Challenging fraudulent transactions and unfair loans as voidable pre-liquidation transactions

Andrew Keay*

1. Introduction

Transactions entered into by a company on or after 23 June 1993[1] and prior to its liquidation may be held by a court, on the application of the liquidator, to be voidable under s. 588FE of the *Corporations Law*.[2] Where a transaction is held voidable the court may make one or more of the orders contained in s. 588FF in relation to the transactions. According to Division 2 of Part 5.7B of the *Corporations Law* there are two broad types of transactions which are able to be classified as voidable: insolvent transactions;[3] and unfair loans.[4]

An insolvent transaction must be, according to s. 588FC, either an unfair preference or an uncommercial transaction, and the transaction must have either been entered into when the company was insolvent or resulted in the insolvency of the company. In addition, the transaction must have been entered into within a specified time zone prior to the liquidation.[5] The time zone is calculated by referring to the relation-back day. This day, defined in s. 9, is pivotal in determining whether pre-liquidation transactions can be challenged by a liquidator.[6] For the most part the date will, in compulsory liquidations, be the date of the filing of the application to wind up. In voluntary liquidations the date will, ordinarily, be the date on which the members resolve to wind up.

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* LLB; MDiv (Hons); LLM, Associate Professor of Law, Faculty of Commerce, University of Southern Queensland, Solicitor of the Supreme Court of Queensland.

1 This was the date on which Division 2 of Part 5.7B of the *Corporations Law* (in addition to other provisions) began to operate (*Commonwealth of Australia Gazette* No. 186, 23 June 1993). The Division was introduced into the *Corporations Law* by the *Corporate Law Reform Act 1992* (Cwlth). If an application to wind up was filed before 23 June 1993 then the previous avoidance provisions as regulated by s. 565 would apply (see s. 1383(3)).

2 All references to sections in this article will be to the *Corporations Law* unless the contrary is indicated.

3 Subsections 588FE(2)-(5).

4 Section 588FE(6).

5 See s. 588FE.

6 Australian Law Reform Commission, *General Insolvency Inquiry*, Report No. 45, 1988 (commonly known as 'the Harmer Report'), para. 635. For a discussion of the 'relation-back day' see Keay, A., 'Relation-back Day and Related Entity: New Key Terms in Liquidation Law' (1994) 2 *Insolv L J* 126 at 127-129.

To determine the time zone for insolvent transactions the liquidator will ascertain the relation-back day and then work back from that date.

Insolvent transactions which are classified as unfair preferences or uncommercial transactions may only be voidable if they were entered into within six months or two years respectively of the relation-back day[7] unless a related entity was a party to the transaction, when the time zone is four years.[8] However, liquidators may be able to attack unfair preferences or uncommercial transactions which were entered into up to 10 years before the relation-back day if they can establish that they were fraudulent transactions within s. 588FE(5).

Determining whether an unfair loan[9] constitutes a voidable transaction is, prima facie, easier as there is no requirement that the company must have been insolvent or became insolvent as a result of the transaction and no time zone applies.

This article examines the features of fraudulent transactions and unfair loans and seeks to identify the problems which may be encountered by liquidators in attacking transactions as either fraudulent transactions or unfair loans. Finally, the article evaluates the efficacy of the relevant provisions of the *Corporations Law* from the point of view of a liquidator.

2. Fraudulent transactions

The Background

According to s. 588FE(5), if a company which is in liquidation entered into a transaction when it was insolvent, and the transaction is either an unfair preference or an uncommercial transaction, it can be avoided if the company was a party to the transaction for the purpose, or for purposes including the purpose of, defeating, delaying or interfering with the rights of its creditors in its winding up if it occurred up to 10 years before the relation-back day.

It is interesting to note that such transactions are not the subject of a separate section but rather they are derivatives of unfair preferences or uncommercial transactions. This is probably a consequence of the legislature's decision to reduce the importance of fraudulent transactions as a basis on which liquidators are able to challenge transactions entered into prior to liquidation. The problem which it creates for a liquidator is that he or she must not only establish that the company had the purpose or a purpose of defeating, delaying or interfering with the rights of creditors it must be proved that the transaction which the liquidator wishes to impugn constituted an unfair preference or an uncommercial transaction.

7 Subsections 588FE(2) & (3).
8 Section 588FE(4).
9 See s. 588FD.

Sub-section 588FE(5) is, in a sense, a successor to s. 121 of the *Bankruptcy Act 1966* (Cwlth) (*Bankruptcy Act*). Section 121 was, like other avoidance provisions contained in the *Bankruptcy Act*, applied by s. 565 of the *Corporations Law*[10] to pre-liquidation transactions entered into by companies prior to the time when Division 2 of Part 5.7B of the *Corporations Law* became operative. Section 121 states:

> (1) Subject to this section, a disposition of property, whether made before or after the commencement of this Act, with intent to defraud creditors, not being a disposition for valuable consideration in favour of a person who acted in good faith, is, if the person making the disposition subsequently becomes a bankrupt, void as against the trustee in the bankruptcy.
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> (2) Nothing in this section shall be taken to affect or prejudice the title or interest of a person who has, in good faith and for valuable consideration, purchased or acquired the property the subject of the disposition or any interest in that property.
>
> (3) In this section, 'disposition of property' includes a mortgage of property or a charge on or in respect of property.

Trustees in bankruptcy and liquidators have, relatively speaking, rarely used the section despite the fact that there are no time limits specified as to when the transaction must have occurred. The reason is that the critical element which must be proved by the trustee (or liquidator) is 'intent to defraud' and that is not easily proved.[11] 'Intent to defraud' does not mean proving deceit in the criminal sense of the word;[12] it means to hinder, delay or deprive creditors.[13] Not even a disposition made for the express purpose of defeating other creditors by giving a preference to one of them will necessarily give rise to a fraudulent intent.[14] Furthermore, if valuable consideration has been given by the recipient of an allegedly fraudulent disposition the trustee (or liquidator) must prove a fraudulent intention on the part of both the disponer (the one disposing of the benefit) and disponee (the one receiving the benefit).[15] A trustee would, in such circumstances, be required to demonstrate that the disponee knew of the disponor's fraudulent intent and accepted the disposition being aware that the sole

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10 For example, see *Re Peninsula Services Pty Ltd (in liq)* (1987) 91 FLR 4.

11 Harmer Report, fn. 6 at para. 680.

12 *Lloyd's Bank Ltd v. Marcan* [1973] 1 WLR 1387 at 1392; *Official Trustee v. Marchiori* (1983) 69 FLR 290 at 298.

13 Ibid.

14 *Grellman v. PT Garuda Indonesian Ltd* (1991) 101 ALR 135 at 143.

15 *Re Johnson* (1881) 20 Ch D 309.

reason for the disposition was the desire of the disponor to defraud his or her creditors.[16]

The Major Features

Division 2 of Part 5.7B eliminates any reference to fraud;[17] it replaces it in s. 588FE(5)(b) with the requirement on the liquidator to prove that the company carried out the transaction with the purpose of 'defeating, delaying or interfering with, the rights of any or all of its creditors ...'. While this excises the word 'defraud' from the legislation, and this is undoubtedly laudable as it removes any overtones of criminality (where there is none), the action is of marginal import. This is because the wording used in s. 588FE(5)(b) is of no substantial difference to that used by the courts to define 'intent to defraud'. The Harmer Report recommended the use of words similar to that in s. 588FE(5)(b) and recognised that the resultant section would not differ greatly in effect from s. 121.[18] The consequence is that it is probably inaccurate to describe a provision such as s. 588FE(5)(b) as totally new; it is a modified s. 121.[19]

What is contemplated by s. 588FE(5) is a transaction which has traditionally been referred to as a fraudulent conveyance. Such transactions have been proscribed since the time of the *Statute of Elizabeth* in 1571.[20] The classic example of a fraudulent conveyance is an attempt by a debtor who is in financial straits to put assets beyond the reach of his or her creditors by transferring the assets for no or little consideration into the safe hands of associates who will hold the assets for the debtor.[21] To put it more colloquially:

> A debtor cannot manipulate his affairs in order to shortchange his creditors and pocket the difference.[22]

While a provision like s. 588FB which, together with ss. 588FC and 588FE provides that uncommercial transactions may be voidable, is

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16 *Re Barnes* [1962] Qd R 231; (1961) 19 ABC 126.

17 This is in accordance with the recommendation of the Harmer Report, fn. 6 at para. 681.

18 Id, s. AT6(1) and para. 681 of the Harmer Report. The wording recommended by the Report was, 'an intention of defeating, delaying or obstructing one or more of the creditors of the company'.

19 Sub-section 588FE(5) is discussed later as far as its application and scope is concerned.

20 13 Eliz. c.5.

21 Swick, M., 'The Power of Avoidance: A Bankruptcy Perspective on the Developing Law of Fraudulent Transfers in Nebraska' (1992) 25 *Creighton Law Review* 577. Also see, Glenn, G., 'The Diversities of the Preferential Transfer: A Study in Bankruptcy History' (1930) 15 *Cornell Law Quarterly* 521 at 525.

22 Baird, D. & Jackson, T., 'Fraudulent Conveyance Law and Its Proper Domain' (1985) 38 *Vanderbilt Law Review* 829 at 829.

likely to be useful to liquidators in challenging a number of types of transactions which, hitherto, could only be attacked under s. 121 of the *Bankruptcy Act*[23] (and probably not successfully), it is fair to say that insolvency law should retain a provision which attacks attempts by debtors at deliberately removing assets from the reach of creditors. Furthermore, as the Harmer Report noted, a provision like s. 588FB may not be successfully employed in striking down some transactions aimed at defeating creditors. For example, where a debtor transfers property to another at full value but the purchase price is delayed or spread over a lengthy period time.[24] In such a situation, and where insolvency transpires creditors would be prejudiced because of the inevitable delay in realising the property at an appropriate value.[25]

However, it is submitted that s. 588FE(5) will enjoy little use in practice. As stated earlier, s. 121 of the *Bankruptcy Act* has been employed successfully on rare occasions only and s. 588FE(5) is, in many ways, narrower than s. 121 in its ambit. Sub-section 588FE(5) will only have application to the 10 years prior to the relation-back day and for a transaction to be impugned under the sub-section a company must have been insolvent at the time at which the transaction was entered into or the company became insolvent as a result of the transaction. While it must be admitted that it would be a rare case where a liquidator would want to proceed in relation to a transaction which occurred more than 10 years[26] before the commencement of winding up, and, therefore, the 10 year limitation is not going to overly restrict liquidators, the requirement concerning insolvency is another issue. There appears to be no reason given by the legislature for restricting actions to cases where insolvent transactions were entered into, although the Harmer Committee did recommend that if it could be established that a transaction was an insolvent transaction, that should be taken into account by a court in determining whether the transaction was made with the intention of defeating the rights of creditors.[27] In

23 An example might be the transaction in *Walker v. Nicolay* (1991) 4 ACSR 309 where the liquidator failed to establish that he could avoid the transaction, inter alia, under s.121. The business of the company in liquidation, X, had been sold at less than its true value to a company, Y, whose shares were owned entirely by the controlling shareholders of X. A liquidator may be able to argue successfully that in such a case there is an uncommercial transaction which may be deemed to be a voidable transaction.

24 Harmer Report, fn. 6 at para. 679. The Harmer Report recorded a number of other not uncommon examples.

25 Singer, Z., 'Invalidation of Antecedent Transactions Under The Corporate Law Reform Act 1992 (Cwlth)' (1994) 2 *Insolv LJ* 36 at 42.

26 The Harmer Committee recommended the 10 year period (fn. 6 at para. 686).

27 The Harmer Report, fn. 6 at para. 683.

fact, s. 588FE(5) requires a liquidator to establish both insolvency and a purpose to defeat the interests of creditors.

Realistically, the obligation of establishing insolvency as far back as 10 years before the relation-back day will, in many cases, be impossible to discharge and, consequently, would appear to mean that the long relation-back period is nugatory.[28]

The idea of requiring proof of insolvency seems to be out of place in a provision which avoids fraudulent transactions. Such provisions are inserted in legislation to restrict the misbehaviour of debtors and they are not, unlike preference provisions, designed to stop creditors from taking advantage of insolvent companies and so benefiting themselves when compared with other creditors, who are prejudiced because of the advantage taken. Consequently, where one has a provision proscribing a fraudulent conveyance one has no need for an insolvency requirement. There is nothing in the legislation or the *Explanatory Memorandum to the Corporate Law Reform Bill 1994* to suggest that s. 588FE(5) is intended not to be in the line of fraudulent conveyance provisions which have been in bankruptcy legislation since 1571 and, subsequently, in liquidation legislation. The remark of Bennetts, while discussing the insolvency requirement in relation to uncommercial transactions in Division 2 of Part 5.7 B of the *Corporations Law*, is most apposite:

> Here, we are concerned with dispositions of property by the company, being conduct which may adversely affect the asset position of the company in any subsequent winding up. The state of its solvency at the time of the transaction is, in view of the policy justification for avoidance, irrelevant.[29]

It is notable that s. 121 of the *Bankruptcy Act* did not require a liquidator to establish insolvency and, as the writer has contended earlier, s. 588FE(5) is founded on s. 121.

What makes s. 588FE(5) likely to be of even less effect is that the legislature declined to adopt the recommendation of the Harmer Committee that where a related person is involved in the transaction there should be a presumption of intent to defeat the interests of creditors.[30] It is contended that s. 588FE(5) would usually only be used where non-arms length transactions were involved and the type of presumption contemplated by the Harmer Committee would have been,

28 Bennetts, K., 'Avoidance Powers Under the Corporations Law: Reviewing the Nexus Between Uncommercial and Insolvent Transactions' (1994) 6 *Australian Insolvency Bulletin* 36. This may, as Bennetts notes, force liquidators to consider the use of the Property Law Acts which exist in each state. These statutes allow for fraudulent conveyances to be impugned and they do not carry the requirement of insolvency.

29 Ibid.

30 The Harmer Report, fn. 6 at para. 684.

one would think, of inestimable value to a liquidator trying to make out a case pursuant to s. 588FE(5).

A further problem for a liquidator is establishing, as required by s. 588FE(5)(b), that the company became a party to the transaction either for the purpose of defeating, delaying or interfering with the rights of creditors or for purposes which included the purpose of defeating, delaying or interfering with the rights of creditors. Proving that something was done with a particular purpose in mind is not easy. Reference can be made to the position in England which existed with respect to preferences before the enactment of the *Insolvency Act 1986* (UK) where liquidators had to prove that a company gave the alleged preference with the intention of granting a preference.[31] This position was the subject of criticism.[32]

Added to this is the fact that while there is no reference to 'fraud' before a transaction can be categorised as a fraudulent transaction some element of questionable practice is assumed to have been pursued by the company and, therefore, courts may require a heavy burden of proof to be discharged by liquidators.

Liquidators will want to argue that because the legislature has removed the need to prove an intent to defraud on the part of the disponor (as contained in s. 121 of the *Bankruptcy Act*) and, in lieu thereof, required proof of 'purpose', the courts should dispense with the strict requirements of s. 121 and be prepared to invoke more of an objective test, with the result that they should be ready to infer a purpose to defeat, delay or interfere with creditors' rights from circumstances. Even in actions initiated pursuant to s. 121 of the *Bankruptcy Act* courts have been ready to infer an actual intent to defraud when the inevitable result of a transaction was to defeat the creditors.[33] Also, it is to be noted that under s. 121 there is no need to demonstrate an intent to defeat creditors as a class; it is sufficient to demonstrate an intent to defeat a single creditor.[34] It is likely that this approach will apply when it comes to liquidators having to prove purpose under s. 588FE(5), with the result that they will only have to prove a purpose of defeating at least one creditor.

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31 For example, see Bailey, E., Groves, H. and Smith, C. 1992, *Corporate Insolvency Law and Practice*, Butterworths, London, 366.

32 For example, see Farrar, J., 'The Bankruptcy of the Fraudulent Preference' [1983] *JBL* 390.

33 For example, see *Freeman v. Pope* (1870) 5 Ch App 538; *Re Trautwein* [1944] 14 ABC 61; *Noakes v. J Harvey Holmes & Son* (1979) 37 FLR 5; *PT Garuda Indonesia Ltd v. Grellman* (1992) 33 FCR 515; 107 ALR 199; *Re World Expo Park Ltd* (1994) 12 ACSR 759; *Re Alvaro* (unreported, Federal Court, 31 October 1994, Heerey J); *Re McInnes* (unreported, Federal Court, 18 November 1994, Einfeld J).

34 *PT Garuda Indonesia Ltd v. Grellman* (1992) 33 FCR 515; 107 ALR 199.

Finally, in relation to fraudulent transactions, it is submitted that if a liquidator can establish that a transaction is a fraudulent transaction the defendant will be unable to rely on any defence. Reliance could not be placed on s. 588FG, which provides a defence for some defendants where an avoidance action is successfully made out by a liquidator, because it requires the defendant to have acted in good faith and this element could not be satisfied by a defendant who is found to have had a purpose of defeating, delaying or interfering with the rights of creditors in entering into the transaction challenged.

3. Unfair Loans

Unlike the fraudulent transaction which has its roots in fraudulent conveyances and fraudulent dispositions, as articulated by s. 121 of the *Bankruptcy Act*, the unfair loan is a fresh concept; it has no counterpart in Australian law. It is defined in s. 588FD.

The aim of the section is to ensure that the rights of unsecured creditors are not prejudiced by reason of the company having entered into a loan arrangement for which the consideration is excessive.[35] Clearly, the aim is not to attack loans which turn out to be bad bargains but to allow for the impugning of those loans which are grossly unfair, that is, loans which no reasonable company in normal circumstances would enter into save where there was some underlying rationale such as where there is a sham agreement designed to confer an undue benefit on the lender.[36]

According to s. 588FD, an unfair loan is a loan which provides for interest which is extortionate or the charges relating to the loan are extortionate. 'Extortionate' is not defined. Whether interest or charges are extortionate will depend on an examination of the factors enumerated in s. 588FD(2). They are:

- the risk assumed by the company in lending;
- the value of any security in respect of the loan;
- the term of the loan;
- the schedule for payments of interest and charges and for repayments of principal;
- the amount of the loan; and
- any other relevant matter.

If a liquidator is able to establish that a transaction was an unfair loan the lender will not be able to seek the protection of any defence. The section in Division 2 of Part 5.7B which provides for a defence, s. 588FG, is expressly excluded when it comes to unfair loans and the lender was a party to the transaction. This makes it all the more imperative for the lender to resist stubbornly the contention that the

35 *Explanatory Memorandum to the Corporate Law Reform Bill 1992*, para. 1048.

36 Ibid.

transaction is an unfair loan within the meaning of that expression in s. 588FD.

Unlike many of the provisions in Division 2 of Part 5.7B, s. 588FD does not appear to have developed from a recommendation of the Harmer Committee. Probably, the section is derived from s. 244 of the *Insolvency Act 1986* (UK) which also deals with extortionate credit transactions. While s. 244 refers to 'credit transaction', which envisages a broader range of transactions than 'loan',[37] the Australian courts may well decide to use or adapt the principles expounded by the courts in the United Kingdom in developing guidelines as to what 'extortionate' means in the context of s. 588FD. The British provision, s. 244, was modelled on sub-sections 138(1), 139(1) and 171(7) of the *Consumer Credit Act 1974* (UK) and under these provisions for a loan to be deemed to be extortionate it must be not only unfair but also oppressive, 'reflecting an imbalance in bargaining power of which the other party took improper advantage'.[38] Section 244 of the *Insolvency Act* provides that 'extortionate' means the obligation to make 'grossly exorbitant payments' or where there is a gross contravention of ordinary principles of fair dealing.[39]

'Loan' is not defined in the *Corporations Law*. Consequently, one is driven back to the common law. At common law a loan is:

> [A] contract whereby one person lends or agrees to lend a sum of money to another, in consideration of a promise express or implied to repay that sum on demand, or at a fixed or determinable future time, or conditionally upon an event which is bound to happen with or without interest.[40]

While guidelines may be developed by the courts it is difficult to see the courts determining each case other than on its own peculiar facts.[41]

There are two primary differences between the English provision and s. 588FD. First, the former only permits the challenging of transactions entered into during the three years before the time when liquidation begins,[42] while no time zone is specified by s. 588FD. While this appears to enable the Australian provision to have a greater

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37 For example, a credit transaction would cover a sale of goods where the payment is deferred. See Snaith, I. 1990, *The Law of Corporate Insolvency*, Waterlow, London, p. 669.

38 Goode, R.M. 1990, *Principles of Corporate Insolvency Law*, Sweet & Maxwell, London, 178. See s. 244(3) and *Corporate Insolvency Law and Practice*, fn. 31 at 372.

39 s. 244(3). This is the same as s. 138(1) of the *Consumer Credit Act 1974* (UK).

40 *Chitty on Contract*, 1983, Vol. 2, 25th edn, Sweet & Maxwell, London, p. 541.

41 This has been the situation in the United Kingdom in relation to decisions made pursuant to the *Consumer Credit Act 1974*.

42 *Insolvency Act 1986* (UK), s. 244(2).

scope it is likely that three years would enable most improper transactions to be challenged by liquidators. In practice one would think that it is likely that the further in the past a transaction was entered into the less chance of a successful attack being mounted by a liquidator. However, it is submitted that the three year period in the English statute is on the short side and a period of five years would be preferable.

Secondly, the English provision places a burden of establishing that a transaction was not extortionate on the lender; s. 244(3) stated that there is a rebuttable presumption that a loan is extortionate. In contrast it appears that a liquidator has the onus of proving that a loan is unfair under s. 588FD. This is consistent with what seems to be legislative policy of placing the burden of proof squarely on the liquidator in relation to recovery actions save in a few instances where he or she is able to rely on the presumptions of insolvency in s. 588E.[43]

It would appear that there is nothing to stop a liquidator from arguing that a loan is both an unfair loan and some other type of voidable transaction, for example, an uncommercial transaction, as 'transaction' as defined in s. 9 includes a loan to the company. Whether the liquidator can submit that the loan constitutes some other kind of voidable transaction will, of course, depend upon when the transaction was entered into and whether the company was insolvent at the time of the transaction.

If the Australian section is interpreted in a similar vein to the English equivalent then it is submitted that the provision will be employed infrequently. Sub-section 244(3) of the *Insolvency Act* states that something is 'extortionate' either where a company is required to make grossly exorbitant payments or where the transaction grossly contravenes ordinary principles of fair dealing. English liquidators can wait and see what evidence the lender is able to adduce and what arguments it can mount.[44] Conversely, Australian liquidators will be required to take the initiative and may have some difficulty in satisfying a court that interest or charges were grossly exorbitant.

The advantage for liquidators in relation to this avoidance provision, in contrast to proving the fact that transactions constituted insolvent transactions, is that he or she need not establish that the company was

43 For example, a liquidator has the burden of establishing the elements of an unfair preference. This includes proving the insolvency of the company and this can be a difficult onus to discharge.

44 Fletcher, I.F. 1990, *Law of Insolvency*, Sweet and Maxwell, London, p. 514 points out that the mere act on the part of the office holder of making an application to reopen a credit transaction has the effect of imposing upon the party who occupies the role of creditor in the transaction a burden of proof consisting of a requirement to demonstrate a negative proposition, namely, that the transaction was not extortionate within the meaning of sub-section (3).

insolvent at the time of the transaction or that the transaction precipitated the insolvency of the company.

As mentioned earlier, if a liquidator can successfully establish the fact that a transaction constitutes an unfair loan then it is likely that the defendant has no defence. Sub-section 588FG(2) expressly states that it cannot be relied on where an unfair loan is established. It is unlikely that a defendant could establish the elements of s. 588FG(1), one of which is that he or she was not a party to the transaction.

If a liquidator can establish that a transaction was an unfair loan then the court can make one of the orders mentioned in s. 588FF. It is likely that a court may need to make more than one order. For instance, one can envisage the need to make an order, under s. 588FF(1)(a), directing the lender of the money to repay money paid pursuant to the loan, and an order, under s. 588FF(1)(e), releasing the debt incurred.

4. Conclusion

The *Corporations Law* provides that transactions entered into by a company during the 10 years prior to its liquidation are voidable if they are insolvent transactions and the company became a party to them where its sole purpose or one of its purposes was to defeat, delay or interfere with the rights of its creditors. The provision is based on s. 121 of the *Bankruptcy Act* and general fraudulent conveyance statutes. While it is probably necessary for any avoidance regime to contain a provision like s. 588FE(5), which strikes down fraudulent conveyances, it is probable that it will be used rarely. The legislature has seen to that by requiring the liquidator to establish that the company was either insolvent at the time of the transaction or became insolvent as a result of the transaction. It has been contended in this article that no such insolvency requirement should have been included in relation to fraudulent transactions as legislation which provides for the avoidance of such transactions has, historically, had as its purpose the prevention of debtor misbehaviour, that is, ensuring that debtors do not put assets out of the reach of their creditors. A requirement that insolvency be established is usually inserted in order to prohibit creditor misbehaviour, for example, where a creditor obtains a preference over other creditors.

The insolvency requirement together with the need for the liquidator to establish that the company, in entering into the transaction attacked, had as its purpose, or one of its purposes, the defeat, delay or interference with the rights of creditors, will mean that liquidators will rarely seek to impugn transactions on the basis that they are fraudulent transactions.

The second type of transaction discussed in this article, the unfair loan, is to be contrasted with the fraudulent transaction. Unlike the fraudulent transaction, the unfair loan does not have any history in Australian legislation and a liquidator will not be required to establish the insolvency of the company if he or she wishes to challenge a transaction as an unfair loan. A liquidator is able to attack any loan made by a company prior to its liquidation in which there is provision for extortionate interest and/or charges.

Because the concept of the unfair loan is fresh to Australia it is difficult to gauge whether liquidators will endeavour to challenge transactions frequently on this basis. While liquidators will not need to establish the insolvency of the company they will have the burden of proving that the loan is extortionate and this burden may be quite onerous.

A factor which is of importance for liquidators is that if they are able to establish the fact that a transaction is a fraudulent transaction or an unfair loan it is unlikely that the defendant would be able to seek to invoke any protective provisions.

It is contended that liquidators will rely primarily on attacking those transactions which are able to be classed as unfair preferences. They are familiar with the preference concept and, in any event if history is a guide, companies will be more likely to enter into transactions which are regarded as preferences rather than transactions which are classed as fraudulent transactions or unfair loans. Notwithstanding that, it is important that the *Corporations Law* permits liquidators to attack such transactions.