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Comparative Legal Treatment of Ponzi Schemes

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Abstract

Ponzi schemes are a problem all around the world. Singapore courts have identified the following common characteristics: (1) there is no genuine underlying investment; (2) early investors receive the moneys paid by later investors, which the scheme describes as profits; (3) to maintain the viability of the scheme, there must be a constant replenishment of moneys from later investors; and (4) the scheme eventually collapses when the moneys from later investors are insufficient to pay earlier investors. The difficulty for recovery is created by the boundaries of insolvency law even if fraudulent conveyance rules can strictly exist outside the insolvency regime. This article will contrast the slightly different positions in various Commonwealth jurisdictions and the United States and suggest some changes if it is believed that the current levels of recovery from the early investors are inequitable from the perspective of the later investors.

Keywords: Company, Insolvency law, Ponzi schemes, Fraudulent transactions, Preferences, Singapore

Introduction

In a 2023 Singapore Court of Appeal decision *Perry, Tamar v Esculier, Jacques Henri* Georges[1] the Court (hearing an appeal from the Singapore International Commercial Court) provided the following definition of a Ponzi scheme:

> The essence of any Ponzi scheme entails the circulation of money among the scheme's investors. Like in all Ponzi schemes, some investors suffer losses, others make gains depending on when they entered and exited their investment. Typically, later investors in a Ponzi scheme will not benefit because at some stage, the money cycle will run out.

While Bitcoin was initially described as a Ponzi scheme,[2] it may be that the absence of redeemability from a centralized counterparty (which is why it is not a chose in action as it was designed not to raise funds for an underlying business obligor but only for

*I would like to thank Tracey Evans Chan, Wee Meng Seng and Kenneth Khoo for their helpful comments and suggestions.

[1] [2023] 2 SLR 30, [1].

[2] Tracey A Anderson, "Cryptocurrency: the wild, wild web: analogies to the American and Canadian wild, wild West - will history repeat?" (2018) 33(4) JIBLR 113.

secondary market trading as Omarova has identified of crypto generally[3]) makes it less likely that it will result in the usual problems created by a Ponzi scheme. This is that the early investors profit from the scheme at the expense of later investors whose monies are used to pay off the earlier ones (although with Bitcoin the initial founders who retain and corner most of the Bitcoin have become immensely wealthy from the secondary market activities of subsequent buyers and miners driving valuation upwards).

Given the worldwide proliferation of Ponzi schemes, most recently dealt with in extensive detail by Goh J at first instance and the Court of Appeal in Singapore in *Envy Asset Management Pte Ltd v CH Biovest Pte Ltd*[4], it may be necessary to use a decision tree (along with a series of questions) to help navigate the many moving parts created both by the different characterisation of parties and transactions and their effects in insolvency. It has been pointed out that having clear steps helps in the judicial reasoning process although it is not an unqualified good and may be more about lending legitimacy to court decisions.[5] *Envy* has provided much assistance in that regard and will be used as the basis for creating and analysing a comparative framework. The main holding in *Envy* was that, given the Ponzi structure there, the earlier investor did not provide valuable consideration for the contracted for profits distributed to them (recoverable as a fraudulent conveyance or undervalue transaction) although there was an antecedent debt for the initial sums invested (an unrecoverable preference).

Envy Trading: a Ponzi scheme in Singapore

The first point to note about *Envy* is that it was not about the later investors suing the earlier ones directly which failed in the *Perry* case above. There, the schemer had already dissipated all the sums given to it before he was arrested by Swiss authorities[6]. The case did not, however, involve the more "derivative"-like action implicating insolvency law where his (more accurately the companies he controlled) representative in bankruptcy tried to recover sums from the earlier investors. Instead, the Singapore Court of Appeal, applying Swiss law, which does not recognise the concept of a trust, found that the recipients there were protected from the direct claim by the earlier investors as they acted in good faith. They were bona fide purchasers for value without notice with respect to both principal and profit. The Singapore court had jurisdiction even though the investors were foreign parties as the monies paid by the later investor were traced to the

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[3] Saule T Omarova, "Financial Innovation: Three Fallacies in the Debate" in *ST Omarova, A Andhov and CA Hill (eds), Hidden Fallacies in Corporate Law and Financial Regulation: Reframing the Mainstream Narratives (Bloomsbury, 2025).*

[4] [2024] SGHC 46 (*Envy*), [2025] SGCA 3 (*Envy CA*). At first instance, Goh J also considered *Barclays Bank plc v Quincecare Ltd* [1992] 4 All ER 363 and acknowledged that it had been extensively reexamined by the UK Supreme Court (at [77]). This concerned the other large area of banking fraud, authorised push payment fraud, which is second only to credit card fraud. The Singapore Court of Appeal did not comment on *Quincecare*.

[5] Mitchell Johnston, "Steptification" (2021) 116 Nw UL Rev 383.

[6] See further Veltrice Tan, "A cautionary tale against Ponzi schemes: a victim's failed attempt in retrieving US $10 million from another victim" (2023) 44(8) Company Lawyer 280.

bank account of a Singapore bank of the earlier investor. The bank then commenced interpleader proceedings to determine who owned the money. It is unlikely that such tracing would often succeed given the cost of individual, as opposed to collective proceedings, and so the first fork in the decision tree would usually be to take the path where the action is brought by the trustee in bankruptcy. As we shall see, however, the question remains whether early investors provide valuable consideration in Ponzi schemes either for the initial investment sums (principal) or the contracted for gains (profits).

In *Envy,* liquidators of the Envy group of companies brought actions against the defendant, which was the recipient of monies paid to it by the Envy Asset Management Pte Ltd (EAM) that resulted from an investment fraud scheme for qualified investors between October 2017 and February 2020. This involved the purported trading of nickel (which being a physical asset and not a capital markets product did not result in any required Monetary Authority of Singapore licensing although EAM lied about having applied for such). The judge described this as a Ponzi scheme with the recipient one of the luckier earlier investors who had invested a principal amount in nickel under a letter of agreement with EAM under which it would receive repayments under an investment formula (linked to the appreciation in the price of nickel which EAM said it could obtain at a discount from an Australian mining company[7] but which it never purchased) after 3 months. The defendant received such repayments that were in excess of the principal amount invested and this was the subject of recovery by the liquidators on the basis that they were non-insolvency conveyances intended to defraud creditors under section 73B of the Conveyancing and Law of Property Act 1886 (based on the old s 172 of the UK Law of Property Act 1925, as the relevant time ruled out the application of the newer provisions in s 438 Insolvency, Restructuring and Dissolution Act 2018) ('IRDA') as well as transactions at an undervalue within the meaning of s 224(3) of IRDA (which provisions are similar to those found in the UK Insolvency Act 1986). The judges at first instance and in the Court of Appeal rejected the investor's arguments that what it had invested was subject to any form of *Quistclose* or other trust in its favour and held that what was paid out to them were both fraudulent conveyances as well as transactions at an undervalue and could be recovered by the liquidators.

The defendant argued that it had provided valuable consideration, which is a specific defence to a s 73B CLPA claim, and which also showed that it was not a transaction at an undervalue for the s 224 IRDA action. While the judge at first instance held that nominal consideration could be good consideration, he found that no valuable consideration had

[7] This was Poseidon Nickel Limited, listed on the Australian Stock Exchange. The Poseidon name was separately linked to the infamous stock market crash of early 1970 in Australian mining companies. The then Poseidon Nickel Limited was also a listed company whose shares rose from 80 cents from late 1969 to $280, partly fueled by the shortage of nickel, overly optimistic ore discoveries, as well as insider trading. It then collapsed and was eventually merged and delisted. It is unclear how the name has been reused and the linkages between the companies.

been provided for the profits as these were an “extracontractual payment”[8] in contrast to the return of principal which repaid an “antecedent debt”[9] (the return was pegged at a guaranteed minimum of 85% of the principal sum). The initial payment in by the defendant could not be seen as valuable consideration for the profit as there was no investment in nickel that could have appreciated in value (given that the whole scheme was a sham from inception). Where the Court of Appeal disagreed with Goh J was in his finding that good consideration was different from valuable consideration.[10] Instead, the higher court thought that both were not about consideration in the contractual sense and had to relate directly to the repayment, which was absent in *Envy*. It did not, however, address Goh J’s finding that consideration sufficient for contract formation was enough to prevent an unjust enrichment claim for the total failure of consideration (with absence of basis still not recognised as an unjust factor).[11]

Ponzi investor: creditor or transferee?

According to Goh J in *Envy*:

> [134] At best, the defendant is entitled to be returned its initial investment sum, which is the antecedent debt owed to it by EAM, though I note that EAM is not seeking a return of the initial investment sum from the defendant in the present application.

While the issue was clearly not fully argued, the Court of Appeal also implicitly accepted that the principal return was also the repayment of a previous debt. The reason why this is important is that the characterization of the investor as a creditor or transferee usually leads the analysis down different paths. Payments to the former can usually only be attacked as a preference where insolvency is a necessary condition. Payments to the latter can, as we have seen in *Envy*, be avoided both as a fraudulent conveyance outside of insolvency as well as a transaction at an undervalue in insolvency.

While the decision in *Envy* relied on some US cases, it may be that the cases there do not speak with one voice, largely because fraudulent conveyance rules are a matter of state law (now the Uniform Voidable Transactions Act 2014, formerly named the Uniform Fraudulent Transfer Act) whereas bankruptcy matters are federal. *Donell v Kowell*[12], a Ninth Circuit Court of Appeals decision that both Goh J and the Court of Appeal analysed in some detail, which came under the then California’s Uniform Fraudulent Transfers Act, prefaces its judgment by stating that US cases have always seen investors in a Ponzi

[8] *Envy* [2024] SGHC 46, [158].
[9] *Envy* [2024] SGHC 46, [134].
[10] *Envy CA* [2025] SGCA 3, [79]. See now *El-Husseiny v Invest Bank PSC* [2025] UKSC 4 holding that “‘consideration’ in section 423(1) has a narrower scope than in contract law generally”, although specifically there in that it has to move from and to the debtor (at [47]),
[11] *Envy* [2024] SGHC 46, [193].
[12] *Donell v Kowell* 533 F3d 762 (9th Cir, 2008). The early investor was allowed to retain some profit based on a settlement as the statute of limitations had run out on some payments.

scheme as “tort creditors”.[13] Unlike in Singapore, where they appear to be voluntary creditors in respect of an “antecedent debt”, it was said in *Donell* that[14]:

> to determine the actual amount of liability, the court permits good faith investors to retain payments up to the amount invested, and requires disgorgement of only the “profits” paid to them by the Ponzi scheme. *See In re Lake States Commodities, Inc.,* 253 B.R. 866, 872 (Bankr.N.D.Ill.2000) (collecting cases). Payments of amounts up to the value of the initial investment are not, however, considered a “return of principal,” because the initial payment is not considered a true investment. Rather, investors are permitted to retain these amounts because they have claims for restitution or recision against the debtor that operated the scheme up to the amount of the initial investment. Payments up to the amount of the initial investment are considered to be exchanged for “reasonably equivalent value,” and thus not fraudulent, because they proportionally reduce the investors' rights to restitution. *United Energy,* 944 F.2d at 595. If investors receive more than they invested, “[p]ayments in excess of amounts invested are considered fictitious profits because they do not represent a return on legitimate investment activity.” *Lake States,* 253 B.R. at 872.

This designation as a tort creditor may not be similar in the Commonwealth given the more rigorous meaning of unjust enrichment there, which as Goh J noted in Envy requires a total, as opposed to an absence, of consideration (where contractual consideration is relevant). But the greater flexibility in legal analysis allowed the *Donell* court to later see the investor as a “transferee”[15] rather than a “creditor”, and that there was a “Ponzi-scheme presumption”[16] that allowed a creditor to bypass the proof requirements of an undervalue transaction with respect to the profits. It is not consistent across US states, however, as a later Minnesota Supreme Court in *Finn v Alliance Bank*[17] refused to recognise such a presumption under its own Minnesota Uniform Fraudulent Transfer Act. It cited its own earlier decision that “the payment of an honest debt is not fraudulent under the general statutes against fraudulent conveyances, although it operates as a preference”[18] and not enough evidence had been led for it to be attacked as such. Although this case was not cited in *Envy*, it may be that it accords more with Commonwealth laws in that it does not automatically assume that the initial investment contract is nullified by public policy and that an antecedent debt can therefore be owed to the investor (see *Envy* at [157], also rejecting the “Ponzi-scheme presumption” of *Donell*). For that debt, which in Singapore would only cover the principal but in Minnesota

[13] *Donell v Kowell* 533 F3d 762 (9th Cir, 2008), 767.
[14] *Donell v Kowell* 533 F3d 762 (9th Cir, 2008), 772.
[15] *Donell v Kowell* 533 F3d 762 (9th Cir, 2008), 774.
[16] Kenneth C Johnston, Kellie M Johnson, Joseph A Hummel, “Ponzi Schemes and Litigation Risks: What Every Financial Services Company Should Know” (2010) 14(1) North Carolina Banking Institute 29, 38.
[17] 860 NW 2d 638 (2015).
[18] *Thompson v. Schiek,* 171 Minn 284, 287, 213 NW 911, 912 (1927).

(and, as we shall see, in the UK and NZ) might also cover the profit, the correct avoidance mechanism is preference and not an undervalue transaction.

Preference or transaction at an undervalue?

The difficulty for recovery is that once it is characterized as a preference, the focus on rescues today means that it is very difficult to succeed in that regard. This is true whether we are talking of English law or US law, which ostensibly should have been easier to utilize as there is no need to prove a *mens rea* like a "desire to prefer" the recipient creditor on the part of the debtor[19]. It has been recently said that:[20]

> '(t)he intent requirement under English law makes successfully proving a preference to a non-connected party nearly impossible. Such a preference is "virtually unavoidable"....However, US law has a host of defences to preference liability that greatly curtail the ability to bring successful preference actions.'

Under English/Singapore law, it would not be a voidable preference if given in the genuine belief that it involved proper commercial considerations.[21] One example is a case where pressure was brought to bear on the debtor by the creditor.[22] If pressure had been asserted by other creditors as well, however, and one particular creditor was favoured because of the good supportive relationship it had with the debtor, that would still amount to an unfair preference unless the pressure from that creditor was overwhelming or proper in the sense that it had some value to the debtor.[23] This though is a question of fact, and quite often an early investor in a Ponzi scheme that obtains repayment would have insisted on repayment when others would have rolled over their investment. This would not be a preference under English or Singapore law.

The number of defences in the US to what is an unfair preference may explain why many courts there have found ways to avoid seeing the investor as a creditor, other than a restitutionary "tort creditor". While it is likely that preference rules cover payments to contingent creditors[24], it is possible that a person with an unliquidated claim for restitution might not be seen as one[25]. Leading US and UK academics may agree that "there can be no overlap in the impact of the statutory provisions relating to transactions

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[19] But see *Kristin van Zwieten, Goode on Principles of Corporate Insolvency law (Sweet & Maxwell, 5th ed, 2019) 664* referring to Gerard McCormack, "Swelling Corporate Assets: Changing What Is on the Menu" (2006) 6 JCLS 39 who argues that preference laws in the US have almost been eliminated by its exceptions.
[20] Robert J Landry III, "Harmonization of English and US Preference Law Regimes: Is the Orthodoxy Losing Traction?" (2023) 32(2) Norton Journal of Bankruptcy Law and Practice Art 3 who argues that it is because of the focus on rescue.
21 *DBS Bank Ltd v Tam Chee Chong* [2011] 4 SLR 948.
22 *Lin Securities Pte v Royal Trust Bank (Asia) Ltd* [1994] 3 SLR(R) 899.
[23] *Cooperatieve Centrale Raiffeisen-Boerenleenbank BA v Jurong Technologies Industrial Corp Ltd* [2011] 4 SLR 977 at [44].
[24] Lee Eng Beng, "The Avoidance Provisions of the Bankruptcy Act 1995 and their Application to Companies" [1995] Sing JLS 597, 606.
[25] Lee Beng Tat, "Claiming a Pound of Flesh as a Contingent or Prospective Creditor under the Companies Act" [1993] Sing JLS 144.

at an undervalue and those concerning preferences."[26] But in US courts, we have seen that some flexibility remains in how they characterize an investor as creditor or non-creditor transferee. This is not because of the tendency to push things to a more uniform fraudulent conveyance law as compared to state corporate laws on, *eg*, capital maintenance[27], as preference laws are federal, but perhaps because of the practical dead end[28] that comes with preference law recovery. Having said that, we have seen how there is even flexibility in the way US courts dealt with a preference-related idea like *pari passu*[29] where the court in the Southern District of New York linked it to whether a sovereign debtor had been "uniquely recalcitrant"[30].

Many parts of the Commonwealth lack such flexibility and so you have to take one path or the other, preference or undervalue transaction, and the odd case that states otherwise is immediately seen as incorrect.[31] In *Envy*, for example, Goh J separately headlined the argument *"Whether the claimants have fundamentally erred in their choice of avoidance provisions".*[32] This was a threshold question that Goh J thought he had to answer given that some see preference law as only concerned with inter-creditor conflicts,[33] whereas undervalue transactions are more about asset preservation. Here, he identified a possible issue arising from another major Ponzi scheme case, *Stanford International Bank Ltd (in liquidation) v HSBC Bank plc*[34] where the UK Supreme Court saw the payments out there to SIB's investors in the nature of debt repayments (redemption payments and interest). The debt or forbearance to sue on that would have provided the necessary consideration so that it would not be a transaction at an

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[26] Van Zwieten, *Goode on Principles of Corporate Insolvency law (Sweet & Maxwell, 5th ed, 2019), 13-101*.
[27] Marcel Kahan, "Legal Capital Rules and the Structure of Corporate Law: Some Observations on the Differences Between European and US Approaches" in *Hopt and Wymeersch (eds), Capital Markets and Company Law (OUP, 2003) 145, 147-8* points out this is preferred in the USA with less chance of forum shopping as these rules are not governed by the law of the state of incorporation.
[28] Andrew Keay, "Preferences in Liquidation Law: A Time for a Change" (1998) 2 CFILR 198, 215 who states that "avoidance of preferences is, except where the creditor is classified as connected with the company, virtually dead".
[29] Van Zwieten, *Goode on Principles of Corporate Insolvency law (Sweet & Maxwell, 5th ed, 2019) 616*.
[30] Compare *NML Capital v Republic of Argentina* 727 F3d 230, 247 (2nd Cir) (emphasis added by the judge in *White Hawthorne LLC v The Republic of Argentina* No 16-cv-1042 (SDNY Dec 22 2016) where it was also held that monetary damages was not separately available for a breach of the *pari passu* clause. See now Riz Mokal, "The Mysterious Pari Passu Principle" (2024) 39(7) BJIBFL 443. The whole area of holding out with sovereign bonds has been said to be uncertain and abused by creditors: N Ranpuria. "A gap in the law", Financial Regulation International, 22 May 2023.
[31] Look Chan Ho and Riz Mokal, "Barber v CI – Preference Equals Undervalue?" 920060 22 IL & P 183 pointing out the logical fallacy in saying that what would have been a preference (due to the precariousness of the creditor's consideration) would per se be a transaction at an undervalue (as the debtor's payment would be equally precarious).
[32] *Envy* [2024] SGHC 46, [63].
[33] A director may have a separate duty to mediate inter-creditor conflicts: *Moulin Global Eyecare Trading Ltd v Olivia Lee Sin Mei (No 3)* (2014) 17 HKCFAR 466, noted in TKC Ng, "Director's Duty Not to Prefer One Creditor to Another" (2015) 74 CLJ 20. It has been held that the New Zealand equivalent provisions on unfair preferences, Companies Act 1993 (NZ) s 292, does not have any requirement that the transaction diminish the assets of the company: *Robt Jones Holdings Limited v McCullagh* [2019] NZSC 86.
[34] *Stanford International Bank Ltd (in liquidation) v HSBC Bank plc* [2023] AC 761 noted Chua Rui Yuan, "The Aftermath of a Ponzi Scheme" [2023] LMCLQ 218.

undervalue (there being no change in the repayor's net asset position), but only an unfair preference. This was quite crucial as there were no formal preference laws in Antigua where SIB was incorporated. SIB's liquidators had to turn to HSBC, who managed SIB's bank accounts, for not preventing the payments.[35]

With respect to whether the repayment of profit was a preference (where like the principal it would have been hard to prove the *mens rea* requirement on the part of the debtor) or just a transaction at an undervalue (which it was given the absence of valuable consideration), Goh J pointed out that the *Envy* case was different from *Stanford* as EAM did not owe a debt to the defendant since EAM never became obliged to repay any profit given that its liability would only have arisen if nickel had been purchased under the letters of agreement, and it had then appreciated in value.[36] Given that no nickel was ever bought, no liability ever arose that could be discharged, and no preference ever ensued with respect to the profit (but only the principal) (although query if an obligation to repay could arise even without actual purchase of the underlying nickel if the contract was one not for delivery but a betting or derivative agreement, which is discussed in the paragraph following the next).

Many of these conceptual problems were discussed in *Re MC Bacon*[37] where it was held that the giving of security to an existing debtor could not be a transaction at an undervalue but only a preference. There is no depletion in the value of a company's assets but there could be an attempt to opt out of a collective scheme and winning the "race of diligence".[38] Preference law prevents a creditor getting more than what it would have in a hypothetical liquidation. While the Singapore Court of Appeal in *Rothstar Group Ltd v Leow Quek Shiong*[39] confirmed that *MC Bacon* applies in Singapore, it was restricted to security given for the grantor's own existing debt. In contrast, the grant of security for a third party's existing debt can in principle still be considered a transaction at an undervalue. A comparison is made with respect to the actual quantifiable monetary value of the consideration received and provided by the grantor. In this case, the grantor received no value in money or money's worth compared to the significant value it provided and the legal mortgage was discharged as the grantor was insolvent at the time of, or became insolvent as a result of, granting the legal mortgage. In *Envy*, such an approach that still looks at the factual matrix was preferred,[40] and was applied to the

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[35] *Stanford International Bank Ltd (in liquidation) v HSBC Bank plc* [2023] AC 761, [83]. There the fallback was the argument that HSBC had breached its *Quincecare* duty to SIB. But the majority in the UK Supreme Court rejected the appeal against the striking out of a claim on the basis that SIB was already insolvent by the time its account was depleted and so did not suffer an actionable loss.

[36] *Envy* [2024] SGHC 46, [83].

[37] [1991] Ch 127, *cf Hill v Spread Trustee Co Ltd* [2006] EWCA Civ 542 and *Eucus International Pte Ltd v Tenacious Investment Pte Ltd* [2016] SGHC 50, [39].

[38] Adrian Walters, "Preferences" in *Howard Bennett and John Armour (eds), Vulnerable Transactions in Corporate Insolvency (Hart Publishing, 2003) 4.14.*

[39] [2022] 2 SLR 158.

[40] *Envy* [2024] SGHC 46, [157].

repayment there to find that there was no valuable consideration for the profits. The Court of Appeal, however, disagreed that there was any "threshold requirement" as the basis for all avoidance provisions were not dissimilar, which was to "preserve the assets of the company", and this worked "in tandem with the 'Distribution Rationale'".[41] Similarly, the UK Supreme Court in *El-Husseiny v Invest Bank PSC*[42] has recently said that while preferences and undervalue transactions are different, "there may be circumstances in which the same transaction falls, to some extent, within section 238 or 339 as a transaction at an undervalue, and to a different extent, within section 239 or 340 as a preference". A test for the former does not exclude the latter, and it is pragmatism rather than a strict binary delineation that prevails.

Instead, Singapore Court of Appeal in *Envy* addressed the argument that the investment contract here was more in the nature of a contract for difference with the price of nickel to be used as a reference point at the end of 3 months whereupon a contractual obligation arose to pay both principal and profit. Here, the Court of Appeal distinguished the Privy Council case of *Fairfield Sentry Limited (in Liquidation) v Migani*[43] as there was a certification clause provided under the agreement there that created an obligation to pay out once certification setting out the amounts due under a Madoff fund was made (based on the new asset value per share of the fund). In contrast, the investment agreement here required the actual trading of nickel to create any possible obligation to pay out on a profit which was not simply calculated on the underlying market value of nickel. The Court of Appeal thought that even if a certification clause were present on the facts, the investor would still not have been entitled to the payouts since the certification clause does not "render valid what was otherwise a fiction".[44] The Court of Appeal[45] held that profits paid out by fraudulent artifices were profits merely in form but not substance. It again referred to *Donell v Kowell,*[46] where the US Court of Appeals for the Ninth Circuit said:

> payouts of 'profits' by Ponzi scheme operators are not payments of return on investment from an actual business venture. Rather, they are payments that deplete the assets of the scheme operator for the purpose of creating the appearance of a profitable business venture.

In summary, under most Commonwealth jurisdictions, payments to initial investors in a Ponzi scheme can be seen as a preference for an antecedent debt or a fraudulent conveyance/transaction at an undervalue, and ordinarily not both. However, there is no threshold question as such to be answered but rather an examination of the factual

[41] *Envy CA* [2025] SGCA 3, [38]-[40].
[42] [2025] UKSC 4.
[43] [2014] UKPC 9. The Singapore Court of Appeal preferred instead *Skandinaviska Enskilda Banken AB (Publ) v Conway (as Joint Official Liquidators of Weavering Macro Fixed Income Fund Ltd)* [2019] UKPC 3.
[44] *Envy CA* [2025] SGCA 3, [48].
[45] *Envy CA* [2025] SGCA 3, [59].
[46] 533 F 3d 962 (9th Cir 2008). This case was also discussed in detail at first instance, *supra* n 12

matrix to see which avoidance provision is at play. If the former, usually for the principal invested, recovery is unlikely (except perhaps in the Antipodes where there is no *mens rea* requirement for a preference). Where the latter is concerned, usually for the contracted for profits, the next questions are then whether insolvency is a necessary condition for recovery and if valuable consideration had been furnished by the early investor.

Non-insolvent fraudulent conveyance or insolvent transaction at undervalue?

Goh J observed in *Envy* that although there are some differences between the post-insolvency transactions at an undervalue provision in s 224 IRDA and the modern incarnation of the pre-insolvency fraudulent conveyance (now also referencing "transaction") provision in s 438 IRDA (which as we have seen did not apply at the relevant transactional time as it only replaced s 73B CLPA on 30 July 2020) he thought that both shared the same principles.[47]

The elision may not just be conceptual but also practical. US fraudulent conveyance cases identify a necessary purpose to defraud creditors only if this leaves the company "insolvent or with unreasonably small capital"[48] as that puts assets beyond the reach of creditors.[49] Intent may otherwise be hard to prove, as this is rarely "susceptible to direct proof".[50] It has separately been pointed out that there is very little litigation on the fraudulent conveyance rules outside of insolvency in the US, and such an approach requires a very large bankruptcy adjudication system[51]. It is likely similar in NZ, where under s 346 of their Property Law Act 2007 the transaction must be made by a debtor who was insolvent or became insolvent due to the transfer, or whose remaining assets were "unreasonably small", or who incurred "debts beyond the debtor's ability to pay".

But that is not the case in the UK, where in *BTI 2014 LLC v Sequana*[52] the judges continued to accept that the fraudulent conveyance rules did not require the need to prove

[47] *Envy* [2024] SGHC 46, [171]. It is said to be the same in the US: *David G Epstein and Steve H Nickles, Principles of Bankruptcy Law (Thomson West, 2007) at 120*. *Cf* Armour, "Transactions Defrauding Creditors" in *Bennett and Armour eds, Vulnerable Transactions in Corporate Insolvency (Hart Publishing, 2003), 3.63* that there are 2 important differences with respect to remedies. Some doubt has been expressed over whether the provisions have a common rationale: *El-Husseiny v Invest Bank PSC* [2023] EWCA 55, [41], but compare [2025] UKSC 4, [62] finding them similar except for the mental element.

[48] Kahan, "Legal Capital Rules and the Structure of Corporate Law: Some Observations on the Differences Between European and US Approaches" in *Hopt and Wymeersch (eds), Capital Markets and Company Law (OUP, 2003)*, *147*.

[49] Section 548(a)(1), US Bankruptcy Code; *Whyte ex rel. SemGroup Litig. Trust v. Ritchie SG Holdings, LLC*, 526 B.R. 556 (D Del 2014).

[50] This is illustrated in *re Kaiser*, 722 F2d 1574 (2d Cir, 1983).

[51] JB Heaton, "The Social Costs of Dividends and Share Repurchases" (2019) 12 Journal of Business, Entrepreneurship & the Law 361 370- 377.

[52] [2022] UKSC 25, affirming [2019] UKCA Civ 112.

insolvency,[53] as they are even meant to protect *future* creditors.[54] There a large special dividend paid by a company to its holding shareholder was a transaction to defraud creditors even though the company only became insolvent 10 years later. Goh J saw the payout of profit in *Envy* as similar in that there was no legal right to such repayment, which was perhaps to be seen more like a discretionary return on equity.[55] The Singapore Court of Appeal thought, however, that this could not be seen as a "transaction", now required by both the insolvent undervalue transaction rules as well as the one *de hors* insolvency (which previously referred to "conveyance"). The Court of Appeal thought that a transaction required some form of mutuality. Whereas the dividend payment in *Sequana* had such since an earlier dividend declaration would have created a debt, and this was part of the shareholder bargain, in *Envy* there was no mutuality given the extra-contractual payment there, which was a unilateral payment. This could not fall under the second limb of s 224(3)(a) as a transaction "on terms that provide for the company to receive no consideration". Instead, the Court of Appeal thought that the extra-contractual payments were in the nature of a gift which was expressly covered by the first limb of that subsection.[56]

The interaction between the two limbs was the subject of detailed analysis by the UK Supreme Court in *El-Husseiny v Invest Bank PSC.*[57] There, the Court of Appeal had held that a debtor, which caused a company he controlled to transfer its assets to his sons, had entered into a transaction to defraud his own creditors which resulted in the diminution in the value of his shares. This was so even though the debtor did not itself transfer any of its own property (in particular the shares he held in the company) to a third party which counsel sought to argue that provision required. Rejecting counsel's argument that s 423 simply did not catch such transactions, however, egregious, the Supreme Court held that the meaning of a transaction was not restricted to the transfer of an asset beneficially owned by the debtor and included the debtor procuring a company which he owned to transfer a valuable asset. The Supreme Court thought that

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[53] In *Sequana*, [2022] UKSC 25, [61], Lord Reed said that "section 423 is one among a number of rules of insolvency law", but none of the other judges saw it as such.
[54] *Midland Bank v Wyatt* (1882) 18 Ch D 588, where the father transferred assets to children without intending to benefit them to protect the family business from long-term commercial risk, ie, future creditors, discussed by Armour, "Transactions Defrauding Creditors" in *Bennett and Armour eds, Vulnerable Transactions in Corporate Insolvency (Hart Publishing, 2003), 3.45*. For an Irish perspective, see *Doherty v Quigley* [2015] IECA 297. Defrauding creditors has to be a purpose and not the sole or dominant purpose of the transaction: *JSC BTA Bank v Ablyazov* [2018] EWCA Civ 1176.
[55] *Envy* [2024] SGHC 46, [177]. The important point about the recovery of returns on equity (as opposed to debt) is discussed by Saul Levmore, "Rethinking Ponzi-Scheme Remedies in and out of Bankruptcy" (2012) 92 BU L Rev 969 and Spencer A Winters, "The Law of Ponzi Payouts" (2012) 111 Mich L Rev 119.
[56] *Envy CA* [2025] SGCA 3, [93]-[108].
[57] [2025] UKSC 4. In a decision on its merits, *Invest Bank PSC v El-Husseini* [2024] EWHC 2976, the High Court held that the purported debtor was not in fact one as it could not be proved that he had guaranteed two loans. Further, there was insufficient evidence that he had the purpose of putting his assets beyond reach of creditors or otherwise prejudicing their interests. This is subjective, and it may be that proof of insolvency or 'financial difficulties' is required. No adverse inferences were drawn against transferor for not giving evidence even though he told his financial advisers that the transfers were for "asset protection purposes".

the second limb referring to "transaction" could not be limited by the reference to "gift" in the first limb to require the transfer of property owned by the debtor. Instead, the meaning of transaction was wider although that does not rule out the requirement of mutuality in some form. Indeed, the Singapore Court of Appeal relied on earlier English authorities to find the need for mutual dealings.[58]

Whether the fraudulent conveyance rules can only be invoked with proof of insolvency might not matter with Ponzi schemes in those jurisdictions like those US states, even those that reject the "Ponzi-scheme presumption", which see the scheme as insolvent from the beginning.[59] But it would in Singapore, where the first instance judge,[60] who followed those US cases, was overruled by the Court of Appeal on the grounds that a balance sheet test is used in the US. Based on that test, a Ponzi scheme would be insolvent from the outset given that its liabilities would always exceed its total assets. Instead, it found on the facts that the payor in Envy was cash-flow insolvent, the test in Singapore, given both its contracted obligations as well as potential claims against it for breaches of contract and misrepresentations.[61] It may, however, be that there will, in future be greater merger between the rules regarding fraudulent conveyances and insolvent transactions at an undervalue in that the former would also invariably call for proof of insolvency. Lord Reed in *Sequana* seemed to see this[62], so might have the decision at first instance in the trial of *El-Husseini*[63] as has a leading UK academic.[64] In Singapore, even though the fraudulent conveyance claim in Singapore is similarly formally not dependent on proof of insolvency, it was said in *Larsen Oil and Gas Pte Ltd v Petroprod Ltd*[65] that for transactions defrauding creditors entered into despite insolvency, the "claim against [the defendant would be] in fact an insolvency claim that is non-arbitrable."

Valuable consideration given for the counter-transfer of profit or just the principal?

Ultimately, then, everything turns on whether valuable consideration was provided by the early investor for the sums paid to it so that the company was obliged to pay out the profits.

[58] *Re Hampton Capital Ltd* [2016] 1 BCLC 374 at [38] followed by *Envy CA* [2025] SGCA 3, [100].
[59] Kenneth C Johnston et al, "Ponzi Schemes and Litigation Risks: What Every Financial Services Company Should Know" (2010) 14(1) North Carolina Banking Institute 29, 38.
[60] *Envy* [2024] SGHC 46, [19].
[61] *Envy CA* [2025] SGCA 3, [117].
[62] *Sequana,* [2022] UKSC 25, [61].
[63] *Invest Bank PSC v El-Husseini* [2024] EWHC 2976.
[64] *Cf* Armour, "Transactions Defrauding Creditors" in *Bennett and Armour eds, Vulnerable Transactions in Corporate Insolvency (Hart Publishing, 2003)*, 3.1, stating that, in practice, it is difficult to show that the creditors have been prejudiced without showing the debtor's insolvency. But compare *El-Husseiny, supra* 47, [75] disagreeing with the Report of the Committee on Insolvency Law and Practice (Cmnd 8558), June 1982 ('Cork Report') which had said that "the remedy is seldom if ever invoked unless the debtor as in fact become insolvent".
[65] [2011] SGCA 21, [58].

We have seen that although the analyses differed in some jurisdictions, most came to the same conclusion with respect to the principal (which cannot be recovered from the investor) and profit (which can). While that was also the majority holding in the New Zealand Supreme Court decision in *McIntosh v Fisk*[66], Goh J, at first instance in *Envy*, however, also dealt with the dissenting judgment there of Glazebrook J (as well as that of Miller J who dissented in the Court of Appeal), which held that no valuable consideration had been provided even in respect of the principal which was consequently recoverable. She thought that the initial investments had no value other than delaying the inevitable collapse of the Ponzi scheme.[67] Policy-wise, Glazebrook J also thought that it would provide incentives even for the first innocent investors to detect the fraud earlier.[68] Such an approach was open to her as the crucial thing about New Zealand's preference rules (which are voidable transactions in s 292 of the Companies Act 1993 sharing the same s 296 defences with undervalue transactions in s 297, so that the latter did not have to be considered) is that there is no *mens rea* requirement on the part of the debtor. Consequently, it does not matter significantly which part of the repayment is seen as a preference and which an undervalue transaction (and the equivalent defence also applies to their s 346 Property Law Act 2007 disposition claim). They are all subject to the question whether valuable consideration had been furnished for the payment.

The majority in *McIntosh* also focused on whether valuable consideration had been provided for the entire repayment amount, and found that while that was not the case with the profit, it was for the principal (which created an antecedent debt up to its stated value only).[69] Goh J saw this case as adopting a more fact sensitive approach, which he preferred given the absence of Ponzi scheme legislation.[70] Whether valuable consideration was provided by the investor was to be judged from the perspective of the company given its net asset position.[71] The Singapore Court of Appeal in *Envy* also adopted this approach but characterized the matter slightly differently. While valuable consideration was a specific defence to the fraudulent conveyance claim, the issue was again not with contractual consideration but whether value had been given for the conveyance. Similarly, for the insolvent undervalue transaction provisions, the "various aspects of considerations are merely touchstones to the overarching inquiry whether the payment…constituted a transaction at an undervalue".[72] This is a pragmatic and factual approach which was also seen in that it did not believe there was a "threshold question"

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[66] *McIntosh v Fisk* [2017] 1 NZLR 863, [2017] NZSC 78 affirming [2016] 2 NZLR 783.
[67] *McIntosh v Fisk* [2017] 1 NZLR 863, [270].
[68] *McIntosh v Fisk* [2017] 1 NZLR 863, [276]. See also Miller J in the Court of Appeal, [2016] 2 NZLR 783, [107].
[69] *McIntosh v Fisk* [2017] 1 NZLR 863, [132]-[133].
[70] *Envy* [2024] SGHC 46, [164].
[71] *Envy* [2024] SGHC 46, [170] following *Rothstar* at [25]. See also van Zwieten, *Goode on Principles of Corporate Insolvency law (Sweet & Maxwell, 5th ed, 2019)*, *636*, referencing *Re MC Bacon Ltd* [1991] Ch 127.
[72] *Envy CA* [2025] SGCA 3, [91].

it had to answer as to whether the transaction in question was either a preference or undervalue transaction.

In fact, it can be argued that the New Zealand (and Australian) approach is the most context-sensitive given that there is no immediate dead end once a payment is characterized as a preference (since there is no *mens rea* requirement). In contrast, we have seen how it matters in other jurisdictions due to either the absence of preference law (Antigua), the need for *mens rea* on the part of the debtor (UK, Singapore), or wide permissible defences (US). For these countries, preference laws could be made stricter so that they provide a more potent avenue for recovery. Indeed, one could argue that it is not the debtor's state of mind but that of the early investor (who may well have known of the scheme and demanded repayment[73]) that is the aggravating factor. While self-help is encouraged, there are other policies at work.

Without any changes to preference recovery, the likely next step in Ponzi litigation would be to argue that the amount represented by an antecedent debt is in fact smaller than the principal amount. This could have happened in *Envy* given that the guaranteed repayment was only for 85% of the principal (but we have seen that the liquidators did not ask for any repayment of principal). Even whether any part of the principal actually represents an antecedent debt could be challenged going forward so that a larger portion of a repayment can be recharacterised (or more accurately properly characterised) as an undervalued transaction.[74] Arguments have been made that what is actually a debt repayment or seen more as a return on equity should be used to determine what can be recovered[75], as should excessive payouts that should have been known to the investor.[76] Instead of a wide meaning of debt based on any form of repayment obligation, for example, a narrower definition drawn from the idea of a loan could be used instead. Here it was held by the Singapore Court of Appeal in *Creanovate Pte Ltd v Firstlink Energy Pte Ltd*[77], again following earlier UK authorities[78] that, in respect of the statutory controls on corporate loans to directors and their connected persons, this required the actual transfer of funds from creditor to debtor and would not include, for example, other indirect forms of granting credit.

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[73] Yet that demand by the creditor may be seen as destructive of any "desire to prefer" on the part of the debtor if the repayment is made in the genuine belief that it involved proper commercial considerations, such as in a case where pressure was brought to bear on the debtor by the creditor: *Lin Securities Pte v Royal Trust Bank (Asia) Ltd* [1994] 3 SLR(R) 899.

[74] Van Zwieten, *Goode on Principles of Corporate Insolvency law (Sweet & Maxwell, 5th ed, 2019)*, *690* citing *Re HHO Licensing Ltd* [2008] 1 BCLC 223 that a payment up to the value of a service was a preference, but any excess beyond that could be an undervalue transaction.

[75] Levmore, "Rethinking Ponzi-Scheme Remedies in and out of Bankruptcy" (2012) 92 BU L Rev 969. See further Robert Flannigan, 'The Debt-Equity Distinction' (2011) 26 Banking and Finance Law Rev 451.

[76] Winters, "The Law of Ponzi Payouts" (2012) 111 Mich L Rev 119.

[77] [2007] 4 SLR(R) 780 (as to the meaning of a loan in ss 162 and 163 of the Companies Act).

[78] *Champagne Perrier Jouet SA* v. *HH Finch Ltd.* [1982] 3 All ER 713.

While bankruptcy law is expected to respect pre-insolvency relative entitlements,[79] ascertaining what those entitlements are is not always straightforward, particularly in a Ponzi scheme where returns are often convoluted and the earliest investors possible colluders (and even if not, would have inadvertently given credence to the whole scheme and may have encouraged later investors to participate) It may also be that debt-equity distinction has been blurred by the private capital market and may only be relevant in collective proceedings.[80] This comes close to challenging pre-insolvency entitlements, but it could be that Ponzi-schemes require some exceptionalism to achieve the fairness that the minority in both the New Zealand Court of Appeal and Supreme Court in *McIntosh* thought was necessary. There are today multiple theories aside from the creditors' bargain and priority that underlie modern insolvency law.[81]

While it is said that preferences are allowed outside of insolvency given that in those situations creditor rights and enforcement are based on 'first-come, first-served'[82], there is nothing really naturally immutable about these rules. It has to be acknowledged, however, that the UK Report of the Review Committee on Insolvency Law and Practice[83] ('Cork Report'), which recommended the abolition of the requirement of a dominant intention to prefer, and led to the present "desire to prefer" test, said that "(t)he creditor who is active to obtain payment of his own debt ought in principle to be allowed to retain the fruits of his diligence. He ought not to be made to refund them for the benefit of others who were less diligent". The point remains, however, that the payee in a Ponzi scheme may not be seen as a creditor, or at least not for the full amounts claimed. With recharacterization in general,[84] it has been said that it is driven by both externalities as well as government interest analysis. In a slightly similar context, we have seen that the first-in-first-out rule of equitable tracing is also varied by context and circumstances. It is not metaphysical and driven by pragmatism and fairness with harsher equitable presumptions applying when the tracing is against a wrongdoer rather than an innocent volunteer.[85] In Ponzi schemes a *pro rata* approach has sometimes been taken with respect to tracing rules.[86]

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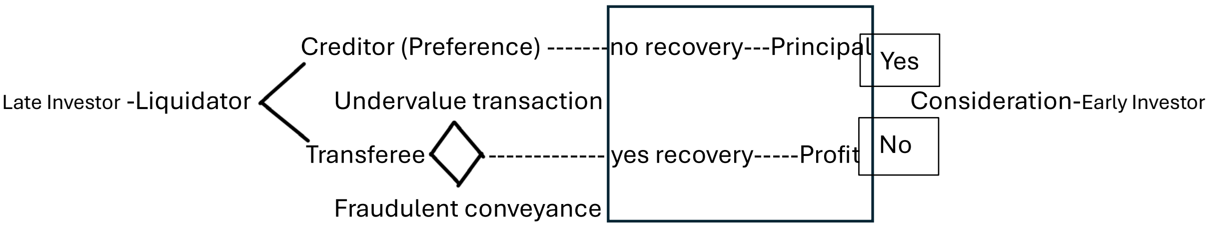
[79] Thomas Jackson, *The Logic and Limits of Bankruptcy Law (Harvard University Press, 1986) 21*, Samuel Biresaw and Mia Rahim, "Theories and goals of insolvency in common law – a critical review" [2025] JBL 24 at 30-31.
[80] Narine Lalfaryan, 'Chameleon Capital' (2024) University of Cambridge Faculty of Law Legal Studies Research Paper No 30/2024.
[81] Biresaw and Rahim, "Theories and goals of insolvency in common law – a critical review" [2025] JBL 24.
[82] Jackson, *The Logic and Limits of Bankruptcy Law (Harvard University Press, 1986) 124*.
[83] Cmnd 8558, 1982 at para 1256.
[84] Steven L Schwarcz, "Collapsing Corporate Structures: Resolving the Tension Between Form and Substance" (2004) 60(1) The Business Lawyer 109.
[85] Magda Raczynska, "Subordination of the Wrongdoer in Tracing Claims" in *Paul S Davies and Hans Tjio (eds), Fraud and Risk in Commercial Law (Hart Publishing, 2024).*
[86] See, eg, US Court of Appeals Seventh Circuit in *In re Mississippi Valley Livestock* 745 F3d 299 (7th Cir 2014) at 308. See also Andrew Kull, "Ponzi, Property and Luck" (2014) 100 Iowa LR 291; *cf* Chapter 2, "The Future of Restitution and Equity in the Distribution of Funds Recovered from Ponzi Schemes and other Multi-Victim Frauds" (2020) 133 Harv LR 2101.

Conclusion

Insolvency law can sometimes be too microscopic and may miss a bigger picture where systemic risks are concerned. This is why its rules are bypassed with market contracts and Recognised Investment Exchanges and Recognised Clearing Houses.[87] Here legislation gives primacy to the default rules of an approved or recognised exchange/clearing house over the general laws of insolvency. Without this, its business rules, as well as its netting arrangements, may not be enforceable once insolvency proceedings have commenced. These provisions protect the clearing house from the insolvency of its members by relaxing extant insolvency law. With Ponzi schemes, however, we may need to strengthen insolvency rules (like removing the "desire to prefer" requirement on the part of debtors for preferences or perhaps altering some pre-insolvency entitlements or at least scrutinising what is in fact a debt or payment obligation) to protect more investors from the insolvency of the Ponzi operator. Sharing more equally likely reduces systemic risks, and as Glazebrook J said it would incentivise everyone to be more vigilant including the early investors whose involvement would have given the scheme the credibility to attract later investors and last longer than it otherwise would. They could also be seen as providing no valuable consideration not just for the profits, but some of the principal as well. In this regard, the non-insolvency fraudulent conveyance provision may still provide some assistance even if the modern versions of it are worded very similarly to the insolvency provisions on transactions at an undervalue.

[87] Van Zwieten, *Goode on Principles of Corporate Insolvency law (Sweet & Maxwell, 5th ed, 2019)*, 13-137.

Ponzi scheme decision tree



Notes to the Diagram (jurisdictional differences are found inside the box)

1. The diagram represents the Singapore position where it was assumed that the principal sum invested created an antecedent debt although that was not fully argued in *Envy Asset Management Pte Ltd v CH Biovest Pte Ltd* [2024] SGHC 46; [2025] SGCA 3. Repayment of this sum could be considered a preference but that requires proof on the part of the debtor of a "desire to prefer" the early investor and is not recoverable. However, the early investor provides no consideration for the profit (which may be seen as a form of discretionary equity return) that can be recovered as an undervalue transaction or fraudulent conveyance.

2. Ponzi schemes are said to be insolvent (on a balance sheet basis) at inception in US states, and so there is no difference between a claim for an insolvent undervalue transaction or a fraudulent conveyance which otherwise can be brought without proof of insolvency. That may not be the case in Commonwealth jurisdictions where the test is not one of balance sheet insolvency although the Court of Appeal in *Envy* found that the scheme was, on its facts, cash flow insolvent. The diamond represents the claim fork and remerger. But it may be the case that the two actions will in future elide given the difficulties of proving a purpose of defrauding creditors without proving insolvency or financial difficulties on the part of the payor.

3. In the US, the early investor is usually seen as a "tort creditor" with a claim for restitution and this is seen as a "Transferee". However, recovery is also limited to the profit only as the investor is seen to have provided valuable consideration for the repayment of principal, which would not be seen as an undervalue transaction or fraudulent conveyance.

4. In New Zealand and Australia, there is no need to prove a "desire to prefer" the early investor and so there is the possible recovery of a preference. However, consideration is again usually seen to have been provided for the principal and not the profit. A minority in *McIntosh v Fisk* [2017] NZSC 78 thought though that there was no consideration even for the return of principal and so the entire repayment could be set aside.

5. In the UK, the entire repayment (particularly if there was some earlier confirmation from the payor under the contract terms) could be seen as one for an antecedent debt and so subject to the preference rules. However, the need to prove a "desire to prefer" would mean that recovery of both principal and profit is difficult without even asking whether valuable consideration was furnished. This is even more the case in its former colony, Antigua, where an appeal to the Privy Council was heard in *Stanford International Bank Ltd (in liquidation) v HSBC Bank plc* [2023] AC 761, which does not have any preference rules at all.

6. The solution is to alter the legal algorithm in the box if a different outcome is desired in any particular jurisdiction. Preference rules could become stricter to facilitate recovery and/or the amounts determined as Principal and Profit and seen to be supported by valuable consideration varied by seeing the initial investment as having a different mix of debt and equity.