IN THE HIGH COURT OF NEW ZEALAND
NELSON REGISTRY

I TE KŌTI MATUA O AOTEAROA
WHAKATŪ ROHE

CIV-2017-442-000022
[2017] NZHC 2733

UNDER	the Companies Act 1993
IN THE MATTER	of the Liquidation of TSL NELSON LIMITED (In Liquidation)
BETWEEN	CATHERINE JANE JOLLANDS AND PETER REGINALD JOLLANDS AS LIQUIDATORS OF TSL NELSON LIMITED (IN LIQUIDATION) Applicants
AND	KELSEY GULL AND ANDREAS GULL First Respondents
	JONATHAN EYLES and AMANDA EYLES Second Respondents
	SEAN COLIN MARR and TANIA TROWBRIDGE Third Respondents

Hearing:	4 and 5 September 2017
Appearances:	R B Hucker and D La Ng-Siu for Applicants G Praat for First Respondents T Jeffcott and D Jackson for Second and Third Respondents
Judgment:	8 November 2017

JUDGMENT OF ASSOCIATE JUDGE MATTHEWS

Introduction

[1] The plaintiffs are the liquidators of TSN Nelson Limited (in liquidation), (TSN), appointed by resolution on 19 December 2013.

[2] The respondents are four of the former shareholders of TSN. Mr Eyles and Mr Marr were directors.

[3] The liquidators apply to set aside four transactions undertaken by TSN on the basis that they are insolvent transactions, and they seek orders that the respondents repay the sums which they are said to have received by virtue of these transactions.

[4] The transactions fall into two categories. First on 4 July 2012 TSN paid $180,000 to its accountant who then made three payments of $60,000 each to, or on behalf of, three minority shareholders in TSN. One minority shareholder transferred his shares to the second respondents, and one transferred his shares to a trust called the Dakota Family Trust, of which the third respondents are two of the three trustees. A third transfer by a minority shareholder to the family trust of the original first respondents to this application is no longer in issue.

[5] A few days earlier TSN had sold its entire trading operation and had received the sum of $500,000, the first tranche of the sale price. Part of this sum was used by TSN to make the payment of $180,000.

[6] At the time of these transactions, the current accounts of the respondents with TSN were in credit. The liquidators say that as the minority shareholdings were transferred to the second respondents, and to the third respondents' family trust, the second and third respondents respectively received the benefit of the payment made by TSN to the extent of $60,000 as repayment of sums owed to each respondent on current account. The liquidators say that by this means each of the respondents received a sum greater than they would have received on the liquidation of TSN. The liquidators say that at the time of these payments TSN was unable to pay its debts as they fell due, and as the transactions were entered within a period of two years of the date of liquidation they are insolvent transactions which are voidable under s 292 of

the Companies Act 1993 and should be set aside. To that end the liquidators invoked the procedure set out in s 294 of the Companies Act, issuing notices to set each transaction aside. As notices of objection were filed the liquidators now seek orders setting aside each transaction.

[7] The second set of transactions occurred in December 2012. On 24 December TSN paid the second respondents $10,000, and on 27 December it paid the third respondents the same sum. In respect of these payments the liquidators mount the same argument as in respect of the payments of $60,000.

[8] The respondents say that TSN was able to pay its debts when each of the transactions occurred. The third respondents also say that they did not receive any shares from a minority shareholder, rather, their family trust did.

The relevant provisions of the Companies Act 1993:

[9] Section 4 provides:

> **4 Meaning of solvency test**
>
> (1) For the purposes of this Act, a company satisfies the solvency test if—
>
> (a) the company is able to pay its debts as they become due in the normal course of business; and
>
> (b) the value of the company's assets is greater than the value of its liabilities, including contingent liabilities.
>
> …
>
> (4) In determining, for the purposes of this section, the value of a contingent liability, account may be taken of—
>
> (a) the likelihood of the contingency occurring; and
>
> (b) any claim the company is entitled to make and can reasonably expect to be met to reduce or extinguish the contingent liability.

[10] Section 288 provides:

> **288 Evidence and other matters**
>
> …

(4) In determining whether a company is unable to pay its debts, its contingent or prospective liabilities may be taken into account.

[11] Section 292 provides:

292 Insolvent transaction voidable

(1) A transaction by a company is voidable by the liquidator if it—

(a) is an insolvent transaction; and

(b) is entered into within the specified period.

(2) An **insolvent transaction** is a transaction by a company that—

(a) is entered into at a time when the company is unable to pay its due debts; and

(b) enables another person to receive more towards satisfaction of a debt owed by the company than the person would receive, or would be likely to receive, in the company's liquidation.

…

(3) In this section, **transaction** means any of the following steps by the company:

(a) conveying or transferring the company's property:

(b) creating a charge over the company's property:

(c) incurring an obligation:

(d) undergoing an execution process:

(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.

…

(5) For the purposes of subsections (1) and (4B), **specified period** means—

(a) the period of 2 years before the date of commencement of the liquidation together with the period commencing on that date and ending at the time at which the liquidator is appointed; and

…

[12] Section 294(1) provides:

> **294 Procedure for setting aside transactions and charges**
>
> (1) A liquidator who wishes to set aside a transaction or charge that is voidable under section 292 or 293 must—
>
> (a) file a notice with the court that meets the requirements set out in subsection (2); and
>
> (b) serve the notice as soon as practicable on—
>
> (i) the other party to the transaction or the charge holder, as the case may be; and
>
> (ii) any other party from whom the liquidator intends to recover.
>
> ...

[13] Section 294(2) sets out various requirements for the liquidator's notice. None are put in issue in this case.

[14] Section 295 provides:

> **Other orders**
>
> If a transaction or charge is set aside under section 294, the court may make 1 or more of the following orders:
>
> (a) an order that a person pay to the company an amount equal to some or all of the money that the company has paid under the transaction:
>
> (b) an order that a person transfer to the company property that the company has transferred under the transaction:
>
> (c) an order that a person pay to the company an amount that, in the court's opinion, fairly represents some or all of the benefits that the person has received because of the transaction:
>
> …

[15] Section 296(3) provides that a court must not order the recovery of property of a company (or its equivalent value) by a liquidator, in certain circumstances. The second and third defendants do not rely on the defence provided by this section.

Further relevant facts

[16] The respondents, including the former first respondents, were also shareholders in a company called TSL International Nelson Limited, formerly Titan Systems International Limited (TSI). Mr Gull, a former first respondent, Mr Eyles

and Mr Marr were also its directors. TSN carried out design and manufacturing of industrial meat slicing machinery, and TSI was a sales and marketing company, involved in selling these products on the international market.

[17] In 2012 TSI sold four machines and related equipment to a substantial food producing company in Canada. According to Mr Marr this led to a company called Mercer Group Limited (Mercer) expressing interest in acquiring the business of TSN and TSI.

[18] On 29 June 2012 TSN and TSI sold their business, assets and goodwill to Mercer for $1,000,000.[1]

[19] The agreement for sale and purchase did not provide for the way in which the purchase price was to be divided between TSN and TSI, nor did it identify which of those companies owned the assets which were to be transferred.

[20] The business and the assets of TSN and TSI were transferred to Mercer under the agreement on 2 July 2012 and both companies ceased to trade. A $500,000 payment was made by Mercer on 3 July and a further $250,000 was paid on 31 July.

[21] After some adjustments to the purchase price pursuant to the terms of the contract, and by agreement, there was a balance owing of $221,700. None of this had been paid by the time TSN and TSI went into liquidation in December 2013. Subsequently the liquidators have recovered part.

[22] The payments of $500,000 and $250,000 were credited to the account of TSN at the ANZ bank.[2] The day after the first of these arrived TSN paid $180,000 to a firm called Nelson Bays Accounting which acted as accountants for TSN and TSI. As noted earlier Nelson Bays Accounting then paid this in three equal sums of $60,000 to, or at

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1 The sale and purchase agreement before the Court is not dated, but a date is given in an amending agreement by which the purchase price was amended to $971,200, the reduction representing staff entitlements assumed by Mercer and a payment made by Mercer on behalf of TSN and TSI to another entity.

2 At that time TSN banked with the National Bank. All National Bank accounts were later reconfigured as ANZ accounts. Reference was made to the ANZ Bank in the evidence. I have adopted the same approach.

the direction of, the three minority shareholders. One of these shareholders transferred shares to Mr and Mrs Eyles, one transferred them to the family trust of the former first respondents, and one transferred them to the family trust of Mr Marr and Ms Towbridge.

[23] At the time the $500,000 payment was received by TSN it had a debt of $122,000 to ANZ on current account and TSI had a debt of $150,000 also to ANZ. Both of these facilities were repaid in full. In an examination by the liquidators, Mr Marr said that there were not sufficient funds to pay other indebtedness TSI had to Westpac. At that time TSI owned one significant asset only, a demonstration machine with a book value of $378,080. Apart from repayment of its ANZ overdraft of $150,000, TSI did not receive payment of any further part of the two payments totalling $750,000 received by TSN under the agreement for sale and purchase prior to its liquidation.

[24] The annual accounts for TSN at 31 March 2012, three months before the first transactions in question, show TSN had an excess of liabilities over assets of $63,534, and a net profit for the year of $66,807 after depreciation.

[25] Each of the second and third respondents are recorded as having a credit balance of $85,304 on current account.

[26] Prior to receipt of the deposits on the transaction the account of TSN with ANZ was overdrawn to $122,000 against a limit of $100,000.

[27] The first payment of $500,000 on 3 July put TSN's ANZ account into credit to the extent of $377,999.92 and the sum of $180,000 was debited the next day, leaving a credit balance of $196,225.36 after a small payment of wages.

[28] Notwithstanding the fact that the payment of $180,000 by TSN to its accountants was applied in three equal shares to purchasing minority shareholdings in TSN, TSN accounted for this $180,000 as "subcontractor payments". Because of this, it was claimed as an expense in TSN's GST return for the relevant period, and it was expensed (net of GST) in the annual accounts to 31 March 2013.

[29] It is common ground that this treatment of the payment was erroneous. This resulted in the need for a GST adjustment and recalculation of the income of TSN to 31 March 2013. The income increased as a result, by $180,000 net of GST, $156,521.

The issues

[30] The respondents accept that all of the payments were transactions (s 292(3)) entered within the specified period (s 292(1) and (5)). They do not challenge the procedural steps taken by the liquidators (s 294).

[31] The third respondents say first that they did not receive any sum towards satisfaction of their current account as no shares were received by them from any minority shareholder: the shares were received by their family trust. All respondents say that none of the payments was an insolvent transaction as defined in s 292(2), as TSN was able to pay its due debts at the time of the payments.

[32] Thus there are three issues to be decided:

(a) did the third respondents receive the benefit of the $60,000 TSN paid for the shares which were transferred to their family trust?

(b) were any of the payments made when TSN was unable to pay its debts?

(c) did the transaction enable the respondents to receive more towards satisfaction of the debts owed to them by TSN than they would receive in its liquidation?

First issue: did the third respondents receive the benefit of the $60,000 TSN paid for the shares which were transferred to their family trust?

[33] Mr Marr and Ms Towbridge say that as shares from one of the minority shareholders were transferred not to them but to the Marr Family Trust (the Trust), the definition of an insolvent transaction in s 292(2) is not met as at no time did TSN owe a debt to the Trust. Mr Marr and Ms Towbridge were owed money in their personal capacity. They are only two of the trustees, the third being a trustee company run by a firm of solicitors. A partially signed share transfer form was produced in evidence showing a transfer to the Trust and a space for it to be executed by Mr Marr, Ms

Towbridge (then Marr) and a trustee company. The resolution of TSN approves a transfer of the relevant shares from the former owner to the Trust. The company register for TSN shows 150 shares owned by these three trustees.

[34] Given these documents Mr Jeffcott says that there is no evidence that Mr Marr and Ms Towbridge personally received anything towards satisfaction of the debt owed to them by TSN, in terms of s 292(2).

[35] These documents establish that this tranche of shares was transferred to the Trust and not to Mr and Mrs Marr. There is, however, more evidence to be considered. The case for the liquidators is that Mr Marr and Ms Towbridge orchestrated the transaction, nominating the Trust as the recipient of the shares.

[36] The first, and perhaps most obvious point, is that TSN paid for the shares, but TSN did not owe anything to the Trust, only to the Marrs personally. There was no logical reason therefore why TSN should have made monies available to the Trust to buy shares, but a plain reason why it would repay money it owed to Mr Marr and Ms Towbridge.

[37] The second is that the stance taken on behalf of Mr Marr and Ms Towbridge is inconsistent with Mr Marr's earlier statement and evidence. First, in his examination by the liquidator Mr Marr said that TSN bought the minority shares. That was plainly wrong in view of the documents executed at the time, and was not a line pursued at trial, but is certainly inconsistent with the position advanced at trial.

[38] Secondly, Mr Marr accepted the liquidators' position in cross-examination. When asked whether he accepted "that you and the other respondents were purchasers of the minority shareholder shares" he responded "Yes, correct". When asked whether "the $180,000 transaction" was a repayment of shareholder funds, Mr Marr confirmed that was the case. Elsewhere in the evidence Mr Marr confirmed other propositions put to him which contained statements that the $180,000 was used to repay shareholders' current accounts.

[39] The third statements of relevance are from Mr Sandri and Ms Pretty. Mr Sandri, whom Mr Marr and Ms Towbridge called as an expert, confirmed in cross-examination that if the monies were not used for TSN to buy back its own shares, TSN could have advanced monies to the shareholders to buy the shares. He did not mention any advance to the Trust. Ms Pretty who was the accountant for TSN at the time said that initially she was told that the transfer of $180,000 to her firm was a contractor payment, and provided for that in the accounts, but said that if that was wrong then the entry would have been transferred to the shareholders' current accounts.

[40] The evidence overwhelmingly supports the proposition that it was the intention of Mr Marr and Ms Towbridge that they receive partial satisfaction of the debt owed by TSN to them on current account by the purchase price of the minority shareholding being debited to that account. The fact that they arranged for the shares themselves to be transferred to the Family Trust rather than to themselves is incidental. It is clear in my view that had the accountant for TSN, Ms Pretty, not wrongly shown the withdrawal of $180,000 as an expense it would properly have been debited in equal shares to the credit balances of the three majority shareholders, including in the case of Mr Marr and Ms Towbridge, to the extent of $60,000.

Second issue: were any of the payments made when TSN was unable to pay its debts?

[41] It is necessary to first decide two preliminary issues. The first is how much of the sale proceeds of the businesses of TSN and TSI each company should have received. The agreement for sale and purchase is silent on this point. The assets of both companies were sold. TSI owned only a demonstration slicing machine, and goodwill. It is common ground that the value of the slicing machine was $378,000.[3] The liquidators presented their case on the premise that the proceeds of sale were receivable by each company in half shares. The respondents presented their case on the basis that the two companies should be considered as one. I will discuss this contention first.

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[3] Rounded.

[42] TSI was incorporated when the directors of the business decided to expand into the United States, raising with them a concern as to liability in the event of an accident occurring with one of their machines, and a lawsuit then being brought against TSN. TSI was therefore incorporated so international sales would be undertaken by an entity with only limited assets. That company would be the defendant in a lawsuit.[4] It was therefore a deliberate business decision to run the operation of manufacturing and selling slicing equipment by two separate companies.

[43] At no point have the two companies been grouped together for tax purposes, nor have consolidated accounts been prepared. No resolutions were produced showing any intention that this should occur.

[44] It is suggested that given common directors and shareholders the company would move monies from one to the other to support liquidity, so they should be treated as one entity. That may be so, but it overlooks the fact that if monies were transferred from one company to the other, there would be a corresponding liability for repayment, so the asset position of each company would remain the same.

[45] These factors show that the business was deliberately run by two companies. I have been unable to find any sound basis on which the companies should be grouped together as one for the purposes of assessing the solvency of TSN at the time of the transactions in issue. I reject this contention.

[46] I return, therefore, to how much of the purchase price was, at the time it was received, the property of each separate company. In addition to the agreement being silent on the point, the issue is further complicated by the fact that the sale price does not seem to have been arrived at by reference to values shown in the accounts, or the value of the assets assessed on some objective basis, but rather by way of settling on a sum which would be sufficient to pay the debts of the two companies.

[47] The argument for the liquidators that the proceeds should simply be divided in equal shares seems, as a matter of first reaction, to be arbitrary. It was however based

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[4] Mr Marr explained this when under examination by the liquidators on oath. He also told the liquidators the price was assessed by reference to asset values, but having regard to the values in the 2012 accounts, this appears unlikely.

on the statements made by Mr Marr in his examination. When asked what apportionment of the sale price was to be made to the two companies his response was "50/50". When it was put to Mr Marr that this meant that from the payments of $750,000 made by Mercer, $375,000 belonged to TSI, Mr Marr confirmed that this was correct.

[48] In cross-examination at the hearing Mr Marr expressed the view that the former of these answers was "a typo". He accepted that this was the first time he had demurred from the answer given during the examination. He then went on to say that the 50/50 split was only to relate to the first two payments totalling $750,000, with the remaining monies owing under the agreement to go to TNL. That is not consistent with the examination notes containing a typo, but is consistent with his answer on the second point.

[49] I did not find this explanation convincing. Mr Marr's answers during his examination were given in response to clear questions and his answers were unequivocal. No reason was advanced for splitting three-quarters of the sale price 50/50 but not the last quarter. Mrs Jollands was able to reach an apportionment of the first payments of $750,000 of approximately 50/50 by reference to book values of assets sold, and with goodwill adjusted, but this did not deal with the unpaid balance, and based on Mr Marr's statements she concluded a 50/50 split of the entire price was correct. I agree. I find that it was the directors' intention that the proceeds of sale of the business were to be divided in equal shares between TSN and TSI. The Court's assessment of the issues before it will be made on that basis. This means that TNL is to be treated as entitled to receive $250,000 initially, then $125,000 a few weeks later, with $125,000 receivable but with payment delayed.

[50] The second preliminary issue is how much debt, actual and contingent, TSN had at 31 July 2012, which was not included in the debtors' figure in its 2012 accounts. The liquidators say that eleven further debts are in this category. I refer to these in turn:

(a) Tony Jackson, an ex-employee, filed a personal grievance against the company. The debt owed to him was $27,077. Mr Marr accepted this debt arose prior to the sale of the business.

(b) CNC Design filed a proof of debt in the liquidation for $25,813. Mr Marr accepted that TNL was liable to CNC Design, but said the actual amount owed was in dispute on the basis that a machine supplied by CNC Design was not fully functional. Mr Marr said that it was intended that this dispute would be referred to a Disputes Tribunal but no step was ever taken and there is no evidence before the Court, nor was any given to the liquidators, about the alleged dispute. I am satisfied, on balance, that the full amount claimed by CNC Design should be added to the debtors figure at July 2012.

(c) Nelson Motor Bodies filed a proof of debt for $720. The respondents have not disputed this. It should be added to the total of debtors.

(d) Wiberg Corporation filed a proof of debt in the sum of $76,652.30. Wiberg Corporation is the North American distributor of machines made by TSN. This represented a down payment on the purchase of a slicer for a total sum of CAD166,608.80 which had been ordered with a deposit paid in June 2011 for delivery in January 2012. Mr Marr explained that TSN had been in negotiations with Wiberg Corporation to buy a larger machine. Given that those negotiations had not come to anything by the time the business was sold I am satisfied that the debt claimed was owing at that time.

(e) A further sum of $47,000 was owing to Wiberg Corporation for additional costs relating to warranty and cost overruns, according to Mrs Jollands. This sum was notified to the liquidators by the purchaser of the business. It should be added to the list of debtors.

(f) There was a sum owing to the Inland Revenue Department on an imputation credit account which had not been accounted for in the company's financial statements. The amount owing was $31,919 and this should be added to the total of debtors.

(g) Similarly, a debt claimed by Maple Leaf was identified to the liquidators by the purchaser, in the sum of $31,000. This too should be added to the debtors.

(h) TSN held a deposit from Wolf-tec for a machine in the sum of $61,155 from November 2010. This does not appear in the company's financial statements. Wolf-tec issued a demand under the Companies Act for repayment in October 2012 and TSN paid this sum in November 2012. It is clear this debt was due and owing before July 2012. Indeed it is likely that it was due from early 2011 so should be added to the list of debtors.

(i) Lago Smallgoods claimed in the liquidation for a deposit paid on a machine that had not been delivered, in a sum of $10,000. This should be added also.

(j) A company called Bertoucci claimed $15,000 in the liquidation for the balance of the work which had been paid to TSN but not completed by TSN. This was completed by Mercer. This should be added to the debtors.

(k) A company called D'Orsogna Limited claimed $27,000 in the liquidation. Mr Marr explained that the credit to be passed to D'Orsogna was conditional on equipment being returned by that company which did not occur. Mr Marr was adamant that he could produce evidence to support his contention but he did not produce this evidence at the trial. On balance I am satisfied that there was an outstanding debt to D'Orsogna Limited as claimed, and so this too should be added.

[51] The consequence of these findings is that TSN had creditors in the sum of $353,336.30 in addition to those shown in its 2012 accounts.

[52] I consider, next, the solvency of TSN, from this starting point. The respondents led evidence from Mr K G Sandri, a chartered accountant. He produced a report he had prepared for the shareholders of TSN and TSI. His brief was to assess whether

TSN was likely to have met the insolvency test at the time of the transactions in question. His initial assessment was predicated, however, on the entire cash payments of $750,000, as well as the balance of the sum receivable under the agreement of $221,220, being receivable by TNL. For the reasons given I do not accept this proposition.

[53] In his analysis Mr Sandri did allow for TSI receiving $378,080 from the sale proceeds, being the value of its demonstrator machine, but his analysis was derived from the accounts of the companies prepared by their accountant which, as I have indicated, were shown to be in error. Further, although there is an initial attraction to the notion of simply appropriating the value of the demonstration machine to TSI, that step does not stand up to scrutiny for two reasons. First, the machine was not included in the sale price at its valuation. To assess a figure which should be accorded to this machine and appropriated to TSI would require assessment of all the assets of both companies against the sale price to determine whether any scaling up or down should have been made. This exercise has not been undertaken, and it is therefore arbitrary to simply apportion to TSI the book value of its machine. Secondly, TSI also owned goodwill. Again, there would need to be an assessment of how much should be apportioned to TSI for this asset which, again, would have to be considered in light of all the assets of both companies. As with the demonstrator, this has not been done.

[54] For these reasons, I do not derive assistance from Mr Sandri's evidence on the issue under discussion.

[55] I note, though, that in cross-examination it was put to Mr Sandri that if the proceeds of sale were divided equally between TSN and TSI, TSN would have failed the balance sheet test for solvency, and he agreed.

[56] Even if that conclusion is wrong, and all of the sale proceeds should have been apportioned to TSN, TSN still had an excess of liabilities over assets at the time of the July transactions. This is because the figures used by Mr Sandri, which he had understandably taken from the companies' accounts, were inaccurate. A significant number of debts were omitted, and a GST liability of $23,479 had to be allowed for, being the GST consequence of writing back the sum of $180,000 which had been

treated as an expense in the 2013 accounts. It was also necessary to adjust for the sale proceeds being $971,200 instead of $1,000,000, and a trading loss of $6,374. When these adjustments are made to the figures produced by Mr Sandri, TSN shows a net deficit of $315,144 if all the sale proceeds are apportioned to TSN, and a deficit of $221,005 if the accounts of TSN and TSI were combined.

[57] Mrs C J Jollands, one of the liquidators and a certified practising accountant, undertook an analysis of the financial position of TSN on the basis of half of the proceeds of sale being apportioned to each company. Her evidence is that on the date of the withdrawal of $180,000 in July, TSN had a net deficit of $276,000. This was based on TSN having received $500,000. It is necessary, however, to also consider the fact that at that point TSN and TSI were owed a further $500,000 under the agreement, so a further $250,000 was receivable by TSN. As I understand the position, even when half of this, received in July, is brought to account, TSN still had a net deficit in July, and by December when the second set of impugned transactions is to be considered, TSN was also in deficit. According to Mrs Jollands the cash payment of $250,000 on 31 July, and subsequent financial transactions undertaken by TSN, resulted in TSN being in deficit then, and remaining in deficit by $151,000 as at 24 December 2012. Even if the final expected tranche of the purchase price, $250,000, is treated as a receivable at that date, TSN would receive only $125,000, leaving it still in deficit to the tune of $26,000.[5] The document by which the sale price was reduced to $971,200 is not dated. There is reference to this price in a working paper prepared by TSN's accountant and dated 29 June 2012. If the sale agreement had been varied by then, the figure to be expected by TSN in December 2012 is $110,600 which would result in a deficit of around $40,000.

[58] Mr Marr's assertion in his examination that the purchase price was intended to cover the companies' debts is not borne out, because with just $221,200 still to be received at 31 March 2013, TSN still owed $81,000 to ANZ on current account, and $109,000 by way of non-current liabilities, a total of $190,000. TSI owed ANZ $2,800 and Westpac $238,000. These figures would have been improved, of course, had

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5 The only explanation given for the balance of the purchase price not having been paid by December 2012 is that the purchasing company was experiencing cashflow difficulties. For present purposes I assume that as at that date the directors were still entitled to treat the full balance owing as a receivable.

$180,000 and then a further $30,000, not been drawn off from TSN by way of the impugned transactions, but even in that event there would still have been a shortfall in meeting debts to ANZ and Westpac.[6]

[59] I am satisfied therefore that as at the date of the first impugned transactions totalling $180,000 TSN was unable to pay its debts, even allowing for notional receipt of the second tranche of the purchase price which was in fact received some three weeks later, and allowing for the balance owing under the contract being considered as a receivable. TSN was insolvent in that its liabilities exceeded its assets. It was not meeting and was not able to meet its due debts. The first limb of the definition of an insolvent transaction in s 292(2) of the Companies Act is therefore established. I am further satisfied that the same conclusion applies as at December 2012 when the second impugned transactions totalling $30,000 were made. The accounts as at 31 March 2013 record a trading loss of $186,374, a figure derived by reversal of the erroneous treatment of the $180,000 withdrawal as an expense, adjusting it for GST, and adding it to the loss shown in the accounts. TSN had not traded since it sold its assets in July 2012. I accept that as a result this loss would have been incurred by December 2012.

Third issue: did the transaction enable the respondents to receive more towards satisfaction of the debts owed to them by TSN than they would receive in its liquidation?

[60] In their notice of opposition the second and third respondents put in issue whether the impugned transactions are voidable transactions as defined in s 292(2). In both his initial written submissions and in his supplementary submissions, Mr Jeffcott made it clear that the second and third respondents oppose the application on the grounds that TSN was solvent when the transactions occurred. This is a narrower position than the ground in the notice of opposition because it refers only to the solvency of TSN, and not to whether each of the transactions was an insolvent transaction as defined in s 292(2), in respect of which the second limb of the test is whether the impugned transaction "enables another person to receive more towards

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6 The accounts for TSI also show a debt as at 31 March 2012 to UDC. There was some debate about this in evidence but I am satisfied that this debt was assumed by Mercer under the terms of the agreement. It appears to be correctly recorded that nothing was owing in the March 2013 accounts for TSI.

satisfaction of a debt owed by the company than the person would receive, or would be likely to receive, in the company's liquidation".

[61] Mr Jeffcott did not direct any submissions to this point either in his initial submissions or in his supplementary submissions.

[62] I am satisfied, however, that the second limb of the test is established.

[63] The evidence of Mrs Jollands is that the financial accounts for TSN for each of the years ending 31 March 2011, 2012 and 2013 show that liabilities exceeded assets. She undertook an analysis of the position between March 2012 and March 2013, arriving at an assessed position in relation to assets and liabilities at each of 4 July 2012 and 24 December 2012, the dates on which the impugned transactions were respectively made. Her analysis showed that on those dates liabilities exceeded assets by $276,000 and $151,000 respectively and that from at least March 2011 onwards TSL was unable to pay its debts. Mrs Jollands concluded that over this entire period TSN was insolvent both on an asset and liability basis, and in terms of its ability to pay its debts. This remained the position until it was liquidated in December 2013.

[64] Mrs Jollands says that if the impugned transactions are set aside and the sums involved are recovered in full from the respondents there will still be a shortfall to unsecured creditors. Although this cannot be finally assessed at this point, she estimates that it will be in the vicinity of $248,000. The present respondents would have been unsecured creditors in a liquidation. Accordingly they would not have received repayment of their current accounts in full. On her calculation of the financial position of TSN when the assessment was made, each of the second and third respondents have received approximately $31,680.70 more than they would have been entitled to receive in a liquidation.

[65] No evidence was given to contradict this assessment and I accept Mrs Jollands' evidence accordingly.

Outcome

[66] The Court makes the following orders:

(a) The voidable transactions set out in the Notice to Set Aside Voidable Transactions dated 30 November 2016 served on the second respondents, being a payment of $60,000 on 5 July 2012 and a payment of $10,000 on 24 December 2012, are set aside.

(b) The second respondents are directed to pay the liquidators $70,000.

(c) The voidable transactions set out in the Notice to Set Aside Voidable Transactions dated 30 November 2016 served on the third respondents being a payment of $60,000 on 5 July 2012 and a payment of $10,000 on 27 December 2012, are set aside.

(d) The third respondents are directed to pay the liquidators $70,000.

(e) The second and third respondents will pay interest on the above sums at the rate of 5 per cent per annum from the date of liquidation, 16 December 2013 to the date of the judgment.

(f) Costs are reserved. The liquidators have succeeded. Memoranda may be filed within 10 working days if agreement cannot be reached.

J G Matthews
Associate Judge

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