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"Minimising Winners to Give More to Losers: An Analysis of New Zealand's Voidable Transaction Regime in Light of Fisk v McIntosh"

Victoria University of Wellington Legal Research Paper, Student/Alumni Paper No. 49/2017

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Fisk v McIntosh brings light to pertinent issues within New Zealand's voidable transaction regime, an integral component of the country's insolvency law framework. The case concerns a payment received by an innocent investor upon exiting a Ponzi scheme. The scheme's liquidator has claimed the entirety of the payment as a voidable transaction under the Companies Act 1993. The High Court and Court of Appeal held that the sum of the original investment can be retained, but any profits must be returned. This paper analyses the Courts' interpretation of the defence provision under the voidable transaction regime and discusses the true meaning of "value" under the Act. The tension between upholding commercial confidence and treating unsecured creditors equally is highlighted. It is argued that courts must give priority to commercial confidence and fairness to individual creditors over a remorseless application of parity-based logic wherever a payment has a preferential effect. It concludes that in order to maintain clarity in New Zealand's company law and ensure its purpose is upheld, creditors should remain entitled to keep payments received in good faith, for which they provided real and substantial value.

"Retaining Retention Money A Critical Analysis of the Retentions Regime in the Construction Contracts Amendment Act 2015"

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Section 18 of the Construction Contracts Amendment Act 2015 introduces a retentions regime to the Construction Contracts Act 2002, requiring retention money to be held on trust for payees in an effort to better protect that money in the event of a payer's insolvency. This paper discusses the context in which the regime was passed, including an overview of the Mainzeal liquidation, before critically examining the regime. The author submits that a number of features of the regime give rise to three key problems: the regime will have an adverse economic impact on the construction industry generally; the regime will fail in its primary purpose of protecting vulnerable payees from the risk of non-payment of retention money in a payer's insolvency; and the regime fails to address how it applies to a contract subsequently varied, causing the retention money under it to exceed the de minimis threshold. A number of amendments are proposed in response to these problems including that all main contracts are excluded from the ambit of the regime, that retention money is held in a designated bank account and that only money retained from progress payments made after the relevant variation is subjected to the regime.

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Victoria University of Wellington Legal Research Papers Series primarily contains scholarly papers by members of the **Faculty of Law at Victoria University of Wellington**. Some issues collect a number of papers on a similar theme to form a suite of papers on a single topic. Others issues are general or distribute mainly recent work.

The Student/Alumni Series is a subseries of the Victoria University of Wellington Legal Research Paper Series. The subseries started in 2015 and publishes papers by students and alumni of Victoria University of Wellington, comprising primarily work for honours and postgraduate courses. Papers are collected into thematic or general issues.

The Victoria University of Wellington was founded in 1899 to mark the Diamond Jubilee of the reign of Queen Victoria of Great Britain and of the then British Empire. Law teaching started in 1900. The Law Faculty was formally constituted in 1907. The first dean was Richard Maclaurin (1870-1920), an eminent scholar of both law and mathematics. Maclaurin went on to lead the Massachusetts Institute of Technology as President in its formative years. Early professors included Sir John Salmond (1862-1924), still one of the Common Law's leading scholars. His texts on jurisprudence and torts have gone through many editions and remain in print.

Alumni include Sir Robin Cooke (1926-2006), one of the leading judges of the British Commonwealth. As Baron Cooke of Thorndon, he sat on over 100 appeals to the Appellate Committee of the House of Lords, one of very few Commonwealth judges ever appointed to do so.

Since 1996 the Law School has occupied the Old Government Building in central Wellington. Designed by William Clayton and opened in 1876 to house New Zealand's then civil service, the building is a particularly fine example of Italianate neo-Renaissance style. Unusually among large colonial official buildings of the time it is constructed of wood, apart from chimneys and vaults.

The School is close to New Zealand's Parliament, courts, and the headquarters of government departments. Throughout Victoria's history, our law teachers have contributed actively to policy formation and to law reform. As a result, in addition to many scholarly articles and books, the Victoria SSRN pages include a number of official reports.

Victoria graduates approximately 230 LLB and LLB(Hons) students each year, and about 60 LLM students. The faculty has an increasing number of doctoral students. Ordinarily there are ten to twelve students engaged in PhD research.

Victoria University observes the British system of academic ranks. In North American terms, lecturers and senior lecturers are tenured doctrinal scholars, not legal writing teachers. A senior lecturer corresponds approximately to a North American associate professor in rank.

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