IN THE COURT OF APPEAL OF NEW ZEALAND

CA291/2015
[2016] NZCA 189

BETWEEN	DAVID ROSS PETTERSON AS LIQUIDATOR OF POLYETHYLENE PIPE SYSTEMS LIMITED (IN LIQUIDATION) Appellant
AND	DAVID CHARLES BROWNE First Respondent
	DAVID BROWNE CONTRACTORS LIMITED AND DAVID BROWNE MECHANICAL LIMITED Second Respondents

Hearing:	29 September 2015
Court:	Winkelmann, Dobson, Gilbert JJ
Counsel:	B D Gustafson and D Duffield for Appellant D J C Russ for Respondents
Judgment:	10 May 2016 at 11.30 am

JUDGMENT OF THE COURT

A The appeal is allowed in part.

B We make an order pursuant to s 299(1) of the Companies Act 1993 setting aside as against the liquidator the general security agreement made between Polyethylene Pipe Systems Ltd (PPS) and Mr Browne dated 28 July 2008.

C **We make an order pursuant to s 299(3) of the Companies Act requiring Mr Browne to pay PPS the sum of $201,316. Mr Browne is entitled to claim as a creditor in the liquidation of PPS for the amount paid by him pursuant to this order.**

D **We make an order pursuant to s 295(a) of the Act requiring David Browne Contractors Ltd (DBC) and David Browne Mechanical Ltd (DBM) to pay PPS the sums of $565,303 and $347,634 respectively. We make an order pursuant to s 295(g) of the Companies Act that DBC and DBM are entitled to claim as creditors in the liquidation of PPS to the extent of the amounts refunded by each of them as a result of this order.**

E **The order for costs in the High Court is quashed. The respondents must pay the appellant costs in the High Court, to be fixed in that Court.**

F **The respondents must pay the appellant costs in this Court for a standard appeal on a band A basis, together with usual disbursements.**

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REASONS OF THE COURT

(Given by Gilbert J)

Introduction

[1] The first respondent, David Browne, is a director and shareholder of Polyethylene Pipe Systems Ltd (PPS). He is also a director and shareholder of the

second respondents, David Browne Contractors Ltd (DBC) and David Browne Mechanical Ltd (DBM). After a significant claim against PPS was notified by McConnell Dowell Constructors Ltd (McConnell Dowell), Mr Browne arranged for PPS to repay unsecured loans that he, DBC and DBM had made to the company, together totalling over $1.25 million. These unsecured loans were replaced by a fresh advance from Mr Browne to PPS of $450,000 secured by a general security agreement (GSA).

[2] The appellant, David Petterson, is the liquidator of PPS. He appeals against a decision of Associate Judge Matthews declining his application under s 299 of the Companies Act 1993 (the Act) for orders setting aside the GSA granted by PPS to Mr Browne and requiring him to repay monies paid pursuant to it.[1] Mr Petterson also appeals against the Court's refusal to make an order under s 295 of the Act requiring DBC and DBM to repay the monies they received from PPS,[2] these transactions having been set aside after the companies failed to respond to notices served pursuant to s 294.

[3] Mr Petterson contends that Mr Browne arranged for the GSA to be granted and the payments to be made in order to protect these parties from significant losses that they would suffer if McConnell Dowell succeeded with its claim and PPS was liquidated, as subsequently occurred. The Associate Judge found that the transactions were not a response to the McConnell Dowell claim but, rather, were part of an ongoing restructure of the companies owned by the Browne family that had commenced long before.[3] He found that Mr Browne had reasonable grounds to believe that PPS was not liable for McConnell Dowell's claim and would be covered by McConnell Dowell's insurance in any event.[4] He considered that PPS was in a sound financial position at the time the transactions were entered into.[5]

[4] Mr Petterson argues that the Associate Judge:

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1 *Petterson v Browne* [2015] NZHC 866 at [133] [HC decision].
2 At [159].
3 At [130].
4 At [130].
5 At [130].

(a) Failed to apply the correct legal test and erred in the above findings of fact when determining whether the GSA granted to Mr Browne should be set aside.

(b) Erred in declining to make an order under s 295 for recovery of the payments made to DBC and DBM despite these transactions having been automatically set aside as a result of the failure by DBC and DBM to object to notices served by Mr Petterson under s 294 of the Act.

[5] If his substantive appeal fails, Mr Petterson appeals against the Associate Judge's decision to order costs calculated in accordance with band C for both sets of proceedings, one against Mr Browne and the other against DBC and DBM.[6] Mr Petterson argues that costs should have between awarded for one set of proceedings only because the issues and evidence were common to both. Mr Petterson also appeals against the Associate Judge's decision to award increased costs, arguing that this was not justified.[7]

[6] Because Mr Petterson contends that the Associate Judge erred in fact as well as law, it is necessary to examine the circumstances in which the transactions were undertaken in some detail before addressing the specific grounds of appeal. It is also helpful to summarise the subsequent events which led to the proceedings in the High Court. Except where stated otherwise, the following chronology has been taken from the judgment under appeal or the documentary evidence.

Chronology

PPS

[7] PPS was incorporated in 1992. It supplied polyethylene pipes and fittings for use in wastewater, stormwater and irrigation projects. PPS also welded polyethylene pipes.

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6 *Petterson v Browne* [2015] NZHC 1950 at [11] [Costs decision].
7 At [22].

[8] Mr Browne and his wife, Sylvia, are the directors of PPS and hold one share each in the company. The remaining 998 shares are held by the Browne Family Trust, the trustees of which are Mr and Mrs Browne; their solicitor, Paul Dorrance of Duncan Cotterill; and their accountant, Dennis Lay, formerly of PKF Goldsmith Fox RDR Ltd.

DBC and DBM

[9] At the relevant time, Mr Browne operated a group of approximately 20 companies. These were funded by unsecured loans from Mr Browne, the Browne Family Trust or other companies within the group.

[10] One of the main operating companies was DBC, a contracting company that installs mechanical services in buildings, including air conditioning and ventilation. Because Mr Browne did not have a personal bank account, his expenses were met by credit card paid for by DBC. Mrs Browne then coded these expenses according to whether they were personal or related to business. Personal expenses were debited to Mr Browne's current account with DBC. Payments due to Mr Browne, such as dividends, were usually paid to other companies in the group and treated as unsecured advances by him on current account.

[11] DBM was established as a holding company to own plant and equipment but Mr Browne advised that it never became an active company.

[12] Mr and Mrs Browne are directors of DBC and hold almost all of the shares. Mr Browne is the sole director and shareholder of DBM.

McConnell Dowell contract

[13] In March 2007, PPS entered into a subcontract agreement with McConnell Dowell to weld the polyethylene pipes that were to be laid on the seabed in Lyttelton Harbour as part of a major sewer outfall project for Christchurch City Council. The pipes were manufactured by a related company, PPS-Frank NZ Ltd (PPS-Frank NZ), under licence to Frank GmbH in Germany. McConnell Dowell

purchased the pipe from PPS-Frank NZ which supplied it direct to PPS.[8] PPS' role under the subcontract agreement was limited to welding the lengths of pipe together.

[14] The pipes had an outside diameter of 1.8 metres and were supplied in six metre lengths. PPS completed the welding in two phases. The six metre lengths were initially welded together in PPS-Frank NZ's factory in Christchurch to create 12 metre lengths. These were then transported to Lyttelton where they were welded together on-site to create 340 metre pipe strings. McConnell Dowell installed the pipe strings in trenches on the seabed at the outfall site using 15 tonne concrete weights set at six metre centres as ballast. The total length of the marine section of the pipe was to be approximately 2.5 kilometres.

[15] At an early stage, PPS expressed concern to McConnell Dowell about the stress on the pipe welds when sections of the pipe were jacked, with the ballast weights attached, to clear inclines in the rail line along which the pipe was being transported to the launching site. Mr Browne says that McConnell Dowell largely ignored these concerns saying that its engineers had approved these handling procedures.

First weld failure

[16] On 19 December 2007, weld 151 failed during the installation of the first pipe string. The project was still in its initial stages and this was only the seventh weld completed on-site. Mr Browne notified Frank GmbH's managing director, Christian Habedank, who suggested that the concrete ballast weights were too heavy and this may have overstressed the welds.

[17] PPS commissioned a report from Dennis Hills, an independent engineering consultant based in Christchurch. He reported on 10 January 2008 that the weld bead at the bottom of the pipe where the fracture occurred was uneven and suggested that this may not have been noticed during the inspection process because of its location. The contract specifications required that the fusion beads be of the same size and

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[8] It is not clear from Mr Browne's evidence whether the pipes were supplied by PPS-Frank NZ Ltd or PKS-Frank NZ Ltd. He initially stated that the supplier was PKS-Frank NZ Ltd but later, in the same affidavit, he stated that PPS-Frank NZ Ltd was the manufacturer and supplier. However, this distinction is immaterial for present purposes.

shape, and project evenly above the outside diameter of the pipe. Mr Hills said that the weld was "clearly suspect" and contributed to the failure. He considered that the stress placed on the weld during the laying process was also a contributing factor but he did not know whether this stress was higher than would normally be expected.

[18] Dr Habedank wrote again on 17 January 2008 advising that concrete ballast weights are normally designed so that when the pipe is filled with water with the weights attached, it will be 10 to 20 per cent heavier than the displaced water volume. By comparison, he calculated that the pipes with the weights used by McConnell Dowell were 32 per cent heavier than the displaced water volume.

[19] PPS forwarded a copy of Dr Habedank's report of 17 January 2008 and Mr Hills' report to McConnell Dowell. At the same time, Mr Browne asked Mr Dorrance at Duncan Cotterill for advice on how he should respond to McConnell Dowell's potential claim and to investigate the insurance position.

[20] Mr Dorrance advised Mr Browne on 18 January 2008 that cl 11.1 of the subcontract required PPS to indemnify McConnell Dowell against all losses arising out of the welding and PPS did not have insurance to cover any such claim:

> In terms of the insurance position, you are quite right that the contract did not require you to get PI [professional indemnity] insurance. You simply had to maintain insurance of plant, motor vehicle and public liability. I now understand your comment that you were advised that you would not have got insurance for welding; it seems that PI insurance for workmanship is not usually granted or, if it is, very expensive. The problem that you face is that clause 11.1 of the contract provides that you will protect and indemnify the [Christchurch City Council] and McConnell Dowell against all losses etc arising out of or in connection with the welding. Although the current issue seems to be isolated this clause opens up a potentially large liability for you in the event there is a more widespread issue which can be attributed to PPS. From what we have discussed, it does not appear that this is the case but I simply highlight for your information.

[21] McConnell Dowell wrote to PPS on 24 January 2008 addressing the potential causes of the failure Mr Hills had identified, namely a "suspect" weld and/or over-stressing of the pipe during the installation process. McConnell Dowell stated that its engineers had calculated that the weld would not have been subjected to stresses greater than 50 per cent of what it ought to have been capable of withstanding under the contract specifications. It therefore concluded that the weld

failed because it was faulty, consistent with Mr Hills' observation of bead irregularities at the apparent point of failure initiation. McConnell Dowell advised that it held PPS responsible for all losses arising from this failure, referring to cl 11.1 of the subcontract agreement which provides:

> The Subcontractor will protect and indemnify the Employer and the Contractor against all losses, claims, costs, charges, expenses and damage arising out of, in connection with, or in consequence of the Subcontract Works unless and to the extent the losses, claims, costs, charges, expenses and damage is caused by the fault or neglect of the Contractor its servants or agents.

[22] Dr Habedank commissioned an independent expert, Isidro Sierra, to consider whether the ballast weights were too heavy. Mr Sierra provided a preliminary report on 1 February 2008 stating that they were. Nevertheless, Mr Sierra calculated that the loading imposed during the sinking process was less than the weld ought to have been able to withstand had it met the specification. This required the ultimate tensile strength of the weld to be no less than 90 per cent of the pipe strength.

[23] Mr Sierra also suggested that the concrete block ballast weights were too long. He said that this would have reduced the flexibility of the pipe and increased the bending moment. He strongly recommended that additional studies be carried out to investigate this issue further. PPS provided a copy of this report to McConnell Dowell on 5 February 2008.

[24] On 20 February 2008, McConnell Dowell's engineering manager, Robert Mawdsley, prepared a report analysing whether weld 151 failed because it was overstressed during the installation process or because the weld was defective. He calculated that the as-built weight of the ballast blocks was approximately four per cent heavier than the design weight. This would have caused a small increase in the bending moments and he recommended that the spacing between the concrete blocks be increased for future installations. Nevertheless, he calculated that at the time of failure the bending moment and axial tensile stresses imposed on weld 151 were well within the allowable range.[9] Mr Mawdsley concluded that the failure of weld 151 was not caused by it being overstressed.

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[9] Mr Mawdsley calculated that the bending moment was in the range of 1,400 to 1,600 kNm, well below the allowable bending moment of 1,890 kNm. He calculated the axial tensile stress at the time of failure was in the range of 9.3 to 10.7 MPa. That was well below the contract specification which required the weld strength to be no less than 90 per cent of the parent material, which he calculated was 20 MPa at a load duration of 16 minutes.

[25] McConnell Dowell then commissioned a report from Robert Le Hunt, an independent plastics engineer based in Australia specialising in pipeline applications. Mr Le Hunt inspected the pipe and reviewed PPS' welding procedures, weld test reports and quality plan. He reported on 2 April 2008 that weld 151 showed brittle fracture behaviour which he considered was probably caused by gaps between the abutting pipes during the welding process. He also noted various departures from specifications and anomalies in PPS' welding records and procedures.

[26] PPS notified the failure of weld 151 to its insurer, IAG New Zealand Ltd (IAG), but was advised that the claim was not covered under PPS' policy. Subsequently, on 18 April 2008, Nigel Allott, a chartered loss adjustor appointed by IAG, wrote to PPS having reviewed the head contract, the subcontract and the insurance certificate for the contract works policy arranged by McConnell Dowell, saying:

> Based on the way the Head Contract and Subcontract are written PPS can argue that the incident should be dealt with under the main Contract Works policy and any costs falling within the policy deductible should be met by McConnell Dowell.

However, it appears that Mr Allott did not look at McConnell Dowell's policy before giving this advice.[10]

Second weld failure

[27] A second weld failed during the launching process on 5 May 2008. This was weld 32 on pipe string six which was undertaken on 28 May 2007 in PPS-Frank NZ's factory. McConnell Dowell immediately notified PPS of this failure and followed up in writing on 8 May 2008:

> As you were made aware immediately after the event, an HDPE pipe weld in pipe string #6 failed as we were launching this pipe string at Lyttelton CMA on Monday 5th May.
>
> The investigations and analysis of this incident that we have conducted to date suggests that the weld failed at considerably less than its specified

[10] Mr Allott sent an email to McConnell Dowell on 31 January 2008 asking for a copy of the special conditions of contract between Christchurch City Council and McConnell Dowell and a copy of the insurance certificate, but not the policy itself.

> capacity. This, together with the nature of the failure has led us to conclude that the weld failed because it was faulty in some way.
>
> We therefore give notice of our intention to seek, in accordance with the provisions of the HDPE pipe welding subcontract, recovery of costs incurred by McConnell Dowell as a direct consequence of the failure of this weld, understood to be weld no.32.

[28] On 20 June 2008 McConnell Dowell wrote to PPS following further investigation into the failure of weld 32:

> This weld failed at considerably less than its specified capacity and investigations we have subsequently undertaken evidence that it, and a number of other welds made in the factory around that time, were faulty. We have received advice that this may be due to deficiencies in the welding process that resulted in irregularities in the abutting pipe ends that prevented the pipe material being heated sufficiently to achieve adequate fusion in some areas of the weld face, leaving weaknesses in the weld. Residual moisture on the weld face at time of heating may also have been a contributing factor.
>
> As a consequence of the failure McConnell Dowell has suffered significant losses, the detail of which we are currently collating and we expect PPS-Frank to meet these costs in accordance with our contract.

PPS directors resolve to repay advances to Mr Browne, DBC and DBM and grant security for a further advance from Mr Browne

On 30 June 2008, 10 days after McConnell Dowell notified its intention to claim significant losses, Mr and Mrs Browne met with Mr Dorrance and their accountant, Mr Lay.[11] The McConnell Dowell issue was discussed at the meeting and it was agreed that this was likely to be a large claim.

[29] As at 31 March 2008, PPS had net assets of $597,010. These included current assets of $1,910,612, largely comprising monies held on deposit at the bank, accounts receivable and tax refunds due. Current liabilities totalled $1,806,716, including amounts outstanding to DBC and DBM of $565,303 and $347,634 respectively. Taking into account the sum of $340,600 due to Mr Browne on his current account, current liabilities totalled $2,147,316 and exceeded current assets. Non-current assets comprised fixed assets of $67,563 and the company's shareholding in PPS-Frank NZ valued at $766,151.

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[11] It is not clear whether this meeting occurred on 30 June 2008, the date of the meeting recorded in the minutes, or on 1 July 2008, the date of the solvency certificate signed by Mr and Mrs Browne relating to the financial position of PPS immediately after those transactions.

[30] Mr Lay advised at the 30 June 2008 meeting that PPS currently held sufficient funds on deposit with the bank to repay the unsecured advances from DBC, DBM and Mr Browne, together totalling $1,253,537, and it was agreed that these advances should be repaid. PPS would then enter into a GSA with Mr Browne to secure a fresh advance of $450,000 he would make to fund PPS' ongoing operations. Mr Lay said that the advance of $450,000 should not be made until after the other advances were repaid so that they were not seen to be related.[12] Mr Lay confirmed in his evidence that one of the objectives was to ensure that the payments to the related parties were made in the ordinary course of business and not vulnerable to attack as insolvent transactions. This concern can only have arisen from the risk of insolvency as a result of liability to McConnell Dowell.

[31] Following these discussions, Mr and Mrs Browne signed the following resolutions:

> **POLYETHYLENE PIPE SYSTEMS LIMITED**
>
> **MINUTES OF DIRECTORS MEETING HELD ON 30TH JUNE 2008**
>
> The directors having received requests from David Browne Contractors Limited and David Browne Mechanical Limited to repay the intercompany current account with Polyethylene Pipe Systems Limited. It was resolved that the company repay David Browne Mechanical Limited $347,634, David Browne Contractors Limited $565,303. The above balances are as at 31 March 2008.
>
> Resolved that the current account balance as at 31 March 2008 for David Browne amounting to $340,600 be also repaid.

[32] There is no evidence that any of these parties had sought repayment of these monies prior to this meeting and no written demand was produced. Mr Dorrance identified this potential difficulty the following year when he reviewed PPS' financial statements for the year ended 31 March 2009. He drew this to Mr Browne's attention on 27 May 2009 and advised "it is important David that you have in your records a demand in writing that was delivered to the directors which would have been I am sure, around April 2008".

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[12] This sequence was not ultimately followed. See [42] and [43].

[33] Mr and Mrs Browne signed a solvency certificate as at 1 July 2008. The contingent liability to McConnell Dowell was addressed by stating that the claim was disputed, would be offset by counterclaims for extras and variations and, in any event, would be covered by McConnell Dowell's insurers:

> The undersigned Directors all of whom have voted in favour of the attached resolution of Directors dated 30th June 2008 concerning the proposed repayment of advances, hereby certify that in their opinion the company will immediately after repayment of the advances referred to in the said resolution of Directors, satisfy the solvency test as defined in Section 4(1) of the Companies Act 1993. And, it is reasonable to believe that:
>
> 1 The Directors have met with the company's legal advisors regarding the request for repayment and have decided to approve the repayment request.
>
> 2 The Directors are aware of the contingent liability arising from the disputed claim relating to the McConnell Dowell Contract. The Directors believe that the Contract is fully covered by McConnell Dowell's insurers and in fact, McConnell Dowell owes the company a substantial amount for extras and variations that they have invoiced to them.
>
> 3 The company is able to pay its debts as they become due in the normal course of business.
>
> 4 The company's assets are greater than the liabilities based on the most recently available annual financial statements.

Transfer of PPS' shares in PPS-Frank NZ Ltd to the Browne Family Trust

[34] It was also decided that PPS would transfer its most significant non-current asset, being the shares it held in PPS-Frank NZ, to the Browne Family Trust. Mr Lay valued the shares for this purpose on 4 July 2008, despite the obvious conflict of interest arising out of the fact that he was PPS' accountant and a trustee of the Browne Family Trust. He arrived at a value of $309,543 by taking the net assets as shown in the financial statements of PPS-Frank NZ at 31 March 2008 of $2,516,744 and then discounting the fixed assets component, being $1,568,809, by 33 per cent. He said that he applied this discount because he did not consider that these assets could be realised for book value. Mr Lay erroneously calculated that this yielded a net asset figure of $1,465,642 (whereas it ought to have been $1,983,348).[13] He took

[13] There is a significant error in Mr Lay's calculation. If he had discounted the fixed assets by 33 per cent, the correct adjusted figure for net assets would have been $1,983,348. The result of this error was that fixed assets were discounted by 66 per cent, not 33 per cent as he stated in his valuation report.

32 per cent of this adjusted figure to reflect the percentage shareholding held by PPS in the company and then applied a further discount of 33 per cent to take account of the fact that this was a minority parcel.

[35] The resulting figure was $309,543. This is to be compared with the value of $766,151 shown in PPS' financial statements as at 31 March 2008, which Mr Lay also prepared. If the shares had been valued at $309,543 in PPS' financial statements, then not only would current liabilities have exceeded current assets, but net assets overall would have reduced to $140,402. If any meaningful provision had been made for the contingent liability to McConnell Dowell, the company would not have met the solvency test under s 4 of the Act:

> **4 Meaning of solvency test**
>
> (1) For the purposes of this Act, a company satisfies the solvency test if —
>
> (a) the company is able to pay its debts as they become due in the normal course of business; and
>
> (b) the value of the company's assets is greater than the value of its liabilities, including contingent liabilities.
>
> …

[36] Most of the shares held by PPS were transferred to the Browne Family Trust in accordance with Mr Lay's valuation pursuant to an agreement for sale and purchase of shares dated 21 August 2008. A small number of shares were retained to ensure sufficient continuity of shareholding to preserve tax losses.

Directors of PPS approve new borrowings from Mr Browne secured by a GSA

[37] In the meantime, PPS asked McConnell Dowell to re-address its 20 June 2008 letter relating to weld 32 to PPS-Frank NZ, presumably because this weld was done in PPS-Frank NZ's factory. Mr Browne forwarded the re-addressed letter to Dr Habedank on 13 July 2008 prompting a vigorous response from him the following day:

> Thank you very much for forwarding this letter to us.
>
> It is clear for everyone involved that the problems occurred during the installation of the Christchurch Outfall were caused due to faulty weldings. This was confirmed during our last shareholder meeting.

> As agreed during our telephone conversation (DavidB) I kindly ask you to consult a lawyer and to write an official letter to MacDow that responsible for these problems is PPS. They also performed the welding in the production and were paid for it by MacDow. The pipe has in no point be claimed and all quality controls etc. were performed.
>
> Furthermore, we have tested some welding samples from PPS here in Germany with very bad results. We asked Daniel to forward the used welding parameters and got no feedback.

Mr Browne acknowledged in his evidence that he was concerned about the prospect that the welding was faulty at the time he received this email.

[38] On 28 July 2008, Mr and Mrs Browne, as directors of PPS, formally approved new borrowings from Mr Browne in unspecified amounts to assist PPS' working capital and cashflow requirements. These borrowings were to be secured by a GSA which Mr and Mrs Browne executed that day in accordance with the discussions at the meeting on 30 June 2008.

Third weld failure

[39] As a result of the failure of weld 32 and concerns about other welds on pipe string six, various dive inspections were undertaken. These revealed that the bead on weld 255 on pipe string three was less than the specified width in the six o'clock position at the bottom of the pipe. This was the same location as the bead irregularities observed on weld 151. Accordingly, on 16 August 2008, McConnell Dowell retrieved pipe string three from the harbour. Daniel Hodder of PPS inspected the weld on 18 August 2008 and recommended that it be cut out and re-welded. This work was completed on 29 September 2008.

Quantification of loss from first failure

[40] On 26 August 2008, McConnell Dowell wrote to PPS with a detailed breakdown of the losses it claimed as a result of the failure of weld 151. These totalled $2,552,671 and largely comprised costs of staff, labour, equipment and materials deployed for an additional 56 working days as a result of the weld failure. The calculation did not include liquidated damages for late completion of the contract because these had not yet been applied.

Mr Browne advances $450,000 to PPS secured by the GSA

[41] On 29 August 2008, $700,000 was transferred from DBC's bank account to PPS. This figure comprised repayment of $250,000 that PPS had advanced to Mr Browne in June 2008 plus the sum of $450,000 that Mr Browne agreed to advance to PPS on the basis that it would be secured by the newly arranged GSA.

PPS repays unsecured advances from DBC, DBM and Mr Browne

[42] On 2 September 2008, PPS repaid the unsecured advances received from DBC, DBM and Mr Browne as follows:

DBC	$565,303
DBM	$347,634
Mr Browne	$340,600

Quantification of loss from second failure

[43] On 5 September 2008, McConnell Dowell provided a breakdown of the losses claimed for the second weld failure, totalling $449,524.

Duncan Cotterill advises that PPS is not covered under McConnell Dowell's policy

[44] Mr Browne asked Duncan Cotterill to advise whether PPS was covered for the claim under the contract works policy obtained by McConnell Dowell. Duncan Cotterill reported on 17 September 2008 that it was not.

[45] Duncan Cotterill commenced its analysis by referring to the definition of "Insured" under the policy:

> 5.5 "Insured"
>
> The term "insured" means:
>
> 5.5.1 The Named Insured
> 5.5.2 all subsidiary and related companies of the Named Insured …
> 5.5.3 any of the following persons or entities to whom or to which the insured parties under clauses 5.5.1 and 5.5.2 above are obliged by virtue of a contract or assumption of responsibility or indemnity under contract to arrange insurance on their

> behalf in respect of the Insured Property, but only to the extent required by such contract or assumed responsibility …

[46] Duncan Cotterill observed that neither the head contract nor the subcontract required McConnell Dowell to arrange insurance on behalf of PPS and accordingly PPS was not an insured for the purposes of the policy. This analysis appears to be correct.

Quantification of loss from third failure

[47] The losses claimed for the third failure were provided on 19 December 2008 and amounted to $394,558.

McConnell Dowell issues notice of adjudication

[48] On 19 January 2009, McConnell Dowell issued a notice of adjudication under the Construction Contracts Act 2002.[14]

Mr Browne demands repayment of amount secured by the GSA

[49] On 16 February 2009, Mr Browne demanded that PPS repay the sum of $450,000 being the amount secured by the GSA.

Adjudication

[50] On 15 May 2009, McConnell Dowell issued a formal claim arising out of the weld failures in the sum of $3,396,753. The claim was heard by Derek Firth, an Auckland barrister and arbitrator who specialises in construction disputes. In his determination issued on 20 July 2009, Mr Firth found that McConnell Dowell's case was compelling and that there was little merit in PPS' response to it:

> The respondent's denial of liability appears to have been without substantial merit. This is because it was presented with compelling technical reports by the complainant and it must have been clear that its advisers were struggling to be supportive.
> …
>
> The claimant has presented a compelling case regarding liability and an equally compelling and meticulous case in relation to the quantum of its claim.

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[14] Construction Contracts Act 2002, s 28.

[51] Mr Firth concluded that the welds failed because they were defective, not due to any fault on the part of McConnell Dowell. He assessed the recoverable losses at $2,965,334 plus costs of $31,590.

Mr Browne appoints a receiver

[52] After the adjudicator's decision was released, Helen Smith, a litigation partner at Duncan Cotterill, wrote to Mr Browne on 20 July 2009 proposing a meeting to discuss the position. Ms Smith suggested that Mr Dorrance should attend the meeting because of his prior involvement in arranging the transactions between PPS and Mr Browne's interests:

> We also need to decide what action to take, if any. From my reading of the decision there are no grounds to review it. The grounds are very limited. The Adjudicator has not, in my view, gone beyond that which he was asked to consider. It is then a case of considering (subject to the insurance position) what payment can be made (if any) and whether a payment should be made. The issues to be considered are more far reaching than PPS having regard to MacDow's apparent intention to pursue either David personally or David Browne Contractors Limited. If a payment was made, we could make an offer on the basis of a full and final settlement of all issues with all parties. Equally, you might wish to leave MacDow to enforce the Adjudicator's decision and then see whether a claim against David personally or David Browne Contractors comes.
>
> It would be useful, having regard to the work undertaken so far in relation to the structure of PPS, to have Paul Dorrance present.

[53] This meeting led to the appointment of Glen Stapley, a chartered accountant in Christchurch, as receiver of PPS on 29 July 2009. Everyone understood that liquidation was likely to follow and that the GSA would be challenged. Recognising this, special arrangements were negotiated to protect Mr Stapley, including the establishment of an escrow account where recoveries would be held until completion of the expected liquidation of PPS. These arrangements, which were to be kept private, were summarised in an email from Duncan Cotterill to Mr Stapley on 28 July 2009:

> As discussed yesterday I attach an Agreement to appoint you as receiver of Polyethylene Pipe Systems Ltd with immediate effect. I also attach a separate undertaking in respect of holding proceeds in an escrow account until PPS Ltd is fully liquidated or you otherwise consent. That provides the additional protection we discussed yesterday without being part of your appointment agreement and available to third parties.

[54] PPS owed Mr Browne $523,579 plus interest at the date the receiver was appointed. We assume that the increase in indebtedness from the time the demand of $450,000 was made in February 2009 to the time the receiver was appointed in July 2009 was because further funds were advanced for the adjudication process.

PPS liquidated

[55] McConnell Dowell applied to have PPS placed in liquidation. Duncan Cotterill discussed with Mr Stapley whether it would be possible to pre-empt this and avoid the GSA being scrutinised by an independent liquidator by having Mr Browne appoint his own liquidator. Duncan Cotterill wrote to Mr Browne on 7 September 2009 concerning this prospect, copying Mr Lay and Mr Stapley:

> McConnell Dowell have now applied to have PPS placed into liquidation. I have discussed this with Glen. We had considered appointing our own liquidator but given that there are no assets left to recover why would the PPS directors/shareholders appoint a liquidator. If we did then most likely McConnell Dowell would challenge that appointment as a sham to protect the receiver from any challenge. In these circumstances we believe there is little to gain from resisting McConnell Dowell's application to appoint their own liquidator. It is likely David's GSA security will be scrutinised and they may well challenge whether that is a voidable security. It is likely our own liquidator would have looked into that also under pressure from McConnell Dowell. There is also the question of funding the liquidation, where there appears to be no assets. Why would the director/shareholders fund a liquidation? Clearly McConnell Dowell will need to fund their liquidator.
>
> In summary our advice is to let the liquidation take its natural course. Until the receiver steps down there is little they can do as they lack any vested power. No doubt they will investigate the GSA and its validity.

[56] PPS was duly placed in liquidation by order of the Court on 5 October 2009 on McConnell Dowell's application and Mr Petterson was appointed liquidator. There were no assets available to meet the claims of unsecured creditors.

[57] Mr Petterson had difficulty obtaining company records and this partly explains why he did not challenge the transactions and the GSA earlier. It appears that some efforts were made to frustrate his access to relevant documents. For example, on 26 July 2010, Duncan Cotterill wrote to Mr Browne, copying Mr Lay:

> I attach a copy of our last correspondence with the Liquidator where we responded to his previous request for documents. I don't believe we have heard anything from him since.

> Glen is correct that you must, as directors, provide reasonable cooperation to the liquidator. I believe there was some discussion in December 2009 as to whether the bank statements be provided. The timing of funds coming in and going out was perhaps not ideal. However we will not be able to resist requests for bank statements indefinitely. Can we perhaps review these bank statements and understand where the problems may lie? I think you may have done that partially with Paul and my colleague Rebecca Jefferies (now overseas).

Payments to Mr Browne by the receiver

[58] Mr Stapley made the following interim distributions to the escrow account and these were subsequently paid to Mr Browne:

7 August 2009	80,000
21 August 2009	100,000
3 September 2009	76,922
Total	$256,922

[59] We note in passing that Mr Petterson does not seek to set aside these payments, which predated his appointment as liquidator. His claim is limited to a final distribution of $201,316 made by Mr Stapley to Mr Browne in May 2013.

Liquidator's notices to set aside payments and GSA

[60] On 4 April 2013, Mr Petterson served notices on DBC, DBM and Mr Browne under s 294 of the Act, seeking to set aside the payments made to them by PPS on 2 September 2008. Mr Browne objected to this notice on 2 May 2013. DBC and DBM did not respond because the accountants who received the notices did not pass them on to Mr Browne. Accordingly, the transactions involving DBC and DBM were automatically set aside 20 working days after the notices were served.[15]

[61] On 9 December 2013, Mr Petterson served Mr Browne with a notice pursuant to s 294 seeking to set aside the GSA. Mr Browne objected to this notice on 20 December 2013.

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[15] Companies Act 1993, s 294(3).

First ground of appeal — was the Associate Judge wrong not to set aside the GSA pursuant to s 299?

Proceedings against Mr Browne in the High Court

[62] Mr Petterson commenced two proceedings in the High Court, one against Mr Browne and the other against DBC and DBM. In the proceeding against Mr Browne, Mr Petterson sought an order that the sum of $340,600 paid by PPS on 2 September 2008 be set aside as an insolvent transaction within the meaning of s 292 of the Act. He also sought an order setting aside the GSA on the basis that it was a voidable charge under s 293 of the Act. Alternatively, he applied for an order under s 299 of the Act for the charge to be set aside as against the liquidator. He also sought an order for repayment of the sum of $201,306 paid by the receiver to Mr Browne in May 2013.

[63] During the course of the hearing, Mr Petterson conceded that the payment of $340,600 made to Mr Browne on 2 September 2008 was not an insolvent transaction because the company was able to pay its due debts at the time the payment was made. He therefore abandoned his claim for repayment of this sum. Mr Petterson also accepted, for the same reason, that the GSA was not a voidable charge for the purposes of s 293 of the Act. His claim against Mr Browne was therefore confined to the application under s 299 to set aside the GSA and for repayment of the $201,306 paid pursuant to it.

Relevant statutory provisions

[64] Section 299 of the Act relevantly provides:

> **299 Court may set aside certain securities and charges**
>
> (1) Subject to subsection (2), if a company that is in liquidation is unable to meet all its debts, the court, on the application of the liquidator, may order that a security or charge, or part of it, created by the company over any of its property or undertaking in favour of —
>
> (a) a person who was, at the time the security or charge was created, a director of the company, or a nominee or relative of or a trustee for, or a trustee for a relative of, a director of the company; or

(b) a person, or a relative of a person, who, at the time when the security or charge was created, had control of the company; or

(c) another company that was, when the security or charge was created, controlled by a director of the company, or a nominee or relative of or a trustee for, or a trustee for a relative of, a director of the company; or

(d) another company, that at the time when the security or charge was created, was a related company, —

shall, so far as any security on the property or undertaking is conferred, be set aside as against the liquidator of the company, if the court considers that, having regard to the circumstances in which the security or charge was created, the conduct of the person … in relation to the affairs of the company, and any other relevant circumstances, it is just and equitable to make the order.

…

(3) The court may make such other orders as it thinks proper for the purpose of giving effect to an order under this section.

…

[65] Mr Browne resisted the claim, in part in reliance on the statutory defence available under s 296(3) of the Act:

296 Additional provisions relating to setting aside transactions and charges

…

(3) A court must not order the recovery of property of a company (or its equivalent value) by a liquidator, whether under this Act, any other enactment, or in law or in equity, if the person from whom recovery is sought (**A**) proves that when A received the property —

(a) A acted in good faith; and

(b) a reasonable person in A's position would not have suspected, and A did not have reasonable grounds for suspecting, that the company was, or would become, insolvent; and

(c) A gave value for the property or altered A's position in the reasonably held belief that the transfer of the property to A was valid and would not be set aside.

…

High Court judgment

[66] The Associate Judge identified the following issues in relation to the claim against Mr Browne:[16]

(a) Did Mr Browne make the advance of $700,000 to PPS notwithstanding that the funds came from DBC's bank account?

(b) Can an order be made under s 299 after a receiver has been appointed under a security?

(c) Should the GSA be set aside under s 299?

(d) If so:

(i) can the Court order repayment under s 299(3); and

(ii) is the Court prevented from ordering repayment by s 296(3)?

[67] The Associate Judge answered the first question "yes" and this is not challenged on appeal.[17] He reached no conclusion on the second issue.[18]

[68] In declining to make any order under s 299, the Associate Judge took three matters into account.[19] The first was the financial position of PPS. The Associate Judge found that PPS was a profitable company with a surplus of assets over liabilities.[20] He found that at the time the payments were made on 2 September 2008, PPS was able to repay the unsecured advances from DBC, DBM and Mr Browne totalling $1,253,537 from cash reserves and without recourse to the advance of $700,000 made by Mr Bowne four days earlier, on 29 August 2008.[21] On

16 HC decision, above n 1, at [35].
17 At [45].
18 At [52].
19 At [58].
20 At [59].
21 At [63].

that basis, the Associate Judge concluded that the secured advance was made for the purpose of operating the company, not to repay previous advances.[22]

[69] The second matter concerned a restructuring of the affairs of Mr and Mrs Browne, their family trust and the companies in the group.[23] Jacob Wolt, a director of Bradley Nuttall Ltd, a firm of financial advisors in Christchurch, gave unchallenged evidence that Mr and Mrs Browne had been involved in restructuring their financial affairs "over a period of quite some time". He did not specify this period, saying only that it predated the impugned transactions. Mr Wolt said that the restructuring was driven by a number of factors including Mr Browne's age, his intention to reduce his involvement in the businesses to allow his sons to take over and a desire by Mr and Mrs Browne to reduce their investments in the group companies. Mr Wolt said that the repayments made by PPS on 2 September 2008 formed part of this restructure and were designed to reduce Mr Browne's financial involvement in the company. Mr Wolt did not explain how Mr Browne's financial involvement in PPS was reduced by increasing his net lending to the company from $90,600 ($340,600 advanced to PPS as at 31 March 2008 less $250,000 paid by PPS to Mr Browne in June 2008) to $450,000. Nevertheless, the Associate Judge considered that Mr Wolt's evidence supported Mr Browne's evidence that the restructuring was part of a long-term plan to withdraw his investments in PPS.[24]

[70] The third matter the Associate Judge took into account was the McConnell Dowell claim.[25] The Associate Judge understood that, at the time the transactions were entered into, McConnell Dowell had not substantiated its claim by providing its own expert reports.[26] He accepted that Mr Browne understood at that time that any claim would be covered under McConnell Dowell's contract works insurance policy, based on Mr Allott's advice.[27] The Associate Judge considered that the claim may indeed be covered under the policy and noted that there was no evidence to explain why the liquidator had not pursued an insurance claim.[28]

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22 At [63].
23 At [67].
24 At [89].
25 At [91].
26 At [111].
27 At [113].
28 At [118].

[71] The Associate Judge summarised his conclusion that it would not be just and equitable to set aside the GSA in the following two paragraphs of his judgment:

> [130] I have concluded that when the charge was given, Mr Browne and PPS had sound reasons to believe that the failure of the joints was not caused by faulty workmanship undertaken by PPS. Furthermore, at that time they had sought, received and justifiably relied on advice that the insurance policy held by McDow would give that company cover for the losses it had incurred (apart from the actual cost of rewelding the joints which would only be the responsibility of PPS if it was later established that its welding had been faulty). The transactions in issue were undertaken by a company in sound financial heart, and were part of ongoing re-arrangement of the affairs of companies in the ownership of the Browne family which had commenced well beforehand and were for legitimate reasons. The substance of the transaction was to effect a legitimate re-arrangement of the finances of PPS in circumstances where that was acceptable conduct.
>
> [131] The fundamental basis for Mr Petterson's case under s 299, that it is just and equitable that the charge given by PPS in favour of Mr Browne be set aside, is not made out.

Submissions

[72] Mr Gustafson submits that the Associate Judge erred in his assessment of each of the key factual issues identified in [130] of his judgment. He submits that:

(a) Mr Browne did not have sound reasons to believe that the failure of the welds was not caused by PPS' faulty workmanship;

(b) there were no reasonable grounds to believe that PPS would be insured for losses caused by its faulty workmanship under McConnell Dowell's insurance;

(c) the related party unsecured loans were repaid and replaced by secured borrowing from Mr Browne solely because of concerns about the McConnell Dowell claim and did not form part of a group restructure that had commenced much earlier; and

(d) PPS did not satisfy the solvency test at the time the GSA was granted, taking into account its contingent liability to McConnell Dowell.

[73] In summary, Mr Gustafson submits that the transactions, including the GSA, were entered into to give Mr Browne, DBC and DBM protection against the risk of the McConnell Dowell claim succeeding and to ensure that they were paid in preference to McConnell Dowell as a contingent creditor. He submits that the statutory defence under s 296(3) was not made out and it would be just and equitable to make an order under s 299 setting aside the GSA.

[74] Mr Russ submits that the Associate Judge's findings are well supported by the evidence and are partly based on his assessment of the witnesses. He emphasises that the Associate Judge had the advantage of seeing the witnesses give their evidence and be cross-examined over a period of two and a half days. Mr Russ also notes that Mr Wolt was not cross-examined and his evidence concerning the broader restructure of Mr Browne's affairs was unchallenged.

Approach on appeal

[75] The appeal is by way of rehearing. The proper approach is as directed by the Supreme Court in *Austin, Nichols & Co Inc v Stichting Lodestar*.[29] The appellant has the onus of satisfying the Court that it should differ from the decision appealed from. The Court will not interfere unless it is persuaded that the decision is wrong. The Court must make its own assessment of the merits of the case but may hesitate before concluding that findings of fact based on the assessment of credibility of witnesses are wrong.

Did Mr Browne have sound reasons to believe that the failure of the welds was not caused by PPS' faulty workmanship?

[76] By the time the GSA was granted on 28 July 2008, two welds had failed and McConnell Dowell had written to PPS holding it liable for all losses as a result of these failures in reliance on the indemnity provision in cl 11.1 of the subcontract. Mr Dorrance had advised Mr Browne on 18 January 2008 that this provision opened up a potentially large liability for PPS.

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[29] *Austin, Nichols & Co Inc v Stichting Lodestar* [2007] NZSC 103, [2008] 2 NZLR 141 at [4]–[5].

[77] Mr Browne had Mr Hills' report on weld 151, dated 10 January 2008, that the weld bead at the bottom of the pipe where fracture initiation occurred was uneven, contrary to specification, clearly suspect, and had contributed to the failure. He had Mr Sierra's preliminary report dated 1 February 2008 that although he considered that the stresses imposed during the sinking process were unnecessarily high, the tensile stresses were less than the weld should have been able to withstand in terms of the specification.

[78] These reports were preliminary and inconclusive and merely suggested possible causes of the failures other than faulty welding. The directors had no advice from independent experts, or from PPS' solicitors, justifying a conclusion that PPS was not liable. That remained the position when Duncan Cotterill reported on 17 November 2008:

> Expert advice is required to determine whether PPS has breached the fusion welding agreement. Even if liability is established, expert advice is also required to determine whether McConnell Dowell has caused and/or contributed to the losses …

[79] Mr Browne was aware that McConnell Dowell had conducted an engineering review and analysis of the installation process and found that weld 151 had been subjected to stresses considerably lower than it ought to have been capable of withstanding. He knew that McConnell Dowell's investigations suggested that weld 32 was also faulty and failed when subjected to stresses considerably lower than specified.

[80] It is unclear whether Mr Browne had received the reports from Mr Mawdsley dated 20 February 2008 or Mr Le Hunt dated 2 April 2008 by the time the GSA was executed on 28 July 2008.[30] We therefore proceed on the assumption that he did not have these reports at that time.

[81] Nevertheless, the evidence establishes that although Mr Browne had reason to believe that PPS might be able to resist McConnell Dowell's claim by arguing that

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[30] McConnell Dowell's letter to PPS on 26 August 2008 records that it had provided PPS with copies of its technical reports in earlier correspondence. Duncan Cotterill refers to Mr Mawdsley's report in some detail in its advice to PPS on 17 November 2008. A Duncan Cotterill file note dated 25 May 2009 refers to Mr Le Hunt's report. However, the evidence does not establish exactly when these reports were provided to PPS.

the weld failures were caused by the way McConnell Dowell handled and ballasted the pipes, he was also aware that there was a growing body of evidence, including Dr Habedank's email of 14 July 2008, to support McConnell Dowell's position that the welds did not comply with specification and failed because they were defective. Mr Browne acknowledged that he was concerned at the time that the welds may have been faulty.

[82] The Associate Judge concluded that, "when the charge was given, Mr Browne and PPS had sound reasons to believe that the failure of the joints was not caused by faulty workmanship undertaken by PPS".[31] We consider that this statement places undue emphasis on PPS' expected defence to the claim without recognising its undoubted exposure to it. It would be more balanced and accurate to say that PPS' directors and advisors knew at the time the GSA was granted that the company would face a substantial claim from McConnell Dowell, exceeding PPS' net worth, and there was a real risk that PPS may be found liable.

Were there reasonable grounds to believe that PPS would be insured for losses caused by its faulty workmanship under McConnell Dowell's insurance?

[83] Mr Browne knew that cl 11.1 of the subcontract agreement required PPS to indemnify McConnell Dowell against all losses arising out of or in connection with or in consequence of the subcontract works unless these losses were caused by McConnell Dowell. He knew that PPS was not covered under its own insurance for losses caused by faulty welding. That was confirmed by Mr Dorrance on 18 January 2008 and separately by IAG.

[84] At the time the GSA was entered into, Mr Browne had not seen a copy of McConnell Dowell's contract works policy and he had received no advice from Duncan Cotterill on whether this would cover PPS' liability. The only suggestion that PPS might be insured for the claim was in the brief report from Mr Allott stating that PPS could argue that it was covered under McConnell Dowell's contract works policy. However, Mr Allott is a loss adjustor, not a lawyer, and his advice was provided without reference to the policy. Mr Browne was clearly uncertain about whether PPS would be covered under McConnell Dowell's insurance at the time the

[31] HC decision, above n 1, at [130].

GSA was granted. Otherwise he would not have needed to seek Duncan Cotterill's advice about this leading to their report on 17 November 2008 that PPS was not covered under this policy.

[85] We consider that the Associate Judge also overstated the position on this issue when he said:[32]

> … [A]t that time they had sought, received and justifiably relied on advice that the insurance policy held by McDow would give that company cover for the losses it had incurred (apart from the actual cost of rewelding the joints which would only be the responsibility of PPS if it was later established that its welding had been faulty).

[86] In fact, although the prospect that cover might be available under McConnell Dowell's insurance had been identified by Mr Allott, PPS had not seen the policy and had not sought advice from its solicitors about whether it afforded cover for the claim. For the reasons given by Duncan Cotterill, PPS was not covered under McConnell Dowell's policy for the loss it had caused McConnell Dowell.

Were the related party unsecured loans repaid and replaced by secured borrowing from Mr Browne because of concerns about the McConnell Dowell claim and not as part of a group restructure that had commenced much earlier?

[87] Mr Browne contends that the GSA had nothing to do with the McConnell Dowell claim. He claims that his unsecured loan to PPS was repaid and replaced with a new loan secured by the GSA as part of a wider restructuring initiative commenced long before and was not for the purpose of elevating him to a creditor class above McConnell Dowell to cover the risk of PPS being found liable and placed in liquidation. This explanation is unconvincing.

[88] While Mr Wolt was not challenged on his evidence that the PPS restructure was part of Mr Browne's estate and succession planning, this does not materially assist Mr Browne's case. No documents were produced indicating that the transactions undertaken by PPS in mid-2008 had been contemplated as part of any restructure prior to the McConnell Dowell claim surfacing. More significantly, the transactions were contrary to the stated objective of the intended restructuring, which

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[32] At [130].

was to reduce Mr Browne's financial involvement in PPS, because they resulted in Mr Browne increasing his lending to PPS from $90,600 to $450,000.[33]

[89] Equally unconvincing is the claim that the shares held by PPS in PPS-Frank NZ, valued at $766,151 in PPS' 31 March 2008 financial statements, were transferred to the Browne Family Trust on 21 August 2008 for $309,543 as part of Mr Browne's "estate planning review". How this transaction could be relevant to Mr Browne's estate planning, particularly given that he owned only one of the thousand shares in PPS, was not explained. That the object of this transaction was instead to remove these assets from the reach of McConnell Dowell is reinforced by a Duncan Cotterill file note prepared at the time the various transactions were in contemplation which refers to an "argument that PPS has been holding [the shares] on trust for fam trust".

[90] Mr Dorrance's letter sent to PPS on 27 May 2009 commenting on the draft financial statements for PPS for the year ended 31 March 2009 supports the conclusion that the transactions were not undertaken in the ordinary course of business, or as part of a long-term restructuring plan, or for estate planning purposes. Rather, the letter suggests that they were completed because of the real prospect that PPS would be placed in liquidation on the application of McConnell Dowell. His comments are unguarded because he considered that his letter would be protected by privilege. He failed to appreciate that the privilege belonged to PPS and could be waived by a liquidator. Mr Dorrance's comments are telling and demonstrate the link between the impugned transactions and McConnell Dowell's claim:

> Kindly note that my advice and communication to you is privileged and it cannot be used in evidence. We need to be careful that other correspondence is not necessarily privileged.
>
> The financial accounts are looking in much better shape and no doubt, the management reports for April and May will make the position look even sounder from the perspective that we are dealing with.
>
> …

[33] Or from $340,600 to $450,000 if one looks at the substance of the transaction overall and ignores the payment of $250,000 made by PPS to Mr Browne in June 2008. We note that this payment was not referred to at the 30 June 2008 meeting.

> I note that you have effectively taken all your current account as drawings for this financial year. This is an upon demand facility and you are able to call up this amount. It is important David that you have in your records a demand in writing that was delivered to the directors which would have been I am sure, around April 2008.
>
> …
>
> From an overall position I think we have effectively now achieved what we set out to do some 9 – 10 months ago to
>
> - Look to wind down in an orderly manner Polyethylene Pipe Systems Limited; and
>
> - Extract out the wealth and cash in the company in an orderly and legal manner; and
>
> - Ensure that the stakeholders in the company are paid in the ordinary course of business, and particularly ensure that you, either via your current account or your secured advance, are paid out in the normal course of business.

[91] If the "perspective that we are dealing with" merely concerned a restructuring initiative that had commenced long before the McConnell Dowell claim was notified, there would be no need to be careful to ensure that communications were privileged. Nor would there be any advantage in having management reports prepared to "make the position look even sounder" from that perspective. Nor would it fit with the timing. Mr Dorrance was plainly referring to the transactions undertaken from July 2008 when he said that "we have effectively now achieved what we set out to do some 9 – 10 months ago". These were the steps initiated at that time "to extract out the cash and wealth in the company" and "ensure that the stakeholders in the company are paid".

[92] Contrary to the view taken by the Associate Judge, we consider that the evidence points strongly to the conclusion that the transactions, including the GSA, were entered into to safeguard Mr Browne and his related interests from the McConnell Dowell claim. Mr Browne and his legal and accounting advisors knew that there was a risk that a liquidator would seek to set aside the transactions. They did what they could to minimise the risk of that occurring. The object of the exercise was to repay DBC and DBM and promote Mr Browne to secured creditor status so that none of them would have to share in the assets of PPS on an equal basis with McConnell Dowell in the event the company was liquidated.

Did PPS satisfy the solvency test at the time the GSA was granted, taking into account its contingent liability to McConnell Dowell?

[93] PPS' financial statements for the year ended 31 March 2008 showed that its current liabilities exceeded its current assets by over $300,000 taking into account the amounts due to Mr Browne, DBC and DBM. Its net assets overall ranged from $140,402 to $597,010 depending on which of Mr Lay's valuations of PPS' shares in PPS-Frank NZ was correct.

[94] Mr Browne made his advance secured under the GSA on 29 August 2008 and the unsecured loans were repaid on 2 September 2008. By that time, three welds had failed due to faulty welding, McConnell Dowell had suffered substantial losses and PPS was liable for these losses under the indemnity in the subcontract. McConnell Dowell had quantified the losses it had suffered from the first of the weld failures at over $2.5 million. The subsequent adjudication merely confirmed that PPS was liable for these losses and the further losses caused by the other two weld failures. Therefore, at the time the payments were made, PPS was unable to meet all of its obligations, including under the indemnity in favour of McConnell Dowell. PPS' liabilities, including the contingent liability to McConnell Dowell, far exceeded its assets. By this time, the directors ought to have appreciated that PPS did not satisfy the balance sheet test for solvency under s 4(1)(b) of the Act taking into account the contingent liability to McConnell Dowell.

[95] Given the expected size of the McConnell Dowell claim and PPS' potential liability for this under the indemnity, we consider that the Associate Judge's conclusion that PPS was "in sound financial heart" at the time was also overstated.

[96] In summary, while we acknowledge the advantages the Associate Judge had in seeing and hearing the witnesses, we are satisfied that his key factual findings — that the failure of the welds was not caused by faulty workmanship undertaken by PPS, Mr Browne was entitled to rely on advice that PPS was insured for the claim, and PPS was in sound financial heart at the relevant time — cannot withstand close scrutiny of the documentary record and the chronology of events.

Is it just and equitable that the GSA be set aside?

[97] PPS was placed in liquidation on 5 October 2009 because it was unable to pay its debts following the adjudication of McConnell Dowell's claim. Mr Browne was a director of the company at the time the GSA was granted in his favour on 28 July 2008. The prerequisites to the making of an order under s 299(1) are therefore satisfied.

[98] Mr Browne knew at that time that McConnell Dowell intended to pursue a substantial claim against PPS and that PPS would not be able to pay if the claim succeeded and no insurance cover was available to meet it. He may have believed at that time that PPS might be able to successfully defend the claim or prove that McConnell Dowell's insurers were obliged to cover it. However, this is somewhat beside the point. It does not change the fact that the transactions were clearly designed by Mr Browne's advisors to protect him and his related interests from the risk of liquidation if the claim succeeded and no insurance was available to cover it.

[99] The purpose of the voidable transactions regime is to prevent any creditor gaining preference over others. This is particularly objectionable in cases where directors, or other persons in control of a company, make arrangements to prefer themselves over other creditors. Such transactions contravene the basic rule that all creditors of the same class should share equally in the assets of an insolvent company.

[100] Having regard to the circumstances in which the GSA was created and all other relevant circumstances as outlined, we consider that it is just and equitable to make an order pursuant to s 299 of the Act setting aside the GSA as against the liquidator. The object of the transactions involving Mr Browne personally was to replace his unsecured lending to PPS of $340,600 with secured lending of $450,000. This ensured that he would have first claim on PPS' assets in the event of a liquidation, leaving McConnell Dowell as an unsecured creditor with no prospect of recovery.

Does Mr Browne have a defence under s 296(3)?

[101] Mr Browne relies on the statutory defence under s 296(3). If this defence is tenable, the appropriate course would be to remit the matter back to the High Court because the Associate Judge did not consider it. However, we are satisfied that the defence is not available on the facts of this case.

[102] The first element of the defence under s 296(3) requires Mr Browne to show that he acted in good faith. The onus is on him to prove that he honestly believed that the transaction would not involve any element of undue preference over other creditors.[34] For the reasons already given, this element of the defence is not established on the evidence.

[103] The second element of the defence has two limbs. It must be proved that a reasonable person in Mr Browne's position would not have suspected at the time the transaction was entered into that PPS was or would become insolvent. Further, it must be shown that at that time Mr Browne *himself* did not have reasonable grounds for suspecting that PPS was or would become insolvent. Neither of these limbs is proved. Indeed, we have found that it was for the very reason that Mr Browne and his advisors suspected that PPS would become insolvent that the GSA was granted and the repayments made.

[104] It is not necessary to consider the third element of the defence, alteration of position, because failure to prove any element of the defence under s 296(3) is fatal. For the reasons given, we are satisfied that Mr Browne has not raised an arguable defence to the liquidator's claim for repayment.

Relief

[105] Mr Petterson claims that to give effect to the order setting aside the GSA, it is necessary to make an order for repayment of the monies paid in reliance on it. As noted, he does not seek repayment of the amounts paid prior to commencement of the liquidation, only the final distribution made in May 2013 of $201,316.

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[34] *Re Orbit Electronics Auckland Ltd (in liq)* (1989) 4 NZCLC 65,170 (CA) at 65,171; and *Re Number One Men Ltd (in liq)* (2001) 9 NZCLC 262,671 (CA) at [32].

[106] The Associate Judge noted the commentary in *Brookers Insolvency Law & Practice*: "it is presumed that this section cannot be used if the security has been realised prior to the commencement of the liquidation".[35] He also referred to similar comments by the learned authors of *Heath and Whale Insolvency Law in New Zealand*:[36]

> It is likely that if the secured creditor has exercised its security prior to the liquidation of the company then it is entitled to the benefits received notwithstanding that the security or charge might have been set aside as against the liquidator under the section.

[107] We do not need to consider this issue in the present case because it does not arise. Mr Petterson only seeks to recover monies paid in May 2013 from the realisation of assets after the commencement of the liquidation. These funds came from the settlement of a claim Mr Stapley pursued on PPS' behalf against Bosch Irrigation Ltd. That claim was settled on 7 December 2012 by Bosch agreeing to make a payment of $201,250 to PPS.

[108] We are satisfied that it is appropriate to make an order under s 299(3) of the Act requiring Mr Browne to repay PPS the sum of $201,316 which he received in May 2013.

[109] In his amended notice of appeal, Mr Petterson sought an order requiring Mr Browne to repay the sum of $541,906, said to have been received by Mr Browne on 2 September 2008. In fact, only $340,600 was paid on that date. The balance of $201,316 was paid following receivership. Mr Petterson is not entitled to an order for repayment from Mr Browne of the sum of $340,600. That claim was based on the notice issued under s 294 which Mr Browne objected to in time. The Associate Judge recorded that Mr Petterson abandoned the claim to those monies at the hearing.[37] Mr Petterson cannot revive it on appeal.

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35 HC decision, above n 1, at [46]: *Brookers Insolvency Law & Practice* (online looseleaf ed, Thomson Reuters) at [CA 299.01].

36 HC decision, above n 1, at [47]: Paul Heath and Michael Whale *Heath and Whale Insolvency Law in New Zealand* (2nd ed, LexisNexis, Wellington, 2014) at [20.78].

37 HC decision, above n 1, at [27].

Second ground of appeal — was the Associate Judge wrong not to order DBC and DBM to repay PPS?

Proceedings against DBC and DBM in the High Court

[110] As noted, DBC and DBM did not object to the notices served by Mr Petterson under s 294 seeking to set aside the payments made to those companies on 2 September 2008. The result was that the transactions were automatically set aside by virtue of s 294(3) as against DBC and DBM.

[111] Mr Petterson applied for an order requiring repayment of the amounts paid pursuant to s 295 of the Act which reads:

> **295 Other orders**
>
> If a transaction or charge is set aside under section 294, the court may make 1 or more of the following orders:
>
> (a) an order that a person pay to the company an amount equal to some or all of the money that the company has paid under the transaction:
>
> (b) an order that a person transfer to the company property that the company has transferred under the transaction:
>
> (c) an order that a person pay to the company an amount that, in the court's opinion, fairly represents some or all of the benefits that the person has received because of the transaction:
>
> (d) an order that a person transfer to the company property that, in the court's opinion, fairly represents the application of either or both of the following:
>
> (i) money that the company has paid under the transaction:
>
> (ii) proceeds of property that the company has transferred under the transaction:
>
> (e) an order releasing, in whole or in part, a charge given by the company:
>
> (f) an order requiring security to be given for the discharge of an order made under this section:
>
> (g) an order specifying the extent to which a person affected by the setting aside of a transaction or by an order made under this section is entitled to claim as a creditor in the liquidation.

[112] DBC and DBM resisted Mr Petterson's claim on two bases. First, they pleaded a defence under s 296(3). Second, they pleaded that it would not be just and equitable to order recovery of the money claiming that:

(a) PPS was solvent at the time the payments were made to them;

(b) they would have had a defence based on solvency but for the failure of their professional advisors to bring the notices to their attention;

(c) their failure to object to the notices was not their fault;

(d) the funds paid to them were received in good faith;

(e) they have used the funds and altered their position in reliance on the validity of the payments;

(f) the liquidator's delay in pursuing recovery has meant that the funds cannot be traced and repayment would be detrimental to recipients and third parties; and

(g) the liquidator failed to pursue recovery under McConnell Dowell's insurance policy.

High Court judgment

[113] The Associate Judge did not address the defence under s 296(3) of the Act. Instead, he focused on the second defence, which assumed that the Court has a general discretion under s 295 to decline recovery to a liquidator even where the transactions have been set aside and the statutory defence under s 296(3) has not been made out.[38] After reviewing various authorities, the Associate Judge concluded that the Court has such a discretion under s 295.[39]

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38 Beginning at [137] of the HC decision, above n 1.
39 At [150].

[114] The Associate Judge considered that the discretion should be exercised in favour of DBC and DBM because PPS was able to pay its due debts at the relevant time and, had the notices been objected to, the transactions would not have been set aside.[40] He followed the approach taken by Tipping J in *Re Huberg Distributors Ltd (in vol liq) (No 2)*, which he considered remained applicable despite the subsequent amendments to the legislation.[41] The Associate Judge summarised his conclusion as follows:

> [158] Given the decision in the Court of Appeal in *Grant v Lotus Gardens Ltd*, I do not think that the only discretion available to the Court in relation to the making of an order under s 295 is contained in s 296(3). Certainly, where a case falls within the circumstances in s 296(3) a recovery order cannot be made, but I do not see any reason why an order cannot be refused in circumstances akin to those before Tipping J in *Re Huberg Distributors*, as are those before the Court in the present case. I am firmly of the view that payment ought not to be ordered, for the very reason his Honour gave:
>
> > … as the liquidator was never entitled to avoid these dispositions it would be inequitable to order recovery…

Submissions

[115] Mr Gustafson submits that the Associate Judge should not have permitted DBC and DBM to argue that PPS could pay its due debts at the time the payments were made. This is because once the transactions have been set aside, it is too late to argue that they were not insolvent transactions.

[116] Mr Gustafson also contends that the Associate Judge was wrong to conclude that the Court has a discretion to decline recovery under s 295 of the Act even where the statutory defence under s 296(3) is not proved. In any event, he argues that any such discretion should not have been exercised in this case.

[117] Mr Russ submits that the Associate Judge made no error and he supports the Associate Judge's conclusion and reasoning.

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40 At [158].

41 *Re Huberg Distributors Ltd (in vol liq) (No 2)* (1987) 3 NZCLC 100,211 (HC) at 100,215.

Is there a residual discretion to decline to make any order under s 295, even where a transaction has been set aside and no defence to a claim for repayment has been made out under s 296(3),or at law or in equity?

[118] Section 295 is in almost identical terms to the Australian equivalent, s 588FF of the Corporations Act 2001 (Cth). As the Associate Judge observed, the Courts in Australia have concluded that the use of the word "may" in s 588FF does not mean that the Court has a general discretion to decline relief. In *Cashflow Finance Pty Ltd v Westpac Banking Corp*, Einstein J reasoned:[42]

> [568] The consequences include that any person who has received money under the transaction which is avoided must repay it. I accept Cashflow's submission that there is no room for the Court to assert that it has a superior sense of justice to that which Parliament has enacted – see *Commonwealth of Australia v SCI Operations Pty Ltd.*
>
> [569] Cashflow submitted and I accept that the presence of the word "may" in s588FF does not mean that there is a discretion in the Court concerning whether to make an order in the circumstances of the present case. In this regard, I accept the following propositions which were put forward by way of Cashflow in its submission as correct:
>
> (i) S588FF more naturally reads as conferring a jurisdiction on the Court, rather than stating that there is a discretion in the court.
>
> (ii) The jurisdiction that is conferred by s 588FF(1) is to make "one or more of the following orders". There is, I accept, clearly a choice to be made by the Court as to which of the orders in the list … is appropriate to be made. That does not mean that, once the Court is satisfied that the circumstances exist which make it appropriate for a preference or uncommercial transaction to be set aside, there is then some separate discretion which the Court can exercise on 'palm tree justice' grounds, in deciding whether to actually make the order.
>
> (iii) The power conferred by section 588FF is one where:
>
> "The word 'may' is merely used to confer the authority: and the authority must be exercised, if the circumstances are such as to call for its exercise." [Per Windeyer J *Finance Facilities Ltd v Federal Commissioner of Taxation* … (with whom Barwick CJ agreed)].
>
> (Citations omitted).

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42 *Cashflow Finance Pty Ltd v Westpac Banking Corp* [1999] NSWSC 671.

[119] This decision has been consistently applied in Australia.[43] We now consider whether the position is different in New Zealand despite the provisions being in materially the same terms.

[120] It is well established that once a transaction has been set aside, the liquidator can pursue an action for recovery of the amount paid as a debt or as monies had and received.[44] The liquidator is not confined to seeking an order under s 295; the section is not a code and does not exclude a liquidator's right to seek recovery by these alternative means.[45] The creditor may resist the liquidator's claim if it can establish the elements of the defence provided under s 296(3) of the Act or any other defence that might be available at law or in equity. Examples are where it can be shown that there was no transaction at all or where a defence of estoppel is available.

[121] If the liquidator pursues a claim for money had and received in relation to a transaction that has been set aside, he or she will be entitled to judgment for the amount required to restore the company's position unless the creditor can establish an available defence under s 296(3) or at law or in equity. The Court could not, in the exercise of an asserted discretion, decline to enter judgment for an appropriate restitutionary sum.

[122] It would be anomalous if the result were different if the liquidator instead pursues recovery under s 295. The same defences are available to the creditor but, if none is established, it is hard to see why the liquidator would not be entitled to an order unless the preference had been repaid or restored. This analysis supports the interpretation adopted in Australia that there is no general discretion under this section to decline to make any order.

[123] The Associate Judge placed considerable reliance on Tipping J's decision in *Re Huberg*. That case was decided under s 311A(7), which was inserted into the Companies Act 1955 by s 26 of the Companies Amendment Act 1980 and is the

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43 See for example *Cussen v Sultan* [2009] NSWSC 1114, (2009) 74 ACSR 496 at [27]–[29]; and *Re Frontier Architects Pty Ltd (in liq)* [2010] FCA 1381, (2010) 81 ACSR 158 at [28].

44 *Westpac Banking Corp Ltd v Nangeela Properties Ltd* [1986] 2 NZLR 1 (CA) at 11; *OPC Managed Rehab Ltd v Accident Compensation Corporation* [2006] 1 NZLR 778 (CA) at [48]–[49]; and *Grant v Lotus Gardens Ltd* [2014] NZCA 127, [2014] 2 NZLR 726 at [43]–[44].

45 *Grant*, above n 44, at [40].

predecessor of s 296(3). It is important to note that, unlike s 296(3) as it currently stands, s 311A(7) contained an additional requirement that the Court consider whether it would be inequitable to order recovery, in whole or in part:

> **311A Procedures relating to voidable preference and voidable securities —**
>
> …
>
> (7) Recovery by the liquidator of any property or the value thereof (whether under this section or under any other provision of this Act or under any other enactment or in equity or otherwise) may be denied wholly or in part if —
>
> (a) The person from whom recovery is sought received the property in good faith and has altered his position in the reasonably held belief that the transfer or payment of the property to him was validly made and would not be set aside; and
>
> (b) In the opinion of the Court it is inequitable to order recovery or recovery in full, as the case may be.
>
> …

[124] In *Re Huberg*, the parties filed an agreed statement of facts confirming all elements of the defence under s 311A(7)(a).[46] The sole issue was whether it would be inequitable to order recovery under s 311A(7)(b). Tipping J found that it would be inequitable to order recovery because the liquidator acknowledged that he was never entitled to avoid the dispositions in the first place.[47]

[125] While the decision in *Re Huberg* was undoubtedly correct, we consider that the Associate Judge's reliance on it was misplaced. The statutory defence under s 311A(7) is materially different to the defence now provided under s 296(3). When enacting the Companies Amendment Act 2006, which came into force on 1 November 2007, Parliament removed from s 296(3) that part of the statutory defence which required consideration of whether it would be inequitable to order recovery in all of the circumstances.[48] That had been a feature of the defence under s 296(3) as originally enacted, and under its predecessor, s 311A(7) of the 1955 Act. This change served one of the objectives of the 2006 amendments, which was to

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46 *Re Huberg*, above n 41, at 100,215.
47 At 100,215.
48 Companies Amendment Act 2006, s 31.

provide greater certainty in this area. Parliament cannot have intended, by removing this element of the statutory defence in s 296(3) in the interests of certainty, that it would nevertheless be brought back into consideration under s 295.

[126] The Associate Judge also relied on *McKinnon v Falla Holdings NZ Ltd (in liq)*.[49] Chambers J expressed the view in that case that equitable considerations were not only relevant under s 296(3) but also under s 295 because that section confers a discretion on the Court:[50]

> It would be wrong to think that a setting aside leads inevitably to a recovery order in the liquidator's favour. First, the remedies available under s 295 are discretionary. Secondly, even if the Court decides to make one or other of the orders, it is clear from the wording of s 295 that recovery may not be total. Thirdly, s 296(3) confers a wide discretion on the Court to deny recovery in certain circumstances.

[127] The Court clearly has a discretion under s 295 regarding the type of order that will be most appropriate in a given case, as is clear from the words "the Court may make 1 or more of the following orders". Further, as Chambers J observed, the Court may order recovery in whole or in part. For example, under s 295(a), the Court may "order that a person pay to the company an amount equal to some or all of the money that the company has paid under the transaction". The Supreme Court confirmed the existence of this discretion, with reference to s 295(c), in *West City Construction Ltd v Levin*:[51]

> The use of the word "may" and the phrase "some or all of the benefits" are indicative of a discretion which might be exercised so as not to require the preferred creditor to account for the full extent of the preference.

[128] We also respectfully agree with Chambers J that the Court had a wide discretion to deny recovery in certain circumstances under the predecessor s 296(3) with which he was concerned. However, this is no longer the case following the 2006 amendment. To the extent that Chambers J may have gone further and suggested that there is a general discretion based on just and equitable considerations

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49 HC decision, above n 1, at [148] and [151]: *McKinnon v Falla Holdings NZ Ltd (in liq)* (1999) 8 NZCLC 262,034 (HC) at 262,041.

50 At 262,041.

51 *West City Construction Ltd v Levin* [2014] NZSC 183, [2015] 1 NZLR 362 at [39].

not to make any order under s 295, distinct from the discretion in s 295 as to the nature and extent of the remedy, we respectfully disagree.

[129] The Associate Judge also placed reliance on similar remarks made by Chambers J when giving the judgment of this Court in *Levin v Market Square Trust*:[52]

> And, in any event, considerations of "fairness" do not arise at this stage of the s 292(2)(b) assessment. That assessment is purely objective. Considerations of fairness (using that concept loosely) arise later in the regime, when the Court is considering what orders, if any, to make under s 295 or whether to deny the liquidator recovery under s 296(3).

[130] *Levin v Market Square Trust* was also decided under the provisions as they were prior to the Companies Amendment Act 2006 coming into force on 1 November 2007 and required consideration of whether it would be inequitable to order recovery.

[131] The Associate Judge next referred to the following passage in the decision of this Court in *Farrell v Fences & Kerbs Ltd*:[53]

> If the creditor does not establish an entitlement to protection under s 296(3), a discretion remains under s 295 as to the extent to which the creditor must repay the payment or other property or benefits received.

[132] This decision was reversed by the Supreme Court in *Allied Concrete Ltd v Meltzer*.[54] However, the passage which the Associate Judge relied upon is uncontroversial. The Court has a discretion under s 295 as to the nature and extent of the remedy in a given case. This is clear from the section as was confirmed by the Supreme Court in *West City Construction Ltd*.[55]

[133] Finally, the Associate Judge referred to the following passages in this Court's decision in *Grant v Lotus Gardens Ltd*:[56]

> Moreover, s 295 does not use exclusive or mandatory language. It states that the Court "may" make the orders set out in that section, and contains no

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52 At [144]: *Levin v Market Square Trust* [2007] NZCA 135, [2007] 3 NZLR 591 at [49].
53 At [146]: *Farrell v Fences & Kerbs Ltd* [2013] NZCA 329 at [28].
54 *Allied Concrete Ltd v Meltzer* [2015] NZSC 7, [2016] 1 NZLR 141 at [106].
55 *West City Construction Ltd*, above n 51, at [39].
56 At [147]: *Grant*, above n 44, at [38].

> words excluding any other remedy. There is no doubt that s 295 gives flexible discretionary powers to a liquidator.

[134] This passage confirms that s 295 is not a code and other avenues of recovery are available to a liquidator, such as by pursuing an action for money had and received. It also confirms that the Court has flexible discretionary powers when fashioning the appropriate remedy under s 295 to meet the circumstances of a particular case. However, this does not address the issue with which we are concerned, namely whether the Court has a discretion to decline to make any order on just and equitable grounds, even where the statutory defence under s 296(3) is not made out.

[135] *Reynolds v James* is an example of a case where no order was made under s 295 but that was because the preference had been restored.[57] This Court upheld the High Court's decision declining relief to a liquidator under s 295 because the creditor who had been preferred by a payment made prior to the liquidation subsequently paid greater sums to the liquidator to fund the liquidation and litigation pursued by the liquidator.[58] The Associate Judge in that case rightly considered that the preference had been cleared and that no order should be made under s 295 in those circumstances.[59] The post-liquidation payments had to be taken into account.

[136] The nature of the Court's discretion under s 295 was also recently considered by this Court in *Timberworld Ltd v Levin*.[60] This was an appeal from an order made in the High Court under s 295(c) for repayment of a preference. The High Court considered that it would undermine the statutory scheme, in particular the elements of the defence under s 296(3), if no order was made under s 295. This Court affirmed that approach:

> [111] Associate Judge Abbott considered, however, that Parliament had specifically prescribed in s 296(3) conditions under which a payment must not be set aside in liquidation, on the basis of unfairness to the creditor. He considered therefore, that although there was some discretion to be exercised in s 295(c) in making orders, given the prescription set out in s 296(3), the threshold for invoking this residual discretion in s 295 ought to be very high. Anything less would undermine the statutory scheme established through

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57 *Reynolds v James* [2014] NZCA 578 at [39]–[40].
58 At [39]–[40].
59 At [39]–[40].
60 *Timberworld Ltd v Levin* [2015] NZCA 111, [2015] 3 NZLR 365 at [111] and [113].

> s 296(3) and would be an unprincipled departure from the basic principle of fairness between creditors. While the Judge accepted an element of unfairness in the situation before him, he did not consider it to reach the threshold required to invoke s 295.
>
> …
>
> [113] We see no reason to depart from the reasoning of Associate Judge Abbott. No grounds or arguments were advanced to us to persuade us that the Judge's reasoning was flawed. The statutory scheme created by s 296(3) should be preserved. We agree with counsel for the liquidators that Timberworld can point to no "unfairness" that is not an intended consequence of the operation of the voidable preference regime, seeking to do justice to all creditors treated equally.
>
> (Footnotes omitted).

[137] The discretion being discussed here is the discretion under s 295(c). That is the discretion which is exercised when assessing the "amount that, in the court's opinion, fairly represents some or all of the benefits that the person has received because of the transaction". This is the same discretion referred to by this Court in *Reynolds* and by the Supreme Court in *West City*.

[138] We conclude that there is a discretion under s 295 as to the nature and extent of the appropriate remedy. However, there is no general discretion based on just and equitable considerations for the Court to decline to make one or other of the orders specified in s 295 if a disposition is set aside and no defence under s 296(3) or at law or in equity is made out. The Associate Judge was accordingly wrong to decline Mr Petterson's application for relief on that basis.

Does DBC or DBM have a tenable defence under s 296(3)?

[139] This leaves the first ground of opposition pleaded by DBC and DBM which relies on the statutory defence under s 296(3). For the reasons already given, we do not consider that DBC and DBM have tenable defences under s 296(3). Mr Browne was a director of these companies and his knowledge must be attributed to DBC and DBM in this context.

[140] Accordingly, we are satisfied that DBC and DBM have not raised any arguable defence to the liquidator's claim for repayment. It is therefore appropriate to make an order pursuant to s 295 of the Act requiring them to repay the amounts

paid to them on 2 September 2008. DBC and DBM will be entitled to prove in the liquidation of PPS to the extent of the refunds paid by each of them in consequence of these orders.

Result

[141] The appeal is allowed in part.

[142] We make an order pursuant to s 299(1) of the Act setting aside as against the liquidator the GSA made between PPS and Mr Browne dated 28 July 2008.

[143] We make an order pursuant to s 299(3) of the Act requiring Mr Browne to pay PPS the sum of $201,316. Mr Browne is entitled to claim as a creditor in the liquidation of PPS for the amount paid by him pursuant to this order.

[144] We make an order pursuant to s 295(a) of the Act requiring DBC and DBM to pay PPS the sums of $565,303 and $347,634 respectively. We make an order pursuant to s 295(g) of the Act that DBC and DBM are entitled to claim as creditors in the liquidation of PPS to the extent of the amounts refunded by each of them as a result of this order.

[145] The order for costs in the High Court is quashed. The respondents must pay the appellant costs in the High Court, to be fixed in that Court.

[146] The respondents must pay the appellant costs in this Court for a standard appeal on a band A basis, together with usual disbursements.

Solicitors:
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