IN THE COURT OF APPEAL OF NEW ZEALAND

CA326/2013
[2014] NZCA 98

BETWEEN	HENRY DAVID LEVIN AND DAVID STUART VANCE AS LIQUIDATORS OF ST GEORGE DEVELOPMENTS LIMITED (IN LIQUIDATION) Appellants
AND	WEST CITY CONSTRUCTION LIMITED Respondent

Hearing:	19 February 2014
Court:	O'Regan P, Stevens and Asher JJ
Counsel:	N H Malarao and K C Francis for Appellants P J Davey and C J Taylor for Respondent
Judgment:	27 March 2014 at 11 am

JUDGMENT OF THE COURT

A The appeal is allowed and the cross-appeal is dismissed.

B An order is made setting aside the assignment of the North Shore City Council bond.

C The respondent is to pay the amount of $104,350 to the appellants.

D The appellants are to have costs on a standard appeal for one counsel on a band B basis in this Court and usual disbursements.

E The order that the respondent was entitled to costs on a scale 2B basis together with disbursements in the High Court is quashed, and substituted by an order that the appellants as liquidators are entitled to

costs on a scale 2B basis together with disbursements as fixed by the Registrar of the High Court.

F Any outstanding costs or interest issues are to be determined in the High Court.

REASONS OF THE COURT

(Given by Asher J)

Introduction

[1] This case concerns the assignment of a bond as a method of payment for services provided by West City Construction Ltd (West City) to St George Developments Ltd (in liquidation) (St George). St George went into liquidation in January 2008 and the appellant liquidators say the assignment took place within the two year voidable transaction period. Associate Judge Abbott found it took place before the two year period began.[1] The issue is whether the assignment occurred by an oral agreement on 22 November 2005 as the Associate Judge found or later, when a deed of assignment was signed on 3 October 2006.

[2] Messrs Levin and Vance submit that the Associate Judge was wrong in finding that there was an effective equitable assignment prior to 22 January 2006, the relevant date for voidable transactions. They claim that the date of the assignment was 3 October 2006, the date of a formal legal assignment, rather than 22 November 2005, the date of the alleged earlier oral agreement. On this basis they submitted the assignment was a voidable transaction and should be set aside.

[3] The respondent, West City, submits that the Associate Judge was correct in finding that there was an oral assignment that occurred prior to 22 January 2006. It cross-appeals against the Judge's finding that there was no defence available to West City under s 296(3) of the Companies Act 1993 if the assignment was on 3 October 2006, inside the two year period. It also cross-appeals on the basis that the Judge

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1 *Levin v West City Construction Ltd* [2013] NZHC 929.

was wrong in indicating that if the assignment was within the two year period he would refuse to exercise his discretion not to set aside the transaction.

Brief facts

[4] West City is a construction company carrying out earthworks and other related projects, including the construction of residential subdivisions. Its principal is Len Ireland. Between 2002 and 2004, West City provided construction services to St George in relation to a residential subdivision known as No.9 Quail Drive in Albany (the Albany subdivision).

[5] On 19 November 2004 St George had entered into a bond with the North Shore City Council in relation to various works it was carrying out to the value of $104,350. The date for the completion of the work specified in the bond was 19 November 2005, and it was provided that if all the work was completed the sum would be refunded in full. West City also carried out work on another construction job for St George at a nearby subdivision known as Point Ridge.

[6] West City completed contract works in July 2004 and was entitled to receive retention monies that had been retained by St George. However, in October 2005, with retentions of $47,532.12 still owed by St George to West City, St George approached West City to provide a quotation to complete additional works and construct a storm water pond. West City provided a quotation for $46,376.05 plus GST to carry out these additional works, together with other minor work.

[7] At the time there were still sections for sale in a subdivision that had been completed by St George. Mr Ireland deposed in his affidavit in opposition that he understood the North Shore City Council was requiring bonds from St George which would enable the Council to release completion certificates for the subdivision and allow further sales to continue. Therefore, by October 2005 St George was in the position where it wanted West City to carry out further work to the value of $46,376.05, but St George owed retentions under earlier contracts, and could not meet its existing indebtedness.

[8] Mr Ireland deposed that he was not prepared to agree to West City carrying out further works for St George unless the outstanding retentions owed to West City of $47,532.12 were paid. As a result St George offered an agreement to pay its debt from the bond monies owed to St George by the Council. Mr Ireland stated:

> I had discussions with [St George's director] Mr Andersen and he agreed to pay for the additional pond works and the outstanding amounts under the original contract by assigning the Council bond monies to West City.

[9] Mr Ireland deposed that he followed up the oral agreement by a letter to Mr Andersen on 6 November 2005 "confirming" his willingness to do the work. He stated, "I advised that the arrangement was acceptable provided it was done with a formal agreement." His letter read:

> RE: Quail Drive Subdivision
>
> I see they have final sorted the Pond planting plan [sic]
>
> We would be happy to carry out this works but the balance of the retentions $47,523.12 [sic] were due on 31st January 2004.
>
> We cannot proceed with the planting and minor works until this is paid
>
> The quote for planting the pond and minor earthworks is $46,376.05 plus [GST]
>
> *We understand you intend payment of these amounts from bond monies held by [North Shore City Council]*
>
> *This arrangement is acceptable provided it is done with a formal agreement*
>
> If you have any queries, please do not hesitate to call me on [cell phone number removed].
>
> (emphasis added)

[10] Mr Ireland then deposed:

> Mr Andersen proceeded to have his lawyer prepare a formal deed relating to the payment of the bonds which is the Deed of Assignment.... I believe that this deed was prepared in November 2005 shortly after my letter to Mr Andersen as it refers to a completion date of 19 November 2005 in the definition section. However, it was simply "kept in the bottom drawer" and not actually signed at that time.

[11] The Associate Judge set out what Mr Ireland said under cross-examination:[2]

> (i) he told the engineer and Mr Andersen that he was not doing any more "until, unless you assign me the bond";
>
> (ii) [Mr Andersen] told him he would arrange payment for the further work and the balance of the retentions from the bond monies held by [the Council];
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> (iii) the deed was "just the assignment", not necessarily what was agreed: "What he agreed to do was pay us using the Council bond money. This [the deed] is just the assignment of it.";
>
> (iv) the first time he saw the deed was when he signed it on 3 October 2006 at St George's offices: he was happy with the agreement that West City would be paid out of the Council bond, as recorded in his letter of 6 November 2005, but had asked for the formal document so that he could take it to Council to get the bond changed into West City's name (which could not happen until the works were complete).

[12] West City commenced the additional work in November 2005. It issued payment claims on 30 November 2005 and 16 January 2006. The work done by West City was completed by 16 January 2006. The payment claims were later certified. On 13 June 2006 West City presented a final claim for the balance of the money due and for the additional work done totalling $109,133.46. The work passed a final inspection of the Council and there was certification for payment of the amount of the extra work. Mr Ireland deposed that he had expected the bond monies to be paid by that time.

[13] The Council then indicated there would be a two year maintenance period for additional work, and it would hold back payment of part of the bond for that two year period. Faced with these further delays Mr Ireland requested Mr Andersen sign the Deed of Assignment. He emphasised that the work had been long completed at this point. Mr Andersen agreed and the Deed of Assignment was executed on 3 October 2006.

[14] On 22 January 2008 the Commissioner of Inland Revenue made an application to place the company into liquidation. The company was placed into liquidation by the Auckland High Court on 2 May 2008. Primary indebtedness is to

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2 *Levin v West City Construction Ltd*, above n 1, at [39](d) (footnotes omitted).

the Inland Revenue Department. The two year voidable transaction period ran, therefore, from 22 January 2006.[3]

[15] On 25 June 2008 Messrs Levin and Vance wrote to West City informing it that they were reviewing all payments made by the company, and noted that the assignment of 3 October 2006 appeared to be a preference. They invited West City to send them any evidence relevant to the classification of the payment.

[16] On 11 July 2008 West City's lawyers responded, asserting that the assignment agreement was entered into prior to the two year period. On 6 October 2009 the liquidators' solicitors wrote to West City stating that insufficient evidence had been provided of this. Further evidence was sought and a response was provided by West City. On 7 December 2011 the liquidators filed a notice setting aside the assignment of the bond. An objection was received and the liquidators issued these proceedings by way of originating application on 25 May 2012.

The decision

[17] In his decision of 1 May 2013 Associate Judge Abbott dismissed the liquidators' application. He held that the development bond was assigned in equity by oral agreement prior to 22 January 2006. As a result the transaction was outside the two year period and so could not be a voidable transaction under s 292. If it was conditional, the arrangement had become unconditional by the carrying out of the work and by its completion at the end of December 2005, the claim for the balance of the pond work being presented on 16 January 2006.

[18] In the alternative, the Judge expressed his view that the assignment was not in the ordinary course of business, and that there were reasonable grounds to suspect the company would become insolvent in November 2005. He would not have upheld the set aside transactions on those grounds.

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[3] Companies Act 1993, s 293(6).

[19] Messrs Levin and Vance submit that the Judge was wrong in finding there was an equitable assignment prior to 22 January 2006. They put forward three primary reasons:

(a) The intention of any November 2005 agreement was not to assign the development bonds, but rather there was an agreement to transfer the bonds once work had been completed.

(b) Assignment can only take place once consideration has been executed, and this consideration was not executed.

(c) Even if there was an equitable assignment, the assignment in October 2006 was a fresh transaction.

Was there an effective assignment in November 2005?

[20] Under s 292(3)(a) of the Companies Act a transaction includes "conveying or transferring the company's property". Such a transaction is voidable if it was made when the company was unable to pay its due debts within the specified period and enabled another person to receive more towards the satisfaction of the debt than would have been received or likely to have been received in the liquidation, unless it took place in the ordinary course of business.[4] An assignment which transfers a chose in action can be such a transaction.

[21] The objective and effect of a voidable transaction regime is to give effect to the well-established *pari passu* principle. This requires that creditors of a company who are in the same class share in the company's funds available for distribution on a pro rata basis.[5] The focus is on achieving fairness amongst all creditors, not on the individual fairness of transactions between a particular creditor and the debtor company.[6] The principle is enshrined in the Companies Act.[7] Voidable preference provisions attempt to strike a balance between the interests of all creditors in being able to share the assets of the company, and the interests of particular creditors who

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4 Companies Act, s 292(2).
5 *Farrell v Fences & Kerbs* [2013] NZCA 91, [2013] 3 NZLR 82 at [65].
6 *Farrell v Fences & Kerbs Ltd*, above n 5, at [68]; *Lewis v Hyde* [1998] 1 NZLR 12 (PC) at 18.
7 Companies Act, s 313(1) and (2).

have taken various steps in good faith to deal with the company while not seeking preference over other creditors.

[22] Section 130 of the Property Law Act 1952 provides that an absolute assignment in writing of a legal or equitable thing in action signed by the assignor passes all rights and remedies in relation to the thing in action to the assignee.[8] An assignment of a chose of action can be made orally.[9] Bonds are recognised as assignable choses in action.[10]

[23] An assignment has been described as "the immediate transfer of an existing proprietary right, vested or contingent, from the assignor to the assignee."[11] In relation to this alleged equitable assignment of a bond, there is no doubt there was consideration, being the further work to be carried out. There is no question as to the identification of the property assigned: it was the bond. The real issue is whether an intention to assign the bonds on or around 22 November 2005 can be discerned on the facts. There is a distinction between a stipulation to pay monies from a fund and equitable assignment.[12] A stipulation to pay from a fund is not enforceable while an agreement to assign is. A stipulation to pay can be revoked.[13] For there to be an oral agreement to assign, there must be an intention to assign.[14] Clear words are needed to show that there was an intention to assign.[15] It has been held:[16]

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8 The Property Law Act 1952, now repealed by the Property Law Act 2007, applies to this assignment. Section 49(1) of the Property Law Act 2007 provides that the Property Law Act 2007 only applies to an assignment of a thing in action made on or after 1 January 2008. The assignment in question occurred prior to 1 January 2008.

9 *Laws of New Zealand* Equity (online ed) at [59]; *Davies v TV3 Network Services Ltd (CanWest TV Works Ltd)* HC Auckland CIV-2004-404-1130, 13 June 2005 at [39]; *Jones v Kenna* HC Wellington M266/98, 23 December 1998; *Copeland v Three Rocks Ltd* HC Dunedin AP22/97, 16 March 1998.

10 *Laws of New Zealand* Choses in Action (online ed) at [14].

11 *Norman v Federal Commissioner of Taxation* (1963) 109 CLR 9 at 26. James Edelman and Steven Elliott in a recent paper, "Two Conceptions of Equitable Assignment" (Current Legal Issues Seminar Series 2013, Banco Court, Supreme Court of Queensland, 6 June 2013) suggest that equitable assignment is at a crossroads, between a conception modelling it on the private trust, and recent case law in Australia and New Zealand treating it as involving a transfer.

12 *Palmer v Carey* [1926] AC 703 (PC) at 706–707.

13 *Laws of New Zealand* Choses in Action (online ed) at [6].

14 *Elders Pastoral Ltd v Bank of New Zealand* [1991] 1 NZLR 385 (PC) at 388; *Continental Heavy Commercials Ltd v Corin* HC Hamilton CIV-2005-419-1296, 18 November 2005 at [37]; *William Brandt's Sons & Co v Dunlop Rubber Company* [1905] AC 454 (HL) at 462.

15 *Tradegro (UK) Ltd v Wigmore Street Investments Ltd* [2011] EWCA Civ 268 at [36]–[37].

16 *Re Vandervell's Trusts (No 2)* [1974] 1 Ch 269 (EWCA) at 294.

> … the mere existence of some unexpressed intention in the breast of the owner of the property does nothing: there must at least be some expression of that intention before it can effect any result. To yearn is not to transfer.

[24] The determination of an intention to assign is a question of fact.[17] We accept that no formal words are required for a valid equitable assignment of a legal chose in action.[18] It was stated in *Elders Pastoral Ltd v Bank of New Zealand*:[19]

> A promise by a debtor to a creditor that a sum owed or which will or may become due to the debtor from a third party should be paid to the creditor by *the third party is a clear form of equitable assignment*, particularly when the promise is given for valuable consideration.

[25] If the intention of the assignor that the contractual right is to become the property of the assignee is clear, equity will require the assignor to do all that is necessary to implement that intention. As in contract, the assessment of intention to assign is discerned objectively as it would be by an independent third party observer, from the parties' outward expressions of intention.[20] Mr Ireland's assertions of his personal belief that there had been an agreement to assign, even if true, are not determinative.

[26] Mr Francis, who presented the argument on whether there was a voidable transaction for the appellants, submitted that the importance of intention is well illustrated by the decision of this Court in *Mountain Road (No 9) v Michael Edgley Corp Pty Ltd*.[21] The assignment document had been drawn in a form contemplating execution by a party. It was held that the operative provisions of the document suggested that it was not intended to become binding between the parties until both parties had signed it. No particular form was required to constitute a valid equitable assignment. The essential element was an intention to assign. As between the assignor and assignee, no notice to the debtor was necessary.[22]

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17 *Oosson v Dyson* [1969] 120 CLR 365 at 388.

18 *William Brandt's Sons & Co v Dunlop Rubber Company*, above n 14, at 462 as approved of in *Pulley v Public Trustee* [1956] NZLR 771 (SC) at 777 and *Elders Pastoral Ltd v Bank of New Zealand,* above n 14, at 387.

19 *Elders Pastoral Ltd v Bank of New Zealand*, above n 14, at 387 (emphasis added).

20 *Gibbston Down Wines Ltd v Perpetual Trust Ltd* [2013] NZCA 506 at [54].

21 *Mountain Road (No 9) v Michael Edgley Corp Pty Ltd* [1999] 1 NZLR 335 (CA) at 340.

22 At 343.

[27] The assignment in question must have been a conditional assignment in that it could only become operative once the work in question was done. We accept that there can be an agreement to assign an existing chose in action in the future.[23] In that situation the assignee has an equitable interest in the property, and the assignor holds it as trustee for the assignee.[24] But there still must be an agreement to assign.

[28] Like the Associate Judge, we accept that if there had been a prior oral equitable assignment of the bonds on or about 22 November 2005 then that would not have been an "insolvent transaction" as it was outside the two year period.

[29] The question here is whether there was a valid oral assignment or agreement to assign on 22 November 2005. The alleged assignment was of an existing chose (a right to the bond money on certified completion), conditional on the work being done by West City.[25]

[30] Mr Francis also placed weight on the fact that there was an "entire agreement" clause. Under the clause all prior representations, conversations and agreements were merged and superseded by the deed. We do not consider that this had the effect of cancelling or in some other way neutralising the alleged earlier agreement to assign, if one had been reached. This is because the clause in the deed had been drafted almost a year earlier, after the alleged oral agreement, and could be seen as consistent with and reflective of that earlier agreement. If there had been an assignment on or around 22 November 2005 it could not be cancelled or revoked by such a clause, drafted as it was in contemplation of the oral agreement continuing to exist. For these reasons we do not regard the entire agreement clause as helpful to the appellants' case.

Was there an intention to assign?

[31] The appellants challenge the Associate Judge's assessment of the evidence. They argue that it is plain on that evidence that no concluded assignment could have

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23 AG Guest *Guest on The Law of Assignment* (Sweet & Maxwell, London, 2012) at 101.

24 *Holroyd v Marshall* (1862) 10 HL Cas 191 at 209; *Bank of New Zealand v Elders Pastoral Ltd* [1992] 1 NZLR 536 (CA) at 538; R Meagher, D Heydon and M Leeming *Meagher, Gummow & Lehane's Equity: Doctrines and Remedies* (4th ed, Butterworths, Sydney, 2002) at 225–226.

25 Clauses 2.4 and 3 of the deed of assignment.

occurred, both as a matter of law and based on the evidence of the parties' intentions, until (at the very earliest) the consideration had been provided and the work was approved by the Council in July 2006.

[32] While the liquidators had the onus of proving a transaction within the specified period,[26] they had in fact done so on a prima facie basis by producing a valid signed assignment dated 3 October 2006. However, in assessing whether an insolvent transaction was proven at that date, the Court had to include in that assessment the evidence of the prior agreement. In this appeal we must carry out our own assessment.[27] There are no specific findings of credibility by the Associate Judge, although clearly he did not find that Mr Ireland lacked credibility or was an untrustworthy witness.

[33] Mr Ireland gave evidence before the Associate Judge. As he had done in the letter, he put the agreement on the basis that it was an arrangement that West City would be paid out of the Council bonds. This in itself would not be an assignment. He also acknowledged that he could not obtain the benefit of the bond until the works were complete. He did, on one occasion, assert that he had told Mr Andersen that he would not do any work "until, unless you assign me the bond". However, on another occasion he asserted "what he agreed to do is pay us using the Council bond money. This [the signed deed] is just the assignment of it."

[34] There are tensions in Mr Ireland's evidence. At times he speaks of no more than a stipulation to pay from the bond monies when they become available. On occasions he speaks of an agreement to assign with immediate effect. On others he deposes that the arrangement was subject to a formal agreement, the terms of the formal agreement being different from the terms he asserted were orally agreed. In particular, there is a vagueness about when the bond was to be assigned. Was it on the completion of work, or rather once the Council agreed there had been satisfactory completion?

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26 *Rea v Russell* [2012] NZCA 536 at [24].

27 *Austin, Nichols & Co Inc v Stichting Lodestar* [2007] NZSC 103, [2008] 2 NZLR 141 at [3] and [5].

[35] In discerning intention the Court only had the evidence of Mr Ireland. The principal of St George, Mr Andersen, did not give evidence. As noted earlier,[28] Mr Ireland in his affidavit adopted as his evidence what his letter of 6 November 2005 stated. The following propositions came out of that letter:

(a) Mr Ireland would not proceed with the planting and minor works until the $47,532.12 due on 31 January 2004 was paid.

(b) The quote for the further work to be done was $46,376.05 plus GST.

(c) Payment of these amounts was intended to come from the bond monies held by the North Shore City Council.

(d) That arrangement was acceptable to Mr Ireland, provided it was "done with a formal agreement".

(e) The work was done by January 2006, but no attempt was made to execute an assignment until 3 October 2006.

[36] There is no doubt that it was within the authority of Mr Andersen to come to an agreement on behalf of West City. Mr Ireland does not appear to have had any direct knowledge of the deed that was prepared, and observed in his affidavit that it was "kept in the bottom drawer" and not actually signed at that time.

[37] The Associate Judge carefully analysed the evidence relating to the claimed agreement to assign the bond. After listing the points for and against an agreement he set out six points supportive of an intention to assign,[29] and concluded:

> [47] It seems likely that the liquidators' concerns over the existence of an agreement will never have a definitive answer. However, I am satisfied on the evidence before the Court that it is more likely than not that Mr Ireland and Mr Andersen came to an agreement in or about November 2005 that St George would assign the bond to West City. The liquidators have the onus of proving a transaction within the specified period. I find that they have not done so. ...

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28 At [9] above.

29 *Levin v West City Construction* Ltd, above n 1, at [46].

[38] The Associate Judge's choice of words is significant. He noted that he was satisfied on the evidence that it was more likely than not that an agreement was reached that St George "would" assign the bond to West City. We must consider whether, if the Associate Judge was indicating in that passage that there was a binding agreement reached to assign in the future, that is a correct analysis of the facts.

[39] We agree with the Associate Judge that it is not possible to discern whether there was an absolute or conditional assignment from what Mr Ireland said. However, we go further. We are unable to discern on the facts any intention of the parties to be bound by an agreement to assign in November 2005. To the contrary, Mr Ireland stated categorically in the letter on which he relied in his affidavit, and which is the only documentary evidence, that the arrangement would "not be acceptable" until there was a formal agreement. There was no formal agreement until 3 October 2006, which was within the two year period.

[40] In addition to the explicit statement by Mr Ireland that West City would not be bound until an agreement was signed, there are the following factors that indicate this was so:

(a) The agreement that was drafted by St George's solicitors (it seems without Mr Ireland's knowledge) was put in the "bottom drawer", an indication that the issue of the parties entering into a contract to assign was shelved for the time being.

(b) West City continued to submit invoices for the further work done through December 2005 and January 2006, indicating they were hoping to be paid in the usual way, rather than there being a promised payment by an assignment.

(c) In addition to the invoices there was a letter sent on 13 June 2006 by West City to the works certifier setting out the various unpaid claims, some of which were certified and some of which it was stated were to be certified in the future. This is not consistent with there being in

existence a binding agreement to settle a debt by the assignment of the bonds. If there was an agreement to assign, it should have been perfected at that time, and payment would have come from the bond funds.

(d) There is no evidence that the Council was informed of the alleged assignment at the time of the July completion, which may have been expected if there had been a binding agreement.

(e) When the deed of assignment was executed on 3 October 2006, it was with a new entity. West City Construction Ltd had changed its name to Ireland Holdings Ltd and a new company had been incorporated in which Mr Ireland's sons were directors, and which took the name West City Construction Ltd. The deed of assignment was with the new West City Construction Ltd. This is indicative of the fact that the parties did not see the original understanding with West City Construction Ltd as a binding equitable assignment. The Associate Judge did not have the benefit of a submission on this point.

(f) It was a condition of the release of the bond that there be satisfactory completion of the works by 19 November 2005, subject to any extension granted by the Council. It would have been surprising for West City to have surrendered its rights of recovery in exchange for an assignment, when the bond itself might never be released or if it was, at some distant time in the future.

[41] It is indicative of the lack of any agreement to assign that some critical details were not agreed. While the subject matter, the bond, is clear on Mr Ireland's evidence, he did not refer to any discussions as to the point at which the bond was to be payable. The Associate Judge appeared to assume that the assignment would come into effect when the works were completed. He assumed that as soon as the works were physically complete that was sufficient. The issue arises, completed to what standard? The Associate Judge assumed that physical completion was enough. The assignment document signed on 3 October 2006 stated that West City was to

undertake and complete the works on or before the completion date "in a proper and workman-like manner and to the full satisfaction of St George and the Council".[30] It was stated at cl 2.4 that the decision of the Council as to what constitutes satisfactory completion of the work should be accepted by the parties as final and binding on each of them.

[42] This uncertainty as to this basic term is indicative of a lack of intention to assign, and would have made it impossible to order specific performance of the alleged oral agreement. This indicates that at the most, all that occurred in November 2005 was an agreement in principle. There were matters still to be resolved before the parties regarded themselves as bound.

[43] We accept the Associate Judge's observation that Mr Ireland was "a man more versed in the subtleties of construction than in the subtleties of language".[31] However, Mr Ireland appears to have been a successful and shrewd businessman. If it had been agreed that the bond was to be transferred to West City, he would have used words in his correspondence at the time and in his original affidavit which indicated this. However, both the letter and the original affidavit indicated no more than a statement by Mr Andersen that the bond monies when received would be used to pay West City, and if an acceptable formal agreement could be reached in relation to those bond monies in the future, then that would be an acceptable mode of payment.

[44] We do not consider it surprising that Mr Ireland would have been prepared to commit West City to further work without payment of outstanding accounts, and without an assignment. The parties had a long working relationship involving very large sums of money. Clearly they trusted each other, and indeed that trust was warranted, as a deed of assignment was executed in due course on 3 October 2006.

[45] Therefore, we reach a view on the facts different from that of the Associate Judge. The material before the Court does not show that the parties intended to enter into a binding assignment in November 2005. There is written evidence that there

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30 Clause 2.1 of the deed of assignment.
31 At [44](a).

was an understanding that, if and when St George was paid the bond monies, they would go to meet the indebtedness to West City. There may have been an understanding that there could be an assignment if that was necessary in the future. However, the evidence does not show an intention to assign or enter into an agreement to assign that was to bind the parties in November 2005.

[46] Therefore, we are satisfied that the agreement to assign was the agreement signed on 3 October 2006, and that there was no binding earlier assignment or agreement to assign. Our assessment differs accordingly with that of the Associate Judge, and we will allow the appeal.

The cross-appeal

[47] Two points were raised on the cross-appeal:

(a) The Judge was wrong to conclude that the respondent would not have established a defence under s 296(3) of the Companies Act; and

(b) The Judge erred in considering whether he would have exercised his discretion under s 295 of the Companies Act.

[48] The Associate Judge held the assignment was not in the ordinary course of business, as the ordinary course was for payments to be made directly to West City.[32] There was originally in the notice of cross-appeal a ground that the Judge was wrong to conclude that the transaction would not have been in the ordinary course of business. It was not pursued before us. We have no doubt the Associate Judge's decision on that point was correct, given that there was no evidence of any other assignments as a method of payment.

[49] The Associate Judge held that should the assignment have been within the two year period, West City did not have a defence under s 296(3). Section 296(3) provides:

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32 *Levin v West City Construction Ltd*, above n 1, at [48].

296 Additional provisions relating to setting aside transactions and charges

…

(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 / suspicion of insolvency

[50] The Associate Judge did not accept that as at October 2006 West City could have honestly believed the deed did not involve any element of undue preference, or that an average businessperson in the shoes of West City would not have had a positive feeling of apprehension or mistrust about St George's insolvency.[33]

[51] The Associate Judge relied on the fact that sections had been released for sale for a period of two years by the time the deed was executed and the debt was still outstanding. We accept Mr Davey's submission for West City that there was insufficient evidence to conclude that this in itself was an indication of bad faith.

[52] However, we accept the Associate Judge's conclusion that Mr Ireland could not have honestly believed the deed did not involve an element of undue preference, or that an average businessperson in the shoes of West City would not have felt apprehension that St George was or would become insolvent.[34] West City had been owed money since January 2004. A delay in payment of over 33 months must have alerted West City to a financial problem, and therefore to the fact that a transfer of a valuable asset to West City in October 2006 involved an element of undue preference.

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[33] At [51].
[34] At [51].

[53] The assignment of the debt in October 2006 was out of the ordinary, and had the obvious effect of denying any other creditors (and there were bound to be some) of a share of the asset. We consider the Associate Judge was right in inferring that Mr Ireland's concern in October 2006 was to be in a position to obtain payment directly from the Council.[35] A reasonable person in his position could not have failed to suspect that the company was or would become insolvent, and he did not receive the payment in good faith.

The giving of value

[54] The Associate Judge did not find it necessary to consider whether value had been given.[36] This Court has recently held in *Farrell v Fences & Kerbs Ltd* that value must be given at the time the property is received, rather than at the time the antecedent debt was created.[37] The assignment was signed on 3 October 2006. The consideration and the contractual work carried out by West City that was contemplated by the deed of assignment had been carried out. Mr Ireland referred to some maintenance work that was done after the deed of assignment, but the evidence of the extent and value of that work was vague, and it is far from clear that the work was done because of the assignment. There is no reference to this further work in the assignment. We are not satisfied that value was given for the assignment on or about 3 October 2006.

[55] Therefore, in our view none of the s 296(3) requirements were met. The payment was not received in good faith. A reasonable person in West City's position would have suspected the company was insolvent and no value was given for the transfer.

The s 295 discretion

[56] The second issue raised on the cross-appeal is whether the Court in its discretion would have declined to make an order for the payment of the sum of $104,350 by West City to the liquidators. The Associate Judge determined that he

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35 At [46](e).
36 At [52].
37 *Farrell v Fences & Kerbs Ltd,* above n 5, at [86].

would not have declined to make an order on the grounds of delay.[38] Given that there is a six year limitation period,[39] the delay in applying to set aside the transaction of approximately four years (during which there was some correspondence concerning the transaction being voidable) was, as the Associate Judge found, insufficient to warrant a refusal to make an order under s 295.

[57] The Associate Judge also rightly rejected another argument that because West City made a relatively modest profit, no order should be made. That was West City's decision and does not come close to a level of unfairness that would warrant an order that derogated from the *pari passu* principle.

Result

[58] The appeal is allowed and the cross-appeal is dismissed.

[59] An order is made setting aside the assignment of the North Shore City Council bond.

[60] West City Construction Ltd is to pay the amount of $104,350 to the appellants.

[61] The appellants are to have costs for a standard appeal for one counsel on a band B basis in this Court.

[62] The order that West City was entitled to costs on a scale 2B basis together with disbursements in the High Court is quashed, and substituted by an order that the appellants as liquidators are entitled to costs on a scale 2B basis together with disbursements as fixed by the Registrar of the High Court.

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38 *Levin v West City Construction Ltd*, above n 1, at [57].
39 Limitation Act 1950, s 4.

[63] Any outstanding costs or interest issues are to be determined in the High Court.

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