IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

CIV-2014-409-908
[2015] NZHC 789

UNDER	the Companies Act 1993
IN THE MATTER OF	the liquidation of Peninsula Quarries Limited (in liquidation)
BETWEEN	DAVID IAN RUSCOE AND RICHARD GRANT SIMPSON Applicants
AND	MCKEOWN GROUP LIMITED Respondent

Hearing: 30 March 2015

Appearances: JWA Johnson and C Webber for Applicants
B Russell and C Mills for Respondent

Judgment: 21 April 2015

JUDGMENT OF MANDER J

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[1] The applicants, David Ruscoe and Richard Simpson (the liquidators), are the liquidators of Peninsula Quarries Limited (in liquidation) (PQL). They apply to set aside, as voidable transactions, payments made by PQL to the respondent, McKeown Group Limited (McKeown).[1] Alternatively, the liquidators seek recovery of the payments as transactions at undervalue.[2] McKeown opposes these applications on the basis that the statutory prerequisites to set aside the transactions, or recover the payments, are not made out. Alternatively, that such payments were made in good faith at a time when McKeown had no reason to suspect PQL was insolvent.

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1 Companies Act 1993, s 292.
2 Section 297.

Background

[2] In June 2007, McKeown began supplying fuel to a company, Governors Bay Transport Ltd (GBT). A director of that company was Mr Barry Blatchford, who personally guaranteed his company's obligations to McKeown.

[3] In October 2008, liquidators were appointed to GBT. At that time, McKeown was owed $97,632.60 by GBT for fuel. McKeown was informed by GBT's liquidators that the money owed by GBT could not be paid until all preferential and secured creditors had been paid in full. It was the intention of GBT's liquidators, however, to continue to trade the company pending further investigation. McKeown was requested by them to open a separate account against which any further fuel supplies would be recorded and paid for. As a result, McKeown continued to trade with the liquidators of GBT and supply fuel under the new account.[3]

[4] In December 2008, the liquidators of GBT sold the business and assets of that company to Mr Blatchford or his nominee. In February 2009, PQL was incorporated. Mr Blatchford and his wife were the directors and shareholders of the company. PQL was nominated as the purchaser of GBT's business and assets.

[5] In March 2009, McKeown continued to supply fuel. It is McKeown's position that it had no knowledge that it was now dealing with PQL, and believed it was continuing to trade with GBT which had "traded out of liquidation". On this basis, McKeown recommenced supplying fuel under the original GBT account.

[6] Between March 2009 and January 2010, PQL made payments totalling $196,021.39 to McKeown. That sum included payment for fuel supplied over that period, totalling $165,044.51. The remaining $30,976.88 were payments which reduced previous debt owed to McKeown by GBT (as guaranteed by Mr Blatchford) prior to that company's liquidation (remaining payments).

[7] In November 2010, PQL was placed into liquidation.

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[3] McKeown states that in the period of 30 September 2008 to 28 February 2009 it invoiced the liquidators of GBT, under the new account, a total of $85,268.32 for fuel supplied. McKeown says further that the liquidators of GBT duly paid all invoices.

Issues to be determined

[8] The liquidators accept that McKeown supplied fuel to PQL for value in the sum of $165,044.51. However, it seeks recovery of the remaining payments. The liquidators' application gives rise to the following issues:

(a) Are the remaining payments voidable transactions under s 292 of the Companies Act 1993 (the Act)?

(b) If not, are they transactions at undervalue under s 297 of the Act?

(c) If they are either voidable transactions or transactions at undervalue, can McKeown rely upon the defence provided under s 296(3) of the Act that the payments were received in good faith with no reason to suspect insolvency?

Are the remaining payments voidable transactions?

[9] Section 292 of the Act provides as follows:

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

(e) paying money (including paying money in accordance with a judgment or an order of a court):

(f) anything done or omitted to be done for the purpose of entering into the transaction or giving effect to it.

[10] It is not contested that the transactions the subject of the liquidators application were entered into within the two year specified period.[4]

[11] Without formally conceding the point, McKeown acknowledged that it was not in a position to dispute the evidence available to the liquidators to show that PQL was unable to pay its due debts at the time the transactions were entered into. From inception, PQL was unable to pay its debts. The company was unable to pay its liabilities to the Inland Revenue for GST, PAYE, student loan, and KiwiSaver contributions. Cheques were regularly dishonored, bank penalty fees incurred, and the company was frequently going into overdraft.

[12] Other than assets that were integral to the continuing operation of PQL's business, no other assets were available to be realised to meet the current liabilities of the company. It is apparent that PQL did not have available to it saleable assets which could be immediately sold to realise cash resources to meet payments as they fell due. The general ledgers of the company indicated that PQL's liabilities exceeded its assets and it is apparent that the company was insolvent.

[13] I am satisfied that PQL was a company unable to pay its due debts at the time the transactions the subject of the liquidators' applications were entered into.[5]

[14] No issue arises that the payments made by PQL were transactions, involving as they did the payment of money. In order for the liquidators, however, to recover those payments, they must prove that the remaining payments enabled McKeown to receive more towards satisfaction of a debt owed by PQL than McKeown would receive, or would be likely to receive, in PQL's liquidation.[6]

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4 Companies Act 1993, s 292(5).

5 Section 4. See too *Blanchett v Joinery Direct Ltd* HC Hamilton CIV-2007-419-1690, 23 December 2008, at [27]; *Levin v Market Square Trust* [2007] NZCA 135, [2007] 3 NZLR 591 at [29].

6 Section 292(2)(b).

[15] The evidence establishes that it would be unlikely for there to be any distribution to unsecured creditors such as McKeown upon the liquidation of PQL. However, McKeown must have been in a creditor/debtor relationship with PQL in order to be held to have received preference over other creditors in satisfaction of the debt owed to it. McKeown's position is that the remaining payments were not made in reduction of debt owed by PQL, but was paid in reduction of debt owed by GBT and Mr Blatchford.

[16] Whether McKeown was in a creditor/debtor relationship turns on whether McKeown could have legitimately filed a proof of debt in the liquidation of the company.[7] The liquidators rely upon PQL being the undisclosed principal of Mr Blatchford, who can sue or be sued on the contract of his agency.[8]

[17] I accept that insofar as the transactions were for fuel supplied by McKeown and paid by PQL for the operation of its business, McKeown was in a continuing business relationship with PQL. That arrangement gave rise to a creditor/debtor relationship, notwithstanding that McKeown may have been unaware of the undisclosed principal, PQL, with which it was in a contractual relationship.[9] PQL was contractually liable to pay for the fuel supplied by McKeown. In the event of non-payment, McKeown could submit a proof of debt in the liquidation of PQL.

[18] However, it is the extension of that analysis to the remaining payments that creates difficulty for the liquidators. The existing debt previously incurred by GBT was owed by that company or Mr Blatchford as guarantor, not by PQL. In respect of that debt, PQL was under no liability to McKeown, and no creditor/debtor relationship existed.

[19] The liquidators submitted that to isolate the remaining payments as not giving rise to a creditor/debtor relationship was artificial. They relied on the nature of the payments made to McKeown, a number in round figures, which McKeown could

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7 *Reece v Buchanan* HC Auckland M1589/98, 28 March 2000; *Donaldson v Owen* HC Rotorua M74/97, 7 August 1998.

8 See generally HG Beale (Gen ed) *Chitty on Contracts: Volume II Specific Contracts* (31st ed, Sweet & Maxwell, London, 2012) at [31-064]-[31-068]; Peter Watts *Bowstead & Reynolds on Agency* (20th ed, Sweet & Maxwell, London, 2014) at Arts 76 and 98.

9 *Donaldson v Owen*, above n 7.

apply at is discretion and in what portion to the outstanding GBT debt. I do not, however, find those features to be convincing. The parties were able to discern what monies were received for fuel supplied to PQL over the relevant period and distinguish those receipts or part thereof from the balance of the payments applied in reduction of the previous debt of GBT. Transactions that were for, or included, a payment that was applied in respect of GBT's debt can be identified and quantified.

[20] In *Gray v Chilton Saint James School*, the Court of Appeal accepted that under the predecessor of s 292, the impugned payment was required to be a debt owed by the party that was in a debtor/creditor relationship with the party receiving the payment before it could be voidable.[10] School fees owed by the parents of a student were paid by a third party company. The Court of Appeal held that in order for there to have been an insolvent transaction for the purposes of the section, it was a requirement that there was a debtor/creditor relationship and that the debt the subject of the payment was owed by the company that had made the payment.

[21] The current wording of s 292(2)(b) of the Act is more explicit than the previous provision reviewed by the Court of Appeal. The reference to the "debt" is particularised as "that owed by the company" the subject of the liquidation.[11] As the remaining payments were not, and could not, have been made in respect of debts owed by PQL, s 292(2)(b) does not apply. The remaining payments fall outside the definition of insolvent transaction and therefore are not voidable.

Were the transactions at undervalue?

[22] The alternative basis upon which the liquidators seek recovery of the remaining payments is that the value McKeown received from PQL under the transactions exceeded the value the company received from McKeown.

[23] Section 297 of the Act provides as follows:

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10 *Gray v Chilton Saint James School* (1997) 8 NZCLC 261,306 (CA), referring to the Companies Act 1955, s 266.

11 Companies Act 1993, s 292(2).

297 Transactions at undervalue

(1) Under subsection (2) the liquidator may recover from a person **(X)** the amount **C** in the formula A − B = C, where—

(a) **A** is the value that X received from a company under a transaction to which the company was or is a party; and

(b) **B** is the value (if any) that the company received from X under the transaction.

(2) The liquidator may recover the difference in value (that is, C in the formula in subsection (1)) from X if—

(a) the company entered into the transaction within the specified period; and

(b) either—

(i) the company was unable to pay its due debts when it entered into the transaction; or

(ii) the company became unable to pay its due debts as a result of entering into the transaction.

[24] PQL entered into the transactions within the specified period.[12] I have already found that the company was unable to pay its due debts at the time it entered into these transactions. In the absence of McKeown providing value to PQL equivalent to the sum of the total payments received, the transactions will be at undervalue. The liquidators' position is that McKeown received total payments of $196,021.39 for providing fuel to PQL to the value of $165,044.51. They are therefore entitled to recover the difference in value between the amount paid and the value of the fuel supplied, being the remaining payments, in the sum of $30,976.88.

[25] McKeown relies upon the evidence of its accounts manager, Mr Stuart Hamilton, who gave evidence that McKeown would not have supplied the fuel (from March 2009) in the absence of the existing debt being reduced. McKeown submitted that the remaining payments represented a "premium" that PQL was required to pay in order to continue to receive the supply of fuel.

[26] The Court is required to determine the value received by PQL from McKeown. I accept there was evidence that the supply of fuel was conditional on

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12 Section 297(3)(b).

the reduction of previous debt. However, the value received by PQL from McKeown was the value of the fuel PQL supplied. While PQL had the benefit of the continued supply of fuel from McKeown, which may not have otherwise been either forthcoming or maintained in the absence of the remaining payments being made, the value that the company received was the price of the fuel supplied. PQL received no value from a reduction in the debt owed by GBT or Mr Blatchford as guarantor.

[27] As an alternative argument, McKeown submitted that PQL had already received value for the remaining payments. This submission was based on evidence provided by Mr Andrew Oorschot, a chartered accountant. In his opinion, the accounting treatment of the transactions involving the remaining payments in reduction of debt owed by GBT, which was personally guaranteed by Mr Blatchford, should have resulted in a debit to Mr Blatchford's shareholder's current account with PQL and a corresponding credit in PQL's account.

[28] This would have resulted in either an increase in the liability of Mr Blatchford to PQL, or a decrease in the amount owed by PQL to Mr Blatchford, depending on the balance of his current account with the company. In turn, there would either be a corresponding increase in the assets of PQL (in the event that this resulted in Mr Blatchford's current account becoming overdrawn), or a reduction in PQL's liabilities (in the event that Mr Blatchford's current account was in credit).

[29] These adjustments would equate to the amount paid by PQL to McKeown in reduction of Mr Blatchford's personal guarantee. In such an event, it was Mr Oorschot's opinion that PQL would have received value in exchange for the remaining payments made to McKeown, being an adjustment of a corresponding value to Mr Blatchford's current account, which would either be an asset of PQL or a reduction in the liability owed by PQL to Mr Blatchford.

[30] I reject the application of Mr Oorschot's analysis to the treatment of the remaining payments made by PQL to McKeown for the following reasons.

[31] Firstly, while Mr Oorschot's opinion may accurately reflect the accounting treatment that should have been applied to the remaining payments, there is insufficient evidence to establish that this, in fact, was how the remaining payments were treated.

[32] Mr David Ruscoe, a chartered accountant, and one of the liquidators of PQL, accepted that where a director (Mr Blatchford) makes payments from a company's account for personal debts, one would expect to see those payments allocated to a shareholder's current account. However, there is no evidence this occurred in the present case, or was the intended accounting treatment.

[33] There were no financial statements prepared for PQL, however, Mr Ruscoe had access to PQL's general ledgers. He identified an account called "Withdrawal - from PQL" against which some of the payments made by PQL to McKeown were allocated. The 2010 and 2011 ledgers show balance sheet accounts for drawings by Mr Blatchford and his wife, and there are also accounts for capital introduced and cash withdrawn. These accounts are classified as "shareholders' current accounts". The entries in the "Withdrawal – from PQL" account have been treated entirely separately to these other accounts.

[34] All debit entries in the "Withdrawal - from PQL" account are narrated as being for GBT. Similarly, the only deposits made into the account were by GBT or an earlier company, Banks Peninsula Transport Ltd. Mr Ruscoe noted that PQL accounted for GST on the payments to McKeown that were allocated to this account. He notes that if they were intended to represent shareholder drawings, or payments meant to be reimbursed by the shareholder, this would not have occurred. Based upon the limited evidence available regarding the treatment of these payments, it is Mr Ruscoe's opinion that there appears to have been no intention they be included as part of Mr Blatchford's current account.

[35] Secondly, the liquidators submitted that s 297 of the Act requires the "value" to have been received from McKeown. The "value" contended for by McKeown would not, on its argument, have been provided by McKeown but by Mr Blatchford, who was not a party to the transactions. I accept that the value referred to in s 297(1)

must be sourced from the party to the transaction in question, not a third party. An example provided by the learned authors of *Brookers Insolvency Law and Practice* supports that conclusion:[13]

> … In the case of a loan by a bank to a company secured by a (separate) guarantee provided by the company's holding company, the value equation under s 297(1) in respect of the guarantee looks to be limited to assessing the value received from the parent guarantor by the bank as a result of the guarantee and then comparing that value to the value received from the bank under the guarantee. The value to the parent guarantor of a bank's loan advance to its subsidiary does not seem to be something that can be taken into account since that value is in respect of a transaction that is different or separate from the guarantee.

[36] Finally, even if the accounting treatment contended for by McKeown was applied to the transaction, it is unlikely to have resulted in any value being received by PQL. Mr Ruscoe's opinion was that in the absence of PQL being repaid, or absent any prospect of it being repaid, either by GBT or by Mr Blatchford, the accounting treatment of the remaining payments made by the company made no difference.

[37] If the repayments were to be treated as a debit against an inter-company account held by GBT, that company was insolvent and had no ability to repay PQL. It is doubtful such inter-company account would represent value to PQL. Similarly, even if the amounts had been debited to a shareholders current account (Mr Blatchford), in the circumstances of this case, it is highly questionable whether such treatment was capable of representing value to PQL in the absence of evidence it could be repaid. The money has not been repaid to the company. It is the liquidators' view that there does not appear to be any intention by Mr Blatchford to repay such sums.

[38] McKeown contested the liquidators' assessment of the likelihood of recovery from Mr Blatchford. It pointed to the fact that it was able to successfully recover from him the balance of the monies owed in respect of fuel supplied to GBT. McKeown observed that Mr Blatchford is not bankrupt and that there is no evidence of the liquidators' attempting to recover from Mr Blatchford a sum equivalent to the remaining payments. It submitted, therefore, that PQL has received value in the

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[13] *Brookers Insolvency Law & Practice* (online looseleaf ed, Thomson Reuters) at [CA297.02(2)].

form of an asset that might be repaid, or could be, if effort was made by the liquidators.

[39] Mr Ruscoe's evidence, however, is that the liquidators have assessed that there is little value in pursuing Mr Blatchford in the absence of any knowledge of substantial personal assets or property owned by him. There are some business assets relating to ownership of land from which PQL ran its business, but there is unlikely to be any substantial realisable value in Mr Blatchford's shares in the company which owns that land.

[40] Mr Blatchford is injured, has no ability to work and, therefore, no income. Reference was made to the similar conclusion reached by the liquidators of GBT that recovery from Mr Blatchford was unlikely, and reference made to their final liquidators' report that, despite a number of matters being investigated, little or no return to creditors had resulted. On balance, I am satisfied that the liquidators' conclusion regarding the unlikelihood of recovery from Mr Blatchford is realistic.

[41] I am satisfied that PQL did not receive any value for the remaining payments from McKeown as required by s 297, and that the liquidators are entitled to recover the value of those payments which represent transactions at undervalue.

Is the defence of good faith and no reason to suspect insolvency available to McKeown under s 296(3) of the Act?

[42] McKeown submitted that if the liquidators succeeded in either or both of their claims for recovery, it has a defence to the liquidators' claims under s 296(3) of the Act. The provision relevantly provides as follows:

> **296 Additional provisions relating to setting aside transactions and charges**
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> …
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> (3) A court must not order the recovery of property of a company (or its equivalent value) by a liquidator, whether under this Act, any other enactment, or in law or in equity, if the person from whom recovery is sought (A) proves that when A received the property—
>
> (a) A acted in good faith; and

(b) a reasonable person in A's position would not have suspected, and A did not have reasonable grounds for suspecting, that the company was, or would become, insolvent; and

(c) A gave value for the property or altered A's position in the reasonably held belief that the transfer of the property to A was valid and would not be set aside.

[43] McKeown's position is that it believed it was receiving the payments from GBT and that it had no knowledge that it was in fact supplying fuel and receiving payments from PQL. Mr Hamilton gave evidence that following GBT being placed into liquidation in October 2008, McKeown discussed with Mr Blatchford repayment of the then outstanding $97,632.60 that he had personally guaranteed. Mr Blatchford represented that he would be able to pay the account following confirmation of refinancing arrangements. Proof of these refinancing arrangements was provided shortly before Christmas by the provision of documentation of a loan agreement entered into with a finance company. However, no payments were made until a $10,000 deposit was received on 29 January 2009.

[44] Following receipt of the $10,000 payment, McKeown continued to pursue Mr Blatchford for further payment in reduction of the GBT account. A further payment of $8,000 was made in mid-February 2009. In March, Mr Blatchford advised that GBT had been performing well, the liquidators had continued to trade and that the company had "managed to trade its way out of liquidation". Mr Hamilton's evidence was that the combination of Mr Blatchford's assurances, together with the volumes of fuel that were being supplied to the liquidators and the regular payments that were being received, led McKeown to believe that GBT was performing well and its prospects for recovery were good.

[45] As a result, McKeown resumed supplying fuel to GBT under its original account in March 2009. From 31 October 2008 to 31 March 2009, McKeown invoiced GBT's liquidators for a total sum of $85,268.32 under the new account. The periodic invoices sent in respect of this fuel were duly paid.

[46] At the time McKeown resumed supplying fuel to GBT under its original account in March 2009, Mr Blatchford assured Mr Hamilton that adopting this

course would ensure the continued successful operation of the business and allow the outstanding account to be repaid.

[47] Between March 2009 and January 2010, McKeown continued to supply fuel. It invoiced GBT. All statements were addressed to that company and posted to its address in Lyttelton. GBT's debt was reduced significantly. It is Mr Hamilton's evidence that throughout this period, McKeown was unaware that the company it was actually dealing with was PQL.

[48] In August 2009, McKeown received a fax from Mr Blatchford setting out a repayment plan. The fax was received on a letterhead entitled "Peninsula Quarries Ltd". Mr Hamilton gave evidence that the company letterhead did not give him cause for concern, noting that the fax header referred to "Governors Bay TSPT", which Mr Hamilton believed informed him that it had come from GBT.

[49] Mr Hamilton deposed that it was not until May 2013, when McKeown received a letter from the liquidators, that it was realised that the payments had in fact been made by PQL. In the meantime, McKeown successfully pursued Mr Blatchford personally for outstanding monies owed by GBT pursuant to the personal guarantee he had provided when payments began to fall behind in January 2010. Judgment was obtained against Mr Blatchford in March 2011, which was successfully enforced.

The question of good faith

[50] McKeown is required to prove that it received the remaining payments in good faith. This is a subjective test which requires McKeown to have an honest belief that the transaction did not involve any element of undue preference over other creditors.[14] The recipient of the money must be shown to honestly believe that the transaction would not involve any element of undue preference, either to itself or to any guarantor.[15]

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[14] *Shephard v Steel Building Products (Central) Ltd* [2013] NZHC 189 at [51].
[15] *Re Orbit Electronics Auckland Ltd (in liq)* (1989) 4 NZCLC 65, 170 (CA).

[51] Related to the issue of good faith is McKeown's submission that the unique circumstances of this case favours the conclusion, as presented by Mr Hamilton in evidence, that it believed at the time it was receiving the remaining payments they were from GBT. McKeown could not therefore have perceived that it was being preferred ahead of PQL's other creditors as it did not know of PQL's existence. In the absence of knowledge that it was dealing with PQL, McKeown submitted it could not have been acting other than in good faith when it received the remaining payments.

[52] McKeown, in making this submission, sought to emphasise the observations made by Elias CJ in *Allied Concrete Ltd v Meltzer* about the equivalent Australian provision, s 588FG(2) of the Corporations Act 2001 (Cth).[16] The Chief Justice observed that the objective and subjective dimension of the requirement that a creditor have no reasonable grounds to suspect a company's insolvency overlaps with and largely overtakes the "good faith" requirement of the defence. The Chief Justice further remarked that it was of significance for the New Zealand legislation, which drew on the work of the Australian Law Commission, that the Australian Commission saw lack of knowledge of insolvency or reasonable suspicion of it to be the central question when determining whether the defence was available.[17]

[53] The remarks of the Chief Justice in *Allied Concrete Ltd v Meltzer* were made in the context of reviewing the policy behind the Australian provision which was drawn on for the purposes of the New Zealand legislation. Despite the emphasis in the recommended Australian reforms on lack of knowledge, or reasonable suspicion of insolvency, to achieve balance between the interests of unsecured creditors and persons who had engaged in fair transactions, the requirements of "good faith" and "valuable consideration" were retained.[18]

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16 *Allied Concrete v Meltzer* [2015] NZSC 7.

17 At [151]-[153].

18 At [144]-[152], citing Explanatory Memorandum, Corporate Law Reform Bill 1992 (Cth) at [1034]. Section 588FG(2) of the Corporations Act 2001 (Cth) relevantly provides:

> …
>
> (2) A court is not to make under section 588FF an order materially prejudicing a right or interest of a person if the transaction is not an unfair loan to the company, or an unreasonable director—related transaction of the company, and it is proved that:
>
> (a) the person became a party to the transaction in good faith; and
>
> (b) at the time when the person became such a party;

[54] McKeown's ignorance of PQL is of critical importance to the assessment of the second element of the defence in s 296(3)(b) as to whether there were reasonable grounds for suspecting that the company (PQL) was, or would become, insolvent. However, its linkage to the question of good faith is less crucial. Section 296(3)(b) requires an examination of the reasonableness of McKeown not suspecting that the company it was trading with was, or would become, insolvent. The provision requires that assessment to be made in relation to the company that made the payments. The company that made the payments to McKeown was PQL and, on its submission, unbeknown to McKeown, it was this company that it was actually trading with. In the absence of that knowledge, there is force in McKeown's submission that it could not have suspected the insolvency of a company it had no knowledge of.

[55] The assessment of good faith on the part of the person from whom recovery is sought under s 296(3)(a) of the Act is not, however, circumscribed in the same way. The onus is on the person from whom recovery is sought to establish that it acted in good faith. The section does not limit the assessment of the person's knowledge and actions by reference to the company from which it received payment, as required by s 296(3)(b).

[56] The assessment of whether McKeown was acting in good faith when receiving the remaining payments is not answered by simply referring to its lack of knowledge of PQL. A wider inquiry is required to determine whether in the circumstances it had an honest belief that the remaining payments involved any element of undue preference or insight that it was being treated preferentially to other creditors. For the purpose of demonstrating that it was acting in good faith this would include its understanding of the financial position of the company it believed it was receiving the payments from and the position of other creditors of that

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(i) the person had no reasonable grounds for suspecting that the company was insolvent at that time or would become insolvent as mentioned in paragraph 588FC(b); and

(ii) a reasonable person in the person's circumstances would have had no such grounds for so suspecting; and

(c) the person has provided valuable consideration under the transaction or has changed his, her or its position in reliance on the transaction.

company. In this case, GBT. The fact that GBT was effectively defunct by this time is immaterial to the assessment of McKeown's motives in acting the way it did.[19]

[57] Essential to the position of the person who seeks to rely on the defence provided by s 296(3) is an honest belief that the payments sought to be recovered by the liquidators were legitimately received. It cannot be the case that a person with knowledge of the financial difficulties of the company it understands it is dealing with and which consciously receives payments to its advantage ahead of others, can claim to have acted in good faith when receiving those payments, only because the corporate vehicle used to house the same business, and to trade with that person, was different from that which the person understood was the source of the payments. That misapprehension should not necessarily be determinative when assessing whether the person was acting in good faith at the time it received the payments. Each case necessarily turns on its own facts and circumstances.

Assessment of good faith

[58] I have reservations as to whether McKeown was unaware of the fact that it was trading with PQL. I have referred to the faxed letter received by McKeown on PQL letterhead in August 2009 regarding a repayment plan to expedite repayment of GBT's debt by Mr Blatchford. The liquidators also cross-examined Mr Hamilton about cheques that had been drawn on PQL's account. These were used to make payments to McKeown and were received with PQL's name, as the account holder, printed on the cheques (19 of the 31 payments made to McKeown were by cheque). Mr Hamilton's evidence was that despite him regularly opening the mail on McKeown's behalf, he did not recall having seen cheques with PQL's name on them. He observed that such cheques may have been deposited directly into McKeown's bank by the payer.

[59] The liquidators were critical of Mr Hamilton's belief that GBT had "traded out of liquidation". Mr Hamilton deposed that he had not appreciated that Mr Blatchford would have only purchased the business assets from GBT's liquidators, not the company. The liquidator submitted that a reasonable

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[19] GBT was struck off the Companies Register on 26 July 2011.

businessperson would know that it was not possible for GBT to trade out of liquidation. Mr Hamilton's experience as a credit manager and his familiarity with the liquidation process was canvassed in the course of cross-examination. It was not, however, directly put to him that his lack of appreciation that GBT could not trade its way out of liquidation was untenable, or that he was being untruthful.

[60] The liquidators of GBT prepared reports on the conduct of the liquidation of the company which were sent to creditors of the company, including McKeown. Mr Hamilton deposed to having reviewed one of those reports, dated 30 October 2009, under a covering letter from GBT's liquidators of 16 November. Mr Hamilton under cross-examination, however, accepted that earlier reports would have been received by McKeown but that he had not personally seen or read those documents, notwithstanding the debt owed by GBT to McKeown.

[61] There were at least two earlier reports, dated 20 November 2008 and 6 May 2009. Like the October report, the May report informed that it was unlikely that unsecured creditors would receive a dividend payment upon completion of the liquidation, and that matters that had been investigated by the liquidators had resulted in little or no return to creditors. While Mr Hamilton's evidence was that he did not read the May report, he accepted that the company would have received the document. Importantly, at the time the liquidators of GBT were appointed in October 2008, McKeown was formally advised that any monies owing to unsecured creditors would not be paid until preferential creditors and secured creditors were paid in full. It was in this correspondence that the liquidators of GBT requested a separate account be opened for the supply of fuel by McKeown.

[62] Mr Hamilton's response to the advice received from the liquidators of GBT in the October 2009 report was that it confirmed his understanding that the business of the company had been sold as a going concern. He believed this was consistent with what Mr Blatchford had advised in early 2009, and the information Mr Blatchford had provided relating to him successfully having secured finance.

[63] The independent evidence of whether McKeown would have been aware that it was trading with PQL is equivocal. Mr Hamilton's evidence was that he was not

aware. In my assessment, McKeown did likely think it was dealing with Mr Blatchford through his original company, GBT, and that this was the corporate vehicle being used by Mr Blatchford to purchase fuel. McKeown had a personal guarantee from Mr Blatchford in respect of GBT debts, and effectively it was with Mr Blatchford and his business that McKeown was dealing and looking to source payment from.

[64] McKeown made the assessment that the best way it could recover its outstanding debts was to support Mr Blatchford in the continuation of his business. It is apparent that in return for the continued supply of fuel, Mr Blatchford would have to reduce the outstanding debt owed by GBT which he had personally guaranteed. This was a deliberate commercial decision by McKeown made on the basis that it provided the best means of reducing GBT's and Mr Blatchford's debt and recover the monies owed to it.

[65] I am forced to conclude that such a course could only have been adopted by McKeown in the belief that it would secure an advantage over other creditors of the company it believed it was dealing with, GBT. When it received the remaining payments, McKeown must have appreciated it was obtaining a preference. McKeown knew GBT had been placed in liquidation in October 2008, at which time it was advised that monies owed to unsecured creditors would not be paid until preferential creditors and secured creditors were paid in full. McKeown had no reason, on that advice from GBT's liquidators, to have continued to supply further fuel to the company in the absence of the liquidators' request to open a separate account with them. From that point, all payments made by the liquidators for fuel were by cheque from their Liquidation Trust Account.

[66] McKeown looked to Mr Blatchford after the liquidation of GBT for payment of the balance of the monies owed in the knowledge that GBT could not pay. Around that time, McKeown received the liquidators' report of 20 November 2008. This report advised that "the company was wound up by the petitioning creditor, the Inland Revenue Department". Reference was then made to the liquidators being hopeful of achieving a sale of the business as a going concern. A statement of affairs attached to the report advised that estimated assets available to unsecured creditors

involved a deficit of $233,302, with a total deficit to creditors of the company of $644,549. As already observed, Mr Hamilton's evidence was that while he had not personally received the report, he accepted that such reports would have been received by McKeown.

[67] In early 2009, McKeown was continuing in its efforts to chase Mr Blatchford for funds promised by him in reduction of the outstanding debt of GBT. Mr Blatchford approached McKeown in March 2009. By that time, he had only managed to personally pay $18,000 in reduction of the debt since the company had been put into liquidation in October the previous year. Despite this, and despite any recourse to the liquidators of GBT, on whose account to date it had been supplying fuel, McKeown accepted what Mr Blatchford represented, that GBT had been performing well and, on Mr Hamilton's evidence, that the company "had managed to trade its way out of liquidation". Clearly, Mr Blatchford had bought the business off the liquidators of GBT, but it is difficult to accept that McKeown would have confidently taken Mr Blatchford's representation that the "company had traded its way out of liquidation" at face value, without, at least, some element of wilful blindness. No evidence was received from Mr Blatchford as to what he had represented to McKeown at this time regarding the status of GBT.

[68] It is very difficult to understand why McKeown would have accepted Mr Blatchford's version of events regarding his company, particularly without checking with the liquidators. It is also difficult to accept that McKeown would have simply accepted that GBT was now a healthy, viable company after what it must have known about its dire financial situation only a matter of months before. McKeown must, at the very least, have had considerable reservations about reopening an account with a company that had recently been placed into liquidation, and must have had obvious concerns regarding its solvency.

[69] It is apparent McKeown saw little prospect of recovering its debt through the liquidation of GBT, but sought to enforce the personal guarantee it held from Mr Blatchford to obtain payment directly from him. In my view, it was a continuation of the efforts to enforce Mr Blatchford's personal responsibility for the outstanding debts that resulted in McKeown agreeing to continue to supply him with

fuel for the purpose of his recently reconstituted business. By entering into that arrangement directly with Mr Blatchford, allowing him to continue to trade, McKeown would hopefully obtain payment of the outstanding unsecured debt. McKeown must have appreciated from that point that such payments would be to its advantage and to the detriment of other creditors of GBT which, on its case, it believed it was resuming to trade with, in the knowledge that it had the benefit of Mr Blatchford's personal guarantee.

[70] Therefore, even accepting McKeown's submission that it was ignorant of the existence of PQL, I have concluded that it could not have honestly believed that the remaining payments did not involve an element of undue preference. It follows that McKeown has failed to show that it acted in good faith when it received the remaining payments.

[71] As I am not satisfied McKeown acted in good faith, it is not necessary for me to consider whether the remaining cumulative criteria of s 296(3) have been established.

Conclusion

[72] There will be judgment entered for the liquidators in the sum of $30,976.88. This figure represents the amount of the undervalue of the transactions which McKeown is ordered to pay to the liquidators.

[73] While the liquidators did plead a claim for interest in their prayer for relief, I have received no submissions on the point. In the absence of such submissions, I am not willing to enter judgment for such. In any event, given the nature of this proceeding, without deciding the matter, I would presently be disinclined to make such an award. If, however, the applicant wishes to pursue their claim for interest, they may file memorandum (not exceeding five pages) within 15 working days of the date of this judgment. The defendants will have a further 15 working days to file a reply (not exceeding five pages).

Costs

[74] In the absence of the parties being able to agree costs, the liquidators may file memorandum (not more than five pages) addressing outstanding costs issues between the parties. McKeown has 15 working days to reply (not more than five pages) from the date of receipt of the liquidators' memorandum.

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