IN THE COURT OF APPEAL OF NEW ZEALAND

CA342/2015
[2016] NZCA 301

BETWEEN	VIVIEN JUDITH MADSEN-RIES AND HENRY DAVID LEVIN (AS LIQUIDATORS OF TE PUA ROAD DEVELOPMENT LIMITED (IN LIQUIDATION) Appellants
AND	DONOVAN DRAINAGE AND EARTHMOVING LIMITED Respondent

Hearing:	12 April 2016
Court:	Kós, Clifford and Brewer JJ
Counsel:	P C Murray and M J Hammer for Appellants D M Grindle and H King for Respondent
Judgment:	4 July 2016 at 11.00 am

JUDGMENT OF THE COURT

A The appeal is dismissed.

B The appellants are jointly and severally to pay the respondent's costs for a standard appeal on a band A basis, together with usual disbursements.

REASONS OF THE COURT

(Given by Clifford J)

Introduction

[1] Ms Madsen-Ries and Mr Levin, the appellants, are liquidators (the Liquidators) of Te Pua Road Development Ltd (in liquidation) (Te Pua). On 3 September 2014 the Liquidators issued a notice under s 294 of the Companies Act 1993 (the Act) to set aside, as insolvent transactions in terms of s 292 of the Act, payments made by Te Pua to Donovan Drainage and Earthmoving Ltd (Donovan Drainage) totalling $184,978.01. Donovan Drainage objected. The Liquidators subsequently applied to the High Court for orders to set aside those transactions. The Liquidators' application was heard by Associate Judge Christiansen on 15 May 2015.

[2] In his judgment of 20 May 2015 the Associate Judge declined the Liquidators' application.[1] The Liquidators now appeal that decision. They say that although the Associate Judge was correct when he found that the challenged payments did constitute insolvent transactions, he was wrong in finding that Donovan Drainage had satisfied the test for the bar on recovery provided by s 296(3) of the Act. In particular, the Judge was wrong to have found that a reasonable person in Donovan Drainage's position would not have suspected, and that Donovan Drainage did not have reasonable grounds for suspecting, Te Pua was or would become insolvent.

Facts

[3] Donovan Drainage carries on business in rural Northland as a drainage and earthworks contractor. The company was incorporated in 2003. Its principal, Mr P Donovan, has been involved in earthwork contracting and related industries for more than 30 years. In June 2008 Donovan Drainage contracted to provide earth and drainage works for Te Pua at a property in Te Pua Road, Kaikohe. Donovan Drainage's tender for the work, which it priced at $140,225.50 (excluding GST), was accepted by Te Pua on 4 June 2008. Donovan Drainage began work shortly thereafter. By the end of September Donovan Drainage had completed the bulk of

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1 *Madsen-Ries v Donovan Drainage and Earthmoving Ltd* [2015] NZHC 1081, [2015] NZCCLR 13.

the work. On 30 September it issued an invoice for work done for $127,441.69 including GST.

[4] On 28 October 2008, before that invoice was paid, Te Pua's office manager Mr Visser called on Mr Donovan on site to advise of some issues with payment. Mr Visser described that meeting in an email later that day to fellow company officers in the following terms:

> I made a site visit today and the project is looking fantastic, the power both over head and under ground have been installed and will be connected by the end of this week. Thomson Survey will have a team on site before the end of this week and will complete the easement survey for the power lines, 223 is expected by the end of this week and we could be applying for 224c by next week, it could take up to two weeks for the approval, Nicolene indicated that we should then allow LINZ another 18 days to title, could be sooner if we are lucky.
>
> Outstanding Account for Donovan Drainage:
>
> I went to Donovans Drainage today to break the news that we do not have the funds available at present to pay our outstanding accounts due to the finance mess. Not a pleasant job.
>
> Well as it was to be expected Peter Donovan was not a happy man as he has to date spent about $150,000.00 on our project and upon completion including the fencer will have spent about $190,000, he did however appreciate the fact that I presented our case in person and therefore feels that he could trust us.
>
> We agreed to the following:
>
> Peter will continue and complete the job; he will inform the fencer as they have a business arrangement.
>
> I offered:
>
> 1. 15% interest per annum.
>
> 2. I have submitted a GST claim (based on DD first invoice submitted) which will result in a $14000.00 refund which I will be paying over to Donovan Drainage.
>
> 3. We will provide DD with security; he prefers lot 8 on Baldrock as the only mortgagee registered is Alan Collins not a bank as he does not want any lots on Te Pua. I have spoken with Alan and he has indicated that he will approve it.
>
> 4. Peter Donovan would only want the security if the bank did not allow a roll over and or they came up with ridiculous terms, he would also like it to be indicated that he is a preferred creditor and

> upon settlement of lot 5, will want to be paid in full including interest.

[5] Shortly after that meeting, and reflecting Mr Visser's assessment of the extent of the works that had by then been completed, Donovan Drainage issued Te Pua a further invoice, dated 31 October 2008, for $48,756.38.

[6] On 20 November 2008 Te Pua paid Donovan Drainage $120,000 on account of the 30 September 2008 invoice.

[7] Donovan Drainage issued further invoices for work at the Te Pua Road site dated 30 November 2008 and 28 February 2009 for $8,780.63 and $39,966.75 respectively. The February 2009 invoice reflected work carried out by a fencing contractor Donovan Drainage had introduced to Te Pua. Donovan Drainage did not itself carry out that work and the invoice was passed through Donovan Drainage as a matter of convenience.

[8] Further payments were received on 2 December 2008 and 19 January 2009. The total record of invoices rendered by Donovan Drainage, and of payments made by Te Pua, is as follows:

Date	**Invoice Amount ($)**	**Payment amount ($)**
30/09/2008	127,441.69	
31/10/2008	48,756.38	
20/11/2008		(120,000.00)
30/11/2008	8,780.63	
02/12/2008		(7,441.00)
19/01/2009		(8,780.63)
19/01/2009		(48,756.38)
28/02/2009	39,966.75	
Totals	$224,945.45	($184,978.01)

[9] So, by 19 January 2009 all Donovan Drainage's outstanding invoices had been paid for the work it had done. Subsequently, and although Te Pua sold a further two of the five lots comprising the development, the project failed. On 30 June 2010 Te Pua was placed in liquidation, and the appellants appointed liquidators, on the

petition of the Commissioner of Inland Revenue. Donovan Drainage's final February 2009 invoice remains unpaid.

[10] The Liquidators gave notice on 3 September 2013, after they had discovered Mr Visser's email, seeking to set aside all of those payments as insolvent transactions.

The law

[11] Liquidators can by notice set aside what is known as a voidable transaction between a company and a creditor, if the creditor does not object.[2] If the creditor does object, the liquidator can then apply to the Court to set the transaction aside.[3] There are two categories of voidable transaction: insolvent transactions and voidable charges. Section 292 of the Act deals with the voidability of insolvent transactions. As relevant it provides:

> **292 Insolvent transaction voidable**
>
> (1) A transaction by a company is voidable by the liquidator if it—
>
> (a) is an insolvent transaction; and
>
> (b) is entered into within the specified period.
>
> (2) An **insolvent transaction** is a transaction by a company that—
>
> (a) is entered into at a time when the company is unable to pay its due debts; and
>
> (b) enables another person to receive more towards satisfaction of a debt owed by the company than the person would receive, or would be likely to receive, in the company's liquidation.
>
> (3) In this section, **transaction** means any of the following steps by the company:
>
> …
>
> (e) paying money (including paying money in accordance with a judgment or an order of a court):
>
> …

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2 Section 294(3).
3 Section 294(5).

[12] Where a transaction is set aside as an insolvent transaction, the Court may make a variety of orders including, where the transaction is the payment of a debt to a creditor, that the creditor repay the amount it received. Section 296(3) provides, however, that:

> (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.

[13] In the 1993 Act as enacted the s 292 threshold test was, as now, expressed by reference to a transaction made when a company was "unable to pay its debts". The availability of the s 296(3) defence then depended on the Court forming the view that it would be "inequitable to order recovery or recovery in full". The 2006 amendments to the Act[4] substituted the Court's view of the "inequitable" factor for the lack of suspicion test.

[14] In *Personal and Corporate Insolvency Legislation* the authors comment on that new test as follows:[5]

> In Australia, there have been some problems in applying this complicated test, and it has been confirmed that each limb covers different, although overlapping, factors.
>
> The defence in s 296(3) contains both subjective and objective elements. The first element requires the recipient to have subjective good faith, but the second requires him or her to prove that a reasonable person would not have suspected insolvency or future insolvency. However, even this ostensibly objective test refers to a "person in [the recipient's] position", that is, imbued with their characteristics in relation to the insolvent company. It has been held that this element means that the hypothetical reasonable person must be,

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4 Companies Amendment Act 2006.

5 David Brown and Thomas GW Telfer *Personal and Corporate Insolvency Legislation: Guide and Commentary to the 2006 Amendments* (2nd ed, LexisNexis, Wellington, 2013) at 107–108 (footnotes omitted).

> not the "man on the Bondi bus", or even an ordinary business person, but a person with the recipient's business qualifications.
>
> Secondly, the cumulative test requires proof that the recipient did not have reasonable grounds for suspecting, which can be interpreted as meaning that either they did not have any grounds, or the grounds which they had were unreasonable ones (mere hunches or rumours, perhaps). This second limb does at least look at the recipient's state of knowledge, and is therefore more subjective. Nevertheless, it is difficult for the recipient to bear the onus of proof of a negative, or actually a double negative, in this case. The defence has been described as "fairly demanding" for a recipient to satisfy. Fortunately, the test of a "suspicion" has been said to be "more than a mere idle wondering", but rather "a positive feeling of actual apprehension or mistrust".

[15] As can be seen from that commentary, s 296(3) is not without its difficulties.

Challenged High Court decision

[16] At the hearing of the Liquidators' application it was not disputed that the challenged payments were transactions, that they had been made within the specified period (that is within the two-year period prior to Te Pua's liquidation), and in terms of s 292(b) that they had enabled Donovan Drainage to receive more towards satisfaction of the debts owed to it than it would have received or would have been likely to receive in that liquidation. In terms of s 292, the only question for the Associate Judge was whether the challenged payments had been made at a time when Te Pua was unable to pay its due debts.

[17] Mr Levin's opinion was that Te Pua had been insolvent (unable to pay its due debts) from at least 31 March 2008. Donovan Drainage disputed that. The Associate Judge made no explicit finding on that point. Given that he went on to consider the availability of the s 296(3) defence, on appeal the Liquidators argued that the Associate Judge had made an implicit finding of insolvency. Donovan Drainage approached the appeal on a similar basis, and did not challenge that implicit finding. We will, therefore, consider the appeal on that basis. In taking that approach we are not, however, endorsing Mr Levin's opinion or that implicit finding, if indeed such a finding can be inferred. Indeed, on the facts as we understand them, we have significant reservations as to the correctness of Mr Levin's opinion.

[18] In terms of s 296(3), it was accepted that Donovan Drainage had given value for the challenged payments, that is, the work it had done for Te Pua. The issues were whether Donovan Drainage had proved it had acted in good faith and whether it had proved the absence of suspicion of insolvency. On appeal the Liquidators did not challenge the Associate Judge's finding that Donovan Drainage had acted in good faith. Rather, their challenge was to the Associate Judge's finding that Donovan Drainage had discharged its onus on the question of suspicion of insolvency. We will, therefore, focus on that aspect of the challenged decision.

[19] The Associate Judge first summarised the evidence. Affidavits had been provided by Mr Donovan and Mr Levin. Mr Donovan was required for cross-examination; Mr Levin was not. As he had done on the question of ability to pay due debts, on the question of suspicion of insolvency Mr Levin relied particularly on Mr Visser's email. As relevant he also deposed that his inquiries as liquidator had established that:

(a) On 20 November 2008 Te Pua raised bridging finance of $120,000 from (we infer) a related party. The receipt of those funds enabled it to pay Donovan Drainage the same amount that day.

(b) On 2 December 2008 Te Pua's shareholder, Global Business Link Ltd, transferred $7,500 into Te Pua's current account, enabling Te Pua to pay to Donovan Drainage $7,441 that day.

(c) On 16 January 2009 the sale of Lot 5 settled. On settlement Te Pua received $601,111.36 being the purchase price, minus the deposit already paid ($60,000) plus rates apportioned to the purchaser ($1,111.36). After Te Pua's solicitors had applied those funds to costs and disbursements related directly to the sale, the available balance was $322,830.41. The solicitors then applied that balance to a range of more general costs of the subdivision incurred by Te Pua, including legal fees, development contributions and utility fees leaving a balance of $232,977.72. That sum was deposited in Te Pua's account with the BNZ.

(d) That balance was applied that day:

(i) to repay the $120,000 bridging finance (which had funded the 20 November payment to Donovan Drainage); and

(ii) to make the two payments to Donovan Drainage of $48,756.38 and $8,780.63.

[20] There was no suggestion that Donovan Drainage was aware of those details. All it knew, as relevant, was what Mr Visser had told it and the fact that it was being paid over the months of November to January.

[21] Following the sale of Lot 5, Te Pua had a GST liability for the two month period ending 30 January 2009. Its return for that period was due by 28 February. In the return it filed on 25 February 2009, GST of $63,870.74 was payable. That return was annotated:

> The client is not in a position to pay the GST by friday. They would like to propose monthly repayments of $5,000 a month starting from the 28th March 2009 so that the balance is paid off by April 2010.

[22] We were not given any evidence as to whether or not any such arrangements, formal or informal, were made.

[23] Mr Donovan's evidence, based on 30 years in the earthwork contracting and related industries in the Northland area, was that Donovan Drainage's dealings with Te Pua were very typical of the way that industry operated. Basically, development companies could not realise the proceeds of the development until titles could be issued: often payments to contractors would only be made after the developer had received the proceeds from sales of the subdivided lots. Even then, payments were often late. Unfortunately, Mr Donovan said, that was something of the "nature of the game" in the civil engineering and property development sectors. Although the position had improved since the passage of the Construction Contracts Act 2002, it was not — before the global financial crisis — unusual to have large amounts owing on the strength of the sale of properties on completion of a subdivision. "Pay when paid" was not uncommon.

[24] There was, in Mr Donovan's view, nothing speculative about the Te Pua development. Donovan Drainage had already done work for Mr Visser and his business partners. They were, Mr Donovan said, impressed with Donovan Drainage's performance and approached Donovan Drainage to do the work at Te Pua Road. Te Pua Road was a small, semi-rural, development. At the time land developments and sales were robust. Prior to contracting with Te Pua, Donovan Drainage had obtained a valuation of the property, both for mortgage purposes and when subdivided. The mortgage valuation of $1.2 million provided for mortgage financing of $800,000. The five lots were assessed as having a sales value of just over $2 million. A person known to Mr Donovan had contracted to buy one section, and he understood that person was intending to buy another. Mr Donovan thought those sales alone were sufficient to cover the development costs.

[25] The development went well. The meeting with Mr Visser on 28 October was not unusual. Mr Donovan understood Te Pua had a temporary cashflow issue. But from his point of view, there was nothing done or said by Mr Visser or Te Pua that put him on notice that the company's solvency might be in doubt or, indeed, that it was or would become insolvent. Moreover, Northland was a small area. If Te Pua or its parent entity had been in financial difficulties, Mr Donovan would have expected to hear about it.

[26] Events after the meeting with Mr Visser did not change Mr Donovan's view of things. Donovan Drainage received a first payment on 20 November 2008. From Mr Donovan's point of view, Donovan Drainage was being paid by Te Pua fairly promptly. The October and November invoices were paid in full on 19 January. Mr Donovan thought the development, to the extent it had had any problems, was back on track and was either making sales or being well supported by its financial backers. Too much should not be read into his discussions with Mr Visser on the possibility of security being provided. Given that Mr Visser had approached him, and had made the offer, Mr Donovan had acted cautiously in responding to it.

[27] In a reply affidavit, Mr Levin deposed that insolvency was not an uncommon occurrence in the property development industry. That was why property developments often had a relatively high failure rate and generated significant

consequent losses to creditors. Developers were often undercapitalised and so failed to pay creditors on time. Mr Visser's offer of security was an indicator of Te Pua's insolvency. In that context, the contents of Mr Visser's email spoke for themselves. What Mr Donovan learnt at that meeting would have put him on notice that Te Pua was insolvent or likely to become insolvent.

[28] In considering the availability of the s 296(3) defence and as to the law, the Judge noted that the Court's focus was to be on the circumstances prevailing at the times when the challenged payments were made. The question of solvency required a review of a company's financial position as a whole. A temporary lack of liquidity did not necessarily mean a company was insolvent.

[29] For the Liquidators, it had been conceded by the Liquidators in argument that there was no reason why Mr Donovan would have reasonably suspected Te Pua was insolvent prior to Mr Visser's visit. As to the events of that day, and thereafter, the Associate Judge essentially accepted the reasonableness of evidence of Mr Donovan. Mr Donovan, the Associate Judge recorded, had been forthright and honest. He was a very experienced provider of land development services. By the time of his meeting with Mr Visser on 28 October 2008, Donovan Drainage had all but completed the work for which its contract price had been accepted. At the end of that meeting, Mr Donovan had said he was left with a sense of trust and confidence. Mr Visser in his email had recorded that that was his impression as well.

[30] The Associate Judge found that Donovan Drainage had established that it did not have reasonable grounds for suspecting that Te Pua was or would become insolvent, and neither would a reasonable person in its position have so suspected. As we see it, the Associate Judge reached that conclusion for the fundamental reason that, given the facts, there was not enough in Mr Visser's email to blunt the probative force of Mr Donovan's evidence of his assessment at the time.

Appeal

[31] In challenging that conclusion, the Liquidators argue that insolvency in subs (b), properly understood, is co-extensive with an inability to pay due debts. That was not the approach the Judge had taken. Moreover, in considering whether

Donovan Drainage had proved the absence of suspicion of insolvency, the Associate Judge had failed to incorporate the necessary degree of objectivity in his analysis. He had placed too much reliance on Mr Donovan's personal, that is subjective, impressions.

[32] The wording of the voidable transaction provisions distinguishes between the concepts of a company being unable to pay its due debts (s 292(2)(a)) and of a company's insolvency (s 296(3)(b)). There is considerable authority, as the Liquidators acknowledged, that the test for liquidity is not co-extensive with the test of solvency, and that therefore a temporary liquidity problem — including an inability to pay a debt when legally due — does not necessarily establish insolvency. In *Madsen-Ries v Rapid Construction Ltd*,[6] another appeal against a decision of an Associate Judge finding a s 296(3) defence proven, this Court said:

> [17] In *Sandell v Porter*, …the High Court of Australia drew a distinction between knowledge of liquidity issues and knowledge of insolvency, stating:[7]
>
> > Insolvency is expressed in s 95 as an inability to pay debts as they fall due out of the debtor's own money. But the debtor's own moneys are not limited to his cash resources immediately available. They extend to moneys which he can procure by realisation by sale or by mortgage or pledge of his assets within a relatively short time — relative to the nature and amount of the debts and to the circumstances, including the nature of the business, of the debtor. The conclusion of insolvency ought to be clear from a consideration of the debtor's financial position in its entirety and generally speaking ought not to be drawn simply from evidence of a temporary lack of liquidity. It is the debtor's inability, utilising such cash resources as he has or can command through the use of his assets, to meet his debts as they fall due which indicates insolvency.

[33] This Court took the same approach in *Yan v Mainzeal Property and Construction Ltd*, a challenge to the placing of a company in liquidation on the grounds of insolvency.[8] In the High Court, the question of solvency — or the lack thereof — had been approached on a liquidity basis. Rejecting that approach, this Court said:

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6 *Madsen-Ries v Rapid Construction Ltd* [2013] NZCA 489, [2015] NZAR 1385.
7 *Sandell v Porter* (1966) 115 CLR 666 at 670.
8 *Yan v Mainzeal Property and Construction Ltd (in rec and in liq)* [2014] NZCA 190.

> [59] The test is one of solvency, not liquidity. A temporary lack of liquidity may not equate to insolvency if the debtor is able to realise assts or borrow funds within a relatively short time frame in order to meet its liabilities as they fall due. As it was put by Barwick CJ in the High Court of Australia's decision *Sandell v Porter*:[9]

The Court referred to the same passage from *Sandell* referred to in *Rapid Construction* above, then continued:

> [60] In *Sandell v Porter*, the Court was dealing with legislation referring to the ability of the debtor to meet liabilities from "his own moneys". There is no longer any such limitation in the relevant provisions of the Act. Nevertheless, the authorities recognise that the solvency of the company requires consideration of debts currently due or falling due within a relatively short time. As Barwick CJ emphasised in *Sandell v Porter*, the issue of solvency requires consideration of the debtor's entire financial position. A realistic commercial approach to the assessment is required.

[34] In the specific context of the suspicion test, this Court in *Rapid Construction* endorsed the same approach:[10]

> [19] The second issue is whether a reasonable person in Rapid's position would not have suspected, or would not have had reasonable grounds for suspecting, that Giant was or would become insolvent. This criterion is to be assessed in accordance with prevailing business practices, the factual matrix of the case and the trading relationship between the parties.
>
> [20] In *Meltzer v Allied Concrete Ltd* Associate Judge Abbott aptly summarised the law on this point as follows:[11]
>
> > [13] The Courts do not look for any single factor but rather judge the matters on the basis of the contemporary knowledge of the recipient, including potentially countervailing factors, which tended to dispel suspicion at the time. While cash-flow problems can raise a suspicion of insolvency they must be viewed in context; apparent cash-flow problems may be explained simply by a habit of delay in payment. Thus, a temporary lack of liquidity is generally insufficient for a conclusion of insolvency. When approaching the question of suspicion, it is important to apply commercial reality, derived from the particular industry, to the facts of the case.

[35] We think it is sufficient to point to that very clear authority to decline the Liquidators' invitation to take a different approach. The deliberate choice of the latter phrase in s 292 suggests there is, indeed, a difference. By the same token, the

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9 *Sandell v Porter*, above n 7.
10 *Madsen-Ries v Rapid Construction Ltd*, above n 6.
11 *Meltzer v Allied Concrete Ltd* [2013] NZHC 977 (footnotes omitted).

deliberate choice of the term "insolvent" in s 296(3) also suggests that it is the different, broader, meaning of that term that is to be used, rather than the slightly narrower approach to solvency found in the s 292, liquidity, first limb of the solvency test. In light of the very clear authority confirming that analysis, we see no reason to adopt the Liquidators' argument to the contrary.

[36] We therefore turn to the Associate Judge's assessment of whether Donovan Drainage had discharged the onus of proving that the defence was available.

[37] The concept of "suspicion" on reasonable grounds is, itself, well known. In the slightly different context of s 310(2) of the Act,[12] the Supreme Court adopted Australian authority on the meaning of a suspicion that something exists:[13]

> [21] In a statement which has long been regarded as authoritative on the statutory test, Kitto J said in *Queensland Bacon Pty Ltd v Rees* that a suspicion that something exists is:
>
> > … more than a mere idle wondering whether something exists or not; it is a positive feeling of actual apprehension or mistrust, amount to "a slight opinion, but without sufficient evidence", as Chambers's Dictionary expresses it. Consequently, a reason to suspect that a fact exists is more than a reason to consider or look into the possibility of its existence. The notion which "reason to suspect" expresses … is, I think, of something which in all the circumstances would create in the mind of a reasonable person in the position of the payee an actual apprehension or fear that the situation of the payer is in actual fact that which the sub-section describes — a mistrust of the payer's ability to pay his debts as they become due and of the effect which acceptance of the payment would have as between the payee and the other creditors.
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> Kitto J added that the test is an objective one. Hodgson J has conveniently summarised the position in *Hamilton v Commonwealth Bank of Australia*:
>
> > I accept that *Queensland Bacon* shows that it is insufficient that the circumstances give a reason to suspect the debtor *might* be insolvent: they must be such that the creditor should have suspected that the debtor *was* insolvent …

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12 The requirement to prove the absence of suspicion that a company was unable to pay its debts, which applies where a transaction that gives rise to an insolvency setoff was made within the specified period.

13 *Trans Otway Ltd v Shephard* [2005] NZSC 76, [2006] 2 NZLR 289 (footnotes omitted, emphasis in original).

[38] Acknowledging the slightly different wording of s 296(3), and both the subjective and modified objective assessments involved, we think that approach to the question as to the existence of a suspicion is appropriate in this context, too.

[39] We emphasise that assessment is to be made by reference to the position that Donovan Drainage was in when it received the challenged payments, and objectively the assessment that a reasonable person would have made in the same circumstances. The assessment is not to be made by reference to the circumstances prevailing when Mr Visser met with Mr Donovan. At that meeting, what Mr Visser had said to Mr Donovan was that Te Pua did not have funds available "at present" to pay the outstanding September invoice "due to the finance mess". It was accepted that the reference "due to the finance mess" was a reference to the impact that, by then, the global financial crisis was having on the New Zealand economy, and the property development sector in particular. Donovan Drainage was an experienced property development contractor. It had worked with companies with which Mr Visser was associated previously. Mr Donovan's assessment that Mr Visser was telling him of a temporary cashflow problem, and that he had no reason to believe Donovan Drainage would not be paid, is, in our view, an objectively reasonable one.

[40] Moreover, and as matters transpired:

(a) no "security" or other arrangements were agreed in writing as Donovan Drainage received a first payment on 20 November, which cleared by far the largest part of the 30 September invoice; and

(b) Donovan Drainage received further payments on 2 December and 19 January so that, by 19 January all Donovan Drainage's invoices for the work it had done were paid in full.

[41] In that context, we agree with the Associate Judge's conclusion that, on the combined objective and subjective test found in s 296(3), neither Donovan Drainage nor a reasonable person in its position would have suspected at the time of those payments that Te Pua was, or would become, insolvent. Rather, we accept Mr Donovan's assessment that, by then, both Donovan Drainage and a reasonable

person in its position would have concluded the Te Pua Road development was back on track (if it had been off track at all) and it was proceeding on a successful basis.

[42] There is also the consideration of whether or not the 30 September invoice was, in fact, due for payment when Mr Visser spoke to Mr Donovan on 28 October. The reason is as follows: that invoice, although dated by the company 30 September, was not in fact issued to Te Pua, by fax, until 2 October. On its terms, the agreement between Donovan Drainage and Te Pua provided:

> Where Donovan Drainage & Earthmoving Ltd submits a payment claim for work in progress (as referred to in the payment claim), the client must pay Donovan Drainage & Earthmoving Ltd the amount claimed in full before 20th of the following month.

There is a strong argument that invoice was not, therefore, due on 28 October, and only became due on 20 November, the very day that the first payment was received.

[43] This is, in our view, a further consideration which supports the Associate Judge's findings as to the availability of the s 296(3) defence.

Outcome

[44] The appeal is dismissed. The appellants are jointly and severally to pay the respondent's costs for a standard appeal on a band A basis, together with usual disbursements.

Solicitors:
Meredith Connell, Auckland for Appellants
WRMK Lawyers, Whangarei for Respondent