IN THE HIGH COURT OF NEW ZEALAND
ROTORUA REGISTRY

CIV 2012-463-000514
[2012] NZHC 2865

UNDER	the Companies Act 1993
IN THE MATTER OF	the liquidation of Contract Engineering Limited
BETWEEN	PETER ESMOND FARRELL AND SIMON PAUL ROGAN AS LIQUIDATORS OF CONTRACT ENGINEERING LIMITED (IN LIQUIDATION) Applicants
AND	FENCES & KERBS LIMITED Respondent

Hearing: 24 October 2012

Appearances: K F Shaw for the Applicants
J Temm for the Respondent

Judgment: 1 November 2012

JUDGMENT OF
ASSOCIATE JUDGE CHRISTIANSEN

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

Registrar/Deputy Registrar
Date……

Solicitors/Counsel:
K Shaw, Harkness Henry, Hamilton – Karen.shaw@harkness.co.nz
J Temm, Barrister, Auckland – jonathan@phoenixchambers.co.nz

[1] The applicants are the liquidators of Contract Engineering Limited (the Company). The Company was put in liquidation by its shareholders on 5 July 2011.

[2] On 26 March 2012 the applicants served a Notice to Set Aside Voidable Transactions on the respondent. Opposition to it was filed on 29 June 2012.

The transaction

[3] Section 292 of the Companies Act 1993 (the Act) provides that a payment (a transaction) made by a company is voidable by the liquidator of that company if it occurs within the specified period i.e. within two years before the date of the liquidation.

[4] It is an "insolvent transaction" if it was entered into at a time when the Company was unable to pay its debts; and if it enabled another person (here, the respondent) to receive more towards satisfaction of a debt than it would have received or would have been likely to receive in the Company's liquidation.

[5] In this case the respondent completed certain concrete and steel foundation construction work for the Company between 4 June and 21 June 2010, albeit without its principal Mr Field who had been off work from 2 June 2010 for three months due to surgery on his shoulder. The respondent's services were provided as part of the Company's contract with Contact Energy Ltd in terms of which milestone payments were made monthly and those were calculated by reference to works completed to that time. It appears agreed that in respect of the works undertaken by the respondent, the Company would receive payment from Contact Energy Ltd when its pipeline had been fixed in place over the foundation construction work completed by the respondent.

[6] The works were completed by six employees using the respondent's vehicles, machinery and tools.

[7] Aspects of the work were subcontracted to others at a cost of $30,445.

[8] Subsequently on about 26 July 2010 the Company contracted the respondent again to complete some foundation platform changes at a cost of $1,500 plus GST.

[9] On 21 June 2010 the respondent issued an invoice for $50,005.92 (plus GST). Its invoice for the additional works was issued on 28 September 2010.

[10] The respondent received payment of the 21 June 2010 invoice by instalments:

- $15,000 on 4 August 2010
- $15,000 on 11 August 2010
- $1,500 on 27 August 2010
- $5,000 on 10 September 2010
- $19,756.66 on 30 September 2010

[11] Payment for the 28 September 2010 invoice was made on 29 October 2010.

[12] The transaction (in this case the payments made on particular dates) occurred within 12 months of the date of liquidation, and hence were well within the specified period during which there is preserved a right of challenge to a liquidator.

[13] The evidence strongly suggests and the respondent does not challenge that the Company was insolvent at the time it paid the respondent. To that extent the Court accepts the applicant has satisfied the onus on it to show at the relevant time the Company was indeed insolvent. It follows that the respondent must prove pursuant to s 296(3) of the Act that when it received the payments it:

(a) Acted in good faith in receiving them;

(b) A reasonable person in the respondent's position would not have suspected, and the respondent had no reasonable grounds for suspecting that the Company was or would become insolvent; and

(c) The respondent gave value for the property or altered its position in the reasonably held belief that the payments to it were valid and would not be set aside.

[14] As to (a) and (b) the applicants accept the respondent acted in good faith when receiving payments from the Company, but they do not accept that the respondent was without reasonable cause to suspect the Company's insolvency.

[15] As to (c) the applicants say it is clear from the authorities that the respondent must show it has provided substantial new value following receipt of the payments made to it; that it is only to the extent that value is given subsequently for invoices issued and paid, that credit can be given by way of reduction to the amount which is accountable to the liquidator. In this case the initial contract works were completed and the subsequent contract works were agreed upon before any payment at all had been received from the Company.

[16] The explanation for this approach appears to be that if it can be shown at the time the first invoice was paid the Company was insolvent then all that can be claimed by the service provider on that occasion is an amount for services rendered subsequently, even though payment for those subsequent services was also made whilst the Company was insolvent. Alternatively it would seem to follow that unless services were provided subsequently then new value could not be claimed.

[17] The applicants claim that authorities of the High Court endorse the view that considerations of value given apply not to invoices issued for works done and payments made when the Company was insolvent, but for works done subsequently and for invoices paid subsequently, provided of course that the respondent can show it acted in good faith and without reasonable cause to suspect the Company's insolvency.

Considerations

Reasonable cause to suspect

[18] Mr Farrell on behalf of the applicants gave evidence of his opinion that the respondent did have reason to suspect the Company was or would become insolvent because:

(a) It had not met the payment terms of the invoice dated 21 June 2010 and therefore the payment was well overdue by the time the Company commenced making its payments;

(b) That payments were made in rounded lump sums, and therefore the respondent must have appreciated the Company was unable to pay the full amount as it fell due.

[19] In response to questions from Mr Temm, Mr Farrell acknowledged that although the initial invoice noted COD [cash on delivery] the requirement for payment of the Company's services (including those subcontracted by the respondent) arose at a time when Contact Energy Ltd's pipeline had been fixed in place over the respondent's works.

[20] Also Mr Farrell appeared to agree that it was only upon the repeat invoice sent on or about 29 July 2010 that there was added the typed words:

> Due For Payment Please Mike

[21] It was six days later that the Company's first payment was made.

[22] Mr Field of the respondent gave additional oral evidence to the Court. He was of course aware of the nature of the Company's contract with Contact Energy Limited. He was aware that the Company would receive monthly milestone payments and would receive payments for the work completed by the respondent when the pipeline over it had been fixed in place.

[23] Mr Field said he assumed the respondent would be paid when the Company in turn was paid by Contact Energy Limited. That was he says "not an uncommon practice".

[24] Mr Field's company is a small one. He said the reference to "COD" in his invoice was there because he did not know 'how to get rid of it'. He had not chased the Company for payment because he saw no need. His comfort lay in what he perceived would have been the due diligence completed by Contact Energy Limited when it engaged the Company's services.

[25] Mr Field deposes he had no reason to suspect the Company was or would become insolvent. The respondent had not previously subcontracted to the Company. He was aware the Company had recently completed work for Contract Engineering in respect of its Te Huka power station (near Taupo). He said the Company looked a viable company from his perspective.

[26] Mr Field deposed he had no knowledge of the Company's credit history; that its slow payment of the respondent's invoice was not unusual in his experience; that the respondent did not issue any letters of demand, late payment notices, or statutory demands; that the Company did not suggest to him at any time there would be payment issues; and, given that the Company had won a tender from Contact Energy Limited (a substantial company) he did not consider that getting paid would be an issue.

[27] My impression of Mr Field is that work of the type involved with the Company's contract, was not readily available. Mr Field appeared to be a canny operator if not somewhat unsophisticated. Also his shoulder surgery clearly limited his ability to supervise the works of his employees.

[28] In this case the respondent must show that a reasonable person in its position would not have suspected insolvency, and it must show also that it did not have reasonable grounds to suspect insolvency. Having heard from Mr Field I am satisfied that the factor of rounded payments over a period of two months instead of

immediate payment as the term 'COD' implied, does not sufficiently support the applicant's claims of reasonable cause for suspicion.

[29] The evidence satisfies the Court that the respondent acted in good faith and reasonably had no cause to suspect that the Company was insolvent.

Value/alteration of position

[30] Although unquestionably the respondent gave value for the payment it received, it is the applicants' position that such was insufficient for its defence of the applicants claim for repayment. The applicants say that if the respondent is to resist the application providing, in effect for its repayment of that which the respondent has received from the Company, it must show that it has altered its position believing it would not be accountable for any repayment i.e. that it has no case based on value given because such value was provided pre payment and therefore cannot be recognised.

[31] Understandably, it is upon this point that the applicants focus their greatest attention. The applicants submit their position is well supported by case authority and by critical commentary. In this respect Ms Shaw refers to the comment by Fisher J in *Baker Timber Supplies v Apollo Building Associates (Tauranga) Society Limited (In liquidation).* [1]

[32] Fisher J said that the main purpose of the defence was:

> ... to assist a creditor if he has deliberately gone down one path in the reasonable expectation that he has received a valid payment, only to find that he is not only required to repay that money but that in the meantime he has also lost a valuable alternative opportunity. In other words, he must have acted to his detriment on the strength of the insolvent company's payment.

[33] At that time the Court was considering the availability of a defence in respect of s 311A(7) of the Companies Act 1955. By that provision a liquidator may be denied recovery if –

[1] (1990) 5 NZCLC 66, 791 at 66, 793.

(a) The person from whom recovery is sought received the property in good faith and has altered his position in the reasonably held belief that the transfer or payment of the property to him was validly made and would not be set aside; and

(b) In the opinion of the Court it is inequitable to order recovery or recovery in full, as the case may be.

[34] The earlier provision considered by Fisher J is different from that which is the subject of present consideration, the present provision in s 296(3) having been amended by the Companies Amendment Act 2006.

[35] The prior provision considered by Fisher J made no reference to the 'giving of value'. In that form considerations of equity dictated outcome provided that there was good faith at the time payment was received.

[36] Ms Shaw also relies upon:

(a) A statement by the authors of *Heath and Whale Insolvency Law in New Zealand*; and

(b) The authority of a decision from this Court since the 2006 Amendment Act came into force, namely *Jollands v Mitchill Communications Ltd.* [2]

[37] In *Heath and Whale Insolvency Law in New Zealand* it is stated:

> The concept of value is to be evaluated in the context of the section; accordingly, it is likely that only new value given by the other party to the transaction will be considered under the section. Section 296(3)(c) requires the alteration in the position to have occurred after the payments were received.

[38] In the *Jollands* case the applicant liquidators sought to set aside four payments totalling about $60,000 paid over a six month period in 2009, just four months before the debtor company went into liquidation. The learned Judge

[2] HC, Auckland CIV 2009-404-8146, 18 January 2011.

accepted evidence of insolvency at the relevant time; and he discounted claims of a running account exception advanced on behalf of the respondent. With regard to considering whether value had been given for payments received the learned Judge adopted the analysis provided by the liquidators. The effect of the Judge's decision is that no credit at all was given in respect of the four payments made in question but instead credit was given for further invoices amounting to $16,910.72. The Judge said that the respondent had given "value only to the extent of $16,910.72". It follows no credit was given for the payments received notwithstanding it was accepted the respondent had acted in good faith in receiving those payments and at a time when there were no reasonable grounds for suspecting that the Company was insolvent.

[39] Therefore the applicants contend a creditor must establish that it has entered into new commitments on the strength of the benefit (the payment) previously received; that it is not enough that the recipient used monies received to pay existing debts which it would have had to be met regardless of whether the payment was received from the debtor or not. [3]

[40] Ms Shaw for the applicants submits that the only reference to any alteration of position in Mr Field's affidavit are the four payments that he has referred to for works the respondent subcontracted to others – which amounted to $30,445.

[41] Ms Shaw submits that three of those payments (totalling $23,315) were to the respondent's trade creditors; and that each of those was in respect of the commitment made before it received any of the payments from the Company – the first of which was made on 4 August 2010. Ms Shaw submits the respondent was contractually obliged to pay those existing debts regardless of any payments it received from the Company even though those obligations were entered into in order for the respondent to complete its obligations to the Company. Therefore Ms Shaw submits those payments made do not meet the statutory test for alteration of position.

[42] Apart from the three payments to trade creditors the final payment effected by the respondent was to its employees. Regardless, Ms Shaw submits that none of

[3] Re: Paul Finch Holdings Limited (1989) 4 NZCLC 64, 774.

these payments are of a kind for which consideration ought to be given on a change or alteration of position basis.

[43] It is the applicants position that it is clear from the wording of s 296 that all three of the cumulative requirements therein are expressly subject to the point in time when the respondent received payment. The section provides:

> (3) A court must not order the recovery of property (or its equivalent value) by a liquidator, whether under this Act, any other enactment, or in law or equity, if the person from whom recovery is sought proves that when [it] received the property [the payment] –
>
> (a) [it] acted in good faith;
>
> (b) a reasonable person in [its] position would not have suspected and [it] did not have reasonable grounds for suspecting, that the company was, or would become, insolvent; and
>
> (c) [it] gave value for the property or altered [its] position in the reasonably held belief that the transfer of the property [payment] to [it] was valid and would not be set aside.

[44] Ms Shaw submits therefore that the giving of value expressly follows the receipt of the payment i.e. that the value should occur after payment was made.

[45] It is Ms Shaw's submission that an assessment of good faith and reasonable cause to suspect is focussed upon that time when the payment was made. Likewise, the giving of value or an alteration of position is about value given or position altered when the payment is received that is, it excludes value given prior to receipt of payment.

Discussion about when value is to be provided

[46] Mr Temm concedes that to the extent the payments received from the Company were utilised for the purposes of meeting the respondent's ongoing trading operations, those may not be sufficient to satisfy the alteration of position criterion.

[47] His hesitation in agreeing to that aspect of the 3(c) aspect is understandable. Notwithstanding it seems that payments which are deposited to a general trading account meet general trading purposes including the payment of wages they will not

provide sufficient exception to the principle of a requirement for accountability upon a voidable transaction application. But, I think, the respondent is better placed in its opposition to the applicants position that the giving of value for payment focuses upon value given after payment was received.

[48] Mr Temm does not subscribe to Ms Shaw's interpretation of s 296(3). He says the genesis of the present provision lays in the corresponding Australian legislation under the Australian Corporations Act 2001 and specifically s 588 FG(2). That provision provides:

> A Court is not to make under section 588FF an order materially prejudicing a right or interest of a person if the transaction is not an unfair loan to the company, or an unreasonable director-related transaction of the company, and provided that:
>
> (a) the person became a party to the transaction in good faith; and
>
> (b) at the time when the person became such a party:
>
> (i) the person had no reasonable grounds for suspecting that the company was insolvent at that time or would become insolvent as mentioned in paragraph 588C(b); and
>
> (ii) a reasonable person in the person's circumstances would have had no such grounds for so suspecting; and
>
> (c) the person has provided valuable consideration under the transaction or has changed his, her or its position in reliance of the transaction.

[49] Mr Temm submits that importantly under the corresponding Australian legislation the valuable consideration to be provided in exchange for the payment does not amount to or require <u>new</u> value. Such a requirement would, he submits, lack logic in one off commercial transactions of sales of goods. Also the statutory language of s 296(3)(c) of the Act does not require <u>new</u> value.

[50] This case is not about a change of position, at least to the extent it was argued. There is no evidence about irrecoverability of position of an extent which should preclude an obligation to repay. Rather, this case is about whether the obligation to give value should be limited to events post payment of the respondent's account. Such a requirement is, the applicants submit, evident from the clear language of the Act. As well, it appears to be supported by the judgment in the *Jollands* case, and in the Heath and Whale text.

[51] Notwithstanding, the Court does not accept that s 296(3)(c) requires that the giving of value must occur from the time that the payment by the Company was made.

[52] It is understandable in the context of judicial pronouncements made pre the 2006 Amendment Act why there was an evaluation of circumstances and in particular about changes of those when Courts were concerned about the purpose to which payments were applied following receipt. In that situation the Court was constrained to identify circumstances where payments were applied for purposes other than usual trading considerations. Among those considerations was whether in addition to a position of change of circumstances, additional value may also have been provided.

[53] The Amendment Act 2006 appears to have combined those factors then currently influencing the Australian and the New Zealand Courts consideration of voidable transaction disputes.

[54] Generally, in the Australian context the focus was upon whether good consideration was provided for the payment received. In the mix, it appears the Australian legislation has adopted New Zealand's "alteration of position standard" whilst it appears New Zealand has endeavoured to adopt the Australian provision of "valuable consideration" for payment.

[55] However, the New Zealand Amendment Act differs in some respects from s 588(FG) of the Corporations Act 2001 of Australia.

[56] The Australian provision provides relief for a person who when paid by an insolvent company "has provided valuable consideration...".

[57] The New Zealand provision provides relief to a person receiving payment to "gave value...".

[58] In those provisions they same the same thing.

[59] Ms Shaw submits the Australian provision does not, as does the New Zealand provision, link the giving of value to that time when payment was received i.e. then but not beforehand. Instead the Australian provision appears only separately to identify considerations of reasonable cause to suspect to that occasion when payment was received. Ms Shaw submits the Australian provision does not confine the consideration of value to that time when payment was received which she submits occurs by the New Zealand provision.

[60] Respectfully I disagree. I consider the assessment about giving value for payment received ought to be made at that time when payment was received but is not confined to circumstances occurring only beyond payment.

[61] If it was something to be addressed anew then as much could have been provided by the 2006 amendment. It was not.

[62] It was the purpose of the 2006 amendment to rely on the closely related insolvency positions of Australia and New Zealand. It seems unlikely in that context that there would have been a deliberate endeavour to distinguish the jurisdiction of those Courts.

[63] Ms Shaw submits that in that view of matters s 296(3)(c) will add nothing because it is extremely unlikely valuable consideration will never have been given for any payment received. But if that is so then the same argument would apply in respect to the usefulness of the 'valuable consideration' test in the Australian provision.

[64] The purpose of the Australian and the New Zealand provisions is to protect creditors who have received payment from a debtor company in good faith, without suspecting insolvency, and who have given something in return for their payment. Equity allows them to retain that payment. Equity would not permit the debtor company to keep what it has received and to also recover what it paid for it.

[65] If that is the purpose of s 296(3) then it is immaterial whether value is given before or after the property or payment is received. The transaction should be viewed as a whole and the equitable foundations of s 296(3) should prevail.

[66] Were it otherwise then a requirement that value be given post receipt of payment would have a very narrow scope in practice – the defence would not accord with normal business practice.

Conclusion

[67] The applicants do not dispute Mr Field's claims on behalf of the respondent that receipt of the company's payments was done in good faith.

[68] The Court does not accept that a reasonable person in the position of the respondent would have suspected, and the Court accepts the respondent did not have reasonable grounds for suspecting that the Company was or would become insolvent.

[69] Whilst considerations of change of position are necessarily confined to a post payment perspective considerations of the giving of value are not, indeed would likely never provide much by way of benefit at all. The New Zealand provision intends the same consequence as that contained in the Australian provision which unarguably permits a focus upon the value of consideration at that time when the consideration is given, and not at the time when payment is received from the insolvent company.

Judgment

[70] The application is dismissed.

[71] The applicants shall pay the respondent's costs calculated on a category 2B basis, together with approved disbursements.

Associate Judge Christiansen