IN THE HIGH COURT OF NEW ZEALAND
NEW PLYMOUTH REGISTRY

CIV 2010-443-000313
[2013] NZHC 189

UNDER	section 292 of the Companies Act 1993
IN THE MATTER OF	the liquidation of Hightower Roofing Limited
BETWEEN	IAIN BRUCE SHEPHARD AND ANDREW ROBERT CROAD Applicants
AND	STEEL BUILDING PRODUCTS (CENTRAL) LIMITED Respondent

Hearing: 12 June 2012

Appearances: D A Bleier for applicants
P R Cogswell for respondent

Judgment: 13 February 2013

JUDGMENT OF ASSOCIATE JUDGE ABBOTT

This judgment was delivered by me on 13 February 2013 at 4 pm,
pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Date……

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[1] This case exemplifies the difficulties that face liquidators of small companies that operated with minimal record keeping. The applicants (the liquidators) were appointed liquidators of Hightower Roofing Ltd (in liquidation) (Hightower). The day before it was put into liquidation the bank account was all but emptied by a direct credit of $12,500 to the respondent, Steel Building Products (Central) Ltd (which traded as Metalcraft Roofing, and to which I will refer as Metalcraft) as well as two cash withdrawals totalling $1,380.

[2] At the time of liquidation Hightower owed other creditors over $90,000, a substantial part of which is claimed to be preferential debt (GST).

[3] A director of Hightower provided the liquidators with no more than some bank statements, invoices, and an invoice book. There were no proper records as required by the Companies Act 1993.

[4] The liquidators initially gave notice to Metalcraft that they sought repayment of the $12,500. Metalcraft contended that it was not liable to repay the money as the payment was made as part of a continuing business relationship, and was received without knowledge of the impending liquidation or that Hightower was in financial difficulty. Metalcraft produced a schedule of all transactions between it and Hightower to demonstrate their relationship. After consideration of those transactions the liquidators accepted that there had been a continuing business relationship and issued a second notice seeking recovery of the amount by which Hightower's indebtedness to Metalcraft had been reduced by payments in the six months or so leading up to liquidation (treating them as one transaction in accordance with s 292(4B) of the Companies Act 1993).

[5] Metalcraft opposes the orders sought by the liquidators. It contends that the liquidators have not shown that Hightower was insolvent or that there was a net indebtedness as claimed, and further that it has a defence under s 296(3) of the Companies Act 1993 because it received the payments in good faith, without suspicion of Hightower's insolvency, and gave value for or altered its position in reliance on the validity of the payments.

Material background

[6] Hightower was incorporated in April 2007 with two directors, Shane Pearce and Rhyss Taylor. It was a small company with only two employees (the evidence does not disclose whether the directors were the employees). It carried out roofing contracts in the New Plymouth region.

[7] Metalcraft was incorporated in April 2009. It manufactures and installs long-run roofing, metal tiles and rainwater systems for the New Zealand residential and commercial construction markets. It has a branch in New Plymouth. As well as supplying trade and retail customers with products, Metalcraft provides an installation service, either through its own employees or through local contractors (whom Metalcraft engages for the purpose).

[8] Hightower was one of the independent roofing contractors engaged by Metalcraft to provide installation services for Metalcraft's customers. Hightower also undertook roofing work which came to it directly. In the latter case it obtained its roofing products from Metalcraft. It purchased these products on Metalcraft's usual terms of trade, which required payment before the end of the month following invoice.

[9] Metalcraft's branch manager in New Plymouth, Mr Maharey, has given evidence that from time to time Metalcraft and Hightower would do a reconciliation of the amounts each party owed the other. He says that this could lead to Metalcraft setting off payments due to Hightower for roofing work undertaken on Metalcraft's behalf against purchases made by Hightower or to payments being made by Hightower to Metalcraft for purchases. Mr Maharey says that Hightower could make one payment in respect of several invoices, or a payment of a "rounded off" amount (as Hightower would not necessarily know what was outstanding at that particular time as accounts were done monthly).

[10] The Accident Compensation Corporation (ACC) filed its application to put Hightower into liquidation on 20 July 2010. It was based on unpaid levies totalling $15,872.94. The application was advertised in the New Zealand Gazette on 18

August 2010 and in the local newspaper, the Daily News (although there is no evidence of the date of that advertisement).

[11] On 13 September 2010 (the day before the hearing of ACC's application at which Hightower was put into liquidation) the last of the payments made by Hightower ($12,500) was direct credited to Metalcraft's bank account. At the same time a "special answer fee" was debited to Hightower's bank account in relation to that payment. On the evening of the same day two withdrawals were made from Hightower's account, through an automatic teller machine (ATM), within a minute of one another. These transactions left a balance in the account of $19.78. This amount was not able to be withdrawn as the ATM permits withdrawals in denominations of $20 only.

[12] Hightower was put into liquidation on 14 September 2010 and the liquidators were appointed.

[13] On 22 September 2010 the Inland Revenue Department submitted a claim to the liquidators in the amount of $70,520.53, of which $50,951.79 was claimed as preferential. The following day Fletcher Steel sent the liquidators a claim in the amount of $5,903.66.

[14] Following the liquidation the liquidators met with Mr Pearce, who provided them with Hightower's records (as already mentioned these amounted only to bank statements, invoices and an invoice book). Neither the liquidators nor Metalcraft have been able to contact Mr Pearce since. There is no mention in the evidence of the second director, Mr Taylor, but the liquidators say (presumably from their examination of what records exist and their meeting with Mr Pearce) that Mr Pearce had effective control of Hightower.

[15] The liquidators wrote to Metalcraft requesting repayment of the $12,500. Metalcraft declined to do so, saying that the payment was made in the normal course of business. In support of that position Metalcraft provided a statement of all transactions between it and Hightower over the period of their business relationship. The statement lists 38 invoices issued by Metalcraft to Hightower, 6 payments

received by Metalcraft (in February, March (3), August and September 2010), 5 "credit adjustments" (in April (2) and July (3) September 2010), and a credit note issued after liquidation that appears to relate to a specific invoice issued in early September 2010.

[16] The liquidators issued their first formal notice (pursuant to s 294 of the Companies Act 1993) seeking to set aside the payment of $12,500. Metalcraft served notice of objection to that notice, contending that the payment was part of a continuing business relationship between it and Hightower, and that Metalcraft had no reason to suspect Hightower was in financial difficulty.

[17] The liquidators reviewed the transactions disclosed by Metalcraft. Using a running account analysis they formed the view that Metalcraft's position had been bettered in the period from April 2010 to liquidation by $35,188.24. They served a second notice on Metalcraft on 17 October 2011 seeking to set aside payments made between 23 April 2010 and the date of liquidation, to the extent that the payments exceeded the value of work in that period (on the basis that the net position was a single transaction in the period in terms of s 292(4B)). Metalcraft again responded with a notice of objection. The present application followed, based on the second notice.

The opposing contentions, legal proposition and issues

[18] The liquidators say that the amount by which Hightower reduced its indebtedness to Metalcraft between April 2010[1] and the date of liquidation is an insolvent transaction (relying on s 292(4B) of the Companies Act). They say that the transaction was entered into at a time when Hightower was unable to pay its due debts, relying both on the presumption in s 292(4A) and on the fact that Hightower had paid no more than minimal amounts in respect of tax or ACC levies over the period of its existence. They say this enabled Metalcraft to receive more than it would have in Hightower's liquidation. They say that Metalcraft cannot avail itself of the defences under s 296 of the Act because it did not act in good faith (it must

[1] There is an issue over the starting point for their analysis, to which I will return.

have known or suspected that Hightower was or would become insolvent) and it has not altered its position in the belief that the payments would not be set aside.

[19] Metalcraft says that the liquidators have not established that this is an insolvent transaction because the evidence does not show clearly that Hightower was insolvent at the relevant times, and on a proper analysis of the transactions Metalcraft did not receive more than it would in the liquidation. It also contends that it is entitled to avail itself of the statutory defence in s 296 because it received the payment in good faith (as a part of the continuing business relationship), there was no reason to believe that Hightower was or would become insolvent, and it either gave value for the payments made under the transaction or altered its position in the reasonably held belief that the transaction was valid and would not be set aside.

[20] A transaction by a company is voidable by the liquidator if it is entered into within two years of the commencement of liquidation, and when the company is unable to pay its due debts, and it enables a person to receive more in satisfaction of its debt than would be likely in the liquidation (that is, the creditor receives a preference).[2] However, a Court must not order recovery of a payment of money if the person receiving the payment proves that he did so in good faith, without having grounds to suspect insolvency, and either gave value for it or altered his position in the reasonably held belief that the payment was valid.[3]

[21] The questions that therefore need to be addressed are:

(a) Have the liquidators established that this was an insolvent transaction, and in particular, that Hightower was insolvent at the time and that Metalcraft received a preference from the transaction?

(b) Has Metalcraft established all the requirements for a defence under s 296?

[2] Companies Act 1993, ss 292(1) and (2).
[3] S 296(3). .

Was Hightower insolvent at material times?

[22] The transaction took place within six months before commencement of the liquidation.[4] As such the statutory presumption[5] applies that Hightower was unable to pay its due debts at that time, unless Metalcraft proves the contrary.

[23] As well as relying on the statutory presumption the liquidators have given evidence that Hightower has paid minimal tax and ACC levies since incorporation. At time of liquidation it had effectively no cash in the bank and only a few assets with apparently modest recoverable value.[6] As against that it had significant debts (evidenced by the claims submitted to and accepted by the liquidators in excess of $90,000) that were well in excess of the value of the few assets.

[24] Counsel for Metalcraft accepted that Metalcraft was unable to bring any evidence as to the financial position of Hightower to rebut the presumption, but submitted that it was for the liquidators to prove insolvency, and it was insufficient for them to rely on the history of tax defaults because a significant amount of the core tax claimed was based on default assessments, which may or not represent the true position (particularly in light of the sparse records). He argued that if the default assessments were incorrect, it was possible that no or minimal tax was payable, and the assets were sufficient to meet the actual tax obligations plus the debt to the one trade creditor, Fletcher Steel.

[25] I do not have to go past the presumption of insolvency. There is no evidence before the Court to rebut it.[7] Moreover, such other evidence as there is supports the presumption. The default assessments went unchallenged. They are deemed to have been accepted under the Tax Administration Act 1994. Further, Inland Revenue's proof of debt shows that, even without the default assessments, Hightower had long-outstanding tax liabilities (PAYE was unpaid from as far back as 30 March 2008,

[4] The restricted period in terms of s 292(6) of the Companies Act 1993.
[5] Section 292(4A).
[6] Counsel for Metalcraft referred in his submissions to plant and equipment and shareholders' current accounts having been mentioned in the liquidators' first report, but that report is not in the evidence before the Court.
[7] The onus lies on Metalcraft: *Blanchett v Joinery Direct Ltd* HC Hamilton CIV 2007-419-1690, 23 December 2008.

GST from July 2008, and income tax from the year ending 31 March 2008 and the last payment made to Inland revenue was on 28 February 2009). It had also stopped even filing returns well before its liquidation. This was more than merely a problem of temporary liquidity. I find that Hightower was insolvent at the time of the transaction.

Did Hightower receive more than it would in the liquidation?

[26] Whether a transaction has a preferential effect is to be assessed objectively (the actual intention of the parties is irrelevant). Each case ultimately turns on its own facts and "must be determined in a practical, realistic and businesslike way".[8]

[27] The liquidators accept that the payments made by Hightower were an integral part of a continuing business relationship between the parties,[9] so as to bring into effect s 292(4B) of the Companies Act 1993:

> 292 Insolvent transaction voidable
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> ...
>
> (4B) Where—
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> (a) a transaction is, for commercial purposes, an integral part of a continuing business relationship (for example, a running account) between a company and a creditor of the company (including a relationship to which other persons are parties); and
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> (b) in the course of the relationship, the level of the company's net indebtedness to the creditor is increased and reduced from time to time as the result of a series of transactions forming part of the relationship;
>
> then—
>
> (c) subsection (1) applies in relation to all the transactions forming part of the relationship as if they together constituted a single transaction; and
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> (d) the transaction referred to in paragraph (a) may only be taken to be an insolvent transaction voidable by the

[8] *Ferrier v Civil Aviation Authority* (1994) 125 ALR 122 at 142.
[9] An appropriate acknowledgement, in my view, looking at the totality of the relationship: *Trans Otway Ltd v Shephard* [2005] NZSC 76, [2006] 2 NZLR 289 (SC) at [9] and the recent decision of the Court of Appeal in *Rea v Russell* [2012] NZCA 536

> liquidator if the effect of applying subsection (1) in accordance with paragraph (c) is that the single transaction referred to in paragraph (c) is taken to be an insolvent transaction voidable by the liquidator.

[28] A set-off can constitute a payment, and hence be part of a transaction for the purposes of s 292(3) of the Act.[10]

[29] Section 292(4B) is based on s 558FA(3) of the Corporations Act 2001 (Australia). A legal commentator has said of the Australian section:[11]

> ...section 588FA(3) requires a series of transactions to be reduced to a single monetary figure, the artificially created "single transaction", which is either a net increase or a net reduction in the indebtedness. That monetary figure is then assessed to see whether it is an [insolvent transaction]. ...If the figure is a net reduction in the indebtedness then presumably this net reduction is to be treated as a debt in respect of which the company has received full payment and thus the net reduction is to be treated as a debt in respect of which the company has received full payment and thus the end reduction constitutes an [insolvent transaction].

[30] Section 558FA(3) was a statutory recognition of common law developed in relation to debts incurred in ongoing relationships (such as running accounts), as discussed by the High Court of Australia in *Airservices Australia v Ferrier*:[12]

> If at the end of a series of dealings, the creditor has supplied goods to a greater value than the payments made to it during that period, the general body of creditors are not disadvantaged by the transaction – they may even be better off. The supplying creditor, therefore, has received no preference. Consequently, a debtor does not prefer a creditor merely because it makes irregular payments under an express or tacit arrangement with a creditor that, while the debtor makes payments, the creditor will continue to supply goods. In such a situation, the Court does not regard the individual payments as preferences even though they were unrelated to any specific delivery of goods or services and may ultimately have had the effect of reducing the amount of indebtedness of a debtor at the beginning of the six month period. If the effect of the payments is to reduce the initial indebtedness, only the amount of the reduction will be regarded as a preferential payment.

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[10] See *Shephard v Kilbirnie Plymouth Investments Ltd* HC Wellington CIV 2009-485-2397, 18 February 2011; *Trans Otway Ltd v Shephard* [2005] 3 NZLR 678 (CA).

[11] H Bolitho "Continuing Business Relationships – Eight Questions in Search of an Answer" (1998) 16 C&SLJ 581 at 592.

[12] *Airservices Australia v Ferrier* (1996) 185 CLR 483 (HCA) at 503; this analysis was adopted in New Zealand in *Jollands v Mitchill Communications Ltd* [2011] NZCCLR 20 (HC) at [13] and more recently in *Rea v Russell* [2012] NZCA 536 at [57].

[31] Metalcraft accepted that s 292(4B)(d) requires the liquidator to treat the net effect of a series of transactions notionally as a single transaction and to determine whether that transaction was preferential. It relies on the legal approach in *Jollands v Mitchill Communications Ltd*:[13]

> If at the end of a series of dealings, the creditor has supplied goods to a greater value than the payments made to it during that period, the general body of creditors are not disadvantaged by the transaction – they may even be better off. The supplying creditor, therefore, has received no preference. Consequently, a debtor does not prefer a creditor merely because it makes irregular payments under an express or tacit arrangement with the creditor that, while the debtor makes payments, the creditor will continue to supply goods. In such a situation, the court does not regard the individual payments as preferences even though they were unrelated to any specific delivery of goods or services and may ultimately have had the effect of reducing the amount of indebtedness of a debtor at the beginning of the six month period. If the effect of the payments is to reduce the initial indebtedness, only the amount of the reduction will be regarded as a preferential payment.

[32] This leads to an important issue for this case, namely what is the appropriate time for determining the commencement of the "single transaction".[14] The choice of opening balance obviously affects the calculation of the single transaction and can be determinative of whether or not there was a net increase or reduction in indebtedness.

[33] The point has not been decided authoritatively in New Zealand. The liquidators say that they are entitled to determine the starting point for the transaction, namely the date of Hightower's peak indebtedness. They rely on the decision of the High Court of Australia in *Rees v Bank of New South Wales* [15] to support this submission. In that case, the High Court held that the liquidator can choose any point in the statutory period to show that there has been a preference from that point.[16] However, this "peak indebtedness" rule has not been applied consistently in Australia. In *Airservices Australia v Ferrier,* the majority of the High Court suggested that the starting point for the running account is not a matter to be decided by the liquidator:[17]

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[13] *Jollands v Mitchill Communications Ltd* [2011] NZCCLR 20 (HC) at [13].
[14] Companies Act 2003, s 292(4B)(c).
[15] *Rees v Bank of New South Wales* (1964) 111 CLR 210.
[16] *Rees v Bank of New South Wales* at 221.
[17] *Ferrier*, above n 11, at 502.

> ... a payment made during the six month period cannot be viewed in isolation from the general course of dealing between the creditor and the debtor before, during and after that period.

[34] The majority held that this follows from the fact that the *purpose* for which the payment was made and received will usually determine whether the payment has the effect of giving the creditor a preference over other creditors.[18] If the purpose of the payment is to induce the creditor to provide further goods or services **as well as** (my emphasis) to discharge an existing indebtedness, the payment will not be a preference unless the payment exceeds the value of the goods or services acquired.[19] Therefore, resort must be had to the context of the payment to determine whether it gives the creditor a preference over other creditors.[20]

[35] I find the Court's reasoning in *Ferrier* persuasive. Allowing the liquidator to pick a point of peak indebtedness is inconsistent with the basic principle of the continuing business relationship test enshrined in s 292(4B),[21] which is to place the transaction in the wider context of "all the transactions forming part of the relationship".[22]

[36] I therefore accept the submission of counsel for Metalcraft that the Court should look at the whole course of trading under the continuing relationship.

[37] I turn to apply this law to the facts. A chronological analysis of the entire course of the trading history, drawn from Metalcraft's statement, was produced in the submissions of counsel. On the evidence before the Court, all of these transactions, at least up to the second to last payment of $9694.23 on 24 August 2010, were part of the continuing business relationship. The analysis shows that in that period Metalcraft provided more to Hightower in goods than Hightower provided to Metalcraft in services and payments. I find that there was no preference in favour of Metalcraft over other creditors up to and including the payment on 24 August 2010.

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[18] At 502.
[19] At 502.
[20] At 502.
[21] See also Rebecca Edwards "A Testing Time" *NZ Lawyer* (online ed, 18 April 2008) arguing that the peak indebtedness rule is at odds with the principle of the continuing business relationship test.
[22] Companies Act 2003, s 292(4B)(c).

[38] The liquidators presented an alternative argument that the Court could look at the position from 20 August 2010 onwards without having regard to the continuing business relationship approach as the last supply was on 19 August 2010.[23] They contend that the payments made on 24 August 2010 and 13 September 2010, totalling $22,194.23 clearly gave Metalcraft a preference.

[39] I have accepted the payment on 24 August 2010 was part of the continuing business relationship, having regard to the proximity to the last supply (19 August 2010) and the absence of any countervailing factors suggesting that that payment was not an integral part of the relationship. There is no evidence to suggest that either party considered the relationship to have ended at that point.

[40] I see the payment on 13 September 2010 differently. It was four weeks after the last purchase, and was made in most unusual circumstances. I have no doubt that it was not an integral part of the continuing business relationship, but was done to prefer Metalcraft (even if without the knowledge of Metalcraft). It could only have been one of Hightower's directors who effected the transfer and instructed the bank to obtain a special clearance (or gave an assistant the information and authority to do so), and then withdrew what was possible of the remaining cash. I find that these facts give rise to an irresistible inference that the payment was made with knowledge of the hearing the following day. In the circumstances there was a clear preference in favour of Metalcraft in respect of that payment.

[41] Having found that there was a preference in respect of the last payment I turn now to consider whether Metalcraft can rely on the defence under s 296. As I am aware that this is a developing area of law, and there is no prior authority in New Zealand on a liquidator's entitlement to choose the point of peak indebtedness as the start of the analysis for the business relationship, I will look at the defence more generally than just applying to the last payment as I accept the liquidators' position that if peak indebtedness is used as the starting point, from that point there is a net reduction in indebtedness of $27,668.36. I will also state briefly my reasons for coming to that view.

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[23] Metalcraft's statement records a further invoice on 8 September 2010 but also a complete credit against that invoice on 30 September 2010.

[42] The liquidators used as their starting point for the notional transaction Hightower's peak indebtedness as disclosed by the statement of transactions supplied by Metalcraft. In their notice to set aside they produced an analysis of that information, on a running account basis, to support an argument that from 23 April 2012 to the date of liquidation Metalcraft's position was improved overall by $35,188.24.

[43] After Metalcraft challenged the liquidators' calculations in its submissions (the point had not been taken explicitly in the notice of objection) the liquidators acknowledged that their analysis took into account a credit given by Metalcraft on 1 April 2010, and failed to allow for the final small indebtedness after all payments and credits had been taken into account. They presented a revised analysis working backwards from the indebtedness of $2,072.23 at the date of liquidation[24] to a peak indebtedness on 1 April 2010 (allowing for duplications in Metalcraft's analysis) of $29,740.59 and that the difference of $27,668.36 represents the net reduction in that period.

[44] Metalcraft relied on a chronological analysis of the trading history leading to the final debit balance of $2,072.23 to support its argument that there was no preference but also contended that if the Court accepted that the liquidator could choose the starting point, the liquidators' calculations were wrong – they had fixed 23 April 2010 as the starting point, and at that point the amount outstanding was $13,640.69, resulting in a net improvement of only $11,568.46. Counsel for Metalcraft submitted that the liquidators could not now amend to rely on an earlier date.[25]

[45] I do not accept that the liquidators are bound by their initial assessment that the point of peak assessment was the date of 23 April 2010. It is clear that they are seeking to recover as a preference the net improvement for Metalcraft from the date of peak indebtedness to date of liquidation, and that the date of 23 April 2010 was

[24] Using an analysis of the information in Metalcraft's statement of transactions that counsel for Metalcraft presented in his submissions.
[25] Relying on *Richelieu Investments Ltd v McCullagh* HC Auckland CIV-2003-404-4751, 30 April 2004.

mistakenly taken to be that point (due to a credit on 1 April 2010 having been recorded on Metalcraft's statement out of chronological order).

[46] I distinguish the decision in *Richelieu Investments Ltd v McCullagh.*[26] That case concerned an application to amend a notice to set aside. The Court found that the rules as to amendment could not be applied as the notice was not a proceeding to which the rules as to amendment apply. Here the liquidators seek to amend their application which clearly is a proceeding.

[47] Metalcraft cannot have been under any misunderstanding as to the liquidators' intention to seek setting aside of payments giving a preference. It is for the Court to determine the payments to set aside, based on the evidence before the Court. If I had come to a different conclusion as to the use of peak indebtedness as the starting point I would have allowed an amendment to the application to seek setting aside of the net reduction of debt from the point of point of peak indebtedness selected by the liquidators to date of liquidation.

[48] The amount of the peak indebtedness would then be a matter of fact for the Court to determine. The liquidators selected the position prior to the credit adjustment on 1 April 2010, which was $29,740.59. Allowing for the final indebtedness of $2,072.23, this results in an overall (net) reduction of indebtedness, and hence preference on that analysis, of $27,668.36.

Has Metalcraft established a defence under s 296?

[49] Metalcraft contends that it has a defence under s 296(3) of the Companies Act 1993 in respect of any payment which might be an insolvent transaction:

> 296 Additional provisions relating to setting aside transactions and charges
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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—

[26] Above n 25.

> (a) A acted in good faith; and
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> (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.

[50] It was common ground, and is clear law, that Metalcraft has the onus of establishing this defence, and that it must satisfy the Court on all requirements of the section.

(i) *Good faith*

[51] To avail itself of this defence, the recipient of the property or money in question has to demonstrate an honest belief that the transaction would not involve any element of undue preference.[27] This is a subjective test. If the recipient has actual or implied knowledge of the financial predicament of the company, and that it was being treated differently or preferentially to other creditors, it will not be able to claim that it received the payment in good faith.[28]

[52] The liquidators point out that both Hightower and Metalcraft were active in a narrow market in a modest-size provincial town, and invite the Court to accept that news of Hightower's financial difficulties would have reached Metalcraft. They say that Mr Maharey's evidence that no one in Metalcraft had any idea that Hightower was under financial pressure or was insolvent was too general to meet the evidential onus. They note that Mr Maharey did not expressly address whether Metalcraft had any suspicions. In particular they say that the payment of $12,500 the day before liquidation was highly suspicious (particularly given that a special answer was arranged on the payment) and has not been explained adequately.

[53] I am satisfied that Mr Maharey's evidence is sufficiently explicit as to lack of knowledge that Hightower was under financial pressure or was insolvent. He has expressly said that neither he nor any of his staff saw the advertisements of the

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[27] *Re Orbit Electronics Auckland Ltd (in Liq)* 1989 4 NZCLC 65 170 (CA).
[28] *Graham v Pharmacy Wholesalers (Wellington) Ltd* CA37/04, 17 December 2004.

liquidation application. He refers to the fact that no payment by Hightower had ever been dishonoured, and that as far as he was concerned they had continued to trade up to the date of liquidation (he noted that the last supply of goods to Hightower was on 19 August 2010).

[54] It is difficult to see what more Mr Maharey or Metalcraft could have said to support the honesty of their belief. Ultimately it comes down to direct evidence as against an inference to be drawn from the last minute payment (as the most cogent evidence that something was amiss). I have no reason to reject the evidence of Mr Maharey. There is no evidence to suggest that he or his staff were accomplices to the last minute payment and special answer. Mr Maharey has denied that he pressured Hightower for payment, or threatened to withhold supply. There is no evidence of any concern about the timing of payments. Nor is the timing of the payments so different from the history of prior payments as to require rejection of his evidence.

(ii) Is there sufficient suspicion of insolvency?

[55] This takes me to the second aspect of the defence, namely whether Metalcraft has shown that a reasonable person in its position would not have suspected, and that Metalcraft did not have reasonable grounds for suspecting, that Hightower was or would become insolvent.

[56] The first part of this requirement requires an objective analysis by reference to a reasonable person having the knowledge and experience of the "average business person".[29] This hypothetical creditor is assumed to have the full range of information available to Metalcraft.[30]

[57] The second limb of this requirement requires consideration of what was known to Metalcraft (its subjective position) and whether that provided reasonable grounds for suspecting insolvency (thus importing an objective element).

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[29] *Cussen v Federal Commissioner of Taxation* (2004) 22 ACLC 1528 (NSWCA) – a decision in relation to s 588FG(2)(b)(ii) of the Australian Legislation.
[30] At [114] and [117].

[58] The test for "suspicion" requires that there be something more than a mere idle wondering whether or not something exists: there must be a cause for a positive feeling of actual apprehension or mistrust.[31]

[59] The liquidators say that this requirement of the defence has not been made out. They say that it is virtually impossible to establish what a reasonable person would have known about the trading history of the company in light of the lack of trading records, but grounds for suspicion can be found in delays in payment of invoices and in payments in rounded amounts rather than of specific invoices, in the close working relationship between Metalcraft's New Plymouth Branch and Hightower's director Mr Pearce,[32] in the size of (and hence familiarity with fortunes within) the local roofing industry, and in the highly unusual circumstances of a last minute payment and special answer.

[60] Metalcraft argues that this element has been satisfied by Mr Maharey's evidence as to the nature of the business relationship between the parties, that no demands for payment nor threats to alter the trading relationship were made, that there had been no history of any dishonour of prior payments, and that neither he nor anyone else in the company knew of Hightower's impending liquidation.

[61] Metalcraft also relied on evidence of Mr Maharey that after the liquidation Mr Pearce had told him that he (Mr Pearce) had no knowledge of the application for liquidation before the order for liquidation was made (contending that the papers had not been served at Hightower's trading address, and may have gone to a previous address which remained the address for service). The liquidators challenged this evidence on the basis of hearsay. Metalcraft contends that it is available as Mr Pearce cannot now be located.[33] Metalcraft, in turn, took issue with evidence of the liquidators that the lump sum payment and request for a special answer indicated that Mr Pearce knew of the impending liquidation and should have raised suspicions of insolvency.

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[31] *Queensland Bacon Pty v Rees* (1966) 115 CLR 266 (HCA) at 303, adopted in *Blanchett v McEntee Hire Holdings Ltd* (2010) 10 NZCLC 264,763. See also Heath and Whale on Insolvency, Lexis Nexis, para 24.135.

[32] In the evidence of collaboration as principal and contractor on projects, and of cross-credits and reconciliations.

[33] Relying on s 18 of the Evidence Act 1986.

[62] I accept that Mr Maharey's evidence can be read, but in light of the unavailability of Mr Pearce and the proof of service on file, I place little weight on it. The evidence of the liquidator (as an expression of opinion) is similarly of limited probative value.

[63] It is for Metalcraft to establish that there were no grounds to suspect. It relies heavily on the continuing business relationship. Although I have accepted that the parties had such a relationship, I am not convinced that the way in which it operated necessarily precludes there being any objective reason for concern about solvency.

[64] There are several aspects of Metalcraft's evidence that leave questions open. Mr Maharey says that the penultimate payment (in August 2010) was payment for four invoices issued by Metalcraft in July and part of another one,[34] without explaining why it was part only of the other one. He does not comment specifically on early payments that were of rounded amounts and cannot be reconciled to any particular invoices, or the fact that the only payments that otherwise correlate with invoices (two payments in March 2010 have the same value as three invoices issued on 31 March 2010) were made ahead of the invoices. Further, Mr Maharey has not provided any documents to show the value of the work undertaken by Hightower that he says is the basis for the adjustments and I note that several of them are also for rounded amounts but have not been explained. On their own they do not give a basis for suspicion, but they form a background that a reasonable person could take into account.

[65] I have no reason to question Mr Maharey's evidence that neither he nor anyone else in Metalcraft knew of the application for liquidation prior to the order being made. However, that is not to say that a creditor in Metalcraft's position could not reasonably be expected to have known of the application. The application was advertised in a relatively small community, and a reasonably prudent business person operating in a small industry sector could reasonably be expected to keep abreast of public notices, particularly those appearing in the one daily newspaper in the area in which that person was conducting business.

[34] $1,172.37 of an invoice of $2,071.39.

[66] In the context of a relationship where payments are intermittent and not clearly related to specific purchases, a payment made by a company facing a liquidation application the day before the hearing of the application, would have to give rise to "a positive feeling of actual apprehension or mistrust" concerning the validity of that payment.

[67] The liquidators also argued that the special answer gave further reasons for suspicion. However, the evidence indicates that the special answer was obtained by Hightower, and there is nothing to challenge directly Mr Maharey's evidence that he knew nothing of the special answer.

[68] Weighing all of these matters, I find that Metalcraft has not established that a reasonable person in its position would not have suspected, at least at the time that it received the final payment, that Hightower was, or would become, insolvent. In case I am wrong on this point, I will continue to address the third requirement of the section.

(iii) Has Metalcraft shown that it gave value or altered its position?

[69] This aspect of the defence requires Metalcraft to show that following receipt of the payment it gave new value or undertook a deliberate course of conduct, that it would not have taken but for receipt of the payment and belief in its validity.[35]

[70] Counsel for Metalcraft argued that it had satisfied this limb of the defence by voluntary assumption of any liability for Hightower's work for Metalcraft's customers. He argued that under normal contract principles, Metalcraft would not be liable for workmanship of Hightower when engaged as an independent contractor and would have no independent exposure for its workmanship. He referred to Mr Maharey's evidence that as well as Metalcraft having altered its position by continuing to supply Hightower, it had assumed liability for warranty claims, retention payments and any obligation to carry out remedial work in relation to such work. Counsel submitted that the Court did not need to place a value on this

[35] *Re BeeJay Builders Ltd* [1991] 3 NZLR 560 (HC) at 566.

assumption of responsibility – as with adequacy of consideration, it was sufficient that it had occurred.

[71] In addition Metalcraft contends that it gave value in the provision of equipment (a scissor lift) which Hightower used in its work.

[72] I am not satisfied that Metalcraft has established that it altered its position in reliance on the validity of the payment. Mr Maharey has stated that Metalcraft provided its customers with an installation service and engaged roofing contractors such as Hightower to carry out the work on its behalf. The assumption of responsibility for that work was undertaken at the time that Metalcraft contracted with its customer. There is no evidence to suggest that it assumed the obligation after the work was undertaken and in reliance on the validity of any payment. Similarly, there is no evidence from Metalcraft to show when it made the scissor lift equipment available, or on what terms, let alone to demonstrate that it was in reliance on validity of the payments being made.

[73] In short, Metalcraft has not provided an evidential basis for this aspect of the defence.

Decision

[74] For the reasons I have given I find that the notional "single transaction" for the purposes of s 292(4B)(c)) is determined by taking into account all of the transactions that were an integral part of the business relationship between Metalcraft and Hightower. Metalcraft received no preference over other creditors in respect of payments received in the course of and as part of that relationship. However, I also find that the final payment of $12,500 was not an integral part of that relationship, and did constitute a preference.

[75] I also find that Metalcraft has not made out the grounds for a defence under s 296 of the Companies Act 1993. I find that it has failed to show that a reasonable business person in its position would not have suspected or have reasonable grounds to suspect Hightower was or would become insolvent, and did not give value for, or

alter its position in reliance on a belief in the validity of that net reduction of indebtedness.

[76] Counsel did not address me on costs. On the information presently before the Court, the liquidators, as the successful party, would be entitled to costs on a scale 2B basis, together with disbursements as fixed by the Registrar. If there are any other circumstances which a party considers might affect that view of costs, or the parties are unable to agree on the costs payable on that basis, they may file memoranda. Metalcraft's memorandum is to be filed within 15 working days and the liquidators' memorandum within a further five working days. Unless there is any issue on which the parties need to be heard, the matter will be determined on the basis of the memoranda.

Associate Judge Abbott