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

**CIV-2012-404-1683**
**[2012] NZHC 1311**

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|---|---|
| UNDER | the Personal Property Securities Act 1999 |
| AND | |
| IN THE MATTER OF | MATAKANA ESTATE LIMITED (In Liquidation and In Receivership) |
| BETWEEN | PATRICIA ANNE VEGAR-FITZGERALD<br>Applicant |
| AND | DIGBY JOHN NOYCE AND KEITH MAWDSLEY<br>First Respondents |
| AND | MATAKANA ESTATE LIMITED<br>Second Respondent |

Hearing: 29 May 2012

Appearances: K W Fulton for Applicant
S M Kilian and F J Hawkins for Respondents

Judgment: 29 May 2012

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**ORAL JUDGMENT OF ASSOCIATE JUDGE BELL**

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[1] This is an application to maintain a financing statement FH6ND899825E9K18 under s 167 of the Personal Property Securities Act 1999.

[2] The applicant, Patricia Anne Vegar-Fitzgerald, claims that she is the security-holder under a general security agreement dated 19 September 2007. It was registered under the Personal Properties Securities Act on 4 November 2010. The general security agreement was granted by Matakana Estate Ltd. That company went into liquidation on 21 November 2010. The liquidators are Digby John Noyce and Keith Mawdsley.

[3] On 19 March 2012 the liquidators made a demand under s 162 of the Personal Property Securities Act 1999 that Mrs Vegar-Fitzgerald file a financing change statement discharging registration of the financing statement. The demand was made under s 162(a), namely that all the obligations under the security agreement had been performed. According to the letter of demand, Mrs Vegar-Fitzgerald had advanced $570,000 to Matakana Estate Ltd, but had received payments totalling $740,000. As she had been more than fully repaid to the extent of $170,000, there was no reason for the general security agreement to remain on the register. The letter also contained the demand for payment under s 298 of the Companies Act 1993.

[4] The present application is solely under s 167 of the Personal Property Securities Act 1999. I am not required to consider an application for relief under the Companies Act.

[5] In general, the applicant's response is that the indebtedness of Matakana Estate Ltd to her is far more extensive than the liquidators have allowed. The inquiry in this case is to establish what were the transactions between the applicant and Matakana Estate Ltd, and whether there is a residual indebtedness by Matakana Estate Ltd to the applicant.

[6] On 30 March 2012, Associate Judge Abbott made an interim order maintaining registration of the financing statement pending further order of the court.

[7] In *Universal Trucks & Equipment Ltd v Reynolds*,[1] Mallon J summarised the statutory context for an application under s 167 at [22]-[27]:

> The PPSA
>
> [22] The PPSA applies to security interests in personal property. It provides a system for the creation, formation and prioritisation of security interests. A security interest may be created by agreement. Except as otherwise provided by the PPSA or any other Act or rule of law or equity, a security agreement is enforceable according to its terms. A security interest may be registered under the PPSA. Enforcement of the security does not depend on registration of the security. Registration may, however, affect the priority of the security as against a competing security.
>
> [23] Registration is effected through the filing of a financing statement. Registration serves to provide notice to searching parties of the existence of security interests over collateral. The mere fact of registration does not mean that the registration is valid. The general rule is that the validity a registration is not affected by "any defect, irregularity, omission, or error" in the financing statement unless it is "seriously misleading". An error in the name of the debtor is a "seriously misleading" error and invalidates the registration. An invalid registration does not, however, invalidate the underlying security agreement.
>
> [24] Where a security interest has been registered, there is a procedure for changes to be made to the register. This procedure begins with a demand to the secured party to register a financing change statement. Section 162 sets out the circumstances in which such a demand may be made as follows:
>
> > **162 When debtor, etc, may demand registration of financing change statement**
> >
> > The debtor or any person with an interest in property that falls within the collateral description included in a registered financing statement may give a written demand to the secured party if –
> >
> > (a) All of the obligations under the security agreement to which the financing statement relates have been performed:
> >
> > (b) The secured party has agreed to release part or all of the collateral described in the collateral description included in the financing statement:

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1 *Universal Trucks & Equipment Ltd v Grant Bruce Reynolds* [2012] NZHC 483, (2012) 10 NZBLC 99-706.

(c) The collateral described in the collateral description included in the financing statement includes an item or kind of property that is not collateral under a security agreement between the secured party and the debtor:

(d) No security agreement exists between the parties:

(e) The security interest is extinguished in accordance with this Act.

[25] The terms "collateral", "debtor", "secured party" and "security agreement" are defined terms as follows:

> **Collateral** means personal property that is subject to a security interest
>
> ...
>
> **Debtor** —
>
> (a) Means —
>
> (i) A person who owes payment or performance of an obligation secured, whether or not that person owns or has other rights in the collateral; or
>
> ...
>
> (vi) If the person referred to in subparagraph (i) and the person who owns or has other rights in the collateral are not the same person, includes—
>
> (A) The person who owns or has other rights in the collateral, where the term debtor is used in a provision of this Act dealing with the collateral; or
>
> ...
>
> **Secured party** —
>
> (a) means a person who holds a security interest for the person's own benefit or for the benefit of another person; and
>
> ...
>
> **Security agreement** —
>
> (a) means an agreement that creates or provides for a security interest;
>
> ...

[26] Once a demand is made the secured party has 15 working days to comply with the demand or to obtain a court order maintaining the registration. If the secured party fails to do either of these things then the

person making the demand may enter the financing change statement in the register. The Registrar then gives the secured party notice that the financing change statement will be registered unless a court order maintaining the registration is served on the Registrar within 15 working days of the notice.

[27] An application to maintain the register is made under s 167 which provides:

> **167 Secured party may obtain court order in cases not involving security trust deed**
>
> (1) At any time before the financing change statement referred to in section 163 is registered, the Court may, on application by the secured party, and if the Court is satisfied that none of the grounds for making a demand under section 162 exist, order that the registration -
>
> (a) Be maintained on any condition, and subject to sections 153 and 154, for any period of time; or
>
> (b) Be discharged or amended.
>
> ...

[8] Section 167 provides that the court may make an order maintaining registration (and other orders) "if the court is satisfied that none of the grounds for making a demand under s 162 exist ..." Until this year, this court has held that it is sufficient if the applicant can show a reasonably arguable, or seriously arguable, case for the security interest at issue: *Asset Traders Ltd v Fava's Sportscar World Ltd*, *Toyota Finance New Zealand Ltd v Christie* and *Daniel Smith Industries Ltd v Cranes International New Zealand Ltd.*[2]

[9] However, in *Universal Trucks & Equipment Ltd v Reynolds*, Mallon J disagreed with this approach. At paragraph [35] she said:[3]

> [35] The statutory test requires that the Court be "satisfied" that "none of the grounds ... exist". In other contexts where a statute requires that a decision maker be "satisfied", the Courts have said that it requires the decision maker to evaluate all the relevant matters and to reach a judgment as to whether he or she is satisfied. It does not imply any onus or standard of proof. Here the statutory words require that a judgment be made as to whether the debtor's ground for requiring a change does not exist. If the

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2 *Asset Traders Ltd v Fava's Sportscar World Ltd* (2006) 3 NZCCLR 545 at [13]; *Toyota Finance New Zealand Ltd v Christie* HC Auckland CIV-2009-404-3797, 15 July 2009 at [15]-[19] per Asher J; and *Daniel Smith Industries Ltd v Cranes International New Zealand Ltd* HC Rotorua CIV-2009-463-286, 16 December 2009, [30]-[32] Allan J.

3 *Universal Trucks & Equipment Ltd v Reynolds* at [35].

> applicant establishes only a reasonably or seriously arguable case that the registered interest exists, that does not seem to me to be the same as saying that the Court is "satisfied" that "none of the grounds for making the demand ... exist".

[10] Mallon J went on to point out that the inquiry under s 167 is a narrow one. If there are disputed facts, the originating application procedure enables evidence to be taken orally and for cross-examination to take place. The court can also give directions as to joinder of other parties. If there are time constraints, an interim order can maintain the current position. She accordingly rejected the reasonably arguable or the seriously arguable test.

[11] While the text of the statute gives support for the approach of Mallon J, it is also important to have regard to context and purpose. With great respect to Mallon J, I prefer the approach taken in the other cases. An application to maintain a financing statement is a summary procedure. There is a tight 15 working day deadline to obtain a court order for maintaining registration – see s 165(1)(b). The consequences of not serving on the Registrar a court order maintaining the financing statement is that it will be removed by the Registrar under s 166(1). This tight time-frame is similar to other tight limits found when applying to set aside a bankruptcy notice, or when applying to set aside a statutory demand under the Companies Act, or to sustain a caveat under ss 145 and 145(a) of the Land Transfer Act. Another example of a summary procedure requiring resolution within a tight time-frame is the determination of adjudications under Part 3 of the Construction Contracts Act 2002.

[12] In a decision under s 290 of the Companies Act, *Industrial Group Ltd v Bakker*,[4] the Court of Appeal noted that the requirement for a summary procedure is that a hearing should in the normal course be short and to the point, and the judgment likewise:

> [24] We note that the statutory scheme is for applications to set aside statutory demands to be a summary proceeding. The application must be made within 10 working days of the date of service of the demand: s 290(2)(a). No extension of time may be given: s 290(3). It follows that it would be unusual for the High Court to engage in detailed analysis of the merit of any counterclaim, set off or cross demand. The section calls for a prompt judgment as to whether there is a genuine and substantial dispute. It

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4 *Industrial Group v Bakker* [2011] NZCA 142, (2011) 20PRNZ 413 at [24]-[25].

> is not the task of the Court to resolve the dispute. The test may be compared with the principles developed in cognate fields such as applications to remove caveats, leave to appeal an arbitrator's award and opposition to summary judgment.
>
> [25] The approach required by the "appearance" test in s 290 is a review with a low threshold. The tight time constraints distinguish the s 290 discretion from that to be exercised on, say, a summary judgment application, where the presence of complex legal issues is not necessarily a bar to a remedy. As with leave to appeal an arbitrator's award, the hearing should, in the normal course, be short and to the point, and the judgment likewise.

[13] That approach indicated by the Court of Appeal appears to be equally applicable to an application to maintain a financing statement under s 167.

[14] An added pointer that a summary procedure is required is that applications under s 167 may be heard by Associate Judges – s 26I(2)(k) of the Judicature Act 1908. That shows an intention for a prompt hearing giving a provisional decision - the characteristic role of Associate Judges in similar cases, setting aside bankruptcy notices, setting aside statutory demands and sustaining or removing caveats.

[15] Given the summary nature of the proceeding, it is inappropriate that the court be required to make a final decision establishing the parties' rights. The summary procedure is appropriate to allow a creditor to continue to have interim protection, until the court is able to establish the parties' rights by ordinary proceeding. The application under s 167 is not by itself adequate for a conclusive finding and determination, unless it is clear that the secured creditor does not have an arguable case for the interest he or she is claiming.

**Leave to bring the proceeding**

[16] The applicant has joined both Matakana Estate Ltd and the liquidators. Under s 162, the person who may demand registration of a financing change statement is the debtor. In this case the debtor is Matakana Estate Ltd. When the liquidators issued the demand, they did not have standing in their own right to do so but could do so only as agents of the company. Because Matakana Estate Ltd is in liquidation, a proceeding cannot be commenced or continued against the company

unless the liquidator consents or the court orders otherwise.[5] Although they invited the present application by their demand under s 162, the liquidators have not formally consented to the application. On the other hand, they have not strongly opposed leave being granted.

[17] This is an appropriate case for leave to be granted under s 248(1)(c) of the Companies Act and I do grant leave.

**Background**

[18] Matakana Estate Ltd produced wine. It was based in Matakana. The directors of the company were Peter and Jean Vegar. Peter's brother, Paul Vegar, was a director for some of the time but was not a director at the time the company went into liquidation. Jean was an accountant, and had some responsibility for the maintenance of the company's day-to-day financial records. She is familiar with the company's accounts. She has given important accounting evidence in support of the applicant. The applicant is the mother of Peter and Paul Vegar but she is not herself a director or a shareholder in the company.

[19] There are other entities associated with Matakana Estate Ltd which are connected with the Vegar family. In this case, they include the VW Trust, the Vines Development Company Ltd, and companies I will refer to as "the Vintage companies" – companies which appear to have gone through changes of name every three years or so. In his affidavit, Mr Noyce has also referred to Vegar Estate Wines Ltd and Vegar Properties Ltd. Unravelling the affairs of Matakana Estate Ltd and its dealings with other companies has not been easy. There has already been one lengthy case: *Swindle v Matakana Estate Ltd (in liq)*.[6] I understand that there remain a number of issues between the companies and its creditors that still remain to be resolved. One of the financiers of the Vegar family's wine-making enterprise was Orakei Securities Ltd.

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5 Section 248(1)(c) Companies Act 1993.

6 *Swindle v Matakana Estate Ltd (in liq)* [2012] 1 NZLR 806 (HC).

[20] The applicant is a close relative of the directors and shareholders in Matakana Estate Ltd. She claims not just that she is a creditor but also that she is a secured creditor. A bank has first-ranking security. It appointed receivers who sold the business of the company. From the proceeds of sale the bank has been fully repaid and there is a surplus. It is uncertain how that surplus will be applied. It is possible that preferential creditors may take ahead of the applicant. I am told that under her security, the applicant has appointed receivers. She claims priority over other unsecured creditors.

[21] In these circumstances it is to be expected that a liquidator would scrutinise the applicant's claims and would be wary of accepting her claims at face value. That the liquidators might wish to challenge the applicant's claims to be a creditor and to have priority is not surprising. However, it has to be noted that the demand under s 162 for registration of a financing change statement is a relatively narrow line of attack. The inquiry in this case is simply whether Matakana Estate Ltd has fully repaid its debts to the applicant. It is not the purpose of an application under s 167 to enquire into questions of validity or voidability that might arise outside the Personal Property Securities Act.

**The transactions in issue**

[22] I consider the particular transactions in this case.

*The general security agreement*

[23] It is common ground that Matakana Estate Ltd entered into a general security agreement with the applicant as security holder. The covenantors for the agreement were Paul Vegar, Peter Vegar and Jean Vegar. The general security agreement used the Auckland District Law Society Form 6301. The memorandum of general terms and conditions was incorporated. Security was taken over all the present and after-acquired property of Matakana Estate Ltd. The memorandum of general terms and conditions contains an extensive definition of "secured monies". I refer in particular to clause 2(a)(iv):

> Loans, credits, advances or other financial services or facilities made or provided to the party granting the security, or to any one or more of them or to any other person for the accommodation of the party granting the security.

I record now that all the indebtedness of Matakana Estate Ltd to the applicant, which is the subject of this decision, comes within the definition of "secured monies" under the memorandum.

[24] The general security agreement is dated 19 September 2007 but was not registered under the Personal Property Securities Act until 4 November 2010, shortly before the company went into liquidation.

[25] Initially, the liquidators accepted the validity of the agreement that was made in September 2007. In [13] of his affidavit, Mr Noyce says that he has never stated that the security interest was not valid or was not voidable. However, in the hearing today, the liquidators have queried the authenticity of documents generally. The applicant has provided a copy of the general security agreement. It does carry a date of 19 September 2007. That date is more than three years before the company went into liquidation. The date of the agreement coincides with the date of her first loan to the company. I accept that she has an arguable case that the security was granted in September 2007.

[26] The decision of the Court of Appeal in *Dunphy v Sleepyhead Manufacturing Co Ltd*[7] makes it clear that even if the general security agreement had not been registered, it would still bind Matakana Estate Ltd including its liquidators.

*Loans accepted by the liquidators*

[27] The liquidators accept that the applicant lent $400,000 to Matakana Estate Ltd on 19 September 2007 under the loan agreement on that date. And they also accept that the applicant lent the company $170,000 on 31 October 2007 under a loan agreement on that date.

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7 *Dunphy* v *Sleepyhead Manufacturing Co Ltd* [2007] NZCA 241, [2007] 3 NZLR 602.

*Payments accepted by the liquidators*

[28] The liquidators have recorded payments made by Matakana Estate Ltd to the applicant between 22 May 2008 and 29 October 2010 amounting to $740,000. The applicant agrees that she received those payments. I note that those include a payment of $300,000 on 31 July 2008.

*Payment of $4,642*

[29] The applicant says that in addition to the payments of $740,000 identified by the liquidators she also received a payment of $4,642 on 31 July 2010. The liquidators do not contest that.

*Wages payment $13,554.55*

[30] In their demand made before this application, the liquidators required the applicant to refund a payment of $13,554.55. This payment was alleged to have been for wages. The liquidators claim that she was not entitled to wages because she did not work for the company. If the liquidators' contention is right, that payment of $13,554.55 could be taken into account as a payment received by the applicant in reduction of the company's indebtedness to her.

[31] However, the applicant has met the objection by including in her evidence a copy of an employment agreement between her and the company, providing for her to work for the company as a pruner. The agreement is dated 28 June 2010. She says that she did work as a pruner. I accept that the applicant is not required to bring the payment of her wages under her employment agreement into account as a payment in reduction of the loans she made to the company.

*Funds lent under the agreement of 8 July 2008*

[32] The applicant also relies on a loan agreement of 8 July 2008 under which she lent $200,000 to the company. She says that she lent $100,000 to the company on 8 July 2008 and a further sum of $100,000 on 20 August 2008. She has put in evidence a copy of the loan agreement of 8 July 2008 and copies of her bank

statements showing the payments. In her reply affidavit, the applicant has also put in evidence copies of bank statements of Matakana Estate Ltd showing payments of $100,000 each into the company's accounts on 8 July and 20 August 2008.

[33] In [19] of his affidavit Mr Noyce accepts that the deposits of $100,000 each, shown in the bank statements of Matakana Estate Ltd, did come from the applicant. The loans under the agreement of 8 July 2008 are no longer in issue. I find, on the balance of probabilities rather than just as an arguable case, that the applicant made the loans under the agreement of 8 July 2008. When those loans are taken into account, the amounts that the applicant lent the company exceed the company's repayments. That finding by itself is sufficient to dispose of this application.

*Term loan of 9 January 2009*

[34] The applicant has put in evidence a loan agreement of 9 January 2009 for $362,420 between her and Matakana Estate Ltd. All the term loans in this case used the Auckland District Law Society term loan agreement. For this loan, the agreement contains a Table M which sets out the loan purpose:

> **Loan purpose**
>
> 1 The Borrower has outstanding debt to the Vintage Companies, who in turn have an outstanding loan facility to Orakei Securities Ltd
>
> 2 The Orakei Securities facility has outstanding principal and interest payments of $356,800
>
> 3 The Borrower has been required by the Vintage Companies to forthwith reduce its debt in order for the loan repayments to be made.
>
> 4 The Borrower has been unable to arrange the funding and has requested the lender arrange a loan facility using her property assets to make available a loan to the Borrower.
>
> 5 The lender has arranged a loan facility with Orakei Securities which will on completion of all documentation be applied directly to the outstanding loan repayments owed by Vintage companies.
>
> 6 The Borrower has reached agreement with the Vintage Companies that upon this occurring the outstanding debt they are owed by the borrower will be reduced by the equivalent amount of the loan advance from Orakei Securities to the lender.

7 The application of funds as described above shall be deemed a full advance of the loan under the loan agreement.

[35] The applicant's initial explanation shows a chain of debts. Matakana Estate Ltd was alleged to owe money for wine purchases to the Vintage companies and the Vintage companies, in turn, are alleged to owe money to Orakei Securities Ltd. The applicant says that Orakei Securities Ltd advanced funds to her, and she in turn lent the money to Matakana Estate Ltd. That company in turn advanced the funds to the Vintage companies. She gave a first mortgage security to Orakei Securities Ltd over a vacant property in Golf Road, Matakana, which is described as Lot 3 Monarch Downs. She has put in evidence the loan offer for the loan to her from Orakei Securities Ltd, a copy of the LINZ title search showing the mortgage to Orakei Securities Ltd registered against the title, and a copy of a solicitor's settlement statement showing the disbursement of the advance from Orakei Securities Ltd.

[36] Mr Noyce accepts that the loan the applicant obtained from Orakei Securities Ltd was used to pay the debts owed by the Vintage companies, but he does not accept that there was any indebtedness by Matakana Estate Ltd to the Vintage companies. He says that Matakana Estate Ltd did not receive any benefit from the payments the applicant made with the funds that she had received from Orakei Securities Ltd. He relies not only on documentation put in evidence by the applicant, but also on affidavits used in the proceeding before Kós J.

[37] Jean Vegar's reply affidavit addresses Mr Noyce's response. She has put in evidence copies of ledgers of Matakana Estate Ltd. Ledger entries show the state of accounts between Matakana Estate Ltd and the Vintage companies. Within the records that she exhibits can be identified payments derived from the applicant. Jean Veger shows that the funds lent by the applicant to Matakana Estate Ltd were applied to the Vintage companies which in turn applied the funds received to pay off debts to Orakei Securities Ltd and to other creditors.

[38] Accordingly, the term loan agreement of 9 January 2009 is consistent with the accounting treatment of the funds made at the time of the loan. At the time of these transactions, Matakana Estate Ltd was not indebted to the Vintage companies

but that does not detract from the fact that the term loan properly records a loan by the applicant to Matakana Estate Ltd.

[39] The liquidators have put in evidence copies of the financial statements of Matakana Estate Ltd for the year ending 30 June 2009. Under the notes there is a section on borrowings, which includes this:

> "Orakei Securities Ltd – this is a back-to-back loan in which Patricia and Vegar-Fitzgerald obtained finance from Orakei Securities Ltd and, in turn, advanced those funds to the company. The Orakei loan is secured over the property of Patricia and Vegar-Fitzgerald. Repayment consists of interest only. Paul Vegar, Jean Vegar and Peter Vegar act as guarantors for the loan."

[40] I find that the applicant has shown that the loan of 9 January 2009 for $362,420 is for an actual advance to Matakana Estate Ltd.

[41] The applicant explains that her debt to Orakei Securities Ltd was repaid in 2010. She sold the property she had used as security for the loan to a trust called the VW Trust. At the start of the hearing I accepted a late affidavit from the liquidators. The VW Trust is a corporate trustee. The applicant is a director and shareholder of that corporate trustee, but at the time of these transactions there was another trustee. She sold the property to the VW Trust for a price of $780,000. She left in $700,000 of the purchase price as a loan. The VW Trust borrowed from a bank to pay out Orakei Securities Ltd. The applicant has put in evidence a copy of a lawyer's settlement statement showing the sale proceeds for the Golf Road property being applied to repay the mortgage to Orakei Securities Ltd in the sum of about $447,000. After that payment is taken into account, it seems to me that there is still a residual indebtedness of the VW Trust to her for funds owed for the purchase of that property. The applicant does not give a figure but on a rough calculation it seems to me that it would be about $253,000.

[42] However, counsel for the applicant maintains that the debt of the trust to the applicant remains $700,000. I am not certain that that represents the true net position between the applicant and the trust.

[43] It is now necessary to refer to a deed of assignment of debt on 26 May 2010. This is a puzzling document. The parties to the deed are the applicant, Matakana

Estate Ltd and the VW Trust. The applicant is the assignor under the deed. Matakana Estate Ltd is the assignee, and VW Trust is the debtor. The recitals include these:

> A The Debtor at the date of this deed owes the Assignor the sum of $446,600 (the Debt).
>
> B The Assignee at the date of this deed is owed $446,600 (the Second Debt) by the assignor.
>
> C The Assignor wishes to assign the Debt to the Assignee and the Assignee agrees to take the Debt over in repayment of the second Debt.
>
> D The Debtor wishes for the Debt to be assigned to the Assignee as repayment of the Second Debt.
>
> E The Debtor and the Assignee have reached an agreement regarding payment of the Debt.

[44] The operative provisions include these:

> 1 In consideration of the Assignee's forbearance to sue for the Second Debt the Assignor hereby assigns to the Assignee all the rights, title and interest of the Assignor in the Debt and any security documentation supporting the Debt which assignment shall be in lieu of payment of the Second Debt.
>
> 2 In consideration of the Assignor assigning the Debt to the Assignee, the Assignee will not pursue the Assignor for payment of the Second Debt and agrees that the assignment of the Debt shall be in lieu of payment of the Second Debt.
>
> 3 The parties acknowledge the present value of the Debt is $446,000 dollars, which sum is the amount owing by the Debtor to the Assignee. The Assignee shall, on the date of this deed, advance the sum of $446,000 dollars to the Debtor which sum, shall be a loan ("the Loan") owing to the Assignee by the Debtor and shall remain outstanding as payable to the Assignee by the Debtor upon demand and shall be subject to interest as per ANZ variable home loan rates. The Debtor may at any time without notice pay to the Assignee in reduction of the Debt one thousand dollars or any multiple of that sum or the balance of the Debt then owing. Should the terms of this deed conflict with the terms of any documentation pertaining to the Debt the terms of this deed shall prevail.

[45] At the same time as this deed of assignment, VW Trust entered into a term loan agreement with Matakana Estate Ltd, under which it lent Matakana Estate Ltd the sum of $446,600. Apparently the parties believed that as a result the deed of assignment, VW Trust had become a creditor of Matakana Estate Ltd. The parties

believe that the debt that Matakana Estate Ltd owed to the applicant had been transferred to the trust.

[46] The applicant, Jean Vegar and Paul Vegar (he being the one who drew up the deed of assignment) all say that the deed of assignment of debt is a mistake. They do not take issue with the sum of $446,600 in recital A, but they say that recital B is factually incorrect because the applicant did not owe Matakana Estate Ltd $446,600. In fact, she was a creditor of Matakana Estate Ltd.

[47] I would also note that the first recital may not be factually correct. The net balance between the Trust and the applicant was about $253,000 because of the claim it was about to make to Orakei Securities Ltd.

[48] Clause 1 of the operative provisions appears to take effect as an assignment by the applicant of the VW Trust debt to the company, but counsel for the applicant disclaims any such interpretation.

[49] For this case, I accept that the applicant has an argument that something has gone wrong under this deed of assignment of debt. However, if it is to be changed, that would have to be done by a proceeding seeking rectification or seeking relief under the Contractual Mistakes Act 1977. If the debt that VW Trust owed to the applicant has been transferred to Matakana Estate Ltd, then any transfer back might have to be done by way of a vesting order under s 7(5) of the Contractual Mistakes Act. Rectification is hard to prove,[8] and it is not appropriate to use a summary procedure such as this to decide an application for rectification. Any proceeding seeking rectification would require not only Matakana Estate Ltd and the applicant, but also the VW Trust as a party to the proceeding.

[50] I accept that an arguable outcome of a proceeding for rectification or relief under the Contractual Mistakes Act is that the debt assigned to Matakana Estate Ltd might be re-vested in the applicant.

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8 *Westland Savings Bank Ltd v Hancock* [1987] 2 NZLR 21(HC) at 27.

[51] The applicant has herself volunteered the deed of assignment of debt and has presented the court with the difficulties raised under that deed. The liquidators have been somewhat neutral in respect of this particular transaction. Jean Vegar has prepared schedules summarising the state of accounts between the applicant and Matakana Estate Ltd. She has prepared two schedules because she has treated the transaction under the deed of assignment of debt of 26 May 2010 in different ways. In her second schedule she has dealt with the transaction as if it had not happened. The first schedule shows that the loan for $362,400 of January 2009 has been assigned to the VW Trust.

[52] Again, if the deed of assignment of debt is effective, it transferred to Matakana Estate Ltd the debt owed to the applicant by the VW Trust. The amount of the debt assigned appears to be about $253,000, given that that was the net amount payable by VW Trust after having paid off the applicant's mortgage to Orakei Securities Ltd. There is nothing to show that the assignment was to be gratuitous, so Matakana Estate Ltd is arguably under an obligation to pay for the debt assigned to it. The effect of the deed of the assignment debt is, if anything, to increase the indebtedness of Matakana Estate Ltd to the applicant, not to reduce it.

*Deed of assignment of 22 November 2007*

[53] The applicant has put in evidence a deed of assignment of debt carrying the date 22 November 2007, and a loan agreement of the same date between the applicant as lender and Matakana Estate Ltd as borrower. The loan agreement is for the sum of $250,000. The deed of assignment of debt is between the Vines Development Company Ltd as assignor, the applicant as assignee, and Matakana Estate Ltd as debtor. The recitals record that Matakana Estate Ltd owed the Vines Development Company Ltd the sum of $250,000, and the Vines Development Co Ltd, in turn, owed the applicant $250,000. The deed provides that the Vines Development Co Ltd assigns the Matakana debt to the applicant, and that assignment took effect in place of payment by the Vines Development Co Ltd. The deed also provides that the assigned debt is to be a loan owing by Matakana Estate Ltd to the applicant. The term loan agreement further records the lending arrangement.

[54] While the documents are dated 22 November 2007, Mr Noyce says that he has established that the documents were only signed in April 2010. He says that he has not found any evidence to support the claim that Matakana Estate Ltd had entered into a loan agreement with the Vines Development Co Ltd during November 2007 which could be the subject of an assignment. He also says that he analysed the accounts of Matakana between July 2007 and November 2010 to show funds received and paid between Matakana and the Vines Development Co Ltd. According to his analysis over that period, the Vines Development Co Ltd received $214,608.55 more than what had been lent to Matakana Estate Ltd.

[55] Jean Vegar's reply affidavit addresses Mr Noyce's objections. She has attached a ledger from Matakana Estate Ltd which shows that immediately before 22 November 2007 Matakana Estate Ltd owed the Vines Development Ltd the sum of $1,570,939.60. The ledger shows a credit of $250,000 so that the debt is reduced to $1,320,939.60. The financial statements for Matakana Estate Ltd for 2007/2008 incorporate the same opening figure as the ledger figure. She also attaches the general ledger entry showing the transfer of the amount of the debt to the applicant and that is shown as having taken effect on 22 November 2007. Later financial statements also show the Vines Development Co Ltd as a substantial creditor of Matakana Estate Ltd.

[56] The applicant has not shown how she became the creditor of the Vines Development Co Ltd for $250,000. The liquidators did not raise that in their evidence but I queried it in the hearing. I am left with the bare recital of the deed of assignment of debt. The point is not pivotal. Even if she were not a creditor of the Vines Development Co Ltd, there is still an effective assignment to her of the debt owed by Matakana Estate Ltd.

[57] For the applicant, there is documentary evidence supporting her claim that she is a creditor of Matakana Estate Ltd for $250,000 plus interest under the loan agreement. While the loan may have been documented after the event, I accept that she has an arguable case that the assignment of the debt to her was carried out in November 2007. Therefore, she has an arguable case for the loan of $250,000.

*Payment made on 22 May 2008*

[58] Mr Noyce says that Matakana Estate Ltd paid the applicant $200,000 on 22 May 2008. The applicant says that the payment was only $100,000. The applicant's position is supported by an extract from the ledger of Matakana Estate Ltd plus a bank statement of the company dated 30 May 2008. The document Mr Noyce relies on was simply preparatory to any payment made. It is preferable to go by the record of payment.

[59] The liquidators also rely on a handwritten note of payment on a copy of the term loan agreement. But that handwritten note has been corrected to show that $100,000, rather than $200,000, was paid. I see no reason to go beyond the handwritten record that $100,000 was paid.

*Payment of 31 July 2008*

[60] The term loan agreement refers to $250,000. It has recorded on it in handwriting a note that "$200,000 was repaid on 31 July 2008". The liquidators say that that is an additional payment that has not been taken into account. However, both parties agree that there were payments totalling $300,000 on 31 July 2008. Part of that $300,000 is the sum of $200,000 recorded on the term loan agreement. Both parties have already brought this sum of $200,000 into account.

*Summary of indebtedness*

[61] Jean Vegar has prepared two schedules summarising the indebtedness between the applicant and Matakana Estate Ltd based on the transactions I have referred to. As I have already explained, the schedules are different in the way they have treated the assignment of the applicant's loan to the VW Trust. For the reasons I have already given, I am not satisfied that the treatment of that assignment is necessarily correct. Jean Vegar's Schedule 1 works on the basis that there should be a deduction because of the effect of the deed of assignment of debt, that is, it is the version which is the least generous to the applicant. That schedule shows total advances of $1,382,400 and total payments to the applicant of $1,107,042, giving her

a remaining balance of $275,358. On the basis of the items in the schedule, the applicant has an arguable case. The schedule has included a calculation of interest charges under the term loan of September 2007, but the liquidator does not challenge that calculation. Even on that schedule, which appears to me to be too generous to the company, the company remains indebted to the applicant.

[62] Jean Vegar's second schedule does not contain any entry for a repayment in respect of the advance of 9 January 2009 for $362,400. That schedule shows total advances of $1,382,400 and total repayments of $744,642 leaving a remaining balance of $637,758. In Schedule 2, Jean Vegar has added on a further interest charge of $261,540 for the loan of $362,500. Again the liquidators have not challenged that calculation. Schedule 2 also shows that the company remains indebted to the applicant.

[63] Overall, I am satisfied that the applicant has an arguable case that Matakana Estate Ltd remains indebted to her, and that the sums owed to her by Matakana Estate Ltd are secured under the general security agreement. Accordingly, Matakana Estate Ltd has not performed all its obligations under the general security agreement.

[64] In coming to this finding, I have relied on copies of accounting records of Matakana Estate Ltd, copies of term loan agreements, deeds of assignment of debt, and other agreements. Mr Noyce has expressed suspicion as to the authenticity of these documents. He has not shown incontrovertibly that they cannot be relied on. The liquidators' submissions raised doubts as to aspects of the applicant's claim, but not to the extent of showing that they are not reasonably arguable. I allow for the possibility that the accounting records and aspects of the applicant's claim might be shown at a later hearing to be incorrect, but at this stage they are sufficiently plausible for me to find that the applicant has an arguable case.

[65] As the applicant has an arguable case that Matakana Estate Ltd was not entitled to demand registration of a financing change statement under s 162(a), and as the company does not rely on any other grounds under s 162, it is appropriate to make an order maintaining registration of the financing statement.

[66] I have not decided whether the general security agreement can or should be set aside under s 299 of the Companies Act or whether it can be challenged under other provisions of the Companies Act. Such an inquiry is not relevant under s 167. So far, no court has made a decision that the security should be set aside under the Companies Act, and until there is an appropriate court order to that effect, or some other effective setting aside of the transaction, the security remains in effect.

[67] If the liquidators wish to have the general security agreement set aside, it is open to him to take appropriate steps under the Companies Act if they think fit.

**Conditions of order**

[68] My finding that the applicant has shown an arguable case that Matakana Estate Ltd has not repaid all its indebtedness to the applicant is provisional. It does not determine conclusively the amount of the indebtedness between the applicant and the company.

[69] As with caveat applications, it may be appropriate to require the applicant to establish her case on the merits. In the ordinary course of events, it would be appropriate to require the applicant to issue proceedings. However, after discussion with counsel, I gather that there is some uncertainty how the liquidation of Matakana Estate Ltd will proceed. The applicant does not have assured priority because there are preferential creditors who may come in ahead of her. The parties have still to see how matters unfold.

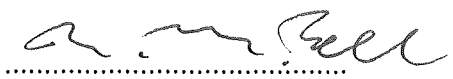
[70] The course I take is to make an order maintaining the interim order of Associate Judge Abbott. I adjourn this hearing to the companies list on Friday, 27 July 2012 at 11:45am. The purpose of that hearing will be to ascertain whether it is necessary for the applicant to issue proceedings to establish the actual amount of indebtedness to the company. It may be that discussion between the parties and with others interested in the liquidation could produce a resolution of matters which may avoid the need for proceedings. I leave the parties to explore those possibilities before requiring the applicant to go to the expense of launching a fresh proceeding.

**Costs**

[71] I reserve the question of costs, to be addressed on Friday 27 July 2012. However, I offer this as provisional thoughts for the parties.

[72] First, while the liquidators were personally joined as parties to the proceeding, I am for the moment provisionally not inclined to make an order for costs against the liquidators personally. To a certain extent this proceeding was instigated by the liquidators in that they triggered the demand under s 162. If the liquidators had started the proceeding themselves, the question of security for costs would arise. There is a line of authority which says that the liquidators ought not to be required to pay security for costs. The effect of that is that a successful defendant has to take the company in liquidation as it finds it. For better or worse, I think that the applicant is at risk of being in a similar position. I bear in mind that any order for costs against the company will be part of the liquidators' costs incurred in the conduct of the liquidation and would therefore take some priority over claims of other creditors. That may not be as effective as an order for costs against the liquidators personally.

[73] Secondly, I have no doubt that preparation for this case required exhaustive work to go through matters of accounting detail. I cannot help thinking that what I have been presented with may be the tip of the iceberg in terms of the preparation that has gone on. Again, provisionally speaking, I would be sympathetic to an application for an allowance for extra time for preparation.



**R M Bell**
**Associate Judge**