IN THE SUPREME COURT OF NEW ZEALAND

SC 43/2014
[2014] NZSC 183

BETWEEN	WEST CITY CONSTRUCTION LIMITED Appellant
AND	HENRY DAVID LEVIN AND DAVID STUART VANCE AS LIQUIDATORS OF ST GEORGE DEVELOPMENTS LIMITED (IN LIQUIDATION) Respondents

Hearing:	17 November 2014
Court:	McGrath, William Young, Glazebrook, Arnold and Blanchard JJ
Counsel:	P J Davey for Appellant D J Goddard QC and K C Francis for Respondent
Judgment:	15 December 2014

JUDGMENT OF THE COURT

A **The appeal is allowed, the judgment of the Court of Appeal is reversed and the judgment of the Associate Judge in the High Court is restored.**

B **The liquidators are to pay the appellant costs and disbursements in respect of the appeal to the Court of Appeal to be fixed by that Court and costs in relation to the appeal to this Court in the sum of $25,000 together with reasonable disbursements.**

REASONS

(Given by William Young J)

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The appeal

[1] The appeal involves construction work carried out in 2005 and 2006 by West City Construction Ltd for St George Developments Ltd (St George) on a subdivision in Albany. The appellant, also called West City Construction Ltd, is a different but successor company to its identically named predecessor. For ease of reference we will generally refer to both companies as "West City". West City's position is that it carried out the 2005 and 2006 construction work on the basis of an agreement by St George to assign to it a bond held by the North Shore City Council (the Council). The bond was later, in October 2006, formally assigned to West City and the money held under the bond was, in due course, paid out to West City.

[2] St George was placed in liquidation by the High Court as a result of proceedings which were commenced on 22 January 2008. As a result, the voidable preference provisions of the Companies Act 1993 were potentially engaged. These were changed significantly with effect from 1 November 2007, that is, after the deed of assignment was executed but before the liquidation of St George. This was pursuant to the Companies Amendment Act 2006.[1] Under s 27(5) of that Act a transaction entered into before 1 November 2007 may not be avoided unless it was also voidable under the previous regime. So a transaction entered into before

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[1] The Companies Amendment Act 2006 came into force on 1 November 2007 pursuant to the Companies Amendment Act 2006 Commencement Order 2007.

1 November 2007 may only be avoided if voidable under both the current provisions and those previously in force.

[3] Because of the way the case was run in the High Court[2] the primary legal focus has been on s 292 of the Companies Act as it was prior to 1 November 2007. Under this section, the transfer of property or the giving of security by a company in liquidation was voidable if it:

(a) was made when the company was unable to pay its debts and within a specified period starting two years prior to the commencement of the liquidation proceedings;

(b) resulted in another person receiving more towards the satisfaction of a debt than would have been received (or likely to have been received) in the liquidation; and

(c) did not take place in the ordinary course of business.

There is a change of position defence under s 296(3). Where a transaction has been set aside, s 295 provides for the Court to order the person preferred to pay to the company some or all of the benefits derived as a result of the transaction.

[4] St George's liquidators sought to avoid the assignment of the bond and to recover the money paid by the Council to West City. Their position has been that there was no assignment prior to October 2006, the assignment then entered into was a voidable preference as it occurred after the start of the specified period (which was on 22 January 2006) and the other conditions referred to in [3] above were satisfied. West City's response, which was upheld in the High Court,[3] was that there was an agreement to assign the bond entered into in or about November 2005 which effected an equitable assignment and which is not subject to avoidance as a preference because it preceded the start of the specified period. The Court of Appeal reversed the High Court judgment, holding that there had not been an agreement to assign

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2 West City relied on the ordinary course of business defence which was available under the former s 292 but not under the current version.

3 *Levin v West City Construction Ltd* [2013] NZHC 929 at [47] [*West City* (HC)].

prior to the formal assignment in October 2006 and concluding that this assignment was a voidable preference.[4] The Court also ordered West City to pay to St George the money which it had received from the Council.[5]

[5] On the further appeal to this Court, the primary issue is whether the Court of Appeal was correct in its conclusion that an agreement to assign the bond was not entered into in November 2005 and, accordingly, was a voidable transaction under s 292 of the Companies Act. A second issue is whether, assuming that the Court of Appeal was right in that conclusion, it was also right to order repayment in full of the money received by West City from the Council. On the basis of our conclusions on the primary issue, the second issue does not arise for determination. We will, however, refer to it briefly towards the end of these reasons.

Background

[6] The work in issue in these proceedings was a sequel to work carried out between 2002 and 2004 by West City on St George's Albany subdivision. Practical completion of this initial work was certified as at 31 July 2004. A six month withholding period for retentions expired on 31 January 2005. The amount retained was $47,532.12. This sum is not readily identifiable on the documentation made available to us and it is not clear whether it is inclusive or exclusive of GST.

[7] Amongst the work that had been carried out by West City was the construction of a storm water pond. This was completed to contractual requirements. But, as built and utilised, the pond did not meet the requirements of the Council. This is because a company associated with St George was piping storm water from an adjacent development into the pond – something for which it had not been designed. So the Council required additional work (including planting) in respect of the pond.

[8] Because of the problem with the pond, the engineer to the contract withheld the final payment certificate. This was inappropriate (as the additional work

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4 *Levin v West City Construction Ltd* [2014] NZCA 98, [2014] 3 NZLR 1 (O'Regan P, Stevens and Asher JJ) at [46] [*West City* (CA)].

5 At [60].

required on the pond was outside the scope of West City's contract) and all subsequent dealings between the parties were on the basis that West City was entitled to be paid the amount retained and for any additional work which was required. There appears to have been no formal challenge to the withholding of the final certificate. This may have been because it was obvious by October 2004 that as a result of a demands by the Council for a bond and other payments (including reserves contributions) there would be no free cash available to pay West City, pending section sales.

[9] The principals of West City and St George were, respectively, Messrs Len Ireland and Kevin Andersen. They had worked together previously and had a good relationship. It is clear that Mr Ireland wanted the amount retained to be paid out but was relatively accepting of St George's cash flow difficulties.

[10] On 19 November 2004, St George entered into a bond with the Council under which it paid the Council $104,350. This was to ensure the completion of certain work, including remediation of the storm water pond. The date for the completion of this work was 19 November 2005. The bond provided that if all the work was completed the sum would be refunded in full. If not, the Council could apply the money to the completion of the work covered by the bond.

[11] In June 2005, St George, via its engineer, asked West City to quote for the additional work which was required in relation to the pond. West City's quotation for $52,173.06 (including GST) was accepted on 3 November 2005 and the work was carried out between November 2005 and January 2006. As is already apparent, the primary issue in the case is whether the agreement for this additional work provided for an assignment to West City of the bond. We will address the evidence as to this shortly. It is sufficient to say at this point that, as it turned out, after the additional work had been satisfactorily completed, the Council required further work to be carried out which West City duly completed. As well, the Council insisted on a two-year maintenance period. This resulted in delays in the payment out by the Council of the bond.

[12] Around this time, the original West City changed its name to Ireland Holdings Ltd and the name "West City Construction Ltd" was assumed by a new company, the present appellant, which was formed by Mr Ireland and his sons. The new company took over the business (including the assets) of the old company.

[13] St George executed a formal assignment of the bond to the new West City on 3 October 2006 and gave notice of the assignment to the Council at the same time. In due course, the Council paid the amount of the bond to West City.

[14] As explained, the voidable preference provisions in the Companies Act apply only to transactions entered into by St George after 22 January 2006. It follows that if there was an effective equitable assignment of the bond to West City before that date, the voidable preference regime would not apply to such assignment. And assuming such an assignment (and thus West City having an equitable interest in St George's rights under the bond), the deed of assignment executed in October 2006 did not confer a preference on West City. It is also now common ground that if the bond was not assigned in equity to West City until the formal deed of assignment was executed in October 2006, the regime does apply and the assignment is voidable. This is because:

(a) St George was unable to pay its debts as at 3 October 2006;

(b) if there was not already an effective assignment in equity, the 3 October 2006 assignment preferred West City;

(c) West City could not establish the old "usual course of business" defence under s 292(2) of the Companies Act as it then was;[6] and

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[6] The ordinary course of business defence in relation to the October 2006 assignment was rejected by the Associate Judge on the basis that the assignment was a "one-off" response to the situation in relation to the pond in a context of long-overdue retentions and that it could not be seen as being in the ordinary course of business for either the parties or the construction industry generally: see *West City* (HC), above n 3, at [48]. The Court of Appeal had no doubt that in this respect the Associate Judge was right: see *West City* (CA), above n 4, at [48].

(d) the s 296(3) change of position defence would not have been available.[7]

The relevant evidence

[15] Mr Andersen was not able to be located by the liquidators and accordingly did not give evidence. The case therefore turns entirely on the affidavit and oral evidence of Mr Ireland and the contemporaneous documents.

[16] Mr Ireland said that when asked to provide a quotation for the additional work, his position was that the outstanding retentions had to be paid and that, by way of response, St George offered an assignment of the bond. Mr Ireland's evidence was that:

> I had discussions with Mr Andersen and he agreed to pay for the additional pond works and the outstanding amounts under the original contract by assigning the Council bond monies to West City.

Although assignment of the bond is not mentioned in West City's quotation or its acceptance, it was, on West City's case, alluded to in a letter Mr Ireland wrote to Mr Andersen on 6 November 2005:[8]

> RE: Quail Drive Subdivision
>
> I see they have final [sic] sorted the Pond planting plan
>
> We would be happy to carry out this works [sic] but the balance of the retentions $47,523.12 [sic] were due on 31st January 2004.
>
> We cannot proceed with the planting and minor works until this is paid
>
> The quote for planting the pond and minor earthworks is $46,376.05 plus Gst
>
> *We understand you intend payment of these amounts from bond monies held by [the Council]*
>
> *This arrangement is acceptable provided it is done with a formal agreement*
>
> If you have any queries, please do not hesitate to call me on …

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7 By October 2006 it was obviously likely that St George was, or would become, insolvent and Mr Ireland appreciated this and that it was likely that West City was being preferred. The s 296(3) criteria were therefore not satisfied: see *West City* (HC), above n 3, at [49]–[52], and *West City* (CA), above n 4, at [55].

8 Emphasis added.

The reference to 31 January 2004 is a mistake. The correct date is 31 January 2005.

[17] St George arranged for its lawyer to prepare a deed of assignment. The evidence suggests that it was prepared shortly after receipt by St George of the 6 November 2005 letter. The deed was not, however, executed then. Indeed, it was not seen by Mr Ireland until 3 October 2006. The materiality of the deed at this point is evidential in that the recitals, which must have been drafted on the instructions of Mr Andersen, record that West City had agreed to carry out the work for St George and, in consideration for that, St George "has agreed to assign" the bond to West City.

[18] West City commenced the additional work in November 2005. It issued payment claims on 30 November 2005 and 16 January 2006. All work was completed by the latter date. The Council then required some further work which West City also carried out which was separately costed. On 13 June 2006, West City presented a final claim incorporating the retentions which should have been paid in January 2005, the additional work agreed to in November 2005 and the further work later required by the Council. The total, including GST, was $109,133.46. The engineer certified for payment in full and the work was approved by the Council. The Council was not, however, prepared to pay until a further maintenance period had elapsed.

[19] At this point the deed of assignment which had been drafted in November 2005 was executed. As we have already noted, this was on 3 October 2006 and on the same day, St George gave the Council notice of the assignment of the bond.

[20] The deed as executed provided:

(a) St George would assign the bond to West City upon satisfactory completion by West City of the contract works:

> 3.1 St George hereby assigns all its right title and interest in the Bonds to West City absolutely upon the satisfactory completion by West City of the Works.

> 3.2 St George shall immediately upon satisfactory completion of the Works by West City complete and execute the notice to Council contained in Schedule 2 and deliver the notice to West City.

(b) The works were to be undertaken by West City on or before the completion date of 19 November 2005 (time being of the essence) "in a proper and workman like [sic] manner and to the full satisfaction of St George and the Council".

(c) The decision of Council as to "satisfactory completion" would be accepted by the parties "as final and binding on each of them".

The deed as executed was not a good fit for the situation as it was in October 2006. By this time all work had been completed, albeit that this was after 19 November 2005.

[21] There are a number of loose ends and ambiguities about the evidence which we should mention at this point:

(a) There had been a formal contract between West City and St George in relation to the main construction work carried out between 2002 and 2004. Mr Goddard QC, for the liquidators, contended that the agreement as to the additional work was under the aegis of, and a variation to, that contract. It is true that at least some of the certificates issued by the engineer in respect of the additional work are consistent with Mr Goddard's theory.[9] But given the non-payment of the retained money to which West City became entitled in January 2005, West City was entitled to be satisfied as to payment before performing any additional work. In light of this, resolution of the question whether the additional work was by way of variation to the primary contract is not material to the outcome of the appeal and Mr Goddard did not contend to the contrary.

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[9] The same form of certificate was employed and some of the certificates were numbered in a way which followed on from the numbers of the certificates under the main contract although others used a different numbering system.

(b) Aspects of Mr Ireland's evidence were not particularly clear. His evidence as to the number and timing of his discussions with Mr Andersen about the assignment of the bond was vague. As well, although his evidence was that the word "assignment" was used, he also sometimes used language similar to that in the letter of 6 November, along the lines that payment was to come from the bond, or that Mr Andersen had agreed to pay, "using the Council bond money".

(c) The case was presented on the basis that the agreement was that West City would do the additional work and that the bond money would be assigned to it by way of discharge of St George's liabilities for the retentions and the additional work rather than as security for payment. While consistent with the deed of assignment as drafted in November 2005 and executed in October 2006, this analysis might be thought a little odd given that (i) the retentions figure was ascertained as was the price for the additional work; (ii) invoices were later rendered by West City both for the additional work as agreed in November 2005 and the further work required by the Council; and (iii) the engineer issued payment certificates. On the other hand, the amount of the bond ($104,350) was not much different from the combined total ($99,705.18) of the retentions ($47,532.12)[10] which had been owed to West City since January 2005 and the agreed price for the additional work ($52,173.06).

The High Court decision

[22] Associate Judge Abbott held that the development bond was assigned in equity by oral agreement prior to 22 January 2006.[11] In the course of his judgment he observed:[12]

> I gained the impression that Mr Ireland was a man more versed in the subtleties of construction than in the subtleties of language. Having said

[10] This assumes that the retentions figure given to us was GST inclusive.
[11] *West City* (HC), above n 3, at [47].
[12] At [44]. Numbering omitted.

> that, I am left in no doubt that in his discussions with Mr Andersen before writing his letter of 6 November 2005, he made West City's position clear: it wanted to ensure that both its retentions and the cost of the further work on the pond would be met.
>
> Although Mr Ireland does not set out particular words in the discussions that he had with St George … I have no doubt that when he recorded his understanding of the agreement in his letter, he meant more than that the bond money was to be the source of payment. He wanted the right to receive that money.
>
> There is no direct evidence as to when the deed was drafted, but there is no reason to question Mr Ireland's evidence that it was drafted by St George's solicitors, on instructions from Mr Andersen. Mr Ireland was clear in cross-examination that he did not see the deed until it was put before him on 3 October 2006.
>
> …
>
> St George produced and signed the deed on 3 October 2006, apparently without demur, when Mr Ireland called for formal documentation of the arrangement so that he could approach the Council direct as owner of the bond.

As to the correlation, or otherwise, between what was agreed in November 2005 and the terms of the deed signed on 3 October 2006, the Associate Judge commented:[13]

> As there was no negotiation on the terms of the deed, it cannot now be said with any certainty whether the parties intended in November 2005 that it was to be an absolute or a conditional assignment. … However, even if it was to be conditional on carrying out the work, it appears that the work was completed by the end of December 2005 (certainly West City presented its claim for the balance of the pond work on 16 January 2006). It must be borne in mind that in November 2005 the only additional work in contemplation was the quoted work for the pond … .
>
> For the purpose of establishing St George's intention, the significant fact is that St George had a deed of assignment prepared, rather than the content of the deed.
>
> …

He concluded by saying:

> [47] It seems likely that the liquidators' concerns over the existence of an agreement will never have a definitive answer. However, I am satisfied on the evidence before the Court that it is more likely than not that Mr Ireland and Mr Andersen came to an agreement in or about November 2005 that St George would assign the bond to West City. The liquidators have the onus

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13 At [46]. Numbering omitted.

of proving a transaction within the specified period. I find that they have not done so. …

The Court of Appeal decision

[23] The Court of Appeal reached a different view on the facts.

[24] The judgment referred to "tensions in Mr Ireland's evidence":[14]

> At times he speaks of no more than a stipulation to pay from the bond monies when they become available. On occasions he speaks of an agreement to assign with immediate effect. On others he deposes that the arrangement was subject to a formal agreement, the terms of the formal agreement being different from the terms he asserted were orally agreed. In particular, there is a vagueness about when the bond was to be assigned. Was it on the completion of work, or rather once the Council agreed there had been satisfactory completion?

The Court then went on:

> [39] We agree with the Associate Judge that it is not possible to discern whether there was an absolute or conditional assignment from what Mr Ireland said. However, we go further. We are unable to discern on the facts any intention of the parties to be bound by an agreement to assign in November 2005. To the contrary, Mr Ireland stated categorically in the letter on which he relied in his affidavit, and which is the only documentary evidence, that the arrangement would "not be acceptable" until there was a formal agreement. There was no formal agreement until 3 October 2006, which was within the two year period.
>
> [40] In addition to the explicit statement by Mr Ireland that West City would not be bound until an agreement was signed, there are the following factors that indicate this was so:
>
> (a) The agreement that was drafted by St George's solicitors (it seems without Mr Ireland's knowledge) was put in the "bottom drawer", an indication that the issue of the parties entering into a contract to assign was shelved for the time being.
>
> (b) West City continued to submit invoices for the further work done through December 2005 and January 2006, indicating they were hoping to be paid in the usual way, rather than there being a promised payment by an assignment.
>
> (c) In addition to the invoices there was a letter sent on 13 June 2006 by West City to the works certifier setting out the various unpaid claims, some of which were certified and some of which it was stated were to be certified in the future. This is not consistent with there being in existence a binding agreement to settle a debt by the

[14] *West City* (CA), above n 4, at [34].

assignment of the bonds. If there was an agreement to assign, it should have been perfected at that time, and payment would have come from the bond funds.

(d) There is no evidence that the Council was informed of the alleged assignment at the time of the July completion, which may have been expected if there had been a binding agreement.

(e) When the deed of assignment was executed on 3 October 2006, it was with a new entity. West City Construction Ltd had changed its name to Ireland Holdings Ltd and a new company had been incorporated in which Mr Ireland's sons were directors, and which took the name West City Construction Ltd. The deed of assignment was with the new West City Construction Ltd. This is indicative of the fact that the parties did not see the original understanding with West City Construction Ltd as a binding equitable assignment. The Associate Judge did not have the benefit of a submission on this point.

(f) It was a condition of the release of the bond that there be satisfactory completion of the works by 19 November 2005, subject to any extension granted by the Council. It would have been surprising for West City to have surrendered its rights of recovery in exchange for an assignment, when the bond itself might never be released or if it was, at some distant time in the future.

The Court also saw it as "indicative of the lack of any agreement to assign that some critical details were not agreed":[15]

> [41] … While the subject matter, the bond, is clear on Mr Ireland's evidence, he did not refer to any discussions as to the point at which the bond was to be payable. The Associate Judge appeared to assume that the assignment would come into effect when the works were completed. He assumed that as soon as the works were physically complete that was sufficient. The issue arises, completed to what standard? The Associate Judge assumed that physical completion was enough. The assignment document signed on 3 October 2006 stated that West City was to undertake and complete the works on or before the completion date "in a proper and workman-like manner and to the full satisfaction of St George and the Council". It was stated at cl 2.4 that the decision of the Council as to what constitutes satisfactory completion of the work should be accepted by the parties as final and binding on each of them.
>
> [42] This uncertainty as to this basic term is indicative of a lack of intention to assign, and would have made it impossible to order specific performance of the alleged oral agreement. This indicates that at the most, all that occurred in November 2005 was an agreement in principle. There were matters still to be resolved before the parties regarded themselves as bound.

[25] The Court expressed its conclusion in this way:

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[15] Citations omitted.

> [45] Therefore, we reach a view on the facts different from that of the Associate Judge. The material before the Court does not show that the parties intended to enter into a binding assignment in November 2005. There is written evidence that there was an understanding that, if and when St George was paid the bond monies, they would go to meet the indebtedness to West City. There may have been an understanding that there could be an assignment if that was necessary in the future. However, the evidence does not show an intention to assign or enter into an agreement to assign that was to bind the parties in November 2005.
>
> [46] Therefore, we are satisfied that the agreement to assign was the agreement signed on 3 October 2006, and that there was no binding earlier assignment or agreement to assign. Our assessment differs accordingly with that of the Associate Judge, and we will allow the appeal.

Our approach

Was there an agreement to assign the bond?

[26] The factual dispute lies within an extremely narrow compass:

(a) St George wanted West City to carry out further work on the subdivision at a time when West City was owed money which had been outstanding for around 18 months.

(b) It was obvious that St George would have trouble paying for the additional work upon completion, at least in a timely way.

(c) It was anticipated that the work which was to be carried out would enable release of the bond held by the Council.

(d) On Mr Ireland's evidence, which was accepted by the Associate Judge, he had made it clear to Mr Andersen that West City would not carry out the work unless the latter agreed to assign the bond to West City to ensure payment.

(e) There is contemporaneous support for this evidence in the form of the not very precise letter of 6 November 2005 from Mr Ireland to Mr Andersen which appears to have been read and understood by Mr Andersen in the sense contended for by West City as he instructed

his solicitors to prepare a formal deed of assignment (in absolute form).

(f) The work was carried out.

(g) On the completion of the work, the deed of assignment was executed and notice of assignment was given to the Council.

[27] In a case of this sort – that is, concerning an oral agreement – a judge is required to make findings of fact as to what was agreed. If possible, this should be by reference to the actual words used by the parties. If that is not possible – as will usually be the case – the judge must do so by reference to the substance of what was agreed. In this case, the evidence was not clear as to the precise words used by Messrs Ireland and Andersen in relation to the assignment. But, on the findings of fact made by the Associate Judge, the substance of the agreement was along these lines: Mr Ireland had made it clear that West City would not do the work unless St George agreed to assign its rights under the bond, St George agreed to do so, and the work was then carried out on basis of that agreement.

[28] Having made findings as to what was said, a judge may then also have to make findings as to what it all meant – in other words, as to how the words used by the parties should be construed in their commercial context.

[29] Messrs Ireland and Andersen, as laymen, were not particularly likely to have turned their minds to such legal subtleties as to whether:

(a) West City was entitled to call immediately for a formal assignment or had to wait until the work was completed; or

(b) the assignment was by way of security for, or alternatively was by way of satisfaction of, St George's liabilities.

And even if they had turned their minds to such issues, they would probably have seen them as being of little moment. The reality was that the bond would not be paid out until the work was completed and the Council was satisfied and both men knew

this. Also, given that the amount of the bond was not much different from the anticipated total amount of St George's liability to West City[16] and the clear intention that the bond money would be paid to West City, the practical distinction between an assignment by way of security and an assignment in satisfaction of all liabilities was at best slight.

[30] We accept that the reference in Mr Ireland's 6 November 2005 letter to the need for a "formal agreement" and the lack of detail and resulting uncertainties of the kind just discussed in [29] would be very material if the questions whether there was a contract and, if so, its terms, had fallen to be determined before any work was carried out. In those circumstances, cases of the kind relied on by Mr Goddard, such as *Mountain Road (No 9) Ltd v Michael Edgley Corp Pty Ltd*[17] and *Concorde Enterprises Ltd v Anthony Motors (Hutt) Ltd*,[18] would have been directly engaged. But in the present case, we know that there was a contract, because additional work was carried out by West City and accepted by St George. Mr Goddard's argument proceeded on the basis that that there was a contract for the carrying out of the additional work[19] and that there was a separate understanding which never achieved contractual effect as to how West City might be paid. But given that the understanding as to assignment preceded the carrying out of the work and its critical significance from the point of view of West City, we do not see this as a commercially plausible. Instead, we consider that the carrying out and acceptance of the work shows that the "formal agreement" contemplated was whatever would be required to effect a legal assignment of the bond. It also follows that the uncertainties which were so influential in the approach of the Court of Appeal would not have been seen as critical by the parties at the time.

[31] In the judgment of the Court of Appeal there is no discussion of the implications of the fact that the work in contemplation in early November 2005 was subsequently completed by West City. Nor was there any recognition that

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16 See [21](c) above. At most, If not, there is a discrepancy of approximately $4,600 which we see as immaterial as West City had been out of its money in respect of the retentions for more than 18 months.

17 *Mountain Road (No 9) Ltd v Michael Edgley Corp Pty Ltd* [1999] 1 NZLR 335 (CA).

18 *Concorde Enterprises Ltd v Anthony Motors (Hutt) Ltd* [1981] 2 NZLR 385 (CA).

19 Either by way of formal variation to the principal contract or as a separate contract consisting of the quotation and its acceptance.

uncertainties of the kind discussed in [29] are perfectly capable of being resolved by a court.

[32] Of the reasons given by the Court of Appeal for reversing the Associate Judge's finding of fact, the only ones (being those referred to in [40](b) and (c) of the Court of Appeal's judgment)[20] which seem to us to have substance relate to the apparent incongruity between an assignment in satisfaction of liabilities as found by the Associate Judge and contended for by West City and the pattern of invoices and certificates which was unnecessary on the basis of such an assignment. Associated with this is the already mentioned consideration that an assignment by way of security might have been more commercially logical than the absolute assignment as found by the Associate Judge.

[33] For the reasons already given, we think it unlikely that the oral agreement which Messrs Ireland and Andersen entered into would have been specific as to whether the assignment of the bond was by way of security for, or discharge of, the liabilities of St George to West City. We also think it most unlikely that Mr Ireland would subsequently have dwelt on the difference between an assignment by way of security for, and assignment in discharge of, St George's liabilities. More generally, it is clear that the arrangements associated with the additional work carried out by West City were loose. Mr Ireland's 6 November 2005 letter is not a model of precision and the deed of assignment was executed in October 2006 in the form in which it had been drafted in November 2005, despite having been well overtaken by events: for example, the completion date was still set at 19 November 2005. The parties were accustomed to a certification process and it may have been implicit in the agreement as to the additional work that this process would continue. As well, the availability of engineers' certificates might have been of assistance in dealing with the Council. For these reasons, we do not regard the pattern of invoices and certificates as inconsistent with the oral agreement asserted by West City.

[34] The only other factor relied on by the Court of Appeal which we should specifically address is the consideration that the October 2006 assignment was to the present West City. The Court suggested that this was "indicative of the fact that the

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[20] See [24] above.

parties did not see the original understanding … as a binding equitable assignment". We disagree. On the somewhat exiguous evidence, the new West City stepped into the shoes of the old West City and this is entirely neutral as to what bargain may have been struck in November 2005.

The legal consequences of what was agreed

[35] Mr Goddard argued that even if there had been an agreement to assign the bond, it was not effective until the work was: (a) completed; (b) certified for payment by the engineer; and (c) accepted by the Council. His position was that because conditions (b) and (c) were not satisfied until after 22 January 2006, the postulated assignment was not effective in equity until after the specified period had commenced. He further contended that this means that the assignment is necessarily subject to the voidable preference regime.

[36] This line of argument touches on legal issues of some difficulty as to whether and when an uncompleted agreement to transfer property results in the transferee obtaining an equitable interest in the property. Where the property in question is a chattel, the general rule is that in the absence of a contractual stipulation to the contrary, a purchaser does not obtain an equitable interest prior to obtaining legal title.[21] In New Zealand, the position is generally to the contrary in respect of agreements for the sale and purchase of land, even when conditional.[22] In the case of the assignment of a present chose in action, there is scope for doubt as to when the assignee obtains an equitable interest. Thus the authors of *Meagher, Gummow and Lehane* have stated:[23]

> … a contract, for value, to assign legal property, effects an equitable assignment when the consideration is paid or executed… The effect of a valid equitable assignment of a legal interest in property after payment or execution of the consideration is to constitute the assignor a trustee of the property for the benefit of the assignee… The position of the assignee after contract, but before the consideration is paid or executed, is rather more

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21 See *Re Wait* [1927] 1 Ch 606 (CA) which was decided in the context of the Sale of Goods Act 1893 (UK).

22 *Bevin v Smith* [1994] 3 NZLR 648 (CA).

23 RP Meagher, JD Heydon and MJ Leeming *Meagher, Gummow and Lehane's Equity: Doctrine and Remedies* (4th ed, Butterworths LexisNexis, Sydney, 2002) at 225–226. To the same general effect is A Guest *Guest on the Law of Assignment* (Sweet & Maxwell, London, 2012) at 102–103.

> obscure… [T]he equitable interest, or trust, can arise only if the contract is one of a kind of which specific performance might be ordered…

[37] On this aspect of the case Mr Goddard's argument very much depended on bringing back into the November 2005 agreement the terms provided for in the deed of assignment executed on 3 October 2006. This was something which the Associate Judge was not prepared to do. And given that those terms were not discussed in November 2005 we consider that the approach of the Associate Judge was correct. On his findings, which we adopt, the position is that prior to the commencement of the specified period on 22 January 2006, West City had done everything which it was required to do to under the contract for the additional works. That contract and West City's right to an assignment of the bond were not subject to any other conditions. There was no need for the assignment to be subject to Council approval of the works because it was appreciated that the Council would not pay out the bond money until it was satisfied with the work which was carried out. Accordingly, the contract was, from the point of view of West City, executed and, on the basis of the principles which we have just discussed, it was entitled to call for a legal assignment of the bond which accordingly became vested in it in equity prior to 22 January 2006.

[38] We also have reservations as to the legal soundness of Mr Goddard's submissions on this point. It is at least open to argument that even if the assignment was subject to satisfaction of the three conditions just mentioned, it might still have had immediate effect in equity, albeit that West City's equitable interest would have been defeasible.[24] Perhaps more importantly, Mr Goddard did not explain in his submissions why a contract entered into before the start of the specified period would be rendered voidable merely because conditions to which it was subject were subsequently satisfied. The focus of s 292, both as it was in November 2005 and now, focuses on when the impugned transaction was "made" or "entered into".[25] A conditional agreement made in November 2005 to assign the bond might be thought

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[24] Guest provides some support for this theory: above n 23, at 103. Such an approach would be consistent with that adopted in *Bevin v Smith*, above n 22, in the admittedly different context of sales of land, it being common practice for caveats to be lodged on the basis of conditional contracts.

[25] Section 292, as it was in 2005, used the term "made", whereas the current version uses "entered into".

to have been "made" or "entered into" at that time even though it later became unconditional by reason of the actions of third parties.

Assuming no equitable assignment in November 2005, should West City be required to repay all of the money it received from the Council?

[39] The order made against West City that it pay to the liquidators the amount it received from the Council appears to have been made under s 295(1)(c), which provides:

> **295 Other orders**
>
> If a transaction or charge is set aside … , the court may make 1 or more of the following orders:
>
> …
>
> (c) an order that a person pay to the company an amount that, in the court's opinion, fairly represents some or all of the benefits that the person has received because of the transaction:

The use of the word "may" and the phrase "some or all of the benefits" are indicative of a discretion which might be exercised so as not to require the preferred creditor to account for the full extent of the preference. That this is so is supported by a comparison of the current s 295 (as inserted with effect from 1 November 2007) with the section it replaced. The earlier version of s 295 was relevantly in these terms:

> If a transaction or charge is set aside … , the Court may make one or more of the following orders:
>
> (a) An order requiring a person to pay to the liquidator, in respect of benefits received by that person as a result of the transaction or charge, such sums as fairly represent those benefits:
>
> …

[40] On the appeal, West City maintained that if it had not established an equitable assignment which became effective before 22 January 2006, it would have been appropriate not to require repayment – at least in full – of the money which it received from the Council. It is clear that the additional work it did was necessary for the amount of the bond to be released. If the work had not been completed, the Council would have used the bond money to pay someone else to complete the work. On this basis, Mr Davey for West City suggested that West City should at least

receive some credit for the value of the additional work which was necessary to ensure release of the bond.

[41] There was in fact some work which West City carried out after 3 October 2006 relating to maintenance of the pond. If West City had failed on the primary issue, some consideration would have been necessary in relation to this work. But leaving aside that comparatively minor point, it seems to us that if there had not been an equitable assignment prior to 22 January 2006, it would have been appropriate to require repayment by West City of all money received from the Council. On this hypothesis, the fact that West City's work had enhanced the financial position of St George would not distinguish West City from other – and unpaid – creditors who had, in one way or another, conferred economic benefits on St George.

Disposition

[42] The appeal is allowed, the judgment of the Court of Appeal is reversed and the judgment of the Associate Judge in the High Court is restored. The liquidators are to pay the appellant costs and disbursements in respect of the appeal to the Court of Appeal to be fixed by that Court and costs in relation to the appeal to this Court in the sum of $25,000 together with reasonable disbursements.

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