

Supreme Court increases certainty for creditors in the voidable transactions regime: *Allied Concrete v Meltzer*

In the recent decision of *Allied Concrete v Meltzer* [2015] NZSC 7, a majority of the Supreme Court has increased certainty for traders who provide goods and/or services on credit. In the context of insolvent transactions, the Court held that where creditors have acted in good faith, had no knowledge that a company is about to enter liquidation, and have received payment made for goods and/or services provided on credit, the payment will be upheld. The Court reversed a Court of Appeal ruling which held that the payment would only be upheld if new value was provided upon payment. The decision has clarified the position for creditors who provide goods and/or services on credit, and significantly decreases the possibility of two year old transactions being reversed for liquidation purposes.

**Partner, Stuart Dalzell and Law Clerk, Danielle Thorne explain the case and the key points for traders, below.*

Introduction

The Supreme Court decision in *Allied Concrete v Meltzer* concerns the application of the voidable transaction regime provided for in the Companies Act 1993. Section 292, as amended in 2006, provides that a transaction by a company is voidable if:

- (a) it is an insolvent transaction; and
- (b) it is entered into within the two years preceding the date liquidation of the company commences.

The voidable transactions regime provides relief for all creditors of the company by ensuring an even distribution upon liquidation. It enables transactions that may have otherwise

served to prioritise one creditor over another to be put aside.

Section 296 provides several exceptions to s 292, and allows for transactions to stand in certain circumstances. The relevant subsection in this case is (3), which provides that the court must not order the recovery of property or its value if the person or company in question:

- (a) acted in good faith; and
- (b) did not suspect or have reasonable grounds to suspect the company would become insolvent; and
- (c) gave value for the property.

The question for the Court in this case involved the interpretation of s 296(3)(c), and specifically whether the term 'gave value' should be interpreted to mean that new value must be given at the time of the payment, or whether it can include value given when the goods and/or services were provided on credit.

Facts

The decision of the Supreme Court in *Allied Concrete* concerned three cases, each with similar fact patterns. Each case involved the provision of goods and/or services on credit, which were later invoiced and paid for. Each of the companies making the payments were placed into liquidation around a year after the payments were made, and the respective liquidators applied to have the payments set aside under the voidable transactions regime.

1. Allied Concrete supplied products to Window Holdings on credit. In October 2010, payment was received by Allied for invoices concerning goods supplied under

a 90 day credit period. When Window Holdings was put into liquidation in July 2011, the liquidators claimed the payment of October 2010 was a voidable transaction.

2. Fences & Kerbs carried out construction work for Contract Engineering, and invoiced for this work in June 2010. The sum was paid by 30 September 2010, and additional work completed was paid by 29 October 2010. Liquidators were appointed for Contract Engineering in July 2011, and it was claimed the payments were both voidable transactions.
3. Hiway Stabilizers carried out contouring and landscaping work for Window Holding's predecessor company in April 2010. Invoices were issued in May and June 2010, and paid in August and September 2010. When Window Holdings was put into liquidation in July 2011, the liquidators claimed the payments were voidable transactions.

As the companies who received the payments, the appellants argued that the exception in s 296(3)(c) applied and the transactions should therefore stand.

It was accepted for the purposes of s 296(3) that the recipients had acted in good faith and did not have reasonable grounds to suspect the respective companies would become insolvent. Therefore, the only question remaining for the court was whether the companies had given value under s 296(3)(c). The appellants argued that value could include value given at the time the debt was created, while the respondents argued that it means new

value must be given at the time the payment was made.

The Court of Appeal Decision

The Court of Appeal held that receipt of a payment to satisfy existing debts did *not* constitute value for the purpose of s 296(3)(c). In this context, the value referred to is any goods and/or services that are provided on credit. In order to make use of the defence in s 296(3) the party making the payment had to have given new, real and substantial value. Under the Court of Appeal's decision, value given at the time the debt was created was not sufficient. On this reasoning, the payments in question constituted voidable transactions.

Supreme Court Decision

The majority judgment was given by Arnold J for McGrath, Glazebrook and Arnold JJ, while Elias CJ and William Young J delivered separate concurring judgments. Both Arnold J and the Chief Justice approached the question by reviewing the wording of the legislation, and the underlying scheme and purpose of the provisions.

All three judgments delivered by the Court allowed the appeals, and held that the transactions in question fell within the exception of s 296(3)(c).

Historical Perspective

Both Arnold J and Elias CJ undertook comprehensive reviews of the legislative background to the introduction of the Companies Act 1993 and the relevant 2006 amendments. Prior to 1993, payments made to creditors in the two years prior to liquidation were voidable if they were made with the intention of giving one creditor preference over another. After the 1993 reforms, a defence to voidable transactions was introduced for transactions made in the "ordinary course of business". This exception was difficult to apply, and did not provide the effects-based approach that Parliament were looking for. Therefore, in 2006 further amendments were made with the intention of bringing the New Zealand position in line with that of Australia and reducing any uncertainty around the voidable transactions

regime. The amendments were also intended to increase the certainty for debtors regarding when they should make payments, and providing certainty for creditors that their payments will not be made void.

The case law history of the voidable transactions regime was also reviewed. Historically, the intention behind this type of regime has been to protect those who receive, in good faith, money that is owed to them. In both Australia and New Zealand payment of antecedent debt has long been held to be constitute valuable consideration.

Policy Considerations

After discussing the history of the relevant provisions, both judges analysed the key policy arguments relating to the regime. There are two key competing policy regimes underlying the voidable transactions regime. First, the regime is designed to protect the creditors of the insolvent company as a whole against having the assets available upon liquidation reduced by a transaction that would favour one creditor. This is to ensure equal treatment of all creditors. Conversely, there is a need to protect individual creditors, and maintain commercial confidence by ensuring that an excessive number of apparently unremarkable transactions are not re-opened.

Therefore, the Court was essentially being asked to make a choice between according primacy to the interests of creditors as a whole, or according primacy to the individual creditors who have accepted payments in good faith and had no reasonable basis to suspect the debtor company was technically insolvent.

Key Points from the Supreme Court Judgment

The Court noted that while the language used in the New Zealand rule differs from the Australian equivalent, the difference is not sufficient enough to warrant different outcomes being reached. The intention of Parliament was clearly stated as being to bring the New Zealand position in line with that of

Australia, in order that Australian precedents could be used to guide our judges while the law was new. The Chief Justice noted that the New Zealand legislation is not clear, and that the underlying policy decision is therefore of increased importance.

If the Court were to uphold the Court of Appeal decision, the defence would become extremely narrow, and would only be available in the rare circumstance that new value is given upon repayment of a debt. This interpretation would be a significant departure from the pre-existing law, and would be inconsistent with the Australian interpretation and Parliament's intention.

The majority also focussed on the Court of Appeal reasoning regarding the use of the word 'when' in s 296(3). The Court of Appeal held that by using the word 'when', Parliament had intended that the value must be given to the debtor at the time the creditor receives the payment. Therefore, because the original goods and/or services were provided on credit, for s 293 to apply, new value would have to be given upon payment of the debt. The majority of the Supreme Court disagreed with this finding, holding that the use of 'when' simply requires that there must simply be a connection between the payment and the elements of s 296(3)(c).

Conclusions/Relevance

The decision of the Supreme Court promotes business and commercial certainty. Creditors who act in good faith and have no knowledge that a company is in, or is about to enter liquidation, will have payments to them pursuant to credit arrangements upheld. This creates certainty for creditors who may otherwise face having two year old transactions re-opened. If the Court of Appeal's decision were to stand, the likelihood of having two year old transactions reversed would be significantly higher, which would create a disincentive to trading on credit, particularly for smaller companies.