IN THE HIGH COURTOF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2014-404-2586
[2015] NZHC 1958

UNDER	the Companies Act 1993
IN THE MATTER	of the liquidation of Sprayman & Auckland Door Finishers Limited (in liquidation)
BETWEEN	DAMIEN GRANT AND STEVEN KHOV AS LIQUIDATORS OF SPRAYMAN & AUCKLAND DOOR FINISHERS LIMITED (IN LIQUIDATION) Plaintiffs
AND	DAVID BRETT MCKENZIE Defendant

Hearing: 16 and 17 March 2015

Appearances: B J Norling for the Plaintiffs
D Mitchell for the Defendant

Judgment: 18 August 2015

JUDGMENT OF WOODHOUSE J

This judgment was delivered by me on 18 August 2015 at 4:00 p.m. pursuant to r 11.5 of the High Court Rules 1985.

Registrar/Deputy Registrar

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Solicitors:
Mr B J Norling, Waterstone Insolvency, Auckland
Mr D Mitchell, Solicitor, Auckland

[1] The plaintiffs are liquidators of Sprayman & Auckland Door Finishers Limited (Sprayman). They have applied under the Companies Act 1993 (the Act) for orders setting aside a payment of $36,000 by the company to the defendant, Mr McKenzie, on the grounds that it is a voidable insolvent transaction.[1]

[2] The payment was made following settlement of a claim by Mr McKenzie for bonuses he said had become due to him in his employment as a sales representative of Sprayman. The payment was made in instalments between 4 November 2013 and 11 February 2014. The company was placed in liquidation on a shareholders' resolution of 25 February 2014.

[3] Mr McKenzie accepts that the payment to him is an "insolvent transaction" as defined in the Act because of the presumption in s 292(4A). The payments in question were made within a period of six months before the commencement of the liquidation. It is a presumption of insolvency which may be rebutted, but Mr McKenzie chose not to seek to rebut the presumption.

[4] Mr McKenzie contends that an order for repayment of the $36,000 should not be made. He relies on s 296(3) of the Act which provides:

> A court must not order the recovery of property of a company (or its equivalent value) by a liquidator, whether under this Act, any other enactment, or in law or in equity, if the person from whom recovery is sought (A) proves that when A received the property—
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> (a) A acted in good faith; and
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> (b) A reasonable person in A's position would not have suspected, and A did not have reasonable grounds for suspecting, that the company was, or would become, insolvent; and
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> (c) A gave value for the property or altered A's position in the reasonably held belief that the transfer of the property to A was valid and would not be set aside.

The evidence and the facts

[5] Mr McKenzie was employed by Sprayman as a sales representative and estimator. His qualifications for this job appear to be that he was a cabinet maker by

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1 Companies Act 1993, ss 292.

trade. He started in October 2008, on an annual gross salary of $46,800. The employment contract provided, in respect of "other benefits":

> A bonus system will operate and will be paid monthly in arrears and will be based on sales made and collected. The bonus will be based on 2.5% of net sales and will kick in after the monthly threshold of $60k has been achieved.

[6] Mr McKenzie stopped working for Sprayman in or about May 2013. He said that during his employment he sought payment of the bonus, but was not paid. He said "every time I brought it up, heavy discussion ensued" and he was "fobbed off". His evidence on this point was not challenged by the two witnesses for Sprayman, Mr Stephen Howe and Mrs Wendy Howe. Mr Howe was the sole director of Sprayman and Mr and Mrs Howe owned all the shares. Mrs Howe also appears to have been involved in the running of the company with her husband.

[7] Mr McKenzie said that he decided not to make an issue of the bonus payment during his employment. The way he put it in his affidavit was:

> … As this period occurred during the recession, and I was recently divorced, I did not wish to push the subject as I really needed to keep my job and did not want to aggravate my employment relationship.

[8] He expanded on this in cross-examination by Mr Norling on behalf of the liquidators. I accept Mr McKenzie's evidence.

[9] The time at which the three elements of s 296(3) are to be assessed is when Mr McKenzie entered into the settlement agreement and was paid. But knowledge of the financial state of Sprayman before that could be relevant to Mr McKenzie's knowledge at the time. The plaintiffs sought to establish that Mr McKenzie did have relevant knowledge during his employment to demonstrate that he cannot meet the onus he has under s 296(3).

[10] It was put to Mr McKenzie in cross-examination that, during his employment, he would have been aware of details of Sprayman's profit and loss and balance sheet. I accept Mr McKenzie's evidence that the only financial information provided to him concerned sales and related details required for the purpose of his effecting sales, such as costings for individual items, and to know whether targets

were being achieved. It was put to Mr McKenzie that he must have had more detailed knowledge than he was acknowledging because his formal job designation was "national sales manager". A supplementary affidavit was put in for the liquidator to establish the point. Nothing turns on this. It was a title without substance. It is clear from Mr McKenzie's evidence that this was a designation designed to give him an appearance of elevated status in his dealings with customers. Mr McKenzie's unchallenged evidence was that the sales of Sprayman were confined to Auckland and he was the only salesman for Sprayman.

[11] Mr McKenzie's evidence, in respect of the period of his employment, was to the effect that, as far as he was aware, the business expanded substantially and successfully between 2008 and 2013. He provided particulars. He said that, when he started, Sprayman had one factory in a complex of three and annual turnover of $350,000. He said that in the five years he was there the business had built up from 6 to 18 employees, had expanded into all three factory spaces, and the annual turnover had increased to over $2 million. He said turnover to staff ratios increased dramatically. He said that the financial information had been provided to him by Mrs Howe. Mrs Howe said she never told Mr McKenzie that the company had a turnover of $2 million. Mr McKenzie may be wrong in his recollection and Mrs Howe was not cross-examined. I do not have to resolve this. If Mr McKenzie was wrong in his recollection, this does not alter the conclusion I draw from other evidence. Some of this is noted in the next paragraph.

[12] Mr McKenzie was cross-examined on these matters, and other information he put forward justifying his proposition that the company was financially successful as far as he was aware. I accept his evidence as to his understanding of the company's financial circumstances. This is actually supported by profit and loss statements put in evidence through an affidavit from Mr Howe. These were produced to establish that the company had never had a turnover of $2 million, with the highest turnover being $1.07 million in the year to March 2013. However, the statements that were put in evidence, for three years only, establish that over the last two years or so of Mr McKenzie's employment turnover (sales) increased from approximately $880,000 for the year to March 2012 to $1,070,000 for the year to March 2013. Sales in the full year to March 2014 were essentially unchanged at $1,057,420.

[13] Mr McKenzie said. in a letter in response to the liquidators' initial claim, that when he started at Sprayman in October 2008 his initial "goal" was to obtain one kitchen renovation per week. It is apparent, from the context, that "goal" was what Mr McKenzie was required to achieve. He referred to the expansion of Sprayman's premises in 2013 and said that he was then required to sell six kitchens per week. This also appears to be reflected in the profit and loss statements. Different types of sale are itemised. There is one item, "EP Acry. Kitchens". The sales for the years ending March 2012, 2013 and 2014 were, respectively, and in round figures: $208,200, $433,900, and $537,300.

[14] Mr Norling, for the plaintiffs, referred Mr McKenzie to the bottom line in the three profit and loss statements. In the three years the rounded figures are a loss of $8,400, a profit of $320, and a loss of $88,800. Those figures would be relevant to the matters I have to decide if there was evidence that Mr McKenzie was provided with them. But there is no evidence that he was provided with any of this information during his employment. This continued after he resigned and notwithstanding he was advancing a claim for a bonus based on sales. Mr McKenzie engaged an employment advocate, Mr David Spalter, to act for him in the bonus claim. The evidence from Mr Spalter, as well as from Mr McKenzie, is that, in the period of the negotiations, over approximately six months, very little financial information about Sprayman was provided to him and Mr McKenzie notwithstanding requests for such information to advance the claim. Mr Spalter's evidence was that the only financial documents provided were a limited number of GST returns.

[15] The plaintiffs referred to evidence from Mr Howe that Sprayman "heavily relied on external funding to stay current with its creditors". This funding came through Mr Howe's shareholder's current account, loans from his other business, J T Management Limited, and his family trust.

[16] Mr Howe said that in about May 2013 it was decided that J T Management Limited would not provide any further loans to the company. Mr Howe said that Mr McKenzie was informed about this "and its negative implications on [Sprayman's] cashflow."

[17] Mr Howe produced balance sheets recording some of the details for his shareholder's account and loans from his other business and the family trust. These were not for the whole of the period of Mr McKenzie's employment but, as with the profit and loss statements, only for the years ending 31 March 2012, 2013 and 2014. There is no evidence that the copies of balance sheets were ever provided to Mr McKenzie. And in some respects the balance sheets support Mr McKenzie. The balance sheet for the March 2012 year does record that Mr Howe's current account was in credit in the sum of $535,905, but there was in fact no "external funding" from J T Management Ltd or the family trust. At 31 March 2013, there were loans from J T Management Ltd and the family trust totalling $105,805. However, at 31 March 2014 the loans from J T Management Ltd and the trust had been reduced to $18,878. In other words, in the year up to liquidation, the two shareholder related parties were repaid a total of $86,927. In addition, at 31 March 2014, the amount recorded as owing to Mr Howe in the shareholder current account had been reduced to $466,039. The total reduction in the shareholder account was $69,866 from 31 March 2012 to 31 March 2014. Of that, $40,610 was repaid in the year up to liquidation.

[18] Although the plaintiffs placed emphasis on this evidence from Mr Howe, the questioning of Mr McKenzie was limited. The only material answer he provided was that he thought that Mr Howe told him from time to time that he put money into the company. Mr McKenzie said: "You just assumed that once the bills came in he would take the money back out again." That answer was not further probed.

Following Mr McKenzie's resignation

[19] Following his resignation Mr McKenzie claimed in excess of $150,000 for unpaid bonuses. No particulars of this claim were provided. It may be that this was an inflated claim. But for reasons I come to it is not necessary to reach any definitive conclusion as to what his contractual entitlement was.

[20] Mr Spalter's evidence was that the initial response from Mr and Mrs Howe, with whom he initially dealt over the issue, was that nothing was due. He said:

> After some months they conceded that some commission was due but supplied me with only small amounts of data to back up their claim that they felt the figure was much lower. Steve [Howe] said the company had never been profitable over the years that Mr McKenzie had worked but the commission clause was not linked to profit, just net sales. My impression was that as a professional financial controller it was unlikely Steve was running an unprofitable business for all those years.

[21] In a letter of 22 July 2013 Mr Howe, on behalf of Sprayman, offered a sum of $8,843.07 in full and final settlement. He concluded his letter as follows:

> Due to cash flow restraints and the necessity to permit the company to pay weekly wages it is proposed for [Sprayman] to pay in six instalments of $1,473.85 on a weekly basis via the payroll system.

The plaintiffs rely on that concluding statement as evidence that means that Mr McKenzie cannot meet the onus on him under s 296(3).

[22] The plaintiffs also rely on an email of 27 September 2013 from an employment consultant subsequently engaged by Sprayman, Mr Max McGowan. Mr McGowan copied to Mr Spalter part of an email Mr McGowan had received from Mr Howe. There was an offer of a total of $36,000, with $12,000 payable on signing an agreement and four payments of $6,000 over four months from 31 October 2013 to 31 January 2014. There was then the following:

> Please note the attached link below regarding instalments, quite clearly Sprayman will have to pay in instalments as it does not have the financial resource to pay in one lump sum.

Mr Spalter said that he followed the link but "it didn't go anywhere" and he could not see that it was relevant in any event.

[23] Mr McKenzie acknowledged in cross-examination that Mr Howe contended during negotiations that Sprayman could not pay in a lump sum because of alleged cash flow problems. And he said he was aware of the contention in the email from Mr McGowan to Mr Spalter about instalment payments. The essence of Mr McKenzie's evidence in relation to this was that it did not lead him to believe that Sprayman was in serious financial difficulty because he considered that it was just a negotiating tactic. Mr Spalter's evidence was to the same effect. Mr Spalter also

said that it was not unusual in employment disputes of this kind, especially with small companies, to receive payments in instalments.

[24] Mr Spalter said that, in the end, the $36,000 was accepted as a pragmatic compromise. He said that Mr McKenzie maintained that the amount should have been much higher, but could see that more resources, such as a forensic accountant, would need to be employed by him to prove that point. Mr Spalter also said that his assessment of Mr McKenzie, in the negotiations, was that he was not a person who wanted to be engaged in a protracted claim.

[25] The plaintiffs also relied on evidence from Mrs Howe that during one meeting with Mr Spalter she advised him that Sprayman could only pay by instalments. She then said: "I further advised him that if [Sprayman] was required to make a lump sum payment it would have to be placed into liquidation." Mr Spalter was questioned about this in cross-examination and said:

> … I have absolutely no recollection of the word liquidation being used by … Wendy Howe and in fact I am not even sure she was involved at that level at that point … during the discussion of instalments. I am fairly sure it was just done by correspondence. I may be wrong but my discussions with Wendy Howe revolved more around … how aggrieved she felt that … Mr McKenzie was applying for any kind of – was claiming any kind of money whatsoever, but I don't have any recollection of her ever using the word liquidation.

[26] Mrs Howe, as with Mr Howe, was not called for cross-examination. (I note in that regard that Mr McKenzie until, it seems, a few days before the hearing, was representing himself.) It is unnecessary to seek to make any finding on the question whether Mrs Howe did refer to liquidation in a discussion with Mr Spalter. This is because it is plain from Mr Spalter's evidence that if the word was mentioned it did not register with him as a matter of any consequence. And in the end the question is not what may or may not have been said to Mr Spalter but what Mr McKenzie knew and also what Mr McKenzie believed.

[27] I am satisfied that Mrs Howe's evidence about liquidation does not bear on the issues under s 296(3). The relevant enquiry is whether Mr McKenzie was told that the company was facing liquidation. There is no evidence to that effect. The

essence of his evidence, which I accept, was the following answer in cross-examination:

> … the word liquidation never came up at all in negotiations. Cash flow came up. The word cash flow came up all the time, but liquidation never came up as far as I am aware.

That evidence is consistent with Mr Spalter's evidence. Although Mrs Howe was not cross-examined, I accept Mr Spalter's evidence, and Mr Spalter's evidence that he has no recollection of this is, for that reason, consistent with Mr McKenzie's evidence.

Submissions

[28] Given the onus on Mr McKenzie, the primary submissions of Mr Mitchell on Mr McKenzie's behalf were that the matters required to be established under s 296(3) were established. The heart of this, in relation to paragraphs (a) and (b) of s 296(3) was that Mr McKenzie did not have any information indicating to him, or which should have indicated to him using the reasonable person test, that Sprayman was in serious financial difficulties at any time during his employment or, and more to the point, when the settlement was reached and he accepted the payments.

[29] Paragraph (c) of s 296(3) required proof that Mr McKenzie gave value for the payments he received, or altered his position in the reasonably held belief that the payments were valid and would not be set aside. The first alternative in paragraph (c) was said to be satisfied because the settlement resulted in Mr McKenzie's foregoing a claim for a substantially greater sum. The second was said to be established by payments he made following receipt of the money, including Mr Spalter's fee of $8,000. Mr Spalter had acted on a contingency fee basis. Proof of the necessary belief was submitted to arise from the matters traversed in respect of paragraphs (a) and (b).

[30] For the liquidators, Mr Norling submitted that the evidence of knowledge Mr McKenzie had, both during his employment and in the settlement negotiations, meant that he failed to satisfy the first and second limbs of subsection (3). As to the third limb, Mr Norling submitted that the compromise of the employment claim did

not provide any value to the company and that the evidence of payments made by Mr McKenzie did not come close to establishing a relevant alteration of position.

Did Mr McKenzie act in good faith? : Section 296(3)(a)

[31] The first limb of the defence requires Mr McKenzie to establish, on the balance of probabilities, that when he received the payments he acted in good faith. This is a subjective test.

[32] In *Levin v Market Square Trust* the Court of Appeal said:[2]

> [54] … The test of "good faith" has been clearly established by this court. The recipient of the property or money must show that he or she honestly believed that the transaction would not involve any element of undue preference either to himself or herself or to any guarantor.[3] The cases show that a creditor is likely to fail this test where he or she has actual or implied knowledge of the company's financial difficulties, due to the company's cheques being dishonoured, its failure to pay its debts on time, or other circumstances indicating *serious* cash-flow problems.[4]
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> [Emphasis added].

[33] As the Court's statement makes clear, the test is what is recorded in the second sentence. The third sentence simply notes circumstances, by way of illustration. The Court was not providing some form of rigid checklist which, if met, means the creditor *must* fail. The need for assessment by reference to all relevant circumstances, and a degree of caution before drawing inferences adverse to the creditor, may be seen in a subsequent Court of Appeal decision in *Madsen-Ries v Rapid Construction Ltd*.[5]

[34] In *Madsen-Ries v Rapid Construction Ltd* the Court dismissed an appeal against a decision of this Court upholding a defence under s 296(3). In doing so the Court applied the test as stated in *Levin v Market Square Trust*, and the earlier cases. But the Court noted that "an awareness of financial difficulty … is not necessarily

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2 *Levin v Market Square Trust* [2007] NZCA 135; [2007] 3 NZLR 591 at [54].

3 *Re Orbit Electronics Auckland Limited (in liquidation), W H Jones & Co (London) Limited v Rea* (1989) 4 NZCLC 65,170, approved in *Re Number One Men Limited (in liquidation), Meltzer v Axiom International Limited* (2001) 9 NZCLC 262,671.

4 *Howes and others* Brookers Company and Securities Law (looseleaf ed) at [CA296.03(1)].

5 *Madsen-Ries v Rapid Construction Ltd* [2013] NZCA 489.

enough to establish a lack of good faith".[6] The Court returned to this point, in relation to matters of principle, when it said:

> [17] In *Sandell v Porter* ... the High Court of Australia drew a distinction between knowledge of liquidity issues and knowledge of insolvency, stating:[7]
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> > "Insolvency is expressed in s 95 as an inability to pay debts as they fall due out of the debtor's own money. 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, 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."

[35] The Court of Appeal expressly endorsed the distinction drawn by the High Court of Australia as applicable to an assessment of good faith under s 296(3). It then discussed that distinction in relation to the facts of the case before it. In that case the creditor knew that the debtor was experiencing cash flow difficulties following a fire in August 2009. The creditor company agreed to continue trading with the debtor company and help it to re-establish its business. The director of the creditor company said he assumed the debtor's liquidity problems were temporary. The arrangement, involving off-setting of amounts owed by one company to the other, continued over a period of more than two years at the end of which there was a cheque swap at a time when the debtor was in a state of insolvency. Following liquidation, the liquidators gave notice setting aside the payment, in the cheque swap, of the full amount of the debt owed to the creditor.

[36] The Court of Appeal's statement earlier cited from *Levin v Market Square Trust* refers to the creditor's "actual or implied knowledge". The Court in that case was applying s 296(3) before it was amended by s 31 of the Companies Amendment Act 2006. The former subsection did not have a provision similar to paragraph (b),

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6 *Madsen-Ries v Rapid Construction Ltd*, above n 5, at [11].
7 *Sandell v Porter* (1966) 115 CLR 666 at 670.

which is an objective test.[8] In my opinion, questions of implied knowledge are now appropriately assessed when considering the second limb of the test under paragraph (b).

[37] The enquiry under paragraph (a) is therefore confined to the creditor's subjective belief. In this case, for the purpose of determining whether Mr McKenzie established that he acted in good faith, I had the benefit of assessing his responses under cross-examination. I am satisfied that he did settle his claim and accept the payments in good faith. Assessed by reference to the test, I am satisfied to the necessary standard that Mr McKenzie honestly believed that the payments to him would not involve any preference to him over other creditors of Sprayman. That, of course, is a test expressed in legal terms. In terms related more directly to the evidence in this case and to Mr McKenzie, I am satisfied to the necessary standard that Mr McKenzie, when he received the payments, honestly believed that Sprayman was not facing any serious financial difficulty, let alone that it was insolvent or close to insolvency, and that the business was continuing to operate successfully as he had understood it to have operated when he was there. In terms of what Mr Spalter actually believed the position to be, as opposed to the objective assessment under paragraph (b), I earlier recorded my findings of fact relating to the period of Mr McKenzie's employment, and the information he received after he resigned, and through to the settlement of his claim. My findings in that regard are all consistent with a conclusion that Mr McKenzie acted in good faith through to receipt of the final payment.

The objective test: Section 296(3)(b)

[38] Mr McKenzie must establish that a reasonable person in his position would not have suspected, and he did not have reasonable grounds for suspecting, that Sprayman was, or would become, insolvent.

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[8] Section 296(3), before the 2006 amendment, provided that recovery by the liquidator could be denied if, "(a) the person from whom recovery is sought received the property in good faith and has altered his or her position in the reasonably held belief that the transfer to that person was validly made and would not be set aside; and (b) in the opinion of the Court, it is inequitable to order recovery or recovery in full." The amendments, and the policy decisions behind them, are discussed in considerable detail by the Supreme Court in *Allied Concrete Limited v Meltzer* [2015] NZSC 7 at [40-53].

[39] The following statement of Kitto J in *Queensland Bacon Pty Ltd v Rees* has been accepted in numbers of New Zealand decisions as authoritative:[9]

> A suspicion that something exists is more than a mere idle wondering whether it exists or not; it is a positive feeling of apprehension or mistrust, amounting to "a slight opinion, but without sufficient evidence" as Chambers' Dictionary expresses it. Consequently a reason to suspect a fact exists is more than a reason to consider or look into the possibility of its existence. The notion which "reason to suspect" expresses ... is, I think, of something which in all the circumstances would create in the mind of a reasonable person in the position of the payee an actual apprehension or fear that the situation of the payer is in actual fact that which the subsection describes - a mistrust of the payer's ability to pay his debts as they become due and of the effect which acceptance of the payment would have as between the payee and the other creditors. ...

[40] In *Trans Otway Ltd v Shepherd* the Supreme Court cited that statement with approval.[10] The Court then said that Hodgson J conveniently summarised the position in *Hamilton v Commonwealth Bank of Australia* in the following statement:[11]

> I accept that *Queensland Bacon* shows that it is insufficient that the circumstances give a reason to suspect the debtor *might* be insolvent: they must be such that the creditor should have suspected that the debtor *was* insolvent …

[41] In *Madsen-Ries v Rapid Construction Ltd* the Court of Appeal approved the following statement of Associate Judge Abbott in this Court as aptly summarising the law under s 296(3)(b):[12]

> The Courts do not look for any single factor but rather judge the matters on the basis of the contemporary knowledge of the recipient, including potentially countervailing factors, which tended to dispel suspicion at the time. While cash-flow problems can raise a suspicion of insolvency they must be viewed in context; apparent cash-flow problems may be explained simply by a habit of delay in payment. Thus, a temporary lack of liquidity is generally insufficient for a conclusion of insolvency. When approaching the question of suspicion, it is important to apply commercial reality, derived from the particular industry, to the facts of the case.[13]

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9 *Queensland Bacon Pty Ltd v Rees* (1966) 115 CLR 266 at 303.
10 *Trans Otway Ltd v Shepherd* [2005] NZSC 76, [2006] 2 NZLR 289 at [21].
11 *Hamilton v Commonwealth Bank of Australia* (1992) 9 ACSR 90 at 113.
12 *Madsen-Ries v Rapid Construction Ltd*, above n 5, at [20].
13 *Meltzer v Allied Concrete Ltd* [2013] NZHC 977 at [13].

[42] Paragraph (b) contains the objective test. It is to be assessed by reference to a person in Mr McKenzie's position. In consequence, regard must be had to all of the information available to him, including the information he obtained during his employment. Given my findings of fact as to the extent of Mr McKenzie's knowledge of the financial performance of the company, during his employment, I am satisfied that a reasonable person in Mr McKenzie's position would not have suspected that Sprayman was, or would become, insolvent. I am also satisfied that Mr McKenzie himself, up to the time he left the company, did not have reasonable grounds for such suspicion. The only other evidence that bears on this is the evidence of the three matters relied on by the plaintiffs arising in the course of negotiations: the letter from Mr Howe to Mr Spalter, the email from Mr McGowan to Mr Spalter, and Mrs Howe's evidence that she told Mr Spalter that the company would go into liquidation if it had to pay a lump sum.

[43] Mrs Howe's evidence does not change the conclusion because of the finding earlier recorded: I accept Mr McKenzie's evidence that he had no knowledge of any such suggestion. It is also clear that, if the statement was made to Mr Spalter, he certainly did not pass it on to Mr McKenzie, because it did not register with Mr Spalter.

[44] My conclusion in relation to the two letters, to the essential effect that cash flow constraints required payment of the settlement by instalments, is that this would not have led a reasonable person in Mr McKenzie's position to suspect that Sprayman was insolvent or would become insolvent. And this information, in my judgment, also did not mean that Mr McKenzie had reasonable grounds for suspecting insolvency.

[45] The facts in this case, as I have found them, provide a firmer foundation for absence of the necessary suspicion than the circumstances outlined by Associate Judge Abbott in the passage cited above and approved by the Court of Appeal in *Madsen-Ries v Rapid Construction Ltd.* In this case there were in fact no instances of actual cashflow problems, such as delayed payments to creditors, or delayed payments to staff. What the plaintiffs' argument relies on is simply two assertions by Mr Howe, in the course of negotiations of an employment dispute, to seek to secure

more advantageous terms of settlement. In determining what a reasonable person would have suspected, I place some weight on Mr Spalter's evidence, which I accept, that proposals of this nature are reasonably common with small companies and, in essence, negotiating tactics which are common enough.

[46] I am satisfied that Mr McKenzie has established the second limb of s 296(3).

Value for the payment or altered position: section 296(3)(c)

[47] The third limb of the defence required Mr McKenzie to establish that he gave value for the payment of $36,000, or that he altered his position in the reasonably held belief that the payment was valid and would not be set aside.

[48] The submissions for Mr McKenzie, and the liquidators' response, were earlier summarised. The arguments for Mr McKenzie were, in essence, that he gave value by compromising his claim, and that, in the alternative, he altered his position because of various payments that were made. It appears that the submissions advanced by Mr Mitchell as to the giving of value were substantially influenced by the law as it stood before the Supreme Court's decision in *Allied Concrete Ltd v Meltzer.*[14] The reliance on the compromise of the claim as being the value provided by Mr McKenzie appears to be based on the perceived need to establish that Mr McKenzie gave value at the time. That is consistent with the decisions of the Court of Appeal resulting in the Supreme Court decision in the *Allied Concrete Ltd v Meltzer* case, but the Supreme Court concluded that value can be given by the creditor at an earlier date. In the conventional case, involving a creditor supplying goods or services, the value referred to in paragraph (c) is the provision of the goods and services, notwithstanding that the debt arising from the transaction is not paid until a later date, with that payment giving rise to the liquidators' action to set aside the payment.

[49] I am satisfied that in this case it is unnecessary for Mr McKenzie to rely on the compromise and seek to prove that, in entering into a compromise, he gave value for the instalment payments of $36,000. The evidence in this case establishes that

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[14] *Allied Concrete Ltd v Meltzer* [2015] NZSC 7.

his position is in substance no different from that of a creditor who may have earlier provided goods or services to Sprayman. Mr McKenzie, in the course of his employment over a lengthy period, provided services to Sprayman. These services were provided by him as an employee. That does not make his position different from that of an external supplier of goods or services. In principle his position is exactly the same. In a broader sense, his position is stronger given the fact that he was an employee with an entitlement to a payment he did not receive at the time he was entitled to receive it.

[50] I am also satisfied that it is not necessary to seek to determine, if the evidence was available, that Mr McKenzie's actual entitlement for overdue bonus payments was no less than $36,000. The evidence available to me establishes, on the balance of probabilities, that he was entitled to more. But the important point is that Sprayman agreed that he was entitled to $36,000. There is no evidence that Sprayman was under any form of pressure to compromise a claim with Mr McKenzie with an inflated sum. The evidence available from the negotiations suggest the opposite. In particular, there is no evidence that Mr McKenzie had any means of exerting some form of pressure. What can be added to that observation is that I do not accept that Mr Howe would have settled Mr McKenzie's claim for $36,000 if Mr Howe believed that it was a bad deal for Sprayman. There is no evidence from Mr Howe that it was a bad deal. I am satisfied that it was a good deal.

Result

[51] The plaintiffs' application is dismissed.

[52] Mr McKenzie is entitled to costs on a 2B basis. These are costs related to the steps taken in the proceeding by Mr Mitchell on Mr McKenzie's behalf. I have added that proviso on my understanding that Mr Mitchell was instructed to act on Mr McKenzie's behalf just before the hearing, with Mr McKenzie acting on his own behalf up until then. Mr McKenzie is not entitled to costs when he acted on his own behalf, but he is entitled to recover reasonable expenses he may have incurred before Mr Mitchell was instructed. If the parties are unable to agree on costs, and reasonable expenses, they are to be fixed by the Registrar. In that event a

memorandum is to be filed for the defendant within six weeks of the date of this judgment, with any response for the plaintiffs to be filed within a further two weeks.

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Woodhouse J