

# PAYMENTS MADE UNDER DIRECT AGREEMENT NOT VOIDABLE TRANSACTIONS

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**The Court of Appeal has found that payments made under a direct agreement by a financier to a builder are not voidable transactions recoverable by a liquidator. In doing so, the Court of Appeal has overruled the High Court's earlier decision.**

## Background

In this case, Takapuna Procurement Limited (TPL) developed the Shoalhaven Apartments. It engaged Ebert Construction Limited to build the apartments. BOSI and Strategic Nominees agreed to finance the development and entered into a direct agreement with TPL and Ebert. The apartments were completed and BOSI made payments of more than \$1.6m to Ebert. In late 2008, liquidators were appointed to TPL. They subsequently applied to set aside the payments made to Ebert.

## High Court set aside payments under direct agreement

The High Court set aside the payments. [1] It took the view that the payments to Ebert were made by TPL for the purposes of section 292 of the Companies Act. TPL reduced the debt it owed to Ebert by BOSI making the payment. In a subsequent judgment, the High Court also awarded the liquidators interest on the judgment sum of \$1.6m from the date of liquidation, even though the liquidators had not taken steps to set aside the payments until 2014.

## Court of Appeal says payments were not voidable

The Court of Appeal had to decide whether, if liquidators are appointed to a developer, payments made by the financier to the builder are voidable transactions by the developer. In this

### WHAT IS A 'DIRECT AGREEMENT'?

A 'direct agreement' is a three-way arrangement between a developer, builder and a financier. Under the agreement, the financier can 'step in' and complete the project if the developer defaults. The financier can also make direct payment to the builder.

case, the Court of Appeal said that the payments were not voidable. The Court sought expert evidence from the parties on the development of direct agreements in the New Zealand construction industry. The Court focused on the fact that the direct payment mechanism under such agreements offers significant additional security for builders.

The Court acknowledged that a payment by a third party can be regarded as a payment by the company that subsequently goes into liquidation. In this case, however, it found that the payments to Ebert were not made by TPL, but by BOSI, under its own direct obligation to Ebert. BOSI did not pay Ebert as an agent of TPL. The Court said that the substance and reality of the transaction is more important than its form. It accepted that the payments to Ebert were not made out of funds belonging to TPL and did not decrease the resources available for TPL to pay other creditors. As the Court decided that the payments were not voidable, it did not need to decide from when interest should run. [2]

The Court was also called upon to decide whether the transfer of an apartment was an insolvent transaction. In the circumstances, it decided it was not.

## Our comments

While it remains to be seen whether the liquidators will appeal, this decision will come as a relief to many involved in the construction sector. Builders can take confidence that payments made under a direct agreement like the one in this case will not be clawed back from them by liquidators.

## References:

[1] *Sanson v Ebert Construction Limited* [2015] NZHC 2402.

[2] *Ebert Construction Limited v Sanson & Anor* [2017] NZCA 239.

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## THE AUTHOR

James McMillan has 14 years' experience in commercial litigation and during that time has advised clients such as insolvency practitioners, banks, developers and construction companies. He manages extremely complex cases through collaboration and attention to detail. In recent years he has been involved in some of the country's most high profile insolvencies and restructurings.

He has appeared twice as lead counsel in the Court of Appeal and has appeared both as a lead counsel and as a junior at numerous defended High Court and District hearings.

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