IN THE HIGH COURT OF NEW ZEALAND
HAMILTON REGISTRY

CIV-2012-419-907
[2013] NZHC 1352

UNDER	the Insolvency Act 2006
IN THE MATTER	of the bankruptcy of Christopher Louis Fawcett
IN THE MATTER	of an application pursuant to section 206 and 207
BETWEEN	JEC NO 2 LIMITED First Applicant
	JEC NO 3 LIMITED Second Applicant
AND	THE OFFICIAL ASSIGNEE AT HAMILTON Respondent

Hearing: 30 May 2013

Counsel: J Nolan for applicants
CT Gudsell QC and PV Cornege for respondent

Judgment: 10 June 2013

JUDGMENT OF ASSOCIATE JUDGE FAIRE
[on application to set aside orders]

This judgment was delivered by me on 10 June 2013 at 3pm
pursuant to Rule 11.5 of the High Court Rules.

F Davies
Registrar/Deputy Registrar

Date 10/6/13

Solicitors: AJ Nolan, Hamilton
Almao Douch, Hamilton

AND PHILIP MORGAN QC, GREG THOMPSON, DAVID GASQUOINE, SALLY WOOTTON, RICHARD LUDBROOK, MURRAY GUTRY, LYN HARRIS, KEVIN MORRIS, ANDREW HEDGE, GREGG BROWN and ANDREW JOHNSON as trustees of the Waikato Anglican College Trust at Hamilton
Third to Thirteenth Respondents

AND KATHARINE TAYLOR
Fourteenth Respondent

AND EMMALINE ANN FAWCETT
Fifteenth Respondent

AND CRAIGS INVESTMENT PARTNERS LIMITED
Sixteenth Respondent

CIV-2012-419-904

UNDER the Insolvency Act 2006

AND

IN THE MATTER of an application pursuant to Section 206 and 207 of the Insolvency Act 2006

AND

IN THE MATTER of an application pursuant to section 206

BETWEEN JEC NO 2 LIMITED
First Applicant

JEC NO 3 LIMITED
Second Applicant

AND THE OFFICIAL ASSIGNEE AT HAMILTON
Respondent

AND PHILIP MORGAN QC, GREG THOMPSON, DAVID

GASQUOINE, SALLY WOOTTON, RICHARD LUDBROOK, MURRAY GUTRY, LYN HARRIS, KEVIN MORRIS, ANDREW HEDGE, GREGG BROWN and ANDREW JOHNSON as trustees of the Waikato Anglican College Trust at Hamilton
Third to Thirteenth Respondents

KATHARINE TAYLOR
Fourteenth Respondent

EMMALINE ANN FAWCETT
Fifteenth Respondent

CRAIGS INVESTMENT PARTNERS LIMITED
Sixteenth Respondent

Introduction

[1] On 13 July 2012 the Official Assignee at Hamilton, acting in the bankrupt estate of Christopher Louis Fawcett, filed two originating applications. The first is an originating application to cancel irregular transactions under s 206 of the Insolvency Act 2006. The second is an originating application to order retransfer of property or payment of value under s 207 of the Insolvency Act 2006.

[2] The originating application procedure for applications under ss 206 and 207 of the Insolvency Act 2006 is specifically provided for by r 24.35. As a result Part 19 of the High Court Rules applies to these originating applications.

[3] The pleading requirements and, in particular, the requirement for a notice of opposition to such applications are provided for by the combined operation of rr 19.10 and 7.24. The consequence of a failure to attend a hearing is provided for in rr 19.10 and 7.40.

[4] On 24 August 2012, the Court ordered that the applicants in the current application, the respondents in the Official Assignee's application, file and serve their notices of opposition and affidavits in opposition by 5 October 2012. Mr H Thompson appeared on behalf of the current applicants at the time that order was made.

[5] The current applicants failed to comply with the order. Counsel for the Official Assignee sought a telephone conference to discuss the current applicants' non-compliance.

[6] Mr Thompson, counsel for the current applicants at the time, filed a memorandum dated 26 October 2012. In that memorandum he advised:

> Quite simply, despite numerous requests, counsel has not received instructions that would put him in a position to prepare, file and serve notices of opposition and affidavits in support of it.
>
> Counsel has informed the first and second respondents that he has terminated his retainer as solicitor and counsel for the first and second respondent. At the telephone conference sought by the applicant counsel will seek leave to withdraw as solicitors on the record for the second and third respondents.

> He will also seek to withdraw as solicitor and counsel for the second defendant in CIV-2012-419-28.
>
> Counsel accepts that, in his capacity as solicitor for the first and second respondents, his office will remain their address for service until notice of an alternative address for service is given by the first and second respondents. Counsel undertakes promptly to pass on the first and second respondents any document served on him.

[7] By a minute issued by me on 30 October 2012 a telephone conference was scheduled for 5 November 2012.

[8] The conference proceeded on 5 November 2012. My minute of that conference records appearances by counsel on behalf of the Official Assignee and Mr Thompson for the two current applicants. An appearance by Mr CL Fawcett in person was also recorded. I issued a minute in the following terms as a result of that conference as follows:

> [1] There are two applications that I consider today. The first is the application on Civ-2012-419-904 and seeks an order cancelling certain transactions pursuant to s 206 of the Insolvency Act 2006. In respect of this application, in a minute of 24 August 2012, I directed the notices of opposition and affidavits in opposition were to be filed and served by 6 October 2012. That has not occurred. Mr Thompson who entered an appearance for the first and second respondents on this application advises that court that he has no present instructions. I proceed on the basis that this is an unopposed application and order as moved. I make it clear that the first and second respondents were not present and were effectively not represented in case they determine that they have an appropriate case to apply to set aside the orders that have been made on the basis that they were unopposed and were not present when they were made.
>
> [2] The second application is an application pursuant to s 207 of the Insolvency Act 2006 and is made on the file Civ-2012-419-907. The first and second respondents in this application have not complied with the order to file and serve a notice of opposition and affidavits in opposition as ordered in my minute of 24 August 2012. The Official Assignee, by counsel, invites me to make an order in terms of paragraph 1(a) as moved. That appears appropriate. It also appears appropriate that the balance of the application be adjourned to the conference directed to be held on 14 November 2012. The comments that are made concerning representation so far as the first and second respondents are concerned relate equally to this application. I order accordingly.

[9] On 9 November 2012, the current applicants filed an interlocutory application seeking to review the orders made on 5 November 2012. On 12 November 2012, the

applicants filed an amended interlocutory notice seeking orders reviewing the orders made on 5 November 2012. Affidavits by Joanne Winifred Roberts and Steven Mary Church Spackman were filed at that time. The amended interlocutory application was called for mention before Priestley J on 21 November 2012 on the basis that counsel for the current applicants wished to advise the Court whether, amongst other things, the applicants would proceed with an application to review or whether an application should be made to an Associate Judge to set aside the orders that I had made. At the mention on 5 December 2012, Priestley J recorded the following minute:

> [1] There is some progress in this matter. the Official Assignee, through counsel, has given assurances to Mr Nolan that the property in question will not be disposed of until resolution of the correctness or otherwise of Associate Judge Faire's orders and directions.
>
> [2] Despite what was intimated to me on 21 November Mr Nolan's preferred option now is to move to have the Associate Judge's orders set aside. This will involve an Associate Judge assessing the matter rather than a High Court Judge.
>
> [3] Mr Gudsell QC observes that the current application before the Court is still hybrid and that, if the respondents wish to apply to have the orders set aside, they should do so in proper form. I therefore direct that a complying application to set aside and a supporting affidavit must be filed by 5pm on Friday 14 December.
>
> [4] The Official Assignee's notice of opposition and any affidavits in reply are to be filed by Friday 25 January 2013.
>
> [5] Reply affidavits from the respondents (if any) must be filed by 4pm on Friday 8 February 2013.
>
> [6] As Mr Gudsell prudently observes, there is a possibility, if the issues between the parties narrow, that Associate Judge Faire may be able to slot it in on a short 90 minute hearing or thereabouts.
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> [7] The Registry is directed to list the matter for a first call only in the Associate Judge's list on 18 February 2012 [sic] at 3.45pm (this is apparently a chambers list). Counsel are directed to inform the Associate Judge exactly what further directions they may then require.

[10] The current applicants filed a further amended application on 18 December 2012.

The applications

[11] The two applicant companies seek orders setting aside the orders made by me on 5 November 2012. In short, they seek the setting aside of an order whereby I declared the following transactions as irregular transactions, namely:

(a) The sale of 127 Galloway Street, Hamilton, CT 41424, by Christopher Louis Fawcett to JEC No 2 Limited, for $1,035,000.00 (payable in 40 years time), pursuant to an agreement for sale and purchase of real estate dated 4 August 2008;

(b) The transfer, on 9 September 2010, by Christopher Louis Fawcett to JEC No 2 Limited of shares, held by Craigs Investment Partners Limited, valued at $44,902.44;

(c) The sale of six properties (detailed below) by Christopher Louis Fawcett to JEC No 2 Limited, for $1,192,530.00 (payable in 40 years) time), pursuant to an agreement for sale and purchase of real estate dated 4 August 2008. The relevant properties are:

(i) 11 Bond Street, Hamilton, CT SA49C/109;

(ii) 180B Fox Street, Hamilton, CT SA67D/446;

(iii) 76 Wellington Street, Hamilton, CT SA538/159;

(iv) 14B Galloway Street, Hamilton, CT SA51B375;

(v) 10B Bains Avenue, Hamilton, CT 51A/99; and

(vi) 94B Cook Street, Hamilton, CT 41A/99.

(d) The sale of three properties (detailed below) by Christopher Louis Fawcett to JEC No 2 Limited, for $900,000.00 (payable in 40 years

time), pursuant to an agreement for sale and purchase of real estate dated 4 August 2008. The relevant properties are:

(i) 10A Bains Avenue, Hamilton, CT SA51A/98;

(ii) 2A Bond Street, Hamilton, CT SA41C/429; and

(iii) 123 Albert Street, Hamilton, CT SA48D/837.

[12] The applicants seek the setting aside of the order which was made consequential upon declaring the transactions irregular, and which vested the subject properties in the Official Assignee in the bankruptcy of the property of Christopher Louis Fawcett.

[13] The grounds in support of the application, in summary, are as follows:

(a) The applicant companies were in effect not present or directly represented at the time the orders were made and have an explanation for why steps in opposition were not taken;

(b) The transactions which were considered by the court were in fact not irregular or insolvent transactions with the result that the applicants have a good ground of opposition to the Official Assignee's application and the order which was made on it;

(c) The Official Assignee in bankruptcy will not suffer any irreparable injury if in fact the orders are set aside.

Preliminary matters

[14] Three preliminary matters require brief comment.

[15] Two recent affidavits were filed by Mr Fawcett, apparently with some input from counsel for the applicants. The first was sworn on 16 May 2013. The second was sworn on 29 May 2013. Mr Gudsell correctly objected to the receipt of those

affidavits and the reading of them in relation to these applications. The affidavits, by-and-large, are argumentative and have marginal relevance. There is some material in them that bears on the question of the solvency of Mr Fawcett at a critical date, namely 4 August 2010. Mr Gudsell advised that, should I admit the affidavits, his instructions were that no further time was required to respond and that he would wish the hearing to continue. I announced in the hearing that although there were objections to the content of the affidavits, I determined that it was best they be admitted and that I would allocate appropriate weight to their content.

[16] The second matter concerned a challenge to my hearing the applications. Initially, Mr Fawcett had invited me to recuse myself from hearing the applications. There is no need for me to go into the background in any detail in this judgment because the request was withdrawn by Mr Fawcett at the commencement of this hearing. In addition, I record that neither counsel for the applicants, Mr Nolan, nor counsel for the Official Assignee, Mr Gudsell, supported any recusal by me.

[17] The important considerations which arise where an issue of recusal is raised are:

(a) The issue:[1]

> is not whether it would be better that another judge should have heard the case, but whether the judge who sat may not have brought an impartial and unprejudiced mind to the resolution of the questions for decision.

(b) A judge's adverse ruling does not per se disqualify the judge from hearing a subsequent proceeding.[2]

(c) While it has to be accepted that there are occasions when a judge's prior rulings might lead a reasonable person to question whether the judge would remain impartial in any subsequent proceeding, that

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1 *Saxmere Company Ltd v Wool Board Disestablishment Company Ltd* [2009] NZSC 72, [2010] 1 NZLR 35 at [9].

2 *Muir v Commissioner of Inland Revenue* [2007] 3 NZLR 495 (CA) at [101].

could be relevant to the question of judicial bias only in the rarest of circumstances.[3]

(d) The authorities disclose that there is a huge potential for abuse if recusal applications were permitted predicated on a party's subjective perceptions regarding a judge's ruling.[4]

(e) The test is one of an apprehension of real, not remote, possibility of bias.[5]

[18] Although no-one now sought my recusal it is appropriate that I record that I have considered my involvement in the various cases that apply to Mr Fawcett's bankruptcy. When I consider the summary of principle that I have just referred to, I am satisfied that it is not an appropriate case for me to recuse myself and, for that reason, I proceed to determine this application.

[19] The third matter relates to whether the application should be regarded as an in-court application or a chambers application. The specific problem arises because there is no High Court Rule which deals with orders made in default of appearances by the respondent on an originating application and where the orders have been sealed. In this case the orders have been sealed. As a consequence, the procedure provided for by the operation of rr 19.10 and 7.40 is not available.

[20] Counsel proceeded on the basis that the application should be treated as an application under r 15.13. It is assumed for this purpose that as the order made and the application to set aside it were filed prior to the repeal of r 15.13, it nevertheless remains operative to deal with this application by the operation of ss 17 and 18 of the Interpretation Act 1999. Assuming, therefore, that the application is based on r 15.13, I conclude that I should deal with it as a matter falling within my chambers jurisdiction and not as a matter incidental to the insolvency jurisdiction I have pursuant to ss 26I(2)(h)(a) and 26IA of the Judicature Act 1908. Even if there is a question as to whether the application is appropriately to be dealt with under r 15.13,

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3 Ibid, at [98].
4 Ibid, at [100].
5 *Saxmere,* n 1, above at [44](4).

it seems to me that I should proceed by way of analogy on the basis that it is. I therefore proceed on the basis that this is a chambers hearing and that the authorities which apply to orders made in default of appearance in respect of a proceeding apply to it.

Applications to set aside

[21] Judgments by default may be set aside or varied on such terms as the court thinks just if it appears to the court that there has been, or may have been, a miscarriage of justice.

[22] The Court of Appeal in *Russell v Cox*[6] cited the following observations made by the Court of Appeal in *Wellington Free Kindergarten Association Incorporated*:[7]

> In approaching an application to set aside a judgment which complies with the rule, the Court is not limited in the considerations to which it may have regard, but three have long been considered of dominant importance. This was accepted by the Chief Justice in the Court below and by all counsel in this Court. They are, 1. That the defendant has a substantial ground of defence; 2. That the delay is reasonably explained; 3. That the plaintiff will not suffer irreparable injury if the judgment is set aside: *Atwood v Chichester* (1878) 3 QBD 722; *Hovell v Ngakapa* (1895) 13 NZLR 298; *Trengrove v Inangahua Hospital Board* [1956] NZLR 587. But, whilst it appears from these cases that delay, if reasonably explained and if it does not create irreparable injury, is not of itself a good reason for refusing to set aside, we do not doubt that where the delay is substantial, as it is here, the Court can more readily conclude that injury would be caused.

[23] In *Russell v Cox* the Court of Appeal added:[8]

> We think that in the light of *Evans v Bartlam* the passage to which reference has just been made should be read as doing no more than emphasising three matters which, as a matter of common sense and practice, the Court will generally regard as of importance in deciding whether it is just to set aside a judgment. But it should not be regarded as laying down a general rule that an application to set aside a judgment must satisfy these conditions as a necessary prerequisite to the exercise of the discretion; it should be taken as doing no more than highlight factors which on any application to set aside a judgment may generally be regarded as relevant to an inquiry which will determine where the justice of the case will lie.

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6 *Russell v Cox* [1983] NZLR 654 (CA) at 659.
7 *Wellington Free Kindergarten Association Incorporated* [1966] NZLR 975 (CA).
8 Above n 6, at 659.

[24] In *Commissioner of Inland Revenue v Mikkelsen* Lang J, in commenting on the particular considerations that have been identified by the Court said:[9]

> Generally speaking, the most important of these factors is whether or not the applicant has a substantial ground of defence. If an applicant has a substantial ground of defence, it will often be the case that a miscarriage of justice will occur in the event that the applicant is not able to have the defence examined by the Court. On the other hand, no worthwhile purpose will be achieved by setting a judgment aside and allowing a case to proceed to trial in circumstances where the proposed defence has no prospect of success.

[25] I shall analyse this application based on the authorities just referred to. In the discussions I had with counsel during the course of the hearing I emphasised, as did they, that clearly in this case the most important factor is whether or not the applicant companies have a substantial ground of opposition to the Official Assignee's application. In short, do they have a substantial ground for the proposition that the transactions were not irregular transactions in terms of s 206 of the Insolvency Act 2006?

Background

[26] Mr CL Fawcett was adjudicated a bankrupt on 14 September 2010 on the application of the Southland Building Society. The application was based on a judgment entered against Mr Fawcett on 17 March 2010 for $1,342,848.85 plus costs of $5,569.70.

[27] Mr Fawcett's liability arose from a guarantee he gave on 29 September 2004 to Southland Building Society in respect of all the indebtedness of the CL Fawcett Family Trust.

[28] In 2007/2008 the trustees of the CL Fawcett Family Trust entered into three loan agreements in relation to a development of a property at 342C Main Road, Tairua as follows:

(a) On 9 November 2007 a transitional facility for an amount of up to $41,010,000 available until 9 July 2008;

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9 *Commissioner of Inland Revenue v Mikkelson* HC Auckland CIV-2010-404-660, 10 May 2011.

(b) On 9 November 2007 a residential term loan for the sum of $1,000,065 (repayable on demand or by 9 July 2008); and

(c) On 2 May 2008 a term loan for the sum of $80,000 (repayable on demand or by 2 August 2008).

[29] The loans were all secured by way of a mortgage over the Tairua property.

[30] The Southland Building Society also lent money to the CL Fawcett Family Trust to assist with the purchase of a property at 7 Hemi Place, Tairua. That lending was secured by a mortgage over that property. The mortgage was ultimately discharged following a payment made by Mr Fawcett of $1,100,000 and which followed the sale of Mr Fawcett's shares to his mother in a company, Bruce Fawcett Ltd. That transaction occurred on or about 18 August 2008.

[31] As at 27 June 2008, the CL Fawcett Family Trust was indebted to Southland Building Society for $3,173,366.59. A letter was sent to the trustees by the Southland Building Society advising that the local branch manager would not support a submission to the Southland Building Society board for extension of the loans. It recorded when the loans were required to be paid by. The dates for repayment were 9 July 2008, 25 July 2008 and 12 August 2008.

[32] I have recorded that the loan in respect of the Hemi Place property was repaid. The balance of the lending, however, fell into default. There is a body of correspondence that passed between the Southland Building Society and the CL Fawcett Family Trust trustees and their lawyers. Whilst this correspondence was proceeding, the agreements that were the subject of the Official Assignee's application and the order I made were entered into on 4 August 2008. The significance of those transactions is that they had a combined value of $3,127,530. The agreements provided for repayment 40 years from the date of the agreement. The advances were unsecured. There is provision prohibiting caveats being registered against the properties. The transfers have a very significant effect on Mr Fawcett's asset position.

[33] Also on 4 August 2008, the CL Fawcett Family Trust effected the transfer of all property held by it, other than the Tairua property, to a company now known as JEC No 1 Ltd as trustee for the JEC No 1 Trust. The consideration was again precisely the same as that which Mr Fawcett personally accepted when he transferred the 10 properties to the applicants in this proceeding. The combined value of the acknowledgment of debt of the property transferred by the CL Fawcett Family Trust to JEC No 1 Ltd was $1,956,000.

[34] It is not denied, anywhere in the material before me, that the purpose of the transfers was to protect some of the "Fawcett assets" from potential creditors. Indeed, the position was put quite clearly in a letter sent by Mr Fawcett's solicitor to Mr Fawcett on 1 August 2008, where it is noted:

> Kit, I must stress yet again that we are going to inordinate lengths to attempt to protect some of your assets from potential creditors I the future. These lengths are a best attempt only and in no way can I guarantee that they will be watertight. I have already mentioned to you that any action taken to defeat creditors within a two-year period can be overturned under the Insolvency Rules.

[35] The evidence discloses that Mr Fawcett's balance sheet of assets representing the beneficial interest in the assets he was entitled to directly after 4 August 2008 agreements were:

(a) CL Fawcett Family Trust debt - $397,282.00 (reduced by deed dated 16 December 2008 to $370,828;

(b) The shares in various companies not precisely valued in the papers but estimated to be not more than $190,000;

(c) The shares in Bruce Fawcett Farms Ltd sold to Mr Fawcett's mother for $1,100,000 on 18 August 2008; and

(d) The rights at the expiration of 40 years to be paid for the properties transferred by Mr Fawcett to the trustee of the JEC No 2 Trust.

[36] The shares in Bruce Fawcett Farms Ltd must be disregarded because they were sold to Mr Fawcett's mother on 18 August 2008 and the money used to clear the debt secured against the Hemi Place, Tairua property. That was necessary to enable the agreement of 4 August 2008 pursuant to which the CL Fawcett Family Trust transferred the Hemi Place property to the trustees of the JEC No 1 Trust.

[37] The balance sheet needs to be considered having regard to the fact that CL Fawcett Family Trust, whose debt Mr Fawcett had guaranteed was in default in respect of its borrowing from the Southland Building Society. The prospect of Mr Fawcett recovering this debt is therefore in doubt.

[38] Although I was invited to find that, because Mr Fawcett held a position as trustee and also beneficiary in respect of a trust, he had an existing beneficial interest in an asset of the trust which should be added to his balance sheet. There is nothing in the material that was presented to the court to show that the trustee had declared a distribution of an asset of the trust to Mr Fawcett personally that could therefore represent an additional personal asset of Mr Fawcett. I have already referred to the fact that the CL Fawcett Family Trust was in financial difficulty with an overdue loan. There is nothing in the material before me to suggest that it had the ability to pay anything to Mr Fawcett had he asked it to do so.

[39] A further development occurred on 9 September 2010 when Mr Fawcett transferred shares held by him with Craigs Investment Partners Ltd to the second applicant. The deed of acknowledgment of debt executed at the time was for the sum of $44,902.44. It was executed only a few days before Mr Fawcett's adjudication as a bankrupt.

Analysis

[40] What is required in determining whether or not there is a substantial defence to the Official Assignee's application, and therefore whether there are grounds for setting aside the order I made, is an analysis of the issue of whether the transactions that were entered into, first on 4 August 2008 and, more latterly, on 9 September 2010, are irregular transactions as set out in s 206 of the Insolvency Act 2006.

[41] It must be emphasised that the Court is not asked to consider a transaction that falls within the insolvent gifts regime as set out in s 204, which has a statutory time limit. Nor is the Court asked to consider the position of insolvent gifts made within two to five years, as provided for in s 205 of the Insolvency Act 2006. Counsel for the applicant companies written submissions misunderstood the basis for the Official Assignee's application.

[42] The Official Assignee's position is that the 4 August 2008 agreements are dispositions of property to which subpart 6 of Part 6 (setting aside of dispositions that prejudice creditors) of the Property Law Act 2007 applies. That is defined as an irregular transaction in s 206 of the Insolvency Act 2006 and is covered by the procedure set out in that section for dealing with those transactions. I do not need to consider the procedural requirements.

[43] What happened was that, following the filing and service of appropriate notices and notice of objection by the applicant companies, the Official Assignee filed the applications on 12 July 2012 seeking orders under both ss 206 and 207 of the Insolvency Act 2006.

[44] Accordingly, it is necessary to consider subpart 6 of Part 6 of Property Law Act 2007 in relation to the 4 August 2008 agreements.

> **PART 6 SPECIAL POWERS OF COURT**
>
> **Subpart 6 Setting aside of dispositions that prejudice creditors**
>
> **344 Purpose of this subpart**
>
> The purpose of this subpart is to enable a court to order that property acquired or received under or through certain prejudicial dispositions made by a debtor (or its value) be restored for the benefit of creditors (but without the order having effect so as to increase the value of securities held by creditors over the debtor's property).
>
> **345 Interpretation**
>
> (1) For the purposes of this subpart,—
>
> (a) a disposition of property prejudices a creditor if it hinders, delays, or defeats the creditor in the exercise of any right of recourse of the creditor in respect of the property; and

(b) a disposition of property is not made with intent to prejudice a creditor if it is made with the intention only of preferring one creditor over another; and

(c) a disposition of property by way of gift includes a disposition made at an undervalue with the intention of making a gift of the difference between the value of the consideration for the disposition and the value of the property comprised in the disposition; and

(d) a debtor must be treated as insolvent if the debtor is unable to pay all his, her, or its debts, as they fall due, from assets other than the property disposed of.

(2) In this subpart, unless the context otherwise requires,—

disposition means—

(a) a conveyance, transfer, assignment, settlement, delivery, payment, or other alienation of property, whether at law or in equity:

(b) the creation of a trust:

(c) the grant or creation, at law or in equity, of a lease, mortgage, charge, servitude, licence, power, or other right, estate, or interest in or over property:

(d) the release, discharge, surrender, forfeiture, or abandonment, at law or in equity, of a debt, contract, or thing in action, or of a right, power, estate, or interest in or over any property (and for this purpose a debt, or any other right, estate, or interest, must be treated as having been released or surrendered when it has become irrecoverable or unenforceable by action through the lapse of time):

(e) the exercise of a general power of appointment in favour of a person other than the donee of the power:

(f) a transaction entered into by a person with intent by entering into the transaction to diminish, directly or indirectly, the value of the person's own estate and to increase the value of the estate of another person

proceeds, in relation to any property, means—

(a) the proceeds of the sale or exchange of the property; and

(b) if the property is money, other property bought with that money

property includes the proceeds of any property.

346 Dispositions to which this subpart applies

(1) This subpart applies only to dispositions of property made after 31 December 2007—

(a) by a debtor to whom subsection (2) applies; and

(b) with intent to prejudice a creditor, or by way of gift, or without receiving reasonably equivalent value in exchange.

(2) This subsection applies only to a debtor who—

(a) was insolvent at the time, or became insolvent as a result, of making the disposition; or

(b) was engaged, or was about to engage, in a business or transaction for which the remaining assets of the debtor were, given the nature of the business or transaction, unreasonably small; or

(c) intended to incur, or believed, or reasonably should have believed, that the debtor would incur, debts beyond the debtor's ability to pay.

[45] Mr Gudsell submitted that the 4 August 2008 agreements were, in terms of s 346(1)(b) either made with an intent to prejudice a creditor, or were made without receiving reasonably equivalent value in exchange. He further submitted that Mr Fawcett, in terms of s 346(2), became insolvent as a result of making the dispositions, or reasonably should have believed that he would incur debts beyond his ability to pay.

[46] Mr Gudsell submitted that the only possible creditor prejudiced by the transfer was the Southland Building Society. All other creditors which had lent Mr Fawcett money to purchase the various properties retained their interest in those properties. At the point of the transfer made after the various loans had fallen due, Mr Fawcett should have been aware of the possibility that his guarantee might be called upon. There is, here, an irresistible inference that Mr Fawcett must have appreciated that by transferring the majority of his substantial assets there was a risk that future attempts by the Southland Building Society to enforce its guarantee would be hindered, delayed or defeated. One only has to consider the terms of the sale and purchase agreement which precluded any claim by Mr Fawcett against the transferees for 40 years.

[47] Mr Gudsell, however, invited me to consider the alternative, namely, that the dispositions were made without receiving reasonably equivalent value. He drew attention to the fact that by agreeing to sell the properties in exchange for a combined debt of $3,127,530 not payable for 40 years and with no security interest, Mr Fawcett had, in effect, received nothing of genuine value in return.

[48] He submitted that Mr Fawcett either became insolvent as a consequence of making the dispositions, or reasonably should have believed that he would incur debts beyond his ability to pay. He drew attention to the fact that Mr Fawcett was a principal debtor in respect of the debt guaranteed to the Southland Building Society as well as a guarantor.

[49] A contract of guarantee creates a debt that is to be treated as due and owing. Mr Gudsell referred me to the analysis of Tipping J in *Regal Castings Ltd v Lightbody*[10] where he cited the decision of Lord Selborne LC in *Re Ridler* where His Lordship stated: [11]

> The arguments on behalf of the Respondents turned much on the proposition that when a person is liable on a guarantee he is not to be regarded for the present purpose as owing a debt of that amount, without taking into account the assets of the principal debtor as well as his own. There is a fallacy in this. To hold that a guarantor can make a voluntary settlement of the whole of his property and support it by shewing that when he made it the person guaranteed had assets enough to pay the amount guaranteed, would go far to defeat the contract of suretyship. We must look at the matter as if the event had already happened the possibility of which the parties must have had in contemplation when the guarantee was given of the debtor being unable to pay. I do not think that any close inquiry as to the supposed capacity of the person guaranteed to pay the debt ought to be entered into. I do not say that there might not be a state of things in which the liability of the guarantor might be so remote that it need not be regarded; but if he conveys away all his property by a voluntary settlement I think it doubtful whether the settlement could in any case be supported in the event of his ultimately being called on under his guarantee.

[50] Tipping J observed:[12]

> The Lord Chancellor went on to indicate that it was not appropriate to speculate about the ability of the principal debtor to satisfy the indebtedness; the Court should consider only the state of the guarantor's assets.

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10 *Regal Castings Ltd v Lightbody* [2009] 2 NZLR 433 (SC) at [116].
11 *Re Ridler* (1882) 22 ChD 74 at 80.
12 Above, n 10 at [117].

His Honour further added:[13]

> The effect of the decision in *Ridler* is that, for present purposes, a guarantor must be treated as if the guaranteed debt was due and owing.

[51] Elias CJ[14] and Blanchard and Wilson JJ[15] similarly cited *re Ridler* with approval.

[52] I accept Mr Gudsell's submissions. The agreements must have been made with intent to prejudice the Southland Building Society which was pursuing its outstanding loans at the time. By making the transfers under the 4 August 2008 agreements Mr Fawcett simply had no means to satisfy the debts that he was obliged to pay. That may well have been because he misunderstood his position as guarantor. Nevertheless, when the law is applied, the conclusion is inevitable that he had insufficient assets to meet the obligations he had undertaken.

[53] The conclusion just reached, but for one further matter, suggests that there is no substantial ground of defence to the original application that would justify setting aside the orders I have made. The one additional matter is that Mr Nolan submitted that the rider to s 344 might well apply. He submitted that by making the order it could have the effect of increasing the value of the securities held by the creditor over the debtor's property. There is, however, no evidence of any increase in the valuation of securities by the order that I made. Accordingly, I find no foundation for Mr Nolan's submissions in this respect.

The share transfer

[54] Mr Gudsell submitted that this transaction was an insolvent transaction. He referred to s 194 of the Insolvency Act 2006. Section 194 provides:

> **194 Insolvent transaction may be cancelled**
>
> A transaction by the bankrupt may be cancelled on the Assignee's initiative if it—
>
> (a) is an insolvent transaction; and

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13 Ibid, at [118].
14 Ibid, at [8].
15 Ibid, at [59].

(b) was made within 2 years immediately before the bankrupt's adjudication.

[55] Section 195 of the Insolvency Act 2006 provides:

> **195 Meaning of insolvent transaction**
>
> (1) An **insolvent transaction** is a transaction by the bankrupt that—
>
> (a) is entered into at a time when the bankrupt is unable to pay his or her due debts; and
>
> (b) enables a creditor to receive more towards satisfaction of a debt by the bankrupt than that person would receive, or would be likely to receive, in the bankruptcy.
>
> (2) **Transaction**, as used in the term "insolvent transaction", means any of the following steps by the bankrupt:
>
> (a) conveying or transferring the bankrupt's property:
>
> (b) giving a charge over the bankrupt's property:
>
> (c) Incurring an obligation:
>
> (d) undergoing an execution process:
>
> (e) paying money (including money paid in accordance with a judgment or an order of a court):
>
> (f) anything done or omitted to be done for the purpose of entering into the transaction or giving effect to it.

[56] Pursuant to s 196 of the Insolvency Act 2006 any

> transaction that is made within 6 months immediately before the bankrupt's adjudication is presumed, unless the contrary is proved, to be made at a time when the bankrupt is unable to pay his or her due debts.

[57] The share transfer was effected approximately five days prior to adjudication. This is a transaction which is presumed to be insolvent. No information has been placed before the Court in an attempt to prove that at the time of the transfer Mr Fawcett was solvent. His adjudication five days later indicates that he was not. I accept therefore, the Official Assignee's submission that the applicants had no substantial defence to this part of the application and the orders that I made.

[58] Mr Nolan acknowledged in his reply submissions that the Official Assignee was entitled to take the share proceeds and therefore conceded that the orders I made in respect of this part of the application should not be set aside.

[59] The conclusion I have reached, therefore, is that there is no substantial ground of opposition to the original application that would justify my setting the orders that I have made. That makes it unnecessary to consider the other matters referred to in [21] to [25] of this judgment. Accordingly, I dismiss the application.

Costs

[60] Counsel requested that I reserve costs. If counsel are unable to agree memoranda in support, opposition and reply shall be filed at five working day intervals. The file shall then be referred to me to consider the question of costs.

JA Faire
Associate Judge