

**IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY**

**I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKĀURAU ROHE**

**CIV-2025-404-438
[2025] NZHC 2486**

UNDER Section 284 of the Companies Act 1993

IN THE MATTER OF an application to reverse and/or modify
decision by the liquidators

BETWEEN DAVID JOSEPH BURT, DAVID PETERS,
KARL MCGHIE, MATTHEW
ALEXANDER, KELLY VAKALAHĪ AND
HAYDEN RUSSELL WRIGHT in their
capacity as the Liquidation Committee of
STANLEY CONSTRUCTION LIMITED,
STANLEY CONSTRUCTION
(AUCKLAND) LIMITED, STANLEY
ECOBUILD LIMITED, STANLEY GROUP
LIMITED AND STANLEY MODULAR
LIMITED (all in liquidation)
Applicants

AND DAMIEN GRANT and ADAM
BOTTERILL
Respondents

Hearing: 25 August 2025

Appearances: F B Collins / E J Gardiner for the Applicants
K Cocks / A Teng for the Respondents

Date of Judgment: 29 August 2025

JUDGMENT OF ASSOCIATE JUDGE BRITTAIN

*This judgment was delivered by me on 29 August 2025 at 12 midday.
Pursuant to Rule 11.5 of the High Court Rules.*

.....
Registrar/Deputy Registrar

Solicitors/Counsel:
Ford Sumner, Wellington
Waterstone, Auckland

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Introduction

[1] Stanley Construction Ltd (in liquidation) (SCL) and Stanley Construction (Auckland) Ltd (in liquidation) (SCAL) traded as construction companies (the companies). The companies engaged subcontractors and retained payments due to the subcontractors pursuant to the subcontracts (the subcontractors' retentions).

[2] The applicants are the liquidation committee for the companies (the committee), and in this proceeding, they represent the interests of the subcontractors. The respondents are the liquidators of the companies.

[3] At the material time, the Construction Contracts Act 2002 (CCA) provided that the companies were required to hold the subcontractors' retentions on statutory trust for the subcontractors.¹ The liquidators and the committee agree that the companies failed to comply with their obligations under the CCA.

[4] The liquidators issued proceedings to recover the shortfall of the subcontractors' retentions from three directors of the companies (the retentions proceedings).² The retentions proceedings have been settled in part, and the liquidators have received settlement payments from two of the directors (the settlement payments).

[5] In addition, the liquidators have received payments of retentions due to the companies from principals under head contracts (the companies' recovered retentions).

[6] There is a dispute about whether the settlement payments and/or the companies' recovered retentions form part of the general pool of the assets of the companies or are held on trust for the subcontractors.

[7] The beneficial ownership of the settlement payments and the companies' recovered retentions affects the liquidators' right to apply the funds towards the liquidators' remuneration and expenses.

¹ Construction Contract Acts 2002, pt 2 sub-pt 2A.

² *Stanley Construction Ltd (in liq) v Stanley* HC Hamilton CIV-2021-419-312.

[8] The committee applies for directions to resolve the issue of beneficial ownership of the settlement payments and the companies' recovered retentions, and for a review of the liquidators' remuneration. The parties agreed that the issues regarding beneficial ownership of the funds should be determined first.

[9] This judgment is confined to giving directions to the liquidators regarding the beneficial ownership of the settlement payments and the companies' recovered retentions.

Background

[10] The companies are wholly owned by Stanley Group Ltd (in liquidation), and form part of the Stanley group of companies (the Stanley group).

[11] The statutory trust provisions of the CCA are contained in sub-pt 2A of pt 2 of the CCA and applied from 1 April 2017. In anticipation of the new regime, the directors of the companies passed a resolution on 14 March 2017 (the resolution), to take effect from 31 March 2017:

That all retentions payable are held "on trust" for the beneficiary being the subcontractor from whom [sic] they are held. The company also dedicates all retentions receivable (also held on trust with us as the beneficiary) as being available and as the liquid asset and a surety for their payment.

[12] The companies were put into liquidation by a resolution of the shareholder on 5 September 2019. On 6 September 2019, a secured creditor, Kiwibank Ltd, appointed receivers to the companies. Those receivers retired on 22 March 2021.

[13] The first liquidator, Damien Grant (Mr Grant), issued his first liquidation report on 12 September 2019, which noted that there would be a shortfall in the subcontractors' retentions.

[14] As at the date of liquidation, SCL had creditors of approximately \$6.1 million and SCAL had creditors of approximately \$5.9 million. The creditors' claims received by the liquidators of SCL include claims by subcontractors for \$897,953.31 of retentions. The creditors' claims received by the liquidators of SCAL include claims by subcontractors for \$1,277,606.59 of retentions.

[15] Mr Grant has not confirmed in his evidence that these creditors' claims for retentions have been accepted by the liquidators. However, in the statement of claim filed in the retentions proceedings, the liquidators plead that the companies' subcontractors are owed retentions for the amounts of \$897,953.31 and \$1,277,606.59, consistent with the creditors' claims by the subcontractors. As at the date of liquidation, there were no funds held on trust by the companies for the benefit of subcontractors.

[16] On 24 March 2020, parties associated with the directors and shareholders of the Stanley group appointed receivers to the companies (the second receivers).

[17] In December 2021, the liquidators commenced the retentions proceedings in the High Court at Hamilton. The retentions proceedings named three directors of the companies as defendants and alleged breaches of the duties of the directors under ss 131 and 137 of the Companies Act 1993, which relate to a failure to act in good faith and in the best interests of the company, and a breach of the duty of care owed to the companies. The particulars of the allegations of breach all relate to the companies' failure to retain the subcontractors' retentions on trust for the subcontractors as required by the CCA.

[18] In 2023, the second receivers brought a proceeding against the liquidators claiming priority to the companies' assets, including any proceeds from the retentions proceedings. In response, the liquidators brought a proceeding against the parties that appointed the second receivers, seeking to set aside the general security agreements that included the purported powers of appointment. The proceedings between the liquidators and the second receivers and their appointors were settled. Mr Grant has not given any detail in his evidence regarding these matters.

[19] The retentions proceedings became complicated. The directors joined an insurer, QBE Insurance (Australia) Ltd (QBE), as first third party, claiming a right to be indemnified under a Directors & Officers policy (the policy) for any damages awarded to the liquidators.

[20] Mr Grant says that the retentions proceedings were commenced under ss 131 and 137 of the Companies Act based on his belief that this would entitle the directors to be indemnified under the policy.

[21] QBE brought a separate proceeding against the directors seeking an order that there was no right to indemnification under the policy.³ QBE's proceeding was consolidated with the retentions proceedings.⁴ The liquidators then applied to join QBE as a defendant in the retentions proceedings, notwithstanding that QBE was already a third party, on the ground that the companies had direct contractual rights against QBE under the policy. Associate Judge Sussock declined that application on 31 March 2025.⁵ QBE remains a third party in the retentions proceedings.

[22] The committee challenges the efficacy of the liquidators' decisions in respect of the conduct of the retentions proceedings. The committee's allegations may be relevant to the issues that have been raised regarding the liquidators' remuneration but are not relevant to the issues determined in this judgment.

[23] Mr Grant says that the liquidators settled with two of the directors of the companies on 7 March 2024. Mr Grant has not disclosed the terms of settlement, asserting that the terms of the settlement are confidential. By 27 March 2025, the liquidators had received settlement payments of \$300,000 from the two directors. Counsel for the liquidators advises that a total of \$400,000 has now been received, and a further \$200,000 is due.

[24] On 16 May 2024, the liquidators discontinued the retentions proceedings against the two directors who settled. The liquidators' claims against the third director and the claims between the directors and QBE remain extant.

[25] Since the date of liquidation, the liquidators have received the companies' recovered retentions. By 27 March 2025, SCL had received payments of retentions from principals of \$44,050 and SCAL had received payments of \$100,179.

³ *QBE Insurance (Australia) Ltd v Stanley* HC Hamilton CIV-2023-419-140.

⁴ *Stanley Construction Ltd v Stanley* HC Hamilton CIV-2021-419-312, 23 June 2023 (Minute of Associate Judge Brittain).

⁵ *Stanley Construction Ltd (in liq) v Stanley* [2023] NZHC 717.

[26] The liquidators have applied all the settlement payments and the companies' recovered retentions towards their remuneration and expenses incurred in respect of the liquidations generally. There are no funds available for the subcontractors, or any other creditors.

[27] The liquidators have not provided any evidence of:

- (a) the separate claims for retentions made by each subcontractor of the companies, which together comprise the global amounts claimed from the directors in the retentions proceedings;
- (b) the separate payments which together comprise the companies' recovered retentions, by reference to particular construction contracts;
or
- (c) in relation to (b), whether there are corresponding payments of retentions due to subcontractors.

[28] The committee challenges the liquidators' decision to apply the settlement payments and the companies' recovered retentions to their remuneration in respect of the liquidations generally. The committee seeks orders under s 284 of the Companies Act reversing those decisions by the liquidators and declaring that the subcontractors are the beneficial owners of the settlement payments and the companies' recovered retentions.

Application for directions for service and an adjournment

[29] As a preliminary point, the liquidators submit that:

- (a) the committee can only bring an application under s 284 if the committee is acting in accordance with its statutory powers and functions;
- (b) the committee's application falls outside the statutory powers and functions of the liquidation committee because the committee has

brought this proceeding solely for the benefit of the subcontractors, who make up approximately 18 per cent of the unsecured creditors of SCL and SCAL; and

- (c) the application should have been commenced under pt 18 of the High Court Rules 2016, and directions obtained to serve the application on the creditors of the companies who are not subcontractors.

[30] When these submissions were made during the hearing, I asked counsel for the liquidators, Ms Cocks, whether the liquidators were applying for an adjournment of the hearing on the grounds that the creditors who are not subcontractors should be served and given an opportunity to be heard. Ms Cocks made an oral application on those terms. I declined that application and the hearing proceeded. My reasons follow.

[31] Section 284(1) of the Companies Act relevantly provides:

284 Court supervision of liquidation

- (1) On the application of the liquidator, a liquidation committee, or, with the leave of the court, a creditor, shareholder, other entitled person, or director of a company in liquidation, the court may—
 - (a) give directions in relation to any matter arising in connection with the liquidation:
 - (b) confirm, reverse, or modify an act or decision of the liquidator:
 - (c) order an audit of the accounts of the liquidation:
 - (d) order the liquidator to produce the accounts and records of the liquidation for audit and to provide the auditor with such information concerning the conduct of the liquidation as the auditor requests:
 - (e) in respect of any period, review or fix the remuneration of the liquidator at a level which is reasonable in the circumstances:
 - (f) to the extent that an amount retained by the liquidator as remuneration is found by the court to be unreasonable in the circumstances, order the liquidator to refund the amount:
 - (g) declare whether or not the liquidator was validly appointed or validly assumed custody or control of property:

- (h) make an order concerning the retention or the disposition of the accounts and records of the liquidation or of the company.

[32] Counsel for the liquidators did not refer to any other relevant statutory powers and functions of a liquidation committee. The argument that the committee's application is ultra vires is based on the Court of Appeal's decision in *Boult v Cain*,⁶ which was concerned with a liquidation committee's specific power to inspect documents of the liquidation under s 256 of the Companies Act. In *Boult*, the committee's exercise of that power was ultra vires.

[33] In this case, the committee has express standing to apply for the directions sought under s 284 of the Companies Act and leave was not required. The liquidators have not advanced any tenable argument that the committee is acting ultra vires.

[34] An application for directions for service could have been made by the liquidators when this proceeding was first served on the liquidators. There was no mention of an issue with directions for service until the mid-point of the hearing on 25 August 2025, despite the hearing having previously been adjourned from 24 July 2025. An application for an adjournment and directions for service was not signalled in the written submissions filed on behalf of the liquidators. The application came too late.

[35] The liquidators have applied the settlement payments and the companies' recovered retentions towards the liquidators' remuneration, relying on their priority as a preferential creditor under sch 7 to the Companies Act. At its heart, this proceeding is a priority dispute between the liquidators and the subcontractors. Both of those parties' interests were represented at the hearing, and arguments available to them were fully advanced. There was no prejudice to other creditors from the hearing proceeding.

Legal principles — s 284

[36] The Court will disturb an act or decision of a liquidator where there are elements of either fraud, lack of good faith in the exercise of a discretion or

⁶ *Bolt v Cain* [2023] NZCA 542, [2023] 3 NZLR 683.

unreasonableness by the liquidator.⁷ Unreasonableness means acting in a way that no reasonable liquidator would have acted.⁸ Serious and obvious lapses in judgement must be shown before the Court will interfere.⁹

[37] The Court will generally not make a direction where the decision to be made is, in truth, a commercial decision for the liquidator.¹⁰ However, directions may be given even where the decision is a commercial one where the liquidator is accused of acting unreasonably.¹¹

[38] It is within the ambit of s 284 for the Court to review acts or decisions of a liquidator relating to the realisation of assets of the company in liquidation, and to give directions regarding any further steps that a liquidator should take in respect of those assets. The Court may give directions of a declaratory nature,¹² including on the legal status of assets held by the company.¹³

[39] When a company is put into liquidation and there are two classes of assets held by the liquidators, the orthodox approach is to have separate pools of assets — one containing assets held on trust and the other consisting of general assets available to creditors.¹⁴

[40] A beneficiary of property held in trust by the company is not generally bound to prove a debt in competition with ordinary creditors. But the liquidator's costs of administering trust assets can be met out of the trust assets.¹⁵

⁷ *Consolidated Technologies Development (NZ) Ltd v McCullagh* (2006) 3 NZCCLR 424 (HC) at [15].

⁸ *Callis v Pardington* (1996) 7 NZCLC 261,211 (CA) at 215.

⁹ *Young & Associates Ltd v Ruscoe* [2012] NZHC 1438, [2012] NZCCLR 23 at [8].

¹⁰ *Re CBL Insurance Ltd (in liq)* [2018] NZHC 2547, [2019] 2 NZLR 262 at [19]; and *Finnigan v Butcher* [2012] NZHC 810 at [17]–[18].

¹¹ *Finnigan v Butcher*, above n 10, at [18], citing *Re Addstone Pty Ltd (in liq)* (1997) 25 ACSR 357 (FCA) at 363.

¹² *Re CBL Insurance Ltd (in liq)*, above n 10, at [21]–[25].

¹³ See for example *Re STA Travel (NZ) Ltd (in liq)* [2022] NZHC 1398; *McDonald v Island Grace (Fiji) Ltd (in rec and liq)* [2024] NZHC 2675; *Ruscoe v Cryptopia Ltd (in liq)* [2020] NZHC 728, [2020] 2 NZLR 809; and *Finnigan v Butcher*, above n 10.

¹⁴ *Graham v Arena Capital Ltd (in liq)* [2017] NZHC 973 at [12].

¹⁵ Paul Heath and Michael Whale *Heath and Whale on Insolvency* (online looseleaf ed, LexisNexis) at [20.35(b)], citing *Re Ararimu Holdings Ltd* (1989) 4 NZCLC 65,104 (HC); and *McKenzie v Alexander Associates Ltd (No 1)* (1991) 5 NZCLC 67,030 (HC).

The statutory trust

[41] The background to the enactment of sub pt 2A of pt 2 of the CCA (the retentions provisions) was set out by Churchman J in *Bennett v Ebert Construction Ltd*:¹⁶

[60] The retentions scheme implemented by the Act effective from 31 March 2017 was a response to the collapse of the Mainzeal Group in 2013. That collapse had seen subcontractors miss out on retentions totalling \$18 million. There was a concern that head contractors were effectively using subcontractors' retentions as working capital and that, on the collapse of a head contractor, subcontractors merely became unsecured creditors, often receiving nothing.

[61] The initial Construction Contracts Amendment Bill was introduced in January 2013 prior to the Mainzeal collapse, but the changes to the retentions regime were introduced to address the issue of retentions and provides some measure of protection to subcontractors.

[62] Although, at the committee stage, the then Minister for Building and Housing, the Hon Dr Nick Smith, said that the effect of the intended legislation was that the retention funds "... are deemed to be held in trust ...", it does not seem that the provisions in the legislation actually created a deemed trust. Rather, they created an obligation for the head contractor to hold the retention monies on trust for the affected subcontractors. One difference between the regime proposed and the normal concept of a trust or deemed trust is that the actual retention funds did not have to be retained as cash. As Dr Nick Smith then Minister for Building and Housing said:

Retentions are to be held on trust. Payers can hold those retentions in liquid assets such as accounts receivables, but if they do not get paid they are still obliged to meet those payments. The trust ends when the retentions are either paid out in full or used to fix defective work.

[42] The retentions provisions were significantly amended in 2023.¹⁷ The retentions provisions that applied during the period in question in this proceeding, from 1 April 2017 to 5 September 2019,¹⁸ were analysed by Churchman J in *Bennett*. I adopt his analysis:¹⁹

[65] For the purposes of the Act "retention money" was defined in s 18A as:

... an amount withheld by the party to a construction contract (Party A) from an amount payable to another party to the contract (Party B) as

¹⁶ *Bennett v Ebert Construction Ltd* [2018] NZHC 2934 (footnotes omitted).

¹⁷ Construction Contracts (Retention Money) Amendment Act 2023, s 4.

¹⁸ The retentions provisions applied from 1 April 2017.

¹⁹ (Footnote omitted).

security for the performance of Party B's obligations under the contract.

[66] When analysed in terms of contract law, a retention is an agreed conditional deferral of part of a chose in action (i.e. a debt). Under the Act, "retention money" does not equate to cash in the bank.

[67] The core obligation to hold retention money on trust is set out in s 18C of the Act:

18C Default arrangement: Trust Over Retention Money

- (1) All retention money must be held on trust by Party A as trustee, for the benefit of Party B.
 - (i) However, see section 18D (which allows for an alternative arrangement, involving a complying instrument, to protect the payment to Party B if Party A fails to pay).
- (2) Retention money held on trust may be held in the form of cash or other liquid assets that are readily converted into cash.
- (3) A trust over retention money ends when—
 - (a) the money is paid to Party B; or
 - (b) a Party B, in writing, agrees to give up any claim to the money; or
 - (c) the money ceases to be payable to Party B under the contract or otherwise by operation of law.

[68] The scheme then is that Party A must hold on trust, some property equivalent in value to the retention money or make some approved arrangement with a third party within s 18D such as a third party bond or letter of credit.

[69] Given the sums of money involved, it seems inherently improbable that the reference to "cash" in s 18C was intended to refer to bank notes.

[70] There is a critical restriction on the use to which Party A can put Retention Money. Section 18E provides:

Section 18E Use of Retention Money

- (1) Party B must not appropriate any retention money held on trust to a use other than to remedy defects in the performance of Party B's obligations under the contract.

[71] Unlike what might be expected with more conventional trust arrangements, there is no need for Party A to hold retention monies for Party B in a separate account, and they may be co-mingled with other monies.

[72] In a further departure from conventional trust principles, s 18F also permits Party A to invest the retention monies. It provides that if this

investment results in a loss then Party A must make up the difference of that loss; but if the reverse occurs, then Party B may keep the profit.

[73] The entitlement of Party A to keep the interest on retention funds and any profit generated by their investment is a major departure from equitable trust principles and, on the facts of this case, presents some problems as to the entitlement to any interest on the monies in the retention account when the fact that the interest has accrued is, in large part, due to the failure by the respondent to pay the monies out when due.

[74] It is clear from ss 18C, 18E, 18F, and 18FB that Party A has a range of alternatives, and considerable flexibility, as to how it satisfies its obligations to hold on trust an amount of liquid assets equivalent to the amount of the retention monies.

[75] Another unusual provision is that s 18FC provides “audit rights” for Party B in respect of the property held on trust.

[76] Section 18FC obliges Party A to keep proper accounting records of:

- (i) all retention monies held on trust; and
- (ii) all amounts of retention money protected by instruments issued for the purpose of this subpart; and
- (iii) all dealings and transactions in relation to retention money or instruments.

[77] Section 18FC(4) obliged Party A to make the accounting and other records available for inspection by Party B at all reasonable times and without charge.

[78] If the legislature’s intent had been to deem Party A’s assets to be held on trust up to the amount of the retention money, it is hard to see why an audit right of this type would be necessary.

[79] Section 18FA of the Act gives retention monies a protection which is relevant to the issues the Court has to determine in this case. The section provides:

Protection of retention money

Retention money held on trust-

- (a) Is not available for the payment of debts of any creditor of Party A (other than Party B);
- (b) Is not liable to be attached or taken in execution under the order or process of any Court at the instance of any creditor of Party A (other than Party B).

[43] The prescription in s 18C(2) of the CCA, that retention money held on trust could be held in the form of cash or other liquid assets that are readily converted into cash, was problematic. It was repealed by the Construction Contracts (Retention

Money) Amendment Act on 5 October 2023 and replaced with a requirement that retention money be held in a sole purpose bank account.²⁰

[44] In its departmental report on the amendment bill, the Ministry of Business, Innovation and Employment noted:²¹

There is no definition of liquid assets in the [CCA], but most interviewees believed that the only liquid assets available for a construction company are cash or cash equivalents, and that any other assets would not meet the requirements of a ‘liquid asset’ for the purposes of the [CCA].

Liquid assets include shares, bonds, and property. The introduction of the ability to hold retention money in liquid assets was intended to support the use of retention money across the contracting chain to provide additional options for parties. However, it has transpired that in practice liquid assets are unlikely to be recoverable in the case of insolvency.

The liquidators’ position

[45] Mr Grant formed the view, early in the liquidations, that:

- (a) any funds recovered by the liquidators from the retentions proceedings would be an asset of the companies held for the general body of creditors and not “classified as retention monies”;
- (b) the subcontractors with claims for retentions would be treated as unsecured creditors, with no priority to any retentions recovered from the directors;
- (c) any retentions recovered from the directors would be distributed in accordance with sch 7 to the Companies Act which sets out priorities in a liquidation; and
- (d) the subcontractors seek to elevate their priority in the distribution of assets in the liquidation, circumventing the *pari passu* principle.

²⁰ Construction Contracts Act 2002, ss 18C–18E.

²¹ Ministry of Business, Innovation and Employment “Construction Contracts (Retention Money) Amendment Bill: Departmental report to the Transport and Infrastructure Committee” (30 September 2021) at 26.

[46] The liquidators elected not to seek directions from the Court to confirm Mr Grant's belief. The liquidators commenced the retentions proceedings on the assumption that the fruits of the litigation would be for the general body of creditors and the liquidators would be entitled to a priority for the liquidators' remuneration and expenses in respect of the liquidations generally.

[47] On that basis, Mr Grant refused to disclose to the committee documents that relate to the conduct of the retentions proceedings, including in-house legal advice, documents filed in the proceedings and documents that relate to the settlement with two of the directors. The committee and the subcontractors were not consulted regarding the settlement.

[48] The committee and the subcontractors have never accepted the liquidators' position on these matters. That resulted in the committee obtaining litigation funding to bring this proceeding.

The companies' recovered retentions

The liquidators' argument

[49] Ms Cocks argues that the resolution means that the ability of SCL and SCAL to pay retentions to subcontractors was dependent on the principals under the head contracts paying retentions to SCL or SCAL on time and without deduction. This was inadequate security and did not constitute a liquid asset readily converted into cash in accordance with s 18C(2) of the CCA. Therefore, there is no statutory trust.

[50] Similarly, an express trust based on the resolution must fail for lack of certainty of subject matter.

[51] Ms Cocks referred to *McVeigh v Decmil Australia Pty Ltd*.²² Decmil had failed to maintain retention monies as required by the CCA. Prior to liquidation, Decmil's shareholder transferred \$3.3 million to Decmil, agreed to be held separately by the liquidator of Decmil for the retention creditors and as a trust fund for that specific

²² *McVeigh v Decmil Australia Pty Ltd* [2021] NZHC 2929.

purpose. The High Court made a consent order to that effect, which did not expressly deem the fund a retention fund under the CCA.

Analysis

[52] *McVeigh* does not assist the liquidators. Duffy J did not consider it necessary to determine if the fund contributed by the shareholder belatedly qualified as a retention fund held pursuant to the CCA. However, that was because the terms of the consent order gave the fund the same protections as those given to retention trust funds by the CCA.²³

[53] Duffy J held that, if monies are characterised as a retention fund under the CCA, then that makes them trust funds. There was no doubt that the fund was subject to a trust, to be applied to meet retention claims in the same way that it would have been if it had been set up under the CCA from the outset. The retentions provisions were to be applied.²⁴

[54] In this case, the companies' retentions were not liquid assets until the defects liability period under each head contract had expired and the retentions became payable by the principal to the companies. Until that point in time, the payment of the companies' retentions was conditional on performance of the terms of the head contract, including any exercise by a principal of the principal's right under the head contract to remedy building defects.

[55] The obligations of the principals under head contracts to pay retentions to SCL or SCAL were transformed into liquid assets of the companies, as accounts receivable, at the point in time when the terms of the head contracts required release of the retentions. The statutory trust then applied to the account receivable.

[56] That position is reflected in the resolution, which specifically acknowledges that the companies hold their rights to receive retentions as a liquid asset and security for payment of the subcontractors' retentions. The wording of the resolution is

²³ At [10].

²⁴ At [10]–[13].

consistent with the flexibility afforded to a head contractor under the retentions provisions, then in force, regarding how a head contractor secured its trust obligations.

[57] When the liquidators received the companies' recovered retentions, those funds were impressed with a statutory trust in favour of the subcontractors. There was no difficulty in the liquidators identifying the trust funds received.

[58] If the companies' recovered retentions are not subject to statutory trusts by virtue of s 18C(2) of the CCA, then I find that the resolution was effective as a declaration of express trust.

[59] There are three certainties required for a valid express trust:²⁵

- (a) certainty of intention;
- (b) certainty of subject matter; and
- (c) certainty of objects.

[60] No formal or technical words are required to create a trust. Any apt expression of intention will do.²⁶ The resolution plainly expresses the requisite intention.

[61] The objects of the trust are the subcontractors.

[62] It is not a significant indicator against a trust that the fungible property of one party is mixed with the fungible property of another in a single pool, nor that the content of that pool and the identity of the beneficiaries is constantly changing. A debt obligation or a chose in action satisfies certainty of subject matter.²⁷

[63] The upstream retentions due to SCL or SCAL, when accrued by SCL or SCAL, are held on trust to meet the downstream retentions due to the subcontractors, in

²⁵ Trusts Act 2019, s 15(1)(b). See also *Knight v Knight* (1840) 3 Beav 148, 49 ER 58 (Ch) at 68; and *Foreman v Hazard* [1984] 1 NZLR 586 (CA) at 594.

²⁶ *Ruscoe v Cryptopia Ltd (in liq)* [2020] NZHC 728, [2020] 2 NZLR 809 at [139].

²⁷ Aove at [157].

respect of specific projects for specific subcontractors that worked on each project. The three certainties for the creation of an express trust are met.

[64] I find that the subcontractors are the beneficial owners of the companies' recovered retentions. The companies' recovered retentions do not form part of the assets of SCL and SCAL subject to the priorities in sch 7 to the Companies Act.

[65] The liquidators did not have the right to apply the companies' recovered retentions to their remuneration and expenses related to the liquidations generally. That decision should be reversed.

The settlement payments

The liquidators' argument

[66] The liquidators rely on the fact that there were no funds held on trust at the commencement of the liquidations. The liquidators argue that, once SCL and SCAL have established breaches of directors' duties under ss 131 and 137 of the Companies Act in the retentions proceedings, any compensation payable by the directors or QBE constitutes a general asset of SCL or SCAL.

[67] The liquidators acknowledge that the Court has a discretion under s 301 of the Companies Act to order that compensation paid by a director be applied in satisfaction of debts owed to a specific class of creditors. The liquidators submit that, if the retentions proceedings continue to trial, then the Court could order that any compensation from the remaining defendant be distributed to the subcontractors. However, the liquidators maintain the settlement payments recovered from the two directors are a general asset of the companies in liquidation.

Analysis

[68] When the companies first withheld the retentions from the subcontractors, the amounts withheld were impressed with the statutory trust under the retentions provisions of the CCA.

[69] There is no evidence or suggestion that:

- (a) the companies entered into an alternative arrangement with a third party to secure the retentions, as then permitted by s 18D of the CCA;
- (b) an event occurred that terminated the trusts under s 18C(3); or
- (c) the retentions were appropriated to remedy building defects under s 18E.

[70] The companies were required to hold the retentions in cash or liquid assets. It is undisputed that there were no cash funds held on trust by the companies for the benefit of subcontractors at the date of liquidation. There is no evidence that the companies were, at that time, holding any companies' recovered retentions that would be impressed with the statutory trust.

[71] On liquidation, the companies were prima facie in breach of their obligations as trustees to hold the subcontractors' retentions in cash or in the form of other liquid assets.

[72] The CCA does not make directors of a company subject to the statutory trust personally liable to restore any missing trust funds or for breach of the statutory trust. Common law principles must apply.

[73] Beneficiaries are entitled to expect that trustees will fulfil their obligations. A third party to a trust may be held personally liable, as if they were a constructive trustee,²⁸ if they dishonestly assist the trustee to perpetrate a breach of trust.²⁹

²⁸ In *Williams v Central Bank of Nigeria* [2014] UKSC 10 at [9], Lord Sumption noted that the phrase "constructive trustee" can refer to two different things to which very different legal considerations apply. In this context, it comprises persons who never assumed and never intended to assume the status of a trustee, whether formally or informally, but have exposed themselves to equitable remedies by virtue of their participation in the unlawful misapplication of trust assets. It does not refer to persons who have lawfully assumed fiduciary obligations in relation to trust property, but without a formal appointment.

²⁹ *McKay v Sandman* [2018] NZCA 103, [2018] NZAR 707 at [21], citing *Royal Brunei Airlines Sdn Bhd v Tan* [1995] 2 AC 378 (PC) at 387.

[74] I do not accept the liquidators' argument that there is a distinction between a construction company that fails to ever put retentions due to a subcontractor aside, and a construction company that initially puts retentions due to a subcontractor aside and then wrongly refuses to pay them out or misapplies them. Each case is a breach of trust.

[75] A constructive trustee's liability is essentially custodial liability, comparable to that of an express trustee.³⁰ Whether or not a constructive trustee has received misapplied trust funds, they will be personally liable to account if they have knowingly assisted in a dishonest and fraudulent design of the trustee to misapply the trust funds.³¹ Dishonesty is objectively assessed, but on the facts known to the third party.³²

[76] In *Air Canada v M & L Travel Ltd*,³³ the Supreme Court of Canada held that:

- (a) a person will be deemed to have known of a trust if it was imposed by statute;³⁴ and
- (b) the taking of a knowingly wrongful risk resulting in prejudice to the beneficiary is sufficient to ground personal liability.³⁵

[77] These principles have been applied in Canada in the context of a statutory trust of retentions.³⁶

[78] The retentions proceedings allege that the directors of the companies are personally liable for the companies' failure to comply with the statutory duties relating to the statutory trust. In substance, the allegation is that the directors assisted in a breach of trust by the companies. The settlement payments were a restoration of trust

³⁰ *Byers v Saudi National Bank* [2023] UKSC 51 at [30], citing *DD Growth Premium 2X Fund v RMF Market Neutral Strategies* [2017] UKPC 36 at [58].

³¹ *Belmont Finance Corp Ltd v Williams Furniture Ltd (No 2)* [1980] 1 All ER 393 at 405; and *Williams v Central Bank of Nigeria*, above n 28, at [9].

³² *Sandman v McKay* [2019] NZSC 41, [2019] 1 NZLR 519 at [132].

³³ *Air Canada v M & L Travel Ltd* [1993] 3 SCR 787.

³⁴ At [39].

³⁵ At [69].

³⁶ See for example *St Mary's Cement Corp v Construc Ltd* 1997 CanLII 12114 (ONSC).

funds to the companies, irrespective of the liquidators' pleaded reliance on ss 131 and 137 of the Companies Act.

[79] When the liquidators received the settlement payments, the companies' trust obligations continued. The liquidators were required to ascertain the companies' rights and liabilities as trustees, and to administer the trusts.³⁷

[80] I find that the subcontractors are the beneficial owners of the settlement payments. The settlement payments do not form part of the assets of SCL and SCAL subject to the priorities in sch 7 to the Companies Act.

[81] The liquidators did not have the right to apply the settlement payments to their remuneration and expenses related to the liquidations generally. That decision should be reversed.

Next steps

[82] There is insufficient evidence before the Court to make specific findings on the amounts due to individual subcontractors from the settlement payments. The liquidators' pleadings in the retentions proceedings make no distinction between discrete subcontracts.

[83] This may be an appropriate case for all subcontractors that have claims comprised in the global amounts claimed by the liquidators in the retentions proceedings to receive a share of the settlement payments on a pro rata basis. That issue requires further consideration.

[84] Similarly, further evidence is required to permit an analysis of the allocation of the companies' recovered retentions to specific subcontractors. I will reserve leave to the parties to seek further directions on these issues if required.

³⁷ *Re PBS Building (Qld) Pty Ltd* [2024] QSC 108 at [70].

[85] The committee accepts that the Court has jurisdiction to order that the liquidators be reimbursed their reasonable remuneration and expenses incurred in respect of the retentions proceedings. The issues for the next hearing are:

- (a) whether the liquidators are entitled to reimbursement of reasonable remuneration and expenses incurred in respect of the retentions proceedings; and
- (b) if so, fixing the remuneration and expenses.

[86] These issues will be dealt with at the hearing scheduled for 29 October 2025.³⁸

Orders

[87] I direct that all settlement payments received by the liquidators of Stanley Construction Ltd (in liquidation) and Stanley Construction (Auckland) Ltd (in liquidation) from the defendants in CIV-2021-419-312 (the settlement payments) are held on trust for the subcontractors of the companies whose claims for retentions are included in the amounts claimed in CIV-2021-419-312.

[88] I direct that all payments of retentions received by the liquidators of Stanley Construction Ltd (in liquidation) and Stanley Construction (Auckland) Ltd (in liquidation) from principals under construction contracts with Stanley Construction Ltd (in liquidation) or Stanley Construction (Auckland) Ltd (the recovered retentions) are held on trust for the subcontractors of Stanley Construction Ltd (in liquidation) and Stanley Construction (Auckland) Ltd.

[89] The decisions of the liquidators of Stanley Construction Ltd (in liquidation) and Stanley Construction (Auckland) Ltd (in liquidation) to apply the settlement payments and the recovered retentions towards their remuneration and expenses are reversed.

[90] Leave is reserved to the parties to seek further directions regarding:

³⁸ *Burt v Grant* HC Auckland CIV-2025-404-438, 26 August 2025 (Minute of Associate Judge Brittain).

- (a) how the settlement payments and the companies' recovered retentions, less any remuneration and expenses allowed to the liquidators, should be distributed amongst the subcontractors; and
- (b) how the retentions proceedings will be conducted in the future.

[91] The proceeding is adjourned for a hearing on 29 October 2025 in accordance with the directions in my minute of 26 August 2025.

[92] Costs are reserved.

Associate Judge Brittain