

**IN THE HIGH COURT OF NEW ZEALAND  
AUCKLAND REGISTRY**

**CIV-2008-404-3965**

UNDER Sections 292 and 294 of the Companies Act  
1993 and Part 19 of the High Court Rules

IN THE MATTER OF An application that transactions be set aside  
voidable transactions under sections 292  
and 294 of the Companies Act 1993

BETWEEN HENRY DAVID LEVIN AND BARRY  
PHILLIP JORDAN  
Applicant

AND SOMBOUN RASTKAR  
Respondent

Hearing: 15 September 2009

Appearances: Mr Stead for Applicant  
Mr Weit for Respondent

Judgment: 9 November 2009 at 4 p.m.

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**JUDGMENT OF ASSOCIATE JUDGE DOOGUE**

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*This judgment was delivered by me on  
09.11.09 at 4 pm, pursuant to  
Rule 11.5 of the High Court Rules.*

*Registrar/Deputy Registrar*

*Date.....*

Solicitors:  
*Kensington Swan, Private Bag 92101, Auckland (Mr Stead)*  
*Dyer Whitechurch, P O Box 5547, Auckland (Mr Weir)*

## Background

[1] Western Clothing Ltd (“**the company**”) carried on business as a clothing sewing business. The sole shareholder and director was Mr Siamac Rastkar (“**Mr Rastkar**”). The respondent, (“**Mrs Rastkar**”) was involved in managing and running the company. The company’s assets were sold to another company, Essential Apparel Limited (“**Essential**”). Mrs Rastkar’s daughter, Amarine Sirichak, was the shareholder and director of Essential. The company sold its business to Essential in June 2004 and ceased trading.

[2] On 16 December 2003 and 6 April 2004, Mrs Rastkar advanced money to the company totalling \$95,000.

[3] In 2004, the company, at the behest of Mrs Rastkar, made a series of loans to family members and an associate as follows:

<b>Date</b>	<b>Transferee</b>	<b>Amount</b>
24 May 2004	Amarine Sirichak	\$17,000
24 May 2004	Kingmany Sisavath	\$10,000
	Joman (NZ) Ltd	\$11,783
		\$45,783.00

[4] Counsel for applicant in her submissions stated:

12. Within the two year specified period as defined by section 292(5) of the Act the maximum amount owed by Western Clothing to Mrs Rastkar was \$60,778.00 on 30 April 2004.

[5] I understand this to mean that the balance of indebtedness of the company to Mrs Rastkar “within the two year specified period” (i.e. two years before the commencement of the liquidation together with the period from the filing of the proceeding until the making of the order) had become \$60,000.

[6] The next step is to refer to a series of creditor entries that were recorded in the ledgers of the company as follows:

[7] Loans made by Western Clothing to Amarine Sirichak of \$17,000, Kingmany Sisavath of \$10,000 and Jo Mann of \$11,783.45 were the subject of ledger entries on 31 March 2005. The liquidator says that the effect of such entries was that the loans that I have referred to in [5] were all “transferred to Mrs Rastkar’s loan account”, reducing Western Clothing’s liability to Mrs Rastkar (together ‘the Loan Transfers’). I interpolate that in the light of the liquidator’s affidavit, the assertions in the last sentence are to be taken as correct.

[8] In detail, the ledger entries were as follows:

<b>Date</b>	<b>Amount</b>	<b>Description</b>
31.03.05	17000	“Loan –Amarine Sirichak”; Credit entry removing loan to Amarine
31.03.05	17000	“Loan-Sambour”; reduces company’s liability to respondent by \$17000
31.03.05	10000	“Loan-Kingsmany Sisvavath”; credit entry, removes loan to Kingsmany
31.03.05	10000	“Loan Samoun”; reduces company’s liability to respondent by \$10,000
31.03.05	11,783.45	“Loan-Jo Man”; credit entry removing loan to Jo Man from company accounts
	11,783.45	“Loan Sambour”; debit entry reducing company’s liability to respondent

[9] For the purposes of this judgment the process can be summarised as follows:

- a) The company made loans to various people;
- b) The company wrote off the loans by a process of off-setting the value of the loans against what it owed to the respondent, with the result that the amount that the company owed to the respondent was reduced by an amount corresponding to the value of the loans written off.

[10] The liquidators' review of the company's general ledger and bank statements also showed that additional payments were made to Mrs Rastkar within the two year specified period totalling \$37,738.62 ('the Additional Payments').

[11] The company was placed in liquidation on 12 May 2005. The application made to the High Court to place the company in liquidation was filed 24 February 2005.

[12] The main creditor of the company is the Inland Revenue Department who has filed a claim in the liquidation for \$183,056.18, of which \$129,378.33 is a preferential claim. The non-preferential element comprises additional tax interest and penalties.

[13] On 20 June 2008, the liquidators issued a notice to set aside voidable transactions pursuant to s 294 of the Companies Act 1993 ('the Notice'). The Notice was filed with the High Court at Auckland on 2 July 2008. On 22 July 2008, Mrs Rastkar filed a notice of opposition in respect of the Notice with the High Court. On 25 June 2009, the liquidators filed this application for orders that the loan transfers and additional payments be set aside ('the Application'). On 19 August 2009, Mrs Rastkar filed a notice of opposition in respect of the application ('Notice of Opposition').

[14] Counsel for the liquidator submits:

28 The payments in question are clearly transactions for the purpose of s 292(1) of the Act, being payment of money by the company to another party.

### **The originating application**

[15] Paragraph 2.3 of the originating application states that the grounds for recovery are that certain transactions were voidable transactions. The grounds given include those set out in paragraph 2.3:

2.3 The company's general ledger shows that loans made by the Company to Amarine Sirichak of \$17,000, Kingmany Sisavath of \$10,000 and Jo Mann of \$11,703.45 were all transferred to the

respondent's loan account, reducing the Company's liability to the respondent.

[16] The Notice of Application continues:

2.4 The Respondent, Somboun Rastkar stated in Court under oath in proceeding CIV 2006-090-1303 that the payment of \$17,000 on 24 May 2004 to Amarine Sirichak, the payment of \$10,000 to Kingmany Sisavath and the payment of \$11,783.45 to Joman (NZ) Limited were all repayments by the Company of Mrs Rastkar's loan. Together those payments total \$38,783.45.

2.5 Additional payments were also made to the Respondent within the two year specified period totalling \$37,738.61. These additional payments are detailed in Appendix A of the Notice to Set Aside Voidable Transaction.

[17] Paragraph 2.6 of the Notice of Application states:

2.6 The balance owing to the Respondent on liquidation was \$7,345.00, therefore, Mrs Rastkar received \$53,433.00 (being the difference between the peak balance of \$60,778.00 and the balance on liquidation of \$7,345.00) in preference to other creditors.

### **The legislation**

[18] In 2006 amendments were made to s 292 of the Companies Act 1993. Counsel agreed that the law to be applied was s 292, in the form that it took prior to its amendment in 2007.

[19] Section 292 in its previous form read as follows:

292 Transactions having preferential effect

(1) In this section, transaction, in relation to a company, means—

- (a) A conveyance or transfer of property by the company:
- (b) The giving of a security or charge over the property of the company:
- (c) The incurring of an obligation by the company:
- (d) The acceptance by the company of execution under a judicial proceeding:
- (e) The payment of money by the company, including the payment of money under a judgment or order of a court.

(2) A transaction by a company is voidable on the application of the liquidator if the transaction—

- (a) Was made—

- (i) At a time when the company was unable to pay its due debts; and
- (ii) Within the specified period; and
- (b) Enabled another person to receive more towards satisfaction of a debt than the person would otherwise have received or be likely to have received in the liquidation—

unless the transaction took place in the ordinary course of business.

- (3) Unless the contrary is proved, for the purposes of subsection (2) of this section, a transaction that took place within the restricted period is presumed to have been made—

- (a) At a time when the company was unable to pay its debts; and
- (b) Otherwise than in the ordinary course of business.

- (4) For the purposes of this section, in determining whether a transaction took place in the ordinary course of business, no account is to be taken of any intent or purpose on the part of a company—

- (a) To enable another person to receive more towards satisfaction of a debt than the person would otherwise receive or be likely to receive in the liquidation; or
- (b) To reduce or cancel the liability, whether in whole or in part, of another person in respect of a debt incurred by the company; or
- (c) To contribute towards the satisfaction of the liability, whether in whole or in part, of another person in respect of a debt incurred by the company—

unless that other person knew that that was the intent or purpose of the company.

- (5) For the purposes of subsection (2)(a)(ii) of this section, specified period means—

[(a) The period of 2 years before the date of commencement of the liquidation together with the period commencing on that date and ending at the time at which the liquidator is appointed; and]

(b) In the case of a company that was put into liquidation by the Court, the period of 2 years before the making of the application to the Court together with the period commencing on the date of the making of that application and ending on the date on which[, and at the time at which,] the order was made[; and]

[(c) If—

- (i) An application was made to the Court to put a company into liquidation; and
- (ii) After the making of the application to the Court a liquidator was appointed under paragraph (a) or paragraph (b) of section 241(2),—

the period of 2 years before the making of the application to the Court together with the period commencing on the date of the making of that application and ending on the date [[and at the time]] of the commencement of the liquidation.]

- (6) For the purposes of subsection (3) of this section, restricted period means—

[(a) The period of 6 months before the date of commencement of the liquidation together with the period commencing on that date and ending at the time at which the liquidator is appointed; and]

(b) In the case of a company that was put into liquidation by the Court, the period of 6 months before the making of the application to the Court together with the period commencing on the date of the making of that application and ending on the date on which[, and at the time at which,] the order of the Court was made[; and]

[(c) If—

(i) An application was made to the Court to put a company into liquidation; and

(ii) After the making of the application to the Court a liquidator was appointed under paragraph (a) or paragraph (b) of section 241(2),—

the period of 6 months before the making of the application to the Court together with the period commencing on the date of the making of that application and ending on the date [[and at the time]] of the commencement of the liquidation.]

## **Discussion**

[20] Counsel for the liquidator said:

28 The payments in question are clearly transactions for the purpose of s 292(1) of the Act, being payment of money by the company to another party.

[21] She also submitted:

61 Mrs Rastkar received money in preference to other creditors when she took funds from Western Clothing, paid them to her daughter amongst other people and then deducted those amounts from the loan account she had with the company...

[22] The payments to which she was referring were the payments in paragraph [5] above.

[23] The sections that I have been considering contemplate that the person from whom recovery would occur must be the person who received the property: (s 294(3)). This consideration focuses attention on to the loan transactions which were made not to the respondent Mrs Rastkar but to the three persons identified in paragraph [3] of this judgment.

[24] A complicating feature raised in the evidence involved a Court proceeding which the liquidators took against Amarine Sirichak in the District Court at Waitakere seeking to recover the loan to her of \$17,000, reference to which I have made in paragraph [5].

[25] The respondent apparently accepted that a payment of that amount was made to Amarine. However the respondent gave evidence to the District Court that the substance of the transaction was not in fact an advance to the respondent. Amarine and the respondent alleged that the respondent Mrs Rastkar had made capital injections into the company and as a result the company was indebted to her; and that Mrs Rastkar procured the payment to Amarine, regarding it as partial repayment of the credit that she had with the company. The District Court Judge apparently accepted this account and concluded that as a result judgment should not be entered against Amarine for the alleged debt which the liquidators claimed.

[26] The conclusion arrived at by the District Court Judge is not, of course, binding on me and nor would it, in any event, bind the parties to the present litigation.

### **Loan to Amarine**

[27] I raised with the parties the question of whether the payment to Amarine (and indeed the advances made to the other parties were transactions within the scope of s 292 of the Companies Act 1993. I received limited submissions on the point. It is essential, though, that some further analysis be attempted which I shall now undertake.



[28] Dealing with the payment from the company to Amarine, I record that the respondent does not dispute that this was a loan. She considered it, though, to be a loan from herself to Amarine. But whatever the respondent's motives or understanding, it is plain that the transaction was not a loan by her. Further, the starting point is that it is only in limited circumstances that the Court in analysing the transaction may ignore the formalities that the parties actually adopted: *Snook v London & West Riding Investments Ltd* [1967] 1 All ER 518 at p 528. The parties have not identified any basis for ignoring the actual structure of the transaction in this case. There is no evidence, for example, that all three parties to the transaction agreed that despite its actual form, the effect of the transaction would be treated between themselves as being a loan from the respondent to Amarine.

[29] Adopting that approach, it is my view that the arrangement with Amarine could not have been a loan from the respondent to her. That is because there was no advance from the company to the respondent, and thence from the respondent to Amarine which would have been required if the transaction was what the respondent says it was. Instead, it must be assumed that the company acting through the instrumentality of the respondent, made an advance or gift to Amarine.

[30] It is further my view that the fact that Ms Rastkar has apparently compensated the company by off-setting the sum advanced against what the company owed her - she not seemingly being obliged to do so - does not bring the transactions in their totality within the scope of s 292. That is, the transaction did not (in the words of the section) enable the respondent to receive more towards satisfaction of a debt, (I interpolate this means a debt that is owed by the company to the person), than the person would otherwise have received or be likely to have received in the liquidation.

#### *Payment to Kingsmany Sisavath*

[31] The factual position concerning this advance is rather different from the advance to Amarine. The respondent says that even though the loan was treated in the accounts as an advance to Mr Sisavath, in fact, the payment was to repay money

which Mr Sisavath advanced to the company when it was pressed financially so that it could pay its current creditors. Oddly, though, when the advance from Mr Sisavath was repaid, it was treated in the company's accounts as a reduction of liability of the company to the respondent. It is odd because the payment to Mr Sisavath discharged a liability of the company and not a liability of the respondent and therefore there would be no reason for the respondent to credit that sum in her account with the company.

[32] The narrative that has been provided by the respondent concerning the payment to Mr Sisavath effectively involves the Court accepting what she says. The corollary of that is that the accounts have been mistakenly drawn in such a way that they do not reflect the reality of the transaction. I consider that it is permissible for the Court to adopt such an approach. If that is so, there has been no transaction which offends s 292. The transaction did not enable the respondent to receive more towards satisfaction of a debt that she would otherwise have received or have been likely to have received in the liquidation. She received nothing as a result of the payment and in fact may have sustained a loss in that the accounts mistakenly reduced what the company owed to her once the transaction had been completed.

#### *Payment to Joman*

[33] The respondent explains this transaction as arising from the fact that she arranged for the company to advance money to Joman so that Joman could meet its debts. As a result a sum of \$11,783.45 was paid to Joman. She says that Joman was unable to repay the funds advanced by the company. But again, oddly, the respondent agreed to, in effect, compensate the company by accepting a reduction in what it owed to her commensurate with the amount that the company had advanced to Joman. Again, this is a plausible explanation. It is not mirrored by the accounts but I am prepared to accept that the accounts may have been mistakenly drawn. In any event, the transaction did not result in the respondent receiving a greater amount in the liquidation than she would otherwise have received. Section 292 is not engaged.

## **Conclusion**

[34] The application by the liquidator will be dismissed. The parties should confer on costs. I would expect that they will be able to reach a sensible agreement. If not I will arrange for them to appear before me by counsel to make submissions at 9 a.m. on a suitable date.

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J.P. Doogue  
Associate Judge