IN THE HIGH COURT OF NEW ZEALAND 14/6 CP.35/89
CHRISTCHURCH REGISTRY

BETWEEN PETER RUSSELL FANTHAM

Plaintiff

A N D CREDITPOINT CORPORATION LIMITED

First Respondent

A N D WILLOWDALE FARM (QUEENSTOWN) LIMITED

Second Respondent

A N D MELANTERIC HOLDINGS LIMITED

Third Respondent

Hearing: 11-12 April, 1991

Counsel: D W Parker for First Respondent
T Sissons and T J McGinn for Third Respondent
No appearance for Plaintiff or Second Respondent
(leave having earlier been granted to counsel to withdraw)

Judgment: 22 APR 1991

JUDGMENT OF FRASER, J

This is an application pursuant to s 60 of the Property Law Act 1952 by the first respondent Creditpoint Corporation Limited (Creditpoint) for an order that an instrument by way of security given by the second respondent Willowdale Farm (Queenstown) Limited (Willowdale) to the third respondent Melanteric Holdings Limited (Melanteric) be declared void.

There are a number of affidavits and in addition evidence was given viva voce by Mr R L Walker, the general manager of Creditpoint, Mrs R J Savill and Mr R A Savill, the directors of Melanteric, and Mr D Riley, Melanteric's solicitor.

The circumstances

Willowdale was incorporated to carry on a deer farming business at Queenstown. Its directors and principal shareholders were Mr S L Savill and his wife Mrs L M Savill. On 24 August 1987 Willowdale borrowed $140,000 from UDC Finance Limited (UDC) to assist it in the purchase of a Bell helicopter. The helicopter was purchased and UDC took an instrument by way of security over it (guaranteed by Mr & Mrs Savill) to secure the loan which was repayable with interest by monthly instalments.

In the latter part of 1987 and early 1988 because of difficulties which had arisen in an unrelated transaction Willowdale was at the limit of its overdraft and had no banking facility. The payments due to UDC were in arrear. Mr S L Savill says in his affidavit that during the course of 1988 he and Hampstead Holdings Ltd, another company in which he had an interest, paid $120,111.80 to UDC under the instrument such payments being treated (as between himself and his companies) as advances by him and Hampstead Holdings Ltd to Willowdale.

On 30 January 1988 Willowdale borrowed $115,000 on a short term basis from Creditpoint on the security of an instrument by way of security over another helicopter. The instrument was guaranteed by Mr and Mrs Savill. The loan was not repaid. There were difficulties about enforcing the security. Eventually the helicopter was sold. The proceeds

($130,000) are held by Creditpoint's solicitors in trust pending the outcome of litigation as to ownership. Those proceedings have been dormant since 1988.

On 7 February 1988 Creditpoint issued proceedings against Willowdale seeking judgment for the principal sum and interest owing under the instrument by way of security of 30 January 1988. A summary judgment was obtained on 9 May 1989 for $116,400.64.

Between February and October 1988 Mr and Mrs S L Savill were involved in litigation with Chase Holdings (Wellington) Ltd in which they sought to enforce a contract for sale of shares. They were unsuccessful. The judgments (High Court, Court of Appeal and Privy Council) are reported at [1989] 1 NZLR 287.

On 2 March 1988 in related litigation NZI Finance Limited obtained a summary judgment against Mr and Mrs Savill for $2.2M. A stay of execution was granted pending an appeal. Their appeal was dismissed on 1 September 1988 ([1990] 3 NZLR 135).

Mrs R J Savill is the mother of Mr S L Savill. In late 1988 she arranged a credit facility with Westpac for $200,000 secured by a mortgage over her home. She advanced $50,000 by way of unsecured loan to Mr S L Savill.

In respect of possible further assistance (not at that stage formulated) it was envisaged that any loans would be secured or possibly assets purchased. For various reasons, including the fact that she was about to leave for England she was advised to establish a small private company to use as a vehicle for these expected dealings. For this purpose she acquired Melanteric. At the same time she asked another son, Mr R A Savill, to be a director in the company with her and he agreed.

Mr R A Savill was on close terms with his brother and on numerous occasions over a period of years had loaned him sums of money usually on a short term basis, the amounts varying from $1,000 to $26,000. He was not however directly involved in any way in his brother's business interests and did not know a great deal about them.

In early 1989 Mr S L Savill asked his mother (then in England) to lend him money to refinance the Bell helicopter owned by Willowdale and under security to UDC. Mrs Savill agreed. $130,000 of the remaining credit at Westpac was uplifted and paid to Melanteric's credit in its solicitor's trust account. An instrument by way of security was taken from Willowdale to Melanteric securing $130,000 and further advances and providing for interest and repayment.

The proceeds of that advance were used as follows: $37,778 was paid to UDC in repayment of its advance and discharge of its security. $10,000 to Willowdale, $50,000

to Mr R A Savill's bank account, $10,000 to Murchison & Wood, Solicitors, Christchurch, (for Mr S L Savill or Hampstead Holdings Ltd) and $21,519 to Hampstead Holdings Ltd.

A further advance of $20,000 was made on 9 May 1989 and paid to Willowdale.

As to the payment to Mr R A Savill's bank account his evidence was that in the context of many years of informal financial transactions and a relationship of trust the $50,000 was paid into his bank account without his prior knowledge or consent and his brother asked him to make various payments on his behalf by cheques drawn on that account. Mr Savill says he was less than pleased about the way it was done but he accepted his brother's explanation and complied. All the payments made are fully documented.

According to Mr S L Savill's affidavit the various payments out of the proceeds of the Melanteric advance apart from that to UDC were repayment in full of the advances previously made by Hampstead Holdings Ltd and repayment in part to him of the advances which he had made.

He was not called as a witness nor was he required by Creditpoint to attend for cross-examination.

On 1 June 1989 Creditpoint issued a writ of sale pursuant to which the Sheriff seized the Bell helicopter. Melanteric immediately claimed that it was

entitled to the machine pursuant to the instrument by way of security of 3 February 1989 but Creditpoint contended that for a number of reasons the charge was invalid. The Sheriff took out interpleader proceedings. Holland J ordered that the helicopter be sold and the proceeds held in trust pending the outcome of the proceedings and directed that pleadings be filed and the issue between Creditpoint and Melanteric determined.

Although the validity of the instrument was initially contested on a variety of grounds the only one pursued by Creditpoint at the hearing was that the instrument should be declared void on the basis that it was given by Willowdale with intent to defraud its creditors and is accordingly voidable at Creditpoint's option pursuant to s 60 of the Property Law Act 1952.

The Law

Section 60 of the Property Law Act 1952 is as follows:

> " (1) Save as provided by this section, every alienation of property with intend to defraud creditors shall be voidable at the instance of the person thereby prejudiced.
>
> (2) This section does not affect the law of bankruptcy for the time being in force.
>
> (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 the alienation, notice of the intention to defraud creditors."

By s.2 "'purchaser' includes a lessee or mortgagee or other person who for valuable consideration takes

or deals for any property; and 'purchase' has a corresponding meaning....".

Counsel were agreed that the onus of proof in respect of the alleged intent to defraud is on Creditpoint but that if such intent is proved the onus of establishing the exception is on Melanteric.

The principles applicable in relation to s.60 of the Property Law Act 1952 were considered in Re Hale [1974] 2 NZLR 1 (SC) [1989] 2 NZLR 503n (CA) [1975] 2 NZLR 274.

The facts in that case as summarised in the headnote are as follows:

> " In 1965 Hale guaranteed a second debenture for $12,000 for a company of which he was a director. The company suffered financial difficulties and in 1967 its two debenture holders appointed a receiver. From time to time Hale's wife had advanced him money, totalling $8800, which he had not repaid. In July 1968 Hale executed a second mortgage in favour of his wife over a residential property to secure those advances. Then in May 1972 he was adjudicated bankrupt. The Official Assignee set aside the mortgage. In the Supreme Court Hale successfully applied for the Official Assignee's decision to be reversed. The Official Assignee appealed.
> It was common ground that because of the dates of the transactions, the provisions of the Insolvency Act 1967 did not apply to this case, and that the sole issue was whether the mortgage executed by Hale in favour of his wife was voidable under s 60 of the Property Law Act 1952."

It was held (again as summarised in the headnote) as follows:

> " The onus of proving an intent to defraud lay on the party attacking the transaction. On the evidence it had not been established that the mortgage was a means of achieving a benefit to the

bankrupt rather than a genuine transaction intended to protect his wife. No doubt the bankrupt anticipated some incidental benefit for himself because the better the financial position of his wife the more capable she would be of helping him in one way or another. But the mere expectation of an incidental benefit of this kind was not enough to bring the mortgage within s 60."

In the course of his judgment in the Court of Appeal Richmond J said at p 508:

" Before dealing with the facts of the case it is necessary to set out certain principles of law which emerge, in the main, from cases decided in relation to the statute 13 Eliz 1, c 5 but which in my view are equally applicable in relation to s 60.

(1) No alienation of property can be caught by the section unless it is first shown to fall within subs (1) as being one made "with intent to defraud creditors". With the possible exception of a voluntary alienation made by an insolvent debtor (Freeman v Pope (1870) LR 5 Ch App 538) 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 (Re Holland [1902] 2 Ch 360, 372; Glegg v Bromley [1912] 3 KB 474, 492). The onus of establishing intent to defraud rests on the party attacking the transaction.

(2) It is not necessary for the purposes of the present case to attempt any precise definition of "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. This in essense was the view taken by Russell LJ in Lloyds Bank Ltd v Marcan [1973] 3 All ER 754, 759.

(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. Mr McKenzie submitted that the authorities which establish this proposition ought not to be followed in New Zealand. He argued that the

Courts have incorrectly placed a gloss on the language of the statute of Elizabeth as a result of confusion between the first and fifth sections of that statute. It is true, as was noted by Parker J in Glegg v Bromley (at p 492) that it is not always clear from the authorities whether the Judges are dealing with the operative part of the statute of Elizabeth (s 1) or with the proviso (which corresponds to s 60(3) of the Property Law Act 1952) contained in s 5. But there are cases of high authority which make it quite clear that the Judges were considering this question solely from the point of view of the intention of the debtor and without reference to the proviso. One of these cases, Re Fasey [1923] 2 Ch 1, was decided by a very strong Court of Appeal (Lord Sterndale MR, Warrington and Atkin LJJ). The intent to defraud creditors is a positive state of mind which is not to be found in the case of a debtor whoe purpose is simply to prefer one creditor to others. For myself I am not prepared to accept this particular submission made by Mr McKenzie and I regard as applicable to s 60 the following passage from the judgment of Atkin LJ in Re Fasey at p 17:

> " We have to bear in mind the fact that a charge on assets given to one creditor, although it may delay and defeat the other creditors, is not within the statute."

(4) The fact that a charge is given to secure a past debt without any present consideration, such as a forbearance to sue, does not make the alienation a voluntary one within the principles discussed in Freeman v Pope (1870) LR 5 Ch App 538. Mr Millard submitted to the contrary. He based his argument on the cases of Wigan v English and Scottish Law Life Assurance Association [1909] 1 Ch 291; Glegg v Bromley... and Official Assignee of Reeves v Paterson [1918] NZLR 623. These cases could be relevant to s 60(3) as the word "Purchaser", which occurs in that subsection, is defined in s 2 of the Act as including "lessee or mortgagee, or other person who for valuable consideration takes or deals for any property" (emphasis added), but in my opinion they have no relevance to s 60(1). In that latter context when a security is given for an existing debt the inference is that it is intended to give a preference to a particular creditor. This is not an intent to defraud creditors as the giving of a preference is

not an illegal purpose so far as s 60 is concerned but is a matter which can be dealt with under the bankruptcy laws only. It may be noted that in Glegg v Bromley the fundamental point at issue was whether there was consideration of a kind which would support an equitable assignment of a future interest. That is a very different question.

(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: Re Fasey."

Intent to Defraud

The first question in the present case accordingly is one of fact, namely whether the instrument given by Willowdale on 3 February 1989 was made "with intent to defraud creditors" in respect of which the onus is on Creditpoint.

It is somewhat surprising that Creditpoint appears not to have known of the instrument by way of security to Melanteric prior to the issue and execution of the writ of sale. But when it did come to its notice and it was realised that the security had been given to a company owned by Mr S L Savill's mother at the very time that Creditpoint was unsuccessfully pressing for repayment of its loan and no payment had come to it out of the supposed advance not unnaturally its suspicions were aroused. Following further investigation its solicitors notified the Sheriff that it challenged the validity of the charge.

The argument for Creditpoint was put in various ways by Mr Parker but I think may be summarised as follows:

(1) Mr S L Savill was the person behind bothe Willowdale and Hampstead Holdings; (2) the balance of the fund after paying UDC was paid by Willowdale to Mr S L Savill or Hamptsead Holdings or to payees for their credit; (3) these payments were made in a covert way by direction to Melanteric's solicitors or Mr R A Savill; (4) the effect was to benefit Mr S L Savill and prevent Creditpoint from recovering money owed to it by Willowdale; (5) these circumstances show that the intention of Mr S L Savill and Willowdale was to defraud Willowdale's creditors; (6) this conclusion remains and is valid even if the Court should find that both Mr S L Savill and Hampstead Holdings were creditors of Willowdale.

Mr Sissons submitted: (1) that the instrument by way of security was given for valuable consideration; (2) That Willowdale's creditors at the relevant time were UDC, Creditpoint, S L Savill and Hampstead Holdings; (3) That in respect of payments made by S L Savill and Hampstead Holdings to UDC for the benefit of Willowdale, Mr S L Savill (as a guarantor) was entitled to be subrogated to UDC's security and Hampstead Holdings would also have an equitable claim in that respect: but apart from the question of security it was undeniable that Hampstead Holdings and Mr S L Savill were creditors of Willowdale; (4) The use of part of the funds obtained from the advance to repay the UDC loan was unquestionably valid and the instrument could not be declared invalid in part (see the judgment of Wild CJ in Re Hale (supra) at p 508); (5) On the authority of Re Hale (supra) (and other cases cited therein which Mr Sissons referred to in some detail

in the course of his argument) the most that could be said was that Willowdale and Mr S L Savill preferred or paid in priority the debts owing to Mr S L Savill and Hampstead Holdings and that such payments did not amount to an intent to defraud creditors in terms of s 60 of the Property Law Act 1952.

I accept that all the witnesses who gave evidence before me were truthful and did their best to recount accurately the circumstances as known to them.

Mr S L Savill was not called but his affidavit contains relevant and material facts. While some criticism has been directed to his failure to produce the financial accounts which one would have expected to be kept and be available, he was not required by Creditpoint to attend for cross-examination. There is no evidence contradicting what he said in his affidavit.

I think it is inescapable that in February 1989 Mr S L Savill and his company were under severe financial pressure not only from Creditpoint but generally in respect of the various matters which are referred to above.

But despite that situation and notwithstanding all the criticism directed at the transaction by Mr Parker it is incontrovertible that the original advance of $130,000 and the further advance of $20,000 were paid by Melanteric in full in cash provided by Mrs Savill and that all the funds were received by Willowdale for its credit. In this connection the

fact that it was a family oriented transaction is beside the point. The position would have been exactly the same if the lender was a third party dealing at arms length.

It is true that by giving the instrument by way of security to Melanteric, Willowdale's equity in the helicopter to the extent of $130,000 ceased to be available to the company's existing unsecured creditors, but as it received the full sum of $130,000 in cash its net position at the conclusion of the transaction was exactly the same as it was before the transaction was carried out.

I find that both Mr S L Savill and Hampstead Holdings were creditors of Willowdale in respect of advances made by way of payments to UDC in respect of Willowdale's indebtedness. Contrary to Mr Parker's submission I consider that this is a matter of crucial importance. If Hampstead Holdings and Mr S L Savill were not creditors and the payments made to them for their credit by Willowdale were voluntary payments, then in view of Willowdale's and Mr S L Savill's financial position the payments could only be seen as a manoeuvre to divert the funds out of Willowdale and defraud its creditors. This may have been sufficient to taint the instrument by way of security itself as part of an overall scheme with that intended effect. But, as Mr S L Savill and Hampstead Holdings were creditors, I agree with Mr Sissons' submission that the most that can be said is that the payments were and were intended to be priority or preferential payments which had the effect of seeing that Mr S L Savill and Hampstead

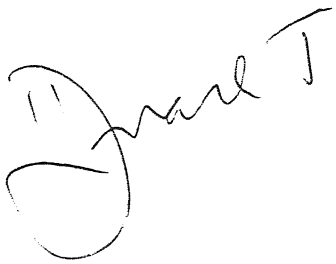
Holdings were paid in whole or in part and Creditpoint was excluded. I also agree that in reliance on Re Hale (supra) and the long line of authority on which it is based such an intention is different from and does not amount to an intent to defraud creditors in terms of s 60 of the Property Law Act 1952.

Such preferential or priority payments may in some circumstances be the subject of action under the relevant bankruptcy or winding up provisions but that is not the issue before me.

In my judgment Creditpoint has not established that the instrument by way of security given by Willowdale to Melanteric on 3 February 1989 was given with the intent of defrauding Willowdale's creditors. The application is refused.

Leave is reserved to all parties to apply further in case some consequential direction is required.

At the request of counsel all questions of costs are reserved.



Solicitors:

Crown Solicitor, Christchurch, for Plaintiff
Farry & Co, Dunedin, for First Respondent
Macfarlanes, Christchurch, for Third Respondent