



The real deal with Mainzeal



Hi

In the wake of Mainzeal there has been some commentating that the Companies Law, with respect to director's duty, needs attention. The Court of Appeal explicitly stated that "The legislation governing insolvent trading in New Zealand is unsatisfactory in a number of respects."

The Court of Appeal is partly correct, but not in the way many understand the situation. The recent Mainzeal decision is important because it clarifies case law in a few key areas; especially as to how the courts should assess losses when looking at director's breaches, and provided some guidelines as to how director's individual liability should be treated by the courts.

It is also fair to critique the decision in that the Supreme Court didn't really explain why some directors were more liable than others. However, that is not the lesson of this case. The real lesson from this case was the horrendous delay.

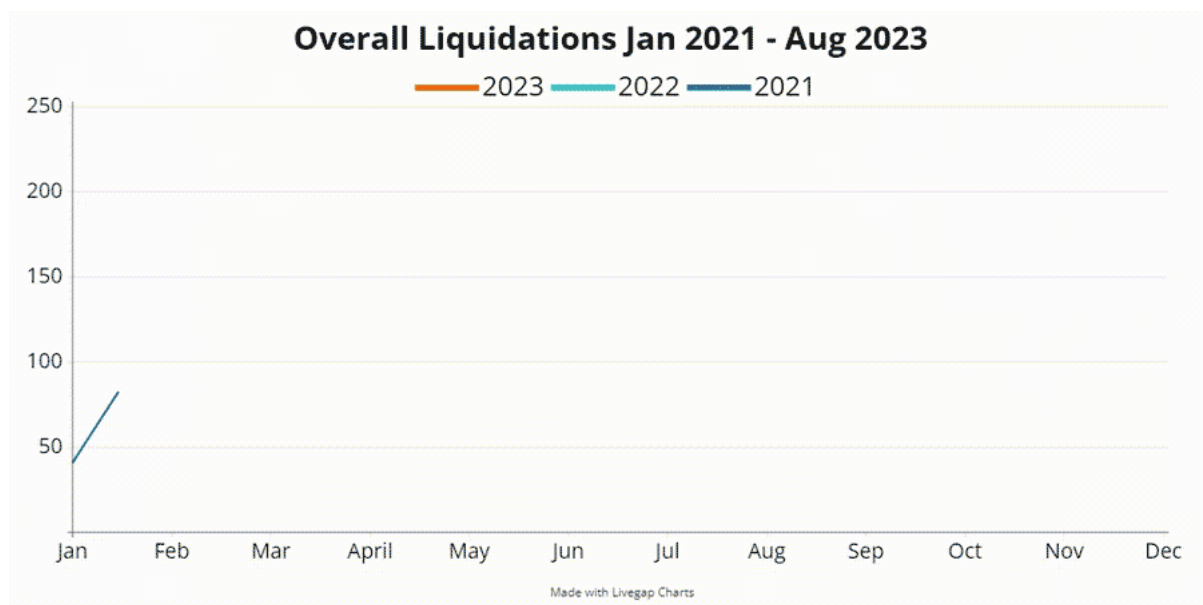
Mainzeal failed over a decade ago. The case has been before the courts since 2015. The litigation costs, for all sides, have been in the tens of millions. The directors and creditors have had to wait a decade for this outcome. This is a massive injustice. For both plaintiffs and defendants.

While it is fine for the Court of Appeal judges to propose the problems in the law, someone needs to address the shocking delays in the judicial system; including the Court of Appeal judges themselves who took eight months to deliver their judgement, which seemed outrageous until the Supreme Court took over twice that long to deliver theirs.

There are many things we can critique about the Mainzeal judgement, but, for better or worse, we now have three decades of jurisprudence stemming from the 1993 Act. Whilst it is true that the legislation could be improved, justice would be better served by improving the speed and lowering the cost, by which decisions are reached.

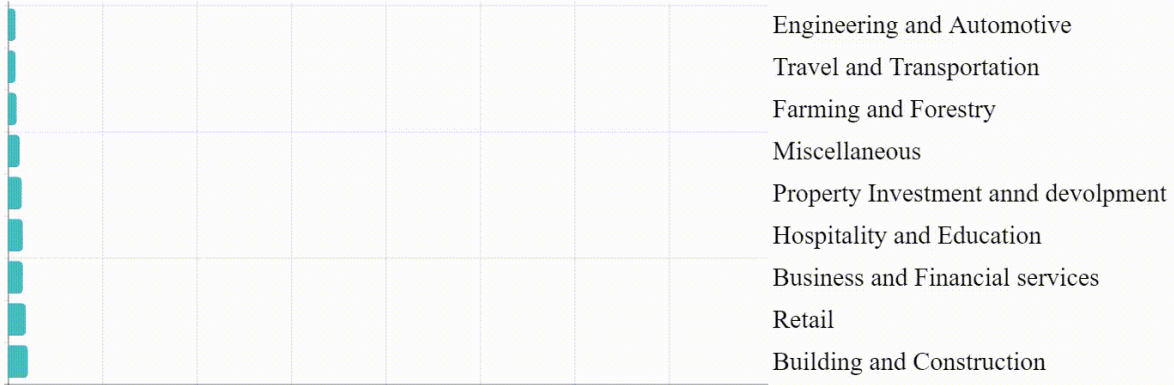
- William Robinson

Insolvency Statistics



Total liquidations see the first fall since May with only a 4% decrease. Month for month 2023 liquidations still remain consistently higher than both 2022 and 2021. Businesses' solvency is likely to continue to be tested for the remainder of 2023, with liquidations expected to remain higher than in previous years.

Aug 2023 Liquidations by Industry %



Liquidations for August show a far more balanced distribution across New Zealand's primary sectors. The building and construction industry dropped from one third of all liquidations in the first financial quarter to 18% in August.

Retail expanded from its modest 9% in the first quarter, to being the second highest sector making up 16% of all liquidations. Business and financial services increased from 9% in the first quarter, to 13% in August.

Waterstone attends INSOL 2023 in Tokyo, Japan



Global restructuring body INSOL held its annual conference in Tokyo from September 11 to 13.

Adam Botterill and Michael Turner of Waterstone were in attendance, as part of a group of 15 making the trip from NZ. While a full diary write-up of events will follow, the conference was an excellent opportunity for our team who attended workshops on alternative dispute resolution and practical problems facing insolvency practitioners globally, and the future of the profession.

Attendees could also listen and learn from world class practitioners and judges from India, Singapore and the US and got to meet with peers from around the world and compare and contrast our differing insolvency practices.

Held in the stunning city of Tokyo which is a modern high-tech landscape that is still steeped in history and tradition. The conference allowed us a real opportunity to engage with our global colleagues and broaden our perspective of insolvency and the important work that we do. We would highly recommend attendance in the future.

Around the world and back to Waterstone

Christchurch's post-earthquake renaissance has transformed it into a vibrant and exciting city. The opportunity to embrace a balanced lifestyle, filled with outdoor activities and a strong sense of community, contributes to overall well-being.

[Read the full article](#)



Case law update

The equitable lien and how this effects creditors and other security holders

The High Court has recently, on two occasions, held that an equitable lien exists in favour of the purchasers of incomplete tiny homes and modular builds which were being constructed by companies that are now in liquidation.

What is an equitable lien?

This is an equitable right conferred by law in the real or personal property of one person in favour of another person until certain specific claims have been satisfied. The right to an equitable lien will survive the intervening insolvency of an individual or company.

Case Law Analysis

Maginness v Tony Town Projects Limited (in liq) [2023] NZHC 494 [14 March 2023]

Tiny Town Projects Limited (in Liquidation) (**Tiny Town**) was in the business of constructing and selling custom-built tiny homes. At date of liquidation, Tiny Town had partially completed construction of six tiny homes. The tiny homes were “fully” constructed at the company’s leased warehouse and then delivered to the purchaser’s address.

The purchasers were made up of those that had paid the full purchase price (their tiny homes were 95% complete) and those that had made partial instalment payments (their tiny homes were 40-50% complete).

Full judgement summary: [The equitable lien by Kelly Cocks](#)

Auckland Office

16 Piermark Drive
Rosedale
0632

reception@waterstone.co.nz

[0800 256 733](tel:0800256733)

Wellington Office

149 Featherston St
Brandon House Lev 3
6011

william@waterstone.co.nz

[021 267 583](tel:021267583)

Christchurch Office

PO Box 1446
67 Cashel Street
8140

peter@waterstone.co.nz

[022 371 8945](tel:0223718945)

[Visit waterstone.co.nz](http://waterstone.co.nz)

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