IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2011-404-829
[2012] NZHC 11

UNDER	the Companies Act 1993
IN THE MATTER OF	the liquidation of FIVE STAR FINANCE LIMITED
BETWEEN	GERALD STANLEY REA AND PAUL GRAHAM SARGISON Applicants
AND	RONALD LESLIE RUSSELL Respondent

Hearing: 14 December 2011

Appearances: S McAnally for Applicants
G J Judd QC for Respondent

Judgment: 24 January 2012 at 3:00 PM

RESERVED JUDGMENT OF ASSOCIATE JUDGE BELL

This judgment was delivered by me on ***24 January 2012*** *at* ***3:00pm***
pursuant to Rule 11.5 of the High Court Rules.

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Registrar/Deputy Registrar

Solicitors:
Keegan Alexander, P O Box 999 Auckland, for Applicants
Short & Partners, P O Box 137241 Parnell, Auckland, for Respondent

Copy for:
G J Judd QC, P O Box 137273 Parnell, Auckland, for Respondent

[1] This is an application under s 294 of the Companies Act 1993 to have transactions set aside as voidable under s 292. The transactions said to be voidable are payments by Five Star Finance Ltd to the Bowden No. 14 Trust between 26 September 2006 and 23 August 2007 amounting to $928,937.79. The liquidators served a notice under s 294 on the respondent, a former trustee of the Bowden No. 14 Trust, on 22 February 2011. The respondent served a notice of opposition on 18 March 2011. His main defence is that as trustee he did not authorise any of the transactions said to give rise to the company's indebtedness to the trust.

[2] As the Court of Appeal noted in *Anzani Investments Ltd v Official Assignee*:[1]

> [6] The purpose of s 292 is to provide a mechanism that enables a liquidator to restore valuable consideration (of various types), with which the company parted prior to liquidation, to the pool of assets available for distribution among all creditors. The object is to prevent one creditor from being given preferential treatment through payment (pre-liquidation) of an amount in excess of that which would have been received had it participated with other creditors of equal rank in the distribution of the proceeds of sale of assets on liquidation. Those general principles are qualified by limited exceptions contained in s 292.

[3] Five Star Finance Ltd is one of the Five Star group of companies. The group was financed primarily by deposits from the public. Another Five Star company, Five Star Debenture Nominee Ltd, received the deposits and in turn advanced them to Five Star Finance Ltd. Five Star Finance Ltd went into receivership on 5 September 2007. An application for Five Star Finance Ltd to be put into liquidation was filed in court on 8 February 2008. An order was made for the company to be put into liquidation on 13 June 2008. On liquidation, Five Star Finance Ltd was found to be grossly insolvent. The liquidators say that creditors' claims total $43,834,842.58. Recoveries so far, have come to $551,887.24.

[4] The directors of the company were Anthony Walpole Bowden, Nicholas George Kirk (managing director) and Marcus Arthur MacDonald. Another prominent person in the company was Mr Neil Williams. He was not formally a

[1] *Anzani Investments Ltd v Official Assignee* [2008] NZCA 144.

director, apparently because he was an undischarged bankrupt.[2] He is alleged to have acted as a de facto director.

[5] The Bowden No. 14 Trust was established under a deed dated 14 July 2002. The settlor is Alistair David Williams (a son of Neil Williams). He is also the appointer, with the power to appoint and remove trustees and add or remove eligible beneficiaries. The eligible discretionary beneficiaries include members of the Williams family. The final beneficiaries are children of Mr Alistair David Williams (the grandchildren of Neil Williams). The respondent, Mr Russell, was trustee from the establishment of the trust on 14 July 2002[3] until 11 September 2007. He was then replaced by Christopher Yates.

[6] On the application of Five Star Consumer Finance Ltd, a creditor of the trust, and another Five Star company, the court appointed Mr Boris van Delden, an Auckland insolvency practitioner, as receiver of the trust on 18 December 2007. The trust is insolvent.

[7] Mr Russell says that he was independent and unrelated to any of the beneficial interests of the trust, that he took no benefit from the trust and that he received no remuneration for acting as trustee. Mr Neil Williams, his brother-in-law, established the trust. He also knew both Mr MacDonald and Mr Kirk, directors of the Five Star companies. Mr MacDonald had been his solicitor and was a long-standing friend. Mr Kirk had been his accountant and was a long-standing friend. Mr Kirk proposed that Mr Russell be trustee. While he was trustee the trust was involved in property projects - 14 Bowden Road, Mt Wellington, 898 Great South Road, Manurewa, and Richmond Park Properties - all in Auckland. For each of these, Mr Russell was provided with a full appraisal of the venture, with copies of the purchase and financing documents, and with legal advice. In entering into transactions, he limited his liability to the assets of the trust. He did not deal with administrative matters, including receiving rent, paying mortgages and outgoings,

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2 While he is the same Neil Williams as the director of the secured lender in *First City Corporation v Downsview Nominees Ltd* [1989] 3 NZLR 710 (HCNZ), [1990] 3 NZLR 265 (CA) and [1993] 1 NZLR 513 (PC), there is no connection between Mr J G Russell in that case and Mr R L Russell in this case, even though they had the same counsel.

3 According to his affidavit, the commencement date was 14 September 2002, but the trust deed shows that that is incorrect.

arranging valuations, leasing, marketing and the like. His role was an overview of the trust's asset position and, on advice, make decisions whether to retain, dispose of or diversify investments. He left it to Mr Kirk to deal with administrative matters, but did not delegate to him the right to make trust decisions as to financial investments, including borrowing, purchasing, or diversifying assets or dealing with other major transactions.

[8] The trust borrowed funds from Westpac Bank and Five Star Consumer Finance Ltd. These transactions were properly documented and expressly subject to Mr Russell's liability as trustee being limited. On the other hand he had no knowledge of the transactions the subject of the liquidators' claim and would not have authorised them.

[9] The accounting records of Five Star Finance Ltd include a loan ledger headed "Loan Details – R 725". It purports to record transactions between Five Star Finance Ltd and Bowden No. 14 Trust between 16 July 2002 and 23 August 2007. While a heading says "Advance, no interest – Ronald Russell Trustee", the ledger shows that the trust was charged interest on a revolving credit basis. The ledger starts with an initial advance in July 2002 of $427,000 to the trust. The ledger shows the trust charged with increasing indebtedness for further advances, interest, fees and the like. By the end of 2003 the debt exceeded $7,500,000. It peaked at $10,014,391.08 in March 2006. At 23 August 2007 the closing balance was $7,067,042.80, with a hand-written note on the ledger print-out that a payment of $2,379,500 apparently made on 29 June 2006 was to be added.

[10] At first the liquidators of Five Star Finance Ltd took the ledger at face value and told the trust's receiver of the debt, adding on certain other charges. The receiver investigated the transactions between the trust and the company. For this case the parties agree that the receiver's reconciliation can be relied on and adopted. Mr van Delden took the view that the only transactions capable of being genuine were cash in or cash out, except where loans were documented, signed by the trustee and funds advanced. There are no documents evidencing any loans between Five Star Finance Ltd and the trust. Mr van Delden did not find any documents in which Mr Russell authorised any advances or investments in Five Star Finance Ltd.

Mr van Delden's analysis of cash transactions shows an initial payment to the trust of $427,000 in July 2002. The running balance in favour of the trust peaked at $1,111,500 in early 2005. By August 2006 cash payments from the trust to the company had wiped out that balance entirely. Mr van Delden's analysis shows a balance of $2,114 payable by the company to the trust at 31 August 2006. From that time on the trust's payments to the company were more than the company's payments to the trust. From 1 September 2006 payments from the trust totalling $1,923,778.98 were made to the company while the company's payments to the trust totalled $930,067.79, giving the trust a shortfall of the net sum of $995,805.57 at 23 August 2007. The liquidators have recalculated the payments made by the company to the trust during the applicable period as totalling $928,937.79. Those are the transactions they want set aside as voidable under s 292 of the Companies Act.

[11] Mr van Delden has included in the payments by the company two payments of $100,000 each to Five Star Consumer Finance Ltd on 30 March 2007. The trust was a debtor of Five Star Consumer Finance Ltd. All the other payments went into the trust's bank account.

[12] In the light of Mr van Delden's analysis, the R 725 loan ledger cannot be and could not have been relied on as an accurate record of transactions between the trust and the company. Many of the entries have no basis in reality. It is common ground that the person responsible for moving funds between the company and the trust was Mr Kirk. At all times he was both managing director of the company and the agent responsible for administration of the trust.

[13] These questions arise:

(a) Which version of s 292 of the Companies Act applies?

(b) Is Mr Russell the correct respondent?

(c) Were the payments transactions entered into inside the specified period?

(d) At the times of the transactions was the company unable to pay its debts?

(e) Are the payments between the trust and the company to be attributed to Mr Russell?

(f) How are the payments between the trust and the company to be characterised?

(g) In the light of that characterisation, how are the payments by the company to the trust to be assessed under s 292?

(h) Was there a preference?

(i) Was there a running account under s 292(4B)?

(j) Were the payments in the ordinary course of business?

(k) Does Mr Russell have a defence under s 296?

[14] The liquidators' case is that:

(a) the court must apply the version of s 292 in force before the Companies Amendment Act 2006 came into force;

(b) Mr Russell is the correct respondent;

(c) the payments were made within the specified period;

(d) the company was not able to pay its debts at the times of the payments;

(e) Mr Russell is responsible in law for the payments between the trust and the company;

(f) there was a creditor-debtor relationship between the trust and the company;

(g) the company's payments were made to reduce its indebtedness for funds advanced when it was insolvent;

(h) the trust has received more than it would in the liquidation;

(i) the payments were not made in the ordinary course of business; and

(j) Mr Russell does not have a defence under s 296.

[15] In response, Mr Russell's case is that:

(a) The court must apply the version of s 292 that came into force under the Companies Amendment Act, except that it cannot set aside a transaction that was not avoidable under the earlier law;

(b) He accepts that he is the appropriate respondent.

(c) He does not contest that the payments were made during the two year period.

(d) While not conceding insolvency, he does not strongly oppose that part of the liquidators' argument.

(e) As Mr Russell did not authorise the payments between the company and the trust, they cannot be attributed to him and there was no relevant creditor-debtor relationship between the trust and the company, which is necessary for a voidable transaction under s 292.

(f) The transactions were part of a running account under s 292(4B), under which there was a net increase in indebtedness; and

(g) The absence of a defence under s 296 is conceded.

Which version of s 292 of the Companies Act applies?

[16] All the payments in this case were made before 1 November 2007, when the present version of s 292 came into force. The version of s 292 in force until 31 October 2007 was:

> **292 Transactions having preferential effect**
>
> (1) In this section, transaction, in relation to a company, means—
>
> (a) A conveyance or transfer of property by the company:
>
> (b) The giving of a security or charge over the property of the company:
>
> (c) The incurring of an obligation by the company:
>
> (d) The acceptance by the company of execution under a judicial proceeding:
>
> (e) The payment of money by the company, including the payment of money under a judgment or order of a court.
>
> (2) A transaction by a company is voidable on the application of the liquidator if the transaction—
>
> (a) was made—
>
> (i) At a time when the company was unable to pay its due debts; and
>
> (ii) Within the specified period; and
>
> (b) enabled another person to receive more towards satisfaction of a debt than the person would otherwise have received or be likely to have received in the liquidation—
>
> unless the transaction took place in the ordinary course of business.
>
> (3) Unless the contrary is proved, for the purposes of subsection (2) of this section, a transaction that took place within the restricted period is presumed to have been made—
>
> (a) At a time when the company was unable to pay its debts; and
>
> (b) Otherwise than in the ordinary course of business.
>
> (4) For the purposes of this section, in determining whether a transaction took place in the ordinary course of business, no account is to be taken of any intent or purpose on the part of a company—

(a) To enable another person to receive more towards satisfaction of a debt than the person would otherwise receive or be likely to receive in the liquidation; or

(b) To reduce or cancel the liability, whether in whole or in part, of another person in respect of a debt incurred by the company; or

(c) To contribute towards the satisfaction of the liability, whether in whole or in part, of another person in respect of a debt incurred by the company—

unless that other person knew that that was the intent or purpose of the company.

(5) For the purposes of subsection 2(a)(ii) of this section, specified period means—

(a) The period of 2 years before the date of commencement of the liquidation together with the period commencing on that date and ending at the time at which the liquidator is appointed; and

(b) In the case of a company that was put into liquidation by the Court, the period of 2 years before the making of the application to the Court together with the period commencing on the date of the making of that application and ending on the date on which[, and at the time at which, the order was made; and

(c) If—

(i) An application was made to the Court to put a company into liquidation; and

(ii) After the making of the application to the Court a liquidator was appointed under paragraph (a) or paragraph (b) of section 241(2),—

the period of 2 years before the making of the application to the Court together with the period commencing on the date of the making of that application and ending on the date and at the time of the commencement of the liquidation.

(6) For the purposes of subsection (3) of this section, restricted period means—

(a) The period of 6 months before the date of commencement of the liquidation together with the period commencing on that date and ending at the time at which the liquidator is appointed; and

(b) In the case of a company that was put into liquidation by the Court, the period of 6 months before the making of the application to the Court together with the period commencing on the date of the making of that application and ending on the date on which, and at the time at which, the order of the Court was made; and

(c) If—

(i) An application was made to the Court to put a company into liquidation; and

(ii) After the making of the application to the Court a liquidator was appointed under paragraph (a) or paragraph (b) of section 241(2),—

the period of 6 months before the making of the application to the Court together with the period commencing on the date of the making of that application and ending on the date and at the time of the commencement of the liquidation.

[17] The current version, which came into effect on 1 November 2007 under the Companies Amendment Act 2006, is this:

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/

(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.

(3) In this section, transaction -
means any of the following steps by the company:

(a) conveying or transferring the company's property:

(b) creating a charge over the company's property:

(c) incurring an obligation:

(d) undergoing an execution process:

(e) paying money (including paying money in accordance with a judgment or an order of a court):

(f) anything done or omitted to be done for the purpose of entering into the transaction or giving effect to it.

(4) In this section, transaction includes a transaction by a receiver, except a transaction that discharges, whether in part or in full, a liability for which the receiver is personally liable under section 32(1) of the Receiverships Act 1993 or otherwise personally liable under a contract entered into by the receiver.

(4A) A transaction that is entered into within the restricted period is presumed, unless the contrary is proved, to be entered into at a time when the company is unable to pay its due debts.

(4B) Where—

(a) a transaction is, for commercial purposes, an integral part of a continuing business relationship (for example, a running account) between a company and a creditor of the company (including a relationship to which other persons are parties); and

(b) in the course of the relationship, the level of the company's net indebtedness to the creditor is increased and reduced from time to time as the result of a series of transactions forming part of the relationship;

then—

(c) subsection (1) applies in relation to all the transactions forming part of the relationship as if they together constituted a single transaction; and

(d) the transaction referred to in paragraph (a) may only be taken to be an insolvent transaction voidable by the liquidator if the effect of applying subsection (1) in accordance with paragraph (c) is that the single transaction referred to in paragraph (c) is taken to be an insolvent transaction voidable by the liquidator.

(5) For the purposes of subsections (1) and (4B), specified period means—

(a) The period of 2 years before the date of commencement of the liquidation together with the period commencing on that date and ending at the time at which the liquidator is appointed; and

(b) In the case of a company that was put into liquidation by the Court, the period of 2 years before the making of the application to the Court together with the period commencing on the date of the making of that application and ending on the date on which[, and at the time at which,] the order was made[; and

(c) If—

(i) An application was made to the Court to put a company into liquidation; and

(ii) After the making of the application to the Court a liquidator was appointed under paragraph (a) or paragraph (b) of section 241(2),—

the period of 2 years before the making of the application to the Court together with the period commencing on the date of the making of that application and ending on the date and at the time of the commencement of the liquidation.

(6) For the purposes of subsection (4A) of this section, restricted period means—

(a) The period of 6 months before the date of commencement of the liquidation together with the period commencing on that date and ending at the time at which the liquidator is appointed; and

(b) In the case of a company that was put into liquidation by the Court, the period of 6 months before the making of the application to the Court together with the period commencing on the date of the making of that application and ending on the date on which, and at the time at which, the order of the Court was made; and

(c) If—

(i) An application was made to the Court to put a company into liquidation; and

(ii) After the making of the application to the Court a liquidator was appointed under paragraph (a) or paragraph (b) of section 241(2), —

the period of 6 months before the making of the application to the Court together with the period commencing on the date of the making of that application and ending on the date and at the time of the commencement of the liquidation.

[18] The relevant repeal and savings provisions are in s 27 of the Companies Amendment Act 2006. Section 27(2) says:

> Section 292 is amended by repealing subsections (1) to (4) and substituting the following subsections:

and here follow subsections (1) to (4B) of the current version. Section 27(3) and (4) are amending provisions. Section 27 (5) says:

> Nothing in this section makes voidable a transaction that was completed before this section came into force, if that transaction would not have been voidable if this section had not come into force.

[19] Subject to any saving provisions, the earlier version of s 292 has ceased to have effect. It has been replaced by new provisions by which transactions are voidable by a liquidator. If the transaction attacked is not voidable under the current version of s 292, it cannot be set aside under the earlier law, because the earlier law has ceased to have effect. However, if a transaction is voidable under the current version of s 292, the effect of s 27(5) is that the transaction is saved if it would not have been voidable under the earlier law. Section 27(5) is an express provision for a limited saving of transactions that were not voidable under the old law. It does not require the court to apply the old repealed law generally in place of the current version to transactions that were completed before 1 November 2007. Section 27(5) does not allow a transaction to be set aside under the old law if it is not also voidable under the current law.

[20] Against that the liquidators submit that s 17 of the Interpretation Act 1999 applies and that the Court of Appeal has applied the repealed provisions generally rather than as a limited saving provision. The reference to s 17 is to s 17(1)(a):

> (1) The repeal of an enactment does not affect—
>
> > (a) The validity, invalidity, effect, or consequences of anything done or suffered…

[21] Section 292 deals with voidable transactions – transactions that may be set aside. They remain effective until they are set aside. The new version of s 292 provided new provisions as to voidability. Any setting aside is governed by the law in force at the time of setting aside, which is the new version of s 292 – subject to any saving provision. Under s 4(1)(b), the provisions of the Interpretation Act do not apply if the context of an enactment requires a different interpretation. This is such a case. Given the express limited saving in s 27(5) of the Companies Amendment Act, it is not possible to invoke s 17(1)(a) to claim that the voidability in general of transactions completed before 1 November 2007 is to be decided according to the repealed provisions.

[22] Decisions of the Court of Appeal that have applied the repealed law generally are *Anzani Investments Ltd v Official Assignee*,[4] *Stapley v Fletcher Concrete and Infrastructure Ltd*,[5] *Higgs v P & W Painters Ltd*[6] and *Levin v Rastkar*[7]. The first three cases were appeals from decisions of the High Court applying the older form of s 292 while it was still in effect. The Court of Appeal's decisions do not refer to s 27(5) of the amending act and there is nothing in the decisions to suggest that the effect of s 27(5) was the subject of submission. Those decisions are not authorities on the effect of s 27(5). The judgment in *Levin v Rastkar* refers to s 27(5) in two places: at [1] where it held generally that the old law applied; and at [53] – [55] where it referred to the section in considering which version of s 296(3) applied. It does not appear that at the s 292 stage of the case, there was argument as to the effect of s 27(5) and the court's decision is consistent with it assuming that the old law applied without having heard argument. Given the court's findings as to transactions in the ordinary course of business, the court's decision would have been the same if it had applied s 27(5) as having only a limited saving effect.

[23] I propose to consider whether the transactions are voidable under the current version of s 292. Only if I find that they are voidable will I consider whether they are saved under s 27(5) of the amending Act. The decisions of the Court of Appeal do not stand in the way of my taking that approach.

Is Mr Russell the correct respondent?

[24] In his notice of opposition Mr Russell contends that either the present trustee or Mr van Delden, the receiver of the trust appointed by the court should be the respondent. However, in the hearing Mr Judd QC accepted that Mr Russell is the correct respondent. The transactions in issue are the payments by the company into the trust's bank account. Mr Russell was the trustee at the time. Although he was personally unaware of the payments, as trustee he was the lawful owner of the funds in the trust's bank account and accordingly was the recipient of the payments by the

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4 *Anzani Investments Ltd v Official Assignee* [2008] NZCA 144 at [5].
5 *Stapley v Fletcher Concrete and Infrastructure Ltd* [2008] NZCA 442 at [4].
6 *Higgs v P & W Painters Ltd* [2008] NZCA 433 at [1].
7 *Levin and Jordan v Rastkar* [2011] NZCA 210 at [1].

company. As the recipient he was a party to the transactions in question. He was a person who had to be served with a notice under s 294(1):

> **293 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
>
> (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.
>
> (emphasis added)

[25] Under s 292(2)(b) an insolvent transaction enables a person to receive more towards satisfaction of a debt than the person would receive in the liquidation. Again the legislation is directed at the recipient. Similarly, the defence under s 296(3) is directed at the recipient:

> (3) 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.
>
> (emphasis added)

[26] In the light of these provisions Mr Judd's concession was properly made. Mr Russell is a necessary respondent so that his liability can be determined. However, if the case reaches the stage where Mr Russell is found liable and orders

are made under s 295, it may be necessary to consider joining the current trustee and the receiver of the trust if Mr Russell seeks indemnity from the trust assets or the liquidators ask to be subrogated to his position.

Were the payments transactions entered into inside the specified period?

[27] The payments are transactions under s 292(3)(e). The payments to Five Star Consumer Finance Ltd in partial reduction of the trust's indebtedness to that company were payments to the trust: *Westpac Banking Corporation v Merlo*.[8] There is no dispute that the specified period under s 292(5) is the two years before the filing of the liquidation application in court plus the period from filing to the liquidation order. The specified period began on 8 February 2006. All the payments were within the specified period.

At the times of the transactions was the company unable to pay its debts?

[28] For evidence of the financial position of the company, the liquidators rely primarily on the financial statements of the company for the year ended 31 March 2006 and draft financial statements for the year ended 31 March 2007. Both were prepared by a chartered accountant in public practice. Although the 2007 financial statements were draft only, Mr Judd did not object to my reading them. His position was that the statements could be referred to as evidence of the company's financial position, even if they had not been formally adopted. While they were not in final form, any adjustments were not likely to change matters significantly for this case.

[29] In considering whether a company was able to pay its due debts at the time of a transaction, it is standard[9] to refer to the principles stated by Richardson J in *re Northridge Properties Ltd (in Liq)*:[10]

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8 *Westpac Banking Corporation v Merlo* [1991] 1 NZLR 560 (CA).
9 See for example *TR Group Ltd v Blanchett* HC Hamilton CIV 2003-404-300 Master Faire 15 May 2003 at [11].
10 *re Northridge Properties Ltd (in Liq)* SC Auckland M46/75, 13 December 1977.

(a) The ability of the company to pay debts is concerned with the position of the debtor at the time when the charge or payment is made or other specified act took place. The concern is with the present.

(b) In considering the present position regard may properly be had to the recent past – relevant to this is whether the debtor has in recent weeks been unable to pay debts as they become due;

(c) In determining the ability to meet debts as they become due, account must be taken of outstanding debts;

(d) The words "as they become due" mean, as they legally become due;

(e) The reference to "payment from his own money" has not been interpreted strictly to require a debtor to keep sufficient cash on hand at all times for that purpose. It is a matter of striking a balance. It is not a matter of simply measuring assets against liabilities, and it is not a matter of whether given sufficient time assets could be realised and debts paid;

(f) The section is concerned with solvency, so there must be a substantial element of immediacy in the ability to provide cash from non cash assets;

(g) If, as is well established, convertibility to cash from non-cash assets on hand may be taken into account in determining solvency, so too must debts becoming due while that conversion takes place. Moreover, the words "as they become due" involve consideration of a debtor's position over a period not an instant of time;

(h) The test of insolvency is an objective one.

[30] The legislation in that case said "payment from its own money". "From its own money" does not appear in s 292. Even under the old legislation the company

was not required to keep cash in hand.[11] The courts have recognised that a company may maintain solvency by recourse to borrowed funds, provided that the borrowing is on deferred terms or that the lender is not a creditor whose debt cannot be repaid when it becomes due and payable.[12]

[31] The three last payments in this case totalling $16,500 were within the restricted period under s 292(6)(b). Under s 292(4A) there is a presumption that the company was not able to pay its due debts at the time of those payments. Mr Russell did not try to rebut that presumption.

[32] For payments made outside the restricted period, the liquidators refer to the financial statements of 31 March 2006. They show a gross profit from trading of $3,865,000 and an operating surplus after taxation of $797,000. As to financial position, the accounts show a total equity of $2,771,000. The liquidators say that this was illusory because the assets include shares in Five Star Consumer Finance Ltd valued at $21,893,000. According to the liquidators those shares had no value at the end of March 2006. They also say that there is no evidence that capitalised finance advances had any value, as they appeared to be related party transactions. However this is not evidence that at March 2006 the company was not able to pay its due debts as they fell due. At best it was a signal of potential future solvency problems. The liquidator points to a deficiency in working capital. Total current assets were $24,633,000 and total current liabilities were $33,497,000, giving a working capital deficit of $8,864,000.

[33] While that is some evidence of inability to pay due debts, by itself it is not enough. Five Star Finance Ltd was dependent for funding on deposits made by the investing public, channelled through advances made by Five Star Debenture Nominee Ltd. For as long as members of the public were willing to provide funding and to renew their investments, it is possible that Five Star Finance Ltd could pay its debts as they fell due. At some point there would come a time when Five Star Finance could not meet its debts as they fell due, but the financial statements of March 2006 are not by themselves enough to show that that point had been reached.

11 *Bank of Australasia v Hall* (1907) 4 CLR 1,514 per Isaacs J at 1,543.

12 *Lewis v Doran* [2005] NSWCA 243, (2005) 219 ALR 555 per Giles JA at [107]–[109].

[34] There is one matter that does point to insolvency, when added to the other evidence. That is the movement of funds between the trust and the company. Under Mr van Delden's analysis, from September 2006, Mr Kirk paid trust funds to the company and repayments by the company to the trust did not close the deficit. The resort to the unorthodox method of using trust funds without the consent of the trustee to address funding requirements of the company is evidence that the company cannot have been meeting its funding requirements from other sources. While the case law such as *Lewis v Doran* acknowledges that structured borrowing on deferred terms may not point to insolvency, when a company director transfers assets from a trust without the knowledge of the trustee, there cannot be any terms for deferred repayment. Between 1 September 2006 and 1 December 2006 the balance repayable by the company to the trust rose from $2,114 to $1,710,793.36. The company's repayments over the next nine months did not wipe out the balance. The transfers of funds from the trust from 1 September 2006 are evidence that by resorting to assets of others the company was not able to meet its liabilities as they fell due from its own resources.

[35] This is supported by the draft financial statements for the year ending 31 March 2007. The trading account shows a gross loss of $1,138,000. The statement of financial performance shows a write off for bad debts of $20,181,000 and a deficit of $22,553,000. Under the statement of financial position, what had been term liabilities to Five Star Debenture Nominee Ltd the year before were now current. They were $44,000,000. There was a working capital deficit of $21,000,000. Total equity is in deficit in the sum of $10,387,000. It is clear that the company did not have the ability to pay due debts from its resources. It was insolvent.

[36] While not conceding that the company was insolvent, Mr Judd did not strongly contest the issue. I find that when Five Star Finance made the payments in issue in this case, it was not able to pay its due debts.

Are the payments between the trust and the company to be attributed to Mr Russell?

[37] There is no reason not to accept Mr Russell's evidence that the transactions between the trust and the company were carried out without his knowledge and

consent. It is corroborated by Mr van Delden's evidence that he did not see any document in which Mr Russell authorised any advances or investments in Five Star Finance Ltd. The liquidators did not challenge Mr Russell's evidence on that point and did not require him to appear to be cross-examined.

[38] Instead the liquidators say that having delegated the management of the trust to Mr Kirk, Mr Russell is bound by the actions of Mr Kirk. Having authorised Mr Kirk to operate the trust bank account, he cannot be heard to say that Mr Kirk did not have authority to transfer funds to the company. Mr Russell should face the consequences of his light-handed conduct of his trusteeship and his failure to monitor the actions of Mr Kirk. Mr Russell, not the company, should carry any losses from the misplaced reliance on Mr Kirk.

[39] It is an established principle of trust law that a trusteeship is personal and only the trustee can exercise the powers, authorities and discretions conferred under a trust. The trustee must exercise his powers in good faith, must not allow others to dictate how he should exercise his powers and must not fetter his discretion. Trustees must act unanimously. Subject to any provision in the trust deed and any relevant statute,[13] the trustee cannot delegate his powers to other trustees or to third parties. However, the law recognises that a trustee cannot attend to everything required for the conduct of a trusteeship and may engage agents to implement trust decisions. Section 29 of the Trustee Act provides for trustees to employ agents. Dal Pont[14] notes the distinction between delegation and agency:

> Trust law, however, distinguishes between the appointment of an agent and that of a delegate. At general law the personal nature of the trustee-beneficiary relationship dictates that although trustees can appoint an agent to carry out or implement decisions made by the trustees, they cannot delegate the exercise of their powers, authorities and discretions under the trust to a third party. Hence, the common law *qui facit per alium facit per se* rule does not apply to a trustee except as allowed by the terms of the trust instrument or pursuant to the limited power of delegation conferred by the trustee legislation.

13 Such as s 31 of the Trustee Act 1956.
14 *Law of Agency* 2nd ed Dal Pont (LexisNexis Butterworths).

[40] Although it does not mark the distinction between delegation and agency quite so clearly, the following dictum of Paterson J in the Court of Appeal's decision in *Niak v Macdonald*[15] makes the same point:

> It is an established rule of trust law that a trustee must not delegate his or her duties or powers, not even to co-trustees. Delegation is, however, allowed where such delegation is specifically permitted by the trust instrument, or practically unavoidable and is usual in the ordinary course of business and the particular agent is employed in the ordinary scope of his or her business...A trustee has a duty to act personally and this duty requires trustees to be unanimous in any decision they take. ...

[41] In that case one trustee had borrowed trust funds to buy a yacht. At first instance it was held that the other trustees had effectively given him general authority to transact trust business. The Judge relied on s 29 of the Trustee Act 1956. The Court of Appeal overturned this on appeal. It held that a general, non-specific delegation cannot be valid. The bar on delegation goes to powers and disabilities, and is not just a matter of obligation. A purported delegation may be not only contrary to a duty, but also ineffective.

[42] In this case the trust deed includes these provisions as to trust powers:

> 4.1 Subject to the Reserved Powers in clause 3, the Trustees shall have all the Powers of a natural Person in respect of the Fund as if he were the absolute and beneficial owner of it.
>
> 4.2 This includes the Power for the Trustee to do anything he thinks desirable even if it is something which a Trustee would not normally have Power to do without an express Power, or without an order of court. By way of illustration only this includes Power: ...
>
> 4.2.3 to delegate any of their management and administration Powers or duties to any Person. ...
>
> 4.2.6 to open any bank account in any name, either on the Trustee's own behalf, or jointly with other Persons, and the Trustee may overdraw such account with or without giving security. The Trustee may himself operate any bank account, or may authorise any delegate named in writing by the Trustee to operate any bank account. ...

[43] The power to delegate management and administration powers does not extend to the power to delegate trustee powers generally. A power to delegate trustee

[15] *Niak v Macdonald* [2001] 3 NZLR 334 (CA) at [16].

functions generally would be tantamount to a power to appoint a new trustee. But that power is held by the appointer, not the trustee. Instead, clause 4.2.3 is to be read in a similar way to section 29 of the Trustee Act. It allows the trustee to engage someone else to attend to management and administration. Although the word "delegate" is used, clause 4.2.3 allows for an agent to be engaged to carry out functions that are management and administration. It does not extend to functions that go beyond management and administration – decisions of strategy and policy and disposition.

[44] The distinction between the powers of an agent of a trustee and those of a trustee can be seen in Lord Millett's example of a solicitor for a family trust in *Dubai Aluminium Co Ltd v Salaam*:[16]

> The courts distinguished between the acts of a solicitor when acting as solicitor to the trustees and acts done by him as an express trustee. The former were within the scope of the ordinary business of a solicitor; the latter were not: see *In re Fryer* (1857) 3 K & J 317. If so, it was equally no part of such a business for him to constitute himself "a constructive trustee" in the sense in which the Court of Appeal were using that term...
>
> It is part of a solicitor's business to advise whether trust money may lawfully be invested in an overseas hedge fund or used to pay a discretionary beneficiary's school fees. It is still not part of his business to make the decision whether to do so or not. If it was not part of the ordinary business of a solicitor to act as an express trustee in 1857, I do not see how it can be part of it today.

[45] A decision to place funds with a finance company is an investment decision. A trustee may decide on a given investment strategy and then leave an agent to make investments following that strategy. Decisions as to investment strategy are non-delegable functions of a trustee. Decisions made in the course of carrying out an investment strategy are managerial and may be delegated under clause 4.2.3 of the trust deed.

[46] In this case the evidence is that the decisions to place funds with Five Star Finance Ltd were made by Mr Kirk without reference to Mr Russell. However, those decisions of Mr Kirk were not within the mandate Mr Russell had given him. They were not within clause 4.2.3 of the trust deed or within s 29 of the Trustee Act

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16 *Dubai Aluminium Co Ltd v Salaam* [2003] 2 AC 366 (HL) at [133]-[134].

or within any statutory provision allowing delegation. Mr Russell authorised Mr Kirk to handle administrative and managerial matters relating to the trust's property projects and their financing. That included the power to operate bank accounts. But none of this is evidence that Mr Russell had decided on an investment strategy that would allow Mr Kirk to place trust funds with a finance company. Mr Kirk did not have Mr Russell's authority to place trust funds with Five Star Finance Ltd. I also accept Mr Russell's submission that there is no evidence that he held out Mr Kirk as having that authority. As Mr Kirk did not have Mr Russell's actual, implied or ostensible authority to transfer trust funds to Five Star Finance Ltd, Mr Kirk's actions cannot be attributed to Mr Russell.

[47] The liquidators tried to meet this argument by saying that Mr Russell was remiss in having trusted Mr Kirk and in not monitoring his administration adequately. It is important to mark the distinction between the scope of powers conferred and potential liability for breach of duties. If a trustee purports to give an agent powers or authority which the trustee cannot confer, the trustee may face liability to beneficiaries for losses arising from the actions of the agent,[17] subject to the court's powers to grant relief under s 73 of the Trustee Act. If the trustee has validly appointed an agent but did not take proper care in the choice of agent or did not take due care in supervising the agent, the trustee potentially faces liability to beneficiaries for losses.[18] Mr Russell might owe a duty of care to the beneficiaries to ensure that trust assets are not dissipated by trust agents, but that is a different question from the scope of authority given to Mr Kirk and the extent to which Mr Kirk's conduct can be attributed to Mr Russell.

How are the payments between the trust and the company to be characterised?

[48] From July 2002 funds from Five Star Finance Ltd had been paid to the trust and repayments from the trust had not fully repaid the company. Mr Russell's evidence that he had no part in the payments from the company is accepted. He did not authorise any borrowing from Five Star Finance Ltd. However, even in the absence of an enforceable contract with the trustee, the company could require

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[17] *Rowland v Witherden* (1851) 3 Mac & G 568, 42 ER 379; *Bostock v Floyer* (1865) LR 1 Eq 26.
[18] *Speight v Gaunt* (1883) 9 AC 1 (HL).

repayment of money paid to the trust as money had and received.[19] By September 2006 the imbalance in favour of the trust had been eliminated by repayments from trust assets. From September 2006 the further payments of trust funds to the company created a balance in favour of the company which was not entirely eliminated when the company went into receivership. The further transfers from September 2006 were arranged by Mr Kirk, a fiduciary agent of the trust, without the consent or authority of Mr Russell the trustee. These non-consensual transfers of trust property gave the trustee a number of potential remedies against the company: for money had and received,[20] for knowing receipt[21] and, more importantly, a proprietary claim. The first two are personal remedies only.[22] The liabilities under these remedies are debts and give rise to claims admissible in a liquidation under s 303 of the Companies Act. Unless the claimant has security, the debt ranks pari passu with other unsecured claims - s 313 Companies Act. Payments made by a company in reduction of a liability for money had and received or for knowing receipt are payments for the purpose of s 292(3)(e) – they may give rise to voidable transactions.

[49] However, the matter is different with a proprietary claim. Lord Millett noted the differences between personal and proprietary claims in *Foskett v McKeown:*[23]

> A plaintiff who brings an action in unjust enrichment must show that the defendant has been enriched at the plaintiff's expense, for he cannot have been unjustly enriched if he has not been enriched at all. But the plaintiff is not concerned to show that the defendant is in receipt of property belonging beneficially to the plaintiff or its traceable proceeds. The fact that the beneficial ownership of the property has passed to the defendant provides no defence; indeed, it is usually the very fact which founds the claim. Conversely, a plaintiff who brings an action like the present must show that the defendant is in receipt of property which belongs beneficially to him or its traceable proceeds, but he need not show that the defendant has been enriched by its receipt. He may, for example, have paid full value for the property, but he is still required to disgorge it if he received it with notice of the plaintiff's interest.
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> Furthermore, a claim in unjust enrichment is subject to a change of position defence, which usually operates by reducing or extinguishing the element of

19 *The Law of Restitution* 7th ed Goff & Jones 22-002.
20 *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548 (HL).
21 *Westpac Bank v Savin* [1985] 2 NZLR 41 (CA), *El Ajou v Dollar Land Holdings plc* [1994] 2 All ER 685 (CA).
22 *Equity and Trusts in New Zealand* 2nd ed. Butler 18.1.2.
23 *Foskett v McKeown* [2001] 1 AC 102 (HL) 129.

> enrichment. An action like the present is subject to the bona fide purchaser for value defence, which operates to clear the defendant's title.

[50] Similarly in the same case Lord Browne-Wilkinson said:[24]

> Those equitable interests under the purchaser's trust deed are also enforceable against whoever for the time being holds those assets other than someone who is a bona fide purchaser for value of the legal interest without notice or a person who claims through such a purchaser. No question of a bona fide purchaser arises in the present case: the children are mere volunteers under the policy trust. Therefore the critical question is whether the assets now subject to the express trusts of the purchasers trust deed comprise any part of the policy moneys, a question which depends on the rules of tracing. If, as a result of tracing, it can be said that certain of the policy moneys are what now represent part of the assets subject to the trusts of the purchasers trust deed, then as a matter of English property law the purchasers have an absolute interest in such moneys. There is no discretion vested in the court. There is no room for any consideration whether, in the circumstances of this particular case, it is in a moral sense "equitable" for the purchasers to be so entitled. The rules establishing equitable proprietary interests and their enforceability against certain parties have been developed over the centuries and are an integral part of the property law of England. It is a fundamental error to think that, because certain property rights are equitable rather than legal, such rights are in some way discretionary. This case does not depend on whether it is fair, just and reasonable to give the purchasers an interest as a result of which the court in its discretion provides a remedy. It is a case of hard-nosed property rights.

[51] It is accepted that an entitlement to trace may arise when an agent holds assets held in a fiduciary relationship.[25] Commentators have suggested that a fiduciary relationship is not always required and that it is sufficient if there is an equitable proprietary right or an equitable base.[26] For this case, it is not necessary to consider that point. There was a relevant fiduciary relationship between Mr Russell as trustee and Mr Kirk as his agent. When Mr Kirk paid trust funds to the company without Mr Russell's authority, as trustee Mr Russell had the right to trace the funds into the company.

[52] The liquidators say that any proprietary claim would be extinguished because any payment of trust funds went into an overdrawn account. As to the legal aspect,

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[24] *Foskett v McKeown* [2001] 1 AC 102 (HL) 108-109.
[25] *Re Ararimu Holdings Ltd* [1989] 3 NZLR 487 (HC) 492-3.
[26] *Equity and Trusts in New Zealand* 2nd ed. Butler 35.2.1 and Lord Millett in *Foskett v McKeown* [2001] 1 AC 102 (HL) 128-129.

there is good authority for this: *Re Registered Securities Ltd*,[27] *Re Diplock*[28] and *Shalson v Russo.*[29] There is no direct evidence that the payments went into an overdrawn account. It is at best a matter of inference. The statement of financial position at 31 March 2006 shows a bank account in overdraft by $231,718 and another current account in credit by $1,426. The draft statement of financial position at 31 March 2007 shows a bank account in overdraft by $1,524,607 and another current account in credit by $976. While there is no consolidation of accounts,[30] the smaller account in credit can be ignored as involving an insignificant sum. With the burden of proving the affirmative defence, the liquidators have not excluded a proprietary claim to the extent of the $976 credit in the smaller account, but it can hardly be cost effective for the parties to trawl through bank statements and other accounting records to see if the credit balance represents trust funds. The overdrawn account in the March 2007 statements shows that if any trust payments in that financial year had put that account into credit, those trust funds were later dissipated. The payments of trust funds to the company after 1 April 2007 totalled $107,500,[31] less than the overdraft of $1,524,000, and by themselves could not have taken that account into credit. Bank statements have not been put in evidence, so that it is not possible to see if payments from other sources have reduced the balance under the overdraft account so that with payments from the trust the account was taken into credit. That outcome seems improbable in the light of the company's insolvency and pending collapse, but there is not enough evidence to exclude it. The liquidators have shown that any proprietary claim for payments before 31 March was extinguished, but not for the payments after that date. Even so, the point remains that the relationship between the trust and the company is more than a creditor-debtor relationship. They were property claimant and recipient.

[53] Although there was no submission on the question, for completeness, the company could not claim to be a bona fide purchaser for value without notice. There is no evidence that the company agreed to give consideration for the payments – the R 725 loan ledger cannot be relied on to show that the company agreed to borrow

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27 *Re Registered Securities Ltd* [1991] 1 NZLR 545 (CA) at 554 per Somers J.
28 *Re Diplock* [1945] Ch 461 (CA) at 521.
29 *Shalson v Russo* [2005] Ch 281(HC) at [138]-[140].
30 *Box v Barclays Bank* [1998] Lloyd's Rep Bank 185, 202, *Shalson v Russo* [2005] Ch 281(HC) at [139].
31 The total of payments made on 12 June 2007, 13 July 2007, 16 July 2007 and 15 August 2007.

money from the trust. At best it is only evidence of a loan going the other way. The company had notice through Mr Kirk that it had received the funds without the authority or consent of the trustee. It did not give value.

How are the payments by the company to the trust to be assessed under s 292?

[54] The liquidators' case is that the company was only under a personal liability to the trust and the payments were made in a creditor-debtor relationship, bringing them within s 292. Their argument is that any proprietary claim expired once the trust's funds were paid into an overdrawn account.

[55] As the recipient of trust funds, the company could be subject to court orders for the specific restoration of the funds to the trust.[32] If the company were to comply with such an order, its payment to the trust would be the return of property to the trust. If the company voluntarily makes payments to the trust, instead of being compelled by court order, the character of the payments is the same: they are the specific restoration of funds to the trust. The fact that the source of the payment may be a withdrawal from a bank account in overdraft does not alter the fact that the company is making specific restoration. It has simply been able to finance the return of funds by borrowing. Such payments are more than the discharge of obligations in a debtor-creditor relationship. When the company made the payments in issue in this case into the trust's bank account, it was restoring trust funds it had received. Those payments went towards partial satisfaction of the trust's proprietary claim. The company brought about that satisfaction by appropriating funds it could draw on to that purpose.

[56] Section 292 is about transactions in a creditor-debtor relationship. So Heath and Whale[33] say:

> ...a debtor/creditor relationship must exist between the creditor and the company and there must be a transaction, in terms of s 292(3), to which the company and the creditor, that has received the preference, are parties...

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32 *Re Diplock* [1945] Ch 465 (CA) 522 : The appropriate equitable relief would be by way of specific restoration of what, in the eyes of equity, never ceased to belong in equity to the estate.

33 Heath and Whale *Insolvency Law in New Zealand* (LexisNexis) 20.13.

That is clear from s 292(2)(b), with its reference to a person receiving more towards satisfaction of a debt than the person would receive in the liquidation. The provision is not directed at transactions under which property or its traceable equivalent is returned to its lawful owner. The payments in this case are not transactions within s 292 because they went beyond payments in satisfaction of debts. That finding is sufficient to decide the outcome of the case. I consider the remaining issues in case I am held wrong on this question.

Was there a preference?

[57] If there were only a creditor-relationship between the trust and the company, the trust would rank only as an unsecured creditor in the liquidation of Five Star Finance Ltd. The company is in receivership. Five Star Debenture Nominee Ltd is a secured creditor which is shown as having a debt of about $44,000,000 in the draft financial statements of 31 March 2007. There appears to be no prospect of any divided for unsecured creditors. The payments the trust received were more than it would receive in the actual liquidation. If the trust is no more than an unsecured creditor, it has clearly been preferred.

[58] The liquidators have established that any proprietary claim by the trust was extinguished except for the amount of $107,500. In the absence of a proprietary claim the trust ranks only as an unsecured creditor for the payments it received before 31 March 2007. If, contrary to my finding above, the payments before 31 March 2007 were not the specific restitution of trust property, but were payments to a creditor, then the trust has received more than it would have received in the actual liquidation. For that remaining $107,500 there is a possible proprietary claim in the liquidation. The possibility has not yet been excluded. To the extent that there is still a proprietary claim, the matter is less clear-cut. There is a possible argument that the trust would have an equitable charge over company assets, along the lines referred to by Lord Templeman in *Space Investments Ltd v Canadian Imperial Bank of Commerce.*[34] That equitable charge would give priority over unsecured creditors. I did not receive argument on the question. The issue would have a bearing on the

[34] *Space Investments Ltd v Canadian Imperial Bank of Commerce* [1986] 1 WLR 1072 (PC) 1073-1074.

liquidators' treatment of the trust's claim in the liquidation. The receiver of the trust would also have an interest in the issue. In the absence of full argument, of all the facts and of the receiver, I do not decide whether there was a preference under s 292(2)(b) for that possible proprietary claim.

Was there a running account under s 292(4B)?

[59] Mr Russell's argument is that individual payments should not be taken in isolation. Instead when they are taken altogether along with the payment of trust money to the company, the overall effect is that the trust is worse off rather than better off. It has not been preferred. In raising that argument, Mr Russell was invoking s 292(4D) – that the transactions were an integral part of a continuing business relationship. There was a running account in the same way as in such well-known Australian cases as *Richardson v Commercial Banking Co of Sydney Ltd,*[35] *Queensland Bacon v Rees,*[36] *Ferrier v Civil Aviation Authority.*[37] The basis for the running account cases can be seen in *Richardson*:

> A debtor who pays something off his grocer's account in order to induce the shop keeper to give him further supplies of groceries can hardly be held, as it seems to us, to give the grocer a preference, if that was the clear basis of the payment. If the grocer credited the money as a payment for the future deliveries instead of the past deliveries of groceries he would in the end be in exactly the same position and yet he could not be attacked as having received a preference. But without stating any principle with an application beyond the facts of this case, it is enough to decide that the payments into the office account possessed in point of fact a business purpose common to both parties which so connected them with the subsequent debits to the account as to make it impossible to pause at any payment into the account and treat it as having produced an immediate effect to be considered independently of what followed and so to be adjudged a preference.

[60] I do not accept that there was a continuing business relationship under s 292(4B) between the trust and the company. In considering whether there is such a relationship, the court must have regard to commercial reality. Thus what might in the eyes of the law be individual transactions may be linked commercially to form part of a business relationship. The transactions that give rise to a commercial relationship need not necessarily be legally enforceable agreements, but there will be

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35 *Richardson v Commercial Banking Co of Sydney Ltd* (1952) 85 CLR 110.
36 *Queensland Bacon v Rees* (1966) 115 CLR 266.
37 *Ferrier v Civil Aviation Authority* (1994) 127 ALR 472 (FCA).

separate parties dealing with each other consensually. In this case Mr Russell, the trustee, did not know of the transfer of funds to and from the company, did not consent to them and had not authorised them. The dealings were between Mr Kirk and the company. Mr Russell was not a party to them. Mr Kirk's unauthorised dealings do not give rise to a business relationship between the trustee and the company. That is just as much a reflection of commercial reality as of the law.

[61] The running account cases are premised on a relationship under which one party continues to deal with the other in the expectation of doing further business, as in the example of the grocer cited in *Richardson* above. This case involves unauthorised transfers of trust funds without any underlying business relationship. A relationship founded only on such unauthorised transfers of funds is not one where there can be a legitimate expectation of future dealings. Mr Russell cannot rely on s 292(4B).

[62] One of the liquidators' reasons for arguing that the old version of s 292 applied was to say that until the 2006 amendment Act took effect, New Zealand courts did not apply the running account test. However, in *Trans Otway v Shephard*[38] Blanchard J suggested that it was already part of our law. New Zealand courts would have applied the Australian case law. It would be a relevant issue under the old version of s 292, but in this case it would not have saved the transactions.

Were the payments in the ordinary course of business?

[63] As the payments are not voidable under the current version of s 292, it is not necessary to consider the ordinary course of business test, which is found only in the repealed version. If I had found that the payments were voidable under the current law, it would be necessary to consider whether the payments were not voidable under s 27(5) of the amendment act because they took place in the ordinary course of business under s 292(2) of the repealed version. The burden of proving that the payments were in the ordinary course of business is on the person alleging that they

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38 *Trans Otway v Shephard* [2006] 2 NZLR 289 (CA) (SC) at [11].

are: *Stapley v Fletcher Concrete and Infrastructure Ltd.*[39] Mr Russell did not allege that the payments did satisfy the test. In *Countrywide Banking Corporation v Dean*[40] the Privy Council described the test:

> Plainly the transaction must be examined in the actual setting in which it took place. That defines the circumstances in which it is to be determined whether it was in the ordinary course of business. The determination then is to be made objectively by reference to the standard of what amounts to the ordinary course of business. As was said by Fisher J in the *Modern Terrazzo Ltd* case, the transaction must be such that it would be viewed by an objective observer as having taken place in the ordinary course of business. While there is to be reference to business practices in the commercial world in general, the focus must still be the ordinary operational activities of businesses as going concerns, not responses to abnormal financial difficulties. Their Lordships respectfully agree with the Judge's conclusion by reference to the policy of the section at p 175:
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> > 'Whether a payment should be regarded as commercially routine at a day-to-day trading and operating level will turn at least in part upon a comparison with the practices of the commercial community in general. But equally, the way in which the particular company has acted in the past, and its dealings with the particular creditor, would seem pertinent. That the payment was simply a repetition of past patterns of behaviour would make it more difficult to argue that it represented special assistance to an insider or the result of special enforcement measures or a situation in which the subject creditor ought to have investigated before extending credit. So at a policy level there is something to be said for the view that relevant considerations should extend to the prior practices of the particular company.'
>
> The section therefore requires examination of the actual transaction in its factual setting (excluding the intent or purpose of the company save as required by subs (4)). Because the examination is undertaken objectively by reference to the standard of the ordinary course of business, there may be circumstances where a transaction, exceptional to a particular trader, will none the less be in the ordinary course of business – as for example its first transaction of a particular type. It may be that transactions undertaken in the past will, because of changed circumstances, no longer be considered as in the ordinary course of business. The payment of some accrued indebtedness may be within the ordinary course of business as may the payment of moneys owing under a lease to secure a lessor's consent to an assignment of the lessee's interest. The particular circumstances will require assessment in each case.

[64] In this case the managing director of the company had taken the unusual course of transferring funds from the trust to the company and then making repayments, without the authority or knowledge of the trustee, when there was no

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39 *Stapley v Fletcher Concrete and Infrastructure Ltd* [2008] NZCA 442.

40 *Countrywide Banking Corporation v Dean* [1998] 1 NZLR 385 (PC) 394.

documentation between the trust and the company evidencing the arrangement in circumstances where it would be standard practice for such arrangements to be recorded in writing between the parties and when the company's own records of its dealings with the trust were quite misleading. These features take the payments in this case well away from the case of the payment to a creditor in the ordinary course of business. Applying the repealed version of s 292 would not have saved the payments, if they were otherwise voidable.

Does Mr Russell have a defence under s 296?

[65] The liquidators accepted on the basis of the Court of Appeal's decision in *Levin v Rastkar*[41] that the current version of s 296 applies. Mr Judd accepted that Mr Russell does not have a defence under s 296(3), because Mr Russell did not give value for the payments and Mr Russell did not alter his position in reliance on the validity of the payments. As Mr Russell did not know about the transactions with the company, he could not have changed his position in reliance on the validity of the payments.

[66] If there had been a relevant creditor-debtor relationship so as to bring s 292 into play, Mr Russell would be in some difficulty. The liquidators intend to enforce any liability for voidable transactions against him personally. As a trustee he has no doubt accounted for the money received from the company. If found liable and ordered to pay under s 295, he may have an indemnity which would entitle him to an equitable lien and the right to be recouped out of trust assets for payment of a judgment debt, but that may be little comfort when the trust is insolvent. Section 296 has not been drawn with trustees such as Mr Russell in mind.

[67] There is a possible way around the difficulty. The voidable transactions provisions of the Companies Act are directed at those who benefit as creditors. Although Mr Russell was in law the recipient of the company's payments, as trustee he had no beneficial interest in the money received. His position is comparable to that of an agent who receives funds and passes them on to his principal. Restitution law may not regard an agent who accounts to his principal as the beneficiary of a

41 *Levin v Rastkar* at [53]–[56].

payment. In principle there seems to be no reason why a similar approach should not be taken in the case of a voidable transaction. A way to address this is to mould any orders so that they are directed at the beneficiaries of any voidable payments rather than the trustee. One such way is to make it a condition of any order for payment under section 295(a) that Mr Russell is not to be personally liable but that the order is to be satisfied only out of the assets of the trust, giving the liquidators a right to be subrogated and to claim against trust assets. On any such subrogation claim the receiver would have to be heard. If I had found that the payments were voidable transactions and had got to the stage of making orders under section 295, I would have considered attaching such a condition.

Conclusion

[68] As the payments by Five Star Finance Ltd were in restoration of property unlawfully misappropriated from the trust, they were not payments by a debtor to a creditor. They were therefore not payments within s 292 of the Companies Act. The liquidators are not entitled to an order setting them aside.

[69] I make the following orders:

(a) I dismiss the liquidators' application.

(b) The liquidators will pay Mr Russell costs on a 2B basis. If the parties cannot agree on costs, they may file memoranda for me to decide costs.

....
Associate Judge R M Bell