



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

**9 AUGUST 2019**

**MEDIA RELEASE – FOR IMMEDIATE PUBLICATION**

**ROBT. JONES HOLDINGS LTD v MCCULLAGH**

**(SC 87/2018) [2019] NZSC 86**

**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](http://www.courtsofnz.govt.nz)**

**Background**

Northern Crest Investments Ltd (Northern Crest) leased a property owned by Robt. Jones Holdings Ltd (RJH). However, Northern Crest fell behind on its rent payments. Northern Crest and RJH eventually entered into settlement agreements under which they agreed on the amount Northern Crest was to pay RJH to satisfy its liability under the lease. Between September 2010 and November 2010, a subsidiary of Northern Crest made eight payments to RJH on Northern Crest’s behalf.

Northern Crest was placed into liquidation less than two years after these payments were made. The liquidators applied to the High Court to set these payments (and others) aside as insolvent transactions under s 292 of the Companies Act 1993.

Under s 292, the liquidator is able to claw back a payment if it is deemed to be an insolvent transaction and is made within two years of liquidation. An insolvent transaction is one that is entered into at a time when the company is unable to pay its due debts and enables the creditor to receive more than they would receive in the company’s liquidation.

Both the High Court and Court of Appeal found that the requirements of s 292 were satisfied and set the payments from the subsidiary to RJH aside.

RJH was granted leave to appeal to the Supreme Court. The approved question was whether the payments made to RJH by the subsidiary on behalf of Northern Crest were insolvent transactions as defined in s 292.

RJH accepted that the requirements specified in the text of s 292 were met: each of the payments made by the subsidiary was a payment by Northern Crest for the purposes of s 292, was made at a time when Northern Crest was unable to pay its due debts, occurred within two years of liquidation and that RJH received more than it would have received in the liquidation of Northern Crest (the other unsecured creditors received nothing).

However, RJH argued that a payment is voidable only if, in addition to the requirements specified in s 292, the payment had the effect of diminishing the pool of assets available to the unsecured creditors of the company in liquidation. RJH argued that no such diminution occurred in this case because the payments were effectively a loan from the subsidiary to Northern Crest and the funds were never available to Northern Crest.

It argued that an earlier decision of the Court of Appeal, *Levin v Market Square Trust*, where the Court rejected an argument similar to that advanced by RJH in the present case, was wrongly decided. Both the High Court and Court of Appeal had applied *Levin v Market Square Trust* in the present case.

### **The Supreme Court's decision**

The Supreme Court has unanimously dismissed the appeal and rejected RJH's argument that the liquidator must prove that the payment diminished the assets of the company in addition to the requirements in s 292.

The Court considered that the primary policy objectives of s 292 are to ensure the equal treatment of a liquidated company's creditors and to prevent a race between creditors to obtain payment. These policies are best upheld by only requiring the liquidator to prove the requirements in s 292, which include that the payment enabled the creditor to receive more than they would have in liquidation. To the extent that a diminution is required, it is embedded in the s 292 requirements themselves.

In addition, the Court noted that requiring the liquidator to prove that the payment diminished assets available to creditors would add complexity for liquidators and result in artificial outcomes. This could not be reconciled with the goal of the law reform that preceded s 292, which was to provide straightforward procedures for realising and distributing the assets of a company in liquidation.

The Court reviewed the law in Australia, Canada and the United Kingdom. However, it did not consider the cases in those jurisdictions supported tacking an additional diminution requirement onto s 292.

It was therefore not necessary for the Court to resolve whether, in fact, the payments by the subsidiary diminished the assets available to Northern Crest's creditors.

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