IN THE COURT OF APPEAL OF NEW ZEALAND

CA440/2014
[2015] NZCA 481

BETWEEN	CASTLEREAGH PROPERTIES LIMITED Appellant
AND	ROBERT BRUCE WALKER AS LIQUIDATOR OF GIBBSTON WATER HOLDINGS LIMITED Respondent

Hearing:	20 August 2015
Court:	Harrison, Wild and Winkelmann JJ
Counsel:	J Moss for Appellant K P Sullivan for Respondent
Judgment:	9 October 2015 at 2 pm

JUDGMENT OF THE COURT

A The appeal is dismissed.

B The respondent is entitled to costs calculated in accordance with band A for a standard appeal, together with usual disbursements.

REASONS OF THE COURT

(Given by Winkelmann J)

[1] The respondent Robert Walker is the liquidator of Gibbston Water Holdings Ltd (Holdings). Mr Walker applied to the High Court for orders confirming decisions he made as liquidator to avoid a sale and purchase agreement between Holdings and the appellant Castlereagh Properties Ltd (Castlereagh), by which

Holdings sold all of its shares in Gibbston Water Services Ltd (Water Services) to Castlereagh.

[2] Castlereagh appeals the decision of Mander J confirming the liquidator's decisions and making related orders.[1] Castlereagh argues that the Judge erred in finding that:

(a) the liquidator had the power to avoid the transaction under s 141 of the Companies Act 1993;

(b) all entitled persons had not consented to the transaction for the purposes of s 107(3) of the Companies Act;

(c) Castlereagh had failed to discharge the onus on it to prove the transaction was at fair value; and

(d) there were grounds to set the agreement aside under s 348 of the Property Law Act 2007.

[3] Prior to the hearing Castlereagh sought leave to adduce an affidavit which outlined developments since the decision of Mander J, purportedly to support its case that the shares were transferred for fair value. We dismissed the application as events occurring some three years after the transaction are irrelevant to the issue of whether at trial Castlereagh discharged its evidential onus of establishing the transaction was for fair value.[2]

Relevant background

[4] Water Services owns and runs a water scheme in the Gibbston Valley near Queenstown, supplying potable (drinkable) water to a number of owners of small lots and vineyards in that area who hold deeds with the company.

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1 *Walker v Gibbston Water Services Ltd* [2014] NZHC 1638 [High Court decision]. Having confirmed the liquidator's decision, the Judge ordered the updating of the share registers, and confirmed the appointment of a director to Water Services by the liquidator. It is common ground that if the appeal is successful then those ancillary orders should be quashed.

2 *Castlereagh Properties Ltd v Robert Walker as liquidator of Gibbston Water Holdings Ltd (in liquidation)* [2015] NZCA 368.

[5] The constitution of Water Services provides that its only objective is the perpetual provision and proper administration and control of suitable potable reticulation to the land situated at Gibbston Valley. It is not permitted to make a profit. The deed holders are to pay the costs of running the company and carrying out the services.

[6] In March 2007 Holdings purchased all of the shares in Water Services for $60,000.00 from an unrelated third party. Water Services is the wholly-owned subsidiary of Holdings, which is in turn the wholly-owned subsidiary of RFD Investments Ltd (RFD). The relevance of this ownership structure is that as of February 2007 a third party, Equitable Property Holdings Ltd (Equitable Property), had a security interest in all of RFD's assets and undertakings under the terms of a general security agreement (GSA). The collateral secured by the GSA therefore included Water Services.

[7] On 12 March 2010, RFD's shares in Holdings were transferred to FTG Trustee Services Ltd (FTG). FTG, Castlereagh, RFD, Holdings and Water Services are all companies which come under the umbrella of David Henderson's Property Ventures Group. Although FTG and Castlereagh are part of that Group, they were not caught by the GSA as they are not subsidiaries of RFD. That meant the transfer to FTG of RFD's shareholdings in Holdings had the potential to defeat Equitable Property's security interest in Holdings and, in turn, in its wholly-owned subsidiary, Water Services.

[8] Receivers were appointed to RFD under the GSA in June 2010, and soon became aware of the transfer of shares. Legal action was initiated against FTG to restore the shares in Holdings to RFD on the basis that the transfer was a breach of the GSA.

[9] In September 2011, FTG agreed to transfer the shares back to RFD in settlement of that proceeding, and that was duly done. But all was not then well, as on 24 August 2011 shortly before the transfer back, Holdings had transferred its shares in Water Services (and with it the Gibbston Valley potable water scheme) to the respondent Castlereagh, a wholly-owned subsidiary of FTG. The transfer was

pursuant to an agreement for sale and purchase of the shares, although the consideration for the sale was expressed to be only $1.00. This agreement was documented and was signed for Holdings by a director, Ms Buxton, who was also a director of FTG and the de facto partner of Mr Henderson. The agreement was signed for Castlereagh by its recently appointed director, Mr Hyndman.

[10] RFD's receivers were concerned that the transfer of Holdings' shares in Water Services to Castlereagh was a further attempt to defeat Equitable Property's security interest in those shares, or at least could have that effect. The receivers appointed Mr Walker as liquidator of Holdings to investigate the transfer and if appropriate, act to recover the shares.

[11] On 19 October 2011 Mr Walker gave notice to interested parties that Holdings was avoiding the agreement for sale and purchase with Castlereagh, and that the original shareholding for Water Services was restored. Subsequently he acted to remove Ms Buxton as a director of Holdings, and to appoint one of the deed holders in her place.

[12] In giving the notice avoiding the agreement, Mr Walker was purporting to exercise powers of Holdings arising under s 141 of the Companies Act.

First ground of appeal: does the liquidator have the power to avoid a transaction under s 141 of the Companies Act?

[13] Section 141 of the Companies Act provides:

> **141 Avoidance of transactions**
>
> (1) A transaction entered into by the company in which a director of the company is interested may be avoided by the company at any time before the expiration of 3 months after the transaction is disclosed to all the shareholders (whether by means of the company's annual report or otherwise).
>
> (2) A transaction cannot be avoided if the company receives fair value under it.
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> (3) For the purposes of subsection (2), the question whether a company receives fair value under a transaction is to be determined on the basis of the information known to the company and to the interested director at the time the transaction is entered into.

(4) If a transaction is entered into by the company in the ordinary course of its business and on usual terms and conditions, the company is presumed to receive fair value under the transaction.

(5) For the purposes of this section,—

(a) a person seeking to uphold a transaction and who knew or ought to have known of the director's interest at the time the transaction was entered into has the onus of establishing fair value; and

(b) in any other case, the company has the onus of establishing that it did not receive fair value.

(6) A transaction in which a director is interested can only be avoided on the ground of the director's interest in accordance with this section or the company's constitution.

[14] Castlereagh does not dispute the sale and purchase of the shares was a transaction in which a director of Holdings was interested, since Ms Buxton was both a director of Holdings at the time the transaction was entered into, and of FTG, the sole shareholder of Castlereagh. However counsel for Castlereagh, Mr Moss, argues there are a number of reasons why the liquidator could not avoid that agreement under s 141.

[15] The first is that the liquidator is a statutory agent and therefore only has the powers conferred on him under pt 16 and sch 6 of the Act. There is no power conferred on a liquidator to act in the name of the company under s 141. Mr Moss says the only potentially relevant power is found in sch 6, cl (h), which does not apply here. That clause provides as follows:

Schedule 6
Powers of liquidators

s 260(2)

A liquidator of a company has power to—

…

(h) act in the name and on behalf of the company and enter into deeds, contracts, and arrangements in the name and on behalf of the company:

…

[16] Mr Moss contends cl (h) does not confer a general power to act in the name of the company, because the words "act in the name and on behalf of the company"

are limited by the words that follow. The effect of cl (h) is no more than that the liquidator has the power to act in the name of the company when entering into deeds, contracts and arrangements in the name and on behalf of the company. If that were not the proper interpretation of those words then the powers of the liquidator would be the same as the powers of the company. If that were the case, it would not be necessary to provide that the liquidator had power to enter into deeds, contracts and arrangements, or indeed to include many of the other powers listed in sch 6.

[17] In the High Court the Judge was satisfied that the exercise of the s 141 power was consistent with the purposes of liquidation. As long as the liquidator was acting in discharge of the liquidator's overall statutory duties, the liquidator could act in the name of the company. The Judge was therefore satisfied that cl (h) should not be confined to simply bestowing on a liquidator a limited ability to execute documentation in the name of and on behalf of a company.[3]

Analysis

[18] The effect of liquidation is to pass to the liquidator the custody and control of the company's assets.[4] The directors remain in office, but cease to have the power to act on behalf of the company except in a number of limited situations.[5] Following liquidation it is therefore the liquidator who acts on behalf of the company, although always in accordance with the liquidator's particular statutory duties and responsibilities.

[19] Section 253 describes a liquidator's duties as follows:

> **253 Principal duty of a liquidator**
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> Subject to section 254, the principal duty of a liquidator of a company is—
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> (a) to take possession of, protect, realise, and distribute the assets, or the proceeds of the realisation of the assets, of the company to its creditors in accordance with this Act; and

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3 High Court decision, above 1, at [51].
4 *Dunphy v Sleepyhead Manufacturing Co Ltd* [2007] NZCA 241, [2007] 3 NZLR 602 at [20]−[25] and [34].
5 Companies Act 1993, s 248.

(b) if there are surplus assets remaining, to distribute them, or the proceeds of the realisation of the surplus assets, in accordance with section 313(4)—

in a reasonable and efficient manner.

[20] Assets which have been transferred in circumstances where the transaction is voidable at the company's election, such as a transaction entered into at an undervalue and by an interested director would, on the face of it, fall within the category of assets which the liquidator has a duty to "take possession of, protect, realise". This brings us to Mr Moss's argument for Castlereagh that unless the liquidator has express statutory power to act on behalf of the company to exercise the power under s 141 to set aside a transaction, the liquidator may not do so.

[21] Section 260 of the Act sets out a liquidator's powers as follows:

260 Powers of liquidator

(1) A liquidator has the powers—

(a) necessary to carry out the functions and duties of a liquidator under this Act; and

(b) conferred on a liquidator by this Act.

(2) Without limiting subsection (1), a liquidator has the powers set out in Schedule 6.

[22] The provisions of s 260 are a complete answer to this argument. The liquidator's powers are expressly not constrained to those set out in sch 6, and if it were necessary, we would find that the liquidator had the power to act under s 260(1) whether or not cl (h) applies. But it is not necessary. The words of cl (h) in sch 6 encompass the liquidator's actions in giving the s 141 notice on this particular occasion. We see no reason to read the words of that clause down in the manner argued for by Castlereagh. Giving effect to the plain meaning of the words of cl (h) does not entail an unrestricted conferral on the liquidator to act in the name of the company. As with any other power statutorily conferred on the liquidator, under s 260 this power must be exercised for the purpose of discharging the liquidator's statutory duties. We accept that on this interpretation there is overlap between cl (h) and other clauses in sch 6, but we do not see this as favouring Castlereagh's interpretation. There is an overlap between the whole of sch 6 and s 260(1).

The point of the various clauses in sch 6 is to put beyond argument that the liquidator has these particular powers.

[23] Mr Moss also argues that it was unnecessary for the liquidator to invoke s 141 to bring in this particular asset, as pt 16 of the Act, which applies to liquidations of a company, contains specific powers enabling liquidators to set aside transactions.

[24] The most relevant sections for present purposes are ss 297 and 298 which enable the liquidator to recover the amount by which the value of an asset transferred by the company exceeded the value of the consideration received by it. These provisions do not allow recovery of the asset transferred and so the relief is different and potentially less favourable to the company than that available under s 141.

[25] Although s 141 will often not be available to a liquidator because of the tight time frame for the giving of notice, we agree with the Judge that the liquidator has the power to issue a notice under s 141 setting aside a transaction if the exercise of that power is for the purpose of taking possession of the company's assets.[6]

Second ground of appeal: did the shareholders of Holdings agree to the transaction so that s 141 has no application?

[26] In the High Court Castlereagh argued that the agreement for sale and purchase of the shares had been approved in writing by Holdings' parent company, FTG, and therefore could not be avoided because of s 107 of the Act. The relevant subsections of s 107 provide:

> **107 Unanimous assent to certain types of action**
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> …
>
> (3) If all entitled persons have agreed to or concur in a company entering into a transaction in which a director is interested, nothing in sections 140 and 141 shall apply in relation to that transaction.

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[6] We add a comment, however, that while s 141 is available to a liquidator, in this case a more straightforward course would have been for the holder of the GSA, Equitable Property, to pursue recovery of the shares in reliance upon the provisions and operation of the GSA. The substantial merits of this case arose from the transfer of the shares to defeat Equitable Property's security interest in them.

(4) For the purposes of this section, no agreement or concurrence of the entitled persons is valid or enforceable unless the agreement or concurrence is in writing.

(5) An agreement or concurrence may be—

(a) a separate agreement to, or concurrence in, the particular exercise of the power referred to; or

(b) an agreement to, or concurrence in, the exercise of the power generally or from time to time.

…

[27] For the purposes of the Act an entitled person is a shareholder and any person upon whom the constitution of the company confers any of the rights and powers of a shareholder.[7] At the time of the sale of the shares to Castlereagh, Holdings' sole shareholder was FTG.

[28] In the High Court, Castlereagh argued that Ms Buxton's signature on the agreement for the sale and purchase of shares was sufficient written record of FTG's agreement. Although she signed in her capacity as a director of Holdings, she was at the same time also the director of Holdings' shareholder, FTG, and on Castelreagh's case her signature in either capacity should be enough.

[29] The Judge rejected the argument that Ms Buxton's signing of the agreement in her capacity as a director of Holdings was adequate written record of FTG's consent to the transaction for the purposes of s 107(3). He found that there was no record in writing of FTG's consent.[8] The Judge said that the fundamental requirement of "a manifestation of an assent or agreement" was absent, and so too a record of that agreement in writing.[9]

[30] On appeal Mr Moss argues that requiring that Ms Buxton to sign separately in her capacity as a director of FTG is to require just the sort of formality s 107 was designed to avoid. He also seeks to bolster the argument by referring us to documents and evidence which he says constitutes further written evidence that FTG agreed to the transaction.

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7 Companies Act, s 2.
8 High Court decision, above n 1, at [66].
9 At [65].

[31] Finally, Castlereagh says that there was no prejudice to FTG as both Holdings and Castlereagh were its wholly-owned subsidiaries so that both before and after the transaction FTG effectively owned Water Services. Any protection offered by s 141 was unnecessary in this case.

Analysis

[32] Castlereagh asks the Court to take a robust, non-formalistic approach on the basis that the purpose of s 107 is to avoid formalities and to do otherwise would therefore defeat its purpose. It is true that s 107 allows a company to undertake certain actions otherwise than in accordance with the formalities prescribed in the Act, if all entitled persons have agreed or concur. But s 107 allows more than "formalities" to be dispensed with. It is a provision which allows certain categories of transaction to occur other than in accordance with the provisions of the Act and even the company's constitution, if there is evidence that all entitled persons agreed to the transaction. The purpose of s 107 has been described as follows:[10]

> … to allow companies with few shareholders (which are the only companies for which it is practical to obtain unanimous written agreement) to avoid the costs of complying with some of the Act's rules, where those rules are imposed solely for the protection of shareholders (and not, for example, for the protection of the company's creditors).

[33] In the context of s 141, s 107 has the effect that a transaction entered into by the company in which a director of the company is interested, and in which the company does not receive fair value, cannot be set aside by the company if all entitled persons agree in writing to the transaction.

[34] We also consider it significant that s 107(4)–(8) creates a detailed regime in connection with the agreement required. Taken as a whole, the legislative scheme into which s 107 fits does not support the kind of "near enough is good enough" approach that Castlereagh argues for.

[35] In terms of s 107(4) the issue is whether FTG agreed in writing to Holdings selling its shares in Water Services to Castlereagh for $1.00. Mr Moss concedes the

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[10] P Watts, N Campbell and C Hare *Company Law in New Zealand* (LexisNexis, Wellington, 2011) at [6.8.4].

company cannot point to any document that constitutes such an agreement. Rather it attempts to draw together threads of evidence, and by doing so construct a record of FTG's consent to the transaction. We are satisfied that none of this evidence and none of these records, whether taken separately or together, is evidence of FTG's written consent.

[36] Ms Buxton swore an affidavit in the High Court proceedings that she approved the transaction in her capacity as a director of FTG. This comes too late to constitute written agreement for the purposes of s 107. By the time she swore that affidavit, Holdings was no longer the wholly-owned subsidiary of FTG. The shares in Holdings had been transferred back to RFD. FTG had therefore ceased to be an entitled person for the purposes of s 107.[11]

[37] We agree with the Judge that Ms Buxton's signature on the agreement is not evidence of FTG's agreement to the transaction. She signed the agreement for sale and purchase in her capacity as a director of Holdings. The capacity in which she signed the agreement is not a minor technicality as Mr Moss would have it. When Ms Buxton signed as a director of Holdings, she did so in discharge of her duties and in exercise of her powers as a director of that company. She was not purporting to comply with her duties or exercise her powers as a director of FTG.

[38] Castlereagh also points to FTG's appointment of Mr Hyndman as director of Castlereagh shortly before the transaction, in circumstances where there was no other director. Castlereagh argues that we can safely infer that since this was shortly before the agreement was signed, FTG's purpose in appointing Mr Hyndman as a director was to enable the transaction to proceed. But the appointment of Mr Hyndman as a director of Castlereagh is not evidence of FTG's agreement to the transaction, let alone agreement in writing.

[39] The last item of evidence Castlereagh relies upon is a letter from FTG's solicitor to the receivers of RFD advising them that Holdings has disposed of its shares in Water Services to Castlereagh. Castlereagh points to the requirements of

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[11] There is an issue as to whether written agreement to the company entering into the transaction has to exist before the transaction is entered into. That is not on issue we need to decide for the purposes of this appeal.

ss 24 and 27 of the Property Law Act in relation to contracts for the disposition of land and contracts of guarantee. Section 24 requires that contracts for the disposition of land must be in writing or recorded in writing, and signed by the person against whom the contract is sought to be enforced. Contracts of guarantee must be in writing and signed by the guarantor pursuant to s 27. Castlereagh says that the evidence of FTG's solicitor's letter would be sufficient evidence for the purposes of those provisions, and so should be sufficient evidence here under s 107 where the requirement that the agreement be in writing is, in essence, the same as under s 24 of the Property Law Act.

[40] We agree that the requirement in s 107 that the agreement be in writing is expressed in very similar terms to the requirements set out in ss 24 and 27 of the Property Law Act, and that there is a similar policy rationale for the provision: a requirement of written evidence of agreement to an important transaction. It is also true that a written record contained in a document or documents not deliberately prepared for the purpose of recording a transaction may be sufficient for the purposes of ss 24 or 27 even if prepared some time after the agreement is concluded. But to constitute a written record of an agreement under the Property Law Act, the documents must contain all of the material terms of the contract.[12]

[41] Mr Moss's assertion that the evidence in this case would be sufficient for the purposes of ss 24 and 27 is wrong. The consideration paid for the shares is clearly a material term here, but the letter does not record that the shares were sold for $1.00 (although we acknowledge it records Holdings' views that the shares were worthless). It also seems that in the portion of the letter relied upon, the solicitors are speaking on behalf of Holdings rather than on behalf of FTG.

[42] Castlereagh also relied upon *Pioneer Insurance Company Ltd v White Heron Motor Lodge Ltd* as a case where a court was prepared to take a flexible approach to what constituted an agreement in writing.[13] But in *Pioneer* the Judge was satisfied that every person interested had signed one of three documents approving or

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12 J Burrows, J Finn and S Todd *Law of Contract in New Zealand* (4th ed, LexisNexis, Wellington, 2012) at [9.3.4].

13 *Pioneer Insurance Company Ltd v White Heron Motor Lodge Ltd* (2008) 10 NZCLC 264, 407 (HC).

establishing the underlying guarantee obligation (a shareholders' resolution, a guarantee or the loan agreement).[14] It is therefore distinguishable from the present case.

[43] Castlereagh's argument that FTG was not prejudiced by the transaction does not assist it. The Act does not recognise a further exception to the application of s 141 to the effect that the agreement may not be set aside if entitled persons are not prejudiced by the transaction.

[44] To conclude, Castlereagh failed to prove that the fundamental requirement as set out in s 107 was met: that as an entitled person, FTG had agreed to the transaction, and that its agreement was in writing. The Judge was therefore correct to conclude that Castlereagh could not avail itself of the defence contained in s 107 to the setting aside of the transaction pursuant to s 141. This ground of appeal fails.

Third ground of appeal: was the transaction for fair value?

[45] Section 141(2) provides that a transaction cannot be avoided if a company receives fair value under it. Whether a company has received fair value under a transaction is to be determined on the basis of the information known to the company and to the interested director at the time the transaction was entered into.[15] It is common ground that the onus was on Castlereagh to establish that Holdings received fair value.

[46] Castlereagh says Water Services was both cash-flow and balance-sheet insolvent. It had no cash flow and had not had any for about two years at the time of the transaction in 2011. It was balance sheet insolvent because there was a net deficit on its balance sheet and it had insufficient assets to meet its liabilities, including contingent liabilities, if and when they fell due. Ms Buxton knew all of these things at the time of the transaction which is why she agreed to the share transfer for $1.00. She says in her affidavits that Water Services did not generate an income, had been run at a loss for many years, and:

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14 At [63].
15 Companies Act, s 141(3).

> … that its ability to meet its obligations was based on the continuing support of other companies I controlled that are shown in the accounts as being creditors of [Water Services].

[47] Castlereagh accepts that if someone was willing to pay for the shares in Water Services, notwithstanding its poor financial situation, then that company did have a value. But it relied on the evidence of one of the deed holders that the residents would be "extraordinarily reluctant" to buy the shares. For his part, the liquidator of Holdings accepted that the residents were the only realistic market to buy the shares.

[48] At the time of the share sale, Water Services had no financial books or records. In preparation for the High Court hearing of the liquidator's application, Ms Buxton instructed Taurus Group Ltd to prepare accounts for Water Services. Accounts for the period 1 April 2011 to 31 July 2011 were initially filed as evidence. These included a statement of financial position which showed accumulated losses of $5,144.00 as at 31 March 2011 and $6,914.00 as at 31 July 2011 (although wrongly recorded as 2012).

[49] These accounts were the subject of criticism in Mr Walker's reply affidavit. He observed that the information described a four-month period only, with no information as to the preceding financial period. He identified that they did not comply with the required standards for financial reporting. Accordingly, very late in the piece, accounts for Water Services for the years ended 31 March 2009 to 2014 inclusive were filed. Each year showed net operating revenue deficits and negative equity.

[50] Castlereagh also provided an affidavit from a valuer, Mr Moore, in which he valued the plant associated with the potable water scheme at $2,500.00. It filed affidavits from Mr O'Connell, a chartered accountant, whose opinion was that the shares were worth nothing at the date of transfer. This opinion was based upon the information contained in the financial statements provided by Castlereagh, and upon the fact that Water Services is not entitled to make a profit.

[51] In the High Court the Judge found that Holdings, and its director Ms Buxton, could not have had an accurate appreciation of the true worth of the company at the time of the sale in August 2011.[16] Although he found deficiencies in the accounts provided, he said that even accepting the accounts at face value, it was not clear that Water Services was worthless so that its shares could have been valued at nil at the critical time. The financial statements included the company's property, plant and equipment at a valuation of $5,000.00, which did not represent the market value of the water scheme. Even for the hearing there had been no valuation of the water scheme, only an assessment of the disposal value of the readily removable parts. The Judge referred to the evidence of Mr Wilson, a surveyor and the managing director of the firm which did the initial survey of the scheme. Mr Wilson said that the cost to replicate the scheme in 2014 would be somewhere in the vicinity of $158,000.00 plus GST. The scheme comprised a bore, a pump, a storage tank, 7.6 kilometres of pipes (at one point passing under a highway) and over 30 valved connections.

[52] The Judge said:

> [80] Leaving to one side investigation or due diligence that might be undertaken in respect of the liabilities listed in the financial statements purportedly reflecting debts to related companies and the costs incurred in obtaining the substitute water permit in 2009, when the replacement cost of the water scheme is taken into account, it is apparent that there is some equity in the Services shares. The water permit itself providing as it does a right to extract potable water until April 2043 is likely to attract a premium above the initial costs associated with securing the water rights. This is particularly so when regard is had to the intrinsic value to owners of properties in the Gibbston Valley from being able to access a constant supply of drinkable water and the deleterious effect on the value of those properties if such a basic piece of infrastructure is not available.

[53] He concluded on this issue as follows:

> [83] The shares in Services had never been valued. More particularly, the value of the potable water scheme as an asset of the company has never been valued, notwithstanding its unique nature and the obvious demand and need for the water service to the residents of the Gibbston Valley. Further, there was no readily accessible accounting information available upon which to assess the true value of the company.

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[16] High Court decision, above n 1, at [73].

Analysis

[54] On appeal, Castlereagh asks us to reach a different view of this evidence. We see no reason to depart from the Judge's conclusions. We agree with the Judge that Castlereagh did not discharge the onus upon it to establish that it paid fair value, based on the information known to the company and to the interested director at the time of the transaction. Like the Judge, we consider the following matters tell against Castlereagh in this regard.

[55] Holdings had not obtained a valuation of the shares at the time of the sale. It did not have up-to-date accounts. We agree with the following assessment by the Judge of the information available to the director at the time:

> [86] Ms Buxton's evidence was that she knew Services was a non-profit company, that there had been difficulties in obtaining the fees from the various deed holders, and that it had liabilities. She stated that she did not need a set of accounts to know the position. Ms Buxton's evidence was that her advice would have come from her husband, Mr Henderson, and from Taurus Accounting. Mr Henderson however did not give evidence and Ms Buxton did not give evidence as to what that advice was. Similarly, no evidence was provided of the content of advice from Taurus Accounting, nor how the accountants would be in any position to give such advice in the absence of accounting records, the preparation of any financial statements or a valuation of the market worth of the potable water scheme to the residents of Gibbston Valley. Ms Buxton confirmed that the residents of the Gibbston Valley were not approached to assess what they may have been prepared to pay to purchase the shares, nor that any enquiry had been made as to their potential sale value.

[56] The information contained in the accounts prepared for this hearing is irrelevant because it was not information available to Ms Buxton at the time the shares were sold. Even if the accounts were relevant, there are strong reasons to doubt their reliability. They were prepared from information provided by Ms Buxton, in some cases several years after the transactions they record, and for the purposes of these proceedings in order to substantiate Ms Buxton's claim that the shares had no value.

[57] The evidence was that Ms Buxton and Mr Henderson continued to control the records of Water Services for the relevant period so that the liquidator could not respond in any detail to the information contained in the accounts. Nevertheless,

even on the face of the accounts there are difficulties with their accuracy. They proceed on the basis 2009 is the first period of trading, yet that is demonstrably not the case. There are significant differences between the initial four-month set of accounts provided with the first affidavit of Ms Buxton, and the annual accounts provided later. Liabilities shown in the accounts include the costs of these proceedings, not properly chargeable to Water Services on any account. They include legal fees shown as payable to a law firm, when those costs had already been paid by another party. They show a liability to a company that had been in receivership for five years, and which had made no call upon Water Services in respect of that amount. Many of the other liabilities shown are to companies related to Mr Henderson, with no documentary trail produced to show why Water Services was indebted to those companies.

[58] We also note that when first called upon to explain why Water Services had no value at the date of sale of the shares, the solicitors for FTG asserted there was a GSA over the company securing $1.1 million. However there is no evidence to suggest that any creditor had a security interest in Water Services securing such a sum. The accounts do not reflect such a liability and the solicitor who made the assertion confirmed under cross-examination that to the best of his knowledge there were no such borrowings secured over Water Services.

[59] Further undermining Castlereagh's case is the evidence that suggests Water Services had value in 2012. Holdings paid $60,000.00 for it when it bought the shares from an unrelated third party in 2007. Shortly after that purchase Water Services had to apply for a new permit, and in 2008 it was successful in obtaining a permit valid until 2043. The deed holders were and are dependent on Water Services for the supply of drinkable water. The cost of a new scheme would be well in excess of $100,000.00. We also attach little weight to the evidence Castlereagh points to of a resident's concession under cross-examination that residents were unlikely to take over the scheme. This was said in the context of the notional taking over a company with the liabilities as described in the accounts prepared for Castlereagh for the hearing. We have noted our concerns in relation to the accuracy of those accounts.

[60] There is therefore no reason to differ from the Judge's finding that Castlereagh, which sought to uphold the transaction, failed to discharge the onus of establishing fair value for the purposes of s 141(2) and (3). This ground of appeal also fails.

Fourth ground of appeal: were there grounds to set the agreement aside under s 348 of the Property Law Act?

[61] The liquidator relied upon s 348 of the Property Law Act as an alternative to his claim under s 141. Pursuant to s 347(1)(b), a liquidator may apply for an order under s 348. These sections provide:

> **347 Application for order under section 348**
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> (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 s 342 of the Companies Act 1993.
>
> (2) The application must specify the disposition claimed to be prejudicial, and the property or compensation sought through the application.
>
> (3) The application, together with a notice communicating the effect of sections 348 and 349, must be served on—
>
> (a) the person in whose favour the disposition of property was made; and
>
> (b) any other person from whom property or compensation is sought through the application.
>
> **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.

(5) The order must not have effect so as to increase the value of a security held by a creditor over the debtor's property.

(6) Subsection (5) overrides subsection (2) and section 350.

(7) This section is subject to section 349.

[62] Section 346 describes dispositions in respect of which orders under s 348 may be made as follows:

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

(b) was engaged, or was about to engage, in a business or transaction for which the remaining assets of the debtor were, given the nature of the business or transaction, unreasonably small; or

> (c) intended to incur, or believed, or reasonably should have believed, that the debtor would incur, debts beyond the debtor's ability to pay.

[63] Pursuant to s 345(1) a disposition by way of gift for these purposes includes:

> …
>
> (c) 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;
>
> …

[64] For the purposes of this application, Holdings was the debtor company.

[65] Because of the findings he had made under s 141 of the Act, the Judge considered the application under s 348 only in the alternative. The Judge was satisfied the shares had been sold at an undervaluation. He found the liquidator of the debtor company had thereby established prejudice for the purposes of s 347, noting that the onus was upon the liquidator.[17] He rejected an argument the liquidator had to show the challenged disposition was made with intent to prejudice a creditor,[18] and that Holdings was not rendered insolvent by the transfer of the shares, both arguments advanced on the basis there was no creditor at the time of the sale.[19] He held that on the face of available documentation, there was a creditor at that time. He said had he been required to do so, the Judge would have found the sale of shares could have been validly set aside pursuant to s 348 of the Property Law Act.[20]

[66] On appeal Castlereagh argues the Judge erred in finding the transaction prejudiced Holdings, as the liquidator had not established the sale of shares was at an undervaluation. Alternatively it argues Holdings was not a debtor company as it had no creditors, was therefore not insolvent at the time of the disposition, and did not become insolvent as a consequence of the disposition.

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17 High Court decision, above n 1, at [99]–[100].
18 At [98].
19 At [102].
20 At [103].

Analysis

[67] As to the first of Castlereagh's arguments, for the reasons listed above, we agree with the Judge the liquidator has proved that the shares in Water Services were sold at an undervaluation.

[68] In relation to the second of the arguments, the Judge proceeded upon the basis that a debt recorded as owing by Holdings to a related company, Mulgrave Investments Ltd, was enforceable at the date of the disposition.[21] He did so even though the liquidator had by that point in time rejected a proof of debt filed by Mulgrave in respect of the $60,000.00. Mulgrave's proof was advanced on the basis that it lent the original $60,000.00 to Holdings to purchase the shares in Water Services in 2007. This was rejected by the liquidator on the grounds that by then the debt was older than six years, and therefore unenforceable.

[69] As is apparent from this chronology, at the date of the transfer of the shares in Water Services to Castlereagh, Mulgrave's debt was still enforceable, because it was then less than six years old. In those circumstances, the transfer of Holdings' only asset to Castlereagh in return for payment of $1.00 would have rendered it insolvent, bringing Holdings within the provisions of ss 346 and 348 of the Property Law Act.

[70] This ground of appeal therefore fails.

Result

[71] All of the grounds advanced in support of this appeal have failed. The appeal is dismissed.

[72] The respondent is entitled to costs calculated in accordance with band A for a standard appeal, together with usual disbursements.

[73] Mr Sullivan submitted that the respondent should be entitled to costs against a non-party, Ms Buxton, on the grounds she had caused this appeal to be brought as

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[21] At [102].

the director standing behind the appellant. However, no notice of this was given to Ms Buxton and without her having the opportunity to be heard on the application, we do not consider it further.

Solicitors:
Ngaire Smith Lawyer, Christchurch for Appellant
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