IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2008-404-005635

UNDER	the Companies Act 1993
IN THE MATTER OF	the liquidation of Claybrook Enterprises Limited
BETWEEN	GERALD STANLEY REA AND PAUL GRAHAM SARGISON Applicants
AND	NEIL ALBERT WOLFGRAM Respondent

Hearing: 17 November 2008

Appearances: S O McAnally for Applicants
P H Thorp for Respondent

Judgment: 21 August 2009

JUDGMENT OF ASSOCIATE JUDGE ROBINSON

This judgment was delivered by me on 21 August 2009 at 5 pm,
Pursuant to Rule 11.5 of the High Court Rules

Registrar/Deputy Registrar

Date…….

Solicitors: Keegan Alexander, PO Box 999, Auckland

[1] The applicants are the liquidators of Claybrook Enterprises Limited. They were appointed on 15 November 2007 when Claybrook was put into liquidation. The respondent is the brother of Malcolm Wolfgram, one of Claybrook's directors. Claybrook has made the following payments to the respondent:

a) $60,000 on 8 August 2007

b) $80,000 on 30 August 2007

c) $20,000 on 31 August 2007

[2] The applicants have served on the respondent and filed in this Court notice to set aside those payments pursuant to s 294(1) Companies Act 1993. That application is opposed by the respondent who claims:

a) The payments were made in the ordinary course of business and are therefore excluded from transactions voidable at the application of the liquidator by virtue of the provisions of s 292(1) that applied prior to 31 October 2007.

b) That the three payments are an integral part of a continuing business relationship the transactions in which are to be taken as one so that the payments are not voidable pursuant to s 292(4B) Companies Act 1993.

Facts

[3] On 5 February 2008 the liquidators wrote to the respondent's solicitors pointing out that the three payments totalling $160,000 had been paid by Claybrook to the respondent at a time when Claybrook was unable to pay its due debts and that as a result the respondent has received more than he would otherwise have received in the liquidation of Claybrook. Because the liquidators were not satisfied the payments were made as an integral part of an ongoing business relationship, they contend the payments to be voidable under s 292 Companies Act 1993 and sought

recovery of the amounts paid from the respondent. At that time the liquidators believed the payment of $80,000 to the respondent had been made on 30 September 2007. The liquidators have subsequently ascertained that payment had in fact been made on 30 August 2007.

[4] The respondent's solicitors in their letter in reply dated 9 February 2008 advise the respondent could not recall receiving the three payments and required a copy of the three paid cheques. The liquidators obtained copies of Claybrook's bank statements showing payments of $60,000 to the respondent's bank account on 8 August 2007, $80,000 to the respondent's bank account on 30 August 2007 and a cheque for $20,000 from Claybrook to the respondent recorded as being repayment of a loan dated 31 August 2007. Copies of those documents were forwarded to the respondent's solicitors on 11 February 2008.

[5] By 7 May 2008 as the liquidators had received no response to their correspondence with the respondent's solicitors in February 2008, they referred the matter to their solicitors. In response to a letter from the liquidators solicitors, the respondent's solicitors by letter dated 20 May 2007 advised:

> **The Payments**
>
> The three payments were drawn by Claybrook on its account at ASB Bank Limited No. 12.3031.0030775.00 as follows:
>
> $60,000 on 8 August 2007
>
> $80,000 on 30 August 2007
>
> $20,000 on 31 August 2007 – cheque No. 701030
>
> Claybrook recorded that the payments were "loan repayments".
>
> The first two payments were made to our client's account at ASB Bank Limited.
>
> The third payment, the cheque, was payable to "N A Wolfgram" and was paid into the same account.
>
> **The status of Claybrook's account**
>
> At the time the payments were made, three months before Claybrook went into liquidation, indications are that Claybrook was solvent.

The Claybrook bank account was in credit - $111,3000.38 after the first payment was made; $65,184.54 after the second payment was made; $40,915.52 after the third payment was made.

Date of Liquidation

Claybrook resolved to appoint a liquidator on 15 November 2007.

Loan

The Liquidator's records will confirm that Mr Wolfgram advanced $250,000 to Claybrook on 30 December 2006.

That payment was made from our client's account at ASB Bank Limited.

Other unsecured loans made by Mr Wolfgram to Claybrook totalled $205,000 – ie a total of $455,000 was owing.

The loans were interest-free and repayable as follows:

Amount	**Due Date**
$60,000	10 August 2007
100,000	31 August 2007
100,000	30 September 2007
95,000	30 November 2007
$455,000	

The Claybrook payments of –

- $60,000 on 8 August 2007 was the payment due on 10 August 2007; and

- $80,000 on 30 August 2007 plus $20,000 on 31 August 2007 was the total of the payment due on 31 August 2007.

The remaining payments - $100,000, $100,000, $100,000 and $95,000 – were never made.

Notwithstanding that the brothers, Mr Neil Wolfgram and Mr Malcolm Wolfgram, have a very close relationship we are assured that Mr Neil Wolfgram had no inkling whatsoever that Claybrook was experiencing financial difficulties until Claybrook actually went into liquidation.

The first that Mr Neil Wolfgram learned that Claybrook was in financial strife was when he received a phone call to that effect on or about 16 November 2007 when he was in Japan. Mr Wolfgram cut short his trip and left Japan the following day en route for New Zealand.

Conclusion

Each of the loan repayments was made by Claybrook to Mr Wolfgram in the ordinary course of business, in accordance with a previously-agreed loan repayment schedule and at a time when Claybrook seems from its bank balances to have been solvent.

We consider, therefore, that the three payments are not caught by the previous section 292 of the Companies Act 1993. If not, they cannot be caught by the present section 292.

Please confirm that no action will be taken against Mr Wolfgram in respect of the three payments or advise details of any reasons you may have for disagreeing with our views.

[6] The liquidators maintain Claybrook was not solvent in August 2007 when the payments were made to the respondent. They point out the final accounts of Claybrook as at 31 March 2006 show a negative equity of $604,607 and by 31 March 2007 this deficit had increased to $1,426,215. Creditors claims in the liquidation total $4,084,776 and recoveries total $3,481,938. The liquidators also do not accept the three payments to have been made in the ordinary course of business or in accordance with a previously agreed loan repayment schedule.

[7] In the notice of objection filed and served by the respondent is a copy of an email from Malcolm Wolfgram to the respondent dated 5 August 2007 at 9.30 am stating as follows:

Subject: program for repayments

Neil,

Here is the program for your repayments:

Amount owed: $455,000

Repay	10.08.07	$80,000
	31.08.07	$100,000.00
	30.09.07	$100,000.00
	31.10.07	$100,000.00
	31.11.07	$ 95,000.00

Malcolm

[8] The liquidators have found a document signed by the director of Claybrook headed “summary of loans”, that document reads as follows:

Summary of Loans

Between

Claybrook Enterprises Ltd

And

N.A. Wolfgram and P.C. Wolfgram

December 30th, 2006

Borrowed deposit on 70 and 70a Isabella Dr, Pukekohe.	$20,000.00
Agreed fee to be paid on sale of sites. $15,000.00 each	$30,000.00

Jan/Feb 2007
Borrowed $250,000.00
Fee: Project manage house alteration at 73 Fausett Rd, Ararima.

6 March 2007
Borrowed deposits for Lots 15, and 19 Cape Vista Dr. $30,000.00

30 March, 2007
Borrowed to settle Lot 15 Cape Vista. $135,000.00
Agreed fee for money to buy Lot 15 Cape Vista and for the deposit
For Lot 19 Cape Vista Dr: $30,000.00

September 30,2007,
Agreed to pay Interest on monies borrowed by Cape Hill Trust Ltd,
From January to September, 2007. $108,000.00

Agreed to pay GST on sale of 104 Cape Hill Rd, from Cape Hill Trust Ltd, to Claybrook Enterprises Ltd. (GST on $500,000.00 difference Between purchase by Cape Hill Trust and sale to Claybrook Enterprises Ltd.)

$ 55,500.00
Total: $658,000.00
Paid: $160,000.00
Balance: $498,000.00

M.C. Wolfgram,
Director
Claybrook Enterprises Ltd

[9] The liquidator's claim the documents they have located caused them concern because:

a) In the letter from the respondent's solicitors dated 20 May 2008 and referred to above reference is made to an advance of $250,000.00 from the respondent to Claybrook on 30 December 2006. However, in

the loan summary there is reference to an advance from the respondent to Claybrook of $250,000.00 in January/February 2007.

b) The liquidators consider an advance of $250,000.00 should have been properly recorded.

c) The loan summary was not prepared until after the payments were made in late August 2007 as the summary refers to payments made up to September 2007.

[10] To substantiate his claim that he advanced $250,000.00 to Claybrook in December 2006 the respondent has produced an agreement dated 15 December 2006 which reads as follows:

Agreement Between N.A. Wolfgram
And
Claybrook Enterprises Ltd. 15 12 2006

Whereby N.A. Wolfgram agrees to advance Claybrook Enterprises Ltd the sum of $250,000.00 for a period of 4 months, starting from 15 December 2006, and to be paid back by 15 April 2006.
The money is to be used as working capital and to pay deposits on land for future settlement.
Payments to be made as follows:

$100,000.00	Paid when Northcape Ltd. (A company owned by M.C.Wolfgram and N.A.Wolfgram, set up to buy 103 Cape Hill Rd) purchases the property from Claybrook Enterprises Ltd, expected January – February 2006.
$150,000.00	Paid when the Wairua Pl land is settled and H. Litchfield is repaid. (expected March, 2006)

Claybrook Enterprises Ltd agrees to pay interest, monthly, at the overdraft rate that N.A. Wolfgram is charged from his bank.
Claybrook Enterprises agrees to allow N.A. Wolfgram to hold a second mortgage over the property owned by Claybrook Enterprises Ltd, at 12 Harrington Ave, Pukekohe.
Claybrook Enterprises Ltd agrees to project manage the construction of a new house for N.A.. and C.Wolfgram at 73 Fausett Rd, Ararimu, at no charge.

Signed:
M.C.Wolfgram,
Director,
Claybrook Enterprises Ltd.

N.A.Wolfgram.

[11] The liquidators point out the agreement is not signed and refers to $250,000.00 to be paid back by 15 April 2006 some eight months prior to the advance on 15 December 2006. The respondent maintains there is an error in the document. Reference to repayment on 15 April 2006 should read 15 April 2007.

[12] The respondent claims the loan agreement he produced did not proceed and was replaced by a mortgage executed by Claybrook securing the $250,000.00, such sum to be paid to the respondent on 15 April 2007. The respondent acknowledges the mortgage was never registered and claims the $250,000.00 has not been repaid.

[13] When the liquidator pointed out that there was no record in Claybrook's general ledger of a number of the payments referred to in the schedule of loans from the respondent to Claybrook, the respondent advises:

a) The payments of $20,000.00 and $30,000.00 referred to as deposit on 70 and 70a Isabella Drive, Pukekohe were not made to Claybrook but were paid by the respondent to the Real Estate agents for the purchase of two sections by Claybrook.

b) The payment of $135,000.00 on 30 March 2007 to settle Lot 15 Cape Vista was paid by the respondent to the solicitors for Claybrook to enable Claybrook to purchase those sections.

c) The payment of $108,000.00 referred to as interest on money borrowed by Cape Hill was an approximation, the correct amount being $116,832.27 which is the total of fourteen instalments which the respondents company paid to Claybrook's bank for interest due in respect of a property purchased by Claybrook at Cape Hill Heights.

d) Payment of $55,000.00 was made by the respondent's company direct to the Inland Revenue Department for GST due by Claybrook on the sale of the Cape Hill Heights property.

Case for the Applicants

[14] It is pointed out on behalf of the applicants that as the payments of $160,000.00 were made within six months of Claybrook being put into liquidation the combined effect of s 292(2) and s 292(4A) and s 296(6) Companies Act 1993 provides a presumption that such payments were made when Claybrook was unable to pay its due debts. Furthermore, the payments received by the respondent enable him to receive more towards satisfaction of the money owing by Claybrook to him than he would have received or be likely to receive in the course of Claybrook's liquidation.

[15] It is pointed out by the applicants that for the payments to the respondent to be excluded from those payments treated as voidable by the liquidator, the payments must be for commercial purposes or as an intregal part of a continuing business relationship. Assuming the advances referred to by the respondent were made it is pointed out that such advances have been bereft of structured repayment terms except in respect of those unrelated provisions recorded in a term loan contract of 27 September 2007. Consequently, it is not possible to treat the payments as an intregal part of the continuing business relationship. Claybrook had to advise the respondent when it was scheduled to make repayments to him and indeed the respondent was unaware of having received the payments.

[16] Advances made by the respondent on 30 September 2007 were not to provide Claybrook with working capital for its usual commercial purposes but were instead to facilitate Claybrook's acquisition of a property at Cape Hill Road in which the respondent had an interest. According to the respondent's evidence in August 2007 the respondent through his company Cape Hill Trust has owned a property at Cape Hill Road. In August 2007 the respondent advised Malcolm Wolfgram that he wanted to travel to the world rugby cup matches in Europe and asked Malcolm Wolfgram if he would like Claybrook to purchase the Cape Hill Road property. Claybrook purchased the property for $3,000,000 financed by way of a first mortgage advanced from Ascend Finance and a second mortgage advance of

$650,000 from the respondent. The second mortgage advance unlike the first advance which are the subject of these proceedings before me were properly recorded as a formal term loan agreement recorded by the parties on 27 September 2007.

[17] To qualify as a payment made in the ordinary course of business counsel for the liquidators referred to a number of authorities including the decision of the Court of Appeal in *Carter Holt Harvey Ltd v Fatupaito* (2003) 19 NZCLC 263, 285 referred to and followed by the Court of Appeal in *Higgs v P & W Painters Ltd* [2008] NZCA, 433 at paragraph 11 where the Court of Appeal stated:

> The business context of course includes the particular contractual context. It is therefore necessary to take account of the circumstances in which the company became obliged to make a payment. It is necessary to ask why the payment was asked when it was: can it be described as simply a routine payment which, though made late, was in fulfilment of the company's obligations rather than a response to its current situation of insolvency?

Counsel for the liquidators submitted that applying the test laid down by the Court of Appeal, the payments in this case cannot be considered to have been made in the ordinary course of business because:

a) It cannot be in the ordinary course of business for advances to be made for substantial amounts of money in circumstances where, except on one occasion, the terms appear to be completely at large;

b) There are few if any agreed terms as to repayment of Claybrook's indebtedness to the respondent.

c) The advances repaid relate to payments made by the respondent in favour of Claybrook to diverse recipients and for somewhat diverse purposes.

d) No evidence has been produced of Claybrook having made payments to the respondent other than in the period approximately three months prior to the appointment of the liquidators at a time when Claybrook was grossly insolvent.

e) The provision of the repayment schedule and ex-post facto production of the loan summary establishes from an objective point of view that the payments were a response to Claybrook's insolvency and pending liquidation.

Case for Respondents

[18] It is submitted that the respondent has been in a business relationship with Claybrook being Claybrook's financier. The transactions have occurred as part of that business relationship and have included formally documented loans, informal undocumented loans including loans made by the respondent paying accounts for Claybrook and associated fees.

[19] The respondent submits the transactions to be integral parts of a continuing business relationship he has with Claybrook. They all involved financial assistance by the respondent to Claybrook to assist in Claybrook's business as a residential property developer. Furthermore, all transactions occurred pursuant to a pattern of dealings. It is not surprising that these dealings were informal given the fact that Claybrook's directors and shareholders were the respondent's brother and sister-in-law.

[20] It is further submitted that the transactions from an objective consideration form part of a business dealing between the respondent and Claybrook.

Decision

[21] In the absence of any evidence to establish that Claybrook was able to pay its debts when the payments totalling $160,000 were made to the respondent in August 2007 I must in accordance with s 292(4A) conclude Claybrook to be insolvent at that time. The uncontradicted evidence of the liquidators is that the payment of $160,000 is more than the respondent is likely to receive in the liquidation. Consequently, the

transactions are clearly insolvent transactions as defined by s 292(2) being transactions made at a time when Claybrook was unable to pay its due debts and enabled the respondent to receive more in satisfaction of his debt than he would receive in Claybrook's liquidation.

[22] S 292 was amended by s 27 Companies Amendment Act 2006 which came into force on 1 November 2007. When s 292 was amended by s 27 Companies Amendment Act 2006 ss 5 of that section provided:

> Nothing in this section makes voidable a transaction that was completed before this section came into force, if that transaction would not have been voidable if this section had not come into force.

These transactions occurred in August 2007. Consequently, the transactions are not voidable if the respondent can prove the transactions took place in the ordinary course of business which was the law applicable prior to the amendment to s 292 or was for commercial purposes forming an intregal part of a continuing business relationship which applies after the amendment to s 292.

[23] According to the respondent these repayments were made by Claybrook pursuant to a repayment schedule emailed by Malcolm Wolfgram, Claybrook's director to the respondent on 5 August 2007. Even if Malcolm Wolfgram entered into the repayment schedule on behalf of Claybrook to prefer the respondent as a creditor, no account can be taken of such intent. The respondent says he believed the company was solvent and consequently in the absence of any evidence to establish the respondent was aware of the company's financial position at the time the repayments were made it cannot be proved that the respondent knew of any intent on behalf of Malcolm Wolfgram to prefer him as a creditor. That is the effect of s 292 ss 4 prior to the amendment of that section on 1 November 2007.

[24] The test to be applied in determining whether a payment was made in the ordinary course of business was considered by the Privy Council in *Countrywide Banking Corporation Ltd v Dean* [1998] 1 NZLR 383. In that case payment of arrears of rent from the proceeds available from the assignment of the lease was held not to be made in the ordinary course of business having regard to the circumstances at the time the payment was made.

[25] At page 390 Gault J, who delivered the decision of their Lordships summarised the Court of Appeal's reasons for concluding the payment not to be in the ordinary course of business as follows:

> The Court went on to consider the particular transaction in question. It was held that while payments of debts as they become due, including payments under a lease, would be part of the ordinary course of business, as might adherence to invariable practice of meeting outstanding indebtedness as a condition of securing a lessor's consent to assignment of a lease, the payment in this case was of a quite different order. This was a payment of long accrued arrears and, being the largest sum paid by the company to Countrywide at any one time, it could not be accepted as having been made in the ordinary course of business. The appeal was dismissed.

[26] In upholding the decision of the High Court and Court of Appeal and dismissing the appeal, Gault J at page 394 of that judgment, line 21 states:

> Plainly the transaction must be examined in the actual setting in which it took place. That defines the circumstances in which it is to be determined whether it was in the ordinary course of business. The determination then is to be made objectively by reference to the standard of what amounts to the ordinary course of business. As was said by Fisher J in the *Modern Terrazzo Ltd* case, the transaction must be such that it would be viewed by an objective observer as having taken place in the ordinary course of business. While there is to be reference to business practices in the commercial world in general, the focus must still be the ordinary operational activities of businesses as going concerns, not responses to abnormal financial difficulties. Their Lordships respectfully agree with the Judge's conclusion by reference to the policy of the section at p 175:
>
> > "Whether a payment should be regarded as commercially routine at a day-to-day trading and operating level will turn at least in part upon a comparison with the practices of the commercial community in general. But equally, the way in which the particular company has acted in the past, and its dealings with the particular creditor, would seem pertinent. That the payment was simply a repetition of past patterns of behaviour would make it more difficult to argue that it represented special assistance to an insider or the result of special enforcement measures or a situation in which the subject creditor ought to have investigated before extending credit. So at a policy level there is something to be said for the view that relevant considerations should extend to the prior practices of the particular company"

[27] In the present case the records of advances claimed to have been made by the respondent to Claybrook are unreliable. In particular there is no record in Claybrook's general ledger of advances claimed to have been made by the respondent which include money he claims to have paid on behalf of Claybrook for property purchased by Claybrook, interest paid on behalf of Claybrook and GST paid on behalf of Claybrook. The advances when and if made did not specify a term

for repayment. In fact a repayment program was provided by Malcom Wolfgram on Claybrook's behalf.

[28] A business arrangement for a financier to make advances from time to time to a company such as Claybrook is invariably incorporated in a formal document specifying the amounts advanced, the interest to be charged and the method of payment. Formal records are invariably kept by the financier of the advances made and by the borrower of advances received. When Claybrook purchased the Cape Hill property and arranged finance from the respondent by way of a $650,000 advance, that arrangement was recorded in formal loan documents and in fact secured by way of second mortgage.

[29] The circumstances surrounding the loan from the respondent to enable Claybrook to settle the purchase of the Cape Hill property are in stark contrast with the very lose informal arrangements in respect of the advances which were paid in August 2007. Such lose arrangements unsupported by any reliable contemporary documentation can hardly be described as transactions taking place in the ordinary course of business. It cannot be described as being in the normal course of business for Claybrook through its director to nominate a repayment schedule without any request from the respondent.

[30] Pursuant to s 292 (3) unless the contrary is proved a transaction that took place within the restricted period is presumed to have been made otherwise than in the ordinary course of business. Thus there is an onus on the respondent in this case to prove that the repayments were made in the ordinary course of business as the transactions did take place within the restricted period. The respondent I am satisfied has not been able to establish that the repayments were made in the ordinary course of business.

[31] The respondent however contends that the repayments are to be treated as a single transaction and not voidable because the transactions form an integral part of a continuing business transaction for commercial purposes and are therefore within the transactions covered by s 292 (4B).

[32] S 292(4B) provides for a series of transactions to be considered as a separate single transaction for the purpose of s 292(1):

> Where-
>
> (a) a transaction is, for commercial purposes, an integral part of a continuing business relationship (for example, a running account) between a company and a creditor of the company (including a relationship to which other persons are parties); and
>
> (b) in the course of the relationship, the level of the company's net indebtedness to the creditor is increased and reduced from time to time as the result of a series of transactions forming part of the relationship;

This section is similar to s 588(f)(a) Corporations Act 2001 in Australia. The effect of that section was considered by the High Court of Australia in *Air Services Australia v Ferrier* (1996) 185 CLR 483:

> If a payment is part of a wider transaction or a "running account" between the debtor and the creditor, the purpose for which the payment was made and received will usually determine whether the payment has the effect of giving the creditor a preference, priority or advantage over other creditors. If the sole purpose of the payment is to discharge an existing debt, the effect of the payment is to give the creditor a preference over other creditors unless the debtor is able to pay all of his or her debts as they fall due. But if the purpose of the payment is to induce the creditor to provide further goods or services as well as to discharge an existing indebtedness, the payment will not be a preference unless the payment exceeds the value of the goods or services acquired. In such a case a court, exercising jurisdiction under s 122 of the Bankruptcy Act, looks to the ultimate effect of the transaction. Whether the payment is or is not a preference has to be "decided not by considering its immediate effect only but by considering what effect it ultimately produced in fact…
>
> To have the effect of giving the creditor a preference, priority or advantage over other creditors, the payment must ultimately result in a decrease in the net value of the assets that are available to meet the competing demands of the other creditors…
>
> If the purpose of a payment is to secure an asset or assets of equal or greater value, the payee receives no advantage over other creditors. The other creditors are no worse off and, where the value of the assets has increased, they are actually better off.

In the present case there is no evidence of a continuing business transaction between the respondent and Claybrook when these payments were made. There is nothing to suggest the payments were necessary to ensure a continuing supply of credit.

[33] Consequently, for the reasons I have given the respondent's defence to the liquidators application to set aside the transactions cannot succeed. As a result, there will be orders that the following payments by Claybrook to the respondent be set aside:

a) $60,000 paid on 8 August 2007

b) $80,000 paid on 30 August 2007

c) $20,000 paid on 31 August 2007

[34] Pursuant to s 295 (a) Companies Act 1993 I order the respondent to pay the said sum of $160,000 to the applicants.

[35] As the applicants have been successful they are entitled to costs which I assess on a 2B basis with disbursements as fixed by the registrar.

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Associate Judge Robinson