11 U.S.C. §101(30)
11 U.S.C. §550(a)

<u>Tualatin Valley Builders v. Harper</u>, #88-0526-S
<u>Hutchings & Harper v. Tualatin Valley Builders</u>, #89-3041-S
<u>In Re James P. Harper</u>, #388-03560-S11
<u>In Re Hutchings & Harper Enterprises</u>, #388-03561-S11
DDS (9/12/90)

The Court found that a creditor was not an insider under §101(30) so that the extended preference period of §547(b)(4)(B) did not apply. The creditor did not run the framing jobs, did not designate who to pay or who not to pay and did not control managerial discretion in inappropriate ways.

Under §550(a) the Court also found that a business was transferred, not just a group of assets. Because the creditor could not restore all the assets transferred and certainly could not restore the debtor as a going business, this was an appropriate case to value the business. The Court set the value of the business at $190,000 based on the transfer agreement as the best evidence. Evidence presented at trial as to value was conflicting.

Judgment to the creditor as to the insider issue of §101(30) and to the debtor as to the value of the property transferred under §550(a).

UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF OREGON

In Re: JAMES P. HARPER, Debtor, TUALATIN VALLEY BUILDERS SUPPLY, Plaintiff, v. JAMES P. HARPER, dba H & H Builders, Defendant,	Bankruptcy Case No. 388-03560-S11 Adversary Proceeding No. 88-0526-S
In Re: HUTCHINGS & HARPER ENTERPRISES, INC., Debtor, HUTCHINGS & HARPER ENTERPRISES, INC., an Oregon corporation, Plaintiff, v.	

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TUALATIN VALLEY BUILDERS')
SUPPLY, INC., an Oregon)
corporation,)
)
Defendant.)

The debtor-in-possession ("debtor") sued Tualatin Valley Builders' Supply ("TVBS") to recover two groups of transfers as preferences under 11 U.S.C. § 547(b). The first group consisted of 17 payments totalling $138,637.65 made by the debtors to TVBS between 90 days and one year prior to bankruptcy. The second group consisted of equipment, accounts, and virtually all of the assets of the debtor which the debtor turned over to TVBS for a credit of $190,000 within 90 days prior to bankruptcy. The debtor should not recover the first group of transfers but should recover $190,000 as the value of the second group of transfers. My reasons follow.

Robert Hutchings ("Hutchings") and James Harper ("Harper") operated a sizable framing contracting business known as H & H Builders ("H & H") for about nine months prior to bankruptcy, beginning in the fall of 1987. They operated as a joint venture at first, then incorporated as Hutchings & Harper Enterprises, Inc., with themselves as owners. They retained the business name. TVBS supplied materials and made substantial payroll loans to H & H which totalled $490,000 on May 18, 1988. Hutchings and Harper on that date turned over all of the assets of H & H to TVBS and signed an employment agreement with Production Builders, Inc. ("PBI") which had just been incorporated by TVBS for the purpose of continuing the business of H & H. Among other documents, Hutchings and Harper signed a bill of sale in favor of TVBS reflecting an agreed sale price of $190,000 for the assets of H & H and obtained an option to purchase the outstanding stock of PBI in return for a series of payments reflecting the remaining debt of $300,000 owing by Hutchings & Harper to TVBS. PBI did not assume the debts of H & H.

PBI took over the construction contracts of H & H and continued the business of H & H with the same crews and equipment. According to testimony, PBI did not complete all of H & H's projects and did not realize as much as they had hoped. Hutchings and Harper and their corporation filed bankruptcy on August 5, 1988. TVBS thereafter offered to allow the debtor to take back the assets TVBS had transferred to PBI if the debtor could find them. Neither party joined PBI as a defendant and transferee under 11 U.S.C. § 550(a) and its fate was uncertain from the evidence.

The parties abandoned some contentions in their pleadings and agreed upon a statement of facts, contentions and issues resulting from the consolidation of two proceedings raising common issues. Avoidance of the first group of transfers depended on whether TVBS was an insider under 11 U.S.C. § 101(30) and therefore within the extended preference period in 11 U.S.C. § 547(b)(4)(B). The second group of transfers assumed that an avoidable preference had occurred but raised the issue of whether the debtor may recover the amount of antecedent debt satisfied by the transfer as the "value of such property" under 11 U.S.C. § 550(a). Trial of the foregoing issues lasted several days.

A "person in control of the debtor" may be an insider under 11 U.S.C. § 101(30(B)(iii) and (C)(v). "[M]ere financial power over the debtor does not necessarily impute insider status to a lender." Practical Investment Corp. v. Rellen (In re Practical Investment Corp.), 95 Bankr. 935, 941 (Bankr. E.D. Va. 1989) (citation omitted). See also, In re Technology for Energy Corp., 56 Bankr. 307, 316 (Bankr. E.D. Tenn. 1985). The control necessary "must be such that the debtor was the mere alter-ego or instrumentality" of the lender or it must be unreasonable control which is inappropriate to the creditors' interest. Burner v. Sec. State Bank (In re Burner), 109 Bankr. 216, 226 (Bankr. W.D. Tex. 1989).

TVBS did not impose upon the debtor either the quality or the quantity of control necessary to become an insider under the preference statute. If anything, the evidence shows that Hutchings and Harper generally lost control over H & H's expenses long before May 1988 and could not look to the balances owing on their contracts to recover. Their personal draws and their personal expenditures were substantial and contributed to the financial chaos. Michael Hillier, TVBS' principal, did not run the jobs, did not designate who to pay and who not to pay and did not control managerial discretion in inappropriate ways. I do not believe the characterizations to the contrary advanced by Hutchings, Harper and Taquino. Hutchings' complaints regarding expenses, payroll and quality of information provided by the debtors' bookkeeper amounted to grousing which was fully justified by TVBS; interest as an unsecured lender. The failure to lend enough to pay the employer portion of social security taxes may have other consequences but is not alone enough to justify holding TVBS as an insider.

The trustee can recover the value of an avoided transfer rather than the property transferred "if the court so orders". 11 U.S.C. § 550(a). Recovery of value is justified if the transferred property has disappeared or has depreciated while in the hands of the defendant. 4 Collier on Bankr. §550.02 550-8 (15th ed. 1990). Ordinarily, the person asserting value has the burden of proof, particularly under 11 U.S.C. § 547(g) but an exception may exist where the other side may be responsible for confusion and may more easily satisfy the burden. See, Freightliner Market Dev. Corp. v. Silver Wheels Freightlines, Inc., 823 F.2d 362, 369 (9th Cir. 1987); United States v. Hayes, 369 F.2d 671, 676 (9th Cir. 1966).

Defendant should be ordered to pay the value of the property transferred because the property has depreciated while in the hands of the transferee and cannot be fairly reassembled. Defendant has not made a reasonable effort to reconstruct the transferred assets of H & H or the proceeds thereof. Ignoring the fact that PBI, a non-party, received the property through TVBS, the property surrendered by the debtor was, for all practical purposes, a going business which the parties intended would be shorn of its unsecured debts and duty to complete its contracts. TVBS cannot restore the contracts of H & H or the equipment, only some of which was listed in the surrender agreement. No one can restore H & H as a going business and no one has argued that the tender of ownership in PBI would be a reasonable substitute as proceeds. H & H as a business is gone and its physical remnants are too uncertain and incomplete to suffice as the "property transferred" within 11 U.S.C. § 550(a).

Recent cases under the current Bankruptcy Code treat the credit given in return for the later avoided transfer as prima facie evidence of its value which may be rebutted by a showing of actual value. Compare, Jarnicki v. Clemons (In re

Clemons), 42 Bankr. 796, 799 (Bankr. S.D. Ohio 1984) where the transferee failed to show actual value, with Kidder Skis Int'l v. Williams, 60 Bankr. 808 (W.D. Mo. 1985), where the parties met the burden of showing actual value by uncontroverted evidence. Consistency adds some logic to this approach under the Code because satisfaction of a debt is expressly designated as value for other purposes. See 11 U.S.C. §§548(d)(2)(A) and 550(b)(1). Historically, it was also held proper under the former Act to allow recovery of the value of a preference based on the amount credited to the bankrupt where the evidence as to actual value was conflicting. 3 Collier on Bankr. §60.59 at 1104, (14th ed. 1977).

The debtor satisfied its burden of showing the value of the property transferred. Proof of the agreement to allow a credit for $190,000 and a bill of sale for the property in this amount is enough to shift the burden to TVBS to prove value. Instead of meeting its burden by positive proof, TVBS attempted to shift the burden to account for value back to the debtor by attacking the agreed valuation of the equipment and some of the accounts on a piecemeal basis.

TVBS's approach is not fair. It was very clear from the evidence that TVBS's Michael Hillier was very much in control of everything after May 18, 1988 when the transfer occurred and, for this reason, was in the best position at that time to inventory and account for the property received. TVBS received at least $82,000 from the accounts and more equipment than that itemized in the agreement. It was TVBS which, with the aid of a consultant, decided to forfeit equipment on jobs, to let jobs go and to not create a decent record of what they actually received and directly or indirectly disposed of. The evidence at trial on value was conflicting and incomplete. Clearly the $190,000 agreed upon at the time of the transfer as the valuation is more reliable than the opposing valuations presented by the opposing parties at trial and is the best evidence of value available.

Judgment should enter in favor of the debtor-in-possession and against TVBS for the sum of $190,000. Interest should be allowed in the amount provided by law from January 27, 1989. See Collier on Bankr. § 550.02 at 550-6 - 550-7 (15th ed. 1990); 3 Collier on Bankr. §60.63 at 1129 (14th ed. 1977). this is a core proceeding under 28 U.S.C. §157(b).

DATED this _______ day of September, 1990.

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DONAL D. SULLIVAN
Bankruptcy Judge

cc: Joseph M. VanLeuven
Don Thacker
Mark M. McCulloch