IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2014-404-2977
[2015] NZHC 2402

BETWEEN	CRAIG ALEXANDER SANSON AND DAVID JOHN BRIDGMAN Applicants
AND	EBERT CONSTRUCTION LIMITED Respondent

Hearing: 7 and 8 September 2015

Appearances: M J Tingey and N Moffatt for Applicants
A Van Ammers and R J Gordon for Respondents

Judgment: 6 October 2015

JUDGMENT OF ASSOCIATE JUDGE J P DOOGUE

This judgment was delivered by me on ***06.10.15 at 4.00 pm****, pursuant to Rule 11.5 of the High Court Rules.*

Registrar/Deputy Registrar

Date……………

Introduction

[1] The applicant liquidators seek to set aside $1,603,891.90 in transactions between Takapuna Procurement Ltd (In Liquidation) ("TPL") and Ebert Construction Ltd ("Ebert") pursuant to ss 292 and 295 of the Companies Act 1993.

Background

[2] The transactions comprise (together, the Transactions):

a) a payment of $499,226.50 to Ebert on 18 November 2008;

b) the transfer of apartment B401 and accessory unit AU40 (certificate of title 341326 (North Auckland registry)) (the Property) to Ebert on 20 November 2008 for reduction in indebtedness of TPL in the sum of $540,000; and

c) a payment of $564,665.40 to Ebert on 21 November 2008.

[3] It is uncontroversial that the two monetary payments in (a) and (c) occurred in the four days before TPL was placed into liquidation on 21 November 2008. There is contention between the parties as to whether transaction (b) occurred at that time or at an earlier point. This will have to be resolved in the course of this judgment.

[4] The claim which Ebert makes is for the balance of amounts which it was owed for the construction of an apartment complex, the Shoalhaven Apartments, located in Takapuna on the North Shore of Auckland (Shoalhaven Apartments).

[5] The Court appointed liquidators to TPL on the application of the Commissioner of Inland Revenue (the Commissioner). The Commissioner alleged that TPL was insolvent and that it had failed to pay $2,272,575.80 in GST payments to the IRD.

[6] It is not in dispute that TPL could not pay the debt owed to the Commissioner or the $17,496,821.61 that it owed to another creditor, Strategic Nominees Ltd (Strategic).

[7] The claim which the liquidators make is that because TPL had failed to make a preferential payment to the IRD of over $3,000,000, Ebert would never have received any of the $1,603,891.90 in liquidation.

Financing and payment arrangements

[8] In October 2005, TPL entered into a construction contract with Ebert to construct the Shoalhaven Apartments (the Construction Contract). The contract was for a lump sum of $32,497,188 (plus GST) (the Construction Sum).

[9] The funding of TPL obtained for the development of the Shoalhaven Apartments came from two lenders, BOS International (Australia) Limited (BOSI) and Strategic (the Financiers). BOSI was the senior lender of the two and its lending arrangements with TPL are those that have some bearing on the present application.

[10] The funding provided by BOSI was under a Senior Facility Agreement (Construction) (the Senior Facility) that BOSI and TPL entered into on 3 November 2005.

[11] The Senior Facility provided for a cash advances facility with a limit of $36,500,000 (the Facility). The Facility was divided into tranches. Tranche A had a maximum limit of $36,000,000 and was to be used to assist in the development of stage 1 and stage 2 of the Shoalhaven Apartments. Tranche B had a maximum limit of $500,000 and was to be used to pay GST due and payable in respect of the Shoalhaven Apartments.

[12] Subsequently, Tranche B was increased to $800,000, taking the overall facility to $36,800,000, under a Deed of Amendment of the Senior Facility.

[13] In addition to the Senior Facility, TPL entered into a direct agreement with Ebert, BOSI and Strategic on 3 November 2005 (Direct Agreement). The Direct Agreement provided that:

a) the Deed was to record agreements reached between TPL, Ebert, BOSI and Strategic about the Construction Contract (recital C);

b) BOSI agreed to pay direct to Ebert the amount payable by TPL to Ebert under the Construction Contract to the extent approved by an approved quantity surveyor (cl 4.2(d));

c) TPL irrevocably authorised BOSI to make an advance pursuant to the Senior Facility for the purpose of payments to Ebert being made (cl 4.6(a)(i));

d) all parties expressly acknowledged that TPL remained primarily liable for all its obligations under the Construction Contract (cl 4.5);

e) notwithstanding anything in the Deed or any act or omission by BOSI or Strategic, TPL remained liable to perform all its obligations assumed pursuant to each relevant document, including the Construction Contract (cl 9.1); and

f) the terms of the Direct Agreement takes precedence over the terms of the Construction Contract but, except to the extent expressly modified by the Direct Agreement, the Construction Contract remained in full force and effect (cl 17).

[14] Reference will be required to other aspects of the Direct Agreement in due course.

History of the Transactions

[15] The construction of the Shoalhaven Apartments reached practical completion under the Construction Contract on or about 23 April 2008.

[16] At the beginning of November 2008, Ebert and TPL agreed that the amount owed by TPL to Ebert under the Construction Contract was $1,603,891.90, broken down as follows:

a) $3,856.66 under payment schedule 34;

b) $647,370.44 under payment schedule 35;

c) $388,000 under extension of time claim 2;

d) $194,695.31 under payment schedule 36; and

e) $369,970.09 under payment schedule 37.

[17] Payment of the amounts which were agreed to be paid thereafter took place by way of the two cash payments and the transfer of the apartment which are referred to above.

[18] The mechanics by which the payment in regard to the apartment were that Ebert took a nomination from Nidus Properties Ltd (Nidus), under the Nidus Agreement pursuant to which Nidus' rights as purchaser passed to Ebert. Notification of this nomination was made to TPL by Nidus' solicitors on 5 November 2008.

[19] The applicants assert that, at the time when the agreement for transfer of the apartment was entered into, it was sixteen days before the call of the IRD's liquidation application on 21 November 2008 which Ebert, by its then CEO, Mr Martin, was aware of.[1]

[1] Mr Martin was the CEO of the company at the time of the Shoalhaven Apartment complex construction.

[20] It would in fact seem that around about this time, the respondent was having some concerns about the liquidity of TPL. On 17 November 2008, Mr Martin, the CEO of Ebert, sent an email to Mr Peter Brown of Strategic in which he stated as follows:

> However, with TPL's forthcoming receivership, I am concerned about the risk of TPL's receiver clawing back any or all money put in escrow.

[21] I interpolate that it is more likely than not that the reference to a receivership should be read as referring to the impending liquidation application which the Commissioner had instigated.

[22] The agreement between TPL and Ebert under which it was proposed and agreed that the respondent would acquire the apartment was recorded in a letter, dated 5 November 2008, sent to TPL by Mr Martin. The agreement referred to in the letter also provided that TPL would make payment of claim 35. Of that claim, Ebert would authorise TPL to pay $152,000 otherwise due and owing to Ebert into the Carter Atmore Law trust account to effect settlement of the Nidus Agreement. Due to this, Ebert would only directly receive $495,370.44 in funds towards payment of claim 35. The remaining $388,000 due under the Nidus Agreement was to be paid through writing off the $388,000 that was due to Ebert under extension of time claim 2.

[23] On the same date, TPL and Ebert entered into a Settlement Agreement under which they recorded arrangements in relation to settling the final account for completion of works at Shoalhaven. BOSI was not a party to this agreement. The agreement recorded that a deed would be prepared for termination of the Direct Agreement and "satisfactory security of payment of outstanding payments to [Ebert]".

[24] On 6 November 2008, Ebert issued a statement of account for payment claims 34 and 35 and extension of time claim 2. The statement reflected the arrangement described above and showed a cash balance owing by TPL in respect of those claims of $499,227.24.

Payment of $499,226.50

[25] On 13 November 2008, TPL issued drawdown notices on BOSI for the sum of $578,868 under Tranche A of the Senior Facility and $72,358.50 from Tranche B of the Senior Facility. The amounts under Tranche A were described as being $426,868 for Ebert and $152,000 to be paid to the Carter Atmore Law trust account. The amounts under Tranche B were described as being for Ebert.

[26] On 18 November 2008, BOSI advanced the sum of $606,879.13 under Tranche A of the Facility and $75,859.89 under Tranche B of the Facility. Out of these sums, BOSI remitted $499,226.50 to Ebert and $152,000 to the Carter Atmore Law trust account. Ebert then allocated the $499,266.50 to pay $3,856.06 of extension of time claim 2 (i.e. the entire claim but for 73 cents) and $495,370.44 of payment claim 35.

[27] I interpolate that the central dispute in this case is whether the payment arrangements amounted to transactions involving TPL making payments as will be explained subsequently.

Transfer of apartment B401 and accessory unit 40

[28] On 19 November 2008, Ebert settled the Nidus Agreement. The transfer of apartment B401 and accessory unit 40 from TPL to Ebert was registered on 20 November 2008.

[29] The Settlement Statement records the receipt of the $152,000 from the drawdown by BOSI under the Senior Facility and that the $388,000 owed by TPL to Ebert under extension of claim 2 was to be treated as a deposit paid towards the $540,000 purchase price.

Payment of $564,665.40

[30] On 19 November 2008, TPL issued drawdown notices for $546,500 under Tranche A of the Senior Facility and for $68,312.50 under Tranche B of the Senior Facility.

[31] On 20 November 2008, BOSI advanced TPL the sum of $546,500 under Tranche A of the Facility and $68,312.50 under Tranche B of the Facility. Of these amounts, $564,665.40 was paid into BOSI's solicitors', Bell Gully, trust account and paid to Ebert on 21 November 2008 at BOSI's direction. The funds were used to repay the entirety of payment claims 36 and 37.

[32] The residual balance of $50,147.10 paid to Bell Gully was left to be held by Bell Gully as Escrow Agent under the terms of an Escrow Agreement, signed on or about 20 November 2008 (the Escrow Agreement). Those sums do not form part of the liquidators' claim. The Escrow Agreement terminated the Direct Agreement and released BOSI from all liability under the Direct Agreement.

[33] Again the nature of the payment and whether it amounted to a transaction subject to the voidable preference provisions of the Companies Act is at the heart of the present dispute.

[34] The applicants allege that, in total, Ebert reduced its exposure to TPL by $1,603,891.90. TPL was placed into liquidation on 21 November 2008. The case for the applicants is that all of this occurred in the days prior to liquidators being appointed by the High Court.

[35] I understand there is no contest that the monetary payments were made in that time period but there is a dispute as to what the effective date was of the acquisition by Ebert of the apartment and the accessory unit. Ebert claims that its rights arose in 2006 which was when the agreement for sale and purchase of the apartment to Nidus was first entered into. This is an issue that will be considered below.

[36] Since that time, the applicants have taken steps to set aside the Transactions.

The grounds of application and opposition

[37] The applicants apply for an order under s 294(5) of the Companies Act setting aside the Transactions described as follows:

a) the payment of $499,226.50 to Ebert on 18 November 2008;

b) the transfer of Apartment B401 and accessory unit for reduction in indebtedness of TPL in the sum of $540,000;

c) the payment of $564,665.40 to Ebert on 21 November 2008; and

d) an order under s 295 of the Companies Act that Ebert pay to the applicant the sum of $1,603,891.90 together with interest.

[38] The grounds upon which the Transactions were said to be voidable were as follows:

a) the Transactions were all made no more than three days before TPL was placed into liquidation;

b) in relation to the payments made on 18 and 21 November 2008, those amounts were paid from TPL's monies, being amounts that had been advanced to TPL by BOSI under the senior facility;

c) when TPL went into liquidation, it owed the following debts;

    i) $40,304,794.32 to Strategic secured by a General Security Agreement;

    ii) a preferential debt of $3,615,493.51 and non-preferential debt of $323,748.96 to the IRD;

    iii) $50,000 in unsecured debt to each of the Brooke Paton and Flood Williams property No. 2 Ltd;

    iv) Ebert had received a preference through the reduction of its debt by $1,603,891.90 as there was no prospect of the IRD's remaining preferential debt of $3,175,929.52 being repaid in full;

v) Ebert had reasonable grounds to suspect that TPL was insolvent at the time of the Transactions as, on 17 November 2008, Ebert's Chief Executive sent an email to Strategic noting that he was concerned about TPL's "forthcoming receivership" and "the risk of TPL's receiver clawing back any or all the money put in escrow";

vi) on 28 May 2014, notice was served to set aside the transaction; and

vii) on 3 June 2014, Ebert notified objection to the Liquidators and provided a copy of notice of objection filed in the High Court at Auckland on 2 June 2014.

[39] The application referred to a number of authorities which will be discussed below.

Grounds of opposition

[40] Ebert filed no less than 20 grounds of opposition to the application. That has not assisted easy resolution of the matters that are genuinely in dispute between the parties.

[41] The first ground of opposition related to the payment of $499,226.50 on 18 November 2008 (Payment #1). The notice of opposition stated that:[2]

a) the payment was not a transaction by TPL;

b) rather, it was made by BOSI pursuant to the contract between Ebert and BOSI dated 3 November 2005;

[2] I will not set out the grounds of opposition verbatim but summarise them in the interests of brevity.

c) BOSI owed a separate contractual obligation to pay this money direct to Ebert under the Direct Agreement. The relevant creditor-debtor relationship was between Ebert and BOSI; and

d) the payment was made to satisfy the obligation of BOSI to Ebert.

[42] The second ground of opposition related to the transfer of apartment B401 and accessory unit in the Shoalhaven development. The grounds were:

a) the subject transaction took place pursuant to an agreement for sale and purchase (ASP) between TPL and a third party, Nidus;

b) the ASP was not a transaction by TPL with Ebert but by TPL with Nidus;

c) the ASP was entered into on 18 October 2006, which is outside the "specified period" described in s 292(5) of the Act;

d) any proceedings in relation to the transaction is time barred by the provisions of the Limitation Act 1950; and

e) the title or interest which Ebert obtained in the apartment:

   i) was acquired from Nidus and not from TPL;

   ii) for valuable consideration;

   iii) without knowledge of the circumstances under which the property was acquired from TPL in October 2006; and

   iv) because the apartment has since been transferred on to a third party who has indefeasible title in the property, an order cannot be made to set aside the transaction under s 294(5) of the Companies Act.

[43] Mention can be conveniently made of the last ground of this point. The applicants are not seeking to reverse the transaction for the sale of the apartment to the third party. They are seeking a monetary payment representing reimbursement of the value of the apartment which they say Ebert acquired as a consequence of a voidable transaction. In those circumstances, the subsequent transfer of the apartment to a third party and the indefeasibility of the title of that person are wholly irrelevant to the enquiry which the court has to make.

[44] The third ground of opposition relates to the payment of $564,565.40 on 21 November 2008 to Ebert (Payment #2) and in relation to which the grounds of opposition are the same as those pleaded in relation to Payment #1.

[45] Other alternative grounds of opposition raised as being applicable to each of the Transactions were that:

a) even if the Transactions came within s 292, they were not insolvent transactions on the ground in s 292(2); and

b) Ebert has defences under s 296(3) in that it acted in good faith and that a reasonable person in Ebert's position would not have suspected, and Ebert did not have reasonable grounds for suspecting, that the company was or could become insolvent. Further, that Ebert gave value for the property, the ground in sub-paragraph 3(c), which is not disputed by the applicants.

[46] Ebert's case, primarily, is that the Liquidators' case falls at the first hurdle. That is because, both factually and as a matter of law, the two payments in issue were not payments by TPL but were payments by BOSI. Accordingly, it was submitted, they may not be set aside as voidable transactions in TPL's liquidation (refer s 292(2) of the Companies Act). However, even in the, it was submitted unlikely, event of this primary issue being determined against Ebert, there are a range of further reasons why the recovery being sought by the Liquidators should still be refused.

Were the two payments under the Direct Agreement "transactions" under s 292?

Overview

[47] The main elements to the argument which Mr Gordon put forward on behalf of Ebert were as follows.

[48] First, it was argued that, in effect, direct payment agreements of the kind which are under consideration in this case occupy a special status in the construction industry where they were widely used. Secondly, the parties to the Direct Agreement intended that the payments the lenders would make to Ebert were not intended to be the property of TPL and that, therefore, the payments in question did not fall within the insolvent transaction regime under s 292 and the following sections.

[49] The essence of the dispute between the parties centres on the Direct Agreement which the parties entered into.

[50] Mr Gordon submitted:

> Primarily in issue are two third party payments to a construction contractor, Ebert Construction Limited (**Ebert**), which it is common ground were not made by the company in liquidation, Takapuna Procurement Limited (in liquidation) (**TPL**). In line with the well known and established practice in the construction industry, Ebert contracted for payment directly with the financiers funding construction of the subject property development (Shoalhaven Apartments). Those financiers, and mortgagees of the development property, were BOS International (Australia) Limited (now struck off) (**BOSI**) (a subsidiary of HBOS Australia, which was a company formed in 2004 to consolidate the Australian holdings of HBOS plc (Halifax Bank of Scotland)), and Strategic Nominees Limited (now in receivership) (**Strategic**) (a subsidiary of Strategic Finance) (together the **Financiers**). Notwithstanding the fact that the two payments were payments by BOSI, TPL's liquidators still insist they may set them aside.

[51] Mr Gordon also said:

> Under the Direct Agreement, BOSI and Strategic each owed their own separate contractual obligations to pay money directly to Ebert. And that is precisely what occurred here. Despite tripartite contracts like the Direct

> Agreement being a well established practice in the construction industry for decades, this is the first time (so far as my research has disclosed) that a New Zealand liquidator has sought to use the voidable transaction provisions in the Act to unseat such a direct payment agreement.

[52] In order to support the argument, Ebert produced evidence which, it was contended, explain the transactions and provide the basis upon which the Court should properly interpret the contractual arrangements between the parties.

Evidence of Mr Martin

[53] I will summarise the points which I understand Ebert said are relevant to the question of whether the payment arrangements in this case were caught by s 292.

[54] Mr Martin deposed that Ebert successfully tendered for the construction of the apartments at a price of approximately $33,000,0000. The principal, TPL, was described as a "shell company" with a capital of $100. It was the corporate vehicle of a Mr R McEwan and his son, Kelly McEwan, which was set up for the purpose of developing the apartments. It was Mr Martin's expectation that, at the end of the project, TPL would "inevitably be placed in liquidation". It was his opinion that the winding up of a low capitalised development company was a common business model that developers at that time (I understand this to be about 2004) adopted as the vehicle under which to carry out property developments.

[55] Mr Martin commented on the financing arrangements as being critical and that the people who mattered most were the financiers behind the construction project. Their decisions to fund were usually based upon valuation reports of the development "as completed" and pre-sales had been achieved. He said that the assessed value of the Shoalhaven Apartments complex on completion would be over $50,000,000. He said that while TPL was a developer, it:

> ... wouldn't be the person actually putting up the money to fund construction. That would be the banks (and/or the finance company), and as such they were the ones who ultimately had their "skin in the game". As a matter of substance, the key parties actually doing the deal on developments such as the Shoalhaven apartments were the financier and the construction company; and it was the financiers who (as I will set out) we at Ebert were particularly careful to also negotiate payment terms with here.

[56] He said that Ebert understood its chances of getting paid for the work done would ultimately depend on the financiers paying them. He said this was a "well understood commercial reality" and was a factor that permeated the pre-contractual exchanges.

[57] He said that the Direct Agreement which was negotiated in this case was a type of agreement reasonably common in the construction industry at that time. He said that he had never previously heard of payments made by a bank/financier to a contractor (presumably under an agreement of the kind under discussion here, the Direct Agreement) being challenged by liquidators later appointed to the development company. He continued:

> Indeed, the whole purpose of these direct agreements is to remove the risk to construction contracts (and also to financiers of a project) of a developer going broke. If direct agreements are not in fact effective to do so, then this would come as a very large shock not just to me but I dear say to most of the major construction companies and trading banks/financiers that operate in the industry.

[58] Mr Martin said that the financiers were intimately involved throughout the life of the project for the reason that it were they who were footing the bill and because they were also "on the hook" for payment themselves. He enumerated the advantages as he saw them that accrued to the parties from entering into agreements of this kind. Being able to come to an agreement direct with the financiers gave the developers security and, conversely, it increased the chances of the contractor taking the work through to completion which was to the advantage of the financiers. The arrangement also permitted the financier to "step in" if the developer had become insolvent part way through. He then discussed the process of negotiation of the Direct Agreement. He said:

> That there has never been the slightest suggestion at any time since November 2005 [that is the date when the various contracts including the construction contract were entered into approximately]. that the only person actually liable to and paying Ebert was TPL alone. If anyone had ever suggested this at the time it would have been laughed away by all concerned … as being silly. More importantly, Ebert would never have undertaken the work that it did to construct the Shoalhaven apartments on that basis. To do so would have been commercial stupidity;

Evidence of Mr Staples

[59] Ebert filed evidence in the proceeding from an experienced commercial lawyer, Mr Staples. As part of his practice, he provides professional services to, amongst other sectors, the construction industry.

[60] The evidence that Mr Staples provided put forward an explanation as to why direct payment agreements were entered into in the construction industry and summarised the advantages to the parties concerned with those agreements.

[61] Mr Tingey objected to this evidence being admitted. Parts of this evidence may be admissible and I will comment on that further below. But to the extent the evidence might be viewed as establishing that the Direct Agreement entered into by the parties in this case was, by its nature, outside the purview of the insolvent transactions regime, I would certainly agree that it would be inadmissible. That, after all, is the very question which the Court must determine.

[62] However, I accept that, to the extent it is relevant, Mr Staples has made clear in his evidence what objectives the parties generally, and presumably the parties in this case, had in entering into a direct agreement. First, where the principal has defaulted under the construction contract, the financier has the right to step in and, in effect, take over the role of principal while providing continuing funding to pay for the construction work. This has plain advantages from the perspective of the contractor who may be able to complete the contract rather than cancelling out and leaving the site. It has an advantage from the perspective of the lender in that it enables work to progress on the site over which the lender will hold security so that the project is completed. Otherwise, the financier would face losing the value of the investment in that the:

> … true value of any development project is only fully realised once the project is actually completed.

[63] The only comment that I would make on this evidence is that the court would have understood the importance of the right to "step in" which was part of Direct Agreement without the need for evidence spelling out that that was the case.

[64] Mr Staples drew attention to the fact that, typically, and in this case, the Direct Agreement establishes an obligation on the part of the financier(s), which is owed to the contractor, to make payments directly to the contractor. I interpolate that, in this case, the Financiers would be required to pay where the following steps had occurred:

a) the engineer under the contract had issued a certificate proving payment of a claim; and

b) the principal agreed in favour of the Financiers that they can determine what drawings are required and authorise these drawings to be made and paid to the contractor. The Financiers' maximum liability could not exceed their own "allocated sums" (i.e. the amount out of the total cost to construct and complete the development project that each lender had agreed to fund).

[65] He also drew attention to the advantage, from the contractor's point of view, that it could compel the financer to continue making advances under the agreement, provided the conditions upon which that obligation is contingent have been met, even though the principal is insolvent.

[66] He accepted that it would be to overstate the position to refer to direct agreements as guarantees. As he noted in the present case, the Direct Agreement did not oblige the financer to underwrite whatever costs the principals might incur on the development project, come what may.

Ebert's submissions on the transaction point

[67] Mr Gordon said that the present case was a significant and unusual voidable transaction case. He said that it involves "a novel attempted exercise of the liquidators power to set aside allegedly insolvent transactions." Further, "[d]espite tripartite contracts such as the Direct Agreement being a well established practice in the construction industry, this is the first time that a New Zealand liquidator has ever sought to use the voidable transaction provisions in the Act to unseat such a direct payment agreement."

[68] Mr Gordon referred to the submission that was made for the applicants that the payments were made from TPL's funds and not the funds of the BOSI and that, alternatively, BOSI made the payments solely as TPL's agent. These arguments Mr Gordon characterised as over-simplistic and not taking proper account of the surrounding evidence.

[69] He referred to the evidence of Mr Staples and to the other witnesses in support of the submission that, but for the willingness of the Financiers to give security/assurance of direct payment to Ebert, Ebert would not have undertaken the construction work and the apartments would never have been built. The respondent would not have proceeded if its only security for performance lay with a "hundred dollar company".

[70] On their part, the Financiers were prepared to contract on the basis that they, too, would be "on the hook" for payments properly due to the respondent. All these legitimate commercial objectives, he submitted, amounted to a commercial bargain which the Court should, as a matter of policy, seek to uphold.

[71] He pointed out that the word "agent" did not appear in any material parts of the Direct Agreement. The significance of that contention was that because the payment was not made by an agent of the company in liquidation, TPL, it was not therefore an insolvent transaction by the company. Other cases where payments had been made on behalf of insolvent companies were therefore distinguishable. He noted that the parties agreed, under cl 17, that the Direct Agreement would take precedence over the construction contract. His conclusion was that:

> The two payments were payments by BOSI, not TPL, and were made by BOSI in satisfaction of its own separate contractual obligation owed to Ebert.

[72] Next, he dealt with the question of timing. The Direct Agreement was entered into in November 2005, some three years before TPL's liquidation and before Ebert's work to construct the apartments had began.

[73] A further point which Mr Gordon made was that the facility entered into by TPL and BOSI required, amongst other securities, a duly registered first mortgage

over the development property in favour of BOSI. The other financier, Strategic, held a registered second mortgage over the development property. He explained:

> There was and would never be any free equity in TPL's only asset (the development property) that would even possibly have been available to its unsecured creditors in the event of insolvency. This simply reflects how, on any economic measure, the parties actually doing the deal here were, indeed, the Financiers and Ebert.

[74] The overall position taken was that it was unsustainable on the facts that the payments were made by BOSI as TPL's "agent".

The Liquidators' case on the substance of the direct payments

[75] Mr Tingey submitted:

> 51. Ebert contends that the Payments are not voidable transactions as they were made, not by TPL, but by BOSI either directly, in the case of the First Payment, or through its solicitors, Bell Gully, in the case of the Second Payment.
>
> 52. Section 5 of the Interpretation Act 1999 requires the meaning of an enactment to be ascertained from its text and in light of its purpose **(BoA, tab 2)**. The purpose of the voidable transaction provisions is "to secure the equal participation in such of the company's property as is available in the liquidation": *Farrell v Fences & Kerbs Ltd* [2013] 3 NZLR 82 **(BoA, tab 5)**. The interpretation of section 292(3) should be read with this purpose in mind so that the principle of parri passu is not undermined by devices such as that employed by Ebert in the present case.
>
> 53. The authorities are clear that a payment by a third party can be regarded as a payment by the company. One such circumstance is where the money with which that third party makes payment is not its own, but that of the company. An early example of this is *Westpac Banking Corporation v Nangeela Properties Limited* (In Liquidation) [1986] 2 NZLR 1 (CA) **(BoA, tab 6)**. In that case, the company's solicitors made a payment to Westpac from monies that it had been paid into its trust account following the sale of a flat owned by the company. The Court held that, notwithstanding that the payment had been made by the company's solicitors, it was an act of the company and subject to the voidable regime. The main statements on this issue were made by Richardson J and Somers J. The former stated at page 4 that "the payment to the bank by the solicitors must be taken to have been made in accordance with its instructions and to be an act of the company." Somers J said at page 10:
>
> > In the second place, assuming the point to be open to the bank, the only reasonable conclusion on the evidence is that the payment was in fact the act of the company. That is

> because the solicitors could not have paid the company's money to the bank without its authority to do so.

[76] He then referred to additional authorities including the High Court decision of *National Bank v Coyle.*[3] In that case, a beneficial shareholder of the company had reduced the company's overdraft with the National Bank. In response to the liquidator's claim for refund of those monies, the bank argued that there was no payment by the bank. That argument was rejected by the Court, stating:[4]

> The submission that the payment of 16 May 1997 was not a payment of the Company is untenable. Whilst it was made by Mr Norton from his personal resources and direct to the Bank, there can be no question that it was in substance an advance to the Company by legal and beneficial shareholders to bring the overdraft facility under control. I have no doubt that but for the intervention of the liquidation, the advance would have been recorded as such in the books of the Company with a corresponding increase to the current accounts of Messrs Goosman and Purser who in turn held one third of their 51% shareholding on trust for Mr Norton.

[77] Reference was also made to the Court of Appeal's decision in *Levin v Market Square Trust*,[5] concerning which Mr Tingey submitted:

> The company intended to sell its business to Peek Developments Limited (**Peek**) but needed its landlord to agree to an assignment of its current lease to Peek. The landlord would not consent to the assignment unless the company paid its rent arrears. Peek entered into a loan agreement with the Company to advance it the monies needed to pay the arrears. Peek then paid the monies directly to the landlord to clear the arrears. As a result, the High Court found that there had been no payment by the company. The Court of Appeal disagreed in a judgment given by Justice Chambers. His Honour referred to the Court's decision in Coyle and noted that present case was even clearer, as (like the present case) the loan arrangement was recorded in correspondence and an appropriate security instrument drawn up and signed: at paragraph [23]. The reasons for the Court disagreeing with the High Court on the issue were summed up at [24]:
>
> > In our respectful view, Associate Judge Sargisson fell into error when she concluded that "Peek did not owe money to One Italy under the sale and purchase agreement at the time of payment, and nor did Peek make the payment using funds which in reality belonged to One Italy as a result of a loan": at [55]. It is true that at the time of payment, settlement under the sale and purchase agreement was not due. But Peek's payment was not made under the sale and purchase agreement; it was made pursuant to a later and separate loan agreement. Contrary to Her Honour's view, Peek did

---

3 *National Bank of New Zealand v Coyle* (1999) 8 NZCLC 262,100 (HC).
4 At 262, 102.
5 *Levin v Market Square Trust* [2007] NZCA 135, [2007] 3 NZLR 591.

> make the payment "using funds which … belonged to One Italy as a result of the loan".

[78] In the *Market Square Trust* case, the liquidator of One Italy Ltd (the tenant and vendor of the business) sought to recover the payment which had been made to the lessor, Market Square Trust and, as indicated in the above passage, was successful.

Discussion on whether the payments were "transactions" under s 292

Relevant law

[79] Section 292 of the Companies Act provides that a transaction by a company is voidable if it is an insolvent transaction and is entered into within the specified period. An insolvent transaction is one when the company enters into a transaction at a time when it is unable to pay its due debts and which 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.

[80] Recovery can be ordered of funds received as a result of an insolvent transaction pursuant to s 295. But the court must not alter the recovery of property of the company if the person from whom recovery is sought proves that:

a) it acted in good faith;

b) a reasonable person in its position would not have suspected and did not have reasonable grounds for suspecting, that the company was, or would become, insolvent; and

c) the recipient gave value for the property or altered its position in the reasonably held belief that the transfer of the property was valid and would not be set aside.

[81] The first requirement is to analyse the obligations of the two agreements which the parties entered into. Prior to doing so, consideration must be given to what matters the Court can take into account when carrying out that analysis.

Discussion of Mr Martin's evidence of negotiations: Mr Staples' evidence

[82] My conclusion is that the interpretation of the Direct Agreement is not assisted by the evidence which Mr Martin and Mr Staples have provided. In the case of Mr Martin, while he might have had a subjective expectation which can be imputed to Ebert that the arrangement that was being entered into would be proof against the voidable transaction regime, that is not a legitimate basis for admitting evidence of this kind in terms of *Vector Gas Ltd v Bay of Plenty Energy Ltd.*[6]

[83] Quite apart from anything else, it is a mistake to view the issue that arises in this case as being soluble by having regard solely or principally to accepted principles of contractual interpretation. In the end, the question is whether the arrangements that the parties actually contracted for are caught by s 292 and the other voidable transaction provisions of the Companies Act. If they are, then it does not matter that the objectives of the contracting parties might thereby be defeated.

[84] The starting point is therefore to analyse the arrangements that the parties have entered into and to come to a conclusion about what the legal effect of such arrangements were, having regard to the terms of the legislation. I accept that it is necessary to come to a view of what legal effect the arrangements adopted actually had. For the purposes of deciding that issue, the parties referred to the leading authority in the area of interpretation of contracts and the admission of evidence of background circumstances for the purpose of interpretation, *Vector Gas Limited.* I agree with that approach. But it is not open to the parties to assert that even if the arrangements adopted prove on analysis to fall within the voidable preference regime, the Court ought to decide otherwise because any other outcome would be inconsistent with what the parties had hoped to achieve. Any attempt to achieve such a result would be unenforceable for the reasons which the Court of Appeal stated in *Attorney-General v McMillan & Lockwood Ltd (in receivership and liquidation).*[7]

---

[6] *Vector Gas Ltd v Bay of Plenty Energy Ltd* [2010] NZSC 5, [2010] 2 NZLR 444.
[7] *Attorney-General v McMillan & Lockwood Ltd (in receivership and liquidation)* [1991] 1 NZLR 53 (CA).

[85] Mr Martin's apparent subjective expectation and belief that the Direct Agreement would provide protection against the voidable transactions regime in the Companies Act is therefore inadmissible. If his evidence was put forward as a statement of what the beliefs of those participating in the construction industry might be, on the question of whether the arrangements fall within the law without the voidable preference provisions, that, too, is inadmissible. That is because it is for the court to interpret the law and not the construction industry.

[86] With that preliminary issue cleared away, I turn to a consideration of the arrangements that the parties entered into.

[87] The principal aspect of the arrangements that seems to be important is the fact that the funding which the developer secures is able to flow directly to the contractor which eliminates, for the latter's purpose, the risk that the developer might divert money financed into other areas to the prejudice of the contractor. As well, the developer is subject to a contractual obligation to the contractor to do all that is necessary to ensure that funds will actually be available when the drawdown date arrives.

[88] It is also understandable that financiers would see advantages in such arrangements as well because they will provide a high level of assurance that money will go to where it is supposed to, resulting in completion of the development. This, in turn, will open the way to settlement of agreements to buy the units in the development which will provide the cash flow from which the developer will be able to repay the secured loans to the financiers. It would also mean that the contractor has an enhanced level of confidence that funding that is raised for the purposes of construction is going to be available when required to meet progress payments as they fall due under the contract.

Conclusions as to the nature of the payments that BOSI made

[89] The issue which arises in this case is whether the transactions pursuant to which BOSI made the monetary payments to Ebert were transactions of TPL and therefore subject to the voidable preference regime. The alternative analysis is that BOSI made payments on its own behalf to discharge its own distinct obligations that

it owed to Ebert. Meaning, no property belonging to TPL was involved and therefore the payments could not amount to transactions of TPL which are caught by the Companies Act provisions.

[90] BOSI engaged with TPL and Ebert with the intent that it would remit to Ebert such amounts as it agreed to advance at the request of TPL and in regard to which TPL was to be the debtor. The obligation was a conditional one. It was first conditional upon TPL owing a liability to Ebert under the construction agreement. By making the contemplated payments, BOSI was not discharging a debt that it owed to Ebert but was paying on behalf of TPL a debt that it owed to Ebert. BOSI's obligation was a conditional one. It was predicated upon the assumption that TPL owed a debt to Ebert. Secondly, it assumed that BOSI was contractually bound by its agreement with TPL to make finance available under the financing arrangements between those two entities. Only with those two preconditions in existence would the obligation under the Direct Agreement bind BOSI. If they were present, BOSI would then make a payment to Ebert to discharge TPL's debt using money that TPL had borrowed from it. Obviously, there had to be some funding still available for that purpose and not yet distributed by BOSI. If all of the funding up to the limit provided for under that agreement had been paid out, there would be no obligation to make further payments.

[91] Of course, if those conditions have been met and BOSI failed to make the payment, then it is likely that Ebert would be able to bring a claim against it for damages for breach of the Direct Agreement. Those damages would provide compensation to Ebert for the failure on the part of BOSI to remit funds borrowed by TPL to discharge the obligations it owed to Ebert under the construction agreement. Such damages as BOSI would be able to recover could not be compensation for breach of the construction contract between TPL and Ebert because BOSI was not a party to it. The only relevance of the construction contract is that, in the background, there would need to have been a legitimate claim available to Ebert under it before liability under the Direct Agreement would accrue. Any damages that Ebert might be able to recover from BOSI would place Ebert so far as possible in the position that it would have been if the contract between it and BOSI had been performed. That is to say, Ebert would have lost the opportunity to receive, via BOSI, funds

which were earmarked for the purpose of reduction of TPL's debt to Ebert. Ebert's claim would therefore be to recover damages from BOSI equivalent to the amount by which TPL's debt to Ebert would have been reduced had BOSI complied with its obligations. In other words, any action by Ebert would be seeking damages but would not represent a claim for recovery of a debt that BOSI had owed to Ebert but had not paid.

[92] It follows that funds that BOSI paid through the Direct Agreement mechanism must have had the character of funds that belonged to TPL because there is no dispute that they were used to pay debts that TPL owed to Ebert. Unless such a debt existed, BOSI's obligation to remit funds that TPL had borrowed did not come into play.

[93] BOSI did not owe any debts to Ebert. It had a contractual obligation to provide the machinery for discharging on behalf of TPL debts that that company owed to Ebert. When it made an advance under the facility and remitted the amount to Ebert, BOSI acquired rights against TPL as its creditor, with those rights taking the form of an enlargement of the debt which TPL owed to it.

[94] While BOSI literally had an obligation to "pay" Ebert, it is to take too narrow a view of matters to focus on cash transactions that would follow from exercise by Ebert of its rights under the Direct Agreement. The duty to pay says nothing about the underlying contractual arrangements that were the genesis of the obligation to pay. BOSI did not, as a result of making the payment, receive a pro tanto reduction of any debt that it owed to Ebert. The only consequence of BOSI making a payment in compliance with the Direct Agreement was that it was released, to the extent of the payment, from part of the accessory obligation that it owed to Ebert to function as a conduit through which funding which TPL raised made its way to Ebert.

[95] On the other hand, as a result of a payment being made by BOSI to Ebert, TPL would receive a credit which was applied to reduce, by an amount equal to the payment made, the debt that it owed to Ebert. The fact that the payment was made directly to Ebert by BOSI is neither here nor there. By executing the Direct

Agreement, TPL relinquished the right that it would otherwise have had to receive the funds that it had agreed to borrow from BOSI directly into its own bank account.

[96] BOSI could not pay the money to the respondent without the authority of TPL which it received through execution of the Direct Agreement. As in *Westpac Banking Corporation v Nangeela Properties Ltd,* BOSI required that authority because it was paying away money that belonged to TPL.[8]

[97] It follows that the funds representing the advances that BOSI made in November 2008 were the property of TPL and were available to it for use as, and were used for the purpose of, partially paying off the debt that TPL owed to the respondent. The position is indistinguishable from that described in *Market Square Trust*, where the Court of Appeal described the process as one where the lender (Peek) paid a debt of the borrower (One Italy):[9]

> using funds which… belonged to One Italy as a result of the loan.

[98] Plainly, what occurred was that BOSI made payment on behalf of TPL of the latter's debts payment when it made the two payments on 18 November 2008 ($606,879.13 and $75,859.89) and 21 November 2008 of $564,665.40.

[99] Subject to dealing with the point about a guarantee which I shall discuss next, it would appear that the two payments were therefore transactions which fell within s 292.

The guarantee point

Did the arrangements amount to a guarantee?

[100] An alternative argument which Mr Gordon put forward was that the arrangements between Ebert and BOSI constituted a guarantee. The point of this submission was that when BOSI made the payments to Ebert, it was doing so in order to discharge a separate guarantee obligation which it owed to Ebert. Therefore, the argument would run, the payments that were made were not made by

---

8 *Westpac Banking Corporation v Nangeela Properties Ltd* [1986] 2 NZLR 1 at 10.
9 *Levin v Market Square Trust*, above n 5, at 596.

TPL and therefore could not be voidable transactions which that company entered into. The details of the alleged guarantee were not spelt out.

[101] I do not consider that the argument is a viable one which enables Ebert to outflank s 292. My reasons, briefly, are as follows. The nature of the obligation which BOSI assumed was ancillary to that of TPL. It was, in effect, to implement performance by TPL of the obligations which it owed to Ebert. Rather than BOSI being required to perform in circumstances where TPL did not, which is the essence of a guarantee, quite the opposite outcome was intended in this case. BOSI was only required to discharge the obligations of TPL. If TPL, in breach of its obligation, did not enable BOSI to provide to it the anticipated funding (by not providing the required security for example), there could be no separate obligation for BOSI to nonetheless make payment of the contemplated amount to Ebert. However, if that funding became available under the agreement between TPL and BOSI, BOSI owed an obligation to pay the funds so raised directly to Ebert.

[102] These considerations make it clear that BOSI was required to assist TPL to perform its obligations to Ebert. That is a different thing from performing TPL's obligations in its place if it failed to perform them. When BOSI paid the two impugned payments to Ebert, it was not a case of it carrying out an obligation which TPL had defaulted under. It was doing exactly what the three parties to the contract all required to do when they entered into the Direct Agreement. I consider the explanation that the relationship between TPL and BOSI was that of principal and guarantor is implausible and ought to be rejected.

Ebert's contention that the arrangements did not contravene the assets deprivation rule

[103] The alternative position which the respondent took is that even if a payment was made to it by TPL (rather than BOSI), because of the nature of the arrangements pursuant to which the payment was made, the assets deprivation principle was not contravened.

[104] Ebert relied upon the commentary to be found in *Emden's Construction Law*, which appears to justify an exception being made on the basis that:[10]

> There was a view among a minority of insolvency lawyers that such clauses [ie direct payment provisions] might fall foul of the pari passu and anti-deprivation rules - both cardinal principles of insolvency law ... However, following a comprehensive consideration of the relevant principles by the Supreme Court in [Belmont Park Investments] it is respectfully suggested that this particular ghost has now finally been laid to rest. The task of the court is to look at the substance of the agreement, rather than its form, and to ask whether the purpose and effect of the relevant provision amounts to an illegitimate intent to evade the insolvency laws or whether it has a legitimate commercial basis. The Belmont Park Investments case concerned complex credit swap transactions and the legitimacy of certain features of those transactions which were brought into operation following the collapse of Lehman Brothers. The Supreme Court acknowledged the legitimacy of these features, emphasising that it is the policy of the law to give effect to party autonomy and to uphold proper commercial bargains.[11]

[105] The line of cases appears to apply where the main contractor has become insolvent. It does not have any application in circumstances where there is a subcontractor who has been paid and the main contractor has become insolvent, which is a different factual situation from the present case.

[106] Another statement of the same approach is to the following effect:[12]

> 20.44 There are, however, at least three circumstances in which a direct payment mechanism may be deployed without objection under insolvency laws ...
>
> 20.46 The second circumstance is where **before the main contractor's insolvency there is a direct payment agreement in place** between owner, main contractor and sub-contractor which permits or even obliges the owner to make direct payment to the subcontractor. Such an agreement will not fall foul of insolvency rules against direct payment on the basis that, by making direct payment, the owner is discharging a primary liability to the subcontractor ...
>
> 20.48 In all of these cases, the *pari passu* principle of insolvency law is not violated because the money which is paid directly to the subcontractor is not money in respect of which the main contractor may claim a proprietary right, that is, **making the payment does not reduce the property of the insolvent main contractor**." (Emphases added)

---

10 *Emden's Construction Law by Crown Office Chambers* (online looseleaf ed, LexisNexis) at [19.82].

11 *Emden's Construction Law by Crown Office Chambers*, above n 10, at [19.82].

12 Julian Bailey *Construction Law* (Routledge, Oxon, 2011) at [20.42].

[107] Reference was also made to a Scottish case which was said to support the suggested approach to direct payment clauses, but that case was apparently concerned with the undertaking of a primary obligation by the employer to pay the subcontractor.[13] In other words, when payment was made to the subcontractor, that was pursuant to a separate contract and it did not involve the subcontractor obtaining priority in breach of the pari passu rule for a claim against the insolvent contractor. I do not regard the case as being of any assistance. It does not lend support to any view that direct payment contracts of the kind under discussion in the setting of the construction industry should be seen as anything other than preferential in their effect.

[108] The case of *Belmont Park*, which is referred to in the extract from *Emsden* above was principally concerned with the so-called anti-deprivation rule. In the principal judgment, Lord Collins explained the issue in this way:[14]

> [60] The anti-deprivation rule was applied to invalidate contractual provisions in the following decisions. In none of them did it matter whether the provision was in a contract from the inception of the relationship. *Whitmore v Mason* (1861) 2 J & H 204, (1861) 70 ER 1031 is a classic case of the application of the anti-deprivation rule. It was concerned with a provision in a partnership deed that, in the event of the 'bankruptcy or insolvency' of a partner, an account was to be taken, and the bankrupt partner was to lose his interest in the partnership assets (mines in Portugal) at a market valuation (save that his interest in a mining lease was to be excluded from the valuation). Sir William Page Wood V-C accepted the assignee's argument ((1861) 2 J & H 204 at 207, (1861) 70 ER 1031 at 1032) that the exclusion of the lease was void because it was 'an attempt to evade the rule in bankruptcy, which provides that, upon an act of bankruptcy being committed, all the property of the bankrupt vests in his assignees', and held that, in so far as it related to the lease, the provision was void as being ((1861) 2 J & H 204 at 213, (1861) 70 ER 1031 at 1035) 'in fraud of the bankrupt laws', because ((1861) 2 J & H 204 at 212, (1861) 70 ER 1031 at 1034)-
>
>> 'the law is too clearly settled to admit of a shadow of doubt that no person possessed of property can reserve that property to himself until he shall become bankrupt, and then provide that, in the event of his becoming bankrupt, it shall pass to another and not to his creditors'.

13 *Brican Fabrications Ltd v Merchant City Developments Ltd* [2003] BLR 512 at 513.

14 *Belmont Park Investments Pty Ltd v BNY Corporate Trustee Services Ltd and Anor* [2012] 1 All ER 505, [2012] 1 AC 383.

> [61] So also in *Ex p Mackay* (1873) 8 Ch App 643 at 648, discussed above, the agreement that the lender could keep the royalties in the event of the borrower's bankruptcy was an unlawful 'additional advantage'. This, like several of the other decisions, is really about an unsuccessful attempt to create a charge. It was applied in *Ex p Williams, Re Thompson* (1877) 7 Ch D 138 (sham rent intended to give lender additional security of distraining on chattels).

[109] This diversionary feature of the anti-deprivation principle was also referred to in the decision of *British Eagle International Airlines Ltd v Compagnie Nationale Air France*.[15] Lord Morris in his speech in that case made reference to the fact that examination of the clearing agreement in that case revealed "no trace of any scheme to divert money in the event of a liquidation".[16]

[110] As well, the anti-deprivation principle does not apply where the "deprivation" is justified for reasons other than making arrangements to protect the interests of a party in the event of bankruptcy:[17]

> Thus in Ex p Jay, Re Harrison (1880) 14 Ch D 19 (the case of the builder's materials) both Brett and Cotton LJJ accepted (at 26) that if forfeiture had taken place on the builder's breach (as the provision envisaged) then it would have been valid: 'It appears that there was no default on the debtor's part up to the filing of the petition, and the [owner] cannot, therefore, succeed except by virtue of the provision for forfeiture on bankruptcy, and according to the authorities such a stipulation is void' (Brett LJ).

[111] In *Belmont Park*, it was further noted that:[18]

> The policy behind the anti-deprivation rule is clear, that the parties cannot, on bankruptcy, deprive the bankrupt of property which would otherwise be available for creditors. It is possible to give that policy a common sense application which prevents its application to bona fide commercial transactions which do not have as their predominant purpose, or one of their main purposes, the deprivation of the property of one of the parties on bankruptcy.

[112] There was no relevant deprivation provision in the contractual arrangements which Ebert entered into in this case. The true dispute that has arisen is whether the arrangements between Ebert, TPL and BOSI are properly to be viewed as disposing of the property of the second-mentioned or the third-mentioned party, with the Court

---

15 *British Eagle International Airlines Ltd v Compagnie Nationale Air France* [1975] 1 WLR 758.
16 At 763. Lord Morris dissented but the majority did not disagree with the remarks noted.
17 *Belmont Park*, above n 14, at [80].
18 At [104].

having concluded that the payments were made with the property of TPL. There was no provision which took effect, or mandated a change to the contractual arrangements, upon the liquidation of TPL.

[113] Consideration of the authorities to which Mr Gordon made reference may be apt where there is an arrangement diverting property away from TPL and, assuming there is, the issue is whether it should be struck down for breaching the anti-deprivation rule. But different requirements apply where these elements are not present and the court is considering the pari passu rule.

[114] In my view, the rule which is engaged in this litigation is the pari passu rule. The parties cannot contract out of the pari passu rule which is embodied in the Companies Act, even if there are good business reasons for doing so; that is, reasons independent of the advantages flowing to the creditor (Ebert, in this case) from a preference.[19] Further, and unlike in the case of the deprivation rule, it is not necessary to demonstrate that a dominant purpose existed of defeating the creditors before the court will strike down the arrangements.

[115] The statutory embodiment of the rule in the case of companies is to be found in s 113 of the Companies Act which provides amongst other things that, after paying preferential claims, the assets of the company must be used in satisfaction of all other claims. Subsection 2 provides:

> The claims referred to in subsection (1) of this section rank equally among themselves and must be paid in full unless the assets are insufficient to meet them, in which case payment shall abate rateably among all claims.

[116] The starting point is, as I have already noted, the Court of Appeal decision of *Attorney-General v McMillan & Lockwood* where it is stated that a direct payment provision which bypasses the main contractor and which results in payment being received directly by the subcontractor gives an unfair preference to the subcontractors vis-a-vis the other unsecured creditors of the main contractor.[20]

---

19 *British Eagle International Airlines Ltd v Compagnie Nationale Air* France, above n 29, at 780.
20 Above n 7.

[117] My conclusions are, first, that the principles described in the English texts do not apply in cases of the present kind. This is not a case of Ebert discharging a separate obligation owed directly to a sub-contractor. Further, it is not a deprivation case, meaning *Belmont Park* does not apply. Thirdly, the present case is one that engages the pari passu principle and there is no requirement to establish intent to defeat the creditors. The principle in *Attorney-General v McMillan & Lockwood* therefore applies.

The apartment and accessory unit transaction

[118] The discussion to this point has been concerned with all of the Transactions but, because of the nature of the apartment and accessory unit transaction, some additional separate discussion is called for relating to the circumstances in which Ebert acquired that property.

[119] The apartment and accessory unit was transferred to Ebert on 20 November 2008. This was the day before TPL was placed in liquidation.

[120] I have already recorded the circumstances surrounding the transfer of the apartment and accessory unit at paragraph [28] above. In summary, TPL satisfied its remaining obligations to Ebert by paying cash of $152,000 out of funds borrowed from BOSI and the balance was satisfied by crediting the amounts that TPL owed to Ebert for compensation for delays, $388,000.

[121] I will deal with the issue of applicability of the principles governing voidable transactions pursuant to s 292(1) in the succeeding section of this judgment. The discussion at that point will extend to the payments and to the transfer of the apartment and accessory unit. For the moment, discussion will be confined to an analysis of the transfer of the apartment and accessory unit.

[122] There is no doubt that s 292(3) embraces transactions comprising a conveyance and transfer of the companies property.

[123] The applicants rely upon the fact that the apartment and accessory unit were conveyed to Ebert on 20 November 2008. They say that was the relevant transaction

for the purposes of s 292. If that were so, the transaction occurred outside the voidable preference period established by s 292(5). I will examine this contention in the next section of the judgment.

The date when the transaction occurred

[124] It is part of the case for the applicants that on 20 November 2008, the property was conveyed to Ebert at which stage any insolvent transaction must have occurred because of the definition of transaction contained in s 292 as including:

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

[125] I consider that the analysis which the applicants put forward concerning this element of the alleged voidable transactions seems to be correct. That is, the liabilities owed to Ebert, totalling $540,000, were satisfied on the date of the transfer of the apartment and the accessory unit to Ebert together with the adjustment to the price on account of the credit which TPL owed to Ebert.

[126] The competing position which Ebert put forward was that the transfer was not caught by the relevant section because the transaction was between TPL and Nidus, not TPL and Ebert. I do not accept that is a correct analysis. Ebert took a conveyance of the properties from TPL in return for a reduction of the debt owed by TPL to Ebert.

[127] It is not relevant, as Mr Gordon submitted, to attribute to that transaction the date the ASP was entered into. The statutory language used is concerned with the date when there was a conveyance or transfer of the company's property to the creditor. The section is not concerned with examining the underlying contractual (or other) grounds which led to the transfer of the property or compelled the company to make the transfer in the first place.

Set off

[128] Ebert relies upon an entitlement to statutory set off contained in s 310 of the Companies Act. Section 310 provides as follows:

310 Mutual credit and set-off

> (1) Where there have been mutual credits, mutual debts, or other mutual dealings between a company and a person who seeks or, but for the operation of this section, would seek to have a claim admitted in the liquidation of the company,—
>
> (a) An account must be taken of what is due from the one party to the other in respect of those credits, debts, or dealings; and
>
> (b) An amount due from one party must be set off against an amount due from the other party; and
>
> (c) Only the balance of the account may be claimed in the liquidation, or is payable to the company, as the case may be.
>
> (2) A person, other than a related person, is not entitled under this section to claim the benefit of a set-off arising from—
>
> (a) A transaction made within the specified period, being a transaction by which the person gave credit to the company or the company gave credit to the person; or
>
> (b) The assignment within the specified period to that person of a debt owed by the company to another person—
>
> unless the person proves that, at the time of the transaction or assignment, the person did not have reason to suspect that the company was unable to pay its debts as they became due.

[129] Mr Gordon noted that the response of Ebert in this regard was the same as the response that it gave in regard to the question of whether there had been a voidable preference under s 292, which was that there was no reason for Ebert to suspect actual insolvency on TPL's part. That is the next issue that I deal with.

[130] The applicants' position was that Ebert is precluded by s 310(2) from claiming the benefit of statutory set off because it knew that TPL was going into liquidation before the transfer of the properties occurred and had clear reason to suspect that it was unable to pay its due debts, particularly given the fact that TPL was going to be placed into liquidation by the IRD within days. In Mr Tingey's submission, any reasonable person would at least suspect that TPL was unable to pay its due debts.

Was TPL insolvent at the time of the transactions?

Section 292(2)

[131] The next consideration is whether the Transactions were insolvent transactions in that they were made at a time when the company was unable to pay its due debts and were transactions that enabled 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.

[132] There is no doubt that the payments and the transfers of the apartment and accessory unit took place within the specified period which commenced on 23 July 2006. Further, the two transactions, whereby payments were made to Ebert, were made within the restricted period which ran from six months before the date of commencement of the liquidation. Therefore, it is presumed that, unless the contrary is proved, the transactions were entered into at a time when the company was unable to pay its debts.[21] Was TPL unable to pay its due debts at the time of the Transactions?

[133] The starting point is to set out the essential submissions which the parties made on this point.

[134] For the Liquidators, it was submitted that s 292(4A) applies. The section provides that a transaction 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. Where a company is placed into liquidation by the court, the restricted period is the period of six 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 time at which the order of the court was made.

[135] In this case, the application to liquidate TPL had been filed on 22 July 2008. The restricted period accordingly ran from 22 January 2008 to the date of liquidation, 21 November 2008. The Transactions occurred in the nine days up to

[21] Companies Act 1993, s 292(4).

the order of liquidation being made: the first payment occurred on 13 November 2008, the transfer occurred on 19 November 2008, and the second payment occurred on 21 November 2008. Consequently, if Ebert wants to argue that TPL was able to pay its due debts at this time, the onus is on Ebert to prove this.

[136] For Ebert, it was submitted it is established law that the transaction may only be set aside as an insolvent transaction if it was made at a time when the company was unable to pay its due debts.[22] The relevant principles for determining this are as summarised in the High Court decision of *Blanchett v Joinery Direct Ltd*:[23]

a) the inquiry is made at the times when the payment is made;

b) regard may be had, however, to the recent past to see if the debtor was unable to pay debts as they became due;

c) a consideration of the outstanding debts at the time is required;

d) "as they become due" means as they become legally due;

e) the ability to pay involves a substantial element of immediacy to provide payment from cash and non-cash resources. An excess of assets over liabilities will not by itself satisfy the test if there is no ability to actually pay. However, the ability to procure sufficient money to pay debts by realisation by sale or mortgaging or pledging assets within a relatively short period of time will satisfy the test;

f) the issue of a company's solvency requires consideration of the company's financial position in its entirety. A temporary lack of liquidity does not necessarily evidence insolvency. A consideration of the position over a period of time is required; and

g) ultimately, the test is an objective one. In undertaking an analysis as to the company's solvency, the whole of its financial position must be

---

22 Companies Act 1993, s 292(2)(a).
23 *Blanchett v Joinery Direct Ltd* HC Hamilton CIV-2007-419-1690, 23 December 2008 at [27].

> taken into account (including the nature of the company's debts, its business, and the question of whether its assets are in a readily realisable form).

[137] On behalf of Ebert, it was accepted that it is normally for a liquidator to establish that a transaction sought to be impugned was made at a time when the company was unable to pay its due debts. However, s 292(4A) further provides that where the transaction was made during the "restricted period" (six months prior to liquidation), it is presumed to have been made when the company was unable to pay its due debts. Though this presumption is, of course, rebuttable.

[138] All that Ebert was able to put forward by way of rebuttal was the views of Mr Martin in his affidavit where he said that TPL's due debts were able to be paid up to the point of liquidation for so long as the Financiers wanted them to be.

Discussion

[139] The conclusions that I have earlier set out about the correct interpretation of the relationship between Ebert, TPL and BOSI mean that Ebert's contentions cannot be accepted. There was a limited amount of money which TPL could pay its debts from. This was the funding that it had borrowed from BOSI. Once that ran out, there was no obligation on BOSI to augment the pool of funding available for creditors of TPL. BOSI did not have an additional liability over and above the amount that it was obliged to provide under the Financing Agreement to BOSI and which amounts it was contractually bound to remit to Ebert. Once it had remitted such funds as TPL was able to borrow from it, BOSI had discharged the entirety of its contractual obligations.

[140] The effect of Ebert receiving 100 per cent of the funding that BOSI provided was to exhaust all of the resources from which TPL would be able to pay its creditors. It was inevitable that the substantial body of other creditors that existed at the time when the transactions were made would receive less or would receive nothing in the liquidation. It is clear that TPL was insolvent at the time that the Transactions with Ebert occurred.

[141] All of this is consistent with the fact that the Commissioner obtained an order from the High Court placing the company into liquidation on the ground that it could not pay its debts on 21 November 2008. Given that the payments and the transfer occurred within the date range from 18 November to 21 November, that circumstance alone gives rise to a strong inference that the company was insolvent at the time of the Transactions. At the date when the company was placed in liquidation, it owed Strategic in excess of $40 million secured by a GSA, the debt of the Commissioner which was preferential was for in excess of $3.5 million and, as well, there was a non-preferential debt of over $300,000. There were two additional unsecured creditors totalling $100,000. The Liquidators have made a payment of $3000 to Strategic and a distribution of $439,563.99 has been paid to the IRD.

[142] Plainly, accumulation of debts of this magnitude did not occur overnight. Nor did the ability of TPL to repay its creditors vanish overnight. The only plausible explanation is that this company, which Mr Martin described as a $100 company, was grossly insolvent well before the date when the Transactions that are under consideration in this case occurred. Such a conclusion is consistent with the apprehensions which Mr Martin expressed at about the time when BOSI was seeking to exit the Direct Agreement in favour of the Escrow Agreement.

[143] Mr Martin had been advised, as late as October 2008, that the Commissioner was taking steps to wind up the company on 21 November 2008. Therefore, by that time, it is likely that TPL would have been served with the liquidation proceedings nominating the hearing date. Mr Martin expressed apprehension at the possible effects of the Escrow Agreement on Ebert's security (as he saw it) under the Direct Agreement. He plainly considered that TPL was going to be placed in liquidation. Consistently with his understanding in late October, Mr Martin on 17 November 2008, in an email, referred to "TPL's forthcoming receivership". I agree with the submission of the applicants that this was a mistaken reference to a liquidation.

[144] I mention Mr Martin's views because they are consistent with an understanding that TPL was insolvent at least in October 2008. It was his business as CEO of Ebert to be alert to hazards such as TPL being wound up and taking steps to protect his company's interests. The judgement he made, looking at it from that

perspective, was that the company was insolvent in October and he sought to position Ebert accordingly. It would be inconsistent with what Ebert itself understood and said at the time to accept that, to the contrary, TPL was solvent during October and the period leading to the Transactions.

[145] In any case, the Transactions have occurred within the specified period. It is incumbent upon Ebert to prove that the company was able to pay its debts but it has put forward no basis upon which the Court could come to such a conclusion.

Preferential effect

[146] The next enquiry pursuant to s 292 (2) is whether Ebert received more towards satisfaction than it would receive or be likely to receive in the company's liquidation.

[147] One has only to look at the figures stated above for what the unsatisfied unsecured creditors of the company were to appreciate, which is that, had Ebert not received the payments and the transfer of the apartment, it would have received little or nothing towards its debt.

[148] This requirement has been proved, in my view.

Delay on the part of the Liquidators in applying to set aside voidable transactions

[149] Ebert opposes the making of an order on the additional ground that delays on the part of the Liquidators have resulted in the application being an abuse of process.

[150] It is now six and half years since the relevant transactions occurred. The proceedings were filed on 31 October 2014. The proceedings were plainly not statute barred because limitation runs from the date of liquidation, which was 21 November 2008.[24] Because the actions upon which the present claim is based occurred before 1 January 2011, the Limitation Act 1950 continues to apply.[25] That

[24] *Levin v Titan Cranes Ltd* [2013] NZHC 2628.
[25] Limitation Act 1950, s 2(A).

Act fixes the time within which claims under s 292 must be brought because s 4 (which establishes a limitation period of six years) is applicable to:

> (d) Actions to recover any sum recoverable by virtue of any enactment, other than a penalty or forfeiture or sum by way of penalty or forfeiture.

[151] There has not been any case decided in which delays have been the basis upon which the court has declined relief even though the claim was not barred by the Limitation Act. It is true that in *Levin v Titan Cranes*, the Court was of the view that:[26]

> It may be unsafe to say categorically that delay can never be a relevant consideration for denying relief under s 295 entirely.

[152] Counsel for Ebert has raised the question of delays under the general rubric of abuse of process. Mr Gordon submitted that, as a consequence of the Liquidators' exceptional and unjustified delay, the Court is now being asked to consider and undo commercial dealings that occurred as long ago as 2004 and 2005. The submission is made that:

> this is highly unsatisfactory.

[153] I observe that the exact basis upon which it is said the Court would be justified in declining to set the Transactions aside is not entirely clear. In the notice of opposition, the reason given is that it would be an abuse of process for the Liquidators to initiate voidable transaction proceedings after the long delays that have occurred. Alternatively, the argument advanced may reflect an argument that the Court has a discretion whether or not to set aside a transaction and that, in exercising that discretion, the Court is entitled to have regard to the delays which have occurred in this case.

[154] No detailed analysis has been provided of how the approach that Ebert suggests can be located within the subject area of abuse of process. The High Court Rules deals with that issue in Part 15, which makes a provision to strike out a proceeding that is likely to cause prejudice or delay.[27] However, it is unlikely that an

---

26 At [98].
27 High Court Rules, r 15.1(1)(b).

order based on r 15.1 would be justified, having regard to any delay that has occurred since the Liquidators commenced their proceedings.

[155] Any other ground would have to be based upon delays that are usually considered where the Limitation Act defence applies because of delays from the accrual of the cause of action to the commencement of proceedings based upon it. However, Ebert does not allege that the proceedings are statute barred under the provisions of the legislation.

[156] An approach of this kind is not without difficulties because it involves a limitation-type defence. Because it has been traditionally regarded as the function of the legislature to determine what the appropriate limitation periods for various causes of action ought to be, it must be taken to have balanced the various competing interests that are relevant to decisions about limitation.

[157] In *Chagos Islanders v Attorney General,* the applicants put forward the submission, as part of their opposition to a strike-out application, that the Court would suspend the effect of a Limitation Act where it would be unconscionable to allow defendants to rely upon it.[28] The Judge dealt with the submission in the following way:[29]

> The [Limitation] Act is quite explicit in prohibiting the bringing of a cause of action after the relevant time limit and has made varied and explicit provision for the circumstances in which time should not run against a Claimant or should be extended. That represents the Parliamentary view of where it would be wrong to allow a Defendant to take advantage of the passage of time and marks the balancing of the interests of finality in litigation and fairness to a Claimant.

[158] The outcome of the decision was that it was not open to the Court to impose a gloss upon provisions of the Limitation Act in the way which the respondents had submitted. My primary conclusion under this part of the case is that the only circumstances in which lapse of time might provide a defence to Ebert is where the period prescribed in the Limitation Act had expired before the proceedings were commenced. In case that conclusion is wrong, I will go on to consider the case from

28 *Chagos Islanders v Attorney General* [2003] EWHC 2222 (QB).
29 At [599].

the point of view that there may be a discretion to decline relief where there have been excess of delays in circumstances where the claim is not statute barred.

[159] An alternative approach would be to construe the legislation so that questions of delay not amounting to a statutory bar can nonetheless be the basis of a discretionary power on the part of the court to dismiss claims under s 292 because of delay. The latter category would involve adoption of the point of view that, even if it is competent to a party to bring a claim before the courts, there may be discretionary reasons why that claim should be defeated by delay which is insufficient to give rise to a time defence under the Limitation Act. It is this dual approach which seems to have been recognised in s 8 of the Limitation Act 2010 which provides:

> **8. Act in does not affect jurisdiction to refuse relief**
>
> Nothing in this Act limits or affects any equitable and all other jurisdiction to refuse relief, whether on the ground of acquiescence or delay, or on any other ground.

[160] That section does not seem to be applicable in the circumstances of this case where the limitation period is determined by the earlier Limitation Act.[30] It may, however, be viewed as a restatement of the existing law in statutory form, in which case it could be seen as declaratory of the law that applied to cases covered by of the 1950 Act.

[161] It might be argued that in the context of voidable transaction cases, there are grounds to adopt special sensitivity towards the lapse of time so as to justify the court taking an approach that the significance of delay is not limited solely to cases where possible contravention of the Limitation Act is under consideration but extends to other factors within its discretion under s 292. That is an approach that I would not be prepared to adopt, however, in the circumstances of this case because of an absence of convincing arguments that might support it.

---

[30] Limitation Act 1950, s 2A.

[162] Mr Gordon made reference to the statutory obligation on a liquidator to carry out his/her duties "in a reasonable and efficient manner"[31] and submitted that declining relief to the liquidator on account of delays would reinforce the statutory obligation.

[163] Mr Tingey submitted that in declining relief on discretionary grounds would frustrate the objective of completing the collection of assets and distribution to the creditors which is the principal duty described in s 253 of the Act.

[164] I do not consider that it has been established that there is a residual discretion of the kind which Ebert relies upon in this case to defeat the Liquidators' claim. I do not consider that it can have been the intention of the legislature that relief should be declined in the circumstances because of alleged delays. My conclusion that such a discretion existed does not fit easily with other statutory provisions regulating the conduct of liquidators.[32] As well, the Court has powers to deal with failures on the part of liquidators to meet their obligations under s 286, including, I assume, failure to comply with the principal duty under s 253.

[165] I therefore consider that the Court ought not to disallow relief because of delays.

Justification for delays

[166] As an alternative answer to the delay point, the Liquidators have put forward grounds which they say justified any apparent delay in proceeding to strike down the Transactions. They were, they say, involved in a dispute about a fund of $782,108.18 concerning which the Liquidators were in doubt about who the correct recipient was.[33] The issue was litigated in the High Court and the Court of Appeal. This litigation, it is said, consumed a lot of the Liquidators' time until it was finally resolved. Mr Tingey said in his submissions:

---

31 Companies Act 1993, s 253.
32 See for example the detailed time requirements set out in Companies Act 1993, s 255.
33 *Strategic Finance Ltd (in rec & in liq) v Bridgeman* [2013] NZCA 357, [2013] 3 NZLR 650 (CA).

> Until the liquidation had been resolved, it was unclear whether the liquidators had any funding to investigate claims that the company had in the liquidation including in recovering voidable transactions.

[167] The relevance of the reference to funding is that the Liquidators in this case, which is not atypical of liquidations generally, are expected to provide funding for the liquidation out of their own resources. I infer that once the Court of Appeal had resolved the issue described above in favour of the Commissioner, the amount of the fund became part of the general accounts in the liquidation and the Liquidators would have been authorised to have access to it in order to provide the resources for investigations into the insolvent transactions that are the subject matter of this case.

[168] The Court's conclusions concerning this aspect of the case are as follows. Assuming that it is relevant to take delay into account, the applicants have put forward a plausible explanation concerning the reasons for the time it took them to commence proceedings. Their evidence has not been controverted and they have not been cross-examined on it.

Prejudice to Ebert due to delay

[169] It would seem relevant to enquire, in the context of a defence of delay in commencing the voidable transaction proceedings, whether delay caused prejudice to the party who had received payment – in this case, Ebert. If the Court were to exercise its discretion to decline relief, grounds of real substance would be required. The only possible ground that suggests itself is that there was prejudice to Ebert as a result of the delays.

[170] But in this case there is little evidence to show that substantial prejudice was caused to Ebert by the delay. There is no suggestion that it has altered its position based upon an expectation that it would have a permanent entitlement to the money which is now subject of recovery action. Indeed, having regard to the apprehension that Mr Martin expressed about the clawback in the "receivership", it would not have been reasonable for Ebert to take the view that the Transactions would not be attacked.

[171] My conclusion is that if prejudice were relevant to the exercise of any discretion to dismiss the application for relief on the grounds of delay, Ebert would not have disclosed any substantial prejudice to support its position.

Defence under Section 296(3)

[172] Ebert relied on the defence set out in s 296(3) of the Companies Act. The section provides:

> (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.

Good faith

[173] The concept of good faith in the context of voidable transactions was discussed by the Court of Appeal in *Market Square Trust*:[34]

> The first matter the trust must establish, therefore, is that it received the property in good faith. The test of "good faith" has been clearly established by this court. The recipient of the property or money must show that he or she honestly believed that the transaction would not involve any element of undue preference either to himself or herself or to any guarantor (*Re Orbit Electronics Auckland Ltd (In Liq*) approved in *Re Number One Men Ltd (In Liq)*.[35] The cases show that a creditor is likely to fail this test where he or she has actual or implied knowledge of the company's financial difficulties,

[34] *Levin v Market Square Trust*, above n 5, at [54]. The case was decided under the version of s 296(3) in force between 1 July 1994 and 31 October 2007. That version of s 296(3) gave the court a discretion to decline relief in full or in part if the court considered it inequitable to order recovery in full and if "the person from whom property is sought received the property in good faith and has altered his or her position in the reasonably held belief that the transfer to that person was validly made and would not be set aside".

[35] *Re Orbit Electronics Auckland Ltd* (in liq) (1989) 4 NZCLC 65,170 (CA) and *Re Number One Men Ltd (In Liq)* (2001) 9 NZCLC 262,671.

> due to the company's cheques being dishonoured, its failure to pay its debts on time, or of the circumstances indicating serious cash flow problems.

[174] In *Levin v Titan Cranes Ltd*, Bell AJ expressed the view that the good faith requirement goes to the recipient's honesty in believing that it would not be preferred. In coming to his conclusion, he referred to the decision of *Royal Brunei Airlines Sdn Bhd v Tan*, in which Lord Nicholls explained dishonesty in the context of accessory liability for breach of trust.[36] Lord Nicholls had noted that acting dishonestly is not acting as an honest person would in the circumstances, and that that was an objective standard. The following extract from that judgment was noted:[37]

> Honesty, indeed, does have a strong subjective element in that it is a description of a type of conduct assessed in the light of what a person actually knew at the time, as distinct from what a reasonable person would have known or appreciated. Further, honesty and its counterpart dishonesty are mostly concerned with advertent conduct not inadvertent conduct. Careless is not dishonesty. Thus for the most part dishonesty is to be equated with a conscious impropriety. However, these subjective characteristics of honesty do not mean that individuals are free to set their own standards of honesty in particular circumstances. The standard of what constitutes honest conduct is not subjective. Honesty is not an optional scale, with higher or lower values according to the moral standards of each individual. ...

[175] Bell AJ further concluded that the passage offered helpful guidance when considering "good faith" under s 296(3). Because carelessness is not a component of dishonesty, it is important to avoid imputing absence of good faith to a recipient on the basis of what they ought to have known, rather than what they actually knew.

[176] I respectfully concur with those opinions and also with the conclusion in *Titan Cranes* that, under the test in the Court of Appeal's decision in *Levin v Market Square Trust*, to hold that the recipient did not act in good faith requires the court not to be satisfied that Titan honestly believed that the payments would not involve any element of undue preference to itself.

[177] Against that background, I will briefly consider the evidence.

---

36 *Royal Brunei Airlines Sdn Bhd v Tan* [1995] 2 AC 378 (PC).
37 At 389.

[178] Reference has already been made[38] to the concern that Mr Martin had about the impending "receivership" of TPL. The good faith of Ebert is to be measured against what Mr Martin understood about the circumstances of TPL at the time when the transactions occurred. That is because Ebert was under the control of Mr Martin. His information, understanding and beliefs on that subject are to be attributed to the company for the purposes of this proceeding. He knew that the IRD had instituted liquidation proceedings and he must have known from the fact that the liquidation proceedings were likely to run their course, that TPL had not been able to find the resources to meet the IRD claim.

[179] Had he genuinely believed that TPL's financiers were prepared to cover TPL for the debt (so that the winding up of that company would be staved off), then he would not have expressed the concerns that he did about the company being placed in receivership and the risks of a clawback of payments that were intended to be made into the Escrow fund. That factor has to be considered together with his understanding that it was not necessary for the financiers, acting for the protection of their own interests, to make funds available to pay the IRD debt.

[180] The last reference is to the fact, which Mr Gordon asserted it to be, that the financiers would be unlikely to advance further funding to pay building development for the purposes of paying money owed to the IRD. Paying such a liability would not advance completion of the project so that sales of the properties could be progressed and thereby bring forward re-payment of what was owing to the financiers.

[181] In these circumstances, I do not consider that Ebert acted in good faith (as explained above) when it received the payments and accepted transfer of the apartment.

[182] All of these requirements are cumulative, of course. The first requirement of good faith, in the context of this case, essentially means that Ebert did not appreciate that the transactions involved any element of undue preference in its favour.[39]

---

38 At [20] above.
39 *Re Orbit Electronics Auckland Ltd (in liq)*, above n 35 at 65, 171.

[183] As well, I do not consider that the element required by s 296(3)(b) is satisfied either. It could not be said that a reasonable person in the position of Mr Martin, who was the relevant person at Ebert dealing with this matter, would not have suspected that the company was or would become insolvent. I record that the third element required under this section by subsection (c) was not disputed by Mr Tingey.

Result

[184] For the foregoing reasons, I conclude that Ebert does not have a defence to the claim which the applicants make for the orders set out in the originating application.

[185] The application for orders in paragraphs 1(a) of the originating application dated 31 October 2014 is granted.

[186] There will also be an order that Ebert is to pay to TPL the sum of $1,603,891.90 pursuant to s 295 of the Companies Act. The applicants are to prepare an interest calculation and refer it to the respondent. I reserve leave for either party to apply for further directions in regard to the question of interest. The parties are also to confer on the question of costs and, if they are unable to agree on them are to file memoranda not exceeding 12 pages on each side within 20 working days of the date of this judgment.

J.P. Doogue
Associate Judge