**IN THE SUPREME COURT OF NEW ZEALAND**

**SC 51/2013**
**[2015] NZSC 7**

| | |
|---|---|
| BETWEEN | ALLIED CONCRETE LIMITED<br>Appellant |
| AND | JEFFREY PHILIP MELTZER AND LLOYD JAMES HAYWARD AS LIQUIDATORS OF WINDOW HOLDINGS LIMITED (IN LIQUIDATION)<br>Respondents |

**SC 80/2013**

| | |
|---|---|
| BETWEEN | FENCES & KERBS LIMITED<br>Appellant |
| AND | PETER ESMOND FARRELL AND SIMON PAUL ROGAN AS LIQUIDATORS OF CONTRACT ENGINEERING LIMITED (IN LIQUIDATION)<br>Respondents |

**SC 81/2013**

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|---|---|
| BETWEEN | HIWAY STABILIZERS NEW ZEALAND LIMITED<br>Appellant |
| AND | JEFFREY PHILIP MELTZER AND LLOYD JAMES HAYWARD AS LIQUIDATORS OF WINDOW HOLDINGS LIMITED (IN LIQUIDATION)<br>Respondents |

Hearing: 18 March 2014

Court: Elias CJ, McGrath, William Young, Glazebrook and Arnold JJ

Counsel: J V Ormsby, C L Webber and J-L Day for Appellant Allied Concrete Limited
B P Keene QC and J F Anderson for Respondents Meltzer and Hayward
J P Temm, S A Hickman and K A Badcock for Appellant Fences & Kerbs Limited
M D Branch and K I Bond for Respondents Farrell and Rogan
D M Hughes and D I Durovich for Appellant Hiway Stabilizers New Zealand Limited

Judgment: 18 February 2015

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**JUDGMENT OF THE COURT**

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**A The appeals are allowed.**

**B The applications of the liquidators for the transactions to be voided are dismissed.**

**C The respondents in each appeal must pay costs of $10,000 to the appellant in the relevant appeal, plus the appellant's reasonable disbursements.**

**D Absent agreement between the parties, costs in the High Court and Court of Appeal are to be fixed by those Courts in light of this judgment.**

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**REASONS**


| | Para No |
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| Elias CJ | [109] |
| William Young J | [176] |


**McGRATH, GLAZEBROOK AND ARNOLD JJ**

(Given by Arnold J)


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## Introduction

[1] These appeals involve a short but important point about the operation of the voidable transaction provisions in the Companies Act 1993 (the Act). The provisions engage two important but potentially conflicting policies.[1]

(a) On the one hand, a key purpose of the voidable transaction regime is to protect an insolvent company's creditors as a whole against a diminution of the assets available to them resulting from a transaction which confers an inappropriate advantage on one creditor by allowing that creditor to recover more than it would in a liquidation. The pari passu principle requires equal treatment of creditors in like positions (in these appeals, unsecured creditors) and facilitates the orderly and efficient realisation of the company's assets for distribution to creditors.

(b) On the other hand, Parliament has long accepted that creditors who enter into transactions with companies which have reached the point of insolvency are entitled to protection in some circumstances. This acknowledges that considerations of fairness to individual creditors are engaged in this context and that there are risks to commercial confidence if what appear to be normal, everyday commercial transactions are re-opened long after the event. This consideration has

[1] These competing policies were reflected in what is said to be England's first bankruptcy legislation, An Act against such Persons as do make Bankrupt 1542 (UK) 34 & 35 Henry VIII c 4: see *Harkness v Partnership Pacific Ltd* (1997) 41 NSWLR 204 (NSWCA) at 228 per Priestley JA.

> particular relevance in New Zealand, with its high proportion of small business enterprises[2] and the two-year period in advance of liquidation during which transactions may be voidable under the Act.[3]

The underlying question for us is how these competing principles are accommodated in New Zealand's current voidable transactions regime.

[2] The appellant companies all received payments from the respondent companies within two years of the latter companies going into liquidation. The payments were on account of goods or services previously supplied. Under s 292(1) of the Act, a transaction (which includes a payment) by a company is voidable by a liquidator if it is an "insolvent transaction" and is entered into within two years of the commencement of the company's liquidation. It is common ground that the payments were "insolvent transactions" as defined.

[3] Section 296(3) provides a defence to a liquidator's claim. A court must not order repayment by a party who proves that, when it received the payment, (a) it acted in good faith, (b) there were no reasonable grounds to suspect, and the party did not suspect, that the debtor company was, or would become, insolvent and (c) it either gave value for the payment or altered its position in the reasonably held belief that the payment was validly made and would not be set aside. The point at issue in these appeals concerns the first alternative in (c), giving value. Against the background that the impugned payments were payments for goods or services previously supplied, the principal question is whether "value" means new value given at, or after, the time the payment is received from the debtor company or whether it also encompasses value given prior to receipt of the payment when the antecedent debt was created.

[4] In *Farrell v Fences & Kerbs Ltd*, where three appeals were heard together, the Court of Appeal held that the former meaning was intended. The Court delivered two judgments, an interim judgment and a final judgment. In its interim judgment, the Court held that "value" referred to something given at the time of the impugned

2 Over 95 per cent of enterprises in New Zealand are small businesses: see Ministry of Business, Innovation & Employment *The Small Business Sector Report 2014* (2014) at 8.
3 Companies Act 1993, s 292(5).

payment and that something of value given earlier when the debt was created was not sufficient.[4] In its final judgment, the Court:

(a) confirmed that the receipt of a payment in satisfaction of an antecedent debt was not "value" for the purposes of s 296(3)(c) and that new value which was "real and substantial" (although not necessarily "full") had to be given at the time of the transaction;[5] and

(b) held that a forbearance to sue could constitute the giving of value, but that it would generally be difficult to show that giving time for payment or forbearing to sue had a quantifiable benefit sufficient to qualify as "value".[6] Moreover, mere inaction by a creditor was not enough – there had to be evidence of an implied promise to forbear to sue, or a forbearance at the express or implied request of the debtor company.[7]

[5] The Court of Appeal's interim judgment was followed by Associate Judge Abbott in *Meltzer v Allied Concrete Ltd*.[8] There, Associate Judge Abbott accepted that giving value for the purposes of s 296(3)(c) did not include value given when the antecedent debt was created.[9] The Associate Judge also rejected two alternative arguments – that by continuing to supply the debtor company and by releasing it from liability for the earlier debt, the creditor had given value.[10]

[6] This Court granted leave to appeal against the decisions of both courts.[11]

**Background**

[7] By way of brief summary, the facts of the cases before us are as follows.

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4 *Farrell v Fences & Kerbs Ltd* [2013] NZCA 91, [2013] 3 NZLR 82 (O'Regan P, Randerson, French JJ) [*Fences & Kerbs* (CA Interim)].

5 *Farrell v Fences & Kerbs Ltd* [2013] NZCA 329 (O'Regan P, Randerson and French JJ) at [27]–[28] [*Fences & Kerbs* (CA Final)].

6 At [42]–[43].

7 At [44].

8 *Meltzer v Allied Concrete Ltd* [2013] NZHC 977 (Associate Judge Abbott) [*Allied Concrete* (HC)].

9 At [29].

10 At [33]–[36].

11 *Allied Concrete Ltd v Meltzer* [2013] NZSC 102.

*Allied Concrete*

[8] The predecessor company[12] to Window Holdings Ltd (in liquidation) (Window Holdings) was a longstanding customer of Allied Concrete Ltd (Allied), purchasing concrete from it since early 2001. Window Holdings purchased product on credit usually on 60 day payment terms (with two extensions in 2010 to 90 days, reflecting the long-standing nature of their relationship).

[9] On 21 October 2010, Allied received a payment of $88,722.41 from Window Holdings. This payment related to 10 invoices which Allied had rendered for the supply of concrete in July 2010, in respect of which the credit period had been extended to 90 days. After receiving the payment in October 2010, Allied continued to supply Window Holdings with concrete as required, until early December 2010. The value of the concrete supplied over that period was $12,625.76.

[10] Messrs Meltzer and Hayward were appointed liquidators for Window Holdings by court order on 1 July 2011. On 22 February 2012, the liquidators gave Allied notice that they regarded $63,649.50 of the 21 October payment as being a voidable transaction.

*Fences & Kerbs*

[11] Fences & Kerbs Ltd (Fences & Kerbs) constructed some concrete and steel foundations for Contract Engineering Ltd (Contract Engineering) in connection with the construction and installation of a new pipeline for Contact Energy Ltd at its Wairakei steam field. Fences & Kerbs sent an invoice to Contract Engineering on 21 June 2010 for $56,256.66.[13] This sum was paid in full by instalments between 4 August 2010 and 30 September 2010. On or about 26 July 2010, Fences & Kerbs agreed to undertake additional work at Contract Engineering's request, for which a further invoice for $1,687.50 was rendered to Contract Engineering on 28 September 2010. This was paid in full on 29 October 2010.

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[12] Harker Underground Construction Ltd. The name of the company changed on 10 May 2011.
[13] All the sums mentioned are inclusive of GST.

[12] Messrs Farrell and Rogan were appointed liquidators of Contract Engineering by shareholders' resolution on 5 July 2011 and on 26 March 2012 served a notice to set aside the payments described.

*Hiway Stabilizers*

[13] Hiway Stabilizers New Zealand Ltd (Hiway Stabilizers) undertook contouring and landscaping work for the predecessor of Window Holdings in April 2010. Hiway Stabilizers issued an invoice for $12,379.51 for this work on 1 May 2010. On 30 June 2010, Hiway Stabilizers rendered a further invoice for $642.04 to Window Holdings for materials supplied earlier that month. The first invoice was paid in full on 23 August 2010 and the second on 6 September 2010.

[14] As previously noted, Messrs Meltzer and Hayward were appointed liquidators for Window Holdings by court order on 1 July 2011. They served a notice to set aside the payments made to Hiway Stabilizers on 17 April 2012.

*High Court decisions*

[15] In each case, the recipient of the contested payments served a notice of objection on the relevant liquidators.[14] In each case, the High Court accepted that at the time of the payments, the recipient acted in good faith and did not suspect, nor were there any reasonable grounds to suspect, that the company was or would become insolvent.[15] In all but the *Allied Concrete* case, the High Court also accepted that while the assessment of "value" given in terms of s 296(3) had to be made at the time of payment, it was not confined to matters occurring at, or after, the time of payment: it could include the value of consideration provided earlier[16] or include value given by the recipient accepting payment in satisfaction and release of an antecedent debt.[17]

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14 Companies Act, s 294(3) and (4).

15 *Allied Concrete* (HC), above n 8, at [17] and [21]; *Farrell v Fences & Kerbs Ltd* [2012] NZHC 2865 (Associate Judge Christiansen) at [29] [*Fences & Kerbs* (HC)]; and *Meltzer v Hiway Stabilizers New Zealand Ltd* [2012] NZHC 3281, [2013] 2 NZLR 725 (Toogood J) at [5] [*Hiway Stablizers* (HC)].

16 *Fences & Kerbs* (HC), above n 15, at [65] and [69].

17 *Hiway Stabilizers* (HC), above n 15, at [34].

## The statutory provisions

[16] Part 16 of the Act deals with liquidation. Sections 292 to 301 allow liquidators to challenge a range of transactions and charges entered into by a company, including voidable transactions,[18] voidable charges,[19] transactions at an undervalue,[20] transactions for inadequate or excessive consideration with directors or other specified persons,[21] certain securities or charges created by the company over any of its property in favour of specified persons,[22] and money or property misapplied, retained or lost by negligence, default, or breach of duty or trust by a person involved in the company.[23]

[17] Our focus is on the voidable transaction provisions, the full text of which we have set out in the appendix to this judgment for ease of reference.

[18] Section 292(1) provides that where two requirements are met, a transaction is voidable:

> (1) A transaction by a company is voidable by the liquidator if it—
>
> (a) is an insolvent transaction; and
>
> (b) is entered into within the specified period.

Section 292(2) defines an insolvent transaction as follows:

> (2) An **insolvent transaction** is a transaction by a company that—
>
> (a) is entered into at a time when the company is unable to pay its due debts; and
>
> (b) enables another person to receive more towards satisfaction of a debt owed by the company than the person would receive, or would be likely to receive, in the company's liquidation.

In terms of s 292(3)(e), the word "transaction" includes "paying money (including paying money in accordance with a judgment or an order of a court)". The

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18 Companies Act 1993, s 292.
19 Section 293.
20 Section 297.
21 Section 298.
22 Section 299.
23 Section 301.

transactions alleged in these appeals were payments for goods or services previously supplied. So, putting it in the context of the present appeals, to be an insolvent transaction there must be a payment made by the company to another in the context of a debtor/creditor relationship,[24] which results in the creditor receiving more than it would in a liquidation. It follows that a "cash on delivery" supply to a technically insolvent company does not involve an insolvent transaction as the payment for the goods or services is not referable to a debtor/creditor relationship.[25]

[19] It is common ground that the transactions at issue in the present appeals were insolvent transactions within the meaning of the definition.

[20] Section 292 distinguishes between transactions entered into within two different time periods, namely, the restricted period and the specified period. Although there are variations in the methods for calculating the particular periods, essentially the restricted period is six months before the commencement of the liquidation[26] and the specified period is two years before its commencement.[27] In respect of a transaction entered into within the specified period, it must be established that the transaction was an insolvent one, whereas a transaction entered into within the restricted period will be presumed to have been entered into at a time when the company was unable to pay its debts, unless the contrary is proved.[28]

[21] Finally in relation to s 292, we note that s 292(4B) deals with transactions which are part of a continuing business relationship. Under that provision, a series of transactions will be treated as a single transaction where the individual transactions are an integral part of a continuing business relationship between the parties (as where the parties operate a running account) and the level of the debtor company's indebtedness fluctuates over time as a result of the various individual transactions. Under this approach, a liquidator will be entitled to claim the net difference of payments made and goods and services received from a creditor which

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[24] Because s 292(2)(b) requires that there be a debt owed.

[25] See *Ferrier v Civil Aviation Authority* (1994) 48 FCR 163 (FCA) at 172; Andrew R Keay *McPherson's Law of Company Liquidation* (3rd ed, Sweet & Maxwell, London 2013), at [11–062]; and Roy Goode *Principles of Corporate Insolvency Law* (4th ed, Sweet & Maxwell, London, 2011) at [13–84].

[26] Companies Act, s 292(6).

[27] Section 292(5).

[28] Section 292(4A).

has an ongoing business relationship with the debtor company. David Purcell illustrates the running account principle in the following way:[29]

> [T]ake a supplier of goods who supplies goods to his [or her] customer on credit terms where the price of goods supplied and payments received are recorded on a running account statement or monthly invoice. For example, assume that a supplier is owed $100,000 and in the three months prior to the winding up of its customer goods to the value of a further $200,000 are supplied. In that same period the customer makes payments of $220,000 to the supplier which have the effect of reducing the supplier's overall debt from $100,000 to $80,000. In this situation the supplier's advantage is a net improvement of $20,000.

[22] The procedure for setting aside a transaction is dealt with in s 294. The liquidator must file a notice that meets certain specified requirements and serve it on the party from whom recovery is sought.[30] The transaction will be automatically set aside as against the recipient of the notice if the recipient does not send the liquidator a written notice of objection within 20 working days.[31] That notice must give particulars of the reason(s) for the objection and identify any relevant documents that substantiate the objection.[32] Where such notice is given, the liquidator may apply to the High Court for a determination that the transaction be set aside.[33]

[23] Section 295 identifies the range of orders that a court may make where a transaction is set aside under s 294. The court may, for example, order a person to pay the company an amount that fairly represents some or all of the benefits received because of the transaction.[34]

[24] This brings us to the s 296(3) defence. Section 296(3) provides:

> (3) A court must not order the recovery of property of a company (or its equivalent value) by a liquidator, whether under this Act, any other enactment, or in law or in equity, if the person from whom recovery is sought (**A**) proves that when A received the property—
>
> (a) A acted in good faith; and

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29 David J Purcell "Banks and the Recovery of Voidable Preferences" (1990) 2(1) Bond L R 107 at 110. See also *Brookers Insolvency Law & Practice* (looseleaf ed, Brookers Ltd, Wellington, 2007) vol 2 at [CA292.06].

30 Companies Act 1993, s 294(1) and (2).

31 Section 294(3).

32 Section 292(4).

33 Section 294(5).

34 Section 295(c).

> (b) a reasonable person in A's position would not have suspected, and A did not have reasonable grounds for suspecting, that the company was, or would become, insolvent; and
>
> (c) A gave value for the property or altered A's position in the reasonably held belief that the transfer of the property to A was valid and would not be set aside.

A similar provision is found in s 208 of the Insolvency Act 2006 in relation to "irregular transactions" prior to bankruptcy.

[25] One significant feature of the s 296(3) defence is that it has broad application. It is available where a liquidator seeks an order for the recovery of a company's property under the Act, under any other Act, or in law or equity. In terms of the Act, it applies not simply to voidable transactions, but also to other situations such as transactions at an undervalue and transactions for inadequate or excessive consideration with directors and others.

[26] As previously noted, it is not disputed that the recipients of the payments in the present appeals met the requirements of both ss 296(3)(a) and (b). In relation to the provision in contention, s 296(3)(c), the question is whether the value referred to must be given at or after the time of payment, or may precede it.

[27] Before we address the relevant arguments, we set out the background to the present company insolvency provisions.

**Legislative background**

[28] To understand the current corporate insolvency provisions and the policy underlying them, it is necessary to have some understanding of the way in which the law has developed. While we will focus on the changes made in 1993 when the Companies Act 1993 was enacted and the changes resulting from the Companies Amendment Act 2006 when the current provisions were enacted,[35] we will also refer to the English origins of the early New Zealand legislation where appropriate.

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[35] The 2006 amendments came into effect on 1 November 2007: see Companies Amendment Act 2006, s 2 and the Companies Amendment Act 2006 Commencement Order 2007.

*The 1993 reforms*

[29] Prior to 1 July 1994 when the Companies Act 1993 came into effect, the law was that a payment made by a company to a creditor within a two-year period prior to liquidation was voidable by the liquidator if it was made "with a view to giving that creditor … a preference over the other creditors".[36] The test was intention-based, the relevant intention being that of the debtor company. This focus on the intention of the debtor to prefer reflects the historical origins of insolvency law.[37] A defence was available where the recipient of a payment from the company had first, received it in good faith and second, altered its position in the reasonably held belief that the payment was validly made and would not be set aside and third, the court considered it inequitable to order recovery, in part or in full.[38]

[30] In 1989, the Law Commission published a report recommending significant reforms to company law in New Zealand.[39] Among the Law Commission's recommendations was a recommendation that voidable transactions be dealt with differently. The report said:[40]

> The final innovation is that voidable transactions are dealt with differently. The focus at present, when a creditor receives payment in preference to others, is on the intention of the debtor company. This means that in circumstances where a creditor is preferred through no voluntary action by the debtor, for example, where a creditor is able to coerce the debtor, the transaction cannot be attacked. This leads to the unsatisfactory situation where creditors may be treated differently according to the quirks of their circumstances. The purpose of a voidable transactions regime is to avoid this, yet the present law permits it. Our proposals, which are drawn from both the Australian Law Reform Commission's Report and the submission of the New Zealand Society of Accountants, set out a test which is more straightforward to apply.

Later, in the discussion of the voidable transaction clauses of its proposed draft Companies Act, the Commission said that on its proposed approach, a transfer of a company's property would be voidable if it related to an antecedent debt, was made while the company was insolvent and within a year prior to liquidation, and enabled

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36 Companies Act 1955, s 309(1).
37 See *Grant v Lotus Gardens Ltd* [2013] NZHC 1135 at [36](c).
38 Companies Act 1955, s 311A(7).
39 Law Commission *Company Law Reform and Restatement* (NZLC R9, 1989).
40 At [649].

the creditor to receive more that it would have received in a liquidation.[41] The Commission explained its approach as follows:[42]

> … the emphasis is on the *effect* of the transfer. Any system which creates a regime rendering some transactions void has to choose between competing interests. In this case, some measure of commercial certainty is sacrificed in favour of fairness to all creditors.

[31] The Law Commission maintained this approach in its subsequent report. The voidable transaction provision, cl 225, focused on the effect of the payment but introduced an "ordinary course of business" exception.[43] The Commission's draft Act also provided for a defence where the creditor had acted in good faith and altered its position in the reasonably held belief that the payment was valid and would not be set aside, and the court considered it inequitable to order recovery, in part or in full.[44]

[32] On enactment in 1993, s 292 relevantly provided:

> **292 Transactions having preferential effect**
>
> …
>
> (2) A transaction by a company is voidable on the application of the liquidator if the transaction—
>
> (a) Was made—
>
> (i) At a time when the company was unable to pay its due debts; and
>
> (ii) Within the specified period; and
>
> (b) Enabled another person to receive more towards satisfaction of a debt than the person would otherwise have received or be likely to have received in the liquidation—
>
> unless the transaction took place in the ordinary course of business.
>
> (3) Unless the contrary is proved, for the purposes of subsection (2) of this section, a transaction that took place within the restricted period is presumed to have been made–

41 At [696].
42 At [696] (emphasis added).
43 Law Commission *Company Law Reform: Transition and Revision* (NZLC R16, 1990), cl 225.
44 Clause 228(8).

> (a) At a time when the company was unable to pay its debts; and
>
> (b) Otherwise than in the ordinary course of business.
>
> (4) For the purposes of this section, in determining whether a transaction took place in the ordinary course of business, no account is to be taken of any intent or purpose on the part of the company–
>
> (a) To enable another person to receive more towards satisfaction of a debt than the person would otherwise receive or be likely to receive in the liquidation; or
>
> (b) To reduce or cancel the liability, whether in whole or in part, of another person in respect of a debt incurred by the company; or
>
> (c) To contribute towards the satisfaction of the liability, whether in whole or in part, of another person in respect of a debt incurred by the company–
>
> unless that other person knew that that was the intent or purpose of the company.
>
> …

The "ordinary course of business" exception in s 292(2) was introduced into the New Zealand regime just as Australia abandoned it,[45] and subsequently proved to be difficult to apply, becoming one of the most litigated areas of the Act.[46]

[33] In addition to that exception, s 296(3) provided:

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

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45 See the observations of Fisher J in *Re Modern Terrazzo Ltd (in liq)* [1998] 1 NZLR 160 (HC) at 189.

46 See Paul Heath and Michael Whale (eds) *Heath and Whale on Insolvency* (looseleaf ed, LexisNexis, 2013) vol 1 at [24.2] and David Brown and Thomas GW Telfer *Personal and Corporate Insolvency Legislation*: *Guide and Commentary to the 2006 Amendments* (LexisNexis, Wellington, 2007) at 70–71.

As is apparent from the language of s 296(3)(a), simple receipt of a payment by a creditor was insufficient – there had also to be an alteration of position, presumably reflecting the fact that there was the "ordinary course of business" exception in s 292.

[34] Identical provisions were introduced into the Companies Act 1955 (ss 266–270) at the same time, given that the 1955 Act continued to apply for a period.

[35] In *Countrywide Banking Corporation Ltd v Dean*, the Judicial Committee of the Privy Council discussed the new 1955 Act provisions.[47] The issue before the Privy Council was whether Countrywide had overcome the presumption in (the 1955 Act equivalent of) s 292(3) and established that the transaction took place within the ordinary course of business, so as to fall within the exception in s 292(2).

[36] Delivering the judgment of the Privy Council, Gault J described the "substantial change" that resulted from the introduction of s 292 in 1993. He said:[48]

> The change effected in 1993 by the new [s 292] was to abandon as the sole ground for avoidability the intention of the debtor to prefer. The inquiry under [s 292(2)] is as to whether in the prescribed circumstances the effect of the transaction was to prefer – to enable a creditor to receive more than would be likely in the liquidation. That intention did not cease to be relevant in all circumstances is apparent from subs (4) which reintroduces it as a factor for consideration of the ordinary course of business exception where the person preferred knew of any intent or purpose of the debtor to prefer. The alteration of position relief for creditors has been maintained in [s 296].

[37] Gault J then went on to discuss the "ordinary course of business" test. Having noted that the test was essentially one of fact and that no particular formulation of it should be adopted, the Judge made a number of general observations about the approach that should be taken to assessing whether a transaction was within the ordinary course of business.[49]

[38] In *Waikato Freight and Storage (1988) Ltd v Meltzer*, the Court of Appeal, having noted the legislature's move from preferential intention to preferential effect,

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47 *Countrywide Banking Corp Ltd v Dean* [1998] 1 NZLR 385 (PC). For ease of reference, we will refer to the section numbers in the 1993 Act.

48 At 391.

49 At 394–395.

emphasised that Parliament had not made payments having preferential effect absolutely voidable.[50] Rather, it had provided two mechanisms by which a recipient creditor could avoid that outcome, first, by establishing that the challenged payment was made in the ordinary course of business and second, by recourse to the s 296(3) defence. The first gave relief as of right, whereas the second was discretionary.[51] For the Court, Tipping J said:[52]

> It is thus evident that Parliament thought it would be unduly harsh to make a transaction voidable simply as a result of its preferential effect. What is more, Parliament considered that the competing interests would not be properly balanced by allowing the creditor simply to seek the exercise of the Court's discretion in terms of s 296(3). An additional protection was given to creditors who had received a payment which was preferential in effect. The creditor can keep the payment if able to show, the onus being on it, that the payment was made by the debtor company in the ordinary course of business. *Parliament thereby intended a commercially unremarkable payment to stand, even if having preferential effect. It must have been Parliament's view that otherwise the ordinary processes of commerce would be unduly undermined.*

[39] Tipping J went on to describe the approach to be adopted:[53]

> … .The question is whether, at the time it was made, the relevant transaction was made in the ordinary course of business. That is a question of objective fact. General business practices are relevant to that question, as are any particular customs or practices within the field of commerce concerned. So too is the previous commercial relationship between the parties. The observer spoken of in the Privy Council [in *Countrywide*] is in reality the Court which must look at the circumstances, as objectively apparent at the time of the transaction. The ultimate question is whether on the evidence before the Court the transaction or payment can be said to have been made in the ordinary course of business. Was it in its objective commercial setting an ordinary or an out of the ordinary transaction for the parties to have entered into?

*The 2006 reforms*

[40] The reform work which culminated in the present versions of ss 292 to 296 began in 1999, when the Government agreed that the (then) Ministry of Commerce[54] should undertake a review of corporate and personal insolvency law. The Ministry

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50 *Waikato Freight and Storage (1988) Ltd v Meltzer* [2001] 2 NZLR 541 (CA) at [17].
51 At [17].
52 At [18] (emphasis added).
53 At [31].
54 The Ministry's name was subsequently changed to the Ministry of Economic Development and is now the Ministry of Business, Innovation and Employment. We will refer to it simply as the Ministry.

commissioned an academic, David Brown, to prepare a paper on voidable transactions.[55] Following consultation on the paper, the Ministry released a review of insolvency law in 2001 (the 2001 review),[56] which led to a further period of consultation. In 2004, the Ministry released a draft Insolvency Law Reform Bill, together with a discussion paper (the 2004 paper).[57] The Insolvency Law Reform Bill was introduced into the House in 2005. It was separated into three separate Bills during the legislative process, resulting in the enactment of the Companies Amendment Act 2006, the Insolvency Act 2006 and the Insolvency (Cross-border) Act 2006. The Companies Amendment Act came into effect on 1 November 2007.

[41] In his paper, Mr Brown discussed the Australian and New Zealand voidable transaction provisions. He suggested that the basis for any reform of s 292:[58]

> … should preserve the effects-based test and seek to examine whether any alterations can be made to the exceptions, onus of proof and defences in order to achieve a higher level of predictability and certainty.

Mr Brown favoured the abandonment of the "ordinary course of business" test and the introduction of a "continuing course of business" test along the Australian lines.[59] In relation to the s 296(3) defence, he concluded:[60]

> The satisfactory solution would therefore be to remove the ordinary course of business test and extend the definition in s 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 and circumstances would suspect insolvency*.

[42] In its discussion of the voidable transactions provisions in its 2001 review, the Ministry noted that the aim of such provisions was to achieve equality amongst creditors. The Ministry said that the provisions do this:[61]

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55 David Brown "Voidable Transactions – A Report for the Ministry of Commerce" (October 1999).

56 Ministry of Economic Development *Insolvency Law Review: Tier One Discussion Documents* (January 2001) [2001 Review].

57 Ministry of Economic Development *Draft Insolvency Law Reform Bill: Discussion Document* (April 2004) [2004 Paper].

58 Brown, above n 55, at 27.

59 At 69.

60 At 75 (emphasis added).

61 2001 Review, above n 56, at 52.

> … by overturning transactions between the debtor and any creditor when the company was technically insolvent. In doing this, the provisions effectively move the time at which the pari passu principle 'bites' back from the date of formal insolvency to the date of technical insolvency. There is not necessarily anything 'wrong', or any misconduct associated with, these transactions. However, they are set aside because it is considered inequitable for a debtor to pay one creditor in full on the eve of liquidation at the expense of the general body of creditors.

The Ministry noted the shift from intention to effect resulting from the legislative changes made in 1993, but also that intention was still a factor in establishing whether a transaction occurred in the ordinary course of business.[62] It considered that the objective of voidable preferences law would be best achieved by focussing strictly on the effect of a transaction, as that would provide "a more principled and consistent basis for determining which transactions should be set aside".[63] It therefore recommended that the ordinary course of business exception be removed and replaced with a simple rule that would achieve greater certainty.[64]

[43] In relation to defences, the 2001 review acknowledged that the concept of collective realisation, with its focus on the position of all debtors, could clash with the pursuit of just outcomes in individual cases and noted that this could have a destabilising impact. The 2001 review said:[65]

> In the context of voidable transactions law, a defence is an argument the recipient of an otherwise voidable transaction can use to avoid having the transaction set aside.
>
> If the objective of voidable transactions law is to support the collective realisation of assets and thereby the pari passu principle, defences, by allowing a party to an otherwise voidable transaction to retain the benefit of that transaction, necessarily undermine that objective.
>
> However, these defences exist notwithstanding that. Their objective is twofold. First, they are designed to ensure effective challenges cover only the type of transactions which the law is concerned to discourage or reverse. Secondly, they are designed to temper the pursuit of collective justice for creditors as a whole with individual justice for a particular party in the circumstances of each case. *There is a risk that, if the law fails to do so, it might impair the free flow of trade by undoing transactions a reasonable New Zealander, aware of the facts known to the trader, would consider normal.*

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[62] At 55–57.
[63] At 56–57.
[64] At 57.
[65] At 53 (emphasis added).

[44] In its detailed discussion of defences, the 2001 review said of the existing s 296(3):[66]

> It is somewhat difficult to reconcile the defence in section 296(3) with the ordinary course of business exception in the section 292 voidable preferences provision, because it is usual to consider knowledge of the debtor's insolvency when deciding whether a payment is in the ordinary course of business. If a court has already found that a creditor knew of the insolvency in the context of 'ordinary course of business' relief is unlikely to be able to be granted under the defence in section 296(3). If the creditor is held not to have the requisite knowledge under the ordinary course of business exception, the transaction will not be set aside and no defence is necessary.
>
> …
>
> The wider issue of whether there ought to be any defences to, or relief from, the voidable transaction regime at all must also be considered. One could argue that there should be no defences to the voidable transactions regime, as any defence would inherently undermine an effects-based test designed to enhance the pari passu principle. The counter-argument is that a move to a strictly effects-based test removes any protection afforded by the ordinary course of business to recipients of transactions in situations where it might be unjust to require repayment. If that is correct, some form of defence provision is necessary to prevent those injustices occurring in the individual situations.

The Ministry recommended that the existing defence be retained.[67]

[45] Appendix 1 to the Ministry's 2004 paper contained a summary of the policy decisions that had been made by the Government up to that point. In relation to voidable transactions two points were noted:[68]

(a) First, it had been accepted that the "ordinary course of business" exception would be removed and a test similar to the Australian "continuing business test" would be introduced.

(b) Second, it had been accepted that the s 296(3) defence would be changed.

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[66] At 68 (footnote omitted).

[67] At 65–66.

[68] 2004 Paper, above n 57, at 51–52.

[46] In relation to the s 296(3) defence, the appendix said:[69]

> **33. A new defence will focus more objectively on the knowledge of the party transacting with the debtor, without requiring that the court be satisfied that it is inequitable to order recovery.**
>
> At present, corporate creditors seeking to avoid a transaction being set aside can rely on the ordinary course of business exception. If that is not available then reliance will normally be placed on section 296(3) of the Companies Act, which provides a defence if:
>
> - the person receiving the payment did so in good faith; and
>
> - the court is satisfied it is inequitable to order recovery.
>
> This test is subjective and the issue of whether a payment is inequitable involves a value judgement, which could potentially lead to uncertainty and unfairness. Instead it is proposed that section 296(3) of the Companies Act be replaced, *and a test be adopted along the lines of section 588FG(2) of the Australian Corporations Law*:
>
> [The text of the Australian section was set out].
>
> This test enables the court to take a more objective view of whether the creditor ought to have known of the debtor's financial position. It also avoids the inclusion of elements requiring a subjective judgement as to what is "inequitable".

[47] The Insolvency Law Reform Bill was introduced in December 2005 and had its first reading in February 2006. The explanatory note opened with a general policy statement, which summarised the underlying policy of collective realisation as follows:[70]

> Insolvency laws provide a framework within which individuals and companies in financial difficulties administer their affairs while ensuring that the creditors of the individual bankrupt and the company are paid. The fundamental principle that underpins insolvency law is the *pari passu* or "equal step" principle. In essence, insolvency law provides for equal treatment of all creditors within a particular class. This avoids wasteful races to the court. In the absence of such a principle, each creditor would have the incentive to act in their own self-interest, seeking to apply to the court first with a view to recovering everything owed to them regardless of the consequences for other creditors.

[48] In relation to voidable transactions, the explanatory note said:[71]

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69 At 52 (emphasis added).
70 Insolvency Law Reform Bill 2005 (14–1) (explanatory note) at 1.
71 At 3.

> Individuals and corporations are generally insolvent in a technical sense for some time before formal solvency. Voidable transactions law reverses some transactions that occurred before formal insolvency. In doing this, these provisions support the system of collective realisation by recovering assets for distribution to the general body of creditors with some measure of equality.

Among the goals that the Bill was intended to achieve in this area was "[reducing] uncertainty regarding certain key tests under voidable transactions".[72] In the clause-by-clause analysis, the explanatory note pointed out that the "ordinary course of business" test had been removed from what became s 292 and the "continuing business relationship" test (as in, for example, running account situations) was introduced.[73] Nothing was said in the clause-by-clause analysis about the change to what became s 296(3).

[49] The explanatory note attached a combined regulatory impact and business compliance cost statement. The regulatory impact statement noted as one of the measures proposed to remove the uncertainties and inconsistencies in the existing voidable transaction regime, "adopting a defence for creditors (to avoid making a transaction void) that focuses more objectively on the knowledge of the creditor that has transacted with the debtor".[74] In stating the benefits of the proposed changes to the voidable transactions regime in relation to corporate insolvencies, the statement said:[75]

> *Liquidators, debtors, and creditors*
>
> The proposed amendments will increase the certainty of the legal tests contained in, and remove procedural inconsistencies between, the various voidable transaction provisions. This will reduce the costs for the liquidator of pursuing voidable transactions.
>
> A reduction in the cost of pursuing voidable transactions will also maximise returns to the creditors *and give them more certainty that the transactions they are entering into will not be made void*. It will also promote business certainty for the parties involved.
>
> With the proposed changes resulting in overturning transactions on a more principled basis, the debtors will have more certainty regarding when and which payments should be made. The debtors will also be more aware of

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[72] At 3.
[73] At 13.
[74] At 19.
[75] At 24–25 (emphasis added).

> which payments can be made void, thereby avoiding such payments and the costs associated with making such payments.
>
> *There will be an initial period of uncertainty regarding the meaning of the new tests, but this will reduce over time and will be mitigated by basing the new test on an Australian test, allowing the courts to have the benefit of the Australian courts' experience in interpreting those provisions*. Overall, there will be net gains for creditors, debtors, and liquidators involved in voidable transaction proceedings.

[50] This extract emphasises that the proposed changes were intended to promote certainty for both debtors and creditors alike.[76] Debtors would have more certainty as to when they should make payments; creditors would have "more certainty that the transactions they are entering into will not be made void". Moreover, it was contemplated that the courts would have the benefit of the Australian experience in interpreting the new provisions, suggesting that the provisions were considered to be closely comparable to the Australian provisions.

[51] We note at this point that a Joint Insolvency Committee comprising representatives of the New Zealand Law Society and the New Zealand Institute of Chartered Accountants made submissions on the Ministry's 2004 paper and to the Commerce Committee which considered the Insolvency Bill 2006. In its submissions on the Ministry's 2004 paper and draft Bill, the Committee noted that the failure in the voidable transaction provisions to adopt identical language to the language used in the Australian provisions might cause difficulties in the application of Australian precedents.[77] Specific reference was made to the continuing business relationship test and to the s 296(3) defence. The concern was raised again in the Committee's submissions on the Insolvency Bill in 2006, although s 296(3) was not specifically mentioned.[78]

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76 The concept of "certainty' or "commercial certainty" is used in different senses in the background material. Sometimes "certainty" seems to mean the certainty that results from the uniform application of a clear rule such as the pari passu principle. Sometimes, however, it is used differently to encompass, for example, giving certainty to creditors. These various concepts of "certainty" may, of course, pull in different directions.

77 Joint Insolvency Committee "Submissions on the Draft Insolvency Law Reform Bill and Discussion Paper" (17 June 2004) at 6.

78 Joint Insolvency Committee "Submissions on the Insolvency Law Reform Bill" (5 April 2006) at 9.

[52] This was taken up in the report of the Commerce Committee on the Insolvency Bill, which said:[79]

> **Voidable transactions**
>
> We recommend amending new section 292(4B) in clause 474 to more closely follow the equivalent provisions in Australia. We note that the Australian test of a "continuing business relationship" has been adopted in the bill to make insolvent transactions void, and we therefore consider it desirable that the bill's provisions mirror those used in Australia. A similar change has been made for the equivalent provision in relation to personal bankruptcy in clause 195.

The s 296(3) defence was not mentioned in the report.

[53] Three points of significance emerge from this account of the background. First, the voidable transaction provisions enacted in the Companies Act 1993 were thought to be unsatisfactory, partly because of their focus and partly because of their complexity in operation. Greater certainty of operation was thought to be necessary. Second, it was accepted that, although a defence was inconsistent with the principle of collective realisation, some form of defence was needed, if only to maintain confidence in the voidable transaction regime. This defence should have a significant objective component. Third, there was a desire to take advantage of the Australian experience in relation to voidable transactions, including in respect of any defence, by enacting provisions based on the same concepts.

## Analysis

[54] As the argument in this Court took the form of challenging, or, in the case of the respondents, supporting, the reasoning of the Court of Appeal, we will use the that Court's reasoning as the framework for our analysis.

[55] Before we begin the analysis, however, we note that the choice facing the Court is a stark one in terms of its consequences.

(a) If the respondents' argument is accepted, primacy will be accorded to the interests of creditors as a whole, but that will be at the expense of

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[79] Insolvency Law Reform Bill 2005 (14–2) (select committee report) at 14.

fairness to individual creditors who have accepted payments in good faith and in circumstances where there was no reasonable basis to suspect that the debtor company was technically insolvent. In other words, what seemed at the time they were effected to be routine commercial transactions would be set aside. On this basis, there would be legal certainty in the sense that there would be a clear rule, routinely applied; but there would be commercial uncertainty in the sense that routine transactions would be vulnerable to challenge for up to two years after they occurred.

(b) On the other hand, if the appellants' argument is accepted, primacy will be accorded to fairness to individual creditors. Creditors who receive what appear to be routine payments in circumstances where they did not, and had no reason to, suspect insolvency will have certainty. This reflects the broader social interest in not causing any disruption to the routine flow of credit in commercial transactions. But that will be at the expense of the class of creditors as a whole and to the concept of collective realisation.

The Court's task is to ascertain the meaning of the provisions from their language, read in context, and the statute's purpose informed by any relevant background material.[80]

[56] In its interim and final decisions, the Court of Appeal relied primarily on the wording of the relevant provisions and the policy underlying them, although it also drew some support from the statutory background to the present provisions. Accordingly, we will undertake our analysis under two heads – the statutory language and the underlying policy, including within the policy discussion relevant aspects of the legislative background. Before we do so, however, we consider the broader historical background.

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80 Interpretation Act 1999, s 5.

*Statutory language*

[57] On the basis of what was said in the material preceding the passage of the Companies Amendment Act in 2006, the appellant companies had argued in the Court of Appeal, as they did before us, that s 296(3) was intended to have the same effect as s 588FG(2) of the Corporations Act 2001 (Cth), which provides:

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

[58] They relied on *Buzzle Operations Pty Ltd (in liq) v Apple Computer Australia Pty Ltd*, where the New South Wales Court of Appeal accepted that release and satisfaction of an antecedent debt was valuable consideration for the purposes of s 588FG(2)(c), even where the antecedent debt was the debt of a third party.[81] In that case, a group of resellers of Apple products formed a company, Buzzle Operations Pty Ltd (Buzzle), to take over their businesses as resellers. In the course of its operations, Buzzle paid debts that the resellers had incurred with Apple prior to Buzzle's incorporation. When Buzzle went into liquidation, these payments were challenged by the liquidators. The Court held that Apple provided valuable consideration for the purposes of s 588FG(2)(c) by releasing the resellers' debts to the extent of Buzzle's payments. In addition, the Court held that Apple had changed its position by releasing certain securities.[82]

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81 *Buzzle Operations Pty Ltd (in liq) v Apple Computer Australia Pty Ltd* [2011] NSWCA 109, (2011) 277 ALR 189 at [161]–[166] per Young JA. The other members of the Court agreed with Young JA's analysis on this point.

82 At [167]–[170] per Young JA.

[59] The appellants also referred to *McPherson's Law of Company Liquidation* where it is accepted that the "valuable consideration" requirement in s 588FG(2)(c) is met by the antecedent supply of goods or services. The text reads:[83]

> In most claims by a liquidator in which it is alleged that the transaction was an unfair preference the defendant will have little difficulty in establishing valuable consideration. This is because, in the normal course of things, the debtor company will have paid the defendant the price, or part thereof, for services rendered or goods supplied and prior indebtedness is good consideration for a payment made in discharge of that indebtedness.

[60] In rejecting the appellants' submission that s 296(3) was intended to have the same effect as s 588FG(2), the Court of Appeal identified several features of the New Zealand provisions that differentiated them from the Australian provisions. The Court said:[84]

> The best guide to statutory intention is the language used. In that respect, New Zealand has deliberately adopted different language.

[61] New Zealand has, of course, used different language from that used in Australia. The question is whether this was done in order to adopt a different approach to that adopted in Australia in relation to antecedent value.

*(i) Text of s 296(3)*

[62] In relation to the appellants' argument that the words "gave value" were sufficiently wide to include value given when the antecedent debt was created, the Court of Appeal said:[85]

> There are several reasons why we cannot accept that interpretation. First, [s 296(3)(c)] is expressed in the past tense simply because it would not otherwise read grammatically. This follows from the use of the words "when A received the property". Secondly, subs (3) is explicit in providing that all three elements are to be proved when the relevant property is received. This means in the present context that the [appellants] had to prove that when the payments were received, value was given for the payment at that time. Thirdly, if the legislature had contemplated that value given could include that given at the time the antecedent debt was created, it would have said so. It did not. Finally, the "transaction" impugned is the payment of money, not the creation of the antecedent debt.

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83 *McPherson's Law of Company Liquidation* (online ed, Thomson Reuters) at [11.1650] (footnotes omitted).
84 *Fences & Kerbs* (CA Interim), above n 4, at [78].
85 At [73] (footnote omitted).

[63] Under s 296(3)(c) the recipient of (in these appeals) a payment from the debtor company must establish that, when it received the payment, it gave value for the payment or altered its position in the reasonably held belief that the payment was valid and would not be set aside.[86] The Court of Appeal considered that the use of the word "when" indicated that a temporal restriction was intended, so that the recipient had to give value *at the time the payment was made* – value given by the provisions of goods or services at an earlier point when the debt was created did not qualify. The Court considered that s 296(3) differed from s 588FG(2) in this respect. In relation to s 588FG(2)(c), there was no temporal link in relation to the giving of valuable consideration.[87]

[64] One obvious problem with this approach is that it cannot apply in respect of the second alternative in s 296(3)(c) – alteration of position – because an alteration is unlikely to occur contemporaneously with the receipt of the payment. The Court of Appeal acknowledged this difficulty:[88]

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

[65] The Court also cautioned against too rigid an approach to the temporal requirement:[89]

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

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86 For the full text of s 296(3), see [24] above.
87 *Farrell* (CA Interim), above n 4, at [57] and [78].
88 At [87].
89 At [90].

[66] The Court of Appeal's acknowledgment that the temporal requirement which it saw in the language of s 296(3) could not be taken literally raises some doubt about the validity of its conclusion that the subsection imposes such a requirement. The use of the word "when" certainly indicates that there must be a linkage or connection between the impugned payment and the elements of s 296(3), but we doubt that it can be taken further than that. If, for example, the subsection had provided that, when it received the payment, the recipient "gave or had given" value for the payment, it would be clear that "when" was simply referring to a state of affairs existing at the time of the payment. So it is not the use of the word "when" but rather the use of the words "gave value" that is significant in temporal terms.

[67] But a "state of affairs at the relevant time" meaning is not adequate either, given that a qualifying alteration of position is unlikely to arise until sometime after the impugned payment has been received.

[68] We consider, then, that the use of the word "when" in s 296(3) does not have the significance that the Court of Appeal gave it. The subsection simply requires that there be a link or connection between the impugned payment and the requirements in s 296(3)(a), (b) and (c). Given that the words "A … altered A's position" in s 296(3)(c) cannot be read literally, as the Court of Appeal acknowledged, we see no reason to read "A gave value for the [payment]" in a literal sense either. We see no reason why, as a matter of interpretation, "gave value" cannot be taken to encompass the notion of having given value earlier.

[69] As to the other reasons given by the Court of Appeal in the extract quoted at [62] above:

(a) We agree that it would have been better had Parliament dealt with the point at issue explicitly. But it did not do so, one way or the other. In those circumstances, we must assess meaning by reference to the text, context and purpose of the provisions, in the light of any relevant background material.

(b) We also agree that the "transaction" for the purpose of the voidable transaction provisions is the payment, not the earlier transaction to which it is referable. But we do not think that takes matters very far. The notion of "giving value" means that it was contemplated that the payment would relate to something else – the payment cannot be viewed in a vacuum. The question is what is the 'something else' that was contemplated.

*(ii) Comparison with the Australian provision*

[70] In rejecting the appellants' argument that s 296(3) was intended to replicate the effect of its Australian equivalent, the Court of Appeal identified several material differences between the Australian provisions and those in the New Zealand legislation.[90]

[71] The first difference that the Court noted was that "transaction" in the Australian Act is more broadly defined than is the case in New Zealand.[91] Section 9 of the Corporations Act defines "transaction" as follows:

> ***transaction***, in Part 5.7B, in relation to a body corporate or Part 5.7 body, means a transaction to which the body is a party, for example (but without limitation):
>
> (a) a conveyance, transfer or other disposition by the body of property of the body; and
>
> (b) a charge created by the body on property of the body; and
>
> (c) a guarantee given by the body; and
>
> (d) a payment made by the body; and
>
> (e) an obligation incurred by the body; and
>
> (f) a release or waiver by the body; and
>
> (g) a loan to the body;
>
> and includes such a transaction that has been completed or given effect to, or that has terminated.

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[90] See at [50]–[61] and [75]–[80].
[91] See [51]–[53].

[72] By contrast, the New Zealand definition, under s 292(2), is:[92]

> (3) In this section, **transaction** means any of the following steps by the company:
>
> (a) conveying or transferring the company's property:
>
> (b) creating a charge over the company's property:
>
> (c) incurring an obligation:
>
> (d) undergoing an execution process:
>
> (e) paying money (including paying money in accordance with a judgment or an order of a court):
>
> (f) anything done or omitted to be done for the purpose of entering into the transaction or giving effect to it.

[73] The Court of Appeal noted that the Australian definition is non-exclusive whereas the New Zealand definition is exclusive.[93] It considered that the reference to "transaction" in s 296(3) related to the impugned payments rather than to the broader transactions to which those payments were referable (ie, the antecedent supply of goods or services).[94] We agree with these conclusions, but do not see them as assisting in the resolution of the question whether "gave value" can only mean value given at the time of the payment is made, for the reason noted at [69](b) above.

[74] Second, the Court of Appeal pointed out that the Australian legislation identifies 'at risk' transactions in a different way from the New Zealand legislation.[95] The Court noted that while the Australian unfair preference provisions are broadly similar to New Zealand's, the Australian uncommercial transactions provisions are very different to the New Zealand equivalent (transactions at an undervalue), with substantially different requirements. We agree that, while the Australian provisions provided an important reference point for the framers of the New Zealand provisions, they did not incorporate all elements of the Australian regime into the New Zealand regime, but again we do not see that as decisive in the present context.

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92 Companies Act, s 292(3).
93 *Fences & Kerbs* (CA Interim), above n 4, at [51]–[52].
94 At [53].
95 At [54]–[55].

[75] Third, the Court of Appeal identified two differences between s 588FG(2) and s 296(3) – the temporal difference already mentioned and the use of the words "valuable consideration" rather than "value".[96] In relation to the valuable consideration/value distinction, the Court noted in its final judgment that the term "valuable consideration" was used in s 296(1)(b) and s 296(2)(b), so that the choice of the word "value" in s 296(3)(c) must have been deliberate. The Court considered that that the use of the term "value" rather than "valuable consideration" indicated that something more than what would qualify as consideration sufficient to support a contract is required under s 296(3).[97]

[76] We agree that the words "gave value" mean that the creditor must have given some consideration that "has a real and substantial value and not one which is merely nominal or trivial or colourable".[98] We note that the Australian courts appear to have adopted this approach to "valuable consideration" in s 588FG(2)(c): those words have been interpreted to require consideration that is real and of substantial value, rather than being simply a reference to the concept of consideration in contract law, where typically issues of adequacy do not arise.[99] We consider that this important distinction is made clear in New Zealand by the use of the words "gave value": Parliament chose those words to underscore that the "value" required under s 296(3)(c) is value that is real and substantial and not simply value that would meet the contractual notion of consideration. We also note that there is authority in Australia for the proposition that the consideration need not be "full".[100] This is not an issue that we need address in these appeals, and it is difficult to see how it could ever arise in cases of this sort, which involve routine commercial transactions between unrelated parties dealing at arm's length. But given that s 296(3) applies to a wide range of situations besides voidable preferences (such as transactions at an undervalue), we think it best to leave the issue until it is raised by a particular fact situation.

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96 At [57]–[58].

97 *Fences & Kerbs* (CA Final), above n 5, at [11] and [40].

98 *In re Abbott* [1983] 1 Ch 45 (CA) at 57 per Sir Robert Megarry VC interpreting s 42 of the Bankruptcy Act 1914 (UK). This language was adopted by the High Court of Australia in *Barton v Official Receiver* (1986) 161 CLR 75 at 86 in relation to the "purchaser … in good faith and for valuable consideration" defence in s 120(1)(a) of the Bankruptcy Act 1966 (Cth).

99 See the discussion in *McPherson's Law of Company Liquidation*, above n 83, at [11.1650].

100 *Buzzle Operations Pty Ltd (in liq) v Apple Computer Australia Pty Ltd*, above n 81, at [162] per Young JA.

[77] While we accept, then, that there are differences between the Australian and the New Zealand provisions, we do not see them as assisting in the resolution of the particular issue before us. What is important is that the legislative history indicates that a policy decision was made to align New Zealand's position with that of Australia. We do not see the language used as being inconsistent with that policy decision.

*Interpretation of "gave value"*

[78] We will discuss the interpretation of "gave value" under three headings – historical perspective, "gave value" in context and underlying policy.

*(i) Historical perspective*

[79] The early history of English insolvency law was concerned with personal insolvency.[101] From the mid-16th century, statutes were enacted on the topic, although it was not until the 19th century, that what might be described as modern bankruptcy legislation emerged. Corporate insolvency law developed in the 19th century, following the passage of the Joint Stock Companies Act 1844 (UK) and later the Companies Act 1862 (UK), assisted by the confirmation of separate corporate personality by the House of Lords in *Salomon v Salomon*.[102]

[80] The Bankruptcy Act 1869 (UK) is a useful starting point for analysis. Section 92 of that Act defined fraudulent preferences. A fraudulent preference arose where a debtor, who was unable to pay his debts as they became due, made a payment from his own money to a creditor with a view to giving that creditor a preference over other creditors within three months before being adjudicated bankrupt. However, the section provided it would "not affect the rights of a purchaser, payee, or incumbrancer in good faith and for valuable consideration".

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101 See Ian F Fletcher *The Law of Insolvency* (4th ed, Sweet & Maxwell, London, 2009) at [1-016]–[1-026]; and Goode, above n 25, at [1-10].

102 *Salomon v Salomon* [1897] AC 22 (HL).

[81] Section 92 was considered by the House of Lords in *Butcher v Stead*.[103] A supplier who had sold goods on credit received payment from the debtor shortly before the debtor went bankrupt. The question was whether the payment, which was admittedly fraudulent as far as the debtor was concerned, fell within the scope of the defence. The House of Lords held that it did. Their Lordships held that the word "payee" included the creditor and treated the goods previously supplied as constituting "valuable consideration" for the payment.[104] Lord Cairns LC said:[105]

> I think it was the intention of the Legislature, in defining for the first time the law as to fraudulent preference, and changing the old rule as to contemplation of bankruptcy into a rule which exposed the payment to be impeached for a period so long as three months, to accompany and temper this enactment by a provision of great convenience in mercantile dealings, and giving a protection, where it is obviously much required, to those who, in good faith, take money that ought to be paid to them, without notice that the person paying is doing anything injurious to his other creditors.

[82] In New Zealand, Richmond J adopted the same approach as had been adopted in *Butcher v Stead* when applying s 78 of the Bankruptcy Act 1883 in *Official Assignee in Bankruptcy of W W Taylor v Moorhouse*.[106] Section 78 was in similar, albeit not identical, terms to s 92 of the English Act.[107]

[83] In *Re McGrath, ex parte The Official Assignee*,[108] a contractor periodically gave his wife (who had no other source of income) large sums of money derived from his business activities, some of which she used for household expenses but most of which remained in her bank account. From time to time, the husband asked his wife to advance money for the purposes of his business. Some months before he went bankrupt, the husband transferred the title to the couple's matrimonial home to his wife. The home had a value of £400. Prior to the transfer, the husband had received advances totalling £800 from his wife out of the money he had previously

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103 *Butcher v Stead* (1875) 7 LRHL 839.

104 At 846–847 per Lord Cairns LC, at 848–849 per Lord Hatherley and at 850–852 per Lord O'Hagan.

105 At 847.

106 *Official Assignee in Bankruptcy of W W Taylor v Moorhouse* (1885) 4 NZLR 420 (SC).

107 These differences are set out by Richmond J at 423.

108 *Re McGrath, ex parte The Official Assignee* (1899) 17 NZLR 646 (CA).

given her. When the Official Assignee challenged the transfer of the house under s 77 of the Bankruptcy Act 1892[109] and under the statute 13 Elizabeth I c 5,[110] it was argued on behalf of the wife that she had given valuable consideration for the transfer in that the debt owed to her by her husband at the time of the transfer (£800) had been reduced by the value of the house (£400).

[84] Although this contention was accepted by Denniston J at trial, the Court of Appeal disagreed. The Court did not accept that the monies given by the contractor to his wife were genuine gifts or that the payments made by the wife to her husband were genuine loans. Rather, it treated the wife as simply being the agent of the husband in this context. It seems clear, however, that the Court of Appeal proceeded on the basis that, had the transactions been genuine, the defence provided for in 13 Elizabeth I c 5 (and, by analogy, the similar defence in s 77) would have been available.[111]

[85] Moving forward almost 100 years, a similar conclusion was reached by the Full Court of the Federal Court of Australia in *P T Garuda Indonesia Ltd v Grellman*.[112] That was a case under the Bankruptcy Act 1966 (Cth). Section 121(1) of the Act provided:

> Subject to this section, a disposition of property, whether made before or after the commencement of this Act, with intent to defraud creditors, not being a disposition for valuable consideration in favour of a person who acted in good faith, is, if the person making the disposition subsequently becomes a bankrupt, void as against the trustee in the bankruptcy.

[86] Section 122 provided that payment which had the effect of giving a preference to a creditor was voidable, although there was a defence under s 122(2)(a) if the creditor received the payment in good faith, for valuable consideration and in the ordinary course of business. The Court, comprising Wilcox, Gummow and von Doussa JJ, considered whether an antecedent debt could constitute valuable

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109 Section 77 of the Bankruptcy Act 1892 provided that a settlement of property was void against the Official Assignee if the settlor was adjudicated bankrupt in certain circumstances, but excluded settlements "made in favour of a purchaser or incumbrancer in good faith and for valuable consideration".

110 It declared that transfers for the purpose of defrauding creditors were void but excluded transfers that were bona fide and for good consideration to persons without notice.

111 At 656–657.

112 *PT Garuda Indonesia Ltd v Grellman* (1992) 35 FCR 515 (FCAFC).

consideration for a payment for the purposes of s 121. Having referred to English and Australian authorities, as well as to *Re McGrath*, and having concluded that the words "valuable consideration" in ss 121 and 122 (among other sections) should be interpreted consistently, the Court held and that "consideration consisting of an antecedent debt constitutes valuable consideration for a payment or transfer of property in discharge of that debt".[113] The Court went on to say:[114]

> A further consideration in support of this conclusion is that otherwise a payment by a debtor in satisfaction of an outstanding account due to the creditor received by the creditor in good faith and in the ordinary course of business could not come within the protective provisions of s 122(2)(a) except in rare cases where the payment is accompanied by some new contemporaneous consideration. On a fair reading of s 122 we do not consider Parliament intended such a narrow meaning, and one which would cause great inconvenience in commerce as a trader could not rely on payments, regularly made in the ordinary course of business, by a customer to whom credit on normal trading terms had been extended, being protected from the preference provisions of the Act.

The Court distinguished this type of case from one where the debtor conveyed property by way of assignment or mortgage as a security for existing indebtedness, in which situation, further consideration was necessary.[115]

[87] We note that initially the Australian legislation governing corporate insolvency had incorporated the voidable transaction provisions of the Bankruptcy Act by reference.[116] The Corporations Act 1989 (Cth) was amended by the Corporate Law Reform Act 1992 to include provisions fashioned after those in the Bankruptcy Act.[117] To the extent relevant, those provisions remain in essentially the same terms in the current legislation, the Corporations Act 2001.

[88] New Zealand's bankruptcy legislation abandoned the "valuable consideration" formulation of the defence in favour of a formulation that asked

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113 At 531. The same approach had been taken by the High Court of Australia in *Barton v Official Receiver,* above n 98, at 86. That decision has since been affirmed in *Cook v Benson* [2003] HCA 36, (2003) 214 CLR 370 at [31]–[32] per Gleeson CJ, Gummow, Hayne and Heydon JJ and at [64] per Kirby J.

114 *PT Garuda Indonesia Ltd v Grellman*, above n 112, 531.

115 At 531.

116 See Companies Act 1981 (Cth), s 451. See also Australian Law Reform Commission *General Insolvency Inquiry* (ALRC R45, 1988) at [628]. The approach to valuable consideration has long been the same in the corporate context: see *Taylor v White* (1964) 110 CLR 129 at 136 per Dixon CJ and at 139 per Kitto J.

117 Explanatory Memorandum, Corporate Law Reform Bill 1992 (Cth) at [1059]–[1061].

whether it was inequitable to order recovery when the Insolvency Act 1967 came into effect.[118] As the Court of Appeal noted in the present case, at the time this was an important change of direction.[119] But it may be that New Zealand has effectively gone back to the earlier approach given that similar language to that previously used has been adopted in s 296(3) of the Companies Act 1993 and in s 208 of the Insolvency Act 2006 and that language is similar to the language of the Australian provisions, which have reflected that approach over the years. In any event, what is clear is that the "valuable consideration" formula has a long pedigree in New Zealand and elsewhere, and it was accepted that the existence of an antecedent debt was sufficient to provide a defence where a preferential payment was alleged.

*(ii) "Gave value" in context*

[89] The words "gave value" must, of course, be interpreted in context. Part of the relevant context is s 292. We make three points.

[90] First, as was the case with the previous voidable transaction regime, Parliament could have made transactions having preferential effect absolutely voidable, but it did not.[120] Rather, it provided a defence, which is available to protect creditors in respect of voidable transactions.

[91] This leads on to the second point. Under s 292, if a creditor receives a payment from the debtor company which is partly on account of existing indebtedness and partly as full payment for further goods or services provided by the creditor contemporaneously with the receipt, that part of the payment that is referable to the new goods or services will not constitute a voidable transaction.[121] This is so quite apart from the operation of the "continuing business relationship" test. To qualify as a voidable transaction, a payment must be made to a creditor and must have the effect of enabling that creditor to receive more than it would on a liquidation. The part of the payment that relates to the giving of new value will not have been made to the supplier as a creditor but for the contemporaneous supply of

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[118] Insolvency Act 1967, s 58(6).
[119] *Fences & Kerbs* (CA Interim), above n 4, at [33].
[120] See the discussion of *Waikato Freight and Storage (1988) Ltd v Meltzer*, above n 50, at [38] above.
[121] See the discussion at [18] above.

the relevant goods or services. In other words, that part of the transaction will be in the nature of a "cash on delivery" sale.[122] Moreover, the funds paid to the creditor for the new supply will not result in the creditor receiving more than it would in a liquidation. This is because the assets of the company will not be diminished by that part of the payment as the company will have received, contemporaneously, new value in return.

[92] If this analysis is correct, in such a case the words "gave value" in s 296(3) must refer to something other than further goods or services provided by the creditor at the time of the disputed payment because the payment for the new value would not be a voidable transaction. Given this, the Court of Appeal's interpretation of "gave value" means that the words would have very limited application indeed. They would be confined to situations where the new value was provided on credit or was intangible, for example, where a creditor promised further supply if existing indebtedness was resolved or mitigated or promised not to take default action or enforce default rights if payment was made in whole or in part, providing this was of substantial benefit to the debtor company. However, on the assumption that such intangible value is sufficient in terms of s 296(3)(c), the creditor may have difficulty establishing that it can meet the requirements of s 296(3)(a) and (b) because a creditor may have little incentive to offer such value unless it is aware of circumstances that may constitute reasonable grounds for suspecting that the company has liquidity issues.

[93] Finally, we mention the second ground available under s 296(3)(c), change of position. An obvious example of a qualifying change of position would be where a creditor agrees to resume supply following payment, in whole or part, for previous supplies from a defaulting creditor.[123] To the extent that this is so, it further narrows the scope of the "gave value" ground as interpreted by the Court of Appeal.

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[122] This will certainly be so if the new goods or services are paid for in full. But even if a partial payment is made for the new goods or services, the same principle will apply in respect of that partial payment.

[123] See, for example, *Re Bee Jay Builders Ltd* [1991] 3 NZLR 560 (HC). Under the current regime, at least some of these situations are likely to fall with the "continuing business relationship" aspect of s 292. The s 296(3) defence will still be available, however.

[94] These points suggest at least that s 296(3)(c) was not intended to be interpreted in the way found by the Court of Appeal.

*(iii) Underlying policy*

[95] The Court of Appeal considered that to interpret s 296(3) in the way contended for by the appellants would undermine the policy of the voidable transaction provisions. The Court noted that the pari passu principle was designed "to secure the equal participation in such of the company's property as is available in the liquidation".[124] The Court described the voidable preference regime as an attempt "to strike a balance between the interests of all creditors in being able to share the assets of the company and the interests of particular creditors who believe that payments have been validly received and they ought not to be required to pay them back"[125] but went on to say that the objective and effect of the regime was not to do justice or achieve fairness between a particular creditor and the debtor company, but instead to achieve fairness among all creditors inter se.[126]

[96] As the material we have cited from the legislative background[127] and the explanatory note to the Companies Amendment Bill 2006[128] demonstrates, both the Government and Parliament understood that there was a conflict between the concept of collective realisation and individual justice in particular cases and accepted that, in some circumstances, the need for individual justice would prevail over the underlying policy of collective realisation. The argument, then, concerns where Parliament ultimately drew the boundary.

[97] The boundary drawn by the Court of Appeal decisions leaves limited room for the operation of the s 296(3) defence, particularly when viewed against the background of the replacement of the "ordinary course of business" test by the "continuing business relationship" test. As we have said, the changes to s 296(3) effected by the 2006 amendments need to be seen against the background of the changes made to s 292 at the same time.

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124 *Fences & Kerbs* (CA Interim), above n 4, at [63] (footnote omitted).
125 At [65] (footnote omitted).
126 At [68].
127 See above at [40]–[46].
128 See above at [47]–[50].

[98] Before the 2006 amendments came into effect, s 292 protected transactions in the "ordinary course of business" from challenge by a liquidator, so that a payment on account of an antecedent debt for good or services could receive protection. As Trish Keeper has said:[129]

> … bona fide trade creditors who had received payment of an antecedent debt in the specified period prior to the liquidation could rely on the "ordinary course of business" exception to escape the voidable transaction claim and therefore seldom were required to utilise the defence provision. Accordingly, many trade creditors prior to the [2006] amendment did receive payments of antecedent debt, which were not subject to claw back by a liquidator, provided they formed part of the ordinary course of business between the company and the creditor.

The "continuing business relationship" test does not provide an exception (or defence) in the sense that the "ordinary course of business" test did. Rather, it specifies what it is that a liquidator may challenge where there is a continuing business relationship between the creditor and the debtor company. Some outcomes that were possible under the "ordinary course of business" test will not be possible under the "continuing business relationship" test, although the "continuing business relationship" test does provide a measure of protection for those creditors who are able to bring themselves within it. Under the provisions following the 2006 amendments, it is the defence in s 296(3) that will be the primary source of relief, particularly for creditors who are not in a continuing business relationship with the debtor company.

[99] As the Court of Appeal interpreted it, s 296(3) has a narrower scope of operation than the provisions it replaced,[130] if only because a supplier which has a one-off credit-based transaction with a technically insolvent company is unlikely to be able to take the benefit of the defence where the company pays in accordance with the supply arrangement. In a routine transaction of that type, the supplier will give nothing additional by way of value when it receives the payment. The defence will generally be available only to suppliers which have more than one transaction with the company, so that subsequent supplies can be seen as referable to the receipt

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[129] Trish Keeper "Court of Appeal Clarifies New Value Required for Defence Against Insolvent Transaction Claims – Farrell and Rogan as liquidators of Contract Engineering (in rec and liq) v Fences & Kerbs" (2013) 21 Insolv LJ 212 at 217.

[130] That is, the combination of ss 292 and 296(3).

of an earlier payment, or where the debtor company breaches a credit-based supply arrangement and the creditor does not enforce its rights (for example, to interest for late payment) and so may be seen as having given value.[131] Even suppliers with ongoing relationships with the debtor company may not be able to rely on the defence because continuing supply after payment of a debt may be credited as part of the calculation of the balance of the transaction as part of the running account exception.[132]

[100] The result is, then, that on the Court of Appeals interpretation, the ability of debtors to avoid the application of the voidable transactions regime was significantly curtailed by the 2006 Amendment Act, although we have seen nothing in the background material to indicate that such a result was intended. Indeed, the background material suggests to the contrary that the new regime was intended to create more certainty for creditors by giving clearer protection, as we now develop.

[101] We have referred to the Government's policy decisions in relation to voidable transactions as they emerged from the process leading to the introduction of the Insolvency Bill 2006. Those policy decisions were reflected in the voidable transaction provisions as ultimately enacted in the 2006 Amendment Act. As the passage cited at [46] above from the Ministry's 2004 paper shows, the test in relation to the new s 296(3) defence was intended to be "along the lines of" the test in s 588FG(2) of the Australian legislation. According to the statements included in the explanatory note, the new s 296(3) defence was intended to be objective in nature and to "give [creditors] more certainty that the transactions they are entering into will not be made void".[133] It is legitimate to ask how this objective could be achieved on the Court of Appeal's interpretation of s 296(3)(c) as the provision would generally operate to preclude reliance on the defence even where a creditor acted in good faith and in the absence of any reasonable grounds to believe that the debtor company was technically insolvent. This is because it is improbable in most situations that a creditor will give value in the sense used by the Court of Appeal when it accepts, in good faith, a payment for an antecedent debt from the debtor

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131 In the latter example, the creditor may, of course, have difficulty in meeting the other requirements of s 296(3): see above at [92].

132 See *Allied Concrete* (HC), above n 8, at [35].

133 See the extract at [49] above.

company in circumstances where it does not suspect, and there is no reasonable basis to suspect, that the debtor company is in financial difficulty.

[102] Furthermore, if the words "valuable consideration" were replaced by the words "gave value" in order to indicate that the approach taken in Australia to the words was not to be adopted and a different approach taken, that would surely have been explicitly signalled at some point in the background materials, given the extensive discussion that preceded the introduction of the Insolvency Law Reform Bill in 2006. But we have seen nothing in those materials to indicate such an intention. If the words "gave value" are interpreted as found by the Court of Appeal, Parliament effected a fundamental change in policy as against the position in Australia but one that was, as far as we have been able to ascertain, unheralded.

[103] Moreover, it is difficult to understand the policy underlying s 296(3) as interpreted by the Court of Appeal. First, although some suppliers may require cash on delivery, credit arrangements (such as payment within seven days from presentation of invoice or payment within 30 days of date of supply) are commonplace. In this context, the existence of any form of credit arrangement, no matter how short-term and commonplace, is critical. It is difficult to see why a supplier under a "one-off" credit-based transaction of a type commonly entered into should be precluded from qualifying for the defence where the debtor company pays in accordance with the terms of supply, particularly where the supplier is not familiar with the debtor company. Although such a one-off supplier might be able to take advantage of the defence where the debtor did not comply with the credit arrangement and the creditor agreed not to enforce its rights (for example, to interest for late payment) in return for immediate payment, it is difficult to see any rational reason for this difference in treatment between the two situations: a payment that appears to be a routine compliance with a commonplace credit arrangement will not be protected, while a payment which is made in breach of a credit arrangement might be protected if the creditor is perceived as having given something additional by way of value when receiving the payment.

[104] Second, in the case of suppliers with a longer term relationship with the debtor company, their ability to utilise the defence might depend on subtle variations

in factual circumstances, in particular, whether they did or said something which could be interpreted as giving additional value at the time of payment. Because giving additional value might include things such as refraining from taking enforcement action or agreeing to continue supply despite previous non-compliance with supply terms (providing that is of substantial value to the debtor company), the application of the defence could depend on differences that do not reflect the underlying merits of creditors' positions. Moreover, as previously noted, it may be difficult for creditors in this type of situation to show that they meet the other requirements of s 296(3), so that the defence will be available in very limited circumstances.

[105] As we have said, the Court of Appeal's interpretation of s 296(3) does not advance the objective of providing creditors with more certainty that the transactions they enter into will not be made void but, rather, undermines it. We think it implausible that Parliament intended the types of outcome that we have just identified. Accordingly, we consider that s 296(3) should be interpreted consistently with the Australian provision, which is consistent with the approach that was taken historically in relation to the "valuable consideration" requirement in the bankruptcy legislation. On that approach, "value" under s 296(3), while it must be real and substantial, can include value given when the debt was initially incurred or value arising from by the reduction or extinguishment of a liability to the creditor incurred by the debtor company as a result of an earlier transaction. In this context, it must be remembered that before a creditor can take advantage of the s 296(3) defence, it must show that it acted in good faith and there were no reasonable grounds for a creditor in its position to believe that the company was technically insolvent. These are significant requirements, not easily met. Moreover, we note that the basic claw-back period in Australia is six months rather than the two-year period applicable in New Zealand, yet the approach applied by the Australian courts to s 588FG(2) does not seem to have provoked critical comment or caused practical difficulties.

[106] We acknowledge that the conclusion reached by the Court of Appeal is consistent with what has become the generally accepted view in New Zealand, as

reflected by commentators such as Heath and Whale.[134] However, we consider that the language used, assessed in light of the legislation's purpose as revealed in the legislative history described above, does not demonstrate any intention to severely curtail the circumstances in which creditors can claim relief from the voidable transaction provisions, which is the effect of the contrary interpretation. Rather, we consider that the intention was to reduce the scope for exceptions under s 292 by removing the "ordinary course of business" test and replacing it with the "continuing business relationship" test and to place greater emphasis on s 296(3) for the purposes of a defence to a liquidator's claim. The intention was to create greater certainty for creditors and to align the New Zealand position with that in Australia. To give effect to that intention, it is necessary to adopt a wider meaning of s 296(3)(c) than that adopted by the Court of Appeal, which leaves the s 296(3) defence with little scope for operation.

## Decision

[107] The appeals are allowed. The applications of the liquidators for the transactions to be voided are dismissed.

[108] The respondents in each appeal must pay costs of $10,000 to the appellant in the relevant appeal, plus the appellant's reasonable disbursements. Absent agreement between the parties, costs in the High Court and Court of Appeal are to be fixed by those Courts in light of this judgment.

## APPENDIX

### COMPANIES ACT 1993

*Voidable transactions*

**292 Insolvent transaction voidable**

(1) A transaction by a company is voidable by the liquidator if it—

(a) is an insolvent transaction; and

(b) is entered into within the specified period.

[134] Heath and Whale, above n 46, at [24.136].

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

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

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

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

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

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

(c) incurring an obligation:

(d) undergoing an execution process:

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

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

(4) In this section, **transaction** includes a transaction by a receiver, except a transaction that discharges, whether in part or in full, a liability for which the receiver is personally liable under section 32(1) or (5) of the Receiverships Act 1993 or otherwise personally liable under a contract entered into by the receiver.

(4A) A transaction that is entered into within the restricted period is presumed, unless the contrary is proved, to be entered into at a time when the company is unable to pay its due debts.

(4B) Where—

(a) a transaction is, for commercial purposes, an integral part of a continuing business relationship (for example, a running account) between a company and a creditor of the company (including a relationship to which other persons are parties); and

(b) in the course of the relationship, the level of the company's net indebtedness to the creditor is increased and reduced from time to time as the result of a series of transactions forming part of the relationship;

then—

(c) subsection (1) applies in relation to all the transactions forming part of the relationship as if they together constituted a single transaction; and

(d) the transaction referred to in paragraph (a) may only be taken to be an insolvent transaction voidable by the liquidator if the effect of applying subsection (1) in accordance with paragraph (c) is that the single transaction referred to in paragraph (c) is taken to be an insolvent transaction voidable by the liquidator.

(5) For the purposes of subsections (1) and (4B), **specified period** means—

(a) the period of 2 years before the date of commencement of the liquidation together with the period commencing on that date and ending at the time at which the liquidator is appointed; and

(b) in the case of a company that was put into liquidation by the court, the period of 2 years before the making of the application to the court together

with the period commencing on the date of the making of that application and ending on the date on which, and at the time at which, the order was made; and

(c) if—

(i) an application was made to the court to put a company into liquidation; and

(ii) after the making of the application to the court a liquidator was appointed under paragraph (a) or paragraph (b) of section 241(2),—

the period of 2 years before the making of the application to the court together with the period commencing on the date of the making of that application and ending on the date and at the time of the commencement of the liquidation.

(6) For the purposes of subsection (4A), **restricted period** means—

(a) the period of 6 months before the date of commencement of the liquidation together with the period commencing on that date and ending at the time at which the liquidator is appointed; and

(b) in the case of a company that was put into liquidation by the court, the period of 6 months before the making of the application to the court together with the period commencing on the date of the making of that application and ending on the date on which, and at the time at which, the order of the court was made; and

(c) if—

(i) an application was made to the court to put a company into liquidation; and

(ii) after the making of the application to the court a liquidator was appointed under paragraph (a) or paragraph (b) of section 241(2),—

the period of 6 months before the making of the application to the court together with the period commencing on the date of the making of that application and ending on the date and at the time of the commencement of the liquidation.

**293 Voidable charges**

(1) A charge over any property or undertaking of a company is voidable by the liquidator if—

(a) the charge was given within the specified period; and

(b) immediately after the charge was given, the company was unable to pay its due debts.

(1A) Subsection (1) does not apply if—

(a) the charge secures money actually advanced or paid, or the actual price or value of property sold or supplied to the company, or any other valuable consideration given in good faith by the grantee of the charge at the time of, or at any time after, the giving of the charge; or

(b) the charge is in substitution for a charge given before the specified period.

(2) Unless the contrary is proved, a company giving a charge within the restricted period is presumed to have been unable to pay its due debts immediately after giving the charge.

(3) Subsection (1A)(b) does not apply to the extent that—

(a) the amount secured by the substituted charge exceeds the amount secured by the existing charge; or

(b) the value of the property subject to the substituted charge at the date of the substitution exceeds the value of the property subject to the existing charge at that date.

(4) Nothing in subsection (1) applies to a charge given by a company that secures the unpaid purchase price of property, whether or not the charge is given over that property, if the instrument creating the charge is executed not later than 30 days after the sale of the property or, in the case of the sale of an estate or interest in land, not later than 30 days after the final settlement of the sale.

(5) For the purposes of subsection (1A)(a) and subsection (4), where any charge was given by the company within the period specified in subsection (1), all payments received by the grantee of the charge after it was given shall be deemed to have been appropriated so far as may be necessary—

(a) towards repayment of money actually advanced or paid by the grantee to the company on or after the giving of the charge; or

(b) towards payment of the actual price or value of property sold by the grantee to the company on or after the giving of the charge; or

(c) towards payment of any other liability of the company to the grantee in respect of any other valuable consideration given in good faith on or after the giving of the charge.

(6) For the purposes of subsection (1), **specified period** means—

(a) the period of 2 years before the date of commencement of the liquidation together with the period commencing on that date and ending at the time at which the liquidator is appointed; and

(b) in the case of a company that was put into liquidation by the court, the period of 2 years before the making of the application to the court together with the period commencing on the date of the making of the application and ending on the date on which, and at the time at which, the order of the court was made; and

(c) if—

(i) an application was made to the court to put a company into liquidation; and

(ii) after the making of the application to the court a liquidator was appointed under paragraph (a) or paragraph (b) of section 241(2),—

the period of 2 years before the making of the application to the court together with the period commencing on the date of the making of that application and ending on the date and at the time of the commencement of the liquidation.

(7) For the purposes of subsection (2), **restricted period** means—

(a) the period of 6 months before the date of commencement of the liquidation together with the period commencing on that date and ending at the time at which the liquidator is appointed; and

(b) in the case of a company that was put into liquidation by the court, the period of 6 months before the making of the application to the court together with the period commencing on the date of the making of the application and ending on the date on which, and at the time at which, the order of the court was made; and

(c) if—

(i) an application was made to the court to put a company into liquidation; and

(ii) after the making of the application to the court a liquidator was appointed under paragraph (a) or paragraph (b) of section 241(2),—

the period of 6 months before the making of the application to the court together with the period commencing on the date of the making of that application and ending on the date and at the time of the commencement of the liquidation.

**294 Procedure for setting aside transactions and charges**

(1) A liquidator who wishes to set aside a transaction or charge that is voidable under section 292 or 293 must—

(a) file a notice with the court that meets the requirements set out in subsection (2); and

(b) serve the notice as soon as practicable on—

(i) the other party to the transaction or the charge holder, as the case may be; and

(ii) any other party from whom the liquidator intends to recover.

(2) The liquidator's notice must—

(a) be in writing; and

(b) state the liquidator's postal, email, and street addresses; and

(c) specify the transaction or charge to be set aside; and

(d) describe the property or state the amount that the liquidator wishes to recover; and

(e) state that the person named in the notice may object to the transaction or charge being set aside by sending to the liquidator a written notice of objection that is received by the liquidator at his or her postal, email, or street address within 20 working days after the liquidator's notice has been served on that person; and

(f) state that the written notice of objection must contain full particulars of the reasons for objecting and must identify any documents that evidence or substantiate the reasons for objecting; and

(g) state that the transaction or charge will be set aside as against the person named in the notice if that person does not object; and

(h) state that if the person named in the notice does object, the liquidator may apply to the court for the transaction or charge to be set aside.

(3) The transaction or charge is automatically set aside as against the person on whom the liquidator has served the liquidator's notice, if that person has not objected by sending to the liquidator a written notice of objection that is received by the

liquidator at his or her postal, email, or street address within 20 working days after the liquidator's notice has been served on that person.

(4) The notice of objection must contain full particulars of the reasons for objecting and must identify documents that evidence or substantiate the reasons for objecting.

(5) A transaction or charge that is not automatically set aside may still be set aside by the court on the liquidator's application.

**295 Other orders**

If a transaction or charge is set aside under section 294, the court may make 1 or more of the following orders:

(a) an order that a person pay to the company an amount equal to some or all of the money that the company has paid under the transaction:

(b) an order that a person transfer to the company property that the company has transferred under the transaction:

(c) an order that a person pay to the company an amount that, in the court's opinion, fairly represents some or all of the benefits that the person has received because of the transaction:

(d) an order that a person transfer to the company property that, in the court's opinion, fairly represents the application of either or both of the following:

(i) money that the company has paid under the transaction:

(ii) proceeds of property that the company has transferred under the transaction:

(e) an order releasing, in whole or in part, a charge given by the company:

(f) an order requiring security to be given for the discharge of an order made under this section:

(g) an order specifying the extent to which a person affected by the setting aside of a transaction or by an order made under this section is entitled to claim as a creditor in the liquidation.

**296 Additional provisions relating to setting aside transactions and charges**

(1) The setting aside of a transaction or an order made under section 295 does not affect the title or interest of a person in property which that person has acquired—

(a) from a person other than the company; and

(b) for valuable consideration; and

(c) without knowledge of the circumstances under which the property was acquired from the company.

(2) The setting aside of a charge or an order made under section 295 does not affect the title or interest of a person in property which that person has acquired—

(a) as the result of the exercise of a power of sale by the grantee of the charge; and

(b) for valuable consideration; and

(c) without knowledge of the circumstances relating to the giving of the charge.

(3) A court must not order the recovery of property of a company (or its equivalent value) by a liquidator, whether under this Act, any other enactment, or in law or in equity, if the person from whom recovery is sought (**A**) proves that when A received the property—

(a) A acted in good faith; and

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

(c) A gave value for the property or altered A's position in the reasonably held belief that the transfer of the property to A was valid and would not be set aside.

(4) Nothing in the Land Transfer Act 1952 restricts the operation of this section or sections 292 to 295.

## ELIAS CJ

[109] A court with statutory or other power to order the recovery by a liquidator of property transferred by a company is prevented from doing so in the circumstances described by s 296(3) of the Companies Act 1993. As is relevant to the present case, s 296(3) permits a creditor who receives payment of a debt owed by a company which is insolvent to provide proof that will shield the creditor from being required to pay back the money received under s 295 of the Act. The defence applies only if the person who received the property proves that "when" he did so he:

(a) acted in good faith; and

(b) did not suspect, or have reasonable grounds for suspecting that the company was insolvent; and

(c) gave value for the property or altered his position in the reasonably held belief that the transfer of property was valid and would not be set aside.

[110] The full text of s 296(3) is as follows:

(3) A court must not order the recovery of property of a company (or its equivalent value) by a liquidator, whether under this Act, any other enactment, or in law or in equity, if the person from whom recovery is sought (**A**) proves that when A received the property—

(a) A acted in good 4faith; and

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

> (c) A gave value for the property or altered A's position in the reasonably held belief that the transfer of the property to A was valid and would not be set aside.

[111] The appeals concern the application of s 296(3) to transactions voidable under s 292(1) because they are "insolvent transactions" within 2 years of the commencement of liquidation.[135] An "insolvent transaction" is defined by s 292(2) as one which:

> (a) is entered into at a time when the company is unable to pay its due debts; and
>
> (b) enables another person to receive more towards satisfaction of a debt owed by the company than the person would receive, or would be likely to receive, in the company's liquidation.

As s 292(2)(b) indicates, the power to avoid the payment and obtain recovery protects the statutory system of priorities on insolvency from being undermined by dealings in the company's assets before liquidation.

[112] Section 296(3) was enacted in its current form in 2006. Before then, s 296(3) had provided the court with a discretion to decline to make an order for the recovery of property by the liquidator "wholly or in part" if:

> (a) The person from whom recovery is sought received the property in good faith and has altered his or her position in the reasonably held belief that the transfer to that person was validly made and would not be set aside; and
>
> (b) In the opinion of the Court, it is inequitable to order recovery or recovery in full.

[113] The amendment of s 296(3) was one amendment of a number made at the same time to Part 16 of the Act.[136] They included removal of the former exclusion from the definition of insolvent transactions of transactions "in the ordinary course of business". At the same time, s 292 was adjusted by the new s 292(4B) to provide

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[135] This two year "specified period" is defined in s 292(5). The period of 6 months before the date of commencement of the liquidation is known as the restricted period, defined in s 292(6). Under s 292(4A) a transaction that is entered into within the restricted period is presumed, unless the contrary is proved, to be entered into at a time when the company is unable to pay its due debts.

[136] Companies Amendment Act 2006. These amendments came into effect on 1 November 2007: see Companies Amendment Act, s 2 and the Companies Amendment Act 2006 Commencement Order 2007, cl 2.

that the preferential effect of transactions which are "an integral part of a continuing business relationship" is determined by their net effect.

[114] Section 292(4B) provides:

> (4B) Where–
>
> (a) a transaction is, for commercial purposes, an integral part of a continuing business relationship (for example, a running account), between a company and a creditor of the company (including a relationship to which other persons are parties); and
>
> (b) in the course of the relationship, the level of the company's net indebtedness to the creditor is increased and reduced from time to time as the result of a series of transactions forming part of the relationship;
>
> then–
>
> (c) subsection (1) applies in relation to all the transactions forming part of the relationship as if they together constituted a single transaction; and
>
> (d) the transaction referred to in paragraph (a) may only be taken to be an insolvent transaction voidable by the liquidator if the effect of applying subsection (1) in accordance with paragraph (c) is that the single transaction referred to in paragraph (c) is taken to be an insolvent transaction voidable by the liquidator.

[115] The former exclusion of transactions "in the ordinary course of business" in effect provided wide relief for creditors against the reopening of payments of trade debts, without the need to have recourse to the defence provided by s 296(3). That was the context in which the pre-2006 defence under s 296(3) (not then or since restricted to transactions voidable for creditor preference) required change of position and a determination by the court that it would be "inequitable" to require repayment.

[116] The adjustment to the s 292 definition of insolvent transactions by s 292(4B) was better targeted to the object of avoiding transactions with preferential effect but did not provide protection to creditors who accepted payment of debts owed to them in the normal course, without alteration of position. (Receipt of payment does not of

itself amount to change of position.)[137] That was the context in which the defence provided by s 296(3) was extended in 2006 to those who gave "value" in the transaction if they proved they had no reason, objectively assessed, to suspect the company's insolvency.

[117] The new s 296(3) is substantially the same as s 588FG(2) of the Corporations Act 2001 (Cth), first adopted in Australia in 1992.[138] Section 588FG(2) provides:

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

[118] The legislative history (discussed at [139]–[143]) indicates that patterning s 296(3) on s 588FG(2) was deliberate choice. Similarly, the treatment of transactions entered into in the course of a business relationship in s 292(4B) was modelled on the Australian adjustment of running accounts in s 588FA(3) of the

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137 *Westpac Banking Corp v Nangeela Properties Ltd* [1986] 2 NZLR 1 (CA) at 5; and *MacMillan Builders Ltd v Morningside Industries Ltd* [1986] 2 NZLR 12 (CA) at 17 per Somers J. Both of these cases were concerned with the precursor to s 296(3), s 311A(7) of the Companies Act 1955.

138 Section 588FG was inserted into the Corporations Act 1989 (Cth) by s 111 of the Corporate Law Reform Act 1992 (Cth). It was then re-enacted in essentially the same form in the Corporations Act 2001 (Cth).

Corporations Act 2001, also first adopted by statute in Australia in 1992 although it had earlier been the subject of case-law.[139] By it, the "net effect" of payments "in" were treated as "so integrally connected with payments 'out' that the ultimate effect of the course of dealings should be considered to determine whether the payments are preferences".[140]

[119] In the present appeals, it is not in dispute that the payments made to the three creditors were "voidable transactions" under s 292 of the Companies Act.[141] Each was entered into within two years of liquidation at a time when the debtor companies were insolvent because unable to pay their due debts. The payments also had the effect of enabling the three creditors whose cases are the subject of the appeals to receive more towards satisfaction of the debts owed to them than they would have received in the liquidations. The only question on the appeal is the application of the shield provided by s 296(3).

[120] It was accepted in the High Court,[142] and was not in issue on appeal to the Court of Appeal,[143] that each creditor acted in good faith and that, assessed both objectively and subjectively, none had reasonable grounds for suspecting or did suspect the insolvency of the debtor companies (as is required by s 296(3)(a) and (b)). We are not concerned with the basis for those findings.

[121] The single point in issue in this Court, is whether each creditor comes within the terms of s 296(3) on the basis that each "gave value" for the disputed payment. (It is not suggested that any came within the alternative basis for relief because they had altered their position in reliance on the payments.) No new value was given at the time of the payments. Each creditor argued however that the provision of goods

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139 *Queensland Bacon Pty Ltd v Rees* (1966) 115 CLR 266 at 280–286 per Barwick CJ, and *Petagna Nominees Pty Ltd v Ledger* (1989) 1 ACSR 547 (WASC) at 564 per Franklyn J.

140 Explanatory Memorandum, Corporate Law Reform Bill 1992 (Cth) at [1042].

141 In the lower Courts, ACME Engineering Ltd, not an appellant in the present appeal, had argued that the High Court was wrong to find that its debtor company, Contract Engineering Ltd, was insolvent at the time payment was made, but the Court of Appeal's rejection of that contention is not the subject of the present appeal. See *Farrell v Fences & Kerbs Ltd* [2013] NZCA 329 (O'Regan P, Randerson and French JJ) at [55]–[61] [*Fences & Kerbs* (CA Final)].

142 *Meltzer v Allied Concrete Ltd* [2013] NZHC 977 (Associate Judge Abbott); *Farrell v Fences & Kerbs Ltd* [2012] NZHC 2865 (Associate Judge Christiansen); and *Meltzer v Hiway Stabilizers New Zealand Ltd* [2012] NZHC 3281, [2013] 2 NZLR 725 (Toogood J).

143 *Farrell v Fences & Kerbs Ltd* [2013] NZCA 91, [2013] 3 NZLR 82 (O'Regan P, Randerson and French JJ) [*Fences & Kerbs* (CA Interim)]; and *Fences & Kerbs* (CA Final).

and services which gave rise to the original debts was value given for the property, within the meaning of s 296(3)(c). Each also argued additionally that the satisfaction of a debt is itself the giving of value for the purpose of s 296(3).

**The appeals**

[122] The liquidators of Contract Engineering Ltd, appointed on 5 July 2011, sought to set aside payments made by Contract Engineering to Fences & Kerbs Ltd for the construction of concrete and steel foundations. An invoice for $56,256.66 rendered on 21 June 2010 was paid in instalments between 4 August 2010 and 30 September 2010. An invoice for further work Fences & Kerbs agreed to undertake at the end of July 2010 (and in respect of which an invoice for $1,687.50 was rendered on 28 September 2010) was paid in full on 29 October 2010.

[123] The liquidators of Window Holdings Ltd, appointed on 1 July 2011, sought to set aside payments by the company to Hiway Stabilizers New Zealand Ltd under two invoices for $12,379.51 and $642.04 rendered for landscaping work and materials on 1 May and 30 June 2010 respectively. The invoices were paid on 23 August 2010 and 6 September 2010.

[124] The liquidators of Window Holdings, appointed on 1 July 2011, sought to recover $63,649.50 from a payment of $88,722.41 made to Allied Concrete Ltd in respect of 10 invoices rendered by Allied for supply of concrete on credit .[144] The allowance made in the claim reflects application of s 292(4B) of the Act (enacted in 2006) which allows a transaction to be aggregated with other transactions with the same debtor if "an integral part of a continuing business relationship" in which the net indebtedness of the company fluctuated as a result of the series of transactions forming part of the relationship. Allied Concrete, unlike the creditors in the other appeals, had been a long-standing supplier of materials to Window Holdings on credit terms of up to 90 days and supplied further material to Window Holdings for which Window Holdings was invoiced $12,625.76 in the months following payment of the $88,722.41.

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[144] The method of calculation is described in *Meltzer v Allied Concrete* [2013] NZHC 977 at [5].

[125] Fences & Kerbs and Hiway Stabilizers were successful in the High Court in the argument that s 296(3) applied because value was given in the provision of goods and services, the debt for which was discharged by the payment. The Court of Appeal reversed the decision in the High Court. It held, in an interim judgment, that "value for the property", as required by s 296(3)(c), must be given at the time the payment (the relevant "property" of the company obtained) was received. The value earlier given in the services and goods supplied was not accepted to be the giving of value within the meaning of s 296(3)(c).[145] In its final judgment, the Court of Appeal rejected also the further argument that the release of the existing debt constituted value given for the property of the company by which payment was made.[146] The Court of Appeal treated the further argument as having been effectively disposed of by the reasons it had given in its interim judgment in holding that new value was required for the property by s 296(3).[147]

[126] The Court of Appeal allowed that the contrary interpretation was tenable, but was persuaded that new value was meant in the legislation by a number of considerations, which may be summarised for present purposes:

(a) section 296(3) required value to be given "when A received the property", indicating the exchange of value was at the time the company's property (the payment) was received;

(b) although the Court of Appeal had been referred to Australian authority that fresh value was not required by the equivalent Australian provision (s 588FG of the Corporations Act 2001), there were material differences between the Australian and New Zealand provisions: "transaction" was "more broadly defined" in the Australian legislation; "value" (the term in s 296(3)) was a wider concept than "valuable consideration" (the term used in s 588FG of the Australian legislation); there are significant differences between the other grounds for avoidance in the New Zealand and Australian provisions, even if the Australian unfair preference provisions and the

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145 *Fences & Kerbs* (CA Interim) at [86].

146 *Fences & Kerbs* (CA Final) at [3]–[28].

147 At [5].

New Zealand voidable preference provisions are broadly similar; and the structure and language of the Australian s 588FG(2) does not anchor the timing of provision of value to the transaction (the payment) as the word "when" in s 296(3) does;

(c) the object of the legislation (promotion of equality of treatment of creditors and protection of the statutory system of distribution) would be undermined if the antecedent value provided for the original debt were treated as value for the payment (the transaction in issue) because the defence would be available to all creditors without notice of insolvency, so that s 296(3)(c) (the alteration of position leg of the defence) would be "practically redundant" in its application to payments to creditors;

(d) this would be a significant departure from the approach adopted before the 2006 amendments, which was "not signalled";

(e) the Australian authorities were distinguishable in their own terms as well as because of the differences in legislation; in particular the decision of the New South Wales Court of Appeal in *Buzzle Operations Pty Ltd v Apple Computer Australia Pty Ltd,*[148] relied on by the creditors, was concerned with transfer of property at an undervalue rather than transactions having preferential effect between creditors, nor was it fully reasoned on the point;

(f) previous New Zealand cases (although decided before the 2006 amendments and therefore concerned with change of position and whether avoidance was inequitable) had taken the view that the creditor had not suffered any "relevant detriment" if required to pay back the amount received with preferential effect in the light of the insolvency regime.

[148] *Buzzle Operations Pty Ltd (in liq) v Apple Computer Australia Pty Ltd* [2011] NSWCA 109, (2011) 277 ALR 189 at [161]–[166] per Young JA (the other members of the Court indicating agreement with Young JA on the point).

[127] In separate proceedings, Allied Concrete had sought to argue in the High Court that its earlier supply of material to Window Holdings was value given for the payment it later received, although the supply was some months before the payment was made. The Associate Judge before whom the matter was heard, Associate Judge Abbott, applied the interim decision of the Court of Appeal in holding that the "value given" in exchange for the property was not satisfied by the goods and services supplied which led to the indebtedness. Although the second, final, decision of the Court of Appeal (dealing with the additional argument that the satisfaction and release of an antecedent debt was itself value given) had not yet been delivered, Associate Judge Abbott took the view that the same reasons given by the Court of Appeal for rejecting the first argument applied to the release of debt (as indeed the Court of Appeal later held in its final judgment).

[128] Leave was given to Fences & Kerbs and Hiway Stabilizers to appeal to this Court from the decisions of the Court of Appeal. Allied Concrete was given leave to appeal directly from the decision of the High Court in the same judgment.

**Approach**

[129] The appeal turns on the meaning of s 296(3)(c). The starting point when interpreting legislation is the text, scheme, and purpose of the legislation. It is unfortunate in a provision of such great practical importance that the legislation in its own terms is not entirely clear. Nor does the immediate legislative history of the 2006 amendments (discussed at [139]–[143]) explicitly address the purpose of the reforms as it bears on the particular point in issue – whether s 296(3)(c) requires new value for payment of an existing debt. There are general indications in the legislative history that harmonisation with the Australian provisions was an object of the 2006 amendments. That could favour interpretation in accordance with Australian authority where possible. The Australian case-law to date is rather slight on the meaning of the legislation. The scheme of the legislation and its purpose is however the product of considerable history. It includes the use of familiar principles and concepts of common law and equity, as well as their statutory development and modification over more than a century. The history of voidable preference provisions in insolvency indicates constant concern to ensure that the

protection of orderly distribution on insolvency does not come at too high a price in terms of business disruption and the oversetting of commercial expectations.

[130] Some acknowledgement of these antecedents is necessary. They are important context in understanding the current legislation. In the end, in coming to a conclusion as to the meaning of the requirement for value, it is the combined purpose and effect of the 2006 reforms, assessed in the context of the history of voidable preferences and the particular New Zealand legislation into which they were inserted (the structure and scope of which provides some explanation for modification of the Australian model used), which has led me to conclude that the provision of new value at the time of payment is not required by the defence in s 296(3).

**Avoidance of "insolvent transactions"**

[131] Although the modern law of voidable transactions in insolvency is generally traced from s 92 of the Bankruptcy Act 1869 (UK), its origins can be seen in Lord Mansfield's adaptation of the law of fraudulent conveyances (under the Statute of Elizabeth) to payment of debts in circumstances of insolvency.[149] Lord Mansfield treated payments in contemplation of bankruptcy with intent to prefer one creditor over others as a fraud on the regime for distribution on insolvency. That justification for reopening transactions retrospectively meant that payment in response to creditor pressure, if without fraud, was not voidable because it arose in the ordinary course of commerce rather than with the debtor's purpose in distorting the system of distribution on insolvency.

[132] The same approach was taken in s 92 of the Bankruptcy Act 1869 (UK), which was adopted in New Zealand by s 78 of the Bankruptcy Act 1883. It provided significant protection for creditors who were diligent in collecting debts and did not overset settled transactions in a way which was disruptive of legitimate commercial activity. It provided a balance between protection of the system of distribution on insolvency and the interests of commerce in certainty in commercial dealings, by permitting "a purchaser, payee or incumbrancer in good faith and for valuable

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[149] See *Alderson v Temple* (1768) 1 Black W 660, 96 ER 384 (KB) and *Rust v Cooper* (1777) 2 Cowp 629, 98 ER 1277 (KB), discussed by A Walters "Preferences" in J Armour and H Bennett (eds) *Vulnerable Transactions in Corporate Insolvency* (Hart Publishing, Oxford, 2003) at [4.10]–[4.11].

consideration" to be unaffected by the powers of avoidance for fraudulent preference. The legislation protected those who "in good faith, take money that ought to be paid to them, without notice that the person paying is doing anything injurious to his other creditors".[150]

[133] The Companies Act 1993 changed the basis on which New Zealand legislation since 1883 had avoided transactions before liquidation from debtor intent, to objective preferential effect. The change brought the New Zealand justification into line with that under Australian law, departing from the traditional justification, still maintained in the United Kingdom following the review by the Cork Committee.[151]

[134] In common with other jurisdictions which have adopted an effects-based approach to avoidance as more rational than an approach based on subjective debtor preference, the New Zealand legislation was however concerned to ensure that the long-standing objects of commercial certainty in normal business activity and fairness to creditors were not swamped by a remorseless logic of avoidance wherever there is preferential effect.

[135] Both as enacted in 1993 and as amended in 2006, the Companies Act in New Zealand does not avoid all transactions with preferential effect within the specified two years before liquidation (a specified period that is considerably longer than those in other jurisdictions, including Australia,[152] and which therefore has greater scope for disrupting commercial expectations). It has continued to protect business dealings – first under the wide original "ordinary course of business" exemption and the defence in s 296(3) as originally enacted and, since 2006, in the recognition given to transactions in the course of a "continuing business relationship" and the wider defence in the present s 296(3) where a transaction is otherwise voidable.

[136] The exclusions in s 292 and s 292(4B) and the defence in s 296(3) serve the same purpose of striking a balance between protecting the system of distribution on

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150 *Butcher v Stead* (1875) 7 LRHL 839 at 847 per Lord Cairns LC.
151 Insolvency Law and Practice: Report of the Review Committee (1982) Cmnd 8558.
152 The period specified in Australia under s 588FE(2) of the Corporations Act 2001 (Cth) is 6 months and the period specified in the United States of America is 90 days under § 547 of the Bankruptcy Code.

insolvency and not confounding the way in which business is reasonably conducted. These provisions are comparable to similar exclusions and defences available in other jurisdictions which avoid transactions with preferential effect.[153]

[137] In considering the meaning of s 296(3), the context provided by the contemporaneous replacement of the "ordinary course of business" exception for transactions otherwise insolvent with the more restricted "continuing business relationship" exception is important. The current exception and the defence are linked in the same manner as the earlier s 296(3) defence and the "ordinary course of business" exemption were noted by the Court of Appeal to be linked in *Waikato Freight and Storage (1988) Ltd v Meltzer*.[154] The effect of amendment to one is highly material to the interpretation of amendment to the other.

[138] Maintaining an appropriate balance between not disrupting settled commercial dealings when insolvency is not suspected and upholding the system of distribution on insolvency has been the long-standing fixed policy of voidable transaction legislation. The point of balance has been adjusted and readjusted from time to time, notably when the legislation changed in 1993 to reflect preferential effect in fact rather than debtor purpose in preference. But reconciliation of the two ends remains a constant policy in the legislation. As the legislative history discussed next indicates, they were also objects in the 2006 amendments.

**The legislative history of the 2006 amendments**

[139] The working of the voidable preference provisions in the 1993 Act was the subject of review undertaken by the Ministry of Commerce from 1999. A report published by the Ministry in 2001 was critical of the "ordinary course of business test". It was said to be difficult to predict and to have given rise to much litigation. Section 292(4) was thought to confuse the legislative justification for avoidance – objective preferential effect – by providing that a creditor's knowledge that the

[153] As already mentioned, Australia has a running account exception in s 588FA of the Corporations Act and a defence similar to the New Zealand s 296(3) in s 588FG. Under § 547 of the Bankruptcy Code in the United States, there is both an ordinary course of business exception and a 'net result' rule, wider in scope than the running account exception in Australia.

[154] *Waikato Freight and Storage (1988) Ltd v Meltzer* [2001] 2 NZLR 541 (CA) at [17] per Tipping J.

debtor intended a preference (an intention itself irrelevant under s 292(4)) was relevant in assessing whether a transaction was "in the ordinary course of business".[155]

[140] Although the report queried whether any defence was consistent with the general approach to avoidance for preferential effect,[156] the Ministry recommended its retention. It pointed out that on an effects-based approach there was no necessary misconduct associated with transactions with preferential effect and that two objects were served by such defences:[157]

> First, they are designed to ensure effective challenges cover only the type of transactions which the law is concerned to discourage or reverse. Secondly, they are designed to temper the pursuit of collective justice for creditors as a whole with individual justice for a particular party in the circumstances of each case. There is a risk that, if the law fails to do so, it might impair the free flow of trade by undoing transactions a reasonable New Zealander, aware of the facts known to the trader, would consider normal.

[141] These purposes (in confining avoidance to "the type of transactions which the law is concerned to discourage or reverse", leaving normal business transactions unimpeded, and in tempering the "collective justice" served by avoidance for preferential effect with "individual justice") may be seen in both the more restricted exemption for "continuing business relationships" eventually adopted in s 292(4B) and the amended defence provided in s 296(3).

[142] The recommendations led to the Insolvency Law Reform Bill 2005. The explanatory note to the Bill and the regulatory impact statement emphasised the underlying principle of equality of treatment of creditors and non-preference, and the expectation that the amendments would promote certainty for all parties.[158] The Parliamentary material made little further reference however to what became s 296(3) and in particular does not deal with the insertion of the alternative to alteration of position in giving of "value", beyond noting that implementation of the

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155 Ministry of Economic Development *Insolvency Law Review: Tier One Discussion Documents* (January 2001) [2001 Review] at 56–57.
156 At 53.
157 At 53.
158 Insolvency Law Reform Bill 2005 (14–1) (explanatory note) at 1–2 and 16–17.

new provisions would be helped by adopting a provision substantially the same as the Australian s 588FG and being able to draw on Australian case-law.[159]

[143] The points which emerge from the legislative history and which are material for present purposes are the desirability for more certainty and less discretion in application, more thorough and consistent focus on preferential effect, replacement of the wide "ordinary course of business" exclusion, adjustment of what constitutes preferential effect in the context of fluctuating liability in the course of a business relationship, and acknowledgement that fairness to creditors and business confidence required retention of a defence where value was given or position was changed without knowledge or reasonable suspicion of insolvency.

**The policy behind the Australian provisions**

[144] As is later explained, I am of the view that textual differences between the New Zealand and Australian legislation, although emphasised in the Court of Appeal and in argument, do not greatly bear on the matter for determination on the appeal. What is of some help however is the articulation in the Australian legislative material of the policies behind the provisions consciously adapted for the purposes of the New Zealand legislation. That articulation preceded the New Zealand discussion about reforms in 2006. Indeed, the New Zealand Law Commission in its report in 1989, recommending the move to avoid transactions because of preferential effect rather than debtor intent, said explicitly that its proposals had been drawn from the Australian Law Reform Commission's report of 1988[160] (the origin of the reconstitution of the defence in s 588FG).[161]

[145] The Australian s 588FG was enacted first in 1992 following recommendations made by the Australian Law Reform Commission in 1988 after a review of the defence then available under the Bankruptcy Act 1966 (Cth) (and incorporated by reference to apply to corporate insolvency).[162] The defence then in force was made out if the creditor established:[163]

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[159] At 24–25.

[160] Australian Law Reform Commission *General Insolvency Inquiry* (ALRC R45, 1988).

[161] Law Commission *Company Law Reform and Restatement* (NZLC R9, 1989) at 649.

[162] See Companies Act 1981 (Cth), s 451.

[163] Australian Law Reform Commission, above n 160, at [644].

- no knowledge or reason to suspect that the debtor was insolvent at the time of the transaction;
- the transaction was made "in the ordinary course of business"; and
- the creditor had no reason to suspect that the effect of the transaction would be to prefer.

[146] The Australian Law Reform Commission explained the policy of retrospective avoidance of transactions as being concerned with disposition of property "within a relevant period prior to the actual commencement of the formal insolvency in circumstances that are unfair to the general body of unsecured creditors".[164] Because avoidance operated retrospectively, it acknowledged that it was necessary for the law to "balance the interests of":[165]

- the unsecured creditors of the insolvent; and
- persons who have engaged in fair transactions with the insolvent.

[147] The Australian Law Reform Commission recommended the existing defence be replaced with "a single ground of defence to a preference claim":[166]

> … that, in the circumstances in which the transaction was made, the creditor did not have reason to suspect that the company was insolvent at the time of the transaction.

[148] The reason for this change was to "centre" the defence on the "crucial element": the insolvency of the debtor at the relevant time. The "single requirement" for the defence suggested was therefore "proof that the creditor had no reason to suspect that the company was insolvent at the time of the transaction". The Commission took the view that the elements in the existing defence (set out here at [145]) overlapped:[167]

> For instance, the issue of whether a transaction was a transaction in the ordinary course of business involves, in most cases, a consideration of whether it was influenced by a belief on the part of the creditor that the debtor might be insolvent. It takes the issue of knowledge or suspicion of insolvency no further.

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164 At [629].
165 At [629].
166 At [648].
167 At [645].

[149] Moreover, the Commission was concerned that the "ordinary course of business" test had been applied by the courts in some cases to involve consideration of the intent of the debtor, even if not known to the creditor. The Commission considered that resulted in "an artificial and strained definition of the phrase 'in the ordinary course of business'" which was "particularly severe on non-related persons" and doubted that it was "commercially acceptable".[168] It treated the thinking behind the ordinary course of business test as sufficiently captured in the single defence of no reason to suspect insolvency.

[150] The review eventually led to the Corporate Law Reform Act of 1992 (Cth). The explanatory memorandum to the Bill cited the Law Reform Commission's explanation that it is necessary, in providing for the retrospective avoidance of transactions with an insolvent company, to "balance the interests of unsecured creditors of the insolvent and persons who have engaged in fair transactions with the insolvent".[169] It explained the provisions in the Bill as seeking to "set out clearly the transactions and the circumstances in which a liquidator may avoid them in the context of a corporate winding up".[170]

[151] The Australian legislation did not entirely follow the proposals of the Law Reform Commission. It adopted the recommendation for adjustment of running accounts to ensure net preference only, building on Australian case-law.[171] But the defence in s 588FG required, in addition to the requirement of no reasonable grounds to believe insolvency, "good faith" and provision of "valuable consideration under the transaction" or alteration of position in reliance on it. The explanatory memorandum to the Bill described the "valuable consideration" requirement as one of giving "adequate consideration for the transaction".[172]

[152] I do not think too much should be read into the retention of the requirements of "good faith" and "valuable consideration", concepts long associated with voidable preferences in insolvency and other transactions voidable in equity. As the

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168 At [646].

169 Explanatory Memorandum, Corporate Law Reform Bill 1992 (Cth) at [1034].

170 At [1034].

171 At [1042] citing *Queensland Bacon Pty Ltd v Rees* (1966) 115 CLR 266 and *Petagna Nominees Pty Ltd & Anor* v Ledger (1989) 1 ACSR 547 (WASC).

172 Australian Law Reform Commission, above n 160, at [1038].

Australian Law Reform Commission pointed out, "good faith" overlaps with and is largely overtaken by the objective and subjective dimensions of lack of notice of insolvency.[173] And "valuable consideration" is provided in payment of a debt, as is discussed from [158].

[153] What is of significance for the New Zealand legislation, which drew on the work of the Australian Law Reform Commission, is the fact that the Australian Law Reform Commission saw lack of knowledge of insolvency or reasonable suspicion of it to be the central question for the defence.

**The Australian position**

[154] The Court of Appeal accepted that in Australia payment of a pre-existing debt was payment of "valuable consideration" which provided a defence to a creditor who had no knowledge of and no reasonable basis for suspecting insolvency. The Court considered however that the Australian legislation was distinguishable because of differences in expression between s 588FG and s 296(3). It also took the view that the single Australian decision relied on, *Buzzle Operations Pty Ltd v Apple Computer Australia Ltd*, did not support the proposition that the giving of value under s 296(3)(c) included "value given when the original debt was created": at best, *Buzzle* was said to support "the proposition that valuable consideration under the Corporations Act provision may be given by the satisfaction and release of the antecedent debt".[174]

[155] In its final judgment in the present case, the Court of Appeal rejected the submission that payment of a debt was the provision of valuable consideration, as held by the Federal Court of Australia under the Bankruptcy Act 1966. The Court of Appeal pointed out that the case cited, *PT Garuda Indonesia Ltd v Grellman*,[175] concerned provisions of the Act dealing with transfer of property at an undervalue

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[173] Australian Law Reform Commission, above n 160, at [645]. The authors of Snell's Equity suggest that "in view of the development of the doctrine of notice it is difficult to imagine a case in which the purchaser does not have notice and yet is not acting in good faith": D Fox "Priorities" in J McGhee (ed) *Snell's Equity* (32nd ed, Thomson Reuters, London, 2010) at [4–021]. In *Midland Bank Trust Co Ltd v Green* [1981] AC 513 (HL) at 528 Lord Wilberforce accepted that in most cases constructive notice and good faith would overlap.

[174] *Fences & Kerbs* (CA Interim) at [79].

[175] *PT Indonesia Ltd v Grellman* (1992) 35 FCR 515 (FCAFC).

and dispositions with intent to defraud creditors which was a "quite different" statutory context.[176] The Court noted that in *Buzzle* the proposition that the satisfaction and release of an antecedent debt is valuable consideration for the purposes of s 588FG(2)(c) of the Corporations Act 2001 was accepted "without discussion".[177] It considered that the "requirement to give value at the time of the payment under s 296(3)(c) was intended to have a different meaning from the phrase "valuable consideration" used in the Australian legislation.[178]

[156] I have considerable reservations about the view taken by the Court of Appeal that the New Zealand legislation differs materially in the present context from the text adopted in the Australian Act. The use of "value" rather than "valuable consideration" in s 296(3)(c) is explicable by the breadth of the application of the defence. As its opening words make clear, it is a provision applicable to many different circumstances in which transactions may be avoided under statute, in law or in equity. Value (which itself has an ancient provenance in defences to voidable transactions) is a term of wide scope, adaptable to context.[179] In some contexts the promise of marriage[180] or some similar change of position may constitute value. In others, the statutory context may require money or money's worth. "Valuable consideration", which may be better aligned with provision of value in money or money's worth, fits the context of the Australian defence which is concerned only with transactions voidable on insolvency. Similarly, "valuable consideration" is appropriate in the circumstances of s 296(1) and (2). But it may have been thought to be insufficiently broad to meet the ambition of s 296(3) which applies where a court has power under any legislation or rule of law to order the recovery of property.

[157] It is not necessary to do more than advert to this topic. That is because, although the question whether "value" is given may in some contexts give rise to difficulty, no such difficulty arises here. If satisfaction and release of antecedent debt amounts to "valuable consideration" (as the Federal Court held in *Garuda*), it

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176 *Fences & Kerbs* (CA Final) at [15].
177 At [12].
178 At [12].
179 As to which, see *Midland Bank Trust Co Ltd v Green* [1981] AC 513 (HL) at 531.
180 *Salih v Atchi* [1961] AC 778 (PC) at 793–794.

equally amounts to "value" (a wider term which must include "valuable consideration"). Any difference in the statutory language is immaterial in this context.

**Provision of "value" for the purposes of s 296(3)**

[158] In *Midland Bank Trust Co Ltd v Green*, Lord Wilberforce considered that "valuable consideration" (the term in the provision there in issue) "requires no definition: it is an expression denoting an advantage conferred or detriment suffered".[181] Equally, it seems to me, "value" denotes an advantage conferred or detriment suffered. What is an advantage or disadvantage for the purposes of a particular statute has to be determined in the context of the statute and may sometimes give rise to a difficult point of interpretation. But no such difficulty here arises where the context is payment of a debt.

[159] It is necessary however to express reservations about the discussion, unnecessary for the determination reached, in the Court of Appeal's final judgment about sufficiency of value,[182]. These reservations apply equally to "valuable consideration" or "value". Both are treated in the authorities as terms of art not requiring further consideration of sufficiency[183] as long as "some value is given in the form of executed consideration".[184] A promise to perform is not valuable consideration, because not paid.[185] But beyond inquiry into whether some real value has actually been passed over, the courts have been reluctant to make further inquiry. Lord Wilberforce regarded the notion of adequacy to be one of "transparent difficulty" if it extended beyond provision of some value.[186] Inquiries into whether valuable consideration was "inadequate" or even "grossly inadequate" "would embark the law upon inquiries which I cannot think were contemplated by Parliament".[187]

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181 *Midland Bank Trust Co Ltd v Green* [1981] AC 513 (HL) at 531.
182 *Fences & Kerbs* (CA Final) at [19]–[28].
183 *Midland Bank Trust Co Ltd v Green* [1981] AC 513 (HL) at 531.
184 Fox, above n 173, at [4–022].
185 *Tourville v Naish* (1734) 3 P WMS 207, 24 ER 1077 (Ch); and *Hardingham v Nicholls* (1745) 3 ATK 304, 26 ER 977 (Ch); and *Taylor Barnard Ltd v Tozer* [1984] 1 EGLR 21 (HC).
186 *Midland Bank Trust Co Ltd v Green* [1981] AC 513 (HL) at 531.
187 At 532.

[160] There are suggestions in some Australian authorities that closer inquiry into sufficiency of value may be appropriate.[188] It is not necessary for the purposes of this appeal to do other than indicate that this matter may require further consideration in a case where it arises. It may be however that such inquiry is difficult to reconcile with the legislative policy of promoting commercial certainty, because it would entail evaluation in many cases. Moreover the statutory scheme provides specific provision for the setting aside of transactions at an undervalue.[189] Such inquiry also does not fit easily with the approach of equity, in distinguishing on the basis of those who provide value and those who are volunteers (and who generally must show change of position to obtain relief).[190]

[161] Before the enactment of statutory avoidance provisions in cases of insolvent preference, the settling of a debt was treated as "valuable consideration". So Bowen LJ in *Taylor v Blakelock* said that "By the common law of this country the payment of an existing debt is a payment for valuable consideration":[191]

> That was always the common law before the reign of Queen *Elizabeth* as well as since. Commercial transactions are based upon that very idea. It is one of the elementary legal principles, as it seems to me, which belong to every civilised country; and many of the commercial instruments which the law recognises have no other consideration whatever than a pre-existing debt.
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> The man who has a debt due to him, when he is paid the debt has converted the right to be paid, into actual possession of the money; he cannot have both the right to be paid and the possession of the money. In taking payment he relinquishes the right for the fruition of the right. In such a case the transaction is completed; and to invalidate that transaction would be to lull creditors into a false security, and to unsettle business.

[162] While insolvency legislation was based on debtor intent to prefer and payments of debts in the ordinary course were treated as negating debtor preference, it may not have been necessary to consider in the context of the legislation whether

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188 See, for example, *Barton v Official Receiver* (1986) 161 CLR 75 at 86; and *PT Garuda Indonesia Ltd v Grellman* (1992) 35 FCR 515 (FCAFC) at 532.

189 Companies Act 1993, s 297.

190 See D Fox, "Trusts Arising to Enforce an Informally Expressed Intention" in McGhee, above n 173, at [24-005]–[24-015]; A Butler (ed) *Equity and Trusts in New Zealand* (2nd ed, Thomson Reuters, Wellington, 2009) at [2.7.3] and [4.3.5]; A Hudson *Equity and Trusts* (8th ed, Routledge, Oxford, 2015) at [5.4.3]–[5.5.3]; and R Meagher, D Heydon and M Leeming (eds) *Meagher, Gummow & Lehane's Equity: Doctrines and Remedies* (4th ed, Butterworths, Chatswood, 2002) from [6-075].

191 *Taylor v Blakelock* (1886) 32 Ch D 560 (CA) at 570.

payment of debts was provision of value or valuable consideration. Following the changed justification for avoidance in 1993, the exclusion of transactions in the ordinary course of business similarly shielded creditors who had accepted payment of existing debts without notice. With the reduced scope of the exclusion, it is necessary to focus on whether a creditor who is paid for a debt has a defence under s 296(3) to an application to compel him to repay the sum received.

[163] In *Buzzle*,[192] the Court of Appeal of New South Wales considered the effect of s 558FG(2) in the context of a transaction voidable as an "uncommercial transaction" (equivalent to s 297 "transactions at undervalue" in the New Zealand legislation). The Court of Appeal in the present case said that the proposition that the satisfaction and release of a debt is valuable consideration was accepted in *Buzzle* "without discussion".[193] That is perhaps fair comment. But it indicates that the matter was thought to be beyond controversy.

[164] Buzzle paid debts owed to a supplier by third parties whose businesses it had acquired, no doubt to continue receiving the product of the supplier in its own business. Its liquidator attempted to recover the payments as an uncommercial transaction. The New South Wales Court of Appeal held that the payment of the debts was for value in the earlier supply to the third parties and that the creditor had, in addition, altered its position (raising the second leg of the defence) by releasing securities it had held over assets of the third parties.

[165] The complete reasoning on the point is contained in a few paragraphs of the judgment of Young JA (with whom the other members of the Court of Appeal expressed agreement):

> [162] It must first be noted that s 588FG(2)(c) does not require Apple [the creditor] to establish that it gave "full consideration" but just that it provided "valuable consideration".
>
> [163] The respondents submit that there is ample authority for the proposition that satisfaction and release of an antecedent debt is valuable consideration and that that is the situation in the present case as Apple, as it

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

193 *Fences & Kerbs* (CA Final) at [12].

> was bound to do as a result of Buzzle's direction, discharged the resellers' debt.
>
> [164] The appellants say that this principle only applies where it is the debt of the payer that is released while here it was the debt of a third party.
>
> [165] No authority was proffered for that submission and I do not accept it. The consideration that moved from the promisee, Apple, was the detriment it suffered at Buzzle's request.
>
> [166] In my view the respondents' submission is clearly correct.

[166] As appears from the discussion from [158], the view that payment of a debt is valuable consideration or value is supported by common law authority. The question is whether the statutory text, scheme and purpose require a different approach.

[167] The critical consideration relied upon by the Court of Appeal is the textual one that under s 296(3) the creditor must prove that "*when* [he] received the property, …[he] gave value for the property or altered [his] position …". I do not think this provision is properly to be read as if it requires the provision of value additional to the satisfaction and release of the debt, which occurs on payment.

[168] In addition, I am of the view that "when" simply establishes the connection that provides occasion for relief and that the earlier supply which occasioned the debt is equally the provision of value for the purposes of the defence. That the use of the word "when" does not specify the timing of the provision of value is indicated by two considerations taken from the terms of the legislation. First, alteration of position is almost always consequential, so that "when" cannot be taken to be an indication of timing in connection with that limb of the defence (as indeed the Court of Appeal acknowledged).[194] Secondly, in other provisions in the legislation where timing is intended, the references are specific. So, for example, s 293(1A), concerning voidable charges, exempts price or value given by the grantee "at the time or, or at any time after, the giving of the charge" and s 293(4) exempts charges in relation to property executed "not later than 30 days" after sale or final settlement.

[169] Although unnecessary for the determination I reach, I also have some reservations about whether it is clear that prepayment or cash on delivery take

194 *Fences & Kerbs* (CA Interim) at [87].

transactions outside the scope of "insolvent transactions", so that the time of payment is as critical as the appellant's argument requires. It is true that cash on delivery has been treated by cases of high authority as being outside the scope of the former fraudulent preference provisions.[195] Some more recent cases at first instance in New Zealand,[196] following the shift to make preferential effect the justification for avoidance, have followed the same approach. Whether they are correct should I think be considered by this Court only in a case where the point arises for determination. Despite suggestions of policy justifications for continued exclusion,[197] it is not self-evident that the policy of the legislation in preventing transactions with preferential effect is served if transactions by a supplier who knows its customer is insolvent are immune from the application of the avoidance provisions. Such a supplier may perhaps be accurately described in the context of the legislation as a creditor in relation to the transaction by which it is paid.

[170] More importantly, the scheme of s 296(3)(c) is inconsistent with "value" being new value. Since provision of new value would also amount to change of position, the provision of value basis for relief would be unnecessary in addition to the change of position if new value must always be provided if the defence is to apply.

[171] It is suggested by the liquidators that, unless new value is required, repayment of existing debts will almost always be for value and the defence in most cases where creditors are paid will turn simply on knowledge of insolvency. I think that is a fair assessment but I do not think it provides good reason to think that value additional to the satisfaction of a debt is required for the payment. It does not make the requirement of provision of value unnecessary. The defence, as is noted at [156], applies to a much wider range of transactions than those voidable because they have preferential effect on insolvency.

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195 See *Airservices Australia v Ferrier* (1996) 185 CLR 483 at 516 per Toohey J; *V R Dye & Co v Peninsula Hotels Pty Ltd* [1999] VCSA 60, [1999] 3 VR 201 at [35] and [39] per Ormiston J; and *Lanpac International Pty Ltd (in liq)* [1998] VSC 9 at [40]–[44].

196 *Burgess v The Raindance Company NZ Ltd* [2013] NZHC 2738 at [34]–[40].

197 See for example *VR Dye & Co v Penninsula Hotels Pty Ltd* [1999] VCSA 60, [1999] 3 VR 201 per Ormiston J at [35].

[172] The most compelling reason to maintain the recognition in cases such as those noted from [158] that payment of an existing debt constitutes value or valuable consideration, is that there is no indication of any intention to change the law so fundamentally in the reforms in 2006. They struck a balance more favourable to the body of creditors on insolvency by removing the broad exclusion of transactions in the ordinary course of business and they imposed a considerable hurdle in the requirement of proof that there was no reason to believe the debtor to be insolvent when payment was received. But requiring new value to be given would overset completely the traditional concern of law to strike a balance between the interests of business confidence and the general pool of creditors on insolvency. And such substantial change to the long-standing policy of law is not suggested in the law reform process.

[173] The Court of Appeal thought that unless the legislation was interpreted to mean that new value must be provided at the time payment was made, there would have been a significant shift in the law, which had not been signalled in the Parliamentary materials.[198] This view was based on the case-law that the s 296 defence before its amendment in 2006 required "proof of detriment to the recipient of the payment". I consider that this assessment was based on a misconception. The older cases relied on by the Court of Appeal[199] were concerned with the defence of alteration of position and the then necessary additional assessment that it would be "inequitable" to order recovery. As I have indicated at [139]–[143], the 2006 amendments changed the balance between protection of the regime of distribution on insolvency and protection of the expectations of ordinary commercial dealing by removing the "ordinary course of business" exclusion and providing a non-discretionary defence for those who gave value for the payment without reasonable suspicion of insolvency. Detriment remains an important consideration in relation to the change of position defence. It is, however, irrelevant to the defence once value is given without suspicion of insolvency.

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198 *Fences & Kerbs* (CA Interim) at [82].

199 See *Baker Timber Supplies v Apollo Building Associates (Tauranga) Soc Ltd (in liq)* (1990) 5 NZCLC 66,791 (HC), cited in *Harte v Wood* [2004] 1 NZLR 526 (CA), and *MacMillan Builders Ltd v Morningside Industries Ltd* [1986] 2 NZLR 12 (CA).

[174] In my view, the history of the voidable preference statutes referred to and the fixed purpose of the legislation in recognising the need for balance between the interests of the pool of creditors on insolvency and the needs of commerce in permitting transactions in the normal course mean that requiring new value to be given would represent a substantial departure from pre-existing law that is unsubstantiated in the legislative history of the 2006 reforms and which is not compelled by the terms of the legislation. It would leave very little scope for creditors to invoke the s 296(3) defence since new value for repayment of a debt is highly unusual and most unlikely except perhaps in circumstances of doubtful insolvency, where the defence will be excluded. Such change is contrary to the fixed policy in protecting ordinary business dealings which has been followed by the law since Lord Mansfield. There is nothing in the immediate legislative history of the 2006 reforms to suggest any statutory purpose in removing protection from ordinary commercial dealings as opposed to need to bring more objectivity and less discretion so that creditors and debtors can have more certainty that their dealings will not be undone retrospectively.

[175] I would allow the appeal with the consequence that the applications by the liquidators to avoid the transactions are dismissed. I concur in the costs orders made in the reasons for judgment of McGrath, Glazebrook and Arnold JJ.

**WILLIAM YOUNG J**

[176] The appeals involve a very simple and common situation: goods or services are supplied on credit to a company, the company, although insolvent, discharges the resulting debt by payment within the specified period provided for under the Companies Act 1993 and, when it receives the payment, the supplier/creditor is not aware of, and does not suspect, or have reasonable grounds to suspect, the debtor's insolvency. In cases within this paradigm, the ability of the liquidator of the company to recover the payment from the supplier/creditor as a preference turns on whether the supplier/creditor "gave value" for the payment for the purposes of s 296(3)(c).

[177] In cases within the paradigm, there are two transactions: first an antecedent supply on credit of goods or services and secondly the later discharge by payment of the associated debt. What is not clear on the text of statute and the authorities is whether, in determining whether value was given, the focus should be on:

(a) the antecedent supply on credit of goods and services ("the antecedent transaction hypothesis"); or

(b) the later discharge by payment of the associated debt ("the discharge hypothesis").

[178] *Butcher v Stead*[200] involved circumstances which were within the paradigm. In holding that the recipients of the payments in question could rely on a statutory defence very similar to that provided by s 296(3) but using the expression "valuable consideration", the majority (Lords Cairns, Hatherley and O'Hagan) were of the view that it was by their antecedent supplies of goods that the payees had provided "valuable consideration". The fourth judge (Lord Selborne), who was doubtful as to the conclusion reached, saw the case as turning on the payees being "creditors for valuable consideration".[201] On this approach the statutory defence could not be relied on by a creditor whose debt was founded on a purely voluntary transaction. The speeches thus proceed on the basis of the antecedent transaction hypothesis.

[179] The passage from the judgment of Bowen LJ in *Taylor v Blakelock*[202] which is cited by the Chief Justice at [161] shows that it is no abuse of language to treat the discharge of a debt which is a consequence of its payment as itself "valuable consideration" for the payment. Although *Taylor v Blakelock* did not involve preference proceedings, the remarks of Bowen LJ support the discharge hypothesis. And further support for this hypothesis is provided by three cases which lie outside the paradigm.

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200 *Butcher v Stead* (1875) 7 LR HL 839.
201 At 852.
202 *Taylor v Blakelock* (1886) 32 Ch D 560 (CA) at 570.

[180] In *Official Assignee in bankruptcy of WW Taylor v Moorhouse*[203] and *PT Garuda Indonesia Ltd v Grellman*,[204] there were no antecedent supplies on credit of goods or services. Instead the debts in issue arose out of defalcations by the debtors from the creditors. In both cases, preference challenges to the transactions by which the debtors repaid, or secured, their indebtedness failed on grounds which included the conclusion that the discharge of, or forbearance in respect of, an existing debt provides "valuable consideration", as required under the terms of the statutory defences which were invoked.[205] The language used in these cases is primarily consistent with the discharge hypothesis.

[181] The third case is *Buzzle Operations Pty Ltd (In liq) v Apple Computer Australia Pty Ltd*,[206] which is discussed in the reasons given by Arnold J at [58] and by the Chief Justice at [154]–[155] and [163]–[165]. That was not a preference case but in issue was the defence under s 588FG(2) of the Corporations Act 2001 (Cth) which, as the other reasons show, corresponds broadly to that provided by s 296(3). The two main differences are that 588FG(2)(c):

(a) uses the expression "valuable consideration" and not "value"; and

(b) focuses on the transaction which is impugned, in particular by requiring the provision of "valuable consideration under" that transaction, language which is consistent with the discharge hypothesis.

[182] In *Buzzle*, the payment in issue discharged a debt not of the insolvent payer but rather of a third party. The antecedent transaction was therefore between the recipient of the payment and the third party and had not involved valuable consideration passing between the recipient and the insolvent payer. As the passage cited by the Chief Justice at [165] shows, the judgment of the Court proceeded expressly on the basis that it was the discharge of the third party's debt which

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203 *Official Assignee in bankruptcy of WW Taylor v Moorhouse* (1885) 4 NZLR 420 (SC).

204 *PT Garuda Indonesia Ltd v Grellman* (1992) 35 FCR 515 (FCAFC).

205 Where A steals money from B, B might be said to have given "value" to A but it would be something of stretch to say that A thereby gave valuable consideration to A.

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

furnished the valuable consideration. Given the text of s 588FG(2)(c), this is not surprising, because, as noted, the defence is predicated on the discharge hypothesis.

[183] The reasons given by Arnold J are based on the antecedent transaction hypothesis whereas those of the Chief Justice proceed on the discharge hypothesis. As the judgment of the Court of Appeal demonstrates, neither hypothesis is free from difficulty: on the one hand, the antecedent transaction hypothesis requires a non-literal interpretation to be given to the word "when" in s 296(3);[207] and, on the other, a debt owed by an insolvent company may have little or no realisable value, absent the preferential payment in issue in the proceedings.[208]

[184] Given the legislative history, the policy underlying the enactment of the current statutory regime and the authorities, all of which are reviewed extensively in the reasons prepared by the Chief Justice and Arnold J, are sufficient to overcome the difficulties just mentioned. But on the more specific question as to which hypothesis is correct, I am in the camp of the Chief Justice. It seems to me to be more consistent with the scheme of the Act to require any objection to the antecedent transaction (for instance because the consideration was inadequate) to be determined in proceedings directed to that transaction, for instance under s 297 of the Act which is addressed to transactions at under-value.

[185] There is one other point on which I wish to comment. The reasons given by Arnold J treat it as axiomatic that a cash on delivery (and therefore a fortiori a pre-payment) arrangement is not subject to avoidance (see [18]). The Chief Justice has expressed reservations as to this (at [169]).

[186] On this issue I agree with Arnold J. Section 292 is engaged only by transactions which result in full or partial satisfaction of a debt. The essence of pre-payment or cash on delivery transaction is that credit is not provided and accordingly that there is no debt. Section 292 is thus not applicable.

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[207] *Farrell v Fences & Kerbs Ltd* [2013] NZCA 91, [2013] 3 NZLR 82 (O'Regan P, Randerson and French JJ) at [90].

[208] *Farrell v Fences & Kerbs Ltd* [2013] NZCA 329 (O'Regan P, Randerson and French JJ) at [43].

[187] Although this point is not directly in issue in the case, I would be reluctant to suggest that there is scope for uncertainty. This is because I think that (a) there is no such scope and (b) any suggestion that pre-payment or cash on delivery transactions are subject to avoidance would have appreciable and adverse commercial consequences.

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