IN THE COURT OF APPEAL OF NEW ZEALAND

CA627/2015
CA43/2016
[2017] NZCA 239

BETWEEN	EBERT CONSTRUCTION LIMITED Appellant
AND	CRAIG ALEXANDER SANSON AND DAVID JOHN BRIDGMAN Respondents

Hearing:	22 and 23 November 2016
Court:	Kós P, Wild and French JJ
Counsel:	D J Goddard QC and R J Gordon for Appellant M J Tingey and N F D Moffatt for Respondents
Judgment:	8 June 2017 at 3.00 pm

JUDGMENT OF THE COURT

A The appeal is allowed.

B The orders made in the High Court are set aside.

C The respondents must pay the appellant costs for a complex appeal on a band A basis together with usual disbursements.

REASONS OF THE COURT

(Given by Kós P)

[1] This appeal concerns a method of construction project financing called a "direct agreement".[1] This is a three-way agreement between developer, builder and financier. The financier is empowered to step in and complete the project if the developer defaults. And during the ordinary life of the project the financier is

[1] They are also known as "direct payment agreements" or "tripartite agreements".

permitted (or required) to make payments direct to the builder. The primary question in these appeals is this: if the developer is put into liquidation, are such payments made to the builder by the financier voidable preferences recoverable by the liquidator?

[2] In the High Court, Associate Judge Doogue set aside two pre-liquidation payments totalling $1.063 million made by financier BOS International (Australia) Ltd ("BOSI") direct to builder Ebert Construction Ltd ("Ebert") on the application of the liquidators of developer Takapuna Procurement Ltd ("TPL").[2] He also set aside a pre-liquidation transfer of an apartment in the development worth some $540,000 from TPL to Ebert. He ordered Ebert to pay $1,603,892 back to the liquidators, together with interest from the date of the liquidation.[3]

[3] Ebert now appeals.

Facts

[4] TPL was created to develop the 134-unit Shoalhaven Apartments complex at Takapuna. It entered into a number of contractual arrangements with financiers and a builder from October to November 2005.

[5] In October 2005 TPL entered a construction contract with Ebert, pursuant to which Ebert would construct the apartments for a fixed lump sum of $32,497,188 plus GST.

[6] On 3 November 2005 TPL entered a "Senior Facility Agreement" with BOSI. Pursuant to it BOSI was to provide a cash advances facility with a limit of $36.8 million, in two tranches. Tranche A was limited to $36 million, to assist finance the construction of the apartments. Tranche B was for $800,000 to pay GST to the Revenue in respect of the apartments. This facility was secured by mortgage over the apartment site and a general security deed.

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2 *Sanson v Ebert Construction Ltd* [2015] NZHC 2402, [2016] NZCCLR 11.
3 *Sanson v Ebert Construction Ltd* [2015] NZHC 3046 [Interest judgment].

[7] On the same date TPL entered a "Junior Facility Agreement" with Strategic Nominees Ltd ("Strategic"), the terms of which are not material to this appeal. Strategic stood behind BOSI's securities.

[8] Also on that date TPL entered a "direct agreement" with Ebert, BOSI and Strategic. The terms of the direct agreement are central to this appeal. It will suffice for present purposes to summarise them:

(a) On receipt of approval payment certificates BOSI agreed to pay direct to Ebert the progress payment amounts payable by TPL to Ebert under the construction contract (cl 4.2(d)).

(b) BOSI and Strategic could terminate TPL's facilities, but only if they first paid any progress payment claims made by Ebert and duly approved (cl 4.3(a)).

(c) After practical completion BOSI and Strategic could make a final payment (the undrawn facility, estimated outstanding sum due to Ebert or such other sum as agreed by Ebert), such payment to be held by BOSI in the joint names of Ebert and TPL and to be paid to Ebert in accordance with TPL's obligations under the construction contract (cl 4.4).

(d) All parties acknowledged that TPL remained "primarily liable for all its obligations under the Construction Contract" (cl 4.5).

(e) TPL irrevocably authorised BOSI to make an advance pursuant to the Senior Facility for the purpose of paying Ebert under the preceding clauses. TPL and Ebert acknowledged that except as contemplated by the direct agreement, "neither [BOSI nor Strategic] shall have any liability or obligation to [Ebert] to pay or perform [TPL]'s obligations under the Construction Contract" (cl 4.6).

(f) Ebert's ability to exercise its rights under the construction contract in the event of default by TPL was limited by the ability of BOSI to step in and make arrangements for completion of the project, provided however that BOSI and Strategic were to remain responsible in accordance with cl 4.2 to pay amounts payable to Ebert under the Direct Agreement (cl 6.1).

(g) The terms of the direct agreement were to take precedence over the terms of the construction contract, but the construction contract remained in full force and effect unless expressly modified by the direct agreement (cl 7).

[9] On 18 October 2006 Nidus Properties Ltd, a company related to Ebert, entered into a sale and purchase agreement with TPL for one of the apartments in the complex ("the Nidus apartment") at a purchase price of $540,000. Settlement would not occur before code compliance certification. It was agreed $388,000 would be credited to the purchase price in settlement of a delay claim against TPL.[4]

[10] Ebert completed construction of Shoalhaven Apartments in April 2008. TPL was in default under the Senior Facility loan from at least 22 July 2008, and quite probably earlier than that date. In November 2008 TPL and Ebert agreed TPL still owed a total of $1,603,891.90 under the construction contract. The parties agreed the payments would be made by two cash payments and transfer of the Nidus apartment. These three transactions are the focus of the appeal.

[11] First, on 13 November 2008, TPL issued drawdown notices on BOSI for $578,868 of Tranche A and $72,358 of Tranche B, nominating Ebert's bank account. Five days later BOSI advanced $606,879 under Tranche A and $75,860 under Tranche B.[5] Of the sums advanced, $499,226 was remitted to Ebert and $152,000 to the Carter Atmore Law trust account as directed by TPL.

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4 As to that, see below at [67]–[69].

5 Nothing turns on the differences.

[12] Secondly, Ebert was nominated by Nidus as purchaser of the apartment. The purchase was settled on 19 November 2008 and Ebert paid the purchase price by:

(a) writing off $388,000 of the debt owing from TPL to Ebert; and

(b) directing the $152,000 in the Carter Atmore Law trust account due for payment to Ebert be remitted to TPL.

[13] Thirdly, on 19 November 2008 TPL issued drawdown notices on BOSI for $546,500 under Tranche A and $68,312 under Tranche B, again nominating Ebert's bank account. The following day BOSI advanced the same sums to Bell Gully: a total of $614,812. Of this $564,665 was paid on to Ebert. The residual balance of $50,147 was held by Bell Gully as escrow agent and is not in issue in this appeal.

[14] TPL was placed in liquidation soon after these transactions, on 21 November 2008, owing money to the Revenue for GST and to two unsecured creditors. The liquidators say they were occupied until 2013 with litigation over who was the correct recipient of a fund of $782,108, and that it was unclear in the interim whether they had funding to investigate other possible claims. Once that litigation ended, the liquidators focused on Ebert's position. They made an application to set aside the cash payments and the apartment transfer on 31 October 2014, under s 292 of the Companies Act 1993.

Development of direct agreements in the construction industry

[15] This Court sought further expert evidence from the parties on the development of direct agreements in the construction industry. That evidence may be summarised in these terms.

[16] Direct agreements began to be used in the New Zealand construction finance sector in the mid-1990s. The impetus came from financiers. The advantage to a financier is the direct agreement provides it with "step in rights". This means the builder cannot immediately terminate the construction contract if the developer defaults on its obligations. Otherwise the financier has the significant risk of being left with only a security interest in a partially completed but now idle site. Purchase

agreements for units would be cancelled and deposits would need to be refunded. The financier would then have the difficulty, significant added expense and delay of hiring a new builder and taking over the development. A financier is in a stronger position under a direct agreement because it can step in and require the builder to complete the work. The financier also gains the benefit of the builder's warranties.

[17] Builders initially did not like direct agreements. They were not accustomed to having a direct contractual relationship with the financier. But some banks would decline to finance projects if the builder refused to sign a direct agreement. Direct agreements gradually became a necessary part of credit approval for larger construction projects.

[18] Some incentives were offered to builders, depending on market conditions and negotiating strength. One incentive was a direct payment mechanism that increased the builder's certainty of payment. That technique (which is not always present) is advantageous to the financier also. It ensures amounts drawn down will be applied to the construction project and not paid by the developer to other creditors.

[19] Where there is a direct payment mechanism, preconditions are usually placed on payment to the builder, such as a quantity surveyor approving the payment, the developer not being in default under the finance facility and there being sufficient funds under the developer's facility to cover the amount of the payment.

[20] One witness, Mr Brian Clayton, a partner at Chapman Tripp, deposed that the direct agreement in this particular case is "not as heavily bank-weighted as most direct agreements that I have seen". He noted that the pre-conditions on BOSI making direct payment to Ebert did not include a condition that TPL was not in default under the facility agreement. He says that is unusual.

[21] Expert perspectives on whether direct agreements were intended to avoid the risk of developer payments being voidable preferences differed. Mr Clayton's view was that the agreements were financier-driven and this consideration was, therefore, quite irrelevant. A similar view was expressed by Mr Murray Greer, an experienced

banker and financial services consultant. But Mr Paul O'Brien, national commercial manager for Leighs Construction, a substantial builder, had a subtly different view. From a builder's perspective a direct payment obligation did offer security for payment in the event of a developer's insolvency. As he put it:

> This was primarily because the payment was not actually being made by the developer, rather was being made by a third party who owed their own separate contractual obligation to pay money to the construction contractor.

As a result, Mr O'Brien says direct agreements evolved to the point where they are commonly understood by builders to be "guarantees of payment given by banks/financiers". The "key thing" for builders was security of payment — and "that was the quid pro quo given by banks/financiers in return for achieving increased control and the ability to ensure continuity and completion of the development".

[22] While we accept that Mr O'Brien's perspective reflects a builder's view of the world, we accept also that the direct payment mechanism did also offer significant additional security to builders. That is why the direct payment mechanism was developed as an incentive. And we also accept Mr O'Brien's observation that direct agreements in that form offer significant benefits to all parties without the cost of (say) a principal's bond. The latter (where the builder's payments are secured by a third party financier) come at a significant transaction cost to the developer and appear to have fallen out of favour in multi-unit developments.

[23] We note also that the documentary pre-contractual evidence in the appeal confirms that direct obligation by BOSI to pay Ebert for sums owed under the construction contract was important to Ebert.

Statutory scheme

[24] The application to set aside the transactions was made under s 292 of the Companies Act, which provides relevantly:

292 Insolvent transaction voidable

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

(a) is an insolvent transaction; and

(b) is entered into within the specified period.

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

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

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

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

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

…

(c) incurring an obligation:

…

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

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

…

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

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

(b) in the case of a company that was put into liquidation by the court, the period of 2 years before the making of the application to the court together with the period commencing on the date of the making of that application and ending on the date on which, and at the time at which, the order was made; and

…

[25] The primary issue in this case is whether the transactions were made "by" TPL for the purposes of s 292(1) when the payments were actually made by BOSI, a third party ("Issue 1"). Courts have held that a payment made by a third party can be regarded as a payment by the company. We discuss the relevant case law later, in the context of Issue 1.[6]

High Court judgment

[26] Associate Judge Doogue set aside the transactions.

[27] The Judge first considered whether the two payments were made "by TPL" for the purposes of s 292(1). He said the funds BOSI paid through the direct agreement to Ebert had the character of funds belonging to TPL because they were used to pay debts owing by TPL to Ebert. BOSI's obligation to remit the funds only came into existence because a debt between TPL and Ebert existed.[7] The fact the payment was made directly to Ebert was neither here nor there because TPL reduced the debt it owed to Ebert by BOSI making the payment, and thereby relinquished the right it would otherwise have had to receive the funds from the Senior Facility.[8] The Judge noted BOSI required authority from TPL before it paid the money direct to Ebert.

[28] The Judge rejected a suggestion the arrangement was a guarantee given by BOSI. BOSI's burden was to implement performance by TPL of the obligations TPL owed to Ebert. BOSI's obligation only arose if TPL enabled it to provide funding.[9]

[29] The Judge then considered whether the Nidus apartment transfer occurred within the two-year window for liquidators' clawback. He rejected a submission that the apartment transfer in effect occurred in 2006 when Nidus entered the purchase agreement. The Judge said the relevant transaction was when Ebert took a conveyance of the property from TPL in November 2008 in return for a reduction of the debt owing from TPL to Ebert.[10]

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6 See below at [41]–[59].
7 *Sanson v Ebert Construction Ltd*, above n 2, at [92].
8 At [95].
9 At [101].
10 At [126].

[30] Having concluded that the three transactions were transactions by TPL and occurred within the two-year window, the Judge went on to address the next element of s 292 — whether TPL was insolvent at the time of the transactions. The Judge found TPL had accumulated debts in the months leading up to the liquidation and was grossly insolvent well before the transactions occurred.[11] This finding is not challenged on appeal.

[31] The Judge found the transactions preferred Ebert because in the liquidation Ebert would have received little or nothing towards its debt if the transactions had not been made prior to liquidation.[12]

[32] The Judge rejected Ebert's defences to setting aside the transactions based on delay by the liquidators in commencing proceedings and good faith on its part. Those findings too are not challenged on appeal.[13]

[33] In a subsequent judgment, the Associate Judge awarded the liquidators interest on the judgment sum of $1,603,891.90 from the date of liquidation — 21 November 2008.[14] He rejected Ebert's suggestion interest should only run from the time the liquidators put Ebert on notice they would apply to set aside the transactions on 20 February 2014. He found Ebert always knew there was a risk of the transactions being set aside, and there was a reasonable explanation why the liquidators had delayed in commencing proceedings.

Issues on appeal

[34] The following issues arise on appeal:

(a) Were the challenged payments transactions "by" TPL?

(b) Were the challenged payments insolvent transactions?

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11 At [142].
12 At [147].
13 At [149]–[183].
14 Interest judgment, above n 3.

(c) Was the apartment transfer an insolvent transaction?

(d) From when should interest run?

Issue 1: Were the challenged payments transactions "by" TPL?

Submissions

[35] Ebert submits the payments were not made by TPL; rather, they were made by BOSI direct to Ebert discharging liabilities of BOSI to Ebert. The payments were not made out of funds belonging to TPL, and did not decrease the resources available for TPL to pay other creditors. Ebert says the situation here is similar to one of indemnity or guarantee given by BOSI to Ebert such that BOSI has an independent liability to Ebert. Ebert could have brought proceedings directly against BOSI if it had refused to make the payments.

[36] The liquidators say TPL drew down its facility with BOSI but directed BOSI to pay direct to Ebert. The funds therefore belonged to TPL as a result of the loan. The Senior Facility was the only liquid asset that TPL had and allowed it to operate during the period of construction. TPL was the party primarily liable under the construction contract to pay Ebert.

[37] In response to the suggestion BOSI had a direct obligation to make payment out of its own funds to Ebert, the liquidators say BOSI did not have to make payment if there were no funds available under the Senior Facility. BOSI had a contractual obligation under the direct agreement to discharge TPL's debts to Ebert, but that was contingent on TPL's primary liability to Ebert and the existence of the facility. So this is a situation far removed from one in which BOSI is a guarantor or indemnifier of TPL.

[38] The liquidators seek to support the judgment on the alternative ground that the payments were made under the Senior Facility between TPL and BOSI. They say that neither payment was preceded by a request to the Approved Quantity Surveyor to approve the sum as required by the direct agreement. The fact TPL

requested drawdown from BOSI suggests the payment was made in the manner anticipated by the Senior Facility.

[39] The liquidators also seek to support the judgment on the grounds BOSI was acting as TPL's agent when it made the payments to Ebert. The liquidators note that the payments were made to Ebert with TPL's authority (given irrevocably in the direct agreement). This shows the money was owned by TPL; otherwise authority would not need to have been given. So BOSI was acting as TPL's agent.

[40] In response to that Ebert says that whether the payment was made under the direct agreement or the Senior Facility is an exercise in semantics. BOSI made the payments and in doing so discharged its liability under the direct agreement and debited the sums to the Senior Facility. The payments depended on BOSI's direct liability under the direct agreement. There was evidence from a quantity surveyor showing approval under the direct agreement on 19 November 2008 for payment of outstanding moneys to Ebert. So the payments were made in the manner contemplated by the direct agreement. The suggestion BOSI was Ebert's agent overlooks that BOSI had its own direct liability to Ebert to make the payments. So even if BOSI was TPL's agent for some purposes, the payments were made because of BOSI's own liability.

Discussion

[41] As the Supreme Court made clear in *Allied Concrete Ltd v Meltzer*, a key purpose of the voidable insolvent transaction regime is:[15]

> to protect an insolvent company's creditors as a whole against a diminution of the assets available to them resulting from a transaction which confers an inappropriate advantage on one creditor by allowing that creditor to recover more than it would in a liquidation.

As the Supreme Court went on to note, the pari passu principle requires equal treatment of creditors in like positions, and facilitates the orderly and efficient realisation of the company's assets for distribution to creditors.

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15 *Allied Concrete Ltd v Meltzer* [2015] NZSC 7, [2016] 1 NZLR 141 at [1].

[42] The fact that a payment is made to a creditor by a third party does not mean that the payment is not a transaction by the company under s 292(2)(b). In *Westpac Banking Corp v Nangeela Properties Ltd* Nangeela was a developer with solvency issues.[16] An apartment in its development was sold and the proceeds paid by the company's solicitors into the company's bank account. That served only to clear the company's current overdraft. This Court held that the solicitors' payment must have been made on the instructions of the company.[17] The conclusion is an obvious one. The solicitors were the agent of their principal, holding the money beneficially for that principal and paying according to its instructions. Significantly the solicitors owned no independent contractual obligation to the Bank to make payment to it and it alone.

[43] A more apposite example, perhaps, is the decision of this Court in *Levin v Market Square Trust*.[18] In that case an insolvent company sold its business to a third party. The sale was conditional on the landlord (which was owed rent in arrears) agreeing to an assignment of the lease. The creditor landlord agreed, provided the arrears were paid. The purchaser then agreed to lend the company the amount of the rent arrears to be deducted from the purchase price on settlement. Although the payment to the creditor was made by the purchaser's solicitor, this Court held the payment was made on behalf of the company "using funds which … belonged to [the company] as a result of the loan".[19]

[44] In our view both these cases are straightforward, but fundamentally different to the present appeal:

(a) payment was made to discharge a liability of the company to the creditor, not a liability of the third party to the creditor;

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16 *Westpac Banking Corp v Nangeela Properties Ltd* [1986] 2 NZLR 1 (CA).
17 At [4] and [10].
18 *Levin v Market Square Trust* [2007] NZCA 135, [2007] 3 NZLR 591.
19 At [24]. A similar result was reached in *Chilton St James School v Gray* (1996) 9 PRNZ 349 (HC) where the purchaser of a company's business was directed to pay part of the purchase price to a school to meet its directors' children's fees.

(b) payment was made on the company's instructions to the third party payer but for which no payment would have been made; and

(c) payments were made out of assets of the company that otherwise would have been available to the general pool of creditors, and enabled the particular creditor to receive more than they would have as a member of that general pool.

[45] The substance and reality of the transaction is more important than the form. In *Westpac Banking Corp v Merlo* company P was indebted to partnership V, which in turn was indebted to bank W.[20] P repaid part of its indebtedness to V in an amount clearing V's indebtedness to W. P then fell into liquidation. This Court held it was not a voidable preference and W was not liable to repay the sum concerned. The payment by P was to V not W. Focussing on substance and reality, neither the legislation nor case law "provide any warrant for brushing aside legal relationships and identities". We follow that approach in this appeal.

[46] In contrast to decisions discussed earlier there is a judgment of Gilbert J in the High Court in *Grant v Il Forno Ltd*.[21] In that case company S was indebted to a creditor I. The latter served a statutory demand and became substituted plaintiff in liquidation proceedings against S. But the sole shareholder of S met the indebtedness of S to I if the liquidation proceedings were discontinued. S was later put into liquidation by that shareholder — and the liquidator sought to recover the payment from I. He contended the payment was in substance by S. He pointed in particular to the fact that the shareholder had made substantial shareholder advances previously to pay S's debts. But Gilbert J said:[22]

> I do not accept this submission. The solicitors on both sides of the transaction were well aware that [company S] was insolvent and was likely to be placed in liquidation within days. They knew that any payment made by [company S] would almost inevitably be clawed back by liquidators. The whole arrangement was designed to protect [creditor I] from such an outcome. It was therefore essential that the payment was not made by [company S].

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20 *Westpac Banking Corp v Merlo* [1991] 1 NZLR 560 (CA).
21 *Grant v Il Forno Ltd* [2014] NZHC 1416.
22 At [16].

Gilbert J found the transaction created an obligation on the shareholder's part only. There was no advance made by the shareholder to company S. The payment was made in discharge of the shareholder's obligation to creditor I, not company S's obligations to I. And the general creditors were not disadvantaged by the payment because: (1) S did not make the payment; and (2) the transaction reduced the overall amount owed to unsecured creditors by removing S's indebtedness to I.

[47] In his submissions Mr Goddard QC offered three abstract but practical examples that we find of assistance.

[48] First, payment by a guarantor to a creditor of a company: that would not naturally be described as a payment by the company, even though the result is the guarantor has a claim against the company for the sum paid by way of subrogation. We are aware of no authority suggesting payment by a guarantor of a company's obligations is a transaction by a company that could be set aside under s 292. As a matter of law and commercial reality, the payment was made by the guarantor. That example, of course, would be apt to describe the effect of a performance bond — the alternative form of transaction that might have been used in the development of the Shoalhaven Apartments.

[49] Secondly, and similarly, if TP agrees to indemnify creditor C against a failure by company D to perform an obligation. For instance an indemnity by a parent company or shareholder. It has not been suggested that payment by TP to C could sensibly be challenged under s 292 as a transaction by company D. Again as a matter of law and commercial reality, the payment is made by the indemnifier TP and not by company D. That example is similar in substance to the circumstances in *Grant v Il Forno Ltd*, discussed above.

[50] Thirdly, where there is joint liability: companies D and E are jointly liable to C, and payment in full is made by E. If D were then to go into liquidation, its liquidator could not recover the payment even though the effect of the payment is to discharge a liability of that company to C, and even though the payment would give rise to a claim for contribution by E against D. The payment by E is not a payment by D, as a matter of both law and commercial reality.

[51] To these examples may be added the letter of credit secured payment mechanism which does not fit neatly within any one of those three categories. Again, payment by a bank under a letter of credit facility is not a payment by the purchaser but by the bank. The solvency of the purchaser is, deliberately, not a matter of direct concern to the supplier under such an arrangement.

[52] The particular feature of these transactions is that unlike the situation described in paragraph [44] above, payment in each is made to discharge a direct liability of the third party. The payment is not made as agent for the indebted company. Payment may of course result in a reduction of assets available to the general pool because the third party payee has a prior inviolable (and now enlarged) secured interest. That fact does not offend s 292, and it does not offend the pari passu principle among the company's unsecured creditors.

[53] The force of these points was to a significant degree acknowledged by Mr Tingey in his submissions for the liquidators. He acknowledged that where a third party made payment under a guarantee of the company's debt or as joint borrower, the third party has its own current obligation as a creditor which it discharges through use of its own funds. In that context the voidable regime is not engaged. Where, as he put it, the third party had its own potential obligation to the creditor, a determination needed to be made as to whether the third party was discharging its own debt or that of the company. That, he submitted, depended in part on whether the third party had a current obligation to the creditor, and whether it was making payment from its own funds or amounts that belonged to the company.

[54] We make five points.

[55] First, we accept Mr Goddard's submission that BOSI was directly liable to Ebert. That, of course, is the whole point of a direct payment agreement. But it is also the commercial arrangement in this appeal, in both substance and reality. The direct agreement creates privity between Ebert and BOSI. In cl 4.2(d) it creates a direct obligation on BOSI's part to pay Ebert approved progress payments. That obligation is expressly dependent on Ebert not being in default under the construction contract. Significantly, it is not dependent on TPL not being in breach

of the Senior Facility Agreement. As noted earlier, BOSI is entitled to terminate the direct agreement in certain circumstances. But it cannot do so without meeting Ebert's progress payment claims up to the date of the termination notice, in accordance with cl 4.3(a)(ii). And Ebert would then have the right to terminate the construction contract unless satisfactory substitute payment arrangements were made.

[56] Secondly, we find that BOSI's direct liability to Ebert is as principal in its own right. We do not accept Mr Tingey's argument that BOSI pays as agent for TPL. In *Nangeela* the solicitor paid the bank as agent of the company. In *Levin Trust* the purchaser lender likewise did so. Neither owed any direct contractual duty to the creditor paid. It is common ground that when a bank executes a customer's instructions to transfer funds, it does so as the customer's agent. In none of these situations does the bank have an independent collateral obligation to the payee. In this case BOSI's obligation to Ebert was as a principal. The point is reinforced by the fact BOSI was not then under any obligation to TPL to pay at its direction.[23] Despite that BOSI remained liable to pay Ebert. That was the provision described as "unusual" by one of the expert witnesses.[24] We note, too, that while cl 4.5 provides that TPL remains "primarily liable" under the construction contract, BOSI's liability to Ebert under the direct agreement is not so described. And TPL is not empowered to direct Ebert not be paid. Accordingly we find that BOSI's liability to Ebert is as principal in its own right.

[57] Thirdly, we do not accept Mr Tingey's argument that the payments were made to Ebert under the Senior Facility Agreement rather than the direct agreement. It seems this submission was advanced also before the Associate Judge. He did not directly address it. We consider the submission lacks commercial reality, in effect wishing the direct agreement out of the picture. The obligations owed by BOSI to Ebert under the direct agreement were discrete from those it owed TPL under the Senior Facility Agreement. Ebert was not a party to the latter; its payment rights arose under the direct agreement and the construction contract. Payment by BOSI under the former discharged TPL's obligations to Ebert under the latter.

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[23] See below at [58].
[24] See above at [20].

[58] Fourthly, at the time of the challenged payments, BOSI's obligation to make payment under the direct agreement was owed to Ebert, and not TPL. TPL was then in breach of the Senior Facility Agreement, and BOSI was not obliged to honour any drawdown request by TPL. The only extant and enforceable payment obligations of BOSI were to Ebert under the direct agreement. As Mr Goddard submitted, it was implausible to suggest BOSI would have made those payments to Ebert on the eve of TPL's liquidation in the absence of direct obligations on BOSI's part. The liquidator's own evidence confirmed that BOSI would not have permitted drawings for the purpose of meeting the needs of other creditors.

[59] Fifthly, it is of essence in the avoidance of preferential payment "by the company" that the funds (or asset conveyed) are from resources available to the company to pay its general creditors.[25] That was the case in the *Nangeela* and *Levin* decisions, for instance. We agree with Mr Goddard's submission that where BOSI was obliged to make these payments to Ebert, and its facility could not have been used by TPL to make payments to any other person, it is artificial and inconsistent for the purposes of s 292 to treat the payments as having been made by TPL.

Conclusion

[60] We conclude the challenged payments were not by the insolvent company TPL, but rather by BOSI pursuant to its own obligation to Ebert.

Issue 2: Were the challenged payments insolvent transactions?

[61] Our conclusion on the first issue obviates the need to answer Issue 2. We will however indicate, briefly, what our conclusions on Issue 2 would have been.

[62] The Associate Judge dealt with Issue 2 briskly. He concluded it was obvious that Ebert received more by the payments than it would have on liquidation.[26]

[63] We disagree. Let us assume the payments by BOSI were instead by TPL (that is, made by BOSI on TPL's behalf, contrary to our conclusion on Issue 1). The

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[25] Although it seems it need not necessarily be the legal property of the company: *McIntosh v Fisk* [2017] NZSC 78 at [57].

[26] *Sanson v Ebert Construction Ltd*, above n 1, at [147].

question under s 292(2)(b) is then whether the payments enabled Ebert to receive more than it would have received in (that is, after) the liquidation. If one then assumes (as one must in this counterfactual) the payments had not been made pre-liquidation, what would have happened? The answer we reach is, exactly the same.

[64] Given Ebert had rights qua BOSI in any event under the direct agreement, it was always entitled to seek to recover against BOSI whether before or after liquidation. That was the principal benefit to it of the direct agreement. Its position would have been just the same if the payments had not been made pre-liquidation. It would not have bothered with the general pool. It would simply have claimed against BOSI, as it plainly was entitled to. The effect of it doing so was, of course, to increase the level of TPL's indebtedness to BOSI, which was secured. But the direct agreement was not entered within the specified period. It was not voidable under s 292.

[65] It may be noted, also, that the outcome would have been precisely the same if Ebert had called on BOSI pursuant to a performance bond instead of under the direct agreement.

Conclusion

[66] We conclude the challenged payments were not insolvent transactions. In short, they did not give Ebert a preferential outcome compared to the position it would have been in if the payments had not been made pre-liquidation.

Issue 3: Was the apartment transfer an insolvent transaction?

[67] We turn now to the transfer of the apartment and the arrangements made described earlier.[27] Some further detail is now needed.

[68] First, the arrangement between Nidus (an associated company of Ebert) and TPL for the sale of unit B401 remained extant as at 19 November 2008.[28] The agreement comprised two instruments (both dated 18 October 2006): (1) the sale and

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[27] See above at [9] and [12].

[28] An agreement between the parties on 18 October 2007 for TPL to on-sell the apartment on behalf of Nidus was not carried into effect.

purchase agreement for $540,000 (and which permitted Nidus to nominate another purchaser); and (2) a governing side letter which provided that if settlement was made within three weeks of settlement date, $388,000 (being "outstanding funds owed by TPL to Ebert") would be treated as a deposit paid and only the balance of $152,000 would be payable.

[69] Secondly, on 5 November 2008 Nidus nominated Ebert as purchaser. Ebert and TPL agreed to complete the contract on the basis that the $388,000 component "was treated as a deposit previously paid in full" (which is consistent with the side letter) and $152,000 from an incoming progress payment was to be directed by BOSI instead to TPL's solicitors' trust account. Settlement occurred on 19 November 2008, two days prior to TPL's liquidation.

Submissions

[70] The liquidators submit that the s 292(2)(b) transaction was the conveyance of the apartment on 19 November 2008, at a time when Ebert had reason to believe TPL was insolvent. It was not the October 2006 sale and purchase agreement because Ebert was not a party to it, it required payment in full and it did not permit set-off of amounts owed by TPL to Ebert.

Discussion

[71] We do not accept the liquidators' submissions on this issue.

[72] First, we accept that a conveyance of title to the apartment on 19 November 2008 was a transaction for the purposes of s 292. Ebert does not contend otherwise. But the question then is whether it was an insolvent transaction for the purposes of s 292(2).

[73] Secondly, we accept Mr Goddard's submission that by virtue of the arrangements made in October 2006, a beneficial interest in the apartment was conveyed to Nidus.[29] There was no issue on the evidence that consideration was

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[29] *Chattey v Farndale Holdings Inc* (1998) 75 P & CR 298 (CA) at 305–306; *Palette Shoes Pty Ltd v Krohn* (1937) 58 CLR 1 (HCA) at 27 per Dixon J, on equitable title in as yet incomplete assets.

given — by Ebert as it happened. By then Ebert had already made an extension of time claim (EOT claim number 2) because of lengthy delays caused by TPL's architects completing architectural drawings, thereby delaying commencement of the above ground works. TPL accepted that claim. Rather than Ebert drawing on the contingency sum provided in the contract, the parties instead agreed to transfer an apartment to Ebert's nominee, subject to payment of the balance of the purchase price at settlement. Ebert's evidence on this from its managing director, Mr Martin, is not refuted by the liquidator's evidence. Indeed, Mr Sanson's evidence accepts that the $388,000 deposit was owed by TPL to Ebert. In these circumstances we find the liquidator's argument distinguishing between Nidus and Ebert artificial: Ebert had the extension of time claim; that claim was accepted by TPL; Ebert contributed the $388,000 consideration (treated as a deposit) and nominated Nidus to take the apartment; and Nidus of course had the ability to re-nominate another party — probably Ebert — as ultimate purchaser before settlement.

[74] Thirdly, we find the 2008 conveyance simply implemented the 2006 agreement. The 2007 variation (enabling TPL to sell on behalf of Nidus) had not been implemented in fact. It fell away, and the 2006 agreement remained to be completed. In 2008 Nidus was at liberty to nominate Ebert, and it did so. We do not accept Mr Tingey's submission that the November 2008 agreement was a new agreement. No evidence adduced by the liquidator supports that proposition. Nor do we accept that the provision of a new tax invoice for the $388,000 sum on 31 October 2008 is material: the indebtedness of TPL for that sum to Ebert was acknowledged in 2006 and resulted in entry into the apartment transaction. The essential proprietary position was unchanged between 2006 and 2008, save that on 19 November 2008 legal as well as the equitable title passed with (1) nomination of Ebert as purchaser and (2) the payment by it of the balance of $152,000. We reject, therefore, Mr Tingey's submission that equity in the apartment was obtained only on TPL's acceptance of the 31 October 2008 invoice.

[75] Fourthly, Ebert would have been entitled to seek specific performance post-liquidation. Liquidation does not eliminate an equitable interest conveyed

pre-liquidation.[30] That equitable interest was conferred in 2006. There is no evidence the transaction was entered at a time when TPL was insolvent. The 2006 transaction is not an insolvent transaction.[31] Damages in lieu would have been a diminished and inadequate remedy given TPL's liquidation; specific performance would have been the probable remedy.[32]

[76] Fifthly, the net effect of these dealings was not, in terms of s 292(2)(b), the enabling of Ebert to receive more than it would after liquidation. Ebert was entitled to nomination as purchaser in 2008. It contributed $388,000 consideration in 2006. The $152,000 balance it paid across to TPL in November 2008 by direction to BOSI was good consideration resulting in passage of legal title and plainly did not disadvantage other creditors. No advantage as against its position post-liquidation is evident.

Conclusion

[77] We conclude, therefore, the conveyance of the apartment was not an insolvent transaction.

Issue 4: From when should interest run?

[78] No amount being repayable to the liquidators, the issue of the date from which interest is payable does not arise. It is unnecessary to decide whether it should run from a date later than receipt by reason of the liquidators' delays, as Ebert contended in the alternative.

Result

[79] The appeal is allowed.

[80] The orders made in the High Court are set aside.

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30 See for example *Re Coregrange Ltd* [1984] BCLC 453 (Ch) at 457.

31 For the purposes of section 292(5)(b), although it did occur within the "specified period".

32 ICF Spry *Equitable Remedies* (9th ed, Lawbook Co, Sydney, 2014) at 70–71: citing *Evans Marshall & Co Ltd v Bertola SA* [1973] 1 WLR 349 (CA); and *Buckland v Hall* (1803) 8 Ves 92 (Ch D), 32 ER 287. See also *Hutton v Palmer* [1990] 2 NZLR 260 (CA) at 272.

[81] The respondents must pay the appellant costs for a complex appeal on a band A basis together with usual disbursements.[33]

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[33] Both parties were agreed that costs on a complex appeal were appropriate.