IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

RJS SET 3

CP No. 814/89

IN THE MATTER of the Companies Act 1955

AND

IN THE MATTER of the Property Law Act 1952

BETWEEN LIARDET DEVELOPMENTS LIMITED (IN LIQUIDATION), having its registered office at Phillips Nicholson, Solicitors, Lower Hutt, Developers

Plaintiff

AND TEDRAIL HOLDINGS LIMITED, a duly incorporated company having its registered office at Phillips Nicholson, Solicitors, Lower Hutt, Developer

Defendant

Date of Hearing: 1 February 1990

Date of Judgment: 9th February 1990

Counsel: S.M. O'Sullivan for Defendant (Applicant)
M.F. McClelland for Plaintiff (Respondent)

JUDGMENT OF NEAZOR J

This is an application to discharge an interim injunction which I granted on an urgent oral ex parte application on 10 October 1989.

The Maori Trustee had obtained an interim injunction against Liardet Developments Ltd to prevent dealings with a property in Lavaud Street, Wellington, which the company was developing by renovating an existing dwelling on it and building two other housing units. The reason for and basis of that application is of no significance in the present proceedings. On 10 October an application was made in the name of the company to set aside the injunction obtained by the Maori Trustee so that a sale of part of the Lavaud Street property could proceed.

Counsel appeared on that occasion for the provisional liquidator of Liardet Developments Ltd to raise an issue about the status of that company to bring the application before the Court or to dispose of the property, the provisional liquidator having been appointed on 4 October 1989. It eventually appeared that the order obtained by Maori Trustee had been of no useful effect in any event because Liardet Developments Ltd did not at the relevant time own the Lavaud Street property, having disposed of it to a new company called Tedrail Holdings Ltd, the defendant in the present proceedings.

The interim injunction obtained by the present plaintiff was given on 10 October on the basis that such inquiries as the provisional liquidator had been able to make in the time available indicated that the disposal of the property to the defendant company (which has, except for one person, the same shareholders and directors as the plaintiff) may have been effected with intent to defraud creditors and be open to attack under s 60 of the Property Law Act 1952. The order made was:

1. The provisional liquidator is sanctioned to bring this proceeding against the defendant in the name and on behalf of the Plaintiff, a company in liquidation;

2. That there be an injunction to restrain the defendant, its servants and agents from selling, transferring or otherwise disposing of its property and/or the units comprising the property at 57 Lavaud Street, Berhampore, Wellington, until further order of the Court.

Since that date two consent orders have been made varying the injunction to allow the sale of two units on the Lavaud Street property on terms as to the disposal of funds thereby produced. Apart from money required to pay a mortgagee in respect of the Lavaud Street property the funds realised by the sales have been held by solicitors in interest bearing accounts.

In the substantive proceeding the plaintiff seeks an injunction preventing the defendant from disposing of its property in Lavaud Street or the units comprising it, an order pursuant to s 60 of the Property Law Act 1952 setting aside the transfer of the property to the defendant and an order that the defendant pay to the plaintiff the proceeds of sale of any part of that property.

On the basis of a second cause of action an order is sought that the defendant pay the whole or part of the plaintiff's debts. That order is sought pursuant to s 315A of the Companies Act 1955.

Of prime importance in this matter in my view is the argument under s 60 of the Property Law Act, subsections (1) and (3) of which provide:

> " (1) Save as is provided by this section, every alienation of property with intent to defraud creditors shall be voidable at the instance of the person thereby prejudiced.
>
> ....
>
> (3) This section does not extend to any estate or interest in property alienated to a purchaser in good faith not having, at the

time of alienation, notice of the intention to defraud creditors. "

The plaintiff alleges that the transfer of the property from Liardet Developments Ltd to Tedrail Holdings Ltd (which was the subject of an agreement dated 16 June 1989 and was effected by registration on 10 August 1989) was made with intent to defraud creditors. It is necessary to look at the circumstances to decide what was the intent at the time of the alienation, (per Richmond J in Re Hale, a bankrupt [1989] 2 NZLR 503n, 508) which I take for present purposes to be 16 June 1989.

I therefore turn to the essential narrative:

(i) 26 August 1987: Mr Donald Dring who is the principal shareholder in Liardet Developments Ltd and a shareholder in Tedrail Holdings Ltd and apparently, the principal actor in relation to both companies, bought a property in Liardet Street, Wellington, for development by the construction on it of 8 housing units;

(ii) 13 January 1988: Totara Construction and Developments Ltd (the original name of Liardet Developments Ltd) was incorporated with Mr Dring, his wife and mother and Mr A.L. Turchie as shareholders. On 15 August 1988 the purchase of Liardet Street was settled and development began there. The property was registered in the name of this company on 4 April 1989;

(iii) January 1989: Mr Dring on behalf of Totara Construction and Developments Ltd agreed to purchase the property at Lavaud Street for $120,000.00 to provide a site for a second development on completion of that in Liardet Street;

(iv) February 1989: Various units of the Liardet Street development had been sold but in the opinion of Mr Dring given to the liquidator on 5 October 1989 the company was insolvent in February, liabilities exceeding assets by $65,000.00. The unsecured creditors then totalled approximately $207,880.00, including the biggest, Carter Holt Ltd, which by March 1989 was owed $109,085.00 for building materials supplied for the Liardet Street development;

(v) March/April 1989: The purchase of the Lavaud Street property was settled on 21 March 1989, financed in part by a new mortgage on that property and some of the proceeds of the sale of one of the Liardet Street units. The company's unsecured creditors then totalled $230,575.82. In April an agreement for sale and purchase of the existing house at Lavaud Street was entered into and a deposit of $20,000.00 was paid into the company's account;

(vi) May 1989: The last unit of the Liardet Street development was sold and according to Mr Dring Totara Construction and Developments Ltd then ceased trading. However, the significant remaining asset of the company was the Lavaud Street property, and work continued on it. According to a letter from the company's solicitor to Carter Holt Ltd, dated 17 May 1989, the company was then insolvent and in addition to the claim by Carter Holt Ltd owed $40-50,000.00 to other creditors. The solicitor said "the cold hard facts" were that the company did not have any funds to complete payment to Carter Holt Ltd. The letter made no mention of the Lavaud Street property;

(vii) June 1989: The company obtained a valuation of the Lavaud Street property in its partially developed and reconstructed state at $166,000.00. On the day that valuation was given Mr Dring as agent for a company to be formed entered into an agreement with Totara Construction and Developments Ltd for the sale of the property for $166,000.00. By that stage the company's creditors were owed in total $408,646.00 including the amount of $90,450.00 secured by mortgage on Lavaud Street. The unsecured creditors were the suppliers of goods and services for the development work on the two properties. Totara Developments Ltd's name was changed on 26 June 1989 to Liardet Developments Ltd;

(viii) July 1989: Tedrail Holdings Ltd was incorporated and in July 1989 it received the balance of the purchase price of the first unit at Lavaud Street. The change of title of the Lavaud Street property to Tedrail Holdings Ltd was not registered until 10 August 1989.

The consideration for the purchase of the property by the company to be formed (which proved to be the defendant) of $166,000.00 was to be met by the purchaser taking responsibility for indebtedness incurred in relation to the Lavaud Street development of:

(i) the $90,450.00 secured by mortgage on the property;

(ii) $84,841.57 trade creditors;

(iii) $2,779.77 trade creditors paid by Totara Decorators Ltd, another of Mr Dring's companies.

Totara Developments Ltd was to be indemnified in respect of those debts, which amounted to more than the designated purchase price of $166,000.00. The general body of creditors were not told of these arrangements although those associated with the Lavaud Street development may have been.

At the stage the sale of the Lavaud Street property was effected it was clear that Totara Developments Ltd was, and was believed by its directors to be, insolvent and that the Liardet Street development would produce a considerable loss. Credit was becoming difficult to obtain and Mr Dring's motive for what was arranged to be done was, he said in an affidavit, to enable the Lavaud Street development to continue. Creditors whose bills related to Lavaud Street were to be paid by the new company (so that credit would continue to be available for that development). It is unspoken in the affidavit by Mr Dring, but clearly anyone who had extended credit for Liardet Street was going to be left to get whatever was obtainable from Liardet Developments Ltd after the transfer - which would be virtually nothing.

Equally it is not explicit in the affidavit, but not denied, that as at the date of transfer there was still some hope of profit from the Lavaud Street development. Mr Dring's affidavit says for instance:

> " 8. After discussions with our solicitor it was clear that any surplus from the Lavaud Street development would be insignificant and would not meet the shortfall from the Liardet Street development. It was apparent however, that the Lavaud Street development would clear most of the Lavaud Street creditors.

> 9. For that reason it was decided to put the Lavaud Street development on a separate footing to the Liardet Street development. This would allow a new entity to incur credit without the hinderance of the Liardet Street shortfall and also ensure that the Lavaud Street creditors were paid. It was for this reason that the Defendant company was incorporated to purchase the Lavaud Street site. "

The profit originally hoped for from this second project was some $90,000.00. There is no suggestion of any commitment by Mr Dring or by the defendant company, enforceable against either, that if the Lavaud Street development did produce a profit that profit would be available to the creditors indebtedness to whom related to the Liardet Street development. The evidence at this stage is that this project also will result in a loss, but the material point of time in relation to intent must be when the alienation was carried out.

There is no evidence that it was the view at the relevant time that there would be no profit. Indeed since Liardet Developments Ltd's creditors to a significant amount were being left with nothing, there is no sensible basis for concluding that it was the interests of other creditors and nothing more which motivated the transfer transaction.

There is other evidence that Mr Dring on behalf of Totara Construction and Developments Ltd/Liardet Developments Ltd actively misled Carter Holt Ltd, the company's largest creditor, and at least one other, into the belief that their bills would be met, when the prospect of fully meeting cheques drawn or of making payments promised did not exist because the Lavaud Street property was being purchased; or at a later stage into a belief that there was nothing from which their bills could be met at a stage when action was in hand to transfer the Lavaud Street property (of which those

creditors had no knowledge) away from the debtor company to Tedrail Holdings Ltd.

It was argued by counsel for the defendant that significant weight should not be accorded to those actions in assessing the matters now in issue because such conduct [designed to stave off action by creditors] could be common to any situation where a company is facing the financial problems that Liardet Developments Ltd faced in April and May of 1989. All I can say is that the fact that such conduct could be common (or is common, if that be so) does not make it honest or insignificant in the creditor/debtor relationship.

There seem possibly to be difficulties in the plaintiff seeking to avoid under s 60 of the Property Law Act an alienation of property when it has consented to the company which purchased the property in issue selling interests in it to third parties, but that is something to be resolved in the trial of the action. The present question is whether a sufficient case has been made out on the whole of the material now before the Court to establish that there is a serious question to be tried and that the balance of convenience and the overall justice of the case requires that a restraining order pending trial should be made - Klissers v Harvest Bakeries [1985] 2 NZLR 129 (C.A.).

On the question of balance of convenience, in so far as the interests of creditors are involved there can be no question: there is no dispute that if the injunction is not continued in effect, there will probably be no point in proceeding with the substantive action because the creditors of Tedrail Holdings Ltd will be paid out, possibly in full, and there will be no point in anyone claiming through Liardet Developments Ltd pursuing the matter.

Considerations weighing the other way are that Tedrail Holdings Ltd creditors whose debts were incurred after the

transfer are not being paid and are embroiled in a problem of which they could probably have known nothing. The continuation in trading of that company and the personal finances of Mr Dring are also at risk if Tedrail Holdings Ltd's creditors are not paid. On balance in my view, however, the situation is such that justice requires that the status quo be preserved until the issues are properly determined - it is to be hoped quite quickly.

Whether there is a serious question to be tried depends on the proper approach to be taken to s 60 of the Property Law Act. There are reported judgments on the question of Perry J in Re Hale (a bankrupt) [1974] 2 NZLR 1 and in the Court of Appeal [1989] 2 NZLR 503n and of Tipping J in Julius Harper Ltd v F.W. Hagedorn and Sons Ltd [1989] 2 NZLR 471.

Principles emerging from earlier decisions are set out in the judgment of Richmond J in Re Hale in the Court of Appeal.

Those principles are that:

> "(1) No alienation of property can be caught by s 60 unless it is first shown to fall within subsection (1) as being one made 'with intent to defraud creditors'... the existence of an intention to defraud is a question of fact to be decided by a consideration of the alienation in the light of all the circumstances ... The onus of establishing intent to defraud rests on the party attacking the transaction.
>
> (2) As to when there is an intent to defraud, if there is an intention to prejudice creditors by putting an asset wholly or partly beyond their reach then that will be an intent to defraud creditors provided that in the circumstances the debtor is acting in a fashion which is not honest in the context of the relationship of debtor and creditor.
>
> (3) If the real object of an alienation is to give a preference to an existing creditor then the alienation will not be one made 'with intent to defraud creditors' merely because it has that effect ... The intent to defraud creditors is a positive state of

> mind which is not to be found in the case of a debtor whose purpose is simply to prefer one creditor to others.
>
> (4) ....
>
> (5) If the real object of the alienation was to defraud creditors then the fact that one creditor incidentally got a preference as a result of the alienation does not prevent the transaction from being voidable."

Richmond J put the question in issue in Re Hale in terms whether the real purpose of the bankrupt was to put the asset in question, namely the equity in his house, out of the reach of his creditors for his own benefit rather than to give a preference to his wife (who was the mortgagee by virtue of the impugned transaction) in relation to an existing debt: The question was one to be answered in a common sense way without reference to any artificial rules. The fact that some incidental benefit for the bankrupt might result because his wife was in a better financial position than she otherwise would be and thus more capable of helping him in one way or another was regarded as not enough to bring the mortgage transaction within s 60. Richmond J said that it would have to be shown that the personal benefit of the bankrupt, rather than the protection of his wife, was the main or real purpose of the transaction.

The present case is not one in which there has been a transaction directly with a creditor which has had the effect of giving that creditor a preference whether by way of granting security or of putting the creditor in a position to set-off his claim against the amount due by him to the insolvent in respect of the transaction. What has happened here is that Liardet Developments Ltd has put an asset which would have been available to its creditors out of their reach by transferring it to Tedrail Holdings Ltd. Any preference to some creditors of Liardet Developments Ltd has been achieved incidentally and indirectly so far as they

are concerned by reason of the agreement between Liardet Developments Ltd and Tedrail Holdings Ltd that the latter company will undertake to pay certain creditors of the former and will indemnify the former against the claims of those creditors.

It may be questionable how much weight should be given to the argument by the defendant that the result was simply to prefer the creditors whose bills Tedrail Holdings Ltd undertook to pay, because there is no evidence of any transaction involving them which would give them recourse against Tedrail Holdings Ltd. Some have been paid, but one at least has taken action directly against Mr and Mrs Dring under a guarantee rather than against either company. The position of all of those creditors seems to be that they are still unsecured creditors of Liardet Developments Ltd. Some have been preferred by actual payment but that is as far as the matter goes.

Liardet Construction Ltd as an entity obtained a benefit in that it obtained an indemnity from Tedrail Holdings Ltd in respect of the payment of certain of its creditors, but the real benefit of the transaction, other than the improved position of the creditors which were to be paid by Tedrail Holdings Ltd, was to those involved in both companies as shareholders and directors in that they had some prospect of obtaining a profit from the Lavaud Street development and they would be able to carry on the development business through the medium of the new company. For the action to be taken when it was and against the background of attempts by the principal creditor to obtain payment and the actions taken by Mr Dring personally and through his solicitors in an endeavour to stave off any action by that creditor was, in my opinion, in the context of the relationship of debtor and creditor, less than honest and was sharp practice, to use the words of Russell LJ in Lloyds Bank Limited v Marcan [1973] 3 All ER 754 at 759. In circumstances so described

Russell LJ considered that the transaction was made with intent to defraud the creditor.

This case is in considerable degree analagous to that of In re Fasey [1923] 2 Ch 1, one of the authorities relied upon in the New Zealand decisions referred to. In that case a builder operating personally and not through a company, hard pressed by his creditors, entered into an agreement with an agent (his solicitor's clerk) on behalf of a company to be formed whereby he agreed to sell all his property including his business, with minor exclusions, to the company. The consideration was an allotment of shares to the vendor or his nominees, the appointment of the vendor as governing director of the new company and an undertaking between the company and the vendor that the company would discharge the business debts and liabilities of the vendor and indemnifying him in respect of them.

It was held by the trial Judge, whose decision was affirmed by the Court of Appeal, that the facts showed that the whole object of the agreement was, under the cloak of a company, to remove the assets of the bankrupt from the reach of his creditors and to retain for the bankrupt the benefit of them and thereby defeat and delay his creditors within the statute of Elizabeth.

In that case it was possible for the creditors to get at the assets by way of the shares in the company which the bankrupt held, but that avenue would not be available in this case, since Liardet Developments Ltd has no interest in Tedrail Holdings Ltd beyond the former's right to have some of its creditors' bills met - now to an amount of $32,000.52.

That companies are involved seems not to have been regarded as ruling out considerations of benefit to an individual as an indication of fraudulent intent when a transaction is

attacked: in the Court of Appeal in In re Fasey at pages 13/14 Lord Sterndale MR said:

> " I do not ignore for the moment, ... the fact that a company, although it may be composed of one man only, the transferor himself, in this case of two the transferor and his solicitor, is a separate entity. The bankrupt is not the company and the company is not the bankrupt, but it may very well be that the transaction of the transfer to the company is for the purpose of enabling the bankrupt under the name of the company, really and substantially himself, to get the benefit of the goodwill and assets of the business which he has transferred to the company. What was the position here? The bankrupt was one of the two and only shareholders of the company, the other being his solicitor. He was the managing director at a salary of 2500l. a year payable out of the assets .... It seems to me quite clear that the whole object of this transaction was to remove these assets out of the reach of the creditors, some of whom had obtained judgments against the bankrupt and were in a position to issue execution, in order that the benefit of the assets might be kept for the bankrupt himself, although under the name of a company. "

The decision in that case confirms my view of the circumstances of the present one: that the evidence indicates that there is certainly a case to say that there was an intention to prefer some creditors but the primary intention was to move assets beyond the reach of Liardet Developments Ltd's creditors so that those involved in the companies, and principally Mr Dring, could continue with the Lavaud Street development with whatever benefits they might gain from that.

There was no argument pressed that if there is a serious question to be tried under s 60(1), s 60(3) applied to the facts presents such a significant bar to the claim

succeeding that the injunction should be discharged. For present purposes, I think that must be the right view: Mr Dring was the prime mover in respect of all transactions and with his wife he holds 70% of the shares of Tedrail Holdings Ltd. Mr Turchie holds the other 30%. The knowledge of these people was the knowledge of the company and for present purposes I accept that they knew the circumstances of and the intention behind the transfer to Tedrail Holdings Ltd.

On the view of the facts set out above, in my judgment there is unquestionably a serious question to be tried and the injunction should stay in place.

It was argued, in relation primarily to the second cause of action relating to s 315A of the Companies Act 1955 that the injunction had the effect of preserving for creditors a means of meeting their judgment and that that was beyond the accepted jurisdiction of the Court. On the s 60 issue I do not think that is the case - more is involved than the preservation of a fund. The attack under the section is on the defendant company's title to the land from sales of which the fund was produced.

The second cause of action seeks an order under s 315A of the Companies Act that Tedrail Holdings Ltd pay to Liardet Developments Ltd as a company being wound up the whole or any part of the debts proveable in the winding up. It was argued for the defendant company that, when regard is had to the considerations set out in s 315C(1) of the Companies Act to which the Court is to have regard in a decision under s 315A, there is not a sufficient basis to justify keeping the injunction in place in this case.

Weight was also placed on the decision of Tipping J in relation to the section in Lewis and Anor v Poultry Processors (Holdings) Ltd and Others (1988) 4 NZ C.L.C. 64,508. That decision provides strong support for the

defendant's contention on this issue particularly on these points:

(i) that s 315A does not give a liquidator a right to any fund or asset but at best a right to obtain an order for payment towards debts. When regard is had further to another matter discussed by His Honour, the Court's reluctance to freeze a defendant's assets before trial to ensure that a potential judgment may be met, there must be a serious question whether it is appropriate to grant an interim injunction pending trial of a proceeding in which an order under the section is sought.

(ii) that it is doubtful that s 315A was intended to prejudice the position of bona fide unsecured creditors of the related company (in this case Tedrail Holdings Ltd). That would be a material point in the present case since it appears on the evidence as it stands that Tedrail Holdings Ltd will not produce any surplus after payment of its own creditors.

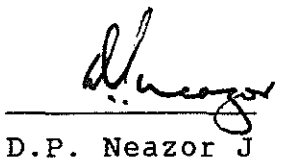
If the present application depended solely on this cause of action, I would have considerable doubt about leaving the injunction in place, but in light of the clear view I have formed in respect of the first cause of action, it is unnecessary, and probably unhelpful, to explore the issue further.

For the reasons given in respect of the first cause of action the application to discharge the injunction is dismissed.

It is plain that the issues in this case will have some degree of complexity if the proceeding succeeds under s 60 of the Property Law Act, since the rights of Liardet Developments Ltd and its creditors and the rights of Tedrail Holdings Ltd and its separate creditors and, possibly, the rights of the purchasers from the latter company may be affected. In the event that the defendant's application to discharge the injunction was declined counsel sought directions designed to procure an early hearing. That seems

to me to be proper, but without hearing counsel it is not possible to determine what directions ought to be given. If neither party has within 21 days of the release of this judgment applied for directions under R 437, the parties are directed to attend a conference under R 441 on as early a date as can be arranged, to be fixed by the Registrar.

Costs are reserved.



D.P. Neazor J

Solicitors: Phillips Nicholson, Lower Hutt for Defendant (Applicant)

Kensington Swan, Wellington for Plaintiff (Respondent)

CP No. 814/89

IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

IN THE MATTER of the Companies Act 1955

AND

IN THE MATTER of the Property Law Act 1952

BETWEEN LIARDET DEVELOPMENTS LIMITED (IN LIQUIDATION, having its registered office at Phillips Nicholson, Solicitors, Lower Hutt, Developers

Plaintiff

AND TEDRAIL HOLDINGS LIMITED, a duly incorporated company having its registered office at Phillips Nicholson, Solicitors, Lower Hutt, Developer

Defendant

JUDGMENT OF NEAZOR J

Delivered judgment
this 9th
day of February 1990
Deputy Registrar
~~Copy to Solor.~~
~~Press. Law Reports~~
~~M. D.C.'s Register~~
Note .....
Register .....
C.D.R. .....