IN THE HIGH COURT OF NEW ZEALAND
NAPIER REGISTRY

CIV-2013-441-000124
[2013] NZHC 3543

UNDER	the Companies Act 1993
BETWEEN	JOHN HOWARD ROSS FISK AND TONY WAYNE PATTISON AS LIQUIDATORS OF EAST QUIP LIMITED (IN LIQUIDATION) Applicants
AND	GALVANISING (H.B.) LIMITED First Respondent
AND	STUART DAVID EASTON AND ROBERT ELVIDGE EASTON AS TRUSTEES OF THE EASTON PROPERTY TRUST Second Respondents
AND	HOOKED ON TRANSPORT LIMITED Third Respondent
AND	STUART DAVID EASTON AND VIVIENNE JANE EASTON Fourth Respondents

Hearing: 9 - 10 December 2013

Appearances: D Chan for Applicants
R P Harley for Respondents

Judgment: 20 December 2013

JUDGMENT OF ASSOCIATE JUDGE OSBORNE
on applications under s 294 Companies Act 1993

Introduction

[1] Stuart and Vivienne Easton (Mr and Mrs Easton) owned and controlled a group of companies (the Easton Group) in Napier. Two of those companies,

Galvanising (H.B.) Limited (Galvanising) and Hooked on Transport Limited (HOT) survived and are first and third respondents in this proceeding. One of the companies, East Quip Limited (East Quip) did not and was put into liquidation on 10 July 2009.

[2] The companies operated a range of businesses – Galvanising in galvanising; HOT in transport, and East Quip in steel production. The entities frequently provided goods or services to one another.

[3] This case concerns a number of transactions which the liquidators of East Quip say occurred within the "specified period" of a little over two years which has significance in relation to the definition of insolvent transactions under s 292 Companies Act 1993.

[4] In particular, the liquidators allege that East Quip entered into transactions with four sets of related entities or people. Two were Galvanising and HOT. The other two sets of respondents are respectively the trustees of the Easton Property Trust (the Trust) (a family trust of Mr and Mrs Easton), and Mr and Mrs Easton themselves. Galvanising had been Mr Easton's first company and it has traded profitably as a provider of galvanising services. Other companies in the Easton Group, including East Quip, were established later. Mr Easton deposed in relation to East Quip that –

> It has always been the case that East Quip Limited (In Liquidation) had financial support from other companies and entities within the wider Easton Group.

[5] Mr Easton might have added that East Quip's survival through to 2009 had been further assisted by not meeting its tax liabilities as they fell due. It was ultimately the Commissioner of Inland Revenue who applied for and obtained East Quip's liquidation.

[6] Somewhat surprisingly the respondents have maintained through to this hearing the proposition that there is an issue as to whether East Quip was insolvent at

the time of each of the impugned transactions.[1] Mrs Harley did not present any closing submissions on the topic.[2] For reasons I come to, East Quip was clearly insolvent throughout the specified period.

The nature of the impugned transactions

[7] The liquidators assert that East Quip entered into a variety of forms of insolvent transactions with the four respondents between 5 May 2007 when the specified period commenced and 10 July 2009 when East Quip was put into liquidation. There are different combinations of types of transaction alleged in relation to each respondent.

[8] The types of transaction impugned are:

(a) Repayments – whereby it is alleged that East Quip paid money to the respondent in repayment of a loan. In relation to Mr and Mrs Easton, the liquidators' claim in relation to loan repayments arises from transactions in Mr and Mrs Easton's East Quip shareholders' current account;

(b) Set-off payments for supplies – whereby it is alleged that East Quip paid for goods and services supplied by a respondent by setting-off amounts owed by the respondent for goods and services supplied by East Quip;

(c) Cash payment of invoices – whereby it is alleged that East Quip paid cash to a respondent for goods and services supplied by that respondent to East Quip;

(d) "Debt claims" – which would not normally arise in a s 292 proceeding such as this. The liquidators have in separate proceedings sued Galvanising, HOT and the Trustees (that is to say the trustees of the Easton Property Trust) in relation to unpaid invoices for goods and

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1 Below at [9] and following.
2 See below at [29].

services supplied by East Quip to a respondent and for unpaid advances (being advances made by East Quip to a respondent). I refer to these collectively as the "debt claims". One ground of the opposition of the respondents (including Mr and Mrs Easton) is that the transactions were entered into at the request of Mr and Mrs Easton and to be funded by Mr and Mrs Easton through their East Quip shareholders' current account. The respondents (including Mr and Mrs Easton) assert that (in terms of the s 292(2)(b) definition of "an insolvent transaction"), East Quip gave a (voidable) credit to Mr or Mrs Easton through their current account thereby enabling them to receive more towards satisfaction of the debt owed by East Quip than they would have received in East Quip's liquidation. Having regard to that anticipated ground of opposition, the liquidators in this proceeding brought against Mr and Mrs Easton an application in the alternative (alternative to their claims against other respondents) for the East Quip transactions which the liquidators assert were with the other respondents. If the Court finds for the respondents on their proposition that the Eastons were truly the parties (as recipients of a credit in the shareholders' current account) to the particular transactions, then the liquidators seek orders against Mr and Mrs Easton in lieu of orders against the particular other respondents.

Insolvency of East Quip in the specified period

The statutory requirements as to "insolvency"

[9] By s 292(1) Companies Act, a liquidator may avoid transactions in certain circumstances. Section 292(1) specifically provides:

> **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.

[10] "Specified period" is defined by s 292(5) of the Act thus:

(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]

[(c) If—

(i) An application was made to the Court to put a company into liquidation; and

(ii) After the making of the application to the Court a liquidator was appointed under paragraph (a) or paragraph (b) of section 241(2),—

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 [[and at the time]] of the commencement of the liquidation.]

[11] By s 292(2) of the Companies Act insolvency is defined by reference to the inability of a company to pay its due debts. The subsection provides:

(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.

[12] In this case, the specified period (under s 292(5) of the Act) ran from 5 May 2007 to 10 July 2009.

[13] The restricted period as defined by s 292(6) of the Act ran from 5 December 2008 to 5 May 2009.

[14] By s 292(4A) there is a presumption (unless the respondents prove to the contrary) that a transaction entered into within that restricted period from 5 December 2007 to 5 May 2009 was at a time when East Quip was unable to pay its due debts.

[15] For the earlier part of the specified period (from 5 May 2007 to 5 December 2008) it is for the applicants to establish on the balance of probabilities that East Quip was unable to pay its due debts. In identifying matters which the Court must consider in relation to the issue of solvency under s 292 of the Act, I adopt what Master Faire said in *TR Group Ltd v Blanchett,* when his Honour stated:[3]

> The authorities that I rely upon are *In re Universal Management Ltd* (in liquidation) (1981) 1 NZCLC 95026; *Sandell v Porter* (1966) 115 CLR 666 and *Rural Log and Lumber Ltd (in receivership and in liquidation) v Tuck* (1987) 8 NZCLC 261329. The specific matters which are relevant are as follows:
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> a) The inquiry is made at the times when the payment is made;
>
> b) Regard may be had, however, to the recent past to see if the debtor was unable to pay debts as they became due;
>
> c) A consideration of the outstanding debts at the time is required;
>
> d) "As they become due" means as they become legally due;
>
> e) the ability to pay involves a substantial element of immediacy to provide payment from cash and non-cash resources. An excess of assets over liabilities will not by itself satisfy the test if there is no ability to pay. The ability to procure sufficient money to pay debts by realisation by sale or mortgaging or pledging assets within a relatively short period of time will satisfy the test;
>
> f) the issue of a company's solvency requires a consideration of the company's financial position in its entirety. A temporary lack of liquidity does not necessarily evidence insolvency. For that reason, a consideration of the debtor's position over a period of time is required;
>
> g) the test is an objective one;
>
> h) …

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3 *TR Group Ltd v Blanchett* HC Hamilton CIV-2003-419-300, 15 May 2003 at [11].

The evidence of East Quip's insolvency

[16] East Quip financial reporting date was 31 March each year.

[17] Those responsible for the governance of East Quip had financial statements finalised through to 31 March 2007. For 2008 and 2009 all that exists is a single page draft containing statements of movements in equity and a statement of financial position.

[18] The liquidator, Tony Pattison, who gave the primary evidence for the liquidators, analysed the financial statement information available and concluded that East Quip's financial position from 2006 to 2009 was as follows:

Year ending 31 March	**Trading deficit**	**Equity – net liabilities over assets**
2006	$191,164	$1,415,359
2007	$54,206	$1,469,565
2008	$308,768	$1,778,333
2009	$828,191	$2,606,526

[19] This analysis was not challenged by the respondents. It accords with the documents which Mr and Mrs Easton as directors of East Quip made available to the liquidators.

[20] If there is focus on the 31 March 2007 and the 31 March 2009 figures (being those closest to the start of the specified period and to the date of the liquidation order) respectively, the total assets and liabilities positions of East Quip were:

Year ending 31 March	**Total assets**	**Total Liabilities**
2007	$938,978.00	$2,408,543.00
2009	$638,377.00	$3,244,903.00

[21] It is clear, that during the specified period, the disparity between East Quip's assets and liabilities increased to become very substantial. The trading deficit also increased substantially.

[22] Mr Pattison deposed that the creditors' claims received by the liquidators amounted to $1,245,483.32. This might at first suggest that the total liabilities figure in the 2009 draft accounts were overstated (the liquidators receiving claims of $1,245,483.32 as against the total liabilities shown in the draft accounts of $3,244,903 as at 31 March 2009). In fact, the difference is largely understandable in the documents in evidence.

[23] Four significant claims initially received from creditors by the liquidators were:

Galvanising	$611,405.33
The Trust	$130,233.04
HOT	$30,691.86
Inland Revenue Department	$234,605.30

(The Inland Revenue Department claim was subsequently adjusted to total $410,720.12)

[24] Victoria Williams, a Collections Officer of the Inland Revenue Department, gave evidence in support of the liquidators' application. Her evidence as to East Quip's record of tax accounting identifies that East Quip was in arrears of payment of both goods and service tax and resident withholding tax by 5 May 2007. East Quip later defaulted in relation to payment of both those forms and other forms of tax. There were discussions and negotiations between representatives of East Quip including Mr and Mrs Easton and of the Department from May 2007 to July 2009 (when East Quip was finally liquidated). East Quip's arrears of taxation payments increased over that period. East Quip in 2007 proposed to raise finance from associated entities. By 2008, Mr Easton was looking to sell assets including Galvanising as an operating company and some forestry assets. None of those possibilities appear to have eventuated.

[25] It transpired, at the hearing, that Mr and Mrs Easton had intended to prove as claimants in the liquidation of East Quip. The main evidence given for the respondents was from David Bickerstaff, the Chief Financial Officer of what is now the GER Group of Companies (formally known as the Easton Group). Mr Bickerstaff produced a creditor's claim form on behalf of the Eastons, in which he claimed that East Quip was indebted to the Eastons in the sum of $2,495,166.21 on a current account balance. Mr Bickerstaff produced a signed receipt indicating that the Eastons' claim form, together with other claim forms, were delivered to the liquidators' offices on 10 September 2009. Mr Bickerstaff gave evidence that although he had also submitted proofs for Galvanising, HOT and the Trust, his personal opinion was that the debts represented truly the Eastons' shareholder current account transactions.

[26] Mrs Harley adduced this additional evidence from Mr Bickerstaff primarily to refute a suggestion made by Mr Chan for the liquidators to the effect that the failure of the Eastons to personally prove in East Quip's liquidation reinforced a reality that the impugned transactions were not transactions between East Quip and the Eastons but between East Quip and the other respondents. But in the context of solvency, the Eastons' assertion that East Quip owed them personally $2,495166.21 serves to emphasise the extent of East Quip's insolvency. As Mr Chan noted, the current account debts would be due debts repayable immediately.[4]

[27] The liquidators caused Companies Act examinations to be conducted of Mr Easton and Mr Bickerstaff on oath in May 2012. Mr Easton then stated that East Quip generally needed more funds than it made because it was run at a loss in most cases. He stated that he believed that East Quip had been unprofitable, losing money.

[28] It is of some significance that although the respondents called Shane Hussey as an expert on financial matters to deal with aspects of the respondents' grounds of opposition, Mr Hussey's evidence did not extend to an analysis of East Quip's solvency or insolvency. I infer that he was not asked to provide evidence on that topic.

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4 *DFC New Zealand Ltd v McKenzie* [1993] 2 NZLR 576 (HC) at 582.

[29] Mrs Harley for the respondents, chose not to make any closing submissions as to East Quip's solvency.

Conclusion: East Quip was insolvent from May 2007 to July 2009

[30] The evidence establishes clearly that East Quip was insolvent at all times between 5 May 2007 and 10 July 2009, in that East Quip was unable to pay its due debts through that period. No point was reached within that period where it could be said that East Quip's financial woes were temporary or short-term – the evidence points to a continuing long-term decline which ultimately caused a creditor's liquidation of East Quip.

Transactions under s 292 Companies Act

The statutory definition of "transaction" as used in s 292

[31] Section 292(3) Companies Act defines "transaction" thus:

> [(3) In this section, **transaction** means any of the following steps by the company:
>
> (a) conveying or transferring the company's property:
>
> (b) creating a charge over the company's property:
>
> (c) incurring an obligation:
>
> (d) undergoing an execution process:
>
> (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.]

[32] Lynne Taylor, contributing to *Company and Securities Law in New Zealand* noted the changes of definition affected by the current s 292(3) of the Act before providing further explanation of the effect of the definition of "transaction", which I adopt:[5]

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[5] Lynne Taylor "Liquidation" in John Farrar and Susan Wilson (eds) *Company and Securities Law* (2nd ed, Brookers, Wellington, 2013) at [31.6.1(1)]

> If A owes a debt to B, and A then agrees to sell an asset to B, the setting off of these two sums as a result of an express agreement between A and B to this effect is a payment of money for the purposes of s 292(3)(e). This was the finding of the Court of Appeal in *Trans Otway Ltd v Shephard,* where the court went on to state that "the expression 'payment of money' is not necessarily dependent on the physical passing of cash or a cheque". The court then cited the following comments of Lord Mustill in *Charter Reinsurance Co Ltd v Fagan*:
>
> > "Unquestionably, it [payment of money] is no longer confined to the delivery of cash or its equivalent. In ordinary speech it now embraces transactions which involve the crediting and debiting of accounts by electronic means, not only transfers between bank accounts by payment cards and direct debits, but also dealings with credit cards and similar instruments."
>
> There will be no payment of money for the purposes of s 292(3)(e) where a company and a creditor agree to vary a contractual agreement so that a monetary obligation is discharged by means other than payment of money. An example of such a transaction is where a creditor agrees to accept goods or the assignment of a book debt in lieu of a monetary payment. However, such an arrangement is caught under s 292(3)(a) as a transfer of property.
>
> (footnotes omitted)[6]

The liquidators' characterisation of transactions

Repayments

[33] The liquidators seek orders setting aside what they say are payments which East Quip made to Galvanising and HOT in repayment of loans or advances. They rely on s 292(3)(e) which defines transaction to include the payment of money.

[34] The liquidators rely upon the ledger records of East Quip as provided to them upon liquidation.

[35] This group of claims is illustrated by a payment of $50,000 made by East Quip to Galvanising on 2 July 2007. On that date East Quip's general ledger ("Current A") records a payment of $50,000 made by East Quip to Galvanising. The ledger shows that immediately before that point, East Quip owed Galvanising $80,000 through the current account. (The existence of that loan and the fact of the 2 July payment are not disputed by the respondents).

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[6] References for the cases referred to being: *Trans Otway Ltd v Shephard* [2005] 3 NZLR 678 (CA) at 685 (subsequently appealed but not on this point): *Trans Otway Ltd v Shephard* [2006] 2 NZLR 289 (SC) at [8]; *Charter Reinsurance Co Ltd v Fagan* [1997] AC 313 (HL) at 384.

[36] In all, the liquidators identify 11 such payments by East Quip to Galvanising, totalling $237,288, all recorded in the general ledger and all constituting repayment of current account advances recorded in the ledger.

[37] The liquidators make one parallel claim against HOT for a payment of $3,500 in relation to a payment recorded in East Quip's current account general ledger for HOT on 2 February 2009.

Set offs for supplies

[38] In these claims, the liquidators focus on set-offs recorded in the companies' ledgers whereby East Quip's debt for services or goods provided was either reduced or fully extinguished.

[39] The liquidators rely on the definition of transaction under s 292(3)(e) and (f) which includes the payment of money and anything done for the purpose of giving effect to an arrangement for the payment of money.

[40] In his submissions, Mr Chan used East Quip and Galvanising as an example. It is the liquidator's case that each company periodically supplied goods or services to the other. Invoices were raised and issued. The liquidators have the original invoices issued by East Quip to Galvanising but did not receive all of the original invoices issued by Galvanising to East Quip, a point not disputed by Mrs Harley for the respondents. To take the case of Galvanising, Mr Pattison received in the course of the liquidation a general ledger which was entitled "general ledger transaction detail – 7301 inter-company Galv". The debts owed by East Quip and Galvanising to each other for supplies of goods and services were on the last working day of each month transferred to that ledger. The liquidators hold copies of two ledgers which record respectively the "customer transactions by account" representing East Quip's receivables and the "Supplier transactions by account" recording East Quip's payables. They record the entry of invoice details from time to time apparently as invoices were rendered or received.

[41] The "GL [General Ledger] transaction detail 7301 inter-company Galv" records the monthly entries whereby both receivables and payables were brought

together. Mr Pattison in his evidence describes the "Inter-company Galv" ledger in this way:

> This ledger shows the debts owed by EQ to Galvanising being paid by setting-off EQ's invoices against Galvanising's invoices.

[42] Mr Pattison noted that Mr Bickerstaff, in the course of his examination, had confirmed that the receivables and payables were "netted off against each other".

[43] Authority for the proposition that a set-off can amount to a preference (or voidable transaction) may be found in *Rea v Russell*[7] and *Trans Otway Ltd v Shephard.*[8] In *Trans Otway* the Supreme Court upheld the judgments in the Courts below which had recognised that the discharge of a debt by way of set-off made within the specified period could be regarded as a "payment" for the purposes of s 292 of the Act.

[44] The 7301 ledger shows that in addition to the monthly entries there was a journal entry completed at the end of the financial year, 31 March 2008 by which the closing balance (a liability of $252,766.69) was transferred to Mr and Mrs Easton's shareholders' current account.

[45] The liquidators' claims in relation to what they say were the East Quip/Galvanising set-offs relate to 23 sets of entries (two resulting in minor credit to East Quip) which produce a total settlement of East Quip invoices in the sum of $469,255.63.

[46] There is a parallel claim against HOT for set-offs for 15 set-offs recorded in the ledger entitled "general ledger Transaction Detail 7304 Inter-company HOT" in the sum of $8,950.34.

[47] Finally, there is a parallel claim against the trustees of the Trust for eight set-offs recorded in the ledger entitled "general ledger transaction detail 7302 Inter-company EPT" in the sum of $27,169.01.

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7 *Rea v Russell* [2012] NZCA 536 per Asher J delivering the reasons of the Court at [27].
8 *Trans Otway Ltd v Shephard* [2006] 2 NZLR 289(SC).

Cash payment of invoices

[48] The Trust supplied goods and services to East Quip for which East Quip was invoiced. Between 16 May 2007 and 14 January 2008, East Quip paid the Trust by seven electronic transfers of funds of $107,273.87.

[49] The liquidators pursue a parallel claim against HOT in relation to payment for supplies by cash. HOT supplied goods and services to East Quip. Between 28 May 2007 and 31 January 2008 Fuel Quip made seven electronic transfers of funds in payment of the sums invoiced by HOT.

[50] All the payments so made by Fuel Quip to the trust and to HOT respectively amount to transactions under s 292(3)(e), being payments of money.

The "debt" claims

[51] The debt claims are alternative claims of the liquidators.

[52] The debt claims relate to unpaid invoices rendered by East Quip to Galvanising, the Trust and HOT. The unpaid advances relate to advances to the Trust.

[53] Between 9 June 2009 and 2 July 2009 East Quip supplied goods and services to Galvanising through 11 invoices to a total value of $7,748.33. Between 9 June 2009 and 7 July 2009, East Quip supplied goods and services to the Trust through five invoices in a total sum of $6,029.98. Finally, between 18 October 2007 and 25 June 2009, East Quip provided supplies to HOT or to the account of HOT (both supplies of goods outright and supplies on lease) to a total value of $120,464.80.

[54] The invoices in relation to those sales to the three named respondents remain unpaid in those sums.

[55] In addition, the liquidators claim against the Trust for advances which have not been repaid. Between 13 August 2007 and 15 June 2009, East Quip transferred

funds from its bank account to the Trust's bank account in a net sum of $200,685.74, comprising 17 transfers by East Quip and six repayments by the Trust.

[56] Both the identified invoices and the identified net advances remain unpaid. I refer to those collectively as the "debt claims". The liquidators have pursued the debt claims through civil proceedings against the immediate recipients of the goods or advances as the case may be.

[57] On the evidence the liquidators put forward, they do not view the debt claims as voidable transactions against Galvanising, the Trust and HOT.

[58] On the other hand, the respondents including Mr and Mrs Easton, assert that the transactions involved with the unpaid invoices and unpaid advances, were transactions not with Galvanising, the Trust and HOT as the case may be but were with Mr and Mrs Easton as the shareholders of East Quip as reduction of the shareholders' current account.

[59] While maintaining the claim in their civil proceeding, that Galvanising, the Trust and HOT are respectively debtors and susceptible to judgment on that basis, the liquidators bring their alternative claim against Mr and Mrs Easton personally in the event the Court finds, (contrary to the liquidators' position) that the transactions were as between East Quip and the Eastons through the shareholders' current account.

[60] If the Court were to find that there were transactions on the current account those each involve a repayment by East Quip in reduction of a debt owing to Mr and Mrs Easton on the current account. Such payments would be impeachable as transactions by s 292(3)(e), as involving payment of money.

The elements of the respondents' and East Quip's conduct

[61] The respondents' pleaded position in relation to the transactions impugned by the liquidators involve grounds of opposition common to a number of sets of transactions and also grounds specific to some transactions. I will deal first with the former category.

The identity of the person to be enabled

[62] Under s 292(2)(b) one aspect of an insolvent transaction is that it enables another person to receive more towards satisfaction of a debt owed by the company than the enabled person would receive or be likely to receive in the company's liquidation.

[63] The respondents deny that Galvanising, the trustees of the Trust or HOT were "enabled persons" within the requirement of s 292(2)(b). They say that the payments made by East Quip and other transactions entered into by East Quip were on account of the Eastons through their East Quip current account.

[64] The respondents do not contend that the contemporaneous documenting of the various "transactions" was other than contended by the liquidators as I have summarised it above[9] but the respondents assert that at the time the events relied upon by the liquidators occurred –

> ... there was already precedent and agreement as between [East Quip and the various respondents (including Mr and Mrs Easton)] that inter-entity debts would be settled by the Eastons, and that is how payments were accounted. On that basis, the payments were on account of the Eastons and are not voidable against [the other respondents].
>
> (I will call this "the shareholders' current account argument")

[65] The respondents' opposition was supported by three affidavits. The deponents were Mr Easton, Mr Bickerstaff and Mr Hussey.

The Eastons' evidence

[66] Mr Easton gave a brief (eight paragraph) affidavit. He did not directly address the shareholders' current account argument. What Mr Easton did was to state –

> I annex marked "A" a copy of the transcript of examination of me under s 261 of the Companies Act 1993.

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9 At [8] (a) – (c).

[67] The transcript of examination was exhibited. Mr Easton was not required for cross-examination by the liquidators. Before Mrs Harley called her remaining witnesses for cross examination I observed to her that Mr Easton's affidavit did not include a statement to the effect that Mr Easton confirmed or verified the statements made in his examination. I indicated to Mrs Harley that if Mr Easton wanted the Court to take it that he was confirming the statements given in his examination then I would expect him to be called to give evidence briefly to that effect. Upon taking instructions Mrs Harley indicated that Mr Easton did not go so far as to ask the Court to treat as confirmed in his evidence the statements previously made in his examination. Mrs Harley indicated that the highest Mr Easton puts it is that the transcript of examination accurately records what was said.

[68] It is apparent from the transcript of Mr Easton's Companies Act examination that Mr Easton had little direct knowledge or understanding of the way accounts and payments were treated as between the entities. Mr Chan conducting most of the examination on behalf of the liquidators asked a number of detailed questions about the transactions between East Quip and Galvanising. The level of Mr Easton's understanding of the arrangements which were in place is reflected in three exchanges.

[69] At one point of the examination Mr Chan showed Mr Easton the ledger of accounts receivable and account payable between the two companies. There was then the following exchange -

> Q. When you go through those accounts receivable and accounts payable at certain times they get zeroed off and the amounts which are payable or receivable get entered into this account 7301. Does that ring a bell with you?
>
> A. No well it won't ring a bell with me because I didn't do it.
>
> Q. Yes I know, but in terms of a system.
>
> A. Course there will be a system like that.
>
> Q. So there is a system where invoices between the two companies...
>
> A. You're asking me to answer something here under oath and I don't really know detail of.

[70] A little later Mr Chan approached the matter in a slightly different way –

> Q. Let's put it another way. If the invoices payable both ways, so if East Quip owed some money to Galvanised for some invoices and Galvanising owed East Quip for some invoices, were they just set off against each other?
>
> A. I can't tell you honestly, you're asking me, I haven't researched anything, and you're asking me this is what the numbers are here. No I didn't do it so I can't say...

[71] Later in the examination Mr Chan took Mr Easton to the journal entry in the 7301 ledger on 31 March 2008 when the closing balance (an East Quip liability of $252,766.69) was transferred to Mr & Mrs Easton's shareholders' current account.[10] The examination exchange is thus –

> Q. ... And then that ledger that you've got there, all of the highlighted ones are recorded in these bank statements. But then you see that from the balance that is keeps (sic) increasing where there a debit, leave aside the credits. Generally speaking the balance increases and then you see on the 31 March 2008 it says "JNL0308YE transfer closing balance". So the balance of that drawings account is transferred out.
>
> A. So this is an East Quip? Ok. For one I don't know the actual bits, it's you saying that, what's behind it I don't know. JNL would be Juken Nikioshi Limited so it would be leasing things.
>
> Q. Are you sure it's not just journal?
>
> A. It maybe a journal.

[72] As a matter of probability, I find that Mr Easton had no detailed understanding of how transactions were being accounted for between the various entities. 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.

[73] The answers Mr Easton gave at his examination indicate not a set plan or arrangement but rather ad hoc arrangements from time to time to deal with the situation of insolvent entities.

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[10] See above at [44].

[74] There is for instance this exchange –

Q. Who would have sent this money out to Galvanising (HB) Limited?

A. It was probably something that we would have to look at our group funds and it was something that probably Priscilla did and we would of had a look at a number of bank accounts to see what funds we had available at the time to do something like that.

Q. When you say group funds what do you mean?

A. No, I didn't say group funds, I said look at what funds we would have available to do it.

Q. You did say group funds.

A. Ok alright.

Q. What do you mean by that?

A. What money we would have available.

Q. What each company within – I use the term group loosely – have? What company needed funds? Is that what you're saying?

A. Um, in some ways we did that yes.

Q. So you're saying that say Galvanising needed money and East Quip had money then East Quip would pay some money to Galvanising?

A. No it was really the other way around. Galvanising was always the funder of the money and it's a rare occasion that East Quip was able to return its funds, so my understanding is that if there is an invoice to be paid we paid that first up.

Q. Right, these payments here do not appear to be related to any invoices for services. They appear to be because they are in this part here, they appear to be a reduction of this current account, does that make sense to you?

A. Well I would imagine that is exactly what would happen.

Q. Yes, so it's a repayment. These payments out in these bank statements are payments which then end up being recorded in this ledger, they appear to be reducing the amount that's owed to Galvanising, does that make sense to you?

A. Well for that period it possibly is.

Q. Who's making that decision to say for $50,000?

A. Well I suppose back in those days from what I can remember, it would be probably, Viv [Mrs Easton]. I'd perhaps have a look at things, would talk to Dave round at the Galvanising and...

Q. Who was the manager?

A. Priscilla was doing the accounting mostly at that level, the business manager at the time was Graham Brand so he would have a little bit of involvement. Between, there would be phone calls backwards and forwards to make it work.

[75] I find that as a matter of probability Mr Easton understood in relation to a transaction such as a supply of services by Galvanising to East Quip that funds would then have to be found from somewhere within the "group" to effect a reduction of the debt owed by East Quip to Galvanising.

[76] It may be that Mrs Easton, who was involved with the office administration, might have had some more understanding of exactly how the funding decisions were made from time to time but the respondents chose to call no evidence from her. There is no basis upon which to conclude as a matter of probability that Mrs Easton understood the ad hoc funding arrangements in any more detail than Mr Easton.

Mr Bickerstaff's evidence

[77] Mr Bickerstaff also exhibited to his affidavit evidence a transcript of his examination under the Companies Act.

[78] When he was called to give evidence, he was asked whether there were two corrections that he wished to make to answers in his examination. He otherwise confirmed that the transcript was "an accurate record". But as with Mr Easton, he did not expressly verify the answers he had given, merely referring to "an accurate record".

[79] Mr Bickerstaff was initially employed by Galvanising as the Galvanising Plant Manager in 1997. He moved to a role of Finance and Legal Officer for the group of Easton companies and entities between February 2008 and May 2008. He describes that role as having involved the preparation of GST returns for the group, insurance, resolving disputes, budgeting and monthly report preparation. He states he was also involved in the preparation of draft financial statements for 2008 and 2009. I note that Mr Bickerstaff's evidence does not suggest that he was involved

directly in business transactions between the companies or in trading decisions generally.

[80] Mr Bickerstaff referred to the creation of sub-accounts on the shareholder current account section of Galvanising. He explained that as new entities were added to the group new submission-account codes were given.

[81] Mr Bickerstaff then referred to the conduct of transactions between the entities. He deposed –

> 10. Transactions between group entities would occur from time to time. These transactions occurred at the request S & V Easton and were accounted for through these Shareholder Current accounts, and their equivalents, in the respective entities.
>
> 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.
>
> 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.
>
> 13. The group used various external accountants between 1997 and 2007. BDO Spicers prepared the 2007 Financial Statements for the group.
>
> 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.
>
> 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.
>
> 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.

[82] Later in his evidence Mr Bickerstaff continued –

> 20. The Accounts Payable and Accounts Receivable ledgers provided a convenient mechanism for processing trading transactions between any entity and S & V Easton and/or one of their entities.

> 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 to do this process monthly.
>
> 22 This process was established by our accounting software specialists Divine Computing.

[83] Mr Bickerstaff deposed that the process which he described had been established by the group's accounting software specialist, Devine Computing.

[84] In cross examination, Mr Bickerstaff accepted that the following which Mr Chan put to him was a fair summary of what Mr Bickerstaff was saying namely –

> ... the transactions that the liquidators are seeking to set aside against Galvanising, Easton Property Trust and Hooked on Transport were actually between East Quip and Eastern through their shareholders' current accounts.

[85] Mr Chan then cross examined Mr Bickerstaff as to the fact that the liquidators had received creditors' claims for Galvanising, the Trust and HOT but not from the Eastons personally in relation to the current account. (It emerged in re-examination that Mr Bickerstaff had a record of having filed a claim on behalf of the Eastons personally). In the meantime Mr Chan's cross examination of Mr Bickerstaff in relation to the lodging of a proof of debt for Galvanising went thus –

> Q. So when you lodged this claim on behalf of Galvanising you're saying that this is money that's got to be paid back to Galvanising aren't you?
>
> A. When I lodged that claim I didn't want it to be a case that is I was found to be incorrect I hadn't lodged a claim so that is why that claim has been lodged in that form.
>
> Q. And you might've been incorrect because looking at the documents there's absolutely nothing in those documents to suggest that it's a payment or that they involve transactions with the Eastons, is that correct?
>
> A. There is nothing in those documents although it was always my understanding that that's in effect what they were.

[86] Mr Chan in cross examination then took Mr Bickerstaff to the various East Quip ledgers involving the other entities, such as the "general ledger transaction detail – 7301 inter-company Galv".[11]

[87] The cross examination took place against the initial additional evidence adduced from Mr Bickerstaff by Mrs Harley. Mrs Harley referred Mr Bickerstaff to passages in the course of his examination in which Mr Bickerstaff had accepted references to the monthly entries in the 7301 ledger as amounting to a "netting off" with the balance of the account being the net of two invoices, one rendered by each company to the other. The exchanges included –

> Q. And what about the monthly netting off if we can out [sic] it that way who did that?
>
> A. I believe that was done by one of the office ladies and I think actually she may have done both sides, both in Galvanising and East Quip, the netting off.
>
> Q. Yes that would make sense.
>
> A. Yes, she would have done a reconciliation process and then netted off the agreed figure.

[88] When Mrs Harley referred Mr Bickerstaff to his acceptance of the word "netted" in such exchanges, Mr Bickerstaff indicated that there was a correction to be made. He gave evidence –

> There is the word "netted" in that paragraph and that was a word being bandied about at the time – the word really should be "transferred" rather than "netted". A reconciliation was done to balance the figure and then it was transferred or the agreed figure was transferred, rather than netted.

[89] When it came to cross examination in relation to the end of month transactions on the ledger, Mr Bickerstaff preferred to refer to that exercise as involving "transferring" the receivables and payables into the ledger rather than the process involving a "netting off" of those items.

[90] Mr Bickerstaff gave evidence that the 7301 ledger was in fact an East Quip shareholder current account (and that the parallel ledgers for the trust and HOT were similarly East Quip shareholder current accounts. Although the coding of East

[11] See above at [44].

Quip's various accounts indicated that those in the 6000 range were the shareholders' current accounts, it was Mr Bickerstaff's evidence that a number of the items listed under the 7000 headed "Current Assets" (including the 7300 series and some of the 7100 series) were shareholders' current accounts. In his affidavit Mr Bickerstaff gave the explanation I have set out at [82] above, as to processing amounts payable and amounts receivable as shareholder transactions at the end of each month.

[91] Both in his affidavit and in his cross examination Mr Bickerstaff referred to the 7301 (Galvanising) 7302 (Trust) and 7304 (HOT) ledgers as being the shareholders' sub-accounts in East Quip.

[92] In his affidavit, as I have quoted,[12] Mr Bickerstaff referred to the "balances in the respective sub-accounts" being later transferred by journals at the year's end to the shareholders' current account opening balance sub-accounts ready for the start of a new financial year.

[93] Mr Chan put it to Mr Bickerstaff that the transfer of debt to the shareholders' current account took place at year's end, in this exchange –

> Q. Yes, now you said at the end of the financial year, the balances of for example this account, would be transferred to the shareholders' current account, is that right?
>
> A. No that is not correct. The balances in these accounts, in the sub-accounts of the shareholders trans – in the sub-accounts of the shareholder current account were transferred, were cleared out to zero and transferred to an opening balance account within the shareholder current account. So they're just movements within the shareholder current account between one account and another.

[94] Mr Chan cross-examined Mr Bickerstaff as to the nature of the transactions that were occurring between the business entities from time to time. One exchange was in these terms –

> Q. And what happened was that I put to you that these truly are transactions between the business entities, not with the Eastons, but at the end of the financial year what you simply did was transfer outstanding balances to the shareholders' current account?
>
> A. No we were doing these transfers regularly through the year.

[12] See above at [81].

Q. If you're right about them being subaccounts.

A. Yes, if I'm correct.

And this further exchange occurred later –

Q. And the same applies for any of these journal transfers. The decision as to where they're to be allocated could be made at any time until the, up to the point of signing off the final accounts, couldn't they?

A. You're correct that an entry could be moved or changed or at any time up to signing off the accounts.

[95] Mrs Harley re-examined Mr Bickerstaff on the same point. This exchange occurred –

Q. Now Mr Chan put to you that at any point in time accounting treatment can be changed – I think that's a fair summation – until the financial statements are signed off by the director?

A. That is correct but, I mean, I am circulating draft accounts and that type of thing all the time so the treatment that I'm taking is open, fully open to view but you are correct. I could reverse any treatment, it could be treated differently at any time prior to the signing off of the accounts.

Q. And then when you would get to the financial statements, the signed financial statements, that the concrete isn't it?

A. Yes, that is correct, yeah.

[96] I wished to clarify precisely what happened at the end of the end of each year and this exchange occurred between the Bench and Mr Bickerstaff –

Q. Mr Chan asked you some questions about the point at which, if I can put it this way, the re-accounting occurred and I think Mrs Harley used the word, "matters became concrete", when the accounts were finalised. The directors, sorry the Easton family were ultimately the ones who were going to give the yes or no to how this would occur at the end of the year, was that your understanding of it?

A. They would formalise what had happened at the end of the year. I'm not sure that their accounting knowledge was such that they would have questioned the figures that had been prepared by myself and then issued by the external chartered accountants. But their signatures would effectively formalise the acceptance of that, yeah.

Mr Hussey's evidence

[97] Mr Hussey, called by the respondents as an expert in relation to financial and accounting matters, gave the opinion that the payments which the liquidators seeks to recover as payments through the 7301/7302 and 7304 ledgers were payments made by East Quip on behalf of East Quip's shareholders, Mr & Mrs Easton, and were appropriately charged to their shareholder current account.

[98] Mr Hussey states that his comments rely upon his understanding as to the Easton Group treatment of inter-entity transactions in the period leading up to and during the specified period.

[99] Mr Hussey referred to "re-arrangements" which were effected by journal entries through the 2006 and 2007 period. He described these re-arrangements as being – "formalised by the adoption of the formal financial statements for each of the entities".

[100] Mr Hussey then explains more fully the basis of the "understanding" which guides his opinions. He states:[13]

> I understand from Mr Bickerstaff that, after the adoption of the 2007 financial statements for the Easton entities, it was decided that all inter-entity transactions would be transaction through the Easton shareholder current accounts as opposed to directly between the entities. That said, I am aware that invoicing was directed directly to the recipient of goods and services provided. Rather, the intention was that the settlement of those invoices, and any general transfers of funds, would be undertaken via the Easton current accounts.
>
> By way of example, funds provided by [Galvanising] to [East Quip] would be charged by [Galvanising] to its Easton current account. From [East Quip's] perspective, funds, received from [Galvanising] would be accounted through its Easton shareholder current account.
>
> As regards [Galvanising], Mr Bickerstaff explains that [Galvanising's] ledgers included a series of submission-accounts which formed part of the shareholder current account.

[13] Mr Hussey's affidavit at [37] – [39].

Discussion

[101] The Court must first focus on the nature of the transactions at the time they were entered into and how they were immediately dealt with.

[102] First, the Eastons personally were not involved in any of the relevant transactions. The transactions were entered into contractually between the entities who provided goods and services to each other. Invoices were correctly issued. The party providing the goods and services was the person entitled to payment. Cash payments were made between East Quip's bank account and the bank accounts of Galvanising, the Trust and HOT. The Eastons' bank account was not involved. The respondents do not suggest that there was any general arrangement, let alone a binding arrangement, in place by which Galvanising, the Trust or HOT were receiving payments on behalf of the Eastons.

[103] Secondly, the respondents assert that the inter-company accounts (7301, 7302, and 7304) which are identified within East Quip's accounting set up as "current assets" were truly in the nature of shareholders' current accounts (alongside those in East Quip's 6000 series).

[104] There is no contemporaneous documentary evidence to indicate that those involved were committed to treating the inter-company (7301,7302 and 7304) accounts, in the year end accounting, as involving liabilities which the Eastons personally would accept. Although Mrs Harley opened upon the basis that there was already "precedent and agreement" as between East Quip, the Eastons and the other three entities that inter-entity debts would be settled by the Eastons, there is no evidence of pre-existing or contemporaneous agreement. The evidence at the hearing was to the contrary. Mr Bickerstaff's evidence clearly recognised that the exercises he was involved in were essentially account drafting exercises, with the ultimate control lying at year's end with the Eastons. 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 character of the payments that were made at the time in relation to those transactions.

[105] Mr Hussey's opinion is expressly predicated upon his understanding of the nature of the transactions from what Mr Bickerstaff has said. To the extent that Mr Bickerstaff invited the Court to conclude that Galvanising, the Trust and HOT were not the persons truly receiving the payments, I reject Mr Bickerstaff's evidence for the reasons stated.

[106] Mr Hussey referred to the various accounting entries and re-arrangements as having been "formalised by the adoption of the formal financial statements for each of the entities". But on the evidence that is clearly a mis-description of what occurred. "Formalisation" implies the existence of something which had previously been committed to albeit informally. Mr Bickerstaff's evidence establishes that there was no informal commitment. There was nothing approaching a binding or estopping commitment by the Eastons to accept further liability through their shareholders' current account at least until their year end decision to do so. Up to that point they were free to leave the individual entities with the financial consequences of the various contracts those entities transacted in the course of the year.

[107] I find for the purposes of ss 292 and 294 Companies Act the trustees and HOT were the other parties to relevant transactions.

The enabling of greater receipt than in a liquidation

[108] It is for the liquidators to establish under s 292(2)(b) that the various payments or set-offs enabled Galvanising, the trustees or HOT (as the case may be) to receive more towards the satisfaction of the debt owed by East Quip than they would have received or would have been likely to receive in East Quip's liquidation.

[109] For the liquidators, Mr Chan submitted that this ingredient of the claim was clearly established. The creditors' claims as received by the liquidators initially amounted to $1,245,483.32. That was before the Commissioner of Inland Revenue

increased her claim to add a further $176,114.26 to the total for creditors. A significant portion of the Commissioner's claims (over $200,000.00) is preferential.

[110] The available assets at 10 January 2013 were $68,888.00 and had reduced to $35,064.00 by 10 July 2013. Mr Pattison deposes to there being no other recoverable assets.

[111] Mr Chan submits that it is clear that in the liquidation the respondents will receive nothing. Accordingly anything received by way of earlier payment from East Quip is more than would have been received in the liquidation.

[112] Mrs Harley did not make submissions in closing on this point.

[113] I find that each of the respondents received through the payments or set-offs received more than they would have received in the liquidation.

Transactions before 1 November 2007 – the ordinary course of business?

[114] The respondents assert that the transactions which took place before 1 November 2007 were conducted in the ordinary course of business. They invoke s 292 of the Act as it stood before it was amended by s 27 Companies Amendment Act 2006. Under the amending legislation, the test as applied under s 292(2) before 1 November 2007 continues to apply to transactions which occurred before 1 November 2007.[14]

[115] Before 1 November 2007, s 292(2) provided:

> 292 Transactions having preferential effect
>
> ...
>
> (2) A transaction by a company is voidable on the application of the liquidator if the transaction –
>
> (a) was made –
>
> (i) at a time when the company was unable to pay its due debts;

[14] *Shephard v Kilbirnie Plymouth Investments Ltd* HC Wellington CIV-2009-485-2397, 18 February 2011 per Mallon J at [54] – [55].

and

(ii) within the specified period; and

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

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

(3) …

(4) For the purposes of this section, in determining whether a transaction took place in the ordinary course of business, no account is to be taken of any intent or purpose on the part of a company—

(a) To enable another person to receive more towards satisfaction of a debt than the person would otherwise receive or be likely to receive in the liquidation; or

…

unless that other person knew that that was the intent or purpose of the company.

…

[116] The correct approach to the former s 292(2) was identified by the Court of Appeal in *Stapley v Fletcher Concrete and Infrastructure Ltd,*[15] in which Randerson J, giving the reasons of the Court, stated:[16]

> [6] There is no challenge to the legal principles adopted by the Judge. The Privy Council in *Countrywide Banking Corp Ltd v Dean* [1998] 1 NZLR 385 at 394 described the approach to be taken to the issue of the ordinary course of business:
>
> > Plainly the transaction must be examined in the actual setting in which it took place. That defines the circumstances in which it is to be determined whether it was in the ordinary course of business. The determination then is to be made objectively by reference to the standard of what amounts to the ordinary course of business. As was said by Fisher J in the *Modern Terrazzo Ltd* case [1998] 1 NZLR 160], the transaction must be such that it would be viewed by an objective observer as having taken place in the ordinary course of business. While there is to be reference to business practices in the commercial world in general, the focus must still be the ordinary operational activities of businesses as going concerns, not responses to abnormal financial difficulties. Their Lordships respectfully agree with the Judge's conclusion by reference to the policy of the section at p 175:

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15 *Stapley v Fletcher Concrete and Infrastructure Ltd* [2008] NZCA 442.

16 At [6] – [8].

> "Whether a payment should be regarded as commercially routine at a day-to-day trading and operating level will turn at least in part upon a comparison with the practices of the commercial community in general. But equally, the way in which the particular company has acted in the past, and its dealings with the particular creditor, would seem pertinent. That the payment was simply a repetition of past patterns of behaviour would make it more difficult to argue that it represented special assistance to an insider or the result of special enforcement measures or a situation in which the subject creditor ought to have investigated before extending credit. So at a policy level there is something to be said for the view that relevant considerations should extend to the prior practices of the particular company."

[7] Since the *Countrywide* decision, this Court has reaffirmed that the question of whether a transaction takes place in the ordinary course of business is one of objective fact involving a consideration not only of the commercial relationship between the parties but also of general business practices. The ultimate question as noted in *Waikato Freight & Storage (1998) Ltd v Meltzer* [2001] 2 NZLR 541 is:

> Was it [the transaction] in its objective commercial setting an ordinary or an out of the ordinary transaction for the parties to have entered into?

[8] And as stated subsequently by this Court in *Carter Holt Harvey Ltd v Fatupaito* (2003) 9 NZCRC 263, 285:

> [22] The business context of course includes the particular contractual context. It is therefore necessary to take account of the circumstances in which the company became obliged to make the payment. It is necessary to ask why the payment was made when it was: can it be described simply as a routine payment which, though made late, was in fulfilment of the company's obligation rather than a response to its current situation of insolvency? This question is to be answered without regard to any subjective intention or purpose of the company to prefer the creditor unless that intention or purpose was known to the creditor: s 292(4) …

[117] For the liquidators, Mr Chan focuses on the knowledge of the guiding minds of the four respondents. Mr Chan submitted that the approach adopted by the Court of Appeal in *Graham v Pharmacy Wholesalers (Wellington) Ltd*[17] was applicable here. In *Graham's* case, the liquidator sought orders setting aside payments made to Pharmacy Wholesalers. The first issue on appeal was whether the payments had been made in the ordinary course of business. William Young J, delivering the judgment of the Court, introduced the relevant discussion thus:[18]

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17 *Graham v Pharmacy Wholesalers (Wellington) Ltd* CA37/04, 17 December 2004.

18 At [63].

When PWL received the payments, was it aware that it was being treated

preferentially?

> [63] If this question is answered in the affirmative, it is decisive of the appeal. As a matter of common sense, and allowing for s 292(4), payments made with an intent to prefer PWL and which PWL knew were made with that intent could not be seen as being in the ordinary course of business.

[118] Then, coming to the knowledge of Pharmacy Wholesalers, the Court concluded:[19]

> [75] We think that PWL can be regarded as being aware that it was being treated preferentially when it received the payments if it knew that:
>
> (a) Shannon Pharmacy was insolvent at the time of the payments;
>
> (b) It was not meeting its obligations to CCL; and
>
> (c) If Shannon Pharmacy was liquidated, the payments would diminish the pool of funds available for other creditors including CCL.
>
> On our assessment of the probabilities, it is practically inevitable that PWL had knowledge of the three points just referred to.
>
> [76] We therefore conclude that when PWL received the payments in question, it knew that it was being treated preferentially.

[119] The Court then went on to consider briefly whether the payments made to Pharmacy Wholesalers were made in the ordinary course of business. It introduced the discussion by observing that the finding made in relation to Pharmacy Wholesalers' knowledge that it was being treated preferentially meant that the question as to whether the payments were made in ordinary course of business had to be answered in favour of the liquidator. The Court then went on to observe features of the payments which had to be viewed as part of the wind-down of the company subsequently placed in liquidation.[20]

[120] Mrs Harley, for the respondents, submitted that Mr Chan's reliance upon *Graham's* case and, in particular, the Court of Appeal's discussion as to the

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[19] At [75] – [76].
[20] At [77] – [78].

knowledge of the respondent in that case, focussed the consideration of the "ordinary course of business" incorrectly on knowledge rather than the transactional aspects of the payments. She submitted that the transactional elements of payments discussed by the Court of Appeal at [77] – [78] of the judgment should be the focus of any "ordinary course of business" enquiry including in this case.

[121] I disagree with Mrs Harley's analysis of the judgment in *Graham's* case. The Court of Appeal in that case came first to the discussion of the respondent's knowledge precisely because it was a dispositive issue. If the respondent entered into a transaction in which it was being preferred and the respondent knew of the relevant features, any outward aspects of the transaction which might tend in favour of a conclusion that the transaction was in the ordinary course of business count for nothing.

Discussion

[122] I approach the issue of the respondent's knowledge under the three headings adopted by the Court of Appeal in *Graham's* case –

(a) Knowledge that the paying company was insolvent:

The key persons for the purposes of knowledge are Mr and Mrs Easton. Mrs Easton chose not to give evidence. Mr Easton gave very brief evidence. Against a background in which East Quip's financial statements showed repeated trading deficits and increasing net liabilities, Mr Easton did not assert a belief that East Quip was solvent at any point. To the contrary, the one relevant statement in his affidavit was –

> It has always been the case that East Quip Ltd (in Liquidation) had financial support from other companies and the entities within the wider Easton Group.

The affidavit evidence points towards a realistic assessment that without financial support from the other entities East Quip would not have survived.

That conclusion as to Mr Easton's state of knowledge is supported by the general tenor and some of the specific statements made by him in his Companies Act examination. I refer, for example, to one of Mr Easton's answers in the exchange I have recorded above:[21]

> Galvanising was always the funder of the money and it's a rare occasion that East Quip was able to return its funds, so my understanding is that if there is an invoice to be paid, we paid that first up.

Hence my finding, at [75] above that as a matter of probability Mr Easton understood in relation to a transaction such as the supply of services by Galvanising to East Quip that funds would have to be found from somewhere within the "group" to effect a reduction of the debt owed by East Quip to Galvanising.

I find that the Eastons knew that East Quip was insolvent throughout the time of the impugned transactions.

(b) The company was not meeting its obligations to other creditors:

The position of the Inland Revenue Department as creditor is most tellingly against the respondents. On the evidence of Ms Williams, Mr and Mrs Easton were both involved in the discussions and negotiations with the Department as to East Quip's arrears of taxation payments. It is inescapable that the respondents were aware that East Quip was not meeting its obligations to at least this other major creditor.

(c) If the company was liquidated, the payment would diminish the pool of funds available for other creditors:

It follows inexorably that as East Quip made payments to its related entities, the pool available to East Quip's creditors when it went into liquidation was diminished proportionately. This consequence was so

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[21] Above at [74].

> plain that I find Mr and Mrs Easton must have been aware of it. In the passage I have quoted from, Mr Easton's evidence as to East Quip's support by its related entities,[22] Mr Easton immediately went on to comment that East Quip was in negotiation with the Commissioner of Inland Revenue in respect of tax liabilities. The impact of all payments out of East Quip during that period of negotiation must have been plain to Mr and Mrs Easton.

[123] Accordingly, I am satisfied on the balance of probabilities that Mr and Mrs Easton as the controlling minds of the various respondents knew that East Quip was insolvent at the time of all of the transactions, that it was not meeting its obligations to at least its unrelated creditor, Inland Revenue Department, and that if East Quip were liquidated, the payments would diminish the pool of funds available for other creditors. The approach of the Court of Appeal in *Graham v Pharmacy Wholesalers (Wellington) Ltd* falls to be adopted – as was the situation in *Graham's* case, it becomes unnecessary to examine whether the payments were by outward appearances made in the ordinary course of business.

[124] The protection available to "ordinary course of business" transactions occurring for 1 November 2007 is not available to the respondents in this case.

A readvancing of payments made to the respondents?

The alternative argument as to readvancing

[125] Galvanising, HOT and the Trust took the primary position in relation to the transactions from which they appeared to benefit that the transactions were in fact with the Eastons personally on a current account. I have found against Galvanising, the Trust and HOT in relation to that argument.

[126] In the alternative, Galvanising argues that (if the Court finds as I have that the transactions were not with the Eastons personally) then Galvanising has already, after receiving such payments, advanced additional funds which repaid all but

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22 See above at [74].

$95,000 of the $237,288 claimed by the liquidators on account of payments by East Quip.

The submissions

[127] Mrs Harley, apart from stating the alternative proposition as I have stated it above, did not develop further argument in relation to it in her written opening or closing submissions. I infer that Mrs Harley was content to rely upon an analysis of Galvanising "repayments" in Mr Hussey's evidence.

Mr Hussey's evidence as to Galvanising "repayment"

[128] Mr Hussey's evidence on the "repayments" covers the period of the transactions between East Quip and Galvanising impugned by the liquidators.

[129] I now set out Mr Hussey's introduction of the subject and his first example:

> However, I now explain why, even if account 7100 and other associated transactions are not found by the Court to be part of the Easton shareholder current account, the transactions that have occurred are such that most of the amounts claimed by the Applicants have already been repaid. To the extent that such have already been repaid, I consider the Applicant should recognise the repayments and not seek further repayments. I now explain my reasoning.
>
> The $50,000 payment made by EQL to GHBL on 2 July 2007 reduced the sum shown to be owed to GHBL (on Account 7100) from the $80,000 to $30,000. However, the next day, being 3 July 2007, EQL was paid $50,000. This amount was posted to the credit of account 7100, and in effect reversed the $50,000 payment that the Applicants seek to recover from GHBL. I consider it wrong in principle to seek repayment of something that has already been paid.

[130] In the following paragraphs, Mr Hussey goes on to identify payments made by Galvanising to East Quip in the period after each of East Quip's payments. In some cases Mr Hussey refers to "further examples of subsequent transactions more than repaying the transaction that the applicants seek repayment from GHBL [Galvanising]". In other cases, Mr Hussey identifies situations where he considers that part of the East Quip payment has been repaid and only part remains outstanding.

[131] Having gone through all the entries, Mr Hussey concludes –

> On the basis of my analysis, I consider that all but $95,000 of the amounts that the Applicants seek to void and have repaid, have already been repaid. That will be the position irrespective of whether the transactions are deemed transactions for the Easton account or for the GHBL account.

Submissions for the liquidators

[132] Mr Chan's primary submission was that there is within Mr Hussey's evidence an assumption which is not supported by evidence from the respondents. The assumption is that Galvanising was "repaying" amounts reflected in transactions recorded a day or more earlier. As Mr Chan observed, Mr Hussey cannot give that evidence of the "repayment" because he was not involved in the transactions.

[133] Secondly, Mr Chan notes that the concept of "repayment" by Galvanising to East Quip does not logically arise because Galvanising was never indebted to East Quip through the current account. East Quip was indebted to Galvanising throughout. Mr Chan observed, correctly in my view, that what occurred was that East Quip occasionally made payments in reduction of indebtedness but then borrowed further funds.

[134] In her submissions in closing, Mrs Harley did not tackle Mr Chan's analysis of the "repayment" argument.

Discussion

[135] The focus of the Court under s 292 of the Act is on each insolvent transaction at the time it is entered into and what it enables another person to receive at that time. I do not rule out the possibility that there may be occasions where the evidence so strongly establishes a connection between payments on different days that the Court can properly approach the two as part of a related transaction for the purposes of s 292 but this is not such a case because the respondents have given no evidence to make the factual link between the various payments which Mr Hussey has identified in his analysis.

[136] Given the evidence, or more correctly the lack of evidence from the respondents on the point, the subsequent "repayments" made by Galvanising do not affect the characterisation of the East Quip payments as "insolvent transactions" under s 292. The liquidators' powers to set aside transactions under s 294 came into play, as did the Court's powers to make orders under s 295 of the Act.

A running account – s 292(4B) Companies Act

The respondents' assertion of a running account

[137] In their notice of opposition, the respondents invoked s 292(4B) of the Act. They asserted:

> The Eastons' EQL current account should be considered a running account pursuant to s 292(4B)(a) of the Companies Act 1993 meaning that all transactions should be viewed as a single transaction. On that basis, the Eastons will only have benefited from the transaction in question if their current account balance decreased in value. Rather, it increased in value, meaning that, viewed as a single transaction, there is nothing to be voided;

The statutory provisions

[138] Section 292(4B) provides:

> (4B) Where—
>
> (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
>
> (b) in the course of the relationship, the level of the company's net indebtedness to the creditor is increased and reduced from time to time as the result of a series of transactions forming part of the relationship;
>
> then—
>
> (c) subsection (1) applies in relation to all the transactions forming part of the relationship as if they together constituted a single transaction; and
>
> (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.]

[139] The origin and rationale of s 292(4B) is concisely explained by the authors of *Brookers Insolvency Law & Practice* when they state:[23]

> **CA 292.06 Continuing business relationship**
>
> The most significant change to s 292 made by the Companies Amendment Act 2006 is the inclusion of s 292(4B), by which what is generally called the "running account" exception is expressly adopted as part of the New Zealand law on unfair (or voidable) preference. The subsection itself is a direct copy of s 588FA Corporations Act 2001 (Aust).
>
> The Government's decision to introduce the "continuing relationship" or "running account" exception was based on a perception that this new test had worked well in Australia, appeared to be more certain than the "ordinary course of business" test, and would encourage creditors to continue to deliver supplies.

[140] Where the liquidator has established the elements of an insolvent transaction under s 292 of the Act, and a respondent is asking Court to exercise its powers under the ameliorating provisions of s 292(4B) of the Act, the onus is on the respondent. There is an evidential burden on the creditor (in this case the respondents) to provide the necessary evidence.[24]

[141] In *Rea v Russell* the Court of Appeal analysed s 292(4B) to require that the multiple transactions involved must arise:[25]

(a) For commercial purposes;

(b) As an integral part of a continuing business relationship;

(c) With that relationship being between the company and the creditor of the company;

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23 *Brookers Insolvency Law & Practice* (online looseleaf ed) at [CA292.06].
24 At [55].
25 *Rea v Russell*, above n 7, at [24].

(d) And with there being increases and reductions from time to time in the company's net indebtedness to the creditor in the course of the relationship; and

(e) Those transactions being a series of transactions forming part of the relationship.

[142] The Court cited the example given by the [High Court of Australia] in *Richardson v Commercial Banking Co of Sydney Ltd.*[26] The example given was of a grocer and a debtor with the debtor paying off something on account which induces the grocer to provide further groceries. The Court of Appeal said of that example:[27]

> In such a situation it is fair to see the payments as part of a larger commercial relationship, not designed to give a party preference but rather as a convenient means of continuing the business arrangement.

[143] In considering the payments made by the company in *Rea v Russell* the Court of Appeal noted:[28]

> They have not been shown to have been made to induce further credit.

The respondent's submissions

[144] Mrs Harley, both in her opening submissions and in her closing submissions chose not to take the Court to any of the detail of the evidence.

[145] Instead, Mrs Harley sought to capture the essence of the respondents' case in one particular paragraph of her submissions which I set out verbatim:

> 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

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26 *Richardson v Commercial Banking Co of Sydney Ltd* (1952) 85 CLR 110 (HCA).

27 *Rea v Russell*, above n 7, at [58].

28 At [60]. See also *Air Services Australia v Ferrier* [1995-1996] 185 CLR 483 (HCA) at 501 – 502, recognising that amelioration under the Australian equivalent of s 292(4B) arises where "the purpose of the payment is to induce the creditor to provide further goods or services as well as to discharge an existing indebtedness".

> by the company to its suppliers should not be viewed in isolation and attacked as preferences.

[146] Mrs Harley relied on passages in the judgment of the Court of Appeal in *Rea v Russell* to which I have already made reference.[29]

The respondents' evidence

[147] Mr Easton, in his brief affidavit did not refer to the concept of a running account or to matters suggesting a running account. Nor, as I read the transcript of his Companies Act examination, did Mr Easton refer to the concept at that examination.

[148] In his evidence, Mr Bickerstaff did not refer to the concept of a running account. Mr Bickerstaff did not identify from his knowledge of the relevant period any discussions or correspondence which would have indicated that East Quip was paying off its accounts in order to induce other parties to continue supplies of goods or services.

[149] In short, the only two witnesses called by the respondents to give evidence of the transactions themselves did not seek to address the facts pertaining specifically to the running account issue.

[150] To the extent that a witness gave evidence for the respondents on the subject, it was Mr Hussey.

[151] Mr Hussey identified the extent to which the financial records of the various entities showed that the Eastons had built up a very substantial credit in their shareholders' current account. Mr Hussey set out the details of the financial accounting and then concluded in this way:

> In summary then, a decision had been taken that the Eastons should become the group "banker".
>
> That the Eastons' (sic) became the group "banker" is also evidenced in the financial statements prepared by the other Easton entities …

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[29] See above at [141] to [143].

and later, Mr Hussey having referred to the obvious benefit to the Eastons (or "so they would have thought") of their continuing to financially support their various entities added –

> On this basis, and bearing in mind the significant returns that [Galvanising] already owed to the Eastons (as reported in the March 2006 financial statements), in my opinion, it was sensible for the group affairs to be arranged (including future transactions) such that the Eastons would become the overall group "banker". Adopting this policy also overcame the issue as to whether advancing funds in creditor was in the best interests of the company doing so.
>
> …
>
> Further, it is 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. Also, it is common for one entity in a group act (sic) as the "banker".

[152] These passages represent the evidence of Mr Hussey which comes closest to the "running account" issue. Yet the focus in Mr Hussey's evidence is upon the wisdom of the way in which the Eastons would inject their funds into the group rather than on the motivation which East Quip as debtor had for paying off its debts within the group. Of course, in relation to actual motivation, Mr Hussey was not a person who could give that evidence. At most, he might have assisted the Court by taking the Court to documents which from an accounting perspective reinforce a perception that the directors of East Quip, when repaying debt for instance to Galvanising were acting in the same way as the debtor exemplified in *Richardson v Commercial Banking Co Sydney Ltd,* namely as an action intended to induce the grocer to provide further supplies of groceries.

[153] Mr Chan in the circumstances correctly submitted that there was no evidence from the respondents to the effect that the payments by East Quip were made for the purpose of inducing further credit. As Mr Chan observed, there was on the evidence no need for East Quip to do something to induce further credit. East Quip and the respondents were all part of the one group. It is clear from the respondents' evidence that funds were moved through the group as thought necessary for the overall benefit of the group and the ultimate owners, Mr and Mrs Easton.

[154] I accept Mr Chan's submission that it is improbable on the evidence adduced that the respondents would ever have withheld supplies to East Quip. Appropriately, Mr Chan cross-examined Mr Bickerstaff on the issue of freedom to contract. The following exchange occurred:

> Q. And so during this espied [sic – I infer this should have read "period"] that we're talking about from May 2007 through to the point of liquidation, if East Quip needed Galvanising work done it would get that done by Galvanising HB Ltd, correct?
>
> A. That's correct, yes.
>
> Q. It wouldn't go off to some other galvaniser around the country to get that work done?
>
> A. No, I mean it could have been free to but it was always instructed by its director to use Galvanising Hawke's Bay.
>
> Q. Which makes sense because it keeps the business within the roof doesn't it?
>
> A. Of course, yes.
>
> Q. And you wouldn't want East Quip to be paying money to a competitor at the expense of Galvanising, correct?
>
> A. That is correct yes.
>
> Q. And the same goes with the other members of the group, Easton Property Trust and Hooked on Transport. If there was something that could be supplied within the group then East Quip would get it from within the group, correct?
>
> A. Yes that is correct.
>
> Q. And even if East Quip couldn't pay for it, because it perhaps didn't have the case which appears to be often, it didn't really matter because, according to you, it would be actively part of Eastons' current account?
>
> A. That's right. It would get transferred to the current account, so effectively paid that way.

[155] The evidence establishes as a matter of probability that the Eastons were always going to give directions to keep business within the group regardless of payment, precisely because the Eastons were prepared to ultimately incur the loss if a particular entity could not pay. The payments were not made to induce further credit. No such inducement was needed.

Outcome – s 292(4B)

[156] The respondents fall far short of discharging the onus upon them to establish that any of the impugned transactions was, in terms of s 292(4B) of the Act, an integral part of the continuing business relationship between the relevant entities for commercial purposes.

[157] Accordingly, the respondents are not entitled under s 292(4B) to have groups of transactions treated as though they constituted a single transaction.

Funds advanced to Mr and Mrs Easton personally

The background

[158] From 29 May 2007 to 29 June 2009 the Eastons caused regular payments of $4,000 per month to be advanced by East Quip and credited in their current account. There were some minor differences of monthly payments on a few occasions. The payments made totalled $109,282.

[159] The payments occurred through electronic transfer of funds from East Quip's bank account to the bank account of Mr and Mrs Easton. Each was treated as a repayment of the Eastons' shareholders current account.

[160] The accounting for the payments was dealt with through a ledger entitled "6040 Drawings".

The liquidators' case

[161] The liquidators seek repayment of the "drawings" upon the basis that they constituted quite simply payments by East Quip to the Eastons and amounted to repayment of the debt owed by East Quip to the Eastons on their shareholders' current account.

[162] Mr Chan, for the liquidators, noted that no evidence had been adduced by the Eastons to give any explanation for the payments other than as repayments of debt.

The respondents' case

[163] In opening for the respondents, Mrs Harley indicated that the evidence would be given that the Eastons had personally paid tax on the so-called "drawings" and that the payments were therefore not as repayments of shareholders' current account but rather as wages.

Discussion

[164] In fact no additional evidence was given as to income tax or other forms of tax being paid on the "drawings". Mrs Harley did not return to this issue in her closing submissions.

[165] I have carefully considered such evidence as the respondents gave in relation to the $4,000 payments.

[166] Mr Easton gave no evidence on the subject.

[167] Mr Bickerstaff covered the subject in two paragraphs which read:

> 29. As had been the situation for many years Stuart and Vivienne Easton worked fulltime in the management and administration of the group. No regular salary was extracted from the group to cover day to day or living expenses. Remuneration to cover these costs was done so in the form of drawings. A regular amount of $4,000 a month was paid from East Quip Limited to S & V Easton.
>
> 30. These drawings were a small portion of the transactions that passed through the S & V Current Accounts.

[168] In his evidence, Mr Hussey does not refer to the linking suggested by Mr Bickerstaff between living expenses and the $4,000 payments. Rather, he (Mr Hussey) states in relation to the $4,000 payments: "The issue is that all transactions should be viewed as a single transaction." For the reasons I have already given, the running account defence is not an answer for the respondents.

[169] That leaves Mr Bickerstaff's undeveloped suggestion that the $4,000 payments should in some way be treated as having been paid as something in the nature of a salary or a wage.

[170] There is no evidence to justify the Court reaching such a conclusion. The transactions appear to be repayments on the current account. There is no evidence to suggest they were treated as contractual payments on account of employment services from month to month.

Outcome

[171] The $4,000 "drawings" payments received by these particular respondents are properly characterised and fall to be treated in the same way as other payments made by East Quip during the specified period to the other respondents.

East Quip's payments and other transactions – a view standing back

~~[172]~~ Having reached the conclusions which I have, I find it useful to stand back and consider more broadly what was occurring between East Quip and its creditors during the specified period.

~~[173]~~ What those involved with the Easton Group thought was going on is arguably best summarised by Mr Bickerstaff in his affidavit where he stated –

> In comments made to me my Stuart Easton he always believed that the continued support of the IRD and the shareholders that East Quip would be able to trade through its difficulties and return to profitability.
>
> I was aware that discussion (sic) were being held with the IRD for many months prior to liquidation regarding repayment options.
>
> I was also aware of the surprise Stuart Easton expressed when the IRD notified their intention to proceed with their application for liquidation.

[174] The steady financial decline of East Quip from its incorporation to its liquidation meant that on liquidation East Quip had substantial indebtedness. Mr Bickerstaff's evidence confirms that those most intimately involved with the affairs of the various entities in the Easton Group, including Mr Easton himself, fully appreciated that the Commissioner of Inland Revenue was going without payment so that the entities within the Group might yet trade out of their insolvency.

[175] At no point did the directors obtain the agreement of creditors to such a course. As the people involved at both ends of most of the transactions, Mr and Mrs Easton and Mr Bickerstaff must have fully appreciated that they were simply taking financial chances at the risk of creditors, including the Commissioner and themselves. As I have found, when each transaction is examined as an individual transaction (as it must be), the recipients of payment or credit under each transaction were enabled to receive more towards satisfaction of the debt owed by East Quip than the recipients would have been likely to receive in East Quip's liquidation. That is because the level of preferential debt owed to the Commissioner, whose debt was continuing to increase through East Quip's defaults, was mounting.

[176] In this way, the various Easton interests through the East Quip transactions preferred themselves as creditors to the creditor (the Commissioner) who was entitled to be treated preferentially.

[177] When initially one views the level of funds which Mr and Mrs Easton injected into East Quip, and have now lost, a sympathy for their position arises. But it was the Eastons and their financial and accounting advisers who drove the decisions to have East Quip trade on in a state of insolvency. During the specified period, they continued to make the payments to their related entities while building up additional taxation debts to the Commissioner.

[178] In these circumstances, orders that the respondents pay to East Quip the sums involved in the insolvent transactions are appropriately to be seen as the direct consequence of the respondents' own decision-making against the background of East Quip's insolvency.

Costs

[179] Costs must follow the event. There will accordingly be an order that the respondents jointly and severally pay the costs of the application.

[180] The amount to be paid by way of costs and disbursements is something which counsel may be able to agree on but failing agreement there will be directions as to submissions, following which I will give a costs judgment on the papers.

Orders

[181] I order:

1. The first respondent, Galvanising (H.B.) Limited, shall pay to the applicants:

   (a) in relation to "loan repayments" $237,288.00;

   (b) in relation to "set-offs" $469,255.63.

2. The second respondents, Stuart David Easton and Robert Elvidge Easton as trustees of Easton Property Trust, shall pay to the applicants:

   (a) in relation to invoice 30028 $13,964.34;

   (b) in relation to "set-offs" $27,169.01;

   (c) in relation to "cash payments" $107,273.87.

3. The third respondent, Hooked on Transport Limited, shall pay to the applicants:

   (a) in relation to a loan repayment $3,500.00;

   (b) in relation to "set-offs" $8,950.34;

   (c) in relation to "cash payments" $2,942.28.

4. The fourth respondents, Stuart David Easton and Vivienne Jane Easton, shall pay to the applicants:

   (a) in relation to cash repayments of current account $109,282.00.

5. The respondents are to pay interest to the applicants in respect of the sums they are respectively ordered to pay in orders 1, 2, 3 and 4 above from 10 July 2009 to today at the rates prescribed from time to time under s 87 Judicature Act 1908.

6. The transactions of East Quip represented by each of the payments which are the subject of orders 1, 2, 3 and 4 above are set aside.

7. The respondents are jointly and severally to pay the costs of the application together with disbursements. In the event the parties are unable to agree on the amount of costs, the applicants are to file submissions (no more than four pages) to be followed within five working days by the respondents (no more than four pages), whereupon the Court will deal with the quantum of costs on the papers;

8. To the extent this judgment does not deal with the applicants' alternative application relating to the "debt claims",[30] I reserve leave to the applicants to have that aspect of the application brought on for further hearing in the event that a Court finds that the respondents or any of them is not a debtor in relation to the "debt claims" but that the Eastons were truly the parties to the transactions involved with the "debt claims".

_____

Associate Judge Osborne

Solicitors:
Carlile Dowling, Napier
Lawson Robinson, Napier

[30] Above at [8](d).