

IN THE HIGH COURT OF NEW ZEALAND  
CHRISTCHURCH REGISTRY

B.59/75

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IN THE MATTER of the Insolvency Act 1967

AND

IN THE MATTER of the estate of GERALD PAUL O'FARRELL a bankrupt

AND

IN THE MATTER of an application by NOEL BRUCE ULLRICH to oppose Official Assignee action in setting aside a disposition

Creditor

Hearing 5 October 1983

Counsel D. J. Boyle for N B Ullrich  
G. K. Pankhurst for Official Assignee

Judgment

14 FEB 1984

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JUDGMENT OF ONGLEY J

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The applicant, Noel Bruce Ullrich, proceeds under S.86 of the Insolvency Act 1967 for an order reversing the decision of the Official Assignee setting aside a disposition of the sum of \$25,000 made by Gerald Paul O'Farrell, a bankrupt, in his favour on 19 June 1975.

At the time of adjudication in bankruptcy on 22 August 1975 O'Farrell's assets amounted to \$36,755.93. The total amount owing by him to unsecured creditors was \$692,000.00. For a period of about 18 months prior to bankruptcy he had employed the applicant as financial adviser under the terms

of a written agreement made in December 1973 which provided for remuneration in part by way of a fixed annual salary of \$30,000.00 payable by monthly installments of \$1,666.00. The applicant deposes that as at the month of June 1975 O'Farrell owed him an amount in excess of \$25,000 for unpaid fees and disbursements made on his behalf. The applicant informed O'Farrell that he was not willing to continue to act for him unless this amount was paid. An arrangement was then made between them that O'Farrell would transfer 49,990 shares of the nominal value of \$1.00 each in a company named New Zealand Jade Limited in satisfaction of the debt owing for the outstanding fees. For the purpose of this transaction the shares were valued at 50 cents each. Contemporaneously with the transfer of the shares the applicant and O'Farrell exchanged their respective personal cheques for the amount of \$25,000 each. The purpose of the payment to O'Farrell, according to the applicant's testimony, was to give the appearance that full value had been paid in cash for the shares whereas, in fact, the applicant was reimbursed by O'Farrell so that no money was paid by way of consideration. Although it has not been expressly so stated I assume that the transaction was carried out in this manner to avoid questions being raised about duty payable on the transfer of the shares. However that may be, the true effect was to pass the shares to the applicant in settlement of the debt claim for arrears of installments and disbursements payable under the contract of service of December 1973.

There is nothing to contradict the applicant's version of what took place between O'Farrell and him and the explanation which he gives for the transaction having taken the form it did does not unduly strain credulity. It was not directly put to him in cross-examination that his account of the considerations which motivated O'Farrell and himself was fabricated and in the brief opportunity which I had to form an opinion of his credibility as a witness I did not discern any reason for disbelieving him. I accept his evidence that the substance of the whole arrangement was the transfer of the shares to him for a consideration other than cash and that the payment to him of a cheque for \$25,000 was part of a subterfuge designed to disguise the true nature of the dealing.

It seems likely that the value of 50 cents per share adopted as the basis of the transfer from O'Farrell to the applicant was vastly in excess of the real value of the shares. A valuation made on the instructions of the Official Assignee as at 31 August 1975 showed them to be worth only 3 cents per share without anything apparently having taken place in the interim which would account for such a dramatic drop in value. On 14 April 1976 the applicant re-sold the shares to the wife of the bankrupt at \$1.00 per share which again was a dramatic variation but which on this occasion the applicant says can be explained by the efforts that he had expended in the interim upon improving the company's position without personal remuneration to himself.

Mrs O'Farrell has defaulted in payment of the purchase monies on the sale of shares to her by the applicant. The applicant has received only \$10,000 and does not appear to regard the prospect of recovering the balance as being very good. If that is so then his total realisation out of the shares transferred to him by O'Farrell will be \$10,000 in cash. As against that he has assumed liability for a guarantee of the company's indebtedness up to \$60,000 in respect of which he is presently being sued. That the ultimate outcome of the bargain which he made with O'Farrell for payment of his fees has not proved to be as favourable to the applicant as he anticipated it would be at the time it was made has only limited relevance to the present application. If the disposition of the shares to him had been attacked as a voidable preference a more detailed examination of these matters might have been warranted but because of the approach adopted by the Official Assignee they have little more significance than to provide a background to relationship between the applicant and the bankrupt.

In order for there to be a valid setting aside under S.58 on the ground that a voidable preference has been given by the bankrupt within the meaning of S.56(1) three requirements must be met. They are:

1. That the bankrupt was at the time of the disposition unable to pay his debts as they became due from his own money.

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2. That he was adjudged bankrupt within two years of making the disposition.
3. That the disposition was made with a view to giving the creditor a preference over other creditors.

There is no dispute over the first two matters. The payment of the cheque for \$25,000 to the applicant was made just over 9 weeks before the adjudication and there can be no doubt that the bankrupt was at that time unable to pay his debts as they became due from his own monies.

It is the third issue to which the evidence and the submissions of Counsel were largely directed. The approach of the Official Assignee is to regard the payment of the cheque for \$25,000 to the applicant by the bankrupt in isolation from the other dealings between them. In examining the question as to whether it was thereby intended to give a preference to the applicant over other creditors it cannot, in my view, be so regarded. In order to give a preference to the applicant the disposition must be shown to have conferred some benefit on him. The evidence which I have accepted shows the contrary to be true. There was an agreement between the two of them to exchange cheques for an equivalent amount for the purpose of giving the appearance of a purchase of shares for cash. The payment of a cheque for \$25,000 by the bankrupt to the applicant

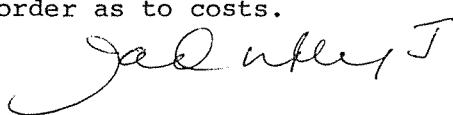
conferred no financial benefit upon the latter because as a condition of receiving that amount he was required to pay to the bankrupt his own cheque for the same amount. The other creditors were deprived of nothing by this exchange and so it cannot be said that the applicant received a preference over them. The exchange may have facilitated the transfer of shares to the applicant but, so far as the evidence before me discloses, that was a lawful transaction which could have been accomplished without the pretence that a cash payment was involved. Whether it could have been avoided as a preferring of the applicant over other creditors is a question which does not require to be explored in these proceedings because the Official Assignee has not chosen to attack it.

The position taken by the Official Assignee in relation to the payment of the cheque for \$25,000 by the bankrupt is not tenable. The evidence does not disclose that the applicant received any preference by reason of the payment and it cannot be properly inferred from the circumstances that it was intended that he should do so.

The applicant is entitled to the order which he seeks and the decision of the Official Assignee setting aside the disposition is reversed.

There will be no order as to costs.

Solicitors:

  
Cavell Leitch Pringle & Boyle, Christchurch, for Applicant  
Official Assignee, Christchurch, for Official Assignee