Perpetual Trustee Company Ltd v Downey

High Court, Auckland (CIV-2001-404-4096) 25 October 2011
Associate Judge Bell

Forum conveniens — Stay of proceeding — Application for stay of local proceeding pending overseas proceeding — Choice of forum agreement — Exclusive jurisdiction clause — Whether waiver or election of forum choice — Whether parallel litigation abuse of process — Effect of liquidation on forum agreement — Forum non conveniens test — Whether other forum more appropriate.

Perpetual Trustee Company Ltd (Perpetual) filed a proof of debt with the liquidators of HIH Holdings (New Zealand) Ltd (HIH NZ), which the liquidators rejected. Perpetual then filed two applications: one seeking leave under s 284 of the Companies Act 1993 to apply under s 284(1)(b) to reverse the liquidators' decision; and the other seeking an order reversing the decision.

In addition to these applications, Perpetual issued a proceeding in the New South Wales Supreme Court against HIH NZ, seeking a declaration to the effect that HIH NZ was and remained indebted to Perpetual as trustee of unredeemed HIH NZ converting notes issued to note holders under a trust deed. Accordingly, Perpetual also filed a third application for an order staying its application to reverse the liquidators' decision, pending the outcome of its New South Wales proceeding.

In its stay application, Perpetual relied on an exclusive jurisdiction clause contained in the trust deed signed by Perpetual, HIH NZ and HIH Australia, the insurance corporation of which HIH NZ was a subsidiary. The relevant documentation contained choice of law and choice of forum provisions whereby the trust deed was governed by the laws and courts of New South Wales. Perpetual also argued that there were advantages in cost, convenience and speed if its proceeding in New South Wales were to continue. Perpetual said that if it was successful, then on a hearing of its s 284 application in New Zealand, it would rely on the New South Wales judgment.

In opposition, the liquidators submitted that only this Court could determine all the issues in a liquidation under the Companies Act 1993. Further, there was no material difference between the applicable laws of New Zealand and New South Wales and this Court was able to interpret a New South Wales contract if required. It was contended that as Perpetual had waived its rights under the exclusive jurisdiction clause by seeking relief in this Court, it therefore could not ask for matters to now be decided in New South Wales.

The liquidators also argued that the parallel litigation in New South Wales was abusive. However, both parties accepted that on a finding in favour of Perpetual, all that would be left would be to quantify the debt.

Held, (1) while the Court has a discretion not to apply an exclusive jurisdiction clause, it does not do so as a matter of convenience, or of forum non conveniens. The party opposing a stay in favour of a chosen exclusive forum must show strong cause, sufficient to outweigh the chosen forum. The party invoking the exclusive jurisdiction clause does not have to justify its choice. (paras 32, 33)

(2) Matters that can be taken as within the parties' contemplation at the time of contracting do not count in favour of a stay. (para 35)

(3) If HIH NZ were not in liquidation, there would have been no reason not to give effect to the choice of the New South Wales courts. Any alleged inconvenience to HIH NZ in having to litigate in Australia would not have been a strong enough reason not to give effect to the forum agreement. Perpetual would have been entitled to insist on any dispute being heard in New South Wales without having to provide any justification for its stance. The matter is different when a company goes into liquidation. Once a company is put into liquidation in New Zealand, the liquidators conduct the liquidation under the supervision of this Court. (paras 36, 37)

(4) The liquidator cannot avoid the supervision provided by s 284 of the Companies Act 1993. It is not open to a liquidator to say that because of a dispute resolution provision in a contract between the company and the creditor, the creditor cannot apply to this Court to review the liquidator's decision. A contractual choice of a foreign forum does not stand in the way of a creditor applying to the Court under s 284. (para 39)

(5) Just as a liquidator is subject to this Court's supervision, notwithstanding a forum agreement between the creditor and the company, so it is with a creditor. An exclusive forum clause cannot prevail over the provisions for making claims and challenging liquidators' decisions under pt 16 of the Companies Act. (para 40)

(6) Perpetual applied in this Court because that was the course it had to take if it was to claim a share of assets under the liquidation. There were apparently no assets of the company outside New Zealand. If Perpetual had changed tack, that did not amount to a waiver or election. It was entitled to propose that in the course of the liquidation, the merits of its claim be determined in a way different from what it initially proposed. The liquidators had not identified any prejudice arising from Perpetual's change of course. The litigation on both sides of the Tasman was at a relatively early stage and neither side could point to prejudice arising from the courts of one jurisdiction stepping back to allow the other to hear the case. (paras 46, 47)

(7) While the present application did not come within the letter of any of the statutory provisions referred to, the proposal that a New Zealand court allow an Australian court to decide some of the issues in a New Zealand proceeding was not incongruous. In this situation, where HIH NZ was in liquidation, the exclusive jurisdiction clause did not have the dominant effect it otherwise would have had if there were no liquidation. Instead, the inquiry was whether it was more appropriate for Perpetual's claim to be heard in New South Wales or in New Zealand. This was a forum non conveniens question. Clearly, the New South Wales Supreme Court was an available alternative Court with competent jurisdiction. (paras 50-52)

(8) Under the forum non conveniens test the Court has to be satisfied that some other court is more appropriate. The party seeking the stay has the onus of persuading the Court that some other forum is more suitable, but beyond that it is not helpful to approach the matter in terms of a burden of proof. A potential cause of difficulty might arise from the split-hearing aspect of the application. That factor goes to appropriateness. (paras 53, 54)

(9) A proceeding in New South Wales was likely to dispose of the substantive issues, with little left for determination on the s 284 application. That reduced the prospect of a second substantive hearing in New Zealand. On that basis the New South Wales Supreme Court could make declarations as to New South Wales law and as to its application to facts that appeared not to be disputed. The findings by the New South Wales Supreme Court could be applied in the s 284 application. Demarcation difficulties were not likely to arise. (para 56, 57)

(10) It is often said that split hearings are treacherous shortcuts. There is potentially a greater risk when matters are heard in a foreign court. Nevertheless, the issues in this case were confined and manageable. The normal caution against allowing split hearings was not decisive against allowing Perpetual's application. (para 58)

(11) In this case the foreign law element was slight and manageable for a New Zealand court. Nevertheless, it was desirable that the merits of Perpetual's claim be determined in New South Wales, because of the Australian legal and factual issues, the choice of Australian law, the contractual choice of the New South Wales courts which applied but for liquidation, and the Australian interests in conflict. New South Wales was the natural forum for the issues in this case. New Zealand courts will endeavour to uphold foreign creditors' choice of a foreign forum where that is feasible and practicable, and not in conflict with New Zealand interests or policy. (paras 63, 64)

(12) There was some risk in the merits of Perpetual's claim to be a creditor being determined offshore. But that risk was not unacceptable when measured against the desirability of those issues being decided in New South Wales. Reinforcing that was this Court's confidence that the New South Wales Supreme Court would be able to give a just and timely determination of Perpetual's claim. (para 65)

(13) Leave would be granted to Perpetual to apply under s 284 to apply for an order to reverse the liquidators' decision to reject its claim. The application under s 284 would be stayed pending further order of the Court, while Perpetual's claim for a declaration was heard in the courts of New South Wales. The liquidators would be required to submit to the jurisdiction of the New South Wales Supreme Court in Perpetual's pending proceeding in that Court. The liquidators would be able to file a cross-claim in that Court seeking a declaration as to Perpetual's entitlement, including any heads of damage claimable by Perpetual. Leave would be reserved to the parties to apply for further directions and for removal of the stay, including on the grounds of delay in the conduct of any proceedings in New South Wales. (paras 22, 66)

Obiter, normally, when there is a successful application for stay of a local proceeding in favour of a proceeding overseas, the stay brings the local proceeding to an end. The parties to the dispute litigate abroad, without the matters in issue coming back to New Zealand. But in this case, any decision in New South Wales would not necessarily have finally determined all issues. It was foreseeable that work may still have had to be done in this Court. Any determination in New South Wales would have required this Court to rule on Perpetual's application under s 284 in the light of decisions made by a New South Wales court. In effect, Perpetual had made a kind of split-trial application (as under rr 10.4 and 10.15 of the High Court Rules), but was proposing that a foreign court decide the preliminary question. There was no precedent for such a course. The absence of authority did not mean that the application should not be considered on its merits. Rule 1.6 of the High Court Rules allows for cases not provided for. The objective of the Rules under r 1.2 is to obtain the just, speedy and inexpensive determination of any proceeding. (para 27)

Cases referred to

Advanced Cardiovascular Systems Inc v Universal Specialities Ltd [1997] 1 NZLR 186, (1996) 9 PRNZ 632 (CA)

Bloom v Harms Offshore AHT Taurus GmbH & Co KG [2009] EWCA Civ 632, [2010] Ch 187, [2010] 2 WLR 349

Brown v Langwoods Photo Stores Ltd [1991] 1 NZLR 173 (CA)

Clear Communications Ltd v Telecom Corp of New Zealand Ltd (1998) 12 PRNZ 333 (HC)

Commissioner of Inland Revenue v Compudigm International Ltd (in rec and in liq) (2010) 24 NZTC 24,579 (HC)

Commonwealth of Australia v Amann Aviation Pty Ltd (1991) 174 CLR 64, 66 ALJR 123, 104 ALR 1 (HCA)

Donohue v Armco Inc [2001] UKHL 64, [2002] CLC 440, [2002] 1 All ER 749

Esso Resources Canada Ltd v Stearns Catalytic Ltd (1991) 77 DLR (4th) 557, 114 AR 27 (CA Alberta)

Garratt v Ikeda [2002] 1 NZLR 577 (CA)

Incitec Ltd v Alkimos Shipping Corp [2004] FCA 698, (2004) 138 FCR 496, 206 ALR 558

KPMG New Zealand v Gemmell HC Auckland CIV-2008-404-4288, 27 March 2009

McDonald v Dennys Lascelles Ltd [1933] HCA 25, (1933) 48 CLR 457, 39 ALR 381

McGregor v Potts [2005] NSWSC 1098, (2005) 68 NSWLR 109

Oriental Inland Steam Co, In Re (1873-74) LR 9 Ch App 557

Robinson v Harman (1848) 154 ER 363, [1843-1860] All ER Rep 383, (1848) 1 Exch 850

Societe du Gaz de Paris v Societe Anonyme de Navigation "Les Armateurs Francais" 1926 SC (HL) 13, (1925) 23 Ll L Rep 209, 1926 SLT 33

Spiliada Maritime Corp v Cansulex Ltd [1987] AC 460, [1986] 3 All ER 843 (HL)

Stone v Newman (2002) 16 PRNZ 77 (CA)

Tepko Pty Ltd v Water Board [2001] HCA 19, (2001) 206 CLR 1, 75 ALJR 775

The Society of Lloyd's v Hyslop [1993] 3 NZLR 135 (CA)

Ti Leaf Productions Ltd v Baikie (2001) 7 NZBLC ¶99-534 (CA)

Tilling v Whiteman [1980] AC 1, [1979] 2 WLR 401, [1979] 1 All ER 737 (HL)

Turners & Growers Ltd v Zespri Group Ltd HC Auckland CIV-2009-404-4392, 5 May 2010

United Railways of Havana and Regla Warehouses Ltd, Re [1961] AC 1007, [1960] 2 WLR 969, [1960] 2 All ER 332 (HL)

Vector Gas Ltd v Bay of Plenty Energy Ltd [2010] NZSC 5, [2010] 2 NZLR 444

Vocalion (Foreign) Ltd, Re [1932] 2 Ch 196

Wholesale Distributors Ltd v Gibbons Holdings Ltd [2007] NZSC 37, [2008] 1 NZLR 277

Windsor Refrigerator Co Ltd v Branch Nominees Ltd [1961] Ch 375 (EWCA)

Reference

McGechan on Procedure para HR6.29.01

Application

This was an application for an order staying another application, pending the outcome of overseas proceedings.

A R Galbraith QC, *G Blanchard* and *J McGuigan* for applicant
J A Farmer QC and *M V Robinson* for respondents

Ex tempore

ASSOCIATE JUDGE BELL

[1] Perpetual Trustee Company Ltd filed a proof of debt with the liquidators of HIH Holdings (New Zealand) Ltd (in liquidation) for NZD$277,304,142.50. On 11 July 2011 the liquidators rejected the proof of debt in full.

[2] Perpetual Trustee Company Ltd has filed two applications. The first seeks leave under s 284 of the Companies Act 1993 to apply under s 284(1)(b) to reverse the liquidators' decision, and a further order to reverse the decision of 11 July 2011. That application also sought an extension of time for filing evidence as to New South Wales law. I dealt with that in my minute of 18 August 2011.

[3] Perpetual has also filed an application for an order staying its application to reverse the liquidators' decision pending the outcome of a proceeding it has brought against the liquidators in the Supreme Court of New South Wales. This decision is mainly about that stay application.

[4] HIH Holdings (NZ) Ltd, (HIH NZ), was ordered to be put into liquidation on 19 July 2001. The liquidators are Kerryn Mark Downey and William Guy Black. They are senior partners in McGrath Nicol (NZ), the New Zealand arm of a trans-Tasman insolvency practice. They are also liquidators of HIH Casualty and General Insurance (NZ) Ltd, FAI (New Zealand) General Insurance Company Ltd and HIH Insurance Holdings (NZ) Ltd. These were all New Zealand companies within the HIH group of insurance companies which carried on business in Australia, New Zealand, the United States, the United Kingdom and Hong Kong. The ultimate holding company of the group is HIH Insurance Ltd, an insurance corporation (called HIH Australia). HIH Australia went into liquidation in Australia. Its liquidators are insolvency practitioners of McGrath Nicol (Australia).

[5] HIH Holdings (NZ) Ltd is a New Zealand subsidiary within the HIH group of companies. It is the sole shareholder of HIH Insurance Holdings (NZ) Ltd which itself is the sole shareholder of HIH Casualty and General Insurance Co Ltd.

[6] The liquidation of HIH Casualty and General Insurance (NZ) Ltd is likely to take another year. All the creditors of Casualty and General will be paid and there will be a surplus available for the shareholder. The liquidators' report for Casualty and General of 19 August 2011 gives a best-case estimate of the surplus for the shareholder of $84,610,564 and a worst-case estimate of $71,713,603. This Court has directed the liquidators of Casualty and General not to conclude the liquidation without leave of the Court.

Claim by Perpetual Trustee Company Ltd

[7] By a prospectus dated 26 October 1998, HIH NZ sought to raise AUD$155,000,000 by the issue of converting notes. On the same day HIH Australia, the ultimate holding company, HIH NZ and Perpetual signed a trust deed. Under the deed, Perpetual was appointed to act as trustee of the HIH NZ Converting Notes 1998 Trust for the benefit of holders of notes issued under the deed. HIH Australia executed a deed poll on the same day: it is called Terms of Conversion, Guarantee and Subordination of Guarantee of Converting Notes 1998 (in this judgment the deed of guarantee) in favour of Perpetual as trustee and the noteholders. Under this deed HIH Australia undertook to guarantee and indemnify the noteholders for the obligations of HIH NZ under the trust deed.

[8] Under clause 2 of the trust deed the directors of HIH NZ could create and issue notes to persons they nominated. Schedule 1 of the trust deed, called *Conditions of Issue of the 1998 Notes*, sets out conditions for issue of the notes, interest payments to noteholders and the conversion of the notes into ordinary shares in the capital of HIH Australia. Notes were subscribed for and allotted. The allotment of notes resulted in

notes contracts between each of the noteholders and HIH NZ. The notes contracts incorporated the terms of the trust deed and the deed of guarantee, and included terms as to conversion. These terms included:

(a) The notes have a face value of AUD$5.00, are issued at the face price and are convertible as provided in condition 4 and subject to conditions 7 and 12 into ordinary shares of HIH Australia, determined under condition 6.5 of the conditions of issue;

(b) Notes are convertible in the circumstances provided in condition 12;

(c) On conversion of a note, HIH NZ must redeem the note for an amount equal to its face value, and the noteholder directs HIH NZ to apply the whole of the moneys payable to subscribing for that number of ordinary shares according to a formula;

(d) HIH NZ can redeem all of the notes for cash, on given events in condition 12.2, and on notice given before the expiry of a conversion period;

(e) If HIH NZ elects not to redeem all the notes for cash under condition 12.2, all notes not converted by 12 June 2003 must be automatically converted into ordinary shares in HIH Australia, the number to be fixed under clause 6.5 of the conditions;

(f) The period when noteholders were entitled to convert ran from 12 June 2001 to 12 June 2003;

(g) Subject to certain conditions, HIH NZ was entitled to redeem some of the noteholders' notes (but in fact they did not do so);

(h) If HIH NZ had not elected to redeem notes earlier, then all notes outstanding at the end of the conversion period must be automatically converted into HIH Australia ordinary shares.

[9] The important provisions are:

Clause 2A.1(b) of the trust deed:

> The company … must, subject to any obligation of the company to convert the Notes into Ordinary Shares in accordance with the Conditions of Issue, pay to the Trustee … the Principal Moneys represented by the Notes … and will … until the whole of the Notes have been redeemed or converted into Ordinary Shares in accordance with the Conditions of Issue, pay to the Trustee interest on the Principal Moneys in accordance with the Conditions of Issue.

Condition 6.5 of the notes conditions:

> On conversion of a Note:
>
> (a) the Company must redeem that Note for an amount equal to its Face Value; and
>
> (b) the holder of that Note, by operation of this clause, hereby directs the Company to apply the whole of the moneys payable by it on redemption in subscribing for that number of Ordinary Shares: [*here follows various provisions on how to calculate the number of shares*].

Condition 12.3 of the notes conditions:

> [A]ll Notes outstanding and not converted at the End of the Conversion Period must be automatically converted into the number of Ordinary Shares in HIH determined in accordance with Condition 6.5.

Clause 15 of the trust deed and condition 13 of the deed of guarantee are choice of law and choice of forum provisions:

> This Deed is governed by and is to be construed in accordance with the laws of New South Wales. Each party irrevocably and unconditionally submits to the exclusive jurisdiction of the courts of New South Wales and Courts entitled to hear appeals from these Courts.

[10] The conversion period started on 12 June 2001. The liquidation of HIH NZ started on 19 July 2001. On that date 42,620,000 notes remained outstanding, not converted into ordinary shares of HIH Australia. Their face value was AUD$213,100,000.

[11] At 12 June 2003, the end of the conversion period, HIH NZ had not redeemed the notes for cash under condition 12.2. There were outstanding notes requiring conversion under 12.3. HIH NZ was insolvent and in liquidation; and HIH NZ could not redeem the outstanding notes and apply the money payable on redemption to subscribe for ordinary shares in HIH Australia. HIH Australia was itself in insolvent liquidation, and the liquidators of HIH NZ say that the ordinary shares would have had no more than a nominal value.

[12] On 15 November 2007 Perpetual served a termination notice on HIH NZ terminating each of the notes contracts.

The Federal Court proceeding

[13] In 2007 the liquidators of HIH Australia brought a declaratory proceeding in the Federal Court at Sydney against Perpetual. They sought declarations that:

(a) The notes issued under the trust deed had been converted into ordinary shares in HIH Australia; and

(b) The liquidators of HIH Australia were justified and entitled to allot shares in HIH Australia for the notes.

[14] Perpetual cross-claimed for declarations that:

(a) For the notes to convert, they had to be redeemed for cash by HIH NZ and then applied in subscription for shares in HIH Australia;

(b) HIH NZ did not redeem the notes; and

(c) Perpetual had validly terminated the notes contracts.

[15] HIH NZ was joined as a defendant. In his judgment Graham J recorded HIH NZ's position on joinder:[1]

> HIH NZ, a company incorporated under the laws of New Zealand, is not opposing becoming a party to these proceedings strictly on the condition that the declaratory relief sought in the Plaintiffs' Further Amended Originating Process and Further Amended Points of Claim are not amended and any Cross-Claim is not filed by the First Defendant without the written consent of HIH NZ. That condition is sought so that the proceedings remain limited to the interpretation of documents governed by the law of New South Wales. Matters pertaining to the liquidation of HIH NZ, including the entitlement of any party to prove in the estate of HIH NZ, is a matter for the supervision of the Courts of New Zealand and any orders made by this Court in these proceedings do not seek to affect or limit in any way the discretion of the liquidators of HIH NZ in adjudicating upon any proofs of debt lodged in future in the liquidation of that company by the other parties to these proceedings.

[16] In his judgment, Graham J found for Perpetual. He held that for the notes to be converted they first had to be redeemed for cash by HIH NZ and then applied to the subscription for the shares. As HIH NZ had not redeemed the notes, its breach entitled Perpetual to terminate and Perpetual's termination was valid.

[17] There was no appeal from that decision and in this case the parties accept it as correct and binding.

The present dispute

[18] The parties disagree on the legal consequences of the termination of the notes contracts. Perpetual says that the noteholders had accrued rights before termination

1 *McGrath and Honey v Perpetual Trustee Co Ltd* (2008) 66 ACSR 210 (FCA) at [3].

and termination did not deprive them of those rights. Those rights were debts for the face value of the notes, the total amount of its proof of debt. Its claim is in debt. The liquidators say that the noteholders did not have accrued rights to be paid the face value of the notes, because the relevant provisions of the notes contracts (conditions 6.5 and 12.3) required HIH NZ to apply those funds to subscription for shares in HIH Australia. Instead of a right to be paid the face value of the notes, they have at best a claim for damages. They say that any claim for damages is valueless because any shares in HIH Australia that would have been allocated to the noteholders had no value. That company is insolvent and there is nothing available to shareholders.

[19] The dispute involves three questions:

(a) The interpretation of provisions of the trust deed and notes contracts;

(b) The effect of termination; and

(c) (If the liquidators are correct), what damages can be recovered for HIH NZ's breach of contract.

[20] Both sides have obtained opinions from impressively qualified and experienced New South Wales senior counsel. Perpetual has had to engage fresh counsel, Mr Mark Leeming SC, after Mr A Meagher SC was appointed to the New South Wales Supreme Court and Court of Appeal. The liquidators have Dr Andrew Bell SC. The opinions have been put in evidence. Neither side submits that the other's argument is frivolous or devoid of merit.

[21] Perpetual applied to the New South Wales Supreme Court for advice on the conduct of the dispute. Brereton J accepted that there are reasonable grounds for thinking that Perpetual's case has reasonable prospects of success, but that in the light of Dr Bell SC's opinion, there is clearly an arguable contrary view. In this decision, I am not required to say which position is correct. I see no reason to disagree with the assessment by Brereton J. I note that Perpetual has not to date contested one aspect of Dr Bell SC's opinion, that is, that if the noteholders' claim is for damages only, the damages would be no more than nominal under Australian contract law.

[22] Given these findings, I asked the parties whether there was any objection to leave being granted to Perpetual under s 284. The liquidators had no objection and by consent I make an order granting leave to Perpetual to apply under s 284 of the Companies Act.

The stay application

[23] In addition to its application against the liquidators under s 284 of the Companies Act in this Court, Perpetual, with a noteholder, Société Générale Australia Ltd, has issued a proceeding in the New South Wales Supreme Court against HIH NZ seeking a declaration to the effect that HIH NZ is and remains indebted to it as trustee of the HIH NZ converting notes for money owing, comprising the face value of the notes. In effect, it seeks a similar determination to the relief it is seeking in its application under s 284 in this Court.

[24] The liquidators have lodged a protest against the New South Wales Supreme Court hearing the case. That case is to be called again on 4 November 2011. The New South Wales Supreme Court is awaiting this Court's decision on Perpetual's stay application.

[25] In its stay application, Perpetual proposes that the proceeding in this Court be stayed while its declaration proceeding is heard in New South Wales. It relies on the exclusive jurisdiction clause in favour of the New South Wales courts, and also says that there are advantages in cost, convenience and speed if its proceeding in New South Wales were to continue.

[26] In opposition the liquidators say that only this Court can determine all the issues in a liquidation under the Companies Act; there is no material difference between the applicable laws of New Zealand and New South Wales and this Court is able to interpret a New South Wales contract if required; and Perpetual has waived its rights under the exclusive jurisdiction clause by seeking relief in this Court.

[27] Perpetual's application is an unusual one. It accepts that this Court must supervise the liquidation of HIH NZ and accordingly the New South Wales Court cannot determine all the matters which this Court could in supervising the liquidation of HIH NZ. Normally, when there is a successful application for stay of a local proceeding in favour of a proceeding overseas, the stay brings the local proceeding to an end. The parties to the dispute litigate abroad, without the matters in issue coming back to New Zealand. But in this case, any decision in New South Wales will not necessarily finally determine all issues. It is foreseeable that work may still have to be done in this Court. Any determination in New South Wales would require this Court to rule on Perpetual's application under s 284 in the light of decisions made by a New South Wales court. In effect, Perpetual has made a kind of split-trial application,[2] but is proposing that a foreign court decide the preliminary question. I am not aware of any precedent for such a course and counsel did not cite any exactly on point. The absence of authority does not mean that the application should not be considered on its merits. Rule 1.6 of the High Court Rules allows for cases not provided for:

> (1) If any case arises for which no form of procedure is prescribed by any Act or rules or regulations or by these rules, the court must dispose of the case as nearly as may be practicable in accordance with the provisions of these rules affecting any similar case.
>
> (2) If there are no such rules, it must be disposed of in the manner that the court thinks is best calculated to promote the objective of these rules (*see* r 1.2).

The objective of the Rules under r 1.2 is to obtain the just, speedy and inexpensive determination of any proceeding.

The exclusive jurisdiction clause

[28] In choice of forum disputes, exclusive jurisdiction clauses have special importance. One of their benefits is that they save arguments as to where proceedings should be heard. They enable parties to contract and conduct business on the basis that any disputes will be heard in a particular chosen law area. When an agreement provides for disputes to be heard in courts of the country whose law governs the contract, there is also the benefit that differences between matters of substance (which are part of the proper law of the contract) and matters of procedure (part of the law of the forum) fall away.

[29] In *Donohue v Armco*,[3] Lord Scott stated the approach to such clauses:

> It is accepted that a contractual exclusive jurisdiction clause ought to be enforced as between the parties to the contract unless there are strong reasons not to do so. Prima facie parties should be held to their contractual bargain: see *The Fehmarn* [1957] 1 Lloyd's Rep 511, *The Chaparral* [1968] 2 Lloyd's Rep 158, the *El Amria* [1981] 2 Lloyd's Rep 119, *The Sennar (No 2)* (1985) 1 WLR 490, *The Angelic Grace* [1995] 1 Lloyd's Rep 87.

[30] New Zealand authority is to similar effect. In *The Society of Lloyd's v Hyslop* Richardson J said:[4]

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2 As under rr 10.4 and 10.15 of the High Court Rules.

3 *Donohue v Armco Inc* [2002] CLC 440, [2002] 1 All ER 749 (HL) at [53].

4 *The Society of Lloyd's v Hyslop* [1993] 3 NZLR 135 (CA) at 142.

> The existence of an exclusive jurisdiction clause places a heavy burden on the party seeking to oppose the clause. While the Court has a discretion, a stay should be granted unless strong cause for not doing so is shown by the plaintiff.

[31] See also the Court of Appeal's decision in *Advanced Cardiovascular Systems Inc v Universal Specialties Ltd*.[5]

[32] While the Court has a discretion not to apply an exclusive jurisdiction clause, it does not do so as a matter of convenience or of forum non conveniens. The party opposing a stay in favour of a chosen exclusive forum must show strong cause, sufficient to outweigh the chosen forum.

[33] The party invoking the exclusive jurisdiction clause does not have to justify its choice. In *Incitec Ltd v Alkimos Shipping Corp* Allsop J said:[6]

> [45] Two international commercial parties chose London arbitration and then the London Commercial Court. Each is entitled to enforce its bargain. It does not have to justify its choice. It may be for tactical gain. So be it. That is the fruit of its bargain. It may well put parties in an unseemly position to have to explain to a court which is not the parties' forum of choice why they did not want to arbitrate or litigate in a place other than that which they have chosen in their bargain. ASC and Hyundai may or may not have had all sorts of reasons why they wanted their time charter litigation in London or why they were prepared to agree to such. It may have been out of an abiding trust in the English arbitration system or courts or in English lawyers, or it may have been out of distrust of courts or lawyers of other countries; it may have arisen from habit; it may have arisen from one or more other reasons. Generally speaking, a party, having bargained for a place of dispute resolution, should not have to go into its private reasons for agreeing to that place and for not wanting to litigate elsewhere.

[34] On the kind of matters that can give strong cause not to apply a forum agreement, Allsop J said:

> [49] … To the extent that the operation of the exclusive jurisdiction clause causes financial or forensic inconvenience to the party which bound itself to the clause, that, of itself, is to be seen as only the direct consequence of the bargain entered and, generally, can be set to one side. What really are of importance in weighing against the operation of the exclusive jurisdiction clause are: (a) the inconvenience, if any, whether financial or other, caused to third parties; (b) the effect, if any, upon the due administration of justice; and (c) any other appropriate public policy consideration that can be discerned in all the circumstances.

[35] The point made is that matters that can be taken as within the parties' contemplation at the time of contracting do not count in favour of a stay.

[36] If HIH NZ were not in liquidation, there would be no reason not to give effect to the choice of the New South Wales courts. Any alleged inconvenience to HIH NZ in having to litigate in Australia would not be a strong enough reason not to give effect to the forum agreement. Perpetual would be entitled to insist on any dispute being heard in New South Wales without having to provide any justification for its stance.

Effect of liquidation on the forum agreement

[37] The matter is different when a company goes into liquidation. Once a company is put into liquidation in New Zealand, the liquidators conduct the liquidation under the supervision of this Court. The Companies Act 1993 has reduced the Court's supervisory role. Part 16 of the Act allows a liquidator to conduct the liquidation with

5 *Advanced Cardiovascular Systems Inc v Universal Specialities Ltd* [1997] 1 NZLR 186, (1996) 9 PRNZ 632 (CA) at 190, 636.

6 *Incitec Ltd v Alkimos Shipping Corp* (2004) 138 FCR 496, 206 ALR 558.

as little interference from the Court as possible. All the same, a liquidator may seek directions, and interested persons may apply to the Court to review the liquidator's actions. The primary provision for that supervision is s 284. Another is the Court's power to grant leave to take proceedings against the company under s 248(1)(c).

[38] Where a liquidator rejects a proof of debt, the creditor's remedy is to apply under s 284(1)(b) for an order reversing or modifying the liquidator's decision. The creditor has a statutory remedy against the liquidator. The creditor who does not apply under s 284(1)(b) loses the opportunity to challenge the liquidator's rejection of his claim, with the consequence that he will not share in the distribution under ss 312 and 313 as he would have wished.[7]

[39] The liquidator cannot avoid the supervision provided by s 284. He cannot by contract oust this Court's jurisdiction. It is not open to a liquidator to say that because of a dispute resolution provision in a contract between the company and the creditor, the creditor cannot apply to this Court to review the liquidator's decision. A contractual choice of a foreign forum does not stand in the way of a creditor applying to this Court under s 284.

[40] Just as a liquidator is subject to this Court's supervision, notwithstanding a forum agreement between the creditor and the company, so it is with a creditor. A creditor wishing to share in the assets in the liquidation must make a claim under s 304. Any claim that falls outside s 304 does not count. A creditor who relies on a contractual choice of forum to bring a proceeding in a foreign court may be able to do so, as the bar on proceedings without leave under s 248 does not apply extraterritorially,[8] but it will not help the creditor obtain recognition of his claim if he does not follow the procedure under s 304 and, if rejected, under s 284. Suppose a creditor brings a proceeding against the company in liquidation in a foreign court, obtains judgment and, relying on a choice of forum clause, seeks to enforce the judgment against the company in New Zealand on the basis of a contractual submission to the foreign court. It could not do so, because the liquidator has custody and control of the company's assets[9] and the liquidator is under a duty (under s 253) to take possession of, protect, realise, and distribute the assets, or the proceeds of the realisation of the assets of the company to its creditors in accordance with the Companies Act, and if there is any surplus, then under s 313(4).[10] A liquidator cannot be compelled to deal with assets contrary to his or her duty under s 253 and must be entitled to resist any attempts by creditors to enforce claims that do not come within the Act.[11] Accordingly, an exclusive forum clause cannot prevail over the provisions for making claims and challenging liquidators' decisions under pt 16 of the Companies Act.

[41] No doubt there are policy reasons underlying the primacy of the statutory provisions, including:

(a) It is consistent with the statutory objective of providing straightforward and fair procedures for realising and distributing the assets of insolvent companies — see clause (e) of the Long Title of the Act;

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7 Reg 15(2) Companies Act 1993, Liquidation Regulations 1994.

8 *In Re Oriental Inland Steam Co* (1873-74) LR 9 Ch App 557, *Re Vocalion (Foreign) Ltd* [1932] 2 Ch 196, *Bloom v Harms Offshore AHT Taurus GmbH & Co KG* [2010] Ch 187, [2010] 2 WLR 349 and *Commissioner of Inland Revenue v Compudigm International Ltd (in rec and in liq)* (2010) 24 NZTC 24,579 (HC).

9 Section 248(1)(a).

10 Section 253.

11 See the discussion by Stanley Burton LJ in *Bloom v Harms Offshore AHT Taurus GmbH & Co KG* especially at [24].

(b) It enables liquidations to be conducted without the cost of unnecessary proceedings overseas;

(c) It allows for the Court's supervision of liquidators; and

(d) It allows for the application of local rules on insolvency issues such as priorities, set-off, and insolvent transactions.

[42] These reasons may explain the apparent absence of cases where forum agreements have been applied against liquidators. The practice has been that where questions of foreign law arise in the course of a liquidation, the Court will apply its choice of law rules. An example that comes to mind is the decision of the House of Lords *Re United Railways of Havana and Regla Warehouses Ltd*.[12]

[43] The apparent novelty of Perpetual's application is its proposal that:

(a) instead of this Court deciding all issues in the liquidation it should allow the merits of Perpetual's claim to be decided in New South Wales; and

(b) there should be a hearing in a New South Wales court, before the matter comes back to this Court.

[44] Before considering the merits of Perpetual's application, I address some preliminary objections by the liquidators.

Waiver and election

[45] The liquidators' argument is that Perpetual has chosen to apply in this Court and therefore cannot ask for matters to be decided in New South Wales. The liquidators refer to advice given by senior counsel in New South Wales for an appeal to be brought in New Zealand, to the fact that the initial application filed in this Court contemplated that this Court would decide the merits of the appeal, and to principles of insolvency law against a creditor proving in an insolvency and attempting recovery outside the insolvency.

[46] I do not accept the objection. Perpetual applied in this Court because that was the course it had to take if it was to claim a share of assets under the liquidation. There are apparently no assets of this company outside New Zealand. If Perpetual has changed tack, that does not amount to a waiver or election. It is entitled to propose that in the course of the liquidation, the merits of its claim be determined in a way different from what it initially proposed. The liquidators do not identify any prejudice arising from Perpetual's change of course.

Parallel litigation

[47] The liquidators refer to the New South Wales proceedings and say that the parallel litigation is abusive. That point can be addressed by ruling on which court is to deal with the matter, by way of a stay ruling or by an anti-suit injunction. The litigation on both sides of the Tasman is at a relatively early stage and neither side can point to prejudice arising from the courts of one jurisdiction stepping back to allow the other to hear the case.

The merits of Perpetual's application

[48] While past practice is against Perpetual's application, it is appropriate to note trends arising from increasing globalisation. There is increasing interaction and cooperation among courts of different law areas. The Insolvency (Cross Border) Act 2006, implementing the Model Law on Cross Border Insolvency, allows for judicial

12 *Re United Railways of Havana and Regla Warehouses Ltd* [1961] AC 1007, [1960] 2 All ER 332 (HL).

assistance when a company in liquidation has assets in more than one law area. There is increasing recognition that questions of foreign law are best resolved in the foreign court. I refer to an article of Brereton J:[13]

> **Problems of Proof**
>
> Distilling the content of foreign law is problematic, as it requires an Australian court to pronounce the law of a jurisdiction with which it is unfamiliar. It is trite to observe that the best court to adjudge the law of a particular forum is a court of that forum.[14] There is a risk, as Spigelman CJ noted in *Murakami v Wiryadi* (2010) 268 ALR 377 at 406; [2010] NSWCA 7 at [150], that "important aspects of the foreign law will be lost in translation". As De Boer has observed:
>
> > Most judges dealing with foreign law in a conflicts case are unaccustomed to its vernacular, unaware of its various layers of meaning, insensitive to its subtleties, ignorant of its usage, oblivious to its context. Small wonder that they are apt to make mistakes that their colleagues abroad would avoid instinctively.[15]

New South Wales has recognised this by amending its civil procedure rules to allow foreign courts to seek pronouncements on Australian law from its Supreme Court.[16]

[49] In trans-Tasman litigation, there is increased willingness on both sides of the Tasman to co-operate in legal proceedings. This is shown not only in statutory provisions[17] allowing courts to co-operate with each other, but also in the decisions of the courts. In *Stone v Newman*,[18] the Court of Appeal said that there is a general expectation that any case having trans-Tasman features should be tried in the Australasian forum that is most appropriate for the trial of the proceeding. With the enactment of the Trans-Tasman Proceedings Act 2010[19] that takes on greater weight. That Act implements the Agreement between the Government of New Zealand and the Government of Australia on Trans-Tasman Proceedings and Regulatory Enforcement of 24 July 2008.[20] The Preamble includes the parties' acknowledgement of their confidence in each other's judicial and regulatory institutions and their desire to establish a new trans-Tasman regime to further streamline civil court proceedings. Parts 1 and 2 of that Act have not yet come into force, but the changes to trans-Tasman proceedings will markedly reduce the difficulties of long-arm litigation between Australia and New Zealand.

[50] While the present application does not come within the letter of any of the statutory provisions I have referred to, against that background the proposal that a New Zealand court allow an Australian court to decide some of the issues in a New Zealand proceeding is not incongruous. The matters making it desirable that the New South Wales Supreme Court decide the merits of Perpetual's claim are:

(a) Perpetual and HIH NZ agreed that the courts of New South Wales would hear any claims under the trust deed and under the deed of guarantee;

(b) Any legal issues in this dispute raise questions of Australian law;

(c) The underlying interests are Australian. The competition is between the noteholders claiming through Perpetual, mainly Australian, and the

13 PLG Brereton "Proof of Foreign Law: Problems and Initiatives" (2011) 85 ALJ 554 at 556.

14 *McGregor v Potts* (2005) 68 NSWLR 109 (NSWSC) at [54] (Brereton J).

15 TJ De Boer, "Facultative Choice of Law: the Procedural Status of Choice-of-law Rules and Foreign Law" (1996) 257 Rec d Cours 222 at 305.

16 Uniform Civil Procedure Rules 2005, r 6.45 (NSW).

17 For example, pt 1A Judicature Act 1908; pt 4 Evidence Act 2006.

18 *Stone v Newman* (2002) 16 PRNZ 77 (CA) at [29].

19 The Act came into force on 1 September 2010, except for pts 1 and 2, and schs 1 and 2.

20 Trans-Tasman Proceedings Act 2010, sch 1.

creditors of HIH Australia, an Australian corporation, who would otherwise benefit if Perpetual's claim fails;

(d) Perpetual's claim is made on behalf of investors who bought in reliance on an Australian prospectus which incorporated the terms in issue in this case, including the provisions for disputes to be decided in New South Wales under the law of New South Wales;

(e) There are no issues of New Zealand law or public policy that are at stake. In particular, those matters that might require New Zealand to decide the merits of the claim, such as local insolvency policy or principles, are not in issue here; and

(f) The case can carry any extra expense and effort required to litigate in Australia — the sums in issue in this case are significant.

[51] In this situation, where HIH NZ is in liquidation, the exclusive jurisdiction clause does not have the dominant effect it otherwise would have if there were no liquidation. Instead, the inquiry is whether it is more appropriate for Perpetual's claim to be heard in New South Wales or in New Zealand. This is a forum non conveniens question. On that I refer to the statement of principle by Lord Goff in *Spiliada Maritime Corp v Cansulex Ltd*[21] quoting Lord Sumner in *Societe du Gaz de Paris v Societe Anonyme de Navigation "Les Armateurs Francais"*:[22]

> The object under the words "forum non conveniens" is to find that forum which is the more suitable for the ends of justice, and is preferable because pursuit of the litigation in that forum is more likely to secure those ends.

[52] Clearly the New South Wales Supreme Court is an available alternative Court with competent jurisdiction.

[53] The default position is that unless an order is made for a stay, this Court will hear the application under s 284. Under the forum non conveniens test the Court has to be satisfied that some other court is more appropriate. The party seeking the stay has the onus of persuading the Court that some other forum is more suitable, but beyond that it is not helpful to approach the matter in terms of a burden of proof.[23] This is different from r 6.29 of the High Court Rules, which casts an onus on a plaintiff to justify a proceeding being heard in New Zealand, when a proceeding filed in New Zealand is served overseas.

[54] A potential cause of difficulty might arise from the split-hearing aspect of the application. That factor goes to appropriateness. White J summarised the principles for split trials in *Turners & Growers Ltd v Enza Ltd*:[24]

> [9] There is no dispute that the Court has a broad discretion under both rules to decide whether justice requires a split trial for a cause of action or a separate question of law. In exercising the broad discretion, however, the Court will take into account not only the interests of the parties immediately affected but also the interests of other parties to other cases awaiting hearing before the Court.
>
> [10] The starting point therefore is the assumption that all matters in issue are to be determined in one trial because that would normally be the most expeditious and efficient manner for dealing with a proceeding: *Clear Communications Ltd*

21 *Spiliada Maritime Corp v Cansulex Ltd* [1987] AC 460, [1986] 3 All ER 843 (HL) at 475, 853-854.

22 *Societe du Gaz de Paris v Societe Anonyme de Navigation "Les Armateurs Francais"* 1926 SC 13 (HL) at 22.

23 Rule 6.29 expressly imposes a burden on the plaintiff to justify the New Zealand court taking jurisdiction over a foreign defendant. That is not the case here. The liquidator does not have to justify the hearing about a liquidation being heard in New Zealand.

24 *Turners & Growers Ltd v Zespri Group Ltd* HC Auckland CIV-2009-404-4392, 5 May 2010.

v Telecom Corp of New Zealand Ltd[25] at 334. Consequently the burden of displacing the presumption rests on the party contending for split trials. The burden has been described as "heavy" or "not insignificant": *Clear Communications v Telecom Corp of New Zealand Ltd* at 335 and *KPMG New Zealand v Gemmell*[26] at [20].

[11] Criteria that have been taken into account in other cases to decide whether to order a split trial include—

(a) The likelihood of delay in finally resolving the proceeding.

(b) The probable length of the hearings if there is a split trial.

(c) Whether a decision one way or the other on the separate questions would end the litigation.

(d) The impact on the length of any subsequent hearing.

(e) A balancing of the advantages to the parties and the public interest in shortening litigation as against any disadvantages asserted by parties opposing a split trial.

(f) Demarcation difficulties in defining issues to be addressed at the first trial.

(g) Resulting difficulties of issues estoppel.

(h) Inadvertent disqualification of a Judge who has expressed views at the first trial on matters for decision at the second trial.

(i) Inadvertent findings at the first trial upon matters that are for full evidence and argument at the second hearing.

(j) The need to recall some witnesses at the second hearing.

(k) The duplication of time involved in the Court and counsel "coming up to speed" again for the second hearing.

(l) The prospect of multiple appeals.

(m) A second round of discovery or other interlocutories and amended pleadings following the first trial.

(n) Rostering difficulties in ensuring that the same Judge is available for the second hearing.

[12] The number and nature of these criteria reinforce the judicial warnings emphasising the risks involved in ordering split trials: *Windsor Refrigerator Co Ltd v Branch Nominees Ltd*[27] at 396, *Tilling v Whiteman*[28] at 25, *Esso Resources Canada Ltd v Stearns Catalytic Ltd*[29] at 560, and *Tepko Pty Ltd v Water Board*[30] at 55.

[13] At the same time the Court has a discretion to exercise in the context of the issues in a particular case. As Fisher J said in *Clear Communications Ltd v Telecom Corp of New Zealand Ltd* at 335—

> In the end, however, every case must be considered individually and the possibility of a split trial should never be dismissed out of hand. The most important single question is usually the interaction between the issues intended to be traversed at the first hearing and those for the second.

[55] Perpetual proposes that the New South Wales Supreme Court decide its declaratory proceeding first. It says that if it is successful, then on a hearing of its s 284 application in New Zealand, it will rely on the New South Wales judgment.

25 *Clear Communications Ltd v Telecom Corp of New Zealand Ltd* (1998) 12 PRNZ 333 (HC).

26 *KPMG New Zealand v Gemmell* HC Auckland CIV-2008-404-4288, 27 March 2009.

27 *Windsor Refrigerator Co Ltd v Branch Nominees Ltd* [1961] Ch 375 (EWCA).

28 *Tilling v Whiteman* [1980] AC 1, [1979] 1 All ER 737 (HL) at 25, 744.

29 *Esso Resources Canada Ltd v Stearns Catalytic Ltd* (1991) 77 DLR (4th) 557 (CA Alberta) at 560.

30 *Tepko Pty Ltd v Water Board* (2001) 206 CLR 1, 75 ALJR 775 (HCA) at 55, 806-807.

All that will be left will be to quantify its debt. Both parties accept that on a finding in favour of Perpetual, there would be little to argue over. The noteholders' claims would exhaust the funds held by the liquidators. The liquidators have not called for claims to be filed, but they have not said that they expect claims from other creditors. Quantifying Perpetual's claim is potentially something that could be resolved without requiring a further hearing.

[56] If Perpetual is unsuccessful, the liquidators signal that there is another potential issue — the damages, if any, recoverable by Perpetual for the breach by HIH NZ. If that is a genuine issue, I see no reason why the liquidators could not seek a declaration from the New South Wales Supreme Court as to the heads of damage for which Perpetual could recover (that being part of the lex causae). Any dispute as to the calculation of damages would be for the court supervising the liquidation. I am not sure that it is a genuine issue. If it had been, I would have expected Perpetual's Australian lawyers to have signalled it by now. Accordingly I accept that the proceeding in New South Wales is likely to dispose of the substantive issues, with little left for determination on the s 284 application. That reduces the prospect of a second substantive hearing in New Zealand.

[57] I accept that on that basis the New South Wales Supreme Court could make declarations as to New South Wales law and as to its application to facts that appear not to be disputed. The findings by the New South Wales Supreme Court could be applied in the s 284 application. Demarcation difficulties are not likely to arise.

[58] It is often said that split hearings are treacherous shortcuts. There is potentially a greater risk when matters are heard in a foreign court. Nevertheless I consider that the issues in this case are confined and manageable. The normal caution against allowing split hearings is not decisive against allowing Perpetual's application.

[59] Against Perpetual's application the liquidators submit that there are no material differences between New South Wales and New Zealand law and therefore no advantages to a New South Wales court hearing Perpetual's claim. In each of the three legal questions in this case, there are nuanced differences in the way the law in each country is described, but I accept that the differences are not relevant in this case.

[60] First, on interpretation, there is generally a movement from text to context.[31] New Zealand has moved further in that direction than Australia, admitting parol evidence even without ambiguity[32] and admitting evidence of post-contract conduct.[33] But such evidence would not be relevant in this case. A New Zealand court would not consider parol evidence in this case given the public nature of the trust deed and the deed of guarantee. Nor would an Australian court let in parol evidence. Effectively, the courts in both countries would apply the same principles of interpretation. I do not detect any differences between the principles of interpretation described by the Australian experts and the way a New Zealand lawyer would approach the task of interpretation, when given only the documents in issue to consider.

[61] Secondly, on the effect of termination/cancellation, Australian law derives from the judgment of Dixon J in *McDonald v Dennys Lascelles Ltd*,[34] whereas in

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31 JJ Spigelman "Contractual Interpretation: A Comparative Perspective" (2011) 85 ALJ 412.

32 *Vector Gas Ltd v Bay of Plenty Energy Ltd* [2010] 2 NZLR 444 (SC).

33 *Wholesale Distributors Ltd v Gibbons Holdings Ltd* [2008] 1 NZLR 277 (SC).

34 *McDonald v Dennys Lascelles Ltd* (1933) 48 CLR 457, 39 ALR 381 (HCA).

New Zealand the Contractual Remedies Act 1979 applies. However, New Zealand courts have applied the reasoning in Dixon J's judgment in giving effect to s 8(3): see *Brown v Langwoods Photo Stores Ltd* and *Garratt v Ikeda*.[35]

[62] Thirdly, Australian courts apply the general rule in *Robinson v Harman*[36] as the sole basis for awarding damages for breach of contract. The High Court of Australia has held that a plaintiff cannot choose between reliance and expectation damages: *Commonwealth of Australia v Amann Aviation Pty Ltd*.[37] On the other hand in *Ti Leaf Productions Ltd v Baikie*[38] the New Zealand Court of Appeal suggested that a plaintiff had a choice between reliance and expectation damages. However, as the result in that case shows, the expectation measure sets a ceiling on any reliance damages, and that is a result similar to the principle followed in *Commonwealth of Australia v Amann Aviation Pty Ltd*.

[63] In this case the foreign law element is slight and would be manageable for a New Zealand court. Nevertheless it is desirable that the merits of Perpetual's claim be determined in New South Wales, because of the Australian legal and factual issues, the choice of Australian law, the contractual choice of the New South Wales courts which would apply but for liquidation, and the Australian interests in conflict. New South Wales is the natural forum for the issues in this case.

[64] A reason to reinforce that desirability is to show that New Zealand courts will endeavour to uphold foreign creditors' choice of a foreign forum where that is feasible and practicable, and not in conflict with New Zealand interests or policy.

[65] Against that desirability, I recognise that there is some risk in the merits of Perpetual's claim to be a creditor being determined offshore. But I do not consider that that risk is unacceptable when measured against the desirability of those issues being decided in New South Wales. Reinforcing that is this Court's confidence that the New South Wales Supreme Court will be able to give a just and timely determination of Perpetual's claim.

[66] Accordingly, I make these orders:

(a) Leave is granted to Perpetual to apply under s 284 to apply for an order to reverse the liquidators' decision to reject its claim.

(b) The application under s 284 is stayed pending further order of the Court, while Perpetual's claim for a declaration is heard in the courts of New South Wales.

(c) The liquidators are directed to submit to the jurisdiction of the New South Wales Supreme Court in Perpetual's pending proceeding in that Court.

(d) The liquidators may file a cross-claim in that Court seeking a declaration as to Perpetual's entitlement, including any heads of damage claimable by Perpetual.

(e) Leave is reserved to the parties to apply for further directions and for removal of the stay, including on the grounds of delay in the conduct of any proceedings in New South Wales.

[67] On costs, I encourage the parties to resolve costs themselves, but if they cannot they may file memoranda. Perpetual should file its memorandum first, and any submissions from the liquidators should come in five working days afterwards.

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35 *Brown v Langwoods Photo Stores Ltd* [1991] 1 NZLR 173 (CA); and *Garratt v Ikeda* [2002] 1 NZLR 577 (CA).

36 *Robinson v Harman* [1843-1860] All ER Rep 383, (1848) 1 Exch 850.

37 *Commonwealth of Australia v Amann Aviation Pty Ltd* (1991) 174 CLR 64, 104 ALR 1 (HCA).

38 *Ti Leaf Productions Ltd v Baikie* (2001) 7 NZBLC ¶99-534 (CA).

Application successful

Reported by Jane Herschell