

## Legal alert - Supreme Court clarifies the good faith defence to voidable transaction claims on credit terms

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Today, the Supreme Court handed down its long-awaited judgment on the appeals in *Allied Concrete Ltd v Meltzer & Anor*, *Fences & Kerbs Ltd v Farrell & Anor* and *Hiway Stabilizers New Zealand Ltd v Meltzer & Anor*. The appeals concerned the application of the good faith defence (under section 296(3) of the Companies Act 1993) to a claim by a liquidator to 'claw back' a payment made by the insolvent company to a creditor, in the two years before the liquidation.

Section 296(3) provides that a court must not order repayment by a party who proves that when it received the payment from the insolvent company:

- It acted in good faith
- There were no reasonable grounds to suspect, and it did not suspect, that the debtor company was, or would become, insolvent
- 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.

In each case, the insolvent company had paid the appellant creditors for goods supplied some time earlier, on credit terms. It was common ground that all of the payments had been received by the appellants in good faith, and that none of the appellants had reasonable grounds to suspect that the insolvent company was insolvent at the time of the payment. The issue for the Court was the meaning of "gave value": did the good faith defence apply when the value had been given by the creditor *before* the allegedly voidable payment was made (which will always be the case for transactions on credit)? The Court of Appeal had, earlier, held that unless value was given *at the time of the payment*, the good faith defence was excluded and the payment was voidable. It follows that the good faith defence was not available to creditors who gave credit for transactions. That decision had sweeping consequences for, in particular, the construction industry and professional service providers, all of whom commonly supply goods and services on credit terms.

The Supreme Court unanimously overturned the Court of Appeal's judgment, and held that a creditor could give value before the payment was received. In the Supreme Court's view, the Court of Appeal's interpretation was inconsistent with both the legislative history and intention, and with the purpose of the section 296(3) defence, which was to create commercial certainty. The Supreme Court observed that if the Court of Appeal's interpretation was correct, the scope of the good faith defence would be significantly reduced. It held that Parliament could not have intended that outcome. The Supreme Court's decision brings the New Zealand position into line with the Australian legislation, and will be welcomed by all those who supply customers on credit terms.

See Court decision [here](#).

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