IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2016-404-001590
[2018] NZHC 1146

IN THE MATTER	of the liquidation of WENZTRO CO-OPERATION LIMITED (IN LIQUIDATION) formerly called Trojan Foods (NZ) Limited
AND IN THE MATTER	of an application by liquidators and a creditor under s 301 of the Companies Act 1993
BETWEEN	PERI MICAELA FINNIGAN and BORIS VAN DELDEN Plaintiffs
AND	BRIAN ROBERT ELLIS First Defendant
	GERALD NORMAN WILLIAMS Second Defendant
	JAMES NEIL BLACK Third Defendant

Hearing:	12, 13, 14, 15, 19, 20, 21, 22 and 26 February 2018 (further memorandum filed for Mr Ellis on 8 March 2018)
Appearances:	K J Crossland, J K Boparoy and A Alipour for Plaintiffs W C Pyke for First Defendant G N Williams in person (G Bogiatto having been excused) J N Black in person
Judgment:	22 May 2018

JUDGMENT OF WYLIE J

This judgment was delivered by Justice Wylie
On 22 May 2018 at 12.00pm
Pursuant to r 11.5 of the High Court Rules
Registrar/Deputy Registrar
Date:……

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Introduction

[1] The plaintiffs are the liquidators of Wenztro Co-operation Ltd (in liquidation) (Wenztro).

[2] The first defendant, Mr Ellis, who is a lawyer and businessman, and the second defendant, Mr Williams, who is a businessman and formerly banned director, were *de jure* directors of Wenztro. Mr Ellis says that he resigned as a director on 6 April 2012. The liquidators say that even if he did resign as from that date, he was a *de facto* or shadow director thereafter. The liquidators also assert that the third defendant, Mr Black, who was for much of the relevant time an undischarged bankrupt residing in Hong Kong, was a *de facto* or shadow director throughout.

[3] The liquidators allege that the defendants breached various duties they owed as directors to the company under the Companies Act 1993 (the Act):

(a) they traded recklessly – s 135;

(b) they agreed to Wenztro incurring various obligations without a reasonable belief that it would be able to perform those obligations when required to do so – s 136; and

(c) they failed to exercise the care, diligence and skill that reasonable directors would have exercised in the same circumstances – s 137.

Recovery is sought from the defendants under s 301(1)(b)(ii) of the Act.

The evolving pleadings

[4] The pleadings have been amended a number of times. In particular, the amount claimed by the liquidators from the defendants has been something of a moving target:

(a) In the initial statement of claim dated 8 July 2016, the liquidators claimed $773,135.26.

(b) In a first amended statement of claim dated 25 September 2017,[1] the amount claimed decreased to $765,405.31.

(c) A second amended statement of claim,[2] dated 21 December 2017, put the amount claimed at $1,981,774.81.

(d) When Mr Crossland opened the case for the liquidators, the amount claimed was $2,379,290.13, or, if a late claim in the liquidation by Mr Ellis was accepted, $2,778,124.80.

(e) A third amended statement of claim[3] was filed during the hearing seeking to amend the sums sought to tie in with the opening.

(f) A fourth amended statement of claim[4] was filed later in the hearing, reducing the amount claimed to $765,692.81.

[5] The amount sought in the second and third amended statements of claim included two large unsecured claims accepted by the liquidators – one by Wenzhou Hongliang Trading Co Ltd (WHT) in the sum of $1,833,478.89, and the other by Sunlucky Style NZ Ltd (Sunlucky) in the sum of $397,515.04. Both claims were said to be for consequential losses following on from a breach of contract by Wenztro.

[6] WHT had filed a proof of debt in the sum of $3,659,335.17. The liquidators accepted the claim in the amount set out in [5] above. They did so after they obtained an independent review from a chartered accountant – Bruce Sheppard. Similarly, Sunlucky had lodged a proof of debt in the sum of $950,397.38. Using the methodology that had been adopted by Mr Sheppard in his review of WHT's claim, the liquidators accepted Sunlucky's claim also in the amount set out in [5] above.

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1 This pleading is intituled as an amended statement of claim. Given the number of amended pleadings, I have treated and referred to it as being the first amended statement of claim. All subsequent amended statements of claim are numbered sequentially.

2 Intituled as the first amended statement of claim.

3 Intituled as the second amended statement of claim.

4 Intituled as the third amended statement of claim.

[7] In their second and third amended statements of claim, the liquidators referred the amount of WHT's claim to the Court for decision under s 307(1)(b) of the Act. The liquidators did not, however, in their second amended statement of claim, refer Sunlucky's claim to the Court. The third amended statement of claim sought to remedy this. It sought the Court's decision on both WHT's and Sunlucky's claims.

[8] The liquidators also accepted a separate proof of debt filed by Mr Ellis. The liquidators approved an initial claim by Mr Ellis in the sum of $82,049.48. On 23 January 2018, Mr Ellis filed a further proof of debt in the sum of $398,834.67. The liquidators did not have sufficient evidence to satisfy themselves that this second claim was in order. Further, it was filed well out of time. The liquidators nevertheless asked Mr Ellis for supporting documentation. As at the date of the hearing, that documentation had not been provided.

[9] Mr Ellis was claiming priority over unsecured creditors, asserting that he held two general security agreements over Wenztro's assets. The liquidators in their pleadings sought to set aside under s 294(5) of the Act:

(a) a general security agreement Wenztro had granted to ASB Banking Ltd (ASB) on 25 March 2011. This agreement had been assigned to Mr Ellis on 9 October 2012; and

(b) a general security agreement granted by Wenztro to Mr Ellis on 25 March 2012.

[10] The filing of the third and fourth amended statements of claim required leave. When the third amended statement of claim was presented to the Court, and leave was sought, the defendants signalled that they might also wish to amend their pleadings:

(a) Mr Ellis sought to both amend his statement of defence and to file a counterclaim under s 284 of the Act challenging the claims made in the liquidation by WHT and Sunlucky.

(b) Mr Black also sought to file an amended statement of defence and counterclaim raising the same issues.

Mr Williams did not seek to amend his pleadings.

[11] In the event, there was no opposition by any party to the grant of leave to any of the amended pleadings and all came in by consent.

Issues resolved

[12] Some of the issues raised in the pleadings were resolved during the trial.

[13] As I have noted in [4](f) above – the liquidators substantially reduced the amount claimed during the course of the hearing. The background to this reduction was as follows:

(a) The evidence from one of the liquidators, Peri Finnigan, disclosed that WHT had some years earlier obtained summary judgment against Wenztro for damages for breach of contract in the sum of $562,158.72, together with interest of $40,353.56, costs of $9,751, and disbursements of $5,133.33 – a total of $617,396.61.[5]

(b) As noted in [5] above, the amount claimed by WHT in the liquidation was said to comprise consequential losses following on from Wenztro's breach of contract. It occurred to me that WHT might be belatedly seeking to recover additional damages and that this might infringe the rule in *Henderson v Henderson*.[6]

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5 *Wenzhou Hongliang Trading Co Ltd v Wenztro Co-operation Ltd* HC Auckland CIV-2012-404-5130, 31 October 2012.

6 *Henderson v Henderson* (1843) 3 Hare 100 (Ch) at 115 per Wigram VC: "… where a given matter becomes the subject of litigation in, and of adjudication by, a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case". See also *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd* [2013] UKSC 46, [2014] AC 160 at [17]-[26].

(c) I raised this issue with counsel. After discussion, and after Mr Pyke's opening on behalf of Mr Ellis, the liquidators resiled from their earlier position and advised that they would no longer seek to recover from the defendants the consequential losses claimed by WHT and Sunlucky. As a result, the fourth amended statement of claim reduced the principal claimed to $765,692.81, made up as follows:

Creditors	Amount claimed ($)
IRD	150.00
Ensor Associates	1,242.50
Lock and Partners	1,603.22
Sunlucky	4,251.00
WHT– judgment debt	617,396.61
Mrs M Hollinger	59,000.00
Mr Ellis	82,049.48
Total claims admitted by liquidators	**$765,692.81**

[14] As a consequence, the liquidators' pleading requesting the Court to decide the quantum of WHT's and Sunlucky's claims under s 307(1)(b) of the Act was no longer in issue. Mr Crossland, on behalf of the liquidators, confirmed that no orders were required in this regard.

[15] The counterclaims made by Mr Ellis and Mr Black under s 284 of the Act also no longer fell for consideration and they were formally abandoned both by Mr Pyke and by Mr Black.

[16] In addition, Mr Ellis:

(a) abandoned his late claim in the liquidation for the additional $398,834.67 noted above at [4](d) and [8];[7] and

(b) accepted that it was appropriate for me to set aside, under s 294(5) of the Act, both of the general security agreements noted in [9] above.

[7] This advice was given by memorandum dated 2 March 2018, filed on 8 March 2018. The memorandum advised that Mr Ellis had abandoned his creditor's claim in the liquidation for $378,834.67. I assume this is a typographical error. The claim was for $398,834.67.

As a result, the liquidators' third cause of action in the fourth amended statement of claim also fell by the wayside. This was acknowledged by Mr Crossland.

Remaining issues

[17] As a result of these various changes in position, the remaining issues that I am required to decide can be summarised as follows:

(a) Was Mr Black a shadow and/or a *de facto* director of Wenztro?

(b) If Mr Ellis resigned on 6 April 2012, did he remain a shadow and/or a *de facto* director of Wenztro thereafter?

(c) Did the directors (whether *de jure*, shadow or *de facto*) agree to, or cause or allow, Wenztro's business to be carried on in a manner likely to create a substantial risk of serious loss to the company's creditors?

(d) When the directors (whether *de jure*, shadow or *de facto*) agreed to Wenztro incurring various obligations, did they believe on reasonable grounds that Wenztro would be able to perform those obligations when it was required to do so?

(e) Did the directors (whether *de jure*, shadow or *de facto*) exercise their powers and perform their duties as directors with the care, diligence and skill that reasonable directors would have exercised in the same circumstances?

(f) What relief, if any, is appropriate and what is the appropriate measure of contribution between the directors (whether *de jure*, shadow or *de facto*)?

[18] Before turning to deal with these issues, I summarise as briefly as I reasonably can the rather convoluted factual background to these proceedings.

Factual background

Incorporation/Business structure

[19] Wenztro was incorporated by Mr Ellis on 16 January 2009. It was originally known as Consolidated International Resources NZ Ltd. On 25 August 2009, the company changed its name to Trojan Foods (NZ) Ltd. On 12 July 2012, it changed its name again – this time to Wenztro Co-operation Limited.

[20] The company's registered office at all relevant times was that of Mr Ellis' legal firm – Ellis Law – in High Street, Auckland. The company had no dedicated office either within Ellis Law's premises or elsewhere.

[21] Mr Ellis, Mr Black and Mr Williams were at all relevant times associated with each other through a complex web of interrelated directorships and shareholdings in a number of companies, both in New Zealand and in Hong Kong. Relevantly:

(a) Mr Ellis was a *de jure* director of Wenztro from 16 January 2009. Mr Ellis says that he resigned on 6 April 2012.

(b) Mr Williams had been a banned director. The ban ended on 18 December 2007 and Mr Williams was a *de jure* director of Wenztro from 29 September 2009 onwards.

(c) By resolution dated 20 January 2008,[8] it was resolved to appoint Mr Black as a director of Wenztro from 20 January 2009. This appointment was not, however, notified to the Companies Office. Mr Black could not have been a registered director after 25 May 2009 – he was an undischarged bankrupt, for a second time, from 25 May 2009 to 12 April 2013.[9]

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8 This date is probably a typographical error – it seems more likely that the resolution was passed on 20 January 2009.

9 As a bankrupt, Mr Black was precluded from being a director of a company – Companies Act 1993, s 151(2)(b). He was not permitted to carry on, or take part in, the management or control of any business – Insolvency Act 2006, s 149(1)(a). It was an offence for him to do so without reasonable excuse, or for him to act as a director – Insolvency Act, s 436(1).

[22] Wenztro issued 120,000 shares upon incorporation. Its share capital was not called up to provide either equity or cashflow.

[23] Wenztro's sole shareholder was a company called Northern Trustee Services (BT) Ltd (NTS). NTS had been incorporated in May 2006. Mr Ellis was its sole director. He and a Mr Lucas held its shares jointly. NTS held the shares in Wenztro under a trust deed on behalf of Trojan Food Holdings Ltd, a Hong Kong registered company. It was Wenztro's parent company. Mr Ellis, Mr Black and a Mr Graham were directors of this company. The trust deed required NTS to follow Trojan Food Holdings Ltd's instructions in respect of the shares in Wenztro. NTS was a bare trustee.

[24] Mr Williams had earlier developed infant formula brands, including a brand known as "Trojan Promax". This brand was owned by a company associated with Mr Williams, and of which he was a director, MSUT Holdings NZ Ltd. It assigned the "Trojan Promax" brand to Wenztro's parent company in Hong Kong, Trojan Food Holdings Ltd, and, on 22 July 2010, Wenztro trademarked the brand "Trojan Promax" in New Zealand. Neither it nor Trojan Food Holdings Ltd trademarked or registered the brand in China, however.

[25] It was intended by the directors that Wenztro would export infant milk powder products from New Zealand into Asian markets, with a primary focus on China. It was hoped that the company would be able to take advantage of the export opportunities presented after melamine was discovered in Chinese manufactured infant milk formula in July 2008.

[26] Wenztro's website stated that it was a New Zealand based private company, with staff in Hong Kong and New Zealand, and with colleagues and partners based in Malaysia, China, Iran and the UAE. It represented that Wenztro specialised in the supply of milk powder based products that it produced and distributed. It said that Wenztro had a team with extensive experience in the New Zealand dairy industry, offices in the heart of New Zealand's dairy industry, quality assurance systems in place, and a distribution network within selected Asian countries. It claimed that

Wenztro had direct links from the producer to end markets and control of its product through every stage of the process.

[27] The evidence disclosed that Wenztro had only one employee in this country – Margaret Hollinger. It may have had contacts in some other jurisdictions, but the evidence in this regard was limited. Mr Black was on occasion described as its Hong Kong based sales director. The business was effectively run from Mr Ellis' law firm.[10] Correspondence, purchase orders and invoices were addressed to that office.

[28] Wenztro had an account with ASB. Mr Ellis was a signatory to the bank account, together with Mr Williams. Wenztro also had a ledger within the trust account operated by Mr Ellis' law firm.

[29] Wenztro had no facilities which enabled it to manufacture milk powder products. Rather, in December 2009, Wenztro signed a supply agreement with an infant formula manufacturer, Unitech Industries Ltd (Unitech). Inter alia, Unitech agreed to supply products to Wenztro's order. The agreement provided that, at the time of any order, Wenztro would put in place a letter of credit or bank guarantee in favour of Unitech. Apart from an assurance of a minimum shelf life of 18 months in the New Zealand market, Unitech made no assurance in relation to the shelf life of any products it might supply under the agreement. The agreement noted that any products manufactured were to be exported to Asian or Middle Eastern markets, and that appropriate analytical testing in local conditions would be required to verify shelf life in the destination market.

[30] The liquidators were able to identify two sales that Wenztro entered into. The first was with WHT and the second with Kiwi Goods Ltd (Kiwi Goods). I deal with each in turn.

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[10] Mr Ellis asserted under cross-examination that the company also had an office in Rotorua at one stage, and that it was manned by a Mr Graham and a secretary called "Sandra". He was unable to provide much further detail and he described it as a "loose arrangement". He did not know who Sandra was employed by.

WHT's order

[31] WHT at the relevant times was a China based import/export and distribution company. It had been established by Yingying Wang, and it held various licences in China permitting it to import and export goods. In 2010, it was seeking to import infant milk formula and other luxury food products into China from New Zealand.

[32] Ms Wang is related to Wei (William) Lin. Mr Lin is a New Zealand citizen. He also was at all relevant times involved in the import/export sector. He conducted his business activities through Sunlucky. WHT appointed Mr Lin as its New Zealand agent. Mr Lin, on behalf of WHT, met with a number of representatives of companies in New Zealand with regard to the possible export of milk formula into China. Mr Lin was introduced to Mr Williams through a common associate – Sylvia Taylor. She sent Mr Williams' contact details to Mr Lin and referred Mr Lin to Wenztro's website.

[33] Mr Lin and Mr Williams initially met in a café in early November 2010. Their subsequent meetings were conducted either in cafes, or at Mr Williams' home in Takapuna. Mr Lin asked Mr Williams if Wenztro could supply infant formula under a brand name to be nominated by WHT as the prospective buyer. Mr Williams initially offered to supply two brands of infant milk formula through another company with which he was associated. Mr Lin advised Mr Williams that WHT would not be interested in those brands. At the time, WHT was contemplating registering the "Promax" brand – both in English and Chinese – in China. It wished to use that brand name. Mr Lin told Mr Williams about this. Mr Williams represented to Mr Lin that Wenztro had its own factory to make milk powder products, and Mr Lin understood that Wenztro itself would manufacture any infant formula ordered.

[34] On 2 November 2010, Mr Williams emailed Mr Lin. He said that Wenztro could supply infant milk formula to WHT under the "Promax" brand. Mr Williams gave Mr Lin prices for both 20-foot and 40-foot containers of infant milk formula. He noted that a 40-foot container could hold 18,300 cans of infant formula. The price quoted for 18,300 cans was $265,472. Mr Williams stated that delivery would occur 12 weeks after order, and that payment of a 30 per cent deposit would be required on order.

[35] At the time, WHT did not have a licence from the Chinese government permitting it to import milk powder. It was able, however, to make arrangements for another Chinese company, which did have the appropriate import licence, to act as its import agent. Mr Lin told Mr Williams about these arrangements.

[36] On 15 November 2010, Mr Williams, on behalf of Wenztro, signed a contract for the supply of 18,300 cans of infant formula to WHT, through its nominated import agent. This contract was not, however, signed by either WHT or the import agent.

[37] On 17 November 2010, WHT engaged a company in China to apply for a trademark for the "Promax" brand in China. Application was made the following day – 18 November 2010.

[38] Wenztro issued a "proforma invoice" for the supply of 18,300 cans of infant formula for $306,525 on 30 November 2010. The increase over the amount initially quoted was commission which Wenztro agreed would be paid to Sunlucky for arranging the order. The commission was built into the price to be charged to WHT. The invoice also set out the terms of sale. Wenztro required a deposit of 30 per cent within seven days of invoice and the balance no later than 14 days before the goods were shipped.

[39] Mr Lin then placed an "irrevocable purchase order" with Wenztro confirming WHT's purchase of 18,300 cans of infant formula in accordance with the proforma invoice at the stipulated price. The irrevocable purchase order is dated 30 November 2010. It was accepted and initialled by Mr Williams for Wenztro. It was also executed by WHT under its common seal. The date beside the common seal is 7 December 2010.

[40] Wenztro's directors calculated that Wenztro's net profit on the sale to WHT would be $30,260.

[41] It had been agreed between Mr Williams and Mr Lin that WHT would approve the labelling on the cans of infant formula to be supplied. Design work for the labels was being undertaken for Wenztro by a company called Flying Possum Design Ltd

(Flying Possum). At Mr Williams' suggestion, Mr Lin made contact with a Mr Korff of Flying Possum. There were a number of meetings between Mr Lin and Mr Korff. Mr Williams attended some of those meetings. Drafts of the labelling prepared by Mr Korff were made available to Mr Lin and, where required, Mr Lin amended them. He made it clear in emails that WHT required that the infant formula have a three-year shelf life and further that the labelling on the cans record this. Mr Williams was copied into these emails. He did not comment on, or take issue with, WHT's requirements. The labelling prepared by Mr Korff incorporated WHT's requirements:

(a) The proposed labels to go on the side of the cans were in Chinese and they were translated into English. The translation was made available to Mr Williams. The translation recorded the three-year shelf life which WHT required.

(b) The production date and the best before date were to be stamped on the bottom of each can. Mr Korff gave the following instruction:

> Production date: see bottom of container, shelf life: 3 years.

(c) Mr Lin also contacted Mr Williams by email to ensure that the correct date format was used on the bottom of each can. The email required the following:

> Date of manufacture: YYYY-MM-DD ie **2011**-02-25.
> Best before: YYYY.MM.DD ie **2014**-02-24.
>
> (Emphasis added)

[42] The proforma invoice set out Wenztro's banking details for payment of the required 30 per cent deposit, and, on 1 December 2010, WHT paid $76,562.45 into Wenztro's bank account. A further payment of $15,326.25 was made on 2 December 2010. Immediately before these payments were made, Wenztro had only $12.71 in its bank account.

[43] The deposit was quickly, and in large part, paid out by Wenztro:

(a) On 2 December 2010:

(i) Sunlucky invoiced Wenztro $11,500 on account of its commission for arranging the purchase order between Wenztro and WHT. Wenztro paid Sunlucky the invoiced amount on 4 December 2010.

(ii) Sunlucky invoiced Wenztro a further $31,988.40 for commission calculated at 10 per cent of the value of the "Promax" formula to be supplied and exported to China. The invoice was paid by Wenztro, also on 4 December 2010.

(b) On 3 December 2010, another company – MSM Holdings NZ Ltd (MSM Holdings) – invoiced Wenztro for $23,000 claiming "progress payment for Promax brand development expenses". This invoice was paid by Wenztro on 6 December 2010. Mr Williams was a director of MSM Holdings, and he and a trustee company on behalf of his family trust held all of its shares.

(c) On 4 December 2010, JNB (Hong Kong) Ltd (JNB) invoiced Wenztro for $57,468 (HK) claiming "development, sales, Promax brands, partial reimbursement of initial development expenses". This invoice was paid – $10,000 (NZ) – on 9 December 2010. Mr Ellis and Mr Black were the directors of JNB, and Mr Black held the shares in this company.

By 9 December 2010, Wenztro's ASB bank account balance had been reduced to $15,408.36.

[44] On 7 December 2010, WHT and Wenztro entered into a long-term supply agreement. Under this agreement, Wenztro agreed to supply product to WHT, subject, inter alia, to order placement and payment. Any order placed had to be in writing and payment for product ordered had to be made in full to a nominated bank account at the time of order. Wenztro was to manufacture, package and label the product in accordance with accepted practices, and to ensure that all product complied with applicable regulations. WHT's approval was required for all artwork, design, printing

plates, graphics and label copy required for the packaging of product. Apart from an assurance of a minimum shelf life of 18 months in the New Zealand market, Wenztro gave no assurance as to the shelf life of any product ordered. The agreement recorded that appropriate analytical testing would be required to verify shelf life in any particular export market. The agreement also recorded that, should product be rejected prior to despatch, Wenztro would use its best endeavours to "assess risks with the supply of replacement stock". Wenztro agreed not to donate or sell any rejected stock packed in WHT's packaging, and to communicate with WHT regarding any possible options for alternative use or the disposal of rejected stock.

[45] Wenztro had to order the infant formula it had contracted to supply WHT from Unitech. Its contract with Unitech – see above at [29] – required that it provide a standby letter of credit or guarantee to secure the payments which would become payable to Unitech for the supply of product. Unitech required security in the sum of $240,000. Wenztro was unable to comply with this obligation and it did not immediately place the order.

[46] It seems that Mr Lin did not know that the order had not been placed. He and Mr Williams corresponded throughout February 2011 about delivery of the infant formula ordered by WHT. Mr Williams emailed Mr Lin saying that delivery would be in late April 2011. In a later email, also sent in February 2011, he said that delivery would be in late May 2011.

[47] On 25 February 2011, Mr Williams was a little more open. He emailed Mr Lin saying that he was embarrassed about the time that it was taking to deliver WHT's order. He told Mr Lin that Wenztro was unable to provide Unitech with the payment guarantee Unitech required, and he asked whether WHT would be prepared to pay in full for the product ahead of delivery. Mr Lin did not agree to this. Mr Williams then asked Mr Lin if Wenztro could borrow sufficient monies from him, or perhaps from another party, to enable it to give Unitech the security it required before it would start production.

[48] On 28 February 2011, Mr Lin agreed to provide $200,000 to support Wenztro. Mr Ellis, via Mr Williams, asked Mr Lin to deposit the $200,000 directly into his law

firm's trust account. Mr Lin refused. Rather, he advised that the $200,000 (to be sourced from his wife) would come via Sunlucky. It would deposit the money into Mrs Taylor's business account. The funds would then be available to support a letter of credit which would be provided to Unitech to support Wenztro's order.

[49] By this stage, Wenztro was also having difficulties with other creditors. For example, on 15 February 2011, Wenztro received a statement from Ensor & Associates. They had registered the "Trojan Promax" trademark in New Zealand for Wenztro. The statement recorded that their account of $1,040.63 was six months overdue. Invoices from Flying Possum were also overdue.

[50] On 8 March 2011, Mr Lin emailed Mr Ellis and Mr Williams, asking how they were getting on with arrangements for the guarantee or standby letter of credit required by Unitech. Mr Ellis replied saying that they were still dealing with Wenztro's bank.

[51] Despite Wenztro's financial difficulties, on 10 March 2011, JNB (Mr Black's company) sent Wenztro a further invoice for $56,647 (HK) claiming "further development, sales and Promax and Truby King brand expenses". Wenztro paid the invoice – $10,000 (NZ) – on the same day. After this payment, Wenztro's bank account stood at $4,884.21.

[52] On 12 March 2011, Mr Lin emailed Mr Williams and Mr Ellis, advising that he needed a final answer on when the infant formula ordered by WHT would be delivered. Mr Williams replied saying that if Mr Ellis could get the letter of credit in place by 15 March 2011, production could take place and delivery would be in mid-June 2011.

[53] By 16 March 2011, the advance from Sunlucky was in Mrs Taylor's business account as security. It was proposed that the ANZ Bank (ANZ) would issue a standby letter of credit to Unitech against the sum being held by Mrs Taylor. Mr Ellis agreed to give a guarantee in support of an additional standby letter of credit for the balance ($40,000) from Wenztro's bank – ASB. In the course of obtaining ASB's agreement, various representations were made by Mr Ellis, including that the net profit on the

WHT sale would be $31,000 and that Wenztro's Hong Kong based director (Mr Black) was negotiating with two further buyers.

[54] On 21 March 2011, ASB wrote to Mr Ellis enclosing the required security documents for signing. Initially, Mr Ellis signed an unlimited guarantee. A general security agreement in favour of ASB over Wenztro's assets was also signed on 25 March 2011 by both Mr Ellis and Mr Williams. Mr Ellis then had second thoughts about the unlimited guarantee, and he signed another guarantee limited to $40,000 to substitute for the prior guarantee.

[55] On 25 March 2011, ASB issued a standby letter of credit for $40,000 in favour of Unitech. On the same day, ANZ emailed Unitech, confirming that it had approved a standby letter of credit in favour of Unitech for $200,000. Mr Ellis wrote to Unitech giving an undertaking on behalf of Wenztro that it would pay the GST involved.

[56] Wenztro's financial statements for the year ended 31 March 2011 recorded that Wenztro then owed ASB $170 and sundry creditors $91,889. Its assets recorded in the balance sheet were brand goodwill of $40,000 and a $9,340 GST refund. According to these accounts, Wenztro's liabilities exceeded its assets by at least $42,000.

[57] Wenztro's position was unlikely to improve. It would receive approximately $214,000 from WHT when the infant milk formula was delivered, but it had to pay Unitech $237,026 (excluding GST), or $272,581 (including GST), to meet the costs of supplying WHT's order. There were no other confirmed sales and no other sources of income.

[58] Notwithstanding Wenztro's financial position, various further payments were made by the directors:

(a) On 14 June 2011, JNB (Mr Black's company) invoiced Wenztro a further $7,700 (HK) claiming "development, sales, Promax brands and partial reimbursement of marketing expenses". Wenztro paid this invoice – $1,150 (NZ).

(b) On 16 June 2011, MSM Holdings (Mr Williams' company) invoiced Wenztro a further $1,150 claiming "progress payment for Promax brand development expenses". This was also paid.

(c) Flying Possum was doing work on a new brand – "Truby King". It invoiced Wenztro for this work. Wenztro paid Flying Possum $3,815.13 on 8 June 2011.

By 30 June 2011, Wenztro's bank account was $216.23 in credit.

[59] Wenztro placed the purchase order with Unitech for the supply of the 18,300 cans of infant formula ordered by WHT on 1 July 2011. The target delivery date was 14 October 2011. Wenztro specified that the expiry date to be printed on the cans should be 24 months. Unitech agreed to this. However, the expiry date required by WHT was three years. The labels prepared by Flying Possum for Wenztro recorded that the formula had a three-year shelf life.

[60] Also on 1 July 2011, Wenztro employed Margaret Hollinger as its general manager. The written offer of employment came from Mr Ellis, and he signed an employment agreement with Mrs Hollinger on behalf of Wenztro. Her gross salary was to be $60,000 a year. In the event, Mrs Hollinger was not paid – apart from a single payment of $1,000 on 1 December 2011. Wenztro's directors did not notify the Inland Revenue Department (IRD) that Mrs Hollinger was its employee. No PAYE was returned to the IRD.

[61] On 10 October 2011, Mr Lin asked for interest on the $200,000 advance he had provided through Sunlucky to Mrs Taylor to secure the standby letter of credit in favour of Unitech. In a letter dated 10 October 2011, Mr Williams and Mr Ellis agreed that Wenztro would pay Mr Lin interest on the $200,000 loan as from 7 March 2011.

[62] WHT was becoming increasingly concerned about Wenztro's failure to deliver the product it had ordered. Mr Lin made enquiries, and, on 19 October 2011, Mr Williams assured Mr Lin that the order would be ready for delivery by 15

November 2011. A few days later, Mr Williams advised Mr Lin that he had organised shipment for 19 November 2011.

[63] Pursuant to the proforma invoice and the irrevocable purchase order, WHT was required to pay Wenztro in full 14 days prior to the goods being shipped. In anticipation of delivery, WHT paid the following amounts into Wenztro's bank account, being payment in full for the infant formula to be delivered:

9 November 2011	$76,564.31
9 November 2011	$916.75
9 November 2011	$37,000
10 November 2011	$50,000
11 November 2011	$50,000
Total	**$214,481.06**

[64] On 15 November 2011, Unitech supplied the first cans of infant formula to Wenztro to fulfil WHT's order. Some specimen cans were given to Mr Lin. It immediately became apparent that the product packaging did not meet WHT's requirements. In accordance with those requirements, the label on the side of each can recorded that the product had a shelf life of three years. However, on the base of each can, there was a stamp recording that the infant milk formula had been manufactured on 11 November 2011 and that its "use by date" was 11 November 2013.

[65] Mr Lin promptly advised Mr Williams that the cans so labelled would not be allowed into China, and that they could not be sold in China under the applicable regulations in that country.

[66] Mr Williams acknowledged in an email to Mr Lin dated 19 November 2011 that he was at fault. He said as follows:

> Your buyer made a request to change the can artwork by putting on the three year storage note. You passed this change on, with others, to us (Jason) by e mail in Chinese characters and the changes were made. Obviously neither Jason nor I could read what the changes were. The contract specified eighteen months and I had agreed to two years. The changes were made, without my knowledge of what they were. The error should have been picked up in the checking process but it was not. There was a translation document prepared and the three years appears in that document. I should have picked that up but

> I did not. That translation document went to Unitech, and they should have picked it up, but they did not either. I accept that you must have thought at the time that three years was acceptable to me and to Unitech. Unfortunately it was not. I only wish it had been brought to my notice at the time.

[67] Mr Williams and Mr Lin met in mid-late November 2011. According to Mr Lin, Mr Williams then accepted that he had misled Mr Lin and acknowledged that Wenztro had never exported dairy product before.

[68] On 18 November 2011, Unitech invoiced Wenztro $237,027.12 plus GST – a total of $272,581.19 – for the supply of the infant milk formula to meet WHT's order. On 23 November 2011, Wenztro paid $200,000 to Unitech. This payment utilised much of the money paid to Wenztro by WHT. Wenztro did not, in making the payment, suggest that Unitech was at fault over the labelling issue.

[69] There were additional invoices from Unitech to Wenztro, including invoices for label work done on brands not owned by Wenztro, but rather by other companies associated with the directors of Wenztro. Unitech took the view that the only company it had a contract with was Wenztro and that Wenztro should therefore be charged for all of the work done on labels by Unitech.

[70] WHT and Wenztro tried to address the situation arising from the labelling issue on the cans:

(a) The container holding the cans of infant formula was not loaded onto a ship.

(b) Ms Wang of WHT and Mr Williams spoke. Ms Wang told Mr Williams that WHT would not accept the cans as they were. She suggested that the date on the bottom of the cans should be overprinted. Mr Williams said that he would think about this. He later advised that overprinting was not an option. He told Mr Lin that he had spoken about this with Unitech, although evidence at the hearing suggested there was no such conversation.

(c) In an email to Mr Lin dated 2 December 2011, Wenztro offered to produce a fresh batch of infant formula, with a three-year shelf life specification, in accordance with WHT's requirements. It said that the replacement product could be delivered in Auckland by 24 February 2012.

(d) Mr Lin contacted Mrs Wang regarding Wenztro's offer to produce a fresh batch of correctly labelled infant formula. Mrs Wang agreed to accept a replacement container, to be delivered by 24 February 2012. Mr Lin advised Mr Williams that WHT agreed to the replacement order.

[71] Wenztro took no steps to replace WHT's order with correctly labelled product. It had no financial ability to do so. Rather, Wenztro shipped the container of mislabelled infant formula to an associated company in Hong Kong, Trojan Dairy Foods Ltd, on 22 December 2011. Wenztro sent an invoice to Trojan Dairy Foods Ltd for $306,525 for the mislabelled infant formula. This invoice was not paid, but the debt owing to Wenztro was not pursued by the directors. When he was examined about this by a previous liquidator, Mr Ellis claimed that the invoice was issued simply for customs purposes.

[72] By 9 December 2011, Wenztro had $5.22 in its bank account. On Ms Finnigan's analysis, it owed creditors $450,578, and its net liabilities exceeded its assets by at least $383,457.

[73] As at February 2012, Wenztro had still not paid Unitech in full for the first order or for the additional work done on other labels. Unitech was pushing Wenztro for payment of the monies owing to it. Mr Williams made various promises, but nothing eventuated.

[74] A Mr Edge from Unitech sent an email to Wenztro on 2 February 2012, after he had received an email from Mr Lin enquiring about the replacement order. Mr Edge in his email to Wenztro stated as follows:

> Good morning guys.
>
> In response to the email from William [Lin], I believe you should be up front and honest with the guy. Tell him you haven't paid your bills and when they are paid we can get on with it.
>
> Cheers Max [Edge].

[75] Mr Ellis went to Hong Kong to try and sell the mislabelled cans. He says that he was unsuccessful. Mr Lin gave evidence that some of the mislabelled product was available for sale on the internet in China. He said that the mislabelled cans must have been smuggled into China, because they could not legally have been imported into that country.

[76] Mr Lin tried to find out more about the replacement product which Wenztro had agreed to supply. He contacted Unitech by email on 15 February 2012 to check when the replacement product was going to be delivered. Unitech advised that it was still owed money by Wenztro, and that it would not manufacture more infant formula until it had been paid for the first order. Mr Edge sent a further email to Wenztro's directors stating as follows:

> The email from William [Lin] certainly doesn't help the prospects of any further business with you guys. What are you playing at?
>
> Max [Edge].

[77] On 16 February 2012, after learning that Wenztro had not placed an order for the replacement product and that it had not paid Unitech in full for the first order, WHT cancelled its infant formula supply contract with Wenztro and demanded a refund of the full amount paid by it, plus interest. It demanded payment on or before 29 February 2012.

[78] WHT's cancellation of the infant formula supply contract was not disputed by Wenztro.

[79] The Unitech debt was still outstanding and Mr Ellis wrote direct to Unitech in this regard. He said that the container of mislabelled infant formula had arrived in Hong Kong and that it was likely to be sold. He promised payment to Unitech once funds were available. He also said that Wenztro had obtained a funding line from

Hong Kong that would be used to clear Wenztro's debt to Unitech, and to place further orders. Mr Edge replied as follows:

> I guess it is a situation of "spot the difference" with today's email. If the payment is not made by Thursday 23 February, … there can be no further business with [Wenztro] as the company stands. It's entirely in your hands!! Would your company do business with a very bad debtor and a company who signed a contract and broke it?

[80] On 28 February 2012, Mr Ellis told Mr Williams that he was arranging a personal loan to clear the Unitech debt. In the event, Mr Ellis advanced $500 to Wenztro and he took a general security agreement over its assets. ASB also agreed to give Wenztro an overdraft facility, after representations were made by Mr Ellis that funds were about to become available, and after Mr Ellis had provided a personal guarantee to the bank. On 30 March 2012, Wenztro transferred $64,048.16 to Unitech. Following this, Wenztro's bank account was overdrawn by $68,445.82.

[81] Wenztro's directors did not prepare accounts for the financial year ending 31 March 2012. Ms Finnigan has, however, estimated the company's financial position as at that date. She concluded that the company had net liabilities of $436,199, including the obligation to repay WHT for the monies it had paid to Wenztro for the mislabelled product not delivered. She made no allowance for the mislabelled product held in Hong Kong. She endeavoured to find out what had happened to that product. Mr Ellis had represented to various parties – including ASB – that the mislabelled infant formula in Hong Kong either had been, or would be, sold and that payments would be forthcoming from a contract referred to as the "Wunan contract". Ms Finnigan could not confirm that there was any such contract, or that there were any other sales. It seems likely that some of the mislabelled product was smuggled into China and sold on the internet, but that the balance was destroyed. While the mislabelled product was being held in Hong Kong, it incurred warehousing costs. As at 22 August 2013, they amounted to $125,000 (HK) – $20,859 (NZ). It is not clear whether these costs were paid, and if so, by whom.

[82] If any of the mislabelled product was sold in China or elsewhere, the proceeds were not paid into Wenztro's bank account.

Kiwi Goods' order

[83] On 31 August 2011, Wenztro entered into a second agreement with a customer – Kiwi Goods.

[84] Kiwi Goods is a New Zealand registered company. It signed an irrevocable purchase order on 19 September 2011 for 9,300 cans of "Promax" infant formula for a total sum of $148,696.15. The agreement was signed by Mr Williams on behalf of Wenztro. Kiwi Goods paid a deposit of $14,869.62 on 23 September 2011. Immediately prior to that payment, Wenztro's bank account was $4.93 in credit.

[85] Kiwi Goods' deposit was in large part paid out by Wenztro. Inter alia:

(a) on 20 October 2011, JNB (Mr Black's company) invoiced Wenztro a further $9,100 (HK) claiming "development, sales, "Promax" brands, partial reimbursements of marketing expenses". Wenztro paid the invoice – $1,380 (NZ) – on 26 October 2011; and

(b) on 25 October 2011, MSM Holdings (Mr Williams' company) invoiced Wenztro a further $1,380 claiming a progress payment on "Promax" brand development expenses.

After payment of various invoices, Wenztro had $1,121.96 in its bank account.

[86] No order was placed by Wenztro with Unitech for the supply of the product ordered by Kiwi Goods.

[87] On 23 February 2012, Kiwi Goods' lawyers wrote to Wenztro and both of its *de jure* directors, namely Mr Ellis and Mr Williams. They referred to the supply agreement between Kiwi Goods and Wenztro, and noted that it required Wenztro to deliver the product ordered by Kiwi Goods within 14 weeks from the date of the order being placed on 19 September 2011. They recorded that the order should have been delivered by 30 December 2011, but that it had not been. They terminated the contract for this breach, and asked that Kiwi Goods' deposit be refunded to it.

[88] Wenztro did not dispute the termination. On 17 May 2012, Wenztro paid $5,000 to Kiwi Goods as part repayment of the deposit Kiwi Goods had paid. Kiwi Goods was paid a further $7,000.20, through Mr Ellis' trust account, by two more payments, the first on 19 June 2012 and the second on 23 July 2012. These payments were funded by personal advances made by Mr Ellis to Wenztro's account utilising his firm's trust account. It seems that Kiwi Goods was either ultimately paid out in full or it accepted the monies it received without pursuing the balance. It did not seek to prove in the liquidation.

Truby King Ltd

[89] In mid-2012, Mr Ellis advised ASB that a new company would be set up – Truby King Ltd – to facilitate shipments of infant formula, and that he had trademarked the brand name "Truby King".

[90] Mr Ellis had in fact incorporated Truby King Ltd earlier on 24 March 2011. Its directors were Mr Ellis and a number of others, all of whom later resigned. The shareholders were Northern Trustee Services (No 12) Ltd and Mr Ellis jointly, and Blainfa Ltd and Mr Black jointly. Mr Ellis was a director of Northern Trustee Services (No 12) Ltd and its sole shareholder was Northern Trustee Holdings Ltd. Northern Trustee Holdings Ltd's shareholders were Mr Ellis and Mr Lucas. Mr Ellis was its sole director. Mr Ellis was also a director of Blainfa Ltd, and its shareholders were Mr Ellis and Mr Black.

[91] Truby King Ltd took over such limited business and assets as Wenztro had. It took over the Wenztro website. All references to Wenztro were replaced with references to "Truby King". Mr Ellis sent the email to the website designer asking for these changes. Notwithstanding that Wenztro had paid to develop the brand name "Truby King", it was assigned to Truby King Ltd for $1. No valuation of the brand was undertaken. Mr Ellis accepted that the figure of $1 was "plucked out of the air".

The liquidation of Wenztro

[92] Wenztro ceased to trade. By this stage:

(a) Sunlucky had engaged a debt collector – a Mr Chapman – to pursue the recovery of interest owed to it on the $200,000 it had advanced to secure the standby letter of credit from ANZ. Mr Chapman pursued Mr Ellis, and Mr Ellis in response made various representations that money would shortly be obtained from the sale of the mislabelled infant formula in Hong Kong.

(b) ASB was pushing for repayment of the overdraft it had advanced to Wenztro. On 19 July 2012, it advised Mr Ellis that he would need to refinance the overdraft into his personal name unless it could be cleared within seven days.

(c) WHT was demanding repayment of the monies it had paid Wenztro. Proceedings were threatened by letter dated 18 May 2012 and on 31 August 2012, summary judgment proceedings[11] were filed by WHT against Wenztro in this Court. Wenztro was served and a hearing was scheduled for 11 October 2012.

[93] Mr Ellis had to advance moneys personally to clear the overdraft. He wanted to take an assignment of the general security agreement held by ASB to protect his position, and on 4 October 2012, he wrote to ASB providing a deed of assignment. On 5 October 2012, $64,634.24 was transferred through Ellis Law's trust account from Mr Ellis personally to Wenztro. This was used to clear the ASB overdraft, and the deed of assignment was delivered shortly thereafter to Mr Ellis.

[94] Four days later, on 9 October 2012, Wenztro was placed into liquidation by its shareholder, NTS. Robert Merlo was appointed as the liquidator. He sent a letter to Mr Ellis noting that Mr Ellis was a secured creditor under the two general security agreements and advising that he would also assume responsibility as a receiver.

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11 See above at [13(a)].

[95] Notwithstanding the liquidation, this Court allowed the summary judgment proceedings to continue, and on 31 October 2012, Doogue AJ entered judgment against Wenztro in favour of WHT.[12]

[96] On 21 November 2012, Mr Merlo filed his first report as liquidator. He stated that the mislabelled product remained in storage in Hong Kong and that it had not been sold. By this stage, the product was 12 months old. It had a use-by date of 11 November 2013.

[97] Mr Merlo's report contradicted representations Mr Ellis had made to several people, namely that the product had been sold either in whole or in part, and that funds were to be obtained from its sale. This discrepancy was taken up by WHT's barrister. He wrote to Mr Ellis, Mr Williams and Mr Merlo asking for further detail. Further, on 31 May 2013, Mr Merlo wrote to Mr Ellis raising queries about the whereabouts of the mislabelled product. It is not clear whether or not Mr Ellis replied. Ms Finnigan gave evidence that she had not seen any letter in reply from Mr Ellis.

[98] Mr Merlo took the same issue up with Mr Williams. Mr Williams replied saying that he had no idea where the container of mislabelled product was. He said that this had been organised by Mr Black in China and that the container of mislabelled product had been sent from New Zealand to Hong Kong by Mr Ellis.

[99] As I have already noted (above at [81]), Ms Finnigan made extensive enquiries, but she was unable to ascertain whether or not the mislabelled infant formula was sold before it went past its use-by date of 11 November 2013.

[100] Mr Merlo was asked by WHT to resign as liquidator of Wenztro in December 2012. He initially refused. He, however, did resign as liquidator a little later on 8 February 2013. On 13 February 2013, a Mr Sargison and a Mr Dalton were appointed by WHT as replacement liquidators. On 17 June 2013, WHT took steps to replace Mr Sargison and Mr Dalton. A Mr Levin and a Ms Madsen-Ries were appointed as liquidators from 21 August 2013. They remained as liquidators until 4 February 2016.

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12 *Wenzhou Hongliang Trading Co Ltd v Wenztro Co-operation Ltd*, above n 5.

Thereafter the present plaintiffs – Ms Finnigan and Mr van Delden – were appointed as liquidators.

[101] The above is a truncated version of the extensive evidence and the very many documents which were put before me. It should suffice to put the issues I am required to decide in context. Before turning to those issues, I make some general observations on the credibility and reliability of Mr Ellis, and on the positions taken by Messrs Williams and Black.

Reliability/credibility of Mr Ellis – positions taken by Messrs Williams and Black

[102] Mr Ellis was the only defendant to give evidence. I did not find him to be either a reliable or credible witness. His evidence-in-chief was selective and partial. Under cross-examination, he was at times bellicose, at times evasive and on occasion unctuous. He claimed that he could not remember various matters. His answers were often inherently implausible. They were frequently contradicted by contemporaneous documents. The answers he gave to questions were in some cases inconsistent with answers he had previously given to former liquidators, when he was examined by those liquidators. By way of example, in May 2015, a former liquidator, Mr Levin, asked Mr Ellis whether he knew in 2011 that Mr Black was a bankrupt. His answer was "did I know, I don't recall". That answer was patently untrue. Mr Ellis accepted before me that he did know that Mr Black was a bankrupt at all material times. In the same interview, Mr Ellis said that he was not a joint shareholder with Mr Black in any other companies. Again, this answer was untrue. Mr Ellis had no convincing explanations for these inconsistencies.

[103] More importantly, many of Mr Ellis' answers to questions were self-serving. He was keen to shift blame wherever he could, in particular to Mr Williams, but also to others, including Mrs Hollinger, Mr Lin and WHT. The only person he did not seek to blame was Mr Black. I was left with the distinct impression that Mr Ellis was prepared to say whatever he thought would best protect his own position. I have been very circumspect on relying on anything that he said.

[104] Mr Williams did not give evidence. He did endeavour to advance his version of events on some issues through various witnesses he cross-examined. Where

witnesses agreed with his questions, I have taken that agreement into account. Otherwise, I have disregarded the evidence he sought to adduce through questioning. Mr Williams also endeavoured to give evidence in the course of his closing submissions. This material was not subject to cross-examination. Because it was not tested, I have given the explanations advanced in the closing submissions little weight.

[105] Similarly, Mr Black did not give evidence. He also endeavoured to give evidence in the course of his closing submissions. For the same reason, I have given his factual assertions in his closing submissions little weight.

[106] I now turn to address the issues which remain in dispute.

Was Mr Black a shadow and/or *de facto* director of Wenztro?

De jure, de facto and shadow directors

[107] The defendants are sued under ss 135, 136 and 137 of the Act. These sections impose duties on the directors of companies.

[108] The word "director" is given an extended meaning under the Act. Relevantly, the Act provides as follows:

> **126 Meaning of director**
>
> (1) In this Act, **director**, in relation to a company, includes—
>
> (a) a person occupying the position of director of the company by whatever name called; and
>
> (b) for the purposes of sections 131 to 141, …
>
> (i) a person in accordance with whose directions or instructions a person referred to in paragraph (a) may be required or is accustomed to act; and
>
> (ii) a person in accordance with whose directions or instructions the board of the company may be required or is accustomed to act; and
>
> …

[109] A director occupying the position of director, by whatever name called, is a *de jure* director. It is only *de jure* directors who should be performing those functions that the law requires directors to perform.[13]

[110] Mr Ellis was a *de jure* director. Mr Ellis says that he resigned from that role on 6 April 2012. Mr Williams was a *de jure* director throughout.

[111] The provisions of the Act treat as directors, and hold liable for the purpose of ss 131-141, persons who come within the relevant statutory provisions.[14] Both *de facto* and shadow directors are liable for the performance of the duties that the Act imposes on directors.[15]

[112] A *de facto* director is a director, although not actually appointed as such, who is held out by the company, and purports to act, as a director.[16] *De facto* directors are caught by s 126(1)(a).

[113] A shadow director is a person who does not openly adopt the role of director, but who, from the wings, controls the persons who purport to act as directors.[17] Shadow directors are caught by s 126(1)(b)(i) and/or (ii). Whether or not a person is a shadow director is a question of fact – the question in each case being whether or not the person occupying the position of a director, by whatever name called, is required or is accustomed to act on the direction or instructions of the shadow director.[18] It is sufficient that the *de jure* director may be required or is accustomed to act in accordance with the directions or instructions of a shadow director, so that the *de jure* director is in effect the puppet of the shadow director.

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13 Peter Watts, Neil Campbell and Christopher Hare *Company Law in New Zealand* (2nd ed, LexisNexis, Wellington, 2016) at [9.1.1].
14 *Arcadia Homes Ltd (in liq) v More to this Life Ltd* [2013] NZCA 286, [2014] 2 NZLR 339 at [35].
15 Watts, Campbell and Hare, above 13, at [9.1.2].
16 *Delegat v Norman* [2012] NZHC 2358 at [26].
17 *Mani v Registrar of Companies* [2016] NZHC 3002 at [38].
18 *Vance v Lamb* (2009) 10 NZCLC 264,498 (HC) at [44]; *Dairy Containers Ltd v NZI Bank Ltd* [1995] 2 NZLR 30 (HC) at 90.

Mr Black's role

[114] In the present case, I have no doubt that Mr Black acted generally as a shadow director, and on occasion, as a *de facto* director.

[115] Mr Black represented himself at the hearing. As I have already noted, he did not give evidence, but he did present closing submissions. He then denied that he was a *de facto* director or shadow director. He acknowledged that he was an undischarged bankrupt; he claimed that he was aware of his status and that he restricted himself to roles that did not conflict with the restrictions on his bankruptcy. He also asserted that he was not resident in New Zealand at the relevant time and that he did not seek to involve himself directly in the company's business. He said that his role was confined to organising sales, the establishment of supply chains and network partners, and the provision of in-market support for a range of commodities, including dairy products. He asserted that he had no involvement with Wenztro until the mislabelling problem occurred.

[116] I do not accept the assertions made by Mr Black in the course of his closing submissions. First, they were not given in evidence, but rather in submissions. Submissions are not evidence. Secondly, Mr Black did not present himself for cross-examination and as a result, his bald assertions, made in the course of submissions, and without any evidential foundation, were of little or no assistance to me. Thirdly, the assertions were inconsistent with a considerable amount of other material which was properly placed before the Court.

[117] Mr Ellis said in evidence that Mr Black was Wenztro's Hong Kong based sales director, and not a director properly so called. For the reasons which I have set out, I did not regard Mr Ellis as either a reliable or credible witness. I reject his evidence in relation to Mr Black's role.

[118] As already noted, by resolution dated 20 August 2008 (likely to be 2009), it was resolved to appoint Mr Black as a director of Wenztro effective from 20 January 2009. Mr Ellis signed the resolution. Mr Black did not sign the resolution, but clearly Mr Ellis' intent, at least at the outset, was that Mr Black would be involved as a director.

[119] Mr Williams was examined by one of the former liquidators, a Mr Levin. Mr Williams then stated that Mr Black was a "major player", and that Mr Black "was involved in orchestrating the arrangement for selling infant formula to China". Mr Williams also said that "… the operation was really run by Brian [Ellis] and Jim [Black]".

[120] Mr Williams also appeared for himself and he did not give evidence either. As a result, these various comments could not be put to him.

[121] Mrs Hollinger did give evidence. When she was earlier examined by Mr Levin, she referred to Mr Black as being the "puppet-master". In her evidence before me, she discussed the day-to-day operation of Wenztro. She said that the key personnel involved were Mr Black, Mr Ellis, and, to a lesser extent, Mr Williams. She said that Mr Black was acknowledged by everyone associated with Wenztro as "the director of all operations". She said that "Mr Black was the main person giving instructions to everyone involved with Wenztro for the order of the day", and that "all instructions relating to the operation of the business came directly from Mr Black or via Mr Ellis, after having corresponded with Mr Black on Skype". She said that it was clear to her that Mr Black was the person that needed to be consulted on every business decision.

[122] Mrs Hollinger was not challenged on this evidence when she was cross-examined. The only question that Mr Black asked her was whether or not she had obtained residency in this country. Mr Ellis said in evidence that he disagreed "most strongly" with Mrs Hollinger's assertions, but curiously, given this assertion, Mrs Hollinger was not cross-examined by Mr Ellis' counsel on this topic either.

[123] Mrs Hollinger's unchallenged evidence clearly established that Messrs Ellis and Williams, as *de jure* directors, were accustomed to acting on Mr Black's instructions. It may even be that Mr Ellis was required to do so, given the shareholding in Wenztro and the bare trust on which the shares were held – see above at [23]. In my judgment, Mr Black was a shadow director caught by s 126(b)(i) and (ii).

[124] Mr Black was also, on occasion, a *de facto* director. He was held out as such by the *de jure* directors. For example:

(a) In a letter sent to Shanghai Kehui Import and Export Co Ltd by Mr Ellis,[19] which seems to have followed on from a meeting held in Shanghai on 3 February 2010, Mr Ellis stated as follows:

> We incorporated (formed) Trojan Dairy Foods Ltd. That company is a Hong Kong company.
>
> We also incorporated (formed) Trojan Foods (NZ) Ltd [Wenztro]. That is a New Zealand company.
>
> Trojan Dairy Foods Ltd and Trojan Foods (NZ) Ltd are both wholly owned subsidiaries of Trojan Food Holdings Ltd. That is, they are associated Companies. **All 3 Companies have the same directors**.
>
> (Emphasis added)

The directors of Trojan Dairy Foods Ltd were Messrs Williams, Ellis and Black.

(b) On 18 March 2011, Mr Ellis sent an email to ANZ in relation to the standby letter of credit then being arranged. Mr Ellis referred to the milk powder which had been ordered by WHT, and said that if WHT failed to pay for the milk powder, there would be considerable interest from others. Mr Ellis went on to say "… **our Hong Kong based director** is presently negotiating the sale to two further buyers".

(c) On 11 May 2011, Mr Ellis emailed Mr Williams, with a copy to Mr Black, asking Mr Williams to contact Mr Edge at Unitech with a request. On the following day, Mr Williams emailed Mr Edge, relaying Mr Ellis' request, and noting that "**[o]ur Hong Kong director** is in Auckland today".

(d) On 12 May 2011, Mr Williams again advised Mr Edge that "**[o]ur Hong Kong director** is in Auckland today".

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[19] The letter is dated 23 January 2018 in the bundle, but the evidence suggested that this was the date it was printed – not the date it was sent.

(e) On 20 September 2011, Mr Williams told Mr Edge that "… **the other director is in Hong Kong** tomorrow".

(f) On 8 December 2011, Mr Williams told Mr Lin that Wenztro's "**Hong Kong director**" would shortly be sending funds from Hong Kong.

(g) On 16 January 2012, Mr Williams sent an email to Mr Edge saying that Wenztro's "**Hong Kong director**" would be in Auckland to finalise details on the following Wednesday.

(h) On 5 June 2012, Mr Ellis sent an email to Mr Black, attaching a draft email to Wenztro's barrister, for Mr Black's reference. The draft email related to the demands then being made by WHT and recorded that he – Mr Ellis – had spoken with Mr Black, Wenztro's "**Hong Kong based principal**", and that Mr Black was very close to finalising structures in Hong Kong and China that would substantially increase the availability of "Promax". The email also recorded that Mr Black would like to visit WHT and meet with its principals, and that Mr Black would like to discuss product supply, quantities required and get confirmation that WHT was pre-qualified to accept shipments into China.

[125] It is also clear from various documents that Mr Black had knowledge of what was happening in Wenztro, and that he acted from time to time as one of its directors. By way of example, I note the following:

(a) When Mr Ellis renewed Wenztro's dairy export licence on 2 March 2011, he sent a copy not only to Mr Williams, but also to Mr Black.

(b) Mr Black and Mr Ellis were copied into correspondence between Mr Williams and Mr Lin.

(c) Mr Williams updated Mr Black and Mr Ellis regularly on matters concerning Wenztro.

(d) Entities associated with Mr Black were prompt in sending invoices to Wenztro whenever its account was in credit.

(e) Mr Williams on occasion asked Mr Black to action matters, for example, obtaining more bar codes, and chasing up trademark registration in China.

(f) Mr Black was asked for, and he gave, his comments to Mr Ellis on a draft email Mr Ellis was proposing to send to the barrister retained by Wenztro to resist WHT's demands.

(g) Mr Black received advice from others regarding Wenztro's affairs. He used to forward that advice to Mr Ellis.

(h) On 5 June 2012, Mr Williams sent an email to Wenztro's barrister, which was copied to both Mr Ellis and to Mr Black, about the mislabelled infant formula. Mr Williams said that it had been decided to ship the containers to Hong Kong and sell the product there, "after discussions with Brian [Ellis] and Jim [Black]".

(i) On 18 June 2012, Mr Ellis emailed Mr Black regarding Wenztro's affairs and asking him for his comments.

(j) On 28 May 2014, Mr Williams emailed Mr Black and Mr Ellis saying that Mr Merlo had called him about the container of mislabelled infant formula.

(k) Mr Black was instrumental in the establishment of Truby King Ltd. On 31 March 2012, he instructed Mr Ellis to put all efforts and resources into developing the "Truby King" brand, as the "Promax" brand had been mismanaged.

[126] I am satisfied that Mr Black acted at times as a *de facto* director, despite his bankruptcy, pursuant to s 126(1)(a).[20]

[127] The fact that Mr Black resided in Hong Kong for much of the relevant period does not affect his liability, nor relieve him from the duties imposed on him as either a *de facto* or shadow director under the Act – "[a] director is not relieved of his duties when he goes through passport control".[21]

[128] During cross-examination, Mr Ellis conceded that he knew that New Zealand law applies to directors or undischarged bankrupts operating companies within New Zealand, even if they are out of the jurisdiction, and he accepted that he was aware of Mr Black's bankruptcy at all relevant times. It is a matter of concern that Mr Ellis, as a lawyer discharging professional obligations, continued to deal with, and take instructions from, Mr Black acting as a shadow and/or *de facto* director of Wenztro.

Did Mr Ellis resign on 6 April 2012 and, if he did resign, did he remain a shadow and/or a *de facto* director of Wenztro thereafter?

[129] A document said to be a director's resolution of Wenztro was signed by Mr Ellis. The resolution recorded as follows:

> It is hereby resolved at a meeting of directors of the company this sixth day of April 2012 pursuant to the constitution of the company that:
>
> 1. The resignations of Brian Robert Ellis as director of the company with effect from the sixth day of April 2012 be and are hereby accepted.

Mr Ellis also signed a letter of resignation addressed to Wenztro dated 6 April 2012. The letter stated that the resignation was to have immediate effect.

[130] In the course of cross-examination, it became apparent that there was no meeting and no proper resolution. To clarify the issue, I put the following questions to Mr Ellis:

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[20] The Court of Appeal, by a majority, has held that s 126(1)(a) catches a director who becomes disqualified by reason of bankruptcy, but continues to act – *Clark v Libra Developments Ltd* [2007] 2 NZLR 709 (CA) at [179]. The Supreme Court declined leave to appeal in *Clark v Libra Developments Ltd* [2007] NZSC 16, [2007] 2 NZLR 709.

[21] *Grant v Pandey* [2013] NZHC 2844 at [16].

Q Well, what happened Mr Ellis, did you simply sign the director's resolution that day when there had in fact been no resolution of the directors?

A Yes, I probably did, Sir, …

Q … there was no formal resolution of the directors?

A No, well I did not, you know, I saw the important point is the actual resignation as the director, rather than the formalities of the resolution.

Mr Crossland put it to Mr Ellis that this was "sloppy". Mr Ellis accepted that it should have been handled differently. Further, Mr Ellis acknowledged that he did not tell Mr Williams that he had resigned "until later".

[131] Mr Crossland put it to Mr Ellis that the resolution and the letter of resignation were backdated, so as to predate a letter from WHT dated 18 May 2012 threatening legal proceedings. Mr Ellis denied any backdating.

[132] I doubt whether Mr Ellis was telling the truth when he denied backdating the resolution and letter of resignation. To my mind, it is significant that Mr Ellis did not immediately tell Mr Williams that he had resigned. It is also significant that Mr Ellis did not take any other steps consequent on his resignation. He did not inform ASB, nor did he cancel his authority to operate Wenztro's bank account. The resignation was only registered with the Companies Office on 24 May 2012. The only other person Mr Ellis seems to have advised was Wenztro's barrister, and even then, not until 30 May 2012. Rather, Mr Ellis continued to act as a director of Wenztro. I refer to the following:

(a) Mr Ellis liaised with debt collectors engaged by Wenztro's creditors, who were seeking to recover debts owing by Wenztro;

(b) Mr Ellis retained control of Wenztro's bank accounts. In particular, he actioned a payment of $4,000 to Sunlucky on 16 April 2012, a loan repayment to himself of $4,000 on 19 April 2012 and a payment of $5,000 to Kiwi Goods on 17 May 2012;

(c) Mr Ellis continued to sign off correspondence as a director. For example, he sent an email to Mr Williams on 19 April 2012 in which he described himself as a director;

(d) Mr Ellis gave instructions to Wenztro's barrister;

(e) Mr Ellis discussed the ongoing sale of Wenztro's products and new artwork for cans of infant formula with Mr Black on 5 June 2012; and

(f) Mr Ellis remained a director of Wenztro's parent company in Hong Kong, Trojan Food Holdings Ltd, which effectively held the shares of Wenztro through a bare trust deed dated 26 August 2009.

[133] Wenztro was unaware that Mr Ellis had resigned and it considered that he was still a director. Its lawyers sent a letter to Mr Ellis on 18 May 2012 addressed to him as a director. Mr Ellis did not then protest or deny that he was a director. It was put to him in cross-examination that he went on to instruct Wenztro's barrister to respond and that he was acting as a director in so doing. His reply was that this was "… because the matter required some commercial reality in light of carrying on business in Hong Kong and China". To my mind, this explanation was specious. On Mr Ellis' evidence, he was no longer a director. If that is true, it is curious that Mr Ellis did not involve the company's only remaining *de jure* director in finalising the instructions to be given to the company's barrister. Rather, he sought advice from Mr Black. In effect, Mr Ellis and Mr Black took charge of the threatened litigation against Wenztro. They can only have been acting as *de facto* directors.

[134] I have no hesitation in concluding that Mr Ellis continued to act as a *de facto* director of Wenztro, notwithstanding his resignation and even assuming he resigned on 6 April 2012.

Directors duties – preliminary observations

[135] In this case, the liquidators allege that the directors have beached the various duties set out in ss 135-137 of the Act. Pursuant to s 169(3), those duties are duties owed to the company and not to its shareholders. Nor are the duties owed directly to

creditors. They do, however, indirectly protect creditors, and creditors have the right under s 301 themselves, or through a liquidator, to seek to enforce claims for breach of the duties owed.[22] It is, however, important not to conflate the directors' duties provisions with s 301 when determining liability,[23] and I deal with both separately, starting with liability.

[136] Although I deal with liability under each of the sections raised by the pleadings separately, I record that there is considerable factual overlap between them in this case.

Did the directors agree to, or cause or allow, Wenztro's business to be carried on in a manner likely to create a substantial risk of serious loss to the company's creditors?

[137] The liquidators allege that Messrs Ellis, Williams and Black traded recklessly, and that they breached s 135 of the Act. That section provides as follows:

> **135 Reckless trading**
>
> A director of a company must not—
>
> (a) agree to the business of the company being carried on in a manner likely to create a substantial risk of serious loss to the company's creditors; or
>
> (b) cause or allow the business of the company to be carried on in a manner likely to create a substantial risk of serious loss to the company's creditors.

[138] The purpose of the section is the avoidance of inappropriate loss to the company's creditors through reckless trading.[24] The section focuses on directors engaging in a course of conduct. It is concerned not with "mere risk", but rather with substantial risk of serious loss,[25] and a distinction is drawn between legitimate and illegitimate business risks.[26]

[139] The Court of Appeal has said that the essential pillars of s 135 are as follows:[27]

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22 *Madsen-Ries v Petera* [2016] NZCA 103 at [16]-[37].
23 *Mason v Lewis* [2006] 3 NZLR 225 (CA) at [52].
24 *Mason v Lewis*, above n 23, at [57].
25 *Nippon Express (New Zealand) Ltd v Woodward* (1998) 8 NZCLC 261,765 (HC) at 261,773.
26 *Re South Pacific Shipping Ltd (in liq)* (2004) 9 NZCLC 263,570 (HC) at [123]; *Löwer v Traveller* [2005] 3 NZLR 479 (CA) at [78].
27 *Mason v Lewis*, above n 23, at [51].

- the duty which is imposed by s 135 is one owed by directors to the company (rather than to any particular creditors);

- the test is an objective one;

- it focuses not on a director's belief but rather on the manner in which a company's business is carried on, and whether that *modus operandi* creates a substantial risk of serious loss;

- what is required when the company enters troubled financial waters is … a "sober assessment" by the directors, … of an ongoing character, as to the company's likely future income and prospects.

[140] The Court of Appeal has also observed as follows:[28]

> [48] As to what is meant by "substantial risk" and "serious loss" Ross, *Corporate Reconstructions: Strategies for Directors* (1999) suggests:
>
> > The first phrase, "substantial risk" requires a sober assessment by directors as to the company's likely future income stream. Given current economic conditions, are there reasonable assumptions underpinning the director's forecast of future trading revenue? If future liquidity is dependent upon one large construction contract or a large forward order for the supply of goods or services, how reasonable are the director's assumptions regarding the likelihood of the company winning the contract? Even if the company wins the contract, how reasonable are the prospects of performing the contract at a profit? (at 40)

The possibility of serious loss must be more than a negligible risk.[29]

[141] The subjective belief of a director does not excuse his or her breach of the duty imposed by s 135,[30] and a director does not have to act knowingly to be caught by the provision.[31]

[142] In my judgment, viewed objectively, Messrs Ellis, Williams and Black as directors both agreed to, and caused and/or allowed, Wenztro's business to be carried on in a manner likely to create a substantial risk of serious loss to the company's creditors. They breached the duty owed by them to the company.

[143] I start with the steps taken by the directors at the outset:

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28 *Mason v Lewis*, above n 23.

29 *Company Law* (online looseleaf ed, Thomson Reuters) at [CA135.04]; *Re Wait Investments Ltd (in liq)* [1997] 3 NZLR 96 (HC).

30 *Thompson v Innes* (1985) 2 NZCLC 99,463 (HC).

31 *Statewide Tobacco Services Ltd v Morley* [1993] 1 VR 423 (VSC).

(a) The directors did not call up the company's share capital. As a result, Wenztro had no funds or liquidity from its inception. I agree with Mr Sheppard that, on incorporation, the directors should have examined the likely capital needs of the company, given what they were planning to do, and issued an appropriate number of shares at a price sufficient to give them a committed capital base, even if that capital was initially uncalled. They failed to do this.

(b) As Wenztro's sole shareholder was a bare trustee for a Hong Kong based holding company, the directors should have satisfied themselves as to the parent company's willingness and capacity to support Wenztro. They should have obtained a letter of support from the parent company. They failed to do so.

(c) The directors should have ensured that Wenztro had in place appropriate insurance cover, in particular for the supply of defective or faulty product. The evidence established that such cover was available. No steps were taken by the directors in this regard.

(d) The *de jure* directors should not have allowed Mr Black to become involved in the running of Wenztro, knowing that he was an undischarged bankrupt. I note Mr Sheppard's observations in this regard. He said that it is very unusual for a board to delegate to an undischarged bankrupt significant decision-making authority, and that it is "completely unheard of" for a board to do so, without putting the bankrupt under close supervision. It was Mr Sheppard's view that a board should require that any delegation to a bankrupt occurs only with the consent of the Official Assignee. The directors should then hold the Official Assignee's consent on file and they should closely supervise the bankrupt's decision-making. I agree with all of these observations. None of these precautions was taken in the present case. The unchallenged evidence was that Mr Black effectively ran Wenztro from overseas.

(e) The directors allowed the company to significantly misrepresent its expertise and trading abilities. Although Mr Ellis tried to suggest otherwise, in my view, the company's website was patently misleading. Wenztro held itself out as an experienced and fully integrated infant milk formula manufacturer and distributor. It was neither of these things. The company and its principals had little or no relevant prior experience.

(f) Mr Williams, in his early meetings with Mr Lin, did nothing to rectify the position. Rather, he encouraged Mr Lin to believe that Wenztro was an experienced supplier with its own manufacturing and distribution facilities.

In my judgment, the directors' initial actions set the company up to fail.

[144] I now turn to the transactions the directors caused or allowed Wenztro to enter into:

(a) The directors allowed Wenztro to enter into the agreement with WHT for the supply of 18,300 cans of milk powder, for a total sum of $306,525. That agreement should ultimately have been self-financing, but the directors made no allowance for funding the production of the milk powder by Unitech pending final payment by WHT. Mr Sheppard said that he "… would be astounded if … [the directors] were not applying their mind[s] as to how that order was [to be] delivered …". The directors, when they caused Wenztro to enter into the agreement with WHT, assumed an obligation to deliver the milk powder ordered. There is nothing to suggest that the directors gave any thought to delivery at all.

(b) The agreement required payment of a 30 per cent deposit by WHT in advance. This deposit was paid, but it was always going to be insufficient to allow Wenztro to proceed to order the product it had contracted to provide to WHT. Unitech required a guarantee or a

standby letter of credit for the full costs of manufacture – approximately $240,000 (exclusive of GST). Without substantial shareholder or third-party support, Unitech's requirements could not be met. The directors did not take any prior steps in this regard. No finance was arranged in advance. No shareholder support was sought. Rather, the directors had to scurry around in increasingly desperate efforts to put in place the standby letter of credit. First, they sought funding from ASB. This attempt was unsuccessful. Secondly, they sought assistance from the New Zealand Export Credit Office of the Treasury. This effort was unsuccessful. The Treasury advised that Wenztro lacked the necessary trading history and that, in any event, it would probably not meet Treasury's credit standards. Next, the directors sought to vary the contract with WHT, to require it to pay in full and in advance. When this attempt was unsuccessful, the directors had to resort to borrowing money from Mr Lin through his company, Sunlucky.

(c) The directors did not retain the deposit paid by WHT to advance the order. Instead, they used the deposit to make payments to entities associated with them. It was Ms Finnigan's evidence that many of the payments were for non-Wenztro expenses, for example, payments to suppliers to advance the "Truby King" brand. Mr Ellis sought to defend the various payments made. I cannot determine this issue on the limited materials before me, but in any event, and even assuming that the payments made were bona fide, I agree with Mr Sheppard's observation that the directors made the "… classic mistake of using working capital for illiquid intangible asset development". This mistake was exacerbated because Wenztro had no other supply contracts and no other cashflow.

(d) The directors, in particular Mr Ellis, employed Mrs Hollinger when Wenztro had no ability to meet its obligations to her. The company's shareholder did not put in cash each month to cover her wages. Nor did the directors. Her wages were not paid (except for one payment of $1,000). The directors seemingly entered into Mrs Hollinger's

employment contract with no ability, nor it can reasonably be inferred, any real commitment, to pay her.

(e) When Wenztro finally placed the purchase order with Unitech for the supply of the infant milk formula ordered by WHT, the directors failed to ensure that the contractual terms they had agreed with WHT (that the product would have a three-year shelf life) were relayed to Unitech. Wenztro's supply agreement with Unitech provided that any product supplied had only an 18-month-old shelf life. The directors knew this. They did manage to persuade Unitech to agree to a two-year shelf life for the product to be supplied to WHT. However, the directors (in particular Mr Williams) either failed to appreciate that WHT required that the product it had ordered had a three-year shelf life, or chose to ignore WHT's requirements.

(f) The directors offered the "Promax" brand to Kiwi Goods for use in China, despite knowing that that brand had been trademarked by WHT for use in that country. They were forced to go back to WHT through Mr Lin to obtain its agreement to Kiwi Goods being able to supply under the "Promax" brand name in China.

(g) The directors caused Wenztro to enter into an agreement to supply milk powder product to Kiwi Goods. They took Kiwi Goods' deposit and virtually immediately paid it out in large part to related parties. At the time, Wenztro had no ability to fund the production of the product ordered by Kiwi Goods and the directors failed to place any order with Unitech or with anybody else. The directors put Wenztro in a position where it was inevitably going to breach its agreement with Kiwi Goods.

[145] I now turn to the directors' day-to-day management failings:

(a) The directors did not keep management accounts or business records.[32] There were no proper reporting systems in place. No proper minute book was kept. No disclosures of interest were made or recorded at appropriate times.

(b) The directors failed to attend to their obligations in regard to Mrs Hollinger's employment. They did not pay PAYE on the one wage payment made to her. They did not seek regular confirmation that her tax obligations were being met.

(c) The directors took no steps to ensure that Wenztro's financial statements and tax returns were prepared in a timely fashion. The company's March 2009 tax return was not finalised until 25 November 2011. The March 2010 tax return was only finalised on 17 May 2012. The March 2011 tax return and the March 2011 financial statements were only finalised on 14 May 2012. It seems that these tax returns were prepared only after the IRD issued a notice regarding the overdue March 2010 tax return in August 2011, advising that failure to file the return was a serious offence, and that it could result in legal action. Only thereafter did Mr Ellis engage accountants. By this inaction, the directors put themselves in the position where they had no means of monitoring the company's performance, or assessing its financial position, at any given point. The directors failed to take the steps required to ensure that they could guide and monitor the management of Wenztro.

(d) The directors allowed the company to continue trading, notwithstanding that its liabilities exceeded its assets by at least $42,000 as at 31 March 2011. As at that date or thereabouts, the directors knew that WHT had contracted to pay Wenztro approximately an additional $214,000, but only when the infant formula WHT had ordered was supplied. The directors also knew that Wenztro had to pay

[32] It may have been arguable that there was a breach of s 194 of the Companies Act, although this was not pursued before me.

Unitech approximately $237,000 (excluding GST), or $272,000 (including GST), to meet the costs of supplying WHT's order. Wenztro's already parlous financial position was going to deteriorate by at least a further $23,000. There were then no immediate prospects of other sales and no other income. The directors traded on regardless.

[146] Finally, in this regard, I turn to the directors' actions when things ultimately came to a head:

(a) When Mr Lin advised that the product supplied did not meet WHT's requirements, and that WHT would not accept it, the directors (in particular Messrs Ellis and Black) sent the mislabelled product to a related entity controlled by them in Hong Kong. They invoiced that related entity, but then took no steps to recover the resulting debt. I note Mr Sheppard's evidence:

> Shipping the product to a parent company to enable it to be illegally imported … into China, was reckless. The decision not to take any interest in having the parent … pay Wenztro what it recovered less a commission perhaps was at least negligent.

I agree.

(b) The directors agreed to provide WHT with a replacement order. Without shareholder or third-party support, they had no financial ability to pay Unitech for the supply of any replacement product. No shareholder or third-party support was sought. No attempt was made to put in place a financial package to enable the replacement order to proceed. Agreeing to the replacement order was irresponsible.

(c) The directors, in particular Mr Ellis, misrepresented the position to numerous third party creditors. Mr Ellis told WHT, ASB, Sunlucky and Unitech that the mislabelled product either was about to be, or had been, sold and that payments owing to them would soon be forthcoming. He failed to disclose the true position. This was dishonest.

(d) The directors, in particular Messrs Ellis and Black, allowed Wenztro's assets, including its intellectual property (specifically in the brand "Truby King" which Wenztro had paid to develop), to be transferred to Truby King Ltd without any adequate consideration. No valuations were obtained, notwithstanding that Wenztro's bank account was substantially in overdraft, there were demands being made by creditors, Sunlucky had employed a debt collector, and a hearing date had been scheduled for WHT's summary judgment proceedings. The directors allowed Wenztro to be stripped of such assets as it had, leaving a shell company for creditors to pursue.

(e) Mr Ellis' reaction to Wenztro's collapse was to put his personal interests above those of unsecured creditors by taking an assignment of the ASB general security agreement.

[147] Mr Pyke argued that the company's trading debts were modest, and largely paid off as they fell due, or shortly thereafter.

[148] I do not accept this submission. While many of Wenztro's other debts were modest, it committed itself to supply WHT with infant milk formula. It took WHT's deposit. The agreement required that Wenztro have in place a line of credit or security, so that necessary outgoings could be paid to sub-contractors, such as Unitech, Flying Possum and the like. The directors made no allowance for these outgoings. Allowing the business of the company to be carried on in such a manner was likely to create a risk for WHT, and for others dealing with the company. Further, the commitments arising out of the WHT agreement were not modest, particularly given that Wenztro had no capital of its own and no guarantee of shareholder support.

[149] Mr Pyke further argued that there were standby letters of credit in place up until October 2011, and that prior to their expiry, the directors' actions were both reasonable and appropriate. He argued that the fact that the deposit paid by WHT was spent on what he described as "other expenses to do with the development of the business", did not mean that the directors were trading while insolvent, because Mr Ellis had shown that he was prepared to put up his own money.

[150] I do not give these arguments much weight. Mr Ellis did eventually provide a personal guarantee in order to obtain a letter of credit from ASB, but only in the sum of $40,000. The guarantee was initially unlimited, but Mr Ellis had second thoughts, and he signed a second guarantee limited to $40,000 in substitution for the prior unlimited guarantee. Mr Ellis' preparedness to put up his own money was limited. It occurred very late in the day and only when there was no other alternative. Until that point, neither Mr Ellis, nor either of the other directors, nor Wenztro's shareholder, nor its parent company, had put up anything. As I have noted, the commitments associated with the WHT agreement were significant. There was always going to be a shortfall, particularly after the deposit had been paid out in large part to associated entities. Those invoices may or may not have been bona fide, but payment of them was irresponsible in the circumstances. The contract to supply WHT was a first transaction, which would only be self-funding once supply was made. For Wenztro, it was a major transaction.[33] Shareholder approval to enter into it should have been, but was not, sought.[34] The directors made no allowance for the payments required before the supply could be completed. No risk assessment was undertaken and no risk management strategy was put in place. Funds which might have been used to advance the WHT agreement were put beyond Wenztro's reach.

[151] Mr Pyke sought to attribute responsibility to WHT – at least in part – for the mislabelling which occurred. He accepted that Mr Lin approved the artwork for the labelling, but noted that he did not "sign off" on the under-can labelling.

[152] I do not accept this submission. As I have noted in [41] above, Mr Lin supplied details of both the side-can labelling and the under-can labelling required to Mr Korff and to Mr Williams. It was Mr Williams who made the error. He knew that WHT required product with a three-year shelf life. He failed to negotiate this with Wenztro's supplier – Unitech. Wenztro could have sought a three-year shelf life from Unitech. Mr Edge from Unitech gave evidence that if this issue had been raised, Unitech would have gone through the formality of getting an indemnity or exoneration. No steps were taken by the directors in this regard and in any event, Wenztro's indemnity would have been worthless.

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33 Companies Act, s 129(2).
34 Section 129(1).

[153] It is noteworthy that the company did not dispute WHT's summary judgment proceedings, which alleged breach by WHT. Nor did it seek to attribute blame for what occurred to Unitech when it made payment to it for the infant formula supplied. In my judgment, responsibility for failing to supply properly labelled product in accordance with WHT's requirements lies fairly and squarely with the directors.

[154] Mr Pyke argued that the directors could not have been expected to foresee the risk of a labelling defect.

[155] Again, I do not agree. The label design was undertaken by Flying Possum, as Wenztro's sub-contractor. WHT, via Mr Lin, had input into the design, with the knowledge and agreement of one of Wenztro's directors – Mr Williams. Mr Williams was made aware of the changes Mr Lin required and the labels – both side-can and under-can – were redesigned to meet WHT's specifications, including to record the three-year shelf life required. Copies of the redesigned labels were made available to Mr Williams, not only in Chinese, but also in English. The directors, through Mr Williams, knew at an early stage what WHT required. The directors failed to marry WHT's expectations and requirements with Unitech's ability to supply. It was not a labelling defect as such. Rather, it was a failure by the directors to supply in accordance with the agreement they had caused Wenztro to enter into. Mr Sheppard put it succinctly when he said:

> … we're not dealing … with a labelling error, we are dealing with a fundamental promise to supply 36 months when [Wenztro] had no capacity to deliver anything more than 18 months …

[156] In my judgment, the governance of Wenztro by Messrs Ellis, Williams and Black was lamentable. Continuing to trade beyond, at the latest, 31 March 2011 was the taking of an illegitimate risk, likely to result in serious losses to the company's creditors, and the directors' actions in so doing were reckless. While the company's demise essentially resulted from the way in which the directors mishandled the WHT agreement, the fact that it was a single transaction does not preclude a finding of reckless trading.[35] The failure to properly structure the business of Wenztro was

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[35] *Morgenstern v Jeffreys* [2014] NZCA 449 at [87]. The Supreme Court declined leave to appeal in *Morgenstern v Jeffreys* [2014] NZSC 176.

exposed by the WHT agreement and it was the directors' reckless trading which ultimately caused the company to fail. At no time did the directors stand back and undertake the "sober assessment" the company's financial circumstances clearly required. In my judgment, this is a paradigm case of reckless trading under s 135.

When the directors agreed to Wenztro incurring various obligations, did they believe on reasonable grounds that Wenztro would be able to perform those obligations when it was required to do so?

[157] The liquidators also allege that Messrs Ellis, Williams and Black breached the duties owed by them under s 136 of the Act, by agreeing to the company incurring obligations when they could not reasonably have believed that Wenztro would be able to perform the obligations when required.

[158] Section 136 provides as follows:

> **136 Duty in relation to obligations**
>
> A director of a company must not agree to the company incurring an obligation unless the director believes at that time on reasonable grounds that the company will be able to perform the obligation when it is required to do so.

[159] This section focuses on particular transactions, rather than on the general conduct of the company's business. Its purpose is to deal with obligations on the capital account of the company.[36]

[160] The Court of Appeal has discussed the three key elements which must be satisfied to establish a breach under s 136.[37] They are as follows:[38]

(a) that the defendant was a director of the company;

(b) that an obligation was incurred by the company; and

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36 *Peace and Glory Society Ltd (in liq) v Samsa* [2009] NZCA 396, [2010] 2 NZLR 57 at [44]. See also *Company Law*, above n 29, at [CA136.01AA].

37 *Peace and Glory Society Ltd (in liq) v Samsa*, above n 36, at [45].

38 At [45].

(c) that at the time of incurring the obligation, the defendant did not honestly believe on reasonable grounds that the company would be able to perform the obligation when it was required to do so.

[161] The section blends both subjective and objective elements. In *Fatupaito v Bates*,[39] this Court noted, in regard to the third element, as follows:

> [80] In order to establish a breach of s 136, the liquidators must show that [the director] agreed to the company incurring an obligation at a time when he did not believe (the subjective test) on reasonable grounds (an objective test) that the company would be able to perform that obligation when required to do so.

A defendant director must hold the belief that the company was able to perform a relevant obligation when required, and objectively that belief must be held on reasonable grounds.[40]

[162] For the reasons I have earlier set out at [107]-[134], at all relevant times, each of Messrs Ellis, Williams and Black were directors of Wenztro.

[163] It is also clear that they allowed the company to enter into the following obligations:

(a) the supply agreement with WHT. Under that agreement, Wenztro was obliged to supply 18,300 cans of infant milk formula to WHT. The labelling on the cans of infant milk formula was to record that the product had a three-year shelf life;

(b) the agreement to pay interest to Mr Lin on the monies he had made available so that Wenztro could obtain a standby letter of credit to comply with Unitech's requirements;

(c) the employment contract with Mrs Hollinger;

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39 *Fatupaito v Bates* [2001] 3 NZLR 386 (HC).

40 *The PC Co Ltd v Sanderson* HC Hamilton CP18/00, 1 November 2001 at [57]. See also *Jordan v O'Sullivan* HC Wellington CIV-2004-485-2611, 13 May 2008 at [55].

(d) the production order with Unitech, requiring Unitech to supply the 18,300 cans of infant milk formula to meet the WHT agreement, and Wenztro to make payment for formula supplied, including GST;

(e) the agreement with WHT to replace the product initially supplied, which WHT had rejected, because the labelling did not comply with its requirements;

(f) the agreement to supply 9,300 cans of infant milk formula to Kiwi Goods; and

(g) the borrowing of funds from ASB by way of overdraft in March 2012.

[164] For the reasons I have already set out in discussing s 135, Wenztro was not able to perform any of these obligations when it was required to do so.

[165] I turn to consider the directors' subjective beliefs.

[166] Mr Ellis' subjective beliefs at the time are not particularly clear from his brief of evidence. He did, however, say as follows:

> In summary, two [standby letters of credit] were given to Unitech by ASB guaranteeing payment of $240,000 to be made to Unitech and enabling the product to be made. At all times, it was my firm view that upon the required security being received from [WHT] as required by the supply agreement, the appropriate [standby letters of credit] could be issued to Unitech as security for payment of the product as subsequently occurred.

It appeared to be Mr Ellis' argument that WHT either had to pay for the product in full in advance, or otherwise pay a deposit, and provide security for the balance, and pay in full prior to uplifting the product for shipment. He said that he was always conscious of acting in the best interests of Wenztro, and he was not prepared to move ahead and even look at arranging a standby letter of credit in favour of Unitech until a back-up security was in place from WHT. He said that that would have been commercially unacceptable and risky, especially as it was a first shipment and sale to WHT.

[167] Mr Pyke, in closing submissions on Mr Ellis' behalf, argued that the directors, and in particular Mr Ellis, acted reasonably. He submitted as follows:

> Prior to the expiry of the [standby letter of credit] on 4 October 2011 the directors acted reasonably. In addition to the [standby letter of credit] in favour of Unitech, there was the binding obligation under the supply agreement, and the deposit had been paid, and security given by Mr Lin. That the deposit was spent on other expenses for the development of the business did not mean the directors were trading while insolvent, since Mr Ellis had shown he was prepared to put up his own money (to back the $40,000 [stand by letter of credit]). Aside from the commitment [associated with WHT], there were sufficient funds to operate this low overhead, small business.

[168] I do not follow these arguments:

(a) As I have noted above at [38], Wenztro issued a proforma invoice for the supply of 18,300 cans of infant formula for $306,525 to WHT on 30 November 2010. Mr Lin (see [39] above) then placed an irrevocable purchase order with Wenztro confirming WHT's purchase in accordance with the proforma invoice at the stipulated price. The proforma invoice set out the terms of sale. WHT was required to pay Wenztro a deposit of 30 per cent within seven days of invoice, and the balance no later than 14 days before the goods were shipped. There was nothing in those documents requiring that WHT pay in full in advance, or that it give security for the balance.

(b) WHT also entered into a long-term supply agreement on 7 December 2010. I discussed that agreement in paragraph [44] above. Relevantly, it provided as follows:

> Payment will be in full and in New Zealand dollars, made to the nominated bank account at the time of order by telegraphic transfer or by another arrangement that may be agreed in writing between the parties. In the event of a deposit duly being paid at the time of order any balance shall be secured and paid not less than fourteen (14) days prior to goods being shipped.

(c) The long-term supply agreement related to the supply of future product, and not to the contract constituted by the proforma invoice and the irrevocable purchase order.

(d) Wenztro did not at any stage suggest that WHT was obliged to pay in full at the outset. It did not suggest that WHT was required to give security for the balance owing. It did not resist WHT's application for summary judgment on this or any other ground.

In my view, the belief advanced by Mr Ellis was an *ex post facto* rationalisation, seeking to belatedly justify what occurred.

[169] In any event, I do not consider that Mr Ellis had reasonable grounds to believe that Wenztro was able to perform its obligations to WHT when it was required to do so. Mr Ellis authorised disbursement of the deposit received from WHT and the projected $31,000 profit (and more) in paying various invoices – largely to related parties. There were no immediate prospects of other sales or of income from any other source. WHT was Wenztro's only customer at the time, and there simply cannot have been any reasonable grounds on which Mr Ellis could have believed that Wenztro would be able to perform its obligations to WHT, without the financial backing of its bank or its shareholder. No prior arrangements had been made with either, and predictably, the bank was not prepared to assist. Wenztro's sole shareholder did not assist either, notwithstanding that Mr Ellis and Mr Black between them controlled Wenztro's parent company. But for Mr Lin's assistance, Wenztro would have been unable to put in place the standby letters of credit and thus to order the product. Moreover, without giving an indemnity to Unitech, which clearly it could not do, Wenztro was never going to be able to comply with its obligation to provide product with a three-year shelf life. Nor could Mr Ellis have reasonably believed that Wenztro would be able to pay Unitech when it delivered the product. Once the deposit was disbursed, there was always going to be a shortfall – see above at [57]. Giving the undertaking on behalf of the company on 25 March 2011 to pay the GST was irresponsible.

[170] Nor could Mr Ellis reasonably have thought when the other obligations were incurred that Wenztro would be able to perform those obligations when it was required to do so:

(a) The directors belatedly agreed to pay Mr Lin interest on the monies he had advanced as from the date of the advance. At this stage, Wenztro had many other obligations, both actual and prospective, and no other business prospects.

(b) The company had no money to pay Mrs Hollinger her wages. Mr Ellis did not even attempt to pay them, save as to one payment of $1,000 on 1 December 2011.

(c) Wenztro could never have met its payment obligations to Unitech.

(d) There was not even a scintilla of hope that Wenztro would be able to meet the obligation it assumed of replacing the product ordered by WHT.

(e) There was no prospect that Wenztro would be able to meet its obligations to supply Kiwi Goods.

(f) Wenztro could not honour the obligations incurred on its behalf to ASB. Those obligations were met when Mr Ellis made a cash contribution – effectively to avoid his personal guarantee being called up. They could not be met by the company.

[171] Mr Ellis must have understood that a start-up business of the kind that Wenztro was involved in would not start to earn a profit for some time. Indeed, Mr Black recognised this point when he and Mr Ellis transferred Wenztro's business to Truby King Ltd. Mr Black sent an email to Mr Ellis on 31 March 2012. He then said:

> It is clear that this business is not going to produce any income for at least two years at best.

[172] Mr Williams did not give evidence as to his subjective beliefs at the relevant times. The circumstances, however, speak for themselves. Whatever Mr Williams subjective beliefs were, he simply cannot have had reasonable grounds to believe that Wenztro would be able to perform the various obligations he and his fellow directors agreed to it incurring.

[173] Nor did Mr Black give evidence of his subjective beliefs. He was clearly a major player, albeit in the background. He was an undischarged bankrupt, breaking the law. It is clear that, at all relevant times, Mr Black knew what was happening with Wenztro. The operation was largely run by him and by Mr Ellis. Mr Black cannot have had reasonable grounds to believe that Wenztro was able to perform the various obligations he and his fellow directors agreed to it incurring.

[174] I note the following observations made by the authors of *Company Law*:[41]

> The underlying purpose of s 136 appears to require directors to ensure that the company is not committed to transactions that will adversely affect its business so as to make it impossible to pay the company's debts as they fall due. Thus it is incumbent on directors before they embark on major projects to ensure that proper costings have been taken or provision for extra staff and materials have been made and that the company can carry on financially until payments from the project start to be made and returns for the project are adequate so far as the company is concerned.

The directors did not ensure that adequate provision was made for the costs of fulfilling the WHT agreement. Nor did they make provision for any of the other obligations they agreed to Wenztro incurring.

[175] I am satisfied that each of the directors was in breach of the duties they owed to the company under s 136 of the Act.

Did the directors exercise their powers and perform their duties as directors with the care, diligence and skill that reasonable directors would have exercised in the same circumstances?

[176] Section 137 of the Act – also relied on by liquidators – provides as follows:

> **137 Director's duty of care**
>
> A director of a company, when exercising powers or performing duties as a director, must exercise the care, diligence, and skill that a reasonable director would exercise in the same circumstances taking into account, but without limitation,—
>
> (a) the nature of the company; and
>
> (b) the nature of the decision; and

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41 *Company Law*, above n 29, at [CA301.06(4)].

(c) the position of the director and the nature of the responsibilities undertaken by him or her.

[177] The section makes it clear that the standard by which to assess a director's care, diligence and skill is the objective standard of a reasonable director. A director's personal knowledge and experience is irrelevant. Further, the statutory duty of care cannot be contracted out of. The law requires a minimum standard of performance from all directors.

[178] If a director becomes involved in a company whose business is outside his or her expertise, he or she can nevertheless be found liable for breaching s 137. So can a director who fails to control a company generally, and extends latitude to co-directors.[42] Directors who allow corporate funds to be paid to related parties while the company is insolvent have been found to be in breach of s 137. Actual knowledge of the payments is not a prerequisite to a finding of statutory negligence.[43]

[179] For much the same reasons as I have already discussed when considering ss 135 and 136, I am satisfied that the directors of Wenztro failed to exercise the care, diligence and skill that reasonable directors would have exercised in the same circumstances. Put bluntly, no responsible director would have acted as Messrs Ellis, Williams and Black acted.

Relief

Setting aside under s 294(5) of the Act

[180] I start by making formal orders setting aside, under s 294(5) of the Act, both the general security agreement Wenztro granted to ASB on 25 March 2011, which was assigned to Mr Ellis on 9 October 2012, and the general security agreement granted by Wenztro to Mr Ellis on 25 March 2012. As noted above at [16](b), Mr Ellis withdrew his opposition to these orders being made. They are effectively made by consent.

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42 *FXHT Fund Managers Ltd (in liq) v Oberholster* (2009) 10 NZCLC 264,562 (HC) at [95]-[98].

43 *Blanchett v Keshvara* [2011] NZCCLR 34 (HC) at [66]-[72]. The Court of Appeal upheld the decision in *Keshvara v Blanchett* [2012] NZCA 553 at [58]-[61]. The Supreme Court then declined leave in *Keshvara v Blanchett* [2013] NZSC 23.

Section 301 contribution – interest – liability as between directors

[181] Section 301(1) provides as follows:

> **301 Power of court to require persons to repay money or return property**
>
> (1) If, in the course of the liquidation of a company, it appears to the court that a person who has taken part in the formation or promotion of the company, or a past or present director, manager, administrator, liquidator, or receiver of the company, has misapplied, or retained, or become liable or accountable for, money or property of the company, or been guilty of negligence, default, or breach of duty or trust in relation to the company, the court may, on the application of the liquidator or a creditor or shareholder,—
>
> (a) …
>
> (b) order that person—
>
> (i) to repay or restore the money or property or any part of it with interest at a rate the court thinks just; or
>
> (ii) to contribute such sum to the assets of the company by way of compensation as the court thinks just; or
>
> …

[182] Here, the liquidators seek orders for contribution under s 301(1)(b)(ii).

[183] Claims brought pursuant to the section require a two-stage evaluation – has there been a breach of duty owed by the director to the company, and if so, to what extent should the director contribute to the losses of the company? Causation, duration and culpability in relation to the impugned conduct are relevant to the exercise of the Court's discretion.[44]

[184] Here, I have found that the directors breached the duties owed by them to the company under ss 135, 136 and 137. The issue becomes to what extent should each of the directors contribute to the company's losses. There was no dispute as to the quantum of those losses. The principal sought by the liquidators is $765,692.81. In addition, they sought interest.

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[44] *Mason v Lewis*, above n 23, at [110]; *FXHT Fund Managers Ltd (in liq) v Oberholster* [2010] NZCA 197 at [28].

[185] I turn first to consider causation.

[186] There were a number of causes for Wenztro's collapse and ultimate liquidation. I note the following:

(a) failure to ensure that the company was properly capitalised from the outset;

(b) misrepresenting the expertise and integrated nature of Wenztro's business, also from the outset;

(c) involving an undischarged bankrupt – Mr Black – in the company's business from a very early stage;

(d) failing to keep proper business management records and financial statements;

(e) failing to undertake a proper risk assessment before entering into the contract with WHT;

(f) failing to consider in advance how the company was going to fund the outgoings required to meet its obligations to WHT;

(g) paying out the deposit paid by WHT to related entities;

(h) failing to match WHT's requirements with Unitech's preparedness to supply;

(i) releasing the mislabelled product to a related company in Hong Kong, without obtaining payment for it;

(j) taking an order from Kiwi Goods which it had no means to perform; and

(k) transferring Wenztro's assets to Truby King Ltd for no proper consideration.

[187] There are many more matters which could be added to this list, but in my judgment, the causative link between the defendants' breaches of their duties as directors and the resulting loss to creditors is obvious. All of the directors were responsible for the way in which Wenztro's business was conducted. All of the errors were avoidable, had the directors been prudent and acted in accordance with the various duties imposed on them by law.

[188] As for duration, very many of the causes which led to the company's collapse started from the outset. Wenztro never had a proper capital base and its expertise was oversold. It was doomed to fail from the start. Once it was trading, the directors ignored obvious signs, and on the evidence, failed to even think about their obligations, let alone work out how they could be met. The company's ongoing mismanagement blighted its prospects. The position quickly went from bad to worse.

[189] In relation to culpability, I agree with Ms Finnigan's assertion in evidence that the directors took illegitimate business risks. They traded while the company was insolvent from, at the latest, 31 March 2011. They entered into multiple commitments the company could not meet. They engaged in practices that primarily benefited themselves, their related entities, Wenztro's parent company and associated companies in Hong Kong. Those transactions were effectively entered into at the expense of third party creditors.

[190] I also accept the submission made by Mr Crossland that there were clear, blatant, ongoing and increasingly serious breaches of the obligations imposed on the directors for the duration of the trading life of Wenztro. It is significant that Mr Black was breaking the law and committing an offence. Mr Ellis was aware of this yet he took many steps to implement Mr Black's instructions. Mr Ellis controlled Wenztro's bank account. He took a central role in its management. In my judgment, he is equally culpable. Mr Williams misrepresented the company's expertise and trading abilities to WHT, Kiwi Goods and Unitech. He relied on the other directors' instructions and allowed them to manage the company. Even though he was a signatory to the bank

account, on the evidence, he did not turn his mind to the financial position of the company at any stage. He made the replacement offer to WHT at a time when Wenztro was struggling to pay its outstanding debt to Unitech, and when there was simply no prospect at all that it would be ever able to pay the costs of a replacement order.

[191] The liquidators are seeking the principal sum of $765,692.81, together with interest as from the date of the liquidation. Part of the principal sum includes the judgment debt obtained by WHT in October 2012. As I discussed with counsel, there is no good reason why interest on the judgment debt should not run at the rate or rates fixed by the Judicature Act 1908 as from the date of judgment up until 1 March 2017, when that Act was repealed, and thereafter under the applicable provisions of the Senior Courts Act 2016. Interest should run on the other amounts proved as from the date of liquidation under the same provisions.

[192] I am satisfied that an order should be made requiring the defendant directors to contribute the principal sum sought, together with interest, in full. There are a number of cases[45] where the Courts have ordered a 100 per cent contribution from company directors, and the facts of this case are worse than those in many of those decisions. I make an order accordingly.

[193] Further, in my view, liability should be joint and several as between Messrs Ellis, Williams and Black. They were all culpable and all took advantage of the situation. I order that the defendant directors are jointly and severally liable for the judgment debt.

Costs

[194] The liquidators advised that they would be seeking indemnity costs for the proceedings and the costs of the liquidation. This claim was resisted by the directors, and specifically by Mr Ellis. Mr Pyke advised that Mr Ellis would assert that any claim for costs should be mitigated or extinguished as a result of the changes in position by the liquidators over the principal amount sought.

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[45] *Löwer v Traveller*, above n 26; *Superior Blocklayers Ltd (in liq) v Bacon* [2016] NZHC 2601; *Morgenstern v Jeffreys*, above n 35; *Steel & Tube Holdings Ltd v Lewis Holdings Ltd* [2016] NZCA 366.

[195] I direct as follows:

(a) any application for costs and disbursements is to be filed within 10 working days of the date of this judgment;

(b) any memoranda in reply are to be filed within a further 10 working days; and

(c) memoranda are not to exceed 10 pages.

I will then deal with the issue of costs and disbursements on the papers, unless I require the assistance of counsel, Mr Williams and Mr Black.

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Wylie J