



Supreme Court
New South Wales

Case Name: The Owners Strata Plan 97121 v RCBS Devco Pty Ltd

Medium Neutral Citation: [2020] NSWSC 1247

Hearing Date(s): 2 & 3 September 2020

Decision Date: 14 September 2020

Jurisdiction: Equity - Technology and Construction List

Before: Hammerschlag J

Decision: See paragraph 87

Catchwords: REAL PROPERTY – Conveyancing Act 1919 (NSW) s 37A – where real property was sold by the second defendant to the third defendant at an undervalue and proceeds distributed immediately – where transactions were completed soon after the second defendant became aware that the plaintiff was contemplating litigation against it for alleged building defects – whether alienations were made with intent to defraud creditors – HELD – the alienations were made with intent to defraud the plaintiff as a creditor.

Legislation Cited: Conveyancing Act 1919 (NSW)
Corporations Act 2001 (Cth)
Home Building Act 1989 (NSW)

Category: Principal judgment

Parties: The Owners Strata Plan 97121 - Plaintiff
RCBS Devco Pty Ltd - First Defendant
RCBS Land Co. Pty Ltd - Second Defendant
Altitude G3 Pty Ltd - Third Defendant
R&V Cassab Pty Ltd - Fourth Defendant
RC Family Holdings Pty Ltd - Fifth Defendant
MJEC Investments Pty Ltd - Sixth Defendant
Suttor Innovation Pty Limited - Seventh Defendant

ESS Asset Pty Ltd - Eighth Defendant

Representation:

Counsel:

G Sirtes SC with D Hand - Plaintiff

M R Pesman SC - First to Eighth Defendants

Solicitors:

DEA Lawyers - Plaintiff

Colin Biggers & Paisley Pty Ltd - First to Eighth Defendants

File Number(s):

2020/28221

JUDGMENT

INTRODUCTION

1 HIS HONOUR: This judgment answers separate questions framed to resolve whether transactions entered into by the second defendant (**Landco**) on and around 21 January 2020 were, within the meaning of s 37A of the *Conveyancing Act 1919* (NSW) (**the Act**), made with intent to defraud creditors and, if so, the appropriate relief that is to go.

2 That section provides:

37A Voluntary alienation to defraud creditors voidable

(1) Save as provided in this section, every alienation of property, made whether before or after the commencement of the *Conveyancing (Amendment) Act 1930*, with intent to defraud creditors, shall be voidable at the instance of any person thereby prejudiced.

(2) This section does not affect the law of bankruptcy for the time being in force.

(3) This section does not extend to any estate or interest in property alienated to a purchaser in good faith not having, at the time of the alienation, notice of the intent to defraud creditors.

3 The plaintiff owners corporation is the registered proprietor of the common property in a strata scheme known as “Altitude” at 1 Boys Avenue, Blacktown, a 27 storey building (**the Building**) comprising 106 residences and four commercial lots. The commercial lots are numbered 1, 2, 3, and 4.

4 Landco and the first defendant (**Devco**) are associated with Messrs Robert Cassab (**Cassab**) and Brett Suttor (**Suttor**), who for some years have been associated with each other, through various corporate vehicles, in the business

of property development. The initials RCBS in the names of Landco and Devco are theirs.

- 5 The substance of the transactions under attack is as follows: Landco sold Lot 3 at an alleged undervalue to a newly formed company, Altitude G3 Pty Ltd (**G3**), controlled by Cassab and Suttor. Landco immediately distributed the proceeds of sale. The effect of this was to leave Landco with no assets whilst its erstwhile asset became owned by G3.
- 6 This judgment refers to a large number of financial transactions. For convenience, cents have been disregarded.

BACKGROUND

- 7 Landco is the trustee of the RCBS Property Trust (**the RCBS Trust**), a unit trust of which 50% of the units are held by entities associated with Cassab and 50% are held by entities associated with Suttor. The precise holding is:
 - (1) 27.42% - the R&V Cassab Superannuation Fund Pty Ltd as trustee for the R&V Cassab Superannuation Fund (the fourth defendant);
 - (2) 11.83% - RC Family Holdings Pty Ltd as trustee for the Robert Cassab Family Trust (the fifth defendant);
 - (3) 10.75% - MJEC Investments Pty Ltd (Cassab's investment vehicle) (**MJEC**) (the sixth defendant);
 - (4) 39.25% - ESS Asset Pty Ltd as trustee for the REA Suttor Superannuation Fund (a self-managed superannuation fund of which the beneficiaries are Suttor, his wife, and his parents-in-law) (the eighth defendant); and
 - (5) 10.75% - Suttor Innovation Pty Ltd as trustee for the REA Suttor Family Trust (the seventh defendant).
- 8 Landco and the RCBS Trust were established for the sole purpose of investing in the land on which the Building now stands. Devco was established to develop it. Devco retained Bauer Projects Australia to design and construct the Building but that organisation went into liquidation and Devco itself became responsible to build. It obtained a contractor's licence and carried out the development. The development was completed in April 2018. An interim occupation certificate was issued on 5 April 2018.

- 9 Many of the residential lots were pre-sold. Landco made a substantial profit in the financial year ending 30 June 2018, most of which, if not all, was distributed to unit holders.
- 10 Mr Grant Parish (**Parish**) is a chartered accountant and a partner at the accounting firm Pitcher Partners. He became associated with Cassab and Suttor in about September 2018 when he met with them to discuss their accounting and tax affairs.
- 11 Lots 2 and 4 were sold by Landco in September 2018. Lot 1 was sold in April 2019. As at January 2020, Landco still had Lot 3. As at 10 September 2018, Lot 3 had been valued at \$1.336 million, equating to about \$5500 per m². Entities associated with Cassab bought a number of residential lots as well.
- 12 Cassab says that in October 2018, Suttor said they needed to sell the remaining commercial lots because he needed cash. Suttor said that his family trust had made little money from the development because much of the profit had been eroded by interest charges due to financiers.
- 13 In late January 2019, Suttor and Cassab and their associated entities were being audited by the Australian Taxation Office (**ATO**).
- 14 At about this time, Suttor established (a second) self-managed superannuation fund called the Suttor Superannuation Fund. He and his wife are its members.
- 15 In March 2019, the plaintiff made enquiries of a remedial building consultant about conducting a building defects audit.
- 16 In May 2019, Suttor sought advice from Parish about the process to deregister Devco and Landco. In an email of 15 May 2019, he said, amongst others:
- At this stage our understanding for Land Co is:
- Sell remaining asset, we are commissioning stamp duty and CGT valuation for this property [at the moment];
- After end of this FY compile 2019 TR lodge and discharge any tax liabilities; (TARGET JULY 2019)
- Close bank accounts
- De register company
- 17 He ended the email:

As previously discussed, whilst we continue to proactively work with building Management to close out handfuls of defects, for your information the key risk consideration for ourselves

- 18 On 20 May 2019, Landco obtained a valuation of Lot 3 at \$1.050 million. On 10 July 2019, Landco obtained a valuation of Lot 3 at \$880,000 (excl. GST).
- 19 On 22 August 2019, the plaintiff held its annual general meeting. Amongst the motions put to the meeting were:

Motion 9 – Building Defects

That the Owners' Corporation instruct the Strata Committee to immediately obtain legal advice regarding building defects to:

- (a) ascertain the Owners' Corporation's time limitations with regards to notification and the lodgement of a building defects claim; and
- (b) ascertain the appropriate steps necessary for the Owners' Corporation to pursue a building defects claim and preserve its rights; and
- (c) ascertain the parties in which the Owners' Corporation must pursue a claim against it

Motion 10 - Rectification Work to Common Property

That the Owners' Corporation consider the following as possible defect and rectification works required to common property, and authorised the Strata manager or Strata committee to engage relevant building experts to inspect the property and provide a report.

- 20 The Cassab and Suttor interests voted against these motions. The motions were defeated.
- 21 In October 2019, Landco retained Colliers International (**Colliers**), a commercial real estate agent, to commence a marketing campaign to sell or lease Lot 3. According to the advertising material, a reduced price would be accepted. The price was not specified. Throughout, Colliers was represented by an Associate Director, Mr Jordan McConnell (**McConnell**).
- 22 At about this time, the plaintiff (through its executive committee) sought quotations from a number of strata defects specialists for a building defect investigation. A number of quotations were obtained.
- 23 During November 2019, a number of offers for Lot 3 were received but nothing eventuated. In December 2019, Parish had a conversation with Suttor to the following effect:

Parish: We've got your draft financials and the tax for the 2018 year. We estimate it to be more than \$400,000 based on the draft profit of the fund.

Suttor: I'm going to have to work out how I'm going to pay this.

Parish: Once you give us the final outstanding queries we will finalise.

24 Cassab says that in early December 2019, Suttor said to him:

Pitcher Partners have just completed the initial draft 2018 financials for my super fund. I need to pay over \$400,000 in tax. I am also going to be hit with interest charges because my tax is late. My super fund does not have enough money in its account to cover this. I need to reduce the super fund's interest in the commercial lot.

25 On 11 December 2019, Mr Greg Wilkins (**Wilkins**) of Pitcher Partners sent an email to Suttor and Cassab, copied to Parish, regarding winding up and deregistering Devco. The email set out the requirements for voluntary deregistration of a company which included that the company must not be involved in any legal proceedings.

26 On 20 December 2019, the plaintiff gave notice of a general meeting to be held on 15 January 2020. The notice included the motions to be put to the meeting.

27 Motion 3 proposed a discussion of the status of the defects affecting the Building.

28 Motion 4 was that the owners approve seeking advice and/or services from DEA Lawyers and that any advice be tabled. The following notes to the motion were included:

A Strata Committee meeting is to be held 7 January 2020 to seek legal advice in relation to the defect warranty periods. If approved at that meeting the advice will be tabled at this meeting. Further that the scheme engage Doyle Edwards Anderson Lawyers Pty Ltd to act on their behalf in this matter.

29 Motion 6 was to authorise the Strata Committee or a managing agent to affix the common seal to documents required to commence legal proceedings and to give effect to any settlement of the defects claim.

30 Cassab was opposed to the plaintiff spending money on consultants and lawyers in respect of a defects claim. His position was that the Building had been well-maintained and issues that had emerged had been dealt with. In a lengthy email of 24 December 2019 to the strata manager and various others, he expressed his views. For his part, Suttor sent an email on 6 January 2020 in which he expressed agreement with Cassab's position. He stated that they had maintained a significant personal and commercial interest in excess of \$6

million worth of assets within the Building which was demonstrative of their advice as being in the interests of the Building. He concluded his email with the following statement:

Whilst I've no immediate intention to sell properties held in Altitude, as an owner I certainly do not want some contrived report containing purported defects on record.

31 Suttor says that in January 2020, he said to Cassab:

Pitchers have now firmed up on my 2018 and 2019 tax for my super fund. I need to pay my tax now as to minimise late charges. My super fund needs the money now.

32 On 7 January 2020, a meeting of the plaintiff's committee, of which both Cassab and Suttor were members, was convened. Voting was by paper. The following resolutions were passed, over opposition from Cassab and Suttor – both of whom had only a day or so earlier returned from overseas:

Motion 2 – Engage DEA Lawyers

That the strata committee engage DEA Lawyers to provide legal advice about potential defects claim in accordance with the costs agreement and disclosure dated 12 December, 2019.

Motion 3 – Call Extraordinary General Meeting

That the strata committee convened an extraordinary general meeting once it has received the legal advice from DEA Lawyers, and to engage DEA Lawyers to be present at that meeting to provide advice to the owners Corporation.

Motion 4 – Urgency

That the strata committee notes that there is urgency regarding the need for legal advice in circumstances where the building is approaching the expiration of the 2 year warranty period.

33 On 9 January 2020, DEA Lawyers gave written advice to the plaintiff about a potential defects claim. The potential defects identified were:

Defective cladding;
Failed hydrants and pumps;
Failed stair pressurisation;
Water leaks throughout the Building;
Failed carpark and emergency lighting;
Concrete spalling; and
Rooftop leaks.

- 34 The advice identified, as one option, pursuing Landco and Devco for the building defects under the warranty provisions of the *Home Building Act 1989* (NSW). It drew attention to limitation periods provided for under that Act.
- 35 Cassab and Suttor sprang into action.
- 36 On 10 January 2020, they obtained written advice from Pitcher Partners regarding the winding up and deregistration of Devco and Landco and the winding up of the RCBS Trust. Pitcher Partners advised that for the trust to be wound up, all remaining assets needed to be sold. They said, pertinently:
- 1. Sale of remaining commercial unit held by the trust* (If you choose to transfer ownership of this asset to a related party, then Stamp Duty will be payable by the acquiring party based on a market valuation by a qualified valuer. Based on a transfer value of between \$304,000 and \$1,013,000, the rate will be 4.5% of every dollar of value above \$304,000 plus a flat rate of \$9112).
- 37 They advised that the requirements to voluntarily deregister a trustee company included that the company must not be involved in any legal proceedings.
- 38 On 13 January 2020, the REA Suttor Superannuation Fund had \$431,853 standing to its credit with the Commonwealth Bank.
- 39 On 14 January 2020, Cassab and Suttor say they received copy of DEA Lawyers' written advice of 9 January 2020.
- 40 The foreshadowed General Meeting of the plaintiff took place on 15 January 2020 at the Blacktown RSL. Cassab and Suttor were present. A motion was passed, over the opposition of the Cassab and Suttor interests, authorising the Strata Committee to use its discretion and make decisions about the defects claim subject to taking into account legal advice from the lawyers. Another motion was passed, also over the opposition of the Cassab and Suttor interests, authorising the Committee to execute documents required to commence legal proceedings and/or give effect to any settlement of the defects claim.
- 41 The following day Cassab and Suttor, in their capacity as Devco's members, consented to deregister it and Suttor, as its director, passed a resolution to apply for its deregistration under the *Corporations Act 2001* (Cth) and executed

the relevant application to ASIC to deregister. He certified, amongst others, that Devco was not party to any legal proceedings.

42 On 17 January 2020, G3 was brought into existence. Cassab and Suttor are its only directors and shareholders.

43 Also on that day, Suttor, on behalf of Landco, accepted a quotation from Robertson & Robertson Consulting Valuers (**Robertson & Robertson**) to provide a valuation of Lot 3. He received a letter from McConnell from which it appears that McConnell had been asked for an updated opinion of value for Lot 3.

44 Yazbek Law (**Yazbek**) is a firm of solicitors in Bankstown.

45 As at 20 January 2020, G3 did not have its own bank account.

46 The following relevant things happened on 20 January 2020:

- A trust called the Altitude G3 Unit Trust was created, with G3 as trustee. A trust deed was signed by Suttor and Cassab on behalf of G3. The holders of the units are:
 - (a) on Cassab's side, MJEC 50%; and
 - (b) on Suttor's side, the trustee of the REA Suttor Superannuation Fund 27%, the trustee of the REA Suttor Family Trust 20%, and the trustee of the Suttor Superannuation Fund 3%.
- Robertson & Robertson provided their valuation of Lot 3 at \$800,000 (excl. GST). The valuers were Messrs Benjamin Doran and Christopher Smith.
- MJEC transferred \$507,500 to Yazbek's trust account.
- Cassab and Suttor held a directors' meeting of Landco and resolved to allocate income for the year ended 30 June 2020 in accordance with unit holdings.

47 21 January 2020 was also a busy day for the Suttor and Cassab interests:

- The REA Suttor Superannuation Fund, the REA Suttor Family Trust, and the Suttor Superannuation Fund transferred \$507,500 to Yazbek's trust account in the amounts of \$274,050 from the REA Suttor Superannuation Fund, \$203,000 from the REA Suttor Family Trust, and \$30,450 from the Suttor Superannuation Fund.
- Landco sold Lot 3 to G3 for \$880,000 (incl. GST) and settlement occurred immediately thereafter.
- Yazbek disbursed \$916,311, of which \$878,868 went to Landco, \$35,052 was paid for stamp duty, and the remainder was paid for lodgement fees and professional fees.

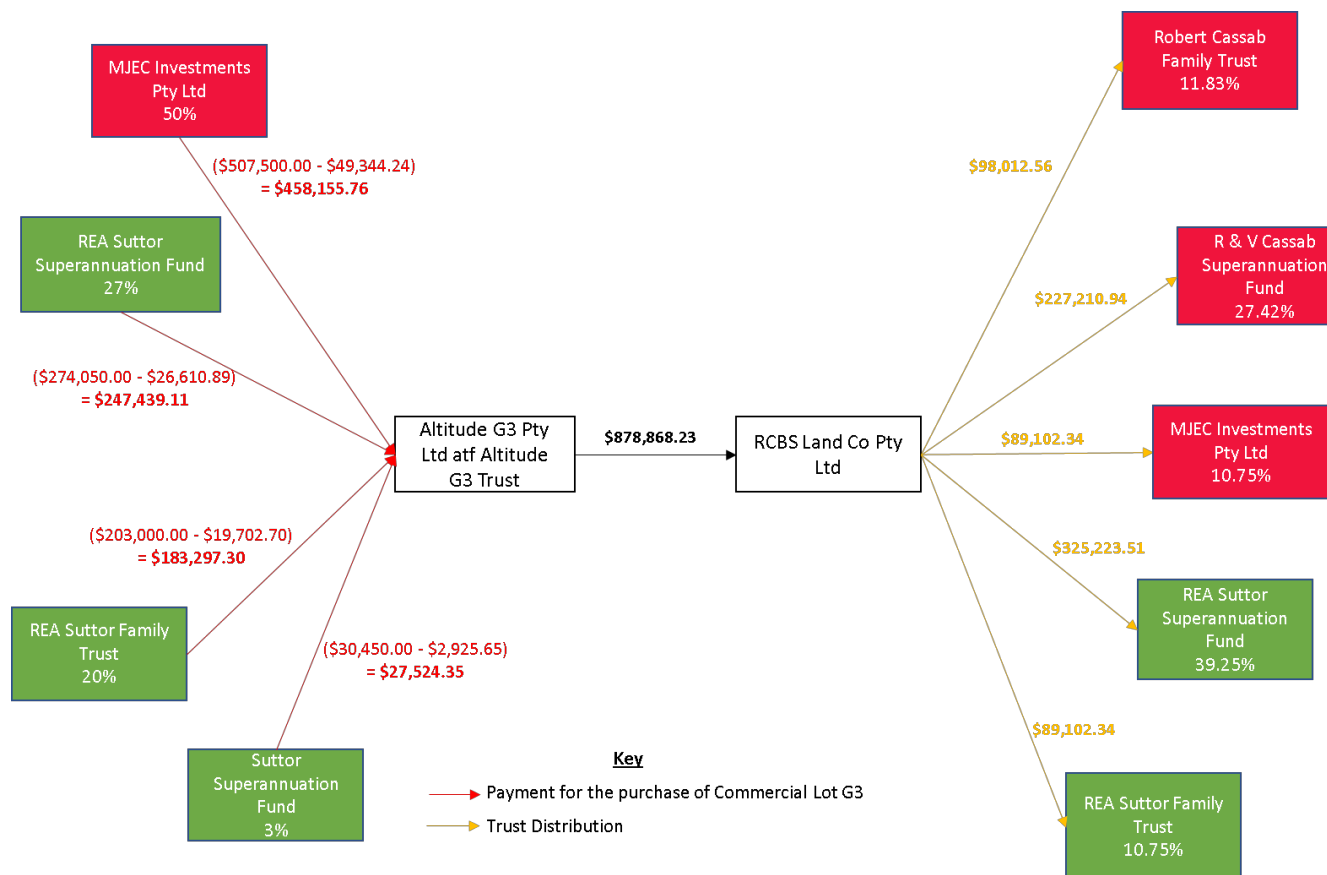
- Suttor authorised Pitcher Partners immediately to pay any monies received from the RCBS Trust into a designated bank account.

48 22 January 2020 was an equally busy day for the Suttor and Cassab interests:

- The members of Landco (Cassab and Suttor) agreed and consented to its deregistration noting, amongst others, that it was not a party to any legal proceedings and Suttor, as a director, executed the relevant application to ASIC to deregister. The application was lodged with ASIC at 4.28pm.
- Landco distributed \$414,325 to the Cassab interests by paying \$98,012 to the Robert Cassab Family Trust, \$227,210 to the R&V Cassab Superannuation Fund, and \$89,102 to MJEC.
- Landco distributed \$414,325 to the Suttor interests by paying \$325,223 to the REA Suttor Superannuation Fund and \$89,102 to the REA Suttor Family Trust.
- Yazbek refunded \$49,344 to MJEC.
- Yazbek refunded \$26,645 to the REA Suttor Superannuation Fund, \$19,737 to the REA Suttor Family Trust, and \$2,960 to the Suttor Superannuation Fund.

49 Figure 1 (which was prepared by the defendants) below shows these transactions:

FIGURE 1



50 The net effects of these transactions were that:

- (1) Whereas the Cassab and Suttor interests previously held Lot 3 through Landco, they now held it through G3.
- (2) Each side contributed half of the cost and, with modest adjustments, got it back through distributions by the RCBS Trust.
- (3) The Cassab interests in Lot 3 became held exclusively by MJEC. They paid \$507,500 and got back \$458,155, thereby making a loss of \$49,344.
- (4) The interest of the REA Suttor Superannuation Fund in Lot 3 was reduced from 39.25% to 27%, the Suttor Family Trust's interest increased from 10.75% to 20%, and the Suttor Superannuation Fund acquired 3%.
- (5) The REA Suttor Superannuation Fund paid in \$247,439 and received back \$325,223, in effect alienating a 12.25% interest in Lot 3 for \$77,784.

51 As referred to earlier, on 13 January 2020, the REA Suttor Superannuation Fund had \$431,853 standing to its credit. After the 21 and 22 January 2020 transactions, it had \$509,638. On 7 February 2020, it paid tax to the ATO for the 2018 Financial Year of \$413,580. There had been a couple of minor transactions in between, so that its balance on 7 February 2020 was \$94,843. On 3 March 2020, it paid tax for the 2019 Financial Year of \$24,970, leaving a balance of \$69,643. This means that it started off with \$431,853 and paid tax for the two financial years totalling \$438,550. In other words, without the transactions with regard to Lot 3, it would have been short by only \$6697 on its 2019 tax bill.

52 On 28 January 2020, the plaintiff commenced these proceedings by suing out a Summons and accompanying Technology and Construction List Statement. It claims damages against Landco and Devco for breach of warranties under the *Home Building Act 1989* (NSW) on the footing that the common property is affected by defects.

53 On about 18 February 2020, Suttor had a discussion with McConnell about relaunching an advertising campaign to sell Lot 3. McConnell arranged for prospective purchasers to inspect it that week. However, on 24 February 2020, he advised Suttor that the inspection did not look like "it's going to go anywhere – not the right fit for the guys [sic] business." McConnell sought approval to get the new campaign kicked off.

54 Cassab wrote to McConnell on 24 February 2020:

We may need to put a hold on this. I think the body corporate is trying to tie us up legally to hang onto the property until the defects reports are issued. We are fighting them but we may have a short term problem in the meantime and we are getting legal advice now.

55 On 28 February 2020, the plaintiff amended its Summons to seek orders vitiating the transfer of Lot 3. On 23 April 2020, it further amended its Summons to seek orders vitiating the disbursement of the proceeds of sale.

SALE AT AN UNDERVALUE

56 The plaintiff called an expert land valuer, Mr Nicholas Garnsey (**Garnsey**), who opined that the market value of Lot 3 on 21 January 2020 was \$1,045,000 (excl. GST). If this is correct, Landco sold Lot 3 for \$245,000 less than it was worth. Garnsey based his valuation principally on the prices that had been achieved for Lots 1, 2 and 4, making adjustments for the differences between them, including size.

57 Lots 1 and 2 are significantly smaller than Lots 3 and 4. Lot 2, which has an area of 66 m², sold on 25 July 2018 for \$575,000, equating to \$8712 per m². Lot 1, which has an area of 55 m², sold on 21 February 2019 for \$450,000, equating to \$8182 per m².

58 Lot 4, which has an area of 181 m², sold on 24 September 2018 for \$820,000, equating to \$4530 per m².

59 Lot 3 is bigger still. It has an area of 243 m². Garnsey opined that having regard to the other sales, which in his opinion occurred in an inferior market, a range of \$4250 to \$4500 per m² would be achievable for Lot 3, after adjusting for "its size, ground floor access/reception, and its position/aspect/shape."

60 On a comparable sales basis, Garnsey reached a value of \$1,060,000.

61 Garnsey cross-checked this value using the capitalisation method which values property by taking its potential net market income and capitalising it at an appropriate yield, reflecting the characteristics of the Lot and the return which the private investor market would expect. Using this method, he reached a value of \$1,030,000.

- 62 Taking the midpoint between the two valuations, he reached a market value of \$1,045,000.
- 63 I accept Garnsey's evidence.
- 64 His evidence was challenged in only one minor respect. It was put to him that offers which had been made for Lot 3 at lower prices but which did not result in any sales were a better guide to market value than his method. Correctly, he disagreed with the proposition.
- 65 Unaccepted offers (even if binding, which none of the offers identified in the evidence appeared to be) and incomplete negotiations are not evidence of market value. Nothing is known of the motivations of the offerors. Nothing is known of their willingness or capacity to complete. Also, Landco did not sell to any of these offerors.
- 66 Landco avowedly based the price at which it sold to G3, on the valuation it obtained from Robertson & Robertson on 20 January 2020. But the valuers who gave it were not called to give evidence in support of it. It may be inferred that their evidence would not have assisted Landco.
- 67 It is also to be observed that had a higher price been paid, there would have been increased stamp duty to be paid. On the basis of what Pitcher Partners advised on 10 January 2020, stamp duty would have increased at a rate of 4.5% of every extra dollar paid. Had Lot 3 been sold for \$1,045,000, an extra \$11,025 would have had to have been paid. Given that Lot 3 stayed within the Cassab and Suttor interests, there was a clear motivation to pay less rather than more.
- 68 I conclude that Landco sold to G3 at a significant undervalue.

INTENTION TO DEFRAUD CREDITORS

- 69 Suttor and Cassab gave evidence and were cross-examined. They say that it was no part of their intention or motivation in bringing about the sale of Lot 3, or the immediate distribution of the proceeds, to defraud Landco's creditors.
- 70 Suttor says that his motivation was to put the REA Suttor Superannuation Fund into funds necessary to pay its tax.

- 71 Cassab says that he wanted to help Suttor and also considered that it would be preferable for all his interest in Lot 3 to be held by MJEC. He says that he viewed the interest in Lot 3 as a long-term investment.
- 72 They both say that they did not think there was a realistic possibility that the plaintiff would sue Landco for building defects and that they therefore did not believe that in reality the plaintiff was or would be its creditor. This, they say, means that they did not intend, and could not have intended, to defraud the plaintiff.
- 73 The parties were *ad idem* that if I did not believe their (or either of their) evidence, the consequence would be that the plaintiff had to succeed.
- 74 I do not believe Cassab and Suttor. Neither was a credible witness.
- 75 The objective contemporaneous circumstances undermine their credibility.
- 76 I do not believe them that they did not think proceedings by the plaintiff for alleged building defects were not a realistic possibility. On 7 January 2020, the Strata Committee voted to engage lawyers to advise about the potential defects claim and to convene an extraordinary general meeting. Three days later, advice was received by them from Wilkins about winding up the RCBS Trust. On 14 January 2020, they received the lawyers' advice of 9 January 2020, and on 15 January 2020, the general meeting resolved to commence proceedings.
- 77 The concept of deregistration had been the subject of advice from Pitcher Partners as early as 15 May 2019, with the target date of July 2019, but nothing was done until the somewhat frenzied activity after the potential defects claim became live.
- 78 To achieve deregistration of Landco (and for that matter, Devco), they had to certify that no proceedings against it were on foot.
- 79 They provided no rational or logical explanation for the breakneck speed at which the transactions complained of were entered into and consummated. They provided no rational or logical explanation for why those steps were taken in such close proximity to the steps taken by the plaintiff in relation to bringing the defects claim.

- 80 I find that the explanation is their intention to defraud the plaintiff by thwarting its claim.
- 81 By December 2019, Pitcher Partners had finalised the draft 2018 and 2019 accounts for Suttor's self-managed superannuation fund. The bank account for that fund was in credit to the extent of \$431,853, which was more than enough pay the 2018 amount and was short by less than \$7000 with respect to the 2019 amount.
- 82 I do not believe Suttor that his motivation for implementing a complex series of transactions was to raise money to pay tax when he only needed such a small amount. That suggested motivation is a pretext.
- 83 Cassab is an astute businessman. He talked of his long and close association with Suttor. The transactions resulted in a net loss to his entities of approximately \$50,000. I do not accept that he took this loss to help his associate raise a minimal amount for tax when he could simply have lent him (or for that matter given him) \$6697.
- 84 Cassab's evidence that the interest in Lot 3 was to be a long-term investment does not sit easily with the fact that almost immediately after the transactions, there was to be a marketing campaign to sell it which was only called off on 24 February 2020 when Cassab wrote to McConnell.
- 85 On 20 December 2019, there was notice of a general meeting which referred to a Strata Committee meeting to be held on 7 January 2020 to seek legal advice in relation to the defect warranty periods. On 6 January 2020, Suttor emailed the Strata Committee and others that he had no immediate intention to sell properties held in the Building, yet less than a month later Landco sold Lot 3 to G3. Under cross-examination about this, he said that he was referring to residential properties. I found the explanation less than convincing. But if he had no such immediate intention on 6 January 2020, he formed one very shortly thereafter.
- 86 I find that the alienations of property, both by the sale of Lot 3 to G3 and by the immediate distribution of the proceeds of sale, were with intent to defraud creditors.

CONCLUSION

87 The Court answers the separate questions as follows:

Question

Was the transfer by the Second Defendant to the Third Defendant in January 2020, pursuant to a Memorandum of Transfer dated 21 January 2020 and registered as dealing AP848173 ("the Transfer") of Lot 3 in Strata Plan 97445, and known as Unit 3, 1 Boys Avenue, Blacktown in the State of New South Wales ("the Property"), made with intent to defraud creditors within the meaning of section 37A of the *Conveyancing Act 1919*?

Answer

Yes.

Question

Were the distributions by the Second Defendant of the proceeds of the Property pursuant to the Transfer to the 4th to 8th Defendants made with intent to defraud creditors within the meaning of section 37A of the *Conveyancing Act 1919*?

Answer

Yes.

Question

Were the transactions in (a) and (b) above made with intent to defraud creditors within the meaning of section 37A of the *Conveyancing Act 1919*?

Answer

Yes.

Questions

(d) If the answer to one or more of (a) to (c) is "yes" should the Court pursuant to section 37A of the *Conveyancing Act 1919*:

- (i) declare the Transfer of the Property void; or
- (ii) declare the distributions void; or
- (iii) grant other relief.

Answer

Yes.

Question

(e) If the answer to Question (a) is "no", should the Court dismiss the claims as against the Third to Eighth Defendants?

Answer

Does not arise.

- 88 The parties made it clear that the form of relief that should be granted would depend on the nature of the findings made and that they wished to be heard on the issue if the plaintiff succeeded.
- 89 I will stand the matter over for a period to allow the parties to consider these reasons and to endeavour to come to agreement as to the appropriate form of relief and orders for costs.
- 90 The parties are, within 14 days, to exchange and forward to my Associate written submissions on the appropriate form of relief and their position on costs, to identify any arithmetical errors or issues which still require resolution, and to propose further directions regarding the principal conduct of the case.

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