IN THE HIGH COURT OF NEW ZEALAND 5/3 No M268/89
PALMERSTON NORTH REGISTRY

IN THE MATTER of THE COMPANIES ACT, 1955

IN THE MATTER of D S EDMONDS ELECTRICAL LTD (IN LIQUIDATION)

BETWEEN THE OFFICIAL ASSIGNEE OF D S EDMONDS ELECTRICAL LTD (IN LIQUIDATION)

Applicant

109

AND TYREE POWER CONSTRUCTION LTD

Respondent

AND AIRWAYS CORPORATION OF NZ LIMITED

Respondent

Date: 12 February 1993

Counsel: Mr G L Lang for applicant
Mr Williams for respondents

Judgment 12 February 1993

(ORAL) JUDGMENT OF HILLYER J

This is expressed to be an application under s311A of the Companies Act 1944 for an order that a disposition is a voidable preference and should be set aside. Strictly speaking it should be an application by the respondent under that section for an order declaring that the disposition is not a voidable preference and should not be set aside. Counsel however, have argued the matter on the papers as they are, and I deal with it on that basis.

On 20 February 1990, D S Edmonds Electrical Ltd was wound up on the petition of the Commissioner of Inland Revenue. The petition was presented on 2 February 1990.

The proceeding concerns a Deed of Assignment entered into in or about the month of July 1989 between D S Edmonds, the director of the company and Tyree Power Construction Ltd, sometimes called Cory Wright.

Late in 1988, Mr Edmonds tendered to the Airways Corporation for the recabling of the taxiway lighting circuits at the Auckland International Airport. The tender was accepted and carried out over the next 12 months, pursuant to the contract. The Airways Corporation made a number of payments pursuant to the contract.

Between May and July 1989 the financial situation of D S Edmonds Ltd was poor. There were a number of creditors, including the Commissioner of Inland Revenue and a company called Olex Cables, which also petitioned pursuant to a s218 notice, dated 10 April 1989. Other companies were threatening to issue 218 notices. By far the largest creditor however, was Tyree Power Construction. In July 1989 that company was owed the sum of $105,655 out of total creditors of $210,655.

Mr Edmonds entered into the Deed of Assignment with Tyree Power under which payments to be received from the Airways Corporation were to be partially paid directly to Tyree Power. The sum of $10,000 was to be paid in respect of the progress payment then due for works completed at the end of July 1989, 40% of any subsequent progress payment to become due would be payable directly and 50% of the final claim also to be paid.

The applicant alleges that that was a fraudulent preference. The principles set out in *In re Aburn* [1908] 27 NZLR 442, *Official Assignee v Wairarapa Farmers Co-operative Assoc* [1925] NZLR 1, and *In re NZ Electrical Appliance Co* [1927] NZLR 16 establish that in order to prove a voidable preference it must be clear that the substantial and dominant motive of the debtor was to give a preference. Bona fide pressure will prevent the payment being a voidable preference, *In re McRae* [1928] GLR 190. The dominant motive of the debtor may be inferred from the facts of the case, *re M Kushla Ltd* 1943 CH248 and *Re Port Supermarket Ltd (in liquidation)* [1978] 1 NZLR 330. A payment made in the ordinary course of business cannot be a voidable preference.

In support of the applicant's allegation, Mr Lang for the Official Assignee called Mr Edmonds, who said quite bluntly that he had had very good treatment from Tyree Power, that they had been very patient and looked after him well, and that he "wanted to do my bit for them to help them recoup their money". He was cross-examined carefully by Mr Williams on behalf of Tyree Power, but in the end result, in my view he was quite clear that although there was pressure being put on him, that was more from other creditors than from Tyree Power.

Mr Williams submitted that with the amount of money owing to Tyree Power, had that company moved to obtain the payment of its debt, D S Edmonds Electrical Ltd would have been wound up. That would have prevented the company going on with the Airways Corporation contract, but equally it appears there were other companies taking more definite steps to obtain payment of moneys due to them, in particular as I have said, the Commissioner of Inland Revenue and Olex Cables. Mr Edmonds told me in as many words, that he preferred to pay Tyree Power because he owed the most to them, that

many companies could survive a small loss, but large sums are much more damaging, and he felt sorry for the ones who had leaned over backwards to help him out.

In my view, on that evidence it is clear there was an intention fraudulently to prefer Tyree Power over the other creditors.

Mr Williams submitted there was in fact no preference, because 40% of the moneys to be received from the Airways Corporation was less than the percentage of the total debt owed by Tyree Power, and that therefore the other 60% would be payable to the other creditors. That assumes that money was going to be received by Tyree Power and that it would be paid to the other creditors. Mr Edmonds said that was not necessarily the case. He commented that at that time, companies were not paying their debts as they fell due and as Mr Lang pointed out, the great advantage of the Deed of Assignment entered into by Mr Edmonds and Tyree Power, was that money that was going to come in from the Airways Corporation, would be paid directly to Tyree Power and not first of all to the company where it might be dissipated.

It seems clear to me there was a substantial advantage given to Tyree Power in the arrangement made pursuant to the Deed of Assignment.

Mr Williams referred to the advantage to Mr Edmonds that the company was thereby able to go on with the Airways contract because Tyree Power would continue to supply it with goods. Those goods were supplied on a strictly limited credit basis.

Mr Williams pointed out that by the end of the contract some $4000 more was owed. I do not think that is an indication there was pressure on Edmonds of the nature

that would make the preference valid. Whenever any company is getting into financial difficulties, there are of course pressures from all sorts of directions and the pressure referred to in the cases I have mentioned, is not the sort of pressure that normally arises or is brought to bear by the whole body of creditors seeking payment of their money.

Mr Williams submitted the dominant intention was not to prefer, but the strongest evidence that it was is that Mr Edmonds said it was.

Mr Williams also put forward the defence under s311A(7) of the Companies Act, which provides:

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

That section requires four elements; the property must be received in good faith, the alteration of the position, the reasonably held belief that the transfer was validly made and would not be set aside, and that it would be inequitable to order recovery or recovery in full as the case may be. It seems clear that Tyree Power knew that Edmonds was in financial difficulties, and it would therefore know that getting an assignment of moneys to come from the Airways Corporation would give them an advantage over other creditors. The alteration of position referred to by Mr Williams was the continuation of credit, but Tyree Power would not

be the only company from which Edmonds could have obtained the on-going supplies it required. There was a strict limit set and not only were payments made for goods received from Tyree Power, except to the extent of $4000, but in addition the company was receiving substantial sums by direct credit from the Airways Corporation towards the original debt.

I do not consider it would be inequitable to order the recovery of the moneys paid. All creditors should be in the same position. The matter is set out very clearly by Wright J *In re Blackburn & Co* (sometimes known as *Buckley's Case*) [1899] 2 CH 725 at 728:

> "If a debtor paid one creditor in advance of others, not from a sense of legal obligation, but from a sense of moral obligation or duty, that was a fraudulent preference."

That was the situation here, and I therefore hold that the disposition is voidable and should be set aside.

Counsel have advised me that if such a determination was made, they should be able to calculate the correct amounts that are to be recovered, pursuant to that ruling. If they are unable to do so leave is reserved to bring the matter back to me.

This decision having been given in open Court, Mr Lang applies for costs. Costs will be allowed to the Official Assignee in the sum of $1000 plus disbursements to be determined by the Registrar.

P.G. Hillyer J

Solicitors
Elvidge & Partners, Napier, for Official Assignee.
Innes Dean for respondents

No M268/89
IN THE HIGH COURT OF NEW ZEALAND
PALMERSTON NORTH REGISTRY

IN THE MATTER of THE COMPANIES ACT,1955

IN THE MATTER of D S EDMONDS ELECTRICAL LTD (IN LIQUIDATION)

BETWEEN THE OFFICIAL ASSIGNEE OF D S EDMONDS ELECTRICAL LTD (IN LIQUIDATION)

Applicant

AND TYREE POWER CONSTRUCTION LTD

Respondent

AND AIRWAYS CORPORATION OF NZ LIMITED

Respondent

(ORAL) JUDGMENT OF HILLYER J
