IN THE COURT OF APPEAL OF NEW ZEALAND

CA69/2014
[2015] NZCA 529

BETWEEN	GALVANISING (HB) LIMITED First Appellant
	STUART DAVID EASTON AND ROBERT ELVIDGE AS TRUSTEES OF THE EASTON PROPERTY TRUST Second Appellants
	HOOKED ON TRANSPORT LIMITED Third Appellant
	STUART DAVID EASTON AND VIVIENNE JANE EASTON Fourth Appellants
AND	JOHN HOWARD ROSS FISK AND TONY WAYNE PATTISON AS LIQUIDATORS OF EAST QUIP LIMITED (IN LIQUIDATION) Respondents

Hearing:	17 June 2015
Court:	Cooper, Venning and Williams JJ
Counsel:	C R Carruthers QC and G J Harley for Appellants D Chan for Respondents
Judgment:	11 November 2015 at 11 am

JUDGMENT OF THE COURT

A The appeal is dismissed.

B The respondents are entitled to costs calculated for a standard appeal on a band A basis, together with usual disbursements.

REASONS OF THE COURT

(Given by Cooper J)

Introduction

[1] The respondents, as the liquidators of East Quip Ltd (EQL), applied to the High Court for orders:

(a) under s 294 of the Companies Act 1993 (the Act), setting aside specified transactions between EQL and the appellants as voidable (the transactions);

(b) under s 295 of the Act, requiring the appellants to pay EQL specified amounts in respect of the transactions, together with interest on those amounts from 10 July 2009 at the rates prescribed under s 87 of the Judicature Act 1908; and

(c) requiring the appellants to pay the respondents' costs.

[2] The application was made on the basis that the transactions were entered into at a time when EQL was unable to pay its debts, and within the specified period in s 292(5) of the Act, namely two years before the application to put EQL into liquidation was made on 5 May 2009. The respondents claimed further that:

(a) those transactions entered into after 5 November 2008 were entered into within the restricted period described in s 292(6) of the Act, being the period six months before the application to put the company into liquidation; and

(b) the transactions occurring before 1 November 2007 did not take place in the ordinary course of business.

[3] The respondents claimed the transactions enabled the appellants to receive more towards satisfaction of debts than they would receive or be likely to receive in EQL's liquidation.

[4] The High Court granted the application.[1] The appellants now contend that in doing so, Associate Judge Osborne made various factual errors, and consequently misunderstood the relationship between the parties. This in turn led him to misapply s 292(4B) of the Act , which provides:

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

[5] The appellants say that on the facts s 292(4B)(a) and (b) applied. The transactions were therefore all to be viewed as one transaction under para (c) and, applying para (d), the transaction was not insolvent and therefore not voidable by the liquidators.

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1 *Fisk v Galvanising (HB) Ltd* [2013] NZHC 3543 [High Court judgment].

Background

[6] The fourth appellants, Stuart and Vivienne Easton, owned and controlled a group of companies based in Napier. As their names suggest, the first appellant Galvanising (HB) Ltd (GHB) provided galvanising services and the third appellant Hooked on Transport Ltd (HOT) was a transport operator. EQL was engaged in steel production. These companies frequently provided goods or services to each other. We will refer to them collectively as "the group".

[7] The transactions to which the respondents' application related involve dealings between EQL on the one hand and, on the other hand, GHB, HOT, Mr Easton and Mr Robert Elvidge as trustees of the Easton Property Trust (the Trust), and Mr and Mrs Easton personally.

[8] The appellants contend that the respondents' approach, accepted by the Judge, overlooked the fact that Mr and Mrs Easton operated as the group's bankers. They argue that transactions between the individual entities, which were funded by the Eastons, should be analysed on the basis they were all part of a continuing business relationship to which s 292(4B) of the Act applied, and the transactions were therefore to be treated as constituting a single transaction to which Mr and Mrs Easton were parties in their personal capacity.

[9] However, the respondents categorised the transactions differently in their application to the High Court. The transactions were set out in schedules attached to the application. Schedule A involved payments made by EQL to GHB in repayment of loans advanced to EQL by GHB. The repayments occurred between 2 July 2007 and 9 July 2009, and totalled $237,288. The repayments were made by electronic transfer of funds from EQL's bank account, to the bank account of GHB. The respondents claimed each of these repayments was a voidable transaction. Schedule A also referred to payments made by EQL for goods and services supplied by GHB. The payments were made by setting off various amounts owed by GHB to EQL between 31 January 2008 and 31 May 2009. The set offs were recorded in a ledger, and comprised 23 items, totalling $469,255.63. The respondents claimed that each set off was a voidable transaction.

[10] Schedule B to the application involved dealings between EQL and the trustees of the Trust. This schedule included amounts of:

(a) $13,964.34 for goods and services supplied by the Trust, paid by EQL setting off an equivalent amount that the Trust owed to EQL for goods and services supplied by EQL, as recorded in an invoice dated 26 June 2007. The respondents alleged the set off was voidable.

(b) $27,169.01 being the total of set offs by which EQL paid for goods and services supplied by the Trust, setting off amounts owed to EQL by the Trust for goods and services EQL had supplied. There were eight set offs between 31 July 2008 and 31 May 2009, each of which was recorded in a ledger specified in the application. The respondents claimed each set off was a voidable transaction.

(c) $107,273.87 comprising payments made by EQL to the Trust for goods and services supplied by the Trust. The payments were made by the electronic transfer of funds from EQL's bank account to the Trust's bank account over the period from 16 May 2007 to 14 January 2008. The respondents alleged that each payment was a voidable transaction.

[11] Schedule C listed dealings between EQL and HOT. There was a loan repayment in the sum of $3,500 made on 2 February 2009, by electronic transfer of funds from EQL's bank account to HOT's bank account. In a separate category was the payment for supplies by set off in a process similar to that which applied in respect of the dealings with GHB just mentioned. In this case, the set offs comprised $8,950.34, and were recorded in a ledger over the period 31 March 2008 to 31 May 2009. Thirdly, the schedule referred to payments made by EQL for goods and services supplied to it by HOT over the period 28 May 2007 to 31 January 2008. The payments totalled $2,942.28, and were made by electronic transfer of funds from EQL's bank account to HOT's bank account. The respondent alleged that the payments and set offs were voidable transactions.

[12] Schedule D listed transactions involving Mr and Mrs Easton personally. The transactions were impugned as an alternative to those listed in schedules A, B and C. In essence, the transactions listed in schedule D treated the various transactions listed in the other schedules as if the Eastons were the parties to them rather than the other entities, so reflecting the records of the transactions in the shareholders current accounts. Therefore if the Court found (contrary to the respondents' position) that the Eastons were properly to be regarded as the parties, then the respondents sought that the transactions be set aside against the Eastons.

The High Court judgment

[13] The Judge began by determining that EQL had been insolvent at all times during the specified period, a conclusion not challenged on appeal.

[14] He then described the liquidators' characterisation of the transactions in schedules A to C, which he grouped as comprising repayments of loans or advances, set offs for supplies and the cash payment of invoices.

[15] The Judge noted the appellants' denial that GHB, the trustees of the Trust and HOT were "enabled persons" in terms of the definition of "insolvent transaction" in s 292(2) of the Act. Under that provision, 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
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> (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.

[16] The Judge recorded the appellants' submission that payments made by EQL and other transactions entered into by EQL were on account of the Eastons, through EQL's shareholder current account. While there was no contemporaneous documentation of the various transactions on this basis, the appellants argued that at all relevant times there was an effective agreement between the Eastons and the entities in the group that the Eastons would settle inter-entity debts.

[17] The Judge then discussed the evidence on which the appellants relied. This was in the form of affidavits from Mr Easton, Mr David Bickerstaff, who was the Easton Group's commercial manager and Mr Shane Hussey, called as an expert accountant.

[18] As the Judge noted, Mr Easton's evidence consisted of a brief eight-paragraph affidavit. He annexed a transcript of his examination under s 261 of the Act, without confirming or verifying the statements he made in the examination. Counsel in the High Court told the Judge that Mr Easton would only accept that the transcript of examination accurately recorded what was said. Having read the affidavit and the transcript, the Judge concluded that Mr Easton had no detailed understanding of how transactions were accounted for between the various entities. He said:[2]

> … There is no suggestion in his evidence or in the examination that the directors of the companies and trustees turned their minds in a forward looking manner to how transactions would work between the various entities and as a matter of probability I find that the directors put no such plan or arrangements in place.

[19] However, a further finding made on the basis of his evidence was that Mr Easton understood in relation, for example, to a transaction involving a supply of services by GHB to EQL, that funds would then have to be found from somewhere within the group so as to pay the debt EQL owed to GHB.

[20] Like Mr Easton, Mr Bickerstaff annexed the transcript of his examination under the Act, and would not expressly verify the answers he had then given, merely accepting the transcript was an accurate record of what he had said. The Judge referred to Mr Bickerstaff's evidence about the creation of sub-accounts in the shareholder current account section of the GHB ledger. Although the sub-accounts were not enumerated in the judgment, Mr Bickerstaff said they were given different identifying numbers and were variously described as the Shareholder Current Account Opening Balance, Capital Introduced, and Current Accounts (there was one sub-account for each entity in the group).

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2 High Court judgment, above n 1, at [72].

[21] The Judge quoted Mr Bickerstaff's evidence about the conduct of transactions between the entities in the group as follows:[3]

> 10. Transactions between group entities would occur from time to time. These transactions occurred at the request [of Mr and Mrs Easton] and were accounted for through these Shareholder Current accounts, and their equivalents, in the respective entities.
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> 11. The separation of these transactions into subaccounts as above, assisted with the reconciliation of these transactions, plus provided useful management information as to which entities were contributing and which were draining shareholder funds.
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> 12. At year end, the balances in the respective sub accounts were transferred by journal to the 'Shareholder Current Account Opening Balance' sub account ready for the start of the new financial year.
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> 13. The group used various external accountants between 1997 and 2007. BDO Spicers prepared the 2007 Financial Statements for the group.
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> 14. In the 2007 Financial Statements prepared by BDO Spicers, all intercompany transaction balances were included under shareholder Current Accounts. This included all intercompany transaction balances that were contained with the Accounts Payable and Accounts receivable ledger.
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> 15. The Eastons were in effect treated as the groups bankers, with all inter entity cash movements, receipts and payments being recorded through their shareholder current accounts.
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> 16. No intercompany balances were shown in the Financial Statements other than a $80,000 short term loan from Galvanising (HB) Limited to East Quip Ltd. For reasons unknown to myself, this single transaction was treated as a loan between companies and not a shareholder balance.

[22] The Judge also referred to evidence given by Mr Bickerstaff that the Accounts Payable and Accounts Receivable ledgers had provided a convenient mechanism for processing trading transactions between one entity in the group and Mr and Mrs Easton and/or one of the other entities. But:[4]

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3 At [81].
4 At [82].

> 21. The existence of shareholder transactions with the Accounts Payable and Accounts Receivable ledgers was however a constant cause of annoyance, as it had the effect of distorting report totals during the financial year. Rather than wait until the end of the financial year to transfer these balances, a procedure was introduced during the 2007/2008 [period] to do this process monthly.
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> …

[23] The Judge then discussed Mr Hussey's evidence to the effect that the payments sought to be recovered by the liquidators were payments made by EQL on behalf of Mr and Mrs Easton as EQL's shareholders and had appropriately been charged to their shareholder current account. Mr Hussey's opinion, however, was essentially based upon Mr Bickerstaff's advice to him as to the nature of the transactions.

[24] The Judge concluded that Mr and Mrs Easton were not personally involved in any of the relevant transactions. The transactions were entered into contractually between the entities providing goods and services to each other. Invoices were correctly issued and the party providing the goods and services was the person entitled to be paid. The Judge found that cash payments were made between EQL's bank account and the bank accounts of GHB, the Trust and HOT. The Eastons' bank account was not involved and there was no general arrangement, still less a binding arrangement, by which those parties were receiving payments on behalf of the Eastons.

[25] Further, there was no contemporaneous documentary evidence to indicate any commitment to treating the relevant inter-entity accounts as involving liabilities that the Eastons would accept as personal liabilities. The Judge concluded, on the basis of Mr Bickerstaff's evidence, that the Eastons had retained control over the final form of draft accounts. He found:[5]

> … The initial outward appearance given each month was that transactions were being entered as inter-company transactions. When at the end of the 31 March 2007 financial year the Eastons elected to treat the losses as to their account, an election or agreement occurred at that point and not earlier. It did not retrospectively undo the character of the subject transactions or the

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5 At [104].

> character of the payments that were made at the time in relation to those transactions.

[26] On this basis, the Judge rejected the appellants' argument that GHB, the trustees of the Trust and HOT were not the parties to the transactions.

[27] The Judge next concluded that each of the appellants had received, through the payments or set off sought to be set aside, more than they would have received in the liquidation of EQL. Available assets as at 10 January 2013 were a little under $69,000 and had been reduced to approximately $35,000 by 10 July 2013. There were no other recoverable assets. As against that, EQL's net liabilities were substantial. They included a significant debt to the Inland Revenue Department in the sum of $410,720.12. The Judge accepted it was clear that in the liquidation the appellants would receive nothing.

[28] After addressing other issues not pursued on appeal, the Judge turned to a submission made by the appellants based on s 292(4B) of the Act. This is the issue that, albeit we suspect in a more refined form, is pursued on appeal.

[29] The Judge began by recording that, in their notices of opposition, the appellants had said that the Eastons' EQL current account should be considered as a running account for the purposes of s 292(4B)(a) of the Act. This meant that all transactions should be viewed as a single transaction. The Eastons would only have benefited from a transaction if their current account balance decreased in value. If it increased in value, there was nothing to be voided. Later, the Judge referred to the written submission made by counsel then acting for the appellants in which she sought to capture the essence of the appellants' case:[6]

> Genuine payments made by a company to reduce a general debit as it stands from day to day and in order to maintain a genuine business relationship which brings advantages to all parties are not preferences, because there is in such cases a mutual assumption by the parties that the business relationship between them will continue. That is in such cases, there is no attempt to terminate the business relationship but rather to ensure that it continues to the mutual benefit of all concerned. In such circumstances, payments made by the company to its suppliers should not be viewed in isolation and attacked as preferences.

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6 At [145].

[30] The Judge noted that neither Mr Easton nor Mr Bickerstaff had referred to the concept of a "running account". Nor was there any evidence that, during the relevant period, EQL was paying off its accounts "in order to induce other parties to continue supplies of goods or services".[7] This conclusion reflected the discussion of the relevant law in this Court's judgment in *Rea v Russell* in which, citing various Australian authorities concerning running accounts, a distinction was made between payments made simply to discharge an existing debt (effectively giving the creditor a preference over other creditors) and payments made in order to induce the creditor to provide further goods or services as well as discharge existing indebtedness.[8]

[31] In this case, the Judge concluded on the balance of probabilities that ultimately the Eastons would be prepared to incur any loss involved if it meant keeping business within the group. In these circumstances it could not be said that any payments had been made to induce the provision of further credit. The Judge found that the appellants fell far short of discharging the onus upon them to establish that any of the transactions were, in terms of s 292(4B) of the Act, an integral part of a continuing business relationship between the relevant entities for commercial purposes.

The appeal

[32] The appellants' principal contention on appeal is that the transactions were entered into as part of a "continuing business relationship" to which s 292(4B) of the Act applied. Mr Carruthers QC explained this by means of a notional transaction between EQL and GHB, pursuant to which EQL purchased supplies from GHB for $10,000. In the example, EQL pays GHB the sum of $10,000, the money passing from EQL's bank account to GHB's bank account. EQL would then receive an advance of $10,000 from the Eastons' shareholder current account enabling it to pay GHB. Having received the $10,000 from EQL, GHB would debit its shareholder current account with the Eastons. These transactions would be recorded in EQL's ledger sub-account for GHB, and similarly GHB's ledger sub account for EQL.

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7 At [148].

8 *Rea v Russell* [2012] NZCA 536, [2015] NZAR 1368 at [57]–[59] citing *Airservices Australia v Ferrier* (1996) 185 CLR 483 at 502 and *Richardson v Commercial Banking Co of Sydney Ltd* (1952) 85 CLR 110 at 133.

By this process, each of the transactions had what was, to use Mr Carruthers' terminology, a "mirror image" in the current account.

[33] As noted by Mr Bickerstaff in para 14 of his affidavit quoted above, in the 2007 financial statements all inter-company transaction balances were included under the shareholder current accounts.[9] That included all the inter-company transaction balances that were contained within the accounts payable and accounts receivable ledgers. Mr Carruthers pointed out that after 2007 the procedure had been changed because of the distorting effect mentioned by Mr Bickerstaff at para 21 of his evidence, again quoted above.[10] Mr Carruthers noted that for the purposes of the appellants' argument, this change made no difference because the transactions were still all transactions in the shareholder current account and the sub-accounts.

[34] Mr Carruthers submitted that, properly understood, the evidence in the High Court established that:

(a) It was common commercial practice to run sub-accounts as opposed to a single account, especially in relation to shareholder current accounts. Mr Hussey gave evidence to that effect.

(b) The Eastons operated as the group's bankers, with all inter-entity cash movements, receipts and payments being recorded through their shareholder current accounts. Mr Bickerstaff gave evidence to that effect. According to Mr Hussey, it is again common for one entity in a group to act as the "banker".

(c) In accordance with Mr Hussey's evidence, it was commercially prudent for a company to apply surplus funds in repayment of debt as opposed to taking the risk associated with advancing funds to other parties.

(d) Mr Pattison, one of the liquidators, accepted in cross-examination that EQL's accounting records demonstrated transactions between EQL

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9 Above at [21].
10 At [22].

and its shareholders through the current account over the relevant period, and that the shareholder current account debts were greater than net asset liability for the 2007 and 2008 years, and for the 2009 year the shareholder current accounts were $2.4 million and net assets were $2.6 million.

(e) In accordance with Mr Bickerstaff's evidence, all inter-company transaction balances were included under shareholder current accounts in the 2007 financial statements prepared by BDO Spicers.

(f) The Easton group used a computing process to transfer balances to the shareholder current accounts on a monthly basis after 2007.

(g) The transactions were recorded in the current account by monthly journal entries.

[35] Mr Carruthers described this as a tri-partite relationship in respect of the transactions. In terms of his example, EQL incurred an obligation (the purchase price) to GHB, and paid money to GHB. For its part, EQL was funded by the Eastons as bankers, for the purpose of entering into the purchase or giving effect to it. These steps fell respectively within s 292(3)(c), (e) and (f):

> **292 Insolvent transaction voidable**
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> …
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> (3) In this section, **transaction** means any of the following steps by the company:
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> …
>
> (c) incurring an obligation:
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> …
>
> (e) paying money (including paying money in accordance with a judgment or an order of a court):
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> (f) anything done or omitted to be done for the purpose of entering into the transaction or giving effect to it.

Therefore, all three parties were involved in the relevant "transaction" for the purposes of s 292.

[36] The next step in the appellant's argument was that this "transaction" was, in terms of s 292(4B)(a), a transaction for "commercial purposes", which was "an integral part of a continuing business relationship … between" EQL and its creditor, GHB "… including a relationship to which … [the Eastons] are parties [as banker]".

[37] Mr Carruthers submitted that the Judge had been wrong to accept the liquidators' approach and to focus on the various categories of transaction between the appellants, without taking into account the actions of the Eastons personally to fund the transactions concerned. In the result the Judge had failed to apply s 292(4B) correctly, and had wrongly concluded that there was no evidence that EQL had made payments for the purposes of "inducing" further credit.[11] The fact that none of the witnesses had referred to the concept of a "running account" was irrelevant; the question raised by s 292(4B) was whether there was a continuing business relationship. Mr Carruthers submitted that contrary to the Judge's finding, the accounting records and the funding practices adopted showed that there was evidence of a pre-existing and contemporaneous agreement that the parties were committed to treating the inter-entity accounts as involving liabilities that the Eastons personally would accept. The focus of s 292(4B) was on a "continuing business relationship" and, in accordance with the following statement from *Airservices Australia v Ferrier*, it is that which must be considered:[12]

> Thus, it is not the label "running account" but the conclusion that the payments in the account were connected with the future supply of goods or services that is relevant, because it is that connection which indicates a continuing relationship of debtor and creditor. It is this conclusion which makes it necessary to consider the ultimate and not the immediate effect of the individual payments.

[38] The appellants then claim that in the course of the relationship, the level of EQL's net indebtedness to the Eastons (as the creditors) forming part of the continuing business relationship was increased and reduced from time to time as a result of the various transactions that took place as part of the relationship, in

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11 *Rea v Russell*, above n 8, at [57]–[59].

12 *Airservices Australia v Ferrier*, above n 8, at 505.

accordance with s 292(4B)(b). In terms of s 292(4B)(c), the transactions were then properly to be viewed as a single transaction.

[39] The Eastons had effectively acted as the bankers of the entities in the group, and they would only have benefited from the transactions in question if their shareholder current account balance had decreased in value. Rather, it had increased in value, meaning that the "single transaction" that arose for the purposes of s 292(4B) was not an "insolvent transaction" as defined in s 292(2).

[40] Mr Chan, for the respondent, argued to the contrary. He submitted that the totality of the evidence showed that the relevant transactions between EQL and the other entities in the group were with those other entities, and did not involve Mr and Mrs Easton. There was no evidence from Mr and Mrs Easton that they had entered into the transactions with EQL. The invoices relating to the transactions showed that they were issued by EQL to the other business entities. Cash payments were made by EQL from its bank account into the bank accounts of the other entities. The various accounts in EQL's accounting system were not set up as sub-accounts of the shareholder current account. The way in which the accounts were operated showed them to be accounts with the business entities. Thus the set off of invoices between EQL and GHB, for example, was done on a monthly basis, and there had been no regular set off of the shareholder current account. Even if the Eastons were characterised as bankers for the group, that did not make them purchasers of the goods that were supplied.

[41] Mr Chan submitted that the Judge had correctly applied the relevant authorities, all of which supported the principle that in order to be protected, a payment must be shown to have been made for the purpose of inducing further credit or supplies, and not merely to pay an existing debt.[13]

[42] Mr Chan noted that there had been no evidence from the appellants that the payments by EQL were made for the purpose of inducing further credit. There had been no need for EQL to induce further credit. EQL and the appellants were all part

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[13] Citing *Rea v Russell*, above n 8; *Airservices Australia v Ferrier*, above n 8; and *Timberworld v Levin* [2015] NZCA 111, [2015] 3 NZLR 365.

of one group, and it was clear from the evidence that funds were moved around the group as thought necessary for the overall benefit of the group and its owners.

Analysis

[43] Although the appellants' argument had several strands, in the end Mr Carruthers accepted that the outcome of the appeal turned on the proper application of s 292(4B) of the Act.

[44] We have earlier set out subs (4B) and the relevant parts of the definition of "transaction" in s 292(3) of the Act. The application of the former depends on there being a transaction that is an integral part of the continuing business relationship between a company and a creditor of the company. For present purposes, we consider the statutory provisions are to be applied on the basis that the "company" is EQL and the "creditor" is whichever of the appellants was involved in that capacity in the impugned transactions with EQL. In the example put forward by Mr Carruthers to illustrate his argument, the creditor was GHB.[14]

[45] In a nutshell, the appellants say the transactions between EQL and GHB were an integral part of a continuing business relationship that included the Eastons as the bankers and source of funds for the transactions. But, more than that, the request by EQL for the Eastons to provide funding and the provision of that funding were, respectively, things done for the purpose of entering into the transactions or giving effect to them. Hence the description of the transactions as "tri-partite" in nature.

[46] Thus, as we have already noted, it is alleged that each of the steps involved in the transactions was covered by s 292(3). The company, EQL, incurred an obligation (the purchase price) to GHB (an action falling within s 292(3)(c)). Subsequently, EQL paid money to GHB, an act falling within s 292(3)(e). EQL was funded by the Eastons, as bankers, "for the purpose of entering into the transaction or giving effect to it" and so s 292(3)(f) applied. In oral argument, as we have noted,

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[14] But this proposition appeared to shift in the course of the hearing: see below at [49].

Mr Carruthers identified a request for funding by EQL as a step that was also covered by s 292(3)(f).[15]

[47] We do not accept this argument, for a number of reasons. First, it is important to recognise that s 292(3) defines "transaction" by reference to a number of "steps" taken "by the company". Clearly "the company" is the debtor and it is the same "company" to which s 292(4B)(a) refers. The distinction drawn by subs (4B)(a) is between the company (EQL) and "a creditor" of the company (for example, GHB). The relationship of debtor and creditor is a straightforward concept, based upon the existence of a debt between the two. While we are prepared to accept that the Eastons did have a role in funding the various transactions (at least after the event) we do not see how in any sense they could be described as creditors of EQL in respect of EQL's transactions with GHB.

[48] Further, only steps "by the company" fall within the definition of "transaction" in s 292(3). In our view, this means that the "transaction" on which subs (4B)(a) must be focused is a transaction constituted by a step taken by the company. Each of the actions set out in the paragraphs of s 292(3) involve steps taken in relation to a particular transaction to which subs (4B) then applies. Provision of funding to EQL to enable it to meet its debt to GHB cannot properly be described as a step "by the company". And a request that another party pay a debt that has been incurred would not in our view constitute one of the relevant acts "by the company" listed in s 292(3). In fact, on the appellants' argument that is not what occurred in any event: they claim that the relevant transactions all involved the Eastons' shareholder accounts and that these were the medium through which the transactions were given effect.

[49] In any event the provision of funds by the Eastons to EQL to enable the company to pay the debt it had incurred to GHB would itself constitute a transaction. We think it would be wrong to characterise that transaction as if it were part of the transaction between EQL and GHB. At one stage in the argument, Mr Carruthers suggested that, for the purposes of subs (4B), there were in fact two creditors,

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[15] We were not referred to direct evidence of any such request, but were effectively asked to infer there must have been one.

namely GHB initially, and after GHB had been paid (using funds supplied by the Eastons) the Eastons themselves would become the creditor. However, the obligation incurred by EQL to the Eastons was a separate obligation to the obligation that EQL had to GHB. We do not consider it a correct analysis to treat both transactions as in effect one.[16]

[50] These conclusions do not depend on the rejection of the appellants' contention that there was agreement between all of the parties that the particular transactions would be funded by the Eastons in the manner that occurred. As has been seen, the Judge found there was no suggestion that those involved in the management of the various entities in the group turned their minds "in a forward looking manner to how transactions would work between the various entities", and he found on the balance of probabilities that the directors "put no such plan or arrangements in place".[17] We are satisfied that finding was correct. However, even if it were incorrect, and the funding was provided as part of a prior arrangement that had been entered into, that would not in our view make the Eastons creditors of EQL for the purposes of EQL's debt to GHB. The transactions would remain separate, just as would be the case if the banker were not the Eastons but, rather, a trading bank.

[51] It is the transactions between EQL and GHB that are the focus of s 292(3) and (4B), and it is those transactions that the respondents have attacked as voidable. We therefore reject the argument advanced in relation to s 292(3).

[52] Nor do we accept that the transactions were of the kind contemplated by s 292(4B)(a). Mr Carruthers claimed that the transactions occurred as part of a continuing business relationship between EQL and GHB, a relationship to which the Eastons were parties. Section 292(4B)(a) stops short of defining "a continuing business relationship", simply referring to a "running account" by way of example. Mr Carruthers submitted that a relevant continuing business relationship between all three parties could be of a kind such as was evident on the facts of this case. We disagree.

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16 In fact in their written submissions the appellants claimed that the Eastons were the relevant creditors on the proper interpretation of s 292(4B).

17 High Court judgment, above n 1, at [72].

[53] The history of the provision was discussed by the Supreme Court in *Allied Concrete v Meltzer* in which Elias CJ traced its origins to cases that introduced the concept of the running account as part of Australian insolvency law.[18] The principles so developed were later taken into the Corporations Act 2001 (Cth), and it is clear that s 292(4B) is based on s 588FA of the Australian statute. It is relevant to note that Arnold J, writing for himself and McGrath and Glazebrook JJ in *Allied Concrete*, summarised the effect of the subsection in the following passage:[19]

> Under [s 292(4B)], a series of transactions will be treated as a single transaction where the individual transactions are an integral part of a continuing business relationship between the parties (as where the parties operate a running account) and the level of the debtor company's indebtedness fluctuates over time as a result of the various individual transactions. Under this approach, a liquidator will be entitled to claim the net difference of payments made and goods and services received from a creditor which has an ongoing business relationship with the debtor company. …

[54] There was a detailed discussion of the provision in this Court's decision in *Timberworld v Levin* in which the Court summarised the key features of the running account approach as follows:[20]

> [34] The key features of a running account, drawn from the Australian case law, may be summarised as follows:
>
> (a) A payment is part of a running account where there is a business purpose common to both parties which so connects a payment to subsequent debits as to make it impossible, in a business sense, to pause at any payment and treat it as independent of what follows.
>
> (b) The amount owing to a creditor is likely to fluctuate over time, increasing and decreasing depending on the payment made and the goods or services provided.
>
> (c) The effect of a payment depends on whether it is paid (i) simply to discharge a debt then owing to the creditor (including the permanent reduction of the balance of an account that is then owing) or (ii) as part of a wider transaction which, if carried out to its intended conclusion, would include further dealings giving rise to further amounts owing at the time of payment.

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18 *Allied Concrete v Meltzer* [2015] NZSC 7, (2015) 11 NZCLC ¶98-031 at [118] citing *Queensland Bacon Pty Ltd v Rees* (1966) 115 CLR 266 at 280–286 and *Petagna Nominees Pty Ltd v Ledger* (1989) 1 ACSR 547 (WASC) at 564.

19 At [21].

20 *Timberworld v Levin,* above n 13 (footnotes omitted).

(d) A payment is part of a transaction that includes subsequent dealings even though it may reduce the amount of debt owing at the time of the payment, where it can be shown it is inextricably linked to further credits, and has the predominant purpose of inducing the provision of further supply and it is impossible to treat the immediate effect of the payment as the only effect.

(e) The manner or form of keeping account of credits and debits does not determine the effect of the payments. Rather, whether the payments are in fact part of a transaction with an effect distinct from the mere reduction of debt owing to the creditor by the debtor company, drives whether the series of transactions constitute a running account. The courts are concerned with the "business purpose", the "business character" and the "ultimate effect" of the payments, in an objective sense.

[55] To similar effect, in *Rea v Russell* this Court observed:[21]

> The assumption behind the running account concept is that the swings and roundabouts of an ongoing business relationship with a commercial purpose, inducing credits or benefits as well as debits to the company that is ultimately liquidated, should be seen as a single transaction. …

[56] In making that statement the Court referred to observations of Blanchard J giving the judgement of the Supreme Court in *Trans Otway Ltd v Shephard* about the "running account cases":[22]

> The transactions in those cases involved a series of payments between the creditor and the debtor company whereby the balance of the account fluctuated. It is entirely proper and in accordance with commercial reality where the creditor is extending further credit to a debtor company to have regard to the net effect of the payments in determining whether overall the creditor has been preferred, and to set them aside only to that extent. …

In s 292(4B), paras (c) and (d) adopt this "net effect" approach.

[57] In *Rea v Russell* this Court emphasised that there needs to be an integral business connection between the payments in and out.[23] The Court referred to observations made in *Airservices Australia v Ferrier*:[24]

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21 *Rea v Russell*, above n 8, at [56]
22 *Trans Otway Ltd v Shephard* [2005] NZSC 76, [2006] 2 NZLR 289 at [11].
23 At [57].
24 *Airservices Australia v Ferrier*, above n 8, at 502.

> If the sole purpose of the payment is to discharge an existing debt, the effect of the payment is to give the creditor a preference over other creditors unless the debtor is able to pay all of his or her debts as they fall due. But if the purpose of the payment is to induce the creditor to provide further goods or services as well as to discharge an existing indebtedness, the payment will not be a preference unless the payment exceeds the value of the goods or services acquired.

[58] Mr Carruthers, as we have noted, did not attempt to argue that the relevant business relationships in this case involved a running account, observing that a running account was simply an example given in s 292(4B) of a kind of continuing business relationship. While that is true, we consider it would be wrong to overlook the origins of the subsection in Australian insolvency law and ultimately s 588FA(3) of the Corporations Act. Whether or not a particular business relationship is characterised as involving a running account we think it is plain from the history and rationale of the provision that the relevant relationship will share the key characteristics of such an account. In particular, the relationship must be one in which the payments made between company and creditor are for the purpose of securing more than the payment of a pre-existing debt. Without an extra dimension such as that referred to in the running account cases there could be no justification for treating the transaction as other than an insolvent transaction voidable under s 292(1).

[59] For present purposes, we therefore consider it would be necessary for the appellants to establish that the payments made by EQL to GHB were more than simply to discharge a debt owing to GHB, but had the wider purpose of maintaining an ongoing business relationship in which it was anticipated that GHB would provide further goods or services on credit. The appellants face the difficulty that the Judge found on the facts that there was no evidence that was so. On the contrary, he considered the evidence established that it was improbable the appellants would ever have withheld supplies from EQL, and the Eastons would always give directions to keep business within the group regardless of payments being made. Succinctly put, "[t]he payments were not made to induce further credit. No such inducement was needed".[25] These were findings open to the Judge on the evidence, and we see no basis for going behind them.

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[25] High Court judgment, above n 1, at [155].

[60] Mr Carruthers submitted at one stage that it would be illogical and contrary to commercial common sense for GHB to continue supplying EQL if there was no payment made by the latter. That submission might be an appropriate one to make had the parties been in an ordinary commercial relationship and operating at arm's length, but in this case we think it overlooks the reality of the way the affairs of the group were managed. We accept Mr Chan's submission made on the basis of the s 261 examinations of Mr Easton and Mr Bickerstaff that funds were moved around the group as thought necessary for the overall benefit of the group and its owners, Mr and Mrs Easton. Mr Bickerstaff also acknowledged in cross-examination the imperative of keeping work within the group and that it did not matter if EQL could not pay for supplies obtained within the group. The Judge's finding that it was improbable supplies would have been withheld from EQL was, therefore, clearly justified on the evidence. Consequently we consider the impugned transactions cannot be described as transactions that were "for commercial purposes, an integral part of a continuing business relationship".

Result

[61] The appeal is dismissed.

[62] The respondents are entitled to costs calculated for a standard appeal on a band A basis, together with usual disbursements.

Solicitors:
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