

**IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY**

**CIV 2014-404-000627
[2014] NZHC 1416**

UNDER the Companies Act 1993
IN THE MATTER OF the liquidation of SM Food Limited (In
Liquidation)
BETWEEN DAMIEN GRANT and STEVEN KHOV
Plaintiff
AND IL FORNO LIMITED
Defendant

Hearing: 20 June 2014

Appearances: A Ho and J K Boparoy for the Plaintiff
S Greer for the Defendnat

Judgment: 23 June 2014

JUDGMENT OF GILBERT J

*This judgment is delivered by me on 23 June 2014 at 3pm
pursuant to r 11.5 of the High Court Rules.*

.....
Registrar / Deputy Registrar

Introduction

[1] The liquidators of SM Food Limited apply to set aside as a voidable transaction a payment of \$8,063.06. This payment was allegedly made by the company to one of its creditors, Il Forno Limited, on 3 May 2013, four days before the company was placed in liquidation.

[2] Il Forno accepts that the payment was made within the specified period, at a time when SM Food was unable to pay its debts, and that there is no defence available under s 296(3) of the Companies Act 1993. However, it opposes the application on the following grounds:

- (a) The notice served by the liquidators pursuant to s 294 of the Act is defective because it does not specify the transaction to be set aside.
- (b) The relevant transaction was between Il Forno and Skipper Trustees Limited, the sole shareholder of SM Food, not SM Food.
- (c) The liquidators have not proved that the transaction was an insolvent transaction in terms of s 292(2) of the Act because they have not proved that the payment enabled Il Forno to receive more towards satisfaction of its debt than it would receive, or would be likely to receive, in the company's liquidation.

The transaction

[3] SM Food appears to have been insolvent well before it was placed in liquidation in May 2013. Its financial statements for the year ended 31 March 2012 disclose that its total liabilities exceeded its total assets by more than \$650,000. In the following year its liabilities exceeded its assets by over \$850,000. The company's trading was supported by substantial shareholder advances. The balance outstanding to Skipper Trustees as at 31 March 2012 in respect of its shareholder advances was approximately \$357,000. By 31 March 2013, this had increased to \$1,294,250.

[4] Il Forno operates a bakery and café business. It supplied bread to SM Food to the value of \$3,759.75 on credit. On 8 April 2013, Il Forno served a statutory demand and on 17 April 2013 it appeared as a creditor in support of a liquidation application by another creditor, European Foods Limited. European Foods received payment of its debt following which Il Forno was substituted as the plaintiff in the winding up proceedings.

[5] On 1 May 2013, Skipper Trustees and Il Forno entered into a deed of settlement in the following terms:

THIS DEED dated the 1st day of May 2013

BETWEEN **SKIPPER TRUSTEES LIMITED** (“Skipper”)

AND **IL FORNO LIMITED** (“Il Forno”)

BACKGROUND

A. Il Forno entered into an agreement with Seafood and More Limited (now known as SM Food Limited) to provide goods which are yet to be paid for. This debt has been accruing interest and costs.

B. An application to put SM Food into liquidation was made by European Foods Limited. Il Forno filed an appearance to substitute as the plaintiff in liquidation proceedings against SM Food Limited. The High Court has made an order substituting Il Forno as creditor in place of the original plaintiff, European Foods Limited.

C. Skipper is the shareholder of SM Food Limited. Skipper has agreed to repay all debt owing to Il Forno by SM Food Limited in consideration for Il Forno withdrawing liquidation proceedings against SM Food Limited and the Court discontinuing such liquidations (sic) proceedings.

THE PARTIES AGREE AS FOLLOWS:

1. Il Forno will accept a payment of \$8,063.06 inclusive of GST (the “Settlement Amount”) from Skipper in full and final settlement of all matters between Il Forno, SM Food Limited and Skipper. This payment shall be made in consideration of: (i) Il Forno agreeing to withdraw liquidation proceedings against SM Food Limited; and (ii) the Court ordering that such proceedings are discontinued (together, the “Conditions”).

2. Skipper agrees that it shall pay the Settlement Amount into its Solicitors’ Trust Account and procure that a solicitor’s undertaking is given to Il Forno’s solicitors that upon satisfaction of the Conditions, the Settlement Amount shall be immediately paid in cleared funds to Il Forno (the “Undertaking”).

3. Il Forno reserves the right to not withdraw liquidation proceedings against SM Food Ltd in the event that: (i) the Conditions cannot be satisfied;

or (ii) the Undertaking has not been received prior to the commencement of the 3 May 2013 hearing of the liquidation proceeding.

4. This deed may be executed in two or more counterparts and the counterparts together may constitute one binding document providing that each party has signed one counterpart.

[6] That same day, 3 May 2013, Skipper Trustees paid the sum of \$8,063.06 to its solicitors, Wynn Williams. The amount was receipted into Wynn Williams' Trust account in the name of Skipper Trustees. The money was immediately transferred to the trust account of Daniel Overton Goulding, Il Forno's solicitors. The liquidation proceeding was discontinued by Il Forno that day.

[7] On 5 May 2013, Il Forno issued a tax invoice to Skipper Trustees for \$8,063.06 in respect of the payment made under the deed. It also issued a credit note to SM Food for \$4,186.05 plus GST. This comprised the sum of \$3,269.35, being the bad debt due from SM Food which was written off, unrecovered costs of \$838.81, and late fees written off of \$77.89 (plus GST in each case).

[8] On 7 May 2013, Skipper Trustees resolved to place SM Food in liquidation.

Was the notice defective?

[9] Section 294(2)(c) of the Act sets out the requirements of the notice a liquidator must file and serve in order to set aside a voidable transaction under s 292. One of these requirements is that the notice must specify the transaction to be set aside.

[10] The liquidators' notice described the transaction they sought to avoid in the following terms:

1 This document notifies you that:

1.1 Damien Grant and Steven Khov as liquidators of SM Foods Limited (In liquidation) ("the company") want to have set aside the following transaction by the company that are voidable under section 292 of the Companies Act 1993 ("the Act"):

a 03/05/13 \$8,063.06

[11] Mr Greer submits that the liquidators' description of the transaction does not sufficiently specify the transaction because it does not identify:

- (a) The type of transaction, namely that it was a payment.
- (b) The form of the transaction, namely an electronic funds transfer from Wynn Williams solicitors' trust account to the trust account of Daniel Overton Goulding.
- (c) The parties to the transaction.
- (d) The representative capacities of the parties to the transaction, namely Wynn Williams on behalf of Skipper Trustees and Daniel Overton Goulding on behalf of Il Forno.

[12] I do not accept Mr Greer's submission. The notice must be read as a whole, as he accepts. It is clear from reading the notice as a whole that the transaction referred to was allegedly between SM Food and Il Forno and involved a payment of \$8,063.06 on 3 May 2013. This is clear from reading cl 1.1 and cl 1.6 of the notice which relevantly states:

1.6 In giving this notice, the liquidators rely on the following grounds:

...

- b The **payment** enabled Il Forno Limited to receive more towards the satisfaction of their debt than they would be likely to receive in the company's liquidation. (emphasis added).

[13] The notice was clear. There could be no doubt that the transaction the liquidators were referring to in their notice was the payment of \$8,063.06 made to Il Forno on 3 May 2013.

Was the transaction between SM Food and Il Forno?

[14] Mr Ho submits that the payment made by Skipper Trustees to Il Forno was a payment on behalf of SM Food for the following reasons:

- (a) Skipper Trustees had made substantial shareholder advances in the past to enable SM Food to pay its creditors.
- (b) All such advances were recorded in the balance sheet of SM Food as current liabilities and were repayable to Skipper Trustees on demand.
- (c) Il Forno negotiated the arrangement with SM Food's solicitors.
- (d) The solicitors acting for Skipper Trustees and SM Food advised that Skipper Trustees was making the payment in its capacity as shareholder of SM Food.

[15] In these circumstances, Mr Ho submits that, in substance, the payment was made by Skipper Trustees to SM Food and then from SM Food to Il Forno and would have been recorded in SM Food's financial records as an advance by Skipper Trustees.

[16] I do not accept this submission. The solicitors on both sides of the transaction were well aware that SM Food was insolvent and was likely to be placed in liquidation within days. They knew that any payment made by SM Food would almost inevitably be clawed back by a liquidator. The whole arrangement was designed to protect Il Forno from such an outcome. It was therefore essential that the payment was not made by SM Food.

[17] Although Skipper Trustees had made substantial shareholder advances to SM Food to enable it to pay its creditors in the past, a further such advance would not have achieved the desired objective in this instance and is not what occurred. Skipper Trustees did not advance monies to SM Food to enable it to pay its debt to Il Forno. Rather, it entered into a deed with Il Forno in terms of which it incurred an obligation to pay monies to Il Forno for which consideration was provided. The payment Skipper Trustees made was in discharge of that obligation. The amount paid substantially exceeded the debt due by SM Food to Il Forno but did not result in that debt being paid. This is confirmed by the fact that Il Forno issued a credit note writing off the debt due from SM Food as an irrecoverable bad debt, which it was.

[18] The creditors of SM Food were not disadvantaged by the transaction because SM Food did not pay the debt. The transaction had the effect of reducing the overall amount due to unsecured creditors by the amount of the debt owed to Il Forno. Mr Greer rightly accepts that Skipper Trustees has no right to claim against SM Food for the payment it made and is not entitled to prove in the liquidation for this sum or any part of it.

[19] Mr Ho accepts that at all times while the money was held in Wynn Williams' trust account, it belonged to Skipper Trustees. If Skipper Trustees had been placed in liquidation at that time, the funds would be payable to the liquidator of Skipper Trustees. SM Food could have no claim to the money. Equally, if Skipper Trustees had been placed in liquidation after the money was paid to Il Forno, the liquidator would have been entitled to avoid the transaction, as a transaction by Skipper Trustees, assuming the criteria set out in s 292 were satisfied.

[20] I conclude that the transaction was not a transaction by SM Food.

Was this an insolvent transaction?

[21] My conclusion that the payment was made by Skipper Trustees on its own behalf and was not a transaction of SM Food is sufficient to dispose of the application. Mr Greer argues that the application should be dismissed in any event because the liquidator has not proved that this was an insolvent transaction in that the payment enabled Il Forno to receive more towards satisfaction of its debt than it would receive, or would be likely to receive, in the company's liquidation. Mr Greer argues that the liquidators have not provided sufficient information about the prospect of paying creditors by pursuing claims against SM Food's director.

[22] I do not accept this submission. The most recent financial statements of SM Food, which are for the year ended 31 March 2012, show total assets of \$1,270,431 exceeded by total liabilities of \$1,929,061. The deficiency in shareholder's funds of \$658,630 would have been far greater had goodwill not been accounted for at \$1,527,000. The liquidators have provided evidence that there are four secured creditor claims totalling \$13,257.36, two preferential creditors with

claims totalling \$576,197.46, and 17 unsecured creditor claims totalling \$381,477.50.

[23] It seems clear from the evidence that unsecured creditors are most unlikely to receive any payment, let alone full payment, of their debts. If SM Food had made the payment, I have no doubt that it would have been an insolvent transaction. I reject Mr Greer's submission to the contrary.

Result

[24] The application is dismissed.

[25] If the issue of costs cannot be resolved, the respondent should file and serve a memorandum within 14 days of the date of this judgment. Any memorandum in response should be filed and served within 14 days thereafter.

M A Gilbert J