IN THE SUPREME COURT OF NEW ZEALAND

SC 57/2016
[2016] NZSC 107

BETWEEN	DAVID CHARLES BROWNE First Applicant	
	DAVID BROWNE CONTRACTORS LIMITED AND DAVID BROWNE MECHANICAL LIMITED Second Applicants	
AND	DAVID ROSS PETTERSON AS LIQUIDATOR OF POLYETHYLENE PIPE SYSTEMS LIMITED (IN LIQUIDATION) Respondent	

Court: William Young, Glazebrook and O'Regan JJ

Counsel: D J C Russ for Applicants
B D Gustafson for Respondent

Judgment: 16 August 2016

JUDGMENT OF THE COURT

A **The application for leave to appeal by Mr Browne is dismissed.**

B **Leave to appeal is granted to David Browne Contractors Ltd and David Browne Mechanical Ltd. The approved question is whether the orders for repayment ought to have been made against them.**

C **Costs are reserved.**

REASONS

The case

[1] The proposed appeal is against a judgment of the Court of Appeal under which:[1]

(a) a general security agreement entered into between Polyethylene Pipe Systems Ltd (PPSL) and David Browne was set-aside under s 299 of the Companies Act 1993 and Mr Browne was ordered to repay $201,316 which had been paid to him in the receivership of PPSL; and

(b) David Browne Contractors Ltd (DBCL) and David Browne Mechanical Ltd (DBML) were ordered to repay $565,303 and $347,634 respectively, which had been paid to them pursuant to transactions which had been set-aside by default under s 294 of the Act.[2]

As we are granting the companies leave to appeal, we will primarily address the application by Mr Browne.

[2] The three companies (PPSL, DBCL and DBML) were part of a group of some 20 companies operated by Mr Browne. In July, August and September 2008 PPSL entered into a series of transactions pursuant to which it paid debts it owed to Mr Browne ($340,600), DBCL ($565,303) and DBML ($347,634) and Mr Browne then re-advanced some $450,000 secured by a general security agreement (the GSA). On the approach of the Court of Appeal, the context for this restructuring was a significant claim advanced by McConnell Dowell Constructors Ltd against PPSL for which the latter company had no insurance. Rejecting the contrary conclusion reached by Associate Judge Matthews,[3] the Court of Appeal concluded that the transactions were entered into to protect Mr Browne and related interests

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1 *Petterson v Browne* [2016] NZCA 189 [*Petterson* CA] (Winkelmann, Dobson and Gilbert JJ).
2 At [60].
3 *Petterson v Browne* [2015] NZHC 866 [*Petterson* HC] at [130].

from the risks associated with the liquidation of PPSL should it be held liable and there was no insurance cover.[4] McConnell Dowell's claim succeeded, Mr Browne responded by placing PPSL in receivership under the GSA and PPSL was eventually put into liquidation on the application of McConnell Dowell, with Mr Petterson being appointed as liquidator.

[3] The $201,316 which Mr Browne was ordered to pay represents a payment made to him by the receiver of PPSL.[5] Mr Browne has four proposed grounds of appeal.

A challenge to the factual findings of the Court of Appeal

[4] Mr Browne wishes to challenge the Court of Appeal's factual findings. We, however, see no appearance of error in those findings sufficient to engage the miscarriage of justice ground. There is only one aspect of the proposed arguments on this issue which we think it necessary to address. At the hearing before the Associate Judge the liquidator abandoned his challenge to the payment of $340,600 made to Mr Browne and also his contention that the GSA was voidable charge under s 293.[6] The basis of this, as recorded in the CA judgment, is that the liquidator accepted that PPSL was able to pay its due debts at the time that these transactions occurred (September 2008) and that the transactions were accordingly not "insolvent transactions" within the s 292 definition.[7] In its judgment, however, the Court of Appeal found that at the times material to the various transactions in issue (July–September 2008), PPSL could not satisfy the solvency test in s 4.[8]

[5] The appeals by the companies may require some assessment of the accuracy of the concessions made by counsel for the liquidator.[9] For present purposes we will assume that the concessions were correct and thus that the liability to McConnell Dowell was not a due debt for the purposes of ss 292 and 4. On that basis, there is

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4 At [98].
5 At [105]–[108].
6 *Petterson* HC, above n 3, at [3]–[4].
7 *Petterson* CA, above n 1, at [63].
8 At [94].
9 As to which, see for instance: *Bank of Australasia v Hall* (1907) 4 CLR 1514, (1907) 14 ALR 51; *Box Valley Pty Ltd v Kidd* [2006] NSWCA 26; and *New Cap Reinsurance Corporation Ltd (In Liq) v Grant* [2008] NSWSC 1015, (2008) 68 ACSR 176.

no material inconsistency between the concessions and the Court of Appeal judgment. Ability to pay due debts is only one of the two parts of the solvency test in s 4. A company which is able to pay its due debts may nonetheless fail to meet the s 4 solvency test by reason of its liabilities, including contingent liabilities, exceeding the value of its assets and, potentially, vice versa.

A contention that where a security has been set-aside under s 299, the Court has no power to require repayment of money previously paid under that security

[6] Section 299(3) provides that where a security has been set-aside, the Court can make "such other orders as it thinks proper for the purpose of giving effect to an order under this section". Unless the $201,316 is required to be repaid, the order that the security be set-aside will not have been given effect to.

[7] We see nothing in this argument which would warrant leave to appeal.

An argument that there is no power to set-aside a security under which a receiver has been appointed

[8] It has been suggested that s 299 cannot be invoked in a case in which a security has been realised prior to the commencement of the liquidation.[10] The basis for this suggestion is not obvious. In any event, the liquidator did not seek to recover payments made by the receiver to Mr Browne prior to the commencement of the liquidation. Instead the claim focused on the payment made by the receiver to Mr Browne well after the liquidation commenced.[11]

[9] We do not see the arguments advanced in respect of this point as giving rise to a point of law warranting a grant of leave to appeal.

An argument that repayment of $201,316 should not have been directed because it represented the proceeds of litigation funded by Mr Browne

[10] The $201,316 represented the proceeds of litigation conducted by the receiver on behalf of PPSL which was funded by Mr Browne. The argument that this means that repayment ought not be directed involves a very narrow issue of discretion.

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10 See *Petterson* CA, above n 1, at [106].

11 The payment was made in May 2013 and the liquidator was appointed on 5 October 2009.

[11] This argument does not involve a point of public or general importance and, in the context of the case as a whole, it does not engage the miscarriage ground.

A final comment

[12] In relation to the appeal by the companies, the Court would appreciate argument as to whether the transactions between PPSL and DBCL and between PPSL and DBML were properly susceptible to challenge under the Companies Act, in other words as to whether the concession made by counsel for the liquidators in the High Court referred to in [4] and [5] was correctly made.

Solicitors:
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Kensington Swan, Auckland for Respondent