IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

CIV 2007 409 002600

BETWEEN METROPOLITAN ADVANCES LIMITED
Applicant

AND MALCOLM GRANT HOLLIS AND JOHN HOWARD ROSS FISK LIQUIDATORS FOR FAST FORWARD TVR (IN LIQUIDATION
Respondents

Hearing: 25 February 2008

Appearances: S Savill for Applicant
D Lester for Respondents

Judgment: 6 March 2008

JUDGMENT OF ASSOCIATE JUDGE CHRISTIANSEN

The dispute

[1] The applicant (Metropolitan) provides accountancy, taxation and compliance services. In that capacity it had acted for Fast Forward TVR Limited (the company) from that company's inception on 1 December 2003, until its liquidation on 30 July 2007.

[2] On 22 August 2007 the respondents issued a notice which, in effect, challenged receipt by Metropolitan, on or about 30 April 2007, of $9,919,49 'by way of deduction from the company's GST refunds', (the deduction).

[3] Metropolitan's application for an order that the transaction not be set aside, or that recovery be denied, identifies these reasons in support:

(a) The deduction was not a transaction within the meaning of that word in s 292 of the Companies Amendment Act 2006 (the Act). The deduction was made pursuant to an assignment/mortgage/charge/lien granted on or about 30 April 2004 by the company, such date preceding the commencement of the specified period defined in s 292 of the Act.

(b) The deduction was made at a time when the company was able to pay its due debts.

(c) It did not enable Metropolitan to receive more towards satisfaction of a debt than it would have otherwise have received, or have been likely to have received in the liquidation of the company.

(d) It was made in the ordinary course of business.

[4] If the Court does not accept that position then, in the alternative, Metropolitan applies for relief, or payment in full or in part, because it received the deduction in good faith and altered its position in the reasonably held belief that the transfer to it was validly made, and would not be set aside.

[5] The application was filed on 26 October 2007, just a few days before the 2006 Companies Amendment Act amended ss 292, 294 and 296 of the Companies Act. Those sections were part of a number of provisions effecting changes to the voidable preference transitions in the Companies Act. However, counsel are agreed that as the transaction occurred prior to the coming into effect of the Companies Act amendments, this case is to be judged by the law in force preceding the changes effected from 1 November 2007.

[6] Accordingly, and unless the contrary is proved, if a transaction took place within 6 months prior to liquidation it is presumed to have been made at a time when the company was unable to pay its debts, and otherwise in the ordinary course of business.

[7] In opposition to the application, the respondents claim:

(a) The transaction was outside the ordinary course of business.

(b) The document dated 30 April 2004, and relied upon by the applicant, does not amount to a charge or otherwise.

(c) The deduction was made at a time the company was insolvent and therefore enabled Metropolitan to receive more towards satisfaction of its debt then otherwise it would have.

Background

[8] Mr Lundy is the managing director of Metropolitan. He is also a director of the company. In late 2003 Mr Darryl Winiata contacted him and asked him to form the company. Mr Lundy says because of his reservations concerning payment of fees for services to be provided, he agreed Metropolitan would accept the instructions provided the company gave security for payment of Metropolitan's fees from tax credits due to the company by the Inland Revenue Department. Mr Lundy said this was agreed to.

[9] To give effect to the agreement for security Metropolitan prepared:

(a) Its appointment as the company's tax agent as identified on IRD form 798.

(b) Direct credit authorisation directing the IRD to pay the company's tax refunds to Metropolitan's bank account.

(c) An authority from the company authorising Metropolitan to take its fees and disbursements from the tax refunds credited by the IRD to Metropolitan's account. That latter document is headed 'Engagement' and noted:

> I authorise (Metropolitan) to debit rendered invoices against tax/GST refunds received on my behalf…

[10] Metropolitan's services to the company included the preparation and filing of financial accounts, GST returns, and annual returns.

[11] Mr Lundy has provided a summary identifying all invoices rendered to 30 June 2007. He has also provided a summary of tax credits received by Metropolitan, pursuant to the direct credit authorisation given to the IRD. He says it shows that on 24 September 2005 the sum of $5,522.07 was paid to the company, and on 8 August 2007 the sum of $6,601.07 was paid to the respondents. These represent the balances paid to the company and to the liquidator after deduction of fees invoiced. That is, those payments provide the total of payments made after deductions for payment of fees invoiced.

[12] Attached to Mr Lundy's affidavit is a reconciliation which details the deductions made from the company's tax credits:

23/4/07		$4,970.39
27/4/07		$ 81.66
30/6/07		$ 675.00
14/7/07		$3,059.94
26/7/07		$ 123.67
30/7/07		$ 168.75
31/7/07		$ 90.00
	TOTAL	$9,919.49

[13] Mr Lundy does address the issue of the company's solvency at the time when the deductions were made. He notes that the 31 March 2007 financial accounts show shareholders' funds exceeding current and term liabilities by $245,823.00. Funding

of the company's assets was mainly by way of advances from Mr Winiata. His account with the company was in credit in the sum of $430,189.00. Mr Lundy states:

> As at 31 March 2007 the company's cash position was relatively OK. Sundry creditors stood at $18,465 (including Metropolitan's fees to that date) and cash assets stood at $51,051, being cash in the bank and including a GST refund due.

[14] Mr Lundy said Mr Winiata told him he would continue to support the company from his own resources. He adds:

> From his advice and information available to me, I believed that the company was solvent and able to pay its debts.

[15] In March 2007 Mr Lundy recalls having received a statutory demand from Castlereagh Nominees addressed to the company. He passed it on to Mr Winiata and was shortly thereafter informed in relation to it that the dispute was resolved and the matter settled.

[16] Mr Lundy states it was Metropolitan's practice to seek and take security over tax credits from clients where there was some element of perceived risk. He believes that it is a relatively common practice amongst accountants. He said the tax credits received from the IRD occurred in the ordinary course of business, and were debited with fees in accordance with the security arrangements he had in place with the company.

[17] But for that security arrangement Metropolitan would not have taken on the company as a client and, if at any time it believed that any payment pursuant to the arrangement could be set aside, it would have ceased to have carried out work for the company. Mr Lundy considers therefore it would be inequitable for the respondents to recover the monies that have been deducted by Metropolitan from the company's tax credits.

[18] Mr Lundy states that Metropolitan's work for the company produced GST tax refunds totalling $25,224.51. Out of those Metropolitan has been paid fees and disbursements of $13,100.74 But for the work being undertaken the tax credits

would not have been generated and the payments not available to the company or its liquidators. For this reason, Mr Lundy argues the transactions have had no preferential effect.

[19] The respondents' position is explained by an affidavit from Ms Somerville, an insolvency practitioner who says she is familiar with the company's liquidation.

[20] Ms Somerville's investigation shows:

(a) The company's funds were used by Metropolitan to pay some small invoices dealing with other companies.

(b) That Metropolitan took some quite small amounts from the company after the liquidation order was made by me on 30 July 2007, and after, on that date an order was made directing that any funds held in trust on behalf of the company were to remain undisbursed.

[21] In Ms Somerville's view of matters the deduction of $5,017.44 was made by Metropolitan on 23 April 2007 from an account into which the GST refunds were paid, but which was not a trust account. Ms Somerville says Metropolitan was paid in advance. The evidence discloses a 'payment' on 23 April 2007 of $9,462.63, whereas to that time, even applying Metropolitan's figures, the sum of $4,070.39 only was outstanding for invoices rendered to that time. Therefore, Metropolitan had raised no invoices in respect of the surplus of $5,017.44 paid to it.

[22] Ms Somerville notes that shortly after the payment was made the account into which the funds were paid went into overdraft. She states that, therefore, the company's funds received by Metropolitan, and for which no invoices had been raised, were used by Metropolitan in meeting other obligations from the account it operated.

[23] Ms Somerville expresses the view that the taking of funds in advance and the subsequent raising of invoices does not fall within the wording of the authorisation

given to Metropolitan on 30 April 2004, that authorisation being limited to permitting Metropolitan to make deductions for invoices rendered.

[24] Instead, Ms Somerville says Metropolitan used the company's funds for its own purposes and, in effect, by way of an advance to itself.

[25] Ms Somerville also disputes Mr Lundy's claims about the company's solvency. She notes a Mr Burton obtained an order for judgment by default in the sum of $10,540.75 on 4 April 2007. Further, on 10 March 2007 Richmond Brook Station issued a statutory demand in the sum of $25,382.31. That was the demand upon which the company was ultimately liquidated. Further, creditors in the sum of about $60,000.00 filed appearances in support of the liquidation.

[26] Ms Somerville notes that Metropolitan continued to raise invoices as a set off against amounts claimed to be owed to the company even after Richmond Brook Station filed its application for liquidation. She says the statement of sundry creditors revealed in the accounts of 31 March 2007 was inaccurate. She adds, as far as assessing the company's solvency as at 31 March 2007, its accounts disclosed stock on hand of $269,000.00. Ms Somerville reports that at the time the liquidators were appointed on 30 July 2007 no stock was located, nor could the proceeds of the claimed stock list be traced or located.

[27] As for Mr Lundy's claim that but for the work Metropolitan did for the company no tax credits would have been generated, she says the respondents recognise there is something to that claim, but that direct recognition would only be given to the cost of filing GST returns. There were 3 such. Ms Somerville states the respondents acknowledge the cost of Metropolitan's work be recognised to a value of $1,200.

The applicant's case

[28] Mr Savill submits the applicant's case is supported by the facts and by the law.

[29] Mr Savill submits the applicant was not an unsecured creditor of the company and therefore s 92 of the Act does not apply, except to permit a secured creditor to prove a claim in a company's liquidation to the extent that the value of a security does not cover the full amount due.

[30] Mr Savill submits the applicant was a secured creditor because it held a charge in relation to the funds it held on behalf of the company. As a charge holder the applicant held a right, or interest, in relation to those funds. Therefore it was entitled to claim priority over other creditors of the company.

[31] Mr Savill relies upon the judgment of Harrison J in *Sleepyhead Manufacturing Co Ltd v Dunphy and Shephard* (CIV 2005-404-1691, 23 February 2006), a matter concerning King Robb Limited (In Liquidation). That case was, as well, concerned with the relationship between a security interest under the Personal Property Securities Act 1999 (the PPSA) and a charge under the Companies Act 1993.

[32] In that case Sleepyhead supplied King Robb Limited with beds and other goods on its ordinary written terms and conditions. Its invoices provided for retention of title in and a security interest over the goods, which it registered following the passage of the PPSA. The parties never signed a formal contract to govern their relationship. After years of trading, King Robb was placed in voluntary liquidation. The liquidators sold the subject goods but refused to recognise Sleepyhead's security interest or account for the proceeds of sale.

[33] The liquidators conceded that the company could be subject to a security agreement but said they were not obliged to recognise it.

[34] Harrison J held the liquidators were acting as King Robb's agents, for and on its behalf, when they sold the goods subject to Sleepyhead's security interest. He held Sleepyhead had a right to immediate possession of the goods it supplied King Robb. Sleepyhead was seeking to enforce its contractual rights against the debtor and its interest constituted a charge in terms of the Companies Act giving it a right to priority to the net proceeds of sale.

[35] Mr Savill submits that judgment provides authority for the right of The applicant to claim a charge in this instance. He refers to Mr Lundy's evidence about the agreement reached in 2004 wherein the company agreed to give security for its fees over the monies payable, or to become payable by the IRD.

[36] He submits that agreement constituted a security agreement/interest under the PPSA because:

(a) The monies payable or to become payable are a chose in action and fall within the definition of "account receivable" in s 6 PPSA.

(b) An account receivable is a sub category of intangibles as defined in s 16 of the PPSA. The definition of Personal Property includes intangibles (s 16 PPSA)

(c) A security interest, as defined in s 17(1) of the PPSA, means an interest in personal property created or provided by a transaction that in substance secures payment, or performance, of an obligation, without regard to:

(i) The form of transaction.

(ii) The identity of the person who has title.

Sub-section 2 provides further that a person who is obligated under an accounts receivable may take a security interest in the accounts receivable under which that person is obligated.

(d) A security interest is not required to be in writing to be enforceable against a debtor.

(e) A security agreement is only enforceable against a third party if:

(i) The collateral is in the possession of the secured party, or;

(ii) It complies with the 'in writing' requirements.

(f) S 40 provides that a security interest must attach, and an attachment occurs when:

(i) Value is given by the secured party.

(ii) The debtor has rights in the collateral.

(g) A liquidator, however, is not a third party, and accordingly writing is not required: in any event, the collateral (the money) is in possession of the secured party (the applicant).

[37] Mr Savill refers me to *Widdup & Mayne* at para 2.9 in support of his submission that a security agreement should be looked at for what it provides in substance, rather than what it provides in form. The learned authors noted:

> In determining whether a transaction is in substance a security interest, the starting point is to disregard the form of the agreement and focus on what the transaction purports to do. If the transaction involves one party providing, or putting up, some personal property to secure an obligation, then the PPSA applies.

[38] Mr Savill submits that the agreement reached in 2004 constituted a security agreement/interest in this case because:

(a) There was an agreement and/or intention to grant a security.

(b) The monies are personal property.

(c) The liquidators are not a third party and, therefore, writing was not required. In any event the collateral (the money) is in possession of the applicant and writing is not required, even if the liquidators were a third party.

(d) There was an agreement because:

(i) The applicant gave value in the form of services provided.

(ii) The company had the right to tax credits from the IRD (the collateral).

[39] Mr Savill submits that if I find there was no security agreement, then nevertheless the deductions were not a transaction, but rather a simple set off of the

applicant's invoices for services rendered pursuant to the authority to deduct dated 13 April 2004.

[40] The applicant disputes that the deductions were made by it on behalf of the company. It says the set offs were made by the applicant alone; that the company took no part in the matter. The deductions were for the benefit of the applicant, and not for the benefit of the company.

[41] For this proposition Mr Savill relies upon the judgment of the Court of Appeal in *Cinema Plus & Others v Australia & New Zealand Banking Group Limited* [2000] NSW CA 195.

[42] The case concerned the exercise by the bank of a contractual right to consolidate, or set off, accounts of a client company. The relevant clause of the contract in issue provided the bank could consolidate any of the customers' accounts towards the payment of money which is then, or will, become due or payable. The Court of Appeal held that clause empowered the bank to act independently and in no sense on behalf of the company. The bank acted on its own behalf and, accordingly, the transaction was not a payment by, or on behalf, of the debtor.

[43] In his book *The Law of Set Off* Dr Royd Derham argued the same reasoning could be applied to enable a right of set off by a bank against the account of an individual.

[44] In summary, in relation to the applicant's claim of a right of set off, Mr Savill submits:

(a) The applicant was acting on its own behalf, and no evidence has been submitted to the contrary.

(b) The deduction/set offs were effective pursuant to the 2004 agreement, which pre-dates the commencement of the specified period.

(c) The deductions/set off cannot be regarded as a payment by the company within the definition of a transaction in s 292.

[45] Mr Savill submits that if I should find there was no right of deduction exercised, or exercisable, within the 6 month specified period prior to the liquidation, then there is insufficient evidence that the applicant suspected, or should have suspected that the company was insolvent. As Mr Savill says, this inquiry is confined to whether or not the applicant had reason to suspect the company was insolvent. Otherwise, as s 310(2) of the Act makes clear, the benefit of a set off would not otherwise be available.

[46] The test of whether or not a person did not have reason to suspect insolvency is objective. As to that, Mr Lundy says he prepared the financial accounts for the company for the year ended March 2007, on or about 16 July 2007. He said the cash position appeared OK, and he believed the company to be solvent. Mr Lundy referred to one statutory demand having been served. Mr Savill offers reasons as to why Ms Somerville's reference to other statutory demands, or other company debts, may not have come to the personal notice of Mr Lundy. In any event, as he points out, a statutory demand notice is itself no evidence of insolvency.

[47] If I should determine that the right of set off, pursuant to the 2004 agreement, is not available to the applicant, the applicant submits the arrangement by which it deducted its fees was part of a practice that continued for more than 3 years until liquidation and was, therefore, was part of the ordinary course of business/commercial practice between the parties. If a Court is of the view the deductions were made as part of the ordinary course of business, notwithstanding they occurred within 6 months of liquidation, then a Court will not order the return of those funds.

[48] Mr Savill refers to the respondents' claim that the deductions were outside the ordinary course of business, as the monies received were held in the applicant's account rather than in a trust account. To this Mr Lundy responds that he does not hold a trust account, and was not obliged to do so. Regardless, it was an arrangement which had been in force between the parties for more than 3 years. He

says it is not an uncommon practice of businesses that do not hold trust accounts and who often look for security or payment up front.

[49] Finally, and referring to s 296(3) Mr Savill refers to the requirement that a Court must not order recovery if the applicant proves when it received the property it acted in good faith, and did not, or could not, have reasonably suspected insolvency, and gave value for the property, or altered its position in the belief it had a right to that property.

[50] Concerning this, Mr Lundy deposed:

> The applicant entered into the security arrangements with the company in 2004 and made the subsequent debits in good faith and in belief that the arrangement and subsequent debits were validly made and would not be set aside. But for the security arrangement, the applicant would not have taken on the company as a client and done the work and if at any time it believed that any payment pursuant to the arrangement could be set aside, it would ceased to have carried out work for the company. Accordingly I am of the view that it would be inequitable for the respondents to recover any monies that had been deducted by the applicant from the company's tax credits.

Discussion

[51] Counsel agree the Court is to deal with s 292 as it stood prior to 1 November 2007 and the changes effected by the Companies Amendment Act 2006.

[52] Accordingly, the Court has to be satisfied that:

(a) There was a transaction, which term includes the payment of money by the company in liquidation.

(b) The transaction occurred at a time when the company was unable to pay its dues debts, and the transaction occurred within the specified period (of six months).

(c) The transaction must have enabled the recipient to receive more towards satisfaction of the debt than otherwise they would have received, or been likely to have received in the liquidation.

(d) If the applicant is to avoid the transaction being voidable, it must show it took place in the ordinary course of business.

[53] Unless the contrary is proved, there is a presumption that the transaction took place within the restricted period and was made at a time when the company was unable to pay its debts, and otherwise than in the ordinary course of business.

[54] My earlier review of the facts identifies how the company's tax refunds were paid to Metropolitan's account. The evidence discloses that was a Westpac banking account in the name of:

Nigel Lundy Accountancy
Metropolitan Advances Limited

[55] Ms Somerville has attached a copy of pages of that bank account covering that period which includes the deposits of tax refunds on 23 April and 27 April 2007.

[56] It is apparent from those pages that the account was operated as a general purpose business banking account from which the applicant made payments of its expenses, including for wages, loan repayments, and entertainment.

[57] The applicant's position is that it became entitled to those tax credits of the company immediately they were received into the applicant's bank account. That is the property in those became the property of the applicant on account of the fact they were to be applied not only for payment of invoices rendered but on account of invoices to be rendered. Mr Savill acknowledged those funds were subject to a trust by which the applicant was to account to the company for those funds which were not applied, or were not to be applied, for the purpose of meeting the applicant's fees. Mr Savill did not accept the trust extended any further than an obligation to account for funds which in time it may be proved would not thereafter be needed to meet a fees payment. Indeed, as his argument was presented, it seemed to me Mr Savill was obliged to argue the applicant's case on this basis for tax refunds totalling $9,462.63 were paid into the applicant's account on 23 April 2007, whereas at that time only a sum of $4,070.39 was outstanding for the invoices rendered. That is, the applicant had raised no invoices in respect of the surplus of $5,017.44 paid to it.

[58] I propose dealing with the applicant's case on the following basis:

(a) To determine whether Metropolitan and the company had an agreement which, in substance, provided for a charge in favour of Metropolitan over the funds received into its bank account from the Inland Revenue Department. If there was a charge then that is the end of this proceeding, for Metropolitan will not be required to account for the payment of fees it made to itself within the 6 months preceding liquidation. [Was there a charge?]

(b) If there was no agreement which provided for a charge, then I should determine whether or not the deductions were a transaction, or instead, as Metropolitan asserts, a simple set off from funds it was entitled to receive pursuant to an authority given it more than 3 years earlier. [Did a right of set off exist?]

(c) If I should determine there was a transaction, and that a right of set off was not available, then I should review the evidence of Mr Lundy's assertion there is insufficient evidence for Metropolitan to have suspected the company was insolvent. [Was there reasonable suspicion of insolvency?]

(d) If Metropolitan could not reasonably have suspected the company was insolvent then I should determine whether the deductions were made as part of the ordinary course of business within the 6 months preceding liquidation. [Were the deductions made in the ordinary course of business?]

Was there a charge?

[59] Mr Lundy asserts the agreement was comprised in the authority I have referred to in para [9(c)] herein. As well, he says he and Mr Winiata orally agreed "the company would give security for payment of the applicant's fees from tax credits due…".

[60] Section 2 of the Act defines a 'charge' as a right or interest in relation to property owned by a company by virtue of which a creditor is entitled to claim payment in priority to other creditors.

[61] In my assessment, the authority upon which Metropolitan relies, neither in form or in substance, creates a charge, nor confers any form of priority, as required by the definition of 'charge'. It is headed 'Engagement'. It is an authority to Metropolitan to act for the company on its accountancy and tax matters. It is nothing more than a standing authority to deduct invoices. It could be cancelled at any time. It would not have prevented the company from changing its tax agent and directing the refunds to be paid elsewhere. It is not an assignment, merely an authority to debit fees. There is nothing irrevocable about it.

[62] Mr Lundy says that document was part of an agreement to provide "security for payment". In my view, although he labels it as a security, it does not mean it is a charge. But, even if it could be considered to be a charge over book debts, that charge would abate as is necessary to meet creditors' claims.

[63] Metropolitan asserts the charge was not required to be in writing in order to be enforceable. In any event, its says the liquidator is not in the position of a third party asserting an interest in the funds, for the liquidator acts as the company's agent. Metropolitan relies upon the authority in *King Robb* case.

[64] I am not sure that King Rob assists Metropolitan to the extent that is claimed. In that case they were held to be the agent of a company because they were acting on its behalf and opposing the claim of a security interest by a creditor. The context of the present case is different. Arguably, initially in a notice seeking to set aside a transaction the liquidators work in a personal capacity and not as the company. Certainly, in the outcome, the liquidators may be held personally responsible.

[65] Regardless, The Court is entitled to be sceptical of claims of an oral agreement to create a charge when a contemporary written record between 2 business partners makes no reference to it. Moreover, I am firmly of the view, despite Metropolitan's claims to the contrary, the funds held by it from the IRD's tax

refunds were always funds that were in the control of the company, not only because Metropolitan had a limited right of access to them, but because there was an obligation to account for those funds which were not redeemable to pay Metropolitan's invoiced costs.

Did a right of set off exist?

[66] As to Metropolitan's alternative position of claiming a set off, I consider it confuses the existence of an authority to deduct fees, with the exercise of power given by that authority. It is the exercise of that power, i.e., the occasion the deduction is made, when one considers whether or not the transaction has occurred. The date of the authority by which the set off is claimed to have been created is, therefore, irrelevant. As much is made clear from the provisions of s 310(2) of the Act, which provides that a set off is not available:

> unless a person proves that, at the time of the transaction or assignment, the person did not have reason to suspect that the company was unable to pay its debts as they become due.

[67] In this case, Metropolitan has tried to characterise the document it relies on as creating an assignment when, plainly, it does not. There are no words of assignment referred to in the document. Indeed, the words of the authority are to be read contrary to the document operating as an assignment. It is an authority to debit.

Was there reasonable cause for suspicion of insolvency?

[68] As to the issue concerning whether or not Metropolitan has cause for suspicion regarding the company's solvency, I have reservations concerning Mr Lundy's claims it did not.

[69] From the beginning he expressed concern about the future performance of Mr Winiata's company, particularly in regard to payment of fees. This is why he says he took his 'security for payment'. He says it was common business practice, but his concerns must have been related to fears his fees would not be paid. That is a matter concerning the company's solvency.

[70] The company's records disclose that the issue price of its shares were unpaid. The company was dependent upon advances from Mr Winiata. Mr Lundy says Mr Winiata informed him he would continue to support the company from his own resources. The question arises – why would this conversation have taken place; why was there a need for Mr Winiata to support the company? Surely such would only be the case if the company was in trouble.

[71] As Mr Lester observes, Mr Lundy's statement that he relied on this advice needs to be contrasted, given Mr Lundy's negative characterisation of Mr Winiata earlier.

[72] Two statutory demands were received by the company at Metropolitan's offices immediately prior to the applicant taking the funds it did in April 2007. Evidence is given of other proceedings having been issued against the company. It is proper to assume that they were served at the registered office.

[73] If Metropolitan had no concerns regarding the company's solvency, then why after receipt of funds in April 2007, and after deduction of its fees from those funds, did it not pay the surplus to the company.

[74] There is also the other observation noted by Mr Lester with respect to the unexplained delay in raising the account from fees in relation to the preparation of the 06/07 financial accounts. As Mr Lester states, that waiting to charge for the 06 accounts into April 07, immediately before the GST refund was received, very much suggests Mr Lundy knew full well that if he raised the invoice before he would not be paid.

[75] I agree with Mr Lester's comment that too much is left unexplained for Mr Lundy to have been satisfied of the requirement in s 310.

Were the deductions made in the ordinary course of business?

[76] Mr Lundy has described Metropolitan's arrangement to deduct its fees from the company's tax credits as being in the ordinary course of business, and

commercial practice between the parties. I have difficulty with that assessment, and of the evidence available to prove it. In fact, as Metropolitan's bank account shows, and as Ms Somerville's affidavit explains, Metropolitan took $5,017.44 prior to, indeed months before, invoices were rendered. I agree with Mr Lester's assessment that it is impossible to characterise that as a payment in the ordinary course of business.

[77] Also question marks arise regarding the invoices issued in April 2007 claiming fees of $3,397.50 in respect of work done for the 2006 and 2007 annual accounts. A reasonable inference is that the major part of the work completed by Metropolitan over the 2 year period in question was washed into 1 invoice, in anticipation of the GST refund that was due to arrive.

[78] I do not consider it is in the ordinary course of business to 'save up' work and raise such an invoice and take payment, particularly at a time when Metropolitan must have known the company was subject to statutory demands.

[79] The relevant test was stated by the Court of Appeal in *Waikato Freight v Meltzer* [2001] 2 NZLR 541. The Court said (at paragraph [31]):

> ...
>
> Was (the transaction) in its objective commercial setting an ordinary or an out of the ordinary transaction for the parties to have entered into?

[80] In the present case, the service of the statutory demands, together with the timing of billing, shows there is a preference involved in the taking of the funds at that time.

Should relief from repayment be granted?

[81] Any claim for relief from the voidable preference provisions requires sufficient evidence of actions undertaken in good faith; because of an absence of suspicion of insolvency; and whether value was given, or there is an alteration of position in the reasonable belief that the deduction of funds was valid.

[82] It should appear plain from the comments I have already made that the Court cannot be satisfied that onus has been discharged by Metropolitan upon any of those grounds, much less, as is required, upon them collectively. However, it is appropriate to allow the sum of $1,200.00 to be retained by Metropolitan from the funds which otherwise in the result would have to be returned to the liquidators. Ms Sommerville estimated that as a reasonable cost for the preparation and filing of 3 GST returns. Her assessment of reasonable cost was not challenged.

Summary

[83] The authority to deduct fees from tax refunds received by Metropolitan did not create a charge over those tax refunds. Evidence of an oral agreement creating a charge is inadequate, imprecise, contrary to contemporary written record, and not supported by reason or inference.

[84] The transaction by which the deductions were made occurred at the time of their taking and not sooner. The 2004 document headed 'Engagement' did not create an assignment. It is, on its face, an authority to debit.

[85] Because the parties' arrangement did not create a charge over the funds, and nor did it create an assignment or right of set off in advance of the tax refunds being received, Metropolitan needed to establish it did not have reason to suspect the company was unable to pay its debts when it made deductions for fees. I am not satisfied Metropolitan has met the level of proof required.

[86] Nor, has Metropolitan satisfied the Court that the events of April 2007 occurred in the normal course of business between it and the company.

[87] For the various reasons adopted in consideration of the foregoing , this is not a case for providing Metropolitan with the relief to enable to retain all of the deductions it has made. Indeed, I am satisfied it should only retain the sum of $1,200.00 of the $9,919.49 it has taken.

Judgment

[88] Metropolitan's application is dismissed.

[89] Costs shall be paid to the respondents calculated on a Category 2B basis, together with disbursements as fixed by the Registrar.

Solicitors
R A Fraser & Associates, Christchurch for Applicant
Layburn Hodgins, Christchurch for Respondents