IN THE COURT OF APPEAL OF NEW ZEALAND

CA842/2013
[2015] NZCA 111

BETWEEN	TIMBERWORLD LIMITED Appellant
AND	HENRY DAVID LEVIN AND VIVIENNE JUDITH MADSEN-RIES as liquidators of Northside Construction Limited (In Liquidation) Respondents

CA226/2014

AND BETWEEN	HENRY DAVID LEVIN AND VIVIENNE JUDITH MADSEN-RIES as liquidators of Tarsealing 2000 Limited (In Liquidation) Appellants
AND	Z ENERGY LIMITED Respondent

Hearing:	28 August 2014
Court:	O'Regan P, Stevens and Miller JJ
Counsel:	D W Grove for Appellant in CA842/2013 C A Murphy and J G Cole for Respondents in CA842/2013 and for Appellants in CA226/2014 R J Gordon for Respondent in CA226/2014
Judgment:	24 April 2015 at 4.00 pm

JUDGMENT OF THE COURT

CA842/2013:

A The appeal is dismissed.

B The cross-appeal is dismissed.

C There is no order as to costs.

CA226/2014:

A The appeal is dismissed.

B The appellant must pay the respondent costs on a standard appeal on a band A basis plus usual disbursements.

REASONS OF THE COURT

(Given by Stevens J)

Table of Contents

Introduction

[1] These two appeals were heard together because each raises an important issue concerning the operation of s 292 of the Companies Act 1993 (the Act). The liquidators (Henry Levin and Vivienne Madsen-Ries) (together, the liquidators) contend that the High Court erred in each case by holding they were not entitled to adopt the "peak indebtedness" rule when calculating the start point for determining whether the creditors (respectively Timberworld Ltd and Z Energy Ltd) had obtained a preference. This rule would enable the liquidators to choose the point during the two-year specified period when the relevant indebtedness was at its highest, as opposed to an earlier date taking into account transactions predating peak indebtedness.

[2] The liquidators sought to apply this peak indebtedness rule to running accounts with the debtor companies in each case (respectively Northside Construction Ltd (Northside) in the Timberworld appeal and Tarsealing 2000 Ltd (Tarsealing) in the Z Energy Ltd appeal – both in liquidation). The specific issue in each case concerns the permissible starting point when assessing the existence and effect of a "single transaction" under s 292(4B)(c) of the Act.

[3] In *Levin v Z Energy Ltd* (CA226/2014) the liquidators appeal against the judgment of Associate Judge Doogue dismissing a claim for $293,555.86 plus costs and interest, said to comprise a voidable transaction under s 292 of the Act.[1] The parties agree that if the appeal is dismissed, the claim is at an end.

[4] In *Levin v Timberworld Ltd* (CA842/2013) the liquidators' claim arises by way of a cross-appeal seeking to reverse a finding by Associate Judge Abbott in which he dismissed a claim for $47,963.95, on the basis that there was a voidable transaction, by applying the peak indebtedness rule.[2] Instead the Associate Judge found Timberworld received the sum of only $29,490.46 as a preference over other creditors, calculated by a straightforward application of the continuing business relationship provision, established in s 292(4B). In addition the sum of $44,250 was obtained after the end of the running account, independently constituting a voidable

---

1 *Levin v Z Energy Ltd* [2014] NZHC 688 [Z Energy Ltd High Court judgment].
2 *Levin v Timberworld Ltd* [2013] NZHC 3180 [Timberworld Ltd High Court judgment].

preference. For its part Timberworld appeals separately, contending the Associate Judge erred in three respects in awarding these sums to the liquidators.

[5] These appeals are significant for both liquidators and creditors generally. Where there is a continuing business relationship between the parties (such as with a running account) the provisions of s 292(4B) may protect a creditor at the suit of a liquidator seeking to prove the existence of an insolvent transaction. Section 292(4B)(c) allows for consideration of all the transactions forming part of the relationship "as if they together constituted a single transaction". Thus it is necessary to identify a start point from which all transactions (both supplies of goods and services, and corresponding payments) are to be combined and considered as a single transaction. Naturally liquidators will wish to use the point where the indebtedness of the company is at its highest. On that basis, any later transactions under which the creditor provides further value to the company will be exceeded in value by other transactions reducing the company's indebtedness. Liquidators could then point to the net reduction in indebtedness as amounting to a preference. Suppliers, however, will seek to use an earlier date so that any increase in indebtedness is offset by earlier transactions through which the creditor supplier gave value to the debtor company.

[6] It is convenient to address first the liquidators' appeal as to peak indebtedness in *Z Energy Ltd* and their cross-appeal in *Timberworld Ltd*. We will then deal with the three separate issues raised by the Timberworld case. We summarise first the factual background in each case.

Factual background

Z Energy

[7] The debtor company Tarsealing was incorporated in 1999. It carried on business undertaking contract asphalting work, primarily for Transit New Zealand (now NZTA) and local authorities. It was placed in liquidation on 4 May 2012. The specified period under s 292(5) of the Act ran from 21 November 2009 to 4 May 2012 when Tarsealing was liquidated by the Commissioner of Inland Revenue as substituted creditor.

[8] In October 2009 Tarsealing applied for a trade credit account with Z Energy for the purchase of bitumen for use in carrying out its asphalting works. The credit account opened in December 2009 and Tarsealing began operating it in February 2010. The entire course of trading with Z Energy occurred over the 17 month period from 28 February 2010 to 21 July 2011. There is no dispute between the parties that a running account applied during this time.

[9] According to a schedule of transactions prepared by the liquidators, the balance of the running account at the start of the specified period was $0, given that trading only began on 28 February 2010. The balance of indebtedness peaked on 30 April 2010 at $293,555.86. The running account returned to $0 in October 2010 when Tarsealing ceased trading with Z Energy for reasons unknown to the latter. No further credit was advanced after that time.

[10] The liquidators sought to challenge the $293,555.86 received by Z Energy on the basis that, using the peak indebtedness rule to select the commencement date at which to calculate the "single transaction", it is a voidable transaction.

Timberworld

[11] The debtor company is Northside. It carried on business as a construction company. Timberworld had provided it with building supplies through a credit account commencing in January 2006. The specified period under s 292(5) ran from 24 May 2009 until 15 July 2011 when Northside was put into liquidation.

[12] There is no dispute the commercial relationship operated as a running account from the time when the credit account was opened in January 2006 through to 15 April 2010 when trading effectively ceased. The running account within the specified period applied between 24 May 2009 and 15 April 2010. Within this period the running account peaked at $95,569.55 on 2 October 2009. When supply under the running account ended on 15 April 2010 the balance was $47,605.60, constituting an improved position for the creditor of $47,963.95. This was the amount the liquidators sought to challenge as a voidable preference received by Timberworld using the peak indebtedness rule. If the commencement of the

specified period were used as the starting point, the quantum of the preference claim up to the end of the running account amounted to $29,490.46.

[13] As noted, the liquidators were successful in recovering the lesser amount of $29,490.46. In addition the liquidators successfully claimed $44,250, being a further sum paid after the running account ceased, also constituting a voidable transaction.

The High Court judgments

[14] We summarise first the parts of the judgments under appeal dealing with the application of s 292 of the Act and the liquidators' reliance on the peak indebtedness rule.

[15] Associate Judge Abbott in *Timberworld* correctly emphasised that the preferential effect of a challenged transaction is to be judged objectively.[3] Such an assessment is to be "effects-based", so the intent of the company and the creditor is irrelevant.[4] The liquidator must show that the creditor received a greater payment than it would in liquidation. This necessitates a comparison between what the creditor actually received and what it would have received in the liquidation as a member of the general body of creditors.

[16] The liquidators argued the preference Timberworld received was the improvement of its position from the point of peak indebtedness within the specified period. Their argument relied, as before us, on Australian authority analysing the comparable provision to s 292. The Associate Judge referred to an earlier decision of his in *Shephard v Steel Building Products (Central) Ltd* in which he drew on the decision of the High Court of Australia in *Airservices Australia v Ferrier* to support a conclusion that s 292 did not permit the use of the peak indebtedness rule.[5] The Associate Judge saw no reason to depart from his reasoning and decision in *Shephard*, stating:[6]

---

3 Timberworld High Court judgment, above n 2, at [40].
4 P Heath & M Whale (eds) *Heath & Whale on Insolvency* (looseleaf ed, LexisNexis) at [24.50].
5 *Shephard v Steel Building Products (Central) Ltd* [2013] NZHC 189; *Airservices Australia v Ferrier* (1996) 185 CLR 483.
6 Timberworld High Court judgment, above n 2, (footnotes omitted).

> [52] … In the absence of any language suggesting that Parliament intended to allow more than one way of determining the single transaction giving rise to the preference, it must be assumed that a single method was intended. There is nothing in the wording of s 292 to support the availability of more than one method of determining the single transaction, and there is no good reason, in my view, to read that into the statute. Moreover, although the majority of the High Court of Australia in *Airservices Australia v Ferrier* did not explicitly reject the peak indebtedness rule, there was no question that it did not apply it:
>
> > Throughout the six-month period, Airservices provided Compass with services whose value far exceeded the value of the payments that Compass made during that period. At the end of the six-month period, Airservices was more than $8 million worse off than it had been at the commencement of the period.
>
> [53] Legal commentators have pointed out a number of arbitrary features to the single transaction concept. However, ultimately that is a matter for the legislature. As I construe s 292, the single transaction is determined by reference to all transactions in the continuing business relationship, within the specified period.

[17] On that basis Associate Judge Abbott found the preference Timberworld received from the single transaction created by the running account within the specified period was $29,490.46. Had the peak indebtedness rule been applied, the preference from the single transaction would have been $47,963.95.[7]

[18] In *Z Energy* Associate Judge Doogue also referred to the Australian case of *Airservices Australia,* noting the majority suggested the start point of the running account is not a matter to be decided by the liquidator. He also referred to Associate Judge Abbott's judgment in *Shephard* and concluded that for similar reasons he rejected the contentions of the liquidators that they are entitled to nominate the starting point of the continuing business relationship.[8]

[19] Referring to various passages from *Airservices Australia,* Associate Judge Doogue stated:

> [25] I consider that would be inconsistent with the policy identified as underlying the running account type cases to allow enquiry about whether there had been a voidable transaction to focus upon the state of the account at one particular point during the duration of the continuing business relationship and to nominate the indebtedness at that point as significant in

---

7 At [53]–[54].

8 Z Energy Ltd High Court judgment, above n 1, at [17].

> measuring whether or not there had been a voidable transaction. To do so would be to ignore the importance of assessing the overall effect of all of the transactions making up the running account which the parties maintained pursuant to their continuing business relationship.

[20] Associate Judge Doogue was satisfied the business arrangements between the parties amounted to a continuing business relationship in the form of a running account.[9] Further, the continuous business relationship covered the entire course of trading between Tarsealing and Z Energy. Accordingly the case fell to be dealt with under s 292(4B) of the Act.

[21] With respect to the application of s 292, the liquidators could only claim a preference if, upon applying the section, the net or overall effect of the continuing business relationship was to result in Z Energy being able to receive more towards a satisfaction of a debt owed by Tarsealing than it would receive or be likely to receive in liquidation. But the Associate Judge concluded the transactions in the sequence making up the running account were of neutral effect. There was therefore no possibility of Z Energy receiving more than it was entitled to in the liquidation and so no preference was conferred.[10]

[22] Given the existence of a running account covering the entire course of trading between the parties, the Associate Judge concluded:

> [35] … The enactment of provisions relating to a running account during the course of a continuing business relationship has the practical effect in a case of this kind that if the result of trading was to return the parties' accounts to a neutral position where neither party owes the other, then there cannot be any voidable transaction. If on the other hand, there had been an antecedent debt that came into existence independently of the dealings that comprise the continuing business relationship and if a payment was made in the course of the relationship which exceeded the liabilities of the company arising from the relationship, then an insolvent transaction would be a possibility. Such a transaction would have occurred if the excess payments made by the company to the creditor were retained by the creditor and applied in reduction of the antecedent debt. That, however, did not occur in this case. At the commencement of the trading relationship, the indebtedness of the company to the respondent was nil. The various transactions making up the running account all set each other off so that even had there been antecedent debt, the running balance would have been neutral in its effect.

---

9 At [32].
10 At [34].

[23] Accordingly, Associate Judge Doogue found there had been no insolvent transaction.

[24] Since the appeals were heard the High Court has again considered the availability of the peak indebtedness rule to liquidators in *Farrell v Max Birt Sawmills Ltd*.[11] Associate Judge Bell was dealing with a somewhat unusual case of supplies going both ways between the parties to a continuing business arrangement. The creditor was to supply logs to the debtor company who processed them and returned sawn timber to the creditor of roughly equal value. But an imbalance developed over time. The debtor company was eventually put into liquidation and the issue to be determined was whether the liquidators could recover from the creditor an amount representing a preference over other creditors.

[25] The amount to be recovered depended on the start point taken and the availability of the peak indebtedness rule. Differing from the approach taken in the present appeals, Associate Judge Bell held that s 292(4B) permitted the liquidators to use the peak indebtedness rule. By way of summary on this point, he said:[12]

> In *Farrell v Fences & Kerbs Ltd*,[13] the Court of Appeal declined to follow the Australian approach to "gave value" in s 296(3)(c) [of the Companies Act 1996] because of crucial differences with the Australian statute. But in the case of a continuing business relationship in which debt levels fluctuate with supplies and payments, where the identical words in the Australian statute have been inserted into s 292, it would be perverse for the meaning of the statute to change according to the side of the Tasman it is applied on. Peak indebtedness does provide a rational basis for establishing a point from which any preferential reductions in debt can be measured. Taking an earlier point entails allowing an earlier transfer of value to be brought into account in working out whether there is a preference: that is inconsistent with the general approach in an effects-based regime for preferential transactions. There is nothing in the text or the purpose of the Act for making a special case for suppliers in a continuing business relationship to require them to be treated more favourably than other creditors. Aside from debt spikes for commercially simultaneous supplies and payments, the peak debt is to be used in measuring the extent of preference under s 292(4B). For these reasons, I regretfully decline to follow other cases which have not applied peak indebtedness.

---

11 *Farrell v Max Birt Sawmills Ltd* [2014] NZHC 3391.
12 At [77].
13 *Farrell v Fences & Kerbs Ltd* [2013] NZCA 91, [2013] 3 NZLR 82.

[26] We will address this reasoning in our analysis on the peak indebtedness rule. We commence our analysis by first setting out the relevant statutory framework at issue, before addressing the case for the liquidators. The discussion will include a reference to the recent Supreme Court judgment dealing with another aspect of the voidable preference provisions of the Act.[14]

Statutory framework

[27] The starting point for analysis must be the statutory framework governing continuous business relationships in New Zealand.

[28] Section 292(1) of the Act provides that a transaction by a company is voidable by a liquidator if it is an insolvent transaction and is entered into within the specified period of two years prior to the commencement of the liquidation.[15] Section 292(2) and (3) respectively define the terms "insolvent transaction" and "transaction" 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.
>
> (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:
>
> (e) paying money (including paying money in accordance with a judgment or an order of a court):

---

[14] *Allied Concrete Ltd v Meltzer* [2015] NZSC 7, (2015) NZBLC 99-717.

[15] For the purposes of subs (1) and (4B), the term "specified period" is defined in s 292(5) of the Companies Act 1993.

> (f) anything done or omitted to be done for the purpose of entering into the transaction or giving effect to it.

Treatment of continuing business relationships

[29] Ordinarily, the operation of s 292(1)–(3) renders every insolvent transaction in principle, recoverable by the liquidator. Individual payments are aggregated to form the amount eventually sought to be returned to the general pool for distribution. However, this straightforward calculation of preferences is altered in the case of a "continuing business relationship". The principles applicable to qualifying relationships of that nature between a company and a creditor are addressed in section 292(4B):

> (4B) Where—
>
> (a) a transaction is, for commercial purposes, an integral part of a continuing business relationship (for example, a running account) between a company and a creditor of the company (including a relationship to which other persons are parties); and
>
> (b) in the course of the relationship, the level of the company's net indebtedness to the creditor is increased and reduced from time to time as the result of a series of transactions forming part of the relationship;
>
> then—
>
> (c) subsection (1) applies in relation to all the transactions forming part of the relationship as if they together constituted a single transaction; and
>
> (d) the transaction referred to in paragraph (a) may only be taken to be an insolvent transaction voidable by the liquidator if the effect of applying subsection (1) in accordance with paragraph (c) is that the single transaction referred to in paragraph (c) is taken to be an insolvent transaction voidable by the liquidator.

[30] Thus a series of transactions will be treated as a single transaction where such transactions are an integral part of a continuous business relationship between the parties (as where the parties have used a running account) and the level of the debtor company's indebtedness fluctuates from time to time as a result of the various individual transactions. With a transaction of this type the liquidator will only be entitled to claim the net difference of payments made and goods and services

received from a creditor, where there is an ongoing business relationship with the debtor company.[16]

[31] Section 292(4B) is based on s 588FA of the Corporations Act 1992 (Cth) which adopted the concept of the "running account" as it has developed in Australian insolvency law.[17] The applicable principles acknowledge that payments made by a company to a creditor in order to maintain a genuine business relationship are not preferences, because a mutual assumption exists between the parties that the business relationship will be for the benefit of both parties.

[32] The key legal consequence of establishing the existence of a continuing business relationship is the application of ss 292(4B)(c) and (d), namely, the series of numerous transactions, occurring as part of the continuing relationship, are treated as constituting one single transaction. To assess whether a preference arises, a comparison is made between the amount owed to the creditor at the point at which the assessment commences and the amount owed at the time of liquidation.[18] A net increase in indebtedness to the creditor, for example, indicates no preference was received, despite the continued exchange of value for goods throughout the running account. A net decrease in indebtedness, however, indicates a permanent reduction in the balance owing to the creditor was achieved, and indicates that to such an extent the creditor has received a preference over others.

[33] The development of this doctrine by Australian courts had occurred over the course of a number of decades. The High Court of Australia has most recently described the principle thus:[19]

---

16 *Allied Concrete Ltd v Meltzer*, above n 14, at [21].

17 For a comprehensive outline of the legislative reforms introduced by the Insolvency Law Reform Bill (14-1), see the discussions of Arnold J and Elias CJ in *Allied Concrete Ltd v Meltzer*, above n 14, at [28]–[53] and [139]–[143] respectively. The Supreme Court cited with approval the description of the running account principle given by David J Purcell in "Banks and the Recovery of Voidable Preferences" (1990) 2(1) Bond LR 107 at 110: at [21].

18 In the present case the creditors say the assessment commences from the beginning of the specified period or the beginning of the continuing relationship, whichever occurs later. The liquidators say they are permitted to commence the assessment from the point of peak indebtedness.

19 *Airservices Australia v Ferrier*, above n 5, at 503 (footnotes omitted). This analysis was adopted by this Court in *Rea v Russell* [2012] NZCA 536 at [57].

> If at the end of a series of dealings, the creditor has supplied goods to a greater value than the payments made to it during that period, the general body of creditors are not disadvantaged by the transaction – they may even be better off. The supplying creditor, therefore, has received no preference. Consequently, a debtor does not prefer a creditor merely because it makes irregular payments under an express or tacit arrangement with a creditor that, while the debtor makes payments, the creditor will continue to supply goods. In such a situation, the court does not regard the individual payments as preferences even though they were unrelated to any specific delivery of goods or services and may ultimately have had the effect of reducing the amount of indebtedness of a debtor at the beginning of the six-month period. If the effect of the payments is to reduce the initial indebtedness, only the amount of the reduction will be regarded as a preferential payment.

[34] The key features of a running account, drawn from the Australian case law, may be summarised as follows:

(a) A payment is part of a running account where there is a business purpose common to both parties which so connects a payment to subsequent debits as to make it impossible, in a business sense, to pause at any payment and treat it as independent of what follows.[20]

(b) The amount owing to a creditor is likely to fluctuate over time, increasing and decreasing depending on the payment made and the goods or services provided.[21]

(c) The effect of a payment depends on whether it is paid (i) simply to discharge a debt then owing to the creditor (including the permanent reduction of the balance of an account that is then owing) or (ii) as part of a wider transaction which, if carried out to its intended conclusion, would include further dealings giving rise to further amounts owing at the time of payment.[22]

(d) A payment is part of a transaction that includes subsequent dealings even though it may reduce the amount of debt owing at the time of the payment, where it can be shown it is inextricably linked to further credits, and has the predominant purpose of inducing the provision of

---

20 *Richardson v The Commercial Banking Corp of Sydney* (1952) 85 CLR 110 at 133; *Queensland Bacon Pty Ltd v Rees* (1966) 115 CLR 266 at 286.

21 *Airservices Australia v Ferrier*, above n 5, at 491 and 504.

22 *Airservices Australia v Ferrier,* above n 5, at 493 per Brennan CJ.

further supply and it is impossible to treat the immediate effect of the payment as the only effect.[23]

(e) The manner or form of keeping account of credits and debits does not determine the effect of the payments. Rather, whether the payments are in fact part of a transaction with an effect distinct from the mere reduction of debt owing to the creditor by the debtor company, drives whether the series of transactions constitute a running account. The courts are concerned with the "business purpose", the "business character" and the "ultimate effect" of the payments, in an objective sense.[24]

The peak indebtedness rule

[35] The peak indebtedness rule emerged from a dictum of Barwick CJ in *Rees v Bank of New South Wales*, where he rejected a submission for the creditor that the assessment of preference in a running account must commence at the date on which the specified period began, spanning the whole period to liquidation of the company.[25] The Chief Justice held instead:[26]

> It was also said in argument for the bank that it was not permissible for the liquidator to choose a date within the period of six months and to make a comparison of the state of the overdrawn account at that date and its state at the date of the commencement of the winding up. It was submitted that the proper comparison was between the debit in the account at the commencement of the statutory period of six months and the debit at the commencement of the liquidation … In my opinion the liquidator can choose any point during the statutory period in his endeavour to show that from that point on there was a preferential payment and I see no reason why he should not choose, as he did here, the point of peak indebtedness of the account during the six months period.

[36] This was the first mention of a peak indebtedness rule in Australia. It allowed the liquidator to pick any period within the statutorily specified period,

---

23 *Richardson v The Commercial Banking Corp of Sydney*, above n 20, at 128–129 and 133; *Queensland Bacon Pty Ltd v Rees,* above n 20, at 283–286; *Rees v Bank of New South Wales* (1964) 111 CLR 210 at 221–222; *Sutherland v Eurolinx Pty Ltd* [2001] NSWSC 230, (2001) 37 ACSR 477 at [140]–[142].

24 *Richardson v The Commercial Banking Corp of Sydney*, above n 20, at 133; *Queensland Bacon Pty Ltd v Rees*, above n 23, at 285–286; *Sutherland v Eurolinx Pty Ltd*, above n 23, at [142].

25 *Rees v Bank of New South Wales*, above n 23, at 220–221.

26 At 221.

typically the point of peak indebtedness of the debtor to the creditor, and to calculate the preference received by the creditor with reference only to the further payments made after that point. This method inevitably enhances the prospects of the liquidator being able to show a preference being received by the creditor — by selecting the point of the highest level of indebtedness in hindsight. The goods or services provided to the debtor thereafter will (almost) never exceed the payments made in return.

Use of peak indebtedness rule in Australia

[37] The peak indebtedness rule was applied in a number of subsequent cases, but nothing further by way of explanation or policy justification was offered in any of these. For example, in *Re Weiss, ex parte White v John Vicars & Co*, Gibbs J stated:[27]

> … when the applicant trustee fails in a challenge to the validity of earlier payments, he is entitled, in the alternative, to choose a later date as the starting point of the examination of the net effect of operations on the account.

[38] In that case, the question was whether the trustee could pick alternative dates to challenge validity, having failed initially. In *CSR Ltd v Starkey*, the creditor challenged the application of peak indebtedness, claiming that the liquidator was required to adopt the commencement of the relation-back period as the start of the running account.[28] The Court held:[29]

> There is no logical reason why that should be so and principle suggests to the contrary. The received view is that a liquidator can choose any point of time during the material period as the commencement of the operations of the running account which gives the payee a preference, priority or advantage over other creditors.

[39] Counsel for the liquidators in the present case provided a number of Australian cases which are said to demonstrate the operation of the peak indebtedness rule. One example is *Rothmans Exports Pty Ltd v Mistmorn Pty Ltd (in*

---

27 *Re Weiss; ex parte White v John Vicars & Co* [1970] ALR 654 (FCA) at 661.
28 *CSR Ltd v Starkey* (1994) 13 ACSR 321 (QSC).
29 At 325, referring to the support provided in *Starkey v APA Transport Pty Ltd* (1993) 12 ACSR 15 (QCA).

liq),[30] in which the date on which the running account terminated happened to coincide with the point of peak indebtedness between the parties. Here, however, the liquidator had no advantage in stating a different figure for the amount outstanding. To suggest this "applied" the peak indebtedness rule is incorrect.

[40] *Olifent v Australian Wine Industries Pty Ltd* was the first case to interpret and apply the new s 588FA of the Corporations Act, following Australian legislative reforms to its insolvency regime.[31] It held that the absence of any provision in s 588FA(2) to alter or vary the approach to assessing preference in a running account as prevailed before the amendments indicated the legislature did not intend to alter it.[32] Accordingly, the liquidator could choose any point during the statutory period, including the point of peak indebtedness, to establish a preferential payment.

[41] In the cases that followed, including *Sheahan v Fabienne Pty Ltd*,[33] *Sutherland v Eurolinx*,[34] *Sutherland v Lofthouse*,[35] *Burness v Supaproducts Pty Ltd*[36] and *Clifton v CSR Building Products Pty Ltd*,[37] the peak indebtedness rule has been applied without further comment or discussion. The Australian courts seem to have assumed the rule had the weight of authority and sufficient pedigree to warrant its direct application. We have located no Australian authorities offering a considered analysis of the rule.

Statutory form of running account principle in Australia

[42] The running account principle was established in Australia in statutory form by s 588FA of the Corporations Act 1992 (Cth).[38] The statutory wording did not refer to the peak indebtedness rule.

---

30 *Rothmans Exports Pty Ltd v Mistmorn Pty Ltd (in liq)* (1994)15 ACSR 139 at 151–152.

31 *Olifent v Australian Wine Industries Pty Ltd* (1996) 19 ACSR 285 (SASC). We address these reforms in more detail below at [42]–[46].

32 At 292.

33 *Sheahan v Fabienne Pty Ltd* (1999) 17 ACLC 1,600 (SASC).

34 *Sutherland v Eurolinx,* above n 23.

35 *Sutherland v Lofthouse* [2007] NSWCA 197, (2007) FLR 157.

36 *Burness v Supaproducts Pty Ltd* [2009] FCA 893, [2009] 259 ALR 339.

37 *Clifton v CSR Building Products Pty Ltd* [2011] SASC 103.

38 Appearing now in identical terms as the same section in the Corporations Act 2002 (Cth).

[43] For convenience, we set out the statutory provision. With minor variations in wording, for example, the use of the term "unfair preferences" instead of "voidable preferences", it is materially similar to s 292(4B):

> **588FA Unfair preferences**
>
> (1) A transaction is an unfair preference given by a company to a creditor of the company if, and only if:
>
> (a) the company and the creditor are parties to the transaction (even if someone else is also a party); and
>
> (b) the transaction results in the creditor receiving from the company, in respect of an unsecured debt that the company owes to the creditor, more than the creditor would receive from the company in respect of the debt if the transaction were set aside and the creditor were to prove for the debt in a winding up of the company;
>
> even if the transaction is entered into, is given effect to, or is required to be given effect to, because of an order of an Australian court or a direction by an agency.
>
> (2) For the purposes of subsection (1), a secured debt is taken to be unsecured to the extent of so much of it (if any) as is not reflected in the value of the security.
>
> (3) Where:
>
> (a) a transaction is, for commercial purposes, an integral part of a continuing business relationship (for example, a running account) between a company and a creditor of the company (including such a relationship to which other persons are parties); and
>
> (b) in the course of the relationship, the level of the company's net indebtedness to the creditor is increased and reduced from time to time as the result of a series of transactions forming part of the relationship;
>
> then:
>
> (c) subsection (1) applies in relation to all the transactions forming part of the relationship as if they together constituted a single transaction; and
>
> (d) the transaction referred to in paragraph (a) may only be taken to be an unfair preference given by the company to the creditor if, because of subsection (1) as applying because of paragraph (c) of this subsection, the single transaction referred to in the last-mentioned paragraph is taken to be such an unfair preference.

[44] The statutory form of the running account principle came about as follows. In 1988, the Harmer Report from the Australian Law Reform Commission expressed support for the judicially developed approach to running accounts in insolvency.[39] That report recommended the running account principle be "reinforced with a statutory provision which would allow the court to have regard to the relationship between the parties, and, if appropriate, the history of transactions between them".[40]

[45] Section 588FA was accordingly inserted into the Corporations Act by the Corporate Law Reform Act 1992 (Cth). The Explanatory Memorandum to that Bill noted:[41]

> … where a transaction is, for a commercial purpose, an integral part of a continuing business relationship such as a running account between a creditor and a company (including such a relationship to which other persons are parties), it should not be attacked as a preference, but rather the effect of all the transactions which form the relationship between that creditor and the company should be taken into account as though they constituted a single transaction. This provision is aimed at embodying in legislation the principles reflected in the cases of *Queensland Bacon Pty Ltd v Rees* (1967) 115 CLR 266 and *Petagna Nominees Pty Ltd v AE Ledger* 1 ACSR 547. The effect of these principles is that it is implicit in the circumstances in which payments are made to reduce the outstanding balance in a running account between the purchaser and supplier that there is a mutual assumption that the relationship of the purchaser and supplier would continue as would the relationship of debtor and creditor. The net effect, therefore, is such that payments 'in' are so integrally connected with payments 'out' that the ultimate effect of the course of the dealings should be considered to determine whether the payments are preferences.

[46] The final sentence just quoted addresses the approach in s 588FA(3). It is also a clear reference to the majority of the High Court of Australia in *Airservices Australia*. It is noteworthy that the Australian legislative materials recommending the implementation of s 588FA do not refer to the peak indebtedness rule. Section 588FA itself does not define what "all the transactions" means. In its 2003 inquiry into insolvency laws, the Parliamentary Joint Committee on Corporations and Financial Services (the Joint Committee) heard submissions concerning the peak indebtedness rule. Despite this, no recommendations were made by the Joint

---

39 Australian Law Reform Commission, *General Insolvency Inquiry* (ALRC 45, 1988) Vol 1 at [131]. The running account principle as referred to here is the principle described above at [33] and applied in the cases noted above at [37]–[41].

40 At [655].

41 Corporate Law Reform Bill 1992 (Cth) (explanatory memorandum) at [1042].

Committee in respect of the rule.[42] When the Joint Committee considered the peak indebtedness rule and its compatibility with *Airservices Australia*, it noted the rule could be "inconsistent" but declined to make a formal recommendation on the issue.[43]

Developments in New Zealand

[47] The enactment of s 292(4B) in New Zealand emerged from the insolvency law reforms in 2004. The Ministry of Economic Development commenced a comprehensive review in 1999 of New Zealand's insolvency regime.[44] It promoted the adoption of the Australian position on running accounts and the implementation of the current s 292(4B) to replace the "ordinary course of business" test.[45] It was addressed in those documents as follows:[46]

> Currently the corporate voidable preference regime is "effects-based" with an exception for transactions in the [ordinary course of business] (section 292 of the Companies Act). Because it is unclear what this test actually means, in practice it is difficult to apply, and this ambiguity can lead to litigation. The Australian Corporations Law contains an exception for transactions that take place as an "integral part of a continuing business relationship". If the level of a debtor's indebtedness to a creditor increases and decreases from time to time, during the course of a relationship, then the relationship is to be viewed as one transaction. Therefore, the "net-effect" of the transactions is to be considered in assessing whether or not there has been a preference. As this test is fact-specific, there is still a risk that litigation may ensue, however the advantages are:
>
> - the test appears to work well in Australia;
> - it appears to be more certain than the "ordinary course of business" test; and
> - it encourages trade creditors to continue supplying.

---

42 We emphasise this was despite the case law as set out above at [37]–[41].

43 Parliamentary Joint Committee on Corporations and Financial Services *Corporate Insolvency Laws: a Stocktake* (June 2004) at [12.40].

44 Commencing with a Ministry-commissioned paper by an academic: David Brown "Voidable Transactions – A Report for the Ministry of Commerce" (October 1999).

45 Ministry of Economic Development *Insolvency Law Review: Tier One Discussion Documents* (January 2001) at [5.1.2] and [5.4.1]; Ministry of Economic Development *Draft Insolvency Law Reform Bill* (April 2004) at 237 (draft cl 435); Ministry of Economic Development *Draft Insolvency Law Reform Bill: Discussion Document* (April 2004) at [32].

46 *Draft Insolvency Law Reform Bill: Discussion Document*, above n 45, at [32].

[48] Section 292(4B) was then introduced in New Zealand alongside a number of other reforms in the Insolvency Law Reform Bill 2005.[47] The Insolvency Law Reform Bill was presented to the House in 2005.[48]

[49] The Explanatory Note to the Bill emphasised the principles according to which the reforms it enacted operated, noting the "fundamental principle" underpinning insolvency law the *pari passu* or "equal step" principle.[49] The Explanatory Note also described the overall objectives behind the reform of insolvency law as being to:[50]

> - provide a predictable and simple regime for financial failure that can be administered quickly and efficiently, imposes the minimum necessary compliance and regulatory costs on its users and does not stifle innovation, responsible risk taking, and entrepreneurialism by excessively penalising business failure; and
>
> - distribute the proceeds to creditors in accordance with their relative pre-insolvency entitlements, unless it can be shown that the public interest in providing greater protection to one or more creditors outweighs the economic and social costs of any such priority; and
>
> - maximise the returns to creditors by providing flexible and effective methods of insolvency administration and enforcement which encourage early intervention when financial distress becomes apparent; and
>
> - enable individuals in bankruptcy to participate again fully in the economic life of the community; and
>
> - promote international co-operation in relation to cross-border insolvency.

[50] The Explanatory Note described the new principles governing a continuing business relationship as removing the uncertainties and inconsistencies that existed in the voidable transaction regime at the time, seeking:[51]

> [To replace] the "ordinary course of business" exception for setting aside a transaction with a test along the lines of the Australian "continuing business relationship". The new test will focus on the business relationship between

---

47 For a comprehensive analysis of the reforms generally, see *Allied Concrete Ltd v Meltzer*, above n 14, at [28]–[39].

48 The Bill in 2005 was eventually broken up into three separate Bills. For present purposes, we are concerned with only the Companies Amendment Act 2006.

49 Insolvency Law Reform Bill 2005 (14-1) (explanatory note) at 1.

50 At 2.

51 At 13–19.

> the parties over a certain period of time. If, in the course of such a relationship, the level of the debtor's indebtedness to that creditor increases and decreases from time to time, then the relationship is to be viewed as one transaction and the net effect of those transactions together is considered in determining whether there is a preference.

[51] The Explanatory Note also referred to the following benefits of the reform:[52]

> The proposed amendments will increase the certainty of the legal tests contained in, and remove procedural inconsistencies between, the various voidable transaction provisions. This will reduce the cost for the liquidator of pursuing voidable transactions.
>
> A reduction in the cost of pursuing voidable transactions will also maximise returns to the creditors and give them more certainty that the transactions they are entering into will not be made void. It will also promote business certainty for the parties involved.
>
> With the proposed changes resulting in overturning transactions on a more principled basis, the debtors will have more certainty regarding when and which payments should be made. The debtors will also be more aware of which payments can be made void, thereby avoiding such payments and the costs associated with making such payments.
>
> There will be an initial period of uncertainty regarding the meaning of the new tests, but this will reduce over time and will be mitigated by basing the new test on an Australian test, allowing the courts to have the benefit of the Australian courts' experience in interpreting those provisions. Overall, there will be net gains for creditors, debtors, and liquidators involved in voidable transaction proceedings.

[52] Section 292(4B) was modelled on s 588FA(3), to import the running account principle into New Zealand. So much is clear from the legislative history set out above. Those documents consistently refer to the running account principle as a replacement for the "ordinary course of business" test. The Explanatory Note to the amendment acknowledged there would be an initial period of uncertainty, but the adoption of "an Australian test" would allow New Zealand courts to benefit from the Australian courts' experience in applying s 588FA.[53]

---

52 Insolvency Law Reform Bill, above n 49, at 24–25.

53 At 25.

The liquidator's appeal and cross-appeal

The case for peak indebtedness

[53] The liquidators ask this Court to conclude that s 292(4B) supports the application of the peak indebtedness rule. Ms Murphy contends that s 588FA of the Corporations Act must be taken to have permitted the application of the peak indebtedness rule.[54] New Zealand adopted the Australian provision, and this also adopted the previous Australian law on running accounts, including application of the peak indebtedness rule.

[54] Ms Murphy refers to the High Court of Australia's decision in *Airservices Australia* which, as we discuss later, appears to be contrary to the peak indebtedness rule. She contends that to the extent the High Court did not follow the orthodox Australian approach on peak indebtedness, that reasoning should not be followed by this Court. Ms Murphy helpfully refers to eight cases from various State Courts and the Federal Court in which the peak indebtedness rule has been applied largely without question.[55]

[55] Ms Murphy contends further the peak indebtedness rule is better characterised as the "net preferential receipt" approach. This is because it seeks merely to identify and recover the net preferential receipt received by a trade creditor. She advanced a number of grounds to as to why it should be adopted as the conventional approach in New Zealand.

[56] First, the running account analysis is merely an assessment of preference requiring a focus on the net difference in the debt position of the creditor (hence, her adoption of the epithet "net preferential receipt"), rather than a "wholesale exemption" from preference. The implication is that selecting the point of greatest indebtedness is the best approach to identifying the net difference in debt position.

[57] Second, the peak indebtedness rule is the only means of calculating preference in a running account that is fair and comports with the principles of

---

54 Citing *Rees v Bank of New South Wales*, above n 23, at 220–221.
55 Referred to above at [37]–[41].

equality and equal treatment of creditors inherent in New Zealand's insolvency regime. Ms Murphy notes findings in New Zealand courts, which held that running account creditors were not preferred. She submits that the apparent conceptual foundation for these findings "appear[ed] to be the view that if the transactions are an integral part of a continuing business relationship, then there can be no preference gained." She submits this is unfair to other unpaid creditors as it overlooks the fact that all creditors have supplied value to the failed company. Ms Murphy submits the peak indebtedness rule avoids this issue, because it only seeks to recover the amount of debt reduction the creditor achieved in excess of the value of further supply. Had it been Parliament's intention to allow trade creditors to retain the benefit of debt reduction, whilst other innocent unsecured creditors receive little or nothing, "it would have needed to say so in the strongest possible terms".

[58] Ms Murphy contends that various statements contained in *Airservices Australia* have resulted in an erroneous approach in the decisions referred to earlier. This has led to creditors invoking the principles in *Airservices Australia* as "effectively a complete answer" to voidable claims. She contends preference law is concerned only with recovering the difference between payment and subsequent supply induced by that payment – therefore it is only where "fresh value" in the form of goods or services thereafter supplied is less than the value of payments received that there is any net surplus to recover. The essential thrust of this argument is that preference assessment (and therefore calculation) starts "with payment rather than with supply".

[59] Finally, Ms Murphy submits that rejecting the peak indebtedness rule would encourage a degree of uncertainty, antithetical to the aims of the legislation. It would result in the "removal from the pool of recovery every transaction with a creditor who benefitted from insolvent transactions" merely upon the grounds a running account existed between the creditor and company. She submits this would be contrary to the legislation, which requires the overall amount of the preference by a creditor, as a result of an insolvent transaction, be returned to the control of the liquidators for the benefit of all unpaid, unsecured creditors.

[60] We have described the liquidators' arguments in some detail as they assist in framing the analysis that follows. This is a vexed area of the law of insolvency and one that has resulted in uncertainty at first instance in New Zealand. There is also, from our own investigations, some evident conceptual opacity in discussions as to peak indebtedness and its alternatives. We address the arguments raised by Ms Murphy and in *Farrell v Max Birt Sawmills*, referred to earlier, upholding the application of peak indebtedness in New Zealand.[56]

Our analysis

[61] The question whether the peak indebtedness rule applies in New Zealand is one of statutory interpretation. The crucial question for this Court is whether, in adopting this "Australian test" and the Australian courts' application of that test, alongside the statutory framework of s 588FA(3), Parliament similarly intended to adopt the peak indebtedness rule.

The purpose of preference law in insolvency

[62] We first address the purpose of preference law in insolvency.

[63] The liquidation of a distressed company has an important social and economic function. Liquidators undertake the gathering in and collective distribution of available assets to the pool of creditors of the company. Thus liquidation is a compulsory process under which the previously unchecked scramble by individual creditors to achieve any advantage available to them is halted in favour of a collective, co-operative approach.

[64] When a company becomes financially distressed, in the absence of legislative intervention, not all creditors have an equal opportunity to recover their funds.[57] As the Supreme Court has said in *Allied Concrete Ltd*, the *pari passu* principle is applied to ensure that creditors falling within the same class of rights are treated the

---

56 *Farrell v Max Birt Sawmills Ltd*, above n 11; noted above at [25].

57 A Keay "In Pursuit of the Rationale Behind the Avoidance of Pre-Liquidation Transactions" (1996) 18(1) Syd LR 55 at 83; Professor C J Tabb "Rethinking Preferences" 43 SCL Rev 981 at 988.

same.[58] The underlying aim of the voidable preference provisions of the Act is to attempt to strike a balance between the interests of all creditors in being able to share the remaining assets of the company and the interests of particular creditors who believe the payments had been validly received and they ought not to be required to pay them back.[59] To the extent that payments or other company assets are recovered by the liquidators, the fair return to the creditors of the company is enhanced.

[65] Within the law of liquidation, rules regarding preferences are designed to achieve the following purposes:[60]

(a) Equality as between creditors according to priorities set out in the Act;

(b) Promoting a collective, orderly and cost-effective approach to the management of failed companies; and

(c) Sharing the burden of loss associated with corporate financial collapse.

[66] Preference laws seek to adjust the imbalance that occurs where an unsecured creditor receives a payment or payments within the two year statutory specified period, which represent a greater recovery than would be achieved if proving for the debt in the liquidation, along with other unsecured creditors. As the learned editors of *Heath & Whale on Insolvency* emphasise, to achieve that equality, the law recognises a period prior to liquidation must be examined because a distressed company is often technically insolvent for some time before formal liquidation occurs.[61] Once a liquidation has occurred, those creditors who are better placed to exercise influence to obtain payment, or are simply faster off the mark in seeking repayment, should not be advantaged. Thus the voidable preference provisions are not concerned with achieving fairness as between the creditor and the company, but rather fairness between the creditor and other similar creditors.[62]

---

58 *Allied Concrete Ltd v Meltzer*, above n 14, at [1](a). See also Companies Act, s 313(1) and (2).
59 P Heath and M Whale, above n 4, at [24.11].
60 Insolvency Law Reform Bill, above n 49, at 1–2.
61 At [24.1].
62 *Allied Concrete Ltd v Meltzer*, above n 14, at [95], citing *Farrell v Fences & Kerbs*, above n 13, at [63].

[67] On the other hand there is a need for certainty and finality in transactions and a desire to avoid hastening corporate collapse through the sudden withdrawal of credit facilities in times of financial distress. As the Supreme Court has said:[63]

> … Parliament has long accepted that creditors who enter into transactions with companies which have reached the point of insolvency are entitled to protection in some circumstances. This acknowledges that considerations of fairness to individual creditors are engaged in this context and that there are risks to commercial confidence if what appear to be normal, everyday commercial transactions are re-opened long after the event. This consideration has particular relevance in New Zealand, with its high proportion of small business enterprises and the two-year period in advance of liquidation during which transactions may be voidable under the Act.

Legislative context

[68] The legislature did not see fit to address the peak indebtedness rule, or to include it in the wording of s 292(4B). Section 292(4B)(c) provides that subsection (1) applies in relation to "all the transactions" forming the continuing relationship and that they are to be treated as together constituting a "single notional transaction".[64] The effect of the section, taken on its face, is to require *all* payments and transactions within the continuing business relationship to be netted off against one another. This includes both payments to the creditor and the supply of goods to the debtor. Of course where the business relationship began before the start of the two year period, only the transactions occurring within the period are taken into account. The statutory wording does not permit a liquidator to disregard some of those transactions. There is also no basis on which the liquidator can commence with only the first payment, and disregard the first supply of goods. The plain meaning of "all transactions" is just that.

---

63 *Allied Concrete Ltd v Meltzer*, above n 14, at [1](b) (footnotes omitted).

64 We note in passing that initial apparent issues with the definition of "transaction", and how that word featured in s 292(4B), have been resolved. See, for example *Blanchett v McEntee Hire Holdings Ltd* HC Rotorua CIV-2010-463-270, 5 August 2010 at [51]–[54]; *Shephard v Steel Building Products (Central) Ltd*, above n 5, at [29]–[33]; *Jollands v Mitchill Communications* [2011] NZCCLR 20 (HC) at [13]. In *Olifent v Australian Wine*, above n 31, for example, the Supreme Court of South Australia addressed the issue of the use of the word "transaction" throughout s 588FA in different contexts – namely "a transaction" must be construed as the same transaction as that in later parts of s 588FA, and a series of transactions, encompassing the flow of goods and services, which in turn must be construed as "one single transaction" (an interpretation resulting in assessing the aggregate of the individual transactions as preferences, contrary to the statutory purpose). This interpretation was rejected by the Court and we reject it also. See, for a further discussion of the issue, *Farrell v Max Birt Sawmills*, above n 11, at [62].

[69] We consider the plain meaning of "all transactions" is all transactions constituting an integral part of the continuous business relationship and therefore falling within the running account. On this approach, the assessment of these transactions will commence when the two-year specified period commences.[65] Where, as with Z Energy, the running account starts only after the specified period has commenced, the starting point is the first transaction during the running account falling within the specified period. It follows from this position that to arrive at some artificial point during the course of all the relevant transactions and to select the date of peak indebtedness (resulting in the transactions prior to this point being disregarded), would be to ignore the express wording used by Parliament.

[70] The liquidators in this case contend that the wording of s 292(4B) can be made to support this interpretation, because the statutory wording should yield to purpose. The argument is that the clear legislative intention behind and purpose of s 292(4B) was to adopt Australian law applying to running accounts in its entirety and therefore also the peak indebtedness rule. The provisions are almost identical in both Australia and New Zealand; if the Australian provision can support the approach, so too can New Zealand's provision.

[71] We turn now to assess the arguments that what we consider to be the plain meaning of s 292(4B) should be disregarded.

Importing s 588FA into New Zealand law

[72] We are satisfied that the legislative history of s 292(4B) centred on removing "ordinary course of business" and replacing it with the running account.[66] As noted, there is no discussion, anywhere, of the peak indebtedness rule. Nor was the peak indebtedness rule referred to in any of the preparatory and research materials engendering the law change, either from the Law Commission or the Ministry of Economic Development (or the academic report commissioned by the Ministry of

---

65 A position consistent with the temporal framework for all other preference assessments in the Act, and therefore in line with the scheme of the Act generally.

66 For this reason also, we reject Ms Murphy's contention that the running account was intended to replace the change of position defence. There is simply nothing to support that submission.

Commerce).[67] We consider the reference in these materials to the "Australian test" and the Australian courts' experience with that test was a reference to the principles applicable to a continuing business relationship.[68]

[73] As a matter of principle, we reject Ms Murphy's submission that the adoption by the legislature in New Zealand of s 588FA(3) in similar language of necessity involved the importation of the peak indebtedness rule. The legislature was plainly aware of the principles of Australian case law governing the running account provisions but it does not follow that the peak indebtedness rule must also be adopted.

[74] As noted earlier, the Australian legislation relied on the decision of the High Court in *Airservices Australia* which, as we go on to explain, is inconsistent with the peak indebtedness rule. As we have already noted, subsequent Australian decisions appear to have applied the peak indebtedness rule on the ground that it is settled law, without analysing its relationship to the legislation.

Airservices Australia v Ferrier

[75] We turn to consider the decision in *Airservices Australia*. The Civil Aviation Authority (the predecessor to Airservices Australia) provided air navigation services to an airline company, Compass Airlines Pty Ltd. The liquidators applied to recover $10.35 million that the company had paid to the Authority by nine payments during

---

[67] David Brown, above n 44; *Insolvency Law Review: Tier One Discussion Documents,* above n 45; *Draft Insolvency Law Reform Bill: Discussion Document,* above n 45, discussed above at [47]–[52]. Indeed, the explanatory memorandum to the Corporate Law Reform Bill, above n 41, itself discussed the principles in two cases it was seeking to capture in its draft s 588FA(3), upon which s 292(4B) is modelled. Neither of these it a peak indebtedness case – rather both concern the operation of the running account: *Queensland Bacon Pty Ltd*, above n 20 and *Petagna Nominees Ltd v Ledger* (1989) 1 ACSR 547 (WASC). This point is demonstrated with some analysis of the key findings in each case. In *Queensland Bacon Pty Ltd*, the Court set out the "classic" statement of the law for running accounts, being (as per Barwick CJ) at 286: "… it is enough if, on the facts of the any case, the court can feel confident that implicit in the circumstances in which the payment is made is a mutual assumption by the parties that there will be a continuance of the relationship of buyer and seller with resultant continuance of the relationship of debtor and creditor in the running account …". It was the first statement as to the mutual assumption requirement and is seen as the first classic articulation of the running account principle. No mention of peak indebtedness is made. In *Petagna Nominees*, the Court set out the modern application of the running account, affirming *Queensland Bacon* at 563–565. Therefore the express references in the legislative materials to the "Australian tests" in question are not references to peak indebtedness cases, although there were many to choose from.

[68] Namely, those set out above at [33]–[34].

the six-month period before the commencement of the winding up, as payments which had the effect of giving the Authority a preference, priority or advantage over the other creditors. Despite those payments, the company's indebtedness on its account with the Authority increased by $8.18 million during that period. The company and the Authority both understood that the provision of further services depended on the company's making payments to reduce its growing debt. The liquidators claimed that at the time of the last payment ($1.7 million on 18 December 1991), the Authority strongly suspected that the company would cease operations the next day.

[76] The Court held there was, in effect, a running account showing regular debits and credits between the company and the Authority, which in turn indicated a continuing relationship contemplating further debits and credits and that the making of these payments was intended to continue and not to determine the relationship. Having regard to the ultimate effect of the payments and not to the immediate effect of each payment, none other than the last preferred the Authority over the other creditors.

[77] The majority of Dawson, Gaudron and McHugh JJ equated a running account with the doctrine of "ultimate effect". Thus, the running account doctrine was designed "to ensure that the effect of a payment that induces the further supply of goods and services is evaluated by the ultimate effect that it has on the financial relationship of the parties".[69] The result of this analysis was that, in the majority's view, all payments other than the final payment were made as part of a running account, and so the "ultimate effect" of all these transactions between the Authority and Compass must be assessed.

[78] The majority stressed that a payment cannot be viewed in isolation from the general course of dealing between the creditor and the debtor:[70]

---

69 At 509.

70 At 502 (footnote omitted). It seems that the "ultimate effect" doctrine is an integral part of the running account principle and continues alongside and to assist interpretation of s 588FA(3): see *V R Dye & Co v Peninsula Hotels Ltd (in liq)* [1999] 3 VR 201 (VSCA) at [27]–[28] and *Sutherland v Lofthouse*, above n 35, at [34]. See also Farid Assaf, Brett Shields and Hilary Kincaid *Voidable Transactions in Company Insolvency* (LexisNexis, Chatswood (NSW), 2015) at [4.62].

> … a payment made during the six month period cannot be viewed in isolation from the general course of dealing between the creditor and the debtor before, during and after that period. Resort must be had to the business purpose and context of the payment to determine whether it gives the creditor a preference over other creditors. To have the effect of giving the creditor a preference, priority or advantage over other creditors, the payment must ultimately result in a decrease in the net value of the assets that are available to meet the competing demands of the other creditors.

[79] If the company pays an outstanding debt in order to induce a creditor to make further supplies available, then provided that the value of the fresh goods or services is equal to or greater than the payment, the company and its other creditors are no worse off than they were before. The majority emphasised:[71]

> Thus, it is not the label "running account" but the conclusion that the payments in the account were connected with the future supply of goods or services that is relevant, because it is that connection which indicates a continuing relationship of debtor and creditor. It is this conclusion which makes it necessary to consider the ultimate and not immediate effect of the individual payments.

[80] This analysis of the running account doctrine is difficult to reconcile with the concept of peak indebtedness. As one Australian commentator has noted:[72]

> The value of any goods or services supplied by the creditor after the commencement of the preference period but prior to the date chosen by the liquidator is simply disregarded for no real reason, even though the same continuing business relationship existed at both times.

[81] If the principle in *Airservices Australia* is that the ultimate effect must be considered in ascertaining the results of a running account, there is no doubt the peak indebtedness rule does violence to that principle.[73] As earlier discussed, the liquidators contend this conclusion has been misused in New Zealand, incorrectly forming a "complete answer" to voidable claims. They submit preferences in the case of a running account should be assessed by looking to the first payment, rather than supply. That would ensure the "net preferential receipt" is considered, rather

---

71 At 505.

72 Hal Bolitho "Continuing Business Relationships – Eight Questions in Search of an Answer" (1998) 16 CSLJ 584 at 599.

73 For an attempt to reconcile the two concepts, see Ken Barlow "Voidable Preferences and the Running Account – the High Court reconsiders" (1998) 26 ABLR 82. We note however, in this article the peak indebtedness principle was of peripheral relevance to the author's general point, and its validity is assumed throughout as opposed to being directly addressed and affirmed.

than using a running account to constitute in effect a complete defence to a preference claim.

[82] The problem with this analysis is that it disregards the first advancement of supply, which would fall within the concept of "all transactions" in the running account as per s 292(4B), with no compelling explanation. Commencing with "payment" still requires the liquidator to select a payment, in the middle of the "single transaction" and assess preference only from that point onwards.[74] The relevant question still remains: why should this be the starting point, in light of the clear statutory wording? The liquidators' position assumes an answer to this question, without justifying it. It goes no further in offering a principled reason *why* the supplies prior to the first payment should be ignored in the "entire transaction".

[83] In New Zealand, various High Court decisions have attempted to grapple with *Airservices Australia* and what it means for peak indebtedness.[75] Associate Judge Bell in *Max Birt* considered *Airservices Australia* did not directly consider peak indebtedness reasoning; the relevant comment was obiter dicta and accordingly does not affect the peak indebtedness rule and its operation.

[84] It is correct *Airservices Australia* was not a "peak indebtedness" case, but that was because there was no question the creditor had not been preferred. Whether or not a running account existed, Airservices Australia had clearly provided services in excess of any payment it had received. The key issue concerned the application of the running account on the facts. The central determination of the High Court was the relevance of the doctrine of "ultimate effect" to that quantum assessment. Peak indebtedness did not apply on the facts but *Airservices Australia* was still a running account case.

---

[74] It is uncommon, although not unheard of, for payment to the supplier to be the first step in the transaction. This is, however, very unlikely. The practical effect of Ms Murphy's submission is that, by starting with payment, there will always be a net preference.

[75] Associate Judges Abbott and Doogue both agreed it indicated peak indebtedness should be rejected: see above at [16] and [19] respectively.

Practical effect of peak indebtedness

[85] Some commentators have promoted the peak indebtedness rule as providing a practical and appropriate measure of recovery by liquidators. Damien McAloon put it thus:[76]

> A creditor may have been fortunate to have had their indebtednesses reduced by payments made by the company prior to its liquidation. However, in replying upon a running account to reduce its exposure to unfair preference claims, the point of peak indebtedness may serve as an appropriate measure of the amount recoverable from the creditor for the benefit of other creditors. The creditors will include those who did not receive such payments and/or did not suspect the company's insolvency. This may be so even if this amount recovered is not necessarily an accurate measure of the net benefit received by the creditor defending the liquidator's claim.
>
> This justification for the peak indebtedness rule is supported by the likely practical consequences if the rule was to be abolished. The unfair preference provisions would still operate in a somewhat arbitrary fashion by reason of the applicable fixed time period. However, without the peak indebtedness rule, the arbitrary timing of the notional "single transaction" would often operate to deprive liquidators of any meaningful recovery in respect of unfair preferences. Liquidators would be less inclined to pursue preferences as the amount likely to be recovered (without the application of the peak indebtedness rule) may not justify the time and expense involved. As a consequence, the assets available for distribution to the general pool of creditors would, in some circumstances, be reduced. … these considerations appear to be the key justification for the peak indebtedness rule.

[86] McAloon himself, however, recognised that there is a case for abolishing the rule.[77] He noted that the Australian Credit Forum in its submission to the Joint Committee sought the abolition of the peak indebtedness rule on the basis that it was "contrary to the principle of equal treatment (*pari passu*) which underpins all avoidance provisions". The Australian Credit Forum submission referred to various scenarios involving a creditor/debtor relationship in which the peak indebtedness rule would operate with a discriminatory effect.[78] These examples are revealing and instructive.

[87] The Australian Credit Forum gave some examples to demonstrate the problems with the peak indebtedness rule. It posits three creditors, Creditor 1, 2 and

---

[76] Damien McAloon "Ultimate Effect" or maximum recovery? – should liquidators be able to apply the "peak indebtedness rule" to running accounts when pursuing unfair preference claims?" (2006) 14 Insolv LJ 90 at 96.

[77] At 94.

[78] Details of the scenarios are set out in Schedule 1 to McAloon's article at 97–98.

3. Each has provided Company X with a $10,000 credit limit. At the beginning of the specified period, the debtor's level of indebtedness to each creditor is $60,000. At the end of the specified period, the debtor owes each creditor $10,000 once more. In each case, the creditor has provided $60,000 worth of supplies to the debtor, and has been paid $50,000. Assuming for present purposes these are correctly classified as running accounts, and the principle in s 292(4B) (or s 588FA(3) as the case may be) applies, there would be no net preference. Taking the running accounts as single transactions, in respect of Creditors 1, 2 and 3, payments did not exceed supply.

[88] The Credit Forum demonstrates, however, if each creditor adopts different credit terms, the peak indebtedness results in a different preference calculation, despite, in substance, their having offered equal supplies and received equal payments. Creditor 1 may not require payment on any specific terms; Company X receives the goods advanced, and advances payments after the full advancement of goods to the value of $60,000. The point of peak indebtedness will be $60,000 and the preference will be as much (the previous supplies being disregarded prior to this point).

[89] Creditor 2 imposes credit terms keeping to the credit limit, therefore advances goods to the value of $10,000 and receiving payment of as much each month. The point of peak indebtedness will only ever reach $20,000, and the preference received after that point will be $10,000. Creditor 3 on the other hand, may impose credit terms requiring payment after three months. It advances supplies to the value of $30,000, after which Company X advances $20,000 and returns to within the credit limit, thereafter receiving goods and paying in $10,000 instalments. In that case, peak indebtedness is $30,000 and the creditor received a preference of $20,000.

[90] These illustrate the arbitrariness of peak indebtedness in operation. Despite each creditor advancing the same value of goods to Company X and receiving the same payments in return, the peak indebtedness rule can operate to produce vastly different outcomes, merely on the basis of the particular credit arrangements in each case. Contrary to the arguments advanced by the liquidators there is no connection between the "preference" received by one creditor, and the entitlement of another.

Each creditor is a trade creditor in precisely the same ultimate circumstances, but is treated differently.

[91] Some commentators have identified similar concerns. Hal Bolitho, for example, has noted:[79]

> This rule can accordingly work to the detriment of continuing business relationship creditors, particularly where a period of regular trading includes isolated large orders which are ultimately paid for. The liquidator can simply take the date after such an order was delivered and show a greater reduction in the net indebtedness, where had the liquidator taken an earlier date the order and its payment would cancel each other out.

[92] The practical operation of the peak indebtedness rule is, therefore, problematic. Nevertheless the liquidators contend the policy behind s 292(4B) and the overall insolvency regime require its adoption in New Zealand. We turn now to address this final argument.

Policy justification

[93] The central policy justification for the peak indebtedness rule is predicated on the *pari passu* rule: that insolvency law is based on equal treatment of equal creditors. It is contrary to that rule to allow trade creditors who are paid to receive a benefit over other trade creditors who are not paid. This is a benefit at the expense of other trade creditors (or even all other unsecured creditors generally), and must be disgorged and returned to the pool for distribution generally. The High Court in *Max Birt Sawmills* accepted this policy argument as the key basis for peak indebtedness. Trade creditors should not be treated as a separate class of creditors entitled to an absolute defence to preference claims. The solution then, is the peak indebtedness rule. We reject this as a matter of both practicality and policy.

[94] First, on a practical level, there is simply no correlation between the quantum of the amount calculated as a preference taken from the peak indebtedness of one creditor and any entitlement of any other creditor. By definition, that is driven by the circumstances of the trading between the company and each individual creditor. Any payment to a particular creditor harms other creditors only to the extent of the bare

---

[79] Hal Bolitho, above n 72, at 599. See further A K Thompson "'Peak Indebtedness' theory: an abuse of the 'running account' defence?" (2011) 85 ALJ 374.

fact that value taken out of the general pool of resources. Of itself, this is not an injustice to other creditors, nor does it disadvantage them. This is because, by definition, trade creditors either return the value they receive in supplies, or must return the value of their preference over and above supplies provided as an insolvent transaction.

[95] Second, on a policy level, it was the purpose of enacting s 292(4B) to give effect to Parliament's intention to set apart certain trade creditors from the general pool of unsecured creditors. That is not a problem with the operation of s 292(4B) – that is a problem with its existence. We set out above the principled basis for the running account and its adoption. As was emphasised in *Allied Concrete*, the reforms intended to extend protection to trade creditors and eliminate the "ordinary course of business" test to promote certainty.[80] Trade creditors would have an incentive to continue providing value to companies in financial distress, and recourse for ordinary creditors fell under s 296(3). Ms Murphy's submission that it is unfair to prefer certain trade creditors is a matter for legislative concern and not a matter for judicial intervention.[81]

[96] Finally, to the extent there is a concern about the potential "over-inclusion" of commercial relationships in the definition of "trade creditors" to unjust effect, we consider that is assuaged by a careful application of running account principles to individual cases. All parties presently came before us having accepted the existence of a running account in each case. Accordingly, the question of the precise scope of the principles governing running accounts, for example, when it commences, when it should be held to have ended and what payments fall within and outside of it, are not an issue in these appeals.[82]

---

80 At [21].

81 This is notwithstanding the fact the peak indebtedness rule would not actually resolve that concern – trade creditors can still prove a running account exists and benefit from that. The peak indebtedness approach merely arbitrarily enhances the quantum a liquidator can claim back. It does not eliminate the underlying concern evinced in Ms Murphy's submissions.

82 For example, the fact that Z Energy's running account fell entirely within the specified period does raise the question of whether the final payments were truly made for the purpose of inducing further supplies – the final payment in *Airservices Australia* was considered to be entirely "backwards-looking". The applicability of that aspect of the High Court's reasoning may require clarification in that regard.

Allied Concrete

[97] One final factor supports our rejection of the peak indebtedness rule. In *Allied Concrete Ltd v Meltzer* the Supreme Court was faced, in interpreting s 296(2), with what it described as a stark choice between competing policies. While the discussion focused largely on the issue of commercial certainty, the Court noted the difficulty in balancing the interests of promoting collective realisation of assets in liquidation against the interest in ensuring fairness to individual creditors, giving value in good faith.[83] The Supreme Court concluded that s 296(3) was one way in which Parliament had expressly provided for mechanisms to ensure fairness to individual creditors could be achieved where necessary, alongside the general principle of promoting collective realisation of assets to all creditors.

[98] The distinct treatment of trade creditors is, in our view, a similar mechanism. Parliament took the decision to set aside a particular group of creditors who continue to provide credit and goods on the assumption of future trade. That is seen as having distinct commercial benefits in the context of liquidation. It is a policy choice consistent with New Zealand's insolvency scheme generally.

Conclusion on peak indebtedness

[99] We are satisfied the peak indebtedness rule is not part of the law in New Zealand. If Parliament had intended to adopt it, it could have done so without difficulty. It chose not to do so. Any change to the legislative policy as we have interpreted it would be a matter for Parliament. We therefore dismiss the liquidators' appeal and cross-appeal.

Timberworld's appeal

[100] Timberworld advances three grounds of appeal against the decision of Associate Judge Abbott:

---

[83] At [105]–[107]. As the reasoning of Associate Judge Bell was influenced by the views of this Court in *Farrell v Fences & Kerbs Ltd* [2013], above n 13 (as the passage cited at [25] above makes clear) the Supreme Court decision in *Allied Concrete Ltd v Meltzer* renders it redundant.

(a) The liquidators failed to prove that Northside was unable to pay its debts as they fell due, and therefore payments received by Timberworld were not impugnable.

(b) The Judge erred in interpreting s 292(4B) (being the running account) as limited to the specified period, and not "all transactions forming part of the relationship".

(c) The Judge erred in declining to exercise its powers under s 295 of the Act.

Did the liquidators prove Northside was insolvent?

[101] Associate Judge Abbott concluded the liquidators had proved Northside was insolvent at the relevant period and rejected Timberworld's challenges to that effect. Specifically:

(a) The financial records to which Timberworld referred the Judge were consistent with Northside's insolvency.

(b) Northside's outstanding tax debt was admissible and proved it was unable to pay its debts.

(c) In light of those two factors, the fact Northside continued paying trade creditors was of no moment.

[102] Timberworld now appeals against these findings. It repeats the challenges to the liquidators' proof of Northside's insolvency it made before Associate Judge Abbott. These are, briefly:

(a) The liquidators only provided financial accounts for 2008 and 2009 to prove Northside was insolvent. These pre-date the relevant period and these also show Northside was able to pay its debts (Timberworld contends they show Northside had money in its accounts and was therefore solvent).

(b) The IRD claim was the only document in evidence that was capable of proving Northside was insolvent. But this was retrospective, did not reconcile with the financial records produced and was not accompanied by evidence showing it was outstanding debt, demanded from Northside.

(c) The company continued to trade and earn (what Timberworld assumed were) substantial funds.

(d) The Court failed to distinguish between a company being "unable" to pay its debts as they fall due, as opposed to "choosing" not to pay its debts. Timberworld contends Northside simply chose not to pay its debts, but it was capable of doing so.

[103] We do not accept these contentions. Associate Judge Abbott determined that the financial accounts presented in evidence before him gave a clear and sufficient picture as to Northside's financial position before and during the relevant period. The 2009 financial statement, for example, included transactions for the 12 months prior to and including March 2009. Given the specified period started on 24 May 2009, less than two months later, the Judge considered this to be adequate evidence of Northside's financial health prior to entering into liquidation. Coupled with the bank statements, and the breakdown of unpaid and overdue debt accompanying various pleadings in evidence, we are satisfied sufficient evidence was presented to prove Northside was unable to pay its debts as they fell due.[84] Finally, in light of that position of insolvency, which we accept was proved, we do not accept that Northside merely chose not to pay its debts. This ground of appeal is dismissed.

---

[84] For example, the financial statements indicated a net deficit after tax in 2008, liabilities exceeding assets in 2009 and the primary asset being an overdrawn shareholder's account in both years. Trading activities in both years were generating modest deficits and Northside was operating with a working capital deficit. The bank statements demonstrated Northside had insufficient cash assets to meet its debts. Further, the liquidators referred to a document breaking down the lump sum of tax liability the company owed to Inland Revenue as a "snapshot" of its liabilities, accumulating the total penalties and interest that had accrued on that debt to liquidation. Further, the allocation of payments between aspects of tax liability (be that core tax debt, or penalty interest payments) is irrelevant to whether the company could pay its debts as they fell due – as Associate Judge Abbott noted. The picture, as a whole, pointed clearly to Northside's insolvency.

Interpretation of s 292(4B) – all transactions or specified period?

[104] Timberworld also appeals on the basis Associate Judge Abbott erred in holding the running account defence is restricted to the specified period, as opposed to "all transactions forming part of the relationship" when interpreting s 292(4B).

[105] The Judge addressed this issue in the course of his reasoning as to the commencement of the continuing business relationship.[85] He accepted the liquidators' argument that, when construed in the context of s 292 as a whole, the single transaction created by s 292(4B) is determined by reference to payments and supplies made only in the supplied period. This was a logical corollary to the underlying rationale of the continuing business relationship, removing the ability to isolate and attack individual payments. This was also consistent with s 292(1)(b), rendering an insolvent transaction made in the specified period voidable. The Judge rejected Timberworld's argument to the contrary.

[106] Timberworld appeals this finding on the basis that the phrase in s 292(4B) "all transactions forming part of the relationship" should be interpreted to mean all transactions in the running account itself. To find otherwise would be to add and delete words variably from the statutory provision, in circumstances where it is contrary to legal principle to do so.

[107] A number of Australian decisions, interpreting this question on the terms of s 588FA(3) have resolved this issue against Timberworld's interpretation. Although there is an issue of interpretation with the definition of "transactions", it is now settled the provision applies to transactions occurring within the specified period, to ascertain whether a net increase or decrease in indebtedness resulted.[86] Associate Judge Abbott was correct to find, when assessed in its statutory scheme and in light of its purpose,[87] the running account is limited in operation to the specified period. Although s 292(4B) does not specifically reference the specified period, we are

---

85 At [46]–[50].

86 Occasionally, where the entire running account relationship commences within the specified period, the transactions will commence at a later period in time than the specified period – that is consistent with this interpretation. What matters is the assessment of preference by reference to the single transaction, which can only be preferential when it occurs in the specified period.

87 With particular emphasis on the workability of s 292(1), requiring insolvent transactions made in the specified period be voidable.

satisfied its operation is intended to be subject to the principle contained in s 292(1) to that effect. As noted earlier in this judgment, the interpretation limiting the running account in such a way is the interpretation which gives effect to the provision in the manner intended by Parliament.[88] To adopt Timberworld's interpretation would undermine the statutory purpose.

[108] We reject this ground of appeal.

Application of s 295 of the Act

[109] In the High Court, Timberworld argued it would be inequitable to order it to repay the payments made to it by Northside. It relied on s 295(a) and (b) of the Act. Those provisions provide:

> **295 Other orders**
>
> If a transaction or charge is set aside under s 294, the court may make 1 or more of the following orders:
>
> (a) 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:
>
> (b) an order that a person transfer to the company property that the company has transferred under the transaction:
>
> …

[110] The reasons Timberworld says it would be unfair to order it to repay the money are:

> (a) Northside's insolvency arises out of its debts to the Commissioner of Inland Revenue, which the Commissioner allowed to accumulate from 2004 and in respect of which the Commissioner took no steps to

---

[88] See above at [68], and above n 64. This is consistent with the Australian position, as set out in *Olifent*, above n 31, at 516–517: "I do not think the legislature can be taken to have intended the actual starting date of the continuing business relationship is the relevant date for the purposes of ascertaining the extent of the preference if the relationship commenced before the commencement of the [specified period]. If that were the position then in the case of the running account, the opening balance would, if it were not a nil balance, be no more than the opening entry on the account and it is almost inevitable that, in circumstances where the debtor company eventually goes into liquidation, the closing balance would exceed the opening balance. In that case a preferential payment would rarely occur…". We agree the legislature cannot be taken to have intended such an outcome.

recover until 2011. At that stage the debt had accumulated significantly, with more than half constituting penalties and interest.

(b) Timberworld had no knowledge of this worsening tax position and was prejudiced by the Commissioner's inaction.

(c) It would be unfair in the circumstances that the Commissioner should be the sole beneficiary of any repayment of debt.

[111] Associate Judge Abbott considered, however, that Parliament had specifically prescribed in s 296(3) conditions under which a payment must not be set aside in liquidation, on the basis of unfairness to the creditor. He considered therefore, that although there was some discretion to be exercised in s 295(c) in making orders, given the prescription set out in s 296(3), the threshold for invoking this residual discretion in s 295 ought to be very high.[89] Anything less would undermine the statutory scheme established through s 296(3) and would be an unprincipled departure from the basic principle of fairness between creditors.[90] While the Judge accepted an element of unfairness in the situation before him, he did not consider it to reach the threshold required to invoke s 295.

[112] Timberworld essentially repeated before us the submissions made in the High Court. Counsel referred to the legislative history of s 295, which it contends indicates an express purpose to protect creditors from "unfairness" of precisely this kind.

[113] We see no reason to depart from the reasoning of Associate Judge Abbott. No grounds or arguments were advanced to us to persuade us that the Judge's reasoning was flawed. The statutory scheme created by s 296(3) should be preserved. We agree with counsel for the liquidators that Timberworld can point to no "unfairness" that is not an intended consequence of the operation of the voidable preference regime, seeking to do justice to all creditors treated equally.

---

89 Being something beyond a general sense of unfairness – requiring instead some cogent and compelling factor going beyond a s 296(3) defence.

90 Given that unfairness to a specific creditor qua creditor has been clearly enumerated in s 296(3) – adding more by a sidewind would detract from that.

[114] It follows Timberworld's appeal must be dismissed.

Result

[115] The appeal and cross appeal in CA842/2013 are dismissed. As the honours are shared there will be no order as to costs.

[116] The appeal in CA226/2014 is dismissed. The respondent is entitled to an order for costs. The appellant must pay the respondent costs on a standard appeal on a band A basis plus usual disbursements.

Solicitors:
Foy & Halse, Auckland for Appellant in CA842/2013
Ford Sumner, Wellington for Respondent in CA842/2013
Gregory Simon Law, Ponsonby for Appellant in CA226/2014
Minter Ellison Rudd Watts, Wellington for Respondent in CA226/2014