

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

**CA271/2024
[2026] NZCA 438**

BETWEEN	ALPHA INSURANCE A/S (IN BANKRUPTCY) Appellant
AND	KARE JOHNSTONE AND ANDREW JOHN GRENFELL AS LIQUIDATORS OF CBL INSURANCE LIMITED (IN LIQUIDATION) Respondents

Hearing:	16 October 2025
Court:	Cooke, Campbell and Whata JJ
Counsel:	A R B Barker KC and K E Cornegé for Appellant D J Chisholm KC and M J Tingey for Respondents
Judgment:	14 September 2026 at 11.00 am

JUDGMENT OF THE COURT

- A The appeal is allowed.**
 - B The orders made by the High Court on 12 August 2024 are set aside.**
 - C Costs in the High Court are to be determined in light of this judgment.**
 - D The respondents are to pay the appellant costs for a standard appeal on a band A basis, together with usual disbursements. We allow for second counsel.**
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REASONS OF THE COURT

(Given by Campbell J)

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Introduction

[1] The respondents, as liquidators of CBL Insurance Ltd (CBL Insurance), applied for an order that three transactions that CBL Insurance entered into with Alpha Insurance A/S (Alpha Insurance) be set aside as insolvent transactions under s 292 of the Companies Act 1993 (the Act). The liquidators asserted that the transactions were entered into when CBL Insurance was unable to pay its due debts and enabled Alpha Insurance to receive more towards satisfaction of a debt owed by CBL Insurance than Alpha Insurance would have received in CBL Insurance's liquidation.

[2] Becroft J found that the transactions were insolvent transactions in terms of s 292(2) of the Act and set them aside.¹ Alpha Insurance appeals. The sole issue on appeal, as it was before the Judge, is whether CBL Insurance was, at the time it entered into the transactions, unable to pay its due debts. In turn, that depends on the extent to which CBL Insurance's outstanding claims liability — an actuarial estimate of its total likely exposure for claims incurred up to that point in time — was a due debt.

Background

The transactions

[3] CBL Insurance was a licensed New Zealand insurer. The vast majority of its business involved reinsuring European insurance companies. One such insurance company was Alpha Insurance, a Danish company writing business in the French construction market.

[4] CBL Insurance was subject to the prudential oversight of the Reserve Bank of New Zealand. The Reserve Bank had, at various points in the 2010s, expressed concern about the solvency and financial and risk management of CBL Insurance. This concern escalated to the point that, on 23 February 2018, the Reserve Bank applied to the High Court to put CBL Insurance into liquidation and for interim liquidators to be appointed. The Court appointed the respondents as interim liquidators that day.² Subsequently, in November 2018, the Court put CBL Insurance into liquidation.³

¹ *Johnstone v Alpha Insurance A/S (in bankruptcy)* [2024] NZHC 725, [2024] NZCCLR 689 [judgment under appeal].

² *Reserve Bank of New Zealand v CBL Insurance Ltd* [2018] NZHC 264 at [3].

³ *Reserve Bank of New Zealand v CBL Insurance Ltd (No 3)* [2018] NZHC 2969, [2019] NZAR 563 at [1].

[5] CBL Insurance entered into the transactions in question in the fortnight or so before the appointment of interim liquidators. The transactions were:

- (a) entry into a liability settlement agreement dated 9 February 2018 with Alpha Insurance (the LSA);
- (b) a payment under a “Quota Share Reinsurance Treaty” of £397,000 to Alpha Insurance on 14 February 2018; and
- (c) a payment under the LSA of €25 million to Alpha Insurance on or about 16 February 2018

(together, the Transactions).

The challenge to the Transactions

[6] The liquidators sought to set aside the Transactions on the ground they were voidable under s 292 of the Act. Section 292(1) provides:⁴

292 Insolvent transaction voidable

- (1) A transaction by a company is voidable by the liquidator if it—
 - (a) is an insolvent transaction; and
 - (b) is entered into within the specified period.

⁴ Section 292 of the Companies Act 1993 was amended, as from 16 May 2020, by s 3 of the COVID-19 Response (Further Management Measures) Legislation Act 2020. Section 3 of that Act also inserted a new pt 3 into sch 1AA of the Companies Act. Part 3 consists of a transitional provision, the effect of which is that the pre-amendment version of s 292 continues to apply in respect of liquidations that commenced before the amendment came into force. The liquidation of CBL Insurance commenced in February 2018 and so the pre-amendment version of s 292 applies. The parties and the Judge proceeded on the basis that the amended version of s 292 applied. The differences between the two versions are not material to the outcome of this proceeding, but we refer to the correct pre-amendment version of s 292 in this judgment.

[7] The Transactions were entered into within the specified period.⁵ As to whether each Transaction was an “insolvent transaction”, that term is defined in s 292(2):

- (2) An **insolvent transaction** is a transaction by a company that—
 - (a) is entered into at a time when the company is unable to pay its due debts; and
 - (b) enables another person to receive more towards satisfaction of a debt owed by the company than the person would receive, or would be likely to receive, in the company’s liquidation.

[8] Alpha Insurance accepts that each Transaction satisfied the second limb of this definition. What is in dispute is whether CBL Insurance was “unable to pay its due debts” at the time it entered into the Transactions.⁶ Under s 292(4A) of the Act, transactions that are entered into within the “restricted period” (as the Transactions were)⁷ are presumed, unless the contrary is proved, to be entered into at a time when the company is unable to pay its due debts. The burden is therefore on Alpha Insurance to prove that CBL Insurance was able to pay its due debts at the time it entered into the Transactions.

Outstanding claims liability

[9] CBL Insurance, as a licensed insurer, was required to hold adequate capital to cover its outstanding claims liability (OCL). Most of the judgment under appeal is concerned with whether CBL Insurance’s OCL was a due debt (it being common ground that if it was, CBL Insurance was not able to pay its due debts when it entered into the Transactions). That was likewise the focus of the submissions on appeal. It is therefore necessary to say something about the OCL.

⁵ The “specified period” is defined to include the period of two years before the making of the application for a company to be put into liquidation to the court: s 292(5)(b). The Reserve Bank having applied to put CBL Insurance into liquidation on 23 February 2018, the specified period commenced on 23 February 2016.

⁶ The Transactions were entered into over a period of eight days. It is not suggested that CBL Insurance’s ability to pay its due debts changed materially over that period. It therefore suffices to refer to the time, rather than the times, of the Transactions.

⁷ Section 292(6)(b) of the Companies Act defines “restricted period” as including the period of six months before the making of the application for a company to be put into liquidation to the court.

[10] We begin with an explanation of a relevant feature of the insurance business. Geoffrey Atkins, an expert actuary who made an affidavit in support of the liquidators' application, explained:

- 11 General insurance is one of few “cash flow positive” businesses in the economy. Premiums are received in advance at or near the commencement of the insurance policy, and most of the outgo is in the form of claims which are paid out over months or years during and after the period of the insurance policy. In the meantime, the insurance company has a positive cash balance of funds collected from premiums and held to meet claims. These funds are generally invested and the return on investments is additional revenue for the insurer.
- 12 This feature — essentially where you get paid for the product before you “manufacture” it — is why insurance accounting and prudential regulation focusses so much on the company holding adequate provisions in respect of liability for insurance policies that have been issued. The liabilities need to be estimated, because the amount and timing of the required payments is not known with certainty. ...

[11] This feature was pronounced for CBL Insurance's business. First, the risks underwritten by Alpha Insurance (and reinsured by CBL Insurance) in the French construction market could have a long “tail”, of up to 15 years. Secondly, in the reinsurance business there may be additional delays in determining whether the insurer's liabilities under the original policies of insurance trigger the reinsurance policies.⁸

[12] The upfront receipt of premiums and the time lag before claims are made, quantified and paid explains why insurers and reinsurers are usually subject to prudential regulation and supervision. An important aspect of this, as Mr Atkins noted, is that insurers and reinsurers are required to make estimates of their liability for outstanding claims and to hold sufficient capital to cover those claims.

[13] In New Zealand, the Reserve Bank is, under the Insurance (Prudential Supervision) Act 2010 (the IPSA), the prudential regulator and supervisor of licensed insurers (including reinsurers). Section 55(1) of the IPSA empowers the Reserve Bank to issue solvency standards. Solvency standards may prescribe matters such as

⁸ A point recognised by White J in *New Cap Reinsurance Corporation Ltd (in liq) v AE Grant* [2008] NSWSC 1015, (2008) 221 FLR 164 at [12].

the minimum amount of capital that an insurer must hold and maintain and how assets and liabilities (including claims liabilities) should be estimated or valued.⁹

[14] The solvency standard applicable to CBL Insurance was the Solvency Standard for Non-life Insurance Business 2014 (the Solvency Standard). The Solvency Standard sets out how an insurer's minimum solvency capital is to be calculated. A key part of an insurer's minimum solvency capital is its OCL.

[15] The OCL is an estimate, provided by an approved actuary, of an insurer's total likely exposure for claims incurred up to a particular date. The OCL is calculated in a standardised way, the calculation for a non-life (re)insurer such as CBL Insurance being governed by Appendix D of the New Zealand Equivalent to International Financial Reporting Standard 4 Insurance Contracts (NZ IFRS 4).

[16] Paragraph 19.1 of Appendix D of NZ IFRS 4 says the OCL "means all unpaid claims and related claims handling expenses relating to claims incurred prior to the end of the reporting period". The term "claims incurred" is defined broadly:

claims incurred	means claims that have occurred prior to the end of the reporting period; the claims could be reported or unreported at the end of the reporting period.
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[17] A key aspect of that definition is that "claims incurred" captures not only claims that have been reported to the insurer but also those that are still unreported. What matters is not whether the claim has been reported but rather whether the insured event which gives rise to the claim has occurred prior to the end of the reporting period. This emerges firstly from the definition of "claim":

claim	means a demand by any party ... for payment by the insurer on account of an alleged loss resulting from an insured event or events, that have occurred, alleged to be covered by insurance .
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⁹ Insurance (Prudential Supervision) Act 2010, s 56(a)(i) and (e)(i).

[18] The need to allow for both reported and unreported claims is made clear by [5.1] and [5.2] of Appendix D. Paragraph 5.1 states that the OCL:¹⁰

... shall be measured as the central estimate of the present value of the expected future payments for *claims incurred* with an additional risk margin to allow for the inherent uncertainty in the central estimate.

[19] What is being estimated is the present value of “expected future payments”. Paragraph 5.2 identifies what those payments include:

The expected future payments shall include:

- (a) amounts in relation to unpaid reported claims;**
- (b) claims incurred but not reported (IBNR);**
- (c) claims incurred but not enough reported (IBNER); and**
- (d) costs, including claims handling costs, which the insurer expects to incur in settling these incurred claims.**

[20] Thus, the OCL must take account of not only unpaid reported claims but also claims incurred but not reported (IBNR) and claims incurred but not enough reported (IBNER). David Pacey, an Auckland chartered accountant with experience in assisting clients in the insurance industry with NZ IFRS 4, gave the following example:

A typical example of IBNR would be a slow water leak hidden within a building cavity where the building owner had a valid insurance policy to cover for this type of event. The leak may remain undiscovered by the building owner as at balance date. Nonetheless a claimable event has occurred, being the internal damage caused by the leak. In determining the OCL and based on the requirements of NZ IFRS 4, an insurer would be required to include an assessment of this, and other likely IBNR claims as at the end of the insurer’s financial year.

[21] To understand the nature of the OCL, it is also helpful to understand the way in which actuaries estimate claims liabilities. The Judge quoted the following

¹⁰ Emphasis in original.

description from a decision of the Supreme Court of New South Wales, *New Cap Reinsurance Corporation Ltd (in liq) v AE Grant*:¹¹

[13] Accounting standards and industry practice require insurers to make provision by way of estimates of liability for claims incurred but not reported (IBNR) or not enough reported (IBNER). Provisions for claims liabilities are not assessed merely by aggregating estimates of liability for individual claims, together with an estimate of IBNR. Actuarial analysis is used to estimate claims liabilities. Actuarial analysis is not based on the aggregation of estimates of individual claims. Rather, typically, claims liabilities are assessed by class of insurance using trends in aggregated data. For example, there may be an historical trend as to how claims liabilities develop over time for a particular class of business. An actuary may use such information in relation to earlier underwriting years to predict the future claims liabilities for later underwriting years. There may be market experience of loss ratios on particular classes of business for certain underwriting years.

[22] Neither party took issue with that description. It is consistent with Appendix D of NZ IFRS 4. Paragraph 5.1.5 says that in estimating the OCL, use may be made of “case estimates” of individual reported claims. Paragraph 5.2.7 says that when “IBNR claims are expected to exist”, they should be estimated “based on past experience” and taking into account any changes in circumstances, such as recent catastrophic events or changes in the volume or mix of insurance contracts underwritten.

Licensed insurers and powers of the Reserve Bank

[23] Any insurer who carries on insurance business in New Zealand must be licensed to do so.¹² An insurer’s licence may be subject to conditions, including a condition to maintain a solvency margin in accordance with the applicable solvency standard (in the case of CBL Insurance, the Solvency Standard).¹³ The solvency margin is the excess (in dollars) of actual solvency capital over minimum solvency capital, meaning it is a margin applied to the minimum solvency capital that the insurer is required to hold under the applicable solvency standard. The solvency margin can also be expressed as a solvency ratio. A solvency margin of zero requires the insurer to hold the minimum solvency capital (a solvency ratio of 100 per cent). A solvency margin of, say, 70 (applied to a baseline of 100) requires the insurer to hold 170 per cent of the minimum solvency capital (a solvency ratio of 170 per cent).

¹¹ Judgment under appeal, above n 1, at [18], quoting *New Cap Reinsurance Corporation Ltd (in liq) v AE Grant*, above n 8.

¹² Insurance (Prudential Supervision) Act, s 15(1).

¹³ Section 21(2)(b).

[24] The Reserve Bank may give various directions to a licensed insurer under sub-pts 1 and 2 of pt 4 of the IPSA. The power to do so arises where the Bank has reasonable grounds to believe that specified circumstances apply, such as the insurer failing to maintain a solvency margin.¹⁴

[25] The Reserve Bank also has the power, under s 151(1) of the IPSA, to apply to have a licensed insurer put into liquidation. Section 151 provides, relevantly:

151 Bank may apply for liquidation of insurers

- (1) The Bank may, in the case of a licensed insurer that may be put into liquidation under or in accordance with the Companies Act 1993, apply to the High Court to appoint a liquidator for the insurer.
- (2) The High Court may, on an application under subsection (1), appoint a liquidator for the licensed insurer if it is satisfied that—
 - (a) the insurer is unable to pay its debts (and, for that purpose, section 287 of the Companies Act 1993 applies with all necessary modifications whether or not the insurer is a company); or
 - (b) the insurer is failing to maintain a solvency margin; or
 - (c) the insurer has persistently or seriously failed to comply with any direction, condition, or other requirement imposed by or under this Act or the regulations; or
 - (d) it is just and equitable that the insurer be put into liquidation.

...

[26] The grounds in s 151(2)(a) and (d) are (respectively) essentially the same as the grounds on which the High Court may, under s 241(4)(a) and (d) of the Act, put any company into liquidation. The grounds in s 151(2)(b) and (c) are peculiar to applications by the Reserve Bank to put a licensed insurer into liquidation.

The Reserve Bank's interventions before and after the Transactions

[27] The Judge set out a chronology of events which he said was “largely uncontested”.¹⁵ We adopt that chronology and record the key events.

¹⁴ Sections 138(1)(a) and 143(1)(a).

¹⁵ Judgment under appeal, above n 1, at [40].

[28] In July 2017, Alpha Insurance's regulator, the Danish Financial Supervisory Authority (the FSA), had concerns about CBL Insurance's ability to meet its reinsurance commitments to Alpha Insurance. The FSA accordingly required Alpha Insurance to substantially increase its reserves. Around the same time, the Reserve Bank also had concerns about CBL Insurance's solvency. It required CBL Insurance to increase its reserves to maintain a solvency ratio of at least 170 per cent. It also appointed McGrath Nicol (the liquidators' firm) to investigate CBL Insurance's financial position. McGrath Nichol's conclusion, supported by actuarial analysis from Mr Atkins, was that CBL Insurance's appointed actuary (PwC) was underestimating its OCL.

[29] On 15 November 2017, CBL Insurance and its appointed actuary advised the Reserve Bank that CBL Insurance was likely to be in breach of its required solvency ratio (of 170 per cent) as at 31 December 2017. On 22 November 2017, the Bank made directions that CBL Insurance and its ultimate parent company, CBL Corporation Ltd (CBLC), were not to enter into any transaction involving a payment or transfer of assets in excess of \$5 million without first consulting the Bank. From December 2017 (at least), CBL Insurance's liabilities far exceeded its assets, and so it was balance sheet insolvent.

[30] On 2 February 2018, the NZX and ASX put trading halts on CBLC. On 5 February 2018, CBLC announced that CBL Insurance had under-reserved its liabilities (including OCL) by \$100 million, was writing off \$44 million of receivables and intended to raise capital.

[31] On 9 February 2018, Alpha Insurance advised CBL Insurance that it believed the FSA was going to prevent it from writing further business with CBL Insurance. It advised that the FSA might do so imminently. The same day, CBL Insurance and Alpha Insurance entered into the LSA. The recitals to the agreement recorded that it was being entered into so that Alpha Insurance could reduce its exposure to CBL Insurance under their reinsurance agreements. Under the LSA, CBL Insurance was to pay Alpha Insurance €25 million to be used to meet current and future claims under the reinsurance agreements. In return, CBL Insurance's liability to Alpha Insurance (as reinsurer) would be reduced by €27 million.

[32] On 12 February 2018, the Reserve Bank directed CBL Insurance not to make the payment of €25 million to Alpha Insurance (the payment having been proposed the previous day). CBL Insurance was also prohibited from entering, without the prior written permission of the Bank, into any transaction or series of related transactions with Alpha Insurance involving a payment or transfer of assets of \$1 million or greater. We note that in a later criminal prosecution of the chief executive officer and chief financial officer of CBL Insurance, this direction was found not to be a valid direction under s 143 of the IPSA.¹⁶ However, it was not suggested to us that the validity or invalidity of the direction had any bearing on the issue before us.

[33] On 14 February 2018, CBL Insurance made a payment of £397,000 to Alpha Insurance under a motor quota share reinsurance treaty in respect of its share of a claim made on Alpha Insurance. On 16 February 2018, believing the Reserve Bank's direction of 12 February to be invalid, the directors of CBL Insurance paid €25 million to Alpha Insurance under the LSA.

[34] On 23 February 2018, the Reserve Bank applied to the High Court for an order that CBL Insurance be put into liquidation and, pending determination of that application, for an order that interim liquidators be appointed under s 246 of the Act.¹⁷ The same day, the Court appointed the respondents as interim liquidators.¹⁸

[35] The Reserve Bank's application to put CBL Insurance into liquidation under s 151 of the IPSA was brought on three grounds: that CBL Insurance was in breach of its required solvency margin, that it had seriously failed to comply with the Bank's directions and that it was just and equitable to wind up CBL Insurance because it was balance sheet insolvent and because of impropriety by its directors. The Bank did not, in its liquidation application, assert that CBL Insurance was unable to pay its due debts.¹⁹

¹⁶ *R v Harris* [2023] NZHC 2635 at [616]. This finding was upheld on appeal: *R v Harris* [2026] NZCA 105 at [39]–[40].

¹⁷ *Reserve Bank of New Zealand v CBL Insurance Ltd*, above n 2, at [2].

¹⁸ At [3].

¹⁹ *Reserve Bank of New Zealand v CBL Insurance Ltd (No 3)*, above n 3, at [8].

[36] On 12 November 2018, the High Court put CBL Insurance into liquidation.²⁰ Among other things, the Court found it was just and equitable to do so because CBL Insurance was balance sheet insolvent.²¹ The Court said that CBL Insurance’s financial position “would not have brought the case within s 151(2)(a), which requires the company not to be able to pay its debts (cashflow insolvency)”.²²

Evidence as to CBL Insurance’s ability to pay its due debts

[37] The evidence in the High Court was by way of affidavit. This included affidavits in support of the liquidators’ application from Mr Atkins, Kare Johnstone (one of the liquidators) and Mr Pacey. Alpha Insurance’s opposition principally relied on an affidavit from Ross Simmonds, an expert actuary.

[38] Mr Atkins’ first affidavit was made in July 2018, in support of the Reserve Bank’s application to put CBL Insurance into liquidation. In that affidavit, Mr Atkins referred to the solvency tests in the Act and the IPSA:

A registered insurer in New Zealand must meet two statutory tests relating to solvency contained in the Companies Act 1993 and in the IPSA. The test for solvency set out in the Companies Act, which applies to all New Zealand registered companies, requires that a company maintains positive net assets and can meet its cashflow obligations as they fall due. IPSA solvency is a stricter test and applies specifically to insurers. It requires that the insurer maintain a specified level of assets in excess of liabilities.

[39] Mr Atkins’ explanation of the solvency test in the Act noted that there are two limbs to that test, one requiring that the company’s assets exceed its liabilities (colloquially called the “balance sheet test”) and the other requiring that the company be able to pay its debts as they become due (colloquially called the “cash flow test” or “liquidity test”).

[40] Mr Atkins’ firm, Finity Consulting Pty Ltd (Finity), made an actuarial valuation of CBL Insurance’s net OCL as at 31 December 2017. Mr Atkins said that an actuarial valuation of liabilities “is an estimate and there is always uncertainty about this estimate”. Given this uncertainty, Finity showed the result of its analysis as a

²⁰ At [1].

²¹ At [32]–[33].

²² At [30].

range, with a low estimate of \$542.7 million and a high estimate of \$657.1 million. This range was well in excess of the \$371.4 million provision for (net) OCL that had been made by CBL Insurance's appointed actuary.

[41] Using Finity's low estimate of the OCL, CBL Insurance's liabilities exceeded its assets by approximately \$100 million as at 31 December 2017. Mr Atkins' conclusion was that, as at that date, CBL Insurance was "therefore insolvent on both the Companies Act and the IPSA basis". In terms of the "Companies Act ... basis", Mr Atkins was referring to balance sheet insolvency. Earlier, Mr Atkins had said:

Mr Harris [(the chief executive officer of CBL Insurance)] expresses the view in his affidavit evidence that [CBL Insurance] is solvent on a cashflow basis. I do not understand this to be a matter which is in dispute. The ability to meet immediate cashflow requirements does not establish the ability of [CBL Insurance] to meet its insurance obligations, nor does it establish that its assets exceed its liabilities. While cashflow is the basis of one of the legs of the Companies Act solvency, the other leg is based on assets and liabilities and in the case of [CBL Insurance] is the operative provision.

[42] Ms Johnstone, in her primary affidavit in support, expressed the opinion that at the time the Transactions were entered into CBL Insurance was "unable to meet its debts", which included the OCL. She said it was "an accounting requirement" to take the OCL into account when considering CBL Insurance's due debts.

[43] Mr Simmonds acknowledged that on Finity's actuarial valuation CBL Insurance was balance sheet insolvent as at 31 December 2017. He then assessed its ability to pay its debts. He first estimated the future payment pattern of its OCL using the insurance claim payment pattern assumptions that had been used by CBL Insurance's appointed actuary. That payment pattern was broadly consistent with CBL Insurance's historical rate of claim payments (as a percentage of net insurance liabilities). He calculated that CBL Insurance's OCL as at 31 December 2017 would be expected to be paid out over a period of approximately 14 years. He next calculated how long CBL Insurance would have been able to make those expected payments from the cash assets it held on that date. Using the valuation of the net OCL provision prepared by CBL Insurance's appointed actuary, Mr Simmonds' calculation was that as at 31 December 2017 CBL Insurance would have been able to meet its expected insurance payments from its cash assets for a further eight years. This analysis was

made on a run-off basis — that is, Mr Simmonds assumed that CBL Insurance ceased writing new business from 31 December 2017.

[44] Mr Simmonds acknowledged that his analysis was based on CBL Insurance’s own accounts (and, therefore, on its appointed actuary’s valuation of the OCL rather than Finity’s valuation). He said any increase in the OCL “would not materially impact the size of the projected payments particularly in the short term”.

[45] The liquidators filed affidavits in reply from Ms Johnstone, Mr Atkins and Mr Pacey. Ms Johnstone repeated her view that the OCL was a due debt. She said Mr Simmonds’ analysis of CBL Insurance’s ability to pay its due debts was flawed because it relied on an unreliable and unrealistic valuation of the OCL.

[46] Mr Atkins made the same point and said Mr Simmonds’ analysis was not realistic. He said:

- 41 ... As a rough estimate, I expect the projected payments would be around double those shown, and the cash position would reach zero after a period between three and five years.
- 42 The fact that it takes some time for [CBL Insurance] to run out of cash does not mean it is able to meet its due liabilities/debts. All of these liabilities are, in my view, ‘due’ and any payment of claims would inevitably result in a preference for those whose claims were paid against those left with unpaid claims when the money runs out. ...

[47] Mr Pacey did not engage with Mr Simmonds’ analysis of CBL Insurance’s ability to pay its debts. He did, however, say that the OCL represented “an amount owed and is thus a debt due at the reporting date”. He said that in his view IBNR claims “are due debts under the relevant insurance policy”.

[48] Notwithstanding the different views expressed by the experts, none were cross-examined.

High Court judgment

[49] The liquidators contended that the phrase “due debts” should be given a wide meaning and so encompass the OCL, which is an actual accrued liability. Not doing so would be contrary to the policy of the Act and would often allow transactions by

insurance companies to escape s 292. Alpha Insurance argued that the OCL is an estimate of forward liabilities that would not crystallise as “debts”, let alone “due debts”, for many years.

[50] The Judge said it was not in dispute that the Transactions took place when CBL Insurance was balance sheet insolvent.²³ However, the question under s 292(2)(a) was whether CBL Insurance was unable to pay its due debts. That depended on whether the OCL was a due debt.²⁴ The starting point was the language of s 292(2)(a). That language — that a company “is unable to pay its due debts” — imposed a cash flow solvency test. Parliament could have also imposed a balance sheet solvency test. But it chose not to, and the words had to be interpreted as they appeared.²⁵

[51] The real question was whether “due debts” could bear only one interpretation (as Alpha Insurance argued) or if a wider interpretation of those words could be taken (as the liquidators argued).²⁶ The Judge concluded that a wider interpretation was possible and justified.²⁷ His reasons were:

- (a) Treating the OCL as a due debt was the only way to “truly and reliably establish” whether a reinsurance company was cash flow solvent.²⁸
- (b) Mr Atkins, Ms Johnstone and Mr Pacey took the view that the OCL should be regarded as a due debt and, while the issue was a legal one, it would be “unsatisfactory if the legal test diverged completely from an expert accounting analysis”.²⁹
- (c) Classifying the OCL as a due debt was consistent with *David Browne Contractors Ltd v Petterson*, in which the Supreme Court said that

²³ Judgment under appeal, above n 1, at [41(a)].

²⁴ At [51(a)].

²⁵ At [80].

²⁶ At [82].

²⁷ At [85].

²⁸ At [85(a)].

²⁹ At [98]. See at [90]–[94].

“[d]ebt can be a word of wide import”.³⁰ In the Judge’s view the OCL is a present and accrued liability, and this meant “it is ‘due’ now”.³¹ The Judge also said that if he were wrong on this point, *David Browne Contractors* supported an interpretation of the word “due” that encompassed distant claims liabilities and a “much longer time frame” more generally.³²

- (d) Treating the OCL as a due debt would be consistent with the approach in *New Cap Reinsurance Corporation* and commonality of approach with Australia was “commercially desirable”.³³
- (e) There were sound policy reasons for treating the OCL as a due debt. On Alpha Insurance’s argument an insurance company could claim to be cash flow solvent despite not being able to pay its OCL. That would render s 292 nugatory — an insurance company could deliberately prefer certain creditors with impunity and continue to operate all the while knowing that any preferential transactions it entered into could not be avoided.³⁴

[52] Having concluded that the OCL is a due debt,³⁵ the Judge recorded the agreed position that CBL Insurance could not pay its OCL and so the Transactions were voidable under s 292.³⁶ The parties subsequently agreed orders to give effect to the judgment. The Judge made those orders on 12 August 2024.

Appeal

[53] Alpha Insurance contends that the Judge erred in finding that the OCL is a due debt. It says it discharged the burden of proving that CBL Insurance was able to pay its due debts at the time it entered into the Transactions. It relies on Mr Simmonds’

³⁰ At [85(c)] and [100]–[101], quoting *David Browne Contractors Ltd v Petterson* [2017] NZSC 116, [2018] 1 NZLR 112 at [88].

³¹ Judgment under appeal, above n 1, at [103].

³² At [104] and [107], citing *David Browne Contractors Ltd v Petterson*, above n 30, at [89]–[92].

³³ Judgment under appeal, above n 1, at [109]–[110], referring to *New Cap Reinsurance Corporation Ltd (in liq) v AE Grant*, above n 8.

³⁴ Judgment under appeal, above n 1, at [111]–[112].

³⁵ At [116].

³⁶ At [118].

opinion that CBL Insurance would have been able to continue paying claims for a further eight years and on Mr Atkins' acknowledgement that it could have paid claims for a further three to five years. It says that even on Mr Atkins' view CBL Insurance was able to pay its due debts.

[54] The liquidators say the High Court's decision was correct. They agree with the Judge's reasons but also support the decision on an additional ground — that at the time of the Transactions it was inevitable that CBL Insurance would shortly be put into liquidation. They say that where liquidation is inevitable all of CBL Insurance's liabilities should be treated as being "due debts" in terms of s 292(2)(a).

[55] We have to determine two issues:

- (a) Is the OCL a due debt?
- (b) Has Alpha Insurance proved that at the time of the Transactions CBL Insurance was able to pay its due debts?

[56] Before addressing these issues, we examine the meaning of "due debts" and place s 292 in its broader legislative context.

The meaning of "due debts" in s 292

[57] The Supreme Court addressed the meaning of "due debts" in s 292 in *David Browne Contractors*. Polyethylene Pipe Systems Ltd (Polyethylene) had undertaken work for McConnell Dowell Constructors Ltd (McConnell Dowell) on a large project. McConnell Dowell made claims against Polyethylene for faulty workmanship. Shortly afterwards, Polyethylene repaid unsecured advances made to it by David Browne Contractors Ltd (Contractors).³⁷ Some months later, McConnell Dowell obtained an award of almost \$3 million against Polyethylene,

³⁷ A second payment was made to another related company, and a third to David Browne (the owner of all the companies) personally. The liquidator did not ultimately seek an order that the payment to Mr Browne was voidable under s 292 of the Companies Act: see *Pettersson v Browne* [2015] NZHC 866 at [3]–[4]. It was therefore only the two payments to the related companies that were the subject of the appeal to this Court and the Supreme Court. For simplicity, we refer only to the first payment.

which was subsequently put into receivership and then liquidation. The liquidator sought to set aside Polyethylene's payment to Contractors under s 292.

[58] The main issue for the Supreme Court was whether the payment to Contractors occurred when Polyethylene was unable to pay its due debts. That depended on whether the amount eventually held to be owed to McConnell Dowell should have been taken into consideration. That, in turn, depended on what was included within the term "due debts" under s 292(2)(a).³⁸ Contractors accepted that "due debts" included both debts that were presently due and debts due within a very short time of the challenged transaction(s). But, Contractors submitted, contingent debts were not included.³⁹

[59] The Supreme Court rejected Contractors' submission. The Court held that "debt" encompasses both present and contingent debts.⁴⁰ As to the word "due", the Court accepted the liquidator's submission that "future debts" should be taken into account if they are "reasonably temporally proximate".⁴¹ The Court explained:⁴²

[90] ... As was said in *Re Cheyne Finance Plc (No 2)*, the issue of "how far into the future the inquiry as to present solvency is to go ... is a fact sensitive question depending upon the nature of the company's business and if known, of its future liabilities". Concentrating only on debts due at the relevant time could fail to distinguish between those companies suffering a temporary liquidity problem and those that are, on any commercial view, insolvent even though able to continue to pay their debts "for the next few days, weeks or even months before an inevitable failure".

[91] Solvency in a cash flow sense must be assessed objectively, taking a practical business [perspective]. What is reasonably temporally proximate will, as indicated above, fall to be considered in light of the facts of the particular case. If a reasonable and prudent business person would be satisfied that there is sufficient certainty that a contingent debt will, within that relevant period, become legally due then it must be taken into account.

[92] We accept that there is a difference between debts and damages but, once liability and quantum have been established in any claim for damages, the resulting judgment sum will be a debt owing. This means that the question is the same — if there is sufficient certainty that a claim will crystallize in the relevant period, then it must be taken into account. ...

³⁸ *David Browne Contractors Ltd v Petterson*, above n 30, at [70].

³⁹ At [78].

⁴⁰ At [88].

⁴¹ At [89]–[90].

⁴² Footnotes omitted.

[60] Thus, a contingent debt must be taken into account if a reasonable and prudent business person would be satisfied there is sufficient certainty it will become legally due within a reasonably temporally proximate period. The length of this period (that is, what is reasonably temporally proximate) depends on the facts of the particular case, including the nature of the company's business and of its future liabilities.

[61] The Supreme Court said this was a "practical business approach",⁴³ the need for which was reinforced by a key purpose of s 292, namely:⁴⁴

... to protect an insolvent company's creditors as a whole against a diminution of the assets available to them resulting from a transaction which confers an inappropriate advantage on one creditor by allowing that creditor to recover more than it would in a liquidation. The pari passu principle requires equal treatment of creditors in like positions ... and facilitates the orderly and efficient realisation of the company's assets for distribution to creditors.

[62] Applying this approach, the Court found that the contingent debt owed to McConnell Dowell should have been treated as a due debt and therefore "should have been taken into account in the cash flow solvency assessment".⁴⁵

[63] Mr Chisholm KC, for the liquidators, submitted that the Supreme Court applied the "reasonably temporally proximate" test to a contingent debt and that the test did not apply to prospective debts (that is, existing debts that are not presently payable but which will certainly fall due for payment in the future including at an as yet undetermined date). He submitted that such debts, which he said in addition to presently payable debts are what make up the OCL, were "actual" debts and so were "due", notwithstanding that they did not need to be immediately paid.

[64] We do not accept that submission. It is true that a contingent debt was at issue in *David Browne Contractors* and that the Court's reasons were expressed primarily by reference to contingent debts. But, as noted, the Court accepted the liquidator's submission that "future debts" should be included if they are reasonably temporally proximate. That expression is apt to include both prospective debts and contingent

⁴³ At [95].

⁴⁴ At [94], quoting *Allied Concrete Ltd v Meltzer* [2015] NZSC 7, [2016] 1 NZLR 141 at [1(a)] per McGrath, Glazebrook and Arnold JJ.

⁴⁵ *David Browne Contractors Ltd v Petterson*, above n 30, at [108].

debts. Further, it would be odd if prospective debts were treated differently from contingent debts. If the “reasonably temporally proximate” test did not apply to prospective debts, such debts would have to be counted as “due debts” even if they were not due to be repaid for, say, 10 years. This would collapse the distinction between cash flow solvency and balance sheet solvency. That would, in turn, as we explain in the next section of the judgment, be inconsistent with the broader legislative context.

[65] That the Supreme Court intended its test to apply to both prospective debts and contingent debts is confirmed by the Court’s reference⁴⁶ to the following passage of Lord Walker’s judgment in *BNY Corporate Trustee Services Ltd v Eurosail-UK 2007-3BL plc*:⁴⁷

[37] ... the “cash-flow” test is concerned, not simply with the petitioner’s own presently-due debt, nor only with other presently-due debt owed by the company, but also with debts falling due from time to time in the reasonably near future. What is the reasonably near future, for this purpose, will depend on all the circumstances, but especially on the nature of the company’s business.

[66] That passage sets a similar test to the Supreme Court’s “reasonably temporally proximate” test and applies the test to “debts falling due from time to time in the reasonably near future”, a phrase which captures prospective debts.

[67] For these reasons, we consider the “reasonably temporally proximate” test applies not only to contingent debts but also to prospective debts. Prospective debts are “due debts” only to the extent that they will become legally due within a reasonably temporally proximate period.

[68] In what follows, we rephrase the test by referring to a period that is “reasonably proximate in time” rather than “reasonably temporally proximate”. We think, with respect, that this is a clearer expression. It is intended to convey the same test.

⁴⁶ At [88], n 90.

⁴⁷ *BNY Corporate Trustee Services Ltd v Eurosail-UK 2007-3BL plc* [2013] UKSC 28, [2013] 1 WLR 1408 per Lord Walker, Lord Mance, Lord Sumption and Lord Carnwath.

The broader legislative context

[69] In this case, s 292 has to be applied with an eye to the broader legislative context in the Act and in the IPSA.

[70] Section 292 employs a cash flow solvency test rather than a balance sheet solvency test. This is in contrast to the solvency test that the Act uses to regulate distributions to shareholders (and some other transactions).⁴⁸ That solvency test is defined in s 4. It requires that a company both be able to pay its debts as they become due in the normal course of business (that is, it is cash flow solvent)⁴⁹ and have assets the value of which exceeds the value of its liabilities, including contingent liabilities (that is, it is balance sheet solvent).⁵⁰ It is thus a two-limbed solvency test.

[71] The predecessor to s 292 was s 309 of the Companies Act 1955, which also employed a cash flow solvency test.⁵¹ This use of a cash flow solvency test in the voidable preference regime had historical roots in United Kingdom legislation. By the time of the Law Commission's work on company law reform that led to the Act, the United Kingdom had, in the Insolvency Act 1986 (UK), adopted a two-limbed (cash flow and balance sheet) solvency test for its voidable preference regime.⁵² The Law Commission was aware of the Insolvency Act (UK).⁵³ The Law

⁴⁸ See Companies Act, ss 52(1), 55(3), 70(1), 77(1), 108(1), 221(1)(b) and 222(1)(b)(iii) and (2)(b)(iii).

⁴⁹ Section 4(1)(a).

⁵⁰ Section 4(1)(b).

⁵¹ Section 309(1) of the Companies Act 1955 did so indirectly, by referencing the equivalent rule in personal insolvency law, s 56 of the Insolvency Act 1967 (and its predecessor, s 79 of the Bankruptcy Act 1908). Section 56(1) of the Insolvency Act provided for a preferential transaction to be avoided if it was completed "by any person unable to pay his debts as they become due from his own money". Section 79(1) of the Bankruptcy Act was identically worded. The equivalent provisions of the two company statutes immediately preceding the Companies Act 1955, s 259(1) of the Companies Act 1933 and s 247(1) of the Companies Act 1908, similarly referred back to s 79 of the Bankruptcy Act. The fraudulent preference provision in the Companies Act 1903 referred to the equivalent rule in the Bankruptcy Act 1892 and, before that, the Bankruptcy Act 1883. Section 225 of the Companies Act 1882 also incorporated the fraudulent preference rule contained in personal insolvency law. In doing so, it indirectly made reference to s 64 of the Debtors and Creditors Act 1876. Section 64 was preceded by the first comprehensive statutory preference provision in New Zealand law, s 75 of the Debtors and Creditors Act 1875. That rule, like those that came after it, applied to "any person unable to pay his debts as they become due from his own moneys". This language can be traced back to s 92 of the Bankruptcy Act 1869 (UK) 32 & 33 Vict c 71.

⁵² Insolvency Act 1986 (UK), ss 123(1)(e) and (2), 239 and 240(2).

⁵³ See Law Commission *Company Law: A discussion paper* (NZLC PP5, 1987) at [336]; and Law Commission *Company Law: Reform and Restatement* (NZLC R9, 1989) at [689].

Commission, while recommending the introduction of the two-limbed solvency test to regulate distributions and some other transactions, and recommending some changes to the voidable transaction regime, did not recommend use of the two-limbed solvency test in that regime.⁵⁴ The regime was further amended by the Companies Amendment Act 2006, and again the cash flow solvency test was retained.⁵⁵

[72] A similar picture emerges with respect to the grounds on which a court may put a company into liquidation. United Kingdom and New Zealand companies legislation historically provided that the principal ground for the appointment of a liquidator was that a company was unable to pay its debts.⁵⁶ Balance sheet insolvency was not an explicit ground for the appointment of a liquidator by the court, though it might be a basis for putting a company into liquidation on the “just and equitable” ground.⁵⁷ The Insolvency Act (UK) explicitly provided, for the first time in that jurisdiction, that balance sheet insolvency was a ground for a court-ordered liquidation.⁵⁸ The drafters of the Act did not adopt that change: in s 241(4), balance sheet insolvency is not an explicit ground on which the court may appoint a liquidator.

[73] This review of the Act, including its legislative history, indicates that a choice was made to use only the cash flow solvency test, and not the balance sheet solvency test, to mark the boundaries of the voidable preference regime. It is important, therefore, that the concept of “due debts” not be applied in a way that collapses the distinction between the cash flow and the balance sheet solvency tests.

⁵⁴ See Law Commission *Company Law: Reform and Restatement*, above n 53, at [330]–[333] (as to the introduction of the solvency test) and [649] (as to changes to the voidable transaction regime).

⁵⁵ See Companies Amendment Act 2006, s 27(2).

⁵⁶ See Companies Act 1955, s 217(e); Companies Act 1933, s 169(e); Companies Act 1908, s 177(d); Companies Act 1903, s 177(d); Companies Act 1882, s 142(4); Joint Stock Companies Act 1860, s 70(4); Companies Act 1948 (UK) 11 & 12 Geo VI c 38, s 222(e); Companies Act 1929 (UK) 19 & 20 Geo V c 23, s 168(5); Companies (Consolidation) Act 1908 (UK) 8 Edw VII c 69, s 129(v); Companies Act 1862 (UK) 25 & 26 Vict c 89, s 79(4); and Joint Stock Companies Act 1856 (UK) 19 & 20 Vict c 47, s 67(4). Although the statutory trigger for a winding up by the court was an inability to pay debts (as opposed to “due” debts), this was understood to call for an assessment of cash flow solvency: see *Re Tweeds Garages Ltd* [1962] Ch 406 (Ch) at 410 (with respect to the Companies Act 1948 (UK)).

⁵⁷ *Insurance Commissioner v Associated Dominions Assurance Society Pty Ltd* (1953) 89 CLR 78 at 111. This was one of the bases upon which the High Court put CBL Insurance into liquidation: *Reserve Bank of New Zealand v CBL Insurance Ltd (No 3)*, above n 3, at [31]–[33].

⁵⁸ Insolvency Act (UK), ss 122(1)(f) and 123(2).

[74] This is so even where cash flow solvency is of limited relevance to the company's business. Mr Atkins said that "the concept of cashflow solvency ... is irrelevant for a general insurance company" and that insolvency for an insurance company is "always assessed based on the difference between the assets of the company and the liabilities". This is reflected in the IPSA, which focusses much of its prudential regulation on an insurer's balance sheet (through concepts such as the OCL and the solvency margin) rather than on its cash flow. That focus is also found in s 151(2)(b), which states that one of the grounds on which the High Court may put a licensed insurer into liquidation is that it is failing to maintain a solvency margin — a balance sheet test. In this way, balance sheet (or capital) inadequacy (in the prudential regulation sense) is an explicit ground for liquidation. Thus, in contrast to the Act, the IPSA directly implicates balance sheet considerations as a basis on which a licensed insurer may be put into liquidation. However, the IPSA does not make any equivalent modification to the application of s 292 to a licensed insurer. This is despite the IPSA making numerous modifications or additions to the liquidation provisions in the Act in their application to a licensed insurer that is in liquidation.⁵⁹

[75] There thus appears to be a mismatch between the text of s 292 and the economic reality of an insurance business. It may have been preferable for the legislature to have modified s 292 in its application to licensed insurers so that its boundaries were marked by a balance sheet solvency test. But it did not do so. The Court must apply s 292 as it is, not as it might like it to be.

Is the OCL a due debt?

[76] The Judge found that the OCL "as a whole" or "globally" — by which he meant the entirety of it — was a due debt in a general sense, rejecting Alpha Insurance's attempt to break the OCL down into its constituent parts.⁶⁰

[77] The OCL included liabilities for unpaid reported claims (including IBNER claims). As Mr Barker acknowledged, many of these would have been due debts. This

⁵⁹ Insurance (Prudential Supervision) Act, ss 154–160 (as to the Reserve Bank's approval for a voluntary liquidation and its participation in insolvency procedures) and 161–169 (as to special insolvency provisions for licensed insurers).

⁶⁰ Judgment under appeal, above n 1, at [102] and [103].

is because some of these liabilities would already have been legally due and others would have been sufficiently certain to become legally due within a matter of days, weeks or a few months — a period that would be reasonably proximate in time.

[78] The OCL also included liabilities for IBNR claims. Mr Barker characterised these liabilities as contingent (or “potential” liabilities). He also said many of these liabilities would not become payable for many years and therefore could not be regarded as due debts. Mr Chisholm said that the characterisation of the liabilities as contingent misunderstood the nature of the OCL, which he said included current and prospective liabilities that were already accrued. He submitted that the OCL was not contingent in nature.

[79] We consider the debate over whether the liabilities for IBNR claims are contingent is of little moment. As the Supreme Court said in *David Browne Contractors*, contingent debts may still be due debts if a reasonable and prudent business person would be satisfied that there is sufficient certainty they will become legally due within a reasonably proximate period of time.⁶¹ The important feature of the IBNR claims, for present purposes, is their long tail. The liabilities for these claims would not become legally due until, at the least, the claims were reported to CBL Insurance. As the Judge acknowledged, some of the IBNR claims might not be reported to CBL Insurance for many years, in some cases for more than a decade.⁶² We do not think that this can be considered a reasonably proximate period of time, even allowing for the nature of CBL Insurance’s business. A reasonable and prudent business person would not consider such debts to be sufficiently proximate to be relevant to cash flow solvency. Further, treating all such future liabilities for IBNR claims as due debts (as the Judge did) collapses the distinction between cash flow solvency and balance sheet solvency (at least in respect of the OCL, which formed the vast majority of CBL Insurance’s total liabilities). We therefore consider the Judge erred in finding that the entirety of the OCL was a due debt.

[80] Mr Chisholm’s written submissions supported the Judge’s finding. In oral submissions he retreated slightly, accepting that, were it not for the inevitability of

⁶¹ *David Browne Contractors Ltd v Petterson*, above n 30, at [91].

⁶² Judgment under appeal, above n 1, at [105].

CBL Insurance’s liquidation, some of the liabilities for IBNR claims would be too distant to be due debts. We propose to deal with the “inevitability” argument separately. First, we address the other arguments made in Mr Chisholm’s written submissions, which largely reflect the reasons the Judge gave for his finding.

Mr Chisholm’s arguments in support of the Judge’s finding

[81] Mr Chisholm said the fact that some of the liabilities in the OCL did not have to be immediately paid did not change the nature of the OCL, which was an estimate of present claims liabilities that were already accrued. He said these liabilities were “existing” and “actual” and therefore due. That submission incorrectly equates the existence of a debt with it being due and gives no other content to the concept of a debt being due. On that submission, a long-term loan repayable in ten years’ time would be due merely because it is an existing debt.

[82] Mr Chisholm said that the expert witnesses for the liquidators all agreed that the OCL should be treated as a due debt. This was also one of the Judge’s reasons for finding that the OCL was a due debt.⁶³ We are not assisted by this expert evidence. As the Judge acknowledged, whether the OCL is a due debt is a legal question. The expert evidence assists in understanding the nature and purpose of the OCL, its constituent parts and how it is calculated. But expert opinion on the ultimate legal question is of significantly less assistance.

[83] Next, Mr Chisholm submitted that including the OCL as a due debt recognised the commercial realities of CBL Insurance’s business and was the only reliable way of assessing its cash flow position. The Judge made a similar point.⁶⁴ We accept that what is a reasonably proximate time depends on the nature of the company’s business. But even allowing for that, we do not consider the time period can be stretched to encompass several years, let alone more than a decade. We do not think that a reasonable and prudent business person would consider that such future liabilities need to be taken into account in assessing due debts. And we do not accept that CBL Insurance’s cash flow position can be reliably assessed only by including

⁶³ At [85(b)], [90] and [97]–[98].

⁶⁴ At [85(a)].

the OCL as a due debt. What underlies this submission (and the Judge’s reason), in our view, is a concern that a due debts analysis is not a reliable measure of CBL Insurance’s *solvency*. Mr Atkins expressed that opinion in his affidavit, saying cash flow solvency is “irrelevant” for an insurance company and that solvency for an insurer is “always” assessed on the basis of the difference between its assets and liabilities (that is, a balance sheet test). That appears correct from an actuarial and prudential perspective. But that is not how s 292 assesses solvency. It does so on a cash flow basis.

[84] Relatedly, Mr Chisholm supported the Judge’s view that if the entirety of the OCL was not taken into account, insurance companies could prefer one creditor over another, yet such preferences would almost always fall outside s 292. He said this could not have been intended by the legislature, referring also to the principle of creditor equality that — as the Supreme Court noted in *David Browne Contractors* — underpins s 292.⁶⁵ But this is a consequence of the legislature having chosen to give effect to the principle of creditor equality by using a cash flow test, and not (also) a balance sheet test, in s 292. The legislative background to the Act, and the formulation of the insolvency provisions in the IPSA, show there was opportunity for the legislature to widen the scope of s 292 either generally or in its application to insurance companies specifically.

[85] We accept that the purpose of s 292 informs both the interpretation and application of the section, as the Supreme Court held in *David Browne Contractors*.⁶⁶ “Due debts” are not limited to those that are literally legally due at a given point in time. But in extending the reach of these words to encompass liabilities that a reasonable and prudent business person would include as relevant to cash flow solvency, the concept of “due” still remains. A liability that is not payable until some years in the future cannot be considered “due”. We will assess below the extent to which some of the OCL can be considered sufficiently proximate to be regarded as a due debt.⁶⁷

⁶⁵ *David Browne Contractors Ltd v Petterson*, above n 30, at [94], citing *Allied Concrete Ltd v Meltzer*, above n 44, at [1] per McGrath, Glazebrook and Arnold JJ.

⁶⁶ *David Browne Contractors Ltd v Petterson*, above n 30, at [95].

⁶⁷ See below at [101] and following.

[86] Finally, Mr Chisholm said the Judge was correct that treating the OCL as a due debt would be consistent with the approach in *New Cap Reinsurance Corporation*. We do not accept this submission. The Supreme Court of New South Wales did not, in that decision, treat the entirety of the OCL as a due debt. New Cap Reinsurance Corporation Ltd (NCRA) carried on business as a reinsurer. A liquidator was appointed in respect of it in September 1999. The liquidator alleged that two payments made by NCRA on, respectively, 8 and 14 January 1999 were voidable transactions. The issue was whether NCRA was insolvent on or from either of those dates.⁶⁸

[87] An actuarial valuation of NCRA's OCL had been prepared. This valuation showed that its OCL was approximately AUD 984 million as at 31 December 1998. Based on that OCL, NCRA had a deficiency of net assets as at that date of about AUD 415 million.⁶⁹

[88] The test for insolvency was in s 95A of the Corporations Act 2001 (Cth):⁷⁰

95A Solvency and insolvency

- (1) A person is solvent if, and only if, the person is able to pay all the person's debts, as and when they become due and payable.
- (2) A person who is not solvent is insolvent.

[89] White J said that s 95A directed attention to a company's cash flow rather than making a simple balance sheet assessment.⁷¹

[90] Mr Chisholm submitted that White J treated NCRA's OCL as a due debt. He relied on the following passages of the judgment:

[112] ... I consider that the insurance liabilities of NCRA to indemnify its reinsureds in respect of paid losses are "debts" within the meaning of s 95A. Once it is found that NCRA's liability to indemnify its reinsureds in respect of paid losses were "debts" within the meaning of s 95A, it follows that its future liabilities to pay claims once the level of paid losses reach the required level to trigger a layer of insurance were contingent debts, assuming of course that

⁶⁸ *New Cap Reinsurance Corporation Ltd (in liq) v AE Grant*, above n 8, at [1]–[3].

⁶⁹ At [15]–[17].

⁷⁰ We set out the version of s 95A of the Corporations Act 2001 (Cth) as at the time of the judgment of the Supreme Court of New South Wales in *New Cap Reinsurance Corporation Ltd (in liq) v AE Grant*. The current s 95A is identical other than that it is entitled "Meaning of *solvent* and *insolvent*".

⁷¹ At [43].

the relevant event which triggered the reinsured's liability to its insured, and hence its contingent right to claim on its policy of reinsurance, had occurred. For the reasons already given, I consider that such contingent debts can be taken into account in determining solvency.

[113] It follows that NCRA's insurance liabilities can be taken into account in determining its solvency.

[91] But White J did not treat the entirety of the OCL as a due debt. He found only that it was a debt for the purposes of s 95A and thus needed to be taken into account.⁷² Earlier in his judgment White J noted that the words "as and when they become due and payable" in s 95A require looking into the future, though "that usually involves looking only to the reasonably immediate future".⁷³ That is a test that has the same function as the "reasonably temporally proximate" test in *David Browne Contractors*. White J did not ultimately need to apply that test, and in the above passages he did not use the word "due". The critical issue was whether NCRA's insurance liabilities could be characterised as "debts" within the meaning of s 95A of the Corporations Act.⁷⁴ White J concluded they could.⁷⁵ Once he reached that conclusion it was unnecessary, in order to determine whether NCRA was insolvent, to consider how many of NCRA's insurance liabilities would become due in the "reasonably immediate future". That is because, throughout January 1999, NCRA had insufficient liquid funds to pay its insurance liabilities that were *then* due, the deficit varying from about AUD 39 million to AUD 52 million.⁷⁶ As White J went on to say immediately after the passages that Mr Chisholm relied on, once NCRA's insurance liabilities were taken into account as debts, "it can readily be concluded that it was insolvent at all relevant times".⁷⁷

Does it make any difference that liquidation was inevitable?

[92] Mr Chisholm submitted that even if some of the liabilities making up the OCL would not in ordinary circumstances be regarded as due, it was inevitable that

⁷² At [110] and [112]–[113].

⁷³ At [44], citing *Bank of Australasia v Hall* (1907) 4 CLR 1514 at 1527, *Lewis (as liq of Doran Constructions Pty Ltd (in liq)) v Doran* [2005] NSWCA 243, (2005) 219 ALR 555 at [103], *Brooks v Heritage Hotel Adelaide Pty Ltd* (1996) 20 ACSR 61 (SASC) at 65 and *Re Kolback Group Ltd* (1991) 4 ACSR 165 (NSWSC) at 169.

⁷⁴ *New Cap Reinsurance Corporation Ltd (in liq) v AE Grant*, above n 8, at [42], [52] and [72]. Alpha Insurance did not suggest that CBL Insurance's OCL could not be characterised as a debt within the meaning of s 292 of the Companies Act.

⁷⁵ At [110] and [112].

⁷⁶ At [32] and [40].

⁷⁷ At [114].

following the Transactions CBL Insurance would be put into liquidation within a very short time, and in those circumstances all the constituent insurance liabilities had to be treated as due. He said this was consistent with the approach taken in a decision of the Supreme Court of Victoria, *Taylor v Australian and New Zealand Banking Group Ltd*,⁷⁸ and was a consequence of the way in which ss 303(1) and 306(1) of the Act deal with contingent and prospective claims in a liquidation.

[93] We accept it was inevitable that CBL Insurance would be put into liquidation within a relatively short time of the Transactions. CBL Insurance had been under Reserve Bank scrutiny for several years. The Bank had also expressly directed it not to make the payment of €25 million to Alpha Insurance. It made that payment anyway. Regardless of whether that direction was valid, it was inevitable that the Bank would then apply to put CBL Insurance into liquidation. Given the state of its balance sheet, liquidation was then inevitable. Mr Barker did not contend otherwise.

[94] But we do not accept that the inevitability of CBL Insurance's liquidation meant that all its liabilities had to be treated as due. *Taylor* does not support Mr Chisholm's submission. There, a company sold its business on 31 December 1983. The directors then proceeded to wind up the affairs of the company, get in debts and pay creditors.⁷⁹ The creditors subsequently appointed a liquidator in respect of the company on 15 March 1984.⁸⁰ The liquidator claimed that a payment made by the company to its bank on 4 January 1984 was a voidable preference.⁸¹

[95] One issue was whether the company was, at the time of the payment, unable to pay its debts as they became due. That depended in part on whether loans to the company by its directors and their wives were due and payable. The company's financial statements dated 31 December 1983 showed these as long-term or non-current liabilities. McGarvie J held, however, that "the only realistic inference"

⁷⁸ *Taylor v Australian and New Zealand Banking Group Ltd* (1988) 13 ACLR 780 (VSC).

⁷⁹ At 784.

⁸⁰ At 781.

⁸¹ At 781–782.

was that these liabilities would become due for payment “in the winding up of the company which was intended to follow the sale”.⁸² This was because:⁸³

In ordinary circumstances the directors and their wives who lent money to the company on the basis that repayment was to be treated as a non-current liability would be entitled to demand payment when the company sold its business and proceeded to wind up its affairs. In considering the position of the company on 4 January it is appropriate to have regard to the fact that during the impending winding up these amounts would, on the balance of probabilities, become payable to the directors and their wives.

[96] Contrary to Mr Chisholm’s submission, McGarvie J did not decide that if liquidation is inevitable at the time of an impugned transaction all liabilities must be treated as due. McGarvie J was merely implying into the loan agreements with the directors and their wives a term that they could demand repayment if the company sold its business and then proceeded to wind up its affairs (which is what the directors had decided to do). No equivalent implication was suggested to be available in respect of the reinsurance contracts to which CBL Insurance was party.

[97] Mr Chisholm also relied on ss 303(1) and 306(1) of the Act to support his submission that future liabilities have to be treated as due if liquidation is inevitable. These sections provide:

303 Admissible claims

- (1) Subject to subsection (2), a debt or liability, present or future, certain or contingent, whether it is an ascertained debt or a liability for damages, may be admitted as a claim against a company in liquidation.

...

306 Ascertainment of amount of claim

- (1) The amount of a claim must be ascertained as at the date and time of commencement of the liquidation.

[98] Mr Chisholm said the effect of these sections is that a company’s future debts or liabilities become due on the commencement of liquidation. We disagree. The effect of s 303(1) is that a creditor can claim in a liquidation not only for debts and liabilities presently due but also for those due in the future. Section 306(1) is

⁸² At 790.

⁸³ At 790.

concerned merely with ascertaining the amount of a claim. These provisions thus deal with what claims can be made in a liquidation in respect of (among other things) future debts or liabilities. But they do not provide for the due date for payment of future debts or liabilities to be accelerated to the date of liquidation. That there is no such acceleration is confirmed by s 309(1), which provides that a claim in respect of a debt not payable until six or more months after the commencement of liquidation is to be treated as a claim for the present value of the debt. Section 309(2) provides that the present value is to be calculated by deducting from the amount of the debt interest for the period from the date of commencement of the liquidation to the date “when the debt is due”. The date when the debt is due is therefore unaffected by the liquidation. This is consistent with the Supreme Court’s observation, in *David Browne Contractors*, that s 303 makes clear that “all actual and potential creditors may make a claim, no matter how unlikely it is that any debt will become payable”.⁸⁴ That observation would not have been made if the Court thought the effect of s 303 is, as Mr Chisholm would have it, that a future debt becomes payable on liquidation.

[99] We have also considered whether all the circumstances — the nature of the proposed Transactions, the instructions from the Reserve Bank and the inevitability of liquidation — taken collectively mean that a reasonable and prudent business person would consider all of the OCL debts to be due debts. We think not. Section 292 still has a more specific and limited focus on cash flow solvency rather than the broader issues arising from these circumstances.

Conclusion

[100] None of Mr Chisholm’s arguments persuade us that the entirety of CBL Insurance’s OCL was a due debt. We consider the Judge erred in finding that it was.

⁸⁴ *David Browne Contractors Ltd v Petterson*, above n 30, at [93].

Has Alpha Insurance proved that at the time of the Transactions CBL Insurance was able to pay its due debts?

[101] Our finding on the first issue does not mean that no part of the OCL was a due debt. There were some due debts within the OCL, such as those in respect of unpaid reported claims. Mr Barker accepted this and acknowledged that the onus remained on Alpha Insurance to prove that CBL Insurance was, at the time of the Transactions, able to pay its due debts.

[102] To discharge that onus, Alpha Insurance relies on Mr Simmonds' analysis of how long CBL Insurance would have been able to continue paying claims and on Mr Atkins' response to that analysis. We summarised their evidence earlier.⁸⁵

[103] Mr Simmonds' methodology was to estimate CBL Insurance's future claim payment pattern based on its appointed actuary's assumptions and its historical rates of claim payments. He then applied that to the OCL (as valued by the appointed actuary). Effectively, he used the estimated future claim payment pattern as a proxy for when the liabilities within the OCL would become payable. Mr Atkins did not take any issue with this methodology (but did take issue with the assumptions on which it was based, including the value of the OCL and the amount of CBL Insurance's cash assets that Mr Simmonds used for his analysis). Nor did Mr Chisholm (other than submitting that the entirety of the OCL was a due debt and so Mr Simmonds' analysis was irrelevant).

[104] Mr Simmonds' methodology appears to us to be a reasonable way in which to determine when the liabilities within the OCL would become payable. We were not taken to any other evidence that might have shed light on that question. As we understand it, this is because actuarial valuations do not (and do not have to) show when the liabilities within the OCL are expected to become payable.

[105] There was, as noted, an issue as to whether the OCL valuation used by Mr Simmonds was appropriate. Mr Simmonds acknowledged that he was using the valuation of the OCL prepared by CBL Insurance's appointed actuary rather than

⁸⁵ See above at [37]–[48].

the valuation subsequently prepared by Finity. On that basis his view was that CBL Insurance would have been able to pay claims for a further eight years. He said Finity's larger valuation of the OCL "would not materially impact the size of the projected payments particularly in the short term". Mr Atkins disagreed. He said that if the Finity valuation were used, then as a "rough estimate" CBL Insurance would have been able to pay claims for only three to five years before it ran out of cash.

[106] We received no submissions as to whether the appropriate OCL valuation to use was that of the appointed actuary or that of Finity. However, the Judge said it was accepted that Finity's valuation was "[a] more accurate calculation of the OCL".⁸⁶ Mr Barker did not raise any issue with that statement at the hearing. We proceed on the basis that the Finity valuation should have been used.

[107] We are left, then, with Mr Atkins' rough estimate that, based on the Finity valuation of the OCL, CBL Insurance would have been able to pay claims for a further three to five years. We received limited submissions on whether this is a period that is reasonably proximate in time. Mr Barker submitted it was beyond what could be considered reasonably proximate. Mr Chisholm did not directly address the point, other than noting that the onus was on Alpha Insurance to prove that CBL Insurance was cash flow solvent at the time of the Transactions.

[108] We are not aware of any decision treating an inability to meet liabilities in three to five years' time as meaning a company cannot pay its due debts. Adopting that period as reasonably proximate in time would require directors to take into account what are, on any view, long-term debts. It bears repeating the Supreme Court's explanation, in *David Browne Contractors*, for accepting the proposition that future debts should be taken into account if they are reasonably temporally proximate:⁸⁷

[90] ... As was said in *Re Cheyne Finance Plc (No 2)*, the issue of "how far into the future the inquiry as to present solvency is to go ... is a fact sensitive question depending upon the nature of the company's business and if known, of its future liabilities". Concentrating only on debts due at the relevant time could fail to distinguish between those companies suffering a temporary liquidity problem and those that are, on any commercial view,

⁸⁶ Judgment under appeal, above n 1, at [34] and [41(b)].

⁸⁷ *David Browne Contractors Ltd v Petterson*, above n 30 (footnotes omitted).

insolvent even though able to continue to pay their debts “for the next few days, weeks or even months before an inevitable failure”.

The concluding words indicate the Supreme Court was not contemplating a period of three to five years as being reasonably proximate in time. Section 292 remains concerned with cash flow solvency rather than balance sheet solvency.

[109] For these reasons, we consider that three to five years is beyond a period that is reasonably proximate in time. Alpha Insurance has therefore proved that at the time of the Transactions CBL Insurance was able to pay its due debts, even allowing for insurance liabilities that were reasonably proximate. It follows that the Transactions should not have been set aside and that the appeal must be allowed.

Result

[110] The appeal is allowed.

[111] The orders made by the High Court on 12 August 2024 are set aside.

[112] Costs in the High Court are to be determined by that Court in light of this judgment.

[113] The respondents are to pay the appellant costs for a standard appeal on a band A basis, together with usual disbursements. We allow for second counsel.

Solicitors:
Tompkins Wake, Hamilton for Appellant
Anthony Harper, Auckland for Respondents