IN THE SUPREME COURT OF NEW ZEALAND

SC 57/2016
[2017] NZSC 116

BETWEEN	DAVID BROWNE CONTRACTORS LIMITED AND DAVID BROWNE MECHANICAL LIMITED Appellants
AND	DAVID ROSS PETTERSON AS LIQUIDATOR OF POLYETHYLENE PIPE SYSTEMS LIMITED (IN LIQUIDATION) Respondent

Hearing:	10 November 2016
Court:	William Young, Glazebrook, Arnold, O'Regan and Ellen France JJ
Counsel:	C R Carruthers QC and D J C Russ for Appellants B D Gustafson and D R Duffield for Respondent
Judgment:	7 August 2017

JUDGMENT OF THE COURT

A The appeal is dismissed.

B The appellants must pay the respondent costs of $30,000 plus reasonable disbursements (to be determined by the Registrar in the absence of agreement). We certify for two counsel.

REASONS
(Given by Glazebrook J)

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Introduction

[1] The issue in this appeal is whether the Court of Appeal was correct to order David Browne Contractors Ltd (Contractors) and David Browne Mechanical Ltd (Mechanical) to repay $565,303 and $347,634 respectively to Polyethylene Pipe Systems Ltd (Polyethylene).[1] These sums had been paid to them pursuant to transactions which had subsequently been automatically set aside under s 294 of the Companies Act 1993.

1 *Petterson v Browne* [2016] NZCA 189 [*Petterson* (CA)] (Winkelmann, Dobson and Gilbert JJ).

[2] The application for leave to appeal by these companies was granted by this Court on 16 August 2016.[2] The Court refused Mr Browne's application for leave to appeal against the decision of the Court of Appeal to set aside a general security agreement (the GSA) entered into between him and Polyethylene, a related company to Mr Browne, and ordering him to repay $201,316 he received as a creditor under the GSA.[3]

The relevant legislation

[3] Section 4 of the Companies Act provides:

> **4 Meaning of solvency test**
>
> (1) For the purposes of this Act, a company satisfies the solvency test if—
>
> (a) the company is able to pay its debts as they become due in the normal course of business; and
>
> (b) the value of the company's assets is greater than the value of its liabilities, including contingent liabilities.
>
> …
>
> (4) In determining, for the purposes of this section, the value of a contingent liability, account may be taken of—
>
> (a) the likelihood of the contingency occurring; and
>
> (b) any claim the company is entitled to make and can reasonably expect to be met to reduce or extinguish the contingent liability.

[4] Section 241 of the Companies Act in relevant part provides that a company may be put into liquidation by the appointment of a liquidator[4] on the application of a creditor (including any contingent or prospective creditor).[5] The Court may appoint a liquidator if, among other reasons, it is satisfied that the company is unable to pay its debts.[6]

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2 *Browne v Petterson* [2016] NZSC 107 [Leave judgment].

3 At [4]–[11]. This Court, at [4], recorded that Mr Browne wished to challenge the Court of Appeal's factual findings. The Court said that it could see no appearance of error in those findings. Many of those factual findings are also relevant to this appeal.

4 Companies Act 1993, s 241(1).

5 Section 241(2)(c)(iv).

6 Section 241(4)(a).

[5] Section 288 provides:[7]

288 Evidence and other matters

…

(4) In determining whether a company is unable to pay its debts, its contingent or prospective liabilities may be taken into account.

(5) An application to the court for an order that a company be put into liquidation on the ground that it is unable to pay its debts may be made by a contingent or prospective creditor only with the leave of the court; and the court may give such leave, with or without conditions, only if it is satisfied that a prima facie case has been made out that the company is unable to pay its debts.

[6] Section 292(1) and (2) provide:[8]

292 Insolvent transaction voidable

(1) A transaction by a company is voidable by the liquidator if it—

(a) is an insolvent transaction; and

(b) is entered into within the specified period.[9]

(2) An **insolvent transaction** is a transaction by a company that—

(a) is entered into at a time when the company is unable to pay its due debts; and

(b) enables another person to receive more towards satisfaction of a debt owed by the company than the person would receive, or would be likely to receive, in the company's liquidation.

[7] Section 294(1) provides:

294 Procedure for setting aside transactions and charges

(1) A liquidator who wishes to set aside a transaction or charge that is voidable under section 292 or 293 must—

(a) file a notice with the court that meets the requirements set out in subsection (2); and

---

7 Section 287 sets out the situations where a company is presumed to be unable to pay its debts unless the contrary is proven and is subject to s 288. Section 288(2) provides that s 287 "does not prevent proof by other means that a company is unable to pay its debts".

8 Section 293 is substantively the same as s 292 but in relation to voidable charges, which are voidable if the charge was given within the specified period and "immediately after the charge was given, the company was unable to pay its debts": s 293(1)(b).

9 Defined in s 292(5) as, essentially, the period of two years prior to the liquidation.

(b) serve the notice as soon as practicable on—

(i) the other party to the transaction or the charge holder, as the case may be; and

(ii) any other party from whom the liquidator intends to recover.

[8] Section 294(2) sets out various requirements for the liquidator's notice. Section 294 then provides further:

> (3) The transaction or charge is automatically set aside as against the person on whom the liquidator has served the liquidator's notice, if that person has not objected by sending to the liquidator a written notice of objection that is received by the liquidator at his or her postal, email, or street address within 20 working days after the liquidator's notice has been served on that person.
>
> (4) The notice of objection must contain full particulars of the reasons for objecting and must identify documents that evidence or substantiate the reasons for objecting.
>
> (5) A transaction or charge that is not automatically set aside may still be set aside by the court on the liquidator's application.

[9] Section 295 provides:

> **295 Other orders**
>
> If a transaction or charge is set aside under section 294, the court may make 1 or more of the following orders:
>
> (a) an order that a person pay to the company an amount equal to some or all of the money that the company has paid under the transaction:
>
> (b) an order that a person transfer to the company property that the company has transferred under the transaction:
>
> (c) an order that a person pay to the company an amount that, in the court's opinion, fairly represents some or all of the benefits that the person has received because of the transaction:
>
> …

[10] Section 296(3) provides:

> A court must not order the recovery of property of a company (or its equivalent value) by a liquidator, whether under this Act, any other

> enactment, or in law or in equity, if the person from whom recovery is sought (**A**) proves that when A received the property—
>
> (a) A acted in good faith; and
>
> (b) a reasonable person in A's position would not have suspected, and A did not have reasonable grounds for suspecting, that the company was, or would become, insolvent; and
>
> (c) A gave value for the property or altered A's position in the reasonably held belief that the transfer of the property to A was valid and would not be set aside.

[11] Section 299(1) permits the court to make an order to set aside a security or charge (in whole or in part) created by a company in favour of those who can be broadly summarised as "related parties"[10] if the company is now in liquidation and unable to meet all its debts and the court considers that:

> … having regard to the circumstances in which the security or charge was created, the conduct of the person, relative, company, or related company, as the case may be, in relation to the affairs of the company, and any other relevant circumstances, it is just and equitable to make the order.

[12] Finally, s 303(1) in relevant part provides:

> … a debt or liability, present or future, certain or contingent, whether it is an ascertained debt or a liability for damages, may be admitted as a claim against a company in liquidation.

Background

General background

[13] Polyethylene, Contractors and Mechanical were part of a group of some 20 companies operated by Mr Browne. In March 2007, Polyethylene entered into a subcontract agreement with McConnell Dowell Constructors Ltd (McConnell Dowell) to weld the polyethylene pipes that were to be laid on the seabed in Lyttelton Harbour as part of a major sewer outfall project for Christchurch City Council.

[14] The pipes were manufactured by another company related to Mr Browne (PPS-Frank NZ Ltd) under licence from Frank GmbH in Germany and were supplied

[10] Including a director of the company and a person, or a relative of a person, who, at the time when the security or charge was created, had control of the company.

to Polyethylene. The pipes were first welded together to create 12-metre lengths. They were then transported to Lyttelton where they were welded on site to create 360-metre pipe strings. McConnell Dowell installed the pipe strings in trenches on the seabed using handling procedures approved by its engineers.

[15] On 19 December 2007, weld 151 failed during the installation of the first pipe string. Mr Browne notified Frank GmbH's managing director, Dr Habedank, who, on 9 January 2008, suggested that the concrete ballast weights were too heavy and this may have overstressed the welds. A letter to this effect was provided.

[16] Polyethylene also commissioned a report from an independent engineering consultant, Mr Hills. He reported on 10 January 2008 that the weld bead at the bottom of the pipe where the fracture had occurred was uneven, which contributed to the failure. In his view the stress placed on the pipe during the installation process was also a contributing factor but he did not know whether this stress was higher than normal. While it was not possible to state that the weld was faulty, it was "clearly 'suspect'".

[17] Dr Habedank's letter and Mr Hills' report were sent to McConnell Dowell. McConnell Dowell responded on 24 January 2008 saying that its engineers had calculated that the weld would not have been subjected to stresses greater than 50 per cent of its capacity under the contract specification. McConnell Dowell concluded that the weld failed because it was faulty. McConnell Dowell said this was consistent with Mr Hills' observations of "bead irregularities at the apparent point of failure". It advised that it held Polyethylene responsible for all losses, referring to cl 11.1 of the subcontract.[11]

[18] A further preliminary report was obtained by Dr Habedank on 1 February 2008 from an expert in Spain, Mr Isidro Sierra. The preliminary report said the pipe failed because, as a result of the concrete block design (which was too long and too heavy), the stress was too great when they were sunk. The report said that the loading percentage of the pipe was approximately 70 per cent which was "too high" but still within the value required under the contractual specifications. Mr Sierra

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[11] See below at [29].

recommended that further studies of the process of sinking and stresses on the pipe be undertaken. He also said that a new method to sink the pipe should be found as the problem would reoccur if the same process were used. A copy of this report was provided to McConnell Dowell on 5 February 2008.

[19] McConnell Dowell's Engineering Manager, Mr Robert Mawdsley, prepared a technical report on 20 February 2008 comparing the engineering calculations on which the installation process for the pipes was based and the actual conditions. He concluded that the actual conditions were "within the range expected" when the process was carried out, although the bending and stresses were higher than previously calculated as the blocks were slightly heavier than designed. The failure of the pipe was "most likely" as a result of weld 151 "falling well below its specified tensile strength, rather than the pipeline or weld being over-stressed". He did note that this conclusion was "subject to an inspection and evaluation of the weld by a suitably qualified and experienced welding inspector".

[20] Another report was commissioned by McConnell Dowell from Mr Robert Le Hunt, an independent consulting engineer from Australia specialising in plastic engineering and in particular pipeline applications. Mr Le Hunt concluded that the welding showed "brittle fracture behaviour", most probably caused by gaps between the abutting pipes in the welding process. Mr Le Hunt also noted anomalies in the welding records and procedures that needed to be rectified, in addition to outstanding matters required to be attended to for the pipes to comply with the specifications.

[21] A second weld, weld 32, failed during the launching process on 5 May 2008. McConnell Dowell wrote to Polyethylene on 8 May 2008 giving notice of its intention to seek recovery of its costs as a consequence of the failure in accordance with the provisions of the subcontract. The letter said that the investigations and analysis of the incident conducted to date suggested that the weld failed at less than its specified capacity and this, together with the "nature of the failure", led McConnell Dowell to conclude that the weld failed "because it was faulty in some way".

[22] As a result of the failure of weld 32 and concerns about other welds on pipe string six, various dive inspections were undertaken. These revealed concerns with weld 255 on pipe string three. Accordingly, on 16 August 2008, McConnell Dowell retrieved pipe string three from the harbour. Daniel Hodder of Polyethylene inspected the weld on 18 August 2008 and recommended that it be cut out and re-welded.[12] This work was completed on 29 September 2008.

[23] On 20 June 2008 McConnell Dowell had written to Polyethylene saying that weld 32 had failed at less than its specified capacity and that investigations had revealed that it and other welds were faulty. As a consequence of the failure McConnell Dowell said that it had suffered significant losses. These were being collated and McConnell Dowell said it expected these to be met by PPS-Frank NZ[13] in accordance with the contract.

[24] Polyethylene asked that the letter be readdressed to PPS-Frank NZ. The Court of Appeal said it assumed this was because weld 32 was done in PPS-Frank NZ's factory.[14] This was done and the readdressed letter was sent to Dr Habedank of Frank GmbH on 13 July.

[25] In an email dated 14 July 2008 to Mr Browne, Dr Habedank said that it was "clear" that the problems were caused by faulty welding. He referred to an agreement in a phone conversation that Mr Browne would consult a lawyer and write an official email to McConnell Dowell outlining that Polyethylene was responsible for the welding. He said the pipe had had all quality controls performed. The email also said that tests in Germany of the welding had "very bad results".[15]

[26] Mr Browne acknowledged in his evidence that he was concerned about the prospect that the welding was faulty at the time he received this email, although he also said that he had had the parameters for the welding checked and they were correct.

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[12] This is referred to as the third weld failure. The weld was considered defective due to "bead abnormalities" identified but it had not failed during the launching process.

[13] We note the subcontract was in fact with Polyethylene.

[14] *Petterson* (CA) , above n 1, at [37].

[15] These were conducted on test welds as the actual failed welds had not been made available for testing.

[27] On 26 August 2008, McConnell Dowell wrote to Polyethylene with a detailed breakdown of the losses it claimed as a result of the failure of weld 151. These totalled $2,552,671. This letter said McConnell Dowell had already provided technical reports to Polyethylene. We presume these were the reports of Mr Mawdsley and Mr Le Hunt referred to above.[16] The evidence does not establish exactly when these reports had been sent to Polyethylene,[17] but presumably they had been sent before this letter was written.

[28] On 5 September 2008, McConnell Dowell provided a breakdown of the losses claimed for the second weld failure, totalling $449,524. The losses claimed for the third weld failure were provided on 19 December 2008 and amounted to $394,558.

Insurance and indemnity

[29] Mr Browne had been advised by his solicitors on 18 January 2008 that Polyethylene was not covered by its own insurance[18] and that consequently, by virtue of cl 11.1 of the contract, it would be liable if the fault was due to faulty welding.[19] Clause 11.1 provided:

> **11. INSURANCE AND RISKS**
>
> 11.1 The Subcontractor will protect and indemnify the Employer and the Contractor against all losses, claims, costs, charges, expenses and damage arising out of, in connection with, or in consequence of the Subcontract Works unless and to the extent the losses, claims, costs, charges, expenses and damage is caused by the fault or neglect of the Contractor its servants or agents.

[30] Mr Browne's insurer confirmed that Polyethylene was not covered by its own insurance cover when the failure of weld 151 (the first weld) was notified to it.[20]

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16 Above at [19]–[20].

17 *Petterson* (CA) , above n 1, at n 30.

18 It appears from the email correspondence that Mr Browne told his solicitors that he knew, before the subcontract was entered into, that faulty welding would not be covered by Polyethylene's insurance. His solicitors on 18 January 2008 said that "I now understand your comment that you were advised that you would not have got insurance for welding" and noted that professional indemnity insurance for workmanship is not usually available or, if it is, it is very expensive.

19 The solicitor also drew attention to cl 12.1, which provided that any part of the subcontract works destroyed or damaged by any person or cause was to be made good by Polyethylene, as a "particularly onerous clause" which favoured McConnell Dowell.

20 *Petterson* (CA), above n 1, at [26].

Advice was, however, received by a chartered loss adjustor, Nigel Allott, on 18 April 2008 that Polyethylene could argue that the loss fell within the contract works policy organised by McConnell Dowell, that Polyethylene was one of the insured under that policy and further that any costs falling within the policy deductible (AUD 600,000) should be met by McConnell Dowell. This was on the basis of Mr Allott's review of the subcontract and certificate of insurance issued for the project. Apparently he had not reviewed the policy itself.[21] Mr Allott said:

> Even if it could be shown that the Subcontract Agreement requires [Polyethylene] to make good the damage, [Polyethylene] as a named insured would then be entitled to be recompensed to the extent that the Contract Works policy would have responded to the loss, but for the value of the deductible.
>
> Notwithstanding the value of the deductible[22] under the main contract works policy, we would expect that resulting damage from this event could be claimed against the policy, and any rights of recovery against [Polyethylene] would therefore be waived. The only cost [Polyethylene] should be liable for would be making good any faulty workmanship, if it could be shown that their error caused the loss, which has not been proven.

[31] It appears that Mr Allott's advice was sent to McConnell Dowell, who replied on 30 July 2008. We do not have a copy of the reply but infer, from the fact that it persisted in its claim against Polyethylene, that McConnell Dowell did not accept the Allott position.[23] A file note of 29 August 2008 of a meeting between Mr Browne and his solicitors records that he was told that it did not appear that McConnell Dowell would be making an insurance claim.

[32] Sometime before mid-September 2008,[24] Mr Browne asked Duncan Cotterill to advise whether Polyethylene was covered for the claim under the contract works policy obtained by McConnell Dowell. Duncan Cotterill reported on 17 November 2008 that it was not.

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21 At [26] and n 10.

22 An issue arose later (after the impugned transactions) as to whether the appropriate deductible was AUD 600,000, the deductible where the claim was related to faulty design, or a lower deductible of AUD 60,000. It was the former that was mentioned as the deductible in Mr Allott's letter.

23 The 30 July McConnell Dowell letter was mentioned in a letter from Mr Browne's solicitors of 5 September 2008.

24 The investigation into the insurance issues are mentioned in an email to Mr Browne from his solicitors of 17 September 2008. See also Mr Browne's comments in evidence referred to below at [105].

[33] For completeness, we note also that, under another clause in the subcontract, Polyethylene indemnified McConnell Dowell for any losses arising from the subcontract works. Clause 3.2 provided:

> **3. APPLICATION OF THE HEAD CONTRACT**
>
> …
>
> 3.2 The Subcontractor will undertake and accept the same obligations and liabilities as are imposed upon the Contractor by the terms of the Head Contract insofar as they relate to the Subcontract Works. The Subcontractor will protect and indemnify the Contractor from and against all obligations and liabilities arising out of the Subcontract Works, and from and against all claims, proceedings, damages (including liquidated damages under the Head Contract), costs, charges and expenses arising out of or in connection with any dispute pertaining to the Subcontract Works or failure to perform those obligations or to fulfil those liabilities.

Decision to restructure

[34] On 30 June 2008 Mr and Mrs Browne met with their solicitor, Mr Dorrance, and their accountant, Mr Lay. Mr Lay advised at that meeting that Polyethylene currently had sufficient funds on deposit with the bank to repay unsecured advances from Contractors, Mechanical and Mr Browne, together totalling $1,253,537. It was agreed that these advances should be repaid and that Polyethylene would then enter into the GSA with Mr Browne to secure a fresh advance of $450,000 to fund Polyethylene's ongoing operations. Mr Lay said that the advance of $450,000 should not be made until after the other advances were repaid so that they were not seen to be related.[25]

[35] Mr Lay confirmed in his evidence that one of the objectives of these proposed transactions was to ensure that the payments to the related parties were made in the ordinary course of business and not vulnerable to attack as insolvent transactions. The Court of Appeal commented that this can only have arisen from concern about the risk of insolvency as a result of liability to McConnell Dowell.[26] It was accepted in evidence that the McConnell Dowell issue, and the potential for a large claim if McConnell Dowell were successful, was discussed at the meeting.

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[25] This sequence was not ultimately followed: see below at [45] and [46].

[26] *Petterson* (CA) , above n 1, at [30].

[36] The Court of Appeal noted that, at this time, the total current liabilities of Polyethylene were $2,147,316 and exceeded current assets by over $200,000.[27] Non-current assets comprised fixed assets of $67,563 and the company's shareholding in PPS-Frank NZ, valued in the 2008 accounts at $766,151. On the basis of the asset values set out in the accounts, this meant that its net assets overall totalled at most $597,010.[28]

[37] Following the meeting, Mr and Mrs Browne signed the following resolutions:

> **POLYETHYLENE PIPE SYSTEMS LIMITED**
>
> **MINUTES OF DIRECTORS MEETING HELD ON 30TH JUNE 2008**
>
> The directors having received requests from David Browne Contractors Limited and David Browne Mechanical Limited to repay the intercompany current account with Polyethylene Pipe Systems Limited. It was resolved that the company repay David Browne Mechanical Limited $347,634, David Browne Contractors Limited $565,303. The above balances are as at 31 March 2008.
>
> Resolved that the current account balance as at 31 March 2008 for David Browne amounting to $340,600 be also repaid.

[38] The Court of Appeal noted that there is no evidence that either Mechanical or Contractors had sought repayment of these monies prior to this meeting and no written demand was produced.[29]

[39] Mr and Mrs Browne also signed a solvency certificate as at 1 July 2008. The contingent liability to McConnell Dowell was addressed by stating that the claim was disputed, would be offset by counterclaims for extras and variations and, in any event, would be covered by McConnell Dowell's insurers.

[40] It was also decided that Polyethylene would transfer most of the shares it held in PPS-Frank NZ to the Browne Family Trust. On 4 July Mr Lay valued this shareholding (approximately 84 per cent of the shares held by Polyethylene) at $309,543, despite the value of $766,151 for the shares shown in Polyethylene's financial statements as at 31 March 2008, which Mr Lay had also prepared.

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27 At [29].

28 At [29] and [93].

29 At [32].

[41] The Court of Appeal commented that, if the shares had been valued at $309,543 in Polyethylene's financial statements, then not only would current liabilities have exceeded current assets, but net assets overall would have reduced to $140,402.[30] The Court said that, if any meaningful provision had been made for the contingent liability to McConnell Dowell, the company would not have met the solvency test under s 4 of the Act.[31]

Implementation of restructuring

[42] On 28 July 2008, Mr and Mrs Browne, as directors of Polyethylene, formally approved new borrowings from Mr Browne in unspecified amounts to assist Polyethylene's working capital and cash flow requirements. These borrowings were to be secured by the GSA which Mr and Mrs Browne executed that day in accordance with the discussions at the meeting on 30 June 2008.

[43] On 21 August 2008 Mr and Mrs Browne, again as directors of Polyethylene, signed a resolution approving the sale of the PPS-Frank NZ shares to the Browne Family Trust. This was at a purchase price of $309,543, with the purchase price remaining owing from the trust to Polyethylene for a term of 20 years at a rate of interest specified by Polyethylene, after which it was repayable on demand. The Browne Family Trust could elect to repay the debt at any time.

[44] The Court of Appeal rejected the contention that these shares were transferred as part of Mr Browne's estate planning review, particularly in light of the fact that he owned only one of the thousand shares in Polyethylene. The Court considered that the object of the transfer was to remove these assets from the reach of McConnell Dowell and that this conclusion was reinforced by a file note from the solicitors prepared when the transactions were in contemplation which refer to an "argument that [Polyethylene] has been holding [the shares] on trust for fam trust".[32]

[45] On 29 August 2008, $700,000 was transferred from Mr Browne to Polyethylene. This figure comprised repayment of $250,000 that Polyethylene had

30 At [35] and [93].
31 At [35].
32 At [89].

advanced to Mr Browne on 9 June 2008[33] and the sum of $450,000 that Mr Browne agreed to advance to Polyethylene on the basis that it would be secured by the newly arranged GSA.[34]

[46] On 2 September 2008 Polyethylene paid the debts it owed to Mr Browne ($340,600),[35] Contractors ($565,303) and Mechanical ($347,634)[36] pursuant to the resolution recorded in the minute of 30 June above.[37]

Adjudication

[47] On 19 January 2009, McConnell Dowell issued a notice of adjudication under the Construction Contracts Act 2002.[38] Adjudication was postponed by agreement while the parties attempted to negotiate. McConnell Dowell then issued a formal claim on 15 May 2009 arising out of the weld failures in the sum of $3,396,753.

[48] The claim was heard by Derek Firth, an Auckland barrister and arbitrator. In his determination issued on 20 July 2009, Mr Firth found that McConnell Dowell's case was compelling (both as to liability and quantum) and that Polyethylene's denial of liability was without substantial merit. He concluded that the welds failed because they were defective and that there was no fault on the part of McConnell Dowell.

[49] Mr Firth assessed the recoverable losses at $2,965,334 (exclusive of any payable GST) plus costs of $31,590. This amount was less than the claim made by McConnell Dowell to reflect costs and overheads that would have been incurred anyway. The sum was also said to be subject to any adjustment in respect of the

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[33] There was no evidence of any resolution made by the directors of Polyethylene about this loan. In an affidavit Mr Browne said it was a loan to himself and that funds were frequently moved around the group as, while the companies trade separately and have separate bank accounts, the group is treated as a "global entity" and funds are transferred around as needed.

[34] There was argument in the High Court as to whether the payment was made by Mr Browne or Contractors, as the money came from Contractors' bank account. Associate Judge Matthews was satisfied that it was advanced personally: *Petterson v Browne* [2015] NZHC 866 [*Petterson* (HC)] (Associate Judge Matthews) at [45].

[35] The $340,600 was in fact credited to the bank account of the Browne Family Trust.

[36] The cheque for this payment was made out to Contractors.

[37] Above at [37].

[38] Construction Contracts Act 2002, s 28.

impact of insurance. Although considering that the claim (excluding the cost to repair the faulty weld and less the deductible of AUD 600,000) may well have been covered under the McConnell Dowell insurance policy, Mr Firth was not sufficiently sure that he had all relevant material in order to hold this provided a defence to the claim.

Insurance claim

[50] From the evidence it is apparent that McConnell Dowell did make a claim under the contract works policy.[39] McConnell Dowell, however, withdrew that claim. It appears, from an email from Mr Browne's solicitors on 22 July 2009, that this may have been because the McConnell Dowell claim pursued against Polyethylene was broader than the insurance claim as it was relying on the indemnity provision in the subcontract. The actual insurance claim therefore was less than the excess. A claim may also have affected McConnell Dowell's no claims bonus.

[51] On 9 July 2009 Mr Coughlan,[40] on behalf of Polyethylene as subcontractor, also made a claim under the McConnell Dowell insurance policy. It appears from an email from the insurers of 22 July 2009 that the insurer's preliminary view accorded with that of McConnell Dowell: that at least two of the three claims were under the AUD 600,000 excess. Mr Browne's solicitors asked for a copy of the parts of the policy relating to the excess and it appears, after this review, there was an issue raised as to which excess applied.[41]

[52] On 14 December 2009 Mr Browne emailed his solicitors saying that his insurance broker, Mr Coughlan, had told him that the insurer had examined the claim and was looking to make a payment under the policy. In a file note of 22 December 2009 Mr Browne's solicitors recorded a conversation with the insurer's solicitors. Mr Browne's solicitors were informed again that McConnell Dowell had withdrawn its claim and asked whether Polyethylene was intending to pursue its claim.

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39 There is a reference, in an email from McConnell Dowell's insurers of 22 July 2009, to the London underwriters investigating the claim "when it occurred in December 2007". An email from McConnell Dowell's insurers to Polyethylene's insurance broker dated 16 July 2009 also said that the first claim was notified in December 2007 when it occurred.

40 Polyethylene's insurance broker.

41 See above at n 22.

Mr Browne's solicitors passed the liquidator's details on to the insurer. There is no further evidence before the Court on the fate of the claim.

Liquidation

[53] When McConnell Dowell's claim succeeded in adjudication, Mr Browne responded on 29 July 2009 by placing Polyethylene into receivership under the GSA. Polyethylene was then put into liquidation on 5 October 2009 on the application of McConnell Dowell, with Mr Petterson being appointed as liquidator.

[54] On 4 April 2013, Mr Petterson served notices on Contractors, Mechanical and Mr Browne as required under s 294 of the Companies Act, seeking to set aside the payments made to them by Polyethylene on 2 September 2008.[42]

[55] Mr Browne objected to this notice on 2 May 2013. Contractors and Mechanical did not respond because the accountants who received the notices did not pass them on to Mr Browne. Accordingly, the transactions involving Contractors and Mechanical were automatically set aside 20 working days after the notices were served.[43]

The proceedings

[56] Mr Petterson brought proceedings in the High Court against Contractors, Mechanical and Mr Browne.

[57] On 11 December 2014 Mr Petterson notified Contractors and Mechanical that he would be applying to the High Court for an order requiring repayment pursuant to s 295 of the Companies Act.[44] Contractors and Mechanical resisted Mr Petterson's claim on two bases on 5 February 2015. First, they pleaded a defence under s 296(3)

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42 See above at [46]. Mr Browne was served with two applications, one in relation to the $340,600 payment and another in relation to the GSA on 9 December 2009, which purported to cover both the $340,600 payment and $201,306 received under the GSA after the appointment of the liquidator. It eventuated that the liquidator only sought the latter: see below at [59].

43 Companies Act, s 294(3).

44 As set out above at [9].

of the Companies Act.[45] Second, they pleaded that it would not be just and equitable to order recovery of the money.

[58] With regard to Mr Browne the claims were:[46]

(a) that the payment of $340,600 made to Mr Browne by Polyethylene was voidable under s 292 of the Companies Act;

(b) that the GSA was a voidable charge under s 293;

(c) in the alternative that the GSA be set aside under s 299; and

(d) that Mr Browne repay all amounts paid under the GSA including $201,306 paid to him by the receiver as secured creditor in May 2013.[47]

[59] At the hearing the liquidator abandoned the first two claims against Mr Browne.[48]

High Court judgment

[60] The Associate Judge said that Mr Browne accepted that the "sole issue" under s 299(1) was whether, having regard to the circumstances listed,[49] it was just and equitable to set aside the GSA.[50] The Associate Judge was of the view that there were three material elements of the circumstances in which the transactions were undertaken that required consideration.[51]

[61] First, the Associate Judge considered that, at the time the transactions were entered into, the sum claimed by McConnell Dowell was not a due debt and that Polyethylene was solvent as defined in s 4.[52] Secondly, the Judge was satisfied that

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45 As set out above at [10].
46 Mr Browne was notified of these claims on 11 July 2014.
47 See above at [2] and n 42.
48 *Petterson* (HC), above n 34, at [4].
49 As set out above at [11].
50 *Petterson* (HC), above n 34, at [54].
51 At [58].
52 At [62].

the transactions were not one-off but were a part of a general restructuring by Mr Browne undertaken for good commercial reasons.[53] Thirdly, the Associate Judge concluded that, "when the charge was given, Mr Browne and [Polyethylene] had sound reasons to believe that the failure of the joints was not caused by faulty workmanship undertaken by [Polyethylene]".[54] The Associate Judge was also satisfied that Polyethylene had sought and obtained advice that (apart from the actual cost of rewelding) it was covered by McConnell Dowell's insurance policy, which was in accordance with the advice McConnell Dowell had given Polyethylene prior to entering the contract.[55]

[62] The grounds for an order under s 299 (that it was just and equitable that the charge given be set aside) were therefore not made out.[56]

[63] With regard to Contractors and Mechanical, the Associate Judge did not address the defence under s 296(3) of the Companies Act. Instead, he held that the court has a general discretion under s 295 to decline recovery to a liquidator even where the transactions have been set aside and the statutory defence under s 296(3) has not been made out.[57] The Associate Judge said that, based on a "slightly grudging acceptance" that the McConnell Dowell claim was not a due debt (and therefore Polyethylene was able to pay its due debts at the relevant time), the liquidator had withdrawn his claims against Mr Browne but had continued claims against the companies "based on a materially identical proposition".[58] The Associate Judge considered that the discretion should be exercised in favour of Contractors and Mechanical because it would be inequitable to order recovery when the liquidator was not entitled to avoid the dispositions.[59] Associate Judge Matthews also said that, had the notices been objected to, the transactions would not have been set aside.[60]

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53 At [87].
54 At [130]. Given his conclusion, Associate Judge Matthews did not address whether it was within the Court's jurisdiction to make an order under s 299(1) after a secured creditor has appointed a receiver and the receiver has realised the assets of the company and made payments to the secured creditor: at [52].
55 At [119]–[120].
56 At [131].
57 At [150].
58 At [155].
59 At [158], relying on *Re Huberg Distributors Ltd (in liq) (No 2)* (1987) 3 NZCLC 100,211 (HC).
60 At [136].

Court of Appeal judgment

[64] The Court of Appeal considered that Polyethylene's directors and advisors knew at the time the GSA was granted that the company would face a substantial claim from McConnell Dowell exceeding Polyethylene's net worth, that there was a real risk that Polyethylene may be found liable and that no insurance cover would be available.[61] Contrary to the view of the Associate Judge, the Court of Appeal considered that the evidence strongly pointed towards the conclusion that the transactions and the GSA were entered into as an attempt to safeguard Mr Browne and his related interests from the McConnell Dowell claim.

[65] By the time the unsecured loans were repaid on 2 September 2008, three welds had failed due to faulty welding, McConnell Dowell had suffered substantial losses and Polyethylene was liable for these losses under the indemnity in the subcontract. McConnell Dowell had quantified the losses it had suffered from the first of the weld failures at over $2.5 million. The subsequent adjudication merely confirmed that Polyethylene was liable for these losses and the further losses caused by the other two weld failures. Therefore, the Court of Appeal concluded that, at the time the payments were made, Polyethylene was unable to meet all of its obligations, including under the indemnity in favour of McConnell Dowell.[62]

[66] As a result, the Court of Appeal held that it was just and equitable for the GSA to be set aside. The transactions were "clearly designed by Mr Browne's advisors to protect him and his related interests from the risk of liquidation if the claim succeeded and no insurance was available to cover it".[63] No defence under s 296(3) was made out.[64] Mr Browne was ordered to repay $201,316.

[67] As to Contractors and Mechanical, the Court rejected the submission that these companies had tenable defences under s 296(3). Mr Browne was a director of

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61 *Petterson* (CA), above n 1, at [82] and [86]. The Court of Appeal commented that the Associate Judge "overstated the position" of the insurance advice: at [85].

62 At [94].

63 At [98].

64 At [104].

these companies and his knowledge must be attributed to Contractors and Mechanical in this context.[65]

[68] The Court of Appeal accepted that there was a discretion under s 295 as to the nature and extent of any appropriate remedy. However, it held that there was no general discretion based on just and equitable considerations for the Court to decline to make one or other of the orders specified in s 295 if a disposition is set aside and no defence under s 296(3) or at law or in equity is made out. The Associate Judge was accordingly wrong to decline Mr Petterson's application for relief on that basis.[66]

[69] The Court of Appeal therefore made an order that Contractors and Mechanical pay to Polyethylene the sums of $565,303 and $347,634 respectively. It also made an order pursuant to s 295(g) of the Companies Act that Contractors and Mechanical were entitled to claim as creditors in the liquidation of Polyethylene to the extent of the amounts refunded by each of them as a result of the order.[67]

Issues

[70] The main issue in the appeal is whether the repayment of the debts to Contractors and Mechanical occurred at a time when Polyethylene was unable to pay its due debts. This requires consideration of what is included in the term due debts under s 292(2)(a) of the Companies Act.[68] In light of this, the next question is whether some or all of the amount eventually held to be owed to McConnell Dowell should have been taken into consideration.

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65 At [139].

66 At [138].

67 At [144].

68 Both parties accepted that the general principles relating to the s 292 test are set out in *Blanchett v Joinery Direct Ltd* HC Hamilton CIV 2007-419-1690, 23 December 2008 at [27]. See also P Heath & M Whale (eds) *Heath & Whale on Insolvency* (looseleaf ed, LexisNexis, Wellington) at [24.48]; Lynne Taylor and Grant Slevin *The Law of Insolvency in New Zealand* (Thomson Reuters, Wellington, 2016) at [26.2.2]; *Re Northridge Properties Ltd (in liq)* SC Auckland M46/75, 13 December 1977; and *Re Universal Management Ltd (in liq)* (1982) 1 NZCLC 99,238 (HC).

[71] The subsidiary questions for this appeal are:

(a) Was the defence in s 296(3) or any other defences made out?

(b) Is there a discretion under s 295 not to make an order, even if no defences are available?

[72] Before we discuss those questions, we need to consider a submission by Contractors and Mechanical that the liquidator should be bound by what amounted to a concession as to the solvency of Polyethylene made in the High Court.

Was a concession as to solvency made in the High Court?

[73] As noted above, at the hearing in the High Court the liquidator abandoned the first two claims against Mr Browne.[69] The Court of Appeal judgment said that this was on the basis that the liquidator accepted that Polyethylene was able to pay its due debts at the time that these transactions occurred (September 2008) and that the transactions were accordingly not "insolvent transactions" within the s 292 definition.[70]

[74] In its leave judgment, this Court said that the appeals by Contractors and Mechanical may require some assessment of the accuracy of the concessions made by counsel for the liquidator as to the solvency of Polyethylene in September 2008. The Court asked for argument on this point.[71]

[75] As it turns out, however, both parties in a joint memorandum on 1 September 2016 accepted that no admission or concession was made.

[76] Despite the fact that no formal concession was made, Contractors and Mechanical submit that it must, however, have been implicit in the abandonment of

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[69] See above at [59].

[70] *Petterson* (CA), above n 1, at [63].

[71] Leave judgment, above n 2, at [5] and [12], referring to *Bank of Australasia v Hall* (1907) 4 CLR 1514; *Box Valley Pty Ltd v Kidd* [2006] NSWCA 26, (2006) 24 ACLC 471; and *New Cap Reinsurance Corp Ltd (in liq) v Grant* [2008] NSWSC 1015, (2008) 68 ACSR 176.

the first two claims against Mr Browne that the liquidator accepted Polyethylene was solvent in the liquidity sense and he should not be allowed to resile from this.

[77] We do not accept this submission. The parties are agreed that no formal concession was made. That the liquidator chose to abandon claims cannot amount to a binding concession. In any event, this Court made it clear in its leave judgment that it would be examining the validity of any alleged concessions.

What should be included in "due debts"?

Submissions of Contractors and Mechanical

[78] Contractors and Mechanical submit that s 292(2)(a), unlike the two-part solvency test in s 4,[72] is not concerned with the state of a company's balance sheet. It is solely a "cash flow" or liquidity assessment made at the time of the challenged transaction.[73] While they accept debts due within a very short time after the challenged transaction are included in this assessment,[74] contingent or prospective debts are not.[75]

[79] In their submission the concept of "due debts" is a narrower concept than "liabilities" or "obligations". To come within due debts, any debts must be legally due. This means that a claim for damages cannot be characterised as a due debt and must be excluded from the assessment under s 292(2)(a) unless an alleged breach triggered an immediate liability to pay a specific amount, such as with a liquidated damages clause. They pointed to the evidence of Mr Ruscoe, a chartered accountant, as supporting this submission.

[80] It is submitted that the Companies Act itself draws a distinction between debts and contingent liabilities. For example, in the solvency test under s 4, the balance sheet limb specifically refers to contingent liabilities.[76] The same is true of

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72 Set out above at [3].

73 Referring to *Re Gladding King Real Estate Ltd (in liq)* (1993) 6 NZCLC 68,261 (HC) at 68,275.

74 Referring to *Re Northridge Properties Ltd*, above n 68*; Re BOP Freight Distribution (1999) Ltd (in liq)* HC Hamilton CIV-2003-419-300, 15 May 2003; and *Bond Cargo Ltd v Chilcott* HC Auckland M548sd99, 4 July 2002.

75 Referring to Master Venning's comments in *Saunders & Co v Fagerlind* HC Christchurch M486/00, 22 June 2001 at [18].

76 Set out above at [3].

s 303 relating to admissible claims in a liquidation.[77] Contractors and Mechanical also refer to s 288(4), which says that contingent or prospective liabilities may be taken into account in assessing whether a company is unable to pay its debts.[78] In their submission, s 288(4) (and therefore the inclusion of contingent and prospective liabilities) applies only to the assessment of a company's inability to pay its debts as a ground for liquidation under s 241 and not to the avoidance of transactions under s 292. Contractors and Mechanical accept that this limited scope is not expressly stated in s 288(4), but submit that it follows from the context.

[81] Contractors and Mechanical also submit that their position accords with case law. An unliquidated claim, in their submission, is generally considered to be a secondary liability. They submit that the authorities have held consistently that a mere claim for damages for breach of contract (which is not quantified by the terms of the contract) is not "due" until it has been determined by arbitration or by a decision of a court, both as to liability and quantum.[79] In support of their submission, Contractors and Mechanical also refer to cases on statutory demands under s 289 of the Companies Act[80] and to a number of Australian construction law cases.[81]

[82] It is submitted that, for all the above reasons, the McConnell Dowell claim was a "disputed, unquantified and contingent" claim. Such claims are not taken into account under the s 292(2)(a) liquidity test. To do so would require companies to "cease trading whenever facing a threatened claim with an indeterminate future outcome, however specious the claim". This is said to be an uncommercial proposition for which the Act does not provide.

Submissions of the liquidator

[83] In response, the liquidator submits that the s 292(2)(a) test is not a simple accounting question, but rather takes into account both fact and law. While he agrees

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77 Set out above at [12].

78 Set out above at [5].

79 Referring to *Holdgate v Holdgate* CA166/02, 23 June 2003 at [7].

80 Including *Northern Crest Investments Ltd v Robt Jones Holdings Ltd* (2009) 19 PRNZ 258 (HC) at [20].

81 *Rejan Constructions Pty Ltd v Manningham Medical Centre Pty Ltd* [2002] VSC 579; and *Merritt Cairns Constructions Pty Ltd v Wulguru Heights Pty Ltd* [1995] 2 Qd R 521 (CA).

that the test of insolvency is a cash flow test, he argues it goes beyond the simple question of whether there is sufficient cash immediately available to meet the company's obligations.[82] In his submission contingent debts can be held to be due if they are likely to become due within the relevant time period. He submits that there was sufficient certainty in the claim by McConnell Dowell for it to be treated as a due debt.

[84] In particular, he relies on McConnell Dowell's particularisation of the losses incurred as a result of the failure of weld 151 on or around 26 August 2008 (prior to the date of the impugned transactions) and further that, by the date of the transaction, Polyethylene had been advised that the failure was as a result of faulty welding. He also points out that, under the Construction Contracts Act, the claim could have been adjudicated on swiftly[83] and further that the arbitration decision shows that Polyethylene had no defence.

[85] As at the date of the impugned transactions, it is submitted that the claim for the losses from the failure of the first weld was a contingent debt. It was temporally proximate to the transactions and there was a real likelihood it would crystallize into an actual debt, given the content of the correspondence between the parties regarding the faulty welding before the transactions took place.

[86] The liquidator submits that the cases cited by Contractors and Mechanical are in a different context and not on point. Rather, he submits that New Zealand should align itself with the case law in Australia and the United Kingdom on the s 292 solvency (cash flow) test.[84] He submits that these cases establish that future contingent debts should be taken into account if they are reasonably temporally proximate (determined after the court considers the facts of each case) and there is a real likelihood the contingent debt will crystallise into an actual debt. Further, in his

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[82] Relying on *Sandell v Porter* (1966) 115 CLR 666 at 670.

[83] The liquidator argues that the adjudication process could have been completed within 35 days.

[84] Relying on *Fryer v Powell* [2001] SASC 59, (2001) 159 FLR 433; *McBain v Palffy* [2009] FCA 260, (2009) 7 ABC(NS) 103; *New Cap Reinsurance Corp Ltd (in liq) v Grant*, above n 71; and *Bank of Australasia v Hall*, above n 71 (arguing that the latter is to be preferred to *Box Valley Pty Ltd v Kidd*, above n 71).

submission, in some circumstances a balance sheet approach can be taken to test the solvency position after the court's review of due debts at a specified time.[85]

[87] In any event, the liquidator submits that the McConnell Dowell claim was one under the indemnity provisions in the contract. Clauses like cls 3.2 and 11.1 are not dependent on a wrong done but a promise made: in this case a promise to indemnify.[86] The claim for losses was therefore contingent only on McConnell Dowell making a claim to be indemnified for losses incurred.

What is taken into account under s 292(2)(a)?

[88] Debt can be a word of wide import[87] and its exact meaning will depend on the context. With regard to similar legislation in Australia,[88] it has been held that the term debt encompasses both present and contingent debts.[89] The same result has been reached in the United Kingdom.[90] We see no reason to take a different approach in New Zealand.

[89] The next issue is what is meant by the term "due". Contractors and Mechanical accept that, as a matter of commercial practicality when assessing solvency, it is appropriate to take into account both recent past events and those subsequent to the transactions under scrutiny.[91] They argue, however, that the

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85 Relying on *The Bell Group Ltd (in liq) v Westpac Banking Corp (No 9)* [2008] WASC 239, (2008) 39 WAR 1 at [1073].

86 The liquidator relies on Harvey McGregor *McGregor on Damages* (19th ed, Sweet and Maxwell, London, 2014) at [1–005] for this proposition.

87 *Worldwide NZ LLC v NZ Venue and Event Management Ltd* [2014] NZSC 108, [2015] 1 NZLR 1 at [16].

88 Corporations Act 2001 (Cth), s 95A.

89 See *Fryer v Powell*, above n 84, at [61]–[63]; *Bank of Australasia v Hall*, above n 71; *New Cap Reinsurance Corp Ltd v Grant*, above n 71, at [75]–[77]; and *McBain v Palffy*, above n 84, at [16]. We note that the latter case applied *Bank of Australasia v Hall* under the Bankruptcy Act 1966 (Cth).

90 Relating to s 123 of the Insolvency Act 1986 (UK): see *Re Cheyne Finance Plc (No 2)* [2007] EWHC 2402, [2008] 2 All ER 987 (Ch) at [56]. This was endorsed by the United Kingdom Supreme Court in *BNY Corporate Trustee Services Ltd v Eurosail-UK 2007-3BL Plc* [2013] UKSC 28, [2013] 1 WLR 1408 at [34] and [37]. This was despite the removal of an explicit reference to "contingent and prospective liabilities" in a former provision. See also Andrew R Keay *McPherson's Law of Company Liquidation* (3rd ed, Sweet & Maxwell, London, 2013) at [3–029]–[3–030]; and compare Roy Goode *Principles of Corporate Insolvency Law* (4th ed, Sweet & Maxwell, London, 2011) at [4–18] and [4–23].

91 Contractors and Mechanical do not attempt to argue (rightly in our view) that s 292(2)(a) requires a "snap shot" to be taken at the time of the transaction as against the "moving picture" under s 309 of the Companies Act 1955: see discussion in Lynne Taylor and Grant Slevin *The Law of Insolvency in New Zealand*, above n 68, at 652–653.

emphasis is on a very short period of time in the future. The liquidator, on the other hand, argues that future debts should be taken into account if they are "reasonably temporally proximate".

[90] We accept the liquidator's submission on this point. As was said in *Re Cheyne Finance Plc (No 2),* the issue of "how far into the future the inquiry as to present solvency is to go … is a fact sensitive question depending upon the nature of the company's business and if known, of its future liabilities".[92] Concentrating only on debts due at the relevant time could fail to distinguish between those companies suffering a temporary liquidity problem and those that are, on any commercial view, insolvent even though able to continue to pay their debts "for the next few days, weeks or even months before an inevitable failure".[93]

[91] Solvency in a cash flow sense must be assessed objectively, taking a practical business prospective. What is reasonably temporally proximate will, as indicated above, fall to be considered in light of the facts of the particular case. If a reasonable and prudent business person would be satisfied that there is sufficient certainty that a contingent debt will, within that relevant period, become legally due then it must be taken into account.

[92] We accept that there is a difference between debts and damages but, once liability and quantum have been established in any claim for damages, the resulting judgment sum will be a debt owing. This means that the question is the same – if there is sufficient certainty that a claim will crystallize in the relevant period, then it must be taken into account.[94] This approach is consistent with the approach taken by the High Court of Australia in *Bank of Australasia v Hall*.[95]

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92 *Re Cheyne Finance Plc (No 2)*, above n 90, at [50].

93 At [51].

94 It follows that the legal position does not accord with that proferred by Mr Ruscoe in evidence: see at [79] above.

95 *Bank of Australasia v Hall*, above n 71, at 1527–1258 per Griffith CJ, 1537–1538 per O'Connor J and 1548–1549 per Isaac J (Higgens J dissenting). Barton J wrote separately, agreeing in result but he did not comment on this point. We note *Box Valley Pty Ltd v Kidd*, above n 71, at [14]–[15] took a different view with regard to unliquidated sums but did not refer to *Bank of Australasia v Hall* in its decision. See also *White Constructions (ACT) Pty Ltd (in liq) v White* [2004] NSWSC 71, (2004) 49 ACSR 220 at [306]–[317]. Commentators in the United Kingdom suggest unliquidated damages would not be taken into account for the solvency test: see Keay, above n 90, at [3–030]; and Goode, above n 90, at [4-18].

[93] We do not consider the textual arguments made by Contractors and Mechanical advance the position. It is understandable for example that contingent liabilities are expressly dealt with in the balance sheet limb of the solvency test in s 4 as contingent liabilities are not normally required to be in the balance sheet but are disclosed in notes to the financial statements.[96] Likewise, in s 303, in a liquidation context it is necessary to make it clear that all actual and potential creditors may make a claim, no matter how unlikely it is that any debt will become payable. As to s 288(4) we note it is not limited expressly to the liquidation context and so in fact this section could apply to s 292(2)(a), although this is not a point we need to decide.

[94] Turning to the cases relied on by Contractors and Mechanical, we accept the liquidator's submission that most of these arise in a different context where a different approach to the term debt could well be warranted. A key purpose of the voidable transactions regime is:[97]

> … to protect an insolvent company's creditors as a whole against a diminution of the assets available to them resulting from a transaction which confers an inappropriate advantage on one creditor by allowing that creditor to recover more than it would in a liquidation. The pari passu principle requires equal treatment of creditors in like positions … and facilitates the orderly and efficient realisation of the company's assets for distribution to creditors.

[95] This policy background reinforces the need for a practical business approach (as against one which is unduly technical) to be taken as to what should be included in the term "due debts" in s 292(2)(a).

[96] We do not accept the submission of Contractors and Mechanical that this interpretation of s 292(2)(a) would require companies to cease trading when faced with a specious claim. The issue of whether a claim is a due debt is assessed objectively from the perspective of a reasonable and prudent business person. Specious claims would not need to be taken into account under this test. Nor would claims where there was a credible defence if there was not sufficient certainty those claims would crystallise into a debt legally due within a reasonably temporally

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96 Unless the possibility of "an outflow of resources embodying economic benefits is remote": New Zealand Accounting Standards Board *New Zealand Equivalent to International Accounting Standards 37* (NZ IAS 37, November 2004) at [28] and [86].

97 *Allied Concrete Ltd v Meltzer* [2015] NZSC 7, [2016] 1 NZLR 141 at [1].

proximate time frame.[98] This means that the test outlined for "due debts" under s 292(2)(a) is not unduly wide.[99]

Application of s 292(2)(a)

Should the McConnell Dowell claim have been taken into account?

[97] In the solvency certificate signed by the directors of Polyethylene on 1 July 2008, three reasons were given to support the contention the company was solvent. Assessed objectively, from the perspective of a reasonable and prudent business person, none of these reasons was valid, either at the time of the solvency certificate or at the time of the impugned transactions in September 2008. No other reasons have been advanced as to cash flow solvency that are relevant to the assessment.

[98] The first reason given was that the debt was disputed. There were, however, no proper reasons for the directors to dispute the debt. Indeed, the reports and other material available to the directors in September 2008 clearly showed that Polyethylene was responsible for the pipe failures.

[99] At the time the directors of Polyethylene (Mr and Mrs Browne) resolved to repay the debts owed to Contractors and Mechanical in June 2008, two welds had failed. There were two possible explanations for the failures: faulty welding and over stressing in the laying process.

[100] Polyethylene's expert, Mr Hills, said that the "suspect" weld had contributed to the first failure, as did stress during the installation process. He did not know, however, whether this stress was higher than normal.[100] The Spanish expert, while

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98 In the sense described at [90]–[91].

99 In any event, defences such as s 296(3) of the Companies Act, when applicable, operate to protect recipients of impugned transactions. Further, the issue under s 292 is not whether a company should continue trading but whether it is permitted to make preferential transactions within the relevant period. Any decision as to continued trading must take account of the reckless trading provision: s 135 of the Act. The test under that section relates to the likelihood of a "substantial risk of serious loss" to the creditors.

100 See above at [16].

blaming stresses in the laying process, noted that the specifications meant that the pipes should have been able to withstand the load.[101]

[101] Polyethylene had received three letters from McConnell Dowell (one in January 2008 after the first weld failure and in May and June 2008 after the second weld failure) indicating that the welds had not been subject to stresses greater than 50 per cent of their capacity under the contract specification.[102] The directors do not appear to have had any basis to doubt this advice, which broadly accorded with that of Polyethylene's Spanish expert.

[102] Dr Habedank in July had reported "very bad results" from the testing of welds.[103] McConnell Dowell had also obtained two engineering reports (received by Polyethylene before the transactions occurred).[104] The first confirmed that the stresses in the laying process were within specification. The second indicated it was likely the failure occurred as a result of the welding process.

[103] Mr Browne acknowledged in evidence that he was concerned the welding was faulty at the time he received the email from Dr Habedank in July 2008.[105] He was right to be concerned. On the basis of the information available to him, he should have been under no illusions that Polyethylene had any defence to the McConnell Dowell claim. No reasonable prudent business person could have considered there to be any such defences. That there were no defences was later confirmed in the adjudication.[106]

[104] The second reason given was that McConnell Dowell owed money for extras and variations. We were not provided with any figures as to amounts allegedly owing.[107] These sums do not appear to have been claimed in the adjudication.

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101 See above at [18].
102 See above at [17], [21] and [23].
103 See above at [25].
104 See above at [19]–[20].
105 See above at [26].
106 See above at [48].
107 In evidence Mr Browne said it went from a $200,000 contract to a "million dollar contract because [McConnell Dowell] gave us that many variations which they never paid for" but in a letter setting out a settlement offer of 18 February 2009 Polyethylene offered to forego claims for variations in the amount of $60,000. We accept this may not have been the complete figure as possibly some claims for amounts owing for variations may have been invoiced earlier.

[105] The third suggestion was that McConnell Dowell's insurance would cover the claim. Mr Browne said that, prior to entering into the subcontract, he had been assured by the project manager for McConnell Dowell that insurance for the project would be covered by McConnell Dowell and Polyethylene had priced the works accordingly.[108] His insurance broker, Mr Coughlan, since deceased, had confirmed this before the subcontract was signed. Further, after the claim was notified, Polyethylene's loss adjustor (Mr Allott) had advised that the claim was covered by the McConnell Dowell insurance.[109] Mr Browne also said that he had taken a number of steps to check the insurance position. He had had discussions (although not recorded) with his solicitors.[110] Mr Browne acknowledged that there was some uncertainty about the position but he believed the insurance broker had set out the correct position as he was the expert.

[106] Mr Allott came to his view on the insurance position on the basis of his review of the subcontract. As the Court of Appeal pointed out, Mr Allott is not a lawyer and had not seen the policy.[111] Further, there did appear to be some qualifications to his report.[112] At the least, Mr Allott's view that McConnell Dowell would be liable for losses caused by Polyethylene up to the AUD 600,000 excess would have appeared, if looked at objectively, exceedingly unlikely in light of the indemnities in favour of McConnell Dowell in the subcontract.[113] A prudent business person would have sought advice promptly on the insurance position, either from McConnell Dowell's insurer or its own solicitor.[114]

[107] Advice from Mr Browne's solicitors was only received in November 2008, some seven months after Mr Allott's letter was received.[115] Had such advice been sought in a timely manner, the answer from Polyethylene's solicitors would have been that it was not covered by the McConnell Dowell insurance (that being the

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108 In an affidavit sworn on 11 September 2014.

109 See above at [30].

110 The timing of these discussions was not noted but they would have been before mid-September 2008. The solicitors' report eventuated in November 2008: see at [32] above.

111 *Petterson* (CA), above n 1, at [26] and n 10.

112 See above at [30] and n 22.

113 And it seems that the directors knew that McConnell Dowell did not accept this position in any event: see above at [31].

114 It is apparent that Mr Allot's advice was sent to McConnell Dowell and a response received on 30 July 2008: see above at [31].

115 See above at [32].

advice received in November 2008).[116] It would seem in any event that Mr Browne may have received that advice from his solicitors informally before the date of the transactions.[117] There was at the least uncertainty over the insurance position, as Mr Browne acknowledged in evidence. A prudent business person could therefore not have relied on there being insurance cover.

[108] Assessed from the perspective of a reasonable and prudent business person at the time the transactions were entered into, the McConnell Dowell claim was therefore sufficiently certain to crystallise into a legally due debt in the relevant time frame that it should have been taken into account in the cash flow solvency assessment. We accept the liquidator's submission that the fact that the parties would have been able, under the Construction Contracts Act, to move to adjudication relatively swiftly strengthens the position that the claim should have been treated as a due debt.[118] Indeed, because there was no valid reason to dispute the claim and insurance cover was unlikely, this was the classic case of a hopelessly insolvent company referred to in *Re Cheyne Finance*.[119]

[109] It is also significant that the Polyethylene directors put into place a scheme to strip Polyethylene of its assets.[120] This shows that they considered there was, at least, a real and substantial risk that the McConnell Dowell claim would succeed.

Was Polyethylene cash flow solvent?

[110] At the time Mr and Mrs Browne signed the solvency certificate, Polyethylene had been advised twice that McConnell Dowell had suffered significant losses and was expecting these to be met under the indemnity. The extent of the claim had been discussed by the directors at their June meeting and it was expected to be a substantial claim.[121]

[111] The repayment of Contractors' and Mechanical's debts occurred on 2 September 2008. On 26 August 2008 McConnell Dowell had written to

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[116] See also *Petterson* (CA) , above n 1, at [83].
[117] See above at [105] and n 110.
[118] See above at [84] and n 83.
[119] See above at [90].
[120] See below at [127]–[129].
[121] See above at [35].

Polyethylene with a detailed breakdown of the losses incurred as a result of the failure of weld 151 on 19 December 2007.[122] These losses totalled $2,552,671. It would have been clear to the directors of Polyethylene that the losses from the second and third weld failures would have added to this total. Even if the directors had considered the claim was inflated, a prudent business person would have tried to estimate the appropriate figure and included that figure when assessing whether to make the repayments to Contractors and Mechanical.[123]

[112] At the end of June 2008, when the directors resolved to make the repayments, current liabilities already exceeded current assets. There was a net overall assets surplus of $597,010 or $140,402, depending on the value given to the PPS-Frank NZ shares.[124] By the time of the transactions at the beginning of September, the PPS-Frank NZ shares had been transferred for $309,543 but on terms that did not give any immediate cash to Polyethylene.[125] There is nothing in evidence to suggest any improvement to the financial position of Polyethylene between June and September. Even if the sum claimed by McConnell Dowell was overstated and in fact Polyethylene was responsible for only a quarter of the claimed losses from the first weld[126] and, even assuming all assets can be taken into account, Polyethylene would have failed the cash flow solvency test at the time of the transactions.

Conclusion

[113] For the above reasons, we accept the liquidator's submission that, considered objectively from the perspective of a reasonable and prudent business person, there was sufficient certainty as to both liability and quantum of the McConnell Dowell claim so that it should have been treated as a due debt at the time of the impugned transactions. Had it been taken into account, Polyethylene would not have met the cash flow solvency test.

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[122] See above at [27].

[123] In an email of 17 September 2008 Polyethylene's solicitors suggested the engagement of a quantity surveyor on the basis that "claims by McConnell Dowell are often inflated". That email was, however, after the date of the impugned transactions.

[124] See above at [36] and [41].

[125] See above at [43].

[126] Even assuming there was insurance coverage, there remained the excess of AUD 600,000 and the costs of repair: see above at [30] and [105]–[106].

[114] In coming to that view, we have not had to rely on the indemnity in the subcontract. We do, however, accept the liquidator's submission that the existence of the indemnity, whatever its nature,[127] serves to strengthen the conclusion we have reached.

Do Contractors and Mechanical have any defences?

Submissions of Contractors and Mechanical

[115] Contractors and Mechanical argue that the Court of Appeal failed to consider all the defences available to them, including estoppel. They argue that the evidence established that Polyethylene was able to pay its due debts and that the transaction would not have been set aside if the companies had objected. It is submitted that the Court of Appeal erred by assessing the s 296(3) defence against the background of the s 299 claim. Contractors and Mechanical submit that the latter permits wider considerations of what is "just and equitable", while the s 296(3) defence imports a liquidity or "trading solvency" assessment only.

[116] They submit that the payments were made in good faith because the evidence established Polyethylene was able to pay its due debts and they had no basis to suspect insolvency. Further, they believed on reasonable grounds that there were defences to the McConnell Dowell claim and in any event that the claim was covered by insurance. They thus acted in good faith. In addition, there was clear evidence that they had altered their position in reliance on the payments.

[117] Finally, it is submitted that the Court of Appeal should not have departed from the High Court's finding that the transactions were part of a wider restructuring that had been decided upon much earlier, referring to the unchallenged evidence of Mr Wolt (Mr Browne's financial advisor) in this regard.[128] They were therefore not designed to defeat the McConnell Dowell claim.

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[127] It has been argued that indemnities can be understood, depending on the wording, as giving a right to a damages claim or to a claim in debt: Rafal Zakrzewski "The Nature of a Claim on an Indemnity" (2006) 22 JCL 54. Given the approach we take, it is unnecessary for us to consider the nature of the indemnity in this case. For more on the types of indemnities, see Courtney Wayne *Contractual Indemnities* (Hart Publishing, Oxford, 2014); and G Andrews and R Millett *Law of Guarantees* (7th ed, Sweet & Maxwell, London, 2015) at ch 1.

[128] *Petterson* (HC), above n 34, at [87].

Submissions of the liquidator

[118] In response, the liquidator argues that Contractors and Mechanical could not establish any defences as the payments and the GSA were parts of a scheme that the Court of Appeal rightly held was designed to repay unsecured debts in the face of a large pending claim that would, if successful (as it inevitably would be), make Polyethylene insolvent.

[119] The liquidator submits that the aim of the scheme was to prefer Polyethylene's related parties, seriously prejudice its largest creditor and frustrate any subsequent liquidation of Polyethylene. In light of this, it is argued that Polyethylene cannot be said to have acted in good faith and that this was known to Contractors and Mechanical through their common director, Mr Browne.

Our assessment

[120] To the extent that the arguments of Contractors and Mechanical rely on the liquidator's alleged concession in the High Court, we have already rejected this argument.[129] Further, to the extent that the argument relies on the McConnell Dowell debt not being a due debt, we have also rejected that argument.[130]

[121] In this case we have already held that there were no reasonable grounds for directors of Polyethylene (Mr Browne and his wife) to consider that Polyethylene was solvent.[131] Mr Browne was also a director of Contractors and Mechanical. His knowledge and motives are therefore attributable to those companies.[132] The requirement in s 296(3)(b) is therefore not met. As the requirements in s 296(3) are cumulative it is not necessary to consider the other two limbs but, for completeness, we consider whether Contractors and Mechanical changed their position and acted in good faith.

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129 See above at [76]–[77]. The argument related to estoppel appears to have relied on the alleged concession.

130 Although it makes no difference in this case, and therefore we do not need to decide the issue, we doubt s 296(3)(b) is referring only to the first part of the solvency test in s 4.

131 See above at [110]–[112].

132 See *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 3 NZLR 7 (PC) at 11–12.

[122] As to the assertion of change in position, it appears, on the evidence before the Court, that the payments were in essence re-circulated around various Browne entities. In these circumstances, it is unlikely that the alteration of position test would be met.[133]

[123] Turning to the question of good faith, the evidence pointed to by Contractors and Mechanical in support of Mr Browne's subjective belief that there were defences to the McConnell Dowell claim and that the claim was covered by insurance consists mostly of assertions of belief from Mr Browne in affidavits and evidence in chief. Little relevant documentary evidence was produced but most in any event related to the period after the impugned transactions and is therefore of no assistance in assessing Mr Browne's beliefs at the time of the transactions.[134]

[124] On the basis of the material available to him at the time of the transactions,[135] it is difficult to believe that Mr Browne could genuinely have believed that there were defences available. Certainly he must have been well aware of the high level of risk that Polyethylene was liable. Nor, in the light of the conflicting advice on insurance, could Mr Browne be said to have been acting in good faith to have allowed Polyethylene to go ahead with the repayments to Contractors and Mechanical before resolving the uncertainties over the insurance cover.

[125] Further, we do not accept the submission that the Court of Appeal should not have departed from the High Court decision that the transactions were part of an earlier decision to restructure. The Court of Appeal did mention Mr Wolt's evidence, but did not consider it supported the High Court's conclusion. We agree. The Court of Appeal said that Mr Wolt did not explain how Mr Browne's financial involvement in Polyethylene would be reduced (the purported aim of the restructuring as accepted by the High Court) by increasing his net lending to the company.[136] Further, no

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133 See *McIntosh v Fisk* [2017] NZSC 78 at [138]–[142] per Arnold, O'Regan and Ellen France JJ and [251]–[259] per Glazebrook J.

134 For example the insurance evidence referred to above at [50]–[52] and n 22 postdate the transactions. Documentary evidence produced prior to the transaction indicated that Polyethylene would be liable for at least the AUD 600,000 excess and the cost of repairs: see above at [30], [106] and n 22.

135 See above at [100]–[103].

136 *Petterson* (CA) , above n 1, at [69].

documents were produced indicating that the particular transactions had been contemplated prior to the McConnell Dowell claim.[137]

[126] Whether the repayments were made as part of an earlier restructuring scheme in any event seems to us to be beside the point. There was still a need to assess solvency at the time of the repayments and, on the basis of the material he had before him at the time of the transaction, Mr Browne was well aware of the risk that Polyethylene was liable and that there may be no insurance cover. He therefore was well aware of the high risk of insolvency. He cannot have been acting in good faith and this means that Contractors and Mechanical cannot have been acting in good faith at the time their loans were repaid.[138]

[127] In any event, we agree with the Court of Appeal that the decisions as to repayment of debt taken on 30 June 2008 and implemented at the beginning of September were made with the purpose of defeating the McConnell Dowell claim.[139] The meeting where it was resolved to repay the debts came only some ten days after receiving the letter from McConnell Dowell indicating that the losses were significant and that it would be looking for indemnification in terms of the contract. It was accepted that the McConnell Dowell claim was discussed at the meeting and that it would be a large claim.

[128] Just before the repayments were made, the amounts for the failure of the first weld had just been quantified and communicated to Polyethylene. On the basis of the correspondence with McConnell Dowell and the experts' reports, it must have been clear that there was a significant risk of liability. There was no evidence of any prior demand by Contractors and Mechanical as to repayment. Further, at the end of June 2008, it was evident the concern was to make the proposed transactions appear to be occurring in the ordinary course of business. As the Court of Appeal said, this can only have been because of a concern about the risk of insolvency.[140] We agree

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137 At [88].
138 See above at [121].
139 *Petterson* (CA), above n 1 at [92].
140 See above at [35].

too that the object of the transfer of the PPS-Frank NZ shares was designed to put them out of reach of McConnell Dowell.[141]

[129] The Court of Appeal also identified a letter from Polyethylene's solicitor on 27 May 2009 commenting on the draft financial statements for Polyethylene for the year ended 31 March 2009 as supporting the conclusion that the transactions were not part of a pre-existing restructure or in the ordinary course of business. Rather, the letter suggests that they were completed because of the real risk of liquidation for Polyethylene and structured in a manner that would mask that fact.[142] The Court commented that, if the transactions were part of a restructuring initiative, there would be no need to be careful to ensure communications were privileged.[143] Again we agree. The letter included the following comments:

> Kindly note that my advice and communication to you is privileged and it cannot be used in evidence.[144] We need to be careful that other correspondence is not necessarily privileged.
>
> …
>
> From an overall position I think we have effectively now achieved what we set out to do some 9–10 months ago to
>
> - Look to wind down in an orderly manner Polyethylene Pipe Systems Limited; and
> - Extract out the wealth and cash in the company in an orderly and legal manner; and
> - Ensure that the stakeholders in the company are paid in the ordinary course of business, and particularly ensure that you, either via your current account or your secured advance, are paid out in the normal course of business.

[130] For the above reasons, there were no defences available to Contractors and Mechanical.

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141 See above at [44].
142 *Petterson* (CA) , above n 1, at [90]–[92].
143 At [91].
144 As the Court of Appeal pointed out, the writer of the letter failed to appreciate that the privilege belonged to Polyethylene and could be waived by a liquidator: at [90].

Is there a discretion under s 295?

Court of Appeal decision

[131] The Court of Appeal[145] said that the courts in Australia have held that there is no discretion as to the making of an order under their almost identical provision.[146] In *Cashflow Finance Pty Ltd v Westpac Banking Corp*, Einstein J said that the use of the term "may" does not mean that, once a voidable transaction has been established, "there is then some separate discretion which the Court can exercise on 'palm tree justice' grounds, in deciding whether to actually make the order". Einstein J concluded that the word may "is merely used to confer the authority; and the authority must be exercised, if the circumstances are such as to call for its exercise".[147]

[132] The Court of Appeal held that there was no reason for the approach in New Zealand to differ from that taken in Australia. Where there is no available defence under s 296(3) and no other defence in law or in equity,[148] there is no general discretion under s 295 based on just and equitable considerations to decline to make a restitutionary order.[149] It pointed out that the statutory defence under s 311A(7) of the Companies Act 1955[150] was materially different to the defence now provided under s 296(3), Parliament having removed that part of the defence which required consideration of whether it would be inequitable to order recovery in all the circumstances.[151]

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145 At [118].

146 Corporations Act 2001 (Cth), s 588FF.

147 *Cashflow Finance Pty Ltd v Westpac Banking Corp* [1999] NSWSC 671 at [568]–[569], quoting from *Finance Facilities Pty Ltd v Federal Commissioner of Taxation* (1971) 127 CLR 106 at 134–135 per Windeyer J, quoting *Macdougall v Paterson* (1851) 11 CB 755 at 766, 138 ER 672 at 677 per Jervis CJ. This approach was applied in *Cussen v Sultan* [2009] NSWSC 662, (2009) 27 ACLC 1,650 at [27]–[28] and by the Federal Court of Australia in *Kazar (in the capacity as the liquidator of Frontier Architects Pty Ltd (in liq)) v Kargarin* [2010] FCA 1381, (2010) 81 ACSR 158 at [28].

148 The Court accepted that there were situations where it could be shown there was no transaction at all or where a defence of estoppel was available: *Petterson* (CA), above n 1, at [120].

149 At [138].

150 Inserted into the Companies Act 1955 by s 26 of the Companies Amendment Act 1980.

151 *Petterson* (CA), above n 1, at [125]. Reliance on comments in cases like *Re Huberg Distributors*, above n 59, was therefore misplaced.

[133] The Court of Appeal referred to the recent decision of that Court in *Timberworld Ltd v Levin.*[152] In that case the Court had said that it agreed with Associate Judge Abbott that, given that Parliament had prescribed specific defences under s 296, any residual discretion in s 295 must have a high threshold "going beyond a general sense of unfairness to some cogent and compelling factor going beyond the s 296(3) defence".[153] The Court agreed that anything less would undermine s 296(3) and, as the Associate Judge said, would be an "unprincipled departure" from the basic principle of the insolvency regime to achieve fairness amongst all creditors.[154]

[134] The Court of Appeal said that the comment in *Timberworld* was referring to the nature and extent of any restitutionary order and not whether one would be made at all. It was accepted that the court has a discretion regarding the type of order and the extent of recovery.[155]

Submissions of Contractors and Mechanical

[135] Contractors and Mechanical contend that the word "may" in s 295 of the Act is intended to confer a general discretion on the court, including as to whether or not to make an order. They submit that there is nothing in the wording of the section or the Act in general that would require "may" to be interpreted as "must" in s 295. They accept that any discretion must be exercised in a principled way having regard to the policy and principles of the Act but argue that the Associate Judge was correct to exercise it in this case.

[136] They submit that, contrary to what the Court of Appeal said in the present case, the High Court in *Timberworld* did not consider that a general discretion would undermine the elements of the defence in s 296(3). The High Court in fact recognised in *Timberworld*, and the Court of Appeal in that case agreed, that there was a discretion to deny a liquidator recovery and for the court not to order payment if to do so would cause unfairness to the creditor. It is submitted therefore that the Court of Appeal in this case had misunderstood its previous decision in *Timberworld*.

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152 *Timberworld Ltd v Levin* [2015] NZCA 111, [2015] 3 NZLR 365 at [111] and [113].
153 *Levin v Timberworld* [2013] NZHC 3180 at [75].
154 At [75].
155 *Petterson* (CA) , above n 1, at [127] and [137].

[137] Contractors and Mechanical submit that since the enactment of s 295 the courts, including the Court of Appeal, have recognised a general discretion to refuse to make an order under s 295. They accept that there is a high threshold to avoid undermining the statutory defence in s 296(3) and this must go beyond a general sense of unfairness. They submit that the Court of Appeal's suggestion that such a discretion no longer exists since the 2006 amendments is not supported by the retention of the same discretionary wording in s 295.

Submissions of the liquidator

[138] The liquidator supports the Court of Appeal finding that there is no general discretion under s 295. In the alternative, if such a discretion does exist, he submits that it should not be exercised in Contractors and Mechanical's favour given their knowledge of and deliberate participation in favouring their own debts over the McConnell Dowell claim.

Our assessment

[139] The Court of Appeal in this case accepted that there would have been a "discretion" not to make an order if one of the defences in s 296(3) had applied or if there had been another defence in law or in equity or if the preference had been restored.[156] The only issue is whether there remains a residual discretion not to order repayment when no defences are available.

[140] We accept the submission that the Court of Appeal in this case may have misinterpreted the finding in *Timberworld*. In that case a general residual discretion was recognised but with a high threshold whereby, before it is exercised, there must be cogent and compelling factors going beyond the s 296(3) defence. Further, any use of the discretion could not undermine the policy behind the principle of fairness between creditors.

[141] In this case, if the Associate Judge been right in his view that Polyethylene was cash flow solvent at the time of the transactions in September 2008 then, had Contractors and Mechanical objected in time, there would have been no claw back.

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[156] At [135].

In these circumstances it would have been consistent with the policy behind the claw back provisions to refuse to make an order under s 295.

[142] The Associate Judge's views have not prevailed, however. It is therefore not necessary for the purposes of this appeal to decide whether any residual discretion not to order repayment under s 295 extends further. Contractors and Mechanical (through Mr Browne) knew that Polyethylene was cash flow insolvent at the time of the transactions, which were entered into with the purpose of defeating the McConnell Dowell claim. We accept the liquidator's submission that there would be no reason to exercise any residual discretion in their favour, even if the discretion is wider than the limited circumstances noted at [141].

Result and costs

[143] For the above reasons, the appeal is dismissed.

[144] The appellants must pay the respondent costs of $30,000[157] plus reasonable disbursements (to be determined by the Registrar in the absence of agreement between the parties). We certify for two counsel.

Solicitors:
Fletcher Vautier Moore, Nelson for Appellants
Kensington Swan, Auckland for Respondent

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[157] These costs are higher than the normal costs for a one day hearing because the liquidator was put to the expense of filing additional submissions in response to the unsolicited additional submissions filed by the appellants after the hearing.