IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV 2017-404-2721
[2019] NZHC 237

BETWEEN	APOLLO BATHROOM AND KITCHEN LIMITED (IN LIQUIDATION) First Plaintiff
	CRAIG SANSON AND DAVID BRIDGMAN Second Plaintiff
AND	SHAN LING Defendant

Hearing: 4, 5 and 7 February 2019

Appearances: M J Tingey for the plaintiffs
G D Wiles and R P Kaur for the defendant

Judgment: 22 February 2019

JUDGMENT OF JAGOSE J

This judgment is delivered by me on 22 February 2019 at 3.00 pm pursuant to r 11.5 of the High Court Rules.

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Registrar / Deputy Registrar

Counsel/Solicitors:
Murray Tingey, Barrister, Auckland
Geoffrey Wiles, Barrister, Auckland
Roshni Kaur, Barrister, Auckland

[1] In this proceeding, Apollo Bathroom and Kitchen Limited (in liquidation) (the "Company") – and its liquidators, Craig Sanson and David Bridgman – seek to recover the sum of $400,000 plus interest from Shan Ling. The sum was paid by the Company to the Commissioner of Inland Revenue in satisfaction of Ms Ling's tax debts.

[2] The Company seeks to recover the sum as money had and received; the liquidators alternatively seek to recover the sum as an undervalue transaction,[1] a prejudicial disposition of property,[2] or a voidable transaction.[3]

Factual background

[3] Ms Ling's husband, Buyun (York) Yu, was the Company's sole director from its incorporation on 6 September 2005, until he was adjudicated bankrupt on 1 June 2017. The Company's sole shareholding varied between Mr Yu and one Furong Wu, latterly resident in China.

[4] Ms Ling and Mr Yu formerly were the sole directors and shareholders of New Zealand New Oak Limited. The company was involved in a variety of disparate businesses, including kitchen cabinetry and countertop construction. In 2009, Ms Ling became the company's sole director and shareholder. It went into receivership in 2011, and later was liquidated. At the time of its liquidation, it was liable to pay some $490,000 to a secured creditor finance company, and some $250,000 to the Inland Revenue Department in unpaid GST and PAYE.

[5] In the latter half of 2010, Ms Ling and Mr Yu appear to have borrowed a total of $1.77m in two loans (of $1.5m, and $270,000) from a friend, Zhong Li. The loans are evidenced by skeletal documents signed only by Ms Ling and Mr Yu, apparently identifying the source of particular funds received into Ms Ling's personal bank account (although Ms Ling asserts the account formerly was held jointly with Mr Yu, in explanation of his continuing access to the account).

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1 Companies Act 1993, s 297.
2 Property Law Act 2007, s 348.
3 Companies Act 1993, s 292.

[6] The borrowings partially were used to fund the Company's acquisition of New Zealand New Oak's business and assets for some $460,000 from its receivers. Ms Ling worked in New Zealand New Oak's business, and continued to do so in the Company's business. She was a signatory on the Company's bank accounts. The Company's business was re-sold for some $695,000 to Xiangyu Fan in April 2016, for possession in November 2016 (and the Company to assist Mr Fan for the next "250 working days").[4] Mr Fan operated the business as Apollo Group Limited from 2018. Ms Ling was employed by that company as a kitchen consultant. Mr Yu appears to have been authorised at least to present that company's annual returns to the Companies Office.

[7] By mid-2016, Ms Ling and Mr Yu were adjudged respectively liable to the Commissioner of Inland Revenue in the amounts of $467,000 and $4.741m. They each were represented by Auckland barrister, Stephen Piggin. So far as Ms Ling was concerned, her liability related to assessed income tax and Working for Families tax credits, penalties, and interest for the 2009 to 2012 years.

[8] The Commissioner also was the petitioning creditor in the Company's September 2017 liquidation, in support of her claim for over $500,000 in assessed income tax, shortfall penalties, and interest for the 2013-2016 years. The Company was advised against objecting to the Commissioner's default assessments on grounds it had not maintained adequate records of its assets, expenses, or accounting.

[9] The essence of both Ms Ling's and the Company's liability to the Commissioner was neither had filed any tax return for the respective years.

The payment at issue

[10] On 19 November 2016, the Commissioner served Ms Ling personally with the sealed certificate of judgment against her, annexed to a bankruptcy notice. On Ms Ling's failure to comply with the notice, the Commissioner served her personally with an application to adjudicate Ms Ling bankrupt, together with a summons to attend

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[4] Additional terms provided, "[w]ithin [*sic*] one year from the settlement date", Mr Yu would "provide any necessary assistance to the Purchaser's daily business operation at no cost"; and the Company would assist Mr Fan in relocating "all equipment and stock in trade" to new premises "before 25/11/2016".

the hearing of that application on 6 April 2017. Mr Piggin repeatedly urged both Ms Ling and Mr Yu individually to seek some settlement of their contended liability. Mr Yu appears to have offered $100,000 on Ms Ling's behalf.

[11] Shortly after the Commissioner's service of the bankruptcy notice, Ms Ling and Mr Yu changed their counsel to another Auckland barrister, David K Wilson. Mr Wilson proposed settlement of the Commissioner's claim against Ms Ling by payment of $400,000. That was accepted by the Commissioner. On 2 April 2017, the Company drew against its own account to obtain an ASB bank cheque for $400,000, which was provided to the Inland Revenue Department, in satisfaction of Ms Ling's outstanding tax obligations.

[12] Ms Ling's defence to the Company's claim for repayment of the $400,000 pleads "the drawing of the cheque and payment to the Inland Revenue Department was a discharge of [the Company's] liability to [Ms Ling] for unpaid salary or wages". Ms Ling says she did not receive any salary or wages in respect of her work in either New Zealand New Oak Limited's or the Company's business. Ms Ling asserts to have been employed full-time for the 2011-2017 years by the Company as a kitchen consultant. She says she was entitled to payment from the Company of $432,841.67 – calculated at wages of $1,100 a week, plus $118,000 as commission calculated at 5 per cent of "total sales" – for that period. The foundation for those calculations is inadequately explained, although I apprehend it may be derived from her subsequent employment by Apollo Group Limited (because it is materially less than the $67,000 annual salary she reverse-engineers from her admitted $400,000 2018 income).[5]

[13] Ms Ling also acknowledges receipt of the benefit of the $400,000, but pleads it was "for valuable consideration and in good faith without knowledge of the fact that it may have been the subject of a disposition that prejudiced the [C]ompany's creditors". On 18 July 2018 (after the pleadings in this proceeding were complete), she filed tax returns for each the 2013 to 2018 years, claiming income only in the last year of $56,700, presumably from Apollo Group Limited, and $400,000 as "overdue salary and commission" from the Company.

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5 See [13] below.

The evidence

[14] Only two witnesses gave evidence. They were the liquidator, Mr Sanson, and Ms Ling. Mr Sanson gave evidence largely from the Company's bank and tax records, and from the record of interviews held between his staff and Mr Yu. Other than her own bank and tax records, Ms Ling's evidence largely was unsupported. Instead she contended for a particular view to be taken of the Company's and her own bank records, as illustrating Mr Yu's unknown or unmediated use of her accounts and affairs for the Company's purposes, and identifying Ms Ling's contributions to the Company as justifying her claim to remuneration.

[15] No evidence was forthcoming from Mr Yu, despite Ms Ling's counsel, Geoffrey Wiles, confirming his availability to give evidence. That confirmation arose on the liquidators' objection to hearsay statements in Ms Ling's evidence. Ms Ling's evidence contained many statements attributed to Mr Yu, to prove the truth of those statements. Such only are admissible if "the circumstances relating to the statement provide reasonable assurance that the statement is reliable", and either Mr Yu was unavailable as a witness, or undue expense or delay would be caused if he was required to be a witness.[6] I was provided with no foundation for the first or last considerations. Given Mr Yu appeared additionally to be available as a witness, statements attributed to Mr Yu as proof of their truth are inadmissible. I disregard them.

[16] As to Ms Ling's reliance as true on extracts from the Company's records provided to her by various identified Company officers and advisors, such only are admissible if the supplier of the information is unavailable as a witness, or I consider the person could not now reasonably be expected to recall the matters dealt with in that information, or undue expense or delay would be caused if s/he was required to be a witness.[7] Again, I was provided with no foundation to determine the supplier's unavailability or the latter considerations. I also disregard those extracts as proof of their truth.

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6 Evidence Act 2006, ss 4 (definition of 'hearsay statement'), 17 and 18.
7 Evidence Act 2006, s 19.

[17] The hearsay nature of much of Ms Ling's intended evidence only came to my attention when her served brief was referred to Mr Sanson in cross-examination by Mr Wiles. On my observation of some of its seemingly inadmissible content, the liquidators' counsel, Murray Tingey, took up the objection. I commended counsel attend to the issue before Ms Ling was to commence giving evidence. In the event, no advance beyond the served brief was made, and it was delivered in that form as Ms Ling's evidence in chief.

[18] Rule 9.11 of the High Court Rules 2016, titled "[c]ompliance with Evidence Act 2006", expressly anticipates any admissibility objection first be raised between the parties within 20 working days after receipt of the brief. If remaining unresolved, "notice that there is an admissibility issue *must* be given to the court by the challenging party" (emphasis added). Ms Ling's evidence originally was due to be served by 7 December 2018. By consent, that date was extended to 18 December 2018. Given the High Court Rules' definition of 'working day' as excluding the period from 25 December to 15 January, the period for raising the objection then had not expired by trial's commencement.

[19] But even the original date would scarcely have allowed resolution of admissibility objections "before the giving of evidence",[8] as the remedially-amended Rules intend.[9] In that case, the Court's only alternative to deal with Ms Ling's inadmissible evidence may have been the brief "not be read in whole or in part".[10] That may have been less helpful than allowing such evidence to be read. Counsel should be clear there is a substantial pre-trial obligation on them to secure admissible evidence.

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8 High Court Rules 2016 (HCR), r 9.10(3).

9 *Jarden v Earthquake Commission* [2015] NZHC 204 following *MacDonald v Tower Insurance Ltd* [2014] NZHC 2876, (2014) 22 PRNZ 490 at [16] and [20]; and *Parihoa Farms Ltd v Rodney District Council* (2010) 20 PRNZ 8 (HC). See also Gillian Combe QC "Witness statements in civil cases – show me the evidence" (paper presented at "Litigation Skills Masterclass" seminar, Stamford Plaza, Auckland, 25 November 2015) <www.gilliancoumbe.co.nz>.

10 HCR 9.7(5).

Ms Ling's employment by the Company

[20] The result is Ms Ling has no admissible evidence beyond her own assertions of employment by the Company. Those assertions are not credible. She has not established, even on the balance of probabilities, she was employed by the Company.

[21] Ms Ling's sole directorship and shareholding of New Zealand New Oak Limited arose more or less contemporaneously with her return to its active business in 2009 (then in kitchen cabinet and countertop manufacturing). She "had to perform many jobs for the company, as some employees had left". She signed documents for that company. She knew of its cashflow problems. In "around 2010", she received correspondence from the IRD about overdue tax payments. "Around the end of 2010/ beginning of 2011", she received "a phone call from the Court", telling her to "stop all [New Zealand New Oak's] business".

[22] Together with Mr Yu, as noted at [5]-[6] above, Ms Ling borrowed money to enable the Company to acquire New Zealand New Oak's business. She started doing more jobs for the Company. She says she told her husband she "should be paid some money for my time and labour spent working in the [C]ompany, or a shareholder's distribution", to which she says her husband said "once suppliers, employees and other costs [have] been paid, [she] would be paid".

[23] That is the high point of Ms Ling's evidence as to her employment by the Company, and of her entitlement to any remuneration from it. It goes no further than an expression of Ms Ling's wish to be paid, and possibly subject to the Company's ability to pay her. She is neutral as to whether her remuneration derive from her time and labour, or as an ownership distribution. Such is to be seen together with Ms Ling's contentions she borrowed money from various people "to assist with [the Company's] cashflow", and "personally" paid the Company $121,950 in cash deposits, and $94,800 in internet transfers from her personal bank accounts, between 2011 and 2016. Ms Ling's evidence is at least as consistent with her continuing effective ownership interest in the business, conducted through various corporate entities together with Mr Yu, as with any employment by the Company.

Plaintiffs' claims

—money had and received

[24] An action for money had and received is a restitutionary remedy, which generally is "to correct normatively defective transfers of value, usually by restoring the parties to their pre-transfer positions".[11] The 'defect' on an action for money had and received is that "the money would not have been paid, but for a mistake of fact [which the payer] made".[12]

[25] The Company contends for the mistake to be that Ms Ling was entitled to the $400,000, presumably as wages or salary as she asserts (but there is no credible evidence of her employment). But there also is no admissible evidence of what motivated the Company's payment of the $400,000 to the Commissioner. Mr Yu only admits in his examination by the liquidators "I think the company owed her and she got some which was long outstanding to her". Although he is pressed for the basis of that liability, he never accepts or admits it was on the basis she was employed by the Company. And he is resolute her contributions to the Company's operation justified the $400,000 payment, and "[s]hould be more than that I believe". That evidence also is hearsay. Again, I have no basis on which to determine the statement's reliability for the truth of its contents or Mr Yu's (un)availability as a witness. Mr Yu's examination by the liquidators is inadmissible insofar as it is relied upon for the truth of its contents.

[26] I am not prepared on the basis of the evidence to find the payment was made under a mistake of fact. This cause of action fails.

—undervalue transaction

[27] Section 297 of the Companies Act 1993 materially provides:

> **Transactions at undervalue**
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> (1) Under subsection (2) the liquidator may recover from a person (X) the amount C in the formula A − B = C, where—

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11 *Commissioners of HMRC v The Investment Trust Companies* [2017] UKSC 29 at [42].

12 *Thomas v Houston Corbett & Co* [1969] NZLR 151 (CA) at 167, approved in *Napier v Torbay Holdings Limited* [2016] NZCA 608, [2017] NZAR 108 at [19].

(a) A is the value that X received from a company under a transaction to which the company was or is a party; and

(b) B is the value (if any) that the company received from X under the transaction.

(2) The liquidator may recover the difference in value (that is, C in the formula in subsection (1)) from X if—

(a) the company entered into the transaction within the specified period; and

(b) either—

(i) the company was unable to pay its due debts when it entered into the transaction; or

(ii) the company became unable to pay its due debts as a result of entering into the transaction.

(3) For the purposes of this section,—

(a) transaction has the same meaning as in section 292(3):[13]

(b) specified period means—

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

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

(iii) if—

(A) an application was made to the court to put a company into liquidation; and

(B) after the making of the application to the court a liquidator was appointed under paragraph (a) or paragraph (b) of section 241(2),—

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

[28] It is notable only the Company need to be party to the 'transaction' at issue – here, the Company's payment to the Commissioner. Thus, although the value Ms Ling

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13 "[P]aying money" is a transaction: Companies Act 1993, s 292(3)(e).

received from the Company "under the transaction" was $400,000, in satisfaction of her tax debts, the value the Company received from Ms Ling "under the transaction" was $0. Whether the Company otherwise received value from Ms Ling is immaterial on the words of the section.[14] The sum susceptible to recovery from Ms Ling is $400,000.

[29] I sought both counsel's comment on that construction: neither had anything to say. Although s 297 typically is characterised as enabling a liquidator "to recover the amount by which the value of an asset transferred by the company exceeded the value of the consideration received by it",[15] that is a broader conception of the 'transaction' than the Act defines. Neither is "X" necessarily the 'counterparty' to the transaction. Instead, the value of 'consideration' is to be taken into account under any available s 296 defence.[16]

[30] As the Company's April 2017 payment to the Commissioner was only some five months before the Company was put into liquidation by the court, it is within the specified period (which is admitted, in any event). Self-evidently, at that time, the Company was unable to pay its due debts: it sold its business and assets for $695,000 five months earlier, and had outstanding tax debts alone exceeding $500,000. Other creditors claiming in the liquidation included the Company's landlord, seeking some $35,000 in unpaid rent and outgoings, apparently for the three months after the business' relocation. And Ms Ling claimed personally to have advanced nearly $220,000 to the Company from 2011 to 2016.

[31] Notably, the purchase price for the business was paid in seemingly late instalments: a $50,000 deposit on 20 December 2016 (due on "the starting of recolation [*sic*]"); and part payments in February ($20,000), April ($415,000), May ($50,000) and June 2017 ($100,000 and $60,000). There is no evidence of the circumstances in which those instalments were established, or of any adjustment to other terms of the sale. Meanwhile, the Company directed its customers to make

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14 See *Rowmata Holdings Ltd (in liq) v Hildred* [2013] NZHC 2435 at [154], upheld on appeal: *Hildred v Rowmata Holdings Ltd* [2015] NZCA 106 at [31].

15 See *Castlereagh Properties Ltd v Walker* [2015] NZCA 481 at [24], although there also addressing s 298's provision for transactions for inadequate or excessive consideration.

16 *Allied Concrete Ltd v Meltzer* [2015] NZSC 7, [2016] 1 NZLR 141 at [166]-[167].

payments of some $55,000 directly to the Commissioner on the Company's account. The $415,000 payment coincided with the Company's $400,000 payment to the Commissioner; the Company also transferred $150,000 to Ms Ling's personal account at the time of the Company's receipt of the final purchase price instalment.

[32] Even if the Company was able to pay its due debts at the time it paid the $400,000 to the Commissioner, the self-evident result of paying the $400,000 was the Company became unable to pay its due debts. The $400,000 payment meant only $295,000 of the purchase price remained to satisfy the Company's larger tax debt, and the Company had no other sources of income.

[33] Thus, subject to any available defence, the liquidators may recover the difference in value – $400,000 – from Ms Ling.

[34] Ms Ling relies on the defence afforded by s 296(3):

> (3) 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—
>
> (a) A acted in good faith; and
>
> (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
>
> (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.

[35] Recovery of a company's 'property' has been interpreted to extend to recovery of its payment of money under s 296's predecessor.[17] Section 296(3) can provide a defence, if all requirements are met, to a creditor who received a payment from a debtor company.[18] It has broad application and can be applied to cases under s 297.[19] But that is distinct from the liquidators' recovery of the 'difference in value' under s 297. And recovery under s 296 is that sought from the person who "received the

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17 Companies Act 1955, s 311A; *MacMillan Builders Ltd (in liq) v Morningside Industries Ltd* [1986] 2 NZLR 12 (CA) at 816.

18 See *Allied Concrete Ltd v Meltzer,* above n 16, at [3].

19 At [25]; and *McIntosh v Fisk* [2017] NZSC 78, 1 NZLR 863 at [135].

property". 'Recovery' thus means to recover the company's property (or its equivalent value) from the person to whom the property was conveyed; s 296 does not apply to prevent recovery from a person obtaining only value "under the transaction" in terms of s 297.

[36] For that reason, s 296 does not afford any defence to Ms Ling in the present circumstances. Mr Wiles' closing submission Ms Ling had not "in fact 'received' the funds in question" would appear to acknowledge the unavailability of the defence. The point is reinforced by s 296(3)(c)'s reference to the 'transfer' not being "set aside": nothing is being 'set aside' under s 297; instead liquidators may recover "the difference in value".

[37] If I am wrong in that, I would also have found, when Ms Ling 'received' the benefit of the transaction in April 2017:

(a) she did not act in good faith. She had no basis to assume the Company's liability to her equalled or exceeded her tax debts. Her opportunistic calculation to that end was with the benefit of hindsight. She knew she was being treated preferentially to other creditors, such as the Company's landlord, whose entitlement to be paid she strongly disputed;

(b) she had reasonable grounds to suspect the Company was or would become insolvent. She knew it had been acquired on the raising of a loan, and propped up thereafter by further substantial payments from her until its sale. On her own evidence, the Company could not afford to pay that which it owed her, even behind that which it owed others. By "around 2016", she knew the Company's business had been sold, meaning it lacked means to meet its debts. A reasonable person in her position would have suspected the Company's present or impending insolvency; and

(c) even to the extent it can be accepted she gave value for the benefit of the transaction, she gave no evidence as to any (or even any reasonably held) belief the payment to the Commissioner was valid and would not

be set aside. Rather her evidence was she had not known of the payment until after it had occurred.

[38] Most critically, those three elements each expressly are for Ms Ling to prove. She has not done so, by a considerable margin. Her evidence was strikingly unsatisfactory.

[39] In the first place, Ms Ling's discovery of relevant documents was halting and incomplete, explained by her under cross-examination as being "sufficient" for the liquidators' purposes. But, subject to contrary orders, discovery is to be made of *all* relevant documents.[20] Standard discovery was ordered here, including documents adversely affecting her case, or supporting the Company's and liquidators' cases. 'Sufficiency' is not a material criterion.

[40] Ms Ling's evidence was significantly unsubstantiated. She contended for "many loans from friends", recorded in undiscovered diaries, as the source of her income and advances to the Company, but:

> I didn't provide information of the diary because that is something quite private and the lender doesn't want the information to be disclosed either, then I didn't believe that I should disclose it ….[21]

The documented loans were only in the form of IOUs, signed by Ms Ling and Mr Yu.

[41] She denied knowledge of her own tax liability, contradicted by belated discovery showing her to have been advised of such directly by Mr Piggin, separately from Mr Yu. She denied knowledge of her pending bankruptcy, contradicted by affidavits of her personal service with bankruptcy documents. She denied knowledge of anything about the Company except as was said to have been told to her by Mr Yu.

[42] Despite her clearly significant involvement in the business' predecessor company, and highly comparable continued involvement in the Company, her contention was for a significantly different role as employee in the latter (although she

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20 HCR 8.7.

21 Ms Ling's translated evidence under cross-examination continued "but I have the obligation to disclose it". In context, I understood Ms Ling to be saying she did not believe she had such an obligation.

contended also to be due payment for her role in the predecessor). She accepted she had wide-ranging managerial obligations, but they excluded any accounting oversight (despite the extent of her loans to the Company, and her being signatory to the Company's accounts).

[43] Ms Ling's response to Mr Sanson's evidence simply asserted an alternative perspective to be drawn from such of Mr Sanson's evidence as Ms Ling would acknowledge to be true. Her evidence often accepted she had no personal knowledge of the foundation for her contentions, and asserted opinion as fact.

[44] Ms Ling has not proved, on the balance of probabilities, s 296(3)'s qualifying elements. If s 296 afforded her a defence to the liquidators' s 297 claim, she has not established its application. The liquidators remain entitled to recover the $400,000 from her.

—prejudicial disposition of property/voidable transaction

[45] Given those findings, it is unnecessary for me to continue to determine the balance of the liquidators' causes of action. Had I to do so:

(a) if satisfaction of Ms Ling's debt to the Commissioner may be characterised as Ms Ling's acquisition or receipt of "property through the disposition" to the Commissioner, I would have required Ms Ling to pay reasonable compensation to the Company under s 348 of the Property Law Act 2007; but

(b) I would not have been prepared to set aside the transaction, or to require Ms Ling to pay $400,000 to the Company, without knowing of the Commissioner's position on the transaction's setting aside.

Interest

[46] The liquidators also seek interest on the $400,000 "under section 87 of the Judicature Act 1908 running from 2 April 2017".

[46] Schedule 1, cl 1 of the Interest on Money Claims Act 2016 – which came into force on 1 January 2018 – provides s 87 of the Judicature Act 1908, although repealed by s 182(4) of the Senior Courts Act 2016, "continues to apply to every civil proceeding commenced before this clause comes into force".

[47] This proceeding was commenced in 2017. Section 87(1) continues to apply. I thus have discretion to order included in the judgment sum:

> … interest at such rate, not exceeding the prescribed rate, as [the Court] thinks fit on the whole or any part of the debt or damages for the whole or any part of the period between the date when the cause of action arose and the date of the judgment.

Since 1 July 2011, clause 4 of the Judicature (Prescribed Rate of Interest) Order 2011 prescribes that rate as "5.0% per year".

[48] While not here applicable in its terms, also relevant to the exercise of my discretion is s 10(1) of the Interest on Money Claims Act 2016, which provides "[i]n every money judgment, a court must award interest under this section as compensation for a delay in the payment of money". While I have discretion whether to award interest at all, the 2016 Act illustrates a general expectation delays in payment of money will be compensated. But, by reason of the 1908 Act, my discretion to award interest may not exceed 5 per cent per annum.

[49] Section 13 of the 2016 Act mandates establishment of an "Internet site calculator", which calculates interest rates for the purposes of the Act. The site's FAQ explains:[22]

> The interest rate is calculated for a specific day by:
>
> 1. Taking the six most recent observations for the retail 6-month term deposit rate that have been published by the Reserve Bank of New Zealand (RBNZ), and taking an average of these six rates. The average is the base rate.
>
> 2. Adding the base rate to the premium (0.15%). The result becomes the per annum simple interest rate.
>
> 3. Converting the per annum simple interest rate into a daily effective rate. The formula for this conversion is as follows:

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22 "Civil Debt Interest Calculator" Ministry of Justice <www.justice.govt.nz>.

> Daily effective rate = ((1+"per annum simple interest rate as %"/100)^(1/"Days in the year"-1) x 100
>
> The result is the interest rate expressed as a daily effective rate for the specific day.

[50] I also take judicial notice of the Reserve Bank of New Zealand's retail 6-month term deposit rate, which has been below 4 per cent per annum since mid-2015.[23] I would not award interest at the maximum Judicature Act rate. To do so would be to allow a meaningful premium. While I initially was attracted to simple application of the Reserve Bank of New Zealand's retail 6-month term deposit rate, the more just calculation is in accordance with the 2016 Act's calculator.

Result

[51] I therefore give judgment to the second plaintiffs against the defendant in the sum of $400,000, plus interest from 2 April 2017 at rates calculated in accordance with the Interest on Money Claims Act 2016 (but not exceeding 5 per cent per annum).

Costs

[52] Mr Tingey asks I reserve costs. Costs are reserved for determination on short memoranda of no more than five pages – annexing a single-page table setting out any contended allowable steps, time allocation, and daily recovery rate – to be filed and served on the other by:

(a) the second plaintiffs within ten working days of the date of this judgment;

(b) the defendant within five working days of service of the second plaintiffs' memorandum; and

(c) the second plaintiffs strictly in reply within five working days of service of the defendants' memorandum.

—Jagose J

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[23] "Interest Rates on Lending and Deposits" Reserve Bank of New Zealand <www.rbnz.govt.nz/-/media/ReserveBank/Files/Statistics/tables/b3/hb3.xlsx>.