

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

**I TE KŌTI MATUA O AOTEAROA
ŌTAUTAHI ROHE**

**CIV-2016-409-001137
[2017] NZHC 2801**

BETWEEN	THE OFFICIAL ASSIGNEE Applicant
AND	MWA CONSULTANTS LIMITED (COMPANY 5185761) First Respondent
AND	LATIMER TRUSTEES LIMITED (COMPANY 5181241), FORMERLY MWA TRUSTEES LIMITED Second Respondent
AND	MWA TRUSTEES LIMITED (COMPANY 1535906) (in liq), FORMERLY LATIMER TRUSTEES LIMITED Third Respondent

Hearing: 22 and 24 August 2017

Appearances: G Slevin for the Applicant
M Withers for the First, Second and Third Respondents

Judgment: 15 November 2017

JUDGMENT OF NATION J

[1] Mrs Maureen Pye was bankrupted on the application of the IRD in respect of a judgment debt to it for \$46,838.80. In these proceedings, the Court is asked to make orders for the benefit of the Official Assignee (the Assignee) against various

companies, controlled by Mr Murray Withers, which received and dealt with the funds arising from Mrs Pye's inheritance.

[2] Mr Withers was Mrs Pye's friend and advisor. He is also a struck off solicitor, having been struck off in December 2013 for what he says was his failure to recognise he was in a conflict of interest situation with his client.¹ Not long before Mrs Pye was declared bankrupt, Mr Withers established a trust for the benefit of Mrs Pye's two children (the KD Trust). At the same time, Mrs Pye assigned to the trust her entitlement as a beneficiary in the estate of her mother. In accordance with that assignment, some \$81,000 was paid into accounts controlled by Mr Withers. Mrs Pye was able to access a significant portion of the funds held in those accounts. Mr Withers also took a portion of that sum by way of costs. Approximately \$30,000 was advanced to his own family trust, the Williams Family Trust.

[3] The issue here is whether the companies involved in transactions relating to the \$81,000 can be ordered to pay some or all of that amount to the Assignee.

The parties

[4] The first respondent, MWA Consultants Limited (MWAC), is the company through which Mr Withers carries on business in setting up and administering trusts.

[5] The second respondent, Latimer Trustees Limited, is a corporate trustee that Mr Withers used in his business. The company was previously named MWA Trustees Limited. Mr Withers advised the Court on 24 August 2017 that the previous day he had gone to the company's office and changed the name of this company from MWA Trustees Limited to Latimer Trustees Limited. For the sake of more ready comprehension, I refer to the second respondent as "RedCo" throughout this judgment.

[6] The third respondent, MWA Trustees Limited, was a trustee company of a trust for the benefit of Mr Withers' family. It was previously named Latimer Trustees Limited. Mr Withers advised the Court on 24 August 2017 that on the previous day

¹ *Re Withers* [2013] NZLCDT 39.

he had changed the name of this company from Latimer Trustees Limited to MWA Trustees Limited. He also advised the Court that, just prior to the hearing of these proceedings resuming on 24 August 2017, an order had been made in another court for this company to be wound-up on the application of Davron Scaffolding Limited, to which it was indebted. MWA Trustees (formerly Latimer Trustees Limited) is thus now in liquidation. To mitigate potential confusion, I refer to the third respondent as “Blue Co”.

[7] Mr Withers is the sole director and shareholder of the above three companies. Because he is struck off, he is prohibited from giving legal advice but carries on business in establishing and administering trusts. He was given leave to appear on behalf of all respondents by the Court on 21 March 2017.

[8] After Mr Withers advised the Court of the way he had changed the respondents’ names, on the Assignee’s application the Court amended the names of the parties so that they now are as set out in the intituling to this judgment.

[9] This hearing began on 22 August 2017 with cross-examination of various witnesses and submissions from Mr Slevin, counsel for the applicant. The hearing reconvened on 24 August 2017 with submissions from Mr Withers. There were then brief submissions in reply from Mr Slevin. It was on 23 August 2017 that Mr Withers, as referred to above, renamed the two companies, effectively reversing their names.

Background

[10] On 19 November 2015, the Commissioner obtained judgment against Mrs Pye in the District Court at Christchurch in the sum of \$39,814.10.

[11] Mrs Pye’s mother, Florence Easson, died on 14 February 2016. Under her last will, Mrs Pye was entitled to an equal share of the estate with her brother.

[12] On 12 April 2016, the IRD issued a bankruptcy notice against Mrs Pye in respect of the debt then due to the Commissioner for \$46,838.80. She was unable to pay that debt, as evidenced by her subsequent adjudication as a bankrupt on 18 August 2016.

[13] On 14 April 2016, Mrs Pye purported to renounce her interest in the residuary estate of her mother, by way of a Deed of Renunciation.

[14] On 26 May 2016, Mrs Pye advised a solicitor for the estate that she had gifted her interest in the estate to a family trust formed for the benefit of her children. On 8 July 2016, she authorised the payment of \$81,046.81 from the estate's solicitors to RedCo.

[15] On 14 July 2016, a deed of trust establishing the KD Trust was executed by Mr Withers as settlor and director of BlueCo.

[16] Between 8 July 2016 and 15 August 2016, RedCo made 17 payments totalling \$40,550 to MWAC. On 16 August 2016, RedCo paid \$40,496.81 to BlueCo as the holder of a bank account for the KD Trust. Also on that date, BlueCo paid \$30,000 to another account in its name as trustee of the Williams Family Trust, a trust for the benefit of Mr Withers' family. \$20,000 was also paid from that account to MWAC.

[17] On 18 August 2016, Mrs Pye was adjudicated bankrupt in the High Court at Christchurch on the application of the Commissioner in respect of a debt then of \$46,838.80.

Assignee's claim against the second respondent – RedCo

[18] The Assignee seeks an order requiring RedCo to pay to the Assignee the sum of \$81,046.81 on account of the payment which was made to it for that amount by Mrs Pye on 8 July 2016. She says that this payment was both an insolvent gift under s 204 Insolvency Act 2006 (Insolvency Act) and an insolvent disposition for the purposes of s 348 Property Law Act 2007 (PLA).

[19] The Assignee's primary claims against MWAC and BlueCo are based on similar principles.

Orders under the Insolvency Act 2006

[20] Section 204 Insolvency Act states:

204 Insolvent gift within 2 years may be cancelled

A gift by a bankrupt to another person may be cancelled on the Assignee's initiative if the bankrupt made the gift within 2 years immediately before adjudication.

[21] Section 206 prescribes the procedure for an Assignee to cancel an irregular transaction to which s 206 applies. An irregular transaction includes an insolvent gift, as referred to in s 204.² It also includes "a disposition of property to which subpart 6 of Part 6 (setting aside of dispositions that prejudice creditors) of the Property Law Act 2007 applies".³

[22] In this regard, relevant portions of subpart 6 of part 6 of the PLA state:

345 Interpretation

(1) For the purposes of this subpart,—

- (a) a disposition of property prejudices a creditor if it hinders, delays, or defeats the creditor in the exercise of any right of recourse of the creditor in respect of the property; and

...

- (c) a disposition of property by way of gift includes a disposition made at an undervalue with the intention of making a gift of the difference between the value of the consideration for the disposition and the value of the property comprised in the disposition; and

- (d) a debtor must be treated as insolvent if the debtor is unable to pay all his, her, or its debts, as they fall due, from assets other than the property disposed of.

(2) In this subpart, unless the context otherwise requires,—

disposition means—

- (a) a conveyance, transfer, assignment, settlement, delivery, payment, or other alienation of property, whether at law or in equity:

- (b) the creation of a trust:

...

- (f) a transaction entered into by a person with intent by entering into the transaction to diminish, directly or indirectly, the value of the person's own estate and to increase the value of the estate of another person

² Insolvency Act 2006, s 206(1)(c).

³ Insolvency Act 2006, s 206(1)(d).

proceeds, in relation to any property, means—

- (a) the proceeds of the sale or exchange of the property; and
- (b) if the property is money, other property bought with that money

property includes the proceeds of any property.

346 Dispositions to which this subpart applies

- (1) This subpart applies only to dispositions of property made after 31 December 2007—
 - (a) by a debtor to whom subsection (2) applies; and
 - (b) with intent to prejudice a creditor, or by way of gift, or without receiving reasonably equivalent value in exchange.
- (2) This subsection applies only to a debtor who—
 - (a) was insolvent at the time, or became insolvent as a result, of making the disposition; or

...

[23] Sections 207 and 208 Insolvency Act provide for the process for, and limits on, recovery of property the subject of irregular transactions:

207 Court may order retransfer of property or payment of value

- (1) On the cancellation of an irregular transaction under which property of the bankrupt, or an interest in property of the bankrupt, was transferred the court may make an order for—
 - (a) the retransfer to the Assignee of the property or interest in the property; or
 - (b) payment to the Assignee of a sum of money that the court thinks appropriate, but the sum must not be greater than the value of the property or interest in the property when the transaction was cancelled.
- (2) The court may make any other order for the purpose of giving effect to an order under subsection (1).
- (3) An order under subsection (1) is in addition to any other rights and remedies available to the Assignee, and this section does not restrict those rights.

208 Limits on recovery

The court must not make an order under section 207 against a person (A) if A proves that when A received the property or interest in 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,—
 - (i) in the case of an insolvent gift, the bankrupt was, or would become, unable to pay his or her debts without the aid of the property that the gift is composed of; or
 - (ii) in the case of any other irregular transaction referred to in section 206(1), the bankrupt was, or would become, unable to pay his or her due debts; and
- (c) A gave value for the property or interest in the property or altered A's position in the reasonably held belief that the transfer of the property or interest in the property to A was valid and would not be cancelled.

[24] On 21 November 2016, Dunningham J made freezing orders in respect of funds held in various bank accounts by the respondents. Those orders have been extended and remain current.

[25] Mr Withers filed a statement in response to the making of the freezing orders. In that statement, he referred to Mrs Pye's difficult family circumstances and her limited financial resources. He said the debt to the IRD was originally for \$14,000 but had increased with penalties and interest to \$49,000. He said that Mrs Pye's mother died when negotiations over the debt were taking place with the IRD. He said that, after discussions with Mrs Pye, "what we did [was] assign the interest of the estate to the benefit of a trust formed for the benefit of Maureen's children". He said he wanted to negotiate a settlement with the IRD whereby the IRD would accept a payment of between \$14,000 and \$20,000.

[26] Section 206 sets out the procedure for cancelling irregular transactions. The Assignee served notices dated 21 November 2016 and 1 December 2016 of her intention to cancel various transactions that are now the subject of these proceedings. It was not suggested the Assignee had not followed the appropriate procedure for cancelling an irregular transaction pursuant to s 206.

[27] The Assignee treated Mr Withers' statement as an objection to the notices preventing the automatic cancellation of the transactions.

[28] The Assignee then filed an application against all three respondents for:

- (a) an order cancelling various specified transactions that are the subject of these proceedings;
- (b) a declaration the KD Trust was a sham;
- (c) an order for the transfer of monies to the Assignee under s 207 Insolvency Act; and/or
- (d) orders for the payment to the Assignee of a sum of money under s 207 or under s 348(2)(b) PLA.

[29] In an affidavit of 28 February 2017, Mr Withers said he had known Mrs Pye for about 35 years as a client when he was a solicitor and also as a friend. He said that, over the last 10 years, he had dealt with her over numerous issues. He said he “rarely charged her fees as she was on a limited income. But recorded significant attendances always on the off chance there might be funds one day.” He referred to her personal and family difficulties, including problems she had in not filing income returns with the IRD. He thought that, after considerable delay, returns were prepared for 2011 and 2012, resulting in a tax liability for her personally of approximately \$14,000, which then increased to \$49,000.

[30] Mr Withers said that Mrs Pye’s mother had owned only a flat in Balclutha worth about \$170,000. She had lived in Australia where she had a grandchild who had limited life expectancy. One of the grandmother’s wishes was that there would be enough money for Mrs Pye to travel to Australia to be with the family when her grandchild died.

[31] Mrs Pye’s mother died at the time Mr Withers was negotiating with the IRD over Mrs Pye’s debt. Mr Withers said:

Maureen and I discussed various options. I did stress the need to take legal advice, which she would not. We talked of renouncing her entitlement or to bringing a claim under the Testamentary Promises Act / Family Protection Act. To what we did and this was assign the interest of the estate to the benefit of a trust formed for the benefit of Maureen’s children. These claims under the

Testamentary Promises Act and Family Protection Act are still available to Maureen.

[32] Mr Withers said the trust was formed “in response to set aside funds to both settle Maureen’s obligations and avoid insolvency but primarily to set aside funds to perfect her mother’s wishes”. He said the trust took an assignment of the interest that Mrs Pye had in her mother’s estate. He said, as there were no immediate trustees available, BlueCo undertook the role as a corporate trustee. Mr Withers said funds were initially paid to RedCo and “held by that company for the benefit of Maureen for a trust to be formed”. RedCo was, he said, a non-asset owning company. Through Mr Withers, it opposed any order that it repay Mrs Pye any funds, and contended it had no ability to pay any funds.

[33] Mrs Pye also swore a brief affidavit dated 28 February 2017. That affidavit was prepared for her by Mr Withers. In that affidavit she said:

Because of my looming potential insolvency I asked Murray to assist and structure my affairs. ... Murray suggested getting legal advice and also suggested a Deed of Family Arrangement be entered into. My brother my co-trustee would not support this ... I considered other options such as shifting the money to Australia or spending it all but Murray suggested that we could potentially achieve a good result by setting aside the funds into a trust. The consideration was a forbearance to sue or bring a claim to protect my mother’s wishes.

...

Prior to my insolvency I assigned the benefit of my inheritance to the KD Trust. I believe this was for a valid consideration and a legitimate transfer. I did so on the basis that the trustee of that trust would make advances to me to pay certain daily household expenses and legitimate business expenses prior to my insolvency. The trustee did this and made advances to me of \$40,500.00. I believe the trustee was entitled to do this as I was not a bankrupt and still opposing that application. I was not insolvent.

...

I confirm at no stage did I make gifts to the KD Trust. I can confirm my intention to transfer further assets to the Trust, it is not a sham. I need it for protection of my family, I have life insurance I want held in that trust, so my children and grandchildren benefit not Steve or the IRD, who remain a threat.⁴

[34] In submissions for the respondents, Mr Withers argued:

⁴ Steve is Mrs Pye’s partner who she and Mr Withers say is also threatened with claims by the IRD.

- (a) Mrs Pye had been victimised unreasonably by the IRD;
- (b) her only creditor was the IRD and she was solvent at relevant times when transfers and payments were made;
- (c) there could be no gift to a trustee because a trustee is not the beneficial owner of any property it receives;
- (d) the consideration for a disposition does not have to be adequate consideration or consideration of the same value as the property received. He suggested that it is common for dispositions of property to be for a consideration of just \$1;
- (e) of the \$81,000 approximately paid out, Mrs Pye had used or spent \$51,000 which he suggested had been recorded as advances to her or her partner and were not distributions;
- (f) RedCo had always acted only as a bare trustee and never took any proprietary interest in funds received and so had never received any gift;
- (g) Mrs Pye was adjudicated bankrupt on 18 August 2016. Prior to that, she could not be defined as insolvent. Her asset position (available cash) exceeded her liabilities. He argued that, prior to her insolvency, her liability to the IRD for tax was approximately \$14,000; and
- (h) there was consideration for the assignment by way of Mrs Pye's forbearance to sue under the Family Protection Act 1955 (FPA) / Law Reform (Testamentary Promises) Act 1949 (Testamentary Promises Act).

Discussion

[35] I am satisfied the payment of \$81,046.81 to RedCo, and the purported assignment of Mrs Pye's inheritance from her mother's estate to a trust to be formed, were insolvent gifts in terms of ss 204 and 206(1)(c) Insolvency Act. Those gifts were made within two years and immediately before she was adjudicated bankrupt.

[36] Although the Assignee did not have to establish this to prove there had been an insolvent gift, I also find Mrs Pye was unable to pay the debt to the IRD at the time it obtained its judgment for \$39,814.10 on 19 November 2015. She was unable to pay the debt to the IRD when it issued its bankruptcy notice against her on 12 April 2016. She was still unable to pay that debt when she was adjudicated bankrupt on 18 August 2016. Mrs Pye has been unable to pay her debt to the IRD when she purported to assign her inheritance, when the \$81,046.81 was paid to RedCo on 8 July 2016, and when the Deed of Trust establishing the KD Trust was executed by Mr Withers as settlor and as director of BlueCo, as trustee company, on 14 July 2016.

[37] I am also satisfied there was no consideration or value from RedCo for the payment of the \$81,046.81. Although Mr Withers suggested in written statements and affidavits that there was a forbearance to bring a claim under the FPA and the Testamentary Promises Act, in cross-examination Mrs Pye said she did not know anything about those Acts. She did not know of anyone making a claim against her mother's estate. She said her mother had not promised to give her anything before she died and was not aware of any other promise to give anything upon her death.

[38] Mrs Pye has two children. On being re-examined by Mr Withers, she said she had talked to her son Daniel about becoming a trustee of the trust. She said he did not want to be involved because he was "a firm believer that whatever his grandmother's money was, was his mother's." Mrs Pye said that her son considered her inheritance was basically hers to do with what she wanted. Mrs Pye says she never talked to her daughter about the possibility of becoming a trustee.

[39] Mrs Pye said she had not explained to her son and daughter that they were beneficiaries of the trust that had been set up. From funds received from her inheritance, she had paid \$1,000 to her daughter but she said that was done in a way which her daughter understood was a gift from her mother, ie Mrs Pye.

[40] There was no evidence to suggest that Mrs Pye was contemplating making a claim under the Testamentary Promises Act or the FPA, or that she would have had any basis for making such a claim. Her mother had left her estate equally to Mrs Pye

and Mrs Pye's brother. There was no evidence that there had been any promise from the mother to Mrs Pye or that any promise was made in return for support.

[41] I am therefore satisfied the suggestion from Mr Withers that the assignment was in consideration of forbearance to sue was a fiction. I am also satisfied that there was in fact an insolvent gift to RedCo when, on the instructions of Mrs Pye, the solicitors for her mother's estate paid \$81,046.81 into RedCo's Westpac Bank account on 8 July 2016.

[42] Consistent with this, Mrs Pye emailed the solicitors responsible for the administration of her mother's estate on 26 May 2016 stating "[i]n terms of my inheritance I have for personal reasons, by deed gifted this interest to my children by means of the formation of a family trust for their benefit".

[43] In his affidavit, Mr Withers said the funds were initially paid to RedCo and held by that company for the benefit of Mrs Pye for a trust to be formed, the trust which was established as the KD Trust. He argued there could be no gift to a trustee because a trustee is not the beneficial owner of any property it receives. He argued that RedCo received the funds as a bare trustee.

[44] When RedCo acquired the \$81,046.81, it became the legal owner of them, even if this was subject to a trust to be formed for the benefit of Mrs Pye or her children.

[45] It is fundamental to a trust that the trustee holds the legal title to the property it receives and that property vests in the trustee. It is of the essence of a "bare" trust that the trustee holds the property.⁵ The trustee has legal title to and control over the property but it is dealt with for the benefit of the beneficiaries.⁶ Consistent with that:⁷

A trustee is personally liable on the contracts into which he or she enters, unless personal liability is excluded by express stipulation; the knowledge of those who deal with the trustee that he or she is contracting as a trustee is immaterial. Accordingly, where a trustee trades or otherwise deals with trust

⁵ GE Dal Pont and DRC Chalmers *Equity and Trusts in Australia and New Zealand*, (2nd ed, Law Book Co of Australia, Pyrmont, 2000) at 403 and 405.

⁶ Andrew Butler (ed) *Equity and Trusts in New Zealand* (2nd ed, Thomson Reuters, Wellington, 2009) at [3.1.2].

⁷ *Laws of New Zealand Trusts* at [429] (footnotes omitted).

property, he or she is deemed, as against all persons other than the beneficiaries, to do so on his or her own account.

A trustee thus may be sued on behalf of or as representing the property of which he is trustee without joining any beneficiary.⁸

[46] RedCo is also not entitled to the protection afforded by s 208 Insolvency Act. Because he was the sole shareholder and director, Mr Withers' knowledge and state of mind is imputed to RedCo.⁹ He orchestrated the whole series of transactions by which Mrs Pye purported to assign her inheritance so that it would not be available to the Assignee on her bankruptcy. I therefore consider that RedCo has not proved that, when it received the \$81,046.81, it acted in good faith. It has not proved that it gave value for the property or that it altered its position "in the reasonably held belief" that the transfer of the property or interest in the property to RedCo was valid and would not be cancelled. RedCo cannot avail itself of the protection afforded by s 208(b) because it was clear to Mr Withers, and thus RedCo, and indeed it was their collective intention that, without her inheritance, Mrs Pye would not be able to pay the debt she had to the IRD.

[47] The Assignee is accordingly entitled to an order cancelling the transaction by which \$81,046.81 was paid from the estate's solicitors to the account of RedCo.

[48] Under s 207(1)(a), the Court may make an order for the retransfer to the Assignee of the property or the interest in the property which RedCo received. As the \$81,046.81 originally paid to RedCo is no longer in its account, it will not be in the account at the time of cancellation through this judgment. The Court thus cannot order the retransfer of those monies to the Assignee pursuant to s 207(1)(a).

[49] Under s 207(1)(b), the Court may make an order for payment of a sum of money but the sum must not be greater than the value of the property or transaction at the time the transaction is cancelled. Generally, the reported judgments concerning

⁸ *Laws of New Zealand Trusts* at [430].

⁹ *Regal Castings Ltd v Lightbody* [2008] NZSC 87, [2009] 2 NZLR 433.

claims under s 207(1)(b) or its predecessor arose out of situations where the transferee had retained ownership of the property acquired from the debtor.¹⁰

[50] I have considered whether s 207(1)(b) should be interpreted so as to limit a court to order payment only where the property to which s 207 refers has been retained by the party to whom it was originally transferred and who might otherwise have been ordered to retransfer that property back to the Assignee.

[51] I do not consider there is such a limitation and that, to interpret s 207(1)(b) in this way, would be contrary to the scheme of the Act.

[52] There is no such limitation where there has been a transaction with the bankrupt where property has been transferred at an under-value. Sections 211 and 212 Insolvency Act provide:

211 Assignee may recover difference in value

- (1) Under section 212, the Assignee may recover from a person (X), who is a party to a transaction with the bankrupt, the amount C in the formula $A - B = C$, where—
 - (a) A is the value that X received from the bankrupt under the transaction; and
 - (b) B is the value (if any) that the bankrupt received from X under the transaction.
- (2) In this section and in section 212, transaction includes the giving of a guarantee by the bankrupt.

¹⁰ See for example *NZTI Ltd v Official Assignee* HC Wellington CIV-2007-485-1270, 4 March 2009; *Official Assignee v Spencer & Cash Ltd* HC Auckland CIV-2008-404-6354, 14 October 2008; *Official Assignee v Scott* [2013] NZHC 2904.

212 When Assignee may recover difference

The Assignee may recover the difference in value (that is, C in the formula in section 211(1)) from X if—

- (a) the bankrupt entered into the transaction with X within 2 years immediately before adjudication; and
- (b) either—
 - (i) the bankrupt was unable to pay his or her debts when the bankrupt entered into the transaction; or
 - (ii) the bankrupt became unable to pay his or her debts as a result of entering into the transaction.

[53] Nor is there any such limitation under ss 213 or 214 which entitle the Court to order the recipient of a contribution by a bankrupt to the recipient's property to pay the value of that contribution to the Assignee where that contribution has been for an inadequate consideration or in a way that reduced the value of the bankrupt's estate.

[54] I interpret s 207(1)(b) as enabling the Court, on cancellation of an irregular transaction, as referred to in s 206, to order the payment of a sum of money to the value of the property which was acquired through the transaction as an alternative to the retransfer of that property back to the trustee. Where that property has been retained by the transferee, the payment required cannot be more than the value of the property which has been retained at the time of the cancellation. There is no such limitation where the property has not been retained. In those latter circumstances, the Court is free to order payment at the value of the property acquired by the transferee at the time it was transferred to the transferee by the debtor. In this instance, that value is the \$81,046.81 which was paid from Mrs Pye's inheritance to RedCo.

[55] By reason of that payment, the whole of the \$81,046.81, which should have been part of Mrs Pye's bankrupt estate, has been lost to the Assignee and thus Mrs Pye's creditors. The Court has a discretion as to whether it requires RedCo to pay the whole or any part of that sum to the Assignee. In exercising that discretion, I have regard to the way the funds received by RedCo have been used.

[56] Between 8 July 2016 and 15 August 2016, RedCo made 17 payments totalling \$40,550 to the account Mr Withers used in carrying on his business, an account in the

name of MWAC. Over that time, MWAC paid out \$11,000 apparently to or for the benefit of Mrs Pye. This took the form of seven payments to undisclosed accounts with payment references including “Pye”, “total rust”, “total auto” and “rust busters”.¹¹ Payment also took the form of a cash withdrawal by Mrs Pye for \$5,000 on 29 July 2016. There was no documentation by which Mrs Pye, Mr Withers or any of the companies involved accepted that the payments to Mrs Pye were “advances” of funds which she would have to repay. The sum of \$8,050 was paid into the MWAC account and retained for fee purposes, effectively for Mr Withers’ benefit. Some \$8,500 appears to have been paid by MWAC into a BlueCo account in the name of the KD Trust.

[57] A number of transactions occurred on 16 August 2016. RedCo paid \$40,496.81 into a KD Trust account held by BlueCo. BlueCo paid \$9,000 from the BlueCo account in the name of the KD Trust (into which MWAC had paid the \$8,500), into another account also in the name of the KD Trust. BlueCo also paid \$30,000 to another account in its name for the benefit of the Williams Family Trust. This was the trust for the benefit of Mr Withers’ family. The sum of \$20,000 was paid from the BlueCo/Williams Family Trust account back to MWAC. The sum of \$5,000 was paid to “Lisa”, a payment which it transpires was to Mr Withers’ wife.

[58] Mrs Pye said she had been led to understand from Mr Withers that the \$30,000 had been invested by the KD Trust. Mr Withers said this was an investment for a year to earn interest at 10 per cent. Contemporaneously with that payment, there was a loan agreement for \$30,000 executed by Mr Withers as the director of BlueCo, as the corporate trustee of the KD Trust, and also as director of BlueCo as the corporate trustee of the Williams Family Trust.

[59] The loan agreement recorded that the loan was to be made on 16 August 2016, repayable on 15 August 2017, with interest at 10 per cent per annum and a default interest rate of 15 per cent per annum. The agreement recorded the loan was to be unsecured but, in the event of default, the borrower was to register a second charge over the property of the borrower at 13 Manning Place, Christchurch.

¹¹ These latter references apparently pertain to the business operated by Mrs Pye’s partner, Steve.

[60] In evidence, Mr Withers acknowledged that the beneficiaries of the Williams Family Trust were members of his family. At the time of the hearing, this loan was overdue. Mr Withers said that steps were being taken to sell the property at Manning Place.¹²

[61] Mrs Pye said in evidence that she did not know the \$30,000 had been invested by way of a loan to Mr Withers' family trust. She did not know that the KD Trust had any entitlement to security, nor did she know that there had been any delay in repayment of the loan.

[62] In response to questions from the Court, Mr Withers said he did not see that he or the corporate trustee of the KD Trust (BlueCo) was in a conflict of interest situation in making a loan for the benefit of the Withers family from the KD Trust because he was no longer a solicitor. He was seemingly unconcerned as to any breach by the trustee of its fiduciary obligations.

[63] Of the \$20,000 paid from BlueCo back to MWAC on 16 August 2016, information provided to the Assignee indicated that some \$11,434 had been paid out to or for the benefit of Mrs Pye between 16 August 2016 and 18 November 2016 through withdrawal from automatic teller machines in amounts ranging from \$20 but more often in \$800, \$500 or \$200 amounts. Mr Withers had arranged for Mrs Pye to

¹² A search copy of the title to 13 Manning Place, Christchurch shows there was a mortgage registered against that property, firstly on 30 January 2014 and then subsequently again on 10 December 2014. The mortgagees are shown as David Charles Rhodes, Carolyn Margaret Rhodes and Murray Ian Withers. The loan secured by the mortgage is for some \$100,000. This suggests that another trust, of which Mr Withers is a trustee, has advanced funds for the benefit of Mr Withers' family.

In evidence in these proceedings, both Mrs Pye and Mr Withers said the \$30,000 had been invested. In evidence, Mr Withers said the investment was by way of loan to BlueCo (ie MWA Trustees, formerly Latimer Trustees Limited) as trustee of the Williams (Withers) Family Trust. Despite this, in response to an email of 16 August 2017 from the Assignee enquiring as to when that loan would be repaid, Mr Withers said:

No the funds are not repaid. The trust never received all the money as it was frozen and therefore there is no legal requirement now to repay the figure you mention. The KD Trust defaulted in terms of the obligation to advance and the other trust was affected by that occurrence. Issues relating to matters need to be resolved Trust to Trust and I am discussing matters with Maureen.

In her evidence, Mrs Pye said there had been no discussions with her about the situation with regard to the loan.

be able to withdraw these funds using an EFTPOS card but said she had to contact him in advance so he could arrange for the funds to be available for her in the appropriate bank account. Mr Withers acknowledged that having those funds in his business account had assisted in his payment of outgoings associated with his business.

[64] Mr Withers was asked by the Assignee to provide accounts and details for any costs that had been paid by BlueCo. No such accounts had been produced or referred to in the affidavits from Mr Withers or Mrs Pye. Mrs Pye said she had received no account for costs as taken by BlueCo but said she knew sums were taken for costs and that there had been periods in the past where Mr Withers had done work for her without recovering any costs.

[65] As the above chronology and traversal of the relevant transactional history indicates, it is apparent that Mr Withers, members of his family, and the various companies which he controlled, benefited from the way Mrs Pye's inheritance was dealt with by both Mrs Pye and Mr Withers.

[66] Given all that has happened regarding the \$81,046.81, I will exercise my discretion to make an order under s 207(1)(b) Insolvency Act that RedCo pay \$81,046.81 to the Assignee.

Orders under the Property Law Act 2007

[67] In the application dated 19 December 2016, the Assignee also sought payment of \$81,046.81 from RedCo, \$60,550 from MWAC and \$40,496.81 from BlueCo under s 348(2)(b) of the PLA.

[68] In relation to subpart 6 of part 6 of the Act, s 344 of the PLA states:

344 Purpose of this subpart

The purpose of this subpart is to enable a court to order that property acquired or received under or through certain prejudicial dispositions made by a debtor (or its value) be restored for the benefit of creditors (but without the order having effect so as to increase the value of securities held by creditors over the debtor's property).

[69] Section 348 states:

348 Court may set aside certain dispositions of property

- (1) A court may make an order under this section—
 - (a) on an application for the purpose (made and served in accordance with section 347); and
 - (b) if satisfied that the applicant for the order has been prejudiced by a disposition of property to which this subpart applies.
- (2) The order must do 1, but not both, of the following:
 - (a) vest the property that is the subject of the disposition in the person (for any applicable purpose) specified in section 350:
 - (b) require a person who acquired or received property through the disposition to pay, in respect of that property, reasonable compensation to the person (for any applicable purpose) specified in section 350.
- (3) If the order does what is specified in subsection (2)(a), it may also require a person who acquired or received property through the disposition to physically restore some or all of that property that is tangible personal property to 1 or more persons specified in the order.
- (4) **Person who acquired or received property through the disposition** means a person who acquired or received property—
 - (a) under the disposition; or
 - (b) through a person who acquired or received property under the disposition.

...

[70] Section 349 states:

349 Protection of persons receiving property under disposition

- (1) A court must not make an order under section 348 against a person who acquired property in respect of which a court could otherwise make the order and who proves that—
 - (a) the person acquired the property for valuable consideration and in good faith without knowledge of the fact that it had been the subject of a disposition to which this subpart applies; or
 - (b) the person acquired the property through a person who acquired it in the circumstances specified in paragraph (a).
- (2) A court may decline to make an order under section 348, or may make an order under section 348 with limited effect or subject to any conditions it thinks fit, against a person who received property in respect of which a court could otherwise make the order and who proves that—

- (a) the person received the property in good faith and without knowledge of the fact that it had been the subject of a disposition to which this subpart applies; and
- (b) the person's circumstances have so changed since the receipt of the property that it is unjust to order that the property be restored, or reasonable compensation be paid, in either case in part or in full.

[71] Section 350 states:

350 Person in or to whom order under section 348 vests property or makes compensation for it payable

- (1) Property vested, or compensation to be paid, by or under an order under section 348, vests in, or is payable to, the following person:
 - (a) the Official Assignee, if the debtor is a bankrupt.

...

[72] Section 348(2)(b) thus permits the Court to require a person who acquired or received property through a disposition of the sort described in s 345 to pay, in respect of that property, reasonable compensation to the Assignee.¹³

[73] Section 345 refers to a disposition of property made by a debtor who was insolvent at the time, or became insolvent as a result of making the disposition and with intent to prejudice a creditor, or by way of gift or otherwise without receiving reasonably equivalent value in exchange.¹⁴

[74] The respondents raised no issue as to the procedure followed by the Assignee and the notice she gave as to this claim. I am also satisfied that, during the hearing, the Assignee and the respondents had the opportunity to and did present the evidence as to what happened with all the transactions and the reasons for them in ways that had to be considered relevant to the potential defences that could be advanced in relation to a claim under the PLA.

[75] For reasons discussed earlier, I am satisfied the disposition of \$81,046.81 from Mrs Pye to RedCo was a disposition to prejudice the IRD and that it was made by way of gift and without receiving reasonably equivalent value in exchange. I am satisfied

¹³ Property Law Act 2007, ss 348(2)(b) and 350(1)(a).

¹⁴ Section 346.

that Mrs Pye was insolvent at the time she arranged for her inheritance to go to RedCo and that she remained insolvent after making that assignment.

[76] I am satisfied RedCo received \$81,046.81 by reason of the disposition from Mrs Pye, a disposition which fell within the terms of s 346.

[77] It would be entirely within the scheme and purpose of subpart 6 of part 6 of the PLA for the Court to also make an order under s 348(2)(b) that RedCo pay the Assignee the sum of \$81,046.81. In his submissions, Mr Slevin submitted:

The provisions of subpart 6 of part 6 Property Law Act 2007 are imported into the Insolvency Act 2006 by section 206(1)(d) so that if a transaction is cancelled under s 206(1)(a), the Court may make an order under s 348 PLA.

[78] Section 206(1)(d) is not, however, in terms which import the provisions of subpart 6 of part 6 PLA into the Insolvency Act. Section 206(1)(d) simply extends the category of transactions in respect of which the Assignee may seek cancellation and either the return of the property or a payment, as provided for in s 207. Section 206(1)(d) does not expressly confer on the Assignee the right to make a claim under the PLA. I must thus consider whether the Assignee can do so and whether the Court can make an order for compensation on that basis.

[79] Crucially, the right to claim compensation under s 348(2) PLA can be made only by those who are permitted to make such a claim. Section 347 states:

347 Application for order under section 348

- (1) Only the following may apply for an order under section 348:
 - (a) a creditor who claims to be prejudiced by a disposition of property to which this subpart applies (whether the disposition was made before or after the debtor became indebted to the creditor):
 - (b) the liquidator, if the debtor is a company in liquidation or an overseas company being liquidated under section 342 of the Companies Act 1993.

...

[80] Section 347 thus expressly permits the liquidator of a company to make a claim under s 348 where the debtor who entered into the prejudicial disposition was a

company. There is no such provision permitting the Assignee to make such a claim where the debtor was an individual. This is surprising because s 350(1) says the beneficiary of an order for the payment of compensation or the reversion of property is to be the Assignee if the debtor is a bankrupt. With the legislation as it is, where the debtor is bankrupt, an Assignee seeking compensation of the sort that might be obtained under the PLA would have to ask a creditor of the debtor to make a claim under s 348, but that claim would be for the benefit of the Assignee and all creditors. I am bound by the terms of the legislation. A claim for compensation under s 348 can be made only by one of Mrs Pye's creditors. The major and potentially only creditor is the IRD. The IRD would probably have succeeded on a claim under s 348 PLA but the Assignee is not permitted to make such a claim.

[81] This interpretation of the relevant provisions of the PLA accords with that of the authors of *Heath and Whale on Insolvency*. In their text, they refer to ss 206, 211 and 2012 Insolvency Act. They state:¹⁵

As a corollary, the remedies available to a liquidator or the prejudiced creditor will be different to those available to the Assignee given the liquidators or prejudiced creditor's recourse to orders pursuant to ss 348-350 of the Property Law Act 2007, whereas the Assignee's recourse is to orders under sections 207-208 of the Insolvency Act 2006.

[82] The authors of *Law of Insolvency in New Zealand* say:¹⁶

A creditor who claims to be prejudiced by a disposition of property to which subpt 6 applies may apply ... A creditor may apply whether the disposition was made before or after the debtor *became indebted to the creditor*. *The only other party with standing to seek an order under s 348 is a liquidator ...*

[83] For those reasons, I would dismiss her claim for compensation under s 348.

Assignee's claim against the third respondent – BlueCo

[84] BlueCo, as the corporate trustee of the KD Trust, received a total of \$49,996.81 by way of the following transactions:

¹⁵ *Heath and Whale on Insolvency* (loose-leaf ed, LexisNexis) at [24.99] (footnotes omitted).

¹⁶ Lynne Taylor and Grant Slevin *The Law of Insolvency in New Zealand* (Thomson Reuters, Wellington, 2016) at [26.11.4].

- 1 August 2016 - payment of \$1,000 from MWAC to an undisclosed account with the reference “Pye KD Trust”;
- 3 August 2016 to 15 August 2016 – four payments from MWAC totalling \$8,500 to the BlueCo account in the name of the KD Trust; and
- 16 August 2016 – payment from RedCo of \$40,496.81.

[85] The dispositions which the Assignee can seek to cancel under s 206 Insolvency Act and in respect of which the Assignee can seek a payment under s 207(1)(b) include those defined by ss 345 and 346 PLA. Those dispositions include an assignment of property, whether at law or in equity, the creation of a trust, and a transaction entered into by a person with intent by entering into the transaction to diminish, directly or indirectly, the value of the person’s own estate and to increase the value of the estate of another person. Pursuant to s 346 PLA, the disposition has to have been made by a debtor with intent to prejudice a creditor or by way of gift.

[86] In applying those sections in the context of all the legislation, it is appropriate to look at the substance of all that has happened. On the evidence I heard in this case, the Assignee has proved that Mrs Pye was an active party involved in the establishment of the KD Trust, the transfer of an inheritance to an account held in the name of that trust, and then the disbursement of monies from that account to MWAC and to BlueCo. Consistent with that, Mrs Pye said in her evidence, “prior to my insolvency, I assigned the benefit of my inheritance to the KD Trust”. She also said that it was her intention to transfer further assets to the trust.

[87] I am thus satisfied the transfer of funds from both MWAC and RedCo to BlueCo were dispositions which the Assignee could apply to cancel under s 206 Insolvency Act and in respect of which BlueCo could be ordered to make payment under s 207(1)(b).

[88] Through Mr Withers and its trustee BlueCo, the KD Trust has been knowingly and deliberately used to prevent the Assignee being able to use Mrs Pye’s inheritance to meet the liabilities associated with her bankruptcy.

[89] Given the way BlueCo has operated as trustee of the KD Trust and the way it has deliberately caused prejudice to the Assignee, it would, in all the circumstances, have been appropriate to order it to pay compensation to the Assignee in the sum of \$49,996.81. That was the compensation which the Assignee sought through Mr Slevin's submissions. It was not, however, the amount sought by way of compensation in the Assignee's application of 19 December 2016. No application was made to amend the amount claimed. For that reason, the maximum amount that I could consider ordering BlueCo to pay is \$40,496.81.

[90] Given the background, I would have considered reserving leave to the Assignee to seek leave to continue with the proceedings against BlueCo so it can seek an order that it pay to the Assignee the sum of \$40,496.81.

[91] The Assignee also made that claim seeking an order for payment of \$40,496.81 from RedCo pursuant to s 348(4) PLA. BlueCo, as trustee of the KD Trust, received \$49,996.81 through dispositions to which ss 346 and 347 apply, primarily the payment of \$81,046.81 paid from Mrs Pye's inheritance to RedCo. Pursuant to s 348(4), BlueCo could be ordered to pay reasonable compensation as a person who acquired or received property through a disposition or dispositions to which ss 346 and 347 apply.

[92] Given all the circumstances referred to already, this was a case where it would have been appropriate for the Court to order BlueCo to pay compensation to the Assignee of at least \$40,496.81 under the PLA but, as with the claim against RedCo, there is a fundamental problem in that, pursuant to s 347, the Assignee is not permitted to make such a claim. For that reason, were it appropriate for me to be giving judgment in these proceedings concerning BlueCo, I would have dismissed the Assignee's claim for such compensation under the PLA.

[93] BlueCo was, however, wound-up by order of the High Court on 24 August 2017. On the winding up of the company, all proceedings against it are stayed but may be continued with leave of the Court.¹⁷ I will allow for this but only as to the possibility of it continuing with the proceedings to obtain an order that it must pay to the Assignee the sum of \$40,496.81.

¹⁷ Companies Act 1993, s 248(1)(c).

Assignee's claim against the first respondent - MWAC

[94] Of the original \$81,046.81 paid to RedCo, \$60,550 was paid to MWAC. The sum of \$40,550 was paid to it directly from RedCo between 8 July 2016 and 15 August 2016 and \$20,000 was paid to it by BlueCo from the payment of \$40,496.81 made by RedCo to the BlueCo/KD account. As with the payments from RedCo and MWAC to BlueCo, the Assignee has established that Mrs Pye was a party to these transactions to the extent necessary for her to have made those dispositions in terms of ss 345 and 346 PLA. Her involvement as a party was consistent with Mr Withers' submission that MWAC had only ever acted as a conduit or agent and had not retained funds that had passed through its account.

[95] The Court thus has jurisdiction to cancel the transactions by which MWAC received \$60,550 under s 206 Insolvency Act.

[96] I consider it appropriate to make an order requiring MWAC to pay \$60,550 to the Assignee. Although the monies may have been in MWAC's account as a conduit for those monies to pass between various parties, I am satisfied that MWAC had control of those monies when they were in its account. They were dealt with on that basis. MWAC must thus be responsible for the way those funds were applied. Through the decisions MWAC made, those funds have been lost to the Assignee. Against the whole background to this case, I consider it appropriate to order MWAC to pay to the Assignee the sum of \$60,550 under s 207 Insolvency Act.

[97] For the reasons already canvassed, when considering the claims against RedCo and BlueCo, it would also have been appropriate to order MWAC to pay compensation under s 348 PLA if the Court had jurisdiction to do so.

[98] MWAC received \$60,550 through a disposition to which ss 346 and 347 of the PLA apply, namely the original payment of \$81,046.81 from Mrs Pye's inheritance to RedCo.

[99] The Court does not have such jurisdiction because the Assignee cannot make a claim under s 348. Accordingly, the Assignee's claim for compensation under s 348 PLA against MWAC is dismissed.

Assignee's claim that KD Trust was a sham

[100] In the alternative, the Assignee argues that the KD Trust was in fact a sham. Mr Slevin submits that the KD Trust deed pretends to create a trust for Mrs Pye's children but that was never the intention of Mr Withers (as both settlor and through his role as sole director and shareholder of the KD Trust's corporate trustee, BlueCo). Rather, the true common intention between Mr Withers as settlor and BlueCo as trustee was to make Mrs Pye's inheritance available to her and to the respondent companies, without regard for trust compliance or the interests of the purported beneficiaries.

[101] If the KD Trust was a sham, as the Assignee submits, then Mrs Pye would have been the owner of the \$81,046.81 paid into the RedCo account. She would have remained the owner of those funds after they were paid to BlueCo for the KD Trust and the payments made from BlueCo/KD Trust to MWAC would all have been payments by her. There would then have been gifts from her to the extent that monies were paid out directly or indirectly from RedCo or BlueCo to other parties without consideration.

[102] It is established law that, in order for a sham trust or sham transaction to be made out, there must be a shared and common intention between the settlor and trustee(s) of the trust.¹⁸ On the evidence here, I am satisfied that Mr Withers was not just a nominal settlor. He orchestrated the whole scheme. Mrs Pye went along with his proposals and helped implement them. I am satisfied that both Mrs Pye and Mr Withers understood that, through the establishment of the KD Trust, Mr Withers, through a trustee company, would have control of the funds received from Mrs Pye's inheritance, but with that company having obligations as a trustee.

[103] Mr Slevin refers to a file note created by a bank employee at the time Mr Withers sought to open the account in the name of the KD Trust. The note, as produced in evidence, records:

[Mr Withers] has had instructions from Maureen Pye...to open up a trust account on her behalf and he is to manage this on his own. The funds will be coming from an inheritance and he will disperse them into her accounts.

¹⁸ *Official Assignee v Wilson* [2008] NZCA 122, [2008] 3 NZLR 45, which approved the long-standing authority in *Snook v London and West Riding Investments Ltd* [1967] 2 QB 786 (CA).

[104] Mr Slevin submitted this was evidence demonstrating that the purpose of the KD Trust was not, in fact, to provide for legitimate beneficiary interests in the form of Mrs Pye's children and grandchildren, but a scheme to make available to, and for the benefit of, Mrs Pye, monies directly managed by Mr Withers personally, albeit through the guise of a trustee vehicle. As to that, I consider this file note somewhat equivocal. It is also hearsay evidence and no basis has been advanced or established for it to be admissible having regard to ss 17, 18 and 19 Evidence Act 2006.

[105] As the Supreme Court held, in *Ben Nevis Forestry Ventures Ltd v Commissioner of Inland Revenue*,¹⁹ and recently confirmed in its decision in *Clayton v Clayton*,²⁰ the test for whether a trust evidences a sham is whether there is a common intention on the part of the settlor and trustee(s) to create a structure which differs from that set out in the trust deed itself. A trust is not a sham merely because it has the effect of defeating the interests of legitimate creditors, provided the intention in creating the trust accords with the terms of the trust as set out in the trust deed. As O'Regan J said in *Clayton*:²¹

...the Court can find that the deed creating a trust is a sham if the parties are shown to have intended it to be a pretence. But there is no basis to extend the sham concept to encompass a trust created under a document that was not intended to be a pretence but that the Court considers is otherwise reprehensible in some way.

[106] I do not agree that, in terms of the applicable legal tests, the KD Trust was a sham. I consider there was not, as a matter of common intention, the necessary intention to create an arrangement other than that which the Trust Deed purported to create, namely a trust for the legitimate benefit of Mrs Pye's family. Clearly, the trust arrangement was designed and operated for ulterior and no doubt questionable purposes. The evidence also demonstrates a laxity on the part of Mr Withers as the controlling hand of BlueCo to ensure that it complied with its obligations as trustee. But the authorities confirm that, even if its primary purpose were to prejudice or thwart

¹⁹ *Ben Nevis Forestry Ventures Ltd v Commissioner of Inland Revenue* [2008] NZSC 115, [2009] 2 NZLR 289.

²⁰ *Clayton v Clayton* [2016] NZSC 29, [2016] 1 NZLR 551.

²¹ *Clayton v Clayton*, above n 20, at [116].

the legitimate interests of a creditor, that falls short of the legal test for a sham. As was said in *Miles v Bull (No 1)*, and approved in *Official Assignee v Wilson*.²²

...a transaction is no sham merely because it is carried out with a particular purpose or object. If what is done is genuinely done, it does not remain undone merely because there was an ulterior purpose in doing it.

[107] It follows that the Assignee has not made out its case on this ground although, as I have held above, it is entitled to payments totalling \$81,046.81 from the three respondents on the grounds pleaded under the Insolvency Act.

End result

[108] From the information available when I heard these proceedings, it would seem that, apart from the \$30,000 loan to BlueCo for the benefit of the Williams Family Trust, no party may hold any asset, savings or investment which can be traced back to the original \$81,046.81 paid to RedCo. That is no reason to decline the Assignee the orders she is seeking and which are otherwise appropriate.

[109] It is apparent from my conclusions under the various claims that the Assignee has been successful in obtaining orders requiring the payment of monies which will exceed the sum of \$81,046.81, which is the maximum to which it can be entitled.

[110] This issue has been considered in other cases, which similarly involve court orders for the retransfer of money or property, albeit in the context of repayment orders for directorial breaches under s 301 of the Companies Act 1993. In *Mizeen Painters Ltd (in liq) v Tapusoa*, Muir J, in discussing the principles in such cases where the combined judgment sums exceed creditors' claims, held:²³

[61] I accept the liquidators' submission that this claim is conceptually independent of a claim to the current account and is appropriately the subject of a separate award. The fact that the current account claim of itself exceeds the creditor claims plus costs and that additional awards under s 300 and s 301 create a further margin over those liabilities is not unusual in this context. In each of *Bay Kiwifruit Contractors Limited (in liq) v Ladher*; *Madsen-Ries v Petera*; and *Richard Geewiz Gee Consultants Limited (in liq) v Gee*; cumulative awards in relation to one or more of current accounts, salaries paid in breach of s 161(5) and s 300 and/or s 301 claims exceeded total outstanding

²² *Miles v Bull (No 1)* [1969] 1 QB 258 (QB) at 264.

²³ *Mizeen Painters Ltd (in liq) v Tapusoa* [2015] NZHC 826, [2016] NZAR 423 (footnotes omitted).

creditor claims. As identified in *Morgenstern v Jeffreys*, the excess will return to Mr and Mrs Tapusoa as shareholders in any event. In that respect I again record the position of a liquidator is to avoid unnecessary circularity. Those practical issues should not, in my view, detract from the principle that discrete heads of claim should be the subject of discrete judgments.

[111] Although the ultimate issue in *Chris de Ruyter Painting Ltd (in liq) v De Ruyter* turned on the specific application of s 301 of the Companies Act 1993, Dunningham J affirmed the general principle that:²⁴

... where there are conceptually different claims against different parties, they are appropriately the subject of separate awards. Furthermore, I accept that the fact that the total of the claims made will significantly exceed the amount owed to creditors is not a barrier to entering judgment for that amount.

[112] Mr Slevin submits that the Court, if it resolves that various orders for payment are appropriate on any of the pleaded grounds, provide that, as a condition of those orders, the Assignee shall be permitted to recover a total sum of no more than \$81,046.81. I consider that is the appropriate course of action.

[113] Pursuant to this judgment, the transactions by which the first respondent, MWAC, received the sum of \$60,550 are cancelled. The first respondent is ordered to pay the Assignee \$60,550.

[114] Pursuant to this judgment, the transactions by which the second respondent (RedCo) received the sum of \$81,046.81 are cancelled. The second respondent is ordered to pay the Assignee the sum of \$81,046.81.

[115] Leave is reserved to the Assignee to seek leave to continue with the proceedings against the third respondent (BlueCo) so as to seek judgment for the sum of \$40,496.81.

[116] These orders are made on the basis the maximum amount the Assignee will be able to recover, pursuant to these judgments, is \$81,046.81, together with interest on that sum and costs.

²⁴ *Chris de Ruyter Painting Ltd (in liq) v de Ruyter* [2017] NZHC 1810 at [41].

[117] If the Assignee seeks costs, a memorandum as to that is to be filed within 21 days. The respondents must file any response within 14 days of receiving the Assignee's memorandum. I will deal with costs on the basis of these memoranda. They are to be no longer than five pages.