IN THE COURT OF APPEAL OF NEW ZEALAND

CA773/2012
[2013] NZCA 91

BETWEEN	PETER ESMOND FARRELL AND SIMON PAUL ROGAN AS LIQUIDATORS OF CONTRACT ENGINEERING LIMITED (IN RECEIVERSHIP AND IN LIQUIDATION) Appellants
AND	FENCES & KERBS LIMITED Respondent

CA783/2012

BETWEEN	PETER ESMOND FARRELL AND SIMON PAUL ROGAN AS LIQUIDATORS OF CONTRACT ENGINEERING LIMITED (IN RECEIVERSHIP AND IN LIQUIDATION) Appellants
AND	ACME ENGINEERING LIMITED Respondent

CA864/2012

BETWEEN	JEFFREY PHILIP MELTZER AND LLOYD JAMES HAYWARD AS LIQUIDATORS OF WINDOW HOLDINGS LIMITED (IN LIQUIDATION) Appellants
AND	HIWAY STABILIZERS NEW ZEALAND LIMITED Respondent

Hearing:	7 February 2013
Court:	O'Regan P, Randerson and French JJ
Counsel:	M D Branch, K I Bond and K F Shaw for the Appellants in CA773/2012 and CA783/2012 B P Keene QC and J F Anderson for the Appellants in CA864/2012 J P Temm and S A Hickman for Respondent in CA773/2012 S A Barker and E M Ritchie for Respondent in CA783/2012 G M Harrison and C Hunt for Respondent in CA864/2012
Judgment:	27 March 2013 at 4pm

INTERIM JUDGMENT OF THE COURT

A The issue raised in the appeals CA773/2012, CA783/2012 and CA864/2012 is determined on the basis that the giving of value in terms of s 296(3)(c) of the Companies Act 1993 must be proved to have occurred at the time the payment or other company property is received and does not include value given at the time the antecedent debt is created.

B All remaining issues are reserved including costs.

C Counsel are to confer and file a joint memorandum by 8 April 2013 addressing how the remaining issues should be dealt with.

REASONS OF THE COURT

(Given by Randerson J)

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Introduction

[1] The issue in these three appeals is the proper interpretation of s 296(3)(c) of the Companies Act 1993 (the Act). That section was amended with effect from 1 November 2007.[1] It operates in cases of voidable transactions and prevents a liquidator from recovering company property or its equivalent value from the recipient in prescribed circumstances.

[2] The appellant liquidators in all three appeals attempted to recover payments made by the companies in liquidation (the companies) to the respondents (the creditors) prior to the liquidation of the companies.

[3] In terms of s 292(1) of the Act, a transaction by a company is voidable by a liquidator if it is an insolvent transaction and is entered into within the specified period of two years prior to the commencement of the liquidation. The terms "insolvent transaction" and "transaction" are relevantly defined by s 292(2) and (3) respectively:

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1 By s 31 of the Companies Amendment Act 2006.

(2) An **insolvent transaction** is a transaction by a company that—

(a) is entered into at a time when the company is unable to pay its due debts; and

(b) enables another person to receive more towards satisfaction of a debt owed by the company than the person would receive, or would be likely to receive, in the company's liquidation.

(3) In this section, **transaction** means any of the following steps by the company:

(a) conveying or transferring the company's property:

(b) creating a charge over the company's property:

(c) incurring an obligation:

(d) undergoing an execution process:

(e) paying money (including paying money in accordance with a judgment or an order of a court):

(f) anything done or omitted to be done for the purpose of entering into the transaction or giving effect to it.

[4] It is common ground that the payments constituted “insolvent transactions” as defined by s 292 of the Act since:

(a) The payments were made when the companies were unable to pay their due debts;[2]

(b) The payments enabled the recipients to receive more towards the satisfaction of the debt owed to them by the companies than they would receive, or would be likely to receive, in the liquidation;[3] and

(c) The payments were made within the “specified period” of two years prior to the commencement of the liquidation.[4]

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2 Companies Act 1993, s 292(2)(a).
3 Companies Act 1993, s 292(2)(b).
4 Companies Act 1993, s 292(1)(b) and (5).

[5] The High Court held in all three cases under appeal that s 296(3) prevented the liquidators from recovering the payments made to the creditors.[5]

[6] In its amended form, s 296(3) provides:

> **296 Additional provisions relating to setting aside transactions and charges**
>
> …
>
> (3) A court must not order the recovery of property of a company (or its equivalent value) by a liquidator, whether under this Act, any other enactment, or in law or in equity, if the person from whom recovery is sought (A) proves that when A received the property—
>
> (a) A acted in good faith; and
>
> (b) a reasonable person in A's position would not have suspected, and A did not have reasonable grounds for suspecting, that the company was, or would become, insolvent; and
>
> (c) A gave value for the property or altered A's position in the reasonably held belief that the transfer of the property to A was valid and would not be set aside.
>
> …

[7] The High Court was satisfied in all three cases that when the payments were made:

(a) The creditor receiving the payments acted in good faith;

(b) A reasonable person in the position of the creditor would not have suspected, and did not have reasonable grounds for suspecting, that the company was, or would become, insolvent; and

(c) The creditor "gave value" for the property (payments) received.

[8] The liquidators do not challenge the first two elements found to have been established (good faith and lack of any reasonable grounds to suspect the company was or would become insolvent). Rather, the focus of the appeals is whether the High Court was right to conclude that the creditors "gave value" under s 296(3)(c) merely by receipt of the payments in

[5] *Farrell and Rogan v Fences & Kerbs Ltd* [2012] NZHC 2865; *Farrell and Rogan v ACME Engineering Ltd* [2012] NZHC 2874; *Meltzer and Hayward v Hiway Stabilizers New Zealand Ltd* [2012] NZHC 3281.

satisfaction of the antecedent debt owed to them by the companies. The liquidators argue that, properly interpreted, s 296(3)(c) requires the creditor receiving payment to establish that new value was given at the time the payment was made. Value given prior to that time may not be taken into account. They submit in particular that the receipt of payment in satisfaction of the antecedent debt owed to the creditor does not constitute the giving of value by the creditor for the purposes of the section.

[9] The broad submission made by the creditors is that s 296(3)(c) was intended to exclude gratuitous transfers. It does not matter whether the creditor "gave value" before or after the time the payment was received. The provision of goods or services to the company which gave rise to the antecedent debt is sufficient to constitute the giving of value for the purposes of the provision.

[10] An alternative argument has also been raised but will require consideration at a later time as we discuss below.

Factual context

[11] The agreed facts may be briefly stated for each of the three appeals.

Fences & Kerbs Ltd

[12] The first two appeals relate to work undertaken by the relevant respondents for Contract Engineering Ltd (Contract Engineering) in connection with the construction and installation of a new pipeline for Contact Energy at Wairakei. Fences & Kerbs Ltd (Fences & Kerbs) undertook the construction of concrete and steel foundations for the pipeline, the work being completed in June 2010.

[13] An invoice was sent to Contract Engineering on 21 June 2010 for $56,256.66 (including GST). This sum was paid to Fences & Kerbs in full by instalments between 4 August 2010 and 30 September 2010. On or about 26 July 2010, Fences & Kerbs agreed at the request of Contract Engineering to undertake additional work for which an invoice for $1,687.50 (including GST) was rendered to Contract Engineering on 28 September 2010. This was paid in full on 29 October 2010.

[14] Messrs Farrell and Rogan were appointed liquidators of Contract Engineering by shareholders' resolution on 5 July 2011 and served a notice to set aside the payments described on 23 March 2012.

ACME Engineering Ltd

[15] ACME Engineering Ltd (ACME) also contracted with Contract Engineering. ACME manufactured a flash silencer and delivered it to Contract Engineering on 19 May 2010. ACME invoiced Contract Engineering on 25 May 2010 for a total of $105,484.50 (including GST). By late July, the invoice for the flash silencer had become a 60 day invoice. As a result, the managing director of ACME contacted Contract Engineering and a payment plan was agreed. ACME was paid in full by ten instalments over the period 13 August 2010 until 22 October 2010.

[16] After their appointment as liquidators for Contract Engineering, Messrs Farrell and Rogan served a notice on 22 March 2012 to set aside the payments made to ACME.

Hiway Stabilizers New Zealand Ltd

[17] The respondent in the third appeal Hiway Stabilizers New Zealand Ltd (Hiway Stabilizers) undertook contouring and landscaping work for the predecessor of Window Holdings Ltd (Window Holdings) in April 2010. An invoice for the work was rendered on 1 May 2010 for $12,379.51 (including GST). A second invoice for $642.04 (including GST) was issued by Hiway Stabilizers to Window Holdings on 30 June 2010, for materials supplied that month. The first invoice was paid in full on 23 August 2010 and the second on 6 September 2010.

[18] Messrs Meltzer and Hayward were appointed liquidators for Window Holdings by court order on 1 July 2011. A notice to set aside the payments made to Hiway Stabilizers was served on 17 April 2012.

[19] Notices of opposition were received by the liquidators in all three cases. In consequence, the liquidators applied to the High Court for orders setting aside the payments.

The High Court decisions

[20] Until the judgments under appeal were delivered, the High Court had accepted (apparently without debate) that the new s 296(3) meant value had to be given by the recipient of a payment at the time it was received from the insolvent company. Goods or services given to the company earlier did not constitute the giving of value for the purposes of that provision.[6]

[21] This Court has also previously considered the new s 296(3) in *Levin v Rastkar*[7] in the context of a direction to an insolvent company to make payments that had the effect of reducing the respondent's loan account in the company. It was held that the respondent did not give value to the company when she directed the payment.[8]

[22] Associate Judge Christiansen delivered one of the earlier High Court judgments. But, in two judgments issued on the same day and after hearing fuller argument, he rejected the proposition that, for the purposes of s 296(3)(c), value must be given by the recipient at the time when payment is received.

[23] In the first judgment (the *Fences & Kerbs* case) he considered there was little material distinction between s 588FG(2) of the Corporations Act 2001 (Cth) of Australia and s 296(3)(c) of the New Zealand legislation. He found that the assessment about giving value for payment received ought to be made at the time when payment was received but was not confined to circumstances occurring only after payment.[9] If fresh consideration was required, then the legislation would have said so.

[24] Associate Judge Christiansen concluded:

> [62] It was the purpose of the 2006 amendment to rely on the closely related insolvency positions of Australia and New Zealand. It seems unlikely in that context that there would have been a deliberate endeavour to distinguish the jurisdiction of those Courts.

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6 *Blanchett v The Roofing Specialists Ltd* [2009] NZCCLR 42 (HC) at [41]; *Blanchett v McEntee Hire Holdings Ltd* [2011] NZCCLR 4 (HC) at 42; and *Jollands v Mitchill Communications Ltd* [2011] NZCCLR 20 (HC) at [32].

7 *Levin v Rastkar* [2011] NZCA 210.

8 At [56].

9 *Fences & Kerbs*, above n 5, at [60].

> [63] [Counsel] submits that in that view of matters s 296(3)(c) will add nothing because it is extremely unlikely valuable consideration will never have been given for any payment received. But if that is so then the same argument would apply in respect to the usefulness of the 'valuable consideration' test in the Australian provision.
>
> [64] The purpose of the Australian and the New Zealand provisions is to protect creditors who have received payment from a debtor company in good faith, without suspecting insolvency, and who have given something in return for their payment. Equity allows them to retain that payment. Equity would not permit the debtor company to keep what it has received and to also recover what it paid for it.
>
> [65] If that is the purpose of s 296(3) then it is immaterial whether value is given before or after the property or payment is received. The transaction should be viewed as a whole and the equitable foundations of s 296(3) should prevail.
>
> [66] Were it otherwise then a requirement that value be given post receipt of payment would have a very narrow scope in practice – the defence would not accord with normal business practice.
>
> …
>
> [69] Whilst considerations of change of position are necessarily confined to a post payment perspective considerations of the giving of value are not, indeed would likely never provide much by way of benefit at all. The New Zealand provision intends the same consequence as that contained in the Australian provision which unarguably permits a focus upon the value of consideration at that time when the consideration is given, and not at the time when payment is received from the insolvent company.

[25] In his second judgment (the *ACME* case), Associate Judge Christiansen adopted the reasons he gave in *Fences & Kerbs* for his conclusion that s 296(3)(c) permitted the court to focus upon the value of consideration given at the earlier time. [10] The provision of the flash silencer by ACME was sufficient to establish the giving of value.[11]

[26] In the *Hiway Stabilizers* case, Toogood J reached similar conclusions. He found that it was reasonable to infer that Parliament intended the New Zealand courts to have recourse to Australian case law interpreting s 588FG(2) of the Corporations Act. While noting differences in the language employed in that provision and s 296(3) of our Act, he concluded, by reference to the Explanatory note to the Insolvency Law Reform Bill in 2006[12] (which we discuss below), that there was nothing in the parliamentary history of the amending legislation to indicate why there should be any departure from the Australian position of

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10 At [37].
11 At [38].
12 Insolvency Law Reform Bill 2005 (14-1) (explanatory note).

requiring only proof of value in the transaction, rather than the provision of new value at the time of or following payment.[13]

[27] Toogood J added:

> [34] It may be that the arguably different position between the New Zealand defence and the Australian defence was unintentional, in that the drafters of the New Zealand legislation did not fully appreciate the arguable significance of applying the temporal element of the defence to all three limbs. But, in any event, an equivalent result to that under the Australian legislation is reached if the expression "gave value" is read as including value given by accepting the payment in satisfaction and release of the antecedent debt.

[28] The Judge went on to agree with Associate Judge Christiansen that the assessment of the value given for payment received ought to be made at the time when payment was received but was not confined to circumstances occurring at or beyond the time of payment.

The approach to the interpretation issue

[29] It is fundamental that the approach to interpretation depends upon the text of the legislation in the light of the statutory purpose.[14] But the history of the legislation also has significance along with any parliamentary materials that may reveal what was intended by the recent amendments.

Statutory history

[30] The New Zealand legislature has long provided for the recovery of payments made to creditors by insolvents, whether individuals or companies. For example, the Companies Act 1908 provided that any conveyance, mortgage, delivery of goods, payment, execution or other act relating to property by a company would be invalid if it would constitute an undue or fraudulent preference of the creditors in a bankruptcy.[15] A similar provision was contained in the Companies Act 1955 when first enacted.[16]

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13 At [32].
14 Interpretation Act 1999, s 5.
15 Companies Act 1908, s 247.
16 Companies Act 1955, s 309(1).

[31] Since fraudulent preferences in companies were linked for many years to bankruptcy legislation, it is necessary to trace the legislation relating to personal insolvency. Section 79 of the Bankruptcy Act 1908[17] relevantly provided:

> 79(1) Every conveyance or transfer of property, or charge thereon made, every payment made, every obligation incurred, and every judicial proceeding taken or suffered by any person unable to pay his debts as they become due from his own money, in favour of any creditor, or any person in trust for any creditor, with a view to giving that creditor a preference over the other creditors, shall, if the person making, taking, paying, or suffering the same is adjudged bankrupt within three months after the date of making, taking, paying, or suffering the same, be deemed fraudulent and void as against the Official Assignee.
>
> (2) Every instrument by way of security under "The Chattels Transfer Act, 1908," over any property of a bankrupt shall be null and void as against the Assignee of the bankrupt's estate if executed within four months prior to the adjudication, except as to money actually advanced or paid, or the actual price or value of goods sold or supplied by the grantee of the security to the grantor at the time of or at any time after the execution thereof. Any unpaid purchase-money for any property shall be deemed to be money actually advanced at the time of execution:
>
> Provided that the instrument for securing the same is executed within twenty-one days after the sale of the property.
>
> (3) **This section shall not affect the rights of a purchaser, payee, or incumbrancer in good faith and for valuable consideration.**
>
> (Emphasis added.)

[32] When the Insolvency Act 1967 came into effect it was initially applied to creditors preferred in company liquidations by s 309 of the Companies Act 1955. When enacted, s 58 of the Insolvency Act 1967 relevantly provided:

> **58 Assignee may recover property or value thereof**
>
> …
>
> (5) A disposition that has been made in favour of any person may be set aside pursuant to subsection (1) of this section **notwithstanding that the property or part of it or any interest in it has at the time of the setting aside been received by any other person in good faith and for valuable consideration**, but the Assignee or appointee shall not have any right or remedy against that other person if that other person claims through a person to whom the disposition was originally made by or on behalf of the bankrupt.

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17 The Bankruptcy Act 1908 was a consolidation of the Bankruptcy Act 1892.

(6) Recovery by the Assignee or appointee of any property or the value thereof (whether under this section or under any other provision of this Act or under any other enactment or in equity or otherwise) may be denied wholly or in part if—

(a) The person from whom recovery is sought received the property in good faith and has altered his position in the reasonably held belief that the transfer or payment of the property to him was validly made and would not be set aside; and

(b) In the opinion of the Court it is inequitable to order recovery or recovery in full, as the case may be.

(Emphasis added.)

[33] This was an important change of direction. A transaction could be set aside despite the party receiving the property bona fide, for valuable consideration, and without notice. This was a significant departure from s 79(3) of the Bankruptcy Act 1908 which protected the party receiving the property in such circumstances. Rather, the focus was now upon receipt in good faith, alteration of position in reliance on the validity of the transfer or payment, and whether it would be inequitable to order recovery.

[34] It was not until the passage of the Companies Amendment Act 1980 that the language of fraudulent preference (by reference to an individual's bankruptcy) was abandoned in favour of the concept of "voidable preference". An amended s 309 relevantly provided:

309 Voidable preference

(1) Every conveyance or transfer of property, every security or charge given over any property, every obligation incurred, every execution under any judicial proceeding suffered, and every payment made (including any payment made in pursuance of a judgment or order of a Court), by any company unable to pay its debts as they become due from its own money, shall be voidable as against the liquidator, if—

(a) It is in favour of any creditor or any person in trust for any creditor **with a view to giving that creditor or any surety or guarantor for the debt due to that creditor a preference over the other creditors;** and

(b) The making, suffering, paying, or incurring of the same occurs within 2 years before the commencement of the winding-up of the company.

(Emphasis added.)

[35] The focus of the new s 309 was very much upon the intention of the company in making the payment or other disposition.

[36] The 1980 amendments to the Companies Act 1955 also provided for voidable securities in an amended s 311. This extended the former s 311 to include every security or charge granted over the property of the company within 12 months of the date of commencement of the winding-up. A new s 311A was also introduced providing for the procedures that were to apply where a liquidator sought to set aside voidable preferences and voidable securities.

[37] Section 311A(7) introduced a statutory defence where a liquidator sought to recover company property or the equivalent value thereof. This reflected the terms of s 58(6) of the Insolvency Act:

> (7) Recovery by the liquidator of any property or the value thereof (whether under this section or under any other provision of this Act or under any other enactment or in equity or otherwise) may be denied wholly or in part if—
>
> (a) The person from whom recovery is sought received the property in good faith and has altered his position in the reasonably held belief that the transfer or payment of the property to him was validly made and would not be set aside; and
>
> (b) In the opinion of the Court it is inequitable to order recovery or recovery in full, as the case may be.

[38] Section 311A(7) was considered by this Court in *MacMillan Builders Ltd v Morningside Industries Ltd*.[18] It was held that, in determining whether it would be inequitable to order recovery, the Court was entitled to look at the equities on each side, including an assessment of the detriment suffered by the recipient of the payment. The Court noted that inequity would commonly arise if an order for repayment would leave the recipient in a worse position than if the payment had never been made.[19] On the facts of the case, it was not shown that the recipient of the impugned payment had suffered detriment. Repayment was ordered.

[39] Further changes to the voidable preference regime were effected by the Companies Act 1993.[20] Section 292 of the new Act adopted the terminology of "voidable transactions" and provided separately for voidable charges under s 293. For present purposes, the key changes were the abandonment of the requirement for the liquidator to demonstrate that the

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18 *MacMillan Builders Ltd (in liq) v Morningside Industries Ltd* [1986] 2 NZLR 12 (CA).
19 At 17 and 18.
20 With effect from 1 July 1994.

payment or other transaction was "with a view to giving a preference over other creditors" in favour of an effects-based test and the inclusion of an exception where the transaction took place in "the ordinary course of business".[21] As introduced, s 292(2) of the Companies Act 1993 provided:

> (2) A transaction by a company is voidable on the application of the liquidator if the transaction—
>
> (a) was made—
>
> (i) At a time when the company was unable to pay its due debts; and
>
> (ii) Within the specified period; and
>
> (b) Enabled another person to receive more towards satisfaction of a debt than the person would otherwise have received or be likely to have received in the liquidation—
>
> unless the transaction took place in the ordinary course of business.

[40] This Court summarised the purpose of s 292 in *Anzani Investments Ltd v The Official Assignee*:[22]

> [6] The purpose of s 292 is to provide a mechanism that enables a liquidator to restore valuable consideration (of various types), with which the company parted prior to liquidation, to the pool of assets available for distribution among all creditors. The object is to prevent one creditor from being given preferential treatment through payment (pre-liquidation) of an amount in excess of that which would have been received had it participated with other creditors of equal rank in the distribution of the proceeds of sale of assets on liquidation. Those general principles are qualified by limited exceptions contained in s 292.

[41] Under the 1993 Act as first enacted the creditor still had to demonstrate detriment in the sense described in *MacMillan Builders Ltd (in liq) v Morningside Industries Ltd*.

[42] The voidable charge provision carried forward the exception for monies actually advanced or paid or the price or value of the property sold or supplied to the insolvent company or any other valuable consideration given in good faith by the grantee of the charge at the time of or at any time after, the giving of the charge.[23]

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21 See the discussion by the Privy Council in *Countrywide Banking Corp Ltd v Dean* [1998] 1 NZLR 385 (PC) at 391–392.
22 *Anzani Investments Ltd v Official Assignee* [2008] NZCA 144.
23 Companies Act 1993, s 293(1)(a) as originally enacted.

[43] Section 296(3) continued the pre-existing s 311A(7) in substantially similar form:

> (3) Recovery by the liquidator of property or its equivalent value, whether under section 295 of this Act or any other section of this Act, or under any other enactment, or in equity or otherwise, may be denied wholly or in part if—
>
> (a) The person from whom recovery is sought received the property in good faith and has altered his or her position in the reasonably held belief that the transfer to that person was validly made and would not be set aside; and
>
> (b) In the opinion of the Court, it is inequitable to order recovery or recovery in full.

[44] In 2001 the Ministry of Economic Development issued a discussion document as part of a review of insolvency law.[24] For present purposes, the key proposals were:

- Consideration should be given to the feasibility of replacing all the current voidable transaction provisions with a single provision that would apply regardless of the nature of the transaction, the intention, knowledge or motive of the debtor or recipient of the transaction or whether the debtor was an individual or a company.

- The "ordinary course of business" exception in s 292 of the Companies Act would be replaced with a test that considered the net effect of a series of transactions based on a United States model. Reference was also made to the "running account" principle established under Australian corporations law.

- The existing defence under s 296(3) of the Act would be retained.

[45] In February 2006 the Insolvency Law Reform Bill was introduced. The Explanatory note observed that:[25]

> The fundamental principle that underpins insolvency law is the pari passu or "equal step" principle. In essence, insolvency law provides for equal treatment of all creditors within a particular class. This avoids wasteful races to the court. In the absence of such a principle, each creditor would have the incentive to act in their own self-

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24 Insolvency Law Review: Tier One Discussion Documents (Ministry of Economic Development, Wellington, 2001).

25 Insolvency Law Reform Bill Explanatory note, above n 12, at 14-1.

> interest, seeking to apply to the court first with a view to recovering everything owed to them regardless of the consequences for other creditors.

[46] The Bill proposed the repeal and replacement of the Insolvency Act 1967 and amendments to the Companies Act 1993. The Government's overall objectives were described in the Explanatory note as being to:[26]

> - provide a predictable and simple regime for financial failure that can be administered quickly and efficiently, imposes the minimum necessary compliance and regulatory costs on its users and does not stifle innovation, responsible risk taking, and entrepreneurialism by excessively penalising business failure; and
>
> - distribute the proceeds to creditors in accordance with their relative pre-insolvency entitlements, unless it can be shown that the public interest in providing greater protection to one or more creditors outweighs the economic and social costs of any such priority; and
>
> - maximise the returns to creditors by providing flexible and effective methods of insolvency administration and enforcement which encourage early intervention when financial distress becomes apparent; and
>
> - enable individuals in bankruptcy to participate again fully in the economic life of the community; and
>
> - promote international co-operation in relation to cross-border insolvency.

[47] The Explanatory note went on to state:[27]

> The following measures are proposed to remove the uncertainties and the inconsistencies that currently exist in the voidable transaction regime:
>
> > - replacing the "ordinary course of business" exception for setting aside a transaction with a test along the lines of the Australian "continuing business relationship". The new test will focus on the business relationship between the parties over a certain period of time. If, in the course of such a relationship, the level of the debtor's indebtedness to that creditor increases and decreases from time to time, then the relationship is to be viewed as one transaction and the net effect of those transactions together is considered in determining whether there is a preference:
> >
> > - harmonising as far as desirable the personal and corporate voidable transaction provisions in the Insolvency Act 1967 and Companies Act 1993 respectively:

---

[26] At 14-2.
[27] At 14-19.

- adopting a defence for creditors (to avoid making a transaction void) that focuses more objectively on the knowledge of the creditor that has transacted with the debtor:

- removing the ability of a liquidator to set aside transactions by filing a notice in the Court, and extending the jurisdiction of the Associate Judges to cover all voidable transaction provisions.

[48] Much store was laid by the respondents and in the judgments in the courts below on the following passage from the Explanatory note:[28]

> There will be an initial period of uncertainty regarding the meaning of the new tests, but this will reduce over time and will be mitigated by basing the new test on an Australian test, allowing the courts to have the benefit of the Australian courts' experience in interpreting those provisions.

[49] It was submitted for the respondents that this passage demonstrated that Parliament's intention was to adopt the Australian approach in relation to voidable transactions and to rely upon case law developed in Australia for guidance. However, we note that this passage is expressed only in the most general terms. For example, it makes no specific reference to the issue we have to decide in relation to the meaning of "giving value" in terms of s 296(3)(c) of the Act. Indeed, we were not referred to any parliamentary materials in which the meaning of that expression has been canvassed.

The Corporations Act 2001 (Cth)

[50] The Courts below relied on the approach taken in Australia to a defence provided by s 588FG(2) of the Corporations Act as well as case law interpreting the relevant provisions. Despite differences in the wording of s 296(3) of the Act and s 588FG(2) of the Australian legislation, the Courts below could not discern any reason to depart from the Australian position of requiring only proof of value in the transaction rather than the provision of new value at the time of or following payment.[29]

[51] There are material differences between the Australian and New Zealand legislation. First, the term "transaction" is more broadly defined in the Corporations Act. Section 9 of the Corporations Act defines that term on a non-exclusive basis:

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[28] At 14-25.

[29] Refer, for example, to the conclusion reached by Toogood J in relation to *Hiway Stabilizers*, above n 5, at [32].

> “**transaction**” , in Part 5.7B, in relation to a body corporate or Part 5.7 body, means a transaction to which the body is a party, **for example (but without limitation)**:
>
> (a) a conveyance, transfer or other disposition by the body of property of the body; and
>
> (b) a security interest granted by the body in its property (including a security interest in the body's PPSA retention of title property); and
>
> (c) a guarantee given by the body; and
>
> (d) a payment made by the body; and
>
> (e) an obligation incurred by the body; and
>
> (f) a release or waiver by the body; and
>
> (g) a loan to the body;
>
> and includes such a transaction that has been completed or given effect to, or that has terminated.
>
> (Emphasis added.)

[52] In contrast, the term “transaction” in s 292(3)[30] is defined on an exclusive basis. That is so despite s 292(3)(f):

> … anything done or omitted to be done for the purposes of entering into the transaction or giving effect to it.

[53] Toogood J in the *Hiway Stabilizers* decision at [39] thought that this provision supported the conclusion that the New Zealand legislation required the transaction to be looked at as a whole. We disagree. The inclusion of para (f) in the definition of transaction covers any incidental act or omission for the purpose of entering into or giving effect to any of the specific transactions identified in paras (a)–(e) of the definition. In the present context, that means any incidental act or omission for the purpose of making the relevant payment to the creditor or giving effect to it. Paragraph (f) does not expand the definition of transaction to include the creation of the antecedent debt as part of the transaction for the purposes of the voidable preference provisions.

[54] A further difference between the two sets of legislation is that the Corporations Act identifies a range of transactions in different ways from our Act. These are “insolvent transactions”; “uncommercial transactions” of the company; “unfair preferences” given by

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30 Quoted at [3] above.

the company to a creditor; "unfair loans"; and "unreasonable director-related transactions" of the company.

[55] The unfair preferences provision[31] is broadly similar to s 292(2) of our Act and refers to "continuing business relationships" in terms similar to s 292(4B) of our Act. We discuss this provision below. However, an "uncommercial transaction" under s 588FB of the Corporations Act is not replicated in the same or even similar terms to s 297 of our Act (transactions at an undervalue). Section 588FB requires an assessment of the benefits and detriments to the company of entering into the transaction, the respective benefits of other parties to the transaction and any other relevant matters.

[56] Under the Corporations Act, the Court has power to make orders relating to voidable transactions.[32] The defences available are expressed in s 588FG(1) and (2). Section 588FG(2) provides:

> (2) A court is not to make under section 588FF an order materially prejudicing a right or interest of a person if the transaction is not an unfair loan to the company, or an unreasonable director-related transaction of the company, and it is proved that:
>
> (a) the person became a party to the transaction in good faith; and
>
> (b) at the time when the person became such a party:
>
> (i) the person had no reasonable grounds for suspecting that the company was insolvent at that time or would become insolvent as mentioned in paragraph 588FC(b); and
>
> (ii) a reasonable person in the person's circumstances would have had no such grounds for so suspecting; and
>
> (c) the person has provided valuable consideration under the transaction or has changed his, her or its position in reliance on the transaction.

[57] Although there are other differences between s 588FG(2) and s 296(3) of our Act, the critical difference for present purposes is the time at which the three elements in the provision must be proved. In s 296(3), all three elements are to be proved "when A received the property …". In contrast, under s 588FG(2), of the Corporations Act, proof under para (c) that "the person has provided valuable consideration under the transaction …" is not linked to

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31 Corporations Act 2001 (Cth), s 588FA.
32 Section 588FF.

payment at the time the person received the property. That allows the possibility that the "valuable consideration under the transaction" has been provided before or after the payment was received (or other transaction occurred) so long as the consideration was provided "under the transaction".

[58] A further difference is that the Australian provision uses the term "valuable consideration" whereas the New Zealand legislation refers to giving "value". The difference is not necessarily purely semantic. This is an issue we will need to consider when deciding remaining issues not yet argued.

[59] The respondents rely on the decision of the Court of Appeal of New South Wales in *Buzzle Operations Pty Ltd (in liq) v Apple Computer Australia Pty Ltd*[33] interpreting s 588FG(2)(c) of the Corporations Act in the context of an allegedly "uncommercial transaction". The company in liquidation (Buzzle) acquired the stock and businesses of resellers of Apple computer products. Prior to Buzzle's insolvency, it made substantial payments to Apple in discharge of debts due by the resellers to Apple. The amounts paid were credited by Apple to the resellers' accounts.

[60] The Court of Appeal rejected an appeal by the liquidator of Buzzle, finding that all three elements of s 588FG(2) had been met. The principal judgment of the Court was given by Young JA. In relation to the issue of valuable consideration, Young JA said:

> [162] It must first be noted that s 588FG(2)(c) does not require Apple to establish that it gave "full consideration" but just that it provided "valuable consideration".
>
> [163] The respondents submit that there is ample authority for the proposition that satisfaction and release of an antecedent debt is valuable consideration and that that is the situation in the present case as Apple, as it was bound to do as a result of Buzzle's direction, discharged the resellers' debt.
>
> [164] The appellants say that this principle only applies where it is the debt of the payer that is released while here it was the debt of a third party.
>
> [165] No authority was proffered for that submission and I do not accept it. The consideration that moved from the promisee, Apple, was the detriment it suffered at Buzzle's request.
>
> [166] In my view the respondents' submission is clearly correct.

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[33] *Buzzle Operations Pty Ltd (in liq) v Apple Computer Australia Pty Ltd* [2011] NSWCA 109, (2011) 277 ALR 189.

[61] Young JA went on to find that the second element of s 588FG(2)(c) was also established.[34] The Judge found that, in reliance on the transaction, Apple changed its position by releasing securities it previously held over certain interests of the resellers. Hodgson JA and Whealy JA agreed with Young JA's conclusion on this point, without further comment.

Discussion

[62] We propose to discuss first the purpose of the voidable transactions legislation and then to address the text of s 296. We will then consider the relevance of the corresponding legislation in Australia before concluding with some other points raised in argument.

The pari passu principle

[63] The starting point for our consideration is the well-established pari passu principle which is designed to secure the equal participation in such of the company's property as is available in the liquidation.[35] Under the pari passu principle, the creditors of a company who are in the same class (for example, unsecured creditors) share on a pro rata basis in the company's funds available for distribution.[36] This principle is also enshrined in statute.[37]

[64] There are statutory exceptions to the pari passu principle including, in particular, prior charges,[38] set-offs,[39] preferential claims,[40] and agreed subordinations of debt.[41]

The rationale for voidable preference provisions

[65] The pari passu principle is supported by the policy underlying voidable preference law. Voidable preference provisions attempt to strike a balance between the interests of all creditors in being able to share the assets of the company and the interests of particular

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34 At [170].
35 P Heath and M Whale (eds) *Heath and Whale on Insolvency* (looseleaf ed, LexisNexis) at [24.1].
36 *Countrywide Banking Corp Ltd v Dean*, above n 21, at 395.
37 Companies Act 1993, s 313(1) and (2).
38 Companies Act 1993, s 305.
39 Companies Act 1993, s 310.
40 Companies Act 1993, s 312.
41 Companies Act 1993, s 313(3).

creditors who believe the payments have been validly received and that they ought not to be required to pay them back.[42] Obviously enough, to the extent that payments or other company property are paid back, the return to the company's creditors is enhanced.

[66] In *Rubin v Eurofinance SA*,[43] the Supreme Court in the United Kingdom has recently described the policy underlying avoidance provisions as being:[44]

> … to protect the general body of creditors against a diminution of the assets by a transaction which confers an unfair or improper advantage on the other party, and it is therefore an essential aspect of the process of liquidation that antecedent transactions whose consequences have been detrimental to the collective interest of the creditors should be amenable to adjustment or avoidance …

[67] Reference was made by Lord Collins[45] to a passage from the UNCITRAL Legislative Guide on Insolvency Law (2005):

> 151. It is a generally accepted principle of insolvency law that collective action is more efficient in maximising the assets available to creditors than a system that leaves creditors free to pursue their individual remedies and that it requires all like creditors to receive the same treatment. Provisions dealing with avoidance powers are designed to support these collective goals, ensuring that creditors receive a fair allocation of an insolvent debtor's assets consistent with established priorities and preserving the integrity of the insolvency estate.

[68] We accept the submission made by Mr Keene QC on behalf of the liquidators in the Hiway Stabilizers appeal that the objective and effect of the voidable preference regime is not to do justice or achieve fairness between a particular creditor and the debtor company. As counsel put it, the objective is to achieve fairness amongst all creditors inter se.

[69] That is evident from the definition of "insolvent transaction" and its focus on whether the relevant transaction enabled the payee (or transferee) to receive more towards the satisfaction of the debt owed by the company than would have been received in the company's liquidation. Unless all the elements in s 296(3) can be established, the amount received must be paid back for the benefit of all creditors.

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42 *Heath and Whale on Insolvency*, above n 35, at [24.11].
43 *Rubin v Eurofinance SA* [2012] UKSC 46, [2013] BCC 1.
44 See the speech of Lord Collins at [95] delivering judgment for himself, Lord Walker and Lord Sumption. Lord Mance adopted Lord Collins' reasoning at [179] and Lord Clarke agreed with the majority on this point at [198].
45 At [96].

[70] The respondents argue that it would be inequitable for the insolvent company to be able to retain the benefit of the goods or services as well as to recover what it paid for those goods or services. We do not accept that proposition. The very purpose of the voidable preference regime is to claw back payments made by insolvent companies in the two year period prior to liquidation for the benefit of all creditors. All creditors (other than purely voluntary ones) will have provided value to the company prior to the liquidation. It may be entirely fortuitous which creditors are paid within the two year period. The general policy is that all should be treated equally.

The text of the legislation

[71] The proposition advanced by the respondents was that s 296(3) was intended to protect creditors who had acted in good faith, without suspecting (or having reasonable grounds to suspect) the company was (or would become) insolvent, and who had given value for the money or other property received or who had altered their position in the reasonably held belief that the payment (or other transaction) was valid and would not be set aside. There can be no quarrel with that proposition as far as it goes since it accords with the statutory language.

[72] But the respondents went further in submitting that the words of s 296(3)(c) “gave value” were sufficiently wide to include value given at the time the antecedent debt was created. It was submitted that the fact that the relevant words were expressed in the past tense supported the proposition that the legislation contemplated looking back to the creation of the antecedent debt.

[73] There are several reasons why we cannot accept that interpretation. First, subs (3)(c) is expressed in the past tense simply because it would not otherwise read grammatically. This follows from the use of the words “when A received the property”. Secondly, subs (3) is explicit in providing that all three elements are to be proved when the relevant property is received. This means in the present context that the respondents had to prove that when the payments were received, value was given for the payment at that time. Thirdly, if the legislature had contemplated that value given could include that given at the time the

antecedent debt was created, it would have said so. It did not. Finally, the "transaction" impugned is the payment of money,[46] not the creation of the antecedent debt.

[74] Mr Keene submitted that the reference to the giving of value under s 296(3)(c) was qualified by the words that follow the reference to alteration of position by A. We do not accept that submission. The giving of value and the alteration of position defence are separate alternatives that are to be viewed disjunctively.

Comparison with the Australian legislation

[75] We consider that the reliance placed by the respondents and by the Courts below on the Corporations Act is misplaced. The generalised reference to the Australian legislation in the Explanatory note to the Insolvency Law Reform Bill which we have already discussed does not provide a satisfactory basis for the inference that the New Zealand Parliament intended to follow the voidable transactions provisions in the Corporations Act to the letter. At best, the Explanatory note could be taken to indicate an intention to follow the general approach in the Australian legislation but it does not follow that there was an intention to follow it in every respect.

[76] In some important respects, the Australian approach has been adopted in our s 296. In particular, the abandonment of the "ordinary course of business" test and the adoption of the "continuing business relationship" provision in our s 292(4B). These changes indicate an intention to avoid the often difficult assessment of whether a transaction is in the ordinary course of business while still recognising an ongoing business relationship. Under s 292(4B) debits and credits can be "netted off". This may occur, for example, in a running account by treating the debits and credits as a single transaction during the two year period prior to commencement of the liquidation. In this respect, the ordinary course of business test has been given at least a partial recognition to assist creditors who engage in ongoing business relationships with a company that ultimately becomes insolvent. This is likely to be a significant benefit to creditors who continue to trade in good faith. It recognises the commercial realities for many involved in business.

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46 Companies Act 1993, s 292(3)(e).

[77] But on the critical issue of the approach to be adopted to the giving of value, the Explanatory note is silent and there are no other materials we are aware of to assist on that question.

[78] While it may be that there was a general intention by Parliament to harmonise our legislation with that of Australia, that has plainly not been put into effect in every respect. We have already discussed in detail some of the key respects in which our legislation differs. Most importantly, the lack in s 588FG(2) of any temporal link to the time when payment is received, combined with the non-exclusive definition of "transaction", are crucial. Both of these differences show that the New Zealand Parliament did not follow the broader approach of the Australian legislation but elected instead to adopt a more constrained approach whereby the giving of value is limited to any value given at the time the payment or other property is received. We are not disposed to think that this can be regarded as an unintentional difference. The best guide to statutory intention is the language used. In that respect, New Zealand has deliberately adopted different language.

[79] Nor do we consider that *Buzzle* supports the proposition that the giving of value in s 296(3)(c) includes value given when the original debt was created. At best, *Buzzle* supports the proposition that valuable consideration under the Corporations Act provision may be given by the satisfaction and release of the antecedent debt. However, it appears to be accepted in Australia that it will not generally be difficult to establish that valuable consideration has been given as appears from the following passages in *McPherson's Law of Company Liquidation*:[47]

> In most claims by a liquidator in which it is alleged that the transaction was an unfair preference the defendant will have little difficulty in establishing valuable consideration. This is because, in the normal course of things, the debtor company will have paid the defendant the price, or part thereof, for services rendered or goods supplied and prior indebtedness is good consideration for a payment made in discharge of that indebtedness.
>
> Where the company entered into a transaction that involved something other than a payment, the issue of valuable consideration may be a live one. As an example, if the company grants to the creditor security for an existing debt, the creditor must demonstrate that some valuable consideration was given for the security. In an appropriate case, "valuable consideration" can also be constituted by the promisee

[47] M Gronow and R Mason (eds) *McPherson's Law of Company Liquidation* (looseleaf ed, Thomson Reuters) at [11.1650] (footnotes omitted).

> recipient suffering a "detriment" at the company's request, such as the "satisfaction and release of an antecedent debt".

[80] The first of these passages addresses the relevance of consideration arising from the supply of goods or services that created the antecedent debt. In that respect, we have rejected the proposition that consideration given at the time the antecedent debt was created can be taken into account under s 296(3)(c). The second passage (and, in particular, the last sentence) raises an issue to be determined in due course.

Other matters relevant to the interpretation issue

[81] There is a further ground for rejecting the respondents' submission. As discussed above, it was well established prior to the 2006 amendments to the Companies Act that the statutory defence under the former s 296(3) and its predecessor (s 311A(7)) required proof of detriment to the recipient of the payment. Something more than having to pay the money back was required. The recipient commonly had to demonstrate that the order for repayment would render the recipient worse off than if the payment had never been received. Mere receipt of the money and the prospect of being required to pay it back was not sufficient to establish the statutory defence. An alteration of position in reliance on the validity of the payment was necessary or it had to be shown that, in some other way, it would be inequitable to order repayment.

[82] If Parliament had intended to adopt the approach now advocated by the respondents (that the mere receipt of the payment in satisfaction of a prior debt is sufficient) then this would constitute a significant policy shift which was not signalled in any of the parliamentary or other materials to which our attention has been drawn. We would not lightly attribute to Parliament an intention to make a statutory change of this nature unless compelled to do so by the terms of the legislation.

[83] It is important to keep in mind the rationale for the avoidance provisions. That is, to recover funds or other dispositions by the insolvent company during the two year period before liquidation. The object is to swell the pool of funds available to the company to be shared rateably amongst all creditors of the same class in accordance with the pari passu principle. We accept the submission made by the appellants that this objective would be substantially undermined if the mere receipt of funds to discharge an antecedent debt were

sufficient to meet s 296(3)(c). Of course, the creditor must also prove that s 296(3)(a) and (b) apply. But if those matters are established, then the giving of value requirement under s 296(3)(c) would be easily satisfied.

[84] We add that, if the respondents' submission were accepted, it would also render the alteration of position option in subs (3)(c) practically redundant since the mere receipt of the funds (assuming some prior value had been given) would be sufficient to satisfy the requirement that value be given.

[85] A final point raised by the respondents was the separate definitions of "value" and "new value" in s 16 of the Personal Property Securities Act 1999. It was suggested that if Parliament had meant s 296(3)(c) of the Act to mean "new value", it would have explicitly stated so. We consider this is a long bow to draw given the entirely different purpose and context of the Personal Property Securities Act and do not attribute any weight to the point.

Conclusions

[86] We conclude that, with one exception, proof of all three elements of s 296(3) of the Companies Act 1993 is to be established at the time the payment or other company property is received. Specifically, in relation to s 296(3)(c), the giving of value must be proved to have occurred at that time and does not include value given to the company at the time the antecedent debt was created. This conclusion is supported by the authors of *Heath & Whale on Insolvency*.[48]

[87] The exception to this general approach arises in the second part of s 296(3)(c) relating to alteration of position in the reasonably held belief that the transfer of the property was valid and would not be set aside. Although in some cases the alteration of position might occur contemporaneously with receipt of the property, it would typically occur after receipt. The legislation necessarily allows for that possibility.

[88] Our general conclusion is consistent with the clear wording of the section and the purpose of the legislation. Our interpretation differs from the approach adopted in the

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48 *Heath and Whale on Insolvency*, above n 35, at [24.136].

corresponding legislation in Australia. The policy adopted there is a perfectly legitimate approach but we have found that it has not been replicated in New Zealand. In particular, we do not accept the argument advanced for the respondents that s 296(3) was only intended to exclude gratuitous transfers such as a payment of shareholder dividends.

[89] Although we have found that all the elements in s 296(3) must be proved to exist at the time the property is received (subject to the exception noted), the court is entitled to consider any surrounding evidence that bears upon the position at the date of receipt. In other words, in considering whether it has been proved that, at the time of receipt, "A" acted in good faith; would not have suspected the company was insolvent; and gave value for the property; the court may look to evidence not only at that date but also to evidence either side of that date.

[90] For practical purposes, the expression "when A received the property" must be interpreted with some degree of flexibility. The assessment need not be made at the precise moment in time when property is received, such as the time funds were credited to the payee's bank account. For example, value might be given by a creditor's agreement to provide further goods or services to the company in return for full or partial payment of the antecedent debt. The agreement to do so or the actual supply of further goods or services might precede the actual date of payment by a short period. Or, the provision of the goods or services might occur soon after the payment was received pursuant to a prior agreement to do so. Neither of these circumstances would preclude a court from concluding that value was given "when" the payment was received. A realistic commercial approach is required to make the legislation work.

[91] In the example just discussed, value is given for the property because the assets of the company are increased to the extent of the value of the goods or services provided. The respondents also seek to develop an alternative argument that the requirement for value to be given when the payment is made can be satisfied by the creditor forbearing to sue at the time of payment or by the creditor receiving the payment in satisfaction of the antecedent debt. On this approach, it is argued that value is given because the company is given further time to pay or because the company is discharged from liability for the debt.

[92] These issues were not addressed by the appellants in argument and only briefly by counsel for ACME. That was on the understanding that the alternative arguments and any remaining issues on ACME's cross-appeal would be dealt with after the court's decision on the issue raised by the appellants' appeals.

[93] Accordingly, the final disposition of these appeals must be deferred until further argument on the remaining issue.

Result

[94] In formal terms:

(a) The issue raised in the appeals CA773/2012, CA783/2012 and CA864/2012 is determined on the basis that the giving of value in terms of s 296(3)(c) of the Companies Act 1993 must be proved to have occurred at the time the payment or other company property is received and does not include value given at the time the antecedent debt is created.

(b) All remaining issues are reserved including costs.

(c) Counsel are to confer and file a joint memorandum by 8 April 2013 addressing how the remaining issues should be dealt with.

[95] We record that the appellants did not seek costs against Fences & Kerbs Ltd or Hiway Stabilizers New Zealand Ltd.

Solicitors:
Harkness Henry, Hamilton for Appellants in CA773/2012 and CA783/2012
Hucker & Associates, Auckland for the Appellants in CA864/2012
Cargill Stent Law, Taupo for Respondent in CA773/2012
Buddle Findlay, Wellington for Respondent in CA783/2012
North Harbour Law, Auckland for Respondent in CA864/2012