 18 of the Companies Act 1993 and has its principal place of business in New Zealand at Level 21, QBE Centre, 125 Queen Street, Auckland.

Directors of Mainzeal

[10] Mr Richard Ciliang Yan (Mr Yan) was appointed a director of Mainzeal on 16 April 2009 and remains a director.

[11] Dame Jennifer Mary Shipley (Dame Jenny Shipley) was a director of Mainzeal from 1 April 2004 until 31 December 2012.

[12] Mr Clive William Charles Tilby (Mr Tilby) was a director of Mainzeal from 1 April 2004 until 31 December 2012.

[13] Mr Peter Gomm (Mr Gomm) was a director of Mainzeal from 24 June 2009 until 5 February 2013.

The contract of insurance

[14] On or about 12 February 2013, QBE International issued the Policy, which was a Directors & Officers Liability and Company Reimbursement Insurance Policy (numbered 800008762PLI) in the name of Richina Global Real Estate Limited and Others, 2012-2013. Relevantly, Mainzeal was an Insured Company under the Policy; Messrs Yan, Gomm and Tilby, and Dame Jenny Shipley were Insured Persons under the Policy; and Messrs Yan and Tilby and Dame Jenny Shipley were non-executive directors for the purposes of extension 5.1 of the Policy.

[15] On or about 1 December 2012, Mainzeal paid the premium to QBE International under the Policy.

Claims against the directors

[16] By letter dated 31 October 2014, from the liquidators' solicitors to QBE International's solicitors the liquidators asserted a statutory charge over insurance money payable under the Policy as provided by s 9 of the Law Reform Act 1936 in respect of claims which the liquidators intended to bring against (among others) the directors.

[17] On or about 15 May 2015, Mainzeal and the liquidators filed claims in the High Court against (among others) the directors.

[18] On 26 February 2019, the High Court delivered judgment in *Mainzeal Property and Construction Ltd (in liq) v Yan*.[5]

[19] The High Court judgment was appealed.

[20] On 31 March 2021, the Court of Appeal delivered judgment in *Yan v Mainzeal Property and Construction Ltd (in liq)*.[6]

[21] The Court of Appeal judgment was appealed.

[22] On 25 August 2023, the Supreme Court delivered judgment in *Yan v Mainzeal Property and Construction Ltd (in liq)*.[7]

[23] The Supreme Court judgment:

(a) held that the directors had breached their duties to Mainzeal under ss 135 and 136 of the Companies Act 1993;

(b) ordered the directors to pay Mainzeal $39,800,000 in compensation together with interest at prescribed rates from 28 February 2013, with the liabilities of Dame Jenny Shipley and Messrs Tilby and Gomm each limited to $6.6 million and interest; and

(c) ordered the directors to pay costs of $65,000 together with reasonable disbursements.

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5 *Mainzeal Property and Construction Ltd (in liq) v Yan* [2019] NZHC 255 [HC judgment].

6 *Yan v Mainzeal Property and Construction Ltd (in liq)* [2021] NZCA 99, [2021] 3 NZLR 598 [CA judgment].

7 SC judgment, above n 2.

Payment under the Policy

[24] By letter dated 29 August 2023, from the liquidators' solicitors (Hamilton Locke) to QBE Australia's solicitors (McElroys) and the directors' solicitors (Chapman Tripp and LeeSalmonLong) the liquidators:

(a) demanded payment (by 1 September 2023) of the amount payable as a result of the Supreme Court judgment (i.e. the contribution of $39.8 million, $20,881,369.86 interest, and $65,000 costs together with disbursements of $11,002.81) (Judgment Debt); and

(b) sought that judgment security in the sum of $18 million (and accrued interest) held by McElroys on behalf of QBE be transferred immediately to BDO's trust account in part satisfaction of the Judgment Debt.

[25] By further letter dated 29 August 2023, from the liquidators' solicitors (Hamilton Locke) to QBE Australia's solicitors (McElroys) and the directors' solicitors (Chapman Tripp and LeeSalmonLong) the liquidators requested that QBE confirm in writing that the liquidators would be released from certain undertakings the liquidators had previously provided in relation to QBE paying costs of $2,349,458.99 to the liquidators.

[26] By letter dated 31 August 2023, from QBE Australia's solicitors (McElroys) to the liquidators' solicitors (Hamilton Locke), QBE informed the liquidators that the total amount available and remaining under the Policy was $19,956,930.78 ($19,956,930.78 represents $17,956,930.78 remaining out of the policy limit of $20,000,000 plus an additional $1,000,000 payable on behalf of each of Dame Jenny Shipley and Mr Tilby under extension 5.1 of the Policy (a further $2,000,000 in total) and:

(a) refused to pay any sum, including any additional payment under extension 5.1, on behalf of Mr Yan in reliance upon exclusion 3.7 of the Policy;

(b) requested confirmation of release from an undertaking in respect of the judgment security to enable QBE Australia to pay the balance of the insurance proceeds (i.e. $19,956,930.78) to the liquidators;

(c) requested confirmation that payment of the $19,956,930.78 would extinguish the statutory charge asserted against the insurance proceeds by the liquidators on 31 October 2014; and

(d) referred to McElroys having been advised by Chapman Tripp of how Dame Jenny Shipley, and Messrs Tilby and Gomm (being the directors who QBE Australia treated as being entitled to cover under the Policy) had agreed the balance of the primary limit of indemnity of $17.956 million ought to be allocated as between the three of them.

[27] By letter dated 31 August 2023, from the liquidators' solicitors (Hamilton Locke) to QBE Australia's solicitors (McElroys) and the directors' solicitors (Chapman Tripp and LeeSalmonLong) the liquidators:

(a) reserved their position as to QBE's denial of cover for Mr Yan;

(b) agreed that, subject to the release and payment occurring simultaneously, payment of the sum of $19,956,930.78 into the liquidators' trust account would release the undertaking provided by McElroys;

(c) confirmed that the statutory charge against the sum of $19,956,930.78 would be released to enable payment of that sum into the liquidators' trust account but maintained the charge on any additional sum that may be payable under the Policy if cover was determined to be available for Mr Yan; and

(d) reserved their position on how Dame Jenny Shipley and Messrs Tilby and Gomm had agreed the balance of the primary limit of indemnity of $17.956 million ought to be allocated as between the three of them.

[28] On 1 September 2023, QBE Australia paid $19,956,930.78, the Indemnity Payment, to BDO’s trust account as nominated by the liquidators.

Mainzeal’s GST return for the taxable period ended 30 September 2023

[29] On or about 27 October 2023, Mainzeal filed its GST return for the taxable period ended 30 September 2023 (September 2023 Period).

[30] In Mainzeal’s GST return for the September 2023 Period it recorded $19,956,930.78 as “total sales and income”.

Notice of Proposed Adjustment (NOPA)

[31] On 26 February 2024, the liquidators issued, pursuant to s 89DA of the Tax Administration Act 1994 (TAA), a NOPA to the Commissioner of Inland Revenue (Commissioner), in which the liquidators proposed an adjustment to Mainzeal’s GST assessment in respect of the September 2023 Period to reduce Mainzeal’s “total sales and income” by $19,956,930.78.

Notice of Response (NOR)

[32] On 26 April 2024, the Commissioner rejected the liquidators’ NOPA by issuing a NOR to the liquidators in accordance with s 89G of the TAA.

[33] The Commissioner’s ground for rejecting the liquidators’ NOPA was that the entirety of the Indemnity Payment is subject to GST under s 5(13) of the GST Act.

[34] On 21 June 2024, the liquidators rejected in writing all of the Commissioner’s NOR.

Plaintiffs’ enforcement of the Supreme Court judgment

[35] The plaintiffs attempted without success to contact Mr Yan and serve on him a letter of demand and, subsequently, a bankruptcy notice and documents related to an application for an order that Mr Yan be adjudicated bankrupt.

[36] On 9 May 2024, the High Court adjudicated Mr Yan bankrupt.

[37] The plaintiffs have not received any payment from Mr Yan.

Mainzeal's letters of demand

[38] By letter dated 28 September 2023, from the liquidators' solicitors to QBE Australia's solicitors the liquidators demanded that QBE Australia pay to Mainzeal an additional amount under cl 4.12 of the Policy to indemnify it for GST payable in respect of the Indemnity Payment.

[39] By letter dated 29 September 2023, from QBE Australia's solicitors to the liquidators' solicitors, QBE Australia refused to pay any additional amount on account of GST on the basis that it was not liable to pay such sum under the Policy, including pursuant to cl 4.12.

[40] By letter dated 13 September 2024, from the liquidators' solicitors to QBE Australia's solicitors, the liquidators demanded that QBE Australia pay to Mainzeal an additional $1,000,000 under extension 5.1 of the Policy in respect of Mr Yan.

[41] By letter dated 15 November 2024, from QBE Australia's solicitors to the liquidators' solicitors, QBE Australia refused to pay any additional amount in respect of Mr Yan, in reliance on exclusion 3.7 of the Policy.

Director's GST registration status

[42] During the period of her directorship of Mainzeal, Dame Jenny Shipley provided director services to Mainzeal by way of a GST registered company.

[43] At the time of the Indemnity Payment:

(a) Dame Jenny Shipley was not personally registered for GST.

(b) Mr Tilby was personally registered for GST.

(c) Mr Gomm was not personally registered for GST.

How should the question of construing the Policy be approached?

[44] Both parties agree on the general and well-established approach to contract interpretation.[8] An objective approach is required to ascertain the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation they were in at the time of the contract.[9] The background knowledge is that to which a reasonable person would regard as relevant.[10]

[45] While context is a necessary element of interpretation and the focus is on interpreting the document as a whole rather than particular words, the text remains of central importance.[11] If the language at issue, construed in the context of the contract as a whole, has an ordinary and natural meaning, it will be a powerful but not conclusive indicator.[12]

[46] It is well established that a court is entitled to receive evidence which demonstrates that the parties have adopted words that have specialised meanings within a particular profession, industry, trade or locality, or words that have a particular meaning simply to them.[13] Further if a particular interpretation produces a commercially absurd result, that may be a reason to read the contract in a different way than the express language might suggest.[14]

[47] It is also well established that the person alleging a breach of contract must prove that breach.[15] However where an insurer relies upon any relevant exclusion under the contract, the burden of proof may shift to the insurer.[16] It follows that the

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8 *Bathurst Resources Ltd v L&M Coal Holdings Ltd* [2021] NZSC 85, [2021] 1 NZLR 696 at [43].
9 *Firm PI 1 Ltd v Zurich Australian Insurance Ltd* [2014] NZSC 147, [2015] 1 NZLR 432 at [60]–[63].
10 At [60].
11 At [63].
12 At [63].
13 At [84].
14 At [89].
15 *Moorhouse Commercial Park Ltd v Vero Insurance New Zealand Ltd* [2024] NZCA 415, [2024] 3 NZLR 567 at [29], citing *Aktieselskabet de Danske Sukkerfabrikker v Bajamar Compania Naviera SA* [1983] 2 Lloyd's Rep 210 (QB) [*the Torenia*] at 215.
16 At [31].

liquidators bear the burden of proof in relation to its allegation that the requirements of cl 4.12 are met. QBE bears the burden of proof in relation to its reliance on the exclusion clause and in respect of its argument that any GST liability Mainzeal has under s 5(13) of the GST Act could (and inferentially should) have been avoided.

Issue one: Is Mainzeal entitled to an additional payment in respect of Mr Yan under extension 5.1 of the Policy?

[48] Clause 5.1 is an additional sum applying to non-executive directors under certain conditions, principally where the indemnity limit and all indemnification for loss available to any non-executive director have been exhausted. It lifts the limit of indemnity by a further $1 million for each non-executive director (subject to an overall cap). It thus recognises a distinction between the level of knowledge and personal liability risks of an executive and non-executive director by creating a ring-fenced pool of indemnity insurance only accessible by the non-executive director where the conditions are met.

[49] As noted, on 1 September 2023, QBE paid the Indemnity Payment to Mainzeal. This included $2,000,000 under this clause in respect of Dame Jenny Shipley and Mr Tilby. Relying on the exclusion in cl 3.7, QBE refused to pay an additional $1,000,000 in respect of Mr Yan.

[50] Exclusion clause 3.7 reads:

> **3.7 PERSONAL PROFIT**
>
> This insurance does not apply to any claim for an Insured Person having committed or allegedly committed a Wrongful Act which was intended to and did result in fact in the gaining of personal profit or advantage to which he or she was not legally entitled if:
>
> (a) a final judgment or other final adjudication determines that:
> (i) the Insured person did, in fact, gain the personal profit or advantage; and
> (ii) the Wrongful Act was intended to gain the personal profit or advantage; and
>
> (b) the Wrongful Act was material to the cause of action so adjudicated.

[51] I first determine how cl 3.7 should be construed before turning to the key issue of whether it is engaged in the present case.

How should cl 3.7 be construed?

[52] Exclusion clauses are construed strictly and more narrowly but not in a constrained or artificial way that loses sight of the overall objective to ascertain the presumed mutual intention of the parties.[17]

[53] The parties agree the rule of construction contra proferentem applies to insurance contracts. In the case of genuine ambiguity, a court will resolve the ambiguity against the party who proffered the phrase.[18] Specifically in the context of exclusion clauses, if there is any doubt as to the meaning and scope of the excluding or limiting term, the ambiguity will be resolved against the party who had inserted it and who is now relying on it.[19]

[54] The qualifying elements in this clause are conjunctive and inter-related requirements. There must be a final judgment determining that the insured person committed a "Wrongful Act" intended by that person to gain personal profit or advantage to which he or she was not legally entitled, and which was in fact gained. Additionally, that act must be material to the cause of action adjudicated in that final judgment.

[55] Clause 3.7 is of wider operation than merely this extension. It also applies to the core insuring clause under the Policy under which QBE agrees to pay on behalf of each Insured Person any Loss on account of any claim for a Wrongful Act made against any Insured Person. It has the potential to exclude any cover at all under the insuring clause. Thus, I accept the submission of Mr Hunter KC for the liquidators that cl 3.7 has prescriptive requirements which must be clearly met before the clause has potency. An interpretation which completely denudes the cover under the Policy and deprives insured persons of any commercial benefit cannot have been intended.

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17 *AMI Insurance Ltd v Legg* [2017] NZCA 321 at [51], citing *Lumley General Insurance (NZ) Ltd v Body Corporate No 205963* [2010] NZCA 316 at [27].

18 *D A Constable Syndicate 386 v Auckland District Law Society Inc* [2010] NZCA 237 at [69].

19 Stephen Todd and Matthew Barber *Burrows, Finn and Todd on the Law of Contract in New Zealand* (7th ed, LexisNexis, Wellington, 2022) at 242.

What is a "Wrongful Act" for the purposes of the Policy?

[56] "Wrongful Act" is defined in the Policy as:

> any actual or alleged:
> - breach of duty;
> - breach of trust;
> - neglect;
> - act, error or omission;
> - misstatement or misleading statement;
> - breach of warranty or breach of authority;
>
> made, committed, attempted or allegedly made, committed or attempted by any Insured Person, individually or otherwise, in the course of his or her duties to the Insured Company…
>
> All causally connected Wrongful Acts will be deemed one Wrongful Act.

[57] It is indisputable that Mr Yan committed a Wrongful Act as defined. The Supreme Court determined that he, along with other directors, breached ss 135 and 136 of the Companies Act 1993. It is not merely the conclusion of breach which is material. It must logically also be the acts committed by Mr Yan on which the breach of duty determination is pinned or, put another way, which were material to that 'adjudicated' cause of action.[20] The Policy definition states that "all causally connected Wrongful Acts will be deemed to be one Wrongful Act".

What does "final judgment" connote?

[58] The expression "determines" in subparagraph (a) of the clause is significant. To determine something ordinarily means to come to a decision or resolve indefinitely, or to be finally and firmly resolved.[21] The structure of the phrase "if a final judgment… determines" is telling. A final judgment must unequivocally decide there was in fact a gain of personal profit or advantage and intention to gain personal profit and advantage to which Mr Yan was not legally entitled by the Wrongful Act, and the Wrongful Act must be material to the adjudicated cause of action — in this case the breach of duty. The words "the Insured Person did, *in fact*, gain the personal profit or

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20 Neither party made anything of the reference to "a cause of action *so adjudicated*" in subparagraph (b) of the clause.

21 Oxford English Dictionary (online ed, Oxford University Press) "determine, verb" at 1509 and 1529.

advantage" reinforces the notion of an evidentiary threshold which must be definitive rather than equivocal.

[59] The reference to a "final judgment", although not defined in the Policy, further supports the evidentiary threshold. It means that a mere allegation of improper conduct will not suffice. Rather, the excluded act must be formally established by a court or tribunal. "Final" imports a requirement that all available rights of appeal have been exhausted or lost by the effluxion of the appeal period.

[60] In this case, this ostensibly refers to the judgment of the Supreme Court as the liquidators argue. I say ostensibly because, while the Supreme Court judgment is the 'final judgment', a common sense approach requires that unchallenged and unimpeached findings of the High Court (or Court of Appeal) may still be relevant for present purposes. That proposition is straightforward if factual determinations are adopted, incorporated or supported by the Supreme Court, expressly or inferentially. The position must be different if there are differences in findings which bear on the disqualifying elements.

[61] The liquidators argue that QBE must point to the Supreme Court's determination of each of the disqualifying elements in subparagraphs (a) and (b) of cl 3.7 and the necessary connection between them. QBE contends that there is no requirement a final judgment does so as if directly considering the application of those disqualifying elements and the operation of the exclusion clause. I consider the answer lies between these two approaches. The liquidators' approach is too narrow. QBE's approach in principle is unobjectionable but there must be clear and unequivocal determinations which are also material to the cause of action adjudicated.

What does "profit or advantage" mean?

[62] I accept Ms Challis' submission on behalf of QBE that "advantage" has a wide meaning. She contended that "advantage" encompasses any gain or benefit, such as an opportunity to make a profit which can constitute a business advantage;[22] personal advantage applies to anything that makes a director better off or improves their

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22 *Jarvis Christian College v National Union Fire Ins*. 197 F 3d 742 (5th Circ 1999).

personal circumstances;[23] and is sufficiently broad to embrace a commercial opportunity, or the avoidance of a negative commercial event.[24]

[63] At the hearing the parties agreed that the phrase "not legally entitled" in cl 3.7 does not require the profit or advantage itself to be illegal. Instead, there must be a legal basis which disentitles the Insured Person from the profit or advantage.[25]

Why does QBE say there are final determinations satisfying cl 3.7?

[64] QBE pleads 12 findings on which it relies to deny indemnity under the extension to Mr Yan.[26] These are both findings of the High Court and Supreme Court.

[65] The 12 pleaded findings or determinations are appended to this judgment at Annexure I for ease of reference.

[66] The statements from the High Court judgment on which QBE relies includes:

> [283] Mr Hodder also argued that the present case is distinguishable from the normal reckless trading case because there is no issue of the directors having significant conflicts of interest. While I accept that is so with respect to his clients, *Mr Yan had a clear conflict of interest*. He was both the person from whom the directors were seeking support, and the person effectively providing it. He owned a significant percentage of Richina Pacific personally. In his capacity as a director of Richina Pacific, he also had obligations to that company, and, by extension, was constrained by the interests of its other shareholders. *It would not have been in their best interests (or his) for Richina Pacific, or the broader group, to provide a legally binding obligation of support to Mainzeal if that could have been avoided.*
>
> (Emphasis added)
>
> …
>
> [432] Mr Yan is clearly in a different position. He was in an inherent conflict of interest. He was communicating the expressions of support that the other directors relied upon. The assurances that he gave were misleading. He acted unreasonably in this respect. Mr Yan was also responsible to the other Richina Pacific shareholders, and had a significant personal shareholding. It was not in his personal interests, or the interests of his fellow shareholders, to offer support in a legally binding way. *Mr Yan and the Richina Pacific shareholders have benefitted considerably from the funds extracted from Mainzeal*. I accept that he also acted honestly, and that he was genuinely committed to Mainzeal.

[23] *Hakea Holdings Pty Ltd v Neon Underwriting Ltd* [2023] FCAFC 34, (2023) 296 FCR 611.
[24] *Hakea Holdings Pty Ltd v Neon Underwriting Ltd*, above n 23.
[25] *Jarvis Christian College v National Union Fire Ins*, above n 22, at 749.
[26] QBE filed an amended statement of defence for which leave to file was granted by consent.

> Nevertheless, he led on the other directors in a way that contributed to their breach of duty. For these reasons, I consider his responsibility, and the level of compensation he should be ordered to pay, should be different from the other directors.
>
> (Emphasis added)

[67] QBE submits that the Court of Appeal did not expressly refer to these findings. But, by neither agreeing nor disagreeing with them, they remained as factual findings on which the Court of Appeal was silent.

[68] QBE contends the Supreme Court's decision generally supported the findings in the High Court. Ms Challis further submitted that the Supreme Court did not itself make any factual findings, nor did it overturn any factual findings of the High Court.

[69] QBE considers the Supreme Court findings support the view that cl 3.7 was engaged following review of the High Court judgment, including the following passages:

> [231] An associated aspect of Mainzeal's governance that warrants notice involves the very limited extent to which the directors sought professional or expert advice. As we have already mentioned, in late 2010, the directors sought corporate governance advice from Ernst & Young. This advice was provided in draft in January 2011 but the recommendations were never implemented. It was not until late 2012 when, at the insistence of BNZ, the directors first sought external advice on Mainzeal's financial situation. And prior to December 2012, no external legal advice was taken in relation to solvency and the directors' obligations under ss 135 and 136. We think it most unlikely that professional, and particularly legal, advice taken in around January 2011 as to solvency and the implications of ss 135 and 136 would have encouraged reliance on unenforceable assurances of support or continuation of a policy of trading while insolvent. Had such advice been sought and given in the terms that we think is likely, it would have:
>
> …
>
> (b) made it distinctly more difficult than it turned out to be for Mr Yan *to maintain continuance of the status quo (trading while insolvent in reliance on unenforceable assurances of support).*
>
> …
>
> [357] …(a) We see Mr Yan as far more culpable than the other directors. From the time when the directors' obligations to Mainzeal required them to have at least substantial regard for the interests of creditors, *his interest as the representative of the shareholder of Mainzeal created a potential conflict.* Furthermore, in a practical sense, the assurances the other directors relied on

> came from him. If he was not in a position to ensure that the assurances were honoured by the parties who formally gave them, they should not have been given. If he was in a position to ensure that assurances were honoured, then they should have been honoured. As well, his actions in the events that immediately precipitated the collapse of Mainzeal were in stark contradiction to the spirit of the assurances. That Mainzeal continued to trade while insolvent and in this way caused the losses to the creditors at the time of its collapse is fundamentally his fault. We see no reason why his liability should be for less than the assessed loss.
>
> (Emphasis added)

[70] Drawing together these findings and the passages in the judgments, QBE says there is a final judgment meeting the requirements of the exclusion clause in that:

(a) Mr Yan benefitted considerably from funds extracted from Mainzeal to Richina Pacific Ltd (Richina), Mainzeal's ultimate parent company of which Mr Yan was a significant shareholder, including to assist in acquiring substantial Chinese assets which were now worth a considerable amount.[27]

(b) Mr Yan procured Mainzeal to pay funds to Richina at times and in amounts which he knew should not be paid given its financial position.

(c) Mr Yan allowed Mainzeal to continue trading while insolvent in reliance on unenforceable assurances of support by Richina.[28]

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[27] HC judgment, above n 5, at [432]: Cooke J expressly considered Mr Yan and the Richina shareholders had benefitted considerably from the funds extracted from Mainzeal. SC judgment, above n 2, at [20]–[23]: the Supreme Court records the funds extracted from Mainzeal for use in China.

[28] HC judgment, above n 5, at [283]: Cooke J considered Mr Yan had a clear conflict of interest as he was both the person from whom the directors were seeking support, and the person effectively providing it. Further he owned a significant percentage of Richina personally and was a director of Richina. At [432]: Cooke J considered Mr Yan was in an inherent conflict of interest as a shareholder and director of Richina and by communicating expressions of support the other directors relied upon. Such assurances were misleading and Mr Yan acted unreasonably in this respect. Cooke J further noted it was not in Mr Yan's interests to offer support to Mainzeal in a legally binding way. It was also considered Mr Yan acted honestly and that he was genuinely committed to Mainzeal. SC judgment, above n 2, at [357(a)]: The Supreme Court considered his interest as the representative of the shareholder of Mainzeal created a potential conflict from the time when the directors' obligations to Mainzeal required them to have at least substantial regard for the interests of creditors. The Court noted the assurances the other directors relied on came from him. If he was not in a position to ensure that the assurances were honoured by the parties who formally gave them, they should not have been given.

(d) Mr Yan provided unreasonable and misleading assurances of ongoing Richina support to the other three directors and deliberately did not sign supporting letters and resolutions for the supporting letters and resolutions required.[29] Had advice as to solvency and the implications of ss 135 and 136 been taken it would have made it distinctly more difficult for Mr Yan to maintain the status quo.[30]

(e) Mr Yan's position was "very different" to that of the other three directors because: his breach occurred from an earlier stage; his conflict position given his personal shareholding in Richina; his misleading assurances were a significant factor in the breaches by other directors; and he benefitted substantially from using Mainzeal's funds to acquire substantial Chinese assets.[31]

(f) The 2009 restructuring which separated Mainzeal from the asset holding companies in the group and the absence of letters in support of the assurances were conscious decisions to limit the risks to the Richina group.[32]

(g) Mr Yan deliberately did not sign proposed letters and supporting resolutions and Mr Yan and Richina never provided an unequivocal commitment to capitalise the company or otherwise address its insolvency.[33] The emails in 2010 as to assurances of support

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29 At [432]: Cooke J considered while Mr Yan acted honestly and was genuinely committed to Mainzeal, he led on the other directors in a way that contributed to their breach of duty. Cooke J expressly stated "the assurances that have gave were misleading" and that "he acted unreasonably in this respect". SC judgment, above n 2, at [42], [62], [64] and [223]: The Supreme Court noted the assurances were sometimes expressed in unconditional terms and adopted the High Court and Court of Appeal finding that the proposed letters and supporting resolutions were never executed which reflected a deliberate decision by Richina and Messrs Yan and Walker.

30 SC judgment, above n 2, at [231(b)]: The Supreme Court considered it most unlikely that professional, and particularly legal, advice taken in around January 2011 as to solvency and the implications of ss 135 and 136 would have encouraged reliance on unenforceable assurances of support or continuation of a policy of trading while insolvent. This would have made it distinctly more difficult for Mr Yan to continue trading while insolvent in reliance on unenforceable assurances of support.

31 HC judgment, above n 5, at [453].

32 SC judgment, above n 2, at [228(b)].

33 At [42], [62], [64] and [223].

mischaracterised the factual and legal situation and did not provide anything tangible which could be relied on.[34]

(h) Mainzeal was very vulnerable to the actions and decisions of Mr Yan and he could be expected to act generally in accordance with the interests of the Richina group.[35]

(i) Mr Yan was more culpable than the other directors.[36]

Why do the liquidators say there are no final determinations meeting the requirements of cl 3.7?

[71] The liquidators argue first that only the Supreme Court judgment can be relied on (see [60] above); secondly that none of the references meet the requirements under the clause; and thirdly, not all of the asserted findings accurately reflect the context in which they appear in the judgments.

[72] Mr Hunter submitted that the asserted pleaded findings do no more than establish that Mr Yan was more culpable for Mainzeal's loss than the other defendants. This was largely by providing non-binding assurances of support on which the other directors unreasonably relied in allowing Mainzeal to continue to trade. But there are no findings by the Supreme Court in respect of Mr Yan that the Wrongful Acts led to a personal profit or advantage to which he was not legally entitled. Further, the Court concluded that he acted honestly.

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34 At [228(e) and (f)]: The Court made these comments in the context of reliance by the directors on assurances of support. The Court observed Mr Yan gave what were, ostensibly, unconditional assurances of support, but the tenor of the email exchange as a whole provided no basis for confidence that such assurances could be relied on by the directors. Further it must have been evident to the directors that Mr Yan and Richina had not backed their assurances of support with anything tangible that could be relied upon if the need arose.

35 At [228(h)]: In the context of the reasonableness of reliance on these assurances of support by the directors, the Court attached "particular weight" to this point.

36 At [295], [352], [356]–[357]: The Supreme Court was informed by Cooke J's assessments of relative culpability. The Court considered Mr Yan's interest as the representative of the shareholder of Mainzeal created a potential conflict. It was noted the assurances the other directors relied on came from him. Further the Court expressly observed, "That Mainzeal continued to trade while insolvent and in this way caused the losses to the creditors at the time of its collapse is fundamentally his fault". However the Court accepted Mr Yan acted honestly.

[73] Mr Hunter also contended that of the 12 findings relied on by QBE, all but two do not even involve or allege gain by Mr Yan of "personal profit or advantage to which he… was not legally entitled". In the same vein, identifying a conflict of interest because of Mr Yan's interest in Richina and declining to provide legally binding support falls short because the test is whether he *in fact* gained a personal profit or advantage to which he was not legally entitled.

[74] He submitted further that, while the Supreme Court concluded Mr Yan was more culpable than the other three directors, there are no findings whatsoever in respect of Mr Yan that the Wrongful Acts led to a personal profit or advantage to which he was not legally entitled.

Was there personal profit or advantage intended and in fact achieved from the Wrongful Act which was material to the adjudicated cause of action?

[75] I accept Mr Hunter's analysis of the 12 particulars pleaded by QBE. Whilst they provide context, I agree that there are two pleaded particulars at the heart of this contest:

(a) (Referencing the High Court judgment): Mr Yan and his fellow shareholders in Richina have benefited very substantially from using Mainzeal's funds to assist in acquiring substantial Chinese assets which are now worth a considerable amount.[37]

(b) (Referencing the Supreme Court judgment): The failure to take professional (particularly legal) advice in relation to solvency and the directors' obligations under ss 135 and 136 made it easier for Mr Yan to maintain continuance of the status-quo — trading while insolvent in reliance on unenforceable assurances of support.[38]

[76] However, the key point is that cl 3.7 requires a causal connection between the personal profit or advantage intended and in fact achieved from the Wrongful Act

37 See [66] above herein, referring to HC judgment, above n 5, at 432.
38 See [69] above herein, referring to SC judgment, above n 2, at [231(b)].

which is material to the adjudicated cause of action. I therefore approach the application of the disqualifying elements in two stages:

(a) First, identifying the wrongful acts or omissions by Mr Yan in the Supreme Court judgment which were material to the finding of breaches of ss 135 and 136 of the Companies Act 1993 (being the pleaded Wrongful Act).

(b) Secondly, ascertaining whether there was a final judgment for present purposes determining that Mr Yan intended to and in fact gained personal profit or advantage from those wrongful acts.

[77] Regarding establishing a breach of s 135 of the Companies Act 1993, Winkelmann CJ and William Young J writing for the Supreme Court concluded, among other things that:[39]

(a) An objective approach is to be taken in determining whether the business of the company was carried on in the prohibited manner.

(b) Thus, subjective awareness of the likelihood of substantial risk or serious loss is not necessary.

(c) When assessing whether the actions of the directors in agreeing to or causing or allowing that trading were in breach of s 135 the courts will proceed on the basis of those facts and circumstances of which the directors were aware, or should have been aware, if exercising appropriate care, skill and diligence.

[78] Having determined that was the approach required by s 135, the Court posed two questions arising from the fact that the directors agreed to Mainzeal carrying on the business in the manner it did from 31 January 2011. First, whether that manner of carrying on business made it likely that there would be a substantial risk of serious loss to creditors. Second, whether the directors acted unreasonably in the sense

39 SC judgment, above n 2, at [211].

summarised at [77(c)] above.[40] The answer to both was yes, the directors adopted a trading policy from 31 January 2011 that was likely to create a substantial risk of serious loss to the company's creditors and were thus in breach of s 135.[41]

[79] The judgments of both the High Court and Supreme Court identify acts or omissions by Mr Yan over and above those of the other directors. Although the High Court was of the view that the directors were in breach of s 135 from mid-2010, it found a breach date of 31 January 2011 because that was the first in time of the breach dates alleged by the liquidators.[42] The Court of Appeal did not disagree with that approach.[43] The Supreme Court said: [44]

> [236] It may be, as Cooke J indicated, that the directors were in breach significantly earlier than 31 January 2011, but, given the way the case was pleaded and run at trial, it is appropriate to take 31 January 2011 as the breach date. In conformity with the findings of the High Court and Court of Appeal, we hold that from 31 January 2011, the directors adopted a trading policy that was "likely to create a substantial risk of serious loss to the company's creditors" and were thus in breach of s 135.

[80] The Court discussed the reliance by the directors on assurances of support, formal and informal, provided by Mr Yan.[45] The Court agreed with the concurrent findings of the High Court and Court of Appeal that the directors could not reasonably rely on these uncertain assurances of support.[46] They considered relevant the history of Richina taking care to avoid any legal liability associated with Mainzeal; the non-accidental separation between Mainzeal and the holding companies in the Richina Group; and that Mr Yan's ostensible unconditional assurances of support as a whole provided no basis for confidence and mischaracterised the factual and legal situation. The Court attached particular weight to the fact that the future of Mainzeal was very vulnerable to the actions and decision of Mr Yan.[47]

[81] The Court pointed to the absence of external legal advice in relation to solvency and had it been sought and given in the expected terms it would have, among

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40 At [219].
41 At [234].
42 HC judgment, above n 5, at [292].
43 CA judgment, above n 6, at [452].
44 SC judgment, above n 2, at [236].
45 At [226] and [228(b)].
46 At [227], citing HC judgment, above n 5, at [235]–[236]; and CA judgment, above n 6, at [445].
47 At [228(h)].

other things, made it distinctly more difficult for Mr Yan to maintain continuance of the status quo, namely trading while insolvent in reliance on unenforceable assurances of support.[48] In failing to recognise that the assurances of support and the limited actions the directors took were insufficient to reduce the risk to the extent required to ensure compliance with the s 135, they acted unreasonably.[49]

[82] As to liability under s 136 of the Companies Act 1993, after 31 January 2011, Mainzeal relevantly continued to enter construction contracts, including four major projects incurring medium to long-term obligations.[50] The Court held the directors acted in breach of s 136 in respect of such projects as, by 31 January 2011, they did not have reasonable grounds to believe that those obligations would be honoured.[51] The Court further endorsed the conclusion of the Court of Appeal that all new obligations incurred after 5 July 2012 were incurred in breach of s 136.[52]

[83] Relevantly, between 31 January 2011 and 31 December 2012, there was a net inflow of funds from Richina to Mainzeal.[53] There were also building materials provided to Mainzeal under a pre-paid goods agreement, direct bonding support and bond guarantees.[54] There was no net deterioration in Mainzeal's position over this period.[55]

Did the funds advanced from Mainzeal to Richina amount to a Wrongful Act by which Mr Yan intended to and in fact gained personal profit or advantage?

[84] Ms Challis submitted that, as a shareholder of Richina, Mr Yan achieved personal profit or financial advantage by procuring advances to Richina to acquire valuable assets in China which legally should not have been made given Mainzeal's financial position. Further Mr Yan intended that Richina would benefit from the

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48 At [231].
49 At [234].
50 At [76] and [256]. These were the Wigram Museum contract in November 2011; Manukau Institute of Technology contract entered into in February 2012; the ANZ Tory Steet contract entered into around October 2012; and the Ministry of Justice Manukau Precinct contract entered into in November 2012.
51 At [373(a)].
52 At [373(b)]. The later date of 5 July 2012 was the date the Court of Appeal found that the directors did not have reasonable grounds for believing that Mainzeal would be able to meet new short-term unsecured obligations when they fell due: CA judgment, above n 6, at [475].
53 At [80] and [229]; CA judgment, above n 6, at [192].
54 At [30]; CA judgment, above n 6, at [193].
55 At [289].

payments to acquire assets and accumulate wealth although it was known to him Mainzeal was insolvent without Richina's ongoing support. She submitted the profit or advantage is not one to which Mr Yan was legally entitled, being the product of breaches of duties to Mainzeal.

[85] While the High Court did find that "Mr Yan and the Richina Pacific shareholders have benefitted considerably from the funds extracted from Mainzeal,"[56] the Supreme Court merely described the flow of funds from Mainzeal to Richina as part of the factual background.[57] There is no express finding by the Supreme Court that relevant advances resulted in Mr Yan "in fact gaining [a] personal profit or advantage to which he… was not legally entitled". Neither did the Court of Appeal find that Mr Yan personally benefitted because there was no requirement to do so to reach the conclusion of a breach of duty.

[86] The breaches of ss 135 and 136 found by the Supreme Court were not anchored nor even tethered to the outflow of funds from Mainzeal to Richina in the earlier period, although those events created the solvency bind for Mainzeal. The foundation for breach of s 135 was the directors' failure to recognise that, without binding support or additional capital, there was a substantial risk of serious loss to creditors.[58]

[87] The High Court found that Mr Yan undoubtedly gained a profit or advantage as a shareholder of Richina. But it is material for present purposes that he did so through a series of actions and/or omissions and a state of affairs created well before 31 January 2011, the critical date from which the statutory breaches were held to have arisen.

[88] I accept Mr Hunter's argument that, for present purposes, the acts (or omissions) material to the Supreme Court's adjudicated causes of action must be acts (or omissions) at or after the breach date. Acts or omissions as contemplated in the exclusion clause are distinguishable from existing states of affairs. The existing state of affairs was the inherent conflict of interest which Mr Yan was in as director of

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56 HC judgment, above n 5, at [432].
57 SC judgment, above n 2, at [20]–[23].
58 At [234].

Mainzeal and director and shareholder of Richina; the continuous deficit and balance sheet insolvency of Mainzeal from the end of 2008 if loans to Richina entities were treated as irrecoverable; and the consistent flow of money out of Mainzeal to the Richina group between 2006 and 2011.

[89] In short, the relevant outflow of funds to Richina in fact occurred prior to the Wrongful Act given that the Supreme Court determined there were breaches of ss 135 and 136 only from 31 January 2011.[59]

[90] Although the Supreme Court held that Mr Yan was far more culpable than the independent directors because of his potential conflict of interest as the representative of the shareholder of Mainzeal and because the assurances the other directors relied on came from him, those acts occurred before the critical date and were not material to the cause of action for breach of duty.

[91] I do not overlook Ms Challis' superficially attractive contention that divorcing the transactions prior to 31 January 2011 is artificial for present purposes and that all the circumstances, including the period prior to 31 January 2011, formed part of the finding of a breach of s 135, including as the High Court judgment records:[60]

> [545] Richina Pacific required Mainzeal to follow an insolvent trading policy using its authority as a holding company. It extracted amounts from Mainzeal by way of loan through vehicles that did not themselves have the ability to repay. This money was used by the Richina Pacific group for its considerable advantage — it was used to acquire assets in China that are now extremely valuable. By the end of 2009, the amount so borrowed, including interest, was over $42 million. Excluding the value of these loans from Mainzeal's balance sheet meant that Mainzeal was insolvent, and was continuously so from 2005 through to its failure in 2013. The effective balance sheet deficit was very significant throughout that period.

[92] In the end however, I find that the prescriptive preconditions for the engagement of cl 3.7 are not met. The Supreme Court's determination that the breaches occurred from 31 January 2011 and its focus on the directors' failure to recognise that without binding support or additional capital Mainzeal could not continue to trade is an obstacle to QBE's argument.[61]

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59 At [219] and [236].
60 HC judgment, above n 5, at [545].
61 SC judgment, above n 2, at [236].

Did continuance of the status quo in reliance on non-binding assurances of support whilst insolvent amount to a Wrongful Act by which Mr Yan Act intended to and in fact gain personal profit or advantage?

[93] Ms Challis submitted that Mr Yan in fact gained a personal profit or advantage by providing unreasonable and misleading assurances of ongoing Richina support as a significant shareholder of Richina. She argued that the benefit was that Richina was not called upon to honour obligations and Mainzeal continued to trade when the refusal to provide an enforceable assurance to support the company would have caused the directors to cease trading. Adopting a broad interpretation of "profit or advantage" Ms Challis maintained this amounted to personal profit or advantage.

[94] Ms Challis further submitted that Mr Yan intended to make a legally unentitled profit or advantage from these unenforceable assurances when he intended that the other directors rely on them to ensure Mainzeal continued to trade and thereafter to ensure Mainzeal could make further payments to Richina.

[95] This is accepted as far as it goes however, I consider that the events connected to "continuance of the status quo" material to the Supreme Court's findings of breaches of ss 135 and 136 did not identify any personal profit or advantage to Mr Yan. The "continuance of the status quo" coincided with a net inflow of funds from Mainzeal to Richina after the breach date.

[96] Insofar as QBE's argument that "continuance of the status quo" resulted in some profit or advantage in the form of preserving future opportunities for Mr Yan to benefit from Mainzeal, I disagree that this is enough to meet the criteria in cl 3.7. It is simply too indirect and too future focused given the express language in cl 3.7. There is no finding that Mr Yan *in fact* gained a profit or advantage from the continuance of trade or that Mr Yan personally intended to profit or advantage from the continuance of trade or that it is one to which he is not legally entitled.

Do statements as to Mr Yan's culpability establish a Wrongful Act by which Mr Yan Act intended to and in fact gain personal profit or advantage?

[97] As noted already, Ms Challis referred to various passages in the Supreme Court judgment, including:

> [352]…The directors did, however, also contend that they had acted honestly and in good faith and had not derived personal benefit from the breaches of s 136. We accept these latter contentions in relation to Dame Jenny and Messrs Tilby and Gomm. As we will explain, the situation in relation to Mr Yan is rather more complex. We accept, however, that he acted honestly.
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> …
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> [357] We take into account the following considerations:
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> (a) We see Mr Yan as far more culpable than the other directors. From the time when the directors' obligations to Mainzeal required them to have at least substantial regard for the interests of creditors, his interest as the representative of the shareholder of Mainzeal created a potential conflict. Furthermore, in a practical sense, the assurances the other directors relied on came from him. If he was not in a position to ensure that the assurances were honoured by the parties who formally gave them, they should not have been given. If he was in a position to ensure that assurances were honoured, then they should have been honoured. As well, his actions in the events that immediately precipitated the collapse of Mainzeal were in stark contradiction to the spirit of the assurances. That Mainzeal continued to trade while insolvent and in this way caused the losses to the creditors at the time of its collapse is fundamentally his fault. We see no reason why his liability should be for less than the assessed loss.

[98] I accept that this identifies specific wrongful acts by Mr Yan in the relevant period in terms of cl 3.7. However, while it establishes Mr Yan's conduct for the purpose of assessing liability for loss, it says little about whether this particular conduct in the period of breach was intended to or did result in a personal profit or advantage to himself. That Mr Yan was more culpable than other directors does not necessarily correlate to a finding that Mr Yan intended to and did in fact gain a personal profit or advantage from the statutory breaches, being the cause of action adjudicated.

[99] For completeness, as earlier noted, the findings that Mr Yan was in an inherent conflict of interest[62] as a shareholder and director of Richina, are findings as to a state of affairs rather than express acts or omissions constituting Wrongful Acts, let alone Wrongful Acts material to the causes of action for breaches of duty.

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62 CA judgment, above n 6, at [432].

What if any inference can be drawn from the absence of any order for disgorgement ?

[100] Mr Hunter placed reliance on the lack of identification of personal profit or advantage for which the Supreme Court could have ordered Mr Yan to repay or restore any profit or advantage in accordance with s 301(1)(b)(i) of the Companies Act 1993. It did not. Instead, the Supreme Court ordered payment of compensation in accordance with s 301(1)(b)(ii). He added further that the claims that Mr Yan committed breaches of fiduciary duty or analogous statutory duties had been dismissed by the High Court.[63]

[101] This does not advance the liquidators' argument significantly. Disgorgement or "a monetary reward in lieu of an account for profits" under s 301 is not a necessary finding before cl 3.7 is triggered. Clause 3.7 does not necessarily require a finding of disgorgement or that a restitutionary award be ordered, although had it been ordered then cl 3.7 would likely be triggered. What is required is a determination of a gain of personal profit or advantage to which Mr Yan was not legally entitled.

Do any of the cases referred to by the parties inform this issue?

[102] The parties referred to a number of cases in their submissions. I do not find them of much assistance because the exclusion clauses were different in one or other respects and the facts and contexts were materially distinguishable. For completeness, I refer to these.

[103] In *Alstrin v St. Paul Mercury Insurance Company*,[64] a decision of the United States District Court of Delaware, a directors and officers policy contained an exclusion clause which excluded claims arising out of, based upon or attributable to the gaining in fact of any profit or advantage to which an insured was not legally entitled. The plaintiff directors were defendants in a class action. The allegations were in the nature of securities fraud and breach of fiduciary duty. The Court there

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63 At first instance Mainzeal pleaded several causes of action alleging specific breaches of fiduciary duties or breaches of analogous statutory duties. The High Court dismissed these causes of action: HC judgment, above n 5, at [313] and [354].

64 *Alstrin v St Paul Mercury Ins Co* 179 F Supp 2d 376 (D Del 2002).

held that the profit or gain had to itself be illegal and not just the by-product of an illegal act.[65]

[104] In *Hakea Holdings Pty Ltd v Neon Underwriting Ltd,* relied on by QBE, the Full Federal Court of Australia held the following exclusion clause applied: [66]

> The Underwriters shall not be liable for Loss in connection with any Claim …based upon, consequent upon, by reason of, arising out of, arising from, directly or indirectly resulting from, attributable to, in any way involving or in connection with any … Director or Officer gaining any personal profit or advantage or receiving any remuneration to which he or she was not or is not legally entitled…

[105] A director, Mr McGrath, was found to have breached s 180(1) of the Corporations Act 1981 (Cth), a negligence-based duty. The trial Judge expressly noted such breach of duty, as a matter of fact, involved the director preferring his own interests and obtaining an improper advantage:[67]

> Mr McGrath's breach of duty under s 180(1) of the Corporations Act involved, as a matter of fact, Mr McGrath preferring his personal interests over his duties to Hakea, and obtaining an improper advantage for himself and for Denham, as Hakea alleged in [its pleadings].

[106] This was an express finding of an "improper advantage" which was upheld by the Full Federal Court:[68]

> …once the personal advantage is identified as the advantage obtained by Mr McGrath by the continuation of the building contract, and where that advantage was obtained by Mr McGrath deliberately withholding information from Hakea in breach of his duties under s 180(1), it follows that the advantage was a personal one to which Mr McGrath was not legally entitled.

[107] In *Hakea*, the exclusion clause was more broadly expressed with the connecting words "in any way involving, or in connection with" as compared to cl 3.7 which requires the Wrongful Act "intended to and did result in fact" in a personal profit or advantage, and that the Wrongful Act was material to the cause of action adjudicated. The Court also determined that the very object of the breach of duty was

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65 At 400.
66 *Hakea Holdings Pty Ltd v Neon Underwriting Ltd*, above n 23.
67 *Hakea Holdings Ltd v McGrath (No 2)* [2022] FCA 995 at [284].
68 *Hakea Holdings Pty Ltd v Neon Underwriting Ltd*, above n 23, at [4] per Colvin and Button JJ.

personal and improper advantage.[69] There is no such express finding of a personal profit or advantage in the Supreme Court judgment in the present case as neither was necessary to establish the pleaded breach of duty.

[108] Similarly, *Jarvis Christian College v National Union Fire Ins.* is distinguishable.[70] The appellate court there upheld the District Court's finding that Mr Cosby in fact gained a personal profit or advantage when he caused the transfer of $2 million of the plaintiff's funds to a company in which he was a 49 per cent owner.

[109] *TIG Specialty Ins. Co. v Pinkmonkey.com Inc.* contained a similarly worded exclusion clause but without the added qualification of materiality to the adjudicated cause of action:[71]

> …any Claim [against any Insured] based upon, arising from, or in consequence of an Insured having gained in fact any personal profit, remuneration, or advantage to which such Insured was not legally entitled.

[110] The Court found the exclusion applied with respect to one of the directors expressly noting "Greene's fraud resulted in the capital investment, which led directly to his personal advantage. Greene was not legally entitled to profit from his fraud."[72]

Can QBE properly rely on the exclusion clause?

[111] For the reasons stated, I find in the liquidators' favour on this issue. QBE is not entitled to rely on the exclusion clause, cl 3.7, to refuse the indemnity payment of $1 million under the extension 5.1 of the Policy in respect of Mr Yan.

Issue two: Is GST payable by QBE on any additional payment under cl 5.1?

[112] This question stands or falls with issue three below since no difference in outcome is identified by either party.

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69 At [284]. This was a product of the pleadings with the trial judge observing that a change in argument "assumes importance because of a particular exclusion in the policy on which Neon relies".

70 *Jarvis Christian College v National Union Fire Ins.*, above n 22.

71 *TIG Specialty Ins. Co. v Pinkmonkey.com Inc.* 375 F 3d 365 (5th Cir 2004).

72 At 371.

Issue three: Is QBE obliged to indemnify Mainzeal for any GST which may be payable by Mainzeal under s 5(13) of GST Act?

[113] Should GST be payable by Mainzeal on the Indemnity Payment, the liquidators argue that QBE is obliged to pay an additional amount under cl 4.12 or in short, to gross up its payment to account for the GST sum.

[114] The liquidators ask the Court to make a declaration that QBE is obliged to indemnify Mainzeal for any GST payable by Mainzeal under s 5(13) on receipt by Mainzeal of an indemnity payment under the Policy regardless of the outcome of the first proceeding.[73]

[115] Clause 4.12 of the Policy reads:

> **4.12 GOODS AND SERVICES TAX**
>
> Where the Insured is liable to pay tax under Section 5(13) of the Goods and Services Tax Act 1985 (or any statutory amendment or re-enactment of the Section or Act) on receiving any indemnity payment under this Policy, QBE will indemnify the Insured for the cost of that tax. The amount payable under this clause is payable by QBE in addition to the Limit of Indemnity.

[116] This issue turns on the meaning of "the Insured" in cl 4.12.

Respective submissions

[117] QBE argues the term "the Insured" in cl 4.12 means the party indemnified under the Policy on behalf of whom the Indemnity Payment is made. It says the Insured are the directors. Consequently, QBE is not obliged to pay any additional amount of GST which might be imposed on Mainzeal under s 5(13) on receipt by Mainzeal of an indemnity payment under the Policy as it is not the Insured liable to pay tax.

[118] In the alternative, QBE argues that if the clause is operative in the present situation, it should not be liable as Mainzeal could have avoided GST liability by adopting a two-step payment process via the directors instead of a direct receipt from QBE. The first step, being a payment from QBE to each director, would not have been

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73 *Mainzeal Property and Construction Limited (in liq) v Commissioner of Inland Revenue*, above n 4.

subject to GST because, save for Mr Tilby, they were not personally GST registered. The second step, being payment from the directors to Mainzeal, would not have been subject to GST because it would constitute compensatory damages unrelated to a taxable supply without triggering s 5(13).

[119] The liquidators argue that "the Insured" in cl 4.12 means the party actually receiving the indemnity payment because of incorporation by reference of s 5(13) of the GST Act. If Inland Revenue's interpretation of s 5(13) is correct then actual receipt of, rather than contractual entitlement to, an indemnity payment is the touchstone for the GST liability and the clause does no more than reflect that.

[120] In response to the contention GST could have been avoided, the liquidators argue that the signalled potential two-step process is irrelevant to the application of cl 4.12 and factually unrealistic. They say that cl 4.12 is triggered by any GST in fact payable, not according to the GST consequences of a hypothetical alternative. In any event, it says it is artificial to hypothesise about a counter-factual mechanism which raises its own risks and complexities.

What does "the Insured" mean in the context of this Policy?

[121] As noted, the essential question is whether reference to "the Insured" should be interpreted to be Mainzeal as the recipient in fact of the Indemnity Payment pursuant to a statutory charge or whether it refers to the directors, being the Insured Persons claiming under the Policy. It was of course the directors' claim to which QBE responded under the Policy.

[122] "Insured" is defined in the Policy to mean:

> Each Insured Person, the Insured Company, or any of them, as the case may require.

[123] "Insured Person" is further defined as:

> Any natural person who, at the time of a Wrongful Act, is deemed by virtue of any applicable law to:
>
> - hold the position of director or manager of the Insured Company; or …

[124] Mainzeal is an "Insured Company" according to the Schedule to the Policy but was not the party making a claim under the Policy. Its claim arose by virtue of its proceedings against the directors and s 9 of the Law Reform Act 1936.

[125] As "Insured" means each Insured Person, the Insured Company, or any of them, *as the case may require*, the answer in any instance depends on the specific context and circumstances in which the term is used. In other words, it depends on whichever party is relevant to the specific incident. There is no need for consistency (rather than coherence) across the Policy. The fact that there may be other clauses where reference to "the Insured" is not necessarily the party calling on the Policy is not relevant.

[126] The starting point for the relevant context and circumstances must be the claim to which the Policy has responded in any particular instance. Here, the Policy responded to the claim made by Mainzeal and the liquidators against the directors as Insured Persons for committing a Wrongful Act.

[127] The claim was notified by the directors, being Insured Persons, to QBE as a result of Loss suffered on account of the claim against them for committing a Wrongful Act. Consequently, the Indemnity Payment arose under cl 1.0(a) whereby QBE agreed to pay on behalf of:

> (a) each Insured Person any Loss for which they do not receive payment by way of indemnity from the Insured Company …
>
> on account of any claim for a Wrongful Act first made against any Insured Person individually or otherwise during the Period of Insurance and notified to QBE during the Period of Insurance …

[128] The Indemnity Payment did not arise under cl 1.0(b) which provides QBE agrees to pay on behalf of:

> (b) the Insured Company any Loss for which it grants indemnity to any Insured Person as permitted or required by law…

[129] QBE accepts if indemnity was provided under cl 1.0(b), Mainzeal would be "the Insured", as it would be indemnifying Loss on account of a Wrongful Act by the Insured Persons(s). However, that is not the case here.

[130] This interpretation is consistent with other conditions of the Policy and the overall Policy.

[131] I accept Ms Challis' submission that the nature of the Policy, which individually covered each Insured, and the severability condition in cl 4.18 inform the interpretation of "the Insured". Relying on *Bituminous Gas. Corp. v Maxey* she submitted that the condition provides each insured with separate coverage, as if each were separately insured with a distinct policy, subject to the liability limits.[74] This is also consistent with the explanation in Derrington and Ashton's *The Law of Liability Insurance*:[75]

> Because of these complexities, references to 'insured', 'an insured', 'any insured', 'the insured' and 'the insured firm' in different parts of the policy must be adjusted for the context. It is always a question of the language and construction of the policy, and standard terms may be affected by other factors, such as the presence of a severance clause. A reference to 'the insured' throughout the policy usually means the insured who is claiming to be indemnified under it, but it does not refer to each insured as a separate and distinct individual apart from any and every other person who may be entitled to the cover. It is viewed from the standpoint of the particular insured against whom the claim is made. This may work for the benefit of the insurer or of the insured, according to the circumstances.

[132] The case of *Transfield Pty Ltd v National Vulcan Engineering Ins Group Ltd* neatly illustrates the point. The case concerned a construction policy involving several different insured parties including contractors, subsidiaries and subcontractors.[76] The relevant insuring clause read:

> The Insurers hereby agree, subject to the limitations, terms and conditions hereinafter mentioned, that they will:
>
> > (a) Pay on behalf of the Insured all sums which the Insured shall become legally obligated to pay as compensation for:
> >
> > > …
> > >
> > > (2) loss of and/or damage to and/or destruction of property and/or the Loss of Use thereof;
> >
> > …
> >
> > (b) Defined in the nature of and on behalf of the Insured any claim or suit against the Insured to recover damages in respect of and/or arising out of occurrences covered hereby.

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74 *Bituminous Gas. Corp. v Maxey* 110 SW 3d 203 (Tex 2003).

75 Desmond Derrington and Ronald Ashton, *The Law of Liability Insurance* (4th ed, LexisNexis, Chatswood, New South Wales, 2025) at [2-402] (footnotes omitted).

76 *Transfield Pty Ltd v National Vulcan Engineering Ins Group Ltd* [2002] NSWSC 830, (2003) 12 ANZ Insurance Cases 61-547.

[133] Events causing damage occurred. As a result, various parties sought compensation. An exclusion under the policy excluded cover "for damage to property owned by the Insured". The question was whether the exclusion operated so that an insured which caused proper damage to another insured under the policy, could seek indemnity under the policy. The insurer argued that "the insured" in the exclusion should be construed as "any insured" under the policy. The Court disagreed.[77]

[134] There are several other clauses in the Policy where "the Insured" can only be sensibly construed as the party indemnified under the Policy,[78] but as discussed this does not advance the argument because of the requirement of flexible construction injected by the qualifier "as the case may require".

What does the reference to s 5(13) of the GST Act achieve in this clause?

[135] The parties disagree as to the operation of the express reference to s 5(13) in cl 4.12. Section 5(13) relevantly provides:[79]

> **5 Meaning of term supply**
>
> …
>
> (13) For the purpose of this Act, except for subsection (13B) and section 20(3), if a registered person receives a payment under a contract of insurance, whether or not the person is a party to the contract, the payment is, to the extent that it relates to a loss incurred in the course or furtherance of the registered person's taxable activity, deemed to be consideration received for a supply of services performed by the registered person—
>
> (a) on the day the registered person receives the payment; and
>
> (b) in the course or furtherance of the registered person's taxable activity:
>
> provided that this subsection shall not apply in respect of any payment received pursuant to a contract of insurance where—
>
> (a) the supply of that contract of insurance is not a supply charged with tax pursuant to section 8(1); or

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77 At [56]–[57].

78 Clauses 4.5, 4.6, 4.8, 4.17, 4.13.

79 The interpretation of this provision of the GST Act is the primary issue in the related proceedings: *Mainzeal Property and Construction Limited (in liq) v Commissioner of Inland Revenue*, above n 4.

> (b) that payment is in respect of an entitlement for any loss of earnings (being earnings within the meaning of the Accident Compensation Act 1982 or the Accident Rehabilitation and Compensation Insurance Act 1992 or the Accident Insurance Act 1998 or the Accident Compensation Act 2001); or
>
> (c) the supply of the contract of insurance is a supply that is chargeable with tax only because sections 5B and 8(4B) apply to it; or
>
> (d) the supply of the contract of insurance is a supply of remote services that is zero-rated under section 11A(1)(x).

[136] Mr Hunter submitted that cl 4.12 incorporates s 5(13) through the mechanism of cross-referral, providing necessary context for interpretation. He contended that the phrase "on receiving an indemnity payment under this Policy" mirrors the language of s 5(13), "if a registered person receives a payment under a contract of insurance".[80] This is notwithstanding the difference, on its face, between "indemnity payment" and "a payment". He submitted "indemnity payment" merely reflects the nature of the payment under the Policy.

[137] Mr Hunter argued that the choice of language in cl 4.12 is deliberate and recognises the way in which s 5(13) imposes GST liability. In particular, "receiving" recognises that s 5(13) imposes the GST liability on a registered person who "receives" a payment under a contract of insurance, subject to the other criteria in s 5(13) being met. He says this supports the liquidators' interpretation of "the Insured" in cl 4.12 as the party receiving the indemnity payment rather than the directors.

[138] Ms Challis submitted that s 5(13) is referenced only because the purpose of inserting condition 4.12 in the Policy is to address the position where s 5(13) applies.

[139] I accept the submission made on behalf of QBE. I consider that the reference to s 5(13) has no significance beyond setting a criterion for triggering the clause. The purpose of cl 4.12 is to indemnify the insured party for any GST they become liable to pay so that they are not out of pocket for the GST amount. Considering that purpose, "the Insured" means the person making the claim for indemnification under the Policy. Further, it is illogical to consider "the Insured" to mean the party receiving the

80 Goods and Services Tax Act 1985, s 5(13).

payment. While in this case Mainzeal was the third-party claimant and, coincidentally, an Insured under the Policy, a third-party claimant receiving the payment will not necessarily also be an insured party.

Does the statutory charge regime inform the interpretation?

[140] Mr Hunter also referred to the statutory charge under s 9 of the Law Reform Act 1936 as providing relevant "context" to construe cl 4.12, since the liquidators received the Indemnity Payment directly from QBE pursuant to that charge. He says that the reference to "the Insured… receiving an indemnity payment under this Policy" in cl 4.12 is consistent with the practical reality that, considering the statutory charge, the insurer commonly makes payment to the relevant third-party claimant asserting the charge, rather than the Insured Persons. He refers to *Pegasus Group Ltd v QBE Insurance International Ltd*.[81]

[141] The issue for determination in *Pegasus* was whether the damages Pegasus sought from its insurer (QBE) and (under the statutory charge) from American House Company (AHA), as the indemnifier of the tortfeasor, should be exclusive or inclusive of GST.

[142] AHA argued that Pegasus was not entitled to indemnification in respect of any GST payable as the payment was not pursuant to a contract of insurance but rather the statutory charge.[82] Winkelmann J (as she then was), in an "on the papers" costs judgment, dismissed this argument being satisfied the payment was made 'under a contract of insurance':[83]

> [12] The issue is whether payment received by Pegasus from QBE is payment received 'under a contract of insurance.' I have no doubt that it is. The payment is received by virtue of enforcement of the statutory charge on money payable under the NZ Express contract of insurance. It is of significance that s 5(1) of the Goods and Services Tax Act expressly provides that the obligation to pay GST arises whether or not the recipient was a party to the contract of insurance.

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81 *Pegasus Group Ltd v QBE Insurance International (Ltd)* HC Auckland CIV-2006-404-6941, 24 September 2010.
82 At [9].
83 At [12].

[143] The reference to QBE in this passage appears to be a transcription error, along with the reference to s 5(1) instead of s 5(13). It is apparent that the Judge in fact intended to refer to AHA.

[144] Whether or not the payment received by Mainzeal is a payment received 'under a contract of insurance' does not, in my view, alter the complexion in the present case because of the emphasis on "the Insured" in cl 4.12. As discussed above, "the Insured" is the party claiming indemnity under the Policy.

[145] Similarly, the statutory charge does not change the position under cl 4.12. The liquidators demanded payment by virtue of and through the vehicle of a statutory charge, but not because it was "the Insured" under the Policy making a claim to which the policy responded. Reliance on the statutory charge was in fact necessary *because* Mainzeal was not the Insured Person. It was not a contractual party to this particular Indemnity Payment. To construe cl 4.12 in this way offends against the natural and ordinary meaning of the Policy.

[146] It is a mere coincidence that Mainzeal is in the position of third-party claimant and an Insured party under the Policy. While the type of claim contemplated by the Policy may commonly be brought by liquidators, that is not always the case. If the identity of the third party suing the directors was other than Mainzeal, it is even more clear that cl 4.12 would not apply. This is telling.

Conclusion

[147] In sum, I am satisfied that QBE's interpretation of "the Insured" in cl 4.12 is correct. The Indemnity Payment indemnified the directors and not Mainzeal. Mainzeal in the context of this case is a third-party claimant only, not "the Insured". It follows that any GST liability on Mainzeal flowing from its receipt of payment is its concern.

[148] For completeness, the fact that QBE may receive an input credit does not alter the position for the purposes of cl 4.12. That is a consequence of the operation of the GST regime.

Issue four: Should a two-step payment mechanism have been agreed to ensure tax efficiency and if so, what is the impact on QBE's obligations?

[149] As I have determined Mainzeal is not entitled to be indemnified for GST under cl 4.12, it is strictly not necessary to determine whether the availability of an alternative payment structure informs any obligation which QBE might otherwise have had. That is, even if cl 4.12 was applicable, whether QBE is entitled to avoid any contractual obligation because Mainzeal ought to have structured receipt of payment in a GST-efficient way.

[150] However, in case an appellate court decides differently, I go on to briefly discuss this aspect.

[151] The key question can be articulated another way. If Mainzeal, as a third party claimant, is entitled pursuant to cl 4.12 to be indemnified for any GST it is required to pay, does it have any obligation to structure receipt of payment from QBE in a manner limiting any GST liability?

[152] QBE argues that, if it is liable in principle to indemnify Mainzeal for GST under cl 4.12, where Mainzeal could have avoided GST liability it should not be liable to indemnify it. Instead of a direct payment from QBE, the liquidators could have demanded that payment be made first to the directors and subsequently on paid to Mainzeal. If structured in that way, GST would not have been payable as the directors were not personally registered for GST (save for Mr Tilby) and the second payment from the directors to Mainzeal is compensatory and would not attract GST.

[153] The liquidators' riposte is that Mainzeal adopted a reasonable course by receipt of money directly from QBE with no obligation to structure the indemnity payment in any particular way under cl 4.12. They say the structure proposed by QBE poses risks, including tax avoidance, rendering it unrealistic.

[154] As above, QBE called evidence from its in house counsel, Mr Shine, and an independent expert, Mr Bullot. Both described the available mechanisms for making payment which would not attract GST. The liquidators called their own expert witness, Mr Russ, in response.

What does the expert for QBE say?

[155] Mr Bullot is a Chartered Accountant and Barrister and Solicitor of the High Court, with over 25 years of experience working exclusively in advising on GST issues in New Zealand and Canada.

[156] Mr Bullot's evidence is that a two-step structure is possible with a carefully drafted agreement based on legal and specialist GST advice.

[157] At a high level, he explained the proposed structure:

(a) The first payment would not be subject to GST if made to a non-GST registered party.

(b) If that non-registered party then has a legal obligation to make payment to a third party, it is considered a second transaction for GST purposes.

(c) In respect of those directors not personally registered for GST, no GST under s 5(13) would have arisen.

(d) If any director was correctly personally registered for GST, QBE would have grossed up any insurance payment.

[158] Mr Bullot qualified this structure as contingent on Inland Revenue accepting that the directors received the payment from QBE in their own right and not as agent for Mainzeal. If the first recipient received the funds in an agency or stakeholder capacity (rather than in their own right), and if the second recipient was GST registered, a GST liability would arise.

[159] Mr Bullot understood QBE's position to be that an arrangement could have been reached with the liquidators whereby the s 9 charge was given effect to while allowing the Indemnity Payment to be made to the directors in the first instance.

[160] Under cross-examination, Mr Bullot accepted there is always a risk of falling foul of the tax avoidance provisions. He said the tax risk is heightened if the only

purpose of the payment is to reduce the incidence of tax, but lowered if there is some other bona fide reason for the payment. He gave evidence of involvement in numerous situations where insurance proceeds have flowed to an intervening party without any suggestion by Inland Revenue of tax avoidance.

What does QBE's in-house counsel say about the structuring options?

[161] Mr Shine gave evidence to address what QBE would have done had it been asked to facilitate the Indemnity Payment directly to the directors with the intention that it be passed on to Mainzeal. He said that with payments of this nature, once a liability is determined there is some discussion with the insurer to ensure the tax treatment is considered, as well as any other remaining issues. He considered the liquidators made demand for payment very quickly in circumstances where there was no credit risk to them in working with QBE and the directors to structure the payment. Further, that a process could have been facilitated to ensure that the Indemnity Payment was passed on to Mainzeal without commercial risk, such as with the provision of undertakings by the respective parties' solicitors.

[162] Mr Shine acknowledged in cross-examination the risk that the statutory charge would not be discharged in the two-step process such that QBE would have to make the payment twice — a risk which is avoided by making payment directly to Mainzeal.

What does the liquidators' expert witness say?

[163] Mr Russ is a lawyer specialising in all aspects of New Zealand taxation with over 30 years of experience in New Zealand and England.

[164] Mr Russ's evidence is that the two-step structured payment is practically unrealistic in the circumstances. He cautioned that the structure raises significant tax and credit risks for the liquidators. This included the potential difficulties with the directors receiving payment, ensuring that no part of the proceeds could be subject to competing claims and loss of the benefit of the statutory charge under the Law Reform Act 1936. Mr Russ said that Inland Revenue might assert that each of the directors had not in fact received the payment in their own right or that there may be other claims made against the directors. He was unable to identify a robust structure to

address such risks, noting too that neither Mr Bullot nor Mr Shine had done so. Mr Russ considered that attempting to mitigate such risk with solicitor undertakings is inconsistent with the directors having received the proceeds in their own right.

[165] Mr Russ considered if the directors were acting as agents for Mainzeal or on some other basis did not receive the payment in their own right, the payment would have been received by Mainzeal for GST purposes.

[166] Mr Russ expanded on the tax risk. He expressly noted the potential for Inland Revenue to invoke s 76 of the GST Act if use of the two-step structure was intended to avoid the application of s 5(13), and the potential of an abusive tax position penalty under s 141D of the Tax Administration Act 1994.

Discussion

[167] I am not persuaded by the argument that, if cl 4.12 was operative, QBE should nonetheless not be liable to indemnify Mainzeal where it would otherwise not have any GST liability had a different structure been adopted.

[168] The liquidators say the Court's focus should be on the form that was adopted by the parties and the GST consequences of such form. They refer to s 109 of the Tax Administration Act 1994 which, in essence, provides a tax position is deemed correct except in objection proceedings. They contend that cl 4.12 falls to be construed on the basis that the Indemnity Payment made to Mainzeal in fact resulted in a GST liability under s 5(13). That is, it must be approached on the basis that Inland Revenue's interpretation of s 5(13) is correct. They rely on *Hawkins Construction Ltd v Chan* to contend where a contract includes a formula linking an amount payable under the contract to whether an amount of GST is payable by one of the parties and if so, the amount of that GST, the formula is to be read as referring to the GST in fact payable by the relevant party to the Commissioner of Inland Revenue.[84]

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84 *Hawkins Construction Ltd v Chan* (2000) 19 NZTC 15,710 (CA).

[169] I am not persuaded that cl 4.12 imports an obligation on the recipient of the Indemnity Payment to limit GST liability arising under s 5(13). A GST liability incurred by the Insured suffices to trigger QBE's obligation to indemnify the Insured for the cost of the tax. The obligation is an indemnity. QBE did not refer to any authority supporting the proposition that some form of mitigation obligation arises as it would with damages claim. It follows that the availability and/or practicality of a structure to avoid the incidence of GST is irrelevant. The Policy responds to a GST position which in fact arises. There is nothing on which to pin some abstract contemplation of alternative structures.

[170] Finally, for completeness, as I find there is no duty to minimise GST liability for the purposes of cl 4.12, I resist determining whether the two-step structure proposed by QBE is sufficiently realistic to have relevance. I consider that it could not possibly be the case that, before cl 4.12 is operative, the kind of inquiry that QBE now asks the Court to engage in could arise. It would reduce the benefit of the clause to the Insured immeasurably and impose an uncommercial burden on the Insured.

Summary on each issue

[171] I summarise my conclusions on each of the issues as follows:

(a) QBE is not entitled to rely on the exclusion clause, cl 3.7, to refuse the indemnity payment of $1 million under the Policy.

(b) QBE Australia is not obliged to indemnify Mainzeal for any GST payable by Mainzeal under s 5(13) of the GST Act on receipt by Mainzeal of payment under the Policy because it is not the Insured entitled to the benefit of cl 4.12 of the Policy.

(c) If the conclusion in (b) above is wrong, there is nevertheless no reason for Mainzeal to be disentitled to indemnification for GST because of the payment structure adopted and no requirement imported to limit the incidence of GST.

Interest

[172] The liquidators sought interest on any judgment sum but did not expressly plead reliance on the Interest on Money Claims Act 2016. As little attention was paid to the question of the rate or date from which interest may be payable, I reserve this question.

Result

[173] I enter judgment against QBE Australia for $1 million under the terms of the Policy to meet its obligations under extension 5.1.

[174] I reserve for further submissions the question of claimed interest on the judgment sum and direct the parties to file brief written submissions on that question.

[175] I dismiss all other claims by the plaintiff.

Costs

[176] Both parties have had a measure of success such that it may be appropriate that costs lie where they fall. I reserve that question. I consider that costs on a 2B basis are appropriate. If costs cannot be resolved between the parties, memoranda may be filed within 14 working days by the party claiming costs, with any response within 10 working days thereafter. Memoranda are not to exceed five pages including schedules.

…………………………………………………

Tracey Walker J

ANNEXURE I

Particulars – High Court Judgment

(a) Mr Yan had a personal equity interest (at least 25% at one point) in Richina Pacific Ltd. This meant he had a clear conflict of interest as the person from whom the directors were seeking support, and the person effectively providing it. He gave assurances about shareholder support which were misleading and acted unreasonably in this respect.

(b) He and the Richina Pacific shareholders have benefitted considerably from the funds extracted from Mainzeal. Although he acted honestly and was genuinely committed to Mainzeal, he nevertheless led on the other directors in a way that contributed to their breach of duty.

(c) Mr Yan was responsible jointly with the other three directors for the $18 million for which they were collectively responsible because he induced them to breach their duties.

(d) The Judge saw Mr Yan's position as being "very different" to that of the other three liable directors. The reasons for this are:

  (i) Mr Yan's breach may have occurred from an earlier stage, and on the basis that he caused Mainzeal to conduct trade in a manner leading to a substantial risk of serious loss to creditors.

  (ii) The conflict position given his own personal shareholding and the shareholding of others which compromised the performance of his fiduciary duties.

  (iii) He misled the directors by the manner in which he provided assurances of support. He exaggerated what the support was and assured them there was no need to worry but failed to live up to those assurances. This was a significant factor in the breaches by other directors.

  (iv) Mr Yan and his fellow shareholders in Richina Pacific have benefitted very substantially from using Mainzeal's funds to assist in acquiring substantial Chinese assets which are now worth a considerable amount.

  (v) The extent of the amount the directors are required to contribute is materially less than the value extracted from Mainzeal to assist in acquiring that wealth.

Particulars – Supreme Court Judgment

(e) The 2009 restructuring separated Mainzeal from the asset holding companies in the group. This was not accidental. Indeed, the decision to separate the two, and the absence of letters of support from asset holding companies in the group, were the result of conscious decisions. The effect, and it must also have been a purpose, was to limit the risks to the Richina Pacific group.

(f) Assurances of support were given by Mr Yan, sometimes expressed in unconditional terms. However, in October 2010 Mr Yan (and Mr Walker) deliberately did not sign proposed letters and supporting resolutions. These included promises of support which, if signed, would have provided a substantial basis for legal argument that CHC and RGREL (asset holding companies) were contractually committed to provide financial support to Mainzeal. As it was, Mr Yan and Richina Pacific never provided an unequivocal commitment (or refusal to provide such a commitment) to capitalise the company or otherwise address its insolvency to the other directors.

(g) The email in 2010 from Mr Yan as to assurances of support mischaracterised the factual and legal situation with him and Richina Pacific not backing their assurances with anything tangible that could be relied on if the need arose.

(h) In about July 2012, the BNZ required personal guarantees from Mr Yan and his family trust supported by a second mortgage over a Remuera home owned by that trust. Although he was not prepared to give a personal guarantee, Mr Yan did provide a second mortgage. However, on 22 January 2013, Mr Yan told Dame Jenny Shipley that unless he could secure a release of the mortgage for his wife, he would cease all support for Mainzeal. By letter dated 29 January 2013, Mr Yan confirmed support would not be provided which meant that Mainzeal was no longer a going concern. This letter was shared with the BNZ which suspended any further drawings on its facilities and triggered Mainzeal's demise.

(i) The failure to take professional (particularly legal) advice in relation to solvency and the directors' obligations under ss135 & 136 (in breach of those provisions) made it easier for Mr Yan to maintain continuance of the status quo – trading while insolvent in reliance on unenforceable assurances of support.

(j) The directors recognised the need for additional capital but such capital was not forthcoming. Mr Yan's support for Mainzeal was "*patently shaky…*", particularly given BNZ's requirement that he provide a mortgage and personal guarantee, the latter which he refused to do.

(k) Particular weight was attached to the fact that "the future of Mainzeal was very vulnerable to the actions and decisions of a single man – Mr Yan. He could be expected to act generally in accordance with the interests of the Richina Pacific group."

(l) Mr Yan was far more culpable than the other directors. When referring to the culpability of Mr Cooper in *Debut Homes*, the Supreme Court recorded that the Mainzeal directors argued that the conduct of Mr Cooper was far more culpable than that of their clients. The Court agreed that Mr Cooper's conduct was egregious, in that he adopted a policy that significantly advanced his own interests and, at the same time, targeted a single creditor. While the Supreme Court said this was not the case with Shipley, Tilby or Gomm, as to Mr Yan (and although it was found he acted honestly):

(i) The Supreme Court was informed by Cooke J's assessments of relative culpability.

(ii) His interest as the representative of the shareholder of Mainzeal created a potential conflict from the time when the directors' obligations to Mainzeal required them to have at least substantial regard for the interests of creditors.

(iii) Mainzeal continuing to trade and then collapsing was "*fundamentally [Mr Yan's] fault*" because he gave assurances of continuing support from himself and Richina Pacific that should have been but weren't honoured or should never have been made.