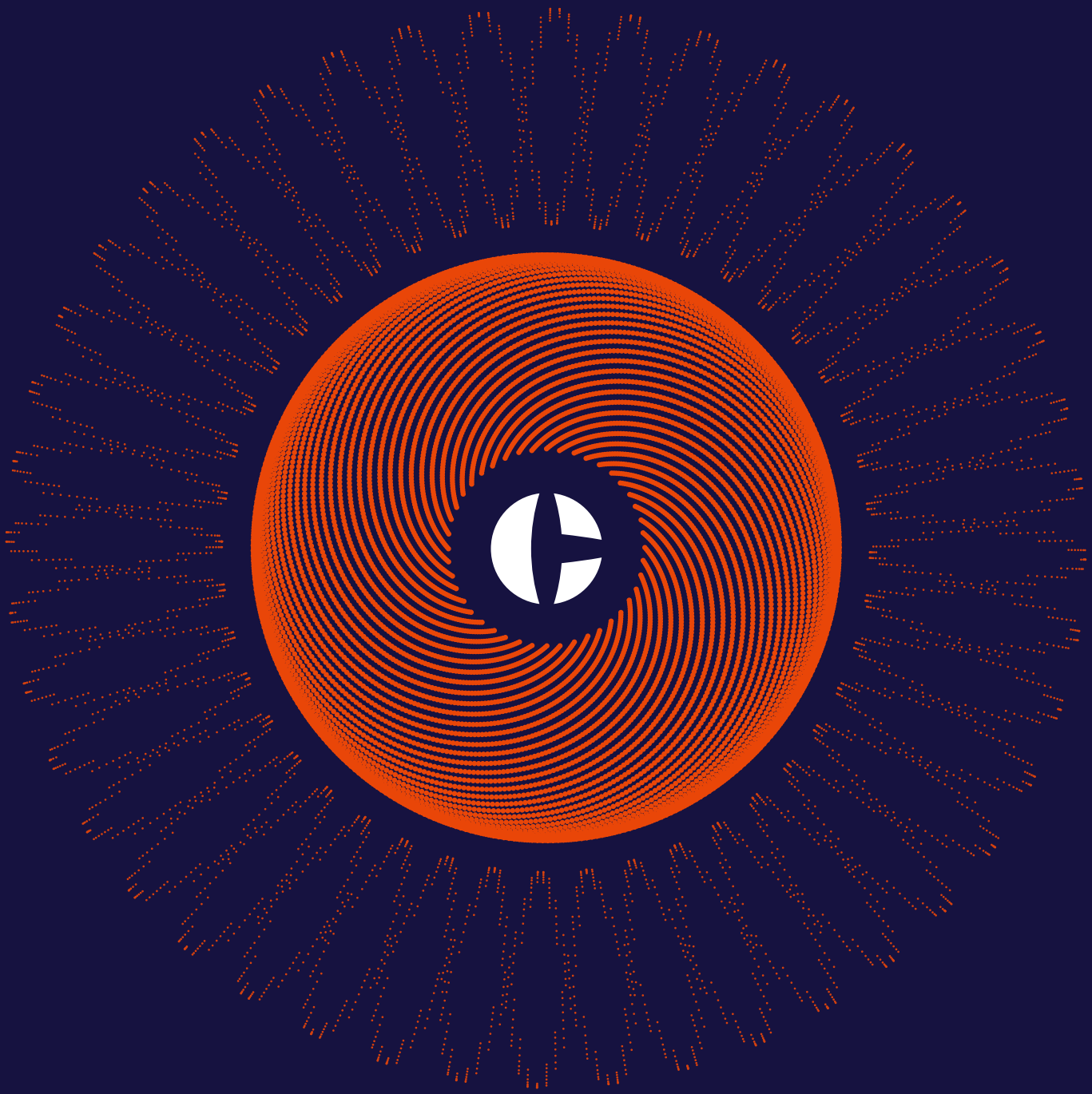
Injunctions to stop mortgagee sales and receiverships — when will the court intervene?

19th Annual Corporate Restructuring and Insolvency Conference



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Our presenters

Michael Arthur
Partner
Auckland

T: +64 9 357 9296 M: +64 27 209 4999
E: michael.arthur@chapmantripp.com

Laura Fraser
Partner
Auckland

T: +64 9 357 9883 M: +64 27 702 6909
E: laura.fraser@chapmantripp.com

Natasha Kusel
Senior Corporate Lawyer
Dispute Resolution

bnz

M: +64 21 229 4202
E: Natasha_Kusel@bnz.co.nz

Contributors

Janko Marcetic
Senior Associate
Auckland

T: +64 9 357 9696 M: +64 27 342 7429
E: janko.marcetic@chapmantripp.com

Nathan Whittle
Solicitor
Auckland

T: +64 9 358 9838
E: nathan.whittle@chapmantripp.com

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Injunctions to stop mortgagee sales and receiverships – when will the court intervene?

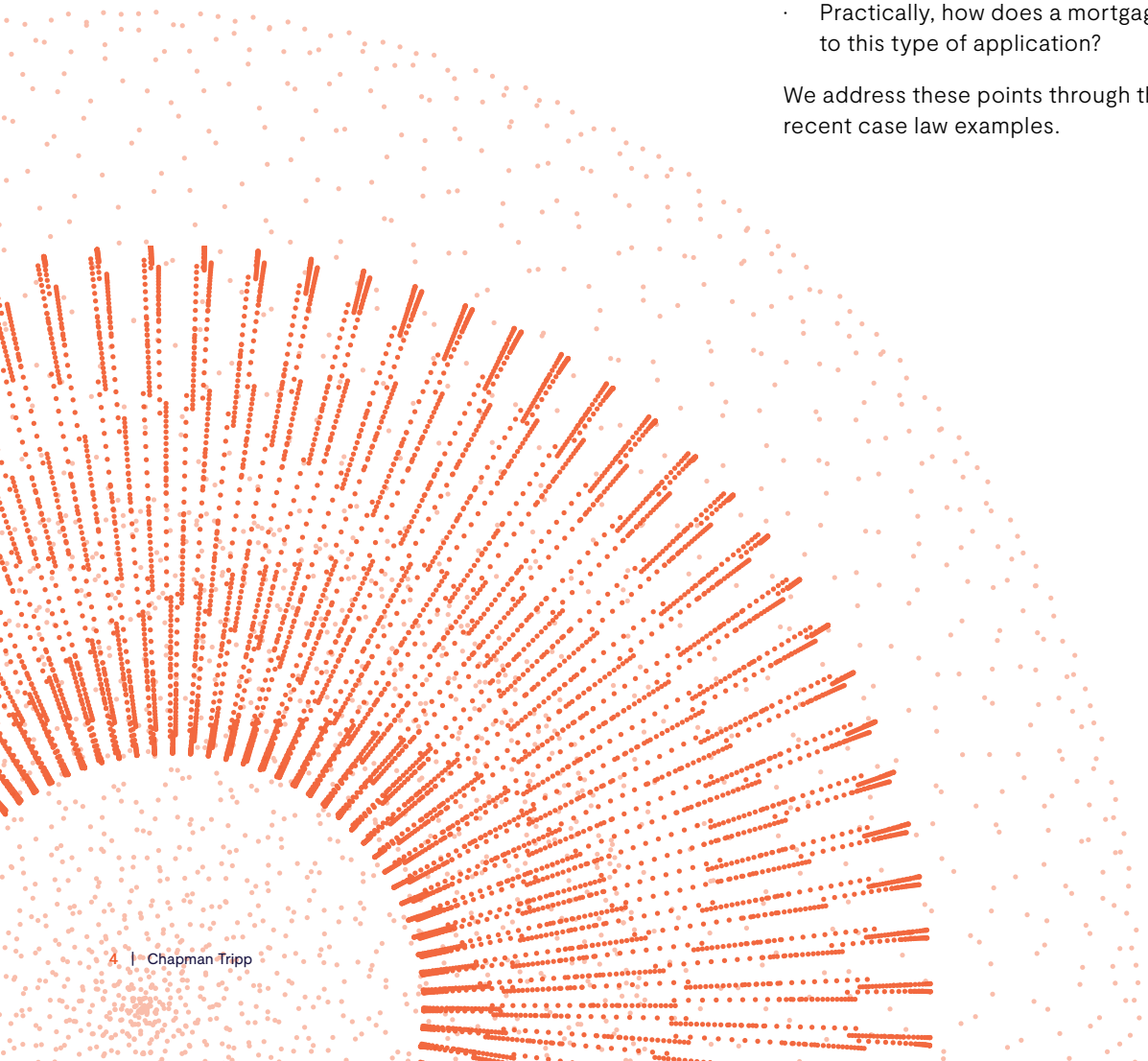
Debtors will often apply for an injunction to stop a mortgagee sale, a receivership sale, or the entire receivership. How does that happen and when will an application succeed?

Interim injunction applications are a recurring feature for mortgagees and receivers. They are typically the last roll of the dice for a desperate debtor or its guarantor. An injunction application that is not managed correctly can be significantly disruptive to a sale process, and potentially threaten settlement.

The session will look at:

- The practical process of getting an injunction (notice requirements, undertakings as to damages, interim protection etc).
- The legal threshold – how hard is it for an applicant to get its case across the line?
- The type of errors, issues and concerns that will cause a Court to intervene in an enforcement process. What might debtors try to argue and when might those arguments succeed?
- Practically, how does a mortgagee or receiver respond to this type of application?

We address these points through the lens of a number of recent case law examples.



The last three years – statistics

In the last three years, there have been 15 judgments addressing injunction applications to stop a sale by receivers or a mortgagee. One of those cases challenged the appointment of a receiver, close to the time of attempted sale.

5 of 15 judgments granted the injunction orders

10 unsuccessful applications

6 failed to show that there was a serious issue to be tried

4 failed to show that the balance of convenience favoured the injunction being granted

12 of the applications were made against mortgagees

2 against receivers alone

1 against both

For the cases where the information is available, typically injunction applications on notice are heard within

5–7 days of filing

A few applications were heard without notice on the same day, often seeking an "interim interim" injunction. Some outlier applications took a month or longer, the cause of which is unknown.

Some of the assets subject to an injunction application include:

- Queenstown land to be developed into a hotel *(Remarkables Hotel Ltd);*
- a major timber processing company *(Clayton);*
- an online education company *(Walmsley);*
- beachfront property in the Marlborough Sounds *(AMFL Ltd);*
- commercial properties *(Stark Trustees Ltd);*
- properties for residential development *(Coronation Gardens);*
- residential properties *(McDonald, Mann, Alpine South Fishing Ltd, Denize Trustee Company Ltd, Jasani, Stark Trustees Ltd, Haines, Marunui);* and
- two warring dental practices *(G J Lawrence Dental Ltd).*

Injunctions – the basics – practical process and legal test

An underlying legal claim against the mortgagee and/or the receiver is required before an injunction application can be made. The applying party must be able to show that its legal rights have been breached or that it has suffered some wrong capable of founding a Court action.

In the mortgagee sales and receiverships context, common examples may include alleged misrepresentations by lenders, as well as failure to obtain the best price reasonably obtainable in any sale process. The injunction, if granted, provides an interim holding position pending resolution of that substantive claim. (Of course, often the main claim does not go ahead as the injunction is the main object.)

Modes of application

Injunction orders are sought pending a substantive hearing (when a permanent injunction can be made). The modes of making an application are:

- on notice;
- without notice; and
- on a Pickwick basis (a hybrid approach where the defendant is provided with papers, usually via counsel, and given a brief opportunity to appear through counsel).

An applicant needs to make a careful call on how to proceed. Without notice applications can be processed and heard more quickly than on notice applications. But there are specific requirements that have to be met to proceed without notice. In an injunction of sale context, the two most typical bases for a without notice application are that:

- requiring an applicant to proceed on notice cause undue delay or prejudice to the applicant;
- the interests of justice require the application to be determined without serving notice of the application.

Counsel for the applicant must personally certify that those grounds exist. The applicant must also disclose all relevant facts (including adverse ones) and potential defences. Failure to do so can result in an injunction being lifted later if it turned out those requirements had not been complied with. It may also result in costs awards being made against the applicant and its counsel.

A court will be careful when making orders on a without notice basis, particularly where the impact of the orders being made may be significant.

An application on a Pickwick basis allows that to be addressed in part. The applicant must still meet the without notice criteria but the Court has the comfort of having heard briefly from the opposing party.

We address later the strategic calls defendants have to make in each of these scenarios.

Documents needed

An applicant has to file:

- statement of claim (and notice of proceeding) setting out the underlying, substantive claim;
- application for interim injunction setting out the grounds for, and need for, orders protecting the position pending trial of the underlying claim;
- supporting affidavit providing evidence that would allow the Court to find that the underlying claim is seriously arguable, and that an injunction ought to be granted;
- undertaking as to damages. It is necessary for the applicant to give an undertaking to the effect that if, because the order is made, any other party sustains damages which the Court finds the applicant ought to pay, the applicant will abide by any such order. That is regardless of whether the injunction is properly granted or not;
- memorandum of counsel. A memorandum of counsel is mandatory as part of a without notice application (including an application on a Pickwick basis). That memorandum must set out the material facts, the grounds on which the orders are sought, why the orders are sought without notice, and all information known to the applicant relevant to the application, including facts and grounds that would support any opposition to the application. With an on notice application, a memorandum is not mandatory but can help to address important case management issues such as timetabling.

An injunction application may be made before or after commencement of the underlying claim – but there must be a case of urgency if before commencement.

The legal test

An applicant seeking to obtain an injunction must convince the court, on the balance of probabilities, that:

- there is a serious issue to be tried in the underlying substantive claim;
- the balance of convenience favours the granting of an injunction;
- the overall justice of the case favours the grant of an injunction.

Serious issue to be tried?

In assessing whether there is a serious issue to be tried in the underlying substantive claim, the Court may well be able to make a "worthwhile tentative appraisal" of the merits. Interlocutory relief is flexible and discretionary and "the relative strength of each party's case", considered on a preliminary basis, may form part of the assessment.

It is not sufficient for the plaintiff to say there is a tenable cause of action at law, and a conflict of evidence on the facts. The claim must therefore be more than theoretically available.

Practically, a court may find it difficult to resolve complex factual disputes on affidavit evidence. In such cases, a respondent has a greater prospect of defending an injunction application where it can show that the applicant's claim cannot succeed as a matter of law.

If the applicant cannot show that there is a serious issue to be tried, the analysis goes no further. An injunction will not be granted.

Balance of convenience?

Only if the Court is satisfied that there is a serious question to be tried does it need to consider the balance of convenience.

This limb is also described as an analysis of "the balance of the risk of doing an injustice". If an injunction is or is not granted, the unsuccessful party will suffer loss or inconvenience in some way. The court's task is to weigh up each scenario. The key questions are:

- would damages be an adequate remedy for the underlying claim? If yes, then the court will not generally grant an interim injunction preserving the status quo pending trial for the underlying claim;
- what are the consequences to the applicant of the injunction not being granted?
- what are the consequences to the respondents of the injunction being granted?

Where the applicant has at least a tenable claim, the real fight is at the balance of convenience stage, and likely to be the target of judicial focus. As Jagose J said in *Remarkables Hotel Ltd*:

- *"Regrettably, counsel spent the bulk of their limited time arguing if there were serious questions for trial. But, as with most interim injunction applications, the real issue here is how one or other party may be affected by the grant or withholding of relief pending trial."*

If there is a serious question to be tried, judges often see some sense in allowing for an injunction to "maintain the status quo", pending resolution of the substantive dispute. But there is no formal presumption that the status quo be preserved. The answer will always depend on all of the circumstances.

Overall justice?

Assessing whether the overall justice of the case favours the granting of an injunction includes:

- whether the injunction will adversely affect innocent third parties;
- whether the public interest favours the determination of the application one way or another;
- any disqualifying conduct by the applicant (e.g. undue delay in bringing application).

The creditworthiness of the applicant giving the undertaking as to damages will be relevant to this assessment. An applicant may be required to fortify the undertaking with security (typically payment of funds into Court), particularly if applicant is out of jurisdiction and has no fixed assets in New Zealand.

When will the courts intervene?

Recent cases provide helpful insight into when the courts will and will not intervene with injunction orders in the context of sales by mortgagees and receivers.

Serious issue to be tried

Alleged procedural impropriety (validity of PLA notices or appointment of receivers)

Remarkables Hotel Ltd v Pearlfisher Trustee Ltd [2020] NZHC 3146:

- Remarkables borrowed $8.5 million from Pearlfisher to develop property in Queenstown. Remarkables failed to repay. Pearlfisher issued a PLA notice.
- The dispute was based on the precision with which notice is required, and the degree to which variances may be excused. The Court found that there were genuine issues regarding the validity of PLA notices. For example, it was factually unclear whether the email address to which the PLA notice was served was an email address "used by the company", and there was an open question of law whether s 26 of the Interpretation Act 1999 could cure the PLA notice only providing 19 days' notice instead of the statutorily required 20 days. Accordingly the Court found there was a serious issue to be tried.

AMFL Ltd v Savill [2020] NZHC 2112:

- On the eve of the Alert Level 4 lockdown in March 2020 Savill sought an urgent same day injunction to stop the sale of the property, which was successful primarily because at Level 4 property viewings could not occur. Once the Alert Level 4 lockdown was lifted, AMFL Ltd later sought to lift that injunction.
- Savill had borrowed money from AMFL Ltd to develop beachfront property in the Marlborough Sounds. Under the terms of the loan, it was unclear whether the security also included water rights.
- Savill also raised arguments about effective service, e.g. PLA notice said 19 days not the statutorily required 20. Though the possibility of success was slim, the Court could not conclude it was "unarguable", and so found there was a serious issue to be tried.

Denize Trustee Company Ltd v Waimauri Ltd [2020] NZHC 1718:

- Waimauri lent money to Denize secured by a mortgage over a residential property. Denize defaulted on those obligations, but was attempting to refinance the loans which, it expected, would occur in the next three weeks.
- Waimauri attempted to serve two PLA notices on Denize. Waimauri emailed the notices to multiple email addresses for both Mr and Mrs Denize, most of which bounced back. They also served the notices to the company's registered address. The Court concluded that the service requirements under the PLA were satisfied.
- The Court went on to consider whether allowing the mortgagee to rely on service would be a miscarriage of justice, given that the mortgagor was no longer occupying its registered address. The Court allowed service to stand as failing to update the company's address with the Companies Office was the director's fault.
- Accordingly the Court concluded that there was no serious issue to be tried about whether the PLA notices were properly served.

Alleged breach of receivers'/mortgagee's duties

Jasani v Vincent Capital Ltd [2018] NZHC 3367:

- Mr Jasani guaranteed a $10.5m loan from Vincent Capital. The loan was secured by mortgages over several properties in Auckland. The loan also required that at least one of the properties be sold by a certain date. None were sold. Vincent Capital served notice of default on Mr Jasani.
- Jasani argued that Vincent Capital was unlawfully exercising its powers of sale because the mortgagee sale was not in good faith for the purposes of being repaid. The Court considered the case for relief was not strong, but because the dispute required considerable factual determination, the Court was *"…not prepared — on this urgent basis, and without opportunity for reply to or cross-examination of deponents — to hold against the prospect Mr Jasani has a serious case for trial."*

Mann v Scutter [2020] NZHC 755:

- Mr Mann's company, Silo, supplied large storage silos. The company operated from his home. The company was doing poorly, and there were bankruptcy proceedings on foot.
- Mr Mann had told his neighbour, Mr Wilson, about his position. Mr Wilson wanted to help Mr Mann. He also wanted to own Mr Mann's property adjacent to his own. Unbeknownst to Mr Mann, Mr Wilson bought Silo's indebtedness, and then appointed a receiver over Silo's assets. The receiver then sought to sell the property to Mr Wilson.
- Mann challenged the appointment of the receiver, on the grounds that there was a breach of good faith duty by Mr Wilson, who was taking advantage of the company by obtaining information through his personal connection with Mr Mann when the company was vulnerable.
- The judge considered there was no serious issues to be tried on the alleged breach of duty. A mortgagor does not need a "purity of purpose", and only acts in bad faith where it objectively acts for a predominant purpose collateral to its interests as mortgagee in preserving its security and being repaid. Here, there were different perspectives on Mr Wilson's actions: Mr Mann likely felt deceived by his neighbour, and Mr Wilson likely felt he had saved Mr Mann from bankruptcy. Though he might have had a collateral advantage of obtaining the next-door property, the process preserved the sale at market value through the independent receiver.

Coronation Gardens Ltd v Small (2005) Ltd [2018] NZHC 2512:

- Coronation Gardens acquired land for development from Small, financed by BNZ and secured by a mortgage over the land. It also raised funds from Small for the development. Coronation Gardens ran into financial difficulties. BNZ sought repayment of the outstanding debt, so Small acquired the Bank's debt and securities and sought repayment itself.
- Small began the process of selling the land. Coronation Garden expressed an interest, and a potential future ability, to redeem its debts and repurchase the land. Small sold the properties to Golden Belt, a related party, for a much higher amount than the expected value of the properties. The proceeds were applied to Coronation's debt. It then offered the land back to Coronation Gardens to redeem its debt. Otherwise, Golden Belt intended to sell the properties "as soon as it can for the best price it can", potentially for less than the properties were sold to Golden Belt. Coronation Gardens applied to prevent such sale.
- Coronation Garden argued that Small breached the duty of good faith by attempting sale to a related party for an above market price. Doing so gave rise to question that they knew something market didn't. The Court found that due to the need for further fact-finding there was a serious question to be tried, but by the slimmest of margins.

Balance of convenience

Evidence of potential payment or similar arrangements in the future to clear the debt

If the applicant can show ability and intention to repay the amount due, that may lend towards an injunction being granted. However, the Court will view that with scepticism when used at the 11th hour, or following a history of similar representations.

See for example *Jasani*: the applicant asserted that a joint venture, which would pay the outstanding debt, was close to finalised. That was not accepted by the Court because the evidence lacked substance, and any loss could be adequately compensated by damages.

Loss of the property if sold and the (in)adequacy of damages

If the property has particular significance to the applicant, that can lean towards an injunction being granted. But this argument is often rejected if the property is a commercial investment, or if the applicant has shown a willingness to sell the property in the past.

See for example *Remarkables Hotel Ltd*: The loss of the property, and therefore the opportunity to operate any eventual hotel and residential apartment complex, made damages an inadequate remedy compared with Pearlfisher who simply wanted to recover its capital as soon as possible through a fast sale of the land.

Impact of an injunction on sale process or underlying value

This factor is key for matters involving significant and complicated transactions. See for example *AMFL Ltd*: If the injunction against selling the property with water rights was granted, AMFL could not effectively sell the property at all, or at a considerable loss of value.

Impact of "fire sale" on ultimate sale price

Receiver and mortgagee sales may have an adverse effect on the sale price. Where that element is pronounced, or will acutely impact on the applicant, the Court will take that into account. See *Avon Parnell Ltd v Chevin*: the property in question was not subject to any other mortgage, and a mortgagee sale would likely lead to seriously decreasing the sale price of the property.

Use of the property as a residential home

The Courts view this argument with scepticism where the property was leveraged as security for a commercial arrangement. But, if the applicant is particularly unsophisticated, it may be considered, especially in circumstances of injustice. See *McDonald*: applicant sought a delay of month, and the sale was of a residential home for the applicant and her mother. They needed the property to live in and had nowhere else to go on short notice.

Injunction to prevent appointment of receivers

A debtor can apply to injunct the appointment of receivers itself, though this is uncommon. Only one has occurred in the last three years (*Mann v Scutter*, see above), and the injunction application occurred around the time of sale.

McLachlan v Mercury Network Ltd HC Auckland CP 476-98, 16 November 1998

- McLachlan (plaintiff) applied for an interim injunction to prevent Mercury Network (first defendant) appointing a receiver for Mercury Geotherm (second defendant) pursuant to the joint venture agreement between the plaintiff and the defendant.
- The principal issue was whether the first defendant was entitled to issue its demand which would lead to the appointment of a receiver. The Court weighed the different matters and considered that the first defendant was entitled to appoint a receiver in the terms of the debenture because the second defendant was insolvent and the joint venture agreement did not prevent an appointment.
- However, the Court also considered that the plaintiff's submission that the first defendant action at this stage was arbitrary and intended to obtain a commercial leverage needed to be taken into account. Overall, the court found that by a "fairly fine margin" it was preferable that the parties had an opportunity to negotiate with one another over the sale of the assets. As such, the court granted an injunction restraining the first defendant from appointing a receiver.

Hertzke Agencies Ltd v Mrowinski HC Auckland CP 1450-90, 4 September 1990

- Hertzke Agencies acquired a jewellery business. As part of the financing of the deal, Hertzke Agencies obtained a first debenture from a bank and a second debenture from the defendants, a father and son.
- Until 27 August 1990 there was no suggestion that Hertzke Agencies was not meeting its obligations. But, on that day, an agent of the father showed up with a demand alleging that interest was owing and had not been paid. The agent threatened to appoint a receiver that day.
- Hertzke had paid the interest to the son, who held a power of attorney over the father. It was under this power of attorney that the debenture had been signed. Unbeknownst to the father, Hertzke had paid the interest to the son. The arrangements between the father and son were unknown to Hertzke.
- Hertzke Agencies made an application without notice. The court was satisfied that there was a serious question to be tried on the evidence. The balance of convenience favoured the preservation of the status quo until the Court had evidence of where the money went, who had the benefit of it and in what circumstances.

Responding to injunction application as receivers or a mortgagee

Served with orders made without notice

As we explained above, in some instances a court may grant injunction orders without the respondent having had any notice of the application.

If you are, or act for, the respondent, and are served with a copy of orders made without notice, you need to carefully review:

- what orders have been made; and
- on what basis (legal and factual) those orders have been made.

Without notice orders typically grant leave to an affected party to apply to the Court for a review of the orders, typically within a narrow window of time (two to three working days). Even if the orders do not provide for such leave, the High Court Rules provide a default right to review the order in a similarly narrow window. Even if an application for review is not made within the permitted time, a party can seek leave to apply out of time if it can show a good reason for the delay.

Being provided with documents on a "Pickwick" basis

As explained above, where an application is being made without notice, the respondents may be provided with papers on a "Pickwick" basis. That means that the application is technically without notice, but respondents are provided (usually via counsel) with the documents and invited to be heard briefly.

A "Pickwick" appearance of course does not afford a respondent the opportunity to prepare fulsome evidence or submissions. The Court will take that into account when considering a respondent's arguments, and the applicant will still have the obligation (albeit a practically reduced one) to bring the Court's attention to any adverse facts or arguments that they are aware of.

Even if the orders are made after a Pickwick appearance by the respondent, that respondent will still have the right to apply to review the orders later. The orders are still treated as having been made without notice.

When appearing on a Pickwick basis, it is important not to prejudice any arguments you may later want to make once you have the opportunity to properly review the material. It is particularly inadvisable to risk running arguments you cannot stand behind due to lack of preparation. Though possible and sometimes necessary, it is not ideal to argue one thing, then advance a different and arguably inconsistent argument later. Depending on the circumstances you may be better off accepting the inconvenience of an "interim interim" injunction in the first instance before mounting a more fulsome defence in due course.

Service of application on notice

You need to act quickly when you are served with an injunction application. Some things to consider:

- Is the application complete? Does the application have for example, a sworn affidavit with all exhibits provided? Has an undertaking as to damages been provided?
- What timeframes are involved? How long before the matter is called in Court? Is there enough time for the application to be determined before settlement of the relevant sale?
- What does the application seek from the court?
- Identify the people you need. Who is best placed to give evidence for the receivers or mortgagee? Who has access to the information you need to prove your position?
- Identify the information you need. What documents will disprove the allegations? How will you show the balance of convenience favours you?
- Identify the impact on third parties if the injunction is or is not granted.

Is defending the application worth it?

Depending on the circumstances, it may not be worth defending the injunction application. Doing so is often time-consuming and expensive. What is the inconvenience caused by the injunction? Is it possible to put off a sales process to a later day without incurring significant expense? Or would a delay threaten the deal entirely?

The underlying allegations in an interim injunction application can be tenuous. But sometimes they are not. When reviewing the allegations, think about whether the applicant may have a point. If they do, it may be worth addressing their concerns directly and resolving the situation that way rather than mounting a full-throated defence.

For example, in *Haines v Memelink*, the mortgagee had refused to provide the mortgagor with various documents necessary for the mortgagor to redeem the mortgaged property. That proved to be a solid basis for an injunction to be granted.

Conditions

The court has a broad general discretion to grant an injunction on conditions. Try to think of sensible ones and offer them up.

Documents to prepare

Notice of opposition

The notice of opposition sets out the defendant's intention to oppose the application for interim injunction. It sets out a high level summary of the factual circumstances and the defendants' legal arguments.

Though a notice of opposition will generally be brief, it can be useful to be more fulsome in an injunction context. It is the first document the Court will see for the respondent, so it helps to provide a detailed outline, particularly if submissions won't be filed until the time of the hearing.

Affidavit(s)

The affidavit evidence will be the focus of much of the time and effort prior to hearing. Preparation of affidavits requires close coordination between the legal team and the client.

Affidavits need to set out the full factual circumstances surrounding the application, with necessary documentary evidence. Preparing an affidavit requires amassing all relevant documents that explain the basis for the sale, and respond to the core allegations by the applicant.

Where an applicant seeks an injunction based on criticisms of the sale process, the focus of the affidavits needs to be on setting out the detail of and the rationale behind the process.

Submissions

Given that injunction applications are generally brought urgently, concise submissions are the order of the day, and will assist the Court to make a prompt decision. Further detail can be addressed in oral submissions as needed.

Case study: *Clayton v Jackson*

The Claymark Group was New Zealand's largest manufacturer and exporter of radiata pine products.

Mark Clayton was director/shareholder of the Claymark Group.

In early December 2019, BNZ appointed receivers over a number of companies in the Claymark Group. The receivers took steps to maintain the business as a going concern, with a view to selling the business.

In January 2020 the receivers began a sale process, involving compiling a register of interested parties, engaging with those parties about the business, and opening up for bids.

In March 2020, the receivers received 12 non-binding indicative offers. One of those offers was from a consortium involving Mr Clayton. Six offers (including Mr Clayton's) proceeded to stage two.

In June 2020, four bidders made final offers for all or part of the business. No offer was made by Mr Clayton and his consortium. The receivers identified a preferred bidder, but remained in communication with other bidders (including Mr Clayton's consortium). By early August 2020, the receivers told Mr Clayton that they had a preferred bidder, but encouraged him to make an offer promptly.

On 26 August 2020, the receivers signed an agreement for sale and purchase with the preferred bidder. The agreement went unconditional days later. Mr Clayton's consortium made a second non-binding indicative offer at around the same time. The receivers promptly informed Mr Clayton they could not entertain that offer in the circumstances.

On 24 September 2020, six days before settlement of the sale, Mr Clayton served an injunction application on the receivers, the bank, and two parties involved with the purchaser.

The claim against the receivers alleged breach of duties owed to Mr Clayton as guarantor under ss 18 and 19 of the Receiverships Act 1993, and at common law and equity. These are the duty to exercise their powers in good faith and for proper purposes and with reasonable regard to the interests of Mr Clayton (provided this was consistent with acting in the best interests of the BNZ), and the duty to obtain the best price reasonably obtainable as at the time of sale.

The alleged breaches of these duties by the receivers were that they:

- failed or refused to consider the offers put forward by Mr Clayton;
- failed to consult with or consider the interests of Mr Clayton; and
- entered into the sale and purchase agreement with the preferred bidder.

The claim against the bank was that the bank acted unjustly or oppressively in terms of the Credit Contracts and Consumer Finance Act 2003. The allegedly unjust or oppressive conduct was the bank's refusal of Mr Clayton's offers, its failure to properly consider Mr Clayton's position, and its failure to engage with him to reach agreement or to instruct the receivers to do so.

Seriously arguable case: claim against receivers

Mr Clayton claimed the receivers breached their duties under ss 18 and 19 of the Receiverships Act in three ways, all related to the process of sale:

- That the receivers did not obtain the best price for the business;
- That the receivers failed to properly consider Mr Clayton's offers;
- That the receivers, in entering into the sale agreement, failed to properly consider Mr Clayton's interests.

All claims against the receivers failed:

- The price the receivers obtained for the business, $60 million was a reasonable price for the business, and was in fact more than Mr Clayton's offer (which was in substance $54 million). The receivers being able to obtain a better effective price than Mr Clayton was willing to pay indicated they had discharged their duties under s 19 of the Receiverships Act 1993;

The injunction application – timeline

Thursday 24 September 2020

~5pm
Clayton served injunction application to stop sale process

Friday 25 September 2020

~12.30pm
Joint memo filed seeking urgent telephone conference with Court

3.00pm
Telephone conference with Court – timetable orders made

Monday 28 September 2020

12 noon
Notices of opposition and affidavits filed and served

~5.00pm
Clayton submissions filed

- At the hearing "there was none of the criticism of the sale process that one usually hears in an application for an interim injunction to restrain a sale by a mortgagee or receiver". There were no allegations of failure to properly market the business, deal with prospective purchasers appropriately, or by failing to provide prospective purchasers sufficient information.
- Mr Clayton "did not establish any case, let alone a seriously arguable one", that the receivers failed to consider his offers. His offers were considered appropriately, and his criticisms would have effectively required the receivers to breach their agreement with the purchaser, which would have almost certainly been in breach of their duties to do.
- It was not seriously arguable that the receivers should have consulted with Mr Clayton before they entered into the agreement. They carried out their obligation to exercise their powers "with reasonable regard" to his interests. The receivers had no obligation to provide him with preferential treatment as guarantor of the Claymark debt.

Seriously arguable case: claim against BNZ

Mr Clayton alleged that the BNZ was unjust or oppressive under the CCCFA. The alleged conduct was accepting the sale agreement, refusing his offers, refusing to engage with him to reach agreement, and failing to consider his position.

Those claims failed. The Court pointed out that these criticisms are again about the sale process and its outcome. The only role BNZ had in that process was approving the receivers' recommendation of the sale, which naturally followed the receivers' rigorous sale process.

Balance of convenience

The Court had already decided there was no seriously arguable case, but went on to explain briefly its view that "the balance was tipped firmly against granting the interim injunction."

The Court considered that damages are likely to be an adequate remedy for Mr Clayton. Although the Court acknowledged that he had an emotional attachment to the business, the Court noted that he was prepared to sell it a year prior.

On the other hand, damages are unlikely to be an inadequate remedy for the respondents. Mr Clayton was already greatly exposed under his personal guarantee, and it was unlikely he could meet any further damages.

An injunction would have significantly disrupted the Claymark business. In anticipation of sale the receivers had made arrangements with shippers, customers, financiers and hundreds of employees.

Broadly, an injunction had the potential to scuttle the sale of the business entirely, given its advanced stage and complexity.

Tuesday 29 September 2020

2.15pm
Opposition submissions filed and served, hearing starts

4.35pm
Judgment given – application declined

Wednesday 30 September 2020

Settlement of sale (on schedule)

Friday 9 October 2020

4.30pm
Reasons for judgment delivered

Thinking ahead: How mortgagees and receivers can put themselves in the best position

When receivers are appointed, or as mortgagee you are looking at enforcing against the secured asset, there are several things you must consider:

- Are the key transaction documents and pre-enforcement correspondence readily available? Who has it? Do not rely on a single person who can access all the relevant information – what if they are unavailable when an injunction application is served?
- Get the enforcement process right. Procedural defects, such as notice requirements, are the most common ground for an injunction.
- Think about your obligations, either as a mortgagee or a receiver. Not only do you have to believe you are complying with those obligations, you may need to prove it. How would you do that?
- Sale process – as you go through each stage of the process, think about how you would look in the cold light of a court room some months later. Document everything and, again, do not rely on a single person to do so in case they are unavailable when an injunction application is served.
- Make sure you can explain your decisions. Even if a judge disagrees with your reasoning, the fact you turned your mind to each issue is important. The worst case scenario is that you have to admit you did not consider the problem at all.

Schedule: Table summary of recent cases

No.	Case Name	Summary & outcome	Comments/description
1	*Walmsley v Hoole* [2021] NZHC 1167 ↗	Interim orders originally made to restrain the receiver from dealing with the company's assets. An application to extend those orders was refused.	**Serious question to be tried:** No. The substantive claim was based on suspicions about the validity of a GSA between the company and its director and a shareholder, who had appointed the receiver. The receiver's evidence went a long way to answering the applicants' suspicions. **Balance of convenience:** favoured the receiver, as an extension of the injunction would mean the company would cease trading and could not be sold as an ongoing concern. Damages were an appropriate remedy for the applicants.
2	*Remarkables Hotel Ltd v Pearlfisher Trustee Ltd* [2020] NZHC 3090 ↗	Urgent interim application successful – mortgagee restrained from marketing property.	**Balance of convenience:** The potential losses for mortgagor were considerably more serious than the potential loss of the costs of a few days marketing and delay in sale.
	Remarkables Hotel Ltd v Pearlfisher Trustee Ltd [2020] NZHC 3146 ↗	Injunction application successful – mortgagee restrained from exercising powers of sale.	**Serious question:** There were valid questions around the validity of PLA Notices (factual issues of whether email addresses were "used by the company" and notices providing less than the statutorily required amount of notice), so there was a serious question to be tried. **Balance of convenience:** better for mortgagee to be held out in the interim rather than the property be lost, damages inadequate.
3	*Stark Trustees Ltd v Alliance Diversified Holdings NZ Ltd Partnership* [2020] NZHC 3087 ↗	Application declined – mortgagee not restrained from exercising power of sale.	**Serious question:** no clear cause of action was advanced against mortgagee. **Balance of convenience:** evidence that mortgagor can repay soon isn't enough.

↗ Link to further information

No.	Case Name	Summary & outcome	Comments/description
4	*Clayton v Jackson* [2020] NZHC 2666 ↗	Application declined – receivers and their appointor (also a mortgagee) not restrained from completing sale.	**Serious question:** no submissions by mortgagor were seriously arguable. Receivers' exercise of their powers was reasonable, and had made reasonable regard to the guarantor's interests. **Balance of convenience:** not necessary to address, but Campbell J was firmly of the view that it was tipped firmly against granting relief: damages likely to be adequate for applicant, but not adequate for defendants; injunction would have seriously disrupted the business; and delay was a risk of upending the complicated sale agreement and process.
5	*Savill v AMFL Ltd* [2020] NZHC 655 (urgent without notice) ↗ *AMFL Ltd v Savill* [2020] NZHC 2112 (application to reconsider injunction) ↗	Initial without notice orders restraining mortgagee from exercising power of sale.	The applicant sought and obtained, on the eve of COVID-19 Alert Level 4 lockdown, an urgent interim injunction without notice preventing the mortgagee from selling. Application succeeded based mainly on the fact that at Alert Level 4, viewings of the property couldn't occur. Mortgagee then applied for injunction to be rescinded. **Serious question:** Applicant had raised valid arguments about effective service and whether certain water assets were/were not part of the security. But Judge considered there was little prospect of the mortgagor ultimately succeeding. **Balance of convenience:** by a large margin balance was in favour of mortgagee. It had a strong argument that it was entitled to sell the water assets with the rest of the property, and there would be a clear reduction in value if they could not.

↗ Link to further information

No.	Case Name	Summary & outcome	Comments/description
6	*McDonald v Toko* [2020] NZHC 2104 ↗	Injunction orders made preventing sale of property for one month to allow attempt to repay debt.	Proceeding filed with extreme urgency and without notice, the day before the property was put to market. Applicant of very modest means. Dobson J only focused on balance of convenience. Mortgagee's arguments were strong on legal principles. But the applicant sought only one month delay because of the life altering injustice that would be suffered and loss of equity if sale proceeded. Because sale would be on "fire sale" terms, (it was a rural property in Kaikoura), balance of convenience favoured a one month postponement. Would only cost the mortgagee the relatively low costs of the real estate agent and associated inconvenience.
7	*Denize Trustee Company Ltd v Waimauri Ltd* [2020] NZHC 1718 ↗	Application declined – mortgagee not restrained from exercising power of sale.	Focused on serious question, in particular whether PLA Notices were validly served. Parties agreed that the question turned on whether the applicant could establish that the mortgagee had no right to exercise power of sale. The Court considered that it could rule on that basis because: "...the exercise of the jurisdiction to award interim relief does not turn on a formulaic approach, but rather on an assessment of the justice of the case as a whole and justice will invariably require that a mortgagee be prevented from wrongfully purporting to exercise a power of sale, given the special character of land." **Serious question:** Mortgagor accepted PLA was technically complied with but was not in practice "effective". There was no miscarriage of justice if mortgagee was allowed to rely on the notice. The ambiguity around service was solely due to mortgagor's failure to update the company's office address. In any event, copies were sent to an email address which the mortgagor clearly used regularly.

↗ Link to further information

No.	Case Name	Summary & outcome	Comments/description
8	*Avon Parnell Ltd v Chevin* [2020] NZHC 976 ↗	Injunction orders made preventing mortgagee from exercising power of sale (including advertising).	Main issue was whether the applicant was bound by the document on which the mortgage was premised. Another party had, by fraud, taken a loan from the mortgagee by naming himself as a director of the company on the company register, but without having been appointed by the company. The mortgagee was then seeking to enforce the mortgage against the innocent company. **Serious question:** there was an arguable case that the company would not be bound by the "director's" actions. **Balance of convenience:** Favoured the applicant as the property in question was not subject to any other mortgage, and a mortgagee sale would likely lead to seriously decreasing the sale price of the property.
9	*Mann v Scutter* [2020] NZHC 755 ↗	Application declined – receiver not restrained from proceeding with sale.	**Serious question:** There was no seriously arguable case. · Validity of appointment: argument had no substance · Validity of notice: no substance, notice was given correctly. · Good faith duty: no arguable case of breach here. Neighbour of the applicant had purchased the debt, appointed receiver, and sought to buy the property. No breach by the receiver. **Balance of convenience/overall circumstances:** Balance of convenience favoured the receiver. The fact the property was the applicant's home was not enough. They had used the home as security for a business. He was trying to settle claims against him, but odds were not good. If an injunction was not imposed, eviction was not imminent, and would require further legal proceedings.

↗ Link to further information

No.	Case Name	Summary & outcome	Comments/description
10	*Marunui v Co-operative Bank Ltd* [2019] NZHC 765 ↗	Application declined – mortgagee not restrained from exercising power of sale. Underlying proceeding struck out as an abuse of process.	**Serious question:** Plaintiff argued that a debt was paid by a promissory note. The promissory note had no legal basis.
11	*Haines v Memelink* [2018] NZHC 3460 ↗ *Haines v Memelink* [2019] NZHC 401 ↗	Without notice injunction application declined. Application succeeded (mortgagee restrained from exercising power of sale)	**Serious question:** There was an arguable case whether the applicants, by the actions of the mortgagee, were being prevented from redeeming the mortgage. **Balance of convenience:** Balance of convenience supported granting the injunction, but only due to a failure to provide information to the applicants to enable them to redeem the mortgaged property.

↗ Link to further information

No.	Case Name	Summary & outcome	Comments/description
12	*Jasani v Vincent Capital Ltd* [2018] NZHC 3367 ↗	Application declined – mortgagee not restrained from exercising power of sale.	**Serious question:** marginal on the evidence, but allowed · Some doubt about validity of notices · Main complaint is unlawful exercise of mortgagee sale. Argued sale was not in good faith to be repaid: appointed receivers, withholding consent to sell, marketing property as "mortgagee sale" Defendant said it is contractually entitled to protect and realise secured assets when in default. · Court was not prepared to hold against the applicant a serious case for trial on an urgent basis without opportunity for reply or cross-examination. The issues were a matter of intensive factual determination. This was despite seeing the case for relief as not strong. **Balance of convenience:** against injunction being granted · Applicant asserted they were in the process of establishing a joint venture including the property which would repay the loan. If the property was sold this would fall over. · Court considered there were grounds to doubt the veracity of the evidence pointing to the JV possibility. · Loss is adequately compensated by damages. Difficult assessments of amorphous loss of opportunity and profit don't make damages inadequate. · The need for a JV indicates the applicant needs financial support, which is unavailable, so preserving the status quo has no utility. · Loss of momentum in the sale process if injunction granted.

↗ Link to further information

No.	Case Name	Summary & outcome	Comments/description
13	*Alpine South Fishing Ltd (in rec) v Kim* [2018] NZHC 2579 ↗	Application declined – mortgagee not restrained from exercising power of sale.	**Serious question:** Marginal, but allowed. Several arguments (non est factum, breach of the FTA, contractual mistake and relief under the Court's inherent equitable jurisdiction) had a very low chance of success, but with further evidence, could potentially succeed at trial. **Balance of convenience:** lies with the receivers because: · the mere fact property was used as residential home cannot be a reason to restrain sale where It was used as security for a loan · there is no disagreement that a large amount of money was left outstanding and that the property was security for the loan · the property is the only asset available to meet the balance of the loan · the arguments regarding the mortgagor's understanding of the documents do not challenge their legal validity.
14	*Coronation Gardens Ltd v Small (2005) Ltd* [2018] NZHC 2512 ↗	Application declined – mortgagee not restrained from exercising power of sale.	**Serious question:** yes, but only just. The question was whether the mortgagee exercised its sale powers in good faith when it sold to a related party. The sale resulted in a substantial margin in price over market offers, which gave rise to the question that maybe there was something the market did not know. **Balance of convenience:** in favour of the mortgagee. If the mortgagor was successful at trial, damages are an adequate remedy, it doesn't need the land. Further, its undertaking as to damages was inadequate should it fail (which was likely).

↗ Link to further information

No.	Case Name	Summary & outcome	Comments/description
15	*G J Lawrence Dental Ltd v Alusi Ltd* [2018] NZHC 533 ↗	Injunction orders made without notice restraining mortgagor from exercising power of sale.	**Serious question to be tried:** Yes. Issue was that the mortgagor was a lay person and may have been "forced" into the agreement. Key claims were: · Undue influence: possibly, was told no need to talk to lawyers. · Unconscionable bargain: she was at a serious disadvantage when she signed. · Oppressive conduct: possible, though need to establish agreements under the Credit Contracts and Consumers Finance Act. **Balance of convenience:** in favour of injunction. There was no major prejudice if an injunction was granted as mortgagee could still sell the property later. Allowing an injunction maintains the status quo.

↗ Link to further information

Chapman Tripp's Restructuring & Insolvency Team acts for corporate debtors and their directors, lenders, creditors, receivers, liquidators and administrators. At the first signs of distress, the team focuses on advisory support, turnaround, restructuring and rescue. Where formal corporate rescue and insolvency processes are unavoidable, Chapman Tripp assists insolvency practitioners and others with potential claims and asset realisation strategies. Known as one of New Zealand's strongest Restructuring & Insolvency teams, the team supports its clients through all stages including: debt restructuring, special situations and workouts; voluntary administration, Part 14 creditor compromises and schemes of arrangement; directors' duties and corporate governance in distressed situations; distressed debt transactions and distressed asset acquisition; and receiverships, liquidations and security enforcement.

Chapman Tripp Restructuring & Insolvency Team:

Michael Arthur, Michael Harper, Laura Fraser, Janko Marcetic, Joshua Jones.

AUCKLAND

Level 34, PwC Tower
15 Customs Street West
PO Box 2206, Auckland 1140
New Zealand

T: +64 9 357 9000

WELLINGTON

Level 17
10 Customhouse Quay
PO Box 993, Wellington 6140
New Zealand

T: +64 4 499 5999

CHRISTCHURCH

Level 5
60 Cashel Street
PO Box 2510, Christchurch 8140
New Zealand

T: +64 3 353 4130

chapmantripp.com