

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

**CIV 2012-443-472  
[2014] NZHC 1602**

IN THE MATTER                      of the liquidation of TSSN LIMITED  
   formerly known as KLN LIMITED and  
   the STEPPING STONES NURSERY  
   LIMITED (in liquidation)

BETWEEN                              DAVID MURRAY BLANCHETT and  
   GRANT DAVID McQUOID  
   Applicants

AND                                      RBI LIMITED  
   Respondent

Hearing:                              16, 17 and 18 October and 18 November 2013  
   9 December 2013 and 3 February 2014

Appearances:                        K J Crossland and S Langston for applicants  
   S A Grant and B M Saldanha for respondent

Judgment:                            9 July 2014

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**JUDGMENT OF ASSOCIATE JUDGE ABBOTT**

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This judgment was delivered by me on 9 July 2014, at 12.00 pm  
pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Date.....

Solicitors:  
Shieff Angland, Auckland  
Sean Kelly Lawyers, Auckland

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## **Introduction**

[1] The applicants are the liquidators of TSSN Limited (in liquidation) (TSSN). They have applied to set aside, as insolvent transactions, 20 payments that TSSN made to the respondent, RBI Limited (RBI), totalling \$543,472.32, in the two years prior to commencement of the liquidation. This application is made under s 292 of the Companies Act 1993 (the Act). They also seek orders for repayment, together with interest and costs.

[2] RBI resists the making of all the orders sought. It says that these are insolvent transactions but claims, in the alternative, that if they are found to be so, it is entitled to the benefit of the statutory exemption in s 296(3) of the Act.

[3] The central issues that arise on this application, therefore, are whether the payments made to RBI were insolvent transactions within the meaning provided by the Act and, if so, whether RBI has shown that it is entitled to the statutory defence. The first includes an issue as to whether all the payments made after 1 June 2010 were made by TSSN or by a phoenix company.

[4] For the reasons I will now give, I have come to the conclusion that the majority of the payments are not insolvent transactions, but for those that are (amounting to \$9,623.29) RBI is not entitled to the benefit of the statutory exemption, and an order for it to repay that sum to TSSN is appropriate.

## **The parties**

[5] Prior to liquidation TSSN was in the business of exporting young ornamental trees, particularly maples. Its main export markets were the United States and Europe.

[6] The majority of trees for the United States market were sold to a joint venture company in the United States, Stepping Stones Nursery USA Inc (SSN USA), in which TSSN had a 50% interest.

[7] RBI is a supplier of international freight services. It acts as an intermediary between exporters and carriers. In the present case it arranged air freight for TSSN's trees.

[8] RBI was incorporated in 2001, with three shareholder interests. Fifty percent of the shares were held by two of its founding directors, Mr and Mrs Brunton, and the other 50% by two companies, Portland Industries Limited and Jeffco International Limited, each having a 25% shareholding. Portland and Jeffco each appointed two directors to RBI's board, making a total of six directors in all. Portland's appointees were brothers, Messrs Elliot Groves and Peter Groves. Jeffco's nominees were a father and daughter, Mr Robert Jeffrey and Ms Gwendalyn Merriman. Portland and Jeffco were major users of RBI's freight forwarding services.

[9] It is of particular significance for the present application that the Groves brothers were also directors of TSSN.

### **Background to the liquidation**

#### *TSSN's business*

[10] TSSN's export business was predominantly seasonal. Young stock was grown in nurseries in New Zealand (either by TSSN itself or by other growers who supplied TSSN). The trees were taken from the ground (lifted) and prepared for export at the start of the New Zealand winter, when the trees were dormant. Trees shipped to the US market were replanted there for some months to comply with quarantine requirements before on-sale. Trees shipped to Europe were on-sold immediately, as there was no similar quarantine requirement.

[11] The seasonal nature of the export business had cashflow consequences for TSSN, differing between the European and US markets:

- (a) The tree stock sold into the European market tended to be shipped to wholesale customers in Europe between May and August, with supply being invoiced at time of shipment and payment being made within a

few weeks of delivery. TSSN carried the cost of supply from the start of the lifting season until payment was received from the overseas customers.

- (b) Tree stock sold into the US market was also shipped in the months May to August, but under a different invoicing and payment arrangement, at least in relation to the supply through SSN USA (which took an estimated 90% of the supply). TSSN had an arrangement with SSN USA that SSN USA was not obliged to pay for stock until it was lifted from the ground in the US and on-sold to SSN USA's customers. The quarantine requirements meant that these trees were held in the ground, until the following spring/summer season, and that there was a delay of 12-18 months in payment. TSSN carried the costs of production up to that point.

[12] TSSN's overseas markets were affected by the global financial crisis in 2008, and as a result of a downturn in property markets and the shrinking of discretionary spending. The US market was affected particularly severely, and by the end of 2008 SSN USA had still not paid for a substantial part of the tree stock shipped in 2006, which was due for payment in 2008 under the deferred payment arrangement. By the end of 2008 TSSN had been paid approximately half the cost of the trees delivered to SSN USA in 2006, and had still to receive payment from SSN USA for stock delivered in 2007 and 2008.

#### *TSSN's financial position in 2009*

[13] The downturn in sales, and the shortfall in anticipated receipts from SSN USA, meant that by the start of 2009 TSSN had to seek an extension to its overdraft facility with its bank, ASB Bank Limited, to meet its on-going operating expenses. The seasonal nature of its business meant that, aside from recovery from overdue debtors, there would be no new income until revenue started flowing from the 2009 season. ASB was sufficiently concerned about TSSN's deteriorating trading position that it requested TSSN to engage independent chartered accountants and insolvency specialists, Korda Mentha, to review TSSN's financial position, its trading forecasts,

and the adequacy of its financial structures for its future viability, and to provide an assessment of ASB's security.

[14] TSSN engaged Korda Mentha in February 2009. Korda Mentha undertook a comprehensive investigation, including travel to the US to get information on the position of SSN USA. Korda Mentha provided a comprehensive written report to TSSN and ASB in March 2009. In that report:

- (a) It noted the payment arrangements for stock delivered to SSN USA (that historically SSN USA had not been required to pay until it was sold) and that there was a delay in effecting sales in the US of at least a year because of the need to replant the tree stock to meet quarantine regulations, and that TSSN was having to wait for payment for between 18 and 24 months from the time of shipment.
- (b) It reported that SSN USA owed TSSN at least US\$3.5 million, that SSN USA's financial performance in the 2008 year was severely affected by the decline in the US market, and that there was a risk that SSN USA's existing funding might not be renewed, in which case it was highly likely that TSSN would be repaid little of its debt (SSN USA's bank had priority over the stock being held by SSN USA).
- (c) Notwithstanding those concerns about the US debt, it said that on the basis of its discussions with SSN USA, it considered that SSN USA should be able to remit between US\$400,000 and US\$500,000 during the 2009 year (assuming that it was able to renew its bank facilities), but that the actual amount would depend on its sales in the 2009 season.
- (d) It considered that during 2009 TSSN would require an overdraft during 2009 of \$1.6 to \$1.8 million, depending on the amount that SSN USA could remit.

- (e) It commented on various restructuring possibilities (including longer-term equity raising), and a proposal to change the operating strategy to focus on non-US business, but noted that the options all had their own complexities and inherently required ASB to advance more money to enable the business to continue trading.

[15] ASB continued to extend the overdraft to enable TSSN to pay what were considered to be essential creditors, whilst it considered whether to provide the additional funding needed to take TSSN through the 2009 season. Initially ASB indicated it was not prepared to provide that funding. TSSN prepared revised forecasts, based amongst other things on an assumption that there would be no sales into the US market in 2009, and (on 4 May 2009) Korda Mentha provided an update on its March report on the basis of the revised forecasts.

[16] ASB apparently did not consider that the revised forecasts altered the position sufficiently to warrant revisiting its decision. On 5 May 2009 it wrote to TSSN's directors (Messrs P and E Groves) recording that TSSN had failed to make payments (of approximately \$14,000) due on 1 May 2009 under several facilities, and that TSSN was in breach of financial governance under the facilities, as a consequence of which all TSSN's indebtedness was declared to be immediately due and payable. The bank demanded repayment by 7 May 2009.

[17] ASB's demand led to immediate high level meetings between TSSN's directors and advisers and ASB/Korda Mentha, at which TSSN's directors put a case to ASB for continued funding through the 2009 season on the grounds that ASB would then be in a better position than it would if it put TSSN into receivership or took other steps towards a forced realisation of securities.

[18] In the course of these discussions, ASB made known to TSSN that it needed certainty over the amount of debt outstanding to growers for tree stock supplied in the 2008 season. TSSN had identified a number of issues between itself and growers over those debts. ASB also wished to be clear about the commitments that TSSN had to growers in respect of any trees supplied in the 2009 season. Historically TSSN had arrangements with some growers to grow on contract, with TSSN being

committed to take all stock irrespective of whether it had on-sale arrangements in place.

[19] This resulted in TSSN's holding meetings with its growers in late May 2009 at which TSSN's issues in respect of the supply in the 2008 season were discussed, and in most if not all cases the debts to growers were crystallised at reduced amounts. As part of this, growers who had previously been growing on a contract basis were asked to agree to a change in the terms of supply so that the growers would be paid only for the stock that TSSN agreed to take to meet specific orders. In due course TSSN entered into agreements with each of the growers reflecting these terms, and settling specific repayment arrangements.

[20] ASB did not take steps to enforce its demand, but continued to extend TSSN's overdraft facility on a week by week basis whilst TSSN had its discussions with the growers. After TSSN reported the successful conclusion to those discussions, and the terms of a formal agreement between TSSN and the growers were settled (with input from ASB's lawyers), in June 2009, ASB informed TSSN that it was increasing TSSN's overdraft limit to meet the forecast expenditure for the 2009 season. This arrangement appears to have been formalised in a further facility agreement signed on 31 August 2009 (it is not in the evidence before the Court).

#### *Refinancing and restructuring of TSSN's business*

[21] TSSN continued its business through the 2009 lifting and selling season. However, at the end of 2009 ASB appears to have decided that TSSN's position was not improving (or was not improving sufficiently for its purposes) as it informed TSSN that it was withdrawing its financial support and TSSN would need to find a new financier.

[22] After approaching several possible financiers, TSSN entered into an agreement with Touchstone Capital Partners Ltd in January 2010, under which Touchstone agreed to work with TSSN to find a solution for TSSN's financial difficulties.

[23] The involvement of Touchstone Capital Partners Ltd appears to have led to ASB extending TSSN's overdraft facility yet again early in 2010, pending negotiations over refinancing (subsequent documents refer to a further facility agreement being signed on 11 March 2010).

[24] A rearrangement of TSSN's financial affairs was put in place in May 2010 under which a related Touchstone entity, Touchstone Eight Limited (as this company was the party to agreements that followed I will refer to it as Touchstone) purchased ASB's debt and securities for \$4.68 million and agreed to reimburse ASB for its further funding from 27 January 2010 to 21 May 2010. As part of this rearrangement, on 18 May 2010 Touchstone, TSSN, the Groves brothers and related parties with liability for at least some of the ASB debt signed an agreement, described as "Heads of Agreement". This set out terms on which Touchstone was to invest in TSSN through a new company, Stepping Stones Nursery Ltd (SSN, as distinct from TSSN) in which Touchstone was to hold a controlling shareholding interest. Touchstone's principal, a Mr McCallum, assumed an active role in the management of the business from that time. In that agreement the parties agreed to negotiate in good faith on terms for a shareholders' agreement, to include the terms on which SSN was to buy the business, and on which Touchstone was to provide funds for repayment of ASB's interim funding and for future working capital for the business. The agreement provided that it was to be binding until a shareholders' agreement was executed.

[25] There is a dispute between the parties as to whether SSN acquired TSSN's business at that point, or whether TSSN continued the business until completion of an agreement that was executed in part on 9 December 2010 but was held in escrow until May 2011. However, it is not in dispute that SSN effectively took over the management of TSSN's business from June 2010 onwards.

[26] The terms of the shareholders' agreement and of an agreement under which SSN was to purchase the business were not settled until early December 2010. One of the last matters to be addressed was what liabilities of the existing business were to pass to SSN. In an e-mail sent on 2 December 2010, Mr McCallum, acting on

behalf of SSN, made it clear that SSN was not taking responsibility for past liabilities, save for one specified loan and employee entitlements.

[27] On 8 December 2010, Mr P Groves signed both a shareholders' agreement and an agreement in respect of SSN's purchase of TSSN's business, both on his own behalf and as attorney for Mr E Groves. There is a dispute as to whether Mr P Groves signed the sale and purchase agreement on behalf of TSSN at that time (he says that he did not do so until mid to late March 2011 because he "became increasingly uncomfortable about the whole transaction") but it is not necessary to determine the point.

[28] The following day, 9 December 2010, Mr McCallum signed the shareholders' agreement on behalf of both Touchstone and SSN, and the sale and purchase agreement on behalf of SSN, but at the same time he signed a deed declaring that the agreements were to be held in escrow until revoked in writing. It is not in dispute that Mr McCallum did not revoke the escrow until 12 May 2011.

[29] The sale and purchase agreement provided for SSN to purchase the business for \$9,835,317.44, payable partly in cash and partly by issue of redeemable preference shares. In May 2011 (at about the same time as Mr McCallum revoked the escrow on the agreements), Touchstone and TSSN entered into a deed of assignment. After referring in the recitals to the terms on which the purchase price for TSSN's business was payable, and to the fact that Touchstone had made demand on TSSN for the debt it had acquired from ASB, the deed provided for an assignment from TSSN to Touchstone of both TSSN's right to receive the cash portion of the purchase price for its business, and TSSN's rights under the agreement to the redeemable preference shares.

[30] On 13 May 2011, SSN paid the cash portion of the purchase price (\$4,114,122.19) to TSSN, and TSSN endorsed that cheque in favour of Touchstone, effectively settling the purchase price for the business.

### **TSSN's liquidation**

[31] TSSN defaulted on various tax obligations in late 2009 and in 2010. This included a failure to pay its PAYE obligations starting with a payment due on 1 December 2009. In October 2010, the Commissioner of Inland Revenue issued a statutory demand against TSSN for \$307,059.10, of which \$302,218.79 was unpaid PAYE.

[32] On 21 December 2010, the Commissioner of Inland Revenue applied to put TSSN into liquidation. On 17 May 2011, TSSN was put into liquidation by order of this Court. The applicants, Mr Blanchett and Mr McQuoid, were appointed liquidators. At that point the tax debt was in the order of \$475,000, of which about \$183,000 was preferential.

### **The payments in dispute**

[33] After reviewing TSSN's records, the liquidators took the view that seven payments made by TSSN to RBI from 9 June 2009 to 15 October 2009, and a further payment on 13 May 2010 (altogether totalling \$232,381.28) were insolvent transactions. On 22 February 2012 they gave notice to RBI that they wished to set aside those payments as voidable transactions under s 292 of the Act.

[34] On 22 March 2012, RBI objected to the liquidators' notice, with detailed reasons, including that it did not accept that RBI was insolvent at the time of the payments, or that the payments gave it any preference over other creditors (maintaining that the payments were part of an established payment regime under a continuing business relationship). It also said that if the payments were found to be insolvent transactions, it was entitled to the statutory defence under s 296(3) of the Act, because it received the payments in good faith, did not suspect and had no good reason to suspect that TSSN was insolvent, and had continued to trade with TSSN (paying airlines and continuing to accept orders for shipping in the belief that the payments were valid).

[35] The liquidators sought further information from RBI, particularly in relation to its contention that the payments were made pursuant to a continuing business

relationship (in the form of a running account). As a consequence of further information provided to them, the liquidators issued an amended notice adding a further seven payments made between 29 July 2010 and 5 November 2010, and five payments made between 16 February 2011 and 29 April 2011, as additional insolvent transactions comprising a further \$311,091.09, bringing the total of impugned transactions to 20 payments amounting to \$543,472.32:

Transaction#	Date of Payment	Amount(\$)
1	9 June 2009	1,242.31
2	16 July 2009	4,893.80
3	29 July 2009	37,868.22
4	14 August 2009	102,978.16
5	31 August 2009	31,000.00
6	31 August 2009	45,208.33
7	15 October 2009	8,810.56
8	13 May 2010	379.90
9	29 July 2010	33,355.80
10	13 August 2010	112,551.81
11	27 August 2010	134,753.68
12	15 September 2010	8,898.00
13	29 September 2010	6,848.65
14	14 October 2010	3,087.10
15	5 November 2010	2,352.61
16	16 February 2011	425.50
17	18 March 2011	1,245.69
18	30 March 2011	2,308.20
19	8 April 2011	5,000.00
20	29 April 2011	264.00
	<b>Total \$</b>	<b>543,472.32</b>

[36] The eight payments in the liquidators' original notice were all made within two years prior to the filing of the application for liquidation (21 December 2010).<sup>1</sup> The 12 payments added under the liquidators' amended notice were all made within the six months prior to the filing of the application for liquidation.<sup>2</sup> The first seven payments were for freight services supplied by RBI in the 2009 season. The succeeding payments were in respect of freight services provided for the 2010 season.

### The application and opposition

<sup>1</sup> The specified period in terms of s 292(5) of the Act.

<sup>2</sup> The restricted period in terms of s 292(6).

[37] The liquidators seek an order setting aside all of the payments identified in their amended notice on the grounds that they are voidable as insolvent transactions entered into within the specified period.<sup>3</sup> They dispute RBI's claim that the payments were made as part of a running account between the parties, but say that if the Court accepts that the payments were part of a running account (so that the Court must consider the effect of the payments as a single transaction),<sup>4</sup> the liquidators can claim the reduction in the account from the point of highest indebtedness in respect of the transactions both in both the 2009 and the 2010 seasons.

[38] The liquidators' application was initially supported by an affidavit of one of the liquidators, Mr Blanchett, who produced documents obtained from TSSN's records, principally addressing TSSN's financial position from December 2008 (the start of the specified period) and responding to RBI's contention in its notice of opposition that the payments were made pursuant to a running account.

[39] RBI opposed the application on the grounds that the payments were not insolvent transactions, both because the records of the company did not establish that it was unable to pay its debts at the date the payments were made to it, and because the payments did not cause it to receive more than it would have in the liquidation. It also said that the payments were made in the course of a continuing business relationship and the deemed single transaction (pursuant to s 292(4B)) was not an insolvent transaction. In the alternative it claimed it was entitled to the statutory defence under s 296(3) on the grounds that it had received all payments in good faith, without reason to believe TSSN was or had become insolvent, and altered its position in the reasonable belief that the payments were valid and would not be set aside.

[40] Given the nature of its opposition (that the liquidators had not made out their case by the production of the company records) RBI's initial evidence focused on the statutory defence under s 296(3). One of the major planks of that opposition was that it had no knowledge of TSSN's precarious financial position. It filed evidence

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<sup>3</sup> Section 292(1).

<sup>4</sup> Section 292(4B).

by RBI's managing director Mr Brunton, and by its non-executive directors Mr Jeffrey and Ms Merriman to this effect.

[41] In reply, the liquidators filed an extensive affidavit from Mr Peter Groves, who had earlier been interviewed by the liquidators and had chosen to provide an affidavit rather than have the liquidators seek an order to attend Court and be examined. Mr Groves said that he had told Mr Brunton and others in RBI, both in meetings and by telephone from 2009 onwards, that TSSN was in financial trouble, and that he had kept Mr Brunton informed of the steps taken with Touchstone to try to resuscitate TSSN, including the formation of the phoenix company, SSN, to take over TSSN's business. He produced a large number of further documents as support for his evidence that RBI was informed of TSSN's financial difficulties, but which also expanded upon the liquidators' contention that TSSN was insolvent.

[42] Mr Groves also gave evidence of his and his brother Elliot Groves' relationship with RBI, as to the importance of keeping RBI paid in order to keep TSSN's business alive, and as to the steps taken with Touchstone to create the phoenix company to take over TSSN's business.

[43] In light of the significance of this evidence from Mr Peter Groves and new substantive allegations raised in it, RBI sought and was granted leave to file further evidence. It filed affidavits by Mr Brunton and Mr Jeffrey, as well as affidavits by Mr Elliot Groves, by a financial adviser who was a consultant to TSSN, Mr Gally, by TSSN's operations manager at relevant times, Mr Findlay, and by two chartered accountants, Mr Darney, who was TSSN's independent accountant, and Mr Hagen, who provided expert evidence as to whether TSSN was insolvent between 22 December 2008 and the date of liquidation based on its financial statements.

[44] Given the extent of this new evidence and a perceived need to file yet further evidence on the critical issues of insolvency and knowledge, scheduled hearings of the application were adjourned on two occasions. Further affidavits were filed on behalf of the liquidators by both Mr P Groves and Mr Blanchett. Mr Groves produced a substantial number of documents extracted from his computer relating both to events in 2009 and 2010 prior to SSN taking over the business, and to a

subsequent period when he remained involved with SSN. Mr Blanchett also produced a substantial amount of further documentation that he had obtained from ASB using his powers as liquidator. A further round of affidavits by both parties followed as yet further issues emerged.

[45] RBI did not amend its grounds of opposition to address the evolving evidence but by the time submissions were prepared it was also advancing a further contention (covered in the evidence) that payments made after 1 June 2009 were made by SSN in respect of debts due by it (rather than by TSSN).

[46] Counsel for the liquidators raised the absence of this point in the grounds of opposition. However, I have taken the view that all grounds should be considered as the liquidators were afforded the ability to address them all in evidence (by reason of the two adjournments of the hearing), including in cross-examination. I am satisfied that any prejudice arising out of the ongoing evolution of the grounds of opposition can be addressed, if necessary, by an appropriate award of costs.

#### **The issues for determination**

[47] The issues that arise on this application are:

- (a) Whether the payments were insolvent transactions. This raises the following sub-issues:
  - (i) Was TSSN unable to pay its due debts at the time of the payments?
  - (ii) Did RBI receive more by these payments than it would receive in the liquidation?
  - (iii) Were the parties on a continuing business relationship at the time of the payments and, if so, what is the net effect of the deemed single transaction?

- (b) Were the payments after 1 June 2010 made to RBI by TSSN (rather than SSN) so as to be insolvent transactions under s 292?
- (c) If the payments are insolvent transactions, has RBI made out the necessary elements for the statutory defence in s 296(3)?
- (d) If the payments do not constitute insolvent transactions, and RBI is not entitled to the statutory defence, what orders should be made?

### **Insolvent transaction**

#### *Two elements*

[48] The liquidators bring their application under s 292 of the Act, which makes a transaction by a company voidable by the liquidators if it is an insolvent transaction entered into within two years prior to the commencement of liquidation. There are two elements that need to be satisfied to make a transaction an insolvent transaction, namely that it is entered into at a time when the company is unable to pay its due debts, and that it enables another person to receive more in satisfaction of a debt owed by the company than it would, or would be likely, to receive in the company's liquidation.<sup>5</sup>

[49] A liquidator has the onus of establishing that a payment is an insolvent transaction (including the overall onus in respect of the single transaction that is deemed to exist in the case of a continuing business relationship) although where the payment is claimed to be part of a continuing business relationship, it is for the creditor to prove that the transactions in issue are part of a continuing business relationship and therefore should be treated as one transaction.<sup>6</sup>

[50] In the case of transactions within the restricted period, a liquidator is entitled to rely on the presumption in s 292(6) of the Act that the company is unable to pay its debts within that period, and it is for the creditor to rebut that presumption.

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<sup>5</sup> Section 292(2).

<sup>6</sup> *Rea v Russell* [2012] NZCA 536 at [24].

### *Inability to pay debts when due*

[51] As is apparent from the language of s 292, the insolvent transaction is defined in terms of a company's inability to pay its due debts, rather than balance sheet insolvency (although balance sheet insolvency may be a factual matter to be taken into account in determining inability to pay due debts). This is essentially a factual inquiry into the circumstances of the company at the time of entry into the transactions. The Courts have given guidelines from time to time on what will be taken into account in determining this question.<sup>7</sup> Although the wording of the present s 292 differs in some respects from its predecessor under the Companies Act 1955,<sup>8</sup> and the original s 292 as enacted by the Companies Act 1993,<sup>9</sup> the guidance given in *Blanchett v Joinery Direct Ltd* remains apposite:<sup>10</sup>

- (a) The inquiry is made at the times when the payment is made;
- (b) Regard may be had, however, to the recent past to see if the debtor was unable to pay debts as they became due;
- (c) A consideration of the outstanding debts at the time is required;
- (d) "As they become due" means as they become legally due;
- (e) The ability to pay involves a substantial element of immediacy to provide payment from cash and non-cash resources. An excess of assets over liabilities will not by itself satisfy the test if there is no ability to pay. The ability to procure sufficient money to pay debts by realisation by sale or mortgaging or pledging assets within a relatively short period of time will satisfy the test;
- (f) The issue of a company's solvency requires a consideration of the company's financial position in its entirety. A temporary lack of liquidity does not necessarily evidence insolvency. For that reason, a consideration of the debtor's position over a period of time is required; and
- (g) The test is an objective one.

[52] One of the differences between s 292 and its predecessor under the Companies Act 1955 is significant. Section 309 of the 1955 Act stated the test as

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<sup>7</sup> See, for example, *Re Northbridge Properties Ltd (in liquidation)* SC Auckland M46/75, 13 December 1977, and more recently *Blanchett v Joinery Direct Ltd* HC Hamilton CIV 2007-419-1690, 23 December 2008.

<sup>8</sup> Which applied at the time of the decision in *Re Northbridge Properties Ltd*.

<sup>9</sup> Which applied until 31 October 2007, and was the provision in force at the time of *Blanchett v Joinery Direct Ltd*.

<sup>10</sup> *Blanchett v Joinery Direct Ltd*, above n 7 at [27].

inability to pay debts “from [the company’s] own money”. That phrase was omitted from s 292, allowing the Court to consider whether the test could be met other than by use of the company’s own money. This no doubt picked up on the finding in *Re Northbridge Properties Ltd* that it was sufficient if the company had assets that could be converted to cash within a short time period and a conversion was in the ordinary course of business.<sup>11</sup>

[53] I have recently considered the use of assets to gain funds from other sources in a related case involving TSSN:<sup>12</sup>

[37] The issue as to whether TSSN was able to meet its due debts at the time of the payments turns on the effect of the further overdraft accommodation provided by ASB in June 2009. The case for Mr and Mrs Forbes is that whatever the position may have been up to that point (and given the seasonal nature of TSSN’s business and the payment practices that had developed they do not accept that it was in fact insolvent at that point), any doubt about TSSN’s ability to pay was resolved by that accommodation. The liquidators challenge this view. They say that this accommodation does not establish that TSSN was able to meet its due debts because it was provided purely to protect ASB’s security position through the pending shipping season (contending that ASB did not withdraw its demand, and at the end of the season withdrew its financial support).

[38] The test for inability to pay due debts does not require that the company be in a position to pay those debts from its own funds. A debtor will be taken to be able to pay its debts if it does so out of funds gained by use of its assets:<sup>13</sup>

But the debtor’s own moneys are not limited to his cash resources immediately available. They extend to moneys which he can procure by realisation by sale or by mortgage or pledge of his assets within a relatively short time – relative to the nature and amount of the debts and to the circumstances, including the nature of the business, of the debtor. The conclusion of insolvency ought to be clear from a consideration of the debtor’s financial position in its entirety and generally speaking ought not to be drawn simply from evidence of a temporary lack of liquidity. *It is the debtor’s inability,*

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<sup>11</sup> John Farrar and Susan Watson (eds) *Company and Securities Law in New Zealand* (2nd ed, Thompson Reuters, 2013) at 934 and the accompanying n 844; *Re Northbridge Properties Ltd*, above n 7 at 29; *Bank of Australasia v Hall* (1907) 4 CLR 1514; *Sandell v Porter* (1966) 115 CLR 666; *Re BOP Freight Distribution (1999) Ltd (in liq)* HC Hamilton M161/02, 15 May 2003; *Bond Cargo Ltd v Chilcott* HC Auckland M548sd99, 4 July 2002.

<sup>12</sup> *Blanchett v Forbes* [2014] NZHC 1210 at [38] – [39].

<sup>13</sup> *Sandell v Porter*, above n 11 at 670 (emphasis added). The High Court of Australia made these findings in relation to s 95 of the Bankruptcy Act 1924-1960 (Cth), that included the requirement that payment be out of the debtor’s own money, but the findings apply equally to the more recent provisions of s 292 of the Companies Act 1993 that do not have this stipulation.

*utilising such cash resources as he has or can command through the use of his assets, to meet his debts as they fall due which indicates insolvency.* Whether that stage of his affairs has arrived is a question for the Court and not one as to which expert evidence may be given in terms though no doubt experts may speak as to the likelihood of any of the debtor's assets or capacities yielding ready cash in sufficient time to meet the debts as they fall due.

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[54] Section 292 as it now stands requires an assessment of an insolvent transaction as one “entered into at a time when the company is unable to pay its due debts”. The words “entered into” were introduced when s 292 was amended by the Companies Amendment Act 2006. Prior to that, transactions “made” at a time when the company is unable to pay its due debts were caught. This change in wording suggests an emphasis on time of entry into the transaction, and academic commentators have suggested that this means that a “still shot” is to be taken of a company's financial position as at the date when the company enters into the transaction, as distinct from the position taken under s 309 of a “moving picture” or “short period of time”.<sup>14</sup> The difference may be a semantic one only. The Court must be able to take events before and after entry into the transaction into account in assessing the position at time of entry.<sup>15</sup>

#### *The parties' contentions*

[55] The liquidators say that all payments were insolvent transactions because TSSN was unable to pay its due debts from October 2008 or, at least, from February 2009. They say that the payments gave RBI a preference in the liquidation given that all of its debts were paid, whereas TSSN owed substantial debts to the Inland Revenue Department (IRD) and the Accident Compensation Corporation (ACC) at the time of liquidation but had no assets that could be used to pay those debts (and

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<sup>14</sup> *Companies and Securities Law in New Zealand*, above n 11 at 935 and the accompanying n 849 – 850, citing *Ching v McCullagh* HC Auckland CIV-2006-404-7843, 18 April 2007 and *Re Pasadena Holdings Ltd (in liquidation)* HC Auckland M1039/98, 30 April 1999.

<sup>15</sup> The requirement to consider the time of entry into the transaction may have significance, however, when considering the single transaction deemed by s 292(4B), where there is a continuing business relationship with transactions both before and during the specified period. In that respect I refer to my decision in *Levin v Timberworld Ltd* [2013] NZHC 3180, particularly at [53] (appeal pending).

the majority of the debt to IRD was unpaid PAYE which had statutory preference in the liquidation).

[56] RBI says that these were not insolvent transactions because TSSN was able to pay its due debts at all relevant times, initially because of the financial support of ASB and TSSN's shareholders (and their related interests), and subsequently with the additional support of Touchstone. It also says that the payments were not insolvent transactions as they were made as part of a continuing business relationship between it and TSSN (either overall or in each trading season) and the net effect of all transactions between it and TSSN during the relationship (deemed a single transaction for this purpose)<sup>16</sup> did not amount to an insolvent transaction. RBI also says that the transactions after 1 June 2010 cannot be insolvent transactions as they were transactions with the phoenix company SSN, in respect of debts due to RBI by that company, not by TSSN. It says that the last payment from TSSN was on 13 May 2010, and that all succeeding payments, commencing on 29 July 2010, were from SSN.

#### *Summary of material evidence*

[57] The liquidators relied on the evidence of one of the liquidators, Mr Blanchett, based on TSSN's records, and also on evidence of one of TSSN's former directors, Mr P Groves, who gave evidence based on his direct knowledge. Although Mr P Groves maintained that both directors (himself and his brother Mr E Groves), had responsibility for many of the decisions made by TSSN material to this case, he was identified on his business card as "Finance & Administration Director" and clearly was closely involved in TSSN's financial and general administration, whereas Mr E Groves was closely involved in sales and marketing (including management of the supply of tree stock).

[58] The liquidators rely broadly on several indicators of insolvency leading up to May 2009, as well as ASB's demand on 5 May 2009 for repayment of all money advanced under TSSN's various facilities, debts due to various other creditors at that time, and a continuing pattern of selective payment of creditors (using the further

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<sup>16</sup> Section 292(4B) of the Act.

borrowings from ASB which they say were made available to protect its position while it realised its securities, rather than being part of the ordinary course of TSSN's business):

- (a) The "evidential indicators" on which the liquidators rely included:
  - (i) substantial losses in the financial years ending 31 October 2007 and 31 October 2008;
  - (ii) concerns expressed by TSSN's accountant in February 2009 after preparing the draft accounts to 31 October 2008 that they made bad reading;
  - (iii) ASB's requirement that TSSN engage Korda Mentha;
  - (iv) a letter written by TSSN's accountant to IRD in March 2009 in which he said that TSSN's future viability depended on bank support;
  - (v) the content of Korda Mentha's report (which the liquidators contend made apparent that TSSN was hopelessly insolvent);
  - (vi) evidence that ASB extended the overdraft through this period to meet wages and other "critical creditors" to keep TSSN operating whilst it considered its position; and
  - (vii) an offer made by TSSN to ASB on 11 May 2009 to compromise the debt (of approximately \$12 million) for the sum of \$5.6 million, which they say evidences that TSSN's assets were clearly insufficient to realise enough to meet the debt to ASB.
- (b) ASB made demand on TSSN on 5 May 2009 for repayment of all facilities, some \$9 million advanced directly to TSSN, and a further \$2–3 million advanced to related parties (the Groves interests) for

failure to meet payments due under the facilities on 1 May 2009, and for breaches of various covenants. TSSN failed to meet the demand for repayment by 7 May 2009. The liquidators say that TSSN's debt to ASB became due at that time, and remained due from that date (because it was never withdrawn) notwithstanding that it was later assigned to Touchstone.

- (c) As at May 2009, significant amounts were owing to growers for tree stock supplied for the 2008 season and, at the instigation of ASB, TSSN entered into negotiations with the growers allegedly to compromise this debt in amounts greater than could be explained by disputes over the invoices rendered.
- (d) ASB's periodic extension to TSSN's overdraft facility was limited to payment of creditors on a selective basis, and was predicated on the commercial reality that by doing so it would realise more from its security than it would by enforcing its rights to recover the outstanding debt, at least through the 2009 season.
- (e) Even if ASB's extension of overdraft allowed other creditors to be paid as part of an ongoing concern, TSSN had an unpaid debt to IRD from 1 December 2009 for PAYE that remained unpaid until the date of liquidation;
- (f) ASB informed TSSN in December 2009 that it would provide no further financial support, and the later extensions to overdraft until May 2010 were made with a view to protecting value in the securities pending sale of its debt to Touchstone, and were on a selected basis only (in particular, TSSN's debts to IRD and ACC were not met).

[59] The material evidence on which RBI relies to support its case that TSSN was able to pay its due debts at material times is, in summary, that:

- (a) TSSN's formal accounts do not take into account the significant value of stock held both in New Zealand and in the United States.
- (b) Korda Mentha reported in March 2009 on TSSN's financial difficulties, and identified that they were largely due to the trading arrangements with SSN USA, the resultant timing of payments and the difficulties in that market causing delays in payment.
- (c) Korda Mentha, a respected practitioner in the insolvency field, at no time stated that TSSN was insolvent, either in its original report in March 2009, or in ensuing correspondence and later reports.
- (d) TSSN's 2008 accounts were finalised in January 2010, with provision for payment of a gross dividend of \$1,300,000. The directors signed a resolution at that time that the dividend satisfied the solvency tests in s 4(1) of the Act. Mr Darney gave evidence in cross-examination that this followed "an oral resolution" in February 2009, amended in April 2009, but acknowledged there was no written resolution at these times.
- (e) The ASB demand was followed by extensions to the overdraft facility, incorporated into later facility agreements, and even when ASB indicated in December 2009 that it was not willing to extend the facility further, it did not demand repayment. Evidence that ASB invited the directors to appoint a receiver (which the directors declined), but did not do so itself, indicates that it did not consider that that step was open to it at that point.
- (f) From that time until 31 May 2010, TSSN was able to pay its debts under further extensions (and a further facility agreement) underwritten by Touchstone as part of the negotiations of Touchstone to acquire the ASB debt and invest in the business.

- (g) Touchstone acquired TSSN's business (but not all of its liabilities) with effect from 1 June 2010, pursuant to an agreement (the Heads of Agreement), signed on 21 May 2010, further documented in the agreement for sale and purchase dated 9 December 2010 and the shareholders' agreement dated 8 December 2010.

[60] Deponents for both parties were cross-examined at length on this evidence.

### *Discussion*

[61] The first payment to RBI that the liquidators seek to recover was made on 9 June 2009. That is the first time at which the liquidators must show that TSSN was unable to pay its debts.

[62] I do not regard the balance sheet insolvency in the formal accounts to 31 October 2008 and 31 October 2009 as determinative of TSSN's ability to meet its debts as at 9 June 2009 or later in the 2009 season. Korda Mentha's March 2009 report sits half way between these two sets of financial statements (which I note were not completed until January 2010 in respect of the 2008 statements and February 2011 in respect of the 2009 statements). It reported that the value of stock recorded in management accounts (produced by TSSN's accountant Mr Darney), was in excess of \$10 million,<sup>17</sup> without expressing its own view as to what value might be attributed to it. However, and significantly, Korda Mentha did not report that TSSN was insolvent, despite the apparent balance sheet insolvency.<sup>18</sup> It can be inferred from this that it accepted at that point that there was some value in the stock that could be taken into account for the purpose of assessing TSSN's future viability. Similarly, however, I do not accept that the value of stock recorded in the management accounts, and identified in the Korda Mentha report, is determinative. It is necessary to look at other evidence.

[63] The conclusion I reach having regard to the other evidence is that TSSN was unable to pay its due debts as at mid-May 2009. It had debts due to growers for

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<sup>17</sup> Mr Darney confirmed that this was on the basis of historical cost.

<sup>18</sup> It is common ground that accounting standards did not permit inclusion of this inventory until sales can crystallise the value.

stock supplied for the 2008 season. Even if there was dispute over part of that debt, at least part of it was not in dispute and was ultimately paid, PAYE was overdue, and TSSN was getting extensions to its overdraft to pay selected creditors only (predominantly wages) pending a decision by ASB on further support having regard to the Korda Mentha report.

[64] At that point TSSN had little or no money coming in. Its income from the European market had been received for the supply in the 2008 year. Income from sales in the US market was overdue and promises of payment had not been kept. ASB was extending the overdraft to meet on-going costs needed to keep TSSN operating ahead of the start of the 2009 “lifting” season but not for old creditors such as the growers and IRD. Although there is no direct evidence on the point, I suspect that at that point ASB considered that those creditors should be met out of TSSN’s debtors, notably SSN USA.

[65] TSSN’s accountant, Mr Darney, gave evidence as to TSSN’s insolvency generally having regard to draft accounts to 31 October 2008, prepared in early February 2009. He said that he considered it to be solvent, taking into account the US receivables and stock. (In relation to his view on solvency generally, I have already mentioned the resolution in respect of the dividend declared for the 2008 year). He acknowledged that TSSN had still to secure funding for the 2009 season, but said that that was usual, and that he was not aware at that time that Korda Mentha had been engaged. He was aware that ASB had sought a review, but thought that that was by Deloitte, the firm the directors engaged annually ahead of seeking finance for the forthcoming season. Counsel for the liquidators challenged him strenuously on this evidence, in cross-examination, pointing to a letter that Mr Darney wrote to IRD from 11 March 2009, which counsel suggested was inconsistent with Mr Darney’s view on solvency.

[66] Before addressing Mr Darney’s letter, I need to say that I do not regard the provision of the very large dividend in 2008, or the resolution of the directors as at that date as helpful on the question of TSSN’s ability to pay its debt, nor, indeed, its solvency generally at the point. I find Mr Darney’s position curious, at best. It appears he may not have been informed of all that was happening, but I find there

was no cogent evidence of the alleged decision by the directors in either February 2009 or subsequent amendment of that decision in April 2009. If there had been any decision to that effect I would have expected it to have documented. It seems highly unlikely. I do not discount the possibility of some discussion at that time (there appears to have been some optimism that SSN USA could be relied upon to make a substantial payment in reduction of its debt, even if that proved to be highly over-optimistic) but that falls well short of proof either of an ability to meet its debt or solvency. It is also significant that the directors, at no time, have given the requisite declaration as to solvency for that dividend.

[67] I find it curious that TSSN would not have informed its accountant that it had been required to engage a specialist such as Korda Mentha to review its financial viability, but I do not have to determine the point to decide the question over TSSN's ability to pay its due debts from 9 June 2009 onwards. I consider that the critical evidence in Mr Darney's letter of 11 March 2009 is his statement that:

Our client will have a loss in the vicinity of \$2-3 million, which has led to a review by the ASB Bank into our client's future viability at this very moment. Their survival is dependent on the banks [sic] continuing support. Which at this present point in time is unknown.

Although Mr Darney says that his letter of 9 March 2009 was sent to IRD in an attempt to head off a proposed tax audit, which does not alter the significance of his statement in any way. It is a clear recognition that TSSN's position was precarious, and that ASB's support was critical.

[68] ASB's lack of support became known at the beginning of May 2009. TSSN had failed to make payments under some of its facilities as at 1 May 2009. I suspect that this was "the last straw" for ASB, in light of the uncertainties about TSSN's future trading identified in the Korda Mentha report (most significantly in relation to recoveries from SSN USA).

[69] The liquidators, understandably in light of the state of TSSN's balance sheet, see the unremedied demand as unanswerable evidence of TSSN's inability to meet its due debt. They point to evidence that on at least two occasions, ASB reserved its right to rely on prior defaults, which must be taken to include the various defaults

listed in its demand of 5 May 2009, and to the absence of any evidence that it withdrew that demand. In addition, they say that there is clear evidence that creditors (both growers and others), remained unpaid: the growers were not paid what they were owed from the 2008 season for over a month after the amount was agreed, and other evidence showed that even small, general creditors, remained unpaid at the beginning of July 2009.

[70] The difficulty for the liquidators with this argument is that ASB did not proceed to enforce its demand. Instead it proceeded to extend the overdraft facility to allow TSSN to continue to operate through the 2009 season, albeit subject to TSSN's taking steps to settle the amount of old debt payable in respect of growers, and to identify the likely costs to be financed for the upcoming 2009 season (which included getting an agreement with growers on TSSN's commitments to them and the time for payment). This appears to be a consequence of meetings with the directors of TSSN (and its financial consultant Mr Gally) in mid-May 2009. Although the extensions were made on a weekly basis up until agreements with the growers were settled (the evidence suggests this was all done by 29 June 2009, the date of the written agreements that were signed with growers), the basis for doing so appears to be that ASB was persuaded by the case put to them by TSSN in mid-May 2009 that it should continue to support TSSN at least through the 2009 season. An agreement on terms for an overdraft facility is inconsistent with the debt continuing to be due. No-one from ASB has given evidence to the contrary.

[71] It is also noteworthy that TSSN signed an extended overdraft facility in August 2009. Although that document was not in the evidence, I infer that it incorporates the terms for extension reached at or after the meeting in mid-May 2009.

[72] Counsel for the liquidators argued that the extension of the overdraft did not detract from the liquidators' case that ASB was merely protecting its security. That may have been an element in ASB's thinking, but it would not have provided the further accommodation, including payment of existing debts to creditors, unless it believed it was likely to improve its position by supporting TSSN's trading. Given the active involvement of Korda Mentha throughout this period, I regard it as highly

unlikely that it would have done so had it believed that there was no value in the US debt or stock and in the New Zealand stock that could be traded at a profit in that season.

[73] I am satisfied that TSSN was able to obtain the additional funding with which to meet old creditors and to meet the costs of operating in the 2009 season by use of its resources. I do not see that this finding is affected by ASB's insistence on some further security from the Groves' interests (assignment of a mortgage taken as part of the sale of a property) as part of the terms for grant of the facility. The same applies to what appears to be another term of the new facility, namely that a term loan in US dollars be converted to New Zealand currency, and be brought under the new overdraft facility. This occurred in September 2009, and was the subject of yet a further facility agreement. There is no evidence of any demand having been made under these two facilities. I accept that at different points ASB reserved its right to rely on past defaults in the future, but that is a different matter from whether the whole of its debt remained due through 2009.

[74] The liquidators point to recitals in later documents signed by TSSN to the effect that TSSN had defaulted and remained in default.<sup>19</sup> That is not the same as saying that the ASB debts were due at all times after expiry of the demand. The overdraft facility was the subject of later agreements (as I have said it was apparently incorporated into the two facility agreements later in 2009), the large US dollar term loan was moved to a current liability as part of the overdraft but was then covered by the September 2009 facility, and other term loans were still shown in TSSN's accounts to 31 October 2009 as non-current liabilities (which would not be the case if they were due for payment at that point). It is also significant that Touchstone made demand for the assigned debt in May 2011, suggesting that it was not in fact due prior to that demand.

[75] Counsel for the liquidators submitted that RBI's argument that ASB's ongoing extension of the overdraft was purely to protect its security was supported by the fact that there was no recovery, in fact, from the US (after payment of US\$50,000 in May 2009), and the 2009 season did not generate the anticipated

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<sup>19</sup> The agreement for sale and purchase dated 9 December 2009 and the deed of assignment of 13 May 2011.

profits. I accept that that is so, but it does not change the fact that ASB made the extended overdraft facility available, and that all creditors (including IRD) were paid out of that facility, at least until the end of the 2009 season.

[76] TSSN incurred one further debt during the 2009 season which was not initially covered by the overdraft extension, namely an invoice rendered by Korda Mentha dated 30 June 2009. This cost had not been included in the cash flow forecasts put to ASB, on the basis of which ASB set its overdraft limit, but it is significant that when it was raised and ASB was approached for an extension to cover it (on 2 December 2009), ASB agreed to a further extension while at the same time advising TSSN it should look at debtor recoveries for any ongoing wages and expenses.

[77] I regard the overdraft extension granted on 2 December 2009 as the watershed in terms of the implications of the overdraft extension for TSSN's ability to pay due debt. The level of the overdraft support was to have peaked at the highest level shown in the cash flow forecast, being \$6.23 million, but that highest level was extended past the original due date when income expectations were not met (largely due to the lack of recoveries from the US). Even when ASB advised TSSN on 5 November 2009 of its annoyance at TSSN's execution of a deed to enable SSN USA to obtain a new banking facility without getting ASB's approval, the level of the overdraft facility was maintained at \$6.23 million.

[78] The watershed came, as I have said, in December 2009. By that time the 2009 trading season was over and TSSN's expenses had reduced to "holding" costs, being wages, maintenance of nurseries and administration of premises. Notwithstanding the reduced expenditure, ASB made known to TSSN that there was to be no further financial support (although I note that there is no evidence of any demand having been made under the overdraft facility, either then or at any subsequent time).

[79] Touchstone became involved at about this time, and within a month or so agreed to underwrite further funding by ASB while it (Touchstone) investigated the basis for investment in TSSN, and subsequently the terms for acquisition of the ASB

debt and for setting up the phoenix company, SSN, to acquire TSSN's business. A further facility agreement was signed in March 2010 in relation to this interim funding.

[80] Further, Touchstone's director, Mr McCallum, as well as TSSN personnel Mr E Groves and Mr Gally, say they initially contemplated that all debts would be met out of the interim funding facility (Mr P Groves said in cross-examination that there was "a view" to this effect). This may have been the position at the time of the negotiation with Touchstone, but the evidence is clear that some debts that were not seen to be essential to the continuation of the business were not paid out of the interim facility (this included several months of PAYE and an ACC debt that appears to be in respect of the previous year) and that Touchstone and SSN declined to accept any obligation to meet these creditors. Mr McCallum says that the agreement reached was that they would consider payment on a voluntary basis, but that prospect fell away when demands were made for payment and, particularly in the case of IRD, TSSN failed to negotiate a settlement on the basis of a partial payment of the debt.

[81] RBI contends that TSSN was not insolvent as Touchstone was prepared to support it, and did so, until it acquired TSSN's business. Counsel for RBI argued that the further funding was also obtained by use of TSSN's resources.

[82] However, it is clear from the evidence that Touchstone saw TSSN's resources as far more limited than even ASB had. It did not entirely dismiss the prospect of recoveries from the US (whether for debt or stock), but even so saw the sum of \$6 million as the maximum it was prepared to pay for all existing assets (including the land securities). Although there is no valuation evidence, this appears to be little different from a reasonable realisation of land value alone.

[83] I see this in a different light from the ASB's funding through the 2009 season. At that point there was some basis for optimism in respect of at least a partial recovery of the US debt, and realisation of the US inventory. That had gone by the end of the 2009 season. No payments had been received and SSN USA's bank had refused to renew its funding facility, making the prospect of recovery even more

remote. Although SSN USA found another funder in October 2009, TSSN agreed to subordinate its debt and its rights to stock to the new funder (as I have mentioned this was undoubtedly a factor in ASB's decision not to support TSSN any further).

[84] I regard the introduction of Touchstone and the further facility extended by ASB with underwriting from Touchstone as a shift from supporting on the basis of TSSN's assets to a holding operation to support its security, and amounting to no more than swapping debt. I find that there was no commitment to fund all debts out of that interim funding facility, and that TSSN was unable to pay its due debts from the time that its PAYE obligation became due in late December 2009. I do not accept the evidence for RBI that there was money available to pay these debts, and that it was a stratagem adopted by Mr P Groves alone not to pay this debt. I find that payment of that debt was deferred to allow payment of other debts in priority.

[85] I also find that RBI has not rebutted the presumption under s 292(4A) in respect of those transactions entered into in the restricted period.

*Was the ASB debt due at material times?*

[86] In light of these findings, I do not need to consider a further argument advanced by RBI, namely that the liquidators could not rely on the ASB debt as being due as there was no evidence of a demand having been made under s 292 of the Property Law Act 1952, to accelerate the time for payment of all loans. However, I will address the point for completeness.

[87] Counsel for RBI submitted that the ASB debt was not due because it had failed to give notice under s 92(1) of that Act for any money becoming payable by reason of default.<sup>20</sup> The liquidators submitted that notice was not required before the full amount of the debt became due, relying on s 9(1) of the Receiverships Act 1993 which provides that s 92 does not apply to the payment of money secured by a debenture. Counsel for the liquidators relied on the decision of the Court of Appeal in *Bank of New Zealand v Adsett*,<sup>21</sup> where the Court held that s 92(1) did not apply in

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<sup>20</sup> The Property Law Act 1952 applies rather than the Property Law Act 2007 because the operative agreements predated the introduction of the 2007 Act.

<sup>21</sup> *Bank of New Zealand v Adsett* [2000] 3 NZLR 446, [2000] 4 NZ ConvC 193,291 at [18].

that case because the liability of the debtor was not secured by a mortgage over land, but went on to state:

[18] It is unnecessary to consider in detail the further question whether s 9(1)(c) of the Receiverships Act 1993 would operate here to render s 92(1) inapplicable, assuming acceptance of Mr Stewart's submission on the primary issue. Suffice it to observe that we see considerable force in Mr Gedye's submission for the appellant that where the payment of money is secured by a debenture, s 92(1) has no application even if that payment is also secured by a mortgage of land ...

[88] The Court of Appeal referred to the decision of this Court in *Elders Pastoral Holdings v Raptorial Holdings Ltd (in receivership)*:<sup>22</sup>

[54] In the end, I am persuaded that Mr Crossland's argument is correct and that a notice under s 92(1) is not required in the three situations contemplated by s 9(1) of the *Receiverships Act* even where there is both a mortgage and debenture securing the loan monies. I reach that conclusion primarily as a matter of statutory construction. In my view, in enacting s 9, the legislature plainly intended to deal with the situation where a receiver is appointed pursuant to a debenture and enters into possession of the company's property without, at that stage, exercising any power of sale in relation to land. In such a situation, the notice under s 92(1) of the *Property Law Act* is not required. However, if a receiver proceeds to sell the company's land, then the power to do so does not become exercisable until the required notice is given. As well, the provisions of s 92(6) are also deemed to apply to a receiver exercising a power of sale under a debenture as if the receiver were selling the land as mortgagee under a mortgage of land.

[89] The comments in *Elders* are instructive in the sense that it confirms that determination of the scope of s 9(1)(c) is primarily a matter of statutory construction to be considered in light of the purpose of s 9 and the context generally. On that basis, s 9(1)(c) is to be read in conjunction with, and supplementary to, the other two subsections, and to the heading to s 92 “Application of s 92 of the Property Law Act 1952 to receivers”. The section is contained within the Receiverships Act 1993.

[90] I accept the submission of counsel for RBI that Parliament would not have intended the Receiverships Act to have general application in cases in which a debenture has been given, but a receiver has not been appointed. The rationale of the exception to the notice requirement is that a receiver needs to be able to act immediately to preserve the assets of a company to which he or she is appointed.

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<sup>22</sup> *Elders Pastoral Holdings v Raptorial Holdings Ltd (in receivership)* (2000) NZCLC 262,192 at [54].

Having to give notice could lead to assets being lost during the notice period. The wide reading of s 9(1)(c) sought by the liquidators would transform a specific exception for receivers into a wide-ranging exception. Such a reading not only undermines the substantive rule in s 92, but is clearly beyond Parliament's intent to exclude receivers only from the s 92 procedure.

[91] Had it been necessary, I would therefore find that ASB was not exempt from giving notice under s 92 of the Property Law Act 1952 (because TSSN was not in receivership at that time), so that ASB's letter of demand of 5 May 2009 did not accelerate the date for payment of the whole of TSSN's debts to ASB. This may well explain in part the evidence that when ASB informed TSSN in December 2009 that it was no longer prepared to provide financial support, it invited TSSN's directors to put it into receivership, but did not do so itself.

[92] I turn now to consider the second element of an insolvent transaction, namely whether the payments enabled RBI to receive more than it would in the liquidation.

*Receipt of more than in liquidation*

[93] The liquidators say that this element of insolvent transaction is clearly established by the fact that RBI was paid all of its debt, but had those payments not been made that would not have been the case (particularly in light of IRD's statutory preference in respect of unpaid PAYE). I accept that this is so, subject to considering RBI's arguments that the payments in respect of the 2010 season were made by SSN, and the effect of a continuing business relationship.

[94] I find, therefore, that the payments before December 2009 are not insolvent transactions.

*Who made the payments?*

[95] A considerable amount of the affidavit evidence and cross-examination was directed towards the effect of the heads of agreement signed by Touchstone and the Groves' interests on 18 May 2010. RBI's case is that this agreement affected a change of ownership in the business from 1 June 2010, notwithstanding that the

transaction was not fully documented until December 2010, nor formally ratified by SSN until that time. On that basis it says that SSN made all the payments to RBI after 1 June 2010 (I will come back to the payment on 13 May 2010), and therefore they fall outside the definition of an insolvent transaction, which must be a transaction in respect of a debt due by the company in liquidation.<sup>23</sup>

[96] The essential facts in relation to the transfer of the business are not in dispute:

- (a) Touchstone's involvement in assisting TSSN with its financial difficulties came in two steps: the acquisition of ASB's debt and incorporation of SSN to acquire TSSN's assets and undertaking (but only selected liabilities) for a price equivalent to that debt.
- (b) To preserve the business opportunity whilst it undertook due diligence on TSSN and negotiated with both ASB and the Groves' interests, Touchstone agreed to underwrite an interim funding facility from ASB through to the date of purchase of the debt (it appears that purchase of the debt was effected by 29 April 2010, but the terms of purchase were varied in some respects)<sup>24</sup> in order to accommodate matters arising out of the heads of agreement as the terms of the deed were restated, and the transfer effected in a deed dated 21 May 2010.
- (c) Touchstone and the Groves' interests signed the heads of agreement on 18 May 2010. Touchstone had initially considered investing directly into TSSN, but under this agreement the parties agreed to establish the phoenix company SSN. SSN, controlled by Touchstone, and with Mr McCallum having a direct hand in its management, operated the business from 1 June 2010. This start date was not recorded in the heads of agreement.
- (d) The heads of agreement provided for the incorporation of SSN, and the drawing up of both an agreement for SSN to purchase TSSN's

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<sup>23</sup> Section 292(3) of the Act.

<sup>24</sup> The deed of 29 April 2010 was not in the evidence.

business and a shareholders' agreement by which SSN was to be operated. There was a delay before these documents were completed. The shareholders' agreement was signed on 8 December 2010. The agreement for sale and purchase was signed on 9 December 2010.

- (e) It was necessary to get ASB's consent to the agreement for sale and purchase of the business. The evidence does not disclose why that was so, but presumably it arose out of the fact that ASB had funded Touchstone's acquisition of TSSN's debt to the ASB. This appears to be the reason that Mr McCallum executed a deed poll at the same time as signing the agreement for sale and purchase (and two related property agreements), placing his signature on these documents in escrow until such time as he revoked his declaration in writing.
- (f) The agreement for sale and purchase remained "in limbo" until 12 May 2011. On that date Mr McCallum revoked the declaration of escrow. The following day Touchstone and TSSN signed a deed under which TSSN assigned to Touchstone redeemable preferable shares allocated by SSN as part payment of the purchase price stated in the agreement for sale and purchase, and recording that TSSN was to pass to SSN a cheque issued for the cash component of the stated purchase price, as a response by TSSN to the demand made on it by Touchstone for repayment of the assigned (ASB) debt.

[97] The interim funding facility between ASB and TSSN had been repaid at the time of transfer of the debt to Touchstone (May 2010) and formed part of TSSN's overall debt to Touchstone. In addition, subsequent to the heads of agreement, Touchstone funded SSN to pay for various liabilities of the business. Those amounts were allocated as part of SSN's payments towards the purchase price.<sup>25</sup>

[98] The net effect of these transactions was that on 13 May 2011, four days before TSSN was put into liquidation, Touchstone received the whole of the price that SSN paid for TSSN's assets and undertaking by way of repayment of the

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<sup>25</sup> Schedule 2 to the sale and purchase agreement of 9 December 2010.

assigned (ASB) debt. That left TSSN with no assets and no means of paying the outstanding debts to IRD and ACC.

[99] In the meantime, and during the course of SSN's operation of the business up to that point, all receivables for the business for the 2010 season had been paid into TSSN's bank account. Mr McCallum and Mr Gally say that this was because the customers had not been informed up to that point that SSN had taken over the business, or asked to change their payment arrangements because it was felt that that would delay receipt of the money. When the money was received into TSSN's bank account, it was transferred to SSN's bank account, and SSN made payment from its account (particularly of the RBI invoices).

[100] Although there is a dispute as to what RBI was told about the change of control of the business (I will come back to this later) it appears to be common ground that RBI invoiced to TSSN until 2 September 2010 (almost the end of the shipping season), but after that date was asked to render its invoices to SSN (RBI issued an invoice to SSN on 9 September 2010 in respect of air freight on 8 September 2010).

[101] Mr McCallum was adamant in responding to questions in cross-examination that at all times he considered that SSN had taken over the business as at 1 June 2010, and had all rights to the proceeds of sales in that season, by reason of the agreement recorded in the heads of agreement. He took this view notwithstanding that SSN was not a party to the heads of agreement, and that the parties had still to negotiate the terms of the shareholders' agreement and the agreement for sale and purchase, and that ASB's consent was then required and the escrow was not lifted until 12 May 2011, and payment was not made until the following day. He said that all the essential terms for the later agreements were contained within the heads of agreement, and the negotiation was only over detail. He accepted that ASB's consent was required, but said that that was merely a matter of agreeing the words implying that there could be no substantive objection).

[102] The critical question in this matter is whether for the purposes of an insolvent transaction the payment was made by TSSN. If the point is considered as a contest

between TSSN and SSN, a number of factual and legal questions need to be decided. For example, was there sufficient certainty that a sale was effected by the heads of agreement so as to give rise to a transfer of property in the stock and proceeds of its sale? If so, what was the effect of the escrow arrangement?

[103] First, even assuming that SSN took over the business legally on 1 June 2010, a significant number of the sales for the 2010 season had already been put in place by TSSN (judging from the earliest shipping schedule in evidence). That suggests the major payments at stake were in respect of sales made by TSSN, not SSN.

[104] Second, in my opinion TSSN, not SSN, was the company making the payments to RBI at all relevant times. The issue can be determined up to September 2010 by consideration of what an outsider to TSSN and SSN's dealings (such as RBI) would have thought as to who was making the payments. I am in no doubt that TSSN/SSN's customers considered that they were dealing with TSSN. The same appears to apply to RBI. They paid TSSN for the orders they placed with TSSN (and RBI was paid from that money after it had been transferred to SSN).

[105] I do not overlook the contest between Mr Groves on the one hand and RBI and the witnesses from TSSN/SSN on whom RBI relies on the other hand as to whether RBI was told of the transfer of the business to SSN. I prefer the evidence of Mr Brunton and Mr Jeffrey, coupled with that of Mr Findlay, that RBI did not know of the change of business (or anything more than a vague reference to restructuring), and was not told of any change in parties until asked to invoice SSN rather than TSSN sometime in the first week of September 2010.

[106] I find that RBI thought it was dealing with TSSN through this shipping season, at least up to the first week of September 2010, by which time the majority of the shipping had been completed. Even at that point (the first week of September 2010), RBI would have been entitled to consider that it was to look to TSSN for payment.

[107] I am also satisfied that after the change in invoicing in September 2010 it was still TSSN that was making the payments. In coming to that conclusion I consider

that the parties receiving payments would have seen no great significance in the change of name between TSSN to SSN. The removal of “The” from the name of the trading entity was not a radical change. RBI had used the abbreviation SSN in minutes of its directors’ meetings and the Groves brothers and Mr Findlay did not change the email addresses they were using (@ssnnz.co.nz and @steppingstonesnursery.com). The same logo was used with the name Stepping Stones Nursery Ltd as had been used with The Stepping Stones Nursery Ltd.

[108] In any event I do not consider it possible to look beyond the effect of the escrow arrangement. While I was invited to consider the escrow arrangement as a mere formality, in my opinion such formalities exist and are entered into for the very reason of preventing the transfer of title unless and until the parties wish for that transfer to occur. At all relevant times TSSN held title to the assets. The later ratification of the agreement does not change the reality that the agreement remained “in limbo” until 12 May 2011. Mr McCallum accepted in cross-examination that he had a discretion whether or not to lift the escrow. The only possible conclusion is that TSSN was the company making the transactions, and SSN’s involvement was no more than an agent in facilitating TSSN’s transactions until that time.

*Was there a continuing business relationship?*

[109] By 2009 TSSN had been using RBI to arrange its freight for several years. Mr Brunton and Mr Findlay (TSSN’s operations manager at the time) have given evidence of an established practice whereby at the start of the shipping season TSSN provided RBI with a pro forma shipping schedule for the upcoming season. Although that schedule could be amended from time to time during the season, it was the “blueprint” that the parties followed in terms of deliveries, freight and payment. RBI could not arrange freight directly with airlines as it was not IATA-accredited so it placed bookings through an IATA-accredited freight forwarder, International Cargo Express Ltd (ICE), agreeing to pay ICE in accordance with ICE’s payment obligation to the airlines under an industry-established process. RBI invoiced TSSN for the freight as each flight booking was made. It also paid ICE within the standard industry time frames within which it (ICE) had to pay the airline.

[110] Mr Brunton stated in evidence:

RBI always maintained a strict payment regime with TSSN. Any transactions that occurred between the 1<sup>st</sup> and 15<sup>th</sup> of the month were payable on the 15<sup>th</sup> of the following month. Any transactions that occurred between the 16<sup>th</sup> and 30<sup>th</sup> or 31<sup>st</sup> of the month were payable on the 1<sup>st</sup> of the following month. This practice occasionally varied by a day or two, but was otherwise strictly enforced.

[111] Mr Brunton also said that he had a practice of calling RBI's customers ahead of payment date, given RBI's need to meet its obligations to ICE. The liquidators contend that these calls were made to pressure TSSN into payment and are evidence of knowledge or suspicion of insolvency. I prefer the evidence of Mr Brunton on this point. It is consistent with good commercial management to ensure that funds are received in time to meet one's own obligations.

[112] The liquidators produced in evidence a schedule of invoices issued by RBI between 21 December 2008 (the start of the specified period) and 25 March 2011 (the last invoice to be paid), together with the date and amounts of the disputed payments. RBI accepts that the schedule is accurate. It shows that for the most part TSSN paid RBI regularly and, as Mr Brunton stated, roughly in accordance with the agreed payment terms.<sup>26</sup> The schedule also shows that the majority of the invoices in the 2009 season (110)<sup>27</sup> were issued between 7 July 2009 and 31 July 2009, and were paid on time, and the majority of invoices for freight in the 2010 season (127)<sup>28</sup> were issued between 28 June and 2 September 2010.

[113] The liquidators' schedule also includes a running total which shows a zero balance prior to the first invoice of 16 December 2008, rising to a peak on 30 June 2009 of \$186,324.05 before dropping back to a zero balance on 15 October 2009,

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<sup>26</sup> Only four of the 20 payments were in respect of a single invoice, and there were some 260 invoices listed in the schedule.

<sup>27</sup> This excludes two invoices issued in December 2008 that were paid 9 June 2009, and two invoices issued on 30 April 2009 and another on 22 May 2009 that were paid on 16 July 2009. A further invoice was issued on 16 March 2010, but there was no information as to whether this related back to the 2009 season or was an early supply (or perhaps even a sample) for the 2010 season: it was a modest amount and was paid on 13 May 2010.

<sup>28</sup> A further six invoices were issued in September 2010, another two in October 2010, one in November 2010 and, two in February 2011 and one in March 2011. The September and the first of the October 2010 invoices were paid on time or close to it, but the second of the October 2010 invoices and the November 2010 invoice were not paid until late February 2011 and mid-March 2011 respectively. The February 2011 and March 2011 invoices were paid on time or close to it.

and a zero balance on 13 May 2010 (after the single invoice issued on 16 March 2010 was paid) rising to a peak of \$255,295.36 on 9 August 2010 before dropping back to a nominal balance of \$2.05 on 29 April 2011. The schedule also shows that the outstanding balance fluctuated in each season as payment was made of the various blocks of invoices.

[114] Counsel for the liquidators submitted that RBI's contention that all payments were pursuant to a continuing business relationship between the parties was untenable because the schedule demonstrated that the payments related to specific invoices. He relied on *Wily v Eastern Elevators Pty Ltd* where the Court rejected a creditor's claim that progress payments made towards the contract price under a construction contract were made as part of a running account or continuing business relationship.<sup>29</sup> In particular, he relied on two of the reasons that had led the Court to that conclusion. First, although it was claimed that the payments were made to secure the provision of future services, the value of the future services was less than the amount of the payments. Secondly, the transactions between the parties did not result in a fluctuating balance, and each payment was specifically related to a specific invoice representing a particular progress payment for past work. Counsel argued that the facts of the present case were analogous.

[115] I do not accept that the fact that payments were made in amounts that equated with specific invoices is determinative of the question. Nor do I consider that *Wily v Eastern Elevators Pty Ltd* is applicable in this case (it concerned payments under a construction contract). Whether there is a continuing business relationship is essentially a factual question. The fact that a payment is of a specific invoice is a fact that can be taken into account, but in the present case the evidence is clear that TSSN was making payments pursuant to an agreed payment time-frame, and over a period during which the balance of the account fluctuated. Although the payment did go towards clearing debt, I am in no doubt that a significant underlying purpose for the payments was that RBI would continue to book further freight for its trees.

[116] I also find that the continuing business relationship was a seasonal one, renewed each year in respect of shipping to TSSN's export market. It started with

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<sup>29</sup> *Wily v Eastern Elevators Pty Ltd* [2003] NSWSC 377 (2003) 45 ACSR 261.

TSSN's provision of the pro forma shipping schedule, and ended when the contemplated shipments had been made and paid for within the agreed payment time-frames (for shipments within the first half of the month, payment by the 15<sup>th</sup> of the following month, and shipments in the second half of the month, for payment by the end of the following month).

[117] There is no evidence as to when the first schedule was put to RBI for the 2009 season, but on 10 June 2009 Mr Findlay sent RBI "the latest version" of the schedule for Mr Brunton "to start putting flights and AWB numbers to them". The schedule provided for a first shipment of 18 May 2009, followed by a further number of shipments from 21 June 2009 to 9 August 2009. The first shipment date (18 May 2009) suggests that the first pro forma schedule was produced somewhere around that date. The final shipment shown for 9 August 2009 indicates the relationship was continuing at that point. That is consistent with the invoices showing freight being invoiced until 17 August 2009, and the payments made to 31 August 2009 (within the payment time-frame) also being within the relationship.

[118] There is also a second schedule in the evidence, dated 17 June 2009. It was sent to RBI on 17 June 2009 as an update. It shows a first shipment on 17 June 2009 (rather than 18 May 2009 as on the first schedule), but otherwise the same range of dates as the first schedule, including the last shipment on 9 August 2009.

[119] Two schedules issued for the 2010 season have also been produced in evidence. The first is dated 3 June 2010, and is attached to an email of that date in which it is described as an updated schedule. The second schedule is dated 23 June 2010, and was attached to an email to Mr Brunton dated 24 June 2010. Both schedules show shipment dates from 20 June 2010 to 18 July 2010, as well as a single further shipment (presumably some kind of follow-up order) on 12 December 2010. The invoicing reflects the shipments in these schedules, and also suggests that the likelihood of a further schedule (or further schedules) for shipments through to the end of September, and perhaps including a shipment invoiced on 18 October 2010, although the invoicing indicates that shipment numbers fell significantly after 2 September 2010. It is clear from the invoicing that shipments continued, and the liquidators' schedule of transactions shows that payment of those invoices was made

in accordance with the agreed time-frame or sufficiently close to it to treat the business relationship as continuing to that point.

[120] It is necessary to consider if, and when, the business relationship came to an end. As I have just indicated, an invoice issued on 18 October 2010 was paid on 5 November 2010. Although a further five invoices were issued after that date, the first of them was not paid until 16 February 2011, and the next (dated 18 November 2010) was not paid until 18 March 2011. However, those payments were outside the payment arrangements. RBI has the onus of establishing that there was a continuing business relationship, and that must include the duration of that relationship. There was no evidence as to what was invoiced on and after 31 October 2010, or to support a case that the relationship was continuing notwithstanding TSSN's failure to meet the agreed payment arrangements.

[121] I find that the payments made of the invoices issued until 18 October 2010, and paid up to 5 November 2010, were to induce RBI to continue to place freight,<sup>30</sup> as well as to allow RBI to meet its obligations to ICE, and as such were an integral part of a continuing business relationship for the 2010 season, but that the subsequent invoices, and payment made in respect of them, were not.

[122] Although it has more significance for other issues, it is also worth noting that the shipping schedule of 3 June 2010 was headed with TSSN's name, whereas the updated schedule was headed with SSN's name. More significantly, there is no evidence that this subtle change (the dropping of "The" from the name) was drawn to RBI's attention when it was given the updated schedule. This is consistent with the evidence already mentioned that RBI was not told of the change until a later date, at which point it started addressing its invoices to SSN.<sup>31</sup>

*What was the effect of the continuing business relationship?*

[123] Because of my finding that TSSN was able to pay its due debts until December 2009, I do not have to consider the effect of the continuing business relationship for the 2009 season. However, I do have to consider the effect of the

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<sup>30</sup> *Airservices Australia v Ferrier* (1996) 185 CLR 483 at 502.

<sup>31</sup> The first invoice being dated 9 September 2010.

continuing business relationship on the payments received for the 2010 season. Before doing so, however, I record that the payment made on 13 May 2010 (of an invoice issued on 16 March 2010) falls outside both seasons, given my findings that the continuing business relationships are seasonal but there was no evidence to show how it is part of either season, and that TSSN was unable to pay its due debts at the time of that payment.

[124] I found that the continuing business relationship for the 2010 season started when TSSN submitted its first pro forma schedule to RBI, and RBI started making the freight bookings. Section 292(4B) provides that all transactions within the continuing business relationship are to be treated as a single transaction for the purpose of assessing whether the creditor has received a preference. Based on a starting point sometime shortly before TSSN's shipping schedule dated 3 June 2010 and an end point of 5 November 2010 there was no preference because the payments were offset by freight provided during that period. However, the liquidators contend that they are entitled to select, as the starting point for the assessment of preference, the point of peak indebtedness, namely \$255,295.36 as at 9 August 2010. This submission is based on Australian authorities on what is known as the rule of peak indebtedness.

[125] There is a difference of view in this Court as to whether the rule of peak indebtedness applies in New Zealand. It was applied in *Blanchett v McEntee Holdings Ltd*,<sup>32</sup> but I took the view in *Shephard v Steel Building Products (Central) Ltd*<sup>33</sup> that it did not apply in New Zealand as a matter of construction of s 292(4B).

[126] Counsel for the liquidators invited me to reconsider my view in *Shephard* on the grounds that the point had not been sufficiently argued in that case. There were two broad points to his argument. The first was that the rule is well-established in Australia, and s 292(4B) is copied from the Australian legislation.<sup>34</sup> Counsel argued that the section codified the rule as established previously at common law.<sup>35</sup> The second basis of counsel's submission was that there are sound policy reasons for

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<sup>32</sup> *Blanchett v McEntee Holdings Ltd* (2010) 10 NZCLC 264,763.

<sup>33</sup> *Shephard v Steel Building Products (Central) Ltd* [2013] NZHC 189.

<sup>34</sup> Section 588FA Corporations Act 2001 (Cth).

<sup>35</sup> *Rees v Bank of New South Wales* (1964) 111 CLR 210.

adopting the rule in any event. Counsel argued that the doubt cast on the application of the peak indebtedness rule in Australia in *Airservices Australia v Ferrier*,<sup>36</sup> on which I relied in *Shephard*,<sup>37</sup> was obiter, but in any event did not expressly overrule *Rees* and the peak indebtedness rule arising from it.

[127] I accept that the argument in *Shephard* did not include reference to a significant amount of Australian case law put to me by counsel for the liquidators, where the rule has been applied since the introduction of s 588FA, nor to submissions made by a lobby group in Australia (the Australian Credit Forum) in submissions to the Australian Parliamentary Joint Committee on Corporations and Financial Services in 2003 arguing (apparently unsuccessfully) for abolition of the rule on peak indebtedness. However, I did not decide *Shephard* on the basis that *Ferrier* had overruled *Rees*, but merely drew from the general principles stated in the case in relation to continuing business relationships. Further, Australian case law where the rule has been applied does not necessarily determine the approach to be taken in New Zealand.

[128] Counsel for the liquidators argued that the peak indebtedness rule best supports the underlying principles of the insolvent transactions regime, namely the *pari passu* principle, and advanced a scenario to counter three scenarios that had been included in the Australian Credit Forum's 2003 submission to demonstrate why the rule on peak indebtedness should not be supported in Australia. The liquidators' scenario was a comparison of two creditors at the point of peak indebtedness, as against their respective positions at time of liquidation where one of the creditor's debt was met as part of a continuing business relationship.

[129] I am not persuaded that this is a valid basis for changing the view I have reached in *Shephard*. The fact that more than one debt was met as a consequence of the continuing business relationship does not mean that that creditor was unfairly preferred or received payment "at the expense" of the other creditor. The running account doctrine underlying s 292(4B) recognises that it is artificial to isolate individual payments within a continuing business relationship as preferential because

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<sup>36</sup> *Airservices Australia v Ferrier*, above n 31.

<sup>37</sup> *Shephard v Steel Building Products (Central) Ltd*, above n 33 at [33] – [35].

those payments were not simply made to meet existing debt but also to induce further supply of goods or services. It is the purpose of the payment that will usually determine whether it has the effect of preferring one creditor over another. As I decided in *Shephard*, the context of the payments must be considered, by taking into account “all the transactions forming part of the relationship”.<sup>38</sup> Although this may appear to be unfair to the creditor that is not in the continuing business relationship in the scenario put by counsel for the liquidators, I see that as an inevitable consequence of Parliament’s decision in providing for the continuing business relationship (and the running account) exception.

[130] It may be contrasted with the arbitrary unfairness implicit within the rule as to peak indebtedness, which punishes a creditor where there is a period of large orders (creating a high peak) that are ultimately paid for within the continuing business relationship.<sup>39</sup> On this scenario (one of the scenarios advanced by the Australian Credit Forum) the rule as to peak indebtedness can be seen to be undermining *pari passu*. I do not see that the fact that the creditor not in a continuing business relationship has a preference at the time of liquidation as undermining the view I have taken of s 292(4B).

[131] Counsel for the liquidators also argued “as a matter of policy” that as the continuing business relationship concept was taken from the Australian legislation the New Zealand legislature intended to codify the rule as applied in Australia, as part of dispensing with the imprecision of the previous “ordinary course of business” defence. Counsel argued that a departure from the rule would allow uncertainty as it is not possible for creditors or liquidators to calculate the net amount simply.

[132] I am not persuaded by this argument. It is equally arguable that if Parliament intended to codify the rule, it could have done so. Instead it left courts to determine what is meant by the “single transaction”. I have already expressed the view that the single transaction consists of all transactions within the specified period, forming part of the continuing business relationship.<sup>40</sup> Counsel was concerned that the Court

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<sup>38</sup> Section 292 of the Act.

<sup>39</sup> A point made by H Bolitho, “Continuing Business Relationships – Eight Questions in Search of an Answer” (1998) 16 C&SLJ 581 at 599.

<sup>40</sup> *Levin v Timberworld Ltd*, above n 16 at [53].

would be forced to adopt “an ad hoc approach on a case-by-case basis”. However, the approach I have taken can be applied consistently in every case. It is not a difficult calculation once the start and finish of the continuing business relationship have been determined.

[133] Applying the above RBI has been preferred only by the transactions fully outside the continuing business relationship. That relationship encompasses the payments made in the 2010 season except for the payment on 13 May 2010 and the payments after December 2010. I turn now to consider the statutory defence.

### **Is RBI entitled to the statutory defence?**

#### *General*

[134] It is clear from s 296(3), and is common ground between the parties, that RBI can only rely on the statutory defence if it can establish all three elements of good faith, lack of suspicion and either giving of new value or alteration of position in the belief that the payments were not voidable.

[135] RBI relies on the evidence of Mr Brunton, as well as Mr Jeffrey and Ms Merriman, to the effect that they knew nothing of TSSN’s financial position until it was placed into liquidation, and had no reason to suspect its insolvency. RBI accepts that it was aware of some restructuring but not of the significance of it. Mr Jeffrey said that Mr Elliot Groves made a passing reference to it after an RBI directors’ meeting (at which Mr Peter Groves was not present),<sup>41</sup> and when he queried Mr E Groves about it the following day he was told that it did not affect RBI’s business. Mr E Groves and other TSSN/SSN witnesses (Mr Gally and Mr Findlay) also say that RBI was not informed of the difficulties or the restructuring. Mr E Groves says he had a discussion with his brother to the effect that there was no need for RBI to be informed. Mr P Groves acknowledged in cross-examination that there had been a discussion at some point in which Mr E Groves said there was no point alarming Mr Brunton. Mr Findlay (one of the more independent witnesses) said that Mr P Groves instructed him initially that there was no need to advise suppliers of the change in the company. Mr Gally later contacted suppliers, and

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<sup>41</sup> A meeting held on 27 April 2010.

advised them of the change. It seems that this was late in 2010 as it is clear that customers were not advised of the change during the 2010 season and continued to make payments into TSSN's account in the 2010 season, and that RBI was not told to change its invoicing until sometime in the first week of September 2010.

[136] This evidence on behalf of RBI was given in response to evidence by Mr P Groves that he had discussions with Mr Brunton (and, indeed, all major creditors) about TSSN's financial difficulties in the first half of 2009, and on various but unspecified occasions after that. He also said RBI was aware, from time to time, of the steps that TSSN was taking to try to get itself out of these financial difficulties, including its dealings with Touchstone and the incorporation of SSN to take over the business.

[137] RBI submitted that the direct evidence of its witnesses was consistent and to be preferred, and on that basis the Court should find that it received the payments in good faith, and without any suspicion or reason to suspect that TSSN was or was likely to become insolvent. It also says that it both gave value by continuing to supply TSSN with freight services, and altered its position by continuing to book freight through ICE. It contends that it would not have done so, and incurred the costs of that freight if it had any doubts about TSSN's solvency.

[138] Counsel for the liquidators submitted that Mr P Groves' evidence on the material disputes as to RBI's knowledge and reason to suspect solvency was to be preferred (contending that it was against Mr Groves' interests to give it), and this also went to establish lack of good faith. He also submitted that the third aspect of the defence could not be met; as RBI had merely paid invoices as they were rendered, this could not constitute either a giving of new value or any alteration of position.<sup>42</sup> However, the liquidators' primary submission is that the defence is not available as RBI had knowledge of TSSN's insolvency by reason of the knowledge held by the Groves brothers.

[139] Although counsel spent a significant amount of time cross-examining witnesses on the disputed evidence, I do not need to determine all of the disputes as I

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<sup>42</sup> As required by *Farrell v Fences & Kerbs Ltd* [2013] NZCA 91, [2013] 3 NZLR 82.

consider that this issue can be determined on the basis of the knowledge of the common directors, Mr Peter Groves and Mr Elliot Groves.

*Attribution of knowledge*

[140] RBI says that the knowledge of TSSN's financial difficulties cannot be imputed to it (in relation to its receipt of these payments) as the Groves brothers were non-executive directors and not its "directing mind and will".<sup>43</sup> RBI says that at all material times Mr Brunton (chairman of the board of directors but also the executive director, and having control of the day-to-day running and management of the business) was its directing mind and will.<sup>44</sup>

[141] In *Meridian Global Funds Management Asia Ltd v Securities Commission*,<sup>45</sup> the Privy Council spoke of three different rules of attribution of acts and knowledge to companies:

- (a) primary rules of attribution peculiar to companies as artificial entities under which acts of organs of the company (usually the board of directors or unanimous members) are attributed;
- (b) general rules of attribution equally applicable to natural persons, namely, the principles of agency; and
- (c) special rules of attribution, to be fashioned by the court for applying particular substantive rules (statutory or otherwise) by interpreting that rule to see whose act or knowledge was intended by the legislature (in the case of statute) or, presumably, contemplated in a case-law rule, to count as the act or knowledge of the company. In the process of interpretation the law's policy has to be considered.

[142] At about the same time *Meridian* was being decided, the English Court of Appeal addressed the question of imputation to a company on an agency basis in *El*

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<sup>43</sup> *El Ajou v Dollar Land plc* [1993] EWCA Civ 4, [1994] 2 All ER 696.

<sup>44</sup> *Lebon v Aqua Salt Co Ltd* [2009] UKPC 2 at [22].

<sup>45</sup> *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 3 NZLR 7 (PC) at 11-12.

*Ajou v Dollar Land plc*.<sup>46</sup> It referred to the concept of the “directing mind and will”, and held that it was not necessarily that of the persons who had the general management and control of the company, but could be found in different persons in respect of different activities. It said that what was required was identification of the person who had actual management and control in relation to the act or omission under consideration.

[143] One of the Judges in *El Ajou* (Hoffman LJ) was also sitting in the Privy Council in *Meridian* (as Lord Hoffman). Although the Privy Council did not refer to *El Ajou*, Lord Hoffman has since revisited the question of attribution of knowledge, sitting in the Privy Council in *Lebon v Aqua Salt Co Ltd* in which he said :<sup>47</sup>

[22] A corporate body can have knowledge only by the attribution of the knowledge of a natural person. The principles upon which one decides whose knowledge should count as the knowledge of a corporate body were discussed by the Privy Council in *Meridian Funds Management Asia Ltd v Securities Commission* [1995] 2 AC 500, [1995] 3 All ER 918, [1995] 2 BCLC 116. The Board said at p 507 that if a given rule of substantive law (such as the rule that a purchaser of land who knows of a prior sale will not take free of the rights of the first purchaser) applies to a company, the question of whose knowledge counts as that of the company will depend upon the interpretation and purpose of the substantive rule:

‘given that [the substantive rule] was intended to apply to a company, how was it intended to apply? Whose act (or knowledge, or state of mind) was for this purpose intended to count as the act etc of the company? One finds the answer to this question by applying the usual canons of interpretation, taking into account the language of the rule (if it is a statute) and its content and policy... [The rule of attribution is a matter of interpretation or construction of the relevant substantive rule ...’

[144] Lord Hoffman also referred to *El Ajou* as an earlier example of the application of the principles set out in *Meridian*, and referred to a more recent example in *Jafari-Fini v Skillglass Ltd* and cited the dictum of Moore-Bick LJ:<sup>48</sup>

[98] In the present case it is unnecessary to consider the position of anyone other than Mr Webster. The obligation to disclose information ‘which comes to the attention of the Borrower’ must, I think, extend to information held by the board of directors as a whole since the board represents the company at the highest level. The question in the present case is whether information which comes to the attention of one director, but

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<sup>46</sup> *El Ajou v Dollar Land plc*, above n 44.

<sup>47</sup> *Lebon v Aqua Salt Co Ltd*, above n 45.

<sup>48</sup> *Jafari-Fini v Skillglass Ltd* [2007] EWCA Civ 261 at [98].

which he has not shared with the rest of the board, is to be treated as information in the possession of the company. In *MAN v Freightliner* I expressed the view that where the board of directors is properly to be regarded as the directing mind and will of the company in relation to a particular transaction the knowledge of each is to be attributed to the company. That case, however, was concerned with the liability of the company for a false statement made in a written contract which the board as a whole had resolved that the company should enter into. The present case differs inasmuch as it is concerned with the acquisition by the company of information, but there are nonetheless certain similarities arising from the fact that the members of the board can generally be regarded as collectively representing the company. In general, therefore, I think that information relevant to the company's affairs that comes into the possession of one director, however that may occur, can properly be regarded as information in the possession of the company itself. In my view that presumption informs the present contract and points to the conclusion that information in the possession of Mr Webster relating to the bribe is to be regarded as information in the possession of PAL itself. That remains the case even if Mr Jafari-Fini can properly be regarded as representing the company in relation to other aspects of the transaction, as to which it is unnecessary to express any view.

[145] This area of the law is not without some controversy. A leading academic, Professor Peter Watts, has written extensively in this area.<sup>49</sup> He has referred to an early leading case, *Marseilles Extension Railway*, where Mellish LJ did not accept that a company necessarily had notice of everything within the knowledge of a common director of two companies, where knowledge was acquired as director of the other company.<sup>50</sup> Further, Professor Watts has questioned the “alter ego” doctrine as it applies to attributing knowledge and acts to a corporation and considers that the term alter ego should be taken simply to refer to an agent with comprehensive authority.<sup>51</sup>

[146] Whether or not the terms “alter ego” and “directing mind and will” are the best means of describing the basis for attribution of knowledge, they are useful shorthand for a director with such authority over the company that his or her knowledge should be imputed automatically to the company in question in respect of a transaction.

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<sup>49</sup> See, for example, Peter Watts, “Imputed Knowledge in Agency Law – Knowledge Acquired Outside Mandate” [2005] NZ Law Review 307.

<sup>50</sup> *Marseilles Extension Railway* (1871) LR 7 Ch App 161 at 168, cited by Watts at 330.

<sup>51</sup> Peter Watts *Imputed Knowledge and Restitutionary Claims – Rationales and Rationes* in Simone Degeling & James Edelman (eds) *Unjust Enrichment in Commercial Law* (Thomson Reuters, Sydney 2008) 429 at 444, and Peter Watts “The Company’s Alter Ego – An Imposter in Private Law” (2000) 116 LQR 225.

[147] The principles that can be drawn from these authorities, as applicable to the present case are:

- (a) There is a general presumption that the knowledge of a common director, gained from one company, should be imputed to the other company for the purposes of a particular transaction, at least where the director has comprehensive authority with respect to that transaction.
- (b) The knowledge of a common director, obtained through one company may also be attributed to the other, for transactions subject to a particular substantive rule where that is required on a proper construction of the rule.

[148] Applying these principles to the present case, I find that the Groves brothers were not the directing mind and will of RBI, nor did they have comprehensive authority for it with respect to the arranging of freight for TSSN or the receipt of payment from it. Although the liquidators put up several matters which they say show that the Groves brothers had greater involvement in RBI's affairs than merely attendance at board meetings, I do not find any of them of a quality to justify a finding of the requisite authority to constitute them agents of RBI for the purpose of these transactions. I accept the RBI submission that in this respect Mr Brunton is the person best identified as the directing mind and will of RBI.

[149] I turn, therefore, to consider whether the knowledge of the Groves brothers (which I accept was sufficient for knowledge or suspicion of insolvency) should be the subject of special attribution having regard to the purposes of the voidable transaction regime. As was made clear in *Meridian*, it is a question of construction whether the substantive rule requires the Groves brothers' knowledge to be attributed to RBI.

[150] I accept the liquidators' submission that the voidable transaction regime is restitutionary in character. Its purpose is to recover payments in order to ensure fairness between creditors *inter se*.<sup>52</sup>

[68] ... the objective and effect of the voidable preference regime is not to do justice or achieve fairness between a particular creditor and the debtor company. As counsel put it, the objective is to achieve fairness amongst all creditors *inter se*.

...

[70] The respondents argue that it would be inequitable for the insolvent company to be able to retain the benefit of the goods or services [supplied to it] as well as to recover what it paid for those goods or services. We do not accept that proposition. The very purpose of the voidable preference regime is to claw back payments made by insolvent companies in the two year period prior to liquidation for the benefit of all creditors. All creditors (other than purely voluntary ones) will have provided value to the company prior to the liquidation ...

[151] The function of s 296(3) of the Act is to ensure that the regime will not result in injustice to those who receive property from a company on the verge of insolvency where they do so in good faith and for value, and do not suspect, and have no reason to suspect, that the company is insolvent.

[152] I consider that the substantive rule, namely the exception to the voidable preference regime, requires that the knowledge of non-executive directors (such as the Groves brothers) be presumptively imputed to companies (such as RBI) in order to achieve the statutory purpose of achieving fairness between the creditors *inter se*.

[153] This question has to be considered in context. RBI is a small company. It held board meetings irregularly (only four from 16 October 2008 to 10 November 2010). There appears to have been sporadic telephone communications between directors but otherwise the contact with the Groves brothers was on an *ad hoc* basis about occasional tasks that RBI's board asked them to undertake. None of these tasks related to RBI's day to day operations. TSSN's contact with RBI over freight services was purely of an operational nature, in which TSSN was the customer and Mr Brunton oversaw RBI's participation.

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<sup>52</sup> *Farrell v Fences & Kerbs Ltd*, above n 43.

[154] It has been held in several cases that information will be imputed to a company where the director is under a duty to communicate that information to his or her principal.<sup>53</sup> This approach has been taken in Australia in cases involving fraud, breach of fiduciary duty or wrongful deprivation of assets.<sup>54</sup> It is helpful, although not determinative, to identify whether the Groves brothers owed a duty to communicate information about TSSN's insolvency to the board of RBI.

[155] I consider that the Groves brothers had a duty to communicate to the board of RBI the perilous nature of TSSN's finances, given that they knew it was possible that TSSN was insolvent, or would be insolvent within two years following the transactions. They knew RBI was at risk of having its payments taken back under the voidable preference regime and, given that TSSN's exports comprised a significant amount of RBI's business, TSSN's financial state was materially relevant to RBI's day-to-day running and future strategy. The fact that RBI's board asked the Groves brothers to resign after TSSN's insolvency came to light is further evidence that the other board members expected them to pass this material information on to the rest of the board.

[156] Further, I regard the statutory requirement for suspicion (rather than knowledge) of insolvency, and the requirement for that suspicion to be determined objectively, as further indicators that the substantive rule requires that the Groves brothers' knowledge be presumptively attributed to RBI, whether or not they had a specific duty to communicate that knowledge.

[157] There are no extenuating circumstances to displace that presumption in this particular case. I therefore find that while the Groves brothers were not the directing mind and will of RBI their knowledge of TSSN's finances should nevertheless be attributed to RBI because the wording of s 269(3) indicates the company claiming the benefit of the statutory defence must be innocent of both actual and perceived knowledge as to the other company's insolvency.

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<sup>53</sup> See, for example *Re David Payne & Co Ltd* [1904] 2 Ch 608 at 616; *Re Hampshire Land Co* [1896] 2 Ch 743 at 748; *El Ajou v Dollar Land plc*, above n 44 at 698.

<sup>54</sup> *Spedley Securities Ltd v Greater Pacific Investments Pty Ltd* (1992) 7 ACSR 155 at 174; *ZBB (Australia) Ltd v Allen* (1991) 4 ACSR 495 at 506-507; *Farrow Finance Co Ltd v Farrow Properties Pty Ltd* (1998) 26 ACSR 554 at 587.

*Suspicion and reason to suspect*

[158] Although I do not need to go any further, given the finding I have just made, for the sake of completeness I will address some key points in relation to RBI's need to show that it did not suspect, and did not have any reason to suspect TSSN's insolvency. This largely turns on the conflict in evidence between Mr P Groves and the one hand and various witnesses for RBI on the other.

[159] Mr P Groves contended that he (and also his brother) had told RBI's other directors and management about TSSN's financial difficulties, and had referred to the steps that it was taking with Touchstone, and the formation of SSN, to work its way out of those difficulties. He says that this was largely in conversation with Mr Brunton, starting as early as about March 2009, but was also the subject of discussion at meetings at RBI's premises either when he attended directors' meetings, or when TSSN used RBI's premises for its (TSSN's) own meetings. He was unable to be specific as to date or even the detail of any conversations, but claimed that there was supporting evidence in the dates that RBI held its directors' meeting and in email correspondence showing that there was a meeting planned between TSSN and Touchstone in February 2010 at RBI's premises. He also said that his recall could be supported by evidence of meetings with growers in May 2009, in particularly an email sent by one grower, a Mr Lye, to TSSN after a meeting on 21 May 2009. In support of his contention that RBI was told of the restructuring, he refers to the email correspondence between Mr Jeffrey and Mr E Groves following RBI's board meeting on 27 April 2010.

[160] Mr Brunton emphatically denied that he was told of TSSN's financial difficulties. He refuted Mr P Groves' suggestion that there was a close working relationship between the two parties (other than the process of putting freight orders together), and said that there was no need for RBI to know of TSSN's business otherwise, and nothing was put to him which raised any concerns. He said specifically that he was not informed of the steps that TSSN was taking with ASB and Touchstone. He agreed that TSSN occasionally used RBI's premises for meetings (whilst in the Auckland area) but said that there was no discussion about the purpose of those meetings (it was TSSN's business). He disputed Mr Groves'

suggestion that there was a discussion between TSSN and RBI about arranging orders to get payment in from TSSN's best customers first, so as to allow RBI to be paid in preference to other creditors. This evidence was supported by Mr Jeffrey (an experienced company director) who accepted that Mr E Groves had made a passing reference to some restructuring at TSSN around the time on the board meeting of 27 April 2010. That led to his email to Mr E Groves the following day but he was nevertheless entirely comfortable with the answer that the restructuring did not in any way affect RBI.

[161] Mr Findlay, operations manager for TSSN, said that there was no specific scheduling of orders to allow RBI to be paid, and that the schedule was put together by TSSN itself. He also said that Mr P Groves instructed him not to inform suppliers about the change to SSN, and they were not informed until sometime later (by Mr Gally). There is further support for RBI's position in the evidence of Mr E Groves who said that he had discussions with his brother to the effect that there was no need to raise TSSN's financial position with RBI. He says he did not do so, as evidenced by the terms of his email to Mr Jeffrey. He said, in essence, that TSSN's operation was run entirely separate from RBI (evidence that is consistent with that of Mr Brunton).

[162] Having heard the witnesses, under cross-examination, I accept the evidence of the witnesses for RBI on this point, in particular the evidence of Mr Brunton, Mr Jeffrey and Mr Findlay. Mr Brunton referred to the strict payment regime that RBI applied with its customers as being an essential element of RBI's business model. That is entirely understandable. It had to meet obligations to the airlines (through ICE), and the importance of this payment regime was even greater given that TSSN's business was seasonal, with a rapid build up of business requiring large payments over a couple months.

[163] Mr Brunton said, and I accept, that RBI was given no reason to question TSSN's position, and the regular payments were merely in accordance with the standing arrangement. He said that he would not have booked freight, and had RBI incur obligations in relation to the bookings, if he had any doubt about RBI's ability to make a valid payment. The pattern of business during 2009 and 2010 (that is,

submission of the freight that TSSN required in the form of the shipping schedule, the booking of the freight coupled with invoicing as part of the issue of the airline's waybill, and receipt of payment in accordance with the arrangements) was consistent with previous seasons. There was the one off shipment in March 2010 (which has not been explained by TSSN but was a very small shipment and could well have been for samples) that was paid 13 days later than the due date, but I do not see that as enough to raise any suspicion. I do see the position changing, however, with late payment of the invoices from 31 October 2010 onwards. However, that cannot amount to reason to suspect insolvency in respect of the earlier payments.

[164] Counsel for the liquidators pointed to the change of invoicing in September 2010 as raising objective reason to suspect. However, this was no more than dropping the word "The" from the front of the name. Minutes of RBI's directors' meetings prior to that time (at least two of which were prepared by one or other of the Groves brothers) referred to TSSN by the abbreviation "SSN", indicating that little significance was placed on the word "The" in TSSN's name.

[165] Counsel for the liquidators also submitted that greater weight should be put on the evidence of Mr P Groves because his evidence was "against his interest". He was critical of evidence of the RBI witnesses, pointing to a finding in a previous case (an application by Mr E Groves for approval to be a director of SSN, given that it was a phoenix company) that Mr E Groves was an unreliable witness, and arguably inconsistent positions by TSSN's financial advisor Mr Gally and accountant Mr Darney between the evidence given in this Court and what was put to outside parties over the relevant period. There is some merit to this criticism, but not enough, in my view, to call into question the clear evidence of RBI's directors (other than the Groves brothers), supported by the largely unchallenged evidence of Mr Findlay. The inconsistencies raised by counsel for the liquidators are reconcilable if one accepts, as I do, that there was optimism within TSSN (however misplaced) that it could work its way through these difficulties.

[166] I have already addressed, and rejected, the contention that there is evidence of suspicion in telephone calls made by Mr Brunton to TSSN seeking payment of invoices. As I have said, that was prudent business, ahead of the scheduled payment

date. RBI continued to deal with the same people at SSN to do the same work for it, and to ship to the same overseas markets, under the same trading arrangements that had applied for several seasons. If RBI had any concern it is not credible that there would have been no mention at all of that concern in the minutes of its directors' meetings (those on 10 August 2009 and 27 April 2010 in particular).

[167] I am not persuaded by the submission that Mr P Groves' evidence is to be preferred because it was against his interest. I accept the submission of counsel for RBI that it could well be in his interest because the liquidators might not need to pursue a claim against him if they succeeded against creditors, and his co-operation could lead to the liquidators treating him favourably if they choose to pursue a claim against the Groves brothers in respect of the dividend paid for the 2008 year. Mr P Groves was unable to provide any detail of the occasions of the alleged discussions, or of the discussions themselves. I do not find that altogether surprising, as there was a lot happening within TSSN at the relevant times, but it indicates that his evidence is an attempt at reconstruction from the occasional document rather than direct recall. I regard the documents on which he relies as equivocal at best.

[168] The conclusion I reach is that RBI did not suspect, and a reasonable person in RBI's position would not have suspected, that TSSN was having financial difficulties which could rise to the payments being recoverable. I accept that if there was any such suspicion, RBI would have changed its trading pattern with TSSN.

*In good faith*

[169] It follows from the views I have expressed on the question of whether RBI had reason to suspect insolvency, that I also accept that RBI received the payments in good faith (again, leaving aside the finding I have already made as to attribution of the knowledge of the Groves brothers to RBI).

*Giving of value/alteration of position.*

[170] It is not necessary for me to make a finding on this given my finding on attribution of the knowledge of the Groves brothers to RBI. However, if RBI's defence was to turn on this point, I would accept that value was given (in terms of

continuing supply) and RBI altered its position by incurring liability to ICE/airlines. As I have already said I accept the evidence of Mr Brunton that RBI would not have continued to book freight for TSSN on the same terms had it any concerns that the payments it was to receive from TSSN would be recoverable due to insolvency.

### *Conclusion*

[171] For the above reasons, I find that RBI has not established an entitlement to the statutory defence in s 296(3), due to the fact that the knowledge of the Groves brothers is to be attributed to it. A reasonable person with that knowledge would have had reason to suspect TSSN's insolvency.

### **What orders should be made?**

[172] I have found that the payment made on 13 May 2010, and the payments after 5 November 2010 are insolvent transactions. I see no reason not to make an order under s 295 of the Act for RBI to repay those amounts, totalling \$9,623.29.

### **Decision**

[173] The liquidators have to establish that the payments that it seeks to recover from RBI were made when TSSN were unable to pay its due debts, and that the payments resulted in RBI receiving more than it would in the liquidation. It was for RBI to establish that it had a continuing business relationship with TSSN at the time of the payments and, if it did, it was again for the liquidators to show that the single transaction deemed by s 292(4B) gave RBI more than in the liquidation. In the event of a finding that one or more of the payments was an insolvent transaction, it was for RBI to establish that it was entitled to the statutory defence under s 296(3).

[174] For the reasons I have given, I find that:

- (a) TSSN was able to pay its due debts for the majority of 2009. TSSN was unable to pay its due debts from sometime in December 2009.

- (b) RBI received more by the payments made from January 2010 onwards than it was likely to receive in the liquidation, save for payments made in the course of the continuing business relationship.
- (c) There was a continuing business relationship between TSSN and RBI from the time that TSSN first engaged RBI to arrange freight for the 2010 season (that was prior to 9 June 2010) and in respect of invoices issued and payments made for that season, up to and including the date of the last payment that was made in accordance with the payment arrangements in place between the parties, mainly 5 November 2010.
- (d) Transactions 8 and 16 to 20 (as numbered at [35] above) are insolvent transactions. Transactions 1 to 7 and 9 to 15 are not insolvent transactions.
- (e) RBI is not entitled to the benefit of the exemption in s 296(3) in respect of the insolvent transactions that I have found, as the knowledge of the common directors, Mr P Groves and Mr E Groves, is to be attributed to it, and that knowledge is sufficient to raise suspicion of insolvency.
- (f) An order for repayment of the insolvent transactions is appropriate.

[175] I make an order that RBI pay the liquidator \$9623.29 together with interest on that sum all the takes prescribed by the Judicature Act 1908 from date of receipt of the component payments up until date of repayment.

[176] Neither party addressed me in the hearing in relation to costs. Both parties have succeeded to some extent. The liquidators established that TSSN was unable to pay its due debts, but only in respect of transactions in the second half of the specified period. RBI succeeded in establishing that there was a continuing business relationship, and I found against the liquidators on the application in New Zealand of the rule of peak indebtedness. On the other hand RBI did not succeed in establishing

its entitlement to the s 296(3) exemption. Weighing all of these factors, I consider that there should be no order as to costs (so that each party is to bear their or its own costs).

A handwritten signature in black ink, appearing to read 'D. Abbott', written over a horizontal line.

Associate Judge Abbott