

Supreme Court confirms that a payment does not need to diminish the assets available to unsecured creditors to be an insolvent transaction

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Please read our previous article on the Court of Appeal's decision for the background to this dispute.

Diminution not a requirement for voidable transactions

RJH argued that, in addition to the requirements in §292 of the Companies Act, for a payment to be voidable it must also have the effect of diminishing the pool of assets available to the unsecured creditors of the company in liquidation. For their part, the liquidators contended that §292 only requires the recipient of the payment to receive more than it would have in the liquidation.

The Supreme Court agreed with the liquidators, confirming that §292 does not require an element of diminution for the following reasons:

- §292 focuses on the effect of the payment, rather than the intention with which the payment was made (which was the emphasis of the previous Companies Act and Privy Council authority);
- there is nothing in the text of §292 to indicate that the definition of 'insolvent transaction' is other than a complete definition of that phrase and there is simply no room for a further common law requirement;
- an additional common law diminution requirement would introduce complexity into the clawback regime;
- protection of the company's asset pool is now only one objective of the insolvent transactions regime — and not the most important one; and
- overseas case law did not provide compelling support for RJH's position.

Potential consequences of a diminution element

The Court considered three arguments made by the liquidators about the potentially significant effect of adopting an element of diminution.

The liquidators first argued that the simplicity of the insolvent transactions regime would be compromised by introducing the common law element. Secondly, they expressed concern that the diminution element would create problems in respect of an overdrawn account. Thirdly, they discussed the artificiality of the diminution requirement. The Court accepted the liquidators' submissions.

Comment

The Supreme Court's decision is sensible and avoids adding an unwelcome element of complexity to the insolvent transactions regime. We expect that the decision will be well-received by liquidators.

To read a copy of the judgment, please [click here](#). If you would like to know more about the Supreme Court's decision, please contact us.

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