IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV-2009-485-2397

UNDER	the Companies Act 1993
IN THE MATTER OF	the liquidation of Dermac Investments Limited
BETWEEN	IAIN BRUCE SHEPHARD AND CHRISTINE MARGARET DUNPHY AS LIQUIDATORS OF DERMAC INVESTMENTS LIMITED (IN LIQ) Applicants
AND	KILBIRNIE PLYMOUTH INVESTMENTS LIMITED Respondent

Hearing: 15-16 December 2010

Counsel: K P Sullivan for the applicants
R C Laurenson for the respondent

Judgment: 18 February 2011 at 3.45pm

JUDGMENT OF MALLON J

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Introduction

[1] Kilbirnie Plymouth Investments Limited ("Kilbirnie") was one of a number of lenders to Dermac Investments Limited ("Dermac"). In June 2007 Kilbirnie negotiated an agreement with Dermac, which was settled in September 2007, the net effect of which was that Kilbirnie received $2,140,000 (or thereabouts) in satisfaction of money Dermac owed to Kilbirnie (or, a related entity, Kilbirnie Plymouth Trust) and one or two of the other lenders. In December 2007 Dermac and related companies were put into liquidation. In April 2008 further related companies were also put into liquidation. Together they owed many millions of dollars to creditors. The liquidators of Dermac apply to set aside Kilbirnie's receipt of the $2,140,000 sum as a voidable transaction under the Companies Act 1993.

[2] Kilbirnie opposes this, submitting that:

a) The transaction is not "transaction' as defined in the Companies Act for the purposes of the voidable transaction provisions;

b) The transaction was made in the ordinary course of business and so is not a voidable transaction;

c) The transaction was made in good faith and Kilbirnie has altered its position such that it would now be inequitable for the Court to require Kilbirnie to pay back some or all of the money it received under the transaction.

The facts

Background relating to Dermac

[3] Dermac is part of the Edpac Group of companies. The Edpac Group of companies are also related to the Joyce Group of companies. All companies in these two groups are in liquidation. A number of the Edpac and Joyce companies have since been made the subject of a High Court pooling order.

[4] Joyce Group Limited, one of the companies in the Joyce Group, was incorporated in the early 1980s and traded as a project and property management and consulting firm for many years. Mr Erne Joyce was involved from the beginning as a sole shareholder and director. Mr David Cunningham became involved as a director in 1984. Other shareholders and directors came and went over the years.

[5] The background to the Joyce Group's association with the Edpac Group was Joyce Group's project management role in respect of student accommodation at a property in Taranaki Street, Wellington. Education Plus New Zealand Limited ("Edplus"), of which Mr John White was a director, placed foreign students in New Zealand tertiary institutions and provided pastoral care for them. The Edpac Group was a collaboration between Edplus and the Joyce Group.

[6] The primary focus of the Edpac Group was to design, build and manage accommodation for tertiary students in collaboration with university institutions. Joyce Group provided design, building construction and project management expertise. The structure of the Edpac Group involved Edpac Holdings Limited as the parent company with a number of subsidiary companies incorporated for each development undertaken. The first entities in the Edpac Group were incorporated in 2003. The initial directors were Mr Joyce and Mr White and these two were the principal shareholders.

[7] The separation between the Edpac entities (conducting the student accommodation operational side) and Joyce Group (providing the project management and consultancy work) did not last long. They became reliant on each other and operated essentially as one entity. The financing from external sources between the various entities was also significantly intermingled.

[8] Tax Planning Services, an accounting firm, were the external accountants for the Edpac Group, including Dermac. Its two directors are Mr Barrie Skinner and Mr David Rowley. The number of entities incorporated in the Edpac Group was on the advice of Tax Planning Services and was put in place, at least in part, for taxation reasons. Tax Planning Services was involved in the financing of Edpac projects, for example in dealing direct with the banks and financiers on behalf of the Edpac

companies. Some of those who lent money to the projects were also clients of Tax Planning Services. Tax Planning Services charged significant fees to the Edpac companies. At times Tax Planning Services' employees were seconded to Edpac.

[9] The Edpac Group purchased a property in Wellington known as the St George in April 2005. The property was in five separate titles which were purchased by various Edpac Group companies. The titles were then transferred to Dermac. Dermac's directors were Mr Joyce and Mr Cunningham. They were also its shareholders.

[10] At the time of its purchase the St George was operating as student accommodation. There were two halls of residence: the St George Hotel and the St George Annex. There was also a car park. Dermac owned the buildings but leased the two residences to two Edpac companies. Edpac Holdings Limited guaranteed the obligations of the two Edpac lessees. Edpac Holdings Limited in turn had leases with Victoria University and other commercial tenants.

[11] At the time of the purchase of the St George, the expressed intention of the directors was to upgrade the property (including refurbishing the rooms) and to strengthen it. The purchase of the St George Hotel was funded by loans from Equitable Property Finance and St Lawrence Lending Limited. This lending was secured by first and second mortgages respectively.

[12] Further funding for the development came from lending from various individuals and organisations. One of the lenders was Kilbirnie and/or Kilbirnie Plymouth Trust. Tax Planning Services put in place Kilbirnie and Kilbirnie Plymouth Trust on behalf of their client, Mr Peter Uren, a resident of the Philippines. Mr Skinner and Mr Rowley were the trustees of Kilbirnie Plymouth Trust. They were in contact with Mr Uren on a regular basis.

[13] The liquidators have had difficulty obtaining details of precisely what occurred in relation to the funding of the St George and other developments. Requests for documentation have not been answered. From the documentation that is available they understand that Kilbirnie and/or Kilbirnie Plymouth Trust made

advances to Dermac or other Edpac companies in respect of the St George development and further advances in respect of a development in Nelson.

[14] From the information obtained the liquidators understand that financing was arranged in relation to each level of the St George and the arrangements with lenders varied. For example the lender in respect of level 4 did not obtain any security over the floor but obtained a general security agreement over Edpac's assets and a guarantee from Mr Joyce and Mr White. The lenders in respect of levels 6 and 7 were to receive rental from these floors. One of the lenders in respect of level 7 also received a general security agreement over Dermac and Edpac assets and guarantees from Mr Joyce and Mr White.

[15] The liquidators understand that consideration was given to obtaining strata title for each floor. This was to enable finance to be obtained by entering into sale and purchase agreements over the floors to be settled once the strata title was issued. In respect of level 1 the liquidators understand[1] that a conditional sale and purchase agreement was entered into between Dermac and the trustees of Kilbirnie Plymouth Trust on 12 September 2005. They understand that a "deposit" of $800,000 was paid. The liquidators understand that the deposit was to become a loan if the strata title did not become available, with the deposit to be repaid to Kilbirnie Plymouth Trust in the sum of $1 million on 12 September 2007. They understand that Kilbirnie Plymouth Trust was paid a fee of $30,000 on entering the contract and that it was also to be entitled to rental, in the place of interest, in the sum of $150,000 per annum.

[16] In respect of level 5 a similar arrangement was made between Dermac and Perse Holdings Limited ("Perse") with Perse apparently paying a "deposit" of $400,000. The loan was to be repaid on 1 September 2007 in the amount of $500,000.

[17] At the hearing before me, counsel produced a document entitled "Deed of Acknowledgement of Debt" between the trustees of Kilbirnie Plymouth Trust and

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1 They have not sighted a copy of this agreement.

Joyce Group Investments Limited dated 29 March 2005.[2] This document records a loan from the Kilbirnie Plymouth Trust to Joyce Group Limited in the sum of $500,000. The loan was repayable with interest on the earlier of five years or the sale of "the Property". The Property was defined as "that land together with the ground and first floor of the buildings in certificates of title WN209/65 and WN509/112", these two certificates of title relating to the St George Hotel (not the St George car park). The security for the loan was stated to be a "a Security Interest in the Property which Property shall be collateral for the purposes of the PPSA". The agreement provided for Kilbirnie Plymouth Trust to register a financing statement to perfect its interest and for Joyce Group Investments Limited to promptly execute any documents to ensure the security constituted a perfected security interest.

[18] The separate titles to the floors of the St George were never issued and Dermac proceeded to enter into agreements for the sale of the properties.

[19] Boulcott Village Properties Limited ("Boulcott") purchased the St George Annex from Dermac in 2005. By the time of Dermac's liquidation Boulcott had not settled this purchase. It was settled with the liquidators. The settlement monies were paid to the secured mortgagee of that property, which at that stage was Allied Nationwide Finance.

[20] In March 2007 Dermac entered into an agreement to sell the St George Hotel to Orchard NZ Trustees Limited ("Orchard"). The sale price was $19,500,000 which, even in the buoyant market at the time, was viewed as a very good sale price. A condition of the agreement was that Dermac would complete structural improvements and strengthening. A retention sum of $1,250,000 was set aside in a solicitors' trust account for this work. (This sum subsequently proved to be an inadequate amount.) It was also a condition of the sale of the St George Hotel to Orchard that the lease arrangements between Dermac and Edpac were transferred to

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[2] The applicants objected to this document being admitted as evidence for the hearing. Counsel for the applicants had not seen this document before and it had not been produced by affidavit evidence. Counsel for the respondent subsequently provided an affidavit from the solicitors whose name appeared on the document to the effect that it appeared to be a loan agreement they had prepared. I allow the document to be admitted as evidence in this proceeding. The applicants acknowledge there is no prejudice to them if the agreement is admitted.

Orchard. There was also a guarantee in place under which Dermac and Edpac guaranteed minimum annual rental. The sale of the St George Hotel to Orchard was settled on or about 2 July 2007.

[21] The directors considered how the proceeds of the sale of the St George Hotel were to be applied, as is evident from a spreadsheet amongst the company papers obtained by the liquidators. The spreadsheet shows a significant deficit between the sale price and the creditors once the secured mortgagees, Equitable Property Finance and St Lawrence were paid. The distribution of the sale proceeds that was made to creditors is set out in a letter from Dermac's solicitors to Dermac dated 12 July 2007. Kilbirnie and Kilbirnie Plymouth Trust were not paid anything from the sale of the St George Hotel.

[22] The last accounts that Tax Planning Services were involved with were the March 2007 accounts. At this time, according to Mr Skinner in his interview with the liquidators, Tax Planning Services considered the group to be solvent. They were, however, aware that there were delays in paying creditors and pressure from them. Tax Planning Services were also having difficulty getting information from the group.

[23] The liquidators say that at the time of the sale of the St George Hotel, there were substantial claims being made against Dermac. The only remaining asset was the St George car park. Some creditors had registered securities over the assets and undertakings of Dermac (eg the McSmyth Family Trust) or had the ability to register a General Security Agreement (eg the Bevans). Kilbirnie, however, had no registered security in respect of the St George properties. Under the loan agreement produced at the hearing (refer [17] above), that particular loan was unsecured but could be converted to a secured interest in respect of the St George Hotel. That property was sold to Orchard before that occurred. There was no registered security in respect of the St George car park and no documentation has been located by the liquidators or produced by Kilbirnie to show that it had any security interest in the St George car park at the time the agreement discussed below ([24] to [32]) was negotiated.

The transaction

[24] On 28 June 2007 Dermac and Kilbirnie Plymouth Trust (or its nominee) entered into an agreement for sale and purchase of the St George car park (which was the remaining unsold block of land in the St George development). The agreed purchase price was $3,600,000 (inclusive of GST) and the deposit amount was $2,450,000. A special condition provided that "[u]pon payment of the deposit, or part thereof, the vendor acknowledges and agrees that the purchaser has a caveatable interest in the property".

[25] A letter dated 12 July 2007 from Kilbirnie's solicitor to Joyce Group Limited records the deposit under this agreement has having "been paid" in part payment of the purchase price. It refers to "earlier discussions" between Tax Planning Services on behalf of Mr Uren and Joyce Group of a proposed development of the land via a joint venture company (60% owned by Kilbirnie or nominee and 40% owned by Joyce Group).

[26] On 13 July 2007 Kilbirnie registered a caveat against the St George car park title. The stated caveatable interest was as purchaser pursuant to the agreement for sale and purchase dated 28 June 2007.

[27] Also on 13 July 2007, Tax Planning Services wrote to Dermac advising that it was no longer appropriate for it to act as Dermac's accountants. On 18 July 2007 Tax Planning Services wrote to Joyce Group seeking confirmation that all further work for the group was to cease, in which case Tax Planning Services would render a final invoice. When interviewed by the liquidators, Mr Skinner said that Tax Planning Services' relationship was severed in July 2007 because it was not being paid, it was not being provided with information and it was working for Kilbirnie.

[28] On 19 July 2007 Dermac's solicitors wrote to Kilbirnie's solicitor advising that negotiations in respect of EP Nelson Limited were to be kept separate and responding to the joint venture terms that had been proposed in relation to the St George car park. In respect of the deposit for the St George car park purchase, the letter said:

> Further, as confirmed in our telephone conversation, no deposit has yet been made or paid by your client in respect to the purchase of the St George car park. We are instructed, however, to undertake to pay to you from the deposit the sum of $1,554,000.00 comprising advances due to your client Mr Uren.

[29] By letter dated 26 July 2007 Kilbirnie's solicitor advised Dermac's solicitor of Kilbirnie's revised offer. The terms of the revised offer included cancelling the existing agreement for sale and purchase and replacing it with a new agreement with a purchase price of $4,000,000 plus GST. There was to be no joint venture but Joyce Group would be appointed project manager for the development at an agreed fee. In respect of the deposit the proposal was:

> The deposit paid would be the agreed sum of $2,140,000.00 as per the transfer of existing sums together with a further $110,000.00 deposit payable on the signing of this Agreement for sale and purchase.

[30] Mr Skinner's understanding, as advised when interviewed by the liquidators, was that the offset of amounts Dermac owed against the deposit payable was negotiated by the lawyers acting for the parties and that the real benefit of the agreement to Mr Uren was that he would have the outstanding indebtedness set off. Mr Skinner said that Kilbirnie/Kilbirnie Plymouth Trust also sought to include the indebtedness in relation to EP Nelson but the solicitor acting for Dermac/Edpac would not allow this.

[31] On 30 July 2007 a new agreement for the sale and purchase of the St George car park was entered into. Under this new agreement the purchase price was increased to $4,000,000 plus GST. The deposit was subject to a special condition. That special condition provided that "[t]he sum of $2,140,000 has been paid by the purchaser to the vendor, receipt of which is acknowledged by the vendor". The special condition also provided for further sums of $110,000 and $190,000 to be paid upon signing of the agreement and on 1 August 2007 respectively. The agreement for sale and purchase also included a condition that, if Kilbirnie Plymouth Trust undertook a development on the land, it would instruct Joyce Group as the project manager.

[32] Consistent with the special condition in the new agreement for sale and purchase, the trust account records of Dermac's solicitors show payments of

$110,000 and $190,000 from Kilbirnie's solicitor on 30 July 2007 and 2 August 2007 respectively. It does not show the sum of $2,140,000 as being received into the account. (That record also shows funds of $260,000 being received from Allied Nationwide and applied in repayment of lending from St Laurence.)

[33] On 5 September 2007 Kilbirnie's solicitors wrote to Dermac's solicitors advising that they had instructions to issue proceedings for specific performance of the agreement for sale and purchase of the St George car park.

[34] As at 7 September 2007 a number of creditors had registered caveats over the St George car park title. In particular, caveats had been lodged by Orchard (the purchaser of the St George Hotel), Boulcott (the purchaser of the St George Annex), Kilbirnie (its caveatable interest being the earlier agreement for sale and purchase – refer [26] above), the McSmyth Family Trust, the Bevans property company and Mr Mark Stevens (who had negotiated the sale of the St George Hotel and was to be paid a commission for that).

[35] A settlement statement dated 7 September 2007 was prepared by Dermac's solicitors for Kilbirnie. That statement recorded deposits of $350,000[3] and $2,140,000 as having being received by Dermac (no date is recorded for this). It also recorded the amount required for Kilbirnie to complete, once rates and GST were taken into account, as being $2,011,562.88. Dermac's solicitors' trust account records show receipt of this sum on 7 September 2007.

[36] Dermac's solicitors prepared a reconciliation statement for Dermac showing that the $2,011,562.88 was distributed largely to those creditors who had lodged caveats on the St George car park title. A handwritten note on the reconciliation statement attributes the $2,140,000 deposit to Mr Uren ($1,554,000), AA Finance ($81,534) and Perse ($504,744). The liquidators have been unable to find out why the amounts apparently owed to AA Finance (believed to be an Auckland finance company called AAA Finance Ltd) and Perse were attributed to Kilbirnie (via the set-off against the deposit under the agreement) or the nature of the relationship

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[3] It is unclear why this amount differs from the payments of $110,000 and $190,000 (refer [31] above).

between Kilbirnie and these two companies. The liquidators are not aware of any payments made by Kilbirnie to these two companies either, but neither of them have claimed in the liquidation of Dermac.

The Nelson advances

[37] Around this time there were discussions between Kilbirnie's and Dermac's solicitors regarding property at Nelson. As stated above, Dermac required that these discussions be kept separate from the negotiations in respect of the sale of the St George car park to Kilbirnie.

[38] Earlier, Kilbirnie Plymouth Trust was one of a number of parties which had advanced money to an Edpac company in respect of a development in Nelson. Kilbirnie Plymouth Trust's advance was structured as a deposit under an agreement for sale and purchase of Block 1 in the development, between the Edpac company and Kilbirnie Property Trust, dated 21 December 2006. Under this agreement the deposit was $720,000, the purchase price was $1,850,000 (plus GST) and the possession date was 20 September 2007. The deposit was subject to a special condition. That special condition acknowledged that $270,000 had already been advanced and the balance was to be paid by 22 December 2006; the purchaser was entitled to agreed rental from the property; the vendor was entitled to use the deposit as it saw fit; the agreement could be terminated by the vendor by notice providing that the full deposit, rental, interest and costs were paid to Kilbirnie Plymouth Trust.

[39] After the settlement of the sale of the St George car park to Kilbirnie, there is a letter from Kilbirnie's solicitor dated 16 October 2007 referring to an agreement reached in respect of claims made by the purchasers of the Nelson property. The solicitor referred to settlement of this involving, amongst other things, an immediate payment of $600,000 by the vendor or nominee to Kilbirnie and a second payment of $510,851.64 (plus a further sum for legal fees) to be paid in November 2007. The liquidators understand this to concern a demand for repayment of monies owed to Kilbirnie via a refinancing of Edpac's Nelson assets. The liquidators say that Kilbirnie was paid at least $600,000 arising from that refinance.

The liquidation

[40] Dermac and Edpac defaulted on the rental guarantee provided to Orchard. By letter dated 1 November 2007 Orchard's solicitors put Dermac and Edpac on notice of this default.

[41] On 21 December 2007, by special resolution of the shareholders, the liquidators were appointed to the Edpac companies, including Dermac. On 1 April 2008, by special resolution of the shareholders, the liquidators were appointed to the Joyce Group companies. The liquidators soon formed the view that the companies were "hopelessly insolvent".

[42] On 8 April 2009 the liquidators gave notice to Kilbirnie of its intention to have set aside "[t]he payment by way of set-off to [Kilbirnie] in the sum of $2,140,278.00 made on or about 10 September 2007".

[43] The liquidators decided to seek a pooling order from the High Court in respect of some of the Edpac and Joyce companies. The liquidators confined the pooling order application to those companies where their management, creditors and finances were so intermingled as to warrant this. This included Dermac. There was correspondence between Kilbirnie's solicitors and the solicitors for the liquidators about the pooling order. Kilbirnie's solicitors advised that the pooling order would not be retrospective and would not alter the defences available in respect of insolvent transactions. On this basis Kilbirnie's solicitors did not oppose the application.

[44] The pooling order was made on 11 November 2009. The terms of the order were that the liquidations of the pooled companies were to proceed as if they were one company; the pooling did not affect the rights of any secured creditor; the preferential creditor claims would be pooled together but retain their priority; and the unsecured creditor claims accepted in the liquidation would rank equally.

The insolvency position

[45] The liquidators engaged Mr Robert Walker, as an expert, to assess the financial position of Dermac at the time of the sale of the St George car park to Kilbirnie. Mr Walker provided an affidavit and was cross-examined by counsel for Kilbirnie. Mr Walker's evidence was that, although there was a balance sheet for Dermac prepared as at 30 June 2007 which portrayed Dermac as solvent, on analysis it was "irretrievably insolvent as at June 2007 and this continued until September 2007."

[46] The only affidavit evidence filed on behalf of Kilbirnie came from Mr Mark Stevens. He had been contracted by Dermac's directors to provide management consultancy services. At the time of the sale of the St George car park to Kilbirnie, Mr Stevens was handling Dermac's daily financial reporting. This included daily reports to Dermac's banker of the financial transactions for each day and of forward transactions. He was provided with a list of creditors and receivables.

[47] Mr Stevens produced a copy of an email dated 3 August 2007 which he sent to Dermac's solicitors in relation to the St George car park sale. The email set out how the sale proceeds would be distributed. As to Mr Stevens' perception of matters, the email said this:

> Whilst a very messy situation the result if achieved is significant for our client (in the main Erne Joyce) and in its current form has resulted in an improvement of $1.8 million in cashflow. Whilst offset by a % decrease in profit % on the developt project this being 2-3 yrs off was irrelevant given the solvency issues and allows Dermac to trade out of its difficulties.

[48] Mr Stevens' evidence, as per his affidavit, was that at the time the sale was settled on 7 September 2007 he "was satisfied that Dermac could meet its due debts at that date". Mr Stevens had prepared a "pro-forma" statement of position for Dermac dated 10 August 2007. Mr Wilson's evidence, on the basis of his analysis of the financial position, was that this pro-forma statement undervalued the liabilities by about $11 million. Mr Wilson also said that it was clear from the pro-forma statement that there was a shortage of liquid assets to meet liabilities.

[49] Mr Stevens' evidence was that there were two other reasons why, at all times relating to the transaction, he had confidence that Dermac could meet its due debts. One of those reasons was a Deloittes' valuation prepared in March 2007. This valuation was prepared for the Edpac Group on Deloittes' understanding that some of Edpac's existing shareholders wished to sell their shares. It was an assessment of the fair market value of the shares as at 31 January 2007. It was based on projections made by Edpac/Joyce and those projections in the liquidators' view were "wildly inaccurate".

[50] The other of Mr Stevens' reasons related to Mr White's stated intention to inject funds from a successful Singapore transaction into Dermac or any of the Joyce or Edpac companies if there was any shortfall in funds to meet their obligations. Mr Stevens' recollection is that Mr White said this at a meeting of directors on 21 August 2007. Mr Stevens had requested the meeting so that Mr White could explain the financial position of the Joyce and Epac Groups and their financial inter-relationship. There was no contractual obligation on Mr White (or those involved in the Singapore transaction) to inject these funds. As it transpired, for reasons unknown to Mr Stevens, money from the Singapore transaction was not injected.

[51] As to Mr Stevens' understanding of the demands from creditors, the evidence from Mr Stevens' in cross-examination included the following:

> Q. When you came on board then, shall we say perhaps May or so 2007, would that be about the time that you provided contracting services direct to –
>
> A. Yes, yes, yes.
>
> Q. When you came on board then, would it be fair to say, Erne Joyce in particular was under real stress and was losing control of the business around him?
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> A. I think that would be a fairly accurate summary, yes. Not only Erne but also David Cunningham.
>
> ...
>
> Q. But they [Tax Planning Services] stopped, pretty much, didn't they, doing the day to day accounting in July 2007?
>
> A. Yes that would be about right, yes.

Q. After that there was a lot of pressure on Erne to arrange the repayment of the various Kilbirnie loans, wasn't there?

A. There was a lot of pressure on Erne to repay all the loans, Kilbirnie being one of them.

...

Q. When the carpark was sold, there were a number of creditors that weren't paid and that were still owed money by Dermac, do you agree with that?

A. There would have been some creditors not paid at the time, correct.

Creditors' claims

[52] As at 25 November 2009, the creditor claim forms received from unsecured creditors in the liquidation of Dermac amounted to approximately $1,750,000. Of this sum approximately $1,450,000 related to Orchard's claim under the rental guarantee (refer [20] above). The liquidators are aware of a number of other unsecured claims. There are also secured claims from the McSmyth Family Trust, Boulcott and another company. The liquidators consider that further creditors of Dermac would be in the millions of dollars. The overall unsecured claims in the liquidation of the Edpac and Joyce Groups total approximately $4,500,000 and the liquidators consider that they are likely to be significantly higher. The liquidators estimate that the total deficiency of assets over liabilities for the Edpac and Joyce groups is in excess of $20 million.

[53] The liquidators do not know whether the off-set of the deposit and the payment in respect of Nelson cleared all of the amounts owing to Kilbirnie or Kilbirnie Plymouth Trust. They say that if the deposit had been paid as money coming into Dermac (rather than paid by way of set-off) it would have all been paid out to secured creditors (and so would not have gone to Kilbirnie or Kilbirnie Plymouth Trust). If the transaction with Dermac (the off-set of the deposit against the loan amounts) is set aside and the money paid to Dermac, then a pro-rata distribution would be made to unsecured creditors of the pooled companies.

Preliminary issue

[54] The voidable transaction provisions in the Companies Act were amended with effect from 1 November 2007. The transaction at issue here was settled in September 2007. The Companies Amendment Act 2006 brought in the new provisions. Section 27 of the 2006 Amendment Act made amendments to s 292 (the section which sets out what constitutes a voidable transaction). Section 27(5) of the 2006 Amendment Act provided that "nothing in this section makes voidable a transaction that was completed before the section came into force, if that transaction would not have been voidable if this section had not come into force."

[55] This means that it is necessary to start with whether the transaction at issue here would have been voidable under the provisions that applied pre 1 November 2007. If it would not have been voidable under those provisions, then the amendments made to s 292 need not be considered. If it would have been voidable under the pre 1 November 2007 provisions then in theory it may also be necessary to consider the amended provisions in case they mean that the transaction is not voidable (under the new provision).[4] I say "in theory" because here counsel were agreed that the new s 292 made no amendments that would save the transaction here if it were voidable under the pre 1 November 2007 provisions.

[56] If a transaction is voidable under s 292 a defendant may rely on the "good faith" defence provided by s 296. If that defence is made out then the Court must not order recovery of property (or its equivalent value) in respect of the transaction. This defence was amended by s 31 of the 2006 Amendment Act. Section 31 did not contain wording similar to s 27(5) of the 2006 Amendment Act (and s 296 is concerned with what the Court may do if the transaction is voidable and not with whether the transaction is voidable one). This indicates that the new wording is intended to apply to all transactions even if occurring before the 1 November 2007

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[4] Previous cases have considered only the pre-amendment provisions to be relevant to whether the transaction is voidable when the transaction occurred prior to 1 November 2007: *TRC Consultants Limited v Higgo* HC Auckland CIV 2005-425-290, 21 December 2007 at [7]; *Blanchett v The Roofing Specialists Ltd* HC Hamilton CIV 2007-419-1691, 5 May 2009 at [8]; and *Blanchett v Joinery Direct Limited* HC Hamilton CIV 2007-419-1690, 23 December 2008 at [7] although in all three cases this was the agreed position of counsel and the Court proceeded on that basis.

amendments. However again counsel were agreed that whether the new or the former "good faith" wording is applied the outcome will be the same.

[57] In view of counsel's position, I will consider only the wording under s 292 and s 296 as it was pre 1 November 2007.

"Transaction"

[58] The application to set aside stated that an order was sought setting aside "the payment by way of set-off to Kilbirnie" in the sum of $2,140,278.00 made on or about 10 September 2007". The grounds stated in support of the application referred to this payment as a "transaction". The notice of opposition also referred to this set-off as a "transaction". The grounds of opposition set out in the notice of opposition did not include that the set-off was not a "transaction" as defined by the Companies Act.

[59] At the hearing, however, Kilbirnie submitted that there was no "transaction" (so that the set-off could not be a "voidable transaction" under s 292). I will consider that submission, despite it being raised late, because the set-off could not be set aside if it does not qualify as a "transaction", I have received some submissions on this issue on behalf of the liquidators and the liquidators were not prejudiced by the issue being raised late.

[60] Pre 1 November 2007, s 292(1) defined "transaction" as meaning any one of five things. The last of those (s 292(1)(e)) was "[t]he payment of money by the company, including the payment of money under a judgment or order of a court". In submitting that the set-off is the payment of money so as to be a "transaction" the applicant relies on *Trans Otway Ltd v Shepherd*.[5] The respondent says *Trans Otway* is distinguishable.

[61] In *Trans Otway* the insolvent company (Newman) had entered into an agreement with Trans Otway under which it agreed to sell its client list to Trans Otway for the amount that it owed Trans Otway pursuant to earlier dealings between

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5 *Trans Otway Ltd v Shepherd* [2005] 3 NZLR 678 (CA).

them. The agreement provided that Trans Otway would pay the agreed sum for the client list with "such payment to be made by the purchaser [Trans Otway] acknowledging that the vendor [Newman] has made full payment of all sums due and owing to the purchaser [Trans Otway]".

[62] The issue in the High Court and the Court of Appeal was whether the set off (as between the amount Newman owed Trans Otway for the earlier dealings and the amount Trans Otway owed Newman for the client list) was "the payment of money" so as to be a "transaction" under s 292(1) of the Companies Act. The High Court found that it was. The Court of Appeal agreed with that conclusion.

[63] The Court of Appeal considered that "payment" was made by the setting off of the monetary cross-claims against each other (Trans Otway paid for the client list and Newman paid its existing debt). It noted[6] that Trans Otway did not agree to take the client list in satisfaction of the debt. Rather Trans Otway expressly agreed it would pay for the client list and the two parties expressly agreed that the two payments would be set off. The Court of Appeal also noted that payment of money is not dependent on the physical passing of cash or a cheque.

[64] The Court of Appeal briefly referred[7] to whether the position might be different when there is a "unilateral" set off: that is, when the set off occurs pursuant to an earlier agreement that permits this to occur. It reached no conclusion on this because it was not what had occurred on the facts.

[65] On the appeal to the Supreme Court,[8] Trans Otway no longer disputed that there was a "transaction". The Supreme Court recorded this position[9] and, in a footnote, said that it was unnecessary on the appeal "to say anything concerning the question of what may constitute a payment under s 292(1)(e)" and that "[w]e leave open the question of the correctness of the Court of Appeal's distinction between unilateral and consensual set-off."

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6 At [28].
7 At [34].
8 *Trans Otway Ltd v Shepherd* [2005] NZSC 76.
9 At [8].

[66] Kilbirnie relies on the comment by the Court of Appeal in *Trans Otway* that Trans Otway had not agreed to take the client list in satisfaction of the debt but rather there was express agreement by both parties that the two payments would be set-off. Kilbirnie submits that it is significant that here there was no contractual provision pursuant to which Kilbirnie and Dermac agreed that the deposit for the purchase of the St George car park would be paid by way of set-off against the loan made by Kilbirnie (and related companies) to Dermac. Rather, the contract acknowledged that the deposit had already been paid. Kilbirnie says that the position was that Kilbirnie converted the moneys previously advanced by Kilbirnie or Kilbirnie Plymouth Trust to Dermac (which had been described as a deposit on floors in the St George Hotel) to a payment of a deposit on the car park purchase, or Dermac agreed to treat the moneys previously advanced in respect of the St George Hotel as satisfaction of the deposit on the car park. It submits that, because of this, there was no movement of property to the creditor under the agreement for sale and purchase.

[67] To the extent that this submission is one about timing, in my view it is not significant that the agreement for sale and purchase provided that the deposit had already been paid. It is clear that the mutual intentions of the parties were that the agreed deposit sum of $2,140,000 would be met by a set-off against the amount that Dermac owed Kilbirnie (and, it would seem, two of the other lenders). Had the agreement for sale and purchase not been entered into, there would be no deposit payable and no sum treated as a deposit payment.

[68] The correspondence is consistent with this. Kilbirnie Plymouth Trust and Dermac had entered into the agreement dated 28 June 2007. Having entered into this agreement, Kilbirnie proceeded on the basis that it had "paid" its deposit and registered a caveat against the title. Despite having entered into that agreement the parties continued to negotiate the terms of the agreement. In light of those negotiations Dermac's position was that "no deposit has yet been made or paid". Kilbirnie proceeded in the negotiations on the basis that "the deposit paid *would* be the agreed sum of $2,140,000 as per the transfer of existing sums" (my emphasis). The revised agreement entered into on 30 July 2007 treated the deposit as having

been paid, because that gave effect to the parties' intention that the existing sums owed by Dermac would be treated as the deposit.

[69] Thus, although the agreement did not expressly state that Dermac owed Kilbirnie Plymouth Trust money and that Kilbirnie Plymouth Trust owed Dermac the deposit and the two obligations would be set off against the other, that was the parties' intention and they proceeded on that basis.

[70] The Court of Appeal's reference to Trans Otway not having agreed to take the client list in satisfaction of the debt does not assist Kilbirnie's submission. That was concerned with a different point than whether the set-off of two monetary obligations constitutes a "payment of money". That sentence followed a reference the Court of Appeal had made to Australian commentary about the nature of a set-off. That commentary discussed the situation where parties agreed that the debtor would take a car in discharge of a debt of £10,000. The commentary makes the point that in agreeing to this the car does not thereby become money and delivery of the car does not amount to a "payment".

[71] That example is concerned with the discharge of a debt by consideration other than money. It is quite different from the situation in *Trans Otway* and here where the insolvent company owes money to the other party and the other party owes money (in Trans Otway for the client list, and here for the deposit on the St George car park) to the insolvent company. In these two situations the two monetary obligations were set-off against each other and in each case the set-off amounts to payment of the monetary obligations.

[72] I am unclear if Kilbirnie was also suggesting that the set-off here was a unilateral one. If it was suggesting that, then on the facts that was not so. The set-off was pursuant to a mutual agreement, acknowledged by the special condition in the contract, to treat the deposit as paid.

[73] Kilbirnie submitted that s 292(b) supported its interpretation that there was no payment of money in respect of the deposit. It says that it did not receive more because all that happened was that the advance previously made was converted to

another use. However, this submission blurs the definition of "transaction" with the conditions that make the transaction voidable. The transaction did involve a set-off of the deposit against the advances already made (and so involved the payment of money from Dermac to Kilbirine). The transaction meant that, in satisfaction for the advances previously made, it paid $2,140,000 less for the St George car park. That is more than it would have received in the liquidation in satisfaction of the advances it had already made.

[74] Finally under this head I consider that the set-off of the deposit against the loan is a transaction of a kind which could have the effect of preferring one creditor over another. It meets the intention of the voidable preference provisions if it is a "transaction" such that it may be set aside if the other criteria for doing so are met and no defences apply.

[75] For these reasons I reject the submissions that there was no "transaction" under s 292(1)(e) of the Companies Act (as it was pre 1 November 2007).[10]

Is the transaction voidable?

[76] As the set-off meets the definition of "transaction", the next question is whether it was a voidable transaction. That is determined by s 292(2) and (3) (pre 1 November 2007)[11] which provided:

> (2) A transaction by a company is voidable on the application of the liquidator if the transaction –
>
> (a) Was made –
>
> (i) At a time when the company was unable to pay its due debts; and

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[10] I note that the position would have been the same under the amended provisions. Section 292(3) defining "transaction" as meaning any of five things one of which is "paying money (including paying money in accordance with a judgment or an order of a court)". There is no material differences between this wording and the pre 1 November 2007 wording as applied to the facts here.

[11] Kilbirnie did not seek to argue that the transaction would not be voidable under s 292 as amended. The new wording is similar to the former wording but does not except transactions made in the ordinary course of business. It does provide for transactions forming part of a continuing business relationship to be treated as a single transaction for the purposes of s 292. But this is not relevant here as it is not contended that there were transactions of this kind.

(ii) Within the specified period; and

(b) Enabled another person to receive more towards satisfaction of a debt than the person would otherwise have received or be likely to have received in the liquidation –

unless the transaction took place in the ordinary course of business.

(3) Unless the contrary is proved, for the purposes of subsection (2) of this section, a transaction that took place within the restricted period is presumed to have been made –

(a) At a time when the company was unable to pay its debts; and

(b) Otherwise than in the ordinary course of business.

[77] The terms "specified period" and "restricted period" are defined. In this case there is no dispute that the transaction took place within the specified period and within the restricted period.[12] Nor is there any dispute that it took place at a time when Dermac was unable to pay its debts.[13] The issue raised by Kilbirnie is whether the transaction took place in the ordinary course of business. If it did not, and if it enabled Kilbirnie to receive more towards satisfaction of Dermac's debt than Kilbirnie would otherwise have received or be likely to receive in the liquidation, then the transaction is voidable. Kilbirnie has the burden of proving that it was in the ordinary course of business because of the presumption that operates under s 292(3) when the transaction took place within the restricted period.

Ordinary course of business

[78] The parties refer to the main authorities[14] as to the meaning of the ordinary course of business. The question is whether in its objective commercial setting it was an ordinary transaction for the parties to have entered into. Relevant to this is the previous commercial relationship between the parties. Against that context it can be asked whether the payment made was a routine one in fulfilment of the

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12 This is so whether the set-off occurred on entry of the agreement or upon its settlement.

13 Mr Walker's evidence related to an analysis of the position as at 30 June 2007 but from that time until settlement under the agreement there is no suggestion that Dermac's financial position had improved.

14 *Modern Terrazo Ltd (In Liquidation)* [1998] 1 NZLR 160, *Waikato Freight and Storage (1998) Ltd v Meltzer* [2001] 2 NZLR 541 at [31]; *Carter Holt Harvey Ltd v Fatupato* (2003) 9 NZLC 263, 285 at [22] and *Stapley v Fletcher Challenge Infrastructure Ltd* [2008] NZCA 442.

company's contractual obligation or whether it was made as a response to the insolvency situation. This is assessed without reference to the subjective intention of the company to prefer the creditor unless that intention was known to the creditor.[15]

[79] Kilbirnie submits that the transaction was in the ordinary course of business. It says that the business of Dermac was that of a property owner which acquired and disposed of property; that Kilbirnie had provided money to Dermac in part acquisition of levels in the St George Hotel building and such payments had been described as deposits; that Dermac wished to have the benefit of the sale of the St George Hotel and to do that it needed to arrange the sale of the Annex and the car park so as to ensure that those who would otherwise have had a claim in respect of the St George Hotel were repaid; that Kilbirnie was able to protect its position by buying the car park from Dermac, which Dermac was in the business to sell; that "it was very ordinary" that Kilbirnie would seek to utilise the moneys earlier provided to Dermac; and the sale price of the car park was at fair value.

[80] The liquidators submit that this was not in the ordinary course of business. They submit that the relationship between Kilbirnie and Dermac was one of financier and customer; that there was a history of loans between Kilbirnie and Dermac, but not of Kilbirnie purchasing the assets of Dermac; that the St George car park was one of the last assets of Dermac (the St George Hotel had been sold and the other asset – the Annex – was already subject to a sale and purchase agreement); that at the time the agreement was entered into creditors were seeking to recover debts, some of which were secured and caveats were registered against the car park land; that the trustees of Kilbirnie Plymouth Trust must have been well aware that Dermac had sold off its other assets and that the car park represented the only prospect of Mr Uren recovering the money he was owed; and that Kilbirnie was keen to enter into the agreement because of this, as demonstrated by the negotiations over the proposed joint venture and through Kilbirnie threatening to file specific performance proceedings against Dermac.

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15 Section 292(4) of the Companies Act (pre 1 November 2007).

[81] I accept the liquidators' submissions on this point. A sale by Dermac of its property was not necessarily in and of itself out of the ordinary. It was in the business of owning the St George properties. Admittedly that was as part of the Edpac and Joyce Groups business of providing accommodation and other services to students. But at some point, having acquired property, it might wish to sell those properties for reasons other than being insolvent. However, the car park sale was negotiated after Dermac's other assets had been sold and the proceeds from those sales would not meet all its creditors. There was no evidence on behalf of Kilbirnie of an agreement that Kilbirnie, and other creditors with interests in the St George Hotel who would not be repaid from the sale proceeds, would permit the sale of the St George Hotel to proceed in exchange for corresponding interests in the remaining properties.

[82] There is no evidence that Kilbirnie was in the business of acquiring properties. So far as can be discerned from the information obtained by the liquidators (and Kilbirnie has not produced evidence to the contrary), Kilbirnie's relationship with Dermac (and Edpac) was as a lender of funds. These loans (or some of them) were structured as deposits on interests in properties, possibly for tax reasons. The position under the Nelson agreement was similarly a financing arrangement that took the form of an agreement for sale and purchase. While under the Nelson agreement Kilbirnie could buy Block 1 outright, that would only occur if Edpac had not earlier repaid the loan.

[83] Prior to entering into the agreement to buy the St George car park, Kilbirnie had no interest, and Dermac had no obligation to Kilbirnie, in respect of that property. Kilbirnie entered into the transaction at a time when it was owed substantial sums by Dermac. It represented Dermac's last asset and therefore the only prospect of Kilbirnie recovering its money. It seemingly negotiated with two other creditors (Perse and AA Finance) to give them some benefit in the transaction.

[84] Dermac was in financial difficulty (the calculations showed that decisions had to be made as to who would and would not be repaid out of the St George Hotel sale proceeds). Tax Planning Services had been closely involved in advising the Edpac Group, it had not been paid, it knew there were difficulties with other

creditors, and it was having difficulty in getting information from the Edpac Group. It terminated its services to Dermac against that background and at the time that its client (Mr Uren's entities) was at risk of not being repaid. It can be inferred, in the absence of evidence to the contrary from Kilbirnie, that it knew that Dermac was in financial difficulties. Its knowledge of those difficulties is to some extent confirmed by Kilbirnie's desire to use the purchase of the car park to also set-off the advances in relation to Nelson.

[85] In these circumstances the agreement was a response to Dermac's insolvency. It would not have been entered into but for Dermac's financial difficulties. There is no evidence that the transaction was entered into pursuant to arrangements put in place at a time when Dermac's financial difficulties were less apparent. Rather it was a new arrangement entered into as a way of Kilbirnie recovering its advances.

Receiving more than in liquidation

[86] Kilbirnie accepts that, if the agreement in relation to the deposit is a transaction, then it enabled Kilbirnie to receive more towards satisfaction of a debt that it would otherwise have received or be likely to have received in the liquidation. The submissions for Dermac set out the reasons why it was highly unlikely that Kilbirnie would have received any payment in the liquidation of Dermac or from the pooled companies. In light of Kilbirnie's position on this there is no need for me to traverse these reasons.

Defence

[87] If a transaction is voidable the Court may order that it be set aside.[16] The Court may also order that a person pay back some or all of the money that the company has paid in the transaction.[17] However, this will not be ordered if:

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16 Section 294 of the Companies Act.
17 Section 295 of the Companies Act.

a) The recipient (in this case Kilbirnie) received the money in good faith; and

b) Kilbirnie altered its position in the reasonably held belief that the transfer to it was validly made and would not be set aside; and

c) The Court considers it would be inequitable to order recovery (in full or in part).[18]

Good faith?

[88] Kilbirnie accepts that it has the onus of establishing that it acted in good faith. It submits that it acted in good faith as shown by: it paying market value for the car park property; that both parties were separately represented by their solicitors; that the agreement resulted from arms length negotiations; and that there was a perception that Dermac was able to pay its way or was not insolvent.

[89] The submission as to the alleged perception of Dermac's financial position was based on a number of factors. Kilbirnie referred to the period leading up to the agreement as a time of economic buoyancy (before what may be described as the global financial crisis). It referred to the financial statement prepared as at 30 June 2007 which showed Dermac as having a net position of plus $10 million. It referred to Dermac being able to attract further finance from Allied Nationwide in the midst of all of this. It referred to Mr Stevens' evidence as to his perception on Dermac's financial position. And it referred to Mr Walker's evidence of Dermac's financial position as an exercise influenced by hindsight.

[90] I consider this evidence to be insufficient to establish Kilbirnie's good faith in entering into the transaction. That is because I do not accept, on the evidence before me, that Kilbirnie would have perceived Dermac to be in a positive financial position in June/July 2007 (when the agreement to buy the car park was negotiated). The 30 June 2007 statement of financial position was obtained by the liquidators but

[18] The parties made their submissions on the basis of the wording pre November 2007. They were agreed that the result would be no different under the current wording.

the information necessary to determine whether the entries were correct were not supplied by Dermac or Tax Planning Services despite its request. The statement of financial position showed Dermac as having assets of $36,421,289. Mr Walker's view was that this was unrealistic and, on his analysis, the assets as at that date totalled just over $9000. It is going too far to say that all of this difference could be explained by the benefit of hindsight which Mr Walker had. Moreover, Kilbirnie says that the financial position was prepared by Tax Planning Services but, if that was so, it was at a time that Tax Planning Services were having difficulty in getting information out of Dermac (refer [22] above).

[91] The fact that Dermac was able to attract another lender at around this period does not assist. The details of that lending, including the information which the lender relied on and the security it received, are not before me.

[92] As for Mr Stevens' perception of matters, it is difficult to see how Mr Stevens could have considered that Dermac would be able to trade its way out of its difficulties (refer [17] above) when it was selling off its remaining asset. The general economic buoyancy of the times is not an adequate basis for perceiving Dermac to be solvent and/or able to trade its way out of difficulties given the actual financial position that it was in. It would only be able to trade its way out of difficulties if there was an injection of capital. There were no remaining assets against which any such capital could be secured. Mr Stevens understood that a capital injection was intended using money from a successful Singapore transaction. But there was no guarantee that this would occur. Despite the position shown in Mr Stevens' pro-forma statement (refer [48] above), Mr Stevens gave evidence that he had called the meeting of directors in August 2007 to get some clarity of (amongst other things) financial matters and it was at this meeting that Mr White said the capital would be injected. This appears to have been at best an indicated intention rather than anything firm and reliable.

[93] Despite Mr Stevens evidence that he believed Dermac could meet its debts, he also gave evidence of the stress that the directors were under and the pressure to repay the loans, and that he was aware that some creditors would not be repaid once Dermac's last asset had been sold. The Deloitte's valuation could not have provided

anyone with any assurance that Dermac was solvent given the date it was prepared, that it was based on projections supplied by the directors and that it was to advise them as to fair value of their shares.

[94] The other problem with Mr Stevens' evidence is that there is no evidence that Kilbirnie, or even Tax Planning Services on its behalf, shared Mr Stevens' view. All the indications are that Kilbirnie was aware that Dermac was in difficulty and that Kilbirnie's money was at risk. At this critical stage for Dermac and Kilbirnie, Tax Planning Services ceased acting for Dermac and concentrated its efforts on acting for Mr Uren's interests. Kilbirnie lodged a caveat on the title soon after entering into the first agreement to buy the car park. Kilbirnie was anxious for the transaction to proceed as is indicated by the threat to seek specific performance.

[95] I therefore conclude that Kilbirnie has failed to establish that it entered into the transaction in good faith. It was acting to protect its position and it must have known that in doing so it was being preferred over other creditors.

Altering position in reasonably held belief of valid transaction?

[96] Kilbirnie submits that it altered its position by proceeding with the purchase and thereby incurring the responsibility for the balance of the purchase. It says that there is evidence that it borrowed funds to do so because there is a mortgage registered on the title in favour of the Bank of New Zealand on the date of transfer to Kilbirnie.

[97] This was part and parcel of the transaction rather than conduct occurring subsequent to the transaction. Whether it might amount to an alteration of position does not need to be determined because Kilbirnie has not established either that this was to its detriment (see below re Kilbirnie's on-sale) or that it had a reasonably held belief that that the transaction was validly made and would not be set aside. The evidence indicates that Kilbirnie acted to protect its position and understood that in doing so it would be preferred over other creditors. Kilbirnie has produced no evidence to counter this.

[98] It is possible that if Kilbirnie made payments to Perse and/or AA Finance then it altered its position in reliance on the transaction. But there is no evidence from Kilbirnie as to whether it made these payments and, if so, the terms on which these payments were made.

Inequitable to order recovery?

[99] Kilbirnie submits that it would be inequitable to order recovery because it paid $800,000 more for the car park than a valuation Joyce Group obtained for the development, this realised otherwise unrecoverable work in progress, and the sale proceeds enabled other creditors to be met.

[100] Given my conclusions on the other two limbs of this defence, it is not necessary to consider this further. Suffice it to say that none of these points persuade me that there would be any inequity given the preference that Kilbirnie in fact obtained. I also note that even if Kilbirnie purchased the property at a price that was $800,000 above a valuation (about which there was no proper reliable evidence) it did not suffer any detriment from purchasing the car park. The evidence is that Kilbirnie on-sold the St George car park at a substantial profit (it was sold for $6.5 million).

Orders

[101] The set-off of the deposit against the advances was a voidable transaction. I set it aside. I order that the full amount of that set-off (ie $2,140,000)[19] be repaid by Kilbirnie to the liquidators.[20]

[102] I see no basis on which anything less than the full deposit of $2,140,000 should be repaid. It does appear that Perse and/or AA Finance received the benefit

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[19] I note that the application and the submissions seek payment of a slightly greater sum than this. I am unclear how that greater sum has been derived. If the parties are agreed that the correct amount should be the slightly greater sum claimed then the order can be read as that amount. Otherwise the parties will have to come back to me.

[20] It is noted that the liquidators have concerns as to whether anything will be able to be recovered from Kilbirnie but they are entitled to pursue this if they wish and so to have the benefit of an order.

of some of this sum but that is a matter for Kilbirnie to address with them, given the absence of evidence from Kilbirnie as to the arrangements it made with them.

[103] If the parties are unable to agree costs they may submit memoranda within 30 days of the date of this judgment. To facilitate agreement I give the preliminary indication that costs should follow the event and that category 2B seems appropriate.

Mallon J

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