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Acquisition Finance

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David Weavers and Matt Consedine
Russell McVeagh

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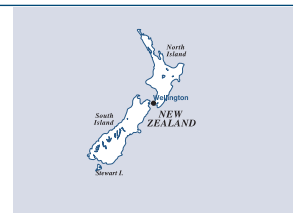
NEW ZEALAND

Law and Practice

Contributed by:
David Weavers and Matt Consedine
Russell McVeagh see p.17



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1. MARKET

1.1 Major Lender-Side Players

Banks provide the majority of funding for acquisition financing in New Zealand. The market continues to be dominated by the four main Australian-owned banks, each of which have large operations in New Zealand. A number of other international banks are also prevalent in the market (in terms of both arranging transactions and participating as lenders in syndication), and there is increasing participation from locally owned banks. There are also recent examples of direct lenders/debt funds sitting alongside senior banks in syndicated deals.

Alternative sources of debt financing, such as direct lenders/debt funds, have not historically formed a significant part of the acquisition finance market in New Zealand. However, there is a growing trend for purchasers to consider the possibility of accessing local and international direct lenders to provide funding, particularly on private equity sponsor-led transactions. Given the variety of options available, private equity sponsors and their debt advisers often seek terms and pricing on alternative financing structures before deciding on a final preferred structure; some of these alternatives may involve a combination of bank debt and direct lenders/debt funds (eg, super-senior RCFs, Holdco Mezz structures).

1.2 Corporates and LBOs

In recent years, acquisition activity has involved a mixture of corporate transactions and leveraged buyouts. On the corporate side, these transactions tend to be led by local corporates with growth-by-acquisition strategies, although investment from large Australian corporates and global trade buyers in the New Zealand market is also common. Leveraged transactions are predominantly led by international private equity firms (with an emphasis on Australasian private equity firms).

There is also now an active and growing set of domestic private equity firms, which tend to focus on mid-market transactions and have enjoyed a number of successes in recent years. In comparison to their international counterparts, domestic private equity firms tend to place less emphasis on maximising leverage to enhance returns.

1.3 COVID-19 Considerations

The acquisition market (for both corporate and leveraged transactions) was relatively subdued in 2020 as a result of the COVID-19 pandemic. Deal activity is beginning to increase in Q2 2021 as confidence in the market grows, particularly as a result of the New Zealand government's strong response to the pandemic.

The COVID-19 pandemic did have an initial impact on existing deals, as a significant number of corporates and sponsors required amendments and/or waivers to their finance documentation consistent with the experience in other markets. Those changes tended to focus on additional liquidity, facility repurposing, financial covenant relief, more extensive reporting obligations, additional equity requirements and re-pricing. However, given the strong performance of the domestic economy, many of these features were not actually required and COVID-19-specific amendment and waiver activity has largely subsided. A government-backed scheme that effectively backstopped a portion of bank credit risk on certain new lending was used widely by some banks, although this was more focused on smaller and mid-market borrowers.

2. DOCUMENTATION

2.1 Governing Law

New Zealand law will govern all finance documents in domestic transactions. This is the case for corporate loans, acquisition finance and LBOs.

For international transactions, the governing law of the main finance documents (aside from security) will be driven by the market where the financing is being raised. However, it would be rare for NZD-denominated financing to be raised outside of New Zealand.

Security documents will typically be governed by the law of the jurisdiction in which the relevant assets are located.

2.2 Use of LMAs or Other Standard Loans

Financing documentation is not fully standardised in the New Zealand market. The Asia Pacific Loan Market Association (the equivalent of the Loan Market Association in the Asia-Pacific region) has produced a suite of standard form documents that are applicable for use in the Australasian market. Although not standard across the market, the APLMA forms are becoming more commonly used for investment-grade transactions. For leveraged transactions, it is still relatively common to base the facility agreement on the sponsor's most recent transaction, rather than starting with an APLMA form.

Each law firm in New Zealand tends to have its own form of facility and security documentation, although these documents are generally similar in substance.

For non-New Zealand law-governed financing documents, the form that the documents take depends on the market practice in the relevant jurisdiction.

2.3 Language

Although it is not a legal requirement, financing documentation is almost always drafted in English.

2.4 Opinions

Typically, legal opinions will be provided by counsel to the lenders in respect of the following, among other things:

- the capacity and authority of, and due execution by, the obligor entities party to the finance documents; and
- the validity, binding nature and enforceability of the main finance documents (including any security documents).

Such opinions will be required to be provided as conditions precedent to initial drawdown under the facilities agreement (in respect of the initial obligors and the initial finance documents), with equivalent opinions to also be provided as conditions precedent to the subsequent accession to the finance documents of any additional obligors, such as the target (in respect of those additional obligors and any new finance documents, such as accession documentation and any new security documents).

3. STRUCTURES

3.1 Senior Loans

The structure of an acquisition financing in New Zealand will vary from transaction to transaction, depending on (among other things) whether it is a corporate or leveraged transaction, the relevant industry, the purchaser and the target.

Corporate acquisitions could be as simple as utilising headroom in the purchaser's existing financing arrangements or amending such financing arrangements to include an additional

acquisition facility, although new acquisition financing arrangements are common too.

Leveraged buyouts tend to be more complex and may involve different facilities/tranches, such as a term loan acquisition facility (some or all of which will often be amortising), a term loan capex facility, a term loan acquisition facility/incremental facility (eg, for bolt-on acquisitions) and a revolving credit facility, as well as different layers of debt (see **3.2 Mezzanine/PIK Loans**).

With the increasing prevalence of direct lenders in the New Zealand market (both international and domestic firms), a growing (albeit still very limited) number of deals have been structured in a style similar to European unitranche deals. Amortisation is typically not required under such structures, and direct lenders are able to offer purchasers greater leverage than traditional bank-led transactions, forgoing the need for multiple layers of debt. This additional flexibility results in wider pricing.

Covenant-lite transactions in the style of term loan Bs – which originated in the US and have become prevalent in other markets (such as in Europe) – are rare in New Zealand. To date, they have only been used on a very small number of large transactions with US sponsors.

3.2 Mezzanine/PIK Loans

Mezzanine/PIK loans do exist in New Zealand but are certainly not the norm. Having said that, this market is expected to grow significantly over the next 24 months.

3.3 Bridge Loans

Bridge loans are less common in the New Zealand leveraged market than they are in other leveraged markets around the world, due to there being no established high-yield bond market in New Zealand. There is a strong domestic market for investment grade corporate bonds and, accordingly, corporate purchasers may enter into a bridge financing to complete an acquisition and then refinance the bridge with a bond issuance (typically, to wholesale and retail investors) or a capital raise.

3.4 Bonds/High-Yield Bonds

While there is an active debt capital market for corporate issuers in New Zealand, this market is rarely used as the primary source of funding for an acquisition (although, as mentioned in **3.3 Bridge Loans**, a bond issuance may be used to refinance an acquisition bridge loan).

There is no established high-yield bond market in New Zealand.

3.5 Private Placements/Loan Notes

Similar to the position as noted in **3.4 Bonds/High-Yield Bonds**, there is no established private placement/loan note market in New Zealand. Corporate issuers (typically in the property or infrastructure sectors) may access overseas private placement markets from time to time, such as in the United States, but such debt is rarely used to fund an acquisition.

3.6 Asset-Based Financing

All of New Zealand's major domestic banks provide asset-based financing solutions. The legal framework around taking security (as noted in **5. Security**) makes this straightforward. Asset-based financing is very common in the rural sector.

4. INTERCREDITOR AGREEMENTS

4.1 Typical Elements

Intercreditor agreements are common in the New Zealand market and are used to contractually regulate the rights and obligations of the various financing creditors of a borrowing group.

There is no market-standard intercreditor agreement in New Zealand, although most intercreditor agreements will cover a number of certain elements. The principles and structure will follow the LMA's form of intercreditor agreements.

Order of Priority

The ranking and order of priority of all financing creditors will be set out. Senior debt will rank ahead of junior debt, and there may be "super senior" debt that ranks ahead of the senior debt on enforcement – for example, where a bank provides a revolving credit facility on a super-senior basis in a unitranche transaction. Hedge counterparties and ancillary finance providers usually rank pari passu with the senior debt providers.

Payments

The intercreditor agreement will govern what payments are permitted to be paid to, and received by, each class of creditor. Payments to senior creditors are usually not restricted. Junior creditors, on the other hand, are often restricted from receiving principal repayments until all senior debt has been repaid or, alternatively, such payments will be subject to strict parameters. Payments of interest and fees to junior creditors are usually permitted, subject to certain conditions, such as compliance with certain covenant levels and no default occurring. Repayments of shareholder loans are typically restricted, with such restrictions mirroring the equivalent restrictions on distributions out of the borrowing group in the finance documents.

Provisions are also typically included to require a creditor to turn over receipts to the agent or security trustee where they have received more than they are contractually entitled to, and to hold such receipts on trust for the agent/security trustee until they have done so.

Enforcement

The intercreditor agreement will set out which group of creditors is entitled to instruct the security trustee to take enforcement action following an event of default. Usually this is a certain majority of senior creditors (usually two thirds). Junior creditors will be restricted from taking enforcement action during a standstill period, during which the senior creditors are permitted to enforce. If the senior creditors fail to take enforcement action during this period, then the junior creditors will be permitted to step in and undertake their own enforcement process, subject to certain conditions and certain time periods being met.

4.2 Bank/Bond Deals

As outlined in **3.4 Bonds/High-Yield Bonds**, there is no high-yield bond market in New Zealand. However, it is relatively common for investment-grade corporate issuers to have a bond or private placement as part of their debt capital structure. In these circumstances, such instrument would usually rank pari passu with the corporate issuer's senior bank debt. The bond holders will often have the same rights and obligations as the bank lenders and, accordingly, the intercreditor agreement in this situation will be straightforward. More complex, bespoke arrangements may be seen where the bond or private placement makes up either a substantial majority (in which case, the bond holders will have greater rights) or a small minority (in which case, the bond holders will have fewer rights) of the debt capital structure of the issuer.

4.3 Role of Hedge Counterparties

Where a borrowing group has hedging in place (which is common), hedge counterparties will typically benefit from any security and will rank pari passu alongside the senior lenders.

The hedge counterparties' rights to terminate hedging transactions or otherwise take enforce-

ment action may be restricted, and will often be governed by an intercreditor agreement.

5. SECURITY

5.1 Types of Security Commonly Used

Leveraged acquisition finance transactions will almost always be secured.

The security package will be dependent on the acquisition that is being financed but will typically involve the following:

- on or prior to closing, all-asset security being granted by the SPV acquisition vehicle and security being granted by the owner of that acquisition vehicle over the shares in the acquisition vehicle, any receivables owing to its owner and any bank account of its owner; and
- within a certain period after closing, all-asset security being granted by the target and certain other target group entities.

Typically, a guarantor coverage test will apply, such that members of the target group owning between approximately 80% and 95% of the target group's assets and contributing between approximately 80% and 95% of the target group's EBITDA must grant all-asset security and become guarantors.

For corporate transactions, on or prior to completion of the acquisition the security package will typically reflect the purchaser's existing security arrangements (and if the purchaser is using headroom in its existing financing arrangements then no new security will be required). Post-closing, whether or not members of the target group grant security and the nature of that security will vary on a deal-by-deal basis, as some strong corporate borrowers are able to borrow on an unsecured basis. Where security is provided, it is common for a guarantor coverage test to be included, as for leveraged transactions.

In New Zealand, property is generally classed into two separate asset types – real property (real estate) and personal property (in general terms, all property other than real property) – and the systems that govern security interests in each are fundamentally different. Real property is governed by the Property Law Act 2007 (PLA) and personal property is governed by the Personal Property Securities Act 1999 (PPSA).

Real Property

Security over freehold or leasehold interests in land (real estate) is generally taken by a registered mortgage. Although an all-assets security agreement will create a security interest over both personal property and real property, registered mortgages will also be taken where land is a material part of the credit package. Registration is not mandatory, but registered mortgages generally have priority over unregistered mortgages. Registration is a straightforward and largely online process facilitated through Land Information New Zealand (a government department).

Personal Property

Under the PPSA, personal property includes (among other things) investment securities (such as shares), goods (such as inventory and other movable goods), money, intangibles (such as receivables and intellectual property rights) and movable assets. Security over personal property can be taken by either an all-asset security deed (which would extend to all personal property and real property owned by the obligor) or a specific security deed (ie, a security deed limited to certain classes of personal property, such as shares, bank accounts or receivables). As referred to above, financiers in a leveraged context would typically require (i) the holding com-

pany of the acquisition vehicle to grant specific security over the shares in the acquisition vehicle, its bank account and any receivables owing to it by the acquisition vehicle, and (ii) all-asset security to be provided by the acquisition vehicle and, post-closing, the target and such members of the target group to grant all-asset security so as to comply with the guarantor coverage test. The security interest will usually operate in relation to both current and future assets, as well as any proceeds of the collateral.

In order for a security interest to "attach" to personal property (ie, for the secured party to obtain in rem rights in the collateral) and for such security interest to be enforceable against third parties, either the collateral must be in the possession of the secured party, or the debtor must sign a security agreement that contains the following:

- an adequate description of the collateral by item or kind that enables it to be identified; or
- a statement that a security interest is taken in all of the debtor's present and after-acquired property (noting that this can be subject to certain exceptions for specific items or kinds or personal property).

Possession of collateral is an impractical method of attachment for most assets, so it is essential (and customary) that the security agreement contains one of the statements referred to above.

Once "attachment" has occurred, security over personal property will be "perfected" once either the secured party has taken possession of the collateral or a financing statement has been registered on the Personal Property Securities Register (PPSR). It is customary for each security interest to be perfected by registering a financing statement on the PPSR. However, a secured party will also take possession of certain types of collateral, such as shares, in order to give the secured party the best protection possible for their collateral. In respect of shares, secured parties will typically take possession of all share certificates, record the security interest over the shares in the share register of the company or (with respect to listed securities) with the relevant clearing house or securities depository and, to assist enforcement, obtain blank executed stock transfer forms.

5.2 Form Requirements

There is no particular form of security agreement that must be followed when taking security over personal property, although certain statements are included in a security agreement for the security to "attach" (as described in **5.1 Types of Security Commonly Used**).

Security agreements governed by New Zealand will be in the form of deeds (rather than simple contracts). This is because they typically contain a power of attorney granted by the grantor in favour of the security party, and such an attorney is only able to execute a deed if it itself has been appointed by a deed (see section 12 of the PLA).

See **5.1 Types of Security Commonly Used** in relation to the registration of security over real property.

5.3 Registration Process

Personal Property

As mentioned in **5.1 Types of Security Commonly Used**, a registration will be made to perfect a security interest over personal property. Key aspects of a security interest over personal property must be included on a PPSR registration, including the names and addresses of the debtor and the secured party, and a description of the collateral. The registration can be made instantly and costs NZD14 (goods and services tax (GST) excluded). The maximum registration period for a financing statement is five years, but

it may be renewed at or before the expiry of this period for an additional NZD14 (GST excluded).

It is critical that the information recorded in a financing statement is correct, otherwise there is a risk of the financing statement (and security perfection) being invalid. For example, if the debtor's name has been incorrectly recorded on the register, this will be deemed to be seriously misleading and the financing statement will be deemed invalid under the PPSA.

Real Property

See **5.1 Types of Security Commonly Used** for a summary of the registration process in respect of mortgages over real property.

5.4 Restrictions on Upstream Security

See **5.5 Financial Assistance** and **5.6 Other Restrictions**.

5.5 Financial Assistance

The Companies Act 1993 regulates the giving of financial assistance (including the giving of a loan or guarantee or the provision of security) to a person for the purposes of, or in connection with, the purchase of a share issued or to be issued by the company, or its holding company, whether directly or indirectly. This restriction is relevant in an acquisition finance context where members of the target group guarantee or secure the acquisition debt.

Financial assistance is permitted where the section 107 test or the section 76 test is complied with; in each case, a modified solvency test must also be complied with.

Section 107 Test

The simplest, and least onerous, procedure under which financial assistance may be given is pursuant to section 107 of the Companies Act. The only two requirements are that:

- all "entitled persons" of the company (being all the shareholders of the company and all other persons (if any) upon whom the constitution of the company confers any of the rights and powers of a shareholder) must agree or concur, in writing, to the financial assistance being given; and
- the board of the company must resolve that it is satisfied, on reasonable grounds, that the company will, immediately after the giving of the financial assistance, satisfy the modified solvency test.

For most companies, the only entitled persons are the shareholders. If this is the case, an agreement expressed to be made under this procedure rather than under the section 76 test dispenses with the need for the section 76 board resolution and the commensurate risk of liability for the board if there is a change of circumstances.

This method is used for wholly owned companies and is very straightforward and quick to implement.

Section 76 Test

The section 76 test requires that, prior to the financial assistance being given, the board must resolve that:

- the company should provide the assistance;
- giving the assistance is in the best interests of the company; and
- the financial assistance was given on fair and reasonable terms and conditions.

In addition, one of the following procedures must also be followed.

- All shareholders have consented in writing to the giving of the assistance.
- The board resolves that the giving of the financial assistance is of benefit to shareholders not receiving the assistance, and that the

terms and conditions under which the assistance is given are fair and reasonable to those shareholders not receiving the assistance. Under this method, a disclosure document must be sent to each shareholder and the assistance cannot be given fewer than ten working days or more than 12 months after the disclosure document has been sent to each shareholder.
- The financial assistance is given under section 80, which permits an aggregate amount of financial assistance under this section up to 5% of the aggregate amounts received by the company in respect of the issue of shares and reserves, as disclosed in the most recent financial statements of the company. The company must also receive fair value in respect of the assistance and must circulate a disclosure notice to all shareholders.

Solvency Test

Before financial assistance is given under any one of the tests described above, the board must be satisfied on reasonable grounds that the company will, immediately after the giving of the financial assistance, satisfy the solvency test.

A company will ordinarily satisfy the solvency test if:

- it is able to pay its debts as they become due in the normal course of business; and
- the value of its assets is greater than the value of its liabilities, including contingent liabilities. For this purpose, "assets" excludes all amounts of financial assistance given by the company at any time in the form of loans, and "liabilities" includes the face value of all outstanding liabilities, whether contingent or otherwise, incurred by the company at any time in connection with the giving of financial assistance. This requires careful analysis, including the treatment of rights of contribution in the case of cross-guarantees.

5.6 Other Restrictions

A director of a New Zealand company has a number of duties. These exist at common law, by way of fiduciary duties, and in most instances have been codified under the Companies Act. Such duties include the duty to act in good faith and in the best interests of the company (section 131 of the Companies Act).

Directors need to turn their mind to this duty when entering into financial transactions. This becomes particularly important when contemplating subsidiaries of a borrower who make up part of the security package. If the borrower is a subsidiary of another company, it is permissible under section 131 for directors to act in the best interests of the company's holding company if this is expressly permitted by the company's constitution. However, if the company is not a wholly owned subsidiary, the prior agreement of the shareholders must also be obtained. Similarly, where a company is carrying out a joint venture, the directors may act in the best interests of the shareholder if they are permitted to do so by the constitution.

5.7 General Principles of Enforcement

A lender's right of enforcement under a financing transaction is governed by the contractual arrangements agreed with the borrowing group and the other financing creditors, and can generally be undertaken without application to the court. In addition to what is agreed contractually, the lender will also be entitled to certain enforcement rights (and subject to certain obligations) under the PPSA (in respect of personal property) and the PLA (in respect of real property).

Typically, the loan documentation will provide that, upon the occurrence of an event of default, the lender will have the right to accelerate the debt owing to it, cancel any undrawn commitments and exercise its rights to enforce its security under the security documents. The security

documentation will then govern the process for enforcement and, to the extent provisions of the PPSA and/or the PLA apply, these will supplement the process for enforcement.

The general principles of enforcement within the security documentation are considered below.

Power of Possession and/or Sale

The security documentation should contain a right for the secured party to take possession of the collateral and/or sell it to recover debts owed. This right also exists as a matter of law under the PPSA (in respect of personal property) and the PLA (in respect of real property). The secured party has a duty to obtain the best price reasonably obtainable (and it is not possible to contract out of this duty).

Appointment of a Receiver

Security documentation will usually include provisions for the lender to appoint a receiver upon an enforcement event. Receivership is a process that allows a secured creditor to appoint a receiver to realise assets or manage the business of a company for its own benefit and is governed under the Receiverships Act 1993. The security agreement will provide that the occurrence of certain debtor defaults may entitle the creditor to appoint a receiver, who can take charge of the grantor's assets and business to the extent covered by the security agreement, to run the business and/or to sell off assets and to repay the creditor from the earnings or sale proceeds. Receivers are appointed in respect of property, and not the company itself, which differs from the liquidation process.

Voluntary Administration

A secured creditor who has a security interest over substantially the whole of a company's property (as may be the case if a secured creditor takes all-asset security over a company) can place a company into voluntary administration, during which an administrator takes control of the company's business and property (except for property in respect of which a secured creditor has appointed a receiver). Upon doing so, a moratorium on enforcement applies, so that creditors of the company cannot take steps to enforce any debts or security against the company without the consent of the administrator or leave of the court. Notwithstanding this, a secured creditor who has a security interest over substantially the whole of a company's property can elect to enforce its security within ten working days of the commencement of the administration.

PPSA

The enforcement section of the PPSA contains certain debtor rights and lender obligations that can be contracted out of. It is expected that a well-drafted security document would contract out of these provisions to the extent it benefits the lender. For example, you would typically see the lender contract out of its obligation to give notice to the debtor that it intends to sell the collateral within ten working days and the debtor's right to reinstate the security agreement prior to sale of the collateral by remedying all defaults (sections 114(1)(a) and 133 of the PPSA).

6. GUARANTEES

6.1 Types of Guarantees

Typically, guarantees are required to be provided by all material companies in the target group (being companies owning or contributing a certain percentage of assets or EBITDA of the group). In addition, sufficient members of the target group to satisfy the guarantor coverage test (as described in **5.1 Types of Security Commonly Used**) must become guarantors.

Guarantees will typically be cross guarantees and indemnities, extending to all obligations

owing by all obligors under the finance documents.

6.2 Restrictions

Financial assistance includes the giving of upstream guarantees; see **5.5 Financial Assistance**.

The corporate benefit test will also apply to any guarantees given, as detailed in **5.6 Other Restrictions**.

6.3 Requirement for Guarantee Fees

There is no requirement in New Zealand for a guarantee fee to be paid to a guarantor, although it may be appropriate for a guarantee fee to be paid in certain circumstances.

7. LENDER LIABILITY

7.1 Equitable Subordination Rules

There is no concept of equitable subordination in New Zealand.

7.2 Claw-Back Risk

When a company enters liquidation proceedings in New Zealand, the recovery by that company's creditors is not always limited to the pool of assets at the date of liquidation. Liquidators are able to void transactions that meet certain criteria under the relevant legislation. The relevant legislation in New Zealand is the Companies Act, which sets out four pre-liquidation situations that give rise to voidable transactions.

Insolvent Transactions

A transaction by a company is voidable in the following circumstances:

- if it was entered into within six months of the commencement of liquidation proceedings (or, in the case of related party transactions, within two years);
- if it was entered into when the company was insolvent; or
- if it enables another person to receive more towards satisfaction of a debt owed by the company than the person would be likely to receive in the company's liquidation.

Voidable Charges

A charge is voidable where it is created within the relevant time periods as for an insolvent transaction (as described above), and if the giving of that charge means the company is unable to pay its due debts.

A charge will not be voidable in certain circumstances, including where it:

- secures valuable consideration given at the time of, or after, the giving of the charge; or
- is a substitute for a charge created before the relevant restricted period.

Transactions at Undervalue

Transactions are voidable to the extent of the difference in the value received by the company and the value given by the company, provided that the transaction occurred within two years of the company's liquidation and the company was either insolvent at the time or became insolvent as a result of the transaction.

Inadequate or Excessive Consideration

The Companies Act also aims to prevent companies from siphoning away their assets in anticipation of future liquidation. Therefore, liquidators can pursue related persons of a company (directors, company controllers or related companies) who have entered into certain transactions with the company within three years of the commencement of liquidation.

The following transactions are considered voidable under this provision:

- where a related person receives consideration from the company considered excessive for the company to have given; or
- where a related person gives consideration to the company that is considered inadequate for the company to have received.

Innocent Creditor Defence

The Companies Act provides for an "innocent creditor" defence to creditors who have dealt with the company. A liquidator or other creditors cannot pursue a creditor party to one of the transactions specified above if said creditor satisfies the three limbs of the test: it must have acted in good faith, there must be no reasonable grounds of suspecting the company was or would become insolvent and it must have provided value or materially altered its position on reasonable belief the transaction was valid.

Property Law Act Voidability

The PLA operates independently of the Companies Act and allows creditors or liquidators to apply to the court to set aside a disposition of property that prejudices a creditor (or creditors). The court may set aside a disposition of property if the company was insolvent at the time or became insolvent as a result of the disposition, would be left with an unreasonably small pool of assets or at least would reasonably have believed it was incurring debts beyond its ability to pay.

The disposition must also have been made with the intent to prejudice a creditor, or was a gift or was made at undervalue. Therefore, there is a degree of overlap with voidability for undervalue transactions in the Companies Act.

Solvency Confirmation

Companies provide a certification of solvency within the customary director's certificate given by a director of the company as a condition precedent to a financing transaction. This provides some comfort to the creditor to the transaction that the innocent creditor defence may apply to them.

8. TAX ISSUES

8.1 Stamp Taxes

No stamp taxes are applicable in New Zealand.

8.2 Withholding Tax/Qualifying Lender Concepts

The concept of a qualifying lender does not exist within New Zealand taxation law. Broadly speaking, New Zealand has two key types of withholding tax:

- resident withholding tax (RWT); and
- non-resident withholding tax (NRWT).

RWT must be withheld on payments of resident passive income made by New Zealand tax residents or non-residents carrying on a taxable activity in New Zealand through a fixed establishment in New Zealand, such as interest, dividends and royalties paid to New Zealand residents. Resident passive income includes payments to non-residents for the purpose of a business they carry on in New Zealand through a fixed establishment, and offshore registered banks operating through a New Zealand branch (who are not associated with the payer).

RWT is required to be withheld at the marginal rate of the payee of the interest (28% for companies), or at a default rate of 45% if information is not provided by the payee regarding the appropriate withholding rates. If the relevant payee of interest holds RWT-exempt status, RWT is not required to be withheld on the interest payment (regardless of whether the lending is provided by a New Zealand or offshore branch).

NRWT must be withheld on payments of non-resident passive income. The rate of NRWT is 15% but this is reduced to 10% in most cases where the payee is resident in a country with which New Zealand has a double tax agreement (with the exception of Malaysia, Chile, Turkey and Thailand).

Where a payer and payee are not associated, a payer may elect to reduce the rate of NRWT to 0% and instead register for and pay an approved issuer levy (AIL) at a rate of 2%. The AIL regime is not available where interest is derived jointly by a resident and a non-resident or by associated persons (unless the approved issuer is a member of a New Zealand banking group), or in instances of related-party debt.

8.3 Thin-Capitalisation Rules

Thin capitalisation rules in New Zealand apply to both inbound and outbound investment. Broadly speaking, the inbound thin capitalisation rules apply to non-resident taxpayers and New Zealand entities controlled by non-residents operating in New Zealand and directly earning NewZealand-sourced income. The rules may apply to outbound investment when a New Zealand company owns foreign-controlled companies or non-portfolio foreign investment funds.

The rules operate to deny interest deductions in circumstances where an entity subject to the thin capitalisation rules has excessive levels of debt in New Zealand in comparison to its level of worldwide indebtedness. An excessive level of debt is determined according to specific debt-to-asset ratios, known as the "safe harbour" thresholds. If the New Zealand group debt percentage is greater than 60% and greater than 110% of the worldwide group debt percentage, interest must be apportioned and added as assessable income.

9. TAKEOVER FINANCE

9.1 Regulated Targets

Transactions in particular industries may give rise to specific requirements (such as notification and/or regulator approval requirements), including banking, financial services, insurance and oil and gas.

The following also applies.

Competition Rules

A merger or acquisition that substantially lessens competition in a market is illegal under the Commerce Act 1986, unless it is authorised by the Commerce Commission. The Commerce Commission will clear a merger or acquisition if it is satisfied that the transaction would not be likely to substantially lessen competition in any New Zealand market. The Commerce Commission may also authorise a transaction that would be likely to substantially lessen competition if it is satisfied that the transaction would be likely to result in such a benefit to the public that it should be permitted.

Overseas Investment

The approval of the Overseas Investment Office may be required for an acquisition by an "overseas person" if such transaction would result in an overseas investment in significant business assets, sensitive land (which includes residential land), farm land or fishing quotas. The Overseas Investment Office's processes and approach to applying the regime are currently undergoing a comprehensive review and overhaul, with changes being aimed at strengthening the regulatory system, simplifying assessments to align with risk levels and streamlining processes for timely and efficient decision making.

Certain Funds

See **9.2 Listed Targets**.

9.2 Listed Targets

There are two options for structuring change of control transactions in relation to listed companies in New Zealand and certain other widely held private companies that are deemed to be "code companies":

- takeover offers under the Takeovers Code Approval Order 2000 (Takeovers Code); and
- schemes of arrangement (Schemes) under Part 15 of the Companies Act.

Takeover Offers under the Takeovers Code

An offer under the Takeovers Code involves the offeror notifying the target company of its intent to make an offer by issuing the target with a takeover notice, which must contain certain prescribed information. The target company must then notify the exchange that a takeover notice has been received and provide such notice to any person that requests it. The offeror may then proceed by submitting an offer to offerees within the prescribed time period.

An offer could be either:

- a full offer (ie, an offer for all of the voting securities in the target company) – such an offer must be conditional on acceptances taking ownership or control over 50%; or
- a partial offer (ie, an offer for less than 100% of the voting securities in the target company) – such an offer must be for sufficient shares to take the offeror's holding over 50% of the voting rights.

Schemes Under Part 15 of the Companies Act

A Scheme is a court-supervised mechanism that allows the restructuring of a group of companies (including by way of amalgamation) to be undertaken so that it is not subject to the Takeovers Code. To be exempted from the Takeovers Code, a Scheme requires:

- consent from the boards of the companies involved, as the Scheme is technically proposed by the target and accordingly would only be available for a recommended takeover and not in a hostile situation;
- shareholder approval from 75% of shares held in each interest class and 50% of all shares; and
- approval of the court – the court must be satisfied that the shareholders of the target company will not be adversely affected by using a Scheme (as opposed to the Takeovers Code) to effect the change of control, unless the Takeovers Panel issues a no-objection statement with regards to the Scheme.

Certain Funds Requirements

Where an offer is conditional on finance from a third party, the ability to terminate the arrangement must not be "in the power or under the control of" the offeror (see rule 25(1) of the Takeovers Code). Typically, the list of conditions to the financing will be limited to conditions that are bona fide required by the third-party financier to protect its interests and which cannot be used a device to avoid the takeover offer.

Within the offer, an offeror must also confirm that sufficient resources will be available to them to meet the consideration in connection with full acceptance of the offer and to pay any debts incurred in connection with the offer (see Clause 9 of Schedule 1 of the Code). As above, to satisfy this requirement, the grounds upon which the financing could be withdrawn would need to be very limited.

10. JURISDICTION-SPECIFIC FEATURES

10.1 Other Acquisition Finance Issues

There are no further considerations that are important to acquisition finance practice in New Zealand.

Russell McVeagh has one of New Zealand's leading acquisition finance offerings. The broader banking and finance team has five partners and 22 other qualified lawyers – with virtually all senior lawyers having worked for leading magic circle and/or US firms. The team acts as bank-panel lawyers for five of New Zealand's major banks (representing 90% of the domestic lending market) and is the go-to adviser for the growing non-bank lending market. It also regularly works with regional and global private equity sponsors on their New Zealand acquisitions.

AUTHORS

David Weavers leads Russell McVeagh's acquisition finance offering and regularly acts for global and regional private equity sponsors on their New Zealand transactions. He also acts for all of New Zealand's major financial institutions and leading credit funds/non-bank lenders. David has completed all three levels of examinations for the Chartered Financial Analyst (CFA) programme, and has many years of experience working on acquisition finance transactions and structures in Europe, Asia and the USA – having been based for many years working for leading US firms in London and Hong Kong before returning to New Zealand.

Matt Consedine is a senior associate at Russell McVeagh and has significant experience in advising financial institutions, non-bank/direct lenders, sponsors and corporates on a wide range of market-leading cross-border financing transactions, including acquisition finance (across the credit spectrum and including public takeovers), corporate finance, margin lending and restructurings. In addition to his experience in the New Zealand market, Matt spent four years working at Linklaters LLP in London, where he acted on some of the most complex and significant transactions in the market.

Russell McVeagh

Vero Centre
48 Shortland Street
Auckland 1140
New Zealand

Tel: +64 9 367 8165
Fax: +64 9 367 8163
Email: david.weavers@russellmcveagh.com
Web: www.russellmcveagh.com