



**Supreme Court of New Zealand
Te Kōti Mana Nui**

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ALLIED CONCRETE LTD V MELTZER (SC 51/2013)

FENCES & KERBS LTD v FARRELL (SC 80/2013)

***HIWAY STABILISERS NEW ZEALAND LTD v MELTZER
(SC 81/2013)***

[2015] NZSC 7

PRESS SUMMARY

This summary is provided to assist in the understanding of the Court’s judgment. It does not comprise part of the reasons for that judgment. The full judgment with reasons is the only authoritative document. The full text of the judgment and reasons can be found at Judicial Decisions of Public Interest www.courtsofnz.govt.nz

These appeals concern the operation of the voidable transactions provisions of the Companies Act 1993, in particular, the defence provided for in s 296(3).

The appellant companies 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 by the appellant companies. The liquidators of the insolvent companies sought to have transactions with the creditor companies voided under s 292 of the Companies Act, which provides that a transaction by a company is voidable 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.

Section 296(3) of the Act provides that a court must not order repayment by a party who proves that when it received the payment from the insolvent company that (a) it acted in good faith; (b) there were no

reasonable grounds to suspect, and it 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 is the meaning of “gave value” in s 296(3)(c). The principal question is whether “value” means new value given at, or after, the time payment is received from the debtor company or whether it also encompasses the original value given by the creditor when the goods or services were supplied.

In *Farrell v Fences & Kerbs Ltd*, the Court of Appeal held that “value” referred to new value given at the time of the impugned payment and that value given earlier when the debt was created was not sufficient. Accordingly, the Court found that the payments to the creditor companies should be set aside. This decision was followed in the High Court by Associate Judge Abbot in *Meltzer v Allied Concrete*.

The Supreme Court granted leave to appeal against the decisions of both courts.

The appellants submitted that “value” in s 296(3)(c) encompasses value given at the time the antecedent debt was created. They argued that the legislative history of the Companies Amendment Act 2006, which enacted the s 296(3) defence, makes clear that Parliament intended to follow the equivalent Australian legislation and case law, where the requirement for “value” is satisfied if the creditor gave value creating the antecedent debt. Further, it was submitted that the approach taken in the Court of Appeal is harmful to businesses and commercial certainty and creates a disincentive to trading on credit because it allows transactions from as long as two years before a debtor company is put into liquidation to be reversed, even if the creditor company traded in good faith and had no knowledge of the debtor company’s liquidity problems.

The respondent liquidators submitted that “value” in the defence should be restricted to mean only new value provided at the time payment is made. The liquidators argued that the fundamental principle of insolvency law, that all creditors be treated equally, requires that the defence be approached narrowly lest that principle be undermined. They contended that although Parliament intended to adopt some aspects of the Australian legislation, it did not intend to follow the equivalent Australian defence precisely. Further, they submitted that the prospect that a supplier to a company will not be treated equally with other creditors if the company goes into liquidation before they are paid would have a more chilling effect on commerce than the result of the Court of Appeal’s decision.

The Supreme Court has unanimously allowed the appeals.

The Court has decided that creditors in the position of the appellants do meet the “gave value” requirement in s 296(3)(c). The Court reached this view after a close consideration of the legislative background. It noted

that this interpretation is consistent with Parliament's aim of increasing certainty for creditors that the transactions they enter into will not be made void, with the approach taken in Australia and with the approach taken historically to the "valuable consideration" requirement in bankruptcy legislation, a longstanding feature of which has been the protection of creditors who have acted in good faith, without knowledge of the debtor's liquidity problems and who have provided value for payments.

The Court considered that the approach of the Court of Appeal left little scope for the operation of the s 296(3) defence in relation to voidable transactions and that it was implausible that Parliament intended such an outcome.

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