IN THE SUPREME COURT OF NEW ZEALAND SC 51/2013

[2014] NZSC Trans 6

BETWEEN **ALLIED CONCRETE LIMITED**

Appellant

AND **JEFFREY PHILIP MELTZER AND LLOYD JAMES HAYWARD AS LIQUIDATORS OF WINDOW HOLDINGS LIMITED (IN LIQUIDATION)**

Respondent

SC 80/2013

BETWEEN **FENCES AND KERBS LIMITED**

Appellant

AND **PETER ESMOND FARRELL AND SIMON PAUL ROGAN AS LIQUIDATORS OF CONTRACT ENGINEERING LIMITED (IN LIQUIDATION)**

Respondent

SC 81/2013

BETWEEN **HIWAY STABILIZERS NEW ZEALAND LIMITED**

Appellant

AND **JEFFREY PHILIP MELTZER AND LLOYD JAMES HAYWARD AS LIQUIDATORS OF WINDOW HOLDINGS LIMITED (IN LIQUIDATION)**

Respondent

Hearing:	18 March 2014
Coram:	Elias CJ McGrath J William Young J Glazebrook J Arnold J
Appearances:	J V Ormsby, C L Webber and J-L Day for the Appellant Allied Concrete Limited B P Keene QC and J Anderson for the Respondents Meltzer and Hayward J P Temm, S A Hickman and K A Badcock for the Appellant Fences and Kerbs Limited M D Branch and K I Bond for the Respondents Farrell and Rogan D M Hughes and D I Durovich for the Appellant Hiway Stablizers New Zealand Limited

---

CIVIL APPEAL

ELIAS CJ:

Thank you.

MR ORMSBY:

May it please the Court, my name is Ormsby. I appear for the appellant, Allied Concrete Limited, together with my learned juniors, Ms Webber and Mr Day.

ELIAS CJ:

Thank you, Mr Ormsby.

MR TEMM:

May it please your Honours, counsel's name is Temm. I appear for the appellant Fences and Kerbs Limited in SC 80, together with my learned juniors Mr Hickman and Mr Badcock.

ELIAS CJ:

Thank you, Mr Temm. Next is Hiway Stabilizers.

MR HUGHES:

May it please your Honours, counsel's name is Hughes, together with Ms Durovich.

ELIAS CJ:

Thank you, Mr Hughes. That's that. So the respondents.

MR KEENE:

Your Honours please, Keene and Ms Anderson for the respondents in the Hiway and the Allied appeals.

ELIAS CJ:

Yes, thank you, Mr Keene.

MR BRANCH:

May it please the Court, counsel's name is Branch, and I appear with Mr Bond in relation to matter 80, which is Fences and Kerbs.

ELIAS CJ:

Thank you, Mr Branch.

Now, have counsel conferred about what order you're going to go in?

MR ORMSBY:

Yes, Ma'am, we have. It's proposed that I open on the Allied appeal. I expect that I will be finished by the time of the morning adjournment. We were then going to suggest that Mr Hughes actually appeared on behalf of his clients, Hiway, and then conclude with Mr Temm in the afternoon in relation to the Fences and Kerbs appeal, if that is acceptable to Your Honours.

ELIAS CJ:

Yes, thank you. So Mr Hughes after you and then Mr Temm?

MR ORMSBY:
Yes, Ma'am.

ELIAS CJ:
Yes, thank you. I should say to counsel we have, of course, read all the submissions. There is a considerable amount of repetition in them. That's not a criticism. That's inevitable. But we would hope that it won't be necessary in the oral hearing to repeat very much.

MR ORMSBY:
Yes, Ma'am.

ELIAS CJ:
Yes, thank you. It also is rather a narrow point, and I would hope that the timeframe that you've indicated may be a little generous in estimation. Thank you.

MR ORMSBY:
Certainly. Yes, I hope so too. I do consider the point to be really a relatively narrow one that we will be examining this morning. It ultimately comes down to a policy position as well as an interpretation issue in terms of the statute itself.

What I'd like to do, your Honours, is in my submissions cut quite quickly, almost immediately, to the core issue, which is the interpretation of subsection 3(c). My client, Allied Concrete Limited, is a supplier of concrete nationally. It provides concrete, as is customary in that industry and many others, on credit. I don't think a lot turns on the facts in these cases, appeals. Most of it turns on interpretation of the statute. So what I'm proposing to do in my submissions is briefly, in a couple of paragraphs, go over the relevant facts for my appeal. I then intend to look at the defence itself under section 296(3). I then intend to turn to why my clients say that the Court of Appeal erroneously interpreted the defence, and then to deal with what we submit should be the proper interpretation of the defence before concluding with talking about some difficulties, some other difficulties from a policy perspective in terms of the current interpretation adopted by the Court of Appeal.

The facts of my client's case are simple. They supplied concrete on credit, sometimes on terms up to 90 days, often 60, sometimes 90. There was no suspicion of insolvency. That's not challenged on this appeal.

ELIAS CJ:

This is an interim judgment. Are there still issues of ordinary course of business and things like that to be argued?

MR ORMSBY:

No, there aren't. My client's position is very unique to the other appellants in that we have leapfrogged the Court of Appeal and come straight from a judgment of Associate Judge Abbott. Associate Judge Abbott waited for the Court of Appeal judgment to come out before delivering his judgment, and so the only issue in my appeal is whether or not the appellant Allied Concrete gave value within the meaning of the current amendments in defence.

ELIAS CJ:

Yes, thank you.

MR ORMSBY:

In my client's situation, in July 2010 they supplied concrete to a company then called Harker Construction. There were 10 invoices for that concrete in that month. That was at the height of the construction project. They gave an extension of time, from 60 to 90 day terms. After – and those invoices, those 10 invoices were then paid within those 90 days in October 2010. After that time, there was an ongoing supply of concrete but at a much lesser scale than the original supplier.

In December 2010, my client became aware of insolvency issues and put the company on stop credit. Seven months after that, the company went into liquidation. So Associate Judge Abbott in the High Court accepted that there was good faith on the part of my client. He accepted that there was no knowledge, no suspicion of insolvency, but in light of the Court of Appeal judgment in *Farrell v Fences & Kerbs Limited* [2013] NZCA 91 he determined that "gave value" had to be interpreted as giving "new value" and therefore the defence could not be invoked by my clients.

What I'd like to do, at the outset, is to compare section 296(3) with its Australian counterpart, on which our case is based. Under the bundle of authorities for the appellant, which is a thick bundle with about 25 tabs in it. Under tab 2 is an extract from The Companies Act 1993 and over the page on tab 2, page 319.

GLAZEBROOK J:
I'm sorry, where are we?

MR ORMSBY:
We're in the fifth bundle, bundle of authorities for the appellant. Tab 2, page 319. So this is section 296 and on page 319 is subsection (3). That section provides that 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 a law in equity, if the person from whom the recovery is sought – in my case that would be the appellant, A, proves that when A received the property, and there are three limbs to the test. The first is, A acted in good faith, which Associate Judge Abbott accepted. The second is 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, so that's a knowledge, objective knowledge based test about suspicion of insolvency. Again, the appellant satisfied that test. And thirdly, A gave value for the property, and then a disjunctive alternative, or altered A's position in the reasonably held belief that the transfer of property to A was valid and it would not be set aside.

This whole appeal turns around the interpretation of "gave value" because of the temporal requirement in 3, which says, "When A received the property A gave value." And so the issue is, does the prior supply of concrete satisfy that requirement or does A need to give some new value for the payment that is received. And, to determine what Parliament intended, in my submission, it's helpful to look at the Australian legislation upon which this clause was based.

ELIAS CJ:
Mr Temm, I should flag that I am not –

WILLIAM YOUNG J:
Ormsby..

ELIAS CJ:
Sorry, Mr Ormsby. I should flag that I am not, myself, convinced that this is a temporal requirement.

MR ORMSBY:
Yes.

ELIAS CJ:

Because it is possible to read the provision as a whole is simply establishing a linkage or a consequence.

MR ORMSBY:

I agree with that, your Honour, and that's where I'm going to endeavour to take, to take you all, as a Court, because, in my submission, the proper approach to this section is a transactional analysis so the payment, what this clause is actually about is that A pays, sorry, B pays A and A receives that payment with no, in good faith, no suspicion of insolvency, and having provided value for the goods that were received.

ELIAS CJ:

For the property –

MR ORMSBY:

Yes.

ELIAS CJ:

– which, which must be the payment in this case.

MR ORMSBY:

Yes that's right, yes.

ELIAS CJ:

I'm just not sure how that helps your argument but carry on with it.

MR ORMSBY:

All right. Well, perhaps if I take your Honours to tab 8, and on page 531 is the Australian equivalent. So tab 8, page 531. You'll see that in the Australian equivalent – it's under subsection 2 so it's a rather convoluted section, number 588FG(2), under that section, the intention of the New Zealand amendments was to adopt the Australian counterpart provisions in relation to insolvent transactions and the defence that was available. This is the Australian defence. The intent of this, you'll see immediately the similarity between the New Zealand section and the Australian legislation. There are three limbs and the creditor who received the payment is required to prove that a) the person became a party to the transaction in

good faith, b) at the time when the person became such a party the person had no reasonable grounds for suspecting that the company was insolvent and a reasonable person – so this is the objective requirement – in the person's circumstances would have had no such grounds for suspecting. So that wording in that second limb is slightly different but exactly the same in meaning to our second limb in New Zealand so, so far the provisions are exactly the same.

Then the third limb, the person has provided valuable consideration under the transaction or has changed his/her/its position in reliance on the transaction. So again, there's a third limb, and similar to ours it is disjunctive. There are two possibilities, valuable consideration or change of position.

Now, in Australia it's accepted that if you give value by way of supply of concrete prior to the receipt of payment you can invoke this defence under the Corporations Act 2001. The Court of Appeal approach in New Zealand was to say that the words are slightly different because of when they received the property, and therefore we have to interpret it as a) must give new value in return for the payment received.

ELIAS CJ:
The authority you rely on, the Australian authority you rely on, it's referred to in the Court of Appeal decision.

MR ORMSBY:
The *Buzzle Operations Pty Limited (in liquidation) v Apple Computer Australia Pty Limited* (2011) 29 ACL 11-024 case.

ELIAS CJ:
The *Buzzle* case. What other authority is there apart from *Buzzle*?

MR ORMSBY:
Well, it's interesting that there's not a lot of authority in Australia, Ma'am, and I'd suggest that the reason for that is because the test is so clear in Australia, which is one of the objectives of the Australian legislation is to have clarity and certainty. In New Zealand, unfortunately, because of the slight change in wording, the test is not clear and that's why we're here today. So –

ELIAS CJ:

Are you going to take us to *Buzzle*, I take it, are you?

MR ORMSBY:

I will, yes.

GLAZEBROOK J:

Just remind me of the dates with that there at the time we were following Australian provision, or what was – have we got anything about what was said in Australia when they brought the provision in?

MR ORMSBY:

Buzzle was decided in 2011, so it's actually after we adopted the provisions. But may I submit that the absence of any temporal requirement in the Australian legislation, it's beyond doubt because what the Australian legislation says is the consideration, the value, has to be given under the transaction.

ELIAS CJ:

But then the question –

GLAZEBROOK J:

How is transaction defined, so we've got that definition?

MR ORMSBY:

"Transaction" is defined under section FE, which is under tab 7.

GLAZEBROOK J:

Thank you.

ELIAS CJ:

It depends what the transaction is. Really, that's what it comes down to.

MR ORMSBY:

Yes, yes.

ELIAS CJ:

And *Buzzle* defines the transaction widely, does it?

MR ORMSBY:

Well, *Buzzle* is actually a case about an uncommercial transaction, which is slightly different provisions in the Australian legislation, similar but slightly different. Australia has a range of transactions that can be challenged.

ELIAS CJ:

Yes.

MR ORMSBY:

Buzzle is really about the meaning of valuable consideration. What I'm focusing on in my submissions right now, rather than focusing on *Buzzle*, is there's a temporal requirement, so the Australian legislation's quite clear.

ELIAS CJ:

Does *Buzzle* not ground it on – well, does *Buzzle* identify what the transaction is for the purposes of this?

MR ORMSBY:

Well, what *Buzzle* says is that the satisfaction and release of a prior debt obligation is valuable consideration, but the Australian legislation is worded in such a way that in our case the transaction would be the supply of concrete on credit and then the receipt of payment for that concrete. So in Australia –

WILLIAM YOUNG J:

Sorry, why isn't it the discharge of the debt?

MR ORMSBY:

Well, in Australia that's accepted as valuable consideration.

GLAZEBROOK J:

Can I just check – I didn't see the definition of "transaction" in tab 7. I saw a definition of "voidable transaction" but not "transaction" itself.

MR ORMSBY:

You're quite right, Ma'am. I'm not sure whether we have the definition of "transaction" in the bundle of authorities and I apologise.

GLAZEBROOK J:

Do you know where it is? Sorry – do you know if there is one and, if so, where it is?

MR ORMSBY:

My recollection is there is one in the statute.

ELIAS CJ:

Well, Justice Randerson refers to it, I think, in paragraph 53. That's the note I've made. He makes the point that transaction is more broadly defined in the Australian legislation, whereas under s 292(3) of our legislation it's defined.

MR ORMSBY:

Well, in our legislation, and one of the difficulties before the Court, is that the defence does not refer to a transaction, whereas the Australian legislation does refer to the valuable consideration given under the transaction. So if I take you to tab 8 –

GLAZEBROOK J:

Well, it's slightly weird because the concrete supply isn't voidable. It's only the payment that's voidable.

MR ORMSBY:

Yes.

GLAZEBROOK J:

So under the Australian legislation it's slightly odd that transaction is looked at more widely, given you're looking at whether it's a voidable transaction, being one that can be set aside, and no one's suggesting that the supply of concrete is set aside.

MR ORMSBY:

No. That's right.

GLAZEBROOK J:

So why, when they're talking about transaction, would they say it's the original transaction, then? It's just it doesn't seem – I suppose the point I'm putting to you is it doesn't seem to me to be that clear on the Australian test that they're referring to the original transaction when they're referring to valuable consideration, because

that's not the transaction that's being set aside. The transaction that's being set aside is the payment, isn't it?

MR ORMSBY:

Well, yes, it is but in the Australian legislation, again, at tab 8 page 531, it says, "A Court is not to make an order under section 588F. Now, if you go to 588FF, and we only have the beginning of it, unfortunately, under tab 7, I think, that's orders about voidable transactions. So it's on page 528 under tab 7.

GLAZEBROOK J:

Well, that was really my point. So the transaction is the payment transaction, not the original transaction?

MR ORMSBY:

Yes, and what the Court is saying in the Australian legislation is that – if you look at C – the person has provided valuable consideration. Well, I see what your Honour is saying. It's not the way that it's been interpreted.

GLAZEBROOK J:

No, I understand that. It's just I can't quite understand why not.

MR ORMSBY:

Well, perhaps if I can take you –

ELIAS CJ:

And, indeed, before you move off from that, under our section 296 I think you said, well, it doesn't deal with – it's not specific to the transaction as the Australian is, but if you read section 296 as a whole, firstly, the first reference is to transaction and the recovery of property is the consequence, but it must be recovery of property pursuant to the transaction which is to be set aside, so that, it seems to me, too, must be – must envisage that the transaction is the payment. So I'm not sure that there's a difference, really, on this point between the Australian legislation and the New Zealand legislation.

MR ORMSBY:

Well, what I wanted to do at this point was only to show that the intention was to follow the Australian legislation. What I'd like to do now is to build on that by then

showing in following the Australian legislation the intention of the New Zealand legislature was to adopt an objective knowledge-based test, not one based on the timing or the giving of value. So I accept what your Honour is saying about the ambiguity and I'd like to develop that a little bit further because –

ELIAS CJ:

Well, it does seem to me that really key to your argument is the *Buzzle* case, because really your argument – and correct me if I'm wrong on this – seems to be premised on that being the effect of the Australian legislation and therefore our legislation.

MR ORMSBY:

Well, perhaps to an extent in that I'm saying that we've adopted the Australian approach, and my view of the Australian approach is that it's the prior transaction, not the payment of money transaction. But for a whole lot of other reasons which I intend to take your Honours through now, I say that also that that wasn't the intention of the New Zealand legislature when they adopted these provisions. The first point, perhaps, that we might draw out in relation to these provisions, and particularly section 292, is that what the liquidators said in the High Court in front of Justice Toogood was that the value to be given under subsection 3 could be linked in a sense to the alteration of position, that is, the value comes after the payment. So a payment in advance might provide you with a defence. You pay in advance, you get value in return. But that's not, in fact, a voidable or an insolvent transaction under the definition of section 292, because under section 292 an insolvent transaction is defined – and we've got section 292 at tab 10 –

ELIAS CJ:

It's predicated on there being a debt.

MR ORMSBY:

Yes, it's predicated on there being a debt, so if you're paying money in advance and then you're getting a product, that's not a debtor-creditor relationship, in fact. It's not an insolvent transaction. So there's no need to call on the defence because you don't need it. And what, in my submission, is clear is that this section 296(3) was intended to be a defence to an insolvent transaction. In other words, it's intended to be a defence to a creditor-debtor relationship. Now, the Court of Appeal says, okay, so payment is in advance and return of value doesn't work, so they've changed it

slightly. They've said it's got to be a two transaction approach to make the temporal requirement work. In other words, you pay new value for the payment that you were to receive for the prior debt and they give a specific example of that, in paragraph 90 of their judgment. Now, that can be found under tab 2, sorry, tab 3.

WILLIAM YOUNG J:
But the most obvious weight in which consideration could be provided, or value could be provided, might be of a kind which would suggest that the creditor was on notice that the company was insolvent.

MR ORMSBY:
Yes and, in fact, what I would suggest is that that aids an interpretation of the section. Well, perhaps if I can come to that point in a moment, Sir, because if we look at the example under paragraph 90, what the Court of Appeal says, "Is for practical purposes," so the Court of Appeal adopts a two transaction approach to make the temporal requirement work. They then say you've got to give new value for the payment for the prior debt, and then they realise well, that doesn't actually work, in terms of the exact temporal requirement, so there's got to be flexibility, and they outline the example in paragraph 90.

For practical purposes the expression when a) receives 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 when funds were credited to the payee's bank account. For example, value, this is the example, 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 enable legislation to work.

Now, in my submission, you've got these two other alternatives out there. The first is, you pay in advance and you get your value. The problem with that is that's not an insolvent transaction anyway, so it's not what the defence was designed to defend. Then you've got this approach from the Court of Appeal, where they say, well, let's

make it two transactions. You're giving new value for the old, for the payment of the old debt, but that's just not realistic commercially, that – people never – creditors don't, unless you've got huge profit margins, and even in those circumstances why would you further expose yourself by sending across more goods. Because what the Court of Appeal says is not only do you have to provide new value, the new value has to be real and substantial approximating the previous transaction. Creditors don't do that.

ELIAS CJ:

Why do you say approximating the – you don't mean of similar value do you?

MR ORMSBY:

Yes, yes –

ELIAS CJ:

Why?

MR ORMSBY:

The Court of Appeal say that it should be of similar value so, I can take you to that if it would help.

ARNOLD J:

So just looking at that first sentence in 91, the Court says, "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 goods or services provided." So is the Court assuming there – if you go back to the example that you've highlighted, providing further goods and services to the company in return for full or partial payment of the antecedent debt, is the Court assuming there'll be no further payment for the new goods that have been provided?

MR ORMSBY:

That's right. It's hard to understand exactly what the Court is assuming.

WILLIAM YOUNG J:

I think, sort of assuming something equivalent to the, sort of, running transaction approach that's in section 292?

MR ORMSBY:

Yes and that's another reason why, Sir, I say the Court of Appeal approach doesn't make sense because any new value that you provide is already credited in the running account test.

WILLIAM YOUNG J:

But that assumes that there is a running account. There might be something that – it might be a one-off additional value.

MR ORMSBY:

That's true, but again, the Court of Appeal approach presupposes two transactions and the example that they use presupposes a payment for an old debt. Now, if you're paying – if you're giving new value for an old debt you've probably got a suspicion problem under the test. You've probably got an objective knowledge problem. So the Court of Appeal two transaction approach really does two things. It presupposes that there's a continuing business relationship because you're giving new value. It's obviously – well, it would normally, in such circumstances, be an ongoing supply relationship. The problem is that that new value is always going to be credited under the running account test and if it's not, and that's the example that they give, where you've giving new value for an antecedent debt, in my submission you've almost certainly got a knowledge problem.

ELIAS CJ:

The difficulty I have with paragraph 90 is that again this assumption that there is a temporal component here and that it is to be read as at the time of. That's why the Court of Appeal is saying that there has to be some degree of flexibility. But if "when" is used in its consequential sense then that focus is quite unnecessary and the complexity that's been introduced by the Court of Appeal is unnecessary, but there still needs to be new value.

MR ORMSBY:

Well, I hesitate to point out a problem with your Honour's position.

ELIAS CJ:

Please do.

MR ORMSBY:

One of the concerns I think I would raise in relation to that is that if that's the case and the temporal element is only afterwards what's the point of having a disjunctive section C? Because what you're doing in that position is you're changing your position.

ELIAS CJ:

Well, I think it is a form of change of position, arguably. It also seems to me that – and I think it is useful to look at section 292 as well as section 296(3) because it occurs to me that section 296(3) really is the equivalent of the exclusion from the definition of a voidable transaction of a contemporaneous exchange of value. It sets up the credit element in section 292 but so, too, arguably, does the exclusion in section 296(3). They seem to be equivalent to me.

MR ORMSBY:

Yes. To my mind, I would submit that that should persuade your Honours to take the view that Parliament didn't intend to have two overlapping mechanisms with which to deal with new value. New value was to be taken account of in determining the extent of the preference. If your new value exceeds the prior payment, again, there's no insolvent transaction because there is no preference. So in my submission, Parliament didn't intend to have two overlapping mechanisms to deal with new value. It intended to have one and that was to determine the extent of the preference. If there's a preference, there's a defence.

ELIAS CJ:

There's two transactions, though.

MR ORMSBY:

Well, I don't know that we need to get caught up in the two transactions, because when you look at – and I'll take your Honours to this in a moment – the way the Bill was passed the intention of 296(3) was to be a defence to an insolvent transaction. It wasn't to – and I understand what your Honour is saying is that perhaps there could be another transaction with new value, but in those circumstances you're not actually dealing with an insolvent transaction and so –

GLAZEBROOK J:

Do you want to take us to the definition of "insolvent transaction"? It might just be easier to understand the point. I ask because I was trying to look for it and I've lost it again.

MR ORMSBY:

It's at tab 10, and it's just over the page. So an insolvent transaction is a transaction by a company entered into, obviously, at a time when the company is unable to pay its debts – but b), and this is, in my submission, important in interpreting 296(3), "It 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." So the problem with new value is that it's taken account of in the running account, and if it exceeds the payment received, well, there's no insolvent transaction anyway. That's why I say that this is intended to be a defence to an insolvent transaction and gave value as a disjunctive element. We just have these unfortunate words to interpret about, you know, when the payment was received.

So it's helpful, I think, to look at the rationale and I think, your Honour, that's why the Court of Appeal reached the view that it did about having to have two transactions.

ELIAS CJ:

Can you just go back to section 292 and the definition of "transaction"?

MR ORMSBY:

Yes.

GLAZEBROOK J:

It would have to be a one-sided value, wouldn't it, for the preference not to arise? Because if you've just got new goods and new debt, you're in the same boat, aren't you? Because on a pari passu way, you'd only get a proportion of the new debt.

MR ORMSBY:

Yes, or potentially you're in a worse boat if you don't get paid, obviously.

GLAZEBROOK J:

Well, yes, obviously, but I'm just not quite sure how you call in 2(b) and (a) to say that you wouldn't, if there was new value, because nobody – I would have thought it unusual for somebody to give new value in order to get payment of a debt to give new value in a one-sided sense that would land you with no preference. So I don't see that that's going to arise. Of course, if they did, if they said, "Oh, well, in order for you to pay me $10 I'm going to give you $20," you know, then that's fine, of course you might land up with no preference in those circumstances. But it's unlikely. I suppose you could have it in an associated party transaction in some way.

MR ORMSBY:

I agree, Ma'am. I think it's very unlikely that you're going to end up in that position. That's why it was important for me to make the point initially that if you pay in advance for new value there's no creditor-debtor relationship, therefore there's no insolvent transaction. If you agree to pay, and what section 296(3)(c), if you read the words, is saying pay money and you gave value for that payment of money, now, if that's new value, as the Court of Appeal says, there are a number of issues. First, it's already going to be taken account of under the running account test because if you've got another supply you've got – probably got – and even from the two supplies may have a continuing business relationship, but that new value is already going to be taken account of under the running account test. If that new value exceeds the payment that you received, well, then, you've got no insolvent transaction again.

ELIAS CJ:

Can I just take you back to the definition in 292 and subsection (3), the definition of "transaction", because it's defined as any of the following steps.

MR ORMSBY:

Yes.

ELIAS CJ:

So it's perfectly possible that the incurring of the obligation is one transaction and the payment in settlement of the debt is another. Which is why the giving value in the payment needs to be distinctly looked at.

MR ORMSBY:

Well, I'd submit what that does is actually leads you to the view that you're looking at the transaction as a whole, but even if –

ELIAS CJ:

Is that your view, the submission you would make?

MR ORMSBY:

That's my submission. But even if I'm wrong on that –

ELIAS CJ:

But then why is it disjunctive, if that's so?

MR ORMSBY:

Because it's not intended to look at value after you receive the payment. It's intended to look at value given in return for the payment and that value can be value that's already been given, or – and Justice Toogood says, "Look, it may have been an unintentional consequence of the drafting, we don't know," but – or you can view value as the same way as *Buzzle* does, which is the release of the debt and –

WILLIAM YOUNG J:

There's very little discussion about it in *Buzzle*. It's just like an assumption.

MR ORMSBY:

There is. It's most unhelpful. It would helpful if there was a lot more discussion.

ELIAS CJ:

Where do we find *Buzzle*? I haven't looked at it.

MR ORMSBY:

It's in the bundle of authorities at tab 25.

ELIAS CJ:

Thank you. What page?

MR ORMSBY:

It's paragraph 161 to 166.

This is really dealing with the definition of "valuable consideration". The contemporaneity point is not really drawn out because under the definition of the Australian legislation – and I appreciate the point that your Honour Justice Glazebrook is making, but it just talks about valuable consideration under the transaction. So there's no real consideration or examination of the temporal requirements of the payment, because it was considered to – the issue was, was it valuable consideration under the transaction, meaning the original, the way they looked at it was the original transaction.

McGRATH J:
The language the Australian provision just didn't raise the issue as far as *Buzzle* was concerned.

MR ORMSBY:
That's right. *Buzzle* just didn't consider that issue to be raised and so they focused on the point of what was valuable consideration.

ELIAS CJ:
Yes. So *Buzzle* really doesn't help us?

MR ORMSBY:
No. I don't think it takes us much further, let me put it that way.

McGRATH J:
I gather your argument is really an argument that looks on the passage of the legislation as the context in which you have to understand what happened in the ultimate provision.

MR ORMSBY:
That's right, which is the point that I was going to take your Honours to now, if I can, which is the high water mark of the Court of Appeal decision, why they came to the decision that they came to, and in my submission it's summarised quite nicely and succinctly in paragraph 70 of the judgment. That's at tab 3.

Perhaps the last two sentences will suffice of paragraph 70. "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." So what the Court of Appeal did, and in my submission this is the fundamental basis on which we depart views, the Court of Appeal said insolvent transactions are all about pari passu. It's about swelling the pool of assets to share rateably amongst creditors. Therefore, in interpreting the section, we need to interpret that on a narrow policy basis and confine it very strictly to what it will apply to.

In my submission, that's the wrong approach and I'll take your Honours to the passage of the legislation shortly, but the reason why I say it's the wrong approach is because in my submission what the section is actually about, what the defence is actually about, because remember the defence, the language of the defence is when a liquidator must not recover, so it's an exception to pari passu, and so to determine the scope of an exception to pari passu you don't look at the original principle. You look at what Parliament was trying to achieve through the introduction of that exception to pari passu. In my submission, Justice Toogood's judgment deals with this very well, but it's helpful, I think, to turn to the explanatory note on the legislation.

McGRATH J:
Are you coming back to Justice Toogood's judgment?

MR ORMSBY:
I will.

So at tab 6, is the explanatory note to the Insolvency Law Reform Bill. Perhaps if I turn first to tab 2 before I get to the provision that deals with the defence itself – sorry, tab 6, page 2 – this deals with the Government's overall objectives in the amendments. It's to provide a predictable and simple regime. The second point, distribute the proceeds to creditors in accordance with the relative pre-solvency 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 such priority. Three, which is, again, a point I will return to, maximise the returns.

If we turn over, I think on page 17, page 17 repeats those public policy objectives, but then if we turn to page 19, it talks about the preferred option.

ELIAS CJ:

This is against the background of the earlier legislation, when they say they want more predictability and certainty in which, ultimately, I think this is right, is it, that it was – maybe it's pre-'93 but didn't the Court have to make a judgement about whether it was fair and just or equitable or something?

MR ORMSBY:

Yes. There was an equitable requirement as the second part of the defence on good faith and alteration of position.

WILLIAM YOUNG J:

It was also only a discretionary defence.

ELIAS CJ:

So is that really the mischief that that – that this has to be looked against, that that was thought to be too uncertain?

MR ORMSBY:

That's one of the mischiefs, but I'll take your Honour to why I say it's not the only thing that we're helped with in relation to this. But your Honour is right. It was – unless in the ordinary course of business then you had a defence and you also had another discretionary defence. If you acted in good faith and altered your position it was inequitable for you to remain in that position, then the Court could give an order in your favour.

WILLIAM YOUNG J:

So ordinary course of business was itself an absolute defence?

MR ORMSBY:

Yes.

Right, so page 19, the first mischief is captured in the first bullet point, Ma'am, replacing the ordinary course of business exception with a new, continuing business relationship. And I say that's important because that's what – that's where we deal with ordinary course of business and that's when new value is taken account of, but then under the third point, "Adopting a defence for creditors to avoid making a transaction void that focuses more objectively on the knowledge of the creditor that is

transacted with the debtor." So in my submission, the defence – appreciate challenges with language – but the defence was to introduce an objective knowledge-based defence. If it had been to deal with swelling the assets, get new value in, and build up the assets supporting the pari passu principle, then they would have said so, and in my submission if it was to adopt the Court of Appeal approach where you have two transactions, new value being provided, either for the old debt, and I think just to answer your Honour Justice Glazebrook's question, yes, it's very unlikely that you'd agree to pay new value for old debt, but the defence presupposes that the value that you're giving is as a defence to the insolvent transaction, so maybe you're giving it as two purposes if it's new value, but I just say that doesn't make sense in a commercial environment and that really the objective here was an objective knowledge-based defence and if they'd intended to capture value differently –

GLAZEBROOK J:
You'd just wonder why they didn't say so because if – really what your submission is if this was a freebie then it's a preference, otherwise it's not.

MR ORMSBY:
Well, not entirely.

GLAZEBROOK J:
You'll probably be looking at associated party transactions.

MR ORMSBY:
Yes, and knowledge.

GLAZEBROOK J:
Yes. Obviously we're taking those bits as read. So if this wasn't a freebie and you didn't know they were insolvent then you should be all right.

MR ORMSBY:
Yes, and if you were going to – what I'm also saying is if you're going to go the way that it's been interpreted thus far, which would severely restrict the defence, even based on the prior defences that existed, severely restrict because when is this actually going to happen in reality, where you're providing new value as a creditor for your old debt or new value for a payment equivalent to your old transaction?

GLAZEBROOK J:

Well, doesn't it expand it because you're not worried about the ordinary course of business, you're just looking at whether they knew and it expands it at least in respect to a change of position?

MR ORMSBY:

Maybe for change of position but the case law on charge of position is that receipt of payment doesn't change your position.

GLAZEBROOK J:

I understand that.

ELIAS CJ:

Isn't the change of position and the provision of value an attempt to channel and guide the case where formerly the Court had a wide discretion to decide what was equitable? Isn't that legislative identification of that?

MR ORMSBY:

No. In my submission what it was intended to do was give you a nice, simple knowledge-based test.

ELIAS CJ:

But it's more than that.

MR ORMSBY:

It's clear and predictable for everyone.

ELIAS CJ:

It's more than that because knowledge was always part – there's a big history to all these provisions. We're just looking at the '93 Act as amended in the Australian Act, but this comes with a lot of history.

MR ORMSBY:

Yes.

ELIAS CJ:

Knowledge has always been an element in these provisions plus that it's unjust or inequitable or here that there's a change of position and value, perhaps.

MR ORMSBY:

In my submission, Ma'am, that's not the case. What Parliament were doing is – what you previously had was quite a wide defence. In the ordinary course of business or good faith change of position, what Parliament in my submission was attempting to achieve, and they adopted the Australian approach, which the temporal requirement is not really at issue in these. I accept the hesitations around *Buzzle* and the meaning of valuable consideration, but the Australian approach was a transactional approach.

ELIAS CJ:

Which, for my part, I think the New Zealand approach arguably is, too.

MR ORMSBY:

Yes, but in Australia I suppose it's never been questioned that it's a transactional approach, looking at the original transaction. And so they adopted an Australian approach with three limbs, and in my submission there's no indication – and perhaps I'll take you to Justice Toogood's analysis shortly – that they intended to severely restrict the defence. In fact, in my submission the contrary is the case. What they intended to do was to align the defence, a good faith requirement, no suspicion of insolvency, and then you're either giving value or you've changed your position in relation to that.

Perhaps if I take your Honours to Justice Toogood's comments, which is at tab 5 I believe. And perhaps if I just take your Honours to a selection of passages. The first is a point that I've already dealt with at paragraph 16, which is the contrary submission to the proposition that Parliament had intended to confine the defence, based on giving value to cases where payment was received from the debtor company before the creditor provided value in exchange for the payment. Now what the Judge says, "This would be the case where, for example, a) did not transfer title to the goods supplied until after payment from the debtor company had been received." In Mr Harrison's submission, such an intention is improbable because it would distinguish, for no good reason, between suppliers of goods to whom payment

is conventionally made in advance of transfer of title of goods, and the providers of services who conventionally invoice their customers after.

Then he goes on to discuss the law, and at paragraph 21 his Honour says that the Bill was designed to create a predictable and simple regime for insolvency in New Zealand. He repeats passages from those which we have just looked at, pre-insolvency entitlements unless a greater public interest maximise returns.

In paragraph 22, most relevantly for present purposes, the legislation sought to redesign the avoidable transaction provisions and harmonize them with corresponding provisions.

ELIAS CJ:
So, just going back to your, to paragraph 16, which you've highlighted.

MR ORMSBY:
Yes.

ELIAS CJ:
Do you adopt that reasoning about there's no good reason to distinguish?

MR ORMSBY:
Well, I go a step further, actually, in what Mr Harrison said I say. If you're paying in advance and you then get the goods, no insolvent transaction because there's no creditor-debtor relationship.

ELIAS CJ:
Well, yes, but there's no inconsistency in that. I'm just wondering about the policy of the legislation, because if the policy of the legislation is about worth credit and dealing with creditors then, as you say, those sort of immediate exchanges are not within the purview of the legislation.

MR ORMSBY:
Yes, but I think it begs the question, why would Parliament adopt a defence to insolvent transactions which required a new transaction? To my mind, that doesn't make sense either legally or commercially. What Parliament was doing was

designing a defence to insolvent transactions. The question is, then, what is the scope of that defence?

At paragraph 25, just to answer your Honour's question, what Justice Toogood says, and unfortunately as her Honour Justice Glazebrook has identified, we don't have s 588FA, which I think would be helpful if we did. But what he says is that the redesigning of the voidable transactions provisions was intended to reflect 588FA and following the Australia's Corporations Act. The explanatory note to the Bill indicates that the intention was to adopt a defence for creditors, in other words, to resist having a transaction set aside, but focuses more objectively on the knowledge of the creditor who or which transacted with the debtor.

Then in 26 –

ELIAS CJ:
I do have 588FA here. What did you think would be helpful to know from it?

MR ORMSBY:
I thought it would probably have a discussion or definition of transaction at some point in those provisions.

McGRATH J:
So Justice Toogood's gone back to that passage in the explanatory note you've just taken us to?

MR ORMSBY:
Yes. So he's seen that as important, and then another passage in the explanatory note, which I could take your Honours – in fact, it might be helpful to go to it because I think it goes on a bit further. He refers to, in paragraph 26 of his judgment, but it's at tab 6 page 25, from memory. It is the second paragraph down. Justice Toogood relies on this as well. "There will be an initial period of uncertainty regarding the meaning of the new test." Now, the new test plural is the running account test and the defence. 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 Court's experience in interpreting those provisions. Overall, there will be net gains for creditors, debtors and liquidators involved in voidable transaction proceedings.

WILLIAM YOUNG J:

The Court of Appeal judgment construes the legislation as a whole far more restrictively from the point of view of creditors than the earlier legislation.

MR ORMSBY:

Yes.

WILLIAM YOUNG J:

Because ordinary course of business is an absolute defence.

MR ORMSBY:

That's right.

WILLIAM YOUNG J:

So if this litigation had fallen to be determined under the old form, all appellants would have succeeded?

MR ORMSBY:

Yes.

WILLIAM YOUNG J:

And the ordinary course of business tests have been taken out, and it's been replaced, it seems, by a) to some extent, the running account provisions.

MR ORMSBY:

Yes. In the running account to determine the extent of the preference, that the defence, I say, operates based on mainly to determine that there's that exchange of value and that there's no knowledge of insolvency and, of course, good faith going with that. If you think about the Court of Appeal test, in my submission there's a number of problematic elements with that test. The first is –

ELIAS CJ:

Which test are you talking about now?

MR ORMSBY:

The Court of Appeal test. I think there are a number of elements that will cause the Courts difficulties and detract from the certainty that Parliament was trying to

achieve, because when you embark on a new value test, one of the first things you have to do is determine how do you measure and examine that new value and, indeed, that's one of the problems before the Court today. But it won't go away because there is going to have to be some test to determine this efficiency of value.

The beauty of the current wording, if we interpret it the way the appellants –

ELIAS CJ:
Sorry, why have you slid into sufficiency of value?

MR ORMSBY:
The Court of Appeal says that in giving value and in reaching their view –

ELIAS CJ:
Oh, this is a reference to the Court of Appeal.

GLAZEBROOK J:
Do you want to give us the paragraph reference to that? I think you were going to earlier. It doesn't have to be immediately.

MR ORMSBY:
It might be helpful for me to do it now. This really comes through in not the interim decision but the final decision, which is located at tab 4 and paragraph 23 is the finding. Paragraph 23, "On the other hand, we are satisfied that real and substantial value is required to be given by the creditor. A nominal or trivial value such as might provide consideration for a contract is not sufficient to bring the creditor within the protection of the legislation." That's where they differ with *Buzzle*.

GLAZEBROOK J:
Not true value, though, just substantial value.

ELIAS CJ:
Yes.

MR ORMSBY:
Real and substantial, yes. That's where they differ from *Buzzle*, because *Buzzle* had the words "valuable consideration". Here we've got the words "give value".

Over the page, I think it's helpful just to work through a couple of other comments or observations by the Court of Appeal. At the top of the page they say – so this is just above paragraph 25 – "The closer the amount of value given by the creditor is to the value of the money or property received, the more likely it is that the Court will find that real and substantial value has been given." Then in paragraph 25, they recognise that this means the defences really never are going to be able to be invoked because in our interim judgment where an instance where a creditor agrees to undertake further work for the company in return for payment, in whole or in part, for the existing debt due to the creditor.

I say they reach that conclusion because it was the only way they could get to the point of dealing correctly in their view with the elements in the defence, but I say that's where they went wrong with their interpretation of the legislation. So they say not all those will be easy to establish, that real and substantial value is thereby given, particularly if the company merely becomes more deeply indebted and ultimately collapses, but the legislation contemplates the availability of defence in those circumstances.

In my submission, it doesn't. The legislation is wider than that. That new value will be taken account of in the running account test, because we have to have a mechanism that companies continue to trade, even if they're aware that a company is shaky. That's why you've got the running account test. So then there's all of those creditors continue to receive payments, continuing to trade. They're going to be treated equally. That's the assurance they're given through the running account test.

What the defence is attempting to do is to deal with those who have no idea. They trade. They're significant credit transactions. In a commercial sense, they alter their position because they've given value through the supply of product and they've received payment. They'll go on and do other things. So in a commercial sense, the giving value element is not really dissimilar to the change of position, but what the court is examining is an exchange of value or Parliament, I should say.

GLAZEBROOK J:

Isn't the real problem that if you look at it either way the – don't you really have to go back to the original policy behind it? Because if you look at it in your way, then only the people who gave away freebies are going to be at risk in respect of that. If you

look at it the other way, then the original value has no effect but if you change your position then you're going to be protected, provided you have the first two no knowledge, et cetera.

MR ORMSBY:

Yes, but –

GLAZEBROOK J:

And the difficulty is, it's not really structured your way in terms of wording, is it, because you're very reliant on arguing that there's a disjunctive element to that rather than almost a proviso, provided that if you gave non-consideration for the original debt then you're not protected which, if that was the policy, you would have thought they would have said so and, in fact, you mightn't even need a change of position in those circumstances. In fact, you probably wouldn't need a change of position because, in fact, why would you want to say, well, it was a freebie but because you've changed your position we think it's okay?

MR ORMSBY:

Yes. There are a lot of points. I'll try and capture all of them. I agree with your Honour that the policy position is ultimately what this will come down to. I think where I depart from your Honour is that the language doesn't support our position. In fact, I do depart from your Honour on that point, but what I say is it doesn't actually work literally. Perception doesn't work literally under either position. It's as simple as that. That's why the Court of Appeal said you've got to adopt a commercial reality approach, because even when you take a two-transaction approach and a new value approach, the literal requirements of the Act don't work. When A received the property A gave value. A altered its position. Well, the alteration always comes afterwards. When A gave value, even under new value, there's never going to be an exactly simultaneous exchange in most circumstances.

ELIAS CJ:

There could be an alteration of position beforehand. I'm just not sure why we're so hung up on thinking – again, it's the temporal point. But if it's as a consequence of the transfer of – or the payment, I don't see why it can't be beforehand.

MR ORMSBY:

In my submission, it's not beforehand at that point. A receives the payment and A alters his position afterwards.

ELIAS CJ:

But if it's on a promise – anyway.

MR ORMSBY:

But that's not what the language of the Act says.

WILLIAM YOUNG J:

It's a reasonably-held belief that the transfer of the property without it would not be satisfied.

MR ORMSBY:

In my submission, the literal wording of the Act doesn't work under either view, if you're going to take a purely and strict, literal interpretation of the words.

GLAZEBROOK J:

I was probably just putting to you there was a much easier way of putting this and much clearer way which, of course you'd say, "Yes, I wish they had done that, but that doesn't mean the words don't mean what I'm saying," and I understand that submission. I certainly understand that.

MR ORMSBY:

Yes, I certainly wish they had done it, worded it slightly differently.

WILLIAM YOUNG J:

Is your argument would be very good for creditors who get paid, really, right at the end, because under the old regime they were in trouble because there was a presumption that transactions within the last six months were not in the ordinary course of business, whereas now if your approach is right you can get paid on the day before liquidation and you hold on to it.

MR ORMSBY:

Yes, but I think, well …

WILLIAM YOUNG J:

I mean, the corresponding position is that the Court of Appeal's approach is pretty tough on people who get payments 18 months or 23 months before who previously had a virtually cast-iron ordinary course of business defence who now don't.

MR ORMSBY:

Yes.

GLAZEBROOK J:

Just one day you'd say it would be very difficult to meet the test of not having knowledge of the insolvency, I would have thought.

MR ORMSBY:

That's what I was going to say, is that in that presumption period it's usually going to be extremely difficult. If you look at my clients, and I haven't actually checked the dates on the others, they're outside that presumption period because there was seven months from the date of payment to the date of liquidation.

GLAZEBROOK J:

Your clients started getting suspicious, I think you said, within that period.

MR ORMSBY:

Yes. During that period, my clients became aware and they put a stop credit, so that was in December, two months after the payment, and the reason for that was they contacted the company and said, "Why haven't you paid us?" and they said, "Well, we've got holiday pay entitlements that we need to meet." Immediately stop credit knowledge and you know there's some trouble.

WILLIAM YOUNG J:

The restricted period now is merely referable to whether the company was able to pay its debts.

MR ORMSBY:

Yes. One observation I would make, Sir, is that in Australia the total period is six months, so the Court of Appeal approach is severely disadvantageous to creditors in New Zealand by comparison to our Australian counterparts because there you look at a six month period, you look at the transaction that took place. By comparison, if

we adopt the Court of Appeal approach this defence rarely, if ever, will able to be invoked in terms of the first element of section 3C.

ELIAS CJ:

Can I just – the running account test, which one are – are you referring to (4)(b)?

MR ORMSBY:

Yes.

ELIAS CJ:

Because that cuts both ways, doesn't it, by aggregating the payments over the period. That's the first question.

MR ORMSBY:

Yes.

ELIAS CJ:

The second, might it not be said that if Parliament has chosen to aggregate in connection with these continuing business relationships, isn't that appointed to the transaction which isn't part of that relationship being distinct and therefore it's that transaction which has to be assessed as a preference?

MR ORMSBY:

In my submission, it's the opposite. To answer the first question, yes, you look at the running account. So what that meant in my client's case, for example, I can't remember the exact numbers but it meant that on a running account basis we supplied an additional $12,000 in new value after we received payment of the invoices that were challenged, so that $12,000 gets deducted and we ended up with somewhere just over 60,000.

WILLIAM YOUNG J:

I didn't quite understand your arithmetic, because about $88,000 was the payment, wasn't it, and only about $12,000 in new transactions.

MR ORMSBY:

Yes. That may be my mistake, Sir. I'd have to look at it to determine.

WILLIAM YOUNG J:
I didn't try to reconstruct it from the judgment.

MR ORMSBY:
I'm not sure that I've got that point right to hand but effectively there was a credit for the prior transactions which resulted in the ultimate amount that was payable.

ELIAS CJ:
As to the interpretation across argument, expressio unius?

MR ORMSBY:
Yes. In my view, the policy position supports the opposite because new value goes to the extent of the preference. New value doesn't go to the defence and the Court of Appeal said pari passu therefore limits the defence. What I'm saying is that the policy behind the defence was different to that.

I also say that when you look at the new value or the test by the Court of Appeal that you have to get to if you're going to make it work in the way that they say it works, so it's two transactions, new value. That removes, in my submission, the certainty and the clear and predicable regime that Parliament were trying to receive.

The other thing, in my submission, that supports the approach that we say should be adopted is that by using the words "giving value" rather than "valuable consideration" under the transaction there are two advantages. The first is that the Court did not have to embark on an adequacy of value investigation because the value is assessed by reference to the payment. They gave value for the payments assessed in the transactional context.

The second is that that avoids problems where there are multiple invoices and the payment received for those that aren't earmarked specifically to one of those invoices, so you're not looking at valuable consideration under one of them and having to work out which one it was paid under. They gave value in relation to that, to the payment received.

I think the adequacy of value point is an important point because it allows adequacy of value to be assessed in the context of the supply that had been given and the payment received rather than embarking on an approach that has to look at the

adequacy of value or develop tests around value such as the Court of Appeal did, with real and substantial value.

So there are difficulties with the Court of Appeal test. Real and substantial value is one of them. The contemporaneity of the exchange, in my submission, is another, how much – how commercially realistic can you be under the Court of Appeal's approach, so they recognised that the literal framework of the Act doesn't work and so therefore there's going to be cases on the time allowed and how contemporaneous an exchange needs to be.

The other difficulty with the Court of Appeal approach is can you actually double-count? That is, can you say the new value supplied after the date, which is already credited to the running account test, can that count as giving value under the defence? Associate Judge Abbott in our case, which is at tab 1, said no.

So at paragraph 35 of tab 1, he says, "On this point, I accept the argument of counsel for the liquidators that Allied cannot rely on the continued supply because the value of that supply has already been credited to it as part of the calculation of the transaction in applying the running account exception."

That, in my submission, highlights one of the difficulties with the interpretation adopted is that Parliament wouldn't have intended to have two overlapping ways of dealing with this new value.

In my submission, the policy implications are significant. Creditors will take practical steps to protect their position, but in my submission the logical consequences of the interpretation and the restrictive nature of the defence means the businesses will be less inclined to trade on credit and they certainly won't consider extending time for payment.

In my case, and this really goes to the alternative arguments, but they had a reservation of title clause. They gave that up. Now, I say that the giving up of – the giving of extra time, forbearance to sue, reservation of title clauses, those are all value, as well. And what Justice Toogood did was to say, "Look, the intention of Parliament was to – was not the pari passu principle but was instead to have a clear and predictable regime which focuses objectively on knowledge and an exchange of value."

Then he said, “If we need to adopt an interpretation based around the temporal element, then the way to do that to meet what was intended by Parliament was to say that satisfaction and release on an antecedent debt is giving value under the provision.”

ARNOLD J:
It’s pretty hard, though, to – I mean, when you look at the explanatory note that you took us to earlier, I mean, the opening point it makes is the pari passu point, isn’t it?

MR ORMSBY:
Yes. What I say there, Sir, is that yes, that’s the point of the insolvent transaction regime but it’s not the point of the defence and so in my submission we have to look at what was intended by the defence, and the Court of Appeal have taken the pari passu principle and effectively reduced the defence to not being a defence. It’s certainly a change of position remains, but in introducing giving value Parliament must have intended something to operate as a defence there, and in my submission the Court of Appeal virtually leaves no room for that provision to operate as a defence. We can play around the fringes and maybe find an exception here or there, but in the general commercial world, there’s not going to be any room left.

ARNOLD J:
So you want “gave” to be interpreted, really, as he’s given?

MR ORMSBY:
Yes, because if you look at “gave”, it’s simple past tense. Now, “gave” of itself doesn’t necessarily impose timing. The problem was the use of the word “when” up above and “when” was necessary because you needed “when” for the good faith element, and you needed it for the knowledge element. But it doesn’t actually work with alteration of position, because you alter your position afterwards and it doesn’t actually work for gave value, so they could have said “had given, did give, or would give value”.

I think I’ve actually covered everything that I need to cover in my submissions, unless Your Honours have questions for me.

GLAZEBROOK J:

Can I mention something that's probably totally left field for you to consider, perhaps, over the break? It's the relationship between section 95 of the PPSA which was referred to in *Stiassny v Commissioner of Inland Revenue* [2012] NZSC 106 and it's basically a leapfrog over a security interest if you have a debtor-initiated payment and it's always puzzled me, the relationship between that and the voidable preference regime, and it might be totally left field and you might decide that it is totally left field but it's a question that has been something that – because, of course, you leapfrog over the security interest and then what happens if it happens to have been a payment in the – that comes within the voidable preference regime.

MR ORMSBY:

If it's acceptable to the Court, perhaps I can consider that over the break.

GLAZEBROOK J:

Yes, that's why I mentioned it now. I certainly wasn't expecting you to address it on the hoof, so to speak.

MR ORMSBY:

Thank you, Ma'am, and then I'll conclude after answering that question.

ELIAS CJ:

Thank you. We'll take the adjournment now.

COURT ADJOURNS 11.30 AM
COURT RESUMES: 11.48 AM

ELIAS CJ:

Thank you Mr Ormsby.

MR ORMSBY:

Thank you Ma'am. Mr Keene has been kind enough to lend me his copy of the PPSA and so to answer Your Honour's question when I examined section 95, which provides priority for a creditor over a debtor initiated payment in respect of the priority, over someone who has a security interest, I'm not sure that that avoids the voidable transaction provisions. In fact –

GLAZEBROOK J:

No that's the point really –

MR ORMSBY:

– for a liquidator –

GLAZEBROOK J:

Yes.

MR ORMSBY:

– in my submission it doesn't. It will obviously operate against a receiver because they're probably a GSA that's perfected a security interest there but it won't operate as against a liquidator in terms of the insolvent transaction provisions. And just finally to answer Justice Young's question about the running account and what happened was the peak indebtedness was calculated and then you take off the payment received and then you look at the supply made and then you deduct those amounts from the peak indebtedness to give you your preference amount and that's how that figure was raised. Those are my submissions.

ELIAS CJ:

Thank you Mr Ormsby. Yes Mr Hughes?

MR HUGHES:

Good morning your Honours. Given your Honours helpful indication earlier that you don't wish for us to double and in effect triple up. I don't propose to go through my written submissions your Honour, my friend's helpfully done that for me in many respects. I just really wanted to touch on a couple of points that I think are particularly relevant to my client Hiway and it is that the test, as laid down by the Court of Appeal has, in effect, created two classes of creditors now. There's one-off supply creditors, which is where the category Hiway falls into, and then there are the continuing business creditors, which is where Allied falls into. If ones takes the Court of Appeal's test to its natural conclusion it is the case that a one-off creditor can never avail itself of the defence and that is because it's not able to provide new value either by way of money or further work, because by definition it is a one-off creditor. So in those circumstances it is very difficult to see how someone in the shoes of Hiway would be able to avail itself of that defence.

That cannot have been the intention of the legislature in relation to that section because rather than giving effect to pari passu the test now offends pari passu because it's creating two different classes of creditors and for me, in my submission, that's the key difference between Hiway's position and that of Allied's.

The best way to sum up what I've just said is to give an analogy and if you had a creditor who – creditor A who did $100,000 worth of work and did so in increments of $10,000 over 10 months, and were paid the month following for 10 months, and you had creditor B who did the same work as a one-off transaction, a one-off job and invoiced the month after the work was done, equally for 100 grand, you'd have a position where the company, once it went into liquidation, creditor A would be required to repay $10,000 under the test. Creditor B would have to repay the entire amount of $100,000 and in my submission that does offend the principle of pari passu.

Just while we're on the PPSA, an argument –

ELIAS CJ:
Could that not be prompted by the policy of concern for those who are locked into continuing business relations? In other words could that not be a deliberate policy?

MR HUGHES:
It's hard to, in my submission it's hard to see why because the creditor who does the large amount of work, and typically that's going to happen right before liquidation as was the case in Hiway, in fact is the last creditor to swell the assets of the company that it ends up in liquidation, and on that basis it shouldn't be, or it's not unfair that it be repaid having been the last to swell the assets. And if you look through the legislature changes in the amendments much is made of swelling company assets and again the –

ELIAS CJ:
Well it may not be. It may be a one-off transaction that was two years beforehand or 18 months beforehand.

MR HUGHES:
Yes, I accept that point your Honour, and I guess I just take that point further, the continuing business relation creditor already has protection under the test that my

friend has just spoken to your Honours about whereas the poor one-off creditor really has no defence. Can't rely on the continuing business relation test or the running account and it certainly can't rely on this defence.

ELIAS CJ:

No, I understand that, that's what – but I was asking you whether that might not be a deliberate policy? However, it's only speculative anyway.

MR HUGHES:

I accept that Your Honour and I think, I take your point and I think you could well be right on the basis that they've been in a continuing relationship and they should pay less but it seems, it's difficult for me to conceptualise why the creditor who comes and does a one-off transaction – and because of the nature of not having a continuing relationship, it's probably less likely to know about the solvency of a company. Why that should be in a different class to the continuing business relationship creditor.

That was going to take me to the PPSA point and I accept that in terms of the PPSA this came well after these amendments to the Act but helpfully what the PPSA does do is it defines both the words "value" and "new value" and in my bundle of authorities, which is dated 6 December 2013. If your Honours turn to page 23, "value" is defined under section 16 of that Act and critically it means, "Consideration that is sufficient to support a simple contract; and includes an antecedent debt or liability." Contrast that with the definition of "new value" which is found at page 21 of that same bundle. "New value means value other than antecedent debt or liability." It's trite that these Acts are to be read closely together and it's difficult, I accept it's difficult to read too much into this because this Act came much later than the – or came after the amendments but what it does helpfully do is define "value" and –

WILLIAM YOUNG J:

It came before the amendments, didn't it?

MR HUGHES:

Sorry, yes, your right your Honour, the 2006 amendments, yes, so this was 1999 and enacted in 2002 so I stand corrected. But it does helpfully give us a definition as to what was intended by value and new value.

ELIAS CJ:

Except new value is not a term used in the Companies Act.

MR HUGHES:

I accept that your Honour. These Acts are now read very closely together obviously with the PPSA dealing with all securities in relation to receiverships and liquidations and I accept that new value is not defined in the Companies Act and indeed value for that matter.

My friend has taken you through the differences between the Australian and the New Zealand legislation and much of my submission relies on what we say is this – the similarities or differences between those two sections. The only point I wish to make is on the case of *Buzzle* and I think I tend to agree with your Honours, the Chief Justice's interpretation, that I think that that case really does break the transactions down into two. I think it's section – sorry, paragraph 63 of that judgment, they actually talk about the second transaction being impugned payment rather than the initial transactions so I think I agree with your Honour in that respect.

My friend also talked about the difference between, or what value is required, and it does seem to me that the Court of Appeal seems to be saying that the closer the value gets to the amount of the payment received the better luck you'll have under the test and that really brings it back to the point in relation to a one-off and how difficult it will be, in fact it's impossible for a one-off creditor to satisfy that test.

WILLIAM YOUNG J:

The whole scheme of the legislation doesn't really work very well because if value means what you say it means then there's never going to be occasion to change the position is there?

MR HUGHES:

I accept that Sir and the only thing I'd supplement that with is to say that when you read through the papers, the working papers, in getting to this position is that it really seems to talk about knowledge and it's really talking about knowledge a creditor had and whether it acted in good faith and then I accept you come back to this position where you say that that renders (c) of the section nugatory.

WILLIAM YOUNG J:

Well that whatever happens it doesn't really work very well because we get every creditor whose preferred will have provided value in the sense that you contend for.

MR HUGHES:

Yes.

WILLIAM YOUNG J:

On the other hand if the Court of Appeal is right then no one is going to get home practically under subsection (c).

GLAZEBROOK J:

Apart from change of position.

WILLIAM YOUNG J:

How can they – it's hard to see how they can change position –

GLAZEBROOK J:

Just in the normal sense.

WILLIAM YOUNG J:

– in a way that isn't mopped up by this continuing course of business.

ELIAS CJ:

Well hardship. Consequential change of position.

WILLIAM YOUNG J:

So they're paid and then perhaps they spend the money.

ELIAS CJ:

Mmm.

GLAZEBROOK J:

That's a classic change of position, defence.

WILLIAM YOUNG J:

Yes, okay.

ARNOLD J:

Was there any discussion in the context of the two year period as to why two years was chosen rather than six months or one year or something?

MR HUGHES:

My reading of the working papers, Sir, is that six months was, in fact, recommended and looked at as opposed to the full two year period and not adopted for whatever reason, but certainly I concur with my friend.

ELIAS CJ:

There's a discretion, of course, isn't there?

MR HUGHES:

There is, your Honour.

WILLIAM YOUNG J:

Where's the discretion?

MR HUGHES:

That's at 295(a), I think.

GLAZEBROOK J:

Have we got that somewhere?

MR HUGHES:

Yes, your Honour. It's at page 6 of that bundle I was just referring to.

Picking up your Honour Justice Young's point, the –

GLAZEBROOK J:

Where's the discretion, sorry?

WILLIAM YOUNG J:

Because the relief is expressed in discretionary terms, all or some.

GLAZEBROOK J:
Is it really a discretion, though?

ELIAS CJ:
Oh, yes, some or all.

MR HUGHES:
Well, whichever way you read the section, it's somewhat unhelpful. If you rely on (a) and (b) of that section you more or less render (c) neutral and if you place too much reliance on (c) you do the same to (a) and (b). For me, (c), I think is there to deal with situations where there may have been share dividend payments, which may have been made in the case of no knowledge of insolvency made in good faith but obviously no consideration.

It's also difficult to see why the Court, in the Court of Appeal decision, made a distinction in terms of the temporal element with respect to the first part of subsection (c) and not the second, and I accept your Honours have already spoken to my friend about that, but it seems odd from my perspective that they can categorically, the Court of Appeal has categorically found that there is a temporal element with respect to the first part of that, but with respect to the second part of that subsection, that change of position can occur after. But I do think the policy around the section was to deal with the knowledge requirements first and foremost, or the knowledge of what a creditor had. That's found in Professor David Brown's paper and also the Insolvency Law Reform Bill. Both of those are referenced in my submissions so I won't take you through those, except to note that Justice Toogood at paragraph 32 agrees with that position.

Professor David Brown, I will just read his quote for the benefit of the Court. What he says is that, "Satisfactory solution would therefore be to remove the ordinary course of business test and extend the definition in section 296(3) so that creditors are required to prove good faith and lack of suspicion of insolvency. Given that this requires creditors to prove a negative, further consideration should be given to the precise wording of the defence, but bearing in mind that its purpose is to achieve relief for creditors who did not actually suspect insolvency and where no reasonable creditor in their shoes in circumstances would suspect insolvency."

McGRATH J:

What paragraph are you reading from, Mr Hughes?

MR HUGHES:

I'm at page 38 of my submission, Sir, and the reference there.

McGRATH J:

Thank you.

MR HUGHES:

That quote is at tab 8, page 72 of my bundle, Sir.

WILLIAM YOUNG J:

The question of discretion wasn't considered in the Courts below, is that correct?

MR HUGHES:

Yes, that's correct Sir. With respect to Hiway.

ELIAS CJ:

Well what's the outcome? Is there a final outcome or is there more to be determined?

MR HUGHES:

There's been a final outcome now that the transactions have been set aside and repayment has been ordered of all three creditors. And I think really the last point I want to make is that if you look at a creditor in the shoes of Hiway Stabilizers under the old continuing business test I think there's no doubt that they would have been entitled to keep the payment that was received and the Court of Appeal test has narrowly confined the test such that a creditor in their shoes now will never be able to avail themselves of that defence.

WILLIAM YOUNG J:

Is there anything in the material, the legislative material, that indicates one way or the other a purpose of narrowing or expending the defences available?

MR HUGHES:

The discussion is about trying to make the test, give the test more clarity in terms of, I think, removing more the discretionary element and I think that's about as far as I can take it from my reading of those papers Sir. It's really about removing discretion and making this more simple and it's perhaps had the opposite effect. I don't wish to labour any points, given your Honours' earlier indication, so unless I can be of any further assistance.

ELIAS CJ:

No thank you, thank you Mr Hughes. Yes Mr Temm?

MR TEMM:

Your Honours, I begin first with an apology in two parts, if I entered my appearance at the wrong time I apologise for that, and the second thing is my client Fences and Kerbs Limited, was the first in time, the decision in the High Court in Rotorua was the first that started this train in process so I feel duty bound to my client to take a little bit more time than Mr Hughes just to explain some of the issues that are relevant here.

Can I just talk briefly about the submissions for the appellant, Fences and Kerbs? There are five submissions. Two are policy, two are statutory interpretation and the last is just commercial efficacy. But I think your Honour, the Chief Justice's, point about we don't arrive here in a vacuum, we've actually had a long genesis to this point, it's something that we do need to touch on by way of opening submission. That is the reality, these changes that occurred in 2006 come against the statutory background that has a long history. I accept my learned friends for the respondents' submissions where they set out some of that history, that initially we had a voidable preference regime, an intention focused regime. That is we looked at what the debtor company did, what its intention was, and if its intention was to prefer then that was voidable and that was the start. Then later in time we moved to intention and added an acting in reliance. So if someone was preferred by the intention of the debtor company but then they acted in reliance, and to their detriment, that was a new element and overlaid over the top and that began the beginning of a defence for them.

Then in time we moved really to outcomes or effect based regime. Your Honours will know, and your clerks will be able to find for you, that really around the world there are three basic premises on which insolvency and voidable preference regimes

proceed. There's either debtor focused, outcomes or effect, or creditor knowledge. Those are the three basic types of regimes you'll see in other jurisdictions with which we compare ourselves. Here in New Zealand we started with intention, we moved to the outcomes and effect and pari passu was given prominence, and now, in my submission, we've now laid, after the 2006 Amendment, the creditor knowledge aspect under 296 of the Act as it now stands. So we've got a bit of a hybrid going on really. We keep pari passu and we look at section 296 as a statutory exception to what pari passu can achieve.

Before we come really to the substance of the appellant's submissions can I just deal with what 292 and 296 used to look like before the Amendment, because this is your Honour Justice Young's point? In 292, before the Amendment, there was at the end of subsection (2) the passage referring to continuing course of business and that was the defence for most creditors. So the transaction was voidable if it was paid at a time the company was insolvent and the creditor got more in that payment than they would get in the liquidation other than in the ordinary course of business and most creditors came along to the course and said, "Look at the circumstances of my case. I am particular. My ordinary course of business I ask you to consider is the defence for me." And this then created uncertainty. A lot of litigation, liquidators were in a difficult position of trying to assess what a creditor response would be to a notice of a voidable preference and that's where the continuing course of business defence mostly operated.

ELIAS CJ:
When did the continuing course of business defence first come in? That was in the 1993 Act?

MR TEMM:
It was your Honour.

ELIAS CJ:
But before that it wasn't part of the two provisions, of course, that are being brought together here, I think –

MR TEMM:
I think that's –

ELIAS CJ:

– aren't there?

MR TEMM:

The continuing course of business defence was in operation from 1993 when the principal 1995 Act was amended.

WILLIAM YOUNG J:

Was it not in the 1995 Act?

MR TEMM:

I don't believe it was your Honour.

ELIAS CJ:

I don't think it was in the Law Commission recommendations either.

MR TEMM:

No. But what it did do, post-1993, was it just created uncertainty and most creditors ran to the continuing course of business defence. Section 296, as it then was, was not a safe harbour for creditors and I ask you to look at 296 before it was amended. Section 296 before it was amended allowed creditors, who had acted in good faith, change their position in reliance to their detriment and then preserved to the Court inequity. That's what the defence was, and so it was difficult to make it out, to be fair.

So your Honour Justice Young I want to pick up your point because the 2006 Amendments do make, in the appellant's submissions, fundamental change. My learned friends for the respondents say the changes are not fundamental but they are for this reason. First, the continuing course of business is absolutely deleted. It's eroded all together. And over in 296 equity is completely ousted. So if you look at the beginning of section 296 and read to yourselves what the provision now provides it is clear. Subsection (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." And what the legislature here is doing is ousting equity where it has always previously existed. That's quite a fundamental change your Honours. I ask that some weight be attached to it because when you come to consider the defence it applies not just to trade creditors, and people in a debtor-creditor relationship, it applies to any payment made by the company. So

shareholders getting dividends, this is their only defence. Anything that the company pays out, other than in the ordinary course of business, this is the only defence available to all who deal with the company and it's much broader now than previously.

ELIAS CJ:
Well that's what I was suggesting in saying that it brought together the fraudulent preference for creditors together with the old provisions against voidable transactions.

MR TEMM:
That's my understanding. It's now all encompassed here and this is the only place to which people who deal with the company, and I ask you to step back, it's a broader horizon than just trade creditors. This is for everyone. Your Honour asked my learned colleague earlier about subsection (c), the second part to it, changing your position in reliance. Is it nugatory? It maybe if you think just about trade creditors but if you think of all the types of transactions companies engaged in, I can think of other examples where the change position in reliance defence would be applicable and I think, for example, dividends of shareholders. So for example three years ago the company has an excellent trading year, in the second year from now it makes a dividend payout to those shareholders, later it then goes into insolvency and a liquidator looks back and says to them, I want those payments back, they're inside the period, you provided no consideration for them, the dividend the shareholder received. They would be able to say, well I acted in good faith. I have no knowledge and I have changed my position in reliance.

Another equally applicable example, not in trade creditor world, but would be sponsorship. Companies provide sponsorship. No consideration exchanged. But the person receiving the sponsorship, or the scholarship, or the other advantage the company provides, would have the defence of being able to say well I've received that in good faith, I had no knowledge, and I've changed my position in reliance. So there are other examples, if you pause to think, outside creditor-debtor relationships where the company is doing transactions, a liquidator may later like to review, I urge caution about thinking that it's all nugatory on that point.

But I return, though, that the proposition that I apprehended Justice Young was asking about and it's this. When the section 292 was amended and the continuing

course of business was deleted, section 296 was deliberately enlarged and it was enlarged by the introduction now of not debtor intention or pari passu equality, but of creditor knowledge. If you can demonstrate as a creditor you acted in good faith, you can demonstrate the requisite knowledge, and these are all conjunctive, and you gave value, you will have the benefit of the defence. And your Honour section 295, the discretion that was mentioned earlier, that existed pre-2006, that's always been there. It's unchanged. So that discretion has remained. So for my client, the appellant, I am urging the Court to look at it in that 296 is actually a broader position and a fundamental change from what we've previously had by the introduction of creditor knowledge and by the absence of equity and by the absence of the ongoing course of business.

GLAZEBROOK J:
Can I just ask you, it's Mr Orsmby's point, I think that it doesn't apply to anyone who doesn't have a debt so it does only effectively apply to trade creditors, 292?

MR TEMM:
Well that's the definition of "voidable transaction".

GLAZEBROOK J:
Insolvent transaction?

MR TEMM:
Insolvent transaction so that, I think, was my learned friend's point of view. Had payments up front in advance of the work being done his proposition was that wouldn't be a voidable transaction because they're not in a debtor-creditor relationship.

GLAZEBROOK J:
Well what about a payment of a dividend? That's the same isn't it?

MR TEMM:
Well I'm not sure that – your point would be that it's not a voidable transaction?

WILLIAM YOUNG J:
Well the declaration of a dividend wouldn't necessarily be a transaction but its payment might be because that's discharging what, by then, is an antecedent debt.

MR TEMM:

Precisely.

GLAZEBROOK J:

Well I suppose you'd say it's a –

WILLIAM YOUNG J:

Say the company just gives money away. What happens then?

MR TEMM:

Well I suppose the liquidator would then be entitled to say, well where has this money gone, examine the people who have received it. If they're not able to bring themselves within 296 –

WILLIAM YOUNG J:

Yes but it's not an insolvent transaction because it doesn't enable someone to receive more in satisfaction of a debt than –

ELIAS CJ:

The voidable conveyance under the old Property Law Act provision, I don't know what that's become under the new Property Law Act.

WILLIAM YOUNG J:

Is there some other provision about inadequate consideration or…

MR TEMM:

Can I just pause and have a look at the statutory provisions. Your Honour can I draw your attention to sections 297 and 298 of Companies Act.

ELIAS CJ:

Sections 297?

MR TEMM:

Transactions at under value is 297 and 298, your Honour, would be transactions for inadequate or excessive consideration although that relates to directors and certain

other persons who have an inside position within the company but I think that maybe part of the answer to your question.

So turning then in a very summary way to the submissions of the appellant. The first submission is purely policy and that is that it was the legislature's intention, with the introduction of the Amendment Act in 2006, to harmonise the Australian and New Zealand voidable preference regime. That was the intention and I have provided in the material in support of that proposition the material that goes back to 2001 when the Ministry of Economic Development began the initial consultation round to try and get more certainty around our voidable preference regime because at that time the continuing course of business defence was begin run up every flagpole you could find, and it was causing uncertainty. So it began the debate and it took six years to mature and as part of that debate it then involved the New Zealand Law Society, the New Zealand Institute of Chartered Accountants who formed the Joint Insolvency Committee, and I've provided you with the background papers from those committees who throughout were recommending an alignment of the two regimes.

ELIAS CJ:
Can I just ask, because the copy of the Corporations Act I've got has, of course, been amended and the fact that they're up to section 588FB and FB and so on, when did those amendments come in that separate out commercial transactions and so on? Do those post-date our legislation?

MR TEMM:
I regret your Honour I am unable to answer that question but can I –

ELIAS CJ:
No, does anyone know the answer to that?

MR TEMM:
– just confer with my learned friend? My learned friend Mr Ormsby tells me that it was about the time of the enactment in 2001 that the changes were made. I'm not sure how that fits with your Honour's –

ELIAS CJ:
Oh was it? Yes, thank you.

MR TEMM:

But if you look back behind the legislation in New Zealand you will see clear footprints that we are trying to harmonise with Australia. In my submission to this Court that is a useful thing to be doing given the cross-border relationships that we now have. The world is getting smaller, not bigger, and we are having consistent dealings across the Tasman with companies and there is a desire that is worthwhile in Parliament's intention to have some harmony. And you'll see more of that harmony when you actually look at the words of section 588FG(2) and our section. And if you look at the Joint Insolvency Committee submissions that I have provided to you, they specifically say to the Ministry of Economic Development in 2004, you should be using the exact words of this section. You are trying to harmonise it, that's what you are trying to do, you should go ahead and do so. And so your Honours the primary submission is that if you accept the proposition that that's what Parliament was trying to do, then we can give effect to that purpose.

I drop back to your Honour the Chief Justice's point that is it temporal or is it a transactional based position and for the appellant it must be transactional. This must be reviewed as a transactional matter. First there was the provision of goods and services and later in the ordinary course you would expect a payment. Those two things are connected. And so the giving of value is occurring as part of a transaction as a whole. That's – sometimes we over think things a bit much. If we just stood back and looked at it as a common sense transaction, and in my client's case he's not a running account example, he's just the maker of concrete foundations for geothermal pipelines. All over the central North Island you will find large, steel, aluminium pipes. He makes the concrete foundations on which they sit. So he was asked to tender, he did tender. He did a one-off piece of work in June of 2010, he was paid in the months that followed, and in July of 2011 this company went into liquidation. He's performed the service. There is no new value that he can give after he has provided the concrete foundations which were adequately suitable for purpose. So like all trade creditors who just do a one-off transaction, he gives the goods or service, he renders an invoice, and he waits for payment. The Court of Appeal's test is that he must give some new real or substantial value at the time of payment but there is nothing more that he can provide because he's provided it already. And you can extrapolate that out and think about professional advisors and professional services. Lawyers, accountants, valuers and others, go and do work, render an account, expect to be paid and can provide no additional value.

That's why when you look at the Australian provision you'll see that they are talking about valuable consideration over the whole of the transaction, because that makes sense.

ELIAS CJ:

For those continuing business relationships but arguably isn't that what subsection (4)(a) achieves also? It's put more clearly, I must say the Australian drafting strikes me as a lot better, but it's – that is the effect, isn't it, that you aggregate them all and it's only if the single overall transaction is an unfair or –

MR TEMM:

Preferential –

ELIAS CJ:

– the Australians say unfair preference, is preferential –

MR TEMM:

That's how it works.

ELIAS CJ:

– that it's, yes. So that's what the Australians provide for.

MR TEMM:

And I accept it. That's what the running account (4)(b) does. My client's not able to make use of that –

ELIAS CJ:

No but the Australian drafting makes it perhaps even clearer that this is a modification of the general approach and that it applies to all transactions forming part of the relationship as if they constituted a single transaction which does leave the central question, it seems to me in this case, as to whether – as to what is the transaction in this case because if it is simply the payment that was made then it maybe tough but that's what the legislation provides for.

MR TEMM:

But the alternative is if the transaction is to be elastic in its concept then my client has the advantage of it because the transaction is over a longer period, in fact it's over the whole of the relationship, as it is in the Australian provision, because as I understand it in the Australian provision it's valuable consideration over the transaction as a whole.

ELIAS CJ:

Well I'm not sure where you get that from but, however, if you want to take us to the Australians provisions, do so.

MR TEMM:

Well it's in the Court of Appeal judgment at paragraph 50 and 51, His Honour Justice Randerson set out "transaction" as defined in the Corporations Act at paragraph 50 and 51. So transaction, and you'll see by looking at it that it bears similarities to what we see in 292. It's at the top of paragraph 51, it's at the top of, I think it's – the pages are unnumbered in my copy.

ARNOLD J:

So you say, looking at the Australian provision, in the Corporations Act says the person has provided valuable consideration under the transaction. The transaction here is the overall transaction you would say the supply of contract plus the payment?

MR TEMM:

Correct. The whole transaction, the whole relationship.

ELIAS CJ:

But why then is it all separated out in the definition? To include a payment made by the body?

MR TEMM:

Well that's the end of the transaction. The transaction can't be just in isolation. The payment can't be made on its own, neither can –

ELIAS CJ:

But that's how the transaction is defined.

MR TEMM:

I accept that. It's the last part of the same thing.

ELIAS CJ:

Mmm.

MR TEMM:

In my respectful – the payment wouldn't be made but for the delivery of the goods and services.

ELIAS CJ:

Why have a regime, then, that's predicated on debt? Because there's always an antecedent exchange.

MR TEMM:

I think you can't ask the last question without asking the first question. Can a commercial business survive without credit?

ELIAS CJ:

Well I think that's an argument of policy. One might make the response to that that the legislation recognises that credit is necessary to make the world go round but that it has risks and those who operate in that have to accept those risks.

MR TEMM:

I accept that. I think though that it comes back to the question you asked about well that's why you make a regime based around debt because that's what arises from the commercial reality of the credit.

ELIAS CJ:

But it doesn't take you back to a unified transaction. It separately identifies –

MR TEMM:

I accept that.

ELIAS CJ:

– payment, yes, all right. Thank you.

MR TEMM:

And perhaps I can take it no further. The appellant says, you need to look at the transaction as a whole because the payment is only part of the transaction. But I accept your Honour's point, that they're all particularised here, and in the same way in 292 and they seem to be focused solely on the last part of the transaction but is that really what's happening is the appellant's question. The payment is in exchange for something. And then we become engaged in, well, if it wasn't for the goods and services it's now for the release of an antecedent debt, which arose on the delivery of the goods and services, and things become more complex and harder than they need to be. This is really about did the company receive value for the payment that it made. Was its balance sheet enhanced at some point by value that was provided. If it was, and there was good faith by the creditor, and there was an absence of knowledge, then they will have the benefit of what is an enlarged defence to take account of the fact that equity in the ordinary course of business had been swept away. That is how the new test is to be interpreted and that's the position on that policy point.

The second policy point that was made in my submissions really arose out of the President of the Court of Appeal's discussion with counsel in that Court where he said, look there are two equally valid policy positions here, a narrow one and a wide one. There are two available, it's just a matter of preference as to which you prefer, and the Court in the Court of Appeal judgment preferred the narrow policy view. That the defence was to be closely confined, that pari passu was to be given prominence, that they didn't regard 296 as being an exception to pari passu if you could make it out. Whereas the appellant's submission here is that the wider policy position is equally available, that we are looking for harmony between the two voidable preference regimes across the Tasman. That commercial practice in Australia hasn't collapsed under the operation of their model. That we followed it for a purpose and that the proposition that everybody's going to be able to have the benefit of the defence ignores the fact that these things are all conjunctive. You must first demonstrate good faith. You must then have both the subjective and objective elements and then you must demonstrate the giving of value.

The third submission in this appellant's material was related to a statutory interpretation question. It's already been discussed by my learned colleagues but the proposition essentially was that the ordinary meaning of the language of the section

as it presently is drafted does encompass past conduct and gave value is talking about something prior to the moment of assessment. It doesn't require performance, as the Court of Appeal have asked for, new and additional value to be given at the time of assessment. At the time of assessment the giving of value can be prior. I think your Honour Justice Young's question to my learned colleague earlier was "has given value" or "gave". And the alternative to that, the full submission for this appellant, was that if we're going to uphold the Court of Appeal's test a new, additional, real or substantive value, then those words would have been used in the section. The concept of new value, as you just heard from my learned friend, already existed in the PPSA. From 1999 new value was a legal term. It was already used in related legislation. If you wanted to use new value it already existed and had previously been defined.

And finally the submission about commercial –

ELIAS CJ:
I suppose in the – I haven't really got my head around it, but in the PPS Act it's not transaction based, so that could be a point of difference.

MR TEMM:
Quite so. I think the point I was making, and it can't be taken any further, is that the concepts of value and new value are defined in a related piece of legislation that was in existence at the time that this piece of legislation –

ELIAS CJ:
But we don't need to adopt that language. That is judicially imported language which maybe quite unhelpful given its statutory use in another context. It's not necessary if one takes a view that the transaction is the payment and that you have to look for value in that transaction.

MR TEMM:
I think the point I was just making is that the Court of Appeal's version of, or interpretation is new value, that was a term that existed. It may have been something that would have been incorporated into the statutory amendment, rather than gave value, the words could easily have read "gave new value". And as you've heard, new value was defined as being something that did not include antecedent debt. It required something express and more.

Now Your Honours I've covered that in a fairly truncated way but that's all I propose to say unless there's some aspect on which I can assist you further?

ELIAS CJ:

No. Thank you Mr Temm. Have the respondents decided what order they'd prefer to…

MR KEENE QC:

Yes Ma'am I will go last.

ELIAS CJ:

Yes, thank you. Thank you Mr Branch.

MR BRANCH:

Thank you. I propose to go to my summary which in my submission still covers the essential points and then go back and flesh them out unless the Court wishes to take me somewhere else in that point in time.

But before I do that there's one issue that I would like to deal with and that's the issue of the continuing business relationship or the running account. In my submission not enough recognition is being given as to the benefits that a creditor gets from the continuing business relationship. The starting point is that the continuing business relationship replaced the ordinary course of business. So it was seen as a replacement. Now the suggestion that's been made by my learned friends is that that ability to keep these payments, which were ordinary and they had no knowledge of in the past, has been lost, and in my submission that's not the case.

WILLIAM YOUNG J:

Why do you say it replaced it? Wouldn't the old change of position defence have pretty much – I know it was discretionary but wouldn't that have pretty much confined the liability of a creditor to the net gain over the relevant period?

MR BRANCH:

Sir, the first starting point is that if you had the ordinary course of business then there was no voidable transaction.

WILLIAM YOUNG J:

Yes, yes.

MR BRANCH:

If you failed that but you'd provided further supplies, and you got a credit for the value of the further supplies –

WILLIAM YOUNG J:

Yes.

MR BRANCH:

– as per the alteration – Sir I can take you to tab 25 of my authorities, which is the Eastlite volume. You'll see your Honours that that's the Insolvency Law Reform Bill. Tab 25 and if I could please refer you to page 398 and the first bullet point, which refers to replacing the ordinary course of business exception, with a test along the lines of the continuing business relationship. So –

WILLIAM YOUNG J:

I know that that's been said but is it right?

MR BRANCH:

Sir in my submission it is because – and if I give you an example –

WILLIAM YOUNG J:

Sorry, I've actually put it incorrectly. The ordinary course of business defence would have mopped up most continuing business relationship cases completely so that there would probably be no liability at all. But those defences could also have been addressed, probably not quite so effectively from the point of view of the creditor under the old section 296(3), because there would be a change of position.

MR BRANCH:

Potentially Sir but the change of position required you getting credit for something that you had done after – the ordinary course of business meant that you just keep in, you didn't have to justify it in anyway. Sir if I could give you an example of the two –

WILLIAM YOUNG J:
Okay, yes.

MR BRANCH:
So if there had been 10 payments of $1000 over a course of a period of trading, and then each of those under the old regime was found to be in the ordinary course of business, they would not be repayable, that's the starting point. If you take the same scenario and now treat the start point and the end point as the continuing business relationship, and the start point is zero and the end point is zero, the effect is the same. But the benefit is that you don't have to go through and analyse each individual payment to see if each one was in the ordinary course of business. It's assumed from the finding of the continuing business relationship. So the effect is the same except it's made it much simpler.

Now there's an issue around –

WILLIAM YOUNG J:
Characteristically though, I mean in insolvency situations it doesn't work quite like that, does it?

MR BRANCH:
I'm about to say, there's an issue around where you pick the starting point, and that's a little bit unsettled at the moment, but where it provides certainty for a creditor is, at least when you get in a position where you're doubting the solvency or you've got suspicions, you can identify your risk. You can say, okay, the peak at the start of the two year period or the peak indebtedness is X. That's my starting point. My end point is Y. I know my risk. My risk is the difference between those two numbers. If it's higher at the end, I have no risk because there's been no preference. If it's lower at the end –

WILLIAM YOUNG J:
Well, you've got quite a big risk, actually, of course.

MR BRANCH:
Well, no. Well, you're not going to get paid.

ELIAS CJ:
No.

MR BRANCH:
But you're not at risk from the liquidator asking you for something extra, as well. In most cases, it will be the other way. There will be a net difference and you will have to pay that back to the liquidator.

Now, what the continuing business relationship allows you to do is to continue to trade, and you know that if you don't alter that starting position and that end position you'll never be up for more than you currently are, and the benefits of that are twofold. First, it allows the company to continue to trade with its creditors in the hope of things coming right, and the creditor can do that and make profit on those future transactions and may well recover sufficient that when the liquidator asks for it back, that's been covered. So the continuing business relationship encourages continued trading, and that has to be good, in my submission, in an economic sense.

GLAZEBROOK J:
Well, not continued trading when insolvent, which is what you're assuming there, isn't it?

MR BRANCH:
No.

GLAZEBROOK J:
Because they shouldn't just trade in the hope that things come right if they're insolvent.

MR BRANCH:
No, your Honour. I'm assuming that through that period with the risk of the creditor the creditor is just worried that there is a position that is there but doesn't have knowledge of actual insolvency, and at least knows that as long as that continuing business relationship continues, it will only ever be the difference between the start point and the end point. So where that continuing business relationship might come to an end is unsettled, but in principle in my submission the continuing business relationship test has adequately replaced the ordinary course of business. That's my principal submission.

So the argument is put up that in some way ordinary course of business which was, in a way, knowledge-based, has been taken away from them. In my submission, they've got an adequate replacement.

GLAZEBROOK J:
What about for one-off creditors, which was the point made by two of your friends?

MR BRANCH:
I come on to that, your Honour. The first is that they still have available to them alteration of position. They won't be able to satisfy the gave value requirement, but the Court of Appeal has said that forbearance to sue, for example, could be alteration of position. So a one-off creditor could do that.

WILLIAM YOUNG J:
In practice, how is that going to – I mean, again, in the context of an insolvency …

MR BRANCH:
Well, your Honour, just whether you can invoke section 296(3), being did you alter your position?

WILLIAM YOUNG J:
I didn't sue someone because I wouldn't have got any money, anyway, if I had.

GLAZEBROOK J:
Because I've already been paid.

MR BRANCH:
Sorry, your Honour?

WILLIAM YOUNG J:
I mean, if I'm paid – I'm owed $10,000 and I'm paid, and I say, right, well, if I haven't been paid I can sue.

MR BRANCH:
Yes, your Honour.

WILLIAM YOUNG J:

But how and why is that an adverse change of position? Presumably if I'd sued I either would have wasted my money or alternatively I would have recovered money and it would still have been picked up under the preference provisions.

MR BRANCH:

That might be the weakness in the argument but the Court of Appeal has recognised that forbearance to sue, because you're being asked to give the money back, might be alteration of position. But another example –

GLAZEBROOK J:

It doesn't make any sense to me because you can't forbear to sue for something you've already been paid for.

MR BRANCH:

No, your Honour, forbearance to sue will come before the payment, so in some way you do something, you don't sue, and then you –

GLAZEBROOK J:

But you haven't changed your position.

MR BRANCH:

Well, it might be in the circumstances that there has been a change of position because in some way you're worse off than if you had proceeded because you're going to have to give the payment back to the liquidator. You may have been better off if, at that point in time, you had continued on and applied to liquidate the company, for example, if it was two years before. So there's that bit of guarantee, in my submission, would be another example, so you might say that I've released the guarantee of someone and in that case you wouldn't have done that if you hadn't relied on the validity of the payment. So even the one-off supply –

GLAZEBROOK J:

I can understand that. I just can't understand the previous submission,

MR BRANCH:

All right, your Honour. In my submission, those one-off creditors have to be given the knowledge from whichever source that they are at risk, and so then they should look

at how do they protect themselves? Do they take guarantees? Do they take security? If they know they're at risk, they can factor that into their economic decisions.

GLAZEBROOK J:
But if they know they're at risk, they can't avail themselves of 296.

MR BRANCH:
Your Honour, all I'm saying is, they know they're at risk that they don't get to rely on the continuing business relationship. Nothing more than that.

GLAZEBROOK J:
All right.

MR BRANCH:
So that's my starting position on the ordinary course of business and the continuing business relationship, and before I go to my summary I'd just like to pick up on a couple of points that my learned friend Mr Temm made. He talked about the requirement for equity or the inequitable situation being removed. Well, in fact, that was an improvement for creditors because the old section used to provide that the creditor had to show that it would be inequitable to order recovery, so the onus was on the creditor to prove that it would be inequitable, and that's been removed. So, in fact, that's of benefit for the creditor, and that's aimed at this idea that there should be more certainty, more black and white, and in my submission that's what the interpretation that the liquidators placed on it provides. Some people don't like the effect of it, but in my submission they can't argue that it's not black and white.

Finally, in relation to my learned friend Mr Temm's submissions, there was a suggestion that the Court of Appeal have said there was a wide policy option and a narrow policy option. With respect to Mr Temm, I don't accept that that's what the Court of Appeal said. What the Court of Appeal said was, there are two policies. There's the policy that's being advanced by the liquidators, effectively, and then there is the Australian policy, and what the Court of Appeal said, either of those policies will work. But our task is to decide which one of those policies Parliament intended. So it wasn't about a narrow or wide, it was just saying which policy does New Zealand wish to adopt, the same as Australia or the one that we have effectively had since 1967?

WILLIAM YOUNG J:
Sorry, what was 1967?

MR BRANCH:
Your Honour, that's where we changed from just being a lack of notice, so bona fide purchaser for value without notice. That used to be the defence. Then in 1967 we added the detriment requirement, so alteration of position or something to that effect. I will come to that.

So now, your Honour, if I take you to my summary.

ELIAS CJ:
So how do you say we differ from Australia in the way that's material to this appeal?

MR BRANCH:
We differ because of the position that everybody has accepted that Australia is effectively a knowledge-based system, so *Buzzle* and the other cases seem to proceed and everybody in this forum, anyway, has seem to accept that gave value will always be satisfied because it goes back to the original transaction and therefore it turns into, effectively, a two-stage test, good faith and suspicion of insolvency. So that – and that policy, everybody says, has worked. I accept that. The question is, is that what we want or is that what was intended or did we intend to maintain a detriment-based requirement on top of those two requirements? In my submission, that's the essential issue here, what was intended in relation to that third category

ELIAS CJ:
If Australia has a transactional requirement, though, is there any – if whatever the name of that case is, *Buzzle*, if *Buzzle* is wrong, or are you going to take us to some other authority?

MR BRANCH:
No, your Honour. In my respectful submission I think *Buzzle* is wrong but everybody has proceeded on the basis that the law or the reasoning that sits behind *Buzzle* has been consistently applied in practice in Australia.

ELIAS CJ:

So if *Buzzle* is wrong, then there isn't any material difference between the two regimes, is there?

MR BRANCH:

No.

GLAZEBROOK J:

And has *Buzzle* been applied even before *Buzzle* in practice in Australia? I say even before *Buzzle* because …

MR BRANCH:

Your Honour, I have the corporate text and one of the points I make in my submission is that this whole idea of what valuable consideration meant just seemed to get no traction at all, no discussion, and then *Buzzle* comes along and so it pops in there. Of course, *Buzzle* was after these changes. But if you go to suspicion of insolvency there's pages and pages and pages, so it just seems to be that in Australia they just haven't worried about whether it was right or wrong or no one's decided to have a crack at it. So it's just continued on in that basis but, Chief Justice, in my submission it probably is the case that there is no difference. It's just they haven't applied it correctly.

And one of the reasons I say that is because if you look back at the test for valuable consideration in an insolvency setting, the Courts, in my submission, have consistently said, "You need something more than something that would support a simple contract. You need real and substantial value," and that's the same wording that the Court of Appeal used and I can take you to the authority on that. So in my submission, yes, the Australian position hasn't correctly applied that. So if you just –

ELIAS CJ:

So what are you talking about there? Are you talking about our position or the Australian position about valuable consideration?

MR BRANCH:

I'm talking about the Australian position.

ELIAS CJ:

In insolvency?

MR BRANCH:

Yes.

GLAZEBROOK J:

Well, nobody is suggesting that if you look at the original transaction that full value wasn't obtained. There's not a peppercorn consideration in these cases. There's real and substantial consideration. Isn't the real question whether you go back to the original transaction or just look at the repayment?

MR BRANCH:

Yes, your Honour. My comments in relation to that were on the assumption that you're looking at the payment.

GLAZEBROOK J:

Yes.

MR BRANCH:

And I think in my submission that's the correct point that you should be looking at.

GLAZEBROOK J:

And it doesn't make any sense to say you're getting full consideration for that, though, does it? Because you're not going to – as I put to one of your friends – pay $100 to get $100 back.

MR BRANCH:

No, your Honour. Generally speaking at that point in time it will be supplied further goods or something to that effect, which will – which you'll get the benefit for under the continuing business relationship, but again in relation to the Australian position it seems to be assumed that under the transaction, and the definition has somehow widened it, and that that allowed the Court to take a wider view. Now, again, the view can be taken that that's not the right approach and the approach should be the same on either side, but in my submission even if valuable consideration is used something more than something which would support a simple contract is required, and in the case that you have an insolvent company, it may well be that the

consideration of releasing them from that debt is worthless. I mean, what is the real value if the company is totally insolvent you're not going to get any money from it and yet you claim consideration on the basis of releasing them from the obligation to pay you, the consideration was worthless.

But my submissions have been predicated on the position that we are not the same as Australia and one of the reasons is that we have deliberately not used valuable consideration in the section, and yet we have used valuable consideration in section 296(1) and (2). In our legislation, section 296(1) and (2) use the words "valuable consideration". When we get to 296(3) it changes to "value".

ELIAS CJ:
What's the difference between valuable consideration and giving value?

MR BRANCH:
It gets back, your Honour, to the discussion we've just had. The Australian approach seems to be the valuable consideration is satisfied for release of the antecedent debt.

ELIAS CJ:
No, I'm just asking in terms of a submission on whether those two terms could ever really be different, not their application, which may have some technical baggage, I suppose.

MR BRANCH:
It is different because valuable consideration can just be sufficient to support a contract and yet what our submission is that will not be enough under 296(3), therefore value must mean something more than that and the Court of Appeal have said real and substantial value, so that's the essence of the argument, that we've used a different word to mean something more than just the release of the antecedent debt.

WILLIAM YOUNG J:
It's just very hard to see how the first bit of section 296(3)(c) is ever going to apply. On the Court of Appeal approach, it's difficult to see how section 296(3) is going to apply in full. On the Court of Appeal approach, it's virtually never going to be the

case that value's going to be supplied and on the appellant's approach it's virtually never the case that a creditor will have to rely on change of position.

MR BRANCH:
Sir, I have a submission on that point, Sir, and it's not a big one but in my submission explains why we could have ended up with that situation and that's contained at paragraph 82 of my submissions. I'll ask your Honour to read that.

WILLIAM YOUNG J:
All right.

ELIAS CJ:
I suppose the very existence of a distinct provision about under value has –

MR BRANCH:
Yes, Sir. Section 297 used to have its own defence so it used to say basically under value and then you had satisfied the good faith no suspicion type arguments. Now, they moved that out and so now all the liquidator has to show in the 297 is the under value, then you flick to section 296(3). So my submission is that if you'd just left it with alteration of position, that person in that transaction probably wouldn't satisfy that because they generally don't do anything after the transaction. But they will generally have given value.

WILLIAM YOUNG J:
But it's the under value to –

GLAZEBROOK J:
Does 296 apply to 297?

MR BRANCH:
Yes, your Honour, it does.

GLAZEBROOK J:
How?

ELIAS CJ:
Whether under this Act –

GLAZEBROOK J:

Well, it's setting aside of a transaction under 295. You think that that's more general?

MR BRANCH:

Yes, your Honour. If you look at 297 there's no defence mechanism any more. It just says if the liquidator proves an under value, then it's an under value transaction. Then you flick over into 296(3) and the rationale there was completely different to voidable transactions. The rationale there is, if it's under value that doesn't matter. Companies enter into transactions at under value for all sorts of reasons, so provided it wasn't a gift, if there was some consideration there, then the party gets to keep the benefit of that transaction even though they got a bargain. That's the way that section works.

GLAZEBROOK J:

Well, that argues against your gave value means full value, then.

MR BRANCH:

Your Honour, I'm not suggesting gave value gave full value. I'm going with the Court of Appeal in real and substantial. So I'm saying that when you flick over to 296(3) you look at it and say did that party to that transaction that got a bargain, did it provide value? Yes. And they get to keep that benefit, and what I'm saying in relation to creditors, they will mostly fail that first one and we'll be left with the test that we've always had.

GLAZEBROOK J:

I think you're probably going to have to go over that again in how 296 relates to 297.

MR BRANCH:

Happy to do that, your Honour.

ELIAS CJ:

All right. We'll take the lunch adjournment now, thank you.

COURT ADJOURNS 12.59 PM

COURT RESUMES 2.17 PM

MR BRANCH:
Thank you, your Honour.

Your Honour Justice Glazebrook asked about section 297 before the break. If I could please refer the Court to tab 19 of the respondents' bundle.

GLAZEBROOK J:
It would actually have been a bit more helpful if counsel had just given us the legislation in one bundle rather than referring us to about five different bundles.

MR BRANCH:
Yes, your Honour.

GLAZEBROOK J:
Maybe we can use the Hiway bundle of authorities because that actually seems to have the full …

MR BRANCH:
Yes, your Honour. I didn't get served with a copy of those.

GLAZEBROOK J:
I don't know whether you've got the full one in yours.

MR BRANCH:
I've got from 292 through until 301 in mine, Your Honour.

GLAZEBROOK J:
Right, well, if you're more comfortable using yours, but it just is – I've got tabs everywhere through everybody's bundles now for the same legislation.

MR BRANCH:
Yes, your Honour.

So section 297 is at page 285 of my bundle and subsection (2) provides that a liquidator may recover the difference in value. So that's the starting point. If there's an under value transaction then a liquidator has the ability to recover. If we go to

section 295 which is – sorry, 296, I should have said, 296(3) which is on page 285, it talks about a court must not order the recovery of property of a company whether under this Act or any other enactment, so 296(3) is designed to be the defence mechanism for 297, where previously 297 used to contain its own defence mechanism, and so I'm not making a big point of this but my submission is that that might explain why gave value has ended up in there when it won't be very often used in the case of a debtor-creditor relationship.

WILLIAM YOUNG J:
But on that basis, because I think it was put to you before lunch, value means any value at all as opposed to market value or something similar.

MR BRANCH:
That's right, your Honour. I still say it was real and substantial but it doesn't have to be market value and that's been the case for –

WILLIAM YOUNG J:
Where did you get "real and substantial" from?

MR BRANCH:
I get that from the definition that the Court of Appeal –

WILLIAM YOUNG J:
Where did they get it from?

MR BRANCH:
Well, they get it from the old – I can take you to the case where they get that from, your Honour.

WILLIAM YOUNG J:
It's in their judgment, that line?

MR BRANCH:
Yes, it's in the judgment.

ELIAS CJ:
But they don't cite authority for it, do they?

MR BRANCH:

No, your Honour. There is some authority. It's in volume –

GLAZEBROOK J:

It doesn't actually make sense to say there's a transaction that is under value but it's okay if you gave some value. Well, by an under value you've got to give them value anyway if you acted in good faith.

MR BRANCH:

Well, your Honour, that's the way it has been even under the old section, because there's a recognition that the normal – the sanctity of contract –

GLAZEBROOK J:

Well, what was the old section, then? It was the change of position, wasn't it?

MR BRANCH:

No. The old section for under value was an under value, good faith, and no knowledge of insolvency, or words to that effect. So previously the defence that is now effectively –

ELIAS CJ:

What was that under? Was that under –

MR BRANCH:

Under section 297 itself, so section 297 used to have –

ELIAS CJ:

Oh, this has been substituted, of course, yes.

MR BRANCH:

Yes, as part of these reforms.

GLAZEBROOK J:

But (c) doesn't make any sense in the case of an under value, even with gave value for the property in there, does it?

MR BRANCH:

In my submission it does, your Honour, because there was a fundamental difference with 297, that is because of the sanctity of contract, so the position has always been that provided there was a transaction under value the beneficiary of that transaction still got to keep it, provided they didn't have knowledge. That's just because the court or the liquidator shouldn't be able to go around after the event and attacking transactions which, on their face, are under value but the company may have had good reason to enter into that arrangement, but if there's no value for that transaction, or not real and substantial value, then it can be upset. But the threshold for an under value transaction is set very low.

WILLIAM YOUNG J:

Where was the defence to the old section 297?

MR BRANCH:

In 297 itself, your Honour.

WILLIAM YOUNG J:

I'm looking at the version between 1999 and October 2007.

MR BRANCH:

Yes, your Honour. That's in tab 18 of the respondents – it's in ours, your Honour. Tab 18. You'll see in subsection (2) where the defence was. In (d), when the transaction was entered into, the other party to the transaction, you ought to have known the company would become unable to pay its due debts as a result of the transaction.

WILLIAM YOUNG J:

Well, that's not really part of the defence. That's part of the liability provision.

ELIAS CJ:

Well, it's not a defence – well, not sure that it's properly described as a defence in either position.

GLAZEBROOK J:

That applied to gifts as well, that section.

MR BRANCH:

Yes, it did but it wouldn't have – there wouldn't have been any value or consideration provided so you would have to pay that back in that situation because there's no basis for the contract. So 2(d) is effectively a knowledge-based criteria that if you knew, or ought to have known, the company would be unable to pay its due debts, so that's the suspicion of insolvency equivalent, then you had to pay the difference in value back. Now that –

GLAZEBROOK J:

Do you say you had to pay a gift back but not because of this provision, because (d) would still protect you. It would have to be the Property Law Act provision.

MR BRANCH:

Or my learned friend Mr Temm pointed out, the sections which deal with payments to related parties where there's no consideration, et cetera. The important point in my submission –

ELIAS CJ:

I'm sorry, I'm lost. Can you tell me what we're looking at? It's 292?

MR BRANCH:

The submission I'm making, your Honours, is that section 297 used to have its contained defence, and if we look at the new 297 –

ELIAS CJ:

No, I just want to look at the old one for this submission. Where we were looking at? Tab 18.

ARNOLD J:

297(2). It's a few pages on.

MR BRANCH:

Page 277, your Honour.

ELIAS CJ:

Yes, thank you.

MR BRANCH:

So the current 297 effectively stops after subsection (1).

GLAZEBROOK J:

But just putting it to you again, the current section with gave value doesn't replicate this section because you didn't have to give value under this section to avail yourself of 2(d) or is there something I'm missing?

MR BRANCH:

No, your Honour, I accept that. But my point is that they've taken the knowledge-based requirement which used to be a defence and put it into 296(3), so they've taken it from 297 and put it in 296(3). So all I'm saying it might have been that if it was a gift, then it would now be repayable under 296. I don't make a big point of it, your Honour. I'm only trying to suggest one reason why gave value might have ended up in 296. I don't intend to take it any further, unless you require me to.

GLAZEBROOK J:

Just in terms of the release of a debt not being valuable, if you were, say, two years out, even if a company was insolvent, you may actually have got 80 cents in the dollar. The release of an 80 cents in the dollar debt is actually quite valuable. It's a real and substantial benefit, isn't it?

MR BRANCH:

I'm sorry, your Honour, I don't quite follow.

GLAZEBROOK J:

Well, I thought your submission earlier was the release of debt entailed in a payment can never be valuable consideration, but you can be insolvent and still land up with, say, 50 cents in the dollar. It's still going to be a real and substantial benefit to get released from that debt, isn't it? So not all of the release of debts will be valueless, will they?

MR BRANCH:

I accept that, your Honour, but it's more that for the – it gets back to the issue of new value, but also that release of that antecedent debt is effectively executed or past consideration, so what we're looking for here is something new and something

different and not just doing something which you were probably bound to do under the original contract, which was release them from the debt if they paid it.

GLAZEBROOK J:
All right. It's just that you had indicated before it's of not being of value, but you say it's not of value because it's past consideration. It's not new value. Is that the submission?

MR BRANCH:
Yes, your Honour. I would say in some circumstances it might not independently qualify as valuable consideration because, in fact, it was worthless but I accept your Honour's point in some cases it might not be the case.

GLAZEBROOK J:
So you'd read new value into subsection (c)?

MR BRANCH:
In my submission, it's value at the time of the transaction or linked to the transaction and so that leads you to say new value but in my submission you don't need to add those words in there. You get – that's the effect of what you get from having value at the time or linked to the transaction.

If I could refer you to page 6 of my submissions and paragraph 20, and this is where I'm looking at the cross-check of the purpose against the interpretation that is being advanced by the appellants, and in paragraph 20, in my submission, there was a watershed change in 1967 and what that – what happened there was, and I've got that in the last sentence, the intention-based nature of the regime remained but it was, at this point that the alteration of position defence was introduced for preferred creditors and substitution of the bona fide purchase of payee defence. So at that point we moved away from a knowledge-based system and we've replaced it with knowledge plus detriment, and I've just set out in paragraph 21 the section which clearly shows that notwithstanding good faith and valuable consideration, they can still be set aside.

So over the page at page 7 –

ELIAS CJ:

It's non-knowledge and detriment?

MR BRANCH:

Yes, knowledge-based in the sense of lack of knowledge, your Honour, exactly. That's the point made in paragraph 22 of my submissions, so it's saying that in 1967 there was a fundamental change, and that remained all the way up until the latest round around 2006, which we're dealing with, and my principal submission is that there's nothing in the material, Parliamentary or otherwise, which signals that we've moved or intended to move away from that fundamental position.

If I could please refer you to page 13 of my submissions, and in particular the second bullet point which refers to harmonising. My learned friends for the appellants have referred to the intention being to harmonise the two voidable transaction regimes in New Zealand and Australia. In my submission, I'd just like to point out that harmonising is used in the sense of harmonising the voidable transaction provisions in the Insolvency Act and the Companies Act, so that's where harmonising is used.

If we could move on to page 17 of my submissions –

GLAZEBROOK J:

And you're going to take us through why they're harmonised now?

MR BRANCH:

No, your Honour. I'm saying all along that there wasn't a desire to harmonise to the extent that the two sections have the same effect, so while there might have been an intention to align and adopt defences like the continuing business relationship, there was no intention to turn the New Zealand test into exactly the same lack of knowledge test that Australia appears to have followed.

GLAZEBROOK J:

Sorry, I thought you were talking about harmonising insolvency in the Companies Act test.

MR BRANCH:

All I'm saying, your Honour, is that my friends in their submissions have said there was an intention in the material to harmonise Australia and New Zealand. I'm just

pointing out that the harmonisation word was used in the context of harmonising between New Zealand legislation.

Page 17, your Honour. There was a question asked about when the Australian regime came into force. That's covered at paragraph 49. It was in the Corporations Act 2001 but it was actually 1989 that they had issues regarding jurisdiction so they re-enacted it in 2001, but effectively it was 1989.

ELIAS CJ:
Of course, yes.

MR BRANCH:
Your Honour, on page 20, I wish to come on to some significant features of the Australian regime which are not present in the New Zealand regime. Under our 296(3) it applies a defence to all matters under the Companies Act but also any other Act, and I just point out that in Australia there are some, a couple of carve-outs that don't get the effect of that defence, so it's not – their defence is not as all-encompassing as ours.

In paragraph 60, it's my submission that it's an important point –

ELIAS CJ:
These provisions came in, as you mentioned earlier, at about the same time, about 2001, was it?

MR BRANCH:
1989, validated in 2001, yes, your Honour, that's my understanding.

ELIAS CJ:
Because this is a model Act, isn't it?

MR BRANCH:
Yes, your Honour. In paragraph 60, I just set out what, in my submission, is a very important difference in the two regimes.

At section 588FH, it allows liquidators to recover payments which were made for the benefit of related entities. So if the company made a payment to a creditor whose

debt they had guaranteed, or any related party to the company had guaranteed, then the Australian Act gives the liquidator the ability to recover it from the person who benefitted from that payment, the person who's been released from the guarantee. So no such disincentive will apply if the appellants' arguments are accepted here, so provided you can keep your key supplier, the ones that you might like to continue with in your next business, provided you can keep them in the dark as to solvency or suspicion, then you can make sure that those people will not have to pay the money back, and if those people are the ones that you've guaranteed, then you will also be able to make sure that you'll be released from your guarantee, so in Australia if it is lack of knowledge-based they have some other tools that they can use. You can't go around preferring people just because they've got a guarantee from you. So again, if we're looking at whether we're looking to replicate exactly the legislation in Australia, we really need, in my submission, to look at everything and they've got protections which we won't have here.

I'm now on page 21, which is the reply to the appellant's submissions. I just point out at paragraph 63 that there's a complaint that this isn't fair. It isn't fair that the person who has got the money should be able to – should have to pay it back. That ignores the underlying principle which it is fair that people should share rateably from the point of insolvency, and the Law Commission noted that in this case some measure of commercial certainty is sacrificed in favour of fairness to all creditors, and that commercial certainty will be who gets there first gets to keep it, and they're saying, well, while that might sound nice and the person in the street might think that's fair, that's not the way the pari passu underlying principle should work.

I move on to page 23 and paragraph 70 and just deal with this –

ELIAS CJ:
Sorry, your reference doesn't give a reference to a page number in your report.

MR BRANCH:
What I just referred to?

ELIAS CJ:
Footnote 46.

MR BRANCH:

Yes.

ELIAS CJ:

It doesn't matter if you don't have it handy, but I'd quite like to remind myself.

MR BRANCH:

I've got here a bundle of authorities tab 22, page 326.

ELIAS CJ:

Yes, 326 is the covering page. It's all right. It doesn't matter.

MR BRANCH:

Your Honour, moving on to page 23, and that's dealing with the commercial uncertainty and unworkability, which is what the appellants say will happen if the Court of Appeal decision is confirmed, in my submission what the Court of Appeal decisions have done is return the commercial world to the position that has been in place for the last five years, and in that period of time we've had the GFC and we've had probably a higher level of liquidations than would normally be the case. And yet throughout that period, the system has worked. It's not until these cases have come along and challenged that underlying belief that everybody had that we're now faced with this, but in practice all the concerns that have been raised haven't been realised to date.

ELIAS CJ:

I can't remember, did you cite some text or authority as to the previous agreement on what the provisions meant on this point?

MR BRANCH:

Yes, your Honour. We referred in paragraph 71 to the various authorities which you've just followed.

ELIAS CJ:

I see, yes.

MR BRANCH:

That's footnote 51, so the various decisions were just followed the approach and also the –

ELIAS CJ:

But do they deal with the point in issue here?

MR BRANCH:

Yes, your Honour, they do, and then in – I note in the *Madsen-Ries v Rapid Construction Ltd* [2012] NZHC 3572 case, in that case is on the basis of alteration of position and without considering the gave value defence, and so in a way even in that situation the Court has skipped over that as it can't be satisfied as focused on alteration of position. But specifically those cases are proceeding on the basis of new value.

ELIAS CJ:

Thank you.

MR BRANCH:

Paragraph 73 just talks about the replacement of the ordinary course of business and the continuing business relationship, which we've already discussed in detail.

Paragraph 74 on page 24 just picks up on that point that what the appellants now say is that it almost never would be employed, that's the value criterion, because creditors would not be aware that payments have been made and one-off suppliers of goods would not be able to avail themselves of the gave value defence.

In my submission, that doesn't address the underlying purpose of the regime. The regime isn't to allow creditors to make a further supply so as to keep the money. Our system is based on one of detriment, so that it's to make sure that the creditor is no worse off for having made the value or alteration of position.

So it's not a case of saying, "I can go out there and make another payment and therefore shore up my position against other creditors." That's not what, in my submission, the legislation is about. It's about making sure that from the point of insolvency, the creditors share rateably.

Paragraph 78, I just deal with one-off suppliers and in my submission they are again going to be relatively rare. Most of the matters which will come in front of the Court will be in relation to debtor-creditor and continuing business relationships, but to the extent they aren't, then –

WILLIAM YOUNG J:
Why, because it's likely to be continuing creditors in continuing relationships that will get preferences?

MR BRANCH:
Well, your Honour, more that if you look at the business activities of a company I would suggest that the greater majority of them will be month by month continuing and the exception will be the one-off suppliers, so you might have a one-off project but generally speaking you'll be dealing with the same people each month so that – and that's all I base that on.

GLAZEBROOK J:
There's lots of people who'd have one-off suppliers and things, wouldn't there?

MR BRANCH:
Yes, your Honour, and I accept that they are not going to be able to avail themselves of the continuing business relationship test because they're a one-off. I accept that. But my submission is that –

GLAZEBROOK J:
With a two year period?

MR BRANCH:
A two year period, your Honour, that's right, but it has to also be accepted that the further you go back in the period the harder it will be for the liquidator, who has the onus, to establish their point of insolvency because it's not a two year absolute –

GLAZEBROOK J:
I suppose you're much more likely to have had a change of position in that period as well, I guess.

MR BRANCH:

Yes, your Honour, and two years before it's, it would happen but the idea that a company traded insolvently for two years but I accept that one-off suppliers will need to look after themselves in this situation.

Turning at page 27 paragraph 24 – sorry, paragraph 84, it's submitted that the appeal is upheld. It will fundamentally alter the voidable transaction regime, and this has been discussed. It's difficult to imagine a case where a creditor who can satisfy 296(3)(a), which will be by, if the argument is accepted, that release of the antecedent debt, then everybody's going to satisfy that and therefore alteration of position is going to become redundant.

So that brings us to what this could do to the regime, and that's set out in paragraph 85, and that is that even though the onus is on the creditor to prove a lack of knowledge of suspicion of insolvency, the reality is if they say nothing then – and the liquidator frequently has incomplete records – it's going to be difficult for a liquidator to upset that. Generally, the creditor is going to say, "Show me what you've got," and then, and if the liquidator hasn't got anything to show suspicion of insolvency, then they're not going to say anything. And the liquidator doesn't get the benefit of discovery, so you don't get discovery under this procedure unless you formally ask for it, but it's not as of right and, of course, discovery has a cost, and in many cases the liquidator doesn't have the money to be able to take that step.

Paragraph 86 is a repetition of what I said before, but it will allow preference. It will allow the insiders of a company to keep preferred creditors in the dark, and it's easy enough to keep them in the dark just by paying them. Pay them on the 20th of the month. You might be incredibly insolvent, but as long as you keep paying these people on the 20th of the month, the liquidator will never be able to challenge them on the ground of knowledge, and therefore without the gave value requirement they'll get to keep their money. As I said before, in Australia there's the ability to maybe go down a different route.

GLAZEBROOK J:

Only for association of related parties, though.

MR BRANCH:

That's what I'm saying. For Australia that's the case, yes, your Honour.

GLAZEBROOK J:
So it wouldn't help your situation?

MR BRANCH:
Well, I haven't had a look but I did notice that there was a carve-out for unfair – there were two specific categories which weren't caught by their equivalent and I suspect that a lot of those would fall under those carve-outs.

So, your Honour, those are my submissions unless there's any further questions.

ELIAS CJ:
Thank you, Mr Branch.

MR BRANCH:
That reference, that page number, was page 344 and footnote 46.

ELIAS CJ:
Yes, Mr Keene, thank you. Thank you, Mr Branch.

MR KEENE QC:
I will deal with limited points because we have been over quite a lot of the material and it probably doesn't improve with repetition. It only confuses.

My first proposition is that I will obviously endorse and adopt Mr Branch's submissions. In particular, the notion that the ordinary course of business test is, had been taken away and therefore there was a need for one to give a wide meaning to section 296(c) and giving value is answered in relation to a running accounts by the existence of the running account provision which, as my friend has explained, has actually cut down a lot of the procedural difficulties and has caused there to be a quite sophisticated and certain regime. It is undoubtedly true that in relation to a one-off payment that regime does not apply and the question really is how would those avail themselves of the 296(3) procedures and I think the exchange between my friend and your Honour Justice Glazebrook in terms of the time and in terms of the alteration of position and in terms of the sheer difficulties which time puts on a liquidator and having to deal with these situations is likely to be the best that can be said.

This area of the role played by the liquidators and the rights of the creditors is, of course, confounded by the fact that in liquidation situations there were always losers and there's always some reason why a creditor wishes to hang on to an advantage and some anomalies. This is just an anomaly but at the price for the anomaly is the sophistication ease of the system that has now been set up and in my submission that's a small enough price to pay.

Policy reason for why that might exist is that when a creditor is in the course of continuous supply, that creditor is more important to the continuation of the company and there is obviously some public good in allowing some reasonable basis for the company to continue on, particularly when it's not known by the creditor that there is an insolvency and some companies do come out of insolvency and there is a public good in that. I think that it is also important, perhaps, to emphasise that the one-off creditor, by definition, comes to the company with a new view about risk and if there is a new view about risk and that risk is not properly evaluated then that person might be different from a person who has had a continuous supply and has taken a risk viewed based upon history, so there could be policy reasons behind those things.

The question of the issue of value – I now turn to a new point and in particular this issue of whether there needs to be new value is dealt with most particularly in our submissions in relation to the Hiway appeal, and if I could ask the Court to have those submissions and if I may take you briefly through paragraphs 27, 28 and following so that our case, our position on this is made clear.

The issue that we address in there is the submission by the appellants that there is a conflation between the antecedent debt transaction from which the debtor-creditor relationship springs and the transaction under which payment is made and in 27 we make some notes which, if I start with (c), perhaps, in looking at 296, the first and second limbs that need to be met are limbs which relate to the state of mind and the reasonable state of mind, indeed, of the creditor. My friend has also already intimated that that state of mind is something that is not necessarily easy for a liquidator to unpick, and part of the thought process behind these changes is to try and make things more clear for the purpose of liquidators making recoveries for the benefit of creditors, thereby giving teeth to the pari passu rule.

So in (d) we talk about the conflation of the insolvent transaction with the impugn transaction, which is the payment of the money, and we say that the transaction to which 292 and therefore, for the purposes of this appeal, 296 applies, is those which relate to the payment of money and you will see at the last sentence in (d) that we take up the point which your Honour Justice Glazebrook made that it's not the case that the supply contract is the contract can be reviewed and avoided because that is clearly not what happens either in New Zealand or in Australia. So we, in my submission, are clearly talking about the payment transaction and not the supply transaction.

ELIAS CJ:

Well, it doesn't exactly leap out, though, from the submission. But that's the submission you make.

MR KEENE QC:

Yes, indeed.

GLAZEBROOK J:

And the release of debt, do you give the same answer as Mr Branch gave? The release of debt that happens at the time of the payment.

MR KEENE QC:

Well, if one said that the release of debt is to be seen as a value added, then you've then got to ask yourself so what is that value? I know that the point has already been made that early on in the difficulties of the company that ultimately turns insolvent there could be some real value behind that, but what happens is that increasingly as it is eroded the question is if a payment is made to a creditor of a sum of money and the real value of the debt is some proportion of that sum of money, is it to be said that the person who then relies upon the defence and says this is gave value, that person has actually broken out of the whole bond of the pari passu rule, which in my submission is not the intention, and this does lead on to the next issue, which the Court has examined, which is why should we be saying that the word "value" actually means real and substantial value as opposed to valuable consideration, if that term is used as that which would support a contract? The reason for that, in my submission, is that we have under subparagraphs (a) and (b) of 296 a regime that is totally in the mind of the creditor, and the creditor's mind may be less than easy to prove or disprove. They will come to Court and they will say whatever they've got to say, and

unless there's some very strong evidence that indicates that the two tests of (a) and (b) are not met then the position becomes very difficult for the liquidator.

In this sort of situation, one would expect that the word "value" and the words "alteration of position" are intended to be very strongly factually based, so you can actually see what someone says has been the alteration of position, or you can see that there is a real value and not merely some kind of nominal value that might support a contract that has actually happened, and this last limb, limb (c) of 296(3) is the really only guiding point that liquidators can use to get to the position of saying, "Now, this is something you have to prove."

GLAZEBROOK J:
But doesn't the person have to prove they acted in good faith and they had a reasonable ground?

MR KEENE QC:
They do indeed, Ma'am.

GLAZEBROOK J:
Well, you said that unless there's evidence to the contrary they'll have proved it. Well, that's not the way the – that's not the way you prove things.

MR KEENE QC:
I understand, Ma'am, and perhaps I've gone too far in saying – I'll put this in a better way. If the creditor comes to the Court and gives evidence about subparagraphs (a) and (b) and talks about his mental state and talks about what he knew or what he did not know, it is a very difficult thing indeed for a liquidator to turn that around. So I'm saying that the real issue that these cases mostly contend with is subparagraph (c). The question, therefore, is, has there been an alteration of position and I absolutely accept your Honour's point that that must be proved by the creditor, but it is a factual position and it can then be looked at by the Court and I absolutely accept, also, that it is the creditor's job to prove the giving of value, but the question of what is value and how that value is to be looked at is something that is important to ensuring that pari passu is given effect to, except in limited circumstances. Now, my submission on value is that that value is to be that taking into account the perspective of the company, so someone may have entered into a detriment, but if there is not a value

to the company, that should not be weighed up in the scales of subparagraph (c) and –

GLAZEBROOK J:
The first paragraph is subparagraph (c), you mean?

MR KEENE QC:
Yes, the first part of subparagraph (c). If you want to go to the detriment, as I think your Honour's question pinpoints, then you go to the question of alteration of position. So this is a question, therefore, of whether whatever has happened upon which the creditor must prove has occurred actually is sufficient to trigger a value point as opposed to a nominal consideration point, and I suspect that that is behind the view taken by the Court of Appeal to say that we don't really want to have trivial arguments around this because, in fact, this is where – this is the fighting ground of all of these issues.

GLAZEBROOK J:
When will this apply? What sort of valuable consideration can you give or value to the company?

MR KEENE QC:
Well, I suppose there's two parts to my answer to that question, Ma'am.

GLAZEBROOK J:
Secondly, do you accept Judge Abbott, I think, saying that just forbearance of time and continuing supply isn't one?

MR KEENE QC:
Yes, I accept that. If I could say that there's two parts to the answer. The first part is that this is intended to be an unusual defence. It is not intended to be an everyday defence. It is not like the everyday defence that there ought to be in the ordinary course of business. So this is, in my submission, an unusual and strongly factually-based defence.

The second proposition is, what kind of transaction might give rise to this giving of value, and I suppose the answer to that might be initially since it's rare, who knows exactly how it's going to come out, but a situation which I have thought of is a

situation where a creditor might be owed an amount of money by the company and in order to ensure that he gets something he may identify some asset of the company and I've playfully thought of the managing director's vintage car, and in that situation come along and say, "You owe me this amount of money. I will buy this car off you at a price of such-and-such," and the company's directors look at that and say, "It's on our books and we think it would realise for something considerably less, so we are prepared to arrange to do this even though we know that the money is actually going to be – or the consideration is actually going to be in part of discharge of the debt." And so you find that the value of the – the overvalue of the car, according to the like view of the company has given value to the company and it may well be a situation like that that this sort of thing could apply to.

ELIAS CJ:

I can't see why you'd argue for that, that the overvalue in the transaction of payment, what is obtained then, is something that is immune from clawback.

MR KEENE QC:

I'm presuming that the transaction would be to acquire the vehicle at a –

ELIAS CJ:

Yes, but it would have to be at full value, otherwise you'd have a transaction at an under value.

MR KEENE QC:

No, no. The company, this is why I'm saying that when we look at the question of value, it is from the company's perspective. The company says, "We have this vehicle. We see its value to be $50,000. This person is prepared to forego recovery of the debt but pay us $75,000. As a result of this, we will receive $25,000 more than we expected and therefore there is a value behind that," and if that transaction takes place, then a liquidator subsequently comes along to attack the transaction, then the answer that liquidator may get, "Well, in the circumstances of this company, with what was done with this transaction, we actually received value and therefore we are entitled to rely upon subparagraph (c)."

WILLIAM YOUNG J:

Is it perhaps a little simpler to think that – to approach the case on the basis that section 296(3) is not confined to voidable preferences, whereas everything basically

– 296(1) and (2), do they apply to voidable preferences or are they more extensive too?

MR KEENE QC:
I mean, they're more extensive.

WILLIAM YOUNG J:
The awkward thing is that it comes in after the voidable preference provisions but before the other provisions, so it makes you think it's looking back but it's also looking forward, and it may be intended, or you can make it work by treating it as primarily applicable to what follows. This is really Mr Branch's point, I think.

MR KEENE QC:
Yes.

WILLIAM YOUNG J:
And perhaps any common law claims. Well, I can't think of common law equitable claims a liquidator might bring, and on that basis you can give meaning to value but it would have to be new value.

MR KEENE QC:
Yes.

WILLIAM YOUNG J:
It wouldn't have to necessarily be full value, but it would be new value, and it would thus exclude from the defence voluntary transactions of a kind which wouldn't normally be able to be justified in a Court of equity.

MR KEENE QC:
Well, on your Honour's first point, I certainly accept that the word "value" in 296(3)(c) applies across the board and there would be different nuances depending upon which of the particular remedy provisions you go to in that particular area. Having said which, I was challenged to give a comment about how this might apply to –

WILLIAM YOUNG J:

Just pausing there, I think section 296(1) and (2) are confined to voidable preferences, because they talk about the setting aside of a transaction or an order made under section 295 of this Act.

ELIAS CJ:

And it's only subsection (3) that is expressed widely, too.

WILLIAM YOUNG J:

I know. That's what I was saying, that subsections (1) and (2) look backwards. Subsection (3) looks backwards and forwards.

GLAZEBROOK J:

Although it doesn't fit very easily under a 297.

McGRATH J:

But 296(3) has come in separately, hasn't it?

GLAZEBROOK J:

Yes.

WILLIAM YOUNG J:

What did the predecessor say? Was the earlier section 296(3) just confined –

GLAZEBROOK J:

It didn't apply to 297 because there was an inherent …

WILLIAM YOUNG J:

A separate defence.

GLAZEBROOK J:

Well, it wasn't a defence, it was a –

WILLIAM YOUNG J:

Yes, a separate basis of liability.

GLAZEBROOK J:
I think they just mucked it up.

ELIAS CJ:
I just wonder whether, really, Mr Ormsby's argument isn't closer to the mark. Not that I think, ultimately, that it helps him, because he was suggesting that this is not – that if it's for new consideration it's not a voidable preference, and one of the reasons why I've been resisting when people talk about this as being a defence, is it is not expressed like that. This is expressed to be an impediment for the action that the Court can take and I don't see that it is inconsistent, if new value is given, that it is not a voidable preference. I don't see inconsistency between 292 and 296 necessarily.

MR KEENE QC:
So if the –

ELIAS CJ:
So if the transaction is simply to settle an antecedent debt, it is voidable. But – so it has to be a new value in a different transaction.

MR KEENE QC:
Well certainly acceptance, I admit that it has to be a new value. I am not sure how much further I can take your proposition.

ELIAS CJ:
Well the reason the Court can't order recovery of that property is because actually it is not a voidable preference. Because it is not within the definition.

MR KEENE QC:
Within 292, yes I understand your Honour's point.

GLAZEBROOK J:
I am not sure I do actually, why is it not within the definition?

ELIAS CJ:
Because it is not then - where is 292. It is not then a payment; sorry I have lost the place.

MR KEENE QC:
292(2).

ELIAS CJ:
Yes, 292(2).

GLAZEBROOK J:
I am still not sure I understood the point.

ELIAS CJ:
Well it is not a pre-existing debt.

WILLIAM YOUNG J:
Say it gets a payment of a pre-existing debt but there is other consideration.

ELIAS CJ:
Yes.

WILLIAM YOUNG J:
Is it a novation?

ELIAS CJ:
No it is not a novation, the Act provides for different transactions it seems to me.

WILLIAM YOUNG J:
Well if I am owed $10,000 by a company, and I say, pay that and I will give you discount of $100, I suppose I am providing some separate consideration but I am still getting a payment of the debt for the balance.

ELIAS CJ:
Yes. And the Law Commission report that you referred us to, it is all about antecedent debts, so that language is actually used which is why I wondered why you were saying that if you provided a sweetener, as in the sale of the car example. I always think analogies should be resisted, myself. Why you would accept that that would take the matter out of being a preference.

MR KEENE QC:

Well going back to my initial response. It is difficult to see how "the gave" value thing would work except in rare situations.

WILLIAM YOUNG J:

Perhaps it wasn't intended to. Perhaps it wasn't intended to apply to voidable preferences, it is intended to apply to sections 297, 98 and 99.

MR KEENE QC:

Yes, well that is quite probably correct except that if someone arrived with some curious situation or other, and that curious situation seemed to mesh with gave value certainly the defence is available if you can bring whatever that curious fact situation is, into gave value.

WILLIAM YOUNG J:

But the more curious the fact situation, the less likely it is that the creditor could establish good faith.

MR KEENZE QC:

Yes, well I understand that.

GLAZEBROOK J:

In some of the Law Commission material, they were really only talking about the change in position, weren't they, as being a defence that needed to be carried on. Do we know when this gave value for the property, when did that pop up?

ELIAS CJ:

2006.

GLAZEBROOK J:

No, I know it popped up in 2006 but it wasn't a part of the antecedent recommendations, was it? Did it just suddenly appear at the time the legislation was drafted?

ELIAS CJ:

There was a different report, wasn't there, which preceded the 2006 changes?

MR KEENE QC:

I believe so. I think it actually came out of the comparison with the Australian section which had the words “valuable consideration”.

GLAZEBROOK J:

So you think it popped in because they were trying to align with the Australian provisions, whatever they may have thought that alignment meant?

MR KEENE QC:

I’m less certain about that for the reason my learned friend Branch put to you, which is where the words “valuable consideration”, words that are used in the earlier subsections of 296, and the word “value” has come through and I have a view that the word “value” is intended to connote something more than valuable consideration.

ELIAS CJ:

Again, it’s ancient, hallowed language in this area of voidable conveyances. If you’re a bona fide purchaser for value, you’re okay. So it’s not surprising that that language occurs.

MR KEENE QC:

Perhaps except that the language valuable consideration is nearly as hallowed, if perhaps not more, and when one uses one of them in one subsection and then on to the other it does alert you to the fact that there may be a different concept or a refinement of concept on the cards.

GLAZEBROOK J:

But whatever the meaning of valuable consideration or valuable, you accept they were trying to align with the Australians. It didn't come from somewhere else altogether. It wasn’t a recommendation specifically of anybody. I’m really trying to see whether there was any explanation as to why those were put in any of the antecedent material.

MR KEENE QC:

I cannot help your Honour any further than that, apart from the comments I’ve already made.

GLAZEBROOK J:

Yes, I know what the submission is and it may well be that they didn't understand what the Australian position actually was if, indeed, that is the correct Australian position.

MR KEENE QC:

Yes. It is, in fact, difficult to know how to deal with the submission that the intention of the New Zealand legislation was to follow the Australian position if one assumes they didn't really know what that position was, and so whether they succeeded or not is an open question.

My learned junior points me to the submission that follows in – if I could take your Honours to paragraph 47 of the Hiway submission, and we there refer to a submission made in relation to what the words "gave value for the property" mean and the MED's response to the effect that gave value will not mean that it relates to the antecedent transaction, but apart from that, as far as I'm aware, there is no separate consideration of the word "value" in the phrase "gave value".

Now, unless I can help your Honours any further, that's my submissions.

ELIAS CJ:

Yes, thank you, Mr Keene. I think that we should start probably with Mr Temm first and unwind you is the normal course.

MR TEMM:

Your Honours, I just want to deal with four brief points that I made. Talking about one-offs, there was discussion by my learned friends for the respondents that, look, the class of creditors that are going to be affected here is very small. Most people aren't involved in ongoing supply and so forth. In actual fact, the appellant rejects that. Think about those who are involved in month after month of supply. They have the benefit of the running account provision in section 292(4)(b). That's where their remedy will lie in that transaction. There are numerous one-off transactions and, indeed, of the three appellant two are one-off transactions but I ask you, and I bear in mind that your Honour the Chief Justice's comments that analogies are never helpful –

ELIAS CJ:

Well, I wouldn't say never but my experience is they often go awry.

MR TEMM:

Well, here we go. Think about residential construction. The person who comes, the contractor who comes and prepares the land for the building site does that work, prepares the land and the parts. That's the end of their involvement. They can do no more. There's no new value to add.

The next contractor on site lays the concrete slab. Once that slab is down, they leave. What happens next is the regulatory people come along and check that it's code compliant. The QS assures themselves that value has been added and a progress payment is made. The next people on site are the framers. They'll frame up the building and then they will leave. Then the roof's on and a party is had, then the building is closed in.

Now, if you think about all of those contractors in construction, they each provide a separate service and they can provide no new value. They deliver and depart. Regulatory compliance is then done. Progress payments are authorised, and that's how they're paid. So one-off transactions are more common than my learned friends would suggest.

Value is value. Antecedent debt, in my respectful submission, can be value. If the Court is not going to accept the submission of the appellant that we're looking over the whole life of the transaction, that the payment doesn't happen in a vacuum, it happens in response to goods and services earlier provided, and says, "No, the transaction is limited in statutory interpretation to the payment," it is the antecedent debt being forgiven at that moment which is the value.

Pari passu is a general principle. General principles are subject to exceptions. You will find them in statutory provisions, section 310, 312, 313. I'm talking there about set off, preferred creditors, schedule 7, holiday employment, wages, there are a whole range of exceptions to the general principle of pari passu and section 296(3) is part of that. It's an exception to the principle being applied.

Finally, the antique car example. You will see straight away that the Court of Appeal have given a model, a test, which can't easily be applied. We've all struggled to find

examples. It doesn't work in practice. The antique car example, why is the creditor even interested in taking an antique car? Answer, because they have some doubts about whether they're going to be paid what they're entitled. They actually fail the (b) test on knowledge, don't they? Alternatively, the antique car will be caught by the set off provisions. So that example, with respect, doesn't really assist you. The Court of Appeal's test is so narrow that few can come within it. That's all I propose to say.

ELIAS CJ:
Thank you, Mr Temm. Yes, Mr Hughes.

MR HUGHES:
Thank you, your Honour. Firstly, your Honour Justice Young asked about the Property Law Act earlier in terms of just giving away company money and the reference for that is subpart 6 of the Property Law Act, which deals with companies giving away money in those circumstances.

WILLIAM YOUNG J:
Well, it's also dealt with in 297 and up to 299.

MR HUGHES:
Yes, but it's also suitably dealt with in the Property Law Act, as well, 2007, Sir. My learned friend Mr Keene made the submission that the defence is meant to be an unusual and factual-based defence and I can't, from my reading of the papers, there's no authority for that. It's just supposed to be a wide defence to protect creditors who have acted in good faith and without knowledge of insolvency. It is not intended to be a narrow defence which requires Court scrutiny. In fact, quite the opposite was proposed.

The only other point I'd like to add, and then I'll leave it to my friend, Mr Ormsby, is that there's quite a lot of surmising about the state of the company in two year period leading up to liquidation and how liquidations are funded and so on and so forth.

My friend, Mr Branch, also talked about discovery not being the norm in a voidable transaction case and that, in fact, works in favour of a liquidator rather than against him or her, and that is simply because the liquidator has access to the accounts of the company and is able to put the best case forward. It is for the creditor then to disprove that onus.

Lastly, liquidators use the voidable transaction regime to fund liquidations and there can be no doubt that Parliament intended for there to be a defence for good faith creditors who have helped to swell assets of companies.

That's all I propose to say by way of reply. Thank you.

ELIAS CJ:
Thank you, Mr Hughes.

MR ORMSBY:
Your Honours, I have 10 brief points in reply. The first is the lengthiest of them.

Your Honours questioned my friend, Mr Branch, and then Mr Keene on this idea a bit further of two transactions, and I want to help your Honour the Chief Justice with my view on that.

If we accept, and I realise there's been a query from Justice Young about this and I'll come back to that, but if we accept that the provision, section 296(3) is a defence intended to operate for insolvent transactions, then in my submission you can't analyse the transaction as the payment only. That's because what is the payment for if it is to be a defence to an insolvent transaction? It's a payment for the satisfaction of the prior obligation.

Now, if, as your Honour has proposed, it is a payment which you receive value for in return, that would just be an entirely new insolvent transaction because the payment is always received before the company goes into formal liquidation or formal insolvency. So they will have given a payment. They will have got some value back, but that's an insolvent transaction because it's received prior to the liquidation.

ELIAS CJ:
Even if there's no credit?

MR ORMSBY:
I'm not sure that I follow Your Honour's query.

ELIAS CJ:

Well, isn't there a step – it's not an insolvent transaction if there's an exchange?

MR ORMSBY:

Yes, I follow.

ELIAS CJ:

Here's my $20.

MR ORMSBY:

Yes, but here's my $20 for some new value. That's not to come back and be put into the general pool as an insolvent transaction, but what I'm saying is under the – if it's to operate as a defence to an insolvent transaction, then you can't analyse it as the payment only because the payment – you have to ask what is the payment for? It's not for the new value. It's for the satisfaction of the prior obligation.

So to make this work, this section, you need a policy position. I should just touch briefly on your Honour Justice Young's query about is this in fact intended to be a defence to voidable transactions or insolvent transactions. In my submission, Sir, it is because the explanatory note makes it very clear in passing the Bill, the explanatory note to the Bill itself, that this is a defence for insolvent voidable transactions.

WILLIAM YOUNG J:

The give value specifically?

MR ORMSBY:

Not the give value part but section 296(3)(c).

WILLIAM YOUNG J:

Well, it is, obviously. Section 296(3) is a defence towards defensive liability encompassing, but not confined to, voidable preferences. What I was postulating is that it might be a better fit for the other heads of liability.

MR ORMSBY:

Understood. In that case, what I'd say is you need to have a policy position because otherwise these provisions are, in a literal sense, unworkable. The Court of Appeal

favoured a policy position of swelling the assets of the company, but in my submission 296(3)(c) and 296(3) is not the policy – the policy underlying it is not swelling the assets of the company. If it was, you wouldn't allow change of position defence because change of position does nothing to swell the assets of the company.

What I say the policy is that underlies it is that there is a similar theme between change of position and gave value under a transaction. That is, where a person changes their position in reliance they're possibly a volunteer. They might be a tortious creditor. There are a range of scenarios which Mr Temm canvassed. Similar to that, the gave value in that circumstance, the person received payment for goods delivered, no suspicion of insolvency, and it's implicit in a commercial sense that what that creditor does with no knowledge or risk that the payment will be unwound is to employ those funds in the business, and that's the practical problem as well with the change of position analysis because in reality, particularly in larger companies, you don't earmark funds and then use them on particular things. They go into a big slosh of a bank account and get employed throughout the business.

Even if Australia hadn't applied its own regime correctly, and I – my submission is they have, but even if they hadn't, these provisions have been around since 1989, as Mr Branch said. My submission is that the real focus here is an exchange of value with no knowledge and that's certainly the knowledge element is what comes out in the papers.

Now, if, as Mr Branch contends, you virtually never have a gave value situation for insolvent transactions, then why include it? Because, in my submission, you don't need gave value if it's simply a non-transactional context. In a non-transactional context, change of position works fine. Gave value is there to deal with the transactional context, and therefore gave value is there to deal with the insolvent transaction, the satisfaction of a prior obligation.

It also avoids problems, for example, and this is analysed by Justice Toogood, where if a creditor has a reservation of title clause and they give it up, then you've got some additional value at that later point. He says that creates an artificial distinction. In my client's case, for example, they had a reservation of title clause, but one of the difficulties the Court then has to embark on and the liquidator is, was that worth anything? What was the state of the concrete? Was it in the ground or wasn't it?

WILLIAM YOUNG J:
Couldn't that be dealt with under section 295(a)?

MR ORMSBY:
Quite possibly, Sir, yes. I accept that that may well be the case.

Our submission is not about unfairness because you don't get to keep the funds.

WILLIAM YOUNG J:
What happens where a payment is made to a secured creditor? That can't be caught by the voidable preferences, I take it.

MR ORMSBY:
No. That normally can't be caught because it's not an insolvent transaction and the reason for that is because you're not receiving more than you would receive.

WILLIAM YOUNG J:
Than you would under an insolvency, I see.

MR ORMSBY:
Under liquidation, yes.

So in my submission, our case isn't about the unfairness between not getting to keep the money. It's about Parliament would not intend to have a regime which creates unfairness between different classes of creditor such as the one-off creditor, or those who can easily supply new value.

Now, I take issue with my friend Mr Branch's point that the main inquiry is always gave value or change of position. In my submission, that's not the case. Very often what is examined is the knowledge component, and the reason for that is the knowledge component is objective, and so the liquidators go through all of the correspondence with the creditors and they look at what was said, what was known, what were the communications between them, and as an example of that, within my client's group there is a decided case in the High Court involving the current appellant and also another company in the group. Now, in that case the main question to be determined was what was the knowledge in an objective sense, and I

can give your Honours the reference if you'd like to have it. But what the High Court said was that subjectively, and my clients in that particular case, didn't have knowledge but objectively there was enough there that should have put them on the trail and they should have smelled it. They should have known. That case is 2013 NZHC 710, so quite often the inquiry is about knowledge.

Getting to my final two points, in my submission for the same reason 296 is not about what's in the mind. It's an objective test. In relation to the example that my friend Mr Keene gave, it falls over on a number of points. Mr Temm mentioned the good faith point. You've got to ask the question, why wouldn't you be receiving money? It would also, in my submission, in normal circumstances be a transaction, that undervalue, and therefore there are a number of mechanisms through which those kind of things would be challenged.

Those are, in essence, my submissions or my points in reply, unless there are any questions.

ELIAS CJ:
Thank you. Yes, thank you, counsel, for your submissions and your assistance. We will reserve our decision in the matter.

COURT ADJOURNS: 3.37 PM