IN THE SUPREME COURT OF NEW ZEALAND

SC 39/2016
[2017] NZSC 78

BETWEEN	HAMISH MCINTOSH Appellant
AND	JOHN HOWARD ROSS FISK AND DAVID JOHN BRIDGMAN Respondents

Hearing:	27 July 2016 (Further submissions received 31 October 2016)
Court:	William Young, Glazebrook, Arnold, O'Regan and Ellen France JJ
Counsel:	Appellant in person M G Colson and L W Brazier for Respondents
Judgment:	26 May 2017

JUDGMENT OF THE COURT

A The appeal and cross-appeal are dismissed.

B The appellant is to pay costs of $15,000 to the respondents together with reasonable disbursements.

REASONS

	Para No.
Arnold, O'Regan and Ellen France JJ	[1]
William Young J	[203]
Glazebrook J	[227]

ARNOLD, O'REGAN AND ELLEN FRANCE JJ
(Given by O'Regan and Ellen France JJ)

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Ponzi scheme

[1] This appeal requires us to resolve issues arising from the collapse of a group of companies run by Mr David Ross as a Ponzi scheme. The principal operating company was Ross Asset Management Ltd (RAM). Prior to its collapse, RAM made a payment to the appellant, Mr McIntosh. The respondents, the liquidators of RAM, sought to claw back that payment. Whether they are entitled to do so depends on how the provisions of both the Companies Act 1993 and the Property Law Act 2007 dealing with the setting aside of dispositions by an insolvent company apply to the unusual facts of the case.

Factual background

[2] The appellant entered into a funds management arrangement with RAM in April 2007. The contract between RAM and the appellant provided that the appellant appointed RAM as his agent to manage his investment portfolio. He paid $500,000 to RAM in 2007, having borrowed that sum from his bank. The contract provided that RAM would hold the funds in a separate account in the name of the appellant and that securities purchased from the fund would be held by an associate company of RAM, Dagger Nominees Limited (Dagger), as nominee.[1]

[3] Unfortunately for the appellant and RAM's other investors, RAM did not comply with the terms of its management contracts with its clients, but rather operated a Ponzi scheme. The term "investor" is used for convenience to describe those who entered into management contracts with RAM though, for reasons discussed below, the legal relationship did not involve them investing in securities issued by RAM. When investors paid money or transferred securities to RAM for management under the terms of their individual management contracts, RAM did not hold the money or securities on trust and did not arrange for Dagger to hold securities it acquired as nominee. Rather it misappropriated the funds or securities. In the case of the appellant, the $500,000 he paid to RAM was misappropriated within days of his making the investment and became part of a co-mingled pool of

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[1] The terms of the contract are discussed in greater detail in the decision of MacKenzie J in the present case: *Fisk v McIntosh* [2015] NZHC 1403, (2015) 11 NZCLC ¶98-033 at [3]–[8] [*McIntosh* (HC)].

cash and securities held by RAM and associated entities.[2] RAM paid money from this pool to other investors who wished to cash up their investments, and also paid various operating expenses of RAM, including personal drawings of its principal, David Ross. Funds received from new investors were treated in the same way as the appellant's investment.

[4] RAM perpetuated the fraudulent Ponzi scheme by reporting to its clients in terms which led them to believe that investments had been made in securities in accordance with the management contract. These quarterly reports listed individual securities with details that matched what was occurring in the market for the relevant securities. But all the transactions recorded in these reports were fictitious and the securities were said to be held by an entity known as "Bevis Marks", which was, in fact, non-existent. As other investors were, the appellant was led to believe that his portfolio was increasing in value and yielding an attractive rate of return.[3] The reports also referred to the deduction of management fees and transaction fees payable to RAM, but the liquidators' evidence was that, with some trivial exceptions, no actual deductions of these fees occurred.

[5] The scale of the fraud perpetuated by RAM was considerable and many investors have suffered significant losses.

[6] In September 2011, the appellant decided to cash up his portfolio and withdraw the amount which, according to the fictitious reports he had received from RAM, totalled $954,047. The $454,047 in excess of the original investment of $500,000 was the amount said to have been earned on the appellant's portfolio in the four and a half years from the time of his investment.[4] The reality was that none of the securities listed in the reports received by the appellant actually existed and the

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[2] If the misappropriation had occurred at a later time, after a period of investment of the appellant's money in accordance with the management contract, the appellant's claim on the co-mingled fund and his claim as a creditor of RAM would have been for an amount reflecting the investment performance during that period – which could have been greater than, or less than, the $500,000 he invested.

[3] Based on the (fictional) reports the appellant received, his portfolio yielded a gross return of 19 per cent per annum (15 per cent per annum after deduction of fees) over the term of the management contract.

[4] The precise amounts were $954,047.62 and $454,047.62 respectively, but we have rounded the figures down for simplicity.

money paid to the appellant was not derived from the sale of securities held on his behalf, as he had been led to believe.[5]

[7] In November 2011, RAM made six payments to the appellant totalling $954,047, in accordance with the notice he had given under the management contract to withdraw the funds under management in his portfolio.[6]

[8] In December 2012, RAM was placed in liquidation at the order of the High Court and the respondents were appointed as its liquidators (they had earlier been appointed receivers). Their investigations revealed the scale of the fraud perpetuated by RAM on its clients.

The proceedings

[9] In July 2013 the liquidators gave a notice of demand to the appellant seeking repayment of all of the $954,047 he received from RAM. In July 2014, they made an application to set aside the payments made to the appellant either under s 292 of the Companies Act or s 348 of the Property Law Act or for an order under s 297 of the Companies Act seeking to recoup the amount by which the payment the appellant received from RAM exceeded the value the appellant gave. The appellant resisted this on the basis that he had a defence under s 296(3) of the Companies Act or s 349 of the Property Law Act.

[10] In the High Court MacKenzie J found that the appellant had made out his defence in relation to the $500,000 he initially invested with RAM, but not in relation to the $454,047 of fictitious profits.[7] He ordered the appellant to pay $454,047 to the liquidators.

[11] The appellant appealed to the Court of Appeal against the High Court decision and the liquidators cross-appealed. By a majority, the Court of Appeal

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5 *McIntosh* (HC), above n 1, at [17].

6 Although the $954,047 was paid to the appellant in six payments totalling that figure, we will for convenience refer to this as a single payment or disposition. Though there was some limited discussion on this point in the Courts below, we do not consider anything to turn on the number of payments.

7 *McIntosh* (HC), above n 1.

upheld the High Court decision.[8] Miller J dissented: he would have allowed the liquidators cross-appeal and ordered the appellant to pay to the liquidators the full $954,047.[9]

[12] The appellant sought leave to appeal against the Court of Appeal decision, and the liquidators sought leave to cross-appeal. This Court gave leave to appeal and cross-appeal, the approved questions being:[10]

(a) Whether an order should have been made setting aside all or part of the payment made by [RAM] to [the appellant] and requiring [the appellant] to pay the relevant amount to the respondents.

(b) If so, whether the order should have been to set aside the payment of all of the $954,047 paid to [the appellant] or $454,047, being the difference between the amount paid to [the appellant] and the $500,000 he invested with RAM.

The liquidators' claims

[13] As noted earlier, the liquidators' claims were made on three separate bases, relying on:

(a) pt 6, subpt 6 of the Property Law Act (ss 344–350);

(b) the voidable transactions provisions of the Companies Act (ss 292–296); and

(c) s 297 of the Companies Act, dealing with transactions at an undervalue.

[14] We will deal with these in the above order.

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8 *McIntosh v Fisk* [2016] NZCA 74, [2016] 2 NZLR 783 (Harrison, French and Miller JJ) [*McIntosh* (CA)].

9 At [112].

10 *McIntosh v Fisk* [2016] NZSC 58.

Equitable claim?

[15] After the hearing, we sought further submissions from the appellant and counsel for the liquidators as to whether ss 292–296 of the Companies Act were engaged on the facts of this case, or whether action for recovery of money paid to the appellant needed to be a claim in equity.[11] We received helpful submissions in response. We will address them to the extent it is necessary to do so later in this judgment.

[16] The reason we asked for those submissions was that the relationship between RAM and the defrauded investors was not an orthodox debtor/creditor relationship. The appellant's position illustrates this. As already noted, the appellant did not deposit or lend money to RAM or subscribe for securities issued by RAM. Rather, he appointed RAM as investment manager of his investment funds, but he remained the beneficial owner of the funds that he paid to RAM. RAM therefore was, when it received the funds, a bare trustee of those funds. If RAM had complied with the management agreement, the appellant would have been at all times the beneficial owner of the securities purchased on his behalf (held by Dagger as his nominee) and any proceeds or profits from those securities. There was no intention that there would be a debtor/creditor relationship between RAM and the appellant or that RAM would ever have a beneficial entitlement to the money paid to it by the appellant or the securities acquired with that money.

[17] When the Ponzi scheme was uncovered and RAM was placed in receivership, the defrauded investors were left only with a pro rata claim to the securities and money held by RAM as investment manager for those investors.[12] The evidence of one of the liquidators, Mr Fisk, is that RAM ran a single bank account and that it had no assets of its own. So the pool of co-mingled trust assets represented the only assets available to the defrauded investors and there was no separate pool of assets that could have been accessible to any non-investor creditors.

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[11] *McIntosh v Fisk* SC 39/2016, 26 August 2016.

[12] See *Foskett v McKeown* [2001] 1 AC 102 (HL) at 109 per Lord Browne-Wilkinson and at 132 per Lord Millett.

[18] When the misappropriation by RAM occurred, the appellant had a claim against RAM for the restoration of the funds misappropriated by RAM. This made him a creditor of RAM, able to prove in RAM's liquidation, though he was unaware of this until after the liquidation commenced. If he had been aware of the misappropriation, he presumably would also have claimed equitable compensation.

Property Law Act claim

[19] The liquidators' Property Law Act claim application is made pursuant to s 347(1)(b) of that Act, which permits a liquidator to apply for an order under s 348. In the present case the liquidators applied for an order under s 348(2) to vest the property subject of the disposition to the appellant (the $954,047) in RAM or to require the appellant to pay reasonable compensation to RAM.

[20] In his submissions filed after the hearing, the appellant argued that the Property Law Act regime does not apply in the present case because it is concerned only with creditors, not those who have claims to an intermingled trust fund. He referred to the statement of the purpose of pt 6 subpt 6 in s 344, which refers to the purpose being to enable that property acquired or received through prejudicial dispositions "be restored for the benefit of creditors". He argued that any amounts required to be repaid to the liquidators in the present case would become part of the mingled trust fund and not available to creditors generally. We do not consider that this reference to creditors in the statement of purpose should be seen as overriding the detailed requirements of the provisions of subpt 6. We will therefore proceed to analyse those provisions before reverting to this argument.

[21] Under s 347(1) those who may apply for an order setting aside dispositions made by a debtor include the liquidator of a company in liquidation. There is no doubt therefore that the respondents had standing to apply for orders under s 348.

[22] Section 346 makes it clear that only a limited class of dispositions can be the subject of orders under subpt 6. In the present case, the liquidators say that the requirements of this provision are met because the disposition (the payment to the appellant) was made by RAM which was insolvent at the time the payment was

made (s 346(1)(a)) and was made with intent to prejudice a creditor or without receiving reasonably equivalent value in exchange (s 346(1)(b)).

[23] In order to evaluate the liquidators' claims under the Property Law Act, it is necessary to determine whether the following requirements were met:

(a) the payment by RAM to the appellant was a "disposition";

(b) the disposition was a disposition of "property";

(c) RAM was a debtor at the time it made the payment;

(d) RAM was insolvent at the time it made the payment; and

(e) either:

(i) the payment was made with intent to prejudice a creditor; or

(ii) RAM did not receive reasonably equivalent value in exchange for the payment.

Disposition

[24] The term "disposition" is defined in s 345(2)(a) as including a "payment". There is no doubt that RAM made a payment to the appellant in this case.

Disposition of property

[25] Section 346(1) applies only to dispositions of "property". The definition of "property" in s 4 of the Property Law Act includes "any estate or interest in property". There is no doubt that RAM had at least legal title to the money paid to the appellant, which satisfies the requirement that the disposition (payment) be "of property".

[26] There is nothing in the definition of disposition in s 345(2) that requires that the payment must be a payment of money that actually belongs to the payer. The

fact that RAM did not have beneficial title to the money it paid to the appellant does not, therefore, mean that there was no disposition for the purposes of s 345(2).[13]

RAM was a debtor

[27] Section 346(1)(a) requires that the payment be by "a debtor" to whom s 346(2) applies. In this case the aspect of s 346(2) which applies is s 346(2)(a) which refers to a debtor that "was insolvent at the time". MacKenzie J found that the "debtor" requirement was fulfilled as long as the payer was a debtor in relation to the insolvency requirement.[14] This was not challenged in the Court of Appeal.[15]

[28] We do not think there is any doubt that RAM was a "debtor" when it made the payment to the appellant. The term "debtor" is not defined in the Property Law Act. However, "creditor" is defined as including a person who is a creditor within the meaning of s 240 of the Companies Act.[16] Section 240 defines creditor as a person who would be entitled to claim in a liquidation in accordance with s 303 of the Companies Act that a debt is owing to him or her. Section 303, in turn, provides that a claim that may be admitted against the company in liquidation includes "a debt or liability, present or future, certain or contingent, whether it is an ascertained debt or a liability for damages".

[29] It is clear that the investors whose money was misappropriated by RAM had claims against RAM for recovery of the amounts misappropriated by RAM. This amounted to a debt to each investor.[17] So we are satisfied that the payment made by RAM to the appellant was made by a debtor as required by s 346(1)(a).

RAM was insolvent at the time

[30] MacKenzie J found that RAM was insolvent at the time it made the payments to the appellant. As RAM was obviously not able to pay the sums owed to its

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13 As found by MacKenzie J: *McIntosh* (HC), above n 1, at [32]–[34], citing *Anzani Investments Ltd v Official Assignee* [2008] NZCA 144. This point is of greater moment in the application of the provisions of the Companies Act: see below at [54]–[59].
14 *McIntosh* (HC), above n 1, at [35]. See also below at [30]–[31].
15 *McIntosh* (CA), above n 8, at [12].
16 Property Law Act 2007, s 4.
17 *McIntosh* (HC), above n 1, at [50].

investors, it was insolvent.[18] Again, this was not challenged in the Court of Appeal.[19]

[31] There was no serious challenge to this aspect in this Court either. We are satisfied that MacKenzie J's analysis was correct. In addition, it is clear from the evidence that RAM was insolvent even if the position of investors was put to one side, because its income was substantially less than its outgoings during the relevant period and it was clearly unable to pay its debts in relation to the costs of operating its business from its own resources.

With intent to prejudice a creditor

[32] Section 346(1)(b) provides that subpt 6 applies to dispositions that are made "with intent to prejudice a creditor … or without receiving reasonably equivalent value in exchange".

[33] Section 345(1) provides further explanation of the phrase "with intent to prejudice a creditor" in s 346(1)(b). Section 345(1) relevantly provides:

> For the purposes of this subpart,—
>
> (a) a disposition of property prejudices a creditor if it hinders, delays or defeats the creditor in the exercise of any right of recourse of the creditor in respect of the property; and
>
> (b) a disposition of property is not made with intent to prejudice a creditor if it is made with the intention only of preferring one creditor over another …

[34] MacKenzie J found that the payments made by RAM to the appellant were made with intent to defeat RAM's creditors.[20] This was not challenged in the Court of Appeal.[21] It was initially not challenged in this Court either, but after the Court sought further submissions, the appellant submitted that this requirement was not met.

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18 At [51]. See also the solvency test set out in s 4(1) of the Companies Act.
19 *McIntosh* (CA), above n 8, at [12].
20 *McIntosh* (HC), above n 1, at [52]–[55].
21 *McIntosh* (CA), above n 8, at [12].

[35] MacKenzie J found that the requirement that the disposition was made with intent to prejudice a creditor was met if it was shown that there was an intention on the part of RAM to hinder, delay or defeat RAM's creditors and that RAM had accordingly acted dishonestly.[22] He said if the circumstances were such that the debtor (here, RAM) must have known that in alienating property (here, paying the appellant), and thereby hindering, delaying or defeating creditors' recourse to that property, he or she was exposing them to a significantly enhanced risk of not recovering the amounts owed to them, the debtor must be taken to have intended this consequence, even if that was not the debtor's wish. He said that the principal of RAM, Mr Ross, must have known that whenever he made a payment to an investor he was thereby exposing other investors to a significantly enhanced risk of not recovering their funds.[23]

[36] We agree with MacKenzie J's analysis. As counsel for the liquidators, Mr Colson, argued, the analysis must be made on the basis that each investor was a creditor, for the reasons given earlier.[24] Unsecured creditors do not have recourse in respect of particular property of a company, but rather to the overall resources of the debtor that remain available for the creditors as a whole. The reality in the present case was that every time a payment was made to an investor of an amount that was greater than the investor's pro rata share of the co-mingled trust fund, the position of the remaining investors/creditors was worsened. That is the inevitable consequence of the operation of a Ponzi scheme and must have been apparent to Mr Ross, and through him RAM, as the operator of the scheme.

[37] In his submissions filed after the hearing, the appellant argued that the reference to defeating a creditor in the exercise of any right of recourse in respect of the property limited the ambit of this provision to those claiming in the general pool of assets of RAM. He said the provision was not appropriately applied in situations where the investors' claims would be made against a mingled pool of trust assets rather than the assets of RAM itself. As payments were made to investors out of the mingled trust fund, it could not be said that such a payment reduced the ability of

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22 *McIntosh* (HC), above n 1, at [53], citing *Regal Castings Ltd v Lightbody* [2008] NZSC 87, [2009] 2 NZLR 433 at [54].
23 At [55].
24 See above at [18].

investors in their capacity as creditors to claim against RAM's own assets since that asset pool (such as it was) was not affected by the payment.

[38] While we agree that the wording of subpt 6 is more easily applied to the orthodox debtor/creditor situation, we do not consider the facts of the present case fall outside the scope of this provision. This is because the investors, as well as having a beneficial interest in the co-mingled trust assets, are also creditors. They would have claims upon both the assets of RAM itself (if there were any) as well as on the co-mingled trust fund. To the extent that the co-mingled trust fund becomes more able to meet the claim, the claim against the assets of RAM itself would diminish commensurately. Thus, a payment made to one investor of more than that investor's share of the co-mingled trust fund commensurately reduces the amount in the pool available to other investors as creditors and, at least theoretically, increases the amount that other investors must claim from any assets beneficially owned by RAM itself. The remaining investors, who are also creditors, are prejudiced.

[39] As an alternative argument, the appellant argued in his post-hearing submissions that if creditors were prejudiced, this was only because a disposition had been made with the intention of preferring one creditor over another, and therefore s 345(1)(b) applied. We do not accept that preferring one creditor over another was the only intent of the making of the payment to the appellant in this case. Another intent, and a much more important intent, was the continued concealment of the existence of the Ponzi scheme, thereby deferring the inevitable detection of the existence of the scheme. Accordingly s 345(1)(b) does not apply in this case.

Non-receipt of reasonably equivalent value

[40] The alternative requirement under s 346(1)(b) is that the disposition was made "without receiving reasonably equivalent value in exchange". It is not strictly necessary to deal with this, having found the requirement of s 346(1)(b) is already met. The question of value is at the centre of the appeal, but it is more convenient to deal with it in the context of the defences advanced by the appellant to both the Property Law Act and Companies Act claims.[25]

[25] See below at [70] and following.

Requirements for Property Law Act claim met

[41] For these reasons we find that the requirements of subpt 6 of the Property Law Act are met. The requirements for the making of an order under s 348 requiring the appellant to pay to the liquidators the amount he received from RAM are established, subject only to the defences provided for in s 349.

Defences to Property Law Act claim: s 349

[42] Section 349 provides as follows:

> **349 Protection of persons receiving property under disposition**
>
> (1) A court must not make an order under section 348 against a person who acquired property in respect of which a court could otherwise make the order and who proves that—
>
> (a) the person acquired the property for valuable consideration and in good faith without knowledge of the fact that it had been the subject of a disposition to which this subpart applies; or
>
> (b) the person acquired the property through a person who acquired it in the circumstances specified in paragraph (a).
>
> (2) A court may decline to make an order under section 348, or may make an order under section 348 with limited effect or subject to any conditions it thinks fit, against a person who received property in respect of which a court could otherwise make the order and who proves that—
>
> (a) the person received the property in good faith and without knowledge of the fact that it had been the subject of a disposition to which this subpart applies; and
>
> (b) the person's circumstances have so changed since the receipt of the property that it is unjust to order that the property be restored, or reasonable compensation be paid, in either case in part or in full.

[43] The effect of s 349(1) in the circumstances of this case is that an order should not be made against the appellant if the appellant proves that he acquired the property (received the payment from RAM) "for valuable consideration and in good faith without knowledge of the fact that it had been the subject of a disposition to which [subpt 6] applies".

[44] The effect of s 349(2) in the circumstances of this case is that the Court may decline to make an order under s 348 if the appellant proves that he received the property (the payment from RAM) in good faith and without knowledge that it was the subject of a disposition to which subpt 6 applies and the circumstances "have so changed since the receipt of the [payment] that it is unjust to [make an order under s 348]".

[45] It is common ground that the appellant received the payment from RAM in good faith and without knowledge of the fact that it had been the subject of a disposition that was liable to be set aside. So the application of s 349(1) turns on whether the appellant "acquired the property [the money paid to him by RAM] for valuable consideration". The application of s 349(2) turns on whether he has changed his position since receipt of the payment in a way that would make it unjust to make an order under s 348.

[46] Most of the argument in the appeal concerned the applicability of these two defences, namely the "value defence" in s 349(1) and the "change of position defence" in s 349(2). They are similar in nature to the defences provided for claims made under the Companies Act, and it is convenient to first establish whether the liquidators have established the basis for claims under ss 292–296 of the Companies Act, before dealing with the value defence and the change of position defence.[26]

Companies Act claims

[47] Having found that the basis for an order under s 348 of the Property Law Act is made out, it is not strictly necessary to establish whether there is also a basis for an order under the Companies Act. However, we will briefly deal with the Companies Act claim for completeness.

[48] The liquidators claim that the payment made to the appellant was an insolvent transaction that was voidable under s 292(1). That provision applies if the insolvent transaction is entered into within the specified period (two years before the

[26] See below at [70] and following.

date of the liquidation).[27] Under the section, the liquidators must establish that the payment made to the appellant:

(a) is a transaction;

(b) is an insolvent transaction; and

(c) was made within the specified period.

[49] There is no doubt that RAM made the payment in question to the appellant within the specified period. So we need concern ourselves only with the factors at (a) and (b) above.

[50] If the transaction was voidable under s 292, then the liquidator may apply to have the transaction set aside under s 294. If the transaction is set aside under s 294, the Court can make orders under s 295, including 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.[28]

Transaction

[51] In the High Court, MacKenzie J found that the payment was a transaction, for the same reasons as he found it was a disposition for the purposes of the Property Law Act claim.[29]

[52] The term "transaction" is defined in s 292(3) as follows:

> (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:

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27 Companies Act, s 292(5).
28 Section 295(a).
29 *McIntosh* (HC), above n 1, at [32].

> (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.

[53] As is apparent from the description of the factual background, the payment made by RAM to the appellant was not a payment made from RAM's own money. Rather, it was money that was part of the fund of misappropriated trust money that was held on trust for all defrauded investors rateably.[30]

[54] The definition of transaction includes the step of "paying money" (s 292(3)(e)). Unlike the steps described in s 292(3)(a) and (b), there is no requirement that the money that is paid is the company's own money. Mr Colson emphasised this distinction, which, he said, indicated that there was no requirement that the liquidators prove that the money paid to the appellant by RAM was RAM's own money.

[55] MacKenzie J accepted this analysis, relying on the decision of the Court of Appeal in *Anzani Investments Ltd v Official Assignee*.[31] There was no challenge to MacKenzie J's finding in the Court of Appeal.[32] The facts of *Anzani* are quite different from those of the present case and it was decided in relation to s 292 as it was prior to the amendment in 2006 that led to the current version of the section.[33] But the essential point it makes is that the requirement that a payment is made "*by* the company" does not import any requirement that the payment comprise only the company's own money. Even if this were not so, it is arguable that the payment of money by RAM would fall within s 292(3)(a) as a transfer of property by RAM, given the wide definition of property in s 2(1) of the Companies Act, which includes "rights, interests, and claims of every kind in relation to property".

[56] The Court of Appeal's conclusion in *Anzani* was a matter of simple statutory interpretation, taking into account the fact that some of the paragraphs in the definition of "transaction" specifically referred to property "of the company", while

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30 See above at [16]–[18].
31 *McIntosh* (HC), above n 1, at [33]; referring to *Anzani*, above n 13.
32 *McIntosh* (CA), above n 8, at [12].
33 Companies Amendment Act 2006, s 27(2).

the paragraph relating to the payment of money did not.[34] We agree with MacKenzie J in the present case and the Court of Appeal in *Anzani* that a payment of money by a company, whether of the company's own money or not, is a "transaction" within the meaning of the definition in s 292(3).

[57] There are also good policy reasons why payment of money that does not belong to the company should still come within the ambit of s 292. If RAM had used money that it had stolen or that was subject to a trust to pay a trade creditor, it is hard to see why the trade creditor would be immune from a claw back proceeding simply because the source of the money used to pay him or her was stolen money or money subject to a trust.

[58] In his submissions made after the hearing, the appellant argued that the payment made to him by RAM was not the payment of money for the purposes of s 292. In support of that submission, he argued that the trustee/beneficiary relationship entered into by investors with RAM was intentional, and was not a debtor/creditor relationship. He said any payment by a company of trust funds must be seen as outside the Companies Act liquidation provisions, including s 292. As trust money does not fall within the insolvent estate of the company, payment from the trust cannot be clawed back.[35] To come within s 292, the money paid by the company must be the company's own money.

[59] We agree with the appellant that the relationship (both intended and actual) between the appellant (and other investors) and RAM was initially only a trustee/beneficiary relationship. But the misappropriation by RAM of the money paid to it by the appellant made him a creditor of RAM, as well as giving him an interest in the co-mingled trust fund, meaning there was both a debtor/creditor relationship as well as a trustee/beneficiary relationship. We disagree with the appellant's submission that s 292 does not apply to a payment by a company unless it is a payment of the company's own money. If that requirement had been intended,

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[34] *Anzani*, above n 13, at [24].

[35] The appellant said this could be derived from *Jennings Roadfreight Ltd (in liq) v Commissioner of Inland Revenue* [2014] NZSC 160, [2015] 1 NZLR 573 at [55] and [61]. We do not agree: *Jennings* was considering a payment of trust money to the only beneficiary of the trust (effectively, therefore, the payee's own money), not a payment from a co-mingled fund in which numerous others had an interest.

s 292(3)(e) would have included the words "of the company", as s 292(3)(a) does. The fact that the payment by RAM was sourced from the co-mingled trust fund does not mean the payment made by RAM was not the payment of money.[36]

[60] There is no dispute that, if a payment was made (as we find it was), it was made by RAM, so it was the payment of money by the company. That means the payment by RAM to the appellant was a transaction under s 292(3)(e).

Insolvent transaction

[61] The term "insolvent transaction" is defined in s 292(2) 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.

[62] We are satisfied that the requirements of s 292(2)(a) are met for the reason given earlier.[37] The transaction in this case (the payment to the appellant) was made when RAM was unable to pay its due debts.

[63] We are also satisfied that s 292(2)(b) is satisfied for the reasons given earlier in relation to s 346(1)(b) of the Property Law Act.[38] The position is even clearer in relation to s 292(2)(b), which requires only that the recipient received more than he or she would have received in the liquidation. That is undoubtedly the case in relation to the appellant.

[64] As already noted, there was no challenge to the finding that the payment was an insolvent transaction in the Court of Appeal.[39]

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[36] Another reason given by the appellant for this submission was that the recipient of a payment of money that is not the company's own property may be left without a defence under s 296(3) unless his restrictive interpretation of "pay money" were adopted. As discussed below at [75]–[80], this potential anomaly does not arise on our interpretation of s 296(3).

[37] Above at [30]–[31].

[38] Above at [36].

[39] *McIntosh* (CA), above n 8, at [12].

Requirements for Companies Act claim met

[65] Subject to any defences that may be available, the liquidators have established that the payment made to the appellant is voidable in terms of s 292.

Defences to Companies Act claim

[66] Section 296(3) of the Companies Act provides:

> **296 Additional provisions relating to setting aside transactions and charges**
>
> …
>
> (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.

[67] In the present case, there is no dispute that the appellant acted in good faith and that there was no reason for him to suspect that the payment made to him by RAM was an insolvent payment. So the requirements of s 296(3)(a) and (b) are met. The issues requiring determination are whether he gave value or altered his position in the manner contemplated by s 296(3)(c).

[68] Section 296(3) is substantially the same as its Australian counterpart, s 588FG(2) of the Corporations Act 2001 (Cth). The legislative history of s 296(3) is summarised in this Court's decision in *Allied Concrete Ltd v Meltzer*.[40]

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[40] *Allied Concrete Ltd v Meltzer* [2015] NZSC 7, [2016] 1 NZLR 141 at [139]–[143] per Arnold J.

Section 297 of the Companies Act

[69] This provision did not occupy the attention of the lower Courts or this Court, though it is still relied on by the liquidators. For reasons that will become apparent, we do not consider it necessary to deal with it.

Defences

[70] Having determined that the liquidators have established the basis on which the payment made to the appellant may be set aside either under the Property Law Act or the Companies Act, we now turn to the defences that the appellant says are available to him. We will deal with these under the headings of value defences and change of position defences.

[71] The appellant argued that he needed only establish a defence under s 296(3) in order to resist both the Companies Act and Property Law Act claims. This is because s 296(3) of the Companies Act provides a defence not only against claims under the Companies Act, but also under "any other enactment, or in law or in equity". He says the reference to "any other enactment" includes the Property Law Act. If he is correct, there would be a strange doubling up between the Companies Act and the Property Law Act in cases where a Property Law Act claim is made by a liquidator. This would be of no moment in relation to the value defences, as the "gave value" defence in s 296(3)(c) of the Companies Act is not materially different from the "valuable consideration" defence in s 349(1) of the Property Law Act, so it is hard to see there ever being a different outcome under the two sections. But it is potentially significant in relation to the change of position defences. Under s 296(3) of the Companies Act, the change of position defence is a complete answer to the claim. However, under s 349(2) of the Property Law Act, establishing a change of position does not necessarily provide an answer: rather, it gives the Court a discretion not to make an order under s 348.

[72] The liquidators argued that pt 6 subpt 6 of the Property Law Act operates independently of the Companies Act provisions. They pointed to a number of factors supporting that view. First, the Law Commission report that preceded the enactment of the Property Law Act said it was intended to be a standalone

procedure, operating independently from the Companies Act and the Insolvency Act 1993.[41] Secondly, if s 296(3) of the Companies Act applied in relation to orders under s 348 of the Property Law Act, there would be no need for s 349 of that Act, at least where the application for orders under s 348 was made by a liquidator. Thirdly, s 347(3) of the Property Law Act requires the liquidator seeking an order under subpt 6 to serve on the person from whom recovery is sought "a notice communicating the effect of sections 348 and 349". It could be expected that this notice would also be required to communicate the effect of s 296(3) of the Companies Act if it was intended that s 296(3) could also apply. Lastly, there is no good reason for duplicate defences to apply to claims under subpt 6.

[73] We think it is unlikely that Parliament intended that s 296(3) of the Companies Act would provide a defence to both a Companies Act claim and a Property Law Act claim. However, for reasons that will become apparent, it is not necessary for us to resolve the point. What is clear, however, is that there is a considerable degree of overlap between s 349 of the Property Law Act and s 296(3) of the Companies Act. We propose to deal first with the value defences under both s 296(3) and s 349 and then the change of position defences under those sections.

Value defences

[74] We have found that the payment of money by RAM to the appellant was a transaction in terms of s 292(3), even though the money paid was not beneficially owned by RAM.[42] That is because s 292(3)(e) refers to "paying money" without any specification of a requirement that that money be the property of the company.

[75] The apparent intention of the drafter of s 296(3) is that the defences provided for in that provision are available in relation to any insolvent transaction in terms of s 292. However, a literal interpretation of s 296(3), which is related to orders for "the recovery of property of a company", would suggest that the defences would only apply to transactions in s 292(3)(a) "conveying or transferring the company's property", which is the only type of transaction in the definition which refers to a transfer of company property.

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41 Law Commission *A New Property Law Act* (NZLC R29, 1994) at [52] and [323].

42 See above at [51]–[60].

[76] It is clear from *Allied Concrete* that the defences apply to insolvent transactions involving a payment of money by the company to a creditor.[43] But the money paid in the cases under consideration in *Allied Concrete* was money belonging to the company concerned, and therefore came within the scope of the term "property of the company" in s 296(3). In contrast to that, the payment made by RAM to the appellant in this case was made from a co-mingled trust fund. RAM had legal title to the money, but the beneficial interest was held by the defrauded investors on a pro rata basis.

[77] A literal interpretation of s 296(3), limiting its ambit to transactions relating to property (including money) that was beneficially owned by the company making the conveyance, transfer or payment would create an anomaly, under which a person who receives money in an insolvent transaction as defined in s 292(2) would have no defences under s 296.[44] This case would be an example of that anomaly.

[78] We do not believe that could be Parliament's intention and both parties to the present appeal agreed that s 296(3) should be construed so as to apply to a claw back claim in relation to any type of insolvent transaction described in s 292. It seems illogical that the defences under s 296(3) would not be available to a particular category of payments made rather than to all transactions covered by s 292.[45]

[79] Even if we are wrong about that, we would be prepared to construe the reference in s 296(3) to "property of the company" to include money in which the company has an interest (such as in the present case where RAM had legal, but not beneficial, title to the money paid to the appellant). The term property is defined in s 2 of the Companies Act as including "rights, interests and claims of every kind in relation to property however they arise". We see that as sufficiently broad to cover the legal interest held by RAM in the money it paid to the appellant.[46]

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[43] *Allied Concrete*, above n 40.

[44] See the discussion above at [51]–[60].

[45] The equivalent Australian provision, s 588FG(2) of the Corporations Act 2001 (Cth), makes it clear that the give value and change of position defences apply to all insolvent transactions. It does not use the term "company property" and simply states that the court must not make an order under the equivalent of s 292 if either defence is made out.

[46] See above at [25] in relation to a similar definition of property in s 4 of the Property Law Act.

[80] We find that the s 296 defences are available to the appellant if he can establish that he comes within s 296(3)(c).

Allied Concrete

[81] Before turning to the arguments made in relation to this issue, we summarise briefly the decision of this Court in *Allied Concrete*, which dealt with the interpretation of s 296(3)(c) of the Companies Act, in particular, the meaning of the term "give value" in that provision.[47] It was accepted by the parties to this appeal that the concept of "valuable consideration" in s 349(1)(a) and "gave value" in s 296(3)(c) of the Companies Act are closely aligned.[48]

[82] *Allied Concrete* dealt with the common situation arising in claims under s 292, namely a trade creditor that had provided goods or services for which the company had paid some time later. The Court of Appeal in one of the decisions under appeal in *Allied Concrete* had said that the defence under s 296(3) required that the giving of value occurred at the time the payment was received.[49] This Court said there was no such requirement. Three of the Judges, McGrath, Glazebrook and Arnold JJ, said that the phrase "gave value" in s 296(3) can include value given when the debt was initially incurred or value arising from the reduction or extinguishment of a liability to the creditor incurred by the debtor company as a result of an earlier transaction.[50] They found that value needed to be "real and substantial", and not simply value sufficient to constitute consideration in contract terms.[51]

[83] In his judgment, William Young J contrasted two possible approaches to determining where value was given.[52] He described the first as the "antecedent transaction hypothesis", which involved a focus on the antecedent supply on credit of goods and services. This was essentially the approach adopted by McGrath, Glazebrook and Arnold JJ. The second he described as the "discharge hypothesis",

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47 *Allied Concrete*, above n 40.
48 As the majority found in *Allied Concrete* at [76]–[77].
49 *Farrell v Fences & Kerbs Ltd* [2013] NZCA 91, [2013] 3 NZLR 82 at [86].
50 *Allied Concrete*, above n 40, at [105].
51 At [76].
52 At [177].

involving a focus on the later discharge by payment of the associated debt. He and the Chief Justice favoured the latter.

[84] As noted earlier,[53] and by both the High Court[54] and Court of Appeal,[55] the facts of the present case differ substantially from the standard trade creditor situation that the Court faced in *Allied Concrete*. Nevertheless, it is clear from *Allied Concrete* that if the appellant gave value or provided valuable consideration at the time he entered into the investment management agreement with RAM, this would remain value or valuable consideration for a later repayment of the amount invested. In other words, the time delay between the initial investment and the repayment would not matter.

The appellant's case on value

[85] The appellant argues that he provided real and substantial valuable consideration for the payment of $954,047 that he received from RAM as follows:

(a) the payment of $500,000 that he made to RAM in April 2007 (which was followed soon after by the misappropriation of that money by RAM);

(b) the management fees notionally deducted by RAM (or the opportunity for RAM to earn such fees);

(c) his providing RAM possession of and legal title to those funds, which allowed RAM to have use of those funds for over four years;

(d) the discharge of RAM's obligations to him when he received the payment of $954,047 in November 2011 either by way of performance or by way of accord and satisfaction.

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53 Above at [16] and [76].
54 *McIntosh* (HC), above n 1, at [72].
55 *McIntosh* (CA), above n 8, at [20] and [36].

[86] The appellant says that each of these constitutes sufficient valuable consideration to satisfy the requirements of s 349 or, alternatively, that they do so in combination.

[87] We will consider each in turn.

Initial "investment" of $500,000

[88] The appellant argues that his payment of $500,000 to RAM was the giving of value for that sum in April 2007 and that this was real and substantial value sufficient to amount to valuable consideration for the payment to him of $954,047 some four and a half years later.

[89] If the appellant had invested in RAM, either by the depositing of money with RAM or otherwise subscribing for securities issued by RAM, "investment" would be a proper description. But this is not what the appellant did in this case. As noted earlier, he appointed RAM as investment manager and gave it possession of and legal title to $500,000. But he never parted with the beneficial ownership of the $500,000 and, if his management contract with RAM had been adhered to, the $500,000 (or the securities purchased with it) would have remained in his sole beneficial ownership throughout. In those circumstances, we do not accept the appellant's submission that he invested $500,000 with RAM and thereby gave value of $500,000 to RAM.

[90] The appellant made a strong plea to the Court to treat the case as a routine arms-length transaction having similar characteristics to the trade creditor transactions at issue in *Allied Concrete*. While we accept that the transaction between the appellant and RAM was an arms-length transaction and that the appellant had no reason to suspect that a Ponzi scheme was in operation, we do not accept that the legal framework within which the appellant's relationship with RAM was conducted is similar to the trade creditor situation. In short, the appellant entered into a management contract which was not intended to make him a creditor of RAM at all. The fact that the transaction was arms-length does not, therefore, have any significance in the analysis of the relationship between the appellant and RAM.

[91] The appellant also argued that, since he provided $500,000 to RAM, this was self-evidently the giving of value. Thus, he argued, in the absence of any mutual wrongdoing, bad faith or knowledge on his part, that should be the end of the inquiry into the issue of valuable consideration. Again, we see this as omitting from consideration the crucial element, namely that the appellant never intended to provide, and did not provide to RAM, more than a bare legal title to the $500,000, retaining beneficial ownership himself.

[92] The appellant argued that the fact that the $500,000 was to be held on trust should not be controlling because the bare trust was an incident of a wider commercial transaction involving agency. For that proposition he relied on the decision of the Supreme Court of the United Kingdom in *AIB Group (UK) plc v Mark Redler & Co Solicitors*.[56] The appellant argued that the bare trust arrangement in the present case was incidental to the commercial relationship and that it would be artificial to look at the trust in isolation from the obligations for which it was brought into being. Thus, he argued, for the purposes of the analysis of "valuable consideration", the existence of the bare trust should be disregarded.

[93] We do not see the observation from *AIB* as applying to the present situation for two reasons. First, the trust arrangement in *AIB* was an incidental aspect of a wider commercial transaction. In the present case, the whole commercial relationship between the appellant and RAM was established on the basis that the appellant would never part with the beneficial ownership of the money he placed under the management of RAM and the securities purchased with that money. The trust arrangement was not, therefore, incidental to the commercial relationship, but essentially defined it. Second, it is clear from *AIB* that the fundamental principles of equity apply to all trusts, whether "traditional" trusts or trusts that are incidental to commercial relationships. So, even if the bare trust in this case were in the latter category, there would be no proper basis in this case to ignore the separation of legal and beneficial title, which is a core element of all trusts.

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[56] *AIB Group (UK) plc v Mark Redler & Co Solicitors* [2014] UKSC 58, [2015] AC 1503 at [70] per Lord Toulson. There has been some academic criticism of this decision: we do not need to engage with that criticism because we are satisfied, for the reasons below at [93], that it does not apply to the factual situation in this case.

[94] The High Court found that, in light of the bare trust arrangement evidenced by the management agreement, no valuable consideration was given when the payment was made by the appellant to RAM.[57] For the reasons given above, we agree with that analysis.

[95] After the money paid by the appellant to RAM was misappropriated by RAM, the situation changed. Both the High Court and Court of Appeal considered that, at this point, valuable consideration was taken by RAM. In the High Court, MacKenzie J said that when the misappropriation occurred the funds were applied by RAM for its own purposes, which meant that the appellant was deprived of the amount of the original investment and RAM was able to use it for its own purposes.[58] He found that the valuable consideration requirement was met when RAM appropriated to itself the appellant's money, thus meeting the requirement in s 349 to the extent of the original investment of $500,000.[59]

[96] The Court of Appeal majority, Harrison and French JJ, upheld that finding by MacKenzie J. They referred to the misappropriation by RAM as RAM "treating the money as its own".[60] They considered that the legal principles adopted in *Allied Concrete* applied to the situation.[61] They said it did not matter whether the antecedent debt or discharge approach was applied.[62]

[97] Under the antecedent debt approach, the creation of a debt owed by RAM to the appellant was decisive: this involved the giving of value by the appellant even if that was not what he intended to do.[63] Under the discharge approach, RAM's payment to the appellant discharged the readily quantifiable element of RAM's obligation to the appellant.[64]

[98] In his submissions in this Court, Mr Colson stressed that the effect of the misappropriation was that RAM was administering a diminishing pool of trust assets

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57 *McIntosh* (HC), above n 1, at [66].
58 At [67].
59 At [74].
60 *McIntosh* (CA), above n 8, at [32].
61 At [36].
62 At [32].
63 At [33].
64 At [34].

on behalf of those who had contributed to the pool. RAM remained the trustee throughout and unsecured creditors would not have had any claim on these assets. This, he argued, meant that RAM did not acquire any value in the funds paid to it by investors. He said it would defeat the policy objectives of the Companies Act (and the Property Law Act) if a person could rely on the value/valuable consideration defence even if the value in question has not been acquired by the company so that it was not available to the creditors in the liquidation.

[99] We agree with the Court of Appeal that the misappropriation led to the appellant becoming a creditor of RAM, because of his claim for the return of the misappropriated funds. However, his funds did not become part of the pool of assets available to unsecured creditors of RAM. So we agree with the liquidators that, when the misappropriation occurred, no value or valuable consideration was provided to RAM in the sense of money that became available to creditors of RAM. RAM remained a trustee at all times: initially it was a bare trustee in accordance with the management contract and after the misappropriation it was the trustee of a co-mingled fund for the benefit of all victims of the misappropriation.

[100] However, we see this case as falling on the borderline of insolvency law and trust law. While the appellant did not provide valuable consideration to RAM in the sense just mentioned, he did transfer $500,000 to RAM and, as a result of RAM's actions at the time of its receipt of that sum, RAM became indebted to him for that amount. We consider that, in the circumstances of this case, it would be unfair to refuse to recognise that $500,000 as value simply because the legal consequence of the misappropriation of the funds meant that his money became part of the co-mingled trust fund, rather than money available to unsecured creditors. That would effectively put the appellant in the position where the claw back regimes in the Companies Act and Property Law Act apply to him (even though the value he gave did not become money which was available to RAM's unsecured creditors) but the value defences in both Acts do not (for the very reason that the value he gave did not become money available to unsecured creditors).

[101] In effect, the appellant had claims on both the unsecured asset pool of RAM (to the extent that this existed) and the co-mingled trust fund, because he was an

unsecured creditor as well as being a pro rata beneficiary of the co-mingled trust fund. Although his $500,000 did not become part of the assets of RAM available in the liquidation, it did become part of the co-mingled trust fund against which he has a claim and from which the payment he received in November 2011 originated. We consider, therefore, that the concept of valuable consideration and value needs to be adapted to the unique facts of this case and that value should be recognised even if the value was derived by the co-mingled trust fund under the control of RAM rather than the unsecured asset pool available to the general body of creditors of RAM. The reality is that the only creditors of RAM of any substance are investors in the same situation as the appellant, who have claims on both the co-mingled trust fund and the unsecured creditor pool. The appellant's payment of $500,000 to RAM provided value to the pool available to those investors/creditors, albeit that the pool into which it went was the co-mingled trust fund not the unsecured creditor pool.

[102] As the appellant stressed in argument, s 296(3)(c) simply says "gave value for the property", without specifying that the value had to be given to the company so that it became part of the company's estate in the liquidation. While it can be expected that in the normal run of cases value would in fact be given in that manner, we see the words of the section as sufficiently flexible to be applicable to the unusual situation that arose in this case.

[103] That still leaves another question to be determined: whether, objectively, payment of money to the operator of a Ponzi scheme can constitute value, given that the effect of the payment is simply the perpetuation of the Ponzi scheme and the deferral of the inevitable detection of the scheme and crystallisation of the losses of the victims of the misappropriation.

[104] In his dissenting judgment in the Court of Appeal, Miller J considered that, even on the assumption that the appellant's payment was made to RAM then became RAM's property, it still delivered no value or valuable consideration. As he put it: "the introduction of new money creates no value but merely delays and worsens the inevitable ruin".[65]

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[65] *McIntosh* (CA), above n 8, at [107].

[105] He cited with approval this observation from the decision of the US District Court in *Merrill v Abbott (in Re Independent Clearing House Co)*:[66]

> "Value" must be determined by an objective standard. If the use of the [investors'] money was of value to the debtors, it is only because it allowed them to defraud more people of more money. Judged from any but the subjective viewpoint of the perpetrators of the scheme, the "value" of using others money for such a purpose is negative.

[106] That observation was made in the context of a ruling about the value of the fictitious profits earned on an amount invested in a Ponzi scheme, rather than the amount itself.[67] However, Miller J said he believed that the reasoning applied equally to the capital component.[68]

[107] On Miller J's analysis, and that of Glazebrook J in her judgment,[69] no value was objectively given by the appellant when he made his $500,000 payment to RAM. Accordingly, he did not give valuable consideration for the payment he received four and a half years later.

[108] The appellant argued that the adoption of Miller J's analysis involved differentiating between creditors fortunate enough to give value to merely mismanaged insolvent companies (as in *Allied Concrete*) and those unfortunate enough to give value to fraudulent ones. He argued there was no proper basis for this distinction given that there were no specific legislative provisions dealing with Ponzi schemes in New Zealand. In support of that submission he cited the decision of the Privy Council in *Fairfield Century Ltd v Migani & Ors*.[70]

[109] *Fairfield* involved a mutual fund that acted as a feeder fund for a Ponzi scheme, Bernard L Madoff Investment Securities LLC. Investors indirectly participated in the Madoff entity by subscribing for shares in the fund at a price that reflected the fund's net asset value per share (which in turn reflected the ostensible value of the Madoff entity). Investors were entitled to withdraw funds by redeeming

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66 At [111], citing *Merrill v Abbott (in Re Independent Clearing House Co)* 77 BR 843 (D Utah 1987) at 859 (citations omitted).

67 The investment in that case was a direct investment creating a debtor/creditor relationship, in contrast to the bare trust arrangement in the present case.

68 *McIntosh* (CA), above n 8, at [111].

69 See below at [270] per Glazebrook J.

70 *Fairfield Century Ltd) v Migani & Ors* [2014] UKPC 9, [2014] 1 CLC 611.

their shares at that share value. When the fact that the Madoff entity was operating a Ponzi scheme became known, share redemptions were suspended and some months later the fund was wound up.

[110] The liquidators of the fund brought proceedings against members of the fund who had redeemed some or all of their shares before the suspension of redemptions. The liquidators claimed the amount paid out on redemption on the basis that the investors had been paid out in a mistaken belief that the assets were as stated by the Madoff entity, when in fact no such assets existed. The liquidators failed in the Privy Council which found that the redemption provisions in the articles of the fund obliged the fund to pay the net asset value per share determined by the directors at the time of the redemption. The fact that this turned out to be incorrect did not change this contractual entitlement. The liquidators could not claim on the basis of "information acquired long afterwards about the existence or value of the assets".[71]

[111] The appellant argued that the same rationale should apply in this case: the existence of the Ponzi scheme in the present case was discovered a year after he had been paid, and could not undermine the finality and certainty encouraged by the voidable preference regime in the Companies Act.

[112] We do not see *Fairfield* as providing any guidance in the circumstances of this case. In *Fairfield*, there was a direct investment in shares issued by the fund, in contrast to the present case where the appellant simply appointed RAM to manage his portfolio while never investing in RAM itself. The decision in *Fairfield* depends on the interpretation of the redemption provisions in the articles of the fund, which were decisive to the outcome. There is no similar situation in the present case and no basis in which *Fairfield* provides guidance to the analysis in the present case.

[113] We consider that the focus of s 296(3) (and s 349) is on the consideration or value provided by the creditor. We accept the appellant's submission that the fact that, after receipt, the recipient acts fraudulently in a way that destroys the value of what has been provided should not undermine the nature of the value given. We do not, therefore, agree with the analysis of Glazebrook J in this Court and Miller J in

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[71] At [23].

the Court of Appeal insofar as they would calculate the value given by the creditor on the basis of the value received by the fraudulent recipient.[72]

[114] In her judgment, Glazebrook J notes that RAM did not give a capital guarantee under the management agreement with the appellant (and other investors).[73] She says this is a significant difference between this case and *Allied Concrete*, because the full amount of the debt owed to the creditors in *Allied Concrete* would have been payable to them in terms of their contract with the debtor company if it had not been insolvent.[74] On our approach to the case, this distinction does not arise. As we see it, once RAM misappropriated the appellant's money, it became indebted to him for the amount he paid to it. The terms of the management agreement between RAM and the appellant did not govern this. So, had RAM not been insolvent, the appellant would, like the creditors in *Allied Concrete*, have been entitled to payment of the full amount of the debt owed to him by RAM, being the $500,000 that RAM misappropriated.

[115] We conclude that the appellant did provide value for the $500,000 that was misappropriated from him shortly after he paid that sum to RAM. He meets the give value test in s 296(3)(c), whether the "antecedent transaction hypothesis" or the "discharge hypothesis" is applied.[75] The extent to which he does so is, however, problematic. We will return to that issue later.

Management fees

[116] The appellant argued that, as RAM was contractually entitled to management fees, his promise to pay those fees constituted value. As already noted there was evidence that RAM did not, in fact, receive any management fees, although the quarterly report it sent to the appellant indicated that it had.[76] We see it as simply unreal to suggest that the contractual entitlement to management fees on the part of

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72 See below at [270]; and *McIntosh* (CA), above n 8, at [107].

73 See below at [271].

74 Below at [272].

75 See the discussion above at [83].

76 See above at [4]. Mr Fisk's evidence was that a trivial amount of management fees had been collected (some $2000 over six years). That figure is small enough that it must be disregarded.

RAM created any value, given the events that transpired. If payments had been made to RAM that may have been different. The fact is they were not.

Use of money

[117] The appellant also argued that the $500,000 provided to RAM was essentially an unsecured advance for four and a half years. The value provided to RAM was, therefore, the use of this money for that period. We see this as a misstatement of the actual legal relationship between the appellant and RAM. No advance was made by the appellant to RAM. Rather, he entrusted money to RAM to hold on trust, and it breached that trust. The appellant's argument was that RAM's possession of the $500,000 objectively had value, based on the fact that the appellant himself had borrowed the sum and incurred borrowing costs, that RAM would have incurred borrowing costs if it had sourced the money elsewhere and that the quarterly reports given to him indicated a return on the funds.

[118] We are not persuaded by any of these points. The value provided to a company cannot be affected by the source of the funds provided by the creditor. It cannot be the case that an investor who funds his investment out of capital is treated differently from an investor who funds his investment by borrowing the money. Similarly, the fact that RAM would have incurred interest costs if it had borrowed money elsewhere is neither here nor there, given that it did not borrow money from the appellant and the returns shown in the quarterly reports to the appellant were entirely fictitious and of no significance at all. They were simply a product of the fraud perpetrated on the appellant and the other victims of the Ponzi scheme operated by RAM.

[119] The outcome we have reached is the same as that which typically applies in the United States in broadly similar circumstances. Section 548(a)(1)(A) and 548(a)(1)(B) of the Federal Bankruptcy Code (11 USC) allow the trustee in bankruptcy to avoid two classes of transfer made within two years before the date of the bankruptcy petition: intentional fraudulent transfers and constructive fraudulent transfers. An intentional fraudulent transfer occurs where the debtor (for our purposes, the Ponzi scheme operator) makes a transfer "with actual intent to hinder,

delay, or defraud" a creditor (for our purposes, other "investors" in the Ponzi scheme).[77] A constructive fraudulent transfer occurs where the debtor:[78]

(a) transfers an interest in property for which it received less than a reasonably equivalent value in exchange; and

(b) is insolvent and either (i) is engaged in business or a transaction for which it has unreasonably small capital or (ii) is incurring debts that are beyond its ability to pay.

[120] In both instances, investors who acted in good faith and gave value will have access to protection, but only to the extent of the principal sum invested – any "return" on the investment will be liable to be returned to the debtor to be available for distribution. This is because the investor will be treated as having given a "reasonably equivalent value" in exchange for the repayment of his or her initial investment but not for any supposed return. There is a useful explanation of the United States' position in *Donell v Kowell*,[79] discussing provisions in the Uniform Fraudulent Transfer Act as adopted by California which are effectively the same as the Bankruptcy Code provisions.[80] That case is not identical to the present case in that the investment with the Ponzi operator was direct rather than trust-based and, in theory, the investor's capital was not at risk as Mr McIntosh's was. Nevertheless, we find the analysis adopted helpful.

Discharge by performance or accord and satisfaction

[121] The appellant argued that the payment to him of $954,047 amounted to discharge by performance or discharge by accord and satisfaction of his management contract with RAM. The discharge was value given by him or valuable consideration provided by him, meeting the requirements of s 296(3)(c) and s 349(1).

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77 11 USC §548(a)(1)(A).
78 §548(a)(1)(B).
79 *Donell v Kowell* 533 F 3d 762 (9th Cir 2008).
80 Uniform Fraudulent Transfer Act Cal Civ Code §3439.04.

[122] His argument in relation to discharge by performance was that he was paid out exactly as if the management contract had been performed, in accordance with the reports he had received during the term of the contract. He asserted RAM was estopped from denying the contract had been performed but gave no relevant authority for the assertion and we can see no proper basis for it.[81] We see this argument as untenable in circumstances where the "performance" is simply the expression of the fraud perpetrated on the investors in the Ponzi scheme. He also relied on *Fairfield Sentry* in this context but, for reasons already given, we see that case as offering no assistance to the analysis of the present case given that the contractual and corporate structure in that case differs substantially from the facts of this case.[82]

[123] His argument in relation to discharge by accord and satisfaction is that his acceptance of the payment of $954,047 discharged RAM's obligations to him (as they were represented to be by RAM). The fact that there was fraud involved gave him the right to elect to avoid the discharge, but in the absence of such an election it remained effective. The problem with this argument is that the "obligations" said to have been discharged were not obligations at all.

[124] The majority of the Court of Appeal differentiated the two elements of the $954,047, being the $500,000 paid by the appellant and the $454,047 fictitious profits. It found the latter could be recovered by the liquidators because the appellant had not given value for it.[83] Although the appellant had a claim against RAM for equitable damages for breach of trust, the payment of the $454,047 was not made in discharge of that liability, but rather according to a notional calculation of "profit" based on fiction. Harrison and French JJ noted that this was consistent with the approach taken in comparative cases in the United States.[84]

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81 The authority he cited, *AA Finance Ltd v Commissioner of Inland Revenue* (1994) 16 NZTC 11,383 (CA) relates to a tax dispute and has no relevance to the current factual context.

82 See the discussion above at [108]–[112].

83 *McIntosh* (CA), above n 8, at [52].

84 At [55] citing *In Re Bayou LLC* 362 BR 624 (Bnkrtcy SD NY 2007) at 636, citing *Soule v Alliot* 319 BR 225 (Bankr ND Okla 2004) at 239l; *Sender v Buchanan* 84 F 3d 1286 (10th Cir 1996) at 1290; *Scholes v Lehmann* 56 F 3d 750 (7th Cir 1995) at 757; and *Wyle v CH Rider & Family* 944 F 2d 589 (9th Cir 1991) at 595.

[125] The liquidators submitted that if the Court accepted that the appellant had given value for his capital investment, the approach of the Court of Appeal should be adopted with regard to the fictitious profits. They emphasised that the three claims the appellant had against RAM after his money was misappropriated had to be evaluated carefully in light of the facts. While his claim for repayment of the $500,000 that was misappropriated was quantified, his claim for equitable damages and his claim to a proportionate share of the co-mingled fund were not. The payment he received did not discharge the equitable damages claim, so it could not be said that satisfaction of that claim (which the appellant was unaware he had) was the value given for the $454,047.

[126] The appellant said the Court of Appeal erred in bifurcating the payment into "capital" and "fictitious profit" components and in finding that the payment did not discharge RAM's antecedent obligation to him.[85] The payment made to him by RAM left RAM and him in the position where neither had a claim against each other and they had gone their separate ways.

[127] We do not consider the Court of Appeal erred in bifurcating the payment. That approach was consistent with the statutory scheme of the both the Companies Act and Property Law Act regimes. Section 295(a) of the former empowers the Court to order repayment by the recipient of an insolvent payment "some or all of the money" paid to that person. Section 348 of the latter provides for an order that the recipient pay "reasonable compensation". Both therefore contemplate that the Court will analyse a payment to see if any value was given and, if so, to what extent. The bifurcation approach is a method of doing that.

[128] Nor do we consider the Court of Appeal was in error in its analysis of the appellant's claim that he gave value or provided valuable consideration for the $454,047 component of the payment. While the $500,000 component can be seen as discharging an antecedent debt to him, for the reasons given earlier, the $454,047 component did not discharge his unquantified (and, indeed, unknown) claim against RAM for equitable damages. As already noted, the $454,047 figure was the product

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[85] The Court of Appeal said the appellant's then counsel accepted this (*McIntosh* (CA), above n 8, at [47]), which the appellant disputed. The liquidators did not seek to rely on any concession and we have proceeded on the basis that none was made.

of fictitious entries in reports made to the appellant by RAM. Those reports were the method of implementing the fraud perpetuated on the appellant by RAM.

[129] There is no other basis for saying the $454,047 component was received for value or valuable consideration. We have already ruled out management fees or time value of money as amounting to value.

$500,000 was real and substantial value for $954,047

[130] The appellant argued that, if it was found that his payment of $500,000 to RAM in April 2007 was the giving of value or the provision of valuable consideration, then the payment to him by RAM of $954,047 in November 2011 amounted to giving of value or was made for valuable consideration on his part, sufficient to satisfy s 296(3)(c) or s 349(1)(a). There is no requirement for equivalence of value: all that is required is that the value or valuable consideration given by the recipient of a payment that is an insolvent transaction is "real and substantial".[86] He argued that his $500,000 payment was therefore sufficient value for the $954,047 he received from RAM, taking into account factors such as management fees, time value of money and so on. As a fallback argument, he said the payment of the $500,000 alone was sufficient to satisfy the value/valuable consideration requirement even if his arguments about management fees and time value of money were rejected.

[131] The lower Courts rejected this argument. In the High Court, MacKenzie J accepted that there was no requirement that there be exact mathematical equivalence of value.[87] But he considered the objective of s 296(3) was not just certainty for creditors but also the balance between fairness to the individual creditor and fairness to the body of creditors.[88] This balance would not be achieved where the discrepancy in value between what was given by the individual creditor and what was received by him or her was significant. As the value given by the appellant was little more than half of what he received, this fairness objective was not met.

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86 *Allied Concrete*, above n 40, at [76] per Arnold J. In her judgment at [159], Elias CJ warned against embarking on an inquiry into the inadequacy of value or valuable consideration given by an individual creditor.

87 *McIntosh* (HC), above n 1, at [92].

88 At [91].

[132] The Court of Appeal saw it as a natural consequence of the bifurcated approach.[89] The appellant relied on the antecedent debt approach to value and the only antecedent debt was $500,000. In the absence of any antecedent debt for the $454,047 or some other value or valuable consideration, there was no value for that component.

[133] We accept that *Allied Concrete* said that value had to be real and substantial. That was in the context of a trade creditor providing value in goods or services, where the account for those goods or services could usually be relied on to represent their value. Practical considerations (not allowing nitpicking disputes about value) were important. In this case there is simply no sustainable basis for saying $954,047 is real and substantial value for a quantified antecedent debt of $500,000.

[134] The obvious point made by the respondents was if a payment that exceeds the quantified debt by nearly 100 per cent is defensible, what would not be? What if the fictitious profits had been a 50 per cent per annum return, rather than 19 per cent per annum? The appellant said if the fictitious profits had been too high, that would have called into question his good faith. We do not see that as an answer. In the circumstances of this case, where the antecedent debt is both quantified and fixed, we do not see any error by the Courts below in confining the calculation of value or valuable consideration to a sum that equals the quantified debt. We do not see that as undermining the comments made about value by this Court in *Allied Concrete* in the context of that case.

[135] The s 296 defence also applies to cases under s 297, which allows liquidators to recover the difference in value between the value a person received from the company under a transaction and the value the company received from that person. Section 296(3) must be interpreted in a manner that can be applied to cases under s 297, which necessarily requires some inquiry as to the amount of value given by the creditor in relation to the amount of value provided by the creditor to the company. Some assessment of equivalence may be required in cases other than the standard trade creditor cases of the kind under consideration in *Allied Concrete*.

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89 See *McIntosh* (CA), above n 8, at [43]–[51].

Conclusion on value defences

[136] In summary, we conclude the appellant provided value for the initial investment of $500,000 and therefore had a defence in respect of that sum under s 296(3) of the Companies Act. Applying the same analysis to the valuable consideration requirement of s 349(1) leads to the conclusion s 349(1) also provides a bar to the liquidators' claim under that provision to the extent of the $500,000.

The change of position defence – Companies Act

[137] The appellant also relied on the change of position defence in s 296(3)(c) of the Companies Act. That is, he said he altered his position "in the reasonably held belief that the transfer of the property to [him] was valid and would not be set aside". Reliance on this defence arises out of the purchase by the appellant and subsequent development of a neighbouring property to the appellant's house in Wellington.

The applicable principles

[138] There are some analogies between s 296(3)(c) and restitutionary principles. David Brown discusses this in his paper on voidable transactions prepared as part of the reform culminating in ss 292–296 of the Companies Act.[90] Of the change of position defence in s 296(3)(c), Mr Brown described the purpose of the general defence as equating "to the general restitutionary defence of change of position".[91] He adds "[t]he language of s 296 … reflects the general statutory defence in section 94B Judicature Act 1908" for payments made under mistake.[92]

[139] Mr Brown observed that the wording of both s 296(3) and its predecessor in s 311A(7) of the Companies Act 1955 were taken from s 94B of the Judicature Act.[93]

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[90] David Brown *Voidable Transactions – A Report for the Ministry of Commerce* (October 1999), one of the law reform papers discussed in *Allied Concrete*, above n 40, at [40].

[91] At 14.

[92] At n 16.

[93] At 54.

He continued, citing[94] the following extract from *MacMillan Builders Ltd v Morningside Industries Ltd*:[95]

> What is clear is that s 94B of the Judicature Act 1908 was intended to provide for relief although the case is not one of estoppel: see *Thomas v Houston Corbett & Co* [1969] NZLR 151 in which it was held that the Court is entitled to look at the equities on each side and has a wide discretion to do what is just. That this will properly involve a consideration of the detriment suffered by the receiver of the money is illustrated by the decision of O'Regan J in *KJ Davies (1976) Ltd v Bank of New South Wales* [1981] 1 NZLR 262, 265.
>
> The provision of s 311A(7) relate not only to claims by a liquidator under ss 309 and 311 but to claims "under any other enactment or in equity or otherwise". The language shows a close correspondence to that of s 94B of the Judicature Act and is similarly intended to enable the Court to do what the justice of the case requires. In that assessment detriment suffered by the recipient of the property is likely to be important.

[140] The restitutionary analogy is not complete[96] but there is some consistency between those principles and the way in which the principal purpose of s 296(3) and its predecessor have been viewed. For example, the Court of Appeal in *Madsen-Ries v Rapid Construction Ltd*[97] endorsed the description of the primary objective of the predecessor to s 296(3) as set out in *Baker Timber Supplies v Apollo Building Associates (Tauranga) Society Ltd (in liq)*, namely:[98]

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94 At 54–55.

95 *MacMillan Builders Ltd v Morningside Industries Ltd* [1986] 2 NZLR 12 (CA) at 18. The link with the law of restitution is a point made by RJ Sutton *The Law of Creditors' Remedies in New Zealand* (Butterworths, Wellington, 1978) at [6.01]; Trish O'Sullivan "Defending a Liquidator's Claim for Repayment of a Voidable Transaction" (1997) 9 Otago LR 111 at 112; and Elise Bant *The Change of Position Defence* (Hart Publishing, Oxford, 2009) at 250 and n 116. See also Charles Mitchell, Paul Mitchell and Stephen Watterson (eds) *Goff & Jones The Law of Unjust Enrichment* (9th ed, Sweet & Maxwell, London, 2016) at [27-66].

96 Section 296(3)(c) requires reliance. There is debate about the need to establish reliance in the context of the change of position defence at common law: Andrew Burrows *The Law of Restitution* (3rd ed, Oxford University Press, Oxford, 2011) at 528–531; *Goff & Jones The Law of Unjust Enrichment*, above n 95, at [27-34]–[27-35]; and Bant, above n 95, at 4. See also *National Bank of New Zealand Ltd v Waitaki International Processing (NI) Ltd* [1999] 2 NZLR 211 (CA) where the majority of the Court of Appeal was prepared to grant the common law change of position defence in circumstances in which they considered the defendant could not show that it had changed its position in reliance on the validity of the original payment, as required by s 94B of the Judicature Act 1908.

97 *Madsen-Ries v Rapid Construction Ltd* [2013] NZCA 489, [2015] NZAR 1385 at [30].

98 *Baker Timber Supplies v Apollo Building Associates (Tauranga) Society Ltd (in liq)* (1990) 5 NZCLC 66,791 (HC) at 66,793. See also *Harte v Wood* [2004] 1 NZLR 526 (CA) at [39] where the Court adopted Fisher J's test in *Baker Timber*. The description of Tipping J in *Re Bee Jay Builders Ltd (in liq)* [1991] 3 NZLR 560 (HC) at 566 is also often cited, again referring to a "deliberate course of conduct".

> … to assist a creditor if he has deliberately gone down one path in the reasonable expectation that he has received a valid payment, only to find that he is not only required to repay the money but that in the meantime he has also lost a valuable alternative opportunity. In other words, he must have acted to his detriment on the strength of the insolvent company's payment.

[141] The Court of Appeal in *Madsen-Ries* approached s 296(3)(c) on the basis that what was required was a "conscious [decision] to act in reliance on the payment".[99] In *Allied Concrete*, Arnold J observed that s 296(3) "requires that there be a link or connection between the impugned payment and the requirements in s 296(3)(a), (b) and (c)".[100] The key consideration is whether a causal connection can be established between the defendant's change in position and the impugned payment. The timing of the payment may well be critical in a factual sense but will not necessarily be determinative.[101] That approach is consistent with the approach taken to the defence at common law as developed by the courts in the United Kingdom.[102] It is also consistent with the principles underlying the defence.[103]

[142] Detriment is required.[104] In this case the High Court and the Court of Appeal and the parties have adopted this approach. We do the same. We are also not aware of any decisions on s 588FG(2)(c) of the Corporations Act 2001 (Cth), the Australian equivalent on which s 296(3)(c) is modelled, that would suggest a different approach.

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99 *Madsen-Ries*, above n 97, at [26] and see also [25].

100 *Allied Concrete*, above n 40, at [68].

101 The defence under s 296(3) has been held to extend to situations where the change of position occurs contemporaneously with the receipt of money or property: *Madsen-Ries v Rapid Construction Ltd* [2012] NZHC 3572 at [46]. See also *Farrell v Fences & Kerbs Ltd,* above n 49, at [87] where the Court of Appeal noted the, albeit atypical, possibility that alteration of position could occur at the same time as payment. This Court on appeal stated that it was "unlikely" that change of position would occur contemporaneously but did not exclude that possibility: *Allied Concrete*, above n 40, at [64]. See also Lynne Taylor and Grant Slevin *The Law of Insolvency in New Zealand* (Thomson Reuters, Wellington, 2016) at 698 where it is stated that "[a]lthough it is possible that an alternation of position might occur contemporaneously with a receipt of money or property, more typically it will occur after receipt" (footnotes omitted).

102 See *Goff & Jones The Law of Unjust Enrichment*, above n 95, at [27-36]; *Dextra Bank & Trust Co Ltd v Bank of Jamaica* [2001] UKPC 50, [2002] 2 LRC 212 at [38]; and *Commerzbank AG v Price-Jones* [2003] EWCA Civ 1663 at [38].

103 Burrows, above n 96, at 533; and Graham Virgo *The Principles of the Law of Restitution* (3rd ed, Oxford University Press, Oxford, 2015) at 690.

104 *Madsen-Ries*, above n 97, at [30]. Elias CJ in *Allied Concrete*, above n 40, at [173] observed that "[d]etriment remains an important consideration in relation to the change of position defence".

The sequence of events

[143] The appellant was familiar with the Wellington property, having lived beside it from 1997. From 2011, he owned properties either side. He knew from around 2010 that the then-owner was in some financial difficulty, so he thought he might be able to buy the property cheaply. Acquiring the property would meet his concern that another buyer might develop it in a way detrimental to his adjacent home.

[144] The appellant did some investigative work with an architectural designer and, as early as February 2011, he approached his solicitors about making an offer on the property. He did not progress the matter, for reasons which are irrelevant, until early May 2011 when he saw the property advertised for sale. He made his first offer for the property at a price below even the land only value. That is because he knew the house, which was a leaky home, would have to be demolished. This offer was unsuccessful. On the same day (5 July 2011) as making his second unsuccessful offer at $986,000, the appellant emailed RAM saying he wanted to sell his portfolio. Then, the appellant's third offer, dated 12 August 2011 also at $986,000, was accepted.

[145] That month, August 2011, also marked the completion of the appellant's Queenstown property. The project had been under construction in the first half of 2011 and involved significant bills.[105]

[146] On 17 August 2011, the appellant sent the agreement for sale and purchase of 33 Palliser Road to the bank. Also on this day, a look through company called Anne Elliot Limited (AEL) was incorporated to complete the agreement for sale and purchase. Subsequently, on 8 September 2011, the appellant signed a guarantee of AEL's obligations to the bank.

[147] There were some issues about finances in the latter part of August and September 2011 with some of the appellant's accounts going into overdraft.[106] At

[105] The appellant said these bills were approximately $100,000 a month.

[106] For example, there is email correspondence on 30 August 2011 about two accounts which were, respectively, some $1,300 and $1,100 in overdraft.

around this time the bank sent its instructions about a mortgage and the interlocking deed of guarantee.

[148] Settlement of the property took place on 9 September 2011. On the same day, the appellant met with Mr Ross to discuss his request to close the RAM portfolio. Formal notice of his wish to withdraw from the investment was given two days later, on 11 September 2011.[107] The appellant followed up on the subsequent lack of progress on several occasions.[108] In late October the appellant gave his account details to RAM to enable repayment. Throughout this period, the appellant kept the bank advised of progress.

[149] In October 2011, prior to the first of the repayments from RAM, an architectural firm, Kerr Ritchie, was engaged by AEL to investigate the opportunities to develop the property. Various options were provided but, eventually, on 4 November 2011, the firm emailed the designs for two new houses.

[150] As we have noted, over this period, that is from 4 November 2011 to 23 November 2011, RAM made a series of payments to the appellant's account.[109] That was applied to approximately $954,000 existing bank debt.

[151] On 8 December 2011, the appellant entered into a contract with Kerr Ritchie to design two houses on the property for a fee of $150,000.

[152] Over the next year various steps were taken to progress the development. For example, on 18 April 2012 there was an application for a minor boundary adjustment.[110] The building consent application was made on 5 June 2012 for the demolition of the leaky home. A more substantial application for boundary adjustment was made on 12 July 2012. Resource consent for the project itself was obtained on 27 November 2012.

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[107] He gave 30 days notice and referred to his need for funds to "reduce debt now".

[108] On 14 September 2011, 4 October 2011, 4 November 2011 and 14 November 2011.

[109] See above at [7].

[110] This was to remedy a "driveway access anomaly" that had "come to light".

[153] In late October 2012 the Financial Markets Authority began to receive complaints about RAM. The appellant said in a letter to the receivers in August 2013 that he was aware from media reports over the weekend of 4–5 November 2012, that RAM "could be in major trouble". Receivers were appointed on 6 November 2012.

[154] On 4 December 2012, the appellant entered into a contract for the demolition of the leaky home on the property, and demolition was completed by 14 December 2012. New titles for the property and for the appellant's adjacent home were issued later that month on 13 December 2012. The building contract was not signed until 4 July 2013, that is, after RAM went into liquidation on 17 December 2012.

[155] From July until late 2013 there was an exchange of correspondence between the liquidators and the appellant but it was not until 30 May 2014 that the notice to set aside the repayment from RAM was made.

The approach in the High Court and in the Court of Appeal

[156] The change of position defence under s 296(3)(c) was rejected in both the High Court and the Court of Appeal primarily on the basis the appellant had not shown the necessary reliance. Both courts found the motivation behind realising the RAM money was to pay for or reduce debt on a property the appellant owned in Queenstown.[111] These findings were made on slightly differing bases.

[157] MacKenzie J treated the decision to proceed with the development of the Wellington property as "the continuation and culmination of a position which had already been decided on, in principle".[112] It followed from this that the Judge saw the subsequent costs incurred (professional fees and the like) over December 2011–November 2012 as the "implementation of the position" which the appellant had already adopted.[113]

[111] *McIntosh* (HC), above n 1, at [120]; and *McIntosh* (CA), above n 8, at [77].
[112] *McIntosh* (HC), above n 1, at [120].
[113] At [125].

[158] In reaching the view he did as to the importance of the Queenstown property, MacKenzie J relied on steps taken prior to repayment as follows:[114]

(a) the appellant purchased the Wellington property using borrowed funds; and

(b) emails showed the appellant intended to develop the Wellington property and he pursued that objective by taking steps "quite soon after the purchase", and prior to repayment, to investigate development options.

[159] The Judge also saw it as significant that the contemporaneous evidence did not suggest either that the appellant was unwilling to proceed without additional borrowing or that his bank was unwilling to lend.[115] Rather, the "tenor of the contemporary emails [did] not indicate any pressure by [the bank] to reduce [the appellant's] debt".[116] Further, the appellant had "significant borrowings, which demonstrate a considerable willingness on his part to take on a large debt burden".[117] MacKenzie J drew further support for his findings from the absence of concern about the appellant's debt levels after RAM's liquidation and when RAM's difficulties were known to both the appellant and to the bank.[118]

[160] Finally, although it was not necessary to decide the point, MacKenzie J concluded that when the building contract was entered into, a reasonable person in the appellant's shoes could not have held a reasonable belief that the payments were valid and would not be set aside.[119]

[161] The Court of Appeal dealt with two claims. The first was whether the appellant would have bought the Wellington property but for receipt of the funds. Although the debt was fungible, the Court considered the inference was "unavoidable" that the appellant sought repayment of the RAM funds "to reduce

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114 At [118].
115 At [122].
116 At [122].
117 At [122].
118 At [123].
119 At [142].

debt owing on his Queenstown property”.[120] The Court based that inference on the following factors:

(a) the appellant’s interest in buying the Wellington property was longstanding and formed well before the notice of withdrawal;[121]

(b) the purchase had two benefits, the intrinsic benefit to the appellant’s own adjacent properties and the extrinsic benefit, that is, the potential value from the redevelopment;[122] and

(c) he told Mr Ross when he deposited the funds and then when he withdrew them that the investment was to pay for the Queenstown property.[123]

[162] On the alternative submission, lost opportunity, the Court of Appeal concluded that the appellant had failed to show the necessary causative link. The relevant factors are summarised as follows:[124]

> (1) … Mr McIntosh viewed the development as being gainful to him, intrinsically in protecting the amenities of his properties on either side … and extrinsically from a modest, even marginal, profit forecast of $200,000.
>
> (2) Once he had acquired [the Wellington property], the next and logical step in Mr McIntosh’s long term plan was to demolish the leaky dwelling and reconstruct new units.
>
> (3) This was a standalone project. There is no evidence that its financial feasibility would be affected by RAM’s payment of $954,047. By 31 October 2011 Mr McIntosh had arranged a facility with [the bank] for $1.1 million to meet the purchase price of $986,000 together with other costs. It was not until about July 2013, well after he was aware of the extent of RAM’s insolvency and was on notice of his risk, that he arranged an increase in [the bank’s] facility, to $2.529 million, to finance [the] obligations under the building contract.

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[120] *McIntosh* (CA), above n 8, at [77].
[121] At [74].
[122] At [75].
[123] At [76].
[124] At [86].

The arguments before this Court

[163] The manner in which the change of position defence is put has developed as the case has proceeded through the courts. The position as advanced now is that the decision to proceed with the project to develop the Wellington property as from December 2011 and to enter into a $3 million building contract in July 2013 was made in reliance on the validity of the repayment from RAM. The appellant described his situation in this way in an affidavit filed in the proceeding:

> At the time I entered into it, I thought the project was always going to be marginal, but had I also known then that the Repayment would or could be clawed back (in addition to the paper loss), I can say without doubt that I would not have commenced it. I would have on-sold the property at cost and repaid the acquisition loan from that sale.

[164] The appellant also stated that his bank would not have allowed him to proceed without the reduction of debt achieved following the repayment of the RAM funds.

[165] The appellant identified two ways in which he has suffered detriment. First, he lost the valuable opportunity of not starting the project and selling off the property without incurring major loss. Secondly, he has suffered a reduction of his own property area by a third.

[166] It is accepted by the appellant that debt reduction itself is ordinarily insufficient to make out the defence. The liquidators say that is all that has occurred here because the repayment from RAM was used to repay debt. The liquidators' position is that this is the end of the inquiry. However it is possible, as a matter of fact, for the appellant to show that unless the debt had been repaid he would not have proceeded with the development of the Wellington property but would have, instead, on-sold it.[125] That factual situation could comprise a change of position. As the appellant contended, the question is what he did in reliance and whether he has shown detriment.

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[125] The authors of *Goff & Jones The Law of Unjust Enrichment*, above n 95, at [27-12] suggest it may amount to a change of position where "the defendant pays a debt, and then incurs further expenditure, … that he would not have incurred …, had the debt still been outstanding".

Action in reliance?

[167] The appellant emphasised that with the receipt of the RAM money, his debt returned to approximately $4.3 million. This state of affairs allowed him to proceed with development whereas, without this money, he could not have serviced the debt. He also said his bank was expecting him to reduce his debt by repayment of the RAM funds. In this context, the submission is that it is not possible to ignore the proximity of his decision to proceed with the project and receipt of the funds. Finally, it is argued that the Courts below have erred in discounting his unchallenged affidavit evidence as to his motivation.

[168] Taking the last point first, we see no error in the approach taken by MacKenzie J. The Judge said:[126]

> [116] Without in any way doubting the [appellant's] credibility, some caution is required in making factual findings based on the [appellant's] evidence, after the event, of what he might have done if he had suspected that the payment might be clawed back. The focus, in considering whether the [appellant] altered his position, must be on the evidence of what was done at the time. The best evidence of that is the email exchanges with [the bank] which I have set out above. Also, it is necessary to focus quite specifically on the steps which were actually taken, to determine whether those constituted an alteration of the [appellant's] position. The issue of the [appellant's] belief, and the reasonableness of that, must also be assessed at the time each step was taken.

[169] Further, there is evidence in the contemporaneous documents to support the findings, made in both lower courts, that the appellant sought the repayment of the RAM funds to pay off the Queenstown property. First, this finding is consistent with what the appellant said he told Mr Ross at the time of making the investment in April 2007. The appellant told the liquidators in a letter of 16 August 2013 that he had informed Mr Ross in 2007 that he "hoped to put the returns" from the RAM investment into the Queenstown project, and that in 2011 he "sought closure of the [RAM] portfolio for the purposes of paying" some of the cost of that project. He gave three reasons for seeking repayment, namely, to repay significant specific debt; to reduce other debt; and to proceed with the development opportunity.

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[126] *McIntosh* (HC), above n 1.

[170] Secondly, the notion of using the funds to pay off the Queenstown property matched what he told Mr Ross at the time he sought repayment of the funds, in an email to Mr Ross of 5 July 2011. In his affidavit the appellant explained this statement by stating that he wanted to keep the potential purchase of the Wellington property confidential. He also explained that the issue was more one about the sequence of repayment (older debts first).[127]

[171] The sequence of events discussed earlier also provides some support for the proposition that the Wellington project did, as the Court of Appeal said, stand alone in a number of respects. The matter needs to be looked at in context. We make the following points.

[172] First, the appellant had a fairly long held interest in acquiring the property both for his own purposes and obviously with an eye to development. That must have been so because it was through developing the property himself that he would protect his own interests. The fact that the project was always marginal, at best, also suggests the purchase was for personal reasons related to the value of the appellant's own property.

[173] Further, for tax reasons, as the appellant told the liquidators, once developed the property would need to be held on to for rental purposes for several years following completion of the project. His thinking was reflected in an email sent to the bank in mid-August 2011 along with the agreement for sale and purchase of the property. In this email the appellant described his "primary thoughts" having been only to secure the land so as to protect his "properties on either side", and "also then to take advantage of that position to develop it into three units if possible". He said he had not had to think much further about this but, prompted by a comment from the contact at the bank, he said he was now thinking of holding on to the units as rentals.

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127 There is some support for the appellant's evidence in this respect in the evidence of his accountant, Mr Florentine who said: "I was aware at the time that his reason for closing his RAM portfolio in September 2011 was to use the proceeds to reduce his overall debt level in light of his contemporaneous purchase of the [Wellington] property".

[174] Secondly, the house on the Wellington property obviously had to be demolished at some point. It is of some significance that the property was purchased for $986,000, significantly below its $2.1 million rateable value.

[175] Thirdly, the appellant was willing to carry debt at a high level. He said he had no other source of funds but he has not provided his full financial position. Nor is there any corroboration of the proposition that his bank would not have done what it subsequently did, that is, continue to lend. Whilst Alan Dent, a partner from Deloitte who provided expert evidence for the appellant, suggests in an affidavit that it was questionable whether the bank would have lent on a 100 per cent debt funded basis, he said nothing further to substantiate that suggestion.

[176] Undoubtedly, the appellant did experience some concerns about his levels of debt. The appellant pointed to his description, in an email to his bank shortly after his offer on the property being accepted, of the prospects of the project as "daunting" and to his 11 December 2012 email to his accountant. In the latter email the appellant referred to financial difficulties over the previous year and the reasons for those difficulties. He also said:

> [S]o i ended up having to move things around and use some credit facilities to pay debts. Among other things, that was why i needed the Ross money. ...

[177] But this unsurprising concern has to be measured against the appetite for debt and the fact the development was always a marginal proposition.

[178] The appellant placed particular weight on an email to his bank dated 14 August 2011 and on an email he sent to his architectural designer in September 2011. The two communications are linked.

[179] In the email of 14 August 2011 to his bank, the appellant set out his initial thinking about development for the Wellington property, namely, three units sold at an average of $1.3 million each which would "clear" him $200,000. He noted in this

email that "all of the above will have a stop/go decision after the feasibility investigation".[128]

[180] The feasibility aspect is referred to in the 19 September 2011 email from the appellant to the architectural designer who had been doing some investigative work for him. In this email the appellant asked:

> Any progress on the town planner?
>
> Don't want to hassle, but if we can't get consent I will need to flick the property asap before it breaks me.

[181] We do not consider these sentiments alter the analysis. Having bought the property the appellant would have had to conduct the feasibility studies he did after purchase, whether he received the RAM funds or not. If there was a problem with feasibility in the sense that a building consent or resource consent could not be obtained the appellant may well have had to on-sell the property. But that does not say anything about reliance on the RAM funds.

[182] When the decision to proceed with the project is looked at in context, we agree the appellant has not shown he changed his position in reliance on the validity of the RAM payments. Rather, other factors such as his wish to recoup costs of the Queenstown property, to protect his other property and to pursue a development project, albeit a marginal one, were predominant.

[183] The liquidators also contended that MacKenzie J was correct to consider that the necessary change of position was that of AEL because AEL is a separate legal entity.[129] We are not convinced a great deal turns on this in the present case where the appellant would be liable for any default by AEL having provided a guarantee to the bank.

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128 The indication of the thinking about development is consistent with what appears to be a note by his lawyer on correspondence also dated 14 August 2011 from the appellant which queries: "Possibly a new entity to carry out a developer[?]".

129 See *McIntosh* (HC), above n 1, at [128].

Detriment?

[184] On the basis of our conclusion on reliance, we do not need to deal with detriment. However, for completeness, we address briefly the appellant's argument he suffered detriment because he lost the opportunity not to commence the project and sell the property without incurring substantial loss or because the area of his adjacent property was reduced by a third.

[185] On the first aspect, the appellant referred to what he described as an "unrealised loss" of $1.06 million. This was comprised of the $1 million capital he injected into the project in late 2014 plus around $60,000 which he described as negative equity in the completed project.

[186] The authors of *Goff & Jones The Law of Unjust Enrichment* suggest that "[i]n principle, foregone opportunities for gains should count as detriment, provided that the defendant can prove that he would have made the gain but for his enrichment".[130] In this case, however, there is some force in the liquidators' submission that it is not appropriate to view the lost opportunity relied upon by the appellant as detriment. That is because, at the time of entering into the project, the appellant considered it was of value albeit any profit might be marginal and his intention was to retain the property longer term, as he in fact did.

[187] Assuming for present purposes that the conceptual problem can be overcome, any detriment would be limited to costs incurred over the period from December 2011 to early November 2012. It may be that costs incurred in anticipation of repayment may be relevant in the context of s 296(3)(c) because the link between the impugned payment and the action described in s 296(3)(c) can be made out.[131] But in the present case, as a matter of fact, costs incurred prior to the repayment could not be relevant. That is because there is insufficient link between the decision to incur those costs, such as those costs incurred in exploring the feasibility of the project, and the validity of the repayment. As we have indicated, those costs would have been incurred in any event. In terms of costs incurred after early November, the key point is that by the weekend of 4/5 November 2012, as we

[130] Above n 95, at [27-27]; and see Bant, above n 95, at 50.
[131] *Allied Concrete*, above n 40, at [68]. Also, see the discussion above at [141].

have noted, the appellant said he was aware of problems with RAM. By that point, it cannot be said that further costs incurred amounted to detriment associated with belief in the validity of the repayment.

[188] Certainly, the entry into the $3 million building contract comes too late in the piece (4 July 2013), because plainly by then the appellant was on notice of the problems with RAM (receivers having been appointed in November 2012). We agree with MacKenzie J as to the position in that respect. The Judge said:[132]

> [142] I do not consider that, following the first public revelation of RAM's position, a reasonable person in the respondent's position could have held a reasonable belief that the payments were valid and would not be set aside. Such a person should have entertained very considerable doubt. Soon after the publication of the liquidators' report to the Court, and their communications with the investors, investors must have known or suspected that they had been the victims of a fraud by Mr Ross, of substantial proportions. By the time the respondent entered into the building contract in July 2013, he was well aware of the situation. He was aware that the profit which had been reported to him, and which had been paid to him, was fictitious. It must, at a broad level, have given rise to concerns for a reasonable person in the respondent's position that the money that he had received purporting to be those fictitious profits must have come from funds to which other investors must have contributed unwittingly. In those circumstances, a reasonable person would have anticipated that the payments might be challenged, and the possibility that they would be set aside could not be excluded. A reasonable person who altered his position in those circumstances could not have done so in the reasonable belief that the payment was valid and would not be set aside.

[189] In terms of the boundary change we see force in the liquidators' submission that it is difficult to assess this as detriment now the project has been completed. The change in boundary was seen to have some value to the appellant. The application for the boundary consents notes that the:

> … new boundary would generally run across the site rather than up and down the site as it does at present. The advantage would be that the open space for each lot would be adjacent to and accessible from the dwellings because they would be at a similar level.

[190] It is also the case, as the liquidators submitted, that the change in boundary is not irreversible, although obviously reversing the position would involve some surveying and legal costs.

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132 *McIntosh* (HC), above n 1.

[191] Accordingly, were it necessary to decide the point, we would have doubts as to whether the appellant had established detriment.

Application of Property Law Act change of position defence

[192] The other possible defence arises under s 349(2)(b) of the Property Law Act. That section provides a defence where the person received the property in good faith and without knowledge of the fact it was the subject of a prejudicial disposition and:

> … the person's circumstances have so changed since the receipt of the property that it is unjust to order that the property be restored, or reasonable compensation be paid, in either case in part or in full.

[193] The appellant's position was that, if the only defence available is the change of position in this section, then, on the equities he should only have to repay his net gain, that is, after his own borrowing costs of $200,000 or at the most only the fictitious profits. Because we take the view the defence is not met on the basis of the facts as we have discussed them, we need only address this defence briefly.

Approach to s 349(2)(b)

[194] The predecessor to s 349 was s 60 of the Property Law Act 1952. The relevant part of s 60, which set out the circumstances in which alienation of property made with the intention to defraud investors would be voidable, provided that the provision did not extend to any estate or interest in property "alienated to a purchaser in good faith not having, at the time of the alienation, notice of the intention to defraud creditors".[133] As this Court noted in *Regal Castings Ltd v Lightbody*, s 60 was derived from the Statute of Elizabeth, 13 Eliz c 5 (1571).[134]

[195] The Law Commission in its report on the Property Law Act said of this defence:[135]

> The formulation concerning change of circumstances differs from that in s 58(6)(a) of the Insolvency Act 1967 and s 311A(7)(a) of the Companies Act 1955 and s 296 of the Companies Act 1993, in that it does not require

[133] Property Law Act 1952, s 60(3).
[134] *Regal Castings Ltd v Lightbody*, above n 22, at [4] per Elias CJ, at [73] per Blanchard J delivering the judgment of himself and Wilson J and at [87] per Tipping J.
[135] Law Commission, above n 41, at [320].

> that the person from whom recovery is sought "has altered his position in the reasonably held belief that the [disposition] to him was validly made and would not be set aside". That seems to require proof of some action taken with conscious thought that the transaction would be undisturbed. In accordance with the modern understanding of the law of change of circumstance, s 69(b)(ii) will merely require a change of circumstances of any kind which makes it unjust that an order for restoration of property or payment of compensation be made.

[196] The reference to the "modern understanding of the law of change of circumstances" reflects the line of authority beginning with *Lipkin Gorman (a firm) v Karpnale Ltd*.[136] As the liquidators submitted, this is not a general hardship defence and there is a need for a sufficient causal link between the unjust enrichment and the loss.[137] The other point, as we have noted, is that unlike the equivalent defence under the Companies Act, relief under s 349 is discretionary.[138]

This case

[197] MacKenzie J took the view that the two defences could be considered together and he approached the applicability of a defence primarily through the lens of s 296.[139] The Judge said:

> [145] The requirement for a change of circumstances is broadly equivalent to the s 296 requirement of an alteration of position. The circumstances must have *so* changed that it is unjust to order repayment. That requires an examination of the respondent's circumstances which extends beyond the financial extent and effect of the change. It includes a consideration of the respondent's state of knowledge when the change of circumstances happened. His knowledge is relevant to the justice of making an order. In broad terms, on the facts of this case, a change of circumstances would not make it unjust to order repayment unless the respondent reasonably believed that his entitlement to the funds was secure. That involves an inquiry similar to that which I have undertaken in considering the reasonable belief limb of s 296(3)(c).

[198] We agree that if the inquiry is approached in this way the requisite change of circumstances under s 349 has not been established for the reasons already discussed.

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136 *Lipkin Gorman (a firm) v Karpnale Ltd* [1991] 2 AC 548 (HL).
137 With reference to Burrows, above n 96, at 527.
138 See above at [71].
139 *McIntosh* (HC), above n 1, at [98].

Result and costs

[199] In accordance with the views of the majority,[140] the appeal and cross-appeal are dismissed. In the result, the payment of $454,047.62 being the difference between the amount paid to the appellant and the $500,000 he invested with RAM was correctly set aside.

[200] In the High Court, the question of interest on the sums involved was reserved. As we understand it, that question has not been resolved and we did not hear full argument on the point. If the parties do not agree on the issue brief submissions may be filed. Any submissions from the appellant are to be filed by 30 June 2017, from the respondents by 21 July 2017 and any submissions in reply from the appellant by 31 July 2017.

[201] At the hearing of the appeal, the appellant sought suppression of personal financial information discussed in the submissions in the context of the change of position defence. The matter was dealt with on the basis there would be an interim suppression order with the issue to be reconsidered in the context of this judgment. Having considered the matter further, we decline to continue suppression. The material in issue is essentially already in the public domain through the publication of the judgments in the High Court and Court of Appeal. To the extent there are matters of detail not referred to in either of those judgments, we do not consider the appellant has met the standard for suppression, namely, "that the interests of justice require a departure from the usual principle of open justice".[141]

[202] In the circumstances, where the appellant has failed on what we see as the primarily important points of principle, a reduced award of costs to the respondents should follow. The appellant is to pay the respondents costs of $15,000 together with reasonable disbursements. This reflects our view of the relative success of the parties.

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140 William Young J concurring in the result we have reached: see below at [226].

141 *Erceg v Erceg [Publication restrictions]* [2016] NZSC 135, [2017] 1 NZLR 310 at [21].

WILLIAM YOUNG J

My approach

[203] I propose to confine these reasons to the "gave value" defences under s 296(3)(c) of the Companies Act 1993 and ss 345(1)(b) and 349(1)(a) of the Property Law Act 2007. In all other respects I agree with the reasons given by other members of the Court.

[204] As will become apparent, I concur in the ultimate conclusions reached by the majority.[142] Accordingly, I would dismiss the appeal and cross-appeal.

Section 296(3)(c) of the Companies Act 1993

[205] Section 296(3)(c) is, relevantly, in these terms:

> (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 … .

[206] For the purposes of the s 296(3)(c) inquiry, value is to be addressed in relation to both the investment of the $500,000 by Mr McIntosh (and immediate misappropriation by Ross Asset Management Limited (RAM)) and the later payment of $954,047 to Mr McIntosh by RAM. It is enough to make out the defence if he "gave value" on either of those occasions. This follows from the adoption by the majority in *Allied Concrete Ltd v Meltzer* of the view that value could be relevantly given in either "the antecedent transaction" (which in this case is the deposit of $500,000) or in the extinguishing of pre-existing liability as the concomitant of the

[142] Above at [199]–[202].

payment made to the appellant of $954,047.[143] In *Allied*, I expressed the view that s 296(3)(c) was focussed solely on value for the payment, a view which I described as "the discharge hypothesis".[144] As will be apparent from my reference to the majority judgment, that view did not prevail.[145]

[207] *Allied* shows that a technical approach to "value" is not to be taken when applying s 296(3)(c). What is required is value which is "real and substantial".[146] This must be assessed not in the abstract but rather in relation to the amount of the payment in issue.

[208] As will be apparent, I agree with the reasons given separately by the majority and by Glazebrook J that ss 292–296 of the Companies Act are generally engaged by the facts of the case.[147] They are, however, awkward to apply in the present context and the legislative language does not provide clear answers to the questions whether Mr McIntosh gave value for the payment made to him and, if so, to what extent. In light of this, I consider the issues must be addressed in terms of policy.

[209] The claim under the Companies Act is pursuant to a regime which is most commonly invoked in respect of preferential payments made by insolvent companies to trade creditors. If the other elements of the s 296(3) defence are made out, such a creditor is entitled to a full allowance for the value provided pursuant to the antecedent transaction. Consistently with this approach, it seems to me to be fair and in accordance with policy for the same allowance to be made to Mr McIntosh.

[210] I am accordingly of the view that Mr McIntosh should be placed in a position as closely analogous as possible to that of a trade creditor who has been preferentially paid. He provided value of $500,000 in terms of his misappropriated investment and has a defence but only to that extent. On this aspect of the case I

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143 *Allied Concrete Ltd v Meltzer* [2015] NZSC 7, [2016] 1 NZLR 141.
144 At [177].
145 The Chief Justice and I shared this view but McGrath, Glazebrook and Arnold JJ preferred what I referred to as the "antecedent transaction hypothesis". The Court was unanimous as to result.
146 At [105] per McGrath, Glazebrook and Arnold JJ, adopting the language used in the Court of Appeal but doing away with the Court of Appeal's temporal requirement.
147 Above at [47]–[68] per O'Regan and Ellen France JJ; and at [241]–[242] per Glazebrook J.

thus agree with the approach favoured by the majority.[148] I would thus allow him to retain $500,000.

Sections 345(1)(b) and 349(1)(a) of the Property Law Act 2007

[211] The Fraudulent Conveyances Act 1571 (Eng) (1571 Act) provided a remedy where a debtor had disposed of assets for the purpose of defrauding creditors. The statute was in these terms:[149]

> For the Avoiding and Abolishing of feigned, covinous and fraudulent Feoffments, Gifts, Grants, Alienations, Conveyances, Bonds, Suits, Judgments and Executions, as well of Lands and Tenements, as of Goods and Chattels, more commonly used and practised in these Days than hath been seen or heard of heretofore: Which Feoffments, Gifts, Grants, [etc], have been and are devised and contrived of Malice, Fraud, Covin, Collusion or Guile, to the End, Purpose and Intent, to delay, hinder or defraud Creditors and others of their just and lawful Actions, Suits, Debts, [etc], not only to the Let or Hinderance of the due Course and Execution of Law and Justice, but also to the Overthrow of all true and plain Dealing, Bargaining and Chevisance between Man and Man, without the which no Commonwealth or civil Society can be maintained or continued.
>
> II. Be it therefore declared, ordained and enacted, … That all and every Feoffment, Gift, Grant, Alienation, Bargain and Conveyance of Lands, Tenements, Hereditaments, Goods and Chattels, or of any of them, … by Writing or otherwise, and all and every Bond, Suit, Judgment and Execution at any Time had or made …, to or for any Intent or Purpose before declared and expressed, shall be from henceforth deemed and taken (only as against that Person or Persons, his or their Heirs, Successors, Executors, Administrators and Assigns, and every of them, whose Actions, Suits, Debts, [etc], by such guileful, covinous or fraudulent Devices and Practices, as is aforesaid, are, shall or might be in any ways disturbed, hindred, delayed or defrauded) to be clearly and utterly void, frustrate, and of none Effect; any Pretence, Colour, feigned Consideration, expressing of Use, or any other Matter or Thing to the contrary notwithstanding.
>
> …
>
> VI. Provided also, … , That this Act, or any Thing therein contained shall not extend to any Estate or Interest in Lands, Tenements, Hereditaments, Leases, Rents, Commons, Profits, Goods or Chattels, had, made, conveyed or assured, or hereafter to be had, made, conveyed or assured, which Estate or Interest is or shall be upon good Consideration and *bona fide* lawfully conveyed or assured to any Person or Persons, or Bodies Politick or Corporate, not having at the Time of such Conveyance or Assurance to them made, any Manner of Notice or Knowledge of such Covin, Fraud or Collusion as is aforesaid; … .

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[148] Above at [88]–[115] and [136].
[149] Fraudulent Conveyances Act 1571 (Eng) 13 Eliz I c 5.

[212] The statute thus consisted of a preamble (set out in the first paragraph just cited), a rule (set out in the second) and a proviso (set out in the third). A conceptual problem with the statute was that transactions of the kind envisaged by the proviso would not usually be subject to the rule. This is a point which was referred to, albeit slightly indirectly, by Parker J in *Glegg v Bromley*.[150]

[213] Legislation to the same effect as the 1571 Act was enacted in most common law jurisdictions. Section 60 of the Property Law Act 1952 was an example. It followed closely the structure of the 1571 Act, with the rule provided for in s 60(1) and the proviso in s 60(3). Section 60(3) protected alienations "to a purchaser in good faith not having, at the time of the alienation, notice of the intention to defraud creditors". As the definition of "purchaser" in s 2 of the Act encompassed only someone who "for valuable consideration" acquired property, s 60(3) was to the same practical effect as the proviso to the 1571 Act.[151] The drafting did not attempt to resolve the difficulty already alluded to as to the relationship between the proviso (s 60(3)) and the rule (s 60(1)). This point was alluded to, again a little indirectly, by Richmond J in *Re Hale (a bankrupt)*.[152]

[214] I will refer to enactments of this kind as "fraudulent conveyances legislation". The conduct primarily addressed by such legislation involves debtors (a) putting their property out of the reach of creditors but (b) nonetheless retaining enjoyment of it. But although the paradigm case addressed by such legislation involves the debtor retaining the enjoyment of the property, the reach of such statutes is not so confined. This broad application of the statute is implicit in the proviso and is, in any event confirmed by *Freeman v Pope*, in which Lord Hatherley LC noted that:[153]

> The principle on which the [1571 Act] proceeds is this, that persons must be just before they are generous, and that debts must be paid before gifts can be made.

[215] The 1571 Act did not operate to avoid preferential payments. The law as to this is reviewed in *Re Hale (a bankrupt)*. In part this is because the debtor does not

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150 *Glegg v Bromley* [1912] 3 KB 474 (CA) at 492–493.
151 Assuming that "good consideration" equates to "valuable consideration".
152 *Re Hale (a bankrupt)* [1989] 2 NZLR 503 (CA) at 508–509.
153 *Freeman v Pope* (1870) 5 LR Ch App 538 at 540.

retain enjoyment of the property which is the subject of the preference. But, and this is how such transactions can be distinguished from *Freeman v Pope*, a creditor who receives the payment provides consideration in the form of the discharge of the existing debt.[154]

[216] At this point, it is helpful to turn to the current New Zealand provisions. They are to be found in ss 344–350 of the Property Law Act 2007. They relevantly provide:

> **344 Purpose of this subpart**
>
> The purpose of this subpart is to enable a court to order that property acquired or received under or through certain prejudicial dispositions made by a debtor (or its value) be restored for the benefit of creditors (but without the order having effect so as to increase the value of securities held by creditors over the debtor's property).
>
> **345 Interpretation**
>
> (1) For the purposes of this subpart,—
>
> (a) a disposition of property prejudices a creditor if it hinders, delays, or defeats the creditor in the exercise of any right of recourse of the creditor in respect of the property; and
>
> (b) a disposition of property is not made with intent to prejudice a creditor if it is made with the intention only of preferring one creditor over another; and
>
> (c) a disposition of property by way of gift includes a disposition made at an undervalue with the intention of making a gift of the difference between the value of the consideration for the disposition and the value of the property comprised in the disposition; and
>
> (d) a debtor must be treated as insolvent if the debtor is unable to pay all his, her, or its debts, as they fall due, from assets other than the property disposed of.
>
> …
>
> **346 Dispositions to which this subpart applies**
>
> (1) This subpart applies only to dispositions of property made … —
>
> (a) by a debtor to whom subsection (2) applies; and

[154] See *Alton v Harrison* (1869) 4 LR Ch App 622; and *Holbird v Anderson* (1793) 5 TR 235 at 238, 101 ER 132 at 134 per Lord Kenyon CJ.

(b) with intent to prejudice a creditor, or by way of gift, or without receiving reasonably equivalent value in exchange.

(2) This subsection applies only to a debtor who—

(a) was insolvent at the time, or became insolvent as a result, of making the disposition; or

(b) was engaged, or was about to engage, in a business or transaction for which the remaining assets of the debtor were, given the nature of the business or transaction, unreasonably small; or

(c) intended to incur, or believed, or reasonably should have believed, that the debtor would incur, debts beyond the debtor's ability to pay.

…

348 Court may set aside certain dispositions of property

(1) A court may make an order under this section—

(a) on an application for the purpose … ; and

(b) if satisfied that the applicant for the order has been prejudiced by a disposition of property to which this subpart applies.

…

349 Protection of persons receiving property under disposition

(1) A court must not make an order under section 348 against a person who acquired property in respect of which a court could otherwise make the order and who proves that—

(a) the person acquired the property for valuable consideration and in good faith without knowledge of the fact that it had been the subject of a disposition to which this subpart applies;

…

[217] Sections 344–350 largely reflect the way in which courts had applied s 60 of the 1952 Act. In particular, s 345(1)(b) is a restatement of the position arrived at under s 60 that an intention to prefer a creditor was not, in itself, an intention to defraud creditors. Section 348 sets out what I have called the rule and s 349(1)(a) the proviso. To at least some extent, the conceptual difficulty which I have described has been addressed by s 346(1)(b) which brings within the rule transactions in which

the debtor does not receive "reasonably equivalent value in exchange", an expression which differs from the phrase "valuable consideration" in s 349(1)(a).

[218] Some context for the particular wording of s 349(1)(a) is provided by two reports of the Law Commission.[155] In the first, the Law Commission observed:[156]

> 252 Section 60(3) provides that the section "does not extend to any estate or interest in property alienated to a purchaser in good faith not having, at the time of the alienation, notice of the intention to [prejudice] creditors". The Commission thinks that the section should refer to the need for full consideration in this context. Section 172(3) of the Law of Property Act 1925 (UK) uses the expression "valuable consideration". We prefer "adequate consideration in money or money's worth" which should avoid the suggestion that "natural love and affection" or something less than full consideration paid in cash or kind is adequate to protect the transaction. The subsection should also, we think, extend to protect third parties who have acted in good faith, without knowledge of the debtor's intention, and who have given adequate consideration to the debtor or the person from whom they acquired the property in issue.

In the second, and in commenting on what by then was a proposed Bill, the Commission commented:[157]

> 319 Certain protections are provided for people who have received property pursuant to a disposition which is attacked under the subpart. The court may not make an order against a person who overcomes the burden of proving that he or she acquired the property for valuable consideration, and in good faith and without knowledge of the fact that it had been the subject of the disposition of a kind with which s 65 deals; nor may an order be made against a person who proves that he or she acquired the property through a person who acquired it in such circumstances: s 69(a)(ii). It is not necessary for the recipient of property to show that it was acquired for *full* consideration. The Law Commission suggested that possibility in para 252 of NZLC PP16, but has been convinced by submissions pointing out the problems that this might cause in situations in which the full or fair value of the property was difficult to assess. Under s 69(a)(i) it will still be necessary for a person resisting the making of an order to prove that valuable consideration was given and that, most importantly, he or she acted in good faith etc. Where there is a significant disparity between full value and the consideration actually given, it may be difficult for the defendant to demonstrate the elements of good faith and lack of knowledge, and such a defence might then fail.

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155 Law Commission *The Property Law Act 1952* (NZLC PP16, 1991); and Law Commission *A New Property Law Act* (NZLC R29, 1994).

156 *The Property Law Act 1952*, above n 155.

157 *A New Property Law Act*, above n 155.

[219] Although there is no reference in the reports of the Law Commission to the conceptual problem to which I have alluded, the retention of the expression "valuable consideration" for s 349(1)(a) and the different wording of s 346(1)(b) make it clear that the application of the former does not turn on the consideration which is relied upon representing "full or fair value" for the property transferred.

[220] For the purposes of the s 348 claim, the critical questions are:

(a) whether the claim under s 348 is precluded by s 345(1)(b); if not:

(b) whether Mr McIntosh "acquired [the $954,047] for valuable consideration"; and, if so:

(c) the extent that this provides a defence.

[221] The actions of Mr Ross in paying out Mr McIntosh involved a payment to Mr McIntosh which was in excess of his actual legal entitlement. I think it follows that the payments were not "made with the intention *only* of preferring one creditor over another". I see this consideration as taking the case outside of the principle in relation to preferential payments.

[222] Mr McIntosh provided, although he did not know it, value to RAM when the latter stole his money. And RAM was thus indebted to him at least for the amount stolen. A like situation arose in *Middleton v Pollock* in which a solicitor who would appear to have stolen money given to him for investment provided a security in favour of some, but not all affected clients, for the amounts stolen.[158] Although the clients were not aware of the security, the pre-existing debts to them were seen as providing consideration so as to be within the proviso. On this basis, it seems to me that Mr McIntosh provided valuable consideration for the payments made to him.

[223] I see such consideration as limited to the amount of the pre-existing debt. This is again consistent with the principles established in relation to preferential payments. While the amount of an existing debt provides consideration for the

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[158] *Middleton v Pollock, ex parte Elliott* (1876) 2 Ch D 104 (Ch).

preferential payment, I see no reason why it should be seen as providing consideration for a payment in excess of the amount of such debt.

[224] At this point some reference to the jurisprudence of the United States of America is appropriate. There are a great many cases in the United States involving Ponzi schemes and claw back claims based on fraudulent conveyances legislation. The largely settled practice has been to reject such claims to the extent of the original investment but to allow them in relation to "fictitious profits". All of this is discussed by Phelps and Rhodes in *The Ponzi Book: A Legal Resource for Unravelling Ponzi Schemes*.[159] The decision of the Ninth Circuit Court of Appeals in *Donell v Kowell* provides an example of this and, as well, a lucid explanation of the legal analysis which American courts have adopted.[160]

[225] As will be apparent from the remarks just made, I am satisfied that s 348 applies (and is not displaced by the operation of s 345(1)(b)) but that Mr McIntosh has a defence in respect of, but limited to, the $500,000 he paid to RAM.

Disposition

[226] I would dismiss the appeal and cross-appeal.

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[159] Kathy Bazoian Phelps and Steven Rhodes *The Ponzi Book: A Legal Resource for Unravelling Ponzi Schemes* (LexisNexis, New Providence (NJ), 2012) at chs 3 and 4.

[160] *Donell v Kowell* 533 F 3d 762 (9th Cir 2008).

GLAZEBROOK J

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Introduction

[227] In April 2007, Mr McIntosh provided $500,000 to Ross Asset Management Ltd (RAM) to invest on his behalf. The funds, any securities purchased and the income from those securities were to be held on a bare trust for Mr McIntosh by another Ross company, Dagger Nominees Ltd (Dagger). RAM was entitled to deduct management fees for its investment services. Similar arrangements were entered into with other investors.

[228] The investors, including Mr McIntosh, were provided with reports that outlined the securities purchased on their behalf and the returns achieved. These reports aligned with what had occurred in the market for the relevant securities. The returns reported were impressive,[161] particularly as they were achieved during the global financial crisis.[162]

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161 Mr McIntosh says that his reported return was 19 per cent per annum gross and 15 per cent per annum after deduction of management fees.

162 The global financial crisis commenced in the United States of America in late 2007.

[229] Unfortunately for the investors, they were the victims of a massive fraud. RAM and its principal, Mr David Ross, were operating a Ponzi scheme.[163] The securities and the reported returns were fictitious.[164] The investors' funds were misappropriated almost immediately on receipt, pooled and used to perpetuate the fraud by repaying capital plus fictitious returns to investors who wished to withdraw their funds, as well as paying RAM's operating expenses and funding drawings by Mr Ross.[165]

[230] In early July 2011, Mr McIntosh informed Mr Ross that he wished to withdraw his funds from RAM's management. After some delay through what in hindsight appear to have been stalling tactics by Mr Ross, Mr McIntosh gave notice to terminate the portfolio on 11 September 2011. He was eventually paid $954,047 in a number of instalments over the course of November 2011.[166] This represented the original investment of $500,000 and the fictitious returns calculated over the term of the investment.

[231] A report provided to Mr McIntosh purported to show how his portfolio had been sold to realise the money paid to him. In fact none of the sums paid had come from shares held on Mr McIntosh's behalf. They were sourced from deposits by other investors and sales from a pool of securities held by RAM.[167] At the time Mr McIntosh was paid out, RAM was insolvent.[168]

[232] RAM was placed in receivership in November 2012 and in liquidation in December 2012. The respondents (the liquidators) were appointed first as receivers and then as liquidators. In July 2014, they filed proceedings[169] claiming the return of

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163 Named after Charles Ponzi, a Ponzi scheme involves promising investors an attractive return on their investment, but in reality no such investment takes place. Instead, participants are paid "dividends" from the contribution of later investors. In 1920, Charles Ponzi promised a 50 per cent return on investments over 90 days, resulting in around 40,000 people investing the equivalent of USD$162 million at today's value: Mervyn K Lewis *Understanding Ponzi Schemes* (Edward Elgar Publishing, Cheltenham, 2016) at 1 and 11.

164 Some securities were purchased by RAM, but these bore no relationship to the reports.

165 For more see the discussion in *Fisk v McIntosh* [2015] NZHC 1403, (2015) 11 NZCLC ¶98-033 (MacKenzie J) [HC decision] at [9]–[11].

166 At [13]–[16].

167 At [16]–[18]. This was not challenged in the Court of Appeal: *McIntosh v Fisk* [2016] NZCA 74, [2016] 2 NZLR 783 (Harrison, French and Miller JJ) [CA decision] at [11].

168 At [24]–[25] and [51].

169 A notice of demand had been served on Mr McIntosh in July 2013. A notice to set aside voidable transactions was served (and opposed by Mr McIntosh) in May 2014.

the $954,047 paid to Mr McIntosh under ss 292 or 297 of the Companies Act 1993 or s 348 of the Property Law Act 2007.[170] Mr McIntosh argued that those sections did not apply and that in any event he had a defence under s 296(3) of the Companies Act and under s 349 of the Property Law Act.

[233] In the High Court, MacKenzie J held that the preconditions to the Court's powers to make claw back orders under the Property Law Act and the Companies Act were met.[171] With regard to the initial investment of $500,000 by Mr McIntosh in RAM, MacKenzie J was satisfied that value or valuable consideration[172] had been provided when RAM appropriated those funds to itself.[173] However, MacKenzie J did not consider that the $454,047 of fictitious profits resulted from the giving of value or valuable consideration.[174] He also rejected a change of position defence under s 296(3)(c) of the Companies Act and s 349(2)(b) of the Property Law Act.[175]

[234] Similarly in the Court of Appeal, the majority (Harrison and French JJ) held that Mr McIntosh had given value for the initial investment but not for any amount paid out in excess of that investment.[176] Miller J did not agree that Mr McIntosh had given value at all. He would have allowed the liquidators' claim to recover both the initial investment and the fictitious profit.[177] The Court of Appeal unanimously dismissed the appeal with regards to the change of position defence.[178]

[235] In his appeal to this Court Mr McIntosh argues that the Court of Appeal was wrong to order him to return the fictitious profits and to reject his change of position defence. The liquidators cross-appeal, arguing that Mr McIntosh should also have been ordered to return the $500,000 initial investment.

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170 For a summary of the history of these proceedings, see the judgment of Arnold, O'Regan and Ellen France JJ [the majority judgment] at [9]–[12].
171 HC decision, above n 165, at [59].
172 As required by s 296(3)(c) of the Companies Act 1993 and s 349(1)(a) of the Property Law Act 2007.
173 HC decision, above n 165, at [74].
174 At [82].
175 At [135] and [143]–[146].
176 CA decision, above n 167, at [39] and [52].
177 At [97] and [112].
178 At [93] per Harrison and French JJ and at [97] per Miller J.

Mr McIntosh's appeal

[236] The Court asked for further submissions on a number of points after the hearing, including submissions on the finding by MacKenzie J in the High Court that the provisions of the Companies Act and the Property Law Act apply, despite the "unusual circumstances" of the liquidation.[179]

[237] In his further submissions, Mr McIntosh argues that neither the Companies Act nor the Property Law Act claw back provisions apply, as the money was trust money and not money belonging to RAM. He argues that the legislative provisions are intended to apply only to traditional debtor/creditor relationships and do not apply to "non-company property" such as mingled trust funds. This is because any claw back will not increase the pool of assets available to RAM's creditors. If the provisions do apply, he submits that the defences in the Companies Act should still apply to ensure the regime is applied uniformly.[180] Additionally, Mr McIntosh argues that he would be protected by the valuable consideration defence in s 349(1)(a) of the Property Law Act and, failing that, the change of position defence in s 349(2).

[238] In his original submissions on the appeal Mr McIntosh submits that he gave value for the $454,047 fictitious returns on the basis of this Court's decision in *Allied Concrete Ltd v Meltzer* (*Allied*).[181] He also argues that the Courts below were wrong to reject his change of position defences under the Companies Act and the Property Law Act.

[239] I will deal with each of these points in turn.

Significance of trust

[240] As a result of the misappropriation of his funds, Mr McIntosh had both personal and proprietary claims against RAM and Dagger as trustees. Mr McIntosh had the right to require the trustees to restore the trust property (or the value thereof)

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[179] HC decision, above n 165, at [23]. This finding was not challenged by Mr McIntosh in the Court of Appeal: CA decision, above n 167, at [12].

[180] Section 296(3) of the Companies Act, which governs the defences, refers to the "property of a company".

[181] *Allied Concrete Ltd v Meltzer* [2015] NZSC 7, [2016] 1 NZLR 141 [*Allied*].

or to seek compensatory equitable damages. He also had a proprietary claim with regard to the property held by RAM. Further, he became a creditor for the misappropriated funds and had a claim for damages for breach of the management contract.[182]

[241] I do not accept Mr McIntosh's submission that, because of the trust relationship, the claw back provisions do not apply.[183] There is no statutory requirement that the property disposed of (under the Property Law Act) or the money paid (under the Companies Act) must belong to the company. Even if there had been such a requirement, the funds were provided to RAM with the intention that the subsequent investments be held on a bare trust. Legal title to the funds passed to RAM therefore,[184] although beneficial ownership remained with Mr McIntosh. While any funds recovered from him would not be available for unsecured creditors (or indeed secured creditors had there been any), they would be available to the other investors. This distinguishes the current proceedings from a line of tax cases referred to by Mr McIntosh in his further submissions.[185]

[242] Despite the fact it was decided under prior legislation and the different factual background, I am satisfied that the reasoning in *Anzani Investments Ltd v Official Assignee* applies and that any question of the rights to any property clawed back would be addressed during the liquidation process.[186] I do not accept the submission made by Mr McIntosh that the role of a liquidator is only concerned with company

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182 The recent High Court decision in *Priest v Ross Asset Management Ltd (in liq)* [2016] NZHC 1803, (2016) 4 NZTR ¶26-016 is distinguishable as Mr McIntosh's assets were not held separately, in contrast to what the High Court held to be the case for the shares in *Priest.*

183 I am in general agreement with the majority's comments on this point: see at [37]–[38] and [59]–[60]. I do note the recent case of *Akers v Samba Financial Group* [2017] UKSC 6, [2017] 2 WLR 713. Given the differences between the United Kingdom legislation and our legislation, I am satisfied that the reasoning in that case does not apply to the current proceedings. I also agree with William Young J (above at [208]) that the issues in this case must be addressed in terms of policy.

184 The definition of property in s 4 of the Property Law Act "includes any estate or interest in property" and therefore the legal interest would come within this definition.

185 *CIR v Smith* [2000] 2 NZLR 147 (CA); and *Jennings Roadfreight Ltd v CIR* [2014] NZSC 160, [2015] 1 NZLR 573.

186 *Anzani Investments Ltd v Official Assignee* [2008] NZCA 144.

property or money. As the liquidators point out, there are cases where liquidators have been charged with the distribution of assets held by a company on trust.[187]

Value

[243] Mr McIntosh argues that he gave real and substantial value for the $454,047 fictitious profits, meaning that s 296(3)(c) of the Companies Act (which requires that he "gave value for the property") and s 349(1)(a) of the Property Law Act (which requires that he "acquired the property for valuable consideration") are satisfied. He submits that RAM had the use of the $500,000 for over four years and the opportunity to earn management fees. In any event, he submits that the $500,000 in itself provided real and substantial value for the fictitious profits.[188] Further, the payment made to him discharged the contract and all the claims he may have had against RAM in equity and this discharge provided real and substantial value. He also submits that reasonably equivalent value is not required by the legislation.

[244] I do not accept these submissions.[189] Under his contract with RAM, the $500,000 should have been invested on Mr McIntosh's behalf. He would have been entitled to all the returns on that investment but in fact no investment was made. The $500,000 therefore did not generate any returns for Mr McIntosh and it cannot have provided value for the fictitious returns made.[190] The fact that there was a contractual right to earn management fees or the potential for RAM to use the funds to generate income does not mean value was given either, because the reality was that neither occurred.[191] RAM received no return on the $500,000, either at the time of the initial 'investment' or over the subsequent four and a half years, as it was used to perpetuate the fraud.[192] No management fees were ever paid.

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[187] See, for example: *Re International Investment Unit Trust* [2005] 1 NZLR 270 (HC); *Re Waipawa Finance Company (in liq)* HC Napier CIV-2010-441-465, 7 February 2011; and *Finnigan v Yuan Fu Capital Markets Ltd* [2013] NZHC 2899.

[188] I consider whether the $500,000 could itself constitute value below at [269]–[270].

[189] On these points I am generally in agreement with what is said at [116]–[135] of the majority's judgment.

[190] This is not importing a requirement of equivalence of value as Mr McIntosh suggests. It is merely saying that the profits did not exist.

[191] I agree with the majority that it is "simply unreal to suggest that the contractual entitlement to management fees on the part of RAM created any value, given the events that transpired": at [116] of their judgment.

[192] For more, see below at [269] onwards.

[245] As to the argument that value was provided to RAM through discharge of the contract and any claims against RAM, Mr McIntosh was only ever entitled to the returns actually made on his investment. The returns in this case were fictitious. There was thus no contractual or other right to any of the profits because they did not exist. Any claim on the contract would be for returns, conceivably even negative, that would have been made had the funds been invested as agreed. Such a claim (which was not even known about at the time) cannot have been discharged by the payment of the fictitious profits.[193] In any event, in *Allied*, the majority's reasoning was dependent on the antecedent transaction and not the discharge of the debts.[194] A claim against an insolvent company would have little or no value.[195]

[246] I do not accept the submission of Mr McIntosh that the decision of the Privy Council in *Fairfield Sentry Ltd v Migani* is relevant to his argument.[196] That case concerned a fund that acted as a feeder fund to the infamous Ponzi scheme of Bernard Madoff. Investors were entitled to redeem their shares based on a calculation of their value which was assessed by reference to the fictional assets of the Madoff fund. The liquidators argued that the redemption was based on a mistaken belief of the value of the assets and should be returned to the fund for distribution to all investors.

[247] The focus of argument in that case was unjust enrichment and it was accepted that unjust enrichment did not apply if there was a contractual entitlement to the payment, as was found to be the case. In Mr McIntosh's case, the investment was direct rather than indirect and there was therefore no similar contractual entitlement.[197]

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193 I accept there could have been other claims arising out of the fraud, as outlined above at [240] but Mr McIntosh would not have known about these claims either at the time of payment. Mr McIntosh submits that it was not necessary for him to know of the claims to give a discharge. It is not necessary, given the view I take, to address this submission.

194 *Allied*, above n 181, at [68] and [105] (Arnold, McGrath and Glazebrook JJ). The minority (Elias CJ and William Young J, writing separately), while agreeing with the result, favoured the "discharge hypothesis": at [167]–[168] and [172] per Elias CJ, and [183]–[184] per William Young J.

195 As William Young J accepted in *Allied* at [183] with regard to the discharge of a debt.

196 *Fairfield Sentry Ltd (in liq) v Migani* [2014] UKPC 9, [2014] 1 CLC 611.

197 I do not need to decide whether the reasoning in *Fairfield Sentry* would apply in New Zealand in a "gave value" case involving indirect investments in a Ponzi scheme.

Change of position[198]

[248] Under s 349(2) of the Property Law Act, if a person acts in good faith,[199] a court may decline to make a claw back order or may reduce the amount if a person's circumstances have so changed since the receipt of the property that it would be unjust to make the order.

[249] Under s 296(3) of the Companies Act a court cannot make a claw back order "whether under this Act, any other enactment, or in law or in equity", if the person acted in good faith, did not have reasonable grounds for suspecting that the company would become insolvent and altered his or her position in the reasonably held belief that the transfer of the property was valid and would not be set aside.

[250] It is not disputed by the liquidators that Mr McIntosh acted in good faith and that he did not suspect that RAM was insolvent and that his lack of suspicion was reasonable. The issue therefore is whether there has been a relevant change in position.

[251] Mr McIntosh bases his change of position defence[200] on the acquisition and development of a property next door to his house (the neighbouring property). The purpose of the acquisition was to control the development of that property and so limit the detriment to his own house property. The intention was to develop the neighbouring property for rental purposes. It is accepted by Mr McIntosh that the decision to develop the property was "marginal" but he was "prepared to take the risk so that he could control what happened on the property".

[252] As set out above, Mr McIntosh approached RAM regarding the withdrawal of his funds in July 2011.[201] The neighbouring property had first come up for sale in

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198 I am in essential agreement with the more detailed discussion of the majority on the change of position defence: see above at [137]–[198] of their judgment.

199 And without knowledge of the fact that it had been the subject of a disposition to which subpart 6 applies.

200 I assume (without deciding) that the Companies Act and Property Law Act provisions regulating the respective change of position defences still apply given the proceedings are governed by the claw back provisions, even though the property is trust property.

201 See above at [230].

May 2011.[202] Mr McIntosh made a series of unsuccessful offers between May and August 2011 before his offer dated 12 August was accepted. In his email to Mr Ross in July 2011, Mr McIntosh said that he needed the RAM funds to "pay for a new dwelling in Queenstown". The payments made by RAM to Mr McIntosh were in fact used to repay a loan he took out to make the investment in RAM and the remainder was used to reduce the debt on the Queenstown property.[203]

[253] Mr McIntosh began investigating development options for the neighbouring property from early 2011. He incurred substantial costs[204] (some $160,000 not including interest costs) in that regard. He had also changed the boundaries of his house property in December 2012[205] to increase the size of the neighbouring property to facilitate its development. Around the time RAM's insolvency became public, Mr McIntosh signed a contract for the demolition of the derelict house on the neighbouring property. He entered into a building contract for the construction of the development in July 2013.

[254] Mr McIntosh submits that it was unreasonable to suggest he should have ceased the development when RAM's insolvency became public. First, he says that accurate information in relation to the asset position of RAM was not known at that stage. Second, he had already incurred substantial development costs. Third, suspension of the project until the asset position was clear would still have meant incurring major irrecoverable costs, including holding costs. He thus realistically had no choice but to continue with the project. He says that he would not, however, have proceeded had he known that he was at risk of having to return the funds received from RAM.

[255] I do not accept Mr McIntosh's submission on change of position. The decision to purchase the neighbouring property and settlement of the purchase

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[202] Mr McIntosh's interest in the neighbouring property was not new. He became aware the owner of the house was in financial difficulties in 2010 and in February 2011, after consulting with an architectural designer about development options, approached a law firm about making an anonymous offer. For various reasons this did not progress.

[203] Mr McIntosh said he told Mr Ross that the money was going towards the Queenstown property because part of it was, and also because he wanted to keep the potential purchase of the neighbouring property confidential.

[204] In particular from October 2011 onwards.

[205] This was the date that the new titles for the two properties were issued. The application was made in July 2012 and the resource consent granted on 9 August 2012.

(which took place in September 2011)[206] occurred before Mr Macintosh's RAM portfolio was supposedly sold and the funds returned to him in November 2011. Indeed, Mr McIntosh had been trying to purchase the property well before he approached RAM for the return of his funds in July 2011.[207] The purchase itself therefore cannot found a change in position defence. Mr McIntosh may well have been more comfortable undertaking the purchase because he thought he had almost $1 m in funds available in the investment managed by RAM which he could use to retire debt but this does not suffice to found a change of position defence.[208]

[256] In any event, I tend to the view, from the history of the interest in the neighbouring property and the personal reasons for the purchase, that Mr McIntosh would have proceeded even had he known the situation with RAM.[209] There is no evidence that, from the bank's point of the view, the funding it provided for the purchase of the neighbouring property was contingent on the receipt of the RAM funds.[210] That Mr McIntosh would have purchased the neighbouring property in any

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206 The sale and purchase was taken over by Anne Elliot Ltd (AEL) pursuant to a deed of nomination in August 2011. This company was incorporated by Mr McIntosh for tax loss attribution purposes. I do not accept the submission of the liquidators that, because the development was undertaken by AEL not Mr McIntosh, any change of position in relation to the purchase of the neighbouring property is not attributable to him. Mr McIntosh is so closely associated with AEL (he is the sole director and shareholder) that it is appropriate to look through it.

207 Even if a change of position defence could apply where the detriment is suffered before receipt, there would have to be a clear causal link between the detriment and the anticipated receipt (lacking in this case). Such anticipatory detriment has been held to found a change of position defence at common law in the United Kingdom: see *Dextra Bank & Trust Co Ltd v Bank of Jamaica* [2001] UKPC 50, [2002] 2 LRC 212 at [38]; and *Commerzbank AG v Price-Jones* [2003] EWCA Civ 1663 at [38]. See also Charles Mitchell, Paul Mitchell and Stephen Watterson (eds) *Goff & Jones The Law of Unjust Enrichment* (9th ed, Sweet & Maxwell, London, 2016) at [27–36]; and Graham Virgo *Principles of the Law of Restitution* (3rd ed, Oxford University Press, Oxford, 2015) at 689–690.

208 The liquidators also submit that there was no conscious alteration of position evident, which in their view was required by the Court of Appeal in *Madsen-Ries v Rapid Construction Ltd* [2013] NZCA 489, [2015] NZAR 1385 at [25]–[26]. Because I do not consider the change in position defence is made out, it is not necessary to consider this submission.

209 Mr McIntosh takes issue in his submissions with the fact that he was not cross-examined on his affidavit evidence, which said in part that, had he known the payment could have been clawed back, "without doubt" he would not have commenced the project. I agree with MacKenzie J that "Without in any way doubting [Mr McIntosh's] credibility, some caution is required in making factual findings based on [his] evidence, after the event, of what he might have done if he had suspected that the payment might be clawed back. The focus, in considering whether [Mr McIntosh] altered his position, must be on the evidence of what was done at the time": HC decision, above n 165, at [116].

210 Correspondence between Mr McIntosh and the bank is set out in the HC decision, above n 165, at [102]–[111]. MacKenzie J came to the same conclusion: at [122]–[123].

event accords with the view of MacKenzie J,[211] the Court of Appeal[212] and the majority in this Court.[213]

[257] As to the development costs, I do not accept Mr McIntosh's submissions. The neighbouring property was purchased for personal reasons. It was not possible to achieve Mr McIntosh's aim of protecting the value of his house property without developing the neighbouring property, even though the development was "marginal". Because of this, once the neighbouring property had been purchased, it would have made no sense to on sell it without at least investigating the costs of development. The funds expended on assessing the feasibility of a development cannot therefore found a change in position defence. These costs were an "implementation of a position [Mr McIntosh] had already adopted"[214] and so were not incurred in reliance on the RAM payments.[215]

[258] Mr McIntosh also relies on the boundary change for his change of position defence. I do not accept that this can found a change of position defence. The boundary change was also a continuation of the pre-existing development decision. Further, as pointed out by the liquidators, it could always have been reversed, although this would have incurred some cost. In any event it would presumably have increased the value of the neighbouring property.

[259] Once the insolvency of RAM became public, there was clearly a risk that the funds might have to be returned and it was not reasonable to rely on those funds in the decision to continue the development by demolition or to enter into the development contract.

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211 HC decision, above n 165, at [120] and [124].

212 CA decision, above n 167, at [74] and [78].

213 Above at [171]–[182].

214 HC decision, above n 165, at [125].

215 Mr McIntosh submits equivalence between the change of position of a party and the payment made to them is irrelevant to a change of position defence. The liquidators argue that an assessment of the equities is inherent in determining whether there has been a change of position and detrimental reliance under the Property Law Act. The liquidators accept that this may possibly not be so under the Companies Act given the intention of the reform to make the Act more certain and objective. I leave this question open as the development costs cannot in any event found a change of position defence.

Conclusion on appeal

[260] For the above reasons, I agree with the majority that Mr McIntosh's appeal should be dismissed.

The cross-appeal

The submissions

[261] The liquidators submit that Mr McIntosh provided no value to RAM, either at the time of the original investment or when it was misappropriated. This is because the amount was to be held on trust. The liquidators maintain that, even though the misappropriation changed the underlying legal relationship to the extent that it created claims against RAM, the funds were still held on trust. Alternatively they submit that, because of the Ponzi scheme, the amount paid delivered no value at all. The liquidators also submit that no value was provided with regard to the management fees as they were never paid to RAM.

[262] Mr McIntosh submits that this case is governed by this Court's decision in *Allied*.[216] More generally, Mr McIntosh submits that the fact that RAM was operating a Ponzi scheme is irrelevant, as is the trust relationship.[217] Further, he submits that "gave value" in s 296(3) is assessed from the point of view of the creditor and not the debtor.[218] He also submits that the payments made to him in 2011 discharged the obligation created by his provision of the funds to RAM in 2007.

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216 *Allied*, above n 181.

217 Mr McIntosh also submits that the trust relationship is incidental as it was a bare trust and further that it would be artificial to look at the trust in isolation from the obligations for which it was brought into being, relying on *AIB Group (UK) plc v Mark Redler & Co Solicitors* [2014] UKSC 58, [2015] AC 1503. I agree with the majority that in that case, the trust arrangement was incidental, by contrast with the current case where the transaction was defined by the trust relationship between Mr McIntosh and RAM: see above at [93].

218 For completeness I note that Mr McIntosh also submits that s 296(3) provides a defence to both the Companies Act and the Property Law Act claims as s 296(3) prohibits the "recovery of any property of a company by a liquidator under any enactment". The liquidators disagree and submit that it cannot have been Parliament's intention that the Companies Act defence would apply to a Property Law Act claim. For more, see the majority judgment above at [71]–[73]. I agree with the majority that, given the conclusion reached, it is not necessary to resolve the point.

[263] I will first address whether *Allied* applies and then engage with Mr McIntosh's other submissions.

Does Allied apply?

[264] *Allied* was a consolidated hearing of appeals from a number of decisions, all of which involved the supply of goods or services.[219] I accept Mr McIntosh's submission that the reasoning in *Allied* is not, however, confined to goods and services and that it could potentially apply to an investment contract, depending on the form this took.

[265] The issue in *Allied* was whether the word "value" in s 296(3)(c) means new value given at or after the time of payment or whether it also encompasses value given when the antecedent debt was created.[220] The majority judgment held that the value given must be "real and substantial" but can include value given when the debt was initially incurred.[221] This interpretation was seen as consistent with that given to similar provision in Australia.[222]

[266] I do not accept Mr McIntosh's submission that this case is covered by *Allied.* There are five reasons for this conclusion, which I will deal with in turn:

(a) Mr McIntosh did not intend to provide value to RAM;

(b) the transaction delivered no value to RAM because of the trust relationship;

(c) the transaction delivered no value to RAM because the funds were used to perpetrate and prolong a fraud;

(d) the funds were to be invested and there was no capital guarantee; and

(e) policy reasons.

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219 *Farrell v Fences & Kerbs Ltd* [2013] NZCA 91, [2013] 3 NZLR 82; *Farrell v Fences & Kerbs Ltd* [2013] NZCA 329; and *Meltzer v Allied Concrete Ltd* [2013] NZHC 977.
220 *Allied*, above n 181, at [3].
221 At [105]–[106].
222 Being s 588FG(2) of the Corporations Act 2001 (Cth). See *Allied*, above n 181, at [76]–[77].

No intention to provide value

[267] Mr McIntosh did not intend to provide $500,000 for RAM to use. He intended that it be used to purchase securities to be held by Dagger for his benefit on a bare trust. By contrast, in *Allied*, the intention of the creditors had been to provide goods and services to the debtor companies for their direct use or benefit.[223]

The trust relationship

[268] The trust relationship meant that RAM was not entitled to use the investor funds for its own purposes. That it did so was a clear breach of trust. It had no right to the funds and the remaining investor funds still remain subject to trust obligations.[224] Those funds, including Mr McIntosh's $500,000, were thus never in fact available to RAM for its use because, despite the misappropriation, the trust relationship continued. The nature of this relationship and the consequence of the obligations in terms of ownership and permissible use of the funds must again be contrasted with the goods and services at issue in *Allied.*

The fraud

[269] In *Allied*, value was given to the respective debtor companies by the provision of goods and services for their use or benefit. Those goods and services provided value to the debtor companies, either through their use in the trading activities of the companies or in otherwise enhancing or contributing to the asset base of the debtor companies. The debtor companies, rightly or wrongly, considered that the value received was equivalent to the debt incurred (and, assuming an arm's length transaction, this will normally be accepted to be the case, even if the company in fact made a bad bargain).[225]

[270] In this case, the only "value" to RAM arising from the provision of Mr McIntosh's initial investment and its misappropriation was in perpetrating and

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[223] This would apply even to goods sold with a reservation of title by the creditor. Such goods would still be intended to be used by the debtor company pending payment.

[224] See above at [240]–[242].

[225] Mr McIntosh submits that equivalence of value is not required. It is not necessary to comment on this, other than to say that the majority in *Allied* said that "real and substantial value" was necessary, although the issue did not arise in that case. In any event, negative value does not suffice.

prolonging the fraud.[226] As Miller J said, the introduction of new money in Ponzi schemes "creates no value but merely delays and worsens the inevitable ruin".[227] Any value to RAM was in fact negative.[228] As the liquidators submit, value must be real, not illusory.

No capital guarantee

[271] Assuming the arrangement had been carried out as agreed, Mr McIntosh would not necessarily have received his $500,000 back. There was no capital guarantee provided by RAM. Returns were based on the market and losses were possible, particularly in the context of the global financial crisis.

[272] This is another significant difference from *Allied.* In those cases, had the debtor companies not been insolvent, then the full amount of the debt (the price for the goods or services) would have been payable in terms of the contract.[229]

Policy reasons

[273] In *Allied* the majority noted that the voidable transactions provisions in the Companies Act must be considered against the background of two potentially conflicting policies:[230]

(a) the pari passu principle, which requires equal treatment of creditors in like positions; and

(b) fairness to individual creditors and the risk to commercial confidence where "what appear to be normal, everyday commercial transactions are re-opened long after the event," particularly given the two year

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[226] I do not accept the submission of Mr McIntosh that the fact the transfer occurred by way of a valid cheque was enough for it to constitute value.

[227] CA decision, above n 167, at [107].

[228] As was said in *Merrill v Abbott (In re Independent Clearing House Co)* 77 BR 843 (D Utah 1987) at 858: "If the use of the [investors'] money was of value to the debtors, it was only because it allowed them to defraud more people of more money. Judged from any but the subjective viewpoint of the perpetrators of the scheme, the "value" of using others' money for such a purpose is negative."

[229] This difference, as is made clear above at [271], assumes no misappropriation – compare the majority decision above at [114].

[230] *Allied*, above n 181, at [1].

period in advance of liquidation where transactions are at risk in New Zealand.[231]

[274] The majority in *Allied* recognised that a choice has to be made between the two approaches: either primacy is accorded to the interests of the creditors as a whole or primacy is accorded to individual creditors.[232] The majority held, based on the statutory language and legislative history, that the legislature had chosen the second approach.[233]

[275] The operation of a Ponzi scheme cannot, however, in any way be described as an ordinary commercial transaction.[234] The only purpose of the scheme is to defraud investors. I accept that Mr McIntosh was an innocent investor who had no knowledge of the fraud. However, this was the same for all the investors. In policy terms an accident of timing as to when funds are withdrawn should not favour one defrauded investor over another. This is particularly the case as the very essence of a Ponzi scheme is that investment by new investors is used to pay out those investors who wish to withdraw their funds. As the liquidators submit, the very purpose of the payments made to Mr McIntosh was to defraud other investors.

[276] As a further policy point, knowledge that the consequences of a fraud, at least on the scale of a Ponzi scheme, will rest on investors equally may encourage more diligence on the part of investors. In this case it may have meant investors would have had an incentive to make further inquiry into returns that were, as it turned out, too good to be true. This may have meant that the fraud was discovered earlier and the resultant liability of RAM (and harm to investors) mitigated.

Other submissions

[277] It will be obvious from what I say above that I do not accept that the trust relationship or the fact RAM and Mr Ross were operating a Ponzi scheme are irrelevant. Nor do I accept Mr McIntosh's submission that s 296(3) is only

[231] Section 292(5) of the Companies Act.
[232] *Allied*, above n 181, at [55].
[233] At [105]–[106].
[234] I accept that more limited frauds (for example theft of trading stock by a rogue employee) could still be seen as part of ordinary commercial transactions.

concerned with the value given by the creditor, rather than what was received by the debtor. That value is received by a debtor is inherent in the concept of "gave value". This means that, where value is not in fact provided to the company, value has not been given at all.

[278] In this case, as noted above,[235] value was not provided to RAM for two reasons. First, because of the existing trust relationship only legal title in the funds passed to RAM and therefore RAM had no right to (or value in) the investment. This continued even when the funds were misappropriated. Secondly, the funds were used for the sole purpose of perpetrating and perpetuating a fraud which cannot be said to have been of real or substantial value to RAM or Dagger.

[279] This does not mean, as Mr McIntosh submits, that courts will be required to inquire into value delivered in every case. As noted above, value will normally be assumed to be present in ordinary business transactions between arm's length parties even if objectively they could be termed bad bargains.

[280] Nor does it mean, as he also submits, that every insolvent transaction is at risk because every insolvent company pays out money that it does not have and every payment into an insolvent company can therefore be seen as perpetuating the insolvency in that it prolongs the period during which the company can continue to trade. Insolvent companies, even those which are hopelessly insolvent, enter into transactions to continue trading. By contrast, in a Ponzi scheme the only purpose of soliciting and receiving funds is to perpetrate the fraud. Outside of such schemes,[236] this approach does not, contrary to Mr McIntosh's submission, result in "diametrically different outcomes between insolvencies depending solely on how the debtor had behaved".

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[235] Above at [268]–[270].

[236] I accept that there may be boundary issues between mere insolvent companies and those operating a Ponzi scheme but such issues do not arise in this case. Mr Ross and RAM were clearly operating a Ponzi scheme.

[281] Finally, to the extent that Mr McIntosh relies on the discharge of RAM's obligations to him constituting value given, this submission is rejected for similar reasons to those set above in relation to the appeal.[237]

Conclusion on cross-appeal

[282] For the above reasons, I do not consider that Mr McIntosh gave value of $500,000, either at the time of the original investment or at the time it was misappropriated.[238]

Conclusion

[283] I agree with the judgment of the majority that the requirements of s 348 of the Property Law Act and s 292 of the Companies Act are met. I am also in agreement that the change of position defences do not apply. However, in my view, the entirety of the $954,047 ought to be repaid by Mr McIntosh as no value was given. I would thus have allowed the cross-appeal and dismissed the appeal.[239]

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[237] See above at [245]–[247].

[238] I do not need to decide whether each of the reasons to distinguish *Allied* on its own would have led me to that conclusion because in combination they certainly do so. I also note that I do not disagree with Miller J's discussion of the US cases (see CA decision, above n 167, at [110]–[111]) but, given the different legislative and factual situations these cases were addressing, I do not find it necessary to rely on them.

[239] I agree with the point made in Mr McIntosh's additional submissions that it is too late for the liquidators to rely on *Re Diplock (Diplock v Wintle)* [1948] Ch 465 (CA) (affirmed by the House of Lords in *Ministry of Health v Simpson* [1951] AC 251) in the current proceedings. However the likely result of my approach in this case (pari passu sharing after the return of all the RAM payments) is consistent with the result in that case. Pari passu sharing between defrauded investors is also consistent with *Barlow Clowes International Ltd (in liq) v Vaughan* [1992] 4 All ER 22 (CA) and *Re International Investment Unit Trust,* above n 187, although these cases did not involve any claw back payments.