

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

**I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKĀURAU ROHE**

**CIV-2021-404-002301
[2022] NZHC 1528**

UNDER the Companies Act 1993

IN THE MATTER OF the liquidation of Ezybuilding Group Co.
Limited (in liquidation)

BETWEEN KEVIN JOHN WHITLEY as liquidator of
Ezybuilding Group Co Ltd (in liquidation)
Applicant

AND SDCIC NZ ARCHITECTURE LIMITED
First Respondent

HUA WU
Second Respondent

Hearing: 11 April 2022

Appearances: R B Hucker and A Moana-Howard for the Applicant
A Ho and X Zhang for the Second Respondent

Judgment: 30 June 2022

JUDGMENT OF ASSOCIATE JUDGE GARDINER

This judgment was delivered by me on 30 June 2022 at 11.30 a.m.
pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar
Date.....

Solicitors:

Crimson Legal, Auckland
Zhang Law Ltd, Auckland
Hucker Law, Auckland

Alden Ho, Auckland

Introduction

[1] Shortly before Ezybuilding Group Co Limited (in liquidation) (**Ezybuilding Group**) was placed into liquidation, it paid \$20,000 to SDCIC NZ Architecture Limited (**SDCIC**), a trade creditor, and gave possession of a 2017 Audi SQ7.

[2] The liquidator of Ezybuilding Group now applies for orders under s 295 of the Companies Act 1993 that SDCIC repay the \$20,000; and that SDCIC and its former director, Hua Wu (also known as Danny Wu), pay Ezybuilding Group \$112,500 as compensation for the motor vehicle. The liquidator maintains that these are voidable transactions under s 292 of the Act, as they were made within six months of the liquidation.

[3] Alternatively, the liquidator seeks an order that the vehicle was transferred at an undervalue and that SDCIC and Mr Wu should compensate Ezybuilding Group under s 297.

[4] SDCIC did not object to the liquidator's notice to set aside these transactions as voidable transactions within the permitted 20 working days. The transactions are thus automatically set aside as against SDCIC.¹ SDCIC has not taken any steps in this proceeding to oppose the orders the liquidator seeks against it.

[5] The dispute concerns the orders the liquidator seeks against Mr Wu. Mr Wu objected to the liquidator's notice to set aside the conveyance of the vehicle and opposes the orders sought under ss 295 and 297. He maintains that SDCIC, not he, was the recipient of the motor vehicle. He also says he is not a creditor of Ezybuilding Group and, further, that the vehicle was not transferred at an undervalue. Initially, Mr Wu also maintained that he had a defence under s 296(3) but he abandoned that defence prior to the hearing.

[6] The application raises these issues:

¹ Companies Act 1993, s 294(3).

- (a) Who received the motor vehicle?
- (b) Was the recipient of the motor vehicle a creditor of Ezybuilding Group?
- (c) If yes, did the recipient receive more towards satisfaction of the debt than they would have received in the liquidation?
- (d) If yes, should the Court exercise its discretion to make orders under s 295?
- (e) Alternatively, was the motor vehicle transferred at an undervalue, justifying orders under s 297?

Background facts

[7] Ezybuilding Group was incorporated on 31 May 2016. It carried out business as a construction company. Its sole director and shareholder was Michael Lee. Ezybuilding Group was part of a few closely held, related companies with similar names. Mr Lee was involved in all those companies.

[8] One related company was Ezybuilding Homes Limited (in liquidation), of which Mr Lee and Junbin Qiu, also known as Jimmy Qiu, were directors and/or shareholders at various times.

[9] SDCIC is a company that Ezybuilding Group contracted with to supply them with labour. Hua Wu was the sole director and shareholder of SDCIC.

[10] Ezybuilding Group went into liquidation and Mr Whitley was appointed liquidator on 23 December 2020. Mr Lee disclosed that the reason he chose to wind up the company was because Ezybuilding Group was having cashflow difficulties.

[11] The liquidator assesses the company to be insolvent and that it has been insolvent since mid-2019.²

² Affidavit of Kevin John Whitley affirmed 17 November 2021.

[12] Between May 2020 and June 2020, SDCIC supplied labour for two projects for Ezybuilding Group, and one for Ezybuilding Homes Limited. The total amount owed for these projects was \$98,498.65. After Ezybuilding Group made one payment of \$10,000 to SDCIC on 23 June 2020, no further payments were made.

[13] SDCIC referred the debts to a debt collector, who served statutory demands on the Ezybuilding companies on 4 September 2020. The first demand was to Ezybuilding Homes Limited, for the sum of \$66,334.30. The second was to Ezybuilding Group, for the sum of \$32,164.35.

[14] On 15 September 2020, Mr Lee and Mr Wu signed a "Payment agreement" which records that Ezybuilding/Mr Lee would pay SDCIC/Mr Wu \$70,000 before 15 October 2020 and Mr Wu would withdraw the statutory demand that day.

[15] At 7.18 pm on 15 September 2020, the debt collector informed Ezybuilding's solicitor that the statutory demands served on both Ezybuilding companies were formally withdrawn.

[16] Ezybuilding Group then paid to SDCIC the following amounts:

- (a) \$20,000 on 16 October 2020;
- (b) \$2,000 on 4 November 2020; and
- (c) \$164.35 on 27 November 2020.

[17] There is no dispute that Ezybuilding Group made these payments to SDCIC's company account.³

[18] Mr Wu deposes that he had several discussions with Mr Lee about the remaining debt of \$47,835.65 (\$70,000 minus \$22,164.35). He deposes that they agreed that Mr Lee would sell a 2017 Audi SQ7 to pay down the remaining debt owed to SDCIC. However, Mr Lee could not obtain the price he wanted from any dealership

³ See the affidavit of Kevin John Whitley in reply affirmed 25 March 2022, annexure Q1.

following extensive attempts throughout December 2020. They agreed instead that the vehicle would be handed over to Mr Wu/SDCIC to pay down the debt.

[19] This agreement was recorded in “Meeting Minutes” dated 6 December 2020. These minutes, translated, record:⁴

Meeting Minutes

A resolution was reached regarding the debt of \$48,000 to Danny during the meeting.

Michael’s Audi car is to be handed over to Danny representing the actual amount of \$28,000, being the sales price of \$88,000 minus the loan of \$60,000. In terms of the remaining \$20,000, Jimmy Qiu is to pay that off at \$2,000 per month to Danny (03[...]22-00). After that is paid off, Jimmy Qiu is to pay \$2,000 per month to Michael Lee (06-0878-027909-00), totalling \$28,000. Both Danny and Michael require a personal guarantee for the payments aforementioned.

If Danny passes on the business to Jimmy Qiu, Jimmy Qiu is to further subsidize \$70,000 to Michael Lee.

[20] The document is signed by Mr Lee, Mr Wu and Mr Qiu.

[21] On 20 December 2020, SDCIC paid the existing finance owed on the Audi to BMW Financial Services of \$59,730.75.⁵ That same day, SDCIC obtained finance for the car of \$86,112 from UDC Finance Limited.⁶

[22] Mr Wu registered himself as the new owner of the vehicle on 10 February 2021.

[23] On 24 March 2021, the liquidator filed a notice to set aside an insolvent or voidable transaction against Mr Wu under ss 292 and 295 of the Companies Act 1993. The liquidator was unable to serve Mr Wu with the notice until an order for substituted service was made on 2 July 2021.

⁴ The original document is in a mix of English and Chinese. It is clear that there are no material differences between this and the translated version — the original document is also dated 6 December 2020 and the movement of money between the three men (with their English names used) is represented the same way with the same amounts.

⁵ Affidavit of Hua Wu affirmed 10 February 2022, annexures 025 and 026.

⁶ At [24] and annexure 094.

[24] On 10 June 2021, Mr Wu changed the plates of the vehicle from MYFMLY to NMK785. He traded in the vehicle to Andrew Simms in Newmarket on 21 June 2021, obtaining a trade-in price of \$85,000.⁷

[25] On 28 September 2021, the liquidator served notice on SDCIC to set aside the transfer of \$20,000 in October 2020 and the transfer of the motor vehicle.

[26] Mr Wu objected to the notice to set aside the vehicle transaction on 6 August 2021. SDCIC did not object to the transactions being set aside as against SDCIC.

Legal principles

[27] Section 292(1) provides that:

- (1) A transaction by a company is voidable by the liquidator if it—
 - (a) is an insolvent transaction; and
 - (b) is entered into within the restricted period.

[28] Section 292(2) defines an insolvent transaction as follows:

- (2) An **insolvent transaction** is a transaction by a company that—
 - (a) is entered into at a time when the company is unable to pay its due debts; and
 - (b) enables another person to receive more towards satisfaction of a debt owed by the company than the person would receive, or would be likely to receive, in the company's liquidation.

[29] “Transaction” includes:⁸

- (a) conveying or transferring the company’s property;
- (b) paying money; and

⁷ Affidavit of Hua Wu affirmed 10 February 2022 at [36].

⁸ Companies Act 1993, s 292(3).

- (c) anything done or omitted to be done for the purpose of entering into the transaction or giving effect to it.

[30] Putting this in the context of the present application, to be an insolvent transaction there must be a payment made by the company to another, or a company asset conveyed, in the context of a debtor/creditor relationship,⁹ which results in the creditor receiving more than it would in a liquidation.

[31] The restricted period is six months before the commencement of the liquidation.¹⁰ A transaction entered into within the restricted period is presumed to have been entered into at a time when the company was unable to pay its debts unless the contrary is proved.¹¹

[32] Section 296(3) outlines a defence to s 292, whereby the recipient of a voidable transaction will nonetheless be allowed to retain the money:

- (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.]

[33] The procedure for setting aside a voidable transaction is set out in s 294. It requires the liquidator to file a prescribed notice in Court and serve it on the party from whom recovery is sought. The transaction is automatically set aside as against the person on whom notice has been served if that person does not object in writing to the

⁹ This is because s 292(2)(b) requires that there be a debt owed: see *Allied Concrete Ltd v Meltzer* [2015] NZSC 7 at [18] and n 24.

¹⁰ Section 292(4C).

¹¹ Section 292 (4A).

liquidator within 20 working days.¹² That notice must give particulars of the reason(s) for the objection and identify any relevant documents that substantiate the objection.

[34] A transaction that is not automatically set aside under s 294 may still be set aside by the Court on the liquidator's application.¹³

[35] Once a transaction is set aside under s 294 of the Act, the Court has a discretion as to the orders it can make. These include an order that a person pay to the company an amount equal to some or all of the money that the company paid under the transaction, or that a person transfer to the company property that the company transferred under the transaction, or that a person pay to the company an amount that, in the Court's opinion, fairly represents some or all of the benefits that person received because of the transaction.

[36] The liquidator's ability to recover in relation to transactions at an undervalue is set out at s 297:

297 Transactions at undervalue

(1) Under subsection (2) the liquidator may recover from a person (**X**) the amount **C** in the formula $A - B = C$, where—

- (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, —

¹² Section 294(3).

¹³ Section 294(5).

- (a) **transaction** has the same meaning as in section 292(3):
- (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.

Matters not disputed

[37] There is no dispute that the transfer of \$20,000 into SDCIC’s bank account and the transfer of the motor vehicle are “transactions” within the meaning of the Act.

[38] There is also no dispute that the two transactions occurred within the six month restricted period under s 292; and therefore, Ezybuilding Group is presumed to have been insolvent when the transactions were made.¹⁴

[39] Further, there is no dispute that the Audi was the property of Ezybuilding Group. It was registered as being owned by Ezybuilding Group from 19 December 2017 to 10 February 2021, when the ownership was changed to Mr Wu.

¹⁴ Section 292(4A).

[40] What is disputed is to whom the vehicle was conveyed or transferred: SDCIC or Mr Wu. The answer is critical for two reasons. First, a voidable transaction must be between a debtor and a creditor.¹⁵ That is because s 292(2)(b) requires there to be a debt owed by the company to the recipient. Second, the answer determines whether orders made under s 295 or 297 are made against SDCIC, or Mr Wu, or both of them.

Who received the motor vehicle?

[41] The liquidator contends that Mr Wu received the vehicle for the purposes of s 292(3). He submits that Mr Wu was the intended recipient under the December 2020 agreement, he was registered and recorded as the owner of the Audi in his personal name and he dealt with the motor vehicle as if it was his own, selling directly to Andrew Simms in Newmarket.

[42] Underpinning this submission is the liquidator's position that by the December 2020 agreement, Mr Wu, not SDCIC, was the creditor. The liquidator contends that the parties deliberately described the \$48,000 debt as owed "to Danny" in this document. The liquidator rejects the possibility that this description was a slip or misunderstanding by Mr Wu and Mr Lee, who meant that the \$48,000 debt was owed to SDCIC. The liquidator says that, objectively construing the document, the parties intended to record that the \$48,000 debt that was originally owed to SDCIC was now owed to Mr Wu.

[43] As to how this might have happened, the liquidator suggests that under the September 2020 "deed" the Ezybuilding companies' debts to SDCIC were consolidated and novated to Ezybuilding Group. Then, through some legal mechanism, SDCIC made Mr Wu the debtor. The liquidator surmises that there must have been a distribution by SDCIC to Mr Wu as shareholder, or an assignment of the debt, or some other step taken by SDCIC to make Mr Wu the creditor.

[44] The liquidator emphasises that SDCIC is not a party to the December 2020 agreement and is not mentioned in the document.

¹⁵ *Allied Concrete Ltd v Meltzer* [2015] NZSC 7 at [18] and n 24.

[45] Consistent with that theory, the liquidator submits that the statement in the December document that “Michael’s Audi car is to be handed over to Danny” records the parties’ intention that the vehicle would be transferred to Mr Wu personally, to reduce Ezybuilding Group’s debt owed to him.

[46] I do not accept that Mr Wu received the motor vehicle for the purposes of s 292(3)(a), for the following reasons.

[47] First, I reject the liquidator’s interpretation of the December 2020 document. This interpretation ignores the surrounding context and attributes an unrealistic level of formality and legal sophistication to the parties. In my view, given the parties and the context, they used their personal names in these minutes to refer to their respective companies. That is the only sensible way to interpret the document. Plainly they were concerned with the debt between the Ezybuilding companies and SDCIC that had been the subject of the statutory demands, the “payment plan” in September 2020, and part-payments by Ezybuilding Group to SDCIC. There is no evidence to support the notion that at some point since, SDCIC had assigned the remaining debt to Mr Wu or taken some step to make Mr Wu the creditor. That is pure speculation. Thus, the only reasonable interpretation of the December 2020 document is that while the parties chose to use their personal names, the agreement in all respects concerned transactions between their companies. This explains why neither Ezybuilding Group nor SDCIC are a party to, or referred to, in the document.

[48] Consistent with that level of informality, the minutes refer to “Michael’s Audi car” being handed over to “Danny”. If, as the liquidator submits, the use of the parties’ names as opposed to their companies was deliberate, then this document indicates that the Audi was in fact owned by Mr Lee, not Ezybuilding Group. Yet it is not disputed that the Audi was owned by Ezybuilding Group, and the liquidator’s claim proceeds on that basis. In my view, it is clear that when the parties used their names, they meant their companies.

[49] Second, having concluded that SDCIC, not Mr Wu, was the creditor, it follows that the parties intended that the vehicle be conveyed to SDCIC. The purpose of the conveyance was to reduce the level of indebtedness between the companies. There

would have been no point in Ezybuilding conveying the car to Mr Wu, as it would have had no effect on the debt between Ezybuilding and SDCIC. Practically, as Mr Wu was the only director and shareholder of SDCIC, the vehicle was conveyed to him on behalf of the company.

[50] Third, when the liquidator examined Mr Lee on 23 December 2020, Mr Lee stated that the vehicle was “sold” two weeks earlier, with the financier repaid and “the balance of the proceeds went to a contractor.” I infer that the contractor was SDCIC.

[51] Fourth, on 20 December 2020, SDCIC (not Mr Wu) repaid the outstanding finance to BMW and took out further finance on the vehicle from UDC Finance.

[52] The only fact going against this interpretation is that Mr Wu became the registered owner of the vehicle. He has not proffered an explanation for why the car was registered in his name rather than his company’s. However, this occurred two months after the vehicle was handed over, as confirmed by Mr Lee to the liquidator; and two months after SDCIC discharged the finance on the vehicle. It is also important to acknowledge that registration is not decisive of the legal ownership of a motor vehicle. The registered person is the party who is responsible for and entitled to take possession of the vehicle. Their position should be distinguished from that of the legal owner.¹⁶ The Motor Vehicle Register makes that distinction clear as it records the person registered as responsible for the vehicle but does not record the legal owner.¹⁷

[53] For these reasons, I reject the liquidator’s submission that Mr Wu was the recipient of the motor vehicle. I find that the agreement reached on 6 December 2020 was that the Audi would be conveyed to Mr Wu on behalf of SDCIC to reduce the debt owed by Ezybuilding Group to SDCIC from \$48,000 to \$20,000. The remaining debt, as the minutes record, was to be progressively paid off by the other director of Ezybuilding Limited, Mr Qiu.

¹⁶ See *Reveal NZ Ltd (in liq) v Inthayung* [2022] NZHC 712 at [14].

¹⁷ “Your responsibilities as the registered person” Waka Kotahi NZ Transport Agency <www.nzta.govt.nz>

Was the recipient of the motor vehicle a creditor of Ezybuilding Group?

[54] I have found that recipient of the motor vehicle was SDCIC (not Mr Wu).

[55] SDCIC was a creditor of Ezybuilding Group at the time of the conveyance.

Did SDCIC receive more towards satisfaction of the debt than it would have received in the liquidation?

[56] In his third report, the liquidator states that he does not expect to make any recoveries from debtors whatsoever.¹⁸ In his reply affidavit, he states that his fees of \$23,275 from the period of the third report and his fees of \$4,435 from the period of the second report are still outstanding.¹⁹

[57] I conclude that there is not likely to be any distribution to unsecured creditors within the liquidation.

[58] Therefore, by receiving \$20,000 and the motor vehicle from Ezybuilding Group within the restricted period, SDCIC received more than it would have otherwise received in the liquidation.

[59] Clearly, s 292(2)(b) is satisfied.

If yes, should the Court exercise its discretion to make orders under s 295?

[60] The transfer of \$20,000 from Ezybuilding Group to SDCIC has been set aside as a matter of law. I can see no reason not to order SDCIC to repay the \$20,000 to Ezybuilding Group under s 295(a).

[61] The conveyance of the vehicle to SDCIC is also set aside as a matter of law, as SDCIC did not object to the liquidator's notice to set aside the transaction. As the vehicle has been on sold, I consider it appropriate for there to be an order under s 295(c) that SDCIC pay Ezybuilding Group an amount that fairly represents the benefit the company received because of the transaction.

¹⁸ Kevin John Whitley *Liquidators' Six-Monthly Third Report to Creditors and Shareholders* (January 2022) at [4.4].

¹⁹ Affidavit of Kevin John Whitley in reply affirmed 25 March 2022 at [51].

[62] The liquidator and Mr Wu have presented competing evidence about the value of the vehicle.

[63] The liquidator claims the vehicle was worth \$112,500 at the time. This price is based on searches on TradeMe of similar vehicles, a valuation certificate obtained from Vehicle Value for \$115,000, and a search on www.driven.co.nz.

[64] Mr Wu disagrees with the liquidator's assessment of the vehicle value. He presents evidence of unsuccessful attempts made by him and Mr Lee from December 2020 to sell the car through various car dealerships. Much of this evidence is hearsay and is inadmissible. Mr Wu deposes that it was based on opinions from the dealerships that he and Mr Lee agreed that the value of the vehicle for the purposes of the December agreement was \$88,000.

[65] Mr Wu deposes that after taking possession of the vehicle, he took steps to sell it from December 2020 to June 2021. It was taken to 4 Better Cars, a car dealership in St Johns, Auckland, which advertised and marketed the vehicle on TradeMe and other websites for approximately 6 months. He says that initially the asking price was \$124,990. The price was subsequently reduced to \$110,000. Mr Wu has provided an email from 4 Better Cars confirming that the car did not sell at this price range. As mentioned, he finally traded in the vehicle for \$85,000 to Andrew Simms in Newmarket.

[66] It is not necessary for me to resolve the competing evidence as to the market value of the car. Section 295(c) entitles me to order SDCIC to pay Ezybuilding Group an amount that fairly represents the benefit the company received because of the transaction. This benefit is fairly assessed as the price SDCIC received when it traded in the car in June 2021 (the only deduction to be made on this value is the amount paid to BMW to release its charge on the Audi of \$59,760). Therefore, the benefit obtained by SDCIC is \$25,240 (\$85,000 – \$59,760).

[67] For the reasons given above in relation to the \$20,000, this amount is more than what SDCIC would have received in the liquidation.

Result

[68] I order:

- (a) the application for orders against the second respondent, Hua Wu, is dismissed;
- (b) the first respondent is to pay the applicant:
 - (i) \$20,000;
 - (ii) \$25,240; and
 - (iii) interest on these sums pursuant to s 10 of the Interest on Money Claims Act 2016 from the date of appointment of the liquidator on 23 December 2020.

[69] The liquidators are to pay Mr Wu's costs on the proceeding. I trust counsel will be able to confer and agree costs but if they are unable to do so, memoranda may be filed. The liquidators are to file their memorandum within five working days of Mr Wu filing his memorandum.

[70] If the liquidators seek costs against SDCIC, they have leave to file a memorandum.

Associate Judge Gardiner