IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2013-404-004935
[2014] NZHC 800

UNDER	The Companies Act 1993
IN THE MATTER OF	the liquidation of Insulae Building Consultants Limited (In Liquidation)
BETWEEN	DAMIEN GRANT and STEVEN KHOV as liquidators of Insulae Building Consultants Limited (In Liquidation) Applicants
AND	NAUHRIA PRECAST LIMITED Respondent

Hearing: 15 April 2014

Appearances: B J Norling and A Ho for the Applicants
K W Fulton for the Respondent

Judgment: 16 April 2014

JUDGMENT OF ASSOCIATE JUDGE CHRISTIANSEN

This judgment was delivered by me on
16.04.14 at 4:30pm, pursuant to
Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar
Date……

[1] The applicants are the liquidators of Insulae Building Consultants Limited (In Liquidation) (Insulae). They seek orders that the amount of $62,371.69 received by the respondent (NPL) from Insulae be set aside and that NBL pay that amount to the liquidators.

[2] The liquidators claim that that amount received by NPL as payment for the supply of goods to Insulae is an insolvent transaction pursuant to s 292(2) of the Companies Act 1993 (the Act).

Facts

[3] On February 2011 Insulae and NPL entered into a credit agreement whereby NPL supplied goods to Insulae on credit. The credit application stated that NPL retained ownership of the goods supplied until full payment was made. The relevant clause of their agreement states:

> Ownership in the goods remained with us until full payment is made regardless of where the goods are stored.

[4] NPL did not register its security interest. The parties traded between 28 March 2011 and 22 August 2011. On 20 September 2011 Insulae was put into liquidation by special resolution of its shareholders.

[5] Upon the liquidators review of Insulae's accounts it considered the transactions with NPL were voidable. A notice to set aside those was served on 12 June 2013. In that notice the liquidators accepted that the account between the parties was a running account (in terms of s 292(4B)) (4B) of the Act. The liquidators sought the net improvement from the peak point selected by the liquidators. The present application before the Court proceeded on the same basis.

Characterisation of the parties trading relationship

[6] NPL responded by filing a notice of objection. After receipt of that the liquidators replied maintaining their position with the concession of a running account.

[7] NPL says that the start date for the running account is 7 February 2011 and there is a net loss of $6,186.61; therefore that there is no improvement or advantage during that trading period identified by the liquidators.

[8] It is now clear that the liquidators have selected a date from which they have chosen to start the period of the transaction under s 292. In their notice and their application there was never a change to the end date that being the date of the last payment.

[9] Section 292(2) provides inter alia that a transaction will be an insolvent transaction if it is entered into when the company is unable to pay its due debts, and which enables a creditor/supplier to receive more towards satisfaction of a debt owed by the company than it would likely have received in the company's liquidation.

[10] In this case there is no dispute that Insulae's payments to NPL were transactions, or that all of these transaction payments were received by NPL in the 6 month restrictive period prior to liquidation when they are presumed to have been entered into with a time when Insulae was unable to pay its due debts.

[11] Issues for consideration in this case include:

(a) whether there has been a voidable transaction in terms of (4B) (whereas here there is a continuing business relationship), and what is the correct start date and can the liquidators select whatever point they chose to start the period of the transaction;

(b) has there been a preferential payment and in that regard what affect does NPL's unregistered security have;

(c) does NPL have a change of position defence in any event?

[12] The start and end dates of the (4B) relationship are central issues in this case. In all prior pleadings and affidavits the parties focus has been upon a relevant start date. Only in the submissions prepared for the Court hearing have the liquidators

turned their attention to arguing that the transaction end date was not 22 August 2011 when the last payment was made.

[13] The relevance of this change will be considered shortly.

[14] The liquidators' position is that the date of peak indebtedness approach is the correct approach to be adopted in New Zealand. This approach allows a liquidator to take into account the commercial realities upon which the transactions took place between the debt and the creditor.

[15] Prior to the introduction of the continuing business relationship provisions (including (4B)) the liquidators could pick and choose individual transactions to target as voidable preferences. In this case the liquidators say that their ability to chose transactions was not replaced by the running account provisions and that the peak indebtedness approach is consistent with the liquidators previous right to pick and choose individual actions to void; that the adoption of the date of peak indebtedness approach will also ensure consistency in relation to the interpretation of the running account in Australia and in New Zealand.

[16] This Court does not accept that approach in this case. Increasingly it is the Court's approach to look at the whole course of trading under a continuing relationship; increasingly the Court will reject a liquidators' right to select a peak period date. Much will depend on whether the Court considers whether the purpose of a payment is to discharge a debt and if so then it is unlikely to be a running account argument. Also a suspicion of insolvency could bring an end to a running account claim.

[17] In this case, indeed as have liquidators done previously, the applicants adopt the peak indebtedness approach. The Court considers that approach to be wrong. Certainly before the introduction of (4B) the approach under s 292 was that the payments made in the ordinary course of business could not be challenged and the running account approach was rejected as applying. Section 292 gave no option but to select an individual transaction but it had to be shown as being outside the ordinary course of business and had the same six month and two year limits. Mr

Fulton submits and the Court agrees that by contrast, s 292 as amended actually states that all transactions within a commercial relationship are the transaction and has essentially rejected the arbitrary selection or picking off of a date when indebtedness was at its peak. As he submits it is more prescriptive now, and it was in effect designed to remedy the uncertainty of the ordinary course approach. However the picking off approach continues to remain to the extent that it can be shown that the (4B) relationship had ended and where it was more like a debt collection exercise.

[18] It is not uncommon in a continuous business relationship for the parties to have significant trading activity in one month whilst there may be another or other months when the business activity is much reduced.

[19] In this case I accept Mr Fulton's submission that to the extent the period of the parties trading relationship is less than two years then it ought to revert to the start of the (4B) relationship and not some selected peak date; that otherwise the whole purpose of (4B) is undermined.

[20] The Court accepts the submission that in this case 7 February 2011 must be the start date of the parties continuing business relationship for it was on that date, as noted in paragraph 3 of this judgment, that the parties entered into a credit agreement for the supply of goods and for NPL to retain ownership until full payment was made.

[21] It is clear from the liquidators' notice and their application the liquidators concede there was a running account albeit from 31 May 2011 (the liquidator's choice of a peak indebtedness date) to 22 August 2011. It was to that date that NPL said it had supplied goods to a value of $114,269.14, and for which they have received payments of $108,082.53, and therefore remained owed $6,186.61. These figures are not challenged by the liquidators. Yet, they claim for present purposes a relationship start date much later than that. Also, as appears from counsel's submissions, the liquidators attempted to exclude Insulae's last six payments from 23 June 2011 by claiming they were not in fact part of the running account. This, even though NPL had on 1 July 2011 invoiced Insulae for a sum of $11,250.45. For the

liquidators it was submitted no account should be made of that invoice because it was "nominal".

[22] As earlier noted only belatedly have the liquidators claimed that the relationship ended before the last payment by Insulae to NPL. In part it appears this approach on behalf of the liquidators has been taken because it may have appeared to them that the Court would not accept the peak indebtedness claim. Quite clearly indeed as the liquidators concede there is no evidence at all that NPL had any idea that the supply arrangement between them was to come to an end or was not intended to be an ongoing arrangement. There is no evidence that no further supplies between the parties were contemplated. There is no evidence that NPL was pressing for payment. As Mr Fulton submits all signs were of a continuing relationship in which the payment pattern did not raise any concerns.

[23] In that background of matters the Court considers the liquidators' analysis of the payments is wrong; that there is no evidence to support an allegation that the relationship had ended by 24 June 2011 i.e. prior to the last six payments made to NPL by Insulae. Clearly the liquidators never alleged that individual payments were voidable as being outside the (4B) relationship.

[24] In that assessment of matters the liquidators' application must fail. What follows is the Court's consideration of matters they would have applied if the liquidators calculations of start and end dates had been accepted.

Other considerations

Did NPL receive preferential payments?

[25] The evidence does not support claims of preference payments to NPL. There was only one security interest registered and that was in favour of a secured creditor that was owed only $698.00. NPL's own unregistered security interest was effective against Insulae and thus against unsecured creditors. For the liquidators it was argued the security interest was ineffective because it was unregistered and because the product supplied by NPL was unable to be retrieved and therefore NPL lost its

security in the collateral once it was transferred by Insulae to the development project.

[26] This statement of position on behalf of the liquidators fails to recognise the actions available to NPL as a security interest holder to access the proceeds of sale of its goods by Insulae and to be paid ahead of any other party.

[27] The fact is s 35 of the Personal Property Securities Act 1999 (PPSA) states the security agreement is effective accordingly to its term and that the interest attaches without registration. Section 66(c) recognises priorities between unperfected and registered security interests.

[28] As Mr Fulton submits, in the circumstances NPL was prima facie a preferred creditor ahead of unsecured creditors and the liquidators have not proved otherwise.

Does NPL have a defence pursuant to s 296(3)?

[29] By that provision a liquidator cannot effect recovery of payments received in good faith, and when insolvency could not have reasonably been suspected, and if the party receiving the payment had altered their position in their reasonably held belief that the payment to it could not be set aside.

[30] The three elements identified are cumulative. The liquidators have conceded that NPL acted in good faith and had no reasonable grounds for suspecting Insulae's insolvency. The question remains whether NPL has changed its position in reliance upon receipt of the payment. It is clear from case authority identified by counsel that acts constituting an alteration of position have to occur contemporaneously or following receipt of the impugned payment[1]; and that the use of money received to meet operating expenses could not amount to an alteration of position.[2]

[1] *Maden-Ries v Rapid Constructions Ltd* [2012] NZHC 3572.
[2] *Watchorn Transport Ltd v Blanchett* 23/11/04, Associate Judge Lang, HC Hamilton CIV 2004-404-165.

[31] Counsel for the liquidators also refers to the authority of *Grant v Shears and Mac Ltd*[3]. Relying on that case the liquidators say that a failure to perfect a security interest was not a change of position. However, in that case it is clear the Court's decision was influenced by the existence already of a perfected security interest of another party. Mr Fulton submits that position is very different from the present one because at the receipt of each payment to NPL the proceeds were arguably covered by the security interest and/or NPL had the right to register a financing statement to ensure ongoing priority. Counsel submits and the Court accepts that the giving of value is not the release of the antecedent debt but in the release of access to the security claim over the proceeds that the company Insulae had received. In those circumstances NPL have altered their position in that while able to register its security interest it did not because of the payments received.

Conclusion

[32] In the Court's view the transaction in question commenced on 7 February 2011 and ran at least until the final payment. Therefore none of the payments received by NPL are otherwise than as part of a continuing business relationship.

[33] There is no evidence to support claims that NPL received payments in preference to others. The Court also concludes NPL had an arguable defence of change of position in respect of each payment it received.

Judgment

[34] The liquidators' application is dismissed.

[35] Costs are awarded to NPL on a 2B basis for which purpose the Court certifies a half day hearing. Disbursements are to be paid as approved by the Registrar.

Associate Judge Christiansen

[3] 2012 NZHC 1772.