SANSON V EBERT CONSTRUCTION LIMITED [2015] NZHC 2402 (SANSON)

This case provides a useful example of how sections 296(3)(a) and (b) can be significant obstacles for creditors. Decided in October 2015, Sanson concerned the successful application by the liquidators of Takapuna Procurement Limited (**TPL**) to set aside payments made by its financier, BOS International (Australia) Limited (**BOSI**), to a construction company engaged by TPL, Ebert Construction Limited (**Ebert**) pursuant to a direct deed arrangement as payments made on behalf of the insolvent developer. Sanson is the first New Zealand case where a liquidator has raised this argument but is unlikely to be the last. Direct deeds are a common contractual tool in construction projects to give financiers the right to step into the place of the developer and directly arrange for payments to the contractor to ensure that the development is completed.

It was held that the direct deed did not provide an independent obligation on the financier to make payments, rather they allow the financier to elect to make payments in place of the developer and prevent the contractor cancelling the contract upon a default[1]. Such payments are made from the loan facility available to the developer and are accordingly limited to the extent of that facility. It is on this basis that the liquidators in Sanson argued that the payments made to Ebert by BOSI were actually the property of TPL which was applied by BOSI on TPL's behalf and therefore unfairly received in preference to other creditors.[2]

The Court rejected the creditor's good faith defence.[3] Relying on section 296(3)(b) Doogue AJ refused to accept Ebert did not appreciate that the transaction gave it an undue preference or did not anticipate insolvency. Associate Judge Doogue declared the payments voidable under s 293 (the charges provision) of the Companies Act 1993. The result of this judgment is that contractors who negotiate and enter into direct deeds and receive payments under them are unlikely to get the protection they will have expected.

Ebert raised several other arguments, including that BOSI's obligations to Ebert were as guarantor and independent of TPL. All were rejected.[4] It is observed that payments made by secured creditors for construction work may create value increases in their security, and be neutral (or even positive) to unsecured creditors in liquidation. Ebert has appealed. Further guidance in this area will be helpful.

EndNotes

1 At [94] – [98].

2 At [38].

3 At [181] and [183].

4 At [71] – [74] and [89] – [92].

BUDDLE FINDLAY