

Not Even Due. Or is it? The Supreme Court of New Zealand broadens the concept of Due Debts

David Browne Contractors Limited and David Browne Mechanical Limited v David Ross Petterson as Liquidator of Polyethylene Pipe Systems Limited (In Liquidation) [2017] NZSC116

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Summary

The recent decision of the Supreme Court of New Zealand in *David Browne Contractors v Petterson*¹ has clarified as to when a contingent liability is to be regarded as a 'due debt' in New Zealand, even though in one sense such a claim may not be a debt nor due.

The Court found that a contingent debt will be regarded as a 'due debt' if a 'reasonable and prudent business person' would be satisfied that there is 'sufficient certainty' that a contingent debt will become a legally due debt at a temporally proximate point.

The decision is consistent with Australian and United Kingdom authorities such that debts may encompass both present and contingent debts.² This decision will be relevant when assessing whether a company's debt is due or not when considering unfair preference claims in New Zealand. It may also be considered by the Australian Court's in assessing whether a company is insolvent or not.

Background

Under section 292 of the *Companies Act 1993 (NZ)* ('the Act'), a Liquidator is able to claw back pre-liquidation payments if the company was 'unable to pay its due debts' at the time of that payment.

In March 2007, Polyethylene Pipe Systems Ltd ('PPS') entered into a subcontract agreement with McConnell Dowell Constructors Ltd ('MCD') to weld pipes that were to be laid on the seabed in Lyttelton Harbour, Christchurch. It was a term of the subcontract agreement that PPS would indemnify MCD for any losses arising from the subcontract works - contingent liability.

The Liquidator of PPS claimed \$912,937 of payments made to related entities David Browne Contractors Limited ('Contractors') and David Browne Mechanical Limited ('Mechanical') in September 2008 ('Impugned Payments'). It is important to note that Impugned Payments were made following a 'restructure' by PPS in June 2008. At the time these Impugned Payments were made, PPS were facing a 'potential' damages claim from MCD for allegedly faulty welding it had undertaken. As a result of the faulty welding, MCD notified PPS that it was liable for these losses under the indemnity in the subcontract. On 19 January 2009, MCD issued a notice of adjudication. On 20 July 2009, MCD succeeded

in adjudication and was awarded approximately \$3 million in damages for the faulty welds. The adjudicator concluded that the welds failed because they were defective and that there was no fault on the part of MCD. PPS was put into liquidation on 5 October 2009.

The Liquidator of PPS commenced proceedings in the High Court for repayment of the Impugned Payments made to Contractors and Mechanical. The High Court held at the time the transactions were entered into, the sum claimed by MCD was not a 'due debt' and that PPS was solvent as defined in section 4 of the Act. Therefore the Liquidator was unsuccessful in obtaining orders to recover the Impugned Payments. On appeal, the Court of Appeal overturned the High Court's decision and ordered the Impugned Payments be returned by Contractors and Mechanical to the Liquidator of PPS. Leave to appeal to the Supreme Court was granted to Contractors and Mechanical.

Issues

The question for the Supreme Court was whether an undetermined claim for damages by MCD as against PPS could be considered a 'due debt' of PPS at the time of the Impugned Payments.

The Supreme Court unanimously dismissed the appeal. It was held that if a 'reasonable and prudent business person' would be satisfied that there is 'sufficient certainty' that a claim will become a legally due debt at a temporally proximate point, then it will be a due debt for the purpose of section 292(2)(a) of the Act. The Court found there was sufficient certainty in the MCD claim. The adjudication after these Impugned Payments were made merely confirmed that PPS was liable for these losses. The Liquidator was permitted to recover the Impugned Payments from Contractors and Mechanical.

It was also worthy to note that PPS had no defences under section 296 of the Act, furthermore as the transactions were entered into for the purpose of avoiding the MCD claim, Contractors and Mechanical did not act in good faith.

Implications

Company directors in New Zealand ought to be aware of reasonably proximate contingent claims when restructuring a company's affairs.

¹ [2017] NZSC 116.

² Bank of Australasia v Hall [1907] HCA 78; 4 CLR 1514; 14 ALR 51.

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