IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA568/2017
[2018] NZCA 358

	BETWEEN	ROBT. JONES HOLDINGS LIMITED Appellant
	AND	ANTHONY JOHN MCCULLAGH AND STEPHEN MARK LAWRENCE Respondents

Hearing:	26 April 2018
Court:	Cooper, Winkelmann and Williams JJ
Counsel:	D G Chesterman for Appellant B P Keene QC and L M Van for Respondents
Judgment:	10 September 2018 at 2.30 pm

JUDGMENT OF THE COURT

A The appeal is dismissed.

B The appellant must pay the respondents one set of costs for a standard appeal on a band A basis and usual disbursements. We certify for second counsel.

REASONS OF THE COURT

(Given by Winkelmann J)

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Introduction

[1] In 2010 Robt. Jones Holdings Ltd (RJH) received payments totalling $751,941.52 in discharge of a debt owed to it by Northern Crest Investments Ltd (Northern Crest). The payments were made, not by Northern Crest, but by two other entities: Columbus Property Marketing Pty Ltd (Columbus) and MSH No 2 Pty Ltd (MSH No 2).

[2] In 2011, Northern Crest was placed in liquidation. Its liquidators applied under s 294 of the Companies Act 1993 to set aside the payments received from Columbus and MSH No 2 on grounds that they were insolvent transactions entered into by Northern Crest in the two-year period before the date of commencement of the liquidation and at a time when Northern Crest was unable to pay its due debts.

[3] The liquidators succeeded in the High Court before Gordon J. The payments were set aside and RJH ordered to pay the $751,941.52 to Northern Crest.[1] RJH now appeals that finding. It does not, on appeal, dispute that Northern Crest was unable to pay its due debts at the time the payments were made. Nevertheless, it argues the Judge was wrong to find these were insolvent transactions for the purposes of the Companies Act because:

(a) there was insufficient evidential basis for the Court to conclude that payments by the third parties were transactions by Northern Crest;

(b) even if the payments by MSH No 2 were transactions by Northern Crest, the Judge was nevertheless wrong to find these were insolvent transactions as the payments did not result in a diminution of the net pool of assets available to the creditors of Northern Crest in the liquidation; and

(c) in any case, the Judge erred in failing to order, under s 295 of the Act, that the amount RJH was required to pay should be reduced

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1 *McCullagh v Robt Jones Holdings Ltd* [2017] NZHC 2182, [2018] NZCCLR 8 at [217]–[219] [High Court judgment].

in light of the liquidators' conduct in attempting to set aside and recover the amounts in question.

Background

The entities and people

[4] Northern Crest is a New Zealand registered company.[2] It was part of the Northern Crest group of companies, which in earlier times had traded as the Blue Chip group of companies. Northern Crest was a promoter of a particular style of property investment. Liquidators were appointed to it in June 2011 by order of the Court.[3] The liquidators are the respondents, Messrs Anthony McCullagh and Stephen Lawrence.

[5] MSH No 2 was an Australian registered company and a wholly-owned subsidiary of Northern Crest. Its sole director, Mr Eakin, was also a director of Northern Crest. It was placed into administration in Australia some time after the transactions that are subject of these proceedings. Another related company, MSH No 1, appears from time to time in the chronology of relevant events.

[6] Columbus is also an Australian registered company. When the payments were made, Mr Robert Hughes was its sole director. Columbus' link with Northern Crest is through Mr Hughes' association with Mr Mark Bryers. Mr Bryers was a director of Northern Crest until he was bankrupted, but even then he continued to be involved in the affairs of Northern Crest as a consultant.

The transactions

[7] Northern Crest fell behind in the rent it owed RJH under a lease of a building in Auckland. In October 2008, a settlement was documented in which a payment was agreed to fully satisfy RJH's claims against Northern Crest.

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2 Formerly Blue Chip Financial Solutions Ltd, Blue Chip New Zealand Ltd, Newcall Group Ltd and The New Zealand Salmon Company Ltd.

3 *Northern Crest Investments Ltd v Haywood* HC Auckland CIV-2010-404-7741, 2 June 2011.

[8] Between 22 January 2010 and 28 May 2010, Columbus made payments to RJH totalling $489,183.07. Between 7 September 2010 and 5 November 2010, MSH No 2 made payments to RJH totalling $262,758.05. RJH received these payments, totalling $751,941.52, in discharge of Northern Crest's obligations under the settlement agreement.

[9] On the liquidators' case, Columbus paid licence fees, due to Northern Crest, to RJH in discharge of Northern Crest's obligations. The liquidators say the MSH No 2 payments were also a redirection of licence fees or, alternatively, were an inter-group loan from MSH No 2 paid to RJH for the benefit of Northern Crest.

The voidable transaction proceedings

[10] The liquidators argue that these third-party payments were insolvent transactions by Northern Crest because they were of funds due to Northern Crest and made at its direction or, at least, with its consent.

[11] In pursuing this case, the liquidators had little cooperation from the directors of Northern Crest, MSH No 2 or Columbus. Before the High Court the evidence and argument for both sides focused on the records of the Northern Crest group that the liquidators had been able to assemble and the work of experts retained by each side to assist them.

Legislative framework

[12] Section 292 provides that a transaction is voidable by the liquidator if it is an insolvent transaction and entered into within the specified period. The onus is on the liquidator to show that the transaction in question is an insolvent transaction. Section 292(2) defines insolvent transaction as follows:

> **292 Insolvent transaction voidable**
>
> …
>
> (2) An insolvent transaction is a transaction by a company that—
>
> (a) is entered into at a time when the company is unable to pay its due debts; and

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

[13] Section 292(3) provides that transaction "means any of the following steps by the company":

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

(b) creating a charge over the company's property:

(c) incurring an obligation:

(d) undergoing an execution process:

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

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

[14] The liquidators rely upon ss 292(3)(e) and (f). They say that these were composite sets of transactions by which RJH was paid money by the third parties due to Northern Crest and at its direction or, at least, with its consent.

[15] The principles as to when a payment by a third party can amount to a transaction for the purposes of s 292 are not in dispute. Courts will be concerned with substance, rather than form, when assessing third party payments.[4] Payments by third parties may constitute insolvent transactions for the purposes of s 292 where the payment is made at the direction or with the consent of the insolvent company, and:

(a) the third party makes that payment in discharge of an obligation it owes to the insolvent company;[5] or

(b) the money is not the third party's, but is paid from funds belonging to the insolvent company or to which that company has rights.[6]

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4 *Re Matthew Ellis Ltd* [1933] 1 Ch 458 (CA) at 469; *Re Mataura Motors Ltd* [1981] 1 NZLR 289 (CA) at 291; *Westpac Banking Corporation v Merlo* [1991] 1 NZLR 560 (CA) at 564; *Re Yukich Brothers Ltd (in liq); Porter Hire Ltd v Blanchett* (2006) 9 NZCLC 264,070 (HC) at [92]; and Paul Heath and Mike Whale (eds) *Heath and Whale: Insolvency Law in New Zealand* (2nd ed, LexisNexis, Wellington, 2014) at 633.

5 *Levin v Market Square Trust* [2007] NZCA 135, [2007] 3 NZLR 591 at 595–596; and *Chilton Saint James School v Gray* (1996) 9 PRNZ 349 (HC) at 354.

6 *Westpac Banking Corporation v Nangeela Properties Ltd* [1986] 2 NZLR 1 (CA).

[16] This issue was fully discussed by the Federal Court of Australia in *Re Emanuel (No 14) Pty Ltd (in liq), Macks v Blacklaw & Shadforth Pty Ltd*.[7] In that case Emanuel had contracted with EFG that, in settlement of all claims between them, EFG would, amongst other things, make payments for Emanuel and at Emanuel's direction to Blacklaw, in partial discharge of Emanuel's debts to Blacklaw. At issue was whether, when payment was made and accepted by Blacklaw, Emanuel and Blacklaw were parties to a transaction for the purposes of the unfair preference provisions of the Corporations Law.[8] The Federal Court was satisfied that Emanuel was party to the transaction since its authorisation was necessary for the payment to be effective in discharging the debt. The Court said:[9]

> We confine our observations for present purposes simply to a course of dealing initiated by a debtor for the purpose of, and having the effect of, extinguishing a debt. It is not apparent to us why it should not be said that, where a debtor so acts and extinguishes a debt, the relevant "transaction" is the totality of the dealings through which the debtor procures the intended outcome, irrespective of whether one or more of the dealings in the sequence in question does not involve or require the participation of the debtor but does require that of a third party. The transaction, in other words, is the totality of the dealings initiated by the debtor so as to achieve the intended purpose of extinguishing the debt.

[17] Section 294 of the Act confers on the court the power to set aside insolvent transactions. Section 295 details the range of orders a court may make where a transaction is set aside under s 294.

First ground of appeal: did the liquidators prove the payments by Columbus were a redirection of licence fees due to Northern Crest?

[18] RJH argues that the liquidators failed to prove that the payments to RJH by Columbus were a redirection of licensing fees due to Northern Crest for the following reasons:

(a) The licensing arrangements the liquidators built their case on were in fact a sham, put in place to help Northern Crest's attempts to gain listing on the Australian Stock Exchange.

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7 *Re Emanuel (No 14) Pty Ltd (in liq), Macks v Blacklaw & Shadforth Pty Ltd* (1997) 147 ALR 281 (FCA).

8 At 282.

9 At 288.

(b) Even if the licensing arrangements were not shown to be a sham, the accounting and company records relied upon to prove these payments were a redirection of licensing fees were demonstrably unreliable. They did not and could not prove that the transactions were from licence fees owed to Northern Crest.

[19] These are two separate grounds of challenge to the judgment. We address each of them in turn. However, as we come to, success for RJH with either argument would not assist it. If the arrangements were a sham or the accounting records unreliable, in the absence of other explanation the inevitable inference would be that these payments by Columbus to RJH were by way of loan to Northern Crest. It is to be remembered that the payments were used to discharge Northern Crest's indebtedness to RJH and were therefore applied for the benefit of Northern Crest.

[20] If by way of loan, the arrangements would still be a transaction by Northern Crest for the purposes of s 292. It follows that even if RJH succeeded with this first ground of appeal, it would still have to succeed on the third ground of appeal — its argument that a loan transaction to repay a debt cannot be an insolvent transaction because it does not diminish the pool of assets available to meet creditors' claims, the same argument it makes in connection with the MSH No 2 payments.

Background

[21] Four licence agreements are relevant to the issues in this proceeding.

January 2009 Agreement

[22] The January 2009 Agreement was between MSH No 2 as licensor and Columbus as licensee. Columbus was granted a non-exclusive licence to the "System" for the whole of Australia. Although Northern Crest was not a party to that agreement, it was defined as the Master Licensor for the purposes of the agreement. The background recitals to the Agreement include the following:

> A The Master Licensor has developed a licensed system and the Master Licensor owns proprietary know how and trade secrets relating to the establishment and operation of the System.

…

C The Master Licensor has granted the Licensor [MSH No 2] rights to the name and all other Intellectual Property in relation to the System and the right to licence the System.

[23] The licensed System is said to enable "the Licensee to provide financial solutions to their customers through the referring, processing and sale of residential property and other investment solutions and related services and products". One of the distinguishing features of the System is said to be a "Licence Owner Manual". Columbus was required by the agreement to conduct its business in accordance with this manual.

[24] Columbus was also required to pay a monthly licence fee reflecting the properties underwritten and settled by the licensee for the relevant month. That fee is defined as "15.0% of the sale value of every third property underwritten by the Licensee in the territory [Australia] exclusive of GST".

November 2009 Agreement

[25] The November 2009 Agreement is the licence agreement the liquidators say generated the licence fees which were redirected to RJH. It was between Northern Crest as licensor and Columbus as licensee, and was expressed to supersede all previous agreements with respect to its subject matter.

[26] The agreement used different language to the January 2009 Agreement. It involved the licensing of intellectual property, rather than systems. But the intellectual property was said to enable Columbus to conduct the "Business", and the Business was defined in very similar terms to the "System". We therefore infer that the November 2009 Agreement licensed similar rights to those licensed in the January 2009 Agreement.

[27] The rights granted were non-exclusive, non-transferable rights to use the intellectual property and to perform the "Licenced Services" (defined as services to be performed by the Licensee in implementation of the Intellectual Property) in Australia for a period of five years.

[28] Like the earlier agreement, the November 2009 Agreement contained a clause requiring the licensee to conduct its business in accordance with the manual, which in this instance was described as the "Procurement Procedure Manual".

[29] The fee structure under the November 2009 Agreement was more complex and, for Columbus, more costly than that documented in the January 2009 Agreement. A fixed fee of $3.5 million was payable for the period 26 November 2009 to 31 March 2010, and there was to be an annual licence fee thereafter.

[30] It is common ground that the full amount of that licence fee of $3.5 million was not paid. It was reflected as an impaired asset in the interim financial report of the Northern Crest Group for the six months ended 30 September 2010. The reason for the impairment was described by Northern Crest in the following terms:

> **New licensee**
>
> Northern Crest has entered into a license [sic] agreement with Rutherford Franchising Pty Ltd. This license [sic] agreement will see the bulk of the residential investment property distribution activity channelled through Rutherford.
>
> As a consequence of the Rutherford license [sic] agreement, Northern Crest has revised the agreement previously entered into with Columbus Property Marketing Pty Limited on 26 November 2009. The new agreement with Rutherford had the effect that Columbus no longer had any exclusivity over distribution.
>
> In recognition of the projected reduction in revenues available to Columbus under the new licensing arrangements, [Northern Crest] has arrived at a commercial settlement with Columbus, resulting in minimum performance standards under the licence arrangements being substantially lowered, including a reduction in the minimum licence fee for the March 2010 year.
>
> The effect of the settlement is a writing down of licence fee receivables from March 2010 and as a consequence, Northern Crest will not now receive the $3.47 million licence fee receivable from FY2010 and has fully impaired this amount as at 30 September 2010.

April 2010 Agreement

[31] This, the third licence agreement, was between MSH No 2 as licensor and Columbus as licensee. Clause 10.10 provides that the April 2010 Agreement "supercedes [sic] all previous agreements, accords, understandings between the parties

and specifically releases Northern Crest Investment Limited from any liability in any event".

[32] The recitals to the April 2010 Agreement state as follows:

> A The Licensor has developed a licensed system and the Licensor owns proprietary know how and trade secrets relating to the establishment and operation of the System.
>
> B The Licensor has expended time, effort and money to develop and protect the System.
>
> C This agreement supercedes a previous agreement between the parties and has been modified by mutual consent as the relationship by mutual accord is no longer exclusive.
>
> D The new agreement takes into account the non exclusive relationship and in doing so reduces the consideration.

[33] A confusing feature of the April 2010 Agreement is that cl 14.1 of the agreement defines "Licensor" in two different ways as follows:

> **Licensor** includes its related Companies and in particular, in relation to ownership of the system, the Intellectual Property and the Marks.
>
> …
>
> **Licensor** means MSH No 2 Pty Limited (ACN 122 293 243).

[34] Columbus was granted a licence to "[e]xploit the System commercially" and "[i]dentify the Business in accordance with the System". Again, the marketing of the System and referral of customers was to be governed by the Licence Owner Manual. The licensee was also required to comply with the provisions of the Licence Owner Manual in relation to accounting, insurance and use of the intellectual property or database.

[35] The licence fee was $25,000 including GST in respect of each property sold by the licensee, which was said to cover the initial cost of training.

The Rutherford Agreement

[36] The final licence agreement in the chronology was between MSH No 2 as licensor and Rutherford Franchising Pty Ltd as licensee. Dated 1 October 2010, it is

the agreement referred to above as the reason for the impairment of the $3.5 million licensing fee.

[37] The terms of the Rutherford Agreement were largely identical to those contained in the April 2010 Agreement with two minor differences: first, there was no provision regarding the superseding of any previous agreement between the parties; and second, the licence fee was said to be $10,000 for each property sold by the Licensee rather than $25,000.

(a) Was the November 2009 Agreement a sham?

RJH's argument on appeal

[38] It was argued before Gordon J that the November 2009 Agreement was a sham. RJH put its case that this was a sham arrangement as follows. Northern Crest's relisting process (it had previously been listed) was underway from 2009. Relisting would have resulted in a capital raising which would clear all debts and provide further capital. However, Australian Stock Exchange compliance required Northern Crest to show $1.5 million in working capital. RJH argues that Northern Crest was therefore motivated to create a licence fee income stream to secure the relisting and, in the meantime, to help channel funds through in order to pay Northern Crest's debt and keep it afloat.

[39] RJH says that Gordon J was wrong to dismiss the evidence that Northern Crest had a clear motive to create a sham arrangement.[10] RJH points to the relationship between Mr Bryers, of Northern Crest, and Mr Hughes, the director of Columbus. In September 2009, Mr Hughes offered to pay $1.2 million to Mr Bryers' creditors from his company Balboa PM Services Pty Ltd. That was just two months before Columbus signed the November 2009 Agreement (the second licence) and was an effort to prevent Mr Bryers' bankruptcy. Two weeks prior to being adjudicated bankrupt, Mr Bryers transferred his shares and directorships in three Australian-listed companies to Mr Hughes. This relationship of assistance between Mr Bryers and Mr Hughes, RJH argues, is evidence which suggests that the November 2009 Agreement

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10 High Court judgment, above n 1, at [102]–[103].

may well have been arranged for an ulterior purpose. Since Mr Bryers' bankruptcy could not be avoided, the licence agreement was a backstop, under which a plan was formulated to keep Northern Crest afloat and secure its relisting in Australia.[11]

High Court judgment

[40] The Judge addressed four critical aspects of RJH's case on this point:

(a) Northern Crest created this sham arrangement to secure re-listing;[12]

(b) there was, in reality, no intellectual property to be licensed;[13]

(c) or if there was, it was owned by MSH No 2 not Northern Crest;[14] and

(d) the licensing fee was inflated and, from the outset, was never intended to be recoverable.[15]

[41] Relying primarily on contemporaneous documentation, the Judge rejected the suggested motive to create a sham arrangement as speculative.[16] She expressed herself satisfied that there was indeed intellectual property to be licensed, that Northern Crest was the master licensor of that intellectual property, and that the fee was agreed and intended to be paid so that the later impairment was legitimate.[17]

Relevant principles

[42] As to when a document will be treated as a sham, the Supreme Court in *Ben Nevis Forestry Ventures v Commissioner of Inland Revenue* articulated the relevant principles as follows:[18]

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11 Mr Bryers was bankrupted on 1 October 2009.
12 High Court judgment, above n 1, at [141].
13 At [104]–[119].
14 At [120]–[133].
15 At [135]–[142].
16 At [141].
17 At [143].
18 *Ben Nevis Forestry Ventures Ltd v Commissioner of Inland Revenue* [2008] NZSC 115, [2009] 2 NZLR 289.

> [33] There is no need for us to engage in any extended discussion of what constitutes a sham for present purposes. In essence, a sham is a pretence. It is possible to derive the following propositions from the leading authorities.[19] A document will be a sham when it does not evidence the true common intention of the parties. They either intend to create different rights and obligations from those evidenced by the document or they do not intend to create any rights or obligations, whether of the kind evidenced by the document or at all. A document which originally records the true common intention of the parties may become a sham if the parties later agree to change their arrangement but leave the original document standing and continue to represent it as an accurate reflection of their arrangement.

[43] RJH's argument before us was not addressed to these legal principles but we have attempted to frame it in conformity with them. We understand RJH's argument to be that the November 2009 Agreement was a sham because neither party intended that there be a licensing of intellectual property (because there was no such property, or at least none owned by Northern Crest) and that neither party intended that there be payment of the licence fee. RJH does not offer an explanation or evidence to suggest the true nature of the transactions allegedly concealed by sham licensing arrangements.

Did the Judge err in dismissing motivation for sham as speculative?

[44] The Judge rejected as speculative RJH's arguments as to why Northern Crest and Columbus would set up sham licensing arrangements.[20] We agree. Mr Chesterman for RJH did not identify for us any evidence tending to prove a link between the proposed relisting on the Australian Stock Exchange and the decisions taken to enter into the agreement, or to make the payments in question. There is however evidence tending the other way. As the Judge observed, the licence fee was impaired at the latest by 30 September 2010, at which time Northern Crest had not been re-listed.

[45] Against this background we are satisfied that the claimed link between the re-listing and the November 2009 Agreement can be discounted. At its highest, the evidence of the close relationship between the two men, which extended to their

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19 *Snook v London & West Riding Investments Ltd* [1967] 2 QB 786 (CA); *Paintin and Nottingham Ltd v Miller Gale and Winter* [1971] NZLR 164 (CA); and *NZI Bank Ltd v Euro-National Corp Ltd* [1992] 3 NZLR 528 (CA).

20 High Court judgment, above n 1, at [141].

business dealings, is a factor to be borne in mind when considering the other aspects of the licensing arrangements.

Was the intellectual property illusory?

[46] On appeal, RJH argues that Gordon J erred in rejecting arguments that the intellectual property and systems purportedly licenced were illusory in the face of the following evidence:

(a) Mr Eakin could not describe the intellectual property when he was interviewed.

(b) The absence of intellectual property manuals or other supporting documents to evidence the existence of the System.

(c) No asset value was attributed to the intellectual property in Northern Crest's accounts. Mr Robertson, Northern Crest's accounts contractor, confirmed that he believed the intellectual property was of questionable value and he had never been asked to include it in the accounts.

[47] In weighing the significance of Mr Eakin's statements made post-liquidation, we bear in mind the evidence produced by the liquidators that the directors of Northern Crest did not cooperate with the liquidators. This lack of cooperation on the part of the directors extended to a failure to hand over relevant documents or to provide documents. Mr Christopher McCullagh, who assisted the liquidators with the liquidation, gave evidence in the High Court. He explained that the records they retrieved were in disarray. They were found in shredder bins, loose or in files. In his opinion, the state of disorder suggested someone had been through the records to "sanitise" them. While Mr McCullagh confirmed that the Liquidators did not know who undertook the santisation process, he said "[i]t is likely that the process was undertaken by the management/directors of [Northern Crest] prior to the Liquidators obtaining custody/control of the records/documents."

[48] Given this context, little if any weight can be attached to the liquidators' failure to produce a Procurement Procedure (Licence Owner) Manual, or to Mr Eakin's inability to describe the intellectual property.

[49] As RJH submits, there was evidence that no value was given to the intellectual property in Northern Crest's accounts. Again, we agree with the Judge that, in the absence of expert evidence as to what to make of this, no weight can safely be attributed to this aspect of RJH's case.[21]

[50] The most reliable evidence as to the existence or otherwise of the intellectual property is the evidence of statements made and actions taken by the Northern Crest group and Columbus directors and personnel around the time the licensing agreements were entered into. This is before liquidation, before the prospect of litigation, and so before the time at which there were interests for the original participants to further or protect.

[51] It was not in dispute that the Northern Crest group (formally Blue Chip group) operated a particular kind of property investment scheme. There was evidence that properties were sold by the licensee and that payments were made pursuant to the licence agreement, payments which flowed in part to RJH:

(a) In January 2010, a financial report prepared by Northern Crest stated under the heading "Revenue":

> Revenue on settlements received to date amounts to $211k. In addition we have accrued a further $2.2m which equates to half of the revenue anticipated in the license agreement.

(b) In a board memorandum dated 24 February 2010, Mr Eakin wrote:

> **(a) Background**
>
> Over a number of months, the Board expressed its concern about the delays in property settlements and the consequential impact on Northern Crest's cash flow. Since November 2009, [Columbus] has settled 33 properties with

[21] At [111].

> a significant cashflow impact in favour of [Northern Crest]…
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> …
>
> **(ii) Debtors**
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> [Columbus] has recently advised that [Northern Crest] can expect to receive a minimum of $500,000 from [Columbus] in March, resulting from the release of the security deposit [Columbus] holds with Korda Mentha on the Aqua project. Prior to any additional cash payments from [Columbus], at least $1.6 million will have been received by [Northern Crest] from [Columbus] in the last five months of the financial year. As at the end of the financial year, that would mean [Columbus] had accounted to [Northern Crest] for approximately 46% of the total licence fees accrued of $3.5 million as provided for in the Licence Agreement.

(c) In March 2010, Mr Eakin prepared a further report titled "Northern Crest Executive Monthly Report for March 2010." Under "Performance/Sales", Mr Eakin wrote:

> … Under the licence agreement, Columbus is obliged to pay Northern Crest a minimum of $3.5 million for the year ended 31 March 2010 which reflected a component for receiving the licence as well as for sales performance. Up until 31 January 2010 Columbus had paid approximately $730,000 to Northern Crest out of a total accrual of $3,030,000. Columbus has since paid an additional $300,000 to Northern Crest, and they have recently advised that a further $500,000 minimum amount should be received by Northern Crest during March 2010, resulting from forecast net revenue exceeding $900,000 for the same month and the return of the Columbus security deposit of $500,000 from the AQUA development. The balance of the fees owed ($1,970,000) should be paid prior to 31 May 2010.

[52] There was therefore ample evidence to satisfy the Judge that the intellectual property did exist.

Did Northern Crest own the intellectual property?

[53] Before Gordon J, RJH advanced the argument that if there was intellectual property, MSH No 2 owned it. On appeal, RJH argues:

(a) Although acknowledging that in his 6 June 2011 interview with the liquidators Mr Eakin stated Northern Crest had always owned the intellectual property, RJH relies on the fact that by the time MSH No 2 was placed into administration, Mr Eakin had changed his account. Mr Arnautovic, administrator for MSH No 2, issued a report in which he recorded that "[t]he company's director has also advised that [MSH No 2] has at all times owned the Intellectual Property for the "[Northern Crest] group".

(b) Mr Lawrence, one of Northern Crest's liquidators, gave evidence that it was unclear who owned the intellectual property.

(c) The assets of MSH No 2, including its intellectual property, were sold by its Administrator for $10,000.

(d) While the January 2009 Agreement referred to Northern Crest as the "Master Licensor", and the November 2009 Agreement described Northern Crest as the "Licensor", the April 2010 and October 2010 license agreements described MSH No 2 as the "Licensor".

[54] As to RJH's first point, Gordon J accepted that inconsistencies in Mr Eakin's statements regarding ownership of the intellectual property raised real questions as to his credibility and veracity.[22] She preferred to place weight on documentation generated around the time of the transactions. As we have outlined above, that is our approach also. We think it the correct approach in the particular circumstances of this case.

[55] As to the second point, Mr Lawrence's evidence, relied upon by RJH, was that the liquidators could not ascertain ownership of the intellectual property but nevertheless considered all of the material they had sighted suggested it was owned by Northern Crest. Mr Lawrence's evidence on this issue was opinion evidence on the issue of ownership. The Judge was correct to attach no weight to it.

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22 At [125].

[56] The same is true of evidence that the administrator of MSH No 2 sold its intellectual property, RJH's third point. It is not clear what intellectual property was the subject of that sale and, as Gordon J observed, the full circumstances of that sale were not in evidence. And even if it was the same intellectual property as that which was licensed, that does not tend to prove who owned it. At best this is evidence of the administrator's opinion on ownership (he must have believed MSH No 2 owned it if he sold it). Again it has no value as evidence relevant to the issue of ownership.

[57] We pause here to note that Mr Chesterman for RJH advanced arguments in support of various grounds of appeal, which attached significance to positions taken by the liquidator and administrator in discussions with each other, and in respect of claims made and rejected. We do not propose to set out all of those arguments in the course of this judgment. They depend on evidence of actions and positions taken in the liquidation/administration context by insolvency professionals who have to act in the best interests of their creditors, and on advice. The evidence relied on is, at best, evidence of the liquidators' and administrator's opinions on the issues before the Court. It is not helpful in determining the nature of the contested actions, agreements and intentions of the companies and their officers at the critical times.

[58] As the Judge found, the contemporaneous documents are the best guide to ownership.[23] That takes us to RJH's fourth point, both the January 2009 and November 2009 Agreements treat Northern Crest as the licensor of that property. The position in respect of the April 2010 Agreement between MSH No 2 and Columbus is, we accept, less straightforward. Nevertheless, we are satisfied, that for the reasons we now give, it is consistent with Northern Crest as master licensor.

[59] MSH No 2 is defined, at the very commencement of the April 2010 Agreement, as the licensor. In the definitions part of the agreement "Licensor" is defined as "includes [MSH No 2's] related Companies and in particular, in relation to the ownership of the system, the Intellectual Property and the Marks". But then in the same part of the agreement "Licensor" is defined as "MSH No 2 Pty Limited".

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[23] At [132]–[133].

[60] In our view, these provisions can be reconciled as a simple matter of contractual interpretation. Although the drafting may be poor, combining the competing definitions gives a coherent and plausible definition: the "Licensor" is MSH No 2 and its related companies. However Gordon J saw the rest of the agreement as inconsistent with such an interpretation of the relevant clauses.[24] That is because cl 10.10 of the April 2010 Agreement records that the agreement supersedes all previous agreements and releases Northern Crest "from any liability in any event".

[61] While we agree this clause rather muddies the waters, cl 10.10 can be readily reconciled with the interpretation of the definition of "Licensor" we have suggested. The release of Northern Crest from "any liability in any event" can be construed as an amplification of the stated intention that the agreement supersedes earlier agreements. On this approach, cl 10.10 simply released Northern Crest from obligations to Columbus arising under the previous agreements. That is not inconsistent with MSH No 2 having entered into its own licensing arrangement with Northern Crest to enable it to sub-license to Columbus. That is after all the model utilised in the January 2009 Agreement.

[62] Other company documents treat Northern Crest as the licensor. For example, a draft announcement to the Australian Stock Exchange, dated 12 April 2011, was prepared which included the following statement:

> Northern Crest Investments creates and licenses intellectual property to third party acquirers and distributors of property, who provide their clients with an approach to property investment which focuses on long term passive income streams and wealth creation.

[63] We are satisfied the Judge was correct to conclude that when the various Northern Crest and licensing documents are assessed, Northern Crest, rather than MSH No 2, was the intellectual property owner.

Was the licence fee intended to be paid or recoverable?

[64] RJH argues that the $3.5 million fee was never intended to be recovered or recoverable. It says the payment of such a large amount of money was unexplained

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[24] At [130].

and unusual. And if the licencing fees were legitimate, the impairment was simply inexplicable. It made no commercial sense for Northern Crest, which was struggling financially, to write down such a large asset to that extent. The reason given for the impairment was implausible because the November 2009 Agreement was already a non-exclusive agreement. Why should Northern Crest give away a contractual right to payment of a fee, for granting rights to other licensors it was contractually entitled to grant? RJH argues that conflicting explanations given in the group's accounting records support its arguments that this was all part of the unwinding of a sham arrangement. In one place, the Rutherford Agreement was referred to, and in another, the April 2009 Agreement (with MSH No 2).

[65] The Judge was satisfied that the $3.5 million was a wildly optimistic figure, rather than a fictional one, noting a number of internal documents which referred to the fee and Mr Eakin's initial confidence that Northern Crest would receive it.[25]

[66] For our part, we accept RJH's argument that the fee arrangements are unusual. The fee is large. It is also seems strange, without further explanation, that this fee was agreed in the November 2009 Agreement when there had been no provision for such a fee in the January 2009 Agreement. The latter granted essentially the same rights. Moreover, the fee was later largely impaired. We also weigh the fact of the close and supportive relationship between Mr Bryers, the former director of Northern Crest, and Mr Hughes, of Columbus. Is this enough to show it was sham?

[67] No witnesses were called from Northern Crest or Columbus to explain the fee or why it would be imposed under the November 2009 Agreement but not the January 2009 Agreement. Mr Chesterman argued that the failure to call directors and staff on this, and other issues, supported an inference that had they been called on the issue, they would have been unhelpful. It followed, Mr Chesterman submitted, that Gordon J erred in failing to draw that inference.

[68] Where a party fails to call a witness or evidence of primary facts, and the circumstances suggest that evidence would be adverse to the party's interests, then the court *may* draw inferences adverse to the party where there is no credible explanation

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25 At [135].

for the failure. It is for the judge what weight is attached to the failure to call. In *Ithaca (Custodians) Ltd v Perry Corp* this Court described the principle as follows:[26]

> There is no rule. Rather, there is a principle of the law of evidence authorising (but not mandating) a particular form of reasoning. The absence of evidence, including the failure of a party to call a witness, in some circumstances may allow an inference that the missing evidence would not have helped a party's case. In the case of a missing witness such an inference may arise only when:
>
> (a) the party would be expected to call the witness (and this can be so only when it is within the power of that party to produce the witness);
>
> (b) the evidence of that witness would explain or elucidate a particular matter that is required to be explained or elucidated (including where a defendant has a tactical burden to produce evidence to counter that adduced by the other party); and
>
> (c) the absence of the witness is unexplained.

[69] Here there was good reason not to draw such an inference. The evidence was that the directors had not cooperated with the liquidators. The Judge was satisfied that Mr Eakin had given inconsistent explanations to the liquidators and there was evidence of the sanitising of the company records. Moreover, it was equally open to RJH, as it was to the liquidators, to call those witnesses.

[70] Because we do not have evidence from participants in the transaction, we do not know the commercial context in which the November 2009 Agreement and, more particularly, the fee arrangements were negotiated. We do not know what commercial interests the parties may have been pursuing or protecting, or their respective bargaining positions or strengths. But the evidence tends to show that the parties, at least initially, acted in a manner consistent with this being a genuine bargain between the parties, intended to be carried into effect. There is evidence in the documents, referred to at [51] above, that the fee was structured partly as a capital payment for the rights granted, and partly to reflect anticipated sales. The internal documents we have set out above tend to prove that Northern Crest initially expected payment of the fee. There is also the evidence (we come to shortly) that part of the fee was paid by Columbus for the benefit of Northern Crest.

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[26] *Ithaca (Custodians) Ltd v Perry Corporation* [2004] 1 NZLR 731 (CA) at [153].

[71] What of the impairment? The Judge dealt with this issue as follows:

> [136] There is then the matter of the subsequent impairment. [Northern Crest's] interim financial report for the six months ending 30 September 2010 states under the heading "New licensee" that as a consequence of a new licensing agreement with Rutherford, [Northern Crest] has revised the Nov09 agreement with Columbus and has arrived at a commercial settlement including a reduction of the minimum licence fee for the March 2010 year. I note however that the only Rutherford agreement in evidence in the present proceeding is an agreement dated 1 October 2010, some six months after the payment deadline of 31 March 2010. In the circumstances of this liquidation, however, it is possible that there was another agreement which came into force at an earlier time but which has subsequently been lost or deliberately destroyed.
>
> [137] Returning to the matter of the impairment, the statement in [Northern Crest's] interim financial report that the licence fee was impaired after a change in licensing arrangements is consistent with other statements in the interim financial report and other documents prepared around that time. The interim financial report stated under the heading "Fundamental Error" that:
>
> > The prior period financial report for the year ended 31 March 2010 did not disclose the revised agreement entered into between MSH No2 Pty Limited and Columbus Property Marketing Pty Limited dated 1 April 2010. The effect of this agreement was that license [sic] fee income of $3,466,000 recorded as income in the year ended 31 March 2010 was written off on 1 April 2010.
> >
> > This agreement should have been disclosed as a subsequent event in the 31 March 2010 Financial Report.
>
> (footnotes omitted)

[72] We see no error in the Judge's reasoning on the issue of the impairment. There is no apparent inconsistency in the explanations in the company's records. The reason for the impairment was both the April 2010 Agreement and the Rutherford Agreement. The April 2010 Agreement released Columbus from the obligation to pay the licence fee. The Rutherford Agreement was the reason for that. Was there a commercial justification for Northern Crest foregoing that fee, when the November 2009 Agreement was already non-exclusive? As the Judge observed, while Columbus was not contractually entitled to exclusivity, it initially had exclusive control over the "distribution" side of the business.[27] The arrangement with Rutherford changed this so that Columbus shared this side of the business.

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[27] High Court judgment, above n 1, at [140].

[73] To conclude on this point, the fee arrangements were unusual but there is evidence Northern Crest expected the fee to be paid, and part of the fee was paid. It may be that Mr Hughes was committing Columbus to a bad deal, or a wildly optimistic one as the Judge put it, but that is not enough to show the arrangements were a sham. There was some commercial logic for the impairment. On the evidence produced at hearing, we are satisfied the Judge was correct to conclude that the November 2009 Agreement was not a sham arrangement.

(b) If the November 2009 Agreement was not a sham, were these payments transactions of Northern Crest for the purposes of s 292?

[74] This addresses RJH's second principal challenge to the Judge's reasoning in connection with Columbus. RJH says that even if the November 2009 Agreement was not a sham, there was inadequate evidence to prove that the payments were of licensing fees due under it to Northern Crest.

The payments

[75] The payments made by Columbus at issue in this proceeding are as follows:

Date	Source	Amount
22 January 2010	Columbus Property Marketing Pty Ltd	$150,000.00
24 February 2010	Columbus Property Marketing Pty Ltd	$135,133.07
2 March 2010	Columbus Property Marketing Pty Ltd	$4,000.00
20 April 2010	Columbus Property Marketing Pty Ltd	$100,025.00
28 May 2010	Columbus Property Marketing Pty Ltd	$100,025.00
Total Columbus payments		**$487,183.07**

High Court judgment

[76] The Judge structured her consideration of this issue around two time frames. First she addressed whether the payments by Columbus before 1 April 2010 were a redirection of licence fees due by it to Northern Crest, and secondly whether the same was true of payments by Columbus after 1 April 2010.[28] She split her consideration

[28] At [74]–[101].

of these payments up in this way because the latter group of payments was made after the (superseding) April 2010 Agreement between MHS No 2 and Columbus had commenced.

[77] Gordon J said the starting point was that the November 2009 Agreement obliged Columbus to pay Northern Crest a licence fee of $3.5 million for the period 26 November 2009 to 31 March 2010.[29] Although a lump sum was required, Columbus made a series of piecemeal payments insufficient to meet this obligation — payments which were made to RJH, not Northern Crest.[30] She noted that the licence fee was not paid in full and linked this with the impairment of the fee.[31] But she also noted the evidence of Mr Kerr, a member of the liquidators' staff who assisted in the liquidation and, in particular, investigated the transactions for the liquidators. Mr Kerr's evidence was that although the fee was impaired in its entirety, Northern Crest recognised income from that fee during the period from 26 November 2009 until 31 March 2010.[32]

[78] The Judge placed weight upon Northern Crest and Northern Crest group documents, which referred to Columbus' obligations to pay Northern Crest the $3.5 million and to payments having been made on account of that obligation.[33] She also relied upon statements of directors and employees from around the time of the transaction, and the liquidators' notes of an interview with Mr Guy Robertson, who had been employed by Northern Crest at the relevant times to prepare its accounts. The Judge concluded that this evidence supported the theory that payments by Columbus to RJH under both time frames were a redirection of licence fees.[34]

[79] Gordon J next considered the primary accounting records for the Northern Crest Group which were in the form of MYOB records. She accepted Mr Kerr's evidence that these accounts supported the conclusion the January, February and March payments were a redirection of licensing fees owed by Columbus to

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29 At [75].
30 At [79].
31 At [76].
32 At [87].
33 At [93].
34 At [82], [94], [101] and [144].

Northern Crest.[35] That was so notwithstanding the payments were accounted for in a series of complex group transactions, including transactions reflected in the accounts of group company MSH No 1. She attached particular weight to an invoice issued by MSH No 1 to Columbus for licence fees which recorded a fee paid in instalments. One of those instalments corresponded in amount with the total of payments made by Columbus to creditors of Northern Crest up until that time.

[80] The Judge addressed the expert evidence produced for both parties about the significance of those accounting records. She preferred the evidence of Mr Hagen, the accounting expert engaged by the liquidators, who supported Mr Kerr's analysis to that of Mr McCloy, the expert witness called by RJH. She concluded:[36]

> Given the surrounding context, the liquidators' theory that the payments to RJH represented a redirection of licence fees is entirely plausible. This theory is supported by statements of individuals who were involved in the affairs of [Northern Crest] and, more importantly, by the contemporaneous accounting records of [Northern Crest] and [MHS No 1]. To the extent there is a conflict between the evidence of Messrs Kerr and Hagen and that of Mr McCloy, I prefer the evidence of Messrs Kerr and Hagen. The evidence offered by these witnesses provided a compelling explanation for the treatment of the Columbus payments in both the [Northern Crest] and [MHS No 1] general ledgers.

RJH's argument on appeal

[81] RJH argues that Gordon J was wrong to treat the MYOB accounts as reliable and that her misplaced confidence in them is attributable to a number of subsidiary errors as follows:

(a) The Judge wrongly proceeded on the basis that RJH did not challenge the reliability of the MYOB accounts. She treated RJH's challenge as being to the reliability of the audited accounts, which could not extend to the MYOB records as neither party suggested that the auditors had a hand in preparing or reviewing MYOB records.

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35 At [93].
36 At [93].

(b) The Judge ignored evidence from the liquidators' accounting expert, Mr Hagen, in which RJH argues he conceded the audited accounts were seriously unreliable and should have raised a red flag for any accountant viewing them.

(c) The Judge ignored the evidence of Mr Christopher McCullagh, that the records had been "sanitised".

(d) The Judge relied upon statements by Mr Eakin and Mr Robertson in various documents, which she saw as corroborative of the financial records. Yet the liquidators had, in a variety of ways, evidenced their doubt as to the truthfulness or veracity of statements made by each of Mr Robertson, Mr Bryers and Mr Eakin.

Should the Judge have relied on the MYOB records?

[82] Mr Chesterman argues it was implicit in RJH's challenge to the reliability of the financial records that the reliability of the source documents, such as the MYOB records, was also challenged. He argues that the Judge misunderstood RJH's argument as to the significance of the role, or rather lack thereof, for the auditors in the preparation of accounts. RJH's case was that the accounts lacked reliability because they were essentially prepared by Northern Crest without proper auditor oversight. Mr Chesterman submits that because the financial accounts had not been properly audited they were unreliable, and so too the underlying source documents.

[83] We have reviewed the transcript of the hearing and are satisfied that Gordon J was correct there was no direct challenge to the reliability of the MYOB records. Mr Chesterman's challenge in cross-examination of Mr Kerr and Mr Hagen focused instead upon the accuracy of the accounts prepared in reliance upon the MYOB records — the audited accounts. We do not consider that it is necessarily implicit in a challenge to audited accounts that the reliability of the underlying source documents is also challenged. In this case, the challenge to the audited accounts seemed to focus upon information omitted from them and not upon deficiencies in the underlying MYOB records.

[84] If RJH wished to challenge the reliability of the MYOB accounting records, that should have been raised directly with Mr Kerr, who had investigated the MYOB entries and the accounts prepared in reliance upon them. It was not. Instead the limited cross-examination in relation to the MYOB records focused upon the meaning of the various entries.

[85] We also think it significant that Mr McCloy, who was called as an expert by RJH, did not question the reliability of those source documents. Although he expressed reservations about the reliability of the information he was asked to consider, he did not link these concerns or reservations to any deficiency in the MYOB records. Rather he placed a different interpretation upon those records to that proposed by the liquidators' experts.

[86] Mr Chesterman claims the liquidators' expert, Mr Hagen, conceded the audited accounts were seriously unreliable. This submission is based on Mr Hagen's acceptance that Northern Crest's auditor's disclaimer to the 31 March 2010 accounts was "sufficiently unusual that it would raise red flags to anybody looking at the financial statements". Mr Chesterman also referred to Mr Hagen's evidence in connection with the 30 September 2010 interim accounts. Those accounts referred to accrued Columbus income of $3.46 million, when in fact that amount was impaired. Mr Hagen's evidence was that he was surprised the directors signed off on the 31 March 2010 accounts on 30 June 2010, knowing of the 2 April 2010 licence. He said it was "very unusual".

[87] Mr Hagen did concede there were unusual features to the audited accounts but those features related to the omission of relevant information from the accounts — issues we do not understand to arise from any deficiency in the MYOB accounts. Whatever the true construction of Mr Hagen's evidence on those points, he made no concession that the MYOB primary accounting records themselves were unreliable.

[88] RJH also relies on evidence of Mr Christopher McCullagh as to the state of the company records. That evidence did not on its face relate to the MYOB records. The MYOB records were provided by Mr Robertson under a search and seizure warrant issued by the Australian Court. They were not part of the records the

liquidators recovered, which Mr McCullagh described in his evidence as disordered and apparently incomplete.

[89] Mr Chesterman is also critical of the Judge's reliance upon statements of directors and Northern Crest staff in contemporaneous documents that are corroborative of Mr Kerr's reconstruction of the nature and treatment of the payments. We see no validity in the criticism. The Judge was entitled to accept some statements made as credible and reliable, and reject others. As earlier observed, statements made by participants to events as they are occurring and before the spectre of litigation, or the prospect of personal risk or advantage, are inherently more reliable than those made with an eye to litigation.

[90] We conclude that the Judge made no error in proceeding upon the basis that weight could be attached to the treatment of the transactions in the MYOB primary accounting records of the Northern Crest group.

What did the MYOB records and other evidence prove in connection with the payments?

Payments prior to 1 April 2010

[91] As to the accounting records themselves, we adopt the Judge's summary of those in relation to the payments before 1 April 2010:[37]

> (a) Each of the payments by Columbus to RJH (and other creditors of [Northern Crest]) was initially recorded in [Northern Crest's] New Zealand general ledger as a loan from Columbus to [Northern Crest]. By 31 March 2010, the balance of the Columbus loan stood at $362,535.94.
>
> (b) On 31 March 2010, a journal entry was posted in [Northern Crest's] New Zealand general ledger, which had the effect of eliminating the balance of the Columbus loan while increasing [Northern Crest's] indebtedness to [MSH No 1] by the same amount. In other words, the liability was transferred from the account for Columbus to [MSH No 1]. The journal entry was narrated "Reclassify Columbus loan".
>
> (c) On the same day, a journal entry was posted in [MSH No 1's] general ledger described as the payment of an invoice,

[37] At [84].

> specifically "Invoice 2". The accounting entry for this transaction recorded a debit to the "NCIL NZ Intercompany Account", representing an increase in the amount owed by [Northern Crest] to [MSH No 1]; and a credit to the "Trade Debtors" account.
>
> (d) On the same day, 31 March 2010, [MSH No 1] issued an invoice to Columbus for a total of $716,898.68. The relevant transaction documentation records that this invoice was paid in five instalments. One of those instalments was an amount of $362,535.94 — a figure which coincided exactly with the total of the payments made by Columbus to creditors of [Northern Crest] up until that time.

[92] Mr Kerr also gave evidence that note 18(e) to the 31 March 2010 financial statements describes all accrued income as relating to the licence agreement between Columbus and Northern Crest.

[93] Mr Kerr referred to "Invoice 2" issued by MSH No 1 to Columbus for licensing fees and referred to in the above summary. It was put to Mr Kerr in cross-examination that Invoice 2 was consistent with MSH No 1, rather than Northern Crest, having provided the services for which Columbus was billed. Mr Kerr said that would be right if MSH No 1 was a company on its own but not where, as here, it was part of a group of companies. It was consistent in his view with MSH No 1 billing Columbus on behalf of the group for services provided by Northern Crest.

[94] Mr Kerr accepted, when cross-examined, that the invoice was also consistent with MSH No 1 being the licensor of the intellectual property. But Mr Chesterman does not suggest that MSH No 1 was the licensor. That would be a difficult argument to mount because the surrounding documentary record, the licence agreements, and reference in numerous group documents all tend to prove that Northern Crest, not MSH No 1, was the licensor.

[95] Mr Hagen explained the transactions as follows:

> It was recorded as a loan initially. What happened was that Columbus owed payments to [Northern Crest] under the licence agreement. Columbus — so Columbus owed money to [Northern Crest]. [Northern Crest] owed money to [RJH]. Columbus paid money directly to [RJH] on the instruction of [Northern Crest] and that money — those payments were initially recorded by [Northern Crest] as a loan from Columbus. One way to have treated them would have been just to have netted them off the amount that was owed by

> Columbus to [Northern Crest] but if you did that you would not be able to easily state or follow how much money had been paid by Columbus to [RJH]. So an easier way to keep track of the payments that had been made by Columbus to [RJH] is to put them in an account called a loan and then you can immediately say, "That's the total amount that's been paid." My understanding is that at the end of the accounting period that sum was then journaled out of that loan account and offset against the amounts owed by Columbus to [Northern Crest].

[96] Mr Colin McCloy, the expert for RJH, gave evidence that Northern Crest's accounting records for the relevant period showed a reduction in the amount owed by Northern Crest to RJH. He considered that the reduction was funded by way of a loan from Columbus. He said that if payments by Columbus to RJH represented a redirection of licence fees, he would have expected Northern Crest to record those payments in the accrued revenue account, rather than the loan account.

[97] Mr Chesterman argues that Mr McCloy's evidence should have been preferred to the evidence of Messrs Kerr and Hagen. But Gordon J preferred the evidence of Messrs Kerr and Hagen, that the accounting records were consistent with the payment by Columbus being a redirection of the licence fees it owed Northern Crest.[38] She was strengthened in that view by the reference in the MSH No 1 accounting records for the payment of "Invoice 2".

[98] While the accounting records may have been open to different interpretations, we are satisfied the Judge was correct in the view she took of those records. This is because contemporaneous documents support Mr Kerr and Mr Hagen's reconstruction that these payments represented a redirection to RJH of license fees payable by Columbus to Northern Crest.

[99] There are the Northern Crest documents we have already referred to which refer to Northern Crest receiving licence fee payments from Columbus. In addition there are documents confirming that the payments to RJH are redirected licence fees. For example, in an email dated 8 September 2010 from Mr Eakin to Northern Crest's lawyer, Mr Terence Stapleton, Mr Eakin stated:

> In respect of the payments made by Columbus on behalf of Northern Crest to [RJH], this was done merely to shortcut the process. The payments made by

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[38] At [93].

> Columbus represent monies that are owed by Columbus to Northern Crest under the licensing agreement between both parties. They are not loans by Columbus to Northern Crest. We have approximately A$2 million in licence fees still outstanding from Columbus as at 31 March 2010, and a minimum of a further A$2.1 million under the Licence Agreement for the period from 1/4/10 to 31/3/11.

[100] To similar effect was the statement made by Mr Robertson to the liquidator Mr Lawrence in his 7 June 2011 interview, recorded as follows:

> Mr Robertson advised that the bulk of creditor payments went through MSH No 2 or through Columbus and those made by Columbus were then deducted from property settlements. Mr Robertson said that all of this information is in the MYOB files that he has provided to the liquidator.

Payments after 1 April 2010

[101] The Judge noted the situation was more complex in respect of the payments by Columbus after 1 April 2010.[39] This was so for two reasons. The first, the agreement between MHS No 2 and Columbus, signed on 2 April 2010 with a commencement date of 1 April 2010, contained cl 10.10. It will be remembered that clause recorded that the agreement superseded all previous agreements and released Northern Crest from any liability arising under those previous agreements. The Judge was satisfied that the April 2010 Agreement was intended to, and did supersede, the November 2009 Agreement between Northern Crest and Columbus.[40] It followed that Northern Crest had no further entitlement to licence fees generated by Columbus after 1 April 2010.

[102] The second complicating factor was that, unlike the payments between January and March 2010, the MYOB accounting records in respect of the April and May payments were not tied to payment of an invoice.[41]

[103] Nevertheless, the Judge considered the MYOB accounting records and statements by Northern Crest personnel provided support for Mr Kerr's reconstruction of the transactions that the April and May 2010 payments by Columbus to RJH

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39 At [95].
40 At [96].
41 At [96].

represented licence fees owed to Northern Crest under the November 2009 Agreement that had accrued prior to 1 April 2010. She summarised Mr Kerr's evidence as follows:[42]

> (a) Each of the payments by Columbus to RJH (and other creditors of [Northern Crest]) was initially recorded in [Northern Crest's] New Zealand general ledger as a loan from Columbus to [Northern Crest]. By 31 August 2010, the balance of the Columbus loan stood at NZ$209,050.00.
>
> (b) On 31 August 2010, a journal entry was posted in [Northern Crest's] New Zealand general ledger, which had the effect of eliminating the balance of the Columbus loan while increasing [Northern Crest's] indebtedness to [MSH No 1] by the same amount. In other words, the liability was transferred from the account for Columbus to [MSH No 1]. The journal entry was narrated "Columbus Receipts ex MSH # 1".
>
> (c) On the same day, a journal entry was posted in [MSH No 1's] general ledger narrated "Columbus Receipts Transferred to [Northern Crest] NZ Creditors". The accounting entry for this transaction recorded a debit to the "NCIL NZ Intercompany Account" and a credit to the "NCIL AUS Intercompany Account" of A$165,388.00. This transaction had no effect on [Northern Crest] net indebtedness to [MSH No 1].
>
> (d) Also on the same day, a journal entry in [Northern Crest's] Australia general ledger recorded a debit to the "MSH1 Intercompany Account" and a credit to the "Accrued Income" account of A$165,388. This entry was narrated "Columbus Receipts transferred to NZ".

[104] In describing the net effect of these transactions, the Judge said:[43]

> Each of the payments by Columbus to creditors of [Northern Crest] was recorded in [a Northern Crest] account named "Loan – Columbus". On 31 August 2010, the balance of the loan was cleared and, via a number of intermediate steps, was recorded instead as accrued income of [Northern Crest]. This is a factor that weighs very strongly in favour of the liquidators' case. …

[105] The Judge was strengthened in her view that these payments were a redirection of licence fees by the additional contemporaneous evidence set out above in which

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42 At [99] (footnotes omitted).
43 At [100] (footnotes omitted).

Mr Eakin and Mr Robertson confirmed that the payments were made by Columbus to creditors of Northern Crest and later deducted from property settlements.[44]

Analysis

[106] We are satisfied that the evidence the Judge had available to her did indeed support the findings that she made in respect of these payments, both prior to and post April 2010. She was entitled to rely upon the MYOB records and she was entitled to place weight upon contemporaneous statements by individuals in finding that the payments by Columbus to RJH represented licence fees owed to Northern Crest.

(c) Final observation regarding Columbus payments

[107] A final point to be made is this. RJH contends that the Judge was wrong to conclude that these payments were a redirection of licence fees because the November 2009 Agreement was a sham or because there was inadequate proof those payments were a redirection of licence fees, and from money belonging to Northern Crest. The difficulty with each of these arguments is that RJH does not seem to contest that Columbus made payments for the benefit of Northern Crest. If the payments were not of licence fees, what were they?

[108] RJH's own witness, Mr McCloy gave evidence that the payments were more properly analysed as loans to Northern Crest. But whether they were payments by way of loan or a redirection of licence fees, they would be Northern Crest transactions for the purposes of s 292. If the money Columbus paid RJH was a loan to Northern Crest, the payments would still be made pursuant to Northern Crest transactions for the purposes of the definition in s 292(3). The payments would, in substance, be payments by Northern Crest. That would leave Northern Crest to argue, as it does in connection with the MSH No 2 payments, that the liquidators also had to show that the payments depleted the available asset pool, and that the liquidators could not show that where the payment was from borrowed money — the third ground of appeal. This argument is addressed below at [125].

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[44] At [105].

[109] The first ground of appeal accordingly fails.

Second ground of appeal: did the Judge err in finding that payments to RJH by MSH No 2 were transactions of Northern Crest?

Was there adequate proof the payments were a loan from MSH No 2 to Northern Crest?

[110] Between September and November 2010, MSH No 2 made eight payments to RJH:

Date	Source	Amount
7 September 2010	MSH No 2 Pty Ltd	$28,000.00
14 September 2010	MSH No 2 Pty Ltd	$26,000.00
15 September 2010	MSH No 2 Pty Ltd	$24,000.00
16 September 2010	MSH No 2 Pty Ltd	$27,000.00
14 October 2010	MSH No 2 Pty Ltd	$25,000.00
27 October 2010	MSH No 2 Pty Ltd	$30,000.00
4 November 2010	MSH No 2 Pty Ltd	$98,000.00
5 November 2010	MSH No 2 Pty Ltd	$4,758.05
Total MSH No 2 payments		$262,758.05

[111] Before Gordon J, the liquidators put their case in respect of the MSH No 2 payments on alternate bases:[45]

(a) the payments by MSH No 2 to RJH continued to be a redirection of the licence fees payable by Columbus to Northern Crest under the November 2009 Agreement; or

(b) the payments by MSH No 2 were a loan to Northern Crest.

[112] The Judge rejected the argument that MSH No 2 was passing Columbus' payments on as a treasurer.[46] Since, as she had held, the November 2009 Agreement between Northern Crest and Columbus was superseded by the April 2010 Agreement between MSH No 2 and Columbus, it followed that MSH No 2 had a right to receive the licence fees for Columbus in its own name under the April 2010 Agreement. It also followed that Northern Crest had no independent claim to the licence fees that were

45 At [151].
46 At [152].

generated by Columbus after 1 April 2010. But she was satisfied that the payments by MSH No 2 to RJH constituted a loan to Northern Crest.[47]

RJH's argument on appeal

[113] RJH argues that there was no clear evidence of a loan agreement between MSH No 2 and Northern Crest in respect of the amounts paid to RJH. Again, the Judge placed undue weight on the MYOB records. No loan documentation was presented in evidence. The Judge also failed to draw adverse inferences against the liquidators arising out of their failure to call as witnesses the people involved in arranging the alleged loan.

[114] RJH says the Judge was also wrong when she attached no significance to the liquidators' rejection of MSH No 2's proof of debt, filed in the liquidation of Northern Crest, for $280,871.50. If the payments were a loan, then the proof should have been accepted. She also erred, says RJH, when she failed to give weight to the liquidators' failure to challenge the administrator's rejection of their claim for unpaid licence fees.

Analysis

[115] Gordon J addressed each of the arguments raised by Mr Chesterman for RJH in her judgment and we see no error in her approach. The Judge had before her the evidence of three witnesses, Messrs Kerr, Hagen and McCloy, who all agreed that the primary accounting records were consistent with the payments from MSH No 2 to Northern Crest being by way of loan.

[116] We have already addressed and rejected the argument that the Judge was wrong to treat those records as reliable, and that she should have drawn adverse inferences from a failure by the liquidators to call witnesses from Northern Crest.[48] As to the absence of loan documentation, as the Judge observed, that was hardly surprising given that MSH No 2 was a wholly owned subsidiary of Northern Crest.[49]

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47 At [163].
48 See discussion at [67] and [106] of this judgment.
49 High Court judgment, above n 1, at [163].

[117] The Judge was correct to proceed on the basis that the contemporaneous documents, and the evidence of the experts, were the best guide as to the nature of the transactions in question.

[118] We also agree with the Judge's assessment that little weight should be placed upon the liquidators' decision to reject MSH No 2's claim and not to challenge the rejection of the Northern Crest claim in the MSH No 2 administration. This falls into the category of post-liquidation conduct we referred to earlier as unhelpful. The Judge noted that when cross-examined about the failure to challenge the rejection of claim, Mr Lawrence said the liquidators had acted on advice received. The Judge commented about the exchange between counsel and Mr Lawrence in cross-examination:

> [162] This interaction reaffirms a familiar fact, namely that there are a number of reasons why a party might decide against pursuing a dispute, even if the party remains convinced of the merits of its case. For that reason, I do not consider that any significant weight should be placed upon the liquidators' decision not to pursue the claim against [MSH No 2].

[119] We also note that a very significant difficulty for RJH's case is that it does not identify any basis, other than by way of loan, on which MSH No 2 would make the payments in discharge of Northern Crest's debt, and which would not amount to a transaction for the purposes of s 292.

[120] For our part, we would be content to find either that it was a loan or a redirection of licence fees. The liquidators argued for either alternative, each of which would fall within the s 292 definition. As outlined above, we do not attach the same weight to cl 10.10 of the April Agreement as the Judge did — since Northern Crest owned the intellectual property, it remained likely that Northern Crest was entitled to payments from MSH No 2 as the master licensor. This is more consistent with contemporaneous documents at the time which continued to treat the payments to RJH as redirection of licence fees.

[121] Ultimately it does not matter. Whether a loan or a redirection of licence fees, they would still be transactions of Northern Crest.

Were the payments by MSH No 2 made at the direction of, or with the consent of Northern Crest?

[122] The factual narrative set out above puts beyond argument that these payments were made, at the very least, with the full consent and knowledge of Northern Crest. While it is necessary that the insolvent company either direct or consent to the payment, the fact of consent will usually be readily inferred where, as here, the insolvent party is involved in the transaction and proceeds on the basis that its debt is discharged by the payment.[50]

[123] There was ample evidence before the Judge tending to prove that Northern Crest procured these payments to be made in order to meet its obligations to RJH, including correspondence from directors of Northern Crest referring to the payments and also the treatment of the payments in Northern Crest's accounts.

[124] This ground of appeal accordingly fails.

Third ground of appeal: were the payments by MSH No 2 insolvent transactions if they did not diminish the pool of assets available to the creditors?

[125] RJH argues that it is an element of the definition of insolvent transactions under s 292 that the transactions must have the effect of diminishing the net pool of assets available to creditors. This requirement of diminution is sometimes called the ultimate effect rule. In this case, says RJH, the effect of the transaction was to swap one creditor for another while the net pool of assets available to other creditors remained unchanged. It follows that even if the liquidators proved the payments made by MSH No 2 to RJH were payments by way of loan to Northern Crest, those payments did not reduce the net pool of assets of Northern Crest available for creditors.

[126] Gordon J rejected this argument, relying upon the decision of this Court in *Levin v Market Square Trust* for the proposition that it was not a requirement of s 292 that the liquidators prove the challenged payment resulted in a diminution of the pool

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50 Paul Heath and Mike Whale, above n 4, at 633. See also *Westpac Banking Corp v Nangeela Properties Ltd (in liq)*, above n 6, at 4 and 10; *Walsh as liq of Thompson Land Ltd v Terranova Pty Ltd* (1994) 14 ACSR 432 (VSC) at 435–436; *Chilton Saint James School v Gray,* above n 5, at 261,124; and *Levin v Market Square Trust,* above n 5.

of assets available to creditors.[51] In *Levin,* this Court held that in order to satisfy s 292(2)(b), a liquidator need only show that the creditor received a greater payment than they would otherwise have received in liquidation.[52] The Court agreed with the following statement by Randerson J in *Chatfield v Mercury Energy Ltd*:[53]

> … the focus of s 292(2)(b) is very different [from the focus of its predecessor section, s 309 of the Companies Act 1959]. It is not concerned with the overall effect of the transaction on the assets of the company. Rather, it is concerned with whether the creditor has received a greater payment than it would otherwise have received in liquidation.

[127] The Court said Randerson J's analysis was consistent with the plain wording of s 292(2)(b) which requires only a comparison between the amount the creditor actually received from the company and the amount the creditor would have received as part of the general body of creditors in the liquidation had the payment not been made.[54] It said the approach taken by Randerson J was also consistent with the position in Australia, citing as authority the following passage from the judgment of Phillips JA in *Walsh v Natra Pty Ltd*:[55]

> Moreover, counsel's argument depended very much on the submission that overall the general body of unsecured creditors was not being prejudiced; the general pool of creditors was no worse off, he said, after the transaction than before. I am by no means clear that that is an argument that still runs under the new s 588FA [of the Corporations Law]; the section does not in terms look to the effect of the transaction on "other creditors", as did the former law. Here the question is, in terms at least, whether the transaction results in the creditor receiving more than it would in a winding up if the transaction were set aside and the creditor were to prove — which as I have said invites a comparison between a return in this case of 100 cents in the dollar on $40,000 and a dividend of nothing in the winding up. The effect of the transaction on "other creditors" does not per se have a part to play in the comparison required by s 588FA, although it might perhaps become material in certain circumstances when an order for repayment was being sought under s 588FF [the Australian equivalent of our s 295].

[128] Mr Chesterman invites us to depart from *Levin*. He argues that this Court in *Levin* proceeded on the mistaken basis that the voidable transaction provisions under the Companies Act were no longer concerned with the overall effect of the transaction. The Court also misconstrued the approach taken by Australian courts to similar

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51 *Levin v Market Square Trust*, above n 5.
52 At [38].
53 *Chatfield v Mercury Energy Ltd* [1998] 8 NZCLC 261,645 (HC) at 261,655.
54 *Levin v Market Square Trust,* above n 5, at [41]–[42].
55 *Walsh v Natra Pty Ltd* [2000] VSCA 60, (2000) 1 VR 523 at 538.

legislation. He submits that it is significant that this Court in *Levin* made no reference to what he characterised as the leading Australian authority, *V R Dye & Co v Peninsula Hotels Pty Ltd (In liq)*.[56]

Analysis

[129] Mr Chesterman asks us to depart from existing Court of Appeal authority. This Court will only depart from an earlier decision in circumstances where it is persuaded that there is good reason to do so.[57] Having regard to certainty and stability of the law, *R v Chilton* set out a number of factors which might be relevant to this Court's decision, including an error of law, critical commentary (although this is not decisive) and significant changes in social conditions and legal developments that would warrant departure.

[130] We see no error in the analysis of this Court in *Levin* and therefore no basis to depart from it. We start with the language of s 292. Nothing in the language supports the importation of the additional requirement suggested by Mr Chesterman. Parliament took care to define what is an insolvent transaction. If the definition had this additional limb Mr Chesterman argues for, then we could reasonably expect it would have been included in the section.

[131] For ease of reference, we again set the definition out:[58]

> An **insolvent transaction** is a transaction by a company that—
>
> (a) is entered into at a time when the company is unable to pay its due debts; and
>
> (b) enables another person to receive more towards satisfaction of a debt owed by the company than the person would receive, or would be likely to receive, in the company's liquidation.

[132] We see good policy reasons not to tack on to the existing comprehensive provisions of s 292 this additional requirement that the court have regard to the overall effect of the transaction. The voidable transaction provisions of the

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56 *V R Dye & Co v Peninsula Hotels Pty Ltd (In liq)* [1999] VSCA 60, [1999] 3 VR 201.
57 *R v Chilton* [2006] 2 NZLR 341 (CA) at [86]–[101].
58 Companies Act 1993, s 292(2).

Companies Act are a code intended to simplify the law, making it certain and predictable.[59] It is not consistent with this objective to graft onto the definition the requirement contended for.

[133] Moreover, the policy of the voidable transaction provisions, apparent on their face, is to ensure equality of treatment of creditors and by that means to ensure fairness between them. The provisions are intended to avoid a scramble for priority between creditors in the period immediately preceding insolvency. They also avoid sharp practices such as, directors of a company, anticipating insolvency, borrowing money to pay off a creditor they wish to see paid in preference to other creditors and at the expense of the lender. In this case, if Mr Chesterman's approach were adopted, RJH would have been preferred as a creditor over MSH No 2 and the liquidators would have been unable to challenge the transaction.

[134] Mr Chesterman argues that parity of treatment of creditors is not the policy behind s 292. He points to the decision of the Supreme Court in *Allied Concrete Ltd v Meltzer* as authority for the proposition that the purpose of s 292 is to enable the setting aside of transactions which have the effect of diminishing the asset pool available to the general body of creditors.[60] He relies upon the following passage from the judgment of Arnold J, writing for the majority:[61]

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

This, he says, shows that the Supreme Court was satisfied that one of the policies behind the regime was preservation of the pool of assets, and so, it follows, the ultimate effect rule remains part of the voidable transaction regime under s 292.

[135] Arnold J was not addressing the definition of an insolvent transaction as we are called upon to do. The passage cited is the opening paragraph of the judgment, in

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59 See Law Commission *Company Law: Reform and Restatement* (NZLC R9, 1989) at [121]–[122]; and (4 September 1990) 510 NZPD at 984.

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

61 At [1(a)].

which Arnold J outlines, in a very general way, the policies behind the Act's voidable transaction regime. The issue before the Court in *Allied Concrete* was the meaning and application of s 296(3)(c), which provides a defence to creditors who received a payment in good faith for value without knowledge of insolvency.

[136] Nevertheless, we do agree that there are other policy considerations at play in the context of the voidable transaction regime contained in 292 to 294, and that one of those objectives is that the pool of assets available to the general body of creditors not be diminished by preferential payments. But the words of the Act are the best guide as to how that objective is achieved. The general body of creditors are protected against diminution of assets by a rule which enables the setting aside of transactions in certain circumstances whereby the creditor receives more in satisfaction of debt than they would, or would be likely to receive, in the liquidation.

[137] Not every policy objective need be given perfect effect through each provision. This is seen in the fact that the Act balances several policy objectives, some of them competing. For example, the provisions also seek to accommodate the public interest in enabling responsible businesses to trade out of difficult financial situations, and to enable commerce to be conducted with the certainty of outcome necessary for the flow of services and goods to achieve that.[62] As discussed in *Allied Concrete,* s 296 creates a defence to the setting aside of a transaction for the creditor that has in good faith provided valuable consideration for the payment received from the debtor company, without knowledge of, or reason to suspect the company was or would become insolvent. Section 292(4B) creates another protection for a creditor dealing with the company, where the creditor receives payments as part of a continuing business relationship, such as a running account relationship, in which there are fluctuating levels of indebtedness between the debtor company and the creditor. That section requires that the court treat the transactions in that continuing business relationship as a single transaction for the purposes of calculating whether the creditor has received more than they would have in the liquidation.[63]

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62 Companies Act, s 292(4B). See also *Report of the New Zealand Law Society Committee on Insolvency Law Reform* (July 1989) at 91.

63 See *Timberworld Ltd v Levin* [2015] NZCA 111, [2015] 3 NZLR 365 at [34] for a discussion of the key requirements for determining the existence of a "continuing business relationship".

[138] The Act then is a carefully worked out framework, balancing several policy objectives. We consider that to allow the doctrine of ultimate effect to be applied more widely in the section would cut across this statutory scheme. It would substantially undermine the policy objectives of s 292 (fairness between creditors) and create complexity where Parliament has aimed for simplicity.

[139] Mr Chesterman also relies upon Australian case law, and what he characterises as this Court's misstatement of the applicable law in *Levin*. In particular, Mr Chesterman relies on the decision of the Supreme Court of Victoria in *V R Dye* which dealt with the comparable provision in s 588FA of the Corporations Law.[64] That section relevantly provides:

> A transaction is an unfair preference given by a company to a creditor of the company if, and only if:
>
> (a) the company and the creditor are parties to the transaction (even if someone else is also a party); and
>
> (b) the transaction results in the creditor receiving from the company, in respect of an unsecured debt that the company owes to the creditor, more than the creditor would receive from the company in respect of the debt if the transaction were set aside and the creditor were to prove for the debt in a winding up of the company;
>
> even if the transaction is entered into, is given effect to, or is required to be given effect to, because of an order of an Australian court or a direction by an agency.

[140] Notwithstanding the absence of anything in the language of s 588FA to this effect, the Supreme Court of Victoria (Court of Appeal) stated that the court should look at the "ultimate effect" of the entire transaction before determining whether it has worked an unfair preference within the meaning of s 588FA. Because of the similarities between s 588FA and s 292(2), Mr Chesterman argues this is the principle the Court in *Levin v Market Square Trust* should have applied, noting that the comments from *Walsh v Natra Pty Ltd* this Court relied upon in *Levin* were obiter.[65]

[141] We accept Mr Chesterman's point that the passage from *Walsh* referred to by the Court was obiter. In *Walsh,* the Judge concluded the comments relied upon in

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64 *V R Dye & Co v Peninsula Hotels Pty Ltd (In liq)*, above n 56; now the Corporations Act 2001 (Cth).

65 *Walsh v Natra Pty Ltd,* above n 55.

Levin with the statement "I merely mention the possibility; I say nothing more about it. It does not fall for consideration on this appeal…"[66]

[142] But we do not accept Mr Chesterman's point that *V R Dye* is leading authority in Australia on the issue with which we are concerned. At issue in *V R Dye* was the prepayment of money by a company on account of fees to be incurred on the performance of work by the company's accountants. Later courts in Australia have tended to confine the authority of *V R Dye* to those particular facts, the prepayment of fees to secure services or goods in the context of an ongoing business relationship.[67]

[143] In *McKern v Minister Administering the Mining Act 1978 (WA),* Nettle JA commented that not all of the reasoning in *V R Dye* was completely convincing.[68] It did not grapple with the plain meaning of the section nor the indications in the Harmer Report No 45 (1998), which led to the enactment of the particular provision, and in the explanatory memorandum which accompanied the Bill, that the new regime was intended to be comprehensive and avoid common law exceptions.[69] The Court in *McKern* expressly declined to extend the ultimate effect doctrine to circumstances where the payment was made in respect of a past debt.[70]

[144] To similar effect is *Federal Commissioner of Taxation v Kassem,* in which the Full Court of the Federal Court of Australia again confined the application of the principles discussed in *V R Dye* to the facts of that case.[71]

[145] For these reasons, there is no basis upon which we would or could depart from this Court's decision in *Levin.* This ground of appeal therefore also fails.

Fourth ground of appeal: relief under s 295

[146] RJH argues that Gordon J was wrong in failing to grant some form of relief under s 295 because of the liquidator's failure to properly exercise their investigative

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66 At [47].

67 *McKern v Minister Administering the Mining Act 1978 (WA)* [2010] VSCA 140, (2010) 28 VR 1; and *Federal Commissioner of Taxation v Kassem* [2012] FCAFC 124, (2012) 205 FCR 156.

68 *McKern v Minister Administering the Mining Act 1978 (WA),* above n 67, at [24].

69 At [24].

70 At [125].

71 *Federal Commissioner of Taxation v Kassem,* above n 67, at [49]–[58].

powers and because they were motivated by the primary purpose of recovering their fee, which, RJH argues, amounted to an abuse of process. This argument can be dealt with shortly.

[147] We see the first ground, the alleged failure of the liquidators to properly exercise their investigative power, as irrelevant to the exercise of the discretion under s 295. The s 295 jurisdiction only arises where the transaction is set aside, which assumes that the grounds for setting aside have been proved. We do not propose to consider the first ground further.

[148] As to the issue of the purposes for which recovery is sought, the liquidators do not dispute, at least for these purposes, that the recovery will be used to pay the costs of the liquidation, including their fees. There is nothing objectionable in that, in and of itself. The Act gives priority to payment of liquidators' fees in a liquidation because there is a public interest in the orderly winding up of insolvent companies.[72] We see the position as well-encapsulated in the following passage from the judgment of the New South Wales Court of Appeal in *Hall v Poolman*:[73]

> While it is plain that liquidators should not "churn and burn", in the sense of pursuing litigation simply in order to generate fees without any view to the interests of creditors or the public interest, we disagree with this passage if and to the extent that it is intended to convey that liquidators are never entitled to bring proceedings where the only prospect of recovery is reimbursement of the liquidators' own fees and expenses.

[149] Accordingly, this final ground of appeal must also fail.

Result

[150] The appeal is dismissed.

[151] The appellant must pay the respondents one set of costs for a standard appeal on a band A basis and usual disbursements. We certify for second counsel.

Solicitors:
Gillespie Young Watson, Lower Hutt for Appellant
Anthony Harper, Auckland for Respondents

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72 Companies Act, Sch 7.
73 *Hall v Poolman* [2009] NSWCA 64, [2009] 254 ALR 333 at [157].