**IN THE COURT OF APPEAL OF NEW ZEALAND**

**CA775/2010**
**[2012] NZCA 93**

| | |
|---|---|
| BETWEEN | COMMISSIONER OF INLAND REVENUE<br>Appellant |
| AND | MICHAEL PETER STIASSNY<br>First Respondent |
| AND | GRANT ROBERT GRAHAM<br>Second Respondent |
| AND | FORESTRY CORPORATION OF NEW ZEALAND LIMITED (IN RECEIVERSHIP)<br>Third Respondent |
| AND | CITIC NEW ZEALAND LIMITED (BVI) (IN RECEIVERSHIP)<br>Fourth Respondent |
| AND | CNI FOREST NOMINEES LIMITED AND BANK OF NEW ZEALAND<br>Fifth Respondents |

| | |
|---|---|
| Hearing: | 22 November 2011 |
| Court: | Glazebrook, Randerson and Harrison JJ |
| Counsel: | D J Goddard QC and H W Ebersohn for Appellant<br>M Crotty for First, Second and Third Respondents<br>R G Simpson, D K Simcock and J Q Wilson for Fourth Respondent<br>J McKay for Fifth Respondents |
| Judgment: | 15 March 2012 at 10 a.m. |

## JUDGMENT OF THE COURT

**A The appeal is allowed.**

**B The respondents' claim against the appellant in the High Court is struck out.**

**C The respondents must pay costs to the appellant as for a complex appeal on a band A basis. We certify for two counsel.**

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## REASONS OF THE COURT

(Given by Randerson J)

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## Introduction

[1] The broad issue in this appeal is whether the High Court was right to decline to strike out the respondents' claim to recover from the appellant Commissioner a GST payment of $127.5m paid to him following a sale of substantial forestry assets in 2003.

[2] The factual background is largely undisputed. At material times, the third respondent (FCNZ) and the fourth respondent (CITIC) traded in a forestry partnership known as the Central North Island Forest Partnership (the CNIFP). Funding for the CNIFP operations was provided by syndicates of banks for which the fifth respondents (the secured creditors) were the security trustees. The secured creditors held security over the assets of the CNIFP and the individual assets of FCNZ and CITIC.

[3] On 26 February 2001, one of the fifth respondents (the BNZ) appointed the first and second respondents (the receivers) to act in respect of the assets charged under the relevant security documents. The Commissioner was notified of the appointment of the receivers on the same day. Although both FCNZ and CITIC were placed in receivership, the receivers were not appointed in respect of the CNIFP.[1] However, FCNZ and CITIC each appointed one of the receivers as its representative on the management board of the CNIFP with effect from 26 February 2001. From that date, the receivers controlled the management board of the CNIFP.

[4] On 10 October 2003, the CNIFP entered into a sale and purchase agreement under which it agreed to sell its assets for USD 621m plus GST of NZD 127.5m. FCNZ and CITIC, in their capacity as the partners of the CNIFP, were named as vendors in the sale and purchase agreement. The proceeds of sale were insufficient to repay in full the secured amounts and the GST payable to the Commissioner on the sale.

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[1] Which could have been achieved by an application to the High Court for the appointment of receivers under the inherent jurisdiction of the Court. See also the definition of "receiver" under s 2(1) of the Receiverships Act 1993. We were told that the assets of the partners were not co-extensive with those of the partnership.

[5] A deed relating to the application of the sale proceeds was entered into on the same date as the sale agreement. The deed was made between FCNZ and CITIC as the partners of the CNIFP, the receivers and BNZ. We refer to this deed in more detail below but, amongst other things, it provided for the receipt into the CNIFP's New Zealand bank account of part of the funds arising from the sale of the forestry assets and for the retention by the receivers of sufficient funds to enable payment of the GST on the sale. The sale of the forest assets was settled in December 2003 when the CNIFP received the proceeds of sale together with the agreed sum for GST.

[6] On 19 December 2003, solicitors acting for CNI Forests Nominees Ltd and Fletcher Challenge Forests Finance Ltd wrote to the Commissioner, the receivers and the BNZ claiming that, by second ranking security documents, they had an entitlement to the proceeds of sale under their securities which ranked ahead of the Commissioner's unsecured claim for GST. The companies reserved their rights to bring a claim against the Inland Revenue Department to recover the GST paid on the sale of the CNIFP assets. A similar letter was sent by the BNZ to the Commissioner and the receivers on 29 January 2004.

[7] After taking legal advice, the receivers considered there was a significant risk that they would be held personally liable for the GST arising on the sale. If they did not make the payment of GST when due, they could be exposed to a claim from the Commissioner for the GST and penalties and interest. From a practical viewpoint, there was insufficient time to seek a court ruling.

[8] On the basis of the legal advice received, the receivers filed a GST return on 29 January 2004 in the name of the CNIFP as the party registered for GST purposes. On the same day, the receivers drew a cheque for $123,416,346.20 in favour of the Inland Revenue Department.[2] The cheque was drawn on an account styled "For Central North Island Forestry Partnership (Receivers A/C)". In dismissing the Commissioner's application to strike out the proceeding, Allan J noted that the CNIFP was not in receivership but the account was styled in that fashion to indicate that the receivers controlled it.

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[2] It is not clear why this sum differed from the sum of $127.5 million paid under the sale agreement but the difference is not material for present purposes.

[9] In March 2004, the receivers filed a Notice of Proposed Adjustment under the Tax Administration Act 1993 in respect of the GST payment. The Commissioner rejected the notice on 3 May 2004.

[10] The respondents later commenced proceedings in the High Court in which they asserted that, contrary to the view earlier taken by the receivers, they were not personally liable to pay the GST.[3] They sought to recover the GST payment on the basis that it was paid under a mistake of law, namely the mistaken belief that the receivers were personally liable to pay the GST.

[11] The Commissioner subsequently applied to strike out the respondents' proceedings on the broad grounds that:

(a) The receivers were personally liable in law to pay the GST.

(b) The GST was paid by the CNIFP from its own funds by way of negotiable instrument and, accordingly, the Commissioner had priority to the amount of the payment under s 95 of the Personal Property Securities Act 1999 (the PPSA).

(c) There was no basis in law to recover the payment made to the Commissioner since it was paid by the CNIFP to discharge a debt which the CNIFP owed to the Commissioner and was received in good faith.

[12] Allan J found that:

(a) The receivers were not personally liable to pay the GST.

(b) The payment was made by the CNIFP from its own funds by way of negotiable instrument and s 95 of the PPSA applied so as to accord the Commissioner priority over the secured creditors to the GST.

(c) However, s 95 of the PPSA did not preclude an *in personam* claim against the Commissioner for recovery of the GST. While it was arguable the payment was made by reason of a mistake, in view of the developing state of the law in relation to payments made under

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[3] *Stiassny v Commissioner of Inland Revenue* HC Auckland CIV-2008-404-549, 4 November 2010.

mistake, and the need to resolve factual issues such as whether the Commissioner received the payment in good faith, it was not appropriate to strike out the proceedings before trial.

**The issues**

[13] Against that background, the issues arising on appeal are:

(a) Whether the receivers were personally liable to pay the GST (in which case it is agreed that the GST is a receivers' expense or liability[4] and the Commissioner is entitled to retain the sum paid).

(b) Whether s 95 of the PPSA operates so as to confer priority to the Commissioner over any claim the respondents have to the GST.

(c) Whether the respondents can recover the GST from the Commissioner on the basis it was paid under a mistake of law namely that the receivers were personally liable to pay the GST.

[14] We have had the benefit of argument on these issues from Mr Goddard QC for the Commissioner and from Mr Simpson who presented submissions on behalf of all respondents. We also heard from Mr Simcock who carried the argument on the first issue.

**Were the receivers personally liable to pay the GST?**

[15] There is no dispute that the sale of the CNIFP assets constituted a taxable activity of the CNIFP for the purposes of the Goods and Services Tax Act 1985 (the GST Act).

[16] Under s 23 of the GST Act, every registered person must, within the specified period, pay to the Commissioner the tax payable on taxable supplies. A "registered person" is a person who is registered or liable to be registered under the Act.[5]

4 By virtue of an inter-creditor agreement under which it was agreed that the receivers' expenses would be a first charge on the proceeds of sale of the secured assets.
5 Goods and Services Tax Act 1985, s 2(1).

Relevantly, "person" includes an "unincorporated body of persons",[6] which, in turn, includes a partnership.[7]

[17] Whether the receivers were personally liable for the payment of the GST in the present case turns on the proper construction of ss 57 and 58 of the GST Act. Section 57 provides for the registration of unincorporated bodies under the Act despite their lack of separate legal personality. Materially, s 57 provides:

> **57 Unincorporated bodies**
>
> …
>
> (2) Where an unincorporated body that carries on any taxable activity is registered pursuant to this Act,—
>
> (a) The members of that body shall not themselves be registered or liable to be registered under this Act in relation to the carrying on of that taxable activity; and
>
> (b) Any supply of goods and services made in the course of carrying on that taxable activity shall be deemed for the purposes of this Act to be supplied by that body, and shall be deemed not to be made by any member of that body; and
>
> (c) Any supply of goods and services to, or acquisition of goods by, any member of that body acting in the capacity as a member of that body and in the course of carrying on that taxable activity, not being a supply to which paragraph (b) of this subsection applies, shall be deemed for the purposes of this Act to be supplied to or acquired by that body, and shall be deemed not to be supplied to or acquired by that member; and
>
> (d) That registration shall be in the name of the body, or where that body is the trustees of a trust, in the name of the trust; and
>
> …
>
> (3) Despite this section, a member is jointly and severally liable with other members for all tax payable by the unincorporated body during the taxable periods, or part of taxable periods as the case may be, the person is a member of the body, even if the person is no longer a member of the body.
>
> …
>
> (5) Subject to subsection (6) of this section, where anything is required to be done pursuant to this Act by or on behalf of an unincorporated body, it shall be the joint and several liability of all the members to do any such thing:

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6 Goods and Services Tax Act, s 2(1), definition of "person".

7 Goods and Services Tax Act, s 2(1), definition of "unincorporated body".

> Provided that any such thing done by one member shall be sufficient compliance with any such requirement.

[18] In *Commissioner of Inland Revenue v Official Assignee* this Court described s 57(2) as an administrative expediency to avoid the inconvenience of taxing partners individually.[8] In the case of a partnership, the members of the partnership may not be registered for GST purposes. Rather, the partnership is treated as carrying on the taxable activity and must be registered as such under the GST Act. However, despite the fact that the members of the partnership are not to be registered for GST purposes, the orthodox principles of partners' liability are preserved by making them liable for the performance of the obligations of the partnership under the GST Act. In particular, the Commissioner may enforce GST obligations against the members of the partnership under s 57(3) and (5). Under those provisions, the partners effectively have a secondary liability for the obligations of the partnership under the GST Act.

[19] Section 58 applies where, in specified circumstances, a registered person is unable itself to perform its obligations under the GST Act. It relevantly provides:

> **58 Personal representative, liquidator, receiver, etc**
>
> (1) In this section and sections 46 and 55—
>
> …
>
> **Incapacitated person** means a registered person who dies, or goes into liquidation or receivership, or becomes bankrupt or incapacitated:
>
> **Specified agent** means a person carrying on any taxable activity in a capacity as personal representative, liquidator, or receiver of an incapacitated person, or otherwise as agent for or on behalf of or in the stead of an incapacitated person.
>
> (1A) Despite sections 5(2) and 60, a person who becomes a specified agent is treated as being a registered person carrying on the taxable activity of the incapacitated person during the agency period, and the incapacitated person is not treated as carrying on the taxable activity during the period.
>
> …

[20] It is not in dispute that if the CNIFP (as the person registered for GST purposes) had been placed in receivership, then the receivers would have been the

8 *Commissioner of Inland Revenue v Official Assignee* [2000] 2 NZLR 198 (CA) at [21].

specified agent of the CNIFP. As such, the receivers would have been liable personally under s 58(1A) on the basis that they were the specified agents of an incapacitated person within the meaning of the section. Counsel all agreed that the difficulty for the Commissioner is that the CNIFP was not placed in receivership and was not therefore an incapacitated person within the meaning of s 58(1). Prima facie, the receivers were not therefore specified agents within the meaning of the section and were not personally liable for the payment of GST under s 58(1A). During the hearing, we raised with counsel whether the partnership was effectively in receivership since both its members were in receivership and the receivers controlled the CNIFP board. However, in view of counsel's concession on this point, we proceed on the basis that, for the purposes of the GST Act, the partnership was not in receivership.

[21] Mr Goddard advanced two separate arguments in support of the submission that the receivers were personally liable:

(a) The receiver of a partner in a partnership is to be treated under s 58(1A) as a registered person carrying on the taxable activities of the partnership, despite the fact that the partners are not themselves required to be registered in respect of those activities.

(b) The receivers are "members" of the partnership for the purposes of s 57 where the receivers "participate" in the taxable activities of the partnership.

[22] The first argument proceeds on the basis that the combined relevant purposes of ss 57 and 58 are to achieve administrative efficiency and to ensure that a receiver pays the registered person's GST liabilities during a receivership. It was submitted on the Commissioner's behalf that the High Court's rejection of the Commissioner's contentions is inconsistent with the identified purposes of ss 57 and 58. Mr Goddard submitted there was an interpretative mechanism available to enable the statutory purposes to be met. This was to apply the "unless the context otherwise requires" proviso to the definition of "registered person" under s 2(1) of the GST Act.

[23] It was submitted that, in the context of s 58, the term "registered person" must also include a person who carries on a taxable activity and who, but for s 57(2), would be liable to be registered in respect of that activity.

[24] We are not persuaded that this interpretation is available to the Commissioner and agree with Mr Simcock's submissions on this issue. First, this interpretation would require the notional insertion of words in s 58 which are not there. Secondly, and more importantly, this approach would directly contradict s 57(2)(a) which provides that partners shall not be registered persons. The Commissioner's approach would mean that partners in a partnership were effectively made registered persons in respect of the partnership's taxable activities whenever the partners went into receivership, despite the clear wording of s 57(2)(a). Thirdly, such an interpretation is not "required" because the Commissioner has a secondary right of recovery against the members of the partnership by virtue of s 57(3) and (5).

[25] Mr Goddard's second argument on behalf of the Commissioner is that the receivers should be treated as "members" of the unincorporated body (the CNIFP) on the basis that they "participated" in the taxable activities of the partnership. As such, the receivers would become personally liable under s 57(3) and (5). It was submitted that it would be anomalous if the receivers would become personally liable under s 58 if they had been appointed in respect of the assets of the CNIFP but were not liable where they were appointed only in respect of the assets of the members of the CNIFP.

[26] We agree with the Judge that this interpretation cannot be supported. First, the GST Act contemplates that primary liability for the payment of GST falls on the unincorporated body as the registered person. Secondary liability under s 57(3) and (5) falls only upon the members of that body. The section does not, for example, provide that directors or executives of a company which is a member of a partnership might become liable for GST because they somehow participate in the taxable activities of the partnership. Secondly, the GST Act provides that receivers only become personally liable to pay GST in the carefully defined circumstances of s 58, which we have found do not apply here. That counts strongly against the Commissioner's argument that "the context requires" an expanded interpretation of

"member" to include the receiver of a member. To accept that submission would be to construe the section beyond the specific circumstances the legislature has prescribed. The Privy Council has confirmed in *Edgewater Motel Ltd v Commissioner of Inland Revenue*[9] that the GST Act should be interpreted according to its terms.

[27] Thirdly, although the receivers manage the partner companies and, through them, the affairs of the partnership, it does not follow that they are deemed for the purposes of the GST Act to be carrying on the taxable activities of the partnership. The partnership (CNIFP) continues to conduct its own activity for GST purposes and, as such, is primarily liable for the payment of GST.

[28] Fourthly, there is no legislative gap which requires to be filled. The members of the partnership remain secondarily liable for the payment of GST. The fact that they and the partnership itself are insolvent is simply a consequence any creditor (including the Commissioner) must face where it arises. As this Court observed in *Rob Mitchell Builder Ltd (in liq) v National Bank of New Zealand Ltd*[10] "considerations of equity or fairness have little or no weight in a tax case".

[29] Mr Goddard relied on the decision of this Court in *Commissioner of Inland Revenue v Official Assignee*[11] which considered the interpretation of s 42(2)(a) of the GST Act. Two natural persons in a partnership had become bankrupt but no receiver was appointed for the partnership. This Court held that the individual partners were liable for the GST by virtue of s 57(3) and (5) and that this liability was a preferential claim in their estates under s 42(2)(a) of the Insolvency Act 1967. The Court said that this interpretation avoided a patent anomaly in the legislation and that a purposive approach was required to accord the Commissioner priority in the circumstances.[12]

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9 *Edgewater Motel Ltd v Commissioner of Inland Revenue* [2004] UKPC 44, (2004) 21 NZTC 18, 664 at [9].

10 *Rob Mitchell Builder Ltd (in liq) v National Bank of New Zealand Ltd* (2004) 21 NZTC 18, 397 at [27].

11 *Commissioner of Inland Revenue v Official Assignee,* above n 8.

12 At [21]–[22].

[30] We are not persuaded that this case supports the Commissioner's submission in the present appeal. The substantive question was not how s 57 was to be interpreted but the effect the section had on the construction of s 42(2)(a). With respect, the conclusion reached appears to be obvious and does not require the strained interpretation of s 57 contended for by the Commissioner in the present case.

[31] We conclude that the Judge was right to conclude that the receivers were not personally liable for the payment of the GST.

**Whether s 95 of the PPSA operates so as to confer priority to the Commissioner over any claim the respondents have to the GST**

[32] Section 95 of the PPSA provides:

> **95 Priority of creditor who receives payment of debt**
>
> (1) A creditor who receives payment of a debt owing by a debtor through a debtor-initiated payment has priority over a security interest in—
>
> (a) The funds paid:
>
> (b) The intangible that was the source of the payment:
>
> (c) A negotiable instrument used to effect the payment.
>
> (2) Subsection (1) applies whether or not the creditor had knowledge of the security interest at the time of the payment.
>
> (3) In subsection (1), **debtor-initiated payment** means a payment made by the debtor through the use of—
>
> (a) A negotiable instrument; or
>
> (b) An electronic funds transfer; or
>
> (c) A debit, a transfer order, an authorisation, or a similar written payment mechanism executed by the debtor when the payment was made.
>
> **Example**
>
> Person A has a perfected security interest in person B's (a car dealer's) inventory (cars).
>
> Person B sells some of the cars and deposits the cash proceeds into a cheque account.
>
> Person B draws a cheque and pays person C (an unsecured creditor).
>
> Person C's interest in the cheque has priority over person A's security interest in the cheque.

[33] It is not in dispute that the cheque issued in favour of the Commissioner was a negotiable instrument used to effect payment of a debt due to the Commissioner as creditor. If the payment was debtor-initiated, then s 95 would accord priority to the Commissioner over the security interest of the secured creditors whether or not the Commissioner had knowledge of the security interest at the time of the payment. However, Mr Simpson submitted that the section did not apply because:

(a) The payment was not debtor-initiated; and

(b) The section was not intended to apply where a receiver had been appointed and an insolvent debtor was engaged in the final realisation and distribution of its assets.

[34] Before addressing these questions, we discuss briefly the rather scarce materials available in respect of the genesis of this new provision.

[35] Section 95 is found within Part 8 of the PPSA and is one of a group of sections that provide limited exceptions to the general priority provisions in the legislation. The PPSA is based primarily on the Personal Property Security Act 1993 (Saskatchewan). It follows a Law Commission report in 1989.[13] Commenting on the then proposed s 25 (which later became the present s 95) the Law Commission said:

> This section complements the rule that security interests in money, instruments and securities can be perfected by registration of a financing statement. This section preserves the negotiability of such collateral in the face of perfected but non-possessory security interests.

[36] Section 95 of the PPSA differs from the form originally proposed by the Law Commission but the Select Committee report on the Bill does not provide any further commentary. However, in commenting on a proposal to amend the Canadian equivalent provision, the Law Reform Commission of Saskatchewan said:[14]

> Secured parties should not be given the power to prevent debtors from paying other creditors out of liquid assets held by them. If this were allowed, great disruption in commercial activity would result.

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[13] Law Commission *A Personal Property Securities Act for New Zealand* (NZLC R8, 1989).

[14] Law Reform Commission of Saskatchewan *Proposals for a New Personal Property Security Act: Report to the Minister of Justice* (Saskatoon, 1992) at 4.

[37] Other academic commentators have also referred to the preservation of the integrity of the payment system as being one of the purposes of the section and to its effect as being equivalent to the power of a debtor under prior law to pay creditors where the debtor had given an uncrystallised floating charge.[15]

[38] We agree with the Judge's summary of the purpose and effect of the section:

> [62] The purpose of s 95 is, in my opinion, to facilitate ordinary trade and commerce by ensuring that a creditor who receives payment of a debt in the manner stipulated by s 95(3) takes priority over any security interests in the funds so paid, the intangibles that were the source of the payment, and the negotiable instrument itself. Such priority arises whether or not the creditor had knowledge of the security interest at the time of payment. …

*Was the payment debtor-initiated?*

[39] The first point of contention between the parties is whether the Judge was correct to find that the GST payment was a debtor-initiated payment within the meaning of the section. Potentially relevant to the determination of this issue are two inter-related questions:

(a) Whether the GST payment was effected by the receivers or by the CNIFP; and

(b) Who "owned" the funds from which the payment was made?

[40] The undisputed starting point is that the assets sold belonged to the CNIFP. The vendors under the agreement for sale and purchase were the members of the partnership, CITIC and FCNZ (both in receivership). The receivers signed the agreement for sale and purchase on behalf of those companies as vendors.

[41] We accept Mr Goddard's submission that, as a matter of law, the proceeds of sale did not belong to the receivers. Where a receiver is appointed in respect of a

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15 Linda Widdup and Laurie Mayne *Personal Property Securities Act: A Conceptual Approach* (revised ed, LexisNexis, Wellington, 2002) at [14.16], citing *Flexi-coil Ltd v Kindersley District Credit Union Ltd* (1993) 107 DLR (4th) 148 (SKCA); Michael Gedye, Ronald Cuming and Roderick Wood *Personal Property Securities in New Zealand* (Thomson Brookers, Wellington, 2002) at 344.

company, the assets of that company remain the property of the company. They are not assigned to the receiver, and the receiver cannot call for transfer of them.[16]

[42] We next examine in more detail the relevant documents to establish the factual background to the GST payment. The agreement for sale and purchase contained detailed provisions in clause 4 relating to the payment by the purchaser of GST in addition to the purchase price. It is evident from these provisions that those responsible for drafting them contemplated that GST would be payable either by the vendor companies (who would be responsible for the payment of GST under s 57(3) of the GST Act) or by the receivers, whether or not as specified agents under s 58. It was further provided that the receivers (again whether or not as specified agents) were to issue to the purchaser a tax invoice in respect of the transaction. The GST amount shown on the tax invoice was to be paid by the purchaser to the vendors (or the receivers) at settlement to a bank account nominated by the receivers.

[43] Under clause 28.4 of the agreement for sale and purchase the purchaser acknowledged that the agreement was signed on behalf of the vendors by the receivers and that (except in limited specified respects) the receivers were not to be personally liable for any of the obligations of the vendors under the agreement. Other provisions of the agreement also excluded personal responsibility on the part of the receivers.[17] The agreement for sale and purchase provided for part of the price to be paid into a New Zealand bank account and part to be paid into a United States bank account.

[44] The deed of application of sale proceeds entered into on 10 October 2003 (the same date as the agreement for sale and purchase) provided for payment of the GST from the New Zealand bank account, described in the deed as the "NZ CNIFP Bank Account". The deed defined this account as meaning the CNIFP bank account in Auckland as advised to the Purchaser by the CNIFP under the terms of the sale agreement. Relevantly, clause 3.1 of the deed provided:

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16 Peter Blanchard and Michael Gedye *The Law of Private Receivers of Companies in New Zealand* (LexisNexis, Wellington, 2008) at [2.08]–[2.09].

17 Clauses 28.3 and 28.5.

> **3. Application of purchase price**
>
> 3.1 Upon the Receivers receiving the Settlement Payment in cleared funds on Settlement, the Receivers shall apply the Settlement Payment so received in the following manner:
>
> (i) the Receivers shall retain the GST Payment to pay GST output tax obligations of the vendors under the Sale Agreement or of the Receivers as Specified Agent for those vendors or otherwise, in respect of the transaction evidenced by the Sale Agreement; and
>
> …

[45] The parties to this deed were FCNZ, CITIC, the receivers and the BNZ as the security trustee on behalf of the senior secured creditors. It is evident from these provisions that the parties (including the BNZ) specifically contemplated that the New Zealand portion of the settlement proceeds would be paid into the CNIFP bank account nominated by the receivers; that the receivers would retain the GST payment from those funds; and that they would pay the GST as an obligation of the vendors under s 57(3) of the GST Act or as an obligation of the receivers (as specified agent for those vendors under s 58(1A) of the GST Act or otherwise). The BNZ as the security trustee for the senior secured creditors specifically authorised those steps to be taken.

[46] As earlier noted, the relevant GST return was made in the name of the CNIFP and the GST payment was made by cheque drawn on an account styled "For Central North Island Forestry Partnership (Receivers A/C)".

[47] The Judge concluded that the GST payment was made by the CNIFP from its funds. He noted that a partnership may only act through the agency of those controlling it. In this case the CNIFP Board (of which the receivers were the only members) controlled the partnership. The Judge found that it was known there was a shortfall in available funds and that the debt owed to the Commissioner for GST could not be paid without disturbing the priorities established by the security documents. The Judge continued:

> [103] But a payment was nevertheless made because the partnership, like the receivers, understood the receivers to be personally liable to the Commissioner for the very same GST debt. The CNIFP therefore (acting by its board) applied its funds in the payment of that debt. That step was thought to be lawfully available because, if the receivers were also liable, the GST payment was a receivership cost which the security documents

> permitted to be paid in priority to the sums owed to the secured creditors. In doing so, the CNIFP permitted its assets to be used for the purpose of discharging its own GST obligations to the Commissioner.
>
> [104] In my opinion the payment cannot properly be analysed in any other way. The receivers (and through them the CNIFP) mistakenly thought that the receivers themselves were personally liable to the Commissioner. That was the reason for the GST payment. There was never more than one GST debt, which was the principal responsibility of the CNIFP, but was also a sum for which the receivers thought they were liable.

[48] Subject to the respondents' argument that the sale proceeds belonged to the secured creditors (which we deal with shortly), we agree with the Judge's analysis. At no time did the receivers have any legal entitlement to an interest in the proceeds of sale of the CNIFP assets. Their role was purely as agents of the two members of the partnership.[18] Through those companies, the receivers controlled the CNIFP as the sole members of its board. Properly, the CNIFP assets were sold by FCNZ and CITIC as the members of the CNIFP. When the settlement proceeds were received, they were paid into the CNIFP bank account nominated by the receivers. The reference to the receivers account was purely to indicate that the receivers controlled it.

[49] As the Judge found, the receivers believed on legal advice that they had (or might well have) personal responsibility for payment of the GST although we note that the documents also contemplated that the partnership members as vendors could themselves have a liability to pay the GST. And, as the Judge found, the CNIFP undoubtedly had responsibility itself to pay the GST.

*The assertion by the respondents that the sale proceeds belonged to the secured creditors*

[50] The respondents gave notice that they intended to support the judgment on other grounds. One of these was that the sale proceeds from which the GST payment was made belonged to the secured creditors and not to the CNIFP as the Judge found. The Judge did not deal specifically with this argument and it is not clear whether it was raised before him.

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[18] Receiverships Act 1993, s 6(3); see also Blanchard and Gedye *The Law of Private Receivers of Companies in New Zealand,* at [2.04].

[51] The essence of the respondents' submission is that, in terms of the general law of property, the proceeds of sale of the assets of the CNIFP belong to the secured creditors and not to the CNIFP. It was submitted that this was so because the proceeds of sale were insufficient to meet the debts due to the secured creditors. It followed, in the respondents' submission, that no equity of redemption was available to the CNIFP which had no legal or equitable interest in the fund after the assets were sold. Effectively, the sale proceeds belonged to the secured creditors. In consequence, the GST payment could not have been a debtor-initiated payment under s 95 and, since no debt was owed by the secured creditors to the Commissioner, the latter gave no consideration for the payment.

[52] The principal authority relied upon by Mr Simpson for these propositions was the decision of the House of Lords in *Buchler v Talbot.*[19] At issue in *Buchler* was whether the reference in s 175 of the Insolvency Act 1986 (UK) to "assets of the company" included assets subject to a floating charge, in which case those assets could be used to pay liquidation expenses. Reliance was placed on the following passage from the speech of Lord Hoffmann:[20]

> When a floating charge crystallises, it becomes a fixed charge attaching to all the assets of the company which fall within its terms. Thereafter the assets subject to the floating charge form a separate fund in which the debenture holder has a proprietary interest. For the purpose of paying off the secured debt, it is his fund. The company has only an equity of redemption ...
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> Putting aside any fixed charges, the position is therefore that if a company is in both administrative receivership and liquidation, its former assets are comprised in two quite separate funds. Those which were subject to the floating charge ("the debenture-holder's fund") belong beneficially to the debenture-holder. The company has only an equity of redemption. Those which were not subject to the floating charge ("the company's fund") are held in trust for unsecured creditors. In the usual case in which the whole of the company's assets and undertaking are subject to the floating charge, the company's fund will consist only of the equity of redemption in the debenture holder's fund.

[53] The respondents also cited English authorities for the proposition that the debtor's equity of redemption was extinguished upon the sale of the charged assets.[21] We are satisfied that these decisions are distinguishable both on the facts and by

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19 *Buchler v Talbot* [2004] UKHL 9, [2004] 2 AC 298.

20 At [39]–[30].

21 *National & Provincial Building Society v Ahmed* [1995] 2 EGLR 127 at 129 (CA) and *Ultraframe (UK) Ltd v Fielding* [2005] EWHC 1638 (Ch) at [403].

reason of the distinctive provisions of the PPSA. *Buchler* was concerned with a company which was both in receivership and in liquidation. The House of Lords was required to consider statutory provisions bearing on a company in liquidation where plainly different considerations apply from a company which is only in receivership.

[54] The *Ultraframe* decision is distinguishable on the footing that the passage relied upon by the respondents was concerned with a sale by a security holder, not by the debtor. We also note that *National & Provincial Building Society v Ahmed* was concerned with land, not personal property for which the PPSA has established in s 95 a wholly different regime.

[55] Secondly, issues relating to the crystallisation of floating charges and title to the funds in dispute have little or no bearing on priority issues under the PPSA. Care should be taken not to import pre-PPSA language and concepts into the interpretation of the PPSA. The authors of *Gault on Commercial Law* have noted[22] that payments under s 95 should not be treated as if they were payments from a bank account subject to an uncrystallised floating charge.[23]

[56] More importantly, the priority scheme under the PPSA is not dependent on traditional questions of title. Rather, it is defined by the Act itself. Section 24 provides that "the fact that title to collateral may be in the secured party rather than the debtor does not affect the application of any provision of this Act relating to rights, obligations and remedies".[24]

[57] The general proposition that the PPSA does not rely on notions of title of equitable interests to determine priorities has been confirmed by the Supreme Court of Canada in *Bank of Montreal v Innovation Credit Union.*[25] The Court was determining the priority of unregistered security interests under Saskatchewan's

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[22] Thomas Gault (ed) *Gault on Commercial Law* (online looseleaf ed, Brookers) at [8A.4.10(6)].

[23] Although the PPSA no longer refers to floating charges as such, it does permit the taking of security over after-acquired property — see ss 43 and 44.

[24] See also s 17(1)(a)(ii) as to the meaning of "security interest".

[25] *Bank of Montreal v Innovation Credit Union* 2010 SCC 47, [2010] 3 SCR 3 at [19].

Personal Property Security Act 1993 against a later security interest created by a chartered bank under federal legislation. The Court stated:[26]

> The *PPSA* does not rely on either the common law notion of title or the equitable concepts of beneficial interest or equity of redemption to resolve priority disputes. Rather, for those interests that come within the scope of the Act, the *PPSA* provides a compendium of rules establishing priority rankings both as between different security interests as well as between security interests and other interests in the collateral, with no regard to the question of who actually has title to the collateral.

[58] We conclude that the correct legal analysis is that, at the time the GST payment was made, the CNIFP remained the legal owner of the sale proceeds from which the payment was made, subject to the security interest of the secured creditors. Indeed, as Mr Goddard pointed out, the respondents plead that, until the sale was settled, the CNIFP "acquired, owned and operated" the assets of the CNIFP; that those assets were sold by the CNIFP and that the CNIFP received the proceeds of sale.[27]

[59] In any event, we are satisfied that the priorities established by a payment falling within s 95 of the PPSA are not controlled by who has title to (or the beneficial interest in) the funds from which the payment is made. It is sufficient if the payment is initiated by the debtor through any of the means stipulated in s 95(3). A creditor receiving a debtor-initiated payment under that subsection is accorded priority over a security interest in the funds paid; the intangible that was the source of the payment (in this case, the debtor's bank account); and the negotiable instrument used to effect the payment (in this case, the cheque).

[60] If the respondents' argument about ownership of the sale proceeds were accepted, it would defeat the evident purpose of s 95 which is to enable a debtor to make payments to its creditors by the means identified irrespective of the existence of a security interest in the funds from which the payment is made.

*Does s 95 apply where a receiver has been appointed?*

[61] Mr Simpson submitted that s 95 does not apply because the section was not intended to address the position of an insolvent debtor engaged in the final

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[26] At [19].

[27] At [1.9], [3.1] and [3.6] of the third amended statement of claim.

realisation and distribution of its assets. At that stage, the assets must be realised and distributed in accordance with the priorities established by the securities and by statute. Construing s 95 in a contextual and purposive manner required that it should not be interpreted to conflict with important principles of insolvency law. In this respect, Mr Simpson referred to the established order of priority of creditor claims prescribed in the PPSA, the Receiverships Act 1993 and the Seventh Schedule of the Companies Act 1993; the principle that all creditors in the same class should be treated on an equal footing; and the voidable preference provisions in Part 16 of the Companies Act 1993 and Subpart 7 of the Insolvency Act 2006.

[62] In the High Court, it was also submitted on behalf of the respondents that FCNZ and CITIC were in receivership and that the receivers had control of the CNIFP; the payment was not made in the normal course of business. It was submitted that the payment was made under compulsion or pressure created by substantial and accumulating exposure by the receivers to statutory penalties that would be imposed if the GST payment was not made on time. This last submission was not pressed before us.

[63] To the contrary, Mr Goddard submitted in the High Court and repeated before us that s 95 removes the pre-PPSA requirement to inquire into:

(a) Whether the security interest had crystallised (a concept he submitted does not survive under the PPSA);

(b) Whether the payment was made in the ordinary course of business; and

(c) Whether the recipient of the payment had notice of crystallisation, or notice that a payment had been made in breach of the terms of a floating charge.

[64] Mr Goddard further submitted that if concepts such as the ordinary course of business or voluntariness of the payment had been intended, the section would have so stated. He submitted that the Court should be wary of importing into the PPSA concepts that were relevant to personal property securities law prior to its enactment

but which do not form part of the PPSA scheme, citing *New Zealand Bloodstock Ltd v Waller*.[28]

[65] His submission was that s 95 is designed to distinguish between payments made at the instigation of a debtor (where the policy goal is to enable creditors to rely on the validity of payments received from a debtor, without needing to inquire into the existence of possible security interests in the funds out of which the payment is made); and payments initiated by the creditor which result from enforcement of security interests (where the usual priority rules will apply). On this last point, it is common ground that the sale of the CNIFP assets was not effected by the secured creditors themselves. Had that occurred, we agree with Mr Goddard that s 95 would not apply since the payment could not, in those circumstances, be described as debtor-initiated.

[66] In rejecting the arguments raised by the respondents, the Judge said:

> [72] …Widdup and Mayne express the view that the terms "debtor-initiated payment" suggests that the payment cannot result from a creditor demanding payment where, for example, the debtor is insolvent. But there is no such suggestion in Gedye, Cuming and Wood. Questions relating to the ordinary course of business, crystallisation of floating charges and creditor notice all formed part of the former law but are not, in my view, relevant to the application of s 95. Former common law concepts are not to be imported into the construction of the PPSA save where they are consistent with the scheme of the new legislation. But there is nothing in the language or purpose of s 95 which requires that a gloss be placed on the meaning of the term "debtor-initiated payment". There can be no question here but that the payment was initiated by or on behalf of the debtor in the sense that a conscious decision was taken by the receivers to forward a cheque to the Commissioner for the amount of the GST liability. The fact that they did so because they believed that they were or might be personally liable for the amount of the GST concerned could not justify the conclusion that the payment was otherwise than debtor-initiated. Although the payment was made for motives associated with the sanctions for late payment imposed by the relevant statutory tax regime, it could not be said that the payment thereby lost its debtor-initiated status. The Commissioner did nothing at all. He simply administered the Act under which the receivers decided, for understandable reasons of their own, to make payment.
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> [73] The language and obvious purpose of s 95 are inconsistent with an approach to a construction of the terms "debtor-initiated payment" which would leave room for a detailed examination of the motives of the payer in given cases. …

[28] *NZ Bloodstock Ltd v Waller* [2006] 3 NZLR 629 (CA).

[67] We would add that it is important to keep in mind that, while the receivers were in control of FCNZ and CITIC (and thereby the CNIFP) they were at all material times acting as the agents of the member companies of the partnership. Importantly too, the payment was made from funds belonging to the CNIFP and with the express consent of the BNZ on behalf of the senior secured creditors. There is no question that the CNIFP owed the GST sum to the Commissioner whether or not the receivers may have believed they were also personally liable for payment of this sum.

*Conclusions on the s 95 issue*

[68] We agree with the Judge that this was a debtor-initiated payment within the meaning of s 95 on the footing that the receivers, as agents for FCNZ and CITIC (and through them the CNIFP) initiated the payment to the Commissioner.

[69] We also agree with the Judge that issues as to whether the security interests had crystallised and whether the payment was made in the ordinary course of business are not relevant to the operation of s 95. In this respect, we accept counsel's submission that it would have been a straightforward matter to have included such concepts in the section if this had been intended by Parliament. It is plain from s 95(2) that whether the creditor had knowledge of the security interests at the time of the payment is also irrelevant under s 95.

[70] What is clear in all of this is that the members of the partnership, the receivers and the BNZ as the security trustee for the senior secured creditors all agreed that the GST should be paid from the sale proceeds and authorised the receivers to proceed accordingly. We add that the receivers no doubt required the purchaser to pay GST on the purchase price so they would have the necessary funds to discharge the GST liability to the Commissioner. At the time the payment was made, it was never contemplated that the secured creditors would receive the windfall benefit of the GST collected on the sale of the partnership assets.

[71] We do not accept the submission made on behalf of the respondents that the issue of whether this was a debtor-initiated payment should have been left for trial rather than being dealt with on a strike-out application. This was a straightforward

issue capable of ready determination as a matter of law on the undisputed facts before the Court. Counsel did not elaborate on what further factual material might have been relevant.

[72] The effect of our conclusions in relation to s 95 is that the Commissioner is prima facie entitled to priority over the secured creditors in relation to the GST payment. This conclusion is subject to the possibility of *in personam* claims to which we now turn.

**Can any of the respondents recover the GST from the Commissioner on the basis it was paid under a mistake of law, namely that the receivers were personally liable to pay the GST?**

[73] The Judge concluded[29] that s 95 did not, either expressly or by implication, exclude the right of an affected party to impugn payment made under this section on independent grounds. He noted that the section was simply concerned with the circumstances in which a debtor-initiated payment takes priority over any relevant security interest. He could not see any policy reason why cases falling within s 95 should enjoy absolute protection. He instanced cases involving knowing receipt, constructive trust issues, and payments involving fraud or mistake. He concluded that s 95 operated to protect a creditor from a proprietary claim to a negotiable instrument falling within the section as against the holder of a relevant security interest but that a claim *in personam* did not conflict with the creditors' rights in a negotiable instrument.

[74] The Judge cited the authors of a Canadian text[30] to the effect that *in personam* claims are preserved under the equivalent provision in the Saskatchewan legislation by, for example, the continuing availability of a common law action to account for money had and received.

[75] Approaching the issue of *in personam* claims on the Judge's view that the receivers were not personally liable for the GST, Mr Goddard submitted:

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29 At [60]–[65].

30 Ronald Cuming and Roderick Wood *Saskatchewan and Manitoba Personal Property Security Acts Handbook* (Carswell, Toronto, 1994) at 243–245.

(a) The secured creditors were precluded from recovering the GST by s 95 of the PPSA;

(b) The receivers had no claim to recover the GST because the money was never theirs and they had not suffered any loss; and

(c) Although the CNIFP had a potential *in personam* claim to restitutionary relief, any such claim was precluded because the Commissioner had given good consideration by discharging the debt due by the CNIFP and had acted in good faith.

*Claims by the secured creditors*

[76] Mr Goddard first submitted that any restitutionary claim could only be made by the debtor (the CNIFP) as the party who paid the money. He submitted there was no legal basis for any claim by the secured creditors who had not made the payment. Secondly, he submitted that the only basis on which the secured creditors could assert any rights against the Commissioner is that he had received money in respect of which the secured creditors claimed priority under the PPSA. Yet this was precisely the type of claim precluded by s 95. Finally, Mr Goddard submitted that the purpose of s 95 would be seriously undermined if a secured creditor could recover money from the payee, notwithstanding the section, whenever the debtor made the payment based on a mistake about priorities.

[77] We accept counsel's submission that it cannot have been intended that the priority over a security interest established by the making of a debtor-initiated payment under s 95 could be circumvented by the simple mechanism of the secured creditor asserting that the payment was made by a mistake about whether the payee was entitled to priority. If the payment is debtor-initiated under s 95, then the section establishes the priorities as between the payee and the secured creditors. Those priorities cannot be disturbed on the basis that the payer was mistaken about the very priorities the section dictates. If that were possible, the purposes of the section would be defeated.

[78] Putting the matter another way, the only basis on which the secured creditors could recover the money from the Commissioner is that he received the GST

payment in priority to them. Yet this is the very type of claim which is precluded by s 95.

[79] The position may be different if the payee knew of the mistake at the time the payment was made or if the payee induced the payment by, for example, a false representation or by duress or undue influence as we later discuss. But there is no suggestion of any such knowledge or conduct by the Commissioner in the present case. The Commissioner was aware of the security interests of the secured creditors but received the payment with no knowledge of any mistake on the part of the secured creditors, the receivers or the CNIFP.[31]

[80] We later discuss the effect of the giving of consideration and good faith in the context of a claim for restitutionary relief by the CNIFP. We consider those issues also bear on the willingness of a court to grant relief to the secured creditors even though the consideration given by the Commissioner (by discharging the debt) was to the CNIFP as debtor, not to the secured creditors. This was a factor the Court could properly take into account when considering any claim to relief brought by the secured creditors.

[81] We add that it may be open to doubt whether the secured creditors could obtain relief for money paid under mistake of law in the absence of any pleading that they acted under a mistake or that someone acting on their behalf did so. As the pleadings currently stand, the mistake of law is said to have been made only by the receivers and the CNIFP.[32]

*Claim by the receivers*

[82] We accept that the receivers have not suffered any loss since the funds from which the GST payment was made never belonged to them. We also accept that, as a general proposition, only the party suffering the loss may bring a claim for restitutionary relief. But we are hesitant to accept Mr Goddard's proposition that a receiver who pays a creditor who is not entitled to priority could never have a claim

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[31] The third amended statement of claim does not allege any mistake on the part of the secured creditors. They rely on mistake by the receivers and the CNIFP.

[32] At [3.4], [5.1] and [6.1] of the third amended statement of claim.

to recover the payment. It might be possible for a receiver to seek relief in such a case in order to correct the error.

[83] But the receivers here could have no greater right to recovery of the GST than the secured creditors. Since we have found the secured creditors have no right of recovery, it follows that the receivers have no such right either.[33]

*An in personam remedy for the CNIFP?*

[84] The final stage of the argument presented on behalf of the Commissioner was that the CNIFP could not recover the GST payment since it was a payment made which discharged its GST liability in respect of the sale of the forestry assets. Assuming for strike-out purposes that it was arguable the receivers made a mistake of law about their personal responsibility for the GST and that this mistake led them to cause the CNIFP to make the payment, Mr Goddard submitted there was no authority for the proposition that such a mistake could found a claim for recovery of money paid where the payment discharged a debt due to the payee.[34]

[85] Both counsel referred to the judgment of Robert Goff J in *Barclays Bank v W J Simms Ltd* [35] and, in particular, the following passage:[36]

> From this formidable line of authority certain simple principles can, in my judgment, be deduced: (1) If a person pays money to another under a mistake of fact which causes him to make the payment, he is prima facie entitled to recover it as money paid under a mistake of fact. (2) His claim may however fail if (a) the payer intends that the payee shall have the money at all events, whether the fact be true or false, or is deemed in law so to intend; or (b) the payment is made for good consideration, in particular if the money is paid to discharge, and does discharge, a debt owed to the payee (or a principal on whose behalf he is authorised to receive the payment) by the payer or by a third party by whom he is authorised to discharge the debt; or (c) the payee has changed his position in good faith, or is deemed in law to have done so.

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[33] We note that s 95 of the PPSA would not appear to preclude a claim by a liquidator of a company where the payment amounted to a voidable preference.

[34] Mr Goddard also submitted that the Commissioner would always have a defence of set-off to any claim by the CNIFP for relief. We have reservations about this submission given that the effect of a mistake in this context may be to vitiate the claimant's intention to make the payment. See Graham Virgo *The Principles of the Law of Restitution* (2nd ed, Oxford University Press, Oxford, 2006) at 137.

[35] *Barclays Bank Ltd v W J Simms Son & Cooke (Southern) Ltd* [1980] 1 QB 677.

[36] At 695–696.

[86] The argument before the High Court and before us focused on proposition 2(b). This was expanded upon by Robert Goff J in the following terms:[37]

> **Proposition 2(b)**. This is founded upon the decision in *Aiken v Short*, 1 H. & N. 210, and upon dicta in *Kerrison v Glyn, Mills, Currie & Co.,* 81 L. J.K.B. 465. However, even if the payee has given consideration for the payment, for example by accepting the payment in discharge of a debt owed to him by a third party on whose behalf the payer is authorised to discharge it, that transaction may itself be set aside (and so provide no defence to the claim) if the payer's mistake was induced by the payee, or possibly even where the payee, being aware of the payer's mistake, did not receive the money in good faith: cf. *Ward & Co v Wallis* [1900] 1 Q.B. 675, 678-679, per Kennedy J.

[87] Allan J accepted that the principles relating to the payment of money made under mistake of fact apply equally to a mistake of law citing the judgment of Lord Goff (as he had by then become) in *Kleinwort Benson Ltd v Lincoln City Council*.[38] The Judge also accepted that, in general, the Court will apply a simple "but for" test for causation, asking the question whether the payment would have been made but for the payer's mistake.[39]

[88] Mr Goddard did not dispute these general principles but his argument was, as the Judge accepted, that the CNIFP (acting by its Board) applied its funds in payment of the GST debt. There was no question that the CNIFP was principally responsible for the payment of that debt and FCNZ and CITIC had secondary liability for it under s 57(3) of the PPSA. In receiving the payment in discharge of the GST liability, the Commissioner gave good consideration for the payment.

[89] Mr Simpson responded by submitting that the Commissioner had, by reason of the mistake of law of the receivers and, through them, the CNIFP, been unjustly enriched. But for the mistake made by the receivers as to the existence or risk of personal liability on their part, the Commissioner would not have received the GST payment and those funds would have been available to the secured creditors. He characterised this as a mistake as to distributional priority. He further submitted that the CNIFP had no authority (actual or ostensible) to make the GST payment.

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[37] At 695.

[38] *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349 (HL) at 379.

[39] *Barclays Bank Ltd v W J Simms Son & Cooke (Southern) Ltd*, at 695; *Deutsche Morgan Grenfell Group plc v Inland Revenue Commissioners* [2006] UKHL 49, [2007] 2 AC 558 at 591; *Nurdin & Peacock plc v DB Ramsden & Co Ltd* [1999] 1 WLR 1249 (Ch) at 1272.

[90] Finally, he submitted that the Commissioner had not received the payment in good faith since he was aware, prior to receipt of the GST payment, that the secured creditors claimed the funds were due to them.

[91] We deal with the authority point first. We are not persuaded that the CNIFP (through its member companies) had no authority to make the GST payment. First, the payment was made with the express authority of the BNZ as the security trustee for the senior secured creditors. Secondly, and more importantly, s 95 of the PPSA recognises that a debtor is entitled to make a payment to a creditor notwithstanding the existence of a security interest over the assets (or their proceeds) from which the payment is made. The question is not whether authority to make the payment existed but whether, in the circumstances, a party claiming to have been disadvantaged may nevertheless recover it for mistake of law.

[92] It is not in dispute that the conceptual basis upon which a restitutionary remedy may be granted for moneys paid under mistake of fact or law is that the payee has been unjustly enriched.[40] Where the necessary elements are established, a remedy is prima facie available unless there are defences to the grant of the remedy or some overriding legal principle which may justify the payee's enrichment and negate the claimant's right to restitution. This is put succinctly in the most recent edition of *Goff & Jones*:[41]

> The courts have held that a claimant must demonstrate three things in order to make out a cause of action in unjust enrichment: that the defendant has been enriched, that this enrichment was gained at the claimant's expense, and that the defendant's enrichment at the claimant's expense was unjust. If these three requirements are all satisfied, then the further question arises, whether there are any defences to the claim, and if there are not, then the court must decide what remedy should be awarded. However, there is an additional consideration that the court must also bear in mind, namely that some overriding legal principle [may] justify the defendant's enrichment and thereby nullify the claimant's right to restitution.

[93] Defences to a restitutionary remedy may include the giving of good consideration by the payee or alteration of position by the payee. And, as noted in

[40] Charles Mitchell, Paul Mitchell and Stephen Watterson (eds) *Goff & Jones The Law of Unjust Enrichment* (8th ed, Sweet &Maxwell, London, 2011) at [9.01]–[9.04].

[41] At [1.09].

*Goff & Jones*, the enrichment may be justified by contract or statute.[42] The writers of some learned texts classify the giving of good consideration as a specific defence to a restitutionary remedy in this context,[43] while in the latest edition of *Goff & Jones*, this "defence" is seen more broadly as justifying the defendant's enrichment.[44]

[94] It is unnecessary for us to enter further into this debate other than to note that the giving of good consideration has been accepted as a proper ground upon which a court may determine that the defendant has not been unjustly enriched. This follows on the simple footing that, if the defendant is entitled to the money, then it cannot be said to be unjust, or against conscience, to require repayment.[45]

[95] We are satisfied that the GST payment was made through funds available to the CNIFP in discharge of the debt which the partnership and its constituent member companies owed to the Commissioner. The Judge accepted this proposition in reliance upon the decision of *Aiken v Short*:[46]

> [124] In *Aiken v Short* the bank acted as agent for the customer. There was no question that the customer owed the debt to the defendant, and that the bank itself did not owe the debt. The bank's mistake was as between the bank and the customer. The Court held that the defendant, having given consideration by discharging the debt, could not be liable to the bank.
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> [125] *Aiken v Short* may be (in part) analogous to the present case. CNIFP made the payment in order to discharge its debt to the Commissioner. Its (mistaken) reason for doing so was to ensure the receivers would not be held personally liable for payment. The Commissioner gave consideration for the payment by discharging the CNIFP's indebtedness. On the *Aiken v Short* analogy, the case falls within proposition 2(b) in *Barclays Bank*, which would exclude recovery.

[96] We agree with the Judge that good consideration was given by the Commissioner for the GST payment given that the CNIFP and its members were undoubtedly liable to make the payment under s 57 of the GST Act. However, the

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42 At [2.01].

43 Virgo *The Principles of the Law of Restitution,* at 172–176; *Mason and Carter's Restitution Law in Australia* (2nd ed, LexisNexis, Chatswood, 2008) at [442] and [2518]–[2522].

44 *Goff & Jones The Law of Unjust Enrichment,* at [29.19].

45 See the discussion of Lord Hope in *Kleinwort Benson Ltd v Lincoln City Council,* above n 38, at 408–409 and *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353 at 379 (in the majority judgment of Mason CJ, Deane, Toohey, Gaudron and McHugh JJ) and at 392 (in the minority judgment of Brennan J).

46 *Aiken v Short* (1856) 1 H & N 210, 156 ER 1180.

Judge went on to find[47] that this finding was not conclusive in the Commissioner's favour. He considered that proposition 2(b) in the *Barclays Bank* case allowed the possibility of an exception to recoverability where the payment was not accepted by the payee in good faith. He noted that, in *Aiken v Short*, there was nothing in the transaction to alert the third party who received the payment to any condition affecting the payment or any circumstance which might give rise to a claim for recovery of the money.[48]

[97] Mr Simpson acknowledged that the relevant principles in relation to recovery of money paid under mistake (including the good faith issue) are not clear-cut. But the essence of his submission was that a payee who receives a payment with knowledge that a legal challenge will or may follow cannot, in good faith, retain the payment if a court concludes that the payer was mistaken. Similarly, if a payee receives payment with knowledge that the payer is operating under an error of law.

[98] There is no allegation pleaded or asserted that the Commissioner was aware of any mistake. The sole basis on which counsel relied in asserting a lack of good faith was that the Commissioner was aware, before the GST payment was received, that CNI Forest Nominees, Fletcher Finance and the BNZ protested the payment, claimed they were entitled to the proceeds of sale and reserved their rights.

[99] Mr Simpson also submitted that, given the prospect of interest and penalties accruing if the GST payment were not made when due, the receivers considered in the light of the legal advice they had received that they had little or no option but to make the payment.

[100] The Judge's conclusions on the good faith point were:

> [137] The good faith point has been argued at some length but not, I believe, as extensively as would occur at trial. These are unusual facts. The problem for the receivers was that they understood that they were personally liable. Other than to make the payment and lodge a challenge as they did, there was no other practical solution available within the two month timeframe after which interest and penalties commenced under the Tax Administration Act. Although the Commissioner did not acknowledge any

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47 At [126].

48 *Aiken v Short,* at 214.

> mistake, he was on notice by the time of receipt that the plaintiffs challenged the validity of the payment. There is an argument to make that in those circumstances the Commissioner did not receive the payment bona fide for the purposes of the provision.
>
> [138] The law relating to recovery of payments made under a mistake (and particularly under a mistake of law) is still evolving. Goff and Jones observe that questions about the scope of the defence of good consideration "have not been definitively answered". Those questions include the good faith requirement. I recognise that questions of law will ordinarily be determined on a strike-out application – even where difficult and troublesome – but in my opinion, this unusual combination of factual and legal issues is best resolved at trial and not only the present application.

[101] The Judge also took into account the observations of Lord Goff in *Kleinwort Benson* to the effect that in cases such as the present, the law should develop incrementally, drawing precedent from comparable cases and from academic writing on the subject.[49] In the circumstances, the Judge considered that the issues relating to the restitutionary claims by the respondents should be established at trial where the issues could be fully developed and argued.

[102] We accept that the relevance of good faith (or the lack of it) remains unclear in the context of restitutionary remedies for mistake of law. A court might be more inclined to grant a restitutionary remedy against a defendant who knew of the payer's mistake, but there is no suggestion here of any such knowledge on the part of the Commissioner. The issue is whether mere notice of an adverse claim is sufficient to demonstrate an absence of good faith on the part of the Commissioner.

[103] The concept of good faith depends entirely on context. It can be a difficult concept to define and applies in a wide variety of circumstances.[50] Analogies with good faith in specific statutory or other contexts may not provide any reliable or appropriate guide. We agree with Lord Goff's view that the courts should be cautious in this area and develop the principles incrementally.

[104] The difficulty is that there are no authorities directly in point on this issue and academic commentary is not of great assistance. There are cases dealing with the separate defence of alteration of position in good faith, but those authorities have no

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[49] *Kleinwort Benson Ltd v Lincoln City Council*, above n 38, at 385.

[50] See the discussion by the New South Wales Federal Court in *Mid Density Developments Pty Ltd v Rockdale Municipal Council* (1993) 44 FCR 290 at 298–299.

direct relevance here where the defence is that the Commissioner gave good consideration for the payment. If good faith is required as an additional element of the defence, the issue is what is required to show an absence of good faith (or its counterpoint, the existence of bad faith). No doubt dishonesty by the defendant payee will amount to a lack of good faith in this context. Conversely, a suggestion made by Brennan J in his minority judgment in *David Securities Ltd*[51] that an honest belief by the defendant that he is entitled to the payment is enough to deny the plaintiff relief was firmly rejected by Lord Goff in *Kleinwort Benson* on the footing that such a sweeping proposition would exclude the right to recovery in a large proportion of cases.[52]

[105] All the Commissioner has done in the present case is to receive the GST payment in the belief that it was properly due, a view which was shared at the time by the receivers and their advisers. Although the Commissioner was advised prior to the making of the payment that the secured creditors claimed to be entitled to the money, there is no suggestion that the Commissioner doubted his entitlement or had reason to believe there was a likelihood he would have to repay the money. Indeed, he rejected the Notice of Proposed Adjustment later issued by the receivers under the Tax Administration Act and has consistently maintained the view that he is entitled to the payment.

[106] We are satisfied that the Commissioner gave good consideration for the GST payment by discharging the debt. If there is also a requirement of good faith there is no room for argument that the Commissioner did not act in good faith on the facts as pleaded. We are not persuaded that mere notice of an adverse claim, without more, is sufficient to show an absence of good faith in this context. Something more such as knowledge of the payer's mistake or knowledge of a lack of entitlement to the money would ordinarily be required. There is no allegation of any other wrongdoing by the Commissioner such as to give rise to an independent ground for relief against him or to be otherwise brought into account in the Court's discretion.

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[51] *David Securities Pty Ltd v Commonwealth Bank of Australia*, above n 45, at 399. Brennan J's proposed principle was that "... it is a defence to a claim for restitution of money paid or property transferred under a mistake of law that the defendant honestly believed, when he learnt of the payment or transfer, that he was entitled to receive and retain the money or property."

[52] *Kleinwort Benson Ltd v Lincoln City Council*, above n 38, at 384–385.

[107] A further point, not addressed by counsel, is that it may be inappropriate to engraft good faith requirements upon the statutory regime under the Tax Administration Act for the resolution of disputes of this kind. When the Commissioner receives a payment of GST he does so with the knowledge that any dispute over liability to pay the GST is subject to the dispute resolution processes under that Act. Absent dishonesty or some other wrongdoing, no question of bad faith arises.

[108] The touchstone for the grant of restitutionary relief on the grounds of a mistaken payment is whether it would be unjust or against conscience in the circumstances to allow the defendant to retain the benefit of the payment. We do not discern any unjust enrichment of the Commissioner at the expense of the secured creditors or the other respondents such as would entitle any of the respondents to relief. Indeed, we consider it would be unjust in the circumstances to require the Commissioner to repay the GST since the CNIFP undoubtedly owed the GST to the Commissioner and recovery by the secured creditors will be a windfall not anticipated at the time of the asset sale.

[109] We are not persuaded that the exploration of factual issues at trial would further elucidate the matter. The relevant factual material is before the Court and is undisputed. The issue is the legal consequences which flow from those facts.

[110] We add that there is merit in Mr Goddard's submission that the CNIFP is not pursuing an *in personam* claim for return to itself of money paid under mistake. Effectively, it is the secured creditors for whose benefit the claim is being pursued. As such, the claim by the CNIFP is open to the same objection advanced in respect of the claims by the receivers and the secured creditors themselves, namely that it would have the effect of defeating the application of s 95 of the PPSA.

## Summary

[111] Summarising our findings on the central issues, we have found that:

(a) The receivers were not personally liable to pay the GST on the sale of the partnership assets under ss 57 or 58 of the Goods and Services Tax Act 1985;

(b) Subject to the availability of an *in personam* remedy, s 95 of the Personal Property Securities Act 1999 operates so as to confer priority to the Commissioner over any claim by the secured creditors to the funds used to make the GST payment; and

(c) A restitutionary claim by the respondents based on mistake of law could not succeed.

[112] We have largely agreed with the High Court. The only issue upon which we differ is the finding that the good faith issue should be left for trial. We have concluded that this issue can be resolved in the context of a strike-out application on the undisputed facts.

## Result

[113] For the reasons given, the respondents' proceeding against the appellant in the High Court cannot succeed and it is struck out accordingly.

[114] The respondents (jointly and severally) must pay costs to the appellant as for a complex appeal on a band A basis. We certify for two counsel.

Solicitors:
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Bell Gully, Auckland for Fourth Respondent
Chapman Tripp, Wellington for Fifth Respondents