FINAL MINUTE OF DEPUTY REGISTRAR OF COMPANIES

SECTION 385 COMPANIES ACT 1993

GREGORY MARTIN OLLIVER

1. Decision sought by IET

1.1. A letter has been provided to me as Registrar, by IET of MBIE, in respect of **Gregory Martin Olliver** ("the Candidate"). If I consider that the Candidate comes within the provisions of s 385 of the Act that letter seeks my decision as to whether to exercise the power to prohibit the Candidate from being a director or promoter of a company, or being concerned in, or taking part, whether directly or indirectly, in the management of a company pursuant to s 385(3) of the Act.

2. Background

2.1. I have issued an Interim Minute, a Further Minute, Further Minute No2, and a further minute No 3 dated 30 August 2021 ("Further Minute no 3"), in respect of this matter.

2.2. In broad terms these minutes had the effect that:

(a) The Candidate was not required to answer to the allegations made against him in respect of OTL, KTL, CIT and Trust; and

(b) Further allegations were made against the Candidate in respect of Holdings;

(c) The Candidate was given an opportunity to respond to all the matters raised in the minutes issued by me, and to provide such further information that he might wish; and

(d) At the request of the Candidate, he was granted the various extensions of time he sought to provide further information for me to take into account. That time limit expired on 14 September 2021.

2.3. On 15 September 2021 IET provided me with an email letter from the Candidate's legal advisors, dated 14 September 2021. This provided statements from various persons in support of the Candidate, comments on the court case and further representations (including 12 documents as supporting evidence) responding, in particular, to matters raised in Further Minute No 2 ("Further Information").

2.4. On 24 September 2021 the Candidate provided an email letter of the same date. The Candidate noted that in his letter of 14 September 2021 he had advised he would be providing some GP medical reports. Because of Covid restrictions the Candidate requested an extension of time to 11 October 2021 to provide those medical reports. The request was granted for that sole purpose.

2.5. On 12 October 2021 IET provided me with an email letter dated 11 October 2021 from the Candidate's legal advisors, providing:

Released under the Official Information Act 1982

(a) certain medical records relating to the Candidate (collectively "medical records"); and

(b) Information advising that interests associated with the Candidate had acquired from JGC, the rights JGC had in its claim on BBG ("acquisition rights").

2.6. Before I determined whether or not to allow information regarding the acquisition rights to form part of the Submissions, I also received from the Candidate on 12 October 2021, at the suggestion of IET, an executed copy of a deed dated 6 October 2021 between JGC and The Pheonix Trust Limited ("the deed").

2.7. The Candidate was out of time to make any general submissions beyond 14 September 2021. Notwithstanding this, I decided, in my discretion, to receive information about the acquisition rights and the deed, and to take them into account when considering the Candidate.

2.8. The email letter of 12 October 2021 from Keegan Alexander ("KA") referred to a letter that was mistakenly provided to IET by them. They asked that it be deleted from IET's system. I record I have not received a copy and have no knowledge as to its contents.

2.9. The term "Submissions" includes the Further Information, medical records, the acquisition rights and the deed. I now therefore consider the Candidate taking into account all the information previously referred to.

2.10. Defined terms in the Interim Minute, Further Minute and Further Minutes No 2 and No 3, have the same meaning here except where specifically altered. The matters set out in the Interim Minute, Further Minute and Further Minutes No 2 and 3 apply as if set out in full herein.

2.11. I referred to BBG Holdings Limited as "Holdings" but both the court case and Submissions refer to it as "BBG." For the sake of clarity, I now refer to it in this final minute as "BBG" or "Company." Similarly, the court case is referred to in the Submissions as "the Judgment" and I use the same terminology for this final minute.

3. Should I delay my determination of the Candidate

3.1. I have previously determined that the process to date has met the requirement to afford natural justice to the Candidate and that I am in a position to make a decision under s 385 regarding the Candidate.

Candidate is not precluded from providing me with information now

3.2. In the Further Information the Candidate noted he was appealing the decision in the Judgment. At paragraph 5(d) the legal advisors said:

"it would be premature and inadvisable for the Deputy Registrar to rely upon the Judgment. In short, no such reliance should be placed on it in the context of the present assessment."

Released under the Official Information Act 1982

3.3. In essence the reasons given are:

(a) The Candidate has applied for leave to appeal the Judgment. If the Court of Appeal were to deny leave, the legal advisors consider the Candidate would be entitled to apply to the Supreme Court for leave.

(b) If leave was granted the substantive appeal will not be heard until well into 2022. At paragraph 5(d)(iii) it is said: "Our client may be entirely successful on appeal in that the orders of Sussock AJ are reversed. Alternatively, those orders might be upheld but upon other grounds and some or all of the findings, or criticisms of Sussock AJ as regards our client's evidence, may not be sustained."

3.4. In terms of natural justice there is no reason to delay my decision until the outcome of the Candidate's appeal is known. The position is that I consider there is information contained in the Judgment which is relevant in my consideration of the Candidate under s 385. The Candidate contends (amongst other things) that the Judgment contains errors and that I should not rely on it when making determinations on the allegations of mismanagement of the Candidate under s 385.

3.5. The Candidate does not have to wait for the appeal proceedings to play out before providing his response to the allegations made against him under s 385. The Candidate is entitled to, and has, made submissions regarding matters contained in the Judgment. So, the Candidate has not been precluded from providing me with any information he wishes to put before me. Indeed, I note at paragraph 5 of the letter of 24 August 2021, it was said that "preparing the grounds for appeal were of considerable assistance in addressing the concerns raised by you." This means the Candidate has been able to put before me all the information he wishes in response to the allegations made against him under s 385.

My determination now does not prejudice the Candidate's appeal hearings

3.6. Some parts of my decision will be deciding on matters that are part of the appeal from the Judgement. My prior decision on these matters does not prejudice the Candidate. The two proceedings are separate and distinct and whatever decision I make here does not restrict or influence the decision of any appeal court. I consider that what the court said in **Davidson** at [144]-[151] is analogous here.

The procedure under s 385 establishes a simple and swift process.

3.7. The purpose of s 385 was considered in **Davidson**. At [87] it was noted s 385 originated out of a need for a "speedier and more efficient means" to deal with considering persons who may have been involved in the mismanagement of companies. At [96(c)] Miller J stated "The section establishes a simple and swift process." The judge recognised that the right to natural justice must be balanced against the purpose of the legislation. But when a procedure is essentially summary in nature then undue delay should be avoided. The comments in **Toilolo v Registrar of Companies** [2019] NZHC 1090, at [108] reinforces this. Therefore, there are policy reasons in favour of making a determination now on the information that is available to me.

Released under the Official Information Act 1982

The weight that can be given to the information in the Judgment

3.8. At paragraph 5(d)(iv) of the letter of 14 September 2021 the Candidate says: "Even if it were reasonable for the Deputy Registrar to take into account the Judgment (which our client denies) we would nevertheless urge caution in this regard." The Candidate gives several reasons for this:

(a) The Candidate was not a party to the proceedings in the Judgment;

(b) The Candidate's interests were not represented in those proceedings;

(c) The findings in the Judgment are not conclusive. It is for me to undertake my own assessment "Including by taking into consideration our client's account of events and the broader context set out in our letter dated 16 July 2021 and in this letter."

3.9. I agree. I would also add that because the matter for decision in the Judgment is different to what I am called upon to decide, I reinforce the point that the facts and determination in the Judgment must be considered in the context of what I am called to decide upon under s 385. The Judgment was not an assessment of whether the Candidate had mismanaged BBG.

3.10. The Candidate's submission is more directed to the probative value of the evidence before me and the weight I should place on the information provided in the court case. I expand on this below.

4. Assessing value and weight of information provided

4.1. In looking at all the material provided to me I must assess what value and weight I should give to it. **Mani v Registrar of Companies** [2016] NZHC,3002 is relevant in this context. Thomas J noted at paragraph [17] that in certain circumstances "higher quality evidence may be necessary" for me to reach a decision. But Thomas J also noted at paragraph [34]:

"There is nothing to preclude the Registrar from taking into account hearsay or generalised statements. It is, however, a matter of assessing the probative value of the evidence, and the weight to be attributed to it and that is for the decision maker to evaluate."

4.2. That was re-affirmed in **Toilolo v Registrar of Companies** [2019] NZHC 1090, at [58](d).

4.3. This is the course I have followed. To the extent I receive information which is speculation I do not take account of that at all. However, I am entitled to draw conclusions (or inferences) from certain facts if, in the circumstances, that is a logical conclusion that can be drawn.

4.4. Where information is provided from the liquidators of companies, (either directly or from the records at the Companies Office) I do place initial reliance on what they say, particularly where the liquidators are appointed by the court. A court appointed liquidator is an officer of the court with the duties and responsibilities that come with that. I consider that includes being objective and truthful.

Released under the Official Information Act 1982

4.5. In this case the Candidate appointed Damien Grant ("liquidator") the liquidator for the Company. I placed just as much weight on the material produced by the liquidator as if he had been appointed by the court. In doing so I record that I am aware of the matters traversed in **Grant v RITANZ** [2020] NZHC 2876.

4.6. The liquidator is now a member of the Restructuring Insolvency and Turnaround Association of New Zealand("RITANZ"). As such the liquidator is required to abide by the rules and requirements of RITANZ. RITANZ's website states that it promotes "high standards of practice and professional conduct." It also states it helps to "develop, maintain and promote the integrity of the insolvency profession."

4.7. I also note that insolvency practitioners are required to be licensed, and are governed by The Insolvency Practitioners Regulation Act 2019 ("IPRA"). The liquidator is a licensed insolvency practitioner. That means the liquidator must comply with the obligations, and uphold the standards, required under IPRA. The liquidator is independent of the shareholder that appointed him. I can also have confidence that the liquidator will comply with the duties that are imposed on liquidators under the Act. That includes approving valid creditor claims, gathering in the assets of the company and distributing those assets to all creditors in the priority set out in the Act. I consider therefore I can rely on the liquidator to be truthful and that his assessments will be fair and objective unless shown to be otherwise.

4.8. I also place initial reliance on the Judgment and the facts that were established in that case where they traversed matters dealing with BBG, JG Civil Limited ("JGC") and the Candidate. Although the Candidate was not a direct party in the Judgment, he was the sole director of both companies that were in liquidation and the Candidate filed affidavits in the court case. Evidence was subjected to testing, or capable of being tested, by examination and cross examination of witnesses. The Judgment is a judicial determination after consideration of opposing viewpoints and the testing of evidence in relation to the issues that were before the court.

4.9. But in evaluating that information I take into account the reservations referred to in paragraphs 3.8 and 3.9 above.

4.10. I of course take the Submissions into account. Where those submissions challenge or query any information from the liquidators and the Judgment I evaluate all the information. The probative value of any information before me will vary. For example, there is a difference between facts and expressions of opinion. And information may carry greater weight where there is supporting information.

4.11. And, in the process of evaluating all information and making a decision, I apply the test in s 385(4)(a) of the Act.

5. Section 385

5.1. The section of the Act that provides the power to prohibit persons from directing, promoting and managing companies is s 385. S 385 provides:

"**385 Registrar may prohibit persons from managing companies**

(1) This section applies in relation to a company –

Released under the Official Information Act 1982

(a) That has been put into liquidation because of its inability to pay its debts as and when they became due; ---

(3) The Registrar may, by notice in writing given to a person, prohibit that person from being a director or promoter of a company, or being concerned in, or taking part, whether directly or indirectly, in the management of, a company during such period not exceeding 10 years after the date of the notice as is specified in the notice ---

(4) The power conferred by subsection (3) may be exercised in relation to - ---

(a) any person who the Registrar – is satisfied was, within a period of 5 years before a notice was given to that person under sub section (5) (whether that period commenced before or after the commencement of this section), a director of, or concerned in, or a person who took part in, the management of a company in relation to which this section applies if the Registrar –- is also satisfied that the manner in which the affairs of it were managed was wholly or partly responsible for the company being a company in relation to which this section applies; or

(b) any person who the Registrar -- is satisfied was, within a period of 5 years before a notice was given to that person under subsection (5) (whether that period commenced before or after the commencement of this section), a director of, or concerned in, or a person who took part in the management of, 2 or more companies to which this section applies, unless that person satisfies the Registrar -- –

(i) that the manner in which the affairs of all, or all but one, of those companies were managed was not wholly or partly responsible for them being companies in relation to which this section applies; or

(ii) that it would not be just or equitable for the power to be exercised.

(5) The Registrar must not exercise the power conferred by subsection (3) unless –

(a) not less than 10 working days' notice of the fact that the Registrar intends to consider the exercise of it is given to the person; and

(b) the Registrar considers any representations made by the person."

6. Are there one or more companies that qualifies under s 385(1)

6.1. The first step in my inquiry is to determine whether there is one or more companies that qualify in accordance with the criteria set out in s 385(1) of the Act. The criteria in s 385(1) concern company failure and for simplicity I will refer to any qualification under this subsection as company failure.

6.2. I am satisfied that the Company qualifies under s 385(1)(a) as the Company was placed in liquidation.

Released under the Official Information Act 1982

7. Was the Candidate a director or manager of the Company within the 5 years preceding IET's notice

7.1. The second stage of my inquiry is to determine whether the candidate for prohibition was a director or manager within the 5 year period preceding IET's notice as required by s 385(4) of the Act.

7.2. The Companies Office register discloses the Candidate has effectively been the sole director of the Company from the time of its incorporation on I October 1998 to its being placed in liquidation on 4 September 2019.

7.3. There was also another person who was a director for a month in 2004. The alleged acts of mismanagement did not take place while that person was a director, so I have disregarded this in my consideration of the Candidate.

7.4. The Candidate comes within the requirements of s 385(4) of the Act.

Giving of notice

7.5. I am satisfied that IET's notice was given to the Candidate in accordance with the Act. It is not necessary for the purposes of s 385 that the Candidate actually receive IET's notice. S 385(5) of the Act requires IET's notice must be "given" to the Candidate. S 364 specifies how notices are given by the Registrar. S 364(1) provides the notice "must be given in writing and in a manner the Registrar considers appropriate in the circumstances."

7.6. In this instance I was provided with an affidavit from a process server who advised he gave IET's notice to the Candidate on 18 February 2021. The letter states that the Candidate acknowledged his identity to the process server.

7.7. I am therefore satisfied that the Candidate was given IET's notice and he was a director or manager of the Company within the 5 year period preceding IET's notice as required by s 385(4) of the Act.

8. Was mismanagement wholly or partly responsible for the failure of the Company

8.1. The third step in my enquiry is to consider whether the manner in which the affairs of the company was managed, was wholly or partly responsible for the company qualifying under s 385(1) of the Act. For simplicity I will refer to this enquiry as being into whether the company was mismanaged, and whether this mismanagement was wholly or partly responsible for the company failing.

8.2. Where there is only one company failure section 385(4)(a) requires that I must be satisfied that there was mismanagement that was wholly or partly responsible for the failure of the company.

8.3. Because I have determined the Candidate was only required to answer to the allegations in respect of BBG then the requirement is that I must be satisfied pursuant to s 385(4)(a) of the Act. But before I consider the allegations against the Candidate, I must be satisfied that IET provides me with sufficient information of sufficient quality in support of each allegation to meet a minimum threshold where the Candidate has a case to answer for that particular allegation. That is so whether or not the Candidate

Released under the Official Information Act 1982

responds to the allegations and whether or not they are considered under s 385(4)(a) or (b) of the Act.

8.4. In this case, subject to the matters listed below, I am satisfied that the information provided by IET meets the threshold requirements.

Factors outside the control of a director causing insolvency

8.5. The Candidate says at various times BBG "failed for reasons beyond Mr Olliver's control" – see for example paragraph 73 of the KA letter of 31 May 2021. A similar comment was made at paragraphs 11 and 23(b) of the KA letter of 16 July 2021. And again, at paragraph 23(a) of the KA letter of 14 September 2021.

8.6. I am satisfied that a director can rarely disclaim responsibility for a company insolvency because the situation was beyond their control. An event such as an earthquake is outside of a director's control. That is not the point. It is what the director does, as a consequence of that unexpected event, that is important. I refer to this again later in this minute.

8.7. In this case I am satisfied that the events described by the Candidate were not matters outside of his control. In fact, as I describe later in this minute, the events raised by the Candidate were very much within his control.

8.8. Even if I was wrong and there were events which had some causal link to the failure of the Company for which no fault attached to the Candidate, that does not avoid the operation of s 385. If I am satisfied that just one of the alleged matters was partly responsible for the failure of the Company then I have the ability to consider the exercise of my power to prohibit the Candidate. It is not enough that there was some other non-mismanagement reason which was partially responsible for the failure of the Company. It would have had to have been the sole reason before I would be precluded from considering whether to exercise my power to prohibit the Candidate.

9. Specific allegations of mismanagement

9.1. The approach IET has often taken to identifying instances of alleged mismanagement, is to gather and present evidence that there has been a failure to meet certain duties that are imposed on directors under the Act ("directors' duties"). I agree that any failure to meet directors' duties which has a causal connection to a company's insolvency will almost invariably lead to a conclusion that mismanagement has occurred.

9.2. However, I note that it is not necessary to establish a breach of directors' duties before determining acts of mismanagement under s 385. Other actions or inactions that do not amount to a failure to meet directors' duties might also constitute mismanagement.

9.3. In this case IET has made the allegation of mismanagement resulting from reckless and insolvent trading (s 135).

9.4. In addition, I have alleged further actions amounted to mismanagement as set out in Further Minute No 2. They can be summarised as:

Released under the Official Information Act 1982

(a) BBG entering into commitments with companies related to the Candidate to the sum of approximately $8 million. That mismanagement relates to the requirements set out in ss 131, 135, 136 and 137.

(b) The entering into the contract with JGC was not in the best interest of BBG. That relates to the requirements set out in s 131.

(c) No written contract as between BBG and JGC. That relates to the requirements of s 137.

(d) The conditional contract for the purchase of land by BBG from CIT was a contract between related parties. The mismanagement was the lack of commercial rationale provided; not determining it was fair to BBG and not complying with legal requirements as to holding of meetings etc. That mismanagement relates to the requirements set out in s 131 and the principles set out in s 161.

(e) The dealings and actions of the Candidate with the liquidators of BBG and CIT was not consistent with the actions of a responsible company director. This is not allegation of mismanagement causing company failure but is an issue relevant to the exercise of my discretion.

10. Response of the Candidate

10.1. The Candidate has provided the Submissions. I have taken into account all the matters raised in the Submissions although I have not necessarily referred to all of them in this Minute.

10.2. The Candidate in his Submissions makes reference to seeking professional advice as being a reason why he should not be prohibited as a director. For example, at paragraph 72(d) of the KA letter of 31 May 2021 it is said that the Candidate "has sought and acted on advice from respected legal and accounting professionals." S 138 was not referred to. But because this submission potentially covers many of the allegations it is appropriate to make some comment now on s 138.

11. Reliance on others

11.1. S 138 says that a director when performing duties as a director may rely on certain information including professional or expert advice. That would include lawyers and accountants.

11.2. I make several general observations regarding s 138:

(a) A director must satisfy the conditions in s138(2).

(b) The onus is on the director to show that the section applies – **Morgenstern v Jeffreys** [2014] NZCA 449. A director must provide direct evidence of the advice given. The onus is on the director whether a candidate is considered under s 385 (4)(a) or (b).

(c) Advice is only as good as the instructions that are given to the person from whom the advice is sought. I adopt the comments in **R v Moses** [2011] NZHC 646. At [100] in this regard.

Released under the Official Information Act 1982

(d) A director would not be acting in good faith to rely on generalised and loose statements – **Debut Homes Ltd (in liq) v Cooper** [2018] NZC 53. There are similar comments in the Court of Appeal and Supreme Court judgments.

11.3. I do not believe the Submissions contend that s 138 applies. But if the Candidate does so contend, I am satisfied s 138 has no application here. Just by way of example there was no direct evidence of any advice that was given, and statements regarding reliance on others was generalised.

12. Factual background

12.1. At least some of the allegations against the Candidate, turn on certain matters of fact. The Candidate has set out a chronology of the facts, and other matters, that he considers are relevant. I set out below, taking into account the Submissions, the Judgment and the other materials, the matters that I consider are most pertinent and which put the allegations and Submissions into context.

12.2. The chronology is as follows:

(a) BBG was incorporated on 1 October 1998. At some stage it did not undertake any business activity for a number of years. The Company was reactivated in 2014 to enter into a business transaction with CIT. See paragraph 22 of the KA letter of 31 May 2021.

(b) BBG entered into certain arrangements with CIT Holdings Limited ("CIT"). CIT and BBG were related companies and the Candidate was the sole director of each company at the time the allegations of mismanagement took place.

(c) The Candidate was the sole director of CIT from 31 October 2006 until 27 February 2009 when he resigned. His then wife Ms Sparks was the sole director from 27 February 2009 to 21 February 2013. From that point Ms Sparks ceased to be a director and the Candidate was the sole director of CIT up to the time CIT was placed in liquidation.

(d) The Candidate and Ms Sparks entered into a joint venture agreement in March 2009 through two trusts (each controlling one of them), and the joint venture was to be carried out through CIT. It involved acquiring and developing certain property known as the Waimarie properties. This arrangement was brought into effect to protect the family interests because the Candidate was being threatened with bankruptcy at that time.

(e) s 9(2)(a) See **CIT Holdings Limited v Glover No. 2 Ltd** [2014} NZHC 3114, the Judgment and other cases between the Candidate and Ms Sparks referred to in the Judgment. These cases set out the interactions between the Candidate and Ms Sparks in more detail.

(f) Ms Sparks, while she was in control of CIT, transferred some of the joint venture property out of CIT and into the name of the trust that was controlled by her. This was without the knowledge and approval of the Candidate. CIT had to take legal proceedings. The High Court and then the Court of Appeal held that CIT

Released under the Official Information Act 1982

was entitled to have the properties re-transferred to CIT. See the chronology of the Candidate at paragraph 8 of the KA letter of 14 September 2021.

(g) On 19 June 2014 BBG entered into a written agreement(s) with CIT ("ASP") to purchase from it some of the Waimarie property. The anticipated settlement date was 19 October 2014.The agreement was conditional upon (amongst other things) CIT procuring the withdrawal of caveats that had been lodged by interests associated with Ms Sparks.

(h) In June/July 2014 BBG engaged JGC to undertake work on, or for the benefit of, the properties that BBG had entered into the ASP with CIT. The work also included property that was not part of the ASP and was not owned by BBG.

(i) The Candidate says that it was anticipated by the parties that the work would cost (inclusive of GST) $154,991.25.

(j) The Candidate acknowledges that the agreement between BBG and JGC was verbal.

(k) JGC commenced the work on 10 July 2014. On 31 July 2014 JGC presented an invoice to BBG for work done up to that date. The invoice was for $216,605.38 (GST inclusive). BBG's engineers on 8 August 2014 certified, by Certificate of Payment No. 1, that amount was in order for payment.

(l) The Candidate advises (p 6 of the KA letter of 14 September 2021) that BBG required a quantity schedule of the amount of material that was being removed. That was necessary otherwise BNZ would not approve funding for the work that BBG wanted JGC to do. The Candidate says BBG needed the funding to pay JGC.

(m) The Candidate notes, also at p 6, in an email to the engineers on 11 August 2014, that he had been "asking for months" for the quantity schedule.

(n) By no later than 18 August 2014 BBG's engineers provided a schedule of quantities. This was a detailed ten page document giving a breakdown of the works and costs. The total figure was $2,097,680. Over the course of several days, and discussions between the engineers and the Candidate, the figure was revised to $1,845,680.

(o) JGC continued with undertaking the work on the properties. BBG's engineers reviewed the work done by JGC from 1 to 31 August and on 22 September 2014 issued a certificate of payment No. 2 in favour of JGC for $619,406.68.

(p) On 1 August 2014 BBG issued an invoice to CIT for $216,605.38 which was a "recharge" of the JGC invoice.

(q) On 1 September 2021 BBG issued an invoice to CIT for $619,406.68 which was a "recharge" of the JGC invoice.

(r) Ms Sparks did not discharge the caveats over the property being the subject of the ASP. CIT had a hearing at the High Court on 15 September 2014 to get a court order seeking their removal. On 5 December 2014 the High Court declined CIT's application.

Released under the Official Information Act 1982

(s) By February 2015 the Candidate accepted all agreements in relation to the property in the ASP had fallen away.

(t) CIT was placed into liquidation by the court on 4 March 2016.

(u) On 4 May 2016 the Candidate on behalf of BBG signed a creditor claim in the liquidation of CIT for $836,012.06 (being the total amount invoiced by JGC), plus interest.

(v) The liquidators of CIT realised the assets of CIT. The liquidators' reports show that after paying out secured and preferred creditors they had a surplus amount available to distribute among CIT's unsecured creditors. The Judgment at [24] advises the amount was approximately $3.8 million. The CIT liquidators' reports state that the settlement date for the sale of CIT's property was on 6 March 2018 so it would appear the surplus amount was identified in the first half of 2018.

(w) On 15 August 2018 the Candidate says the liquidators of CIT advised that they had accepted BBG's claim (excluding interest).

(x) The Judgment shows that the liquidators only accepted the claim after seeking further information from BBG which was supplied by BBG's lawyers on 29 March 2018. See [26] of the Judgment.

(y) On 4 September 2019 BBG was placed in liquidation by shareholder resolution.

(z) At paragraph 31 of the KA letter of 31 May 2021 the Candidate says that he arranged for his accountants to file "proof of debts" for $7 million, with the liquidators of BBG, for moneys allegedly owed by BBG to entities under the control of the Candidate.

(aa) The Candidate did not say when this was done but [33] of the Judgment puts the date at 6 September 2019. The Judgment at [34] states BBG's liquidator deposed that spreadsheets were not sufficient and that the Candidate would have to file formal proof of debt forms with supporting information.

(bb) The Judgment states, at [40], that on 21 July 2020 the Candidate provided further information to BBG's liquidator in the form of draft financial statements. The Judgment at [41] states that BBG's liquidators said that was not sufficient.

(cc) The Judgment at [42] states CIT's liquidators wrote to the creditors of CIT (including BBG) on 27 July 2020 seeking their consent to a proposed distribution.

(dd) The Judgment, at [44], notes that on 30 July 2020 BBG's liquidator deposed that he told the Candidate by phone that based on the documents provided to him, that he was not going to accept the Candidate's claims. It also records that BBG's liquidator says the Candidate told him he would ensure BBG's claim in the CIT liquidation would be rejected.

(ee) The Candidate says (see page 9 of the KA letter of 14 September 2021) that on 7 August 2020 he provided CIT's liquidator with some further information that he says had only "recently come to light." The Candidate says that he told CIT's liquidators that in light of that information it would be appropriate for CIT to

Released under the Official Information Act 1982

reject BBG's proof of debt. The information that the Candidate says had only recently come to light was the Agreement for Sale and purchase between CIT and BBG regarding the Waimarie properties ie the ASP.

(ff) CIT rejected BBG's claim. BBG then filed proceedings against CIT to get its proof of debt re-instated. The liquidators of BBG and CIT, and the Candidate, gave evidence in the hearing which gave rise to the Judgement. That included evidence, which in the view of the Candidate, meant that CIT had no liability to BBG for the JGC debt.

(gg) That included the re-charging of the JGC invoices by BBG to CIT which the Candidate says was done by the Candidate's internal contract accountant, and it was a mistake.

(hh) Associate Judge Sussock, having received and considered the evidence, determined that BBG was entitled to claim in the liquidation of CIT for the sum of $836,012.06.

(ii) Although the Candidate was not a party to the proceedings giving rise to the Judgment, he seeks to appeal the Judgment. And, amongst other things, he says "There are strong grounds indicating that the Judge's determinations were, with respect, erroneous from factual and legal standpoints." See paragraph 7(e) of the Notice of Application for Leave to appeal by non-party dated 20 August 2021; and the KA letter of 14 September 2021 generally.

12.3. Except where expressly indicated most of this chronology comes from the Candidate.

13. Incurring obligations where the benefit accruing does not go to the Company

The allegation

13.1. The Candidate arranged for BBG to enter into a contract with JGC to clear certain land and construct earthworks on that land. I will say more about that contract later. But the land on which the work was undertaken did not belong to BBG. Therefore, BBG incurred a liability to JGC but did not get the benefit of the work that was being undertaken. It is alleged that this is mismanagement.

Response of the Candidate

13.2. The Candidate denies the allegation. He says, at paragraphs 10-12 of the KA letter of 14 September 2021, that BBG had agreed by way of the ASP to purchase most of the land being the subject of the JGC contract. He says that BBG had a reasonable expectation it would acquire title to the land because:

(a) BBG had a reasonable belief that the conditions in the ASP would be fulfilled.

(b) The Candidate was the director of both BBG as purchaser and CIT as seller and there was a common intention to complete the ASP.

(c) The property market was buoyant so it was expected that the subdivided land would sell easily and accrue a profit for BBG.

Released under the Official Information Act 1982

13.3. Although some work was carried on land which was not going to be owned by BBG the Candidate says it would give some overall benefit to the land that was to be purchased by BBG under the ASP. In any event the Candidate says the overall amount involved regarding the land that would not be owned by BBG was minimal.

13.4. The Candidate denies BBG incurred a liability of over $800,000 to JGC. He disputes the claim of JGC. The Candidate says that if the liquidator of BBG has accepted JGC's claim then that is wrong and the Candidate would seek an order from the Court "reversing the decision of the liquidator of BBG to accept in full the claim of JGC" - paragraph 11(f)(iii).

My decision

13.5. I refer to the factual background set out in paragraph 12 above. It is common ground that BBG agreed to purchase the bulk of the land on which JGC was to carry out the work. It is also common ground that the ASP was executed on 19 June 2014 and the scheduled settlement date was 19 October 2014. Again, it is common ground that the ASP was subject to certain conditions and BBG would not get good title to the land until settlement took place.

13.6. It therefore follows that if, for any reason, the settlement of the ASP could not proceed then BBG would not own the land.

13.7. The contract between BBG and JGC was entered into between those parties, at the very latest, within three weeks of BBG signing the ASP. I say that because work under the JGC contract commenced on 10 July 2014.

13.8. The Candidate disputes how much BBG was obligated to pay JGC under the agreement but, according to his Submissions, he would have ensured BBG paid $154,991.25 for the work.

13.9. The Candidate was dependent upon being able to settle the ASP to get title to the land. If it did not do so then BBG had a liability to pay JGC for work on land which BBG did not own. And this is what in fact happened. The conditions on the ASP could not be satisfied; the agreement lapsed and BBG never got to own the land.

13.10. The Candidate says that he had a "reasonable belief" that the conditions in the ASP would be fulfilled. I am satisfied that on any objective assessment that confidence was entirely misplaced. To the contrary I consider the Candidate was foolhardy.

13.11. One of the main conditions was for CIT to ensure the withdrawal of caveats over the title. That was not a condition that BBG could control. Furthermore, the satisfaction of the condition required the co-operation of the Candidate's ex-wife. The relationship between the Candidate and Ms Sparks was fraught as evidenced by the litigation that had occurred between them by that time. s 6(c)

Released under the Official Information Act 1982

13.12. So, a reasonable and prudent company director would not commit a company to expenditure on land it did not own, until at the very least, the company had an unconditional contract to purchase the land. The reality is that Ms Sparks did not agree to release the caveats and in the ensuing legal proceedings the court upheld Ms Sparks.

13.13. I characterise the actions of the Candidate as mismanagement. It is not necessary to tie this mismanagement to specific director duties. But I consider that the actions of the Candidate were not in the best interests of BBG and the actions could be considered to be in breach of s 131. It is not necessary for me to analyse the mismanagement with reference to s 131 but I consider that the Candidate comes within one or more of the exceptions referred to in **Debut Homes Limited (in liq) v Cooper** [2020] NZSC 100, at [113] and the comments at [109] are apposite. I also consider that s 135 is applicable as I mention later in this minute. Furthermore, this is below the standard of care required of a director having regard to the duty of care under s 137.

13.14. I am satisfied that there is a causal connection between the Candidate's mismanagement and the failure of BBG. If the Candidate had only entered into the JGC contract once it had title to the land then BBG would have had control of the situation. And if, as happened here, BBG could not get clear title then it would not have incurred any commitment to JGC.

13.15. The Candidate says that BBG was in a position to pay the agreed price. Even if it had been in a position to do so it did not. The Candidate himself says BBG was placed in liquidation because of action taken by JGC to recover money under that contract.

14. Entering into an oral contract with JGC

The allegation

14.1. The Candidate caused BBG to enter into an oral contract with JGC. It is alleged that this was mismanagement because there was a greater potential for dispute as to what was to be done under the contract and what were the duties and obligations of each party. It is alleged that this is what in fact happened and it was at least a partial reason for the failure of BBG. It is alleged that the actions of the Candidate breached his duties as a director, including duty of care under s 137 of the Act.

Response of the Candidate

14.2. The Candidate, at paragraph 15 of the KA letter of 14 September 2021, makes a number of points in rebuttal:

(a) The Candidate says he did exercise a degree of care and skill. He says he engaged JGC for work which BBG could afford. "No one could have anticipated that JGC would charge $836,012.06 which was many times the price the parties agreed to." - Paragraph 15(a).

(b) The Candidate says it had been his attention to secure a written contract. "Indeed, he understood that at the time BBG instructed JGC a written contract was being prepared. Formalisation of the parties' agreement was expected to occur after issue by the engineers of their schedules of quantities." KA went to say: "we are further instructed that this is not an unusual form of arrangement as

Released under the Official Information Act 1982

between developers and contractors where the works in question are preliminary in nature and relatively modest in amount." – paragraph 15(b).

(c) The Candidate says at paragraph 15 (c) he "cannot be criticised for the failure of BBG to pay the invoices of JGC given the dispute between the parties." He also says that JGC took no concrete steps to recover payment of their invoices until about five years after the date the invoices were issued.

My decision

14.3. The fact that the Candidate says there is a dispute with JGC demonstrates that there was a problem in the parties (or BBG at least) being able to determine the respective rights and obligations of the parties. The existence of a written contact does not eliminate the risk of parties ending up in dispute. But it should reduce that risk.

14.4. I am satisfied that each of the points made by the Candidate do not alter my conclusion that the Candidate mismanaged BBG by entering into a verbal contract with JGC. To explain why I am satisfied there was mismanagement it is necessary to look at the circumstances leading up to, and immediately after the JGC contract was entered into.

Background to entering into the JGC contract and circumstances pertaining over the period 2014-2015

14.5. As a preliminary point, I note that my focus is on whether there were acts of mismanagement by the Candidate in relation to the JGC contract; not adjudicating who is entitled to what under the JGC contract. I note that there is at least the possibility that the JGC contract will be subject to judicial scrutiny. That would likely traverse decisions I have made in this minute. I record that my findings in this minute have no bearing on such proceedings. The s 385 process is separate and different and my findings carry no weight outside the s 385 process. This same point applies to any matters traversed here which form part of the Candidate's appeal from the Judgment.

14.6. And I only have the perspective of the Candidate as director of BBG. I do not have any information from JGC. Indeed, I was not provided with any correspondence from JGC at all and do not know whether any such correspondence exists. So, there is nothing from JGC showing any agreement to doing specific work for a specific amount.

14.7. As another preliminary point, nothing in this Final Minute suggests that JGC has covered itself in glory as to deciding to undertake work, when it was uncertain as to what was to be done and for how much. But any fault on the part of JGC does not excuse or exonerate BBG's mismanagement.

14.8. The pertinent information having regard to the facts set out in paragraph 12 above, is as follows:

(a) The Candidate had been considering from at least early 2014 whether BBG should purchase the land from CIT. That can be inferred from the Candidate's email to BBG's engineer referred to at p 6 of the KA letter of 14 September 2021.

(b) The Candidate has also made it clear that the purchase was so that BBG could subdivide the land and sell individual lots.

Released under the Official Information Act 1982

(c) Before the land could be sold as individual subdivided lots it was necessary for the land to be cleared and earthworks undertaken.

(d) BBG intended to borrow money from BNZ to fund the work required once the clearing work had been done. See p 7 of the KA letter of 14 September 2021.

(e) The Candidate knew that a quantity survey or quantity schedule was needed before BNZ would approve funding to BBG. The Candidate also knew that the only way in which there could be an accurate costing was if this work was carried out.

(f) The Candidate on behalf of BBG engaged engineers to act for BBG. This was a "number of months" before the work commenced under the JGC contract. – p6 KA letter of 14 September 2021.

(g) At that time the Candidate asked the engineers to provide a schedule of quantities. So, this request was made well before BBG entered into the JGC contract. The Candidate says, at p 6 of the KA letter, that he asked for this schedule "a number of times – well before work started so that we would be prepared."

(h) Despite having a lead in time before BBG executed the ASP on 19 June 2014, the Candidate then entered into the oral agreement with JGC, and had work commence, all within a three week period.

(i) There is no adequate explanation as to why it was so urgent to commence the clearing and earthworks before having some essential matters first put in place. There is reference in the Submissions (paragraph 27 of the KA letter of 31 May 2021) to the weather, and the Candidate might refer to the reasonable adage that time is money in these circumstances.

(j) But this was an artificial urgency created solely by the Candidate and from his failure to have got in place a schedule of quantities from the engineers. And he did not need to have the schedule of quantities in place before having a form of written agreement being put before JGC. The written agreement could have been generally agreed with the quantities, and price, being plugged into the agreement at the end. I am satisfied the actions and inactions of the Candidate on these matters, amount to mismanagement.

(k) The Candidate had the matter solely within his control as to whether BBG should enter into commitments with JGC, without the schedule of quantities and without a written agreement. The engineers were engaged by BBG; not JGC. It was up to the Candidate to get what was required for his purposes.

(l) I do not have to determine whether the engineers were at fault for not providing what the Candidate wanted within the time frame he required. Even if that was the case the Candidate was not obliged to contract with JGC without the schedule of quantities in place. He deliberately chose to do so.

(m) In any event the statements made by the Candidate to the engineers (as referred to in his chronology of events) are self-serving. I also consider they do not tell the full picture. Annexed as "F" to the KA letter of 16 July 2021 there is information

Released under the Official Information Act 1982

which includes an email of Mr Dryland of the engineers dated 10 September 2014. It responds on a point by point basis to the email from the Candidate as referred to in the Submissions.

(n) The engineer responded the Candidate's statement that "I specifically asked you a number of times over a number of months for a schedule well before work had started so that we would be prepared. At this point all I had to go on was a guesstimate of around $1m which I had funded and budgeted." The engineer said:

"Correct – you asked numerous times for an Engineer's Estimate and as per our discussions at the time, I could not produce one accurately amidst the wall and platform level design changes that were being requested. Once design was confirmed, I believe that an Engineer's Estimate was produced in a timely manner."

(o) The engineer could only provide an estimate once the owner finalised what he wanted done. Until the Candidate could make up his mind the engineer was not in a position to provide the Engineer's Estimate. Based on this response it was the fault of the Candidate in not finalising what was wanted. And that necessarily means that the figure of $154,991.25 which the Candidate referred to had to be, at best, a guesstimate.

(p) In fact, I believe that sounds as though there is some basis for coming up with that figure. The reality is that the contract is vague as to what work was to be done for the figure of $154,991.25. Also, the Candidate could never have reasonably believed that would be the total costs for JGC completing the works when the Candidate says, before the work was started, his guesstimate was $1 million.

(q) In any event by 31 July 2014, the Candidate knew, whatever he might have initially believed, that an estimate of $154,991.25 was no longer applicable On 31 July 2014 BBG received an invoice for the work done to that point in time (approximately 21 day's work). The invoice was for $216,605.38. That was over the figure of $154,991.25.

(r) There is no suggestion that JGC had overcharged. The invoice was scrutinised by BBG's engineers. By Certificate of Payment No 1 the engineers certified the invoice was in order for payment. It is also apparent from the correspondence between BBG's engineers and the Candidate that the clearing work involved more than what they had originally anticipated.

(s) The Candidate did not make payment. It is not clear as to whether this was a refusal to do so or an inability to do so. Either alternative is equally serious. If BBG refused to do so then it misled JGC into doing work over the property. It was an exacerbating feature that it was property that was not even owned by BBG.

(t) The Candidate had said to the engineers that the clearing and earthworks had been budgeted and funded for up to $1 million. If this was the case then BBG could have paid. The Candidate has said that funding was coming from BNZ, but if it was coming from that source, BBG could not get funding approval until

Released under the Official Information Act 1982

the Engineer's Estimate was in place, which it wasn't. That would also mean the Candidate had entered into the JGC contract in breach of s 136.

(u) The Candidate says at paragraph 11(d) that "BBG was in a position to pay the agreed price." Firstly, having regard to the above analysis there was no such agreement that $154, 991.25 would cover all the earthworks and clearing to enable the subdivision to go ahead. Even the Candidate referred to that figure as an estimate. Also, Mr Dryland's responses, as referred to in paragraph 14.8(n) above, generally, show how uncertain the position was.

(v) Secondly, if BBG had the ability to pay it did not do so. This is despite what the Candidate said at paragraph 27 of the KA letter of 31 May 2014. It was said "JG Civil were contracted to undertake the first stage only ie the clearing of the site, for an estimated 220K. Mr Olliver had those funds available to him which he could, and intended to, advance to [BBG] to cover its liability for this sum to JG Civil."

(w) It is a stretch to call BBG's failure to pay as being caused by a dispute with JGC. Work had been done to the value of the invoice rendered. BBG's own engineers certified to that. The JGC contact was not a fixed price contract, for the total clearing and earthworks necessary for the subdivision to proceed. The problem for BBG was it had not adequately done its homework before it got JGC to undertake the work. Given that it was not a fixed price contract the responsibility for scoping out the costs was for BBG, and its engineers. This is more a case that the Candidate started to revise his thinking once the true costs of doing the clearing and earthworks became clearer to him.

(x) Furthermore, on 15 September 2014, CIT had its court hearing to seek the removal of Ms Spark's caveats. I can infer that the Candidate, at least with his CIT hat on, would have known before that date that Ms Sparks was not going to release the caveats and court action would be required. Even a director with rose tinted glasses would appreciate the greatly increased risk that the ASP would not go ahead. Allowing the JGC agreement to continue in such circumstances is a cynical and exacerbating feature.

(y) I consider that the Candidate's focus was just getting the work done because it was crucial that rubbish be cleared off the site and earthworks done so that value could be extracted from the property and BNZ as a secured lender to CIT would get repaid. That is clear from the evidence that the Candidate gave and referred to at [102] (g) and (h) of the Judgment.

(z) There does not appear to be any valid reason why the Candidate should not have arranged for BBG to pay $216,605.38 in terms of Certificate of Payment No 1.

(aa) Irrespective of this, as at 31 July BBG had received an invoice for work that exceeded the price that the Candidate says that he estimated it to be. At that point the Candidate was on notice that there was more work that he wanted done but that from his perspective there was a mis-match as to the work he wanted done and the price that he wanted to pay.

(bb) It was incumbent on the Candidate at that point to alert JGC to this fact and for work to cease until the matter was sorted out. At the very least the solvency of

Released under the Official Information Act 1982

BBG was becoming an issue and the Candidate owed duties to BBG's creditors, as well as the Company.

(cc) It is a gross distortion of the facts to say at paragraph 11(c) of the KA letter of 14 September 2021, "Our client clearly could not have anticipated that, having exceeded the entire contract sum in the first three weeks (covered by the first invoice of JGC), JGC would undertake further work to the amount of $619,406.68." The Candidate knew what the situation was. He did not raise the price and work with JGC. He kept quiet and allowed for work to be undertaken which enhanced the land.

(dd) And there is nothing at all to justify the statement that the continuing work after the first invoice was "without the authority of Mr Olliver, and in spite of his protests, JG Civil ended up spending $836K on the site."-See paragraph 28 of the KA letter of 31 May 2014.

(ee) It is an exacerbating feature that BBG did not own the land. So, in the worst-case scenario BBG would be wound up. But it would have no assets and the Candidate would have no personal liability to JGC. Yet a company that was owned and controlled by the Candidate (CIT) would, on the face of it, have no liability to JGC but yet received the benefit of the work done by JGC. Whether this was intentional or not, the result is that JGC had nowhere to go. If the land had been owned by BBG then JGC would have had a bargaining chip. It would have meant that there was the risk for the Candidate that a liquidator could be appointed to BBG and the liquidator would take control of the land for the benefit of BBG's creditors.

(ff) I note it is not claimed that the work undertaken by JGC, represented by the invoice of $619,406.68, was not of an appropriate standard. Nor is it claimed that the work JGC said it had done was in not fact done. That is recognised by the fact that BBG's engineers reviewed the invoice and by Certificate of Payment No 2 certified it was in order for payment.

(gg) It is a gross distortion of the facts for the Candidate to claim, as he does at p 6 of the KA letter of 14 September 2021 that "with regard to the payment situation this is not my doing."

(hh) Based on the Candidate's Submissions, he says it was intended as between BBG and CIT, that JGC could not have recourse to the company that benefited from the work that it undertook. At paragraph 15 (e) of the KA letter of 14 September 2021, the Candidate refers to provisions in the ASP which he says precludes BBG, and by extension JGC as a creditor of BBG, from having any claim against CIT.

(ii) That means that the Candidate knew the value of the property would be enhanced by the work undertaken by JGC. With his BBG hat on that benefited the Candidate if the purchase from CIT was completed. But with his CIT hat on the Candidate was comfortable if the agreement did not go ahead. On the Candidate's analysis the property was improved through the work of JGC but CIT would have no liability to JGC.

Released under the Official Information Act 1982

(jj) The issue as to whether CIT has a liability to BBG for the recharge of the JGC invoices was a matter dealt with in the Judgment. The result of the Judgment was that BBG's claim in the liquidation of CIT had to be accepted by CIT's liquidators.

(kk) I note that the Candidate is seeking leave to appeal the Judgment and this is one of the findings that he is seeking to overturn.

(ll) It is not necessary for me for me to determine whether the Judgment is correct or not on this point. What is important in my consideration of the Candidate are the decisions and mindset of the Candidate as a director of BBG. The Candidate says that it was a considered decision taken by him (wearing both his BBG and CIT hats) that CIT would have no liability for work carried out on its land by BBG. This necessarily means that the Candidate intended BBG would not be able to recover from CIT what was owing by BBG to JGC. I am satisfied that through the Candidate seeking this outcome his actions amounted to mismanagement.

(mm) But because I said there was some criticism of the Candidate's evidence which I could potentially take into account in the exercise of my discretion, I make some brief comments at paragraph 14.10-14.14 below which touch on the ability of BBG to on-charge for JGC's work.

(nn) The Candidate says that the arrangement with JGC "is not an unusual arrangement as between developers and contractors where the works in question are preliminary in nature and relatively modest in amount" – paragraph 15 (b) KA letter of 14 September 2021.

(oo) The Candidate did not produce any further information in support of that position. I am sceptical as to its veracity but do not need to determine that as a matter of general principle. On the facts of this case, I am satisfied the works were not preliminary and it was not a modest amount. And having regard to all the facts in this case as identified above it could never have been appropriate to have these works undertaken pursuant to a verbal contract.

Conclusion

14.9. I am satisfied that the combination of BBG:

(a) Failing to scope the extent of the clearing and earthworks required for a subdivision;

(b) The failure to have title to the land;

(c) The entering into a contract with vague and uncertain terms;

(d) Failing to pay Certificate of Payment No 1 on due date;

(e) Continuing to allow JGC to continue the works after receiving the first invoice; and

(f) Not paying Certificate of Payment No2 as certified in order for payment by BBG's engineers,

Released under the Official Information Act 1982

amounted to mismanagement and each aspect of this mismanagement was at least a partial reason for the failure of the Company.

Candidate's position regarding charge back to CIT

14.10. The Candidate says that CIT has no liability to BBG to pay for the work done by JGC. He says that there was no agreement to do so and that such matter is determined by the ASP. Part of the reasoning process advanced by the Candidate is that BBG should never have issued the charge back invoices to CIT.

14.11. These were matters traversed in the Judgment. In Further Minute No 2, I noted criticisms of Sussock AJ as to the evidence of the Candidate and that, in effect, raised issues as to the integrity of the Candidate. One of those criticisms was the evidence given around the charging of CIT for the JGC invoices. At [92] of the Judgment Sussock AJ said the Candidate's "explanations as to why earthworks were recharged by BBG to CIT, if CIT had not agreed were not convincing. They ranged from not being aware of the invoices, despite their size and his admitted focus at the time on making the land more saleable so the bank could be repaid, to not being able to recall why BBG's claim was put into the liquidation if CIT had not agreed to pay."

14.12. The Candidate says that he does not accept the criticisms of Sussock AJ and, at paragraph 19 of the KA letter of 14 September 2021, the Candidate makes a detailed response.

14.13. I have read and re-read both the Judgment and the Submissions on this matter. The Submissions do not resolve for me the matters raised by Sussock AJ. But because of the conclusions I have reached elsewhere I do not need to take account of the criticisms of Sussock AJ in coming to my conclusions and have disregarded them as a potential factor to take into account in the exercise of my discretion or in determining a period of prohibition.

15. Reckless and insolvent trading

IET's allegations

15.1. IET says directors must not carry on business in a manner that creates or is likely to create a substantial risk of serious loss to company's creditors such as Inland Revenue ("IRD"). IET says that the Candidate was a director of BBG which was placed into liquidation owing money to the IRD.

15.2. IET notes the company was placed in liquidation by a special resolution of the shareholders. The liquidator's reports referred to a preferential creditor's claim of $32,354.61 and unsecured creditor's claims in the amount of $849, 935,48 as at 7 October 2020.

15.3. IET says that a failure to make payments to the IRD is potentially a serious breach of a director's duties and may indicate an ignorance or indifference of the director's responsibilities. IET says that a failure to operate a company responsibly is likely to lead to its failure.

Released under the Official Information Act 1982

Response of the Candidate to the allegation of reckless trading

15.4. The Candidate notes that he was effectively the controlling shareholder of BBG. The Candidate notes that it was through his initiative that BBG was placed in liquidation.

15.5. The Candidate says that in respect of the preferential claim of $32,354.61 that this was made by the IRD. The Candidate says that BBG never had any income so he queries whether any money is owed by the company to IRD.

15.6. The Candidate says that the unsecured claim of $849, 935.48 arises from two separate claims lodged by J G Civil Limited ("JGC"). The Candidate said in the Further Submissions that BBG and JGC were in dispute over some preliminary work to be done by JGC. The Submissions in their totality expand on that point but the Candidate says that when the solvency of BBG was put under threat as a result of the dispute with JGC, the Candidate took what he says was the responsible decision to put BBG into liquidation.

Legal principles

15.7. S 135 is the relevant statutory requirement regarding insolvent trading. I consider those principles are useful when considering IET's allegations of mismanagement regarding the IRD debt. S 135 provides a director of a company must not "agree" or "cause to allow" the business of a company to be carried on "in a manner likely to create a substantial risk of serious loss to the company's creditors." The leading cases on the interpretation of s 135 are now **Debut Homes Limited (in liq) v Cooper** [2020] NZSC 100, and **Yan v Mainzeal Property and Construction Ltd (in liq)** [2021] NZCA 99. The legal principles referred to below and the specific case references are consistent with **Debut Homes** and **Mainzeal.**

15.8. The legal principles around what constitutes a substantial risk to creditors of a company are well established. **Mason v Lewis** [2006] 3 NZLR 225 (CA) [51] set out the essential pillars of a reckless trading claim under s 135 of the Act. They include:

(a) it is an objective test;

(b) the focus is not on the director's belief but on the reality of the market conditions, and whether the way the business is carried on creates a substantial risk of serious loss; and

(c) once the company enters into troubled financial waters the directors are required to make a "sober assessment" of the company's future income stream and prospects.

15.9. In addition to considering the interests of the company, it is also well established that a director is also obliged to consider the interests of the creditors once solvency becomes an issue. See for example **Sojourner v Robb** [2008] 1 NZLR 751 and re-affirmed by **Debut Homes** at [31].

15.10. A company will be insolvent if it does not make payments owed to a creditor when due (such as the IRD); and continues to incur fresh obligations. As was noted in

Released under the Official Information Act 1982

Madsen-Ries v Greenhill [2016] NZHC 3188 at [64]: "a company is solvent when able to pay its debts as they fall due in the normal course of business and the value of its assets is greater than the value of its liabilities. Both limbs must be met. See also **Debut Homes** at [34].

15.11. Once a company becomes insolvent, or solvency is a real issue, that becomes a watershed moment. **Debut Homes** notes at [49] "Solvency is a key value in the Act." That triggers an increased range of duties, and options, available to the directors. And a director should consider whether such options would be appropriate in their particular case.

15.12. Placing a company into liquidation or receivership are two options. But **Debut Homes** notes there are other options. For example, the directors could seek a compromise with creditors as provided for in parts 14 and 15 of the Act. In addition, part 15A provides for voluntary administration. Compromises and voluntary administration require directors to put forward a strategy and plan for the company's survival and engage with the company's creditors. And if successful that would give the company an opportunity to turn things around and the directors would avoid the potential risks of s 135 through any continued trading.

15.13. Directors are not obliged to utilise the formal mechanisms of Parts 14, 15 and 15A of the Act. **Debut Homes** at [47] notes a company could use other mechanisms such as an informal arrangement with its creditors. But the essential component in all these options is that the directors have to involve the company's creditors.

15.14. Directors are required to balance reward with risk. And when a company's solvency becomes an issue that balance should be reviewed. This is entirely appropriate. If the directors continue to trade without involving the creditors, then they are putting the creditors' money at risk without the creditors being aware. This is not a fair bet. If things work out then the directors/shareholders get a greater return through their equity in the company. But if the trading brings about further losses, then it is the creditors who bear that loss; not the directors/shareholders. See also **Mainzeal** at [230].

15.15. It will not be the fault of the creditors that a company gets into financial difficulty. The directors are responsible for that. Therefore, it seems only fair that the directors reconsider the balancing of risk and reward through the eyes of the creditors as well.

15.16. Directors might wish to complete a sober assessment before deciding upon their strategy and whether and how to engage with the company's creditors. And they should be allowed a period of time to conduct that assessment. But once the directors are aware (or should have been aware) of the financial position the directors should immediately start the process of sober assessment so that a decision can be made.

15.17. There is a difference between which limb of the solvency test is breached as to the time that may be allowed to complete a sober assessment. In **Greenhill** it was noted a "company need not cease trading as soon as it is technically insolvent" [64]. The reference to a technical insolvency" is where liabilities exceed assets at a particular point in time. The same point is made in **Re South Pacific Limited (in liq)** (2004) 9 NZCLC 263, at 570.

Released under the Official Information Act 1982

15.18. However, any decision to continue trading should be, that on an objective assessment, and on a risk reward basis, the company and its creditors are likely to be better off by trading on than if the company was immediately placed in liquidation. The type of example given is a company in the final phase of completing a contract which will result in a large payment which would be lost if the company was placed in liquidation.

15.19. Where a company is in breach of the cash flow test, rather than the balance sheet test, the failure to make payments as they fall due is an even more immediate issue that requires attention. It requires a director to immediately consider his or her obligations under s 136 and whether a company can meet future obligations. As was noted in **Richard Geewiz Consultants limited (in liq) v Gee** [2014] NZHC 1483, at [101], how realistic is it that continuing to trade will generate sufficient cash to not only meet the new obligations but also repay the overdue existing debt. That position becomes increasingly unrealistic where the pattern continues.

15.20. As I have noted the amount of time permissible to complete a sober assessment will vary according to the circumstances of each individual case. A balance sheet insolvency may give rise to more complex issues requiring more time to evaluate the situation. Also, if there was a sudden unforeseen event such as fire or earthquake, which put a company under financial stress, more time may be required.

15.21. But these situations are unlikely to be the case in the great majority of cases where the directors, or their families, are shareholders; and the directors are actively involved in the business. The businesses are unlikely to be complex and the directors should have a good handle on the businesses they own and operate. In most cases the slide towards insolvency is gradual so they will be aware of the general situation and the issues will be well defined. In those circumstances, particularly where a company is cash-flow insolvent, directors should need little time to make their decision.

15.22. When the directors are making their sober assessment, they are obliged to consider the interests of all the creditors and not just some. Also, they must consider the interests of each creditor individually. The Supreme Court in **Debut Homes** stated at [72]:

"It is not an answer to s 135 that [continuing the business activities] was a sensible business decision in that it had the potential to benefit some of the creditors by providing higher returns than immediate liquidation would have done. It is not possible to compartmentalise creditors in this fashion. If continued trading [carried a serious risk] in a shortfall --- then there was a breach of s 135 whether or not some creditors would be better off and whether or not any overall deficit was projected to be reduced."

15.23. When considering the interests of the creditors the directors must take into account liabilities that will arise from the continuing business activity. Debut Homes Limited was a property developer. In **Debut Homes** there was no GST liability (and the IRD was not a creditor in relation to existing properties) at the time the decision was taken to trade on. That liability would arise when the properties were sold. However, that was irrelevant. The Supreme Court noted that the director knew a GST liability would arise. "That the GST on future sales was not a current obligation at the end of October 2012 is beside the point, contrary to the view of the Court of Appeal. Section 135 is necessarily forward-looking" – [71].

Released under the Official Information Act 1982

15.24. So, once a company becomes insolvent or solvency is a real issue the directors must take stock. It may be at that time that the directors immediately take steps to put in place one of the options referred to in paragraph 12.16 above. Or, they may choose to informally consult with creditors as referred to in paragraph 12.17 above. If they choose not to invoke one of those procedures then the directors are obliged to conduct a sober assessment of the company's position.

15.25. If, on an objective basis, the assessment shows there is a realistic prospect of the company being restored to profitability then the directors are not obliged to consult and work with the creditors. But if the directors do decide to keep the company trading, the directors are required to have a "coherent plan" (**Richard Geewiz** at [101]) to restore the company to profitability. It would seem unlikely that a coherent plan could ignore, or not engage with the creditors. Part of any plan would require for there to be targets and milestones. There would need to be a regular review of the position and if there were insufficient measurable improvements within a short timeframe then the company would need to cease to trade. If the directors choose to not engage with the creditors, they run a heightened risk of breaching s 135.

15.26. As I have already noted, if a company's solvency is under threat, the directors must take some action. There is not some moratorium period where the directors do nothing. That is different from allowing some time as information is gathered and options evaluated. And working harder following the same strategies as before is not a sober assessment. If a director claims that he or she did consult with creditors, did a sober assessment or produced a plan, they will need to show some evidence of these things. Without being prescriptive it would almost certainly need to be in writing.

15.27. Putting something in writing helps with objectivity, particularly given that directors may not be the best decision makers in times of insolvency or near-insolvency. As was noted in **Debut Homes** at [43]:

"This is because their decisions may be compromised by conflicting interests and, even where that is not the case, they may be too close to the company and its business to be able to take a realistic and impartial view of the company's situation."

15.28. In any event there would need to be director meetings recording the information reviewed and decisions made. Also, there should almost certainly be shareholder meetings even where a director is also the sole shareholder. The whole scheme of the Act is centred around a company being a separate legal entity from its shareholders and directors. That means the interests of the shareholders/ directors are not the same as for the company, particularly where a director has conflicting interests. The holding of meetings, and declarations of interest, is not a matter of administrative neatness. It is a fundamental requirement of the Act and an essential plank of good governance.

15.29. If a director cannot produce evidence that they conducted a sober assessment, engaged with creditors, held meetings or compiled rescue plans, the inference is that these things never happened. That is consistent with **Toilolo v Registrar of Companies** [2019] NZHC 1090 at [94].

My determination regarding the IRD debt

15.30. I am satisfied the IRD is a creditor of the Company for the amount stated. The Candidate's belief that there was no such debt carries no weight. The liquidator has to

Released under the Official Information Act 1982

assess a creditor's proof of debt to determine whether it is valid. The liquidator would not have admitted the claim if it was not valid.

15.31. There is little other information available regarding the IRD debt. I am not aware of when the IRD debt was incurred but I note that **Toilolo** at [65] states "The Deputy Registrar was not required to consider issues such as the aging of debts ---."

15.32. The fact that the IRD debt, or a significant proportion of it, is preferential means it relates to the non-payment of GST or PAYE. Those moneys have a quasi-trust character about them. That, and the fact that the IRD is a preferential creditor for such moneys, means that the failure to pay the IRD is serious. I am satisfied that is mismanagement.

15.33. I need to be satisfied that there is a causal connection between the mismanagement, and the insolvency of the company. I note that BBG was placed into liquidation by the shareholders and not the IRD. That is not determinative of the position. It is not necessary for the creditor to have initiated the winding up to determine a link between the mismanagement and the winding up. Very often the shareholders are just simply beating the creditor to the punch by initiating the winding up. See also **Toilolo** at [72] and [73]. And the Candidate noted he initiated the winding up because of the enforcement action being taken by another creditor; namely JGC.

15.34. But notwithstanding **Toilolo** at [85], if I were to consider the IRD debt in isolation, I wonder whether the Candidate might have been able to ensure payment was made from his own resources. However, the fact is that the IRD was not paid and there were insufficient assets in BBG for the liquidator to be able to pay the IRD or any other creditor.

15.35. More importantly the failure to pay the IRD needs to be considered in the context of the total debts owed by BBG. In 2014 BBG had contracted with JGC to undertake work. I have dealt with the JGC contract earlier in this minute but it necessary to briefly re-traverse some matters arising out of that contract to consider the solvency of BBG in 2014.

15.36. As a result of the work undertaken by JGC that company issued two invoices totalling $849,935.48. As the Candidate notes (see paragraph 15 of the KA letter dated 16 July 2021) this occurred in 2014. BBG disputed the amount. At paragraph 13 of the 16 July 2021 letter the Candidate says the amount claimed by JGC was $836,012.06 but that the original sum in the contract for the work was $154,991.25, inclusive of GST.

15.37. In 2019 the Candidate says that JGC took more concerted action to pursue recovery from BBG. After taking legal advice, the Candidate "perceived that the Company faced a serious insolvency risk" – (paragraph 16 of the 16 July 2021 letter). It was then that the Candidate took action to place BBG into liquidation.

15.38. I consider BBG was insolvent from 2014. The Candidate says at paragraph 10 of the 16 July 2021 letter that BBG "never had any income" but it had engaged JGC to undertake the works without any income to pay for it. It is clear that JGC did carry out certain work and the Candidate acknowledges that the Company had agreed to pay $154, 991.25. But BBG did not pay that amount and did not have the means to do so.

Released under the Official Information Act 1982

15.39. The Candidate in effect says that BBG expected it would be able to pay for the works through a transfer of properties to it and a planned subdivision. I firstly note that for a company to be solvent it must not only have assets exceeding liabilities it must also be cash flow positive. Even if the expected transactions had gone ahead and that resulted in assets exceeded liabilities, the company was insolvent because it could not meet its debts as they fell due. In any event, by February 2015 at the latest (see the chronology at paragraph 8 of the KA letter of 14 September 2021) those transactions could no longer proceed.

15.40. The Candidate, in the KA letter of 16 July 2021, says that at the time it expected CIT would pay BBG for the invoices it had rendered to CIT for the work undertaken by JGC. Irrespective of the Candidate's changed position regarding those invoices CIT went into liquidation on 4 March 2016. Therefore, it could not expect any moneys from that source.

15.41. So, at this point in time (applying the same sort of analysis in **Toilolo** at [84]-[85]), BBG, (from March 2016 at the latest), was insolvent. It was not in a position to pay JGC and there is a causal connection between the IRD debt and the liquidation of BBG.

15.42. The action taken by the Candidate in 2019 should have been undertaken three years earlier in 2016.

Conclusion

15.43. I am satisfied that the failure to pay the IRD debt was mismanagement and it was at least a partial reason for the failure of BBG.

Further comment

15.44. I do not need to be satisfied as to the following matters to determine the mismanagement referred to above. But I do note that there is nothing in the material before me to indicate that before 2019 the Candidate ever undertook a sober assessment of BBG's financial position, or that he ever considered the interests of the creditors of BBG. And there is nothing to indicate that the Candidate considered the position of each creditor individually, and the IRD in particular.

16. Borrowing approx. $8 million from parties related to the Candidate

Background

16.1. The Candidate says that BBG borrowed approximately $8 million from parties related to the Candidate ("the lenders"). The Candidate says that BBG did not repay that money and the lenders have sought to be classified as creditors of BBG and to be entitled to claim in any moneys that the liquidators of BBG might gather in.

The allegation of mismanagement

16.2. On that basis it is alleged that BBG had no capacity to be able to repay the $8 million borrowed. Any such transaction(s) were without meetings of shareholders and directors as required by the Act. The Company was not solvent at the time and/or the Company could not have had a reasonable expectation that it could repay the money when called upon. That means the entry into the loans amounted to mismanagement.

Released under the Official Information Act 1982

Response of the Candidate

16.3. In the KA letter of 31 May 2021, the Candidate said at paragraph 30, "entities under the Candidate's] control injected some $7M into BBG --." At paragraph 31 he said that there were "proof of debts filed by Mr Olliver's accountants, Findex, [with the liquidators of BBG], in respect of the $7 million injected into that company by entities under his control."

16.4. At paragraph 17 (a) of the KA letter of 14 September 2021, KA says:

"On our client's instructions, the entities related to him did not, and would not have, demanded repayment if to do so would have caused BBG to fail. Thus, the advances in question were not responsible for the failure of BBG."

16.5. At paragraph 17(b) KA said:

"In deciding to place BBG in liquidation our client did not take into account the advances made to BBG by the entities related to him."

My decision regarding non-repayment of a loan

16.6. The Candidate did not provide any documents detailing the identity of the lenders or the amounts owed to each lender individually. However, paragraph 33 of the Judgment provides information derived from a spreadsheet that the Candidate sent to BBG's liquidators. That listed five entities related to the Candidate and the amount, in the aggregate, was approximately $8 million.

16.7. Given that this was information derived from what the Candidate sent to the liquidators, I am satisfied this information most accurately sets out the amounts claimed by the Candidate's entities.

16.8. It is important to clarify the nature of the alleged assistance provided by the Candidate. When the Candidate used terminology of "injecting" money into BBG it might have meant as capital. If that had been the case there would be no issue. However, the Candidate has made it clear that he claims money was lent to BBG.

16.9. On this basis I am satisfied that the acceptance of such loans by BBG, in the circumstances here, would amount to mismanagement. The fact that it was debt, and not capital, meant it had to be repaid.

16.10. The Candidate says that he would not have called for repayment of the loans if it had meant that BBG went into liquidation. I consider no weight can be attached to such an assertion. The Candidate provided no loan agreements; no resolutions or communications from any of the lenders stating the same. There is nothing to indicate parental support. In any event both **South Pacific** and **Mainzeal** demonstrate the degree of commitment required before the Candidate's assertion could have any weight.

16.11. The Candidate has not advised when the loans were made and perhaps the timing is not particularly relevant. But, based on the information provided to me, it seems it would have been in a rather narrow window during 2014. I say that because the Candidate says (paragraph 22 of the KA letter of 31 May 2021) that the Company had

Released under the Official Information Act 1982

been inactive for a number of years until then. And at paragraph 18(d) of the KA letter of 16 July 2021 the Candidate says BBG ceased trading by around the last quarter of 2014.

16.12. The Company had no assets in early 2014 because the Company had been inactive. This conclusion is supported by the BBG Liquidation Report No 4 which stated the Company had no physical assets as at the date of liquidation. Therefore, unless the money was kept in a bank account and not utilised, there could not be a matching off of an asset and liability. Therefore, the Company would be insolvent.

16.13. And the Candidate says these related party loans were not repaid; Once the loans were disbursed BBG never had the capacity to repay the loans and the lenders are in fact seeking repayment.

Was in fact a loan ever made

16.14. On the basis of the information before me I consider no loans were made by the lenders of the amounts contended by the Candidate. If that is correct then there would not be an act of mismanagement having a causal connection to the failure of BBG. But it would mean that the assertions and approach taken by the Candidate on this matter are relevant in considering the exercise of my discretion.

16.15. It would appear the Candidate never filed a formal proof of debt form with the liquidator for BBG. See [33], [34], [40], [41, [43] and [44] of the Judgment.

16.16. The Candidate has not provided me with any evidence of a loan entered into between the lenders and BBG. Had he provided me with "unsigned draft and unaudited financial statements" ([43] of the Judgment) I am satisfied that would not be sufficient evidence.

16.17. The Candidate cannot point to any signed loan agreement. Nor can he point to any meetings or resolutions that would have been required by both borrower and lender before any loan agreement was entered into.

16.18. More importantly there is nothing to show the existence of any money having passed through the BBG's bank account. And if $8 million had been lent to BBG, where did it go to?

16.19. If the money had been lent in the period from July to October in 20014 it would have been available to meet liabilities under the JGC contract but that did not happen. The Company was inactive before 2014 so it is unlikely any loan would have been made before then. The ASP did not proceed so the loan was not used for that purpose. The Company did not trade from September/October 2014. And the Company went into liquidation without any physical assets. So how could $8 million disappear without having some corresponding assets in the Company.

16.20. From the foregoing information I infer that there were never any such loans.

16.21. If I was wrong on this point, it would mean an even more serious case of mismanagement by the Candidate. Under his watch $8 million would have been spirited away out of the control of the Company and its creditors.

Released under the Official Information Act 1982

Would the existence of a loan benefit the Candidate in the liquidation of BBG

16.22. If there had been loans to BBG, by interests associated with the Candidate, the Candidate would benefit from that. This would be if BBG receives a dividend from the CIT liquidators for BBG's proof of debt for the JGC debt. At present the only creditor of BBG, outside of the IRD, is JGC.

16.23. If loans from interests related to the Candidate were accepted by BBG's liquidator then the lenders would also share in any moneys received by BBG from CIT. Sussock A J came to a similar conclusion. See [77] and footnote 22 of the Judgment.

16.24. I believe it can be inferred from the following facts that the Candidate was alive to commercial benefits that would derive from the existence of a loan.

16.25. The Candidate signed BBG's proof of debt on behalf of BBG, in the liquidation of CIT, for the JGC debt. This occurred within two months of CIT being placed in liquidation in March 2016.

16.26. By about June 2018 the Candidate knew that CIT 's liquidators had money to distribute to creditors of CIT. That included BBG.

16.27. On 4 September 2019 BBG went into liquidation. Two days later the Candidate was seeking BBG's liquidator to accept his claim in relation to the lenders.

16.28. On 27 July 2020 the Candidate was aware that CIT intended to distribute money to its creditors and that included BBG.

16.29. On 30 July 2020 the Candidate was made aware by BBG's liquidator that on the basis of the information provided by the Candidate he was not going to accept the claim that BBG owed approximately $8 million to interests of the Candidate.

16.30. On 7 August 2020 the Candidate contacted CIT's liquidators. At paragraph 16 of Vivian Fatupaito's affidavit of 12 November 2020 she deposed as follows:

"On 7 August 2020 Mr Olliver advised me that he sought to challenge the proposed distribution to BBG on the grounds that new material had come to light which suggested BBG incurred liabilities on the basis that it had signed an agreement for sale and purchase on the properties."

16.31. The "new material" was the ASP. At paragraph 19 (e) of the KA letter of 14 September 2021 the Candidate says the ASP was a highly relevant document that the CIT liquidator should be put in possession of. And this is what the Candidate did. The KA letter says "Far from reflecting a lack of responsibility or integrity, the context reveals quite the contrary and highlights the probity of our client's character."

16.32. I deal with the issue of the circumstances of BBG's re-charge of the JGC debt and the Candidate's explanation elsewhere. The point I note here is that there is a subtle but important difference between Ms Fatupaito and the Candidate, as to what was said. The Candidate characterises his actions as one who recognises the decision is for CIT's liquidators to make, and that he is a disinterested by-stander. But Ms Fatupaito's affidavit shows there is a wider context of the Candidate wanting to challenge the decision of BBG's liquidator.

Released under the Official Information Act 1982

16.33. To the extent it is necessary I prefer the sworn statement of Ms Fatupaito, which I consider to be disinterested and objective recollection, over the statement of the Candidate in the Submissions.

16.34. I also consider when one views the history of the Candidate's dealings with the liquidators of BBG and CIT, the combative approach of the Candidate is consistent. For example, the CIT liquidation reports give some brief details as to how Bankhouse Trust Limited ("BTL") attempted to appoint a receiver so that CIT's assets could be controlled by them. BTL is controlled by the Candidate and CIT had to be involved with litigation before the court ordered the removal of the receiver. The liquidators also had to take legal proceeding to terminate a purported lease between CIT and the Candidate, as well as action to get vacant possession so one of the properties occupied by the Candidate, could be settled.

16.35. I also consider the telephone conversation between the Candidate and BBG's liquidator on 30 July 2020, and referred to at [44] of the Judgment, to be highly relevant. Mr Grant in a sworn statement deposed that when he told the Candidate he would not accept the Candidate's claims in BBG's liquidation he "responded by saying that he would ensure that BBG's claim in the CIT liquidation would be rejected and that he was going to instruct his lawyer to ensure the BBG claim would be set aside."

16.36. At paragraph 19 (e) of the KA letter of 14 September 2021 KA says "The allegation that our client advised the liquidator of BBG that our client would ensure the claim of BBG be rejected is denied."

16.37. To the extent it is necessary, I prefer the sworn statement of BBG's liquidator to the statement in the Submissions. I also note that the Candidate did not challenge Mr Grant's statement in his affidavit and I note the comments of Sussock AJ in relation to this. See [50] and [51] of the Judgment.

16.38. If in fact there were no loans to BBG from interests associated with the Candidate then my narrative from paragraph 16.14 onwards is not directed to mismanagement which has some connection to the insolvency of BBG. But it has some relevance as a factor I can take into account when I consider the exercise of my discretion.

16.39. I refer to my comments at paragraph 14.5. My determinations here have no bearing on any legal proceeding that may ensue between the Candidate and BBG's liquidators as to the existence or not of any loan, or any other matter referred to in this section.

17. Was the entry into the ASP in the best interests of BBG

The allegation

17.1. BBG and CIT were related companies and the Candidate was the sole director for both. There was nothing in the materials I received from IET to suggest why BBG should enter into a contract to purchase property from CIT, and whether the agreement was fair to BBG.

17.2. It is noted that there was no evidence of BBG holding any director or shareholder meetings, declarations of conflicts of interest and the passing of any resolutions. It was alleged that there was mismanagement and that it gave rise to a breach of s 131 of the Act.

Released under the Official Information Act 1982

Response of the Candidate

17.3. The Candidate says (paragraph 13(a) of the KA letter of 14 September 2021) there was a sound commercial rationale for the purchase. BBG entered into the ASP with the intention of subdividing the property and making a profit from selling the subdivided lots.

17.4. In terms of the lack of documentation it was said at paragraph 13(b):

"(i) It is, in our understanding, not uncommon in practice for this to be the case where the same director is involved on both sides of a transaction.

(ii) Although not ideal, the lack of complete internal company documentation is understandable in this case, given the pressures faced by our client in or around mid-2014."

17.5. The KA letter then outlined the pressures faced by the Candidate. It also says at paragraph 13(b)(iii) that the failure of internal company documentation could not have led to the failure of BBG.

General legal principles

17.6. Before looking at the specifics of this case it is useful to put these matters into a wider context. The principles underlying s131 are relevant when considering both this allegation, and the other allegations. S131(1) requires that a director "must act in good faith and in what the director believes to be in the best interests of the company." This is a subjective test. Previous case law (**Robb** at [102]) put an objective gloss on some director actions but this has been overturned by **Debut Homes**.

17.7. However, **Debut Homes** notes at [113] there are exceptions and qualifications to the subjective test. They include:

(a) Where there is no evidence of actual consideration of the best interests of the company;

(b) Where, in an insolvency, or near insolvency situation there is a failure to consider the interests of the creditors;

(c) Where there is a conflict of interest or where the action was one that no director could have made if they had any understanding of their fiduciary duties;

(d) The director's decision was irrational.

17.8. The general principle behind s131 lies in the relationship between a director and the company. The company is a separate legal identity to its shareholders, directors and employees. It is also separate from any other company controlled by the director. The director owes duties to the company; and its creditors, when solvency is an issue. The personal interests of the director do not necessarily equate to the interests of the company.

17.9. In normal circumstances, where there are dealings between a company and an independent third party it can be inferred the director will act in the best interests of

Released under the Official Information Act 1982

the company. There is no reason for the director to do otherwise. Where the dealings are between the director and the company (or between two companies where there is a commonality of directors and shareholding) that inference is no longer there, because of the inherent conflict of interest.

17.10. That same inherent conflict of interest arises when a director does not consider the interests of each and every creditor. A shareholder will wish for a company to keep going even if the company is insolvent. The shareholder will not suffer any further downside if the company's losses increase, but will get the benefit of the upside if the company's fortunes are turned around. Where the director is also a shareholder or related to the shareholder, the conflict is obvious. And even in the best of circumstances **Debut Homes**, at [43], notes directors are not well placed to make dispassionate decisions in such circumstances.

17.11. Where there are two or more companies with common directors and shareholders the directors may wish to treat them, effectively, as one entity. That may be permissible in accounting terms but that is not the case legally. The operations of a group of companies could be contained in one company with several divisions. But when multiple companies are set up then the directors of each company must consider the interests of that company individually; not as a group.

17.12. The interests of each company in the group are likely to be divergent. For example, in the group, Company A transfers its assets to Company B. The assets are worth $100,000 and there are two creditors in Company A totalling $100,000. If Company B pays only $50,000 for the assets, then there are now insufficient assets in Company A to repay its creditors. Company B has no liability to the creditors of Company A so the creditors of Company A no longer have recourse to the assets they would have been entitled to.

17.13. If a director cannot produce evidence of meetings, resolutions, certificates etc the inference is that no meetings were held, resolutions passed or certificates provided. That is consistent with **Toilolo**. The holding of meetings and putting things in writing is not just a matter of administrative convenience. It is an essential plank of good governance. Following the correct procedures helps focus a director's mind as to what is in the best interests of a company.

My decision

17.14. I am satisfied that BBG entered into the transaction with the intention of making a profit. That is not really the issue. The question was more directed as to why should the sale to BBG take place at all when CIT could have undertaken the transaction and not involved BBG at all.

17.15. The commercial rationale for doing so is explained in paragraph 22 of the KA letter of 14 May 2021. The letter said BBG was chosen as the vehicle to develop the St Heliers site "because it was a subsidiary of a prenuptial trust and therefore thought to be not vulnerable to attack by Ms Sparks."

17.16. But that does not address whether the agreement was fair to BBG as opposed to CIT. For example, if the value of the land was $5 million but BBG paid $10 million that would be unfair to BBG and not be in its best interests. That would amount to mismanagement.

Released under the Official Information Act 1982

17.17. Had the transaction been an arms-length transaction between two independent parties it could be inferred that the price paid by BBG was a fair price. But when it is a deal between two related parties that inference is no longer available. The BBG director, considering only the interests of BBG, should have turned his mind as to the price. The type of process referred to in s 161 when conferring benefits on a director are relevant here. BBG should have held a meeting and determined that the transaction would be fair to the company. The resolution should set out the reasons why the BBG considered the transaction was fair to BBG. One might reasonably expect some independent evidence, like a valuation report, that the price was a fair one.

17.18. There was nothing at all. And if it was the usual practice for the Candidate to have such inter-company dealings without internal documentation and processes then I am satisfied this is mismanagement. The Candidate said that personal pressures he was under was the reason for no documentation. That does not cure the mismanagement but it is a factor I can take into account when considering the exercise of my discretion.

17.19. The failure to have internal documentation can be linked to the failure of a company in some circumstances. It is not necessary to expound on the general reasons why this is so, when there is a very specific reason in the case of BBG. The Candidate says that the terms of the ASP do not permit BBG to charge back the JGC invoice to CIT. If that is correct then BBG incurred a liability to JGC, which benefited CIT, but which CIT avoided liability to BBG. That is clearly not in the interests of BBG.

Conclusion

17.20. I am satisfied that the Candidate, with his BBG director hat on, failed to properly consider the interests of BBG before entering into the ASP for the reasons given. I am satisfied this was mismanagement.

17.21. Because of the conclusions I have come to regarding the other allegations, I have decided to suspend my decision whether or not the mismanagement was linked to the failure of the Company. Nevertheless, the mismanagement identified is a factor I can take into account in the exercise of my discretion.

18. Taking into account the purpose of s 385 and all relevant factors, should the Candidate be prohibited

18.1. Having established that mismanagement was at least partially responsible for the failure of the Company, I have the discretion to prohibit the Candidate as a director. That power can be exercised pursuant to the general discretion contained in s 385 of the Act.

Purpose and intention of s 385

18.2. The legislative history and policy behind the introduction of s 385 is set out in **Davidson**. I have followed that and taken it into account when considering the Candidate here. The analysis of s 385 in **Davidson**, at [87] – [103], takes the legislative history into account. In that analysis Miller J, at [91], makes it clear that the purpose of s385 is both protective and punitive in character.

18.3. **Davidson** at [91] then says:

Released under the Official Information Act 1982

"Prohibition is aimed not at remedying wrongs done to shareholders and creditors of the insolvent company but at protecting the public from unscrupulous or incompetent directors in future, deterring others and setting appropriate standards of behaviour."

18.4. I refer to these strands again, below. For present purposes I note that **Davidson** at [91] and again at [137], makes it clear that the purpose of s 385 is not only to protect the public but to also act as a deterrent and set appropriate standards of behaviour.

18.5. **Davidson** at [97] makes it clear that s 385 is "protective and forward looking." For that reason, my enquiry is addressed initially "to mismanagement of the company's affairs and its causal connection to insolvency, not the behaviour of individual directors." Once the mismanagement has been identified "all of the company's directors and managers are eligible for prohibition." It is at this point my focus switches to the individual qualities and conduct of the candidate.

18.6. The exercise of my discretion "must be exercised for the statutory purpose, that of excluding from company management those who are unsuited for it" – **Davidson** [100]. Where a person has been responsible for mismanagement which has resulted in a loss to a company or its creditors then that indicates such a person may not be suited to management of a company unless there are sufficient countervailing factors.

18.7. That is so whether or not the director personally benefits, or could potentially benefit, from the mismanagement. As I have noted the intention of s 385 is to both protect the public (of which the creditors are an important component) and to act as a deterrent. S 385 applies to shareholder directors employed by the company as well as non-executive directors who may have no skin in the game.

18.8. The nature of the mismanagement can take different forms. For example, a shareholder/ director's mismanagement might take the direct step of diverting company money to themselves. But if another director of the same company was aware of what was happening, or should have been aware, and did nothing that can be just as reprehensible. By doing nothing would be an abrogation of the duties of a director and would suggest such a person was not suited to manage a company. The effect on the creditors is just the same where a director stands passively by and does nothing.

18.9. In **Davidson** the nature of Mr Petricevic's mismanagement was different to that of Mr Davidson. Mr Davidson was a man of integrity. Mr Davidson's mismanagement can be at least partly characterised as an over reliance on Mr Petricevic (when he knew, or should have known. that was unwarranted); and a failure to control Mr Petricevic. It was Mr Petricevic who abused his position. Mr Petricevic could be classified as an unscrupulous and dishonest director.

18.10. Yet ultimately the mismanagement of Mr Davidson was determined to be serious. His mismanagement allowed Mr Petricevic to continue his dishonest activity. Although the mismanagement was different the result for the creditors was the same. The main reason why it was concluded Mr Davidson should be prohibited was not because he posed a risk to the public. It was because there was a need to set standards and for the prohibition to act as a deterrent to others.

Released under the Official Information Act 1982

Conduct of director as compared to other directors of the same company

18.11. In the exercise of my discretion **Davidson**, paragraphs 97 and 98 makes it clear that mismanagement does not have to be sheeted home to a particular director before the power of prohibition arises. However, paragraph 97 notes that actual mismanagement of a candidate, or the lack thereof, is a significant issue when considering the exercise of my discretion or considering the term of any prohibition.

18.12. The actual conduct of a candidate while in office might assist them where there is more than one director. In those circumstances I can consider whether there were actions of the candidate which can be differentiated from the other director(s) and which would give rise to factors which would favour the Candidate when considering the exercise of my discretion.

18.13. Here, this issue does not apply because the Candidate was effectively the sole director of the Company.

Wheeler dealer directors

18.14. At paragraph 87, **Davidson** makes reference to the comment by the Rt Hon Geffrey Palmer when introducing the legislation encompassing s 385. He noted the public concern over "persons who use the benefits of limited-liability companies to wheel and deal for their own benefit."

18.15. It was also referred to in **Brand v Registrar of Companies** [2018] NZHC 3148. Cull J held that Mr Brand did not fall into the wheeler and dealer category of directors. She determined Mr Brand should not be prohibited as a director.

18.16. I am satisfied that s 385 is not limited to wheeler dealer directors. I consider the formulation as set out in **Davidson** remains the case that best sets out the principles, and process, I should follow under s 385. As I have noted above Mr Davidson clearly did not fall into the category of a wheeler dealer, nor was he considered to be a risk to the public. Yet the court held that that after considering the exercise of my discretion it was appropriate to prohibit Mr Davidson. I consider **Davidson** correctly analyses the policy and purpose of s 385. S 385 applies to incompetent and misguided directors as well as unscrupulous directors.

18.17. **Brand** turned very much on its largely unique set of facts. Just by way of example, Cull J considered Mr Hubbard (a fellow director of Mr Brand) was primarily responsible for the mismanagement of the companies and Mr Brand could be positively differentiated from him. In addition, Cull J noted that Mr Brand had gone to considerable (and successful) efforts to get Mr Hubbard to introduce some of his personal assets back into the companies for the benefit of the creditors. She also noted that the statutory management enabled creditors to recover substantially all they were owed (albeit at a much later date). None of these types of factors are present here.

Factors I can take into account in the exercise of my discretion

18.18. I note that a director's role in mismanagement which contributed to liquidation is not the only factor to be considered when considering the exercise of my discretion. I consider that in the exercise of my discretion I can take into account other factors so long as I do so in a manner consistent with the purpose and intention of the Act.

Released under the Official Information Act 1982

18.19. **Davidson** at [97], noted that in the exercise of my discretion I am "not confined to conduct that caused the company's insolvency; all of the individual director's attributes and conduct in office may be taken into account." This was followed by **Toilolo** at [102]. Such an exercise requires, to the extent known, consideration of all the countervailing factors, including all the attributes of the candidate and their personal conduct both then and now.

18.20. Therefore, I have reviewed again all the information referred to in this Minute, solely for the purposes of considering the exercise of my discretion. The factors I have taken into account are those referred to in paragraph 19 below.

19. The specific factors considered in the exercise of my discretion

Nature of the mismanagement and the role of the candidate in relation to that

19.1. Where a candidate is solely, or jointly with other directors, responsible for the mismanagement that is a very important factor to take into account when considering the exercise of my discretion. What part did the candidate play in the mismanagement of the company. The focus is on the extent the candidate contributed to the mismanagement leading to the insolvency of the company.

19.2. The nature of the mismanagement is also important. Was it incompetence or did it involve recklessness or fraud. Another relevant factor is whether the candidate personally benefited from the mismanagement.

The purpose and intention of the Act generally

19.3. The long title to the Act reaffirms the value of the company structure and the limited liability of individuals in carrying out business activities. This is seen as a way of achieving economic and social benefits; the spreading of economic risk and the taking of business risks.

19.4. I also recognise that the large majority of commercial enterprise in New Zealand is conducted through small and medium sized businesses under a corporate structure. Therefore, companies are important for New Zealand's business activity. The Act encourages business enterprise.

19.5. It is recognised that in seeking success, business risks will be taken. It is implicit that with risk comes the possibility of company failures with a loss to creditors. S 385 has potential application when a company has failed and creditors have lost money. That does not mean that the exercise of the power of prohibition will automatically come into play. This is so even if, with the advantage of hindsight, it could be determined the directors could have done better.

19.6. The exercise of the power of prohibition under s 385 is likely to come into play when a director abuses the company structure; takes illegitimate business risks; cannot recognise when a mistake has been made; or does not alter their approach when circumstances change. The right to conduct business through a limited liability company is not an absolute right.

19.7. New Zealand has made a policy decision to make it easy for a person to set up in business with a company structure and limited liability. With the benefit of

Released under the Official Information Act 1982

commencing business easily and cheaply it is incumbent on directors to comply with their duties and obligations. The general health of a business community depends on all persons adhering to common standards. It is only fair to the rest of the business community, who take the time and effort to understand what is required, to remove those who do not meet or flout those standards.

Setting of standards and deterrence

19.8. I have already noted **Davidson** and that it considered that the setting of standards, and deterrence, are important factors. All persons who are directors or manage a company must have it reinforced for them that they must exercise proper governance and not ignore the basic duties imposed on them. They must be held accountable for their actions. It is also important that there is consistency in treatment of candidates so as to be fair to all candidates.

19.9. In addition, I consider that s 299 of the Insolvency Act is analogous to s 385. **Henderson** [2017] NZHC,474 considered the purpose of s 299 of the Insolvency Act and it followed and approved **Davidson**. At [29] Associate Judge Osborne stated:

"--- there is a public interest in protection. This goes beyond that section of the public who may be involved in a particular company or in potential dealings with the former bankrupt and from the most obvious group to be protected. There is also a public interest in deterrence."

19.10. There is a need to maintain public confidence that directors will carry out their functions having due regard for the law and will not put their personal interests ahead of the parties they owe duties to.

Risk to the public

19.11. Another important factor to take into account is the protection of the public. The public requires protection from incompetent, stupid, misguided and irresponsible directors as well as the unscrupulous and dishonest director. If the Candidate was ever a director or manager of a company in the future is there a risk that he could mismanage a company and that insolvency would result in a loss to creditors.

19.12. In making this assessment I have to determine how fundamental and serious were the failings of the Candidate and whether he then and now fully understands the duties and obligations of a company director.

19.13. Protection of the public is also partly achieved by restricting a person from exposing the public to the risk of loss from further misconduct. **Henderson**, at [31], quoted with approval the following passage:

"Partly a disqualification order --- achieves its purpose of protecting the public by deterring other directors from misconduct" – Sir Andrew Park in **Re Morija plc, Kluk v Secretary of State for Business, Enterprise and Regulatory Reform** [2007] EWHC, 3055, at [33].

Released under the Official Information Act 1982

Personal factors

19.14. I must take into account the conduct of the director while in office and also what the person may have done outside the office as a director. That includes conduct while the candidate was a director as well as subsequently.

19.15. The personal attributes of a candidate are also relevant but unless there are exceptional circumstances the risk to the public is likely to outweigh the risk of possible adverse circumstances to the candidate. A candidate is likely to incur some adverse publicity from a notice of prohibition and may suffer reputational harm. It is likely that prohibition will cause difficulties for a candidate and his or her family. But that is an inevitable consequence of being prohibited and is an element of the deterrent factor. That, of itself, is not a valid reason to not impose a period of prohibition. I deal with the issue of future work prospects later in this minute.

19.16. There are some other aspects of the personal factor which I have addressed in separate sub-headings below.

Criticisms of the Candidate in the Judgment

19.17. As referred to in paragraphs 14.10-14-14 I have disregarded the criticisms of the Candidate by Sussock AJ in the Judgment.

Health issues

19.18. I have taken account of the matters raised by the Candidate at paragraph 23 of the KA letter of 16 July 2021, as well as the testimonial of s 9(2)(a), and the medical statement of s 9(2)(a) and other information contained in the KA letter of 12 October 2021. I have also taken into account that the Candidate is the sole carer of his three children.

19.19. To maintain the Candidate's privacy, I will not detail all of the above information here. But I can say that I accept that the Candidate would have been under considerable stress with what was going on in both his business and personal life and that was likely to have had some effect on his decision making in this period.

Testimonials

19.20. I was provided with the testimonials provided by the Candidate and referred to at paragraph 20 of the KA letter of 14 September 2021. I have read the testimonials and taken them into account. They offer another perspective of the Candidate which does not necessarily come through from the other information in relation to the mismanagement.

Consequences of prohibition on future work prospects or existing businesses

19.21. I note that a notice of prohibition does not necessarily prevent a person from taking up paid activity. It simply restricts the scope of those activities. For example, in most circumstances being an employee of an organisation would not breach a notice of prohibition.

Released under the Official Information Act 1982

19.22. Furthermore, a notice of prohibition will not necessarily prevent a person from carrying on their own business provided it is unincorporated. It is true that without the privilege of limited liability the individual becomes personally responsible for the debts of the business but that just reinforces the principle that a sober assessment should be undertaken each time the business is about to enter into significant commitments. In addition, it would not be too different from operating a company because nearly all banks, and many trade creditors, require a director of a company to personally guarantee a company's debt.

19.23. There is an additional factor to take into account where a candidate has continued to be a director or manager of another company, subsequent to the mismanagement alleged in respect of the failed company. If the new company has operated successfully in that period that is a positive factor in favour of the candidate and must be taken into account.

19.24. Each case must be considered on its merits and the matrix of all relevant matters. It is sufficient to note here that there is a difference between managerial responsibilities and work expertise. So, if the business is a bakery, it is likely to be crucial that it has persons who are skilled bakers. The company also requires a director, or directors, to manage the business. The skilled baker does not necessarily have to be a director or manager. The skills required are very different.

19.25. Also, the structure of the business can be altered by the addition of other directors who could take the place of the candidate. A candidate could still be employed by the business. Professional advice would need to be taken so that the employee or consultant role did not encompass managerial responsibilities. Alternatively, if the candidate wished to remain in control of the business, then the underlying business of the company could be transferred to an unincorporated business.

19.26. In the present case the Candidate is carrying on business, involving property, through other companies. The Candidate has provided some further information in paragraph 23 (c) of the KA letter of 16 July 2021 about the continuing business activities of the Candidate. The Candidate says that those other companies have a lower risk profile than that of the Company. Those reasons include low overhead expenses; no employees and no property development activity.

19.27. I agree that on the basis of the Submissions the ongoing companies have a lower risk profile and I have taken this into account in my weighing up of all the factors. But in doing so I recognise that in the absence of a period of prohibition there is nothing to prevent the Candidate from changing the nature of his business activities in the future.

19.28. The Candidate did not say what effect his prohibition under s 385 would have on the other companies he is a director of. However, I have assumed that the Candidate would say that it would cause him considerable difficulty to relinquish his directorships and managerial responsibilities to those companies. I have taken this factor into account, along with the other factors referred to, in the exercise of my discretion.

The extent of the loss and its effect on creditors/investors; the rate of loss and the duration

Released under the Official Information Act 1982

19.29. The extent of loss to creditors is a relevant consideration. A loss of $1million is more serious than a loss of $50,000 for example. Also, the duration of the mismanagement is important and whether the director recognised a change of approach was required. It will be less likely that the amount of the loss, of itself, will be the predominant factor but it will be in the mix of all the factors. Another potential factor is the nature of the mismanagement and the effect it had on creditors or investors of the company.

Timeliness

19.30. The principle of timeliness is relevant when considering the exercise of my discretion. I referred to this generally in paragraphs 4.7-4.11 of the Interim Minute and paragraph 4.12 in this minute in respect of BBG. It is appropriate that I briefly expand on this when considering the exercise of my discretion.

19.31. In **Toilolo** there was a considerable delay in IET referring Mr Toilolo to me. There was an elapse of over four years from the time of liquidation to the issue of my final minute. Also, Mr Toilolo had served a period of bankruptcy in this period so a delay in starting a period of prohibition was prejudicial to him.

19.32. Here the mismanagement took place in 2014 but that mismanagement could not be reviewed until the Company was placed in liquidation in 2019. And once IET received a complaint about the Candidate's handling of the Company in 2020, there has been no lack of timeliness on their part. Also, any delays since the issue of the Notice have been to accommodate the Candidate by granting him the extensions of time that he sought.

19.33. In **Toilolo**, Wylie J said, at [108], that the issues of deterrence and risk must not have been as important for IET, given the delays. I note that I am the decision maker and not IET. In some situations, the issues of risk and deterrence may become less important over time, particularly if there is a subsequent change in behaviour of a candidate.

19.34. That is not the situation here. Because the Candidate considers his conduct was acceptable, and he shows no remorse, then the risk and deterrence factors remain very important. For all the foregoing reasons, timeliness is not a factor I have taken into account when considering the exercise of my discretion.

Market conditions

19.35. The market conditions in which a company is operating is a potentially relevant factor when considering the exercise of my discretion. For example, starting a new business in the midst of a global recession is likely to be more challenging than one where trading conditions are benign, A director should be allowed more leeway where the operating environment is challenging.

19.36. However, directors must set policies and strategies that take account of the market conditions that actually exist; not as they would like them to be. In challenging circumstances, one would expect for example, that budgets and financial projections would be more conservative and robustly reviewed. The fact that business conditions were difficult will not be a positive factor for directors if their strategies and approach failed to take the challenging conditions into account.

Released under the Official Information Act 1982

19.37. Natural disasters, such as an earthquake, can occur. From a business perspective, such events are not foreseen and are outside the control of a director. A flourishing business could be adversely affected by such an event and subsequently fail. That is potentially a factor to not impose a period of prohibition when considering the exercise of my discretion.

19.38. But it will still depend on the individual circumstances as to the relative weight of such a factor or whether it should be a factor at all. Although the disaster may have not been foreseen the main issue then becomes how have the directors reacted and adapted the company's strategies and approach to the altered market conditions.

19.39. The position is not much different to a company losing a major customer, or a major supplier not being able to provide an essential product because of a fire in their factory. Again, it can be said that such events were outside the control of the directors. But as market conditions fluctuate and change it is the role of directors to reassess the position and alter the approach to ensure the company remains profitable.

Acquisition rights

19.40. The KA letter of 12 October 2021 advises that or around 1 October 2021 the Candidate entered into negotiations with JGC to obtain an assignment of JGC's claim against BBG. On 6 October 2021 JGC entered into the deed with the Pheonix Trust Limited ("PTL") which is a company controlled by the Candidate.

19.41. I was provided with a redacted copy of the deed. I was told that confidentiality provisions with JGC meant that the Candidate and PTL "could not reveal the redacted portion even if they were minded to." (paragraph 4).

19.42. I take from this statement that the Candidate does not wish me to see the redacted portion. I say this because it might have been possible for me to view the redacted portion. It might be that the present circumstances would constitute an exception to maintaining confidentiality. The Candidate could have also sought a waiver from JGC.

19.43. I am not aware whether the redacted potion might have some relevance to my consideration of the Candidate under s 385. In any event I can only give weight to the actual information that is put before me.

19.44. I am satisfied the deed carries limited weight when considering the exercise of my discretion in relation to the Candidate. It does not "cure" the Candidate's mismanagement. And the effect of the deed does not mean PTL paid JGC the amount owed by BBG to JGC.

19.45. This is a commercial arrangement whereby PTL, after making a payment to JGC of $138,000, now stands in the shoes of JGC. That means PTL has the right to receive $836,012.06 from BBG. So, if the Candidate's appeal against the Judgment is unsuccessful or discontinued, then BBG should receive a payment from the liquidators of CIT being a creditor of CIT. That payment would come about for the work that was done by JGC. The moneys would be distributed to the only two creditors of BBG (PTL and the IRD) in the proportion of the total debts owed to them.

Released under the Official Information Act 1982

19.46. In addition, PTL now becomes the major creditor of BBG. That may mean PTL may now have some rights as to influence how the liquidation of BBG is conducted or even being able to appoint a new liquidator in place of the existing liquidator.

19.47. The Candidate has made reference, in paragraph 5 of the KA letter of 12 October 2021, as to certain requests of BBG's liquidator and subsequent action taken by the Candidate. I have taken it into account but placed little weight on it. Outcomes are uncertain. Also, parties can change their position and the events described in paragraph 5, were before PTL obtained the acquisition rights. There has been a material change of circumstances.

19.48. Notwithstanding my foregoing comments, I did take the existence and effect of the deed into account when considering the exercise of my discretion.

The reviewing of the factors

19.49. Each individual case must be considered on its merits. The weight that might be given to an individual factor will depend on the facts of that case. Several cases may have all of the same individual factors but the weight attached to each individual factor may be different which will lead to different results.

19.50. Subject to the overriding principle that each individual case is considered on its merits, the fact that the risk to the public might be assessed as low or zero does not automatically mean that there would be no prohibition or only a limited period of prohibition.

19.51. The deterrence factor remains important. For example, in **Davidson** the risk to the public was considered to be non-existent or negligible. Nevertheless, in that case it was agreed that, in considering the exercise of my discretion, prohibition was appropriate.

19.52. That said, I consider that in making my decision it should necessarily be forward looking. Past conduct is likely to become less important the further back it goes, unless it indicates a repeating pattern of mismanagement or misconduct. I need to consider how relevant past mismanagement is when considering whether a candidate can properly carry out the functions of a company director going forward. So, how a candidate has conducted themselves subsequent to the mismanagement is a relevant factor.

My consideration of all the factors referred to in respect of the Candidate

19.53. I have considered, and taken into account, all the factors previously referred to. In the reviewing of all the factors I first consider the actual mismanagement that contributed to the failure of the Company.

19.54. The Candidate was the sole director and directly responsible for the mismanagement. I consider each act of mismanagement was, at the very least, reckless, and they were serious. The actions taken by the Candidate which gave rise to the mismanagement were considered and deliberate. They were taken to maximise the commercial benefit to the Candidate personally. The Candidate did not consider, or else sufficiently take into account, the duties he owed to the Company or its creditors.

Released under the Official Information Act 1982

19.55. From the information referred to earlier it is clear the Candidate wanted to develop the Waimarie property. He also wanted to ensure that he could enjoy the fruits of that labour without his ex-wife having any share of those fruits or for her to have any influence or control in the development. That all seems sensible and prudent from the perspective of the Candidate. There is no objection to that.

19.56. And the Candidate sought to maximise the commercial advantage and returns he could achieve from his dealings. Again, there is no objection to that.

19.57. But the Candidate, in seeking to achieve his ends, chose to do so through company vehicles. And in going so the Candidate was required to separate his personal interests from the duties he owed the Company and its creditors. There is no evidence that the Candidate did so. The evidence demonstrates that the Candidate either cannot understand that his personal interests do not equate with the interests of the company, or else he has disregarded it. And similar comments apply when considering the different interests of BBG and CIT. In relation to the transactions referred to earlier, where they advantaged one company, they necessarily disadvantaged the other company.

19.58. I recognise the stress and pain that the Candidate was under at the times of the mismanagement. I have made some allowance for this as an explanation as to why the Candidate allowed some of the mismanagement to occur; the verbal contract for example. But it carries less weight than it might do. The Candidate has not claimed that, with the advantage of hindsight, bad decisions were made in the heat of the moment through stress or any underlying medical condition. Rather the Candidate even now continues to assert the decisions that he made were appropriate. Based on the Candidate's Submissions it seems he would have made the same decisions today, without being under stress or pain from his underlying medical conditions.

19.59. On the other hand, I am impressed with some aspects of the Candidate's personal qualities and given them full weight. The resilience of the Candidate for example.

s 9(2)(a)

19.60. I consider that the Candidate currently remains a risk to the public. He disregarded duties that are basic and fundamental and this continued for a significant period of time. The Candidate does not really acknowledge any fault on his part. If a director cannot recognise their past mistakes, then there is a risk of those same mistakes being repeated in the future.

19.61. I consider that on the basis of deterrence and setting appropriate standards of commercial behaviour that is another reason for exercising my discretion to impose a substantial period of prohibition. It is a fundamental plank of good governance that a director must not allow his or her self-interest to be a factor in any decisions made as a company director. All directors must recognise that if they fail to adhere to well established standards, then there must be consequences. Anything less than a substantial period of prohibition would be a slap in the face for all law-abiding directors. I also note that the Candidate has not expressed any remorse. The Candidate asserts that he has done nothing wrong.

Released under the Official Information Act 1982

19.62. I have taken into account that the Candidate has continuing business interests which are currently conducted through companies of which the Candidate is a director. The result of my decision is that the Candidate will have to resign as a director of those companies and relinquish any management position. I repeat what I said at paragraph 19.23-19.28. In the end I have to take into account of the setting of standards and treating all candidates on a consistent basis.

19.63. I have taken the testimonials into account. I will not refer to their contents in detail but conder the overview at paragraph 20 of the KA letter of 14 September 2021 is helpful. It is headed "Professional testimonials (testimonials as to commercial acumen and integrity)." The overall tenor of the testimonials is that each person who has provided a testimonial, considers the Candidate has a high degree of professionalism; a good knowledge of company law and the duties required of a director; and one who seeks professional advice as necessary.

19.64. I accept the persons who gave the testimonials are persons of integrity. I respect their opinions. The fact that I do not share their opinions, in respect of the particular mismanagement that I have considered, does not impugn their integrity in any way.

19.65. Firstly, I accept the view that the Candidate is a person of commercial acumen. It is apparent that the Candidate has been in business for some while and has shown resilience when in some difficult circumstances. But a successful property developer/investor does not necessarily equate to being a good company director. The skills required are very different. Also, it is one thing to have a good knowledge of company law and director duties, but another thing as to whether they are applied in any given situation.

19.66. Based on what is said in the testimonials I have assumed there have been specific examples in the past which justify the opinions expressed. But they are not expressing an opinion as to whether the circumstances referred to here, meet the standards that they identify in the testimonials. So, whatever may have been the situation(s) in past dealings they were not present here. On the other hand, if the mismanagement here can be regarded as an aberration then the testimonials carry greater weight.

19.67. I have taken all the factors referred to in paragraph 19 above although I have not specifically referred to all of them in my final analysis. The reality is that, based on the matters referred to above, the decision was clear cut. But several of the factors not expanded on in the final analysis have more importance when I come to consider the appropriate period of prohibition.

My conclusion regarding the exercise of my discretion

19.68. After taking into account all the matters referred to in paragraph 19 above, and considering the statutory purpose of s 385, I have determined that I should exercise my discretion to impose a period of prohibition.

Released under the Official Information Act 1982

20. Term of prohibition

The factors I should take into account

20.1. In following the process set out in **Davidson** I have considered again all the information referred to in this final minute. In considering an appropriate period of prohibition it is through the prism of information which is relevant to the statutory purpose of s 385. I have taken into account all the specific factors referred to in the preceding paragraphs. They apply as if they had been set out in full here.

The reviewing of the factors

20.2. My comments as to the general reviewing of all the factors, as set out in paragraphs 19.49-19.52 apply, as if set out in full here, when considering the appropriate period of prohibition.

20.3. In respect of **Davidson** the risk to the public was considered to be negligible or non-existent. The court upheld the period of prohibition that was imposed on Mr Davidson of half the then maximum period permissible.

20.4. I have also taken into account and followed **Clarke v Registrar of Companies** [2018] NZHC, 1608 generally, and [30] – [35] in particular. **Clarke** was a case where van Bohemen J upheld a period of prohibition of 7 years. The judge noted that the period of prohibition in that case was one where I considered the protection of the public and setting of standards to be the predominant factors.

20.5. Clarke noted the differences between Mr Davidson and Mr Clarke. At [32] van Bohemen J said that the lack of impropriety of Mr Davidson was in sharp contrast with Mr Clarke who had a "flawed understanding of his responsibilities as a director and little insight of the impact of his actions on others." The judge then said at [33]:

"In terms of protection of the public therefore, Mr Clarke's situation is different and more serious from that of Mr Davidson, notwithstanding the much more significant losses suffered --- [in Bridgecorp] --- and notwithstanding the fact that it was the IRD rather than private investors that suffered the loss in Mr Clarke's case."

20.6. Both **Davidson**, at [142] and **Clarke**, at [33] recognise that the 10 year maximum period operates as a cap and is not reserved for the worst possible case with a sliding scale down from that.

20.7. I consider the nature of the mismanagement will usually be more important than whether there has been a single company failure or multiple company failures. I note that **Clarke** at [33], stated that to place too much emphasis on losses suffered "risks making punishment the primary focus" which would be a distortion of s 385. In considering the term of prohibition I consider cumulative separate acts of mismanagement are more serious than multiple breaches of the Act stemming from one substantive act of mismanagement.

My consideration of all the factors in respect of the Candidate

20.8. My review of all the factors to be considered regarding the term of prohibition raises all the matters I referred to at paragraphs 19.49-19.69 when I considered the exercise of

Released under the Official Information Act 1982

my discretion. I repeat them here as if they were set out in full. I have considered the Candidate on the mix of actual factors that are present in his case as referred to in the preceding paragraph.

20.9. The likely loss to creditors here is very much less than the losses suffered by the creditors in **Davidson** and **Clarke.** But the nature of the Candidate's conduct as a director of the Company is very different to that of Mr Davidson. Mr Davidson was a non-executive director who gained no personal benefit from the decisions he made as a director. Mr Davidson was conscious of his duty to the shareholders if the companies of which he was a director, and to their creditors. It was also considered that Mr Davidson was not a risk to the public.

20.10. The personality and character of the Candidate is different to that of Mr Davidson.

20.11. Each act of mismanagement was separate. I could fix the period of prohibition by assigning a notional period to each act of mismanagement and arrive at a grand total. But in this case, when it comes to fixing a period of prohibition, I consider the acts of mismanagement can be regarded as being inter-related. It is more appropriate to look at fixing the period of prohibition in this light.

20.12. Also, when I consider the practical effect of the deed, it has had the result that JGC has received some payment for the work it undertook for BBG. I have also taken into account that there were only two creditors of the Company and the aggregate debt was much less than in **Davidson** and **Clarke.** And, although timeliness is not an issue in the sense referred to in **Toilolo**, I have taken account of the fact that the initial mismanagement happened some time ago.

20.13. The Candidate is resourceful and resilient, and appears to be a person of intelligence and ability. The Candidate acknowledged no wrongdoing and expressed no remorse. However, I am hoping that the Candidate now recognises that he could, and should, have done things differently. That would mean that the Candidate not only has the capacity to change, but that he will willingly do so. My decision in paragraph 21 below is predicated on this hope.

21. My decision

21.1. After taking all matters into account, and the particular mix of factors in this case, I direct that the Candidate is prohibited for a term of four years (to take effect from the date of the section 385(3) notice) from being a director or promoter of a company, or being concerned in, or taking part, whether directly or indirectly, in the management of a company.

....

Peter Barker
Deputy Registrar of Companies
20 October 2021

Released under the Official Information Act 1982