IN THE SUPREME COURT OF NEW ZEALAND

SC 21/2012
[2012] NZSC 106

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

Hearing: 27 and 28 September 2012

Court: McGrath, William Young, Chambers, Gault and Blanchard JJ

Counsel: M R Crotty for First, Second and Third Appellants
R G Simpson, D K Simcock, J Q Wilson and P G Watts for Fourth Appellant
J A McKay and B J Burt for Fifth Appellant
D J Goddard QC and H W Ebersohn for Respondent

Judgment: 28 November 2012

JUDGMENT OF THE COURT

A The appeal is dismissed.

B The appellants are to pay the respondent's costs in this Court in the sum of $40,000 together with reasonable disbursements as fixed by the Registrar.

REASONS

(Given by Blanchard J)

Introduction

[1] A partnership known as the Central North Island Forest Partnership (CNIFP) carried on a forestry business on a substantial scale. The business encountered financial difficulties. The two partners were the second and third appellants, Forestry Corporation of New Zealand Limited (FCNZ) and CITIC New Zealand Limited, who in this litigation sue together as a firm.

[2] In 2001 Mr Stiassny and Mr Graham, the first appellants, were appointed as receivers of each of FCNZ and CITIC by their first ranking secured creditor, the fifth appellant, Bank of New Zealand. The case has been argued on the basis that BNZ held a security over all the assets of the partnership, as well as over the separate assets of each partner. There may of course be other documentation we have not seen. However, on the documents before the Court at least, it appears that the security was given by the partners individually and not by the partnership, so that what was charged was each partner's interest.[1] This potentially important issue was not argued before us, so we will put it to one side and deal only with the matters advanced by counsel.

[3] Central to the dispute to be resolved at this stage of the litigation is the fact that there was no receivership of CNIFP. Instead, the receivers procured appointment of themselves as the board of CNIFP, constituted under the terms of the partnership agreement between FCNZ and CITIC. By that means the receivers then controlled and managed the ongoing business of CNIFP.

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1 See *United Builders Pty Ltd v Mutual Acceptance Ltd* (1980) 144 CLR 673 at 687–688.

[4] In 2003, and therefore after the Personal Property Securities Act 1999 (PPSA) came into force on 1 May 2002, thenceforward governing the priority of interests in the forestry assets,[2] the receivers caused CNIFP to sell all of its forestry assets to a partnership of certain Cayman Island companies for a price of USD 621 million plus a further sum expressed as representing GST on that price of approximately NZD 127.5 million.

[5] BNZ and the second ranking secured creditor of the partnership, the fourth appellant, CNI Forest Nominees Limited, were of the opinion that their charges over the sale proceeds gave them priority in respect of the sum earmarked for GST and that they were therefore entitled to receive that sum in priority to the Commissioner of Inland Revenue.[3] They so advised the Commissioner. For their part, the receivers were concerned that under s 58 of the Goods and Services Tax Act 1985 they might, as specified agents, be personally liable for the GST payable by CNIFP in respect of its taxable period during which the sale was transacted. A failure to pay it within the time period prescribed by the Act might result in their also becoming liable for penalty tax and interest. The sums involved were very large. They made a decision that it was safer to pay the GST and seek recovery if they could establish that they had no personal liability. The GST was therefore paid by cheque to the Inland Revenue Department.[4] That payment had the effect of discharging the liability of the partnership and the partners for the GST owing to the Crown by CNIFP. No demand for payment had been made by the Commissioner and it seems that there had been no prior discussions with the Department concerning it. Subsequently, the receivers filed a Notice of Proposed Adjustment (NOPA) in their own names contesting their personal liability. The Commissioner rejected that notice.

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2 The Act applies expressly to any fixed or floating charge (s 17(3)) and makes no exception for pre-existing charges, although it did allow a transitional period of six months for perfecting them: ss 195–198. The partnership held relatively minor interests in land that were not affected by the Act but neither party treated them as having significance in the case.

3 The case has been argued on the basis that the combined total of the price and the GST sum is insufficient to repay the secured creditors.

4 The amount of the cheque differed from the GST component of the price (itself affected by any movement in the exchange rate on the US dollar price) because the partnership was able to deduct GST paid by it during the relevant GST period.

[6] In this proceeding the receivers, CNIFP and the security holders seek a declaration that the receivers are not liable to the Crown for the GST in respect of the sale and also orders that any assessment against them be cancelled and that the Commissioner must refund the GST plus interest in accordance with the Tax Administration Act 1994. The appellants brought their proceeding both under that Act (via the receivers) and as a claim for recovery of money paid under mistake or under compulsion. The Commissioner applied to strike out the proceeding.

[7] The Commissioner's position is, first, that the receivers were indeed personally liable for the GST under either s 58 or s 57 of the GST Act. He has been unsuccessful on that ground in both the Courts below. But he says that, even if the receivers were not personally liable and were mistaken in paying or causing the GST to be paid, he does not have to refund it because the payment the Department received was a debtor-initiated payment for which the Crown has priority under s 95 of the PPSA, having received it in good faith and having acted in accordance with reasonable standards of commercial practice in terms of s 25 of that Act. He also denies that the payment is recoverable by way of any restitutionary claim.

[8] In the High Court, Allan J concluded that there was a tenable argument that the payment, though made by the partnership and thus "debtor-initiated" in terms of s 95, had been made under a mistake of law by the receivers as to the order of priority of creditors and that, although the Commissioner gave good consideration (the discharge of the debt owing for the GST), the payment was arguably not received in good faith.[5] These questions, the Judge concluded, should be left to be resolved at trial.

[9] The Court of Appeal allowed the Commissioner's appeal,[6] holding that s 95 gave the Commissioner priority. It agreed that the payment was debtor-initiated. It also found that the Commissioner had given good consideration. If there were also a requirement of good faith, the Court said, in reasons given by Randerson J, the Commissioner had so acted on the facts as pleaded. Mere notice of the secured

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5 *Stiassny v Commissioner of Inland Revenue* (2011) 25 NZTC ¶20-003 (HC).

6 *Commissioner of Inland Revenue v Stiassny* [2012] NZCA 93, (2012) 25 NZTC ¶20-113.

creditors' adverse claim, without more, was not sufficient to show an absence of good faith in the context of the case:[7]

> 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.

The Court of Appeal struck out the appellants' claim. They appeal to this Court against that striking out.[8]

Were the receivers personally liable?

[10] The Commissioner gave notice of his intention to support the Court of Appeal's order striking out the appellants' claim on the ground that, contrary to that Court's view, the receivers were personally liable for the tax. Logically, that is the first issue to be addressed since, if the Commissioner is correct, the appeal must fail.

[11] It will be recalled that, although the two partners of CNIFP were in receivership at the time of the sale of the forestry assets, CNIFP itself was not. Bearing that in mind, we approach the salient provisions of the GST Act.

(a) The GST Act

[12] There is no doubt that CNIFP was carrying on a "taxable activity" as defined in s 6(1)(a),[9] or that, in terms of subs (2) of that section, the sale of its forestry assets came within the definition:

> (2) Anything done in connection with the beginning or ending, including a premature ending, of a taxable activity is treated as being carried out in the course or furtherance of the taxable activity.

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7 At [106].

8 The principles on which applications to strike out a proceeding are determined are stated in *Couch v Attorney-General* [2008] NZSC 45, [2008] 3 NZLR 725 and *Body Corporate 207624 v North Shore City Council* [2012] NZSC 83.

9 "... any activity which is carried on continuously or regularly by any person, whether or not for a pecuniary profit, and involves or is intended to involve, in whole or in part, the supply of goods and services to any other person for a consideration".

[13] GST payable by any person is recoverable as a debt due to the Crown.[10] The Crown is, however, an ordinary (unsecured) creditor of the taxpayer, save to the extent that particular provisions give it preferential priority for GST. Section 42(2) confers a priority in respect of certain assets for GST unpaid on the commencement of a formal insolvency. It is provided, in particular, in relation to an unincorporated body (defined in s 2 as including a partnership) that on the appointment of a receiver on behalf of any person, the amount of unpaid GST payable by the unincorporated body ranks in priority over the claims of any person under a security interest to the extent that it is over all or any part of the unincorporated body's accounts receivable and inventory, and must be paid out of any accounts receivable and inventory that is subject to the security interest (or their proceeds).[11] But that does not help the Commissioner in circumstances where no receiver has been appointed in respect of the partnership (which could only, it seems, have been done by court order), and there has been no other formal insolvency of the partnership of a kind listed in the section.

[14] A person who is carrying on a taxable activity is required by s 51 to be registered. Because a partnership is not in law a legal personality separate from its partners but only the means whereby they conduct a business in common, the requirement that someone carrying on a taxable activity must register might, if not qualified elsewhere in the Act, require registration both by the partnership and by each partner. That would plainly be overcomplicated and undesirable. There are accordingly special registration rules in s 57 for partnerships and other unincorporated bodies. That section relevantly reads:

> **57 Unincorporated bodies**
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> …
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> (2) Where an unincorporated body that carries on any taxable activity is registered pursuant to this Act,—
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> (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

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10 Section 42(1).
11 Section 42(2)(c).

> (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
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> (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) 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
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> (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
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> (e) subject to subsections (3) to (3B), any change of members of that body shall have no effect for the purposes of this Act.
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> (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.
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> (3A) When an individual member dies, the member's estate is severally liable in due course of administration for tax payable by the unincorporated body to the extent that it remains unpaid, whether or not the individual was a member on the date of their death.
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> …
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> (5) Subject to subsection (6), 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: provided that any such thing done by 1 member shall be sufficient compliance with any such requirement.
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> …

[15] The section requires the registration to be in the name of the unincorporated body only; and that its members shall not be registered or liable to be registered in relation to the carrying on of the activity which the body is carrying on. It also deems any supply of goods and services made in the course of the activity to be supplies by the body and not by any member. Despite this, however, a member of an unincorporated body is made by subs (3) jointly and severally liable with other members for all tax payable by the body during the taxable periods, or part thereof, when that person is a member. And, in subs (5), it is provided that where anything is

required to be done pursuant to the Act by or on behalf of an unincorporated body, it is the joint and several liability of all the members to do any such thing (which would include filing of returns and payment of GST due by the body). Compliance by any one member suffices.

[16] In short, speaking of a partnership, only the partnership can be registered and can make and receive taxable supplies, but both the partnership and every member of it are concurrently liable for compliance with the Act in relation to its taxable supplies. The common law position of a partnership and its members is therefore maintained but subject to the device, for administrative convenience, that the GST registration is in the name of the partnership only. This is akin to the provision in the High Court Rules enabling a partnership to sue and be sued in its firm name.[12] It creates no separate legal personality for the partnership.

[17] Section 58 further modifies the position concerning registration during any period when a registered person is "incapacitated":

> **58 Personal representative, liquidator, receiver, etc**
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> (1) In this section and sections 46 and 55—
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> **agency period** means the period beginning on the date on which a person becomes entitled to act as a specified agent carrying on a taxable activity in relation to an incapacitated person and ending on the earlier of—
>
> (a) the date on which some person other than the incapacitated person or the specified agent is registered in respect of the taxable activity; or
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> (b) the date on which there is no longer a person acting as a specified agent in relation to the incapacitated person
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> **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.

[12] High Court Rules, r 4.25(1).

(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.

(1B) If a person becomes a specified agent and has been appointed to carry on part of the incapacitated person's taxable activity only, subsection (1A) applies only to the part of the taxable activity the person has been appointed to carry on.

(1C) Subject to section 46(7), a specified agent may deduct an amount under section 20(3) relating to supplies made before the agency period if the incapacitated person is entitled to, and has not previously deducted, the amount.

(1D) A specified agent is not personally liable for any liabilities incurred under this Act by the incapacitated person on or before the date the agency period starts.

(2) Where a mortgagee is in possession of any land or other property previously mortgaged by the mortgagor, being a registered person, the Commissioner may, from the date on which the mortgagee took possession of that land or other property, until such time as the mortgagee ceases to be in possession of that land or other property, deem the mortgage, in any case where and to the extent that the mortgagee carries on any taxable activity of the mortgagor, to be a registered person.

(3) Any person who becomes a specified agent, or who as a mortgagee in possession carries on any taxable activity of the mortgagor, shall, within 21 days of become a specified agent or commencing that taxable activity of the mortgagor, inform the Commissioner in writing of that fact and of the date of the death or of the liquidation or receivership or bankruptcy or mortgagee taking possession of any land or other property previously mortgaged by the mortgagor, or of the nature of the incapacity and the date on which it began.

[18] The effect of s 58 is that where someone is acting as an agent, including as a receiver, of an incapacitated person, and is carrying on the taxable activity of the incapacitated person, that agent is to be treated as personally carrying on the taxable activity whilst entitled to act as agent and until ceasing to act as such or until a third party becomes registered in respect of the taxable activity. During the agency period the incapacitated person is not to be treated as carrying on the taxable activity. Those who act in circumstances which make them specified agents under s 58 can be anticipated under ordinary agency principles to be entitled to have recourse to the assets of their principal by way of indemnity and to an equitable lien arising as a

matter of law to afford them a security.[13] The lien ranks ahead of the claims of secured creditors in respect of the fund created by the taxable supply. In this indirect way the Commissioner achieves a priority for the GST for which liability arises during the incapacity.[14]

[19] We were advised by Mr Goddard QC that at this strike out stage of the proceeding, the Commissioner does not rely upon any argument, in order to establish personal liability of the receivers, that CNIFP had become an "incapacitated person" when its only members both came within the definition in s 58(1) by virtue of their receiverships, that is, by virtue of the word "incapacitated" at the end of the definition. Counsel said this would involve factual questions not able to be determined without a trial. He reserved the Commissioner's right to make such an argument if the proceeding were not struck out and the matter were to go back to the High Court for trial. If the partnership could indeed be established to have been incapacitated, it would appear to be very arguably the position that the receivers would then have been its specified agents in their capacity as the only members of the board which controlled it.

(b) The Commissioner's arguments and our response

[20] We turn then to the interpretation of ss 57 and 58 which the Commissioner did advance and which he said must, on two alternative bases, give rise to personal liability on the part of the receivers. Mr Goddard prefaced his particular arguments by saying that it was the policy or purpose of s 58 that GST liability incurred as a result of a transaction entered into by an entity under the control of a receiver, or someone in a like position, should have the same priority as other expenses incurred in relation to the transaction[15] and should thus be borne by the secured creditor for whose benefit the transaction was conducted. The secured creditor should not be able to take the benefit of the transaction without accepting a concomitant liability

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13 Such a lien is not within the PPSA regime: s 23(b) of the PPSA.

14 Peter Blanchard and Michael Gedye *Private Receivers of Companies in New Zealand* (LexisNexis, Wellington, 2008) at [6.04] and [6.08].

15 GST payable in respect of the sale of an asset by a mortgagee or receiver is an expense of the sale: *Commissioner of Inland Revenue v Edgewater Motel Ltd* [2004] UKPC 44, [2005] 3 NZLR 289.

for the resulting GST. Counsel cited the general principle enunciated by Kekewich J in *Lathom v Greenwich Ferry Co*:[16]

> [T]he incumbrancer ... cannot assert the propriety of the sale and ask for payment out of the proceeds of the sale without first allowing to be deducted, in the first instance, the costs which have been incurred in realising those proceeds. If you come here to claim the benefit of the sale so as to get payment, it follows that you must pay the costs incurred in producing the sum which is available for payment.

[21] In the absence of s 58, counsel submitted, a receiver could cause the assets to be sold, add GST to the price, but then pay the gross sum to the secured creditor, leaving the Commissioner as an unsecured creditor. The purchaser of the asset, if registered under the Act, would normally be entitled to an input credit for the GST amount paid to the vendor. So the ultimate result would be that the secured creditor would benefit, at public expense, by receiving more than the value of the asset realised upon.

[22] It was submitted that, notwithstanding that in this case there was no appointment of receivers made in respect of the partnership, the Court should be willing to give an interpretation to either s 57 or s 58 which was said to be consistent with their purposes and would make the receivers liable for the GST. It would then be a receiver's expense ranking in priority to the secured creditors.

[23] In this country, the general approach to the interpretation of a revenue statute is much the same as for other statutes. The purpose of a taxing provision may be a guide to its meaning and intended application.[17] But, as Burrows and Carter point out, in most cases the only evidence of that purpose is the detailed wording of the provision and the safest method is to read the words in their most natural sense.[18] In construing and applying a taxing provision, a court leans neither for nor against the taxpayer, but should require that before the provision is effectual to make the taxpayer amenable to the tax, it uses words which, on a fair construction, must be

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16 *Lathom v Greenwich Ferry Co* (1895) 72 LT 790 (Ch) at 793.

17 Interpretation Act 1999, s 5 and see *Commissioner of Inland Revenue v Alcan New Zealand Ltd* [1994] 3 NZLR 439 (CA) at 444 per McKay J.

18 John Burrows and Ross Carter *Statute Law in New Zealand* (4th ed, LexisNexis, Wellington, 2009) at 217.

taken to impose that tax in the circumstances of the case.[19] We now proceed to consider in that way the interpretation of ss 57 and 58 in this case.

[24] The first interpretive argument advanced by Mr Goddard was that, in effect, s 58 should be read in the circumstances of this case as if s 57 did not appear in the Act. Absent s 57, each partner would be treated as carrying on the partnership's taxable activity and would be required to be registered. Each partner was an incapacitated person because it was in receivership at the time of the sale. The receivers would then be their specified agents and must under s 58(1A) be treated as carrying on the taxable activity and so liable to pay the GST incurred in the course or furtherance of that activity.

[25] The argument requires a reading of s 58 as though a "registered person" in the definition of "incapacitated person" in subs (1) included a person who would be required to be registered in respect of the taxable activity in question but for s 57(2). So, on the facts of this case, FCNZ and CITIC would, but for s 57(2), be registered persons.[20] They are each incapacitated by their receiverships and the receivers would thus be their specified agents and liable for the GST on the supply of the forestry assets occurring as part of their taxable activity in relation to the partnership.

[26] The argument is ingenious but, like the Courts below, we do not accept it. It requires the carefully crafted and very clear directives in s 57(2) that members of an unincorporated body are *not* liable to be registered and that the body's taxable supplies are deemed *not* to be made by any member to be disregarded or, as the Court of Appeal said, contradicted; and it would require a reading of the definition of "incapacitated person" in s 58(1) as if it said "a registered person (or someone who would be required to be registered but for s 57)". It would be wrong to ignore the directives in s 57 and to put into s 58 additional words which are not obviously required by the sense of the provision.

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[19] The application of an anti-avoidance provision requires the approach taken in *Ben Nevis Forestry Ventures Ltd v Commissioner of Inland Revenue* [2008] NZSC 115, [2009] 2 NZLR 289.

[20] A registered person is defined in s 2 as "a person who is registered or is liable to be registered" under the Act.

[27] The Commissioner's alternative argument was in respect of s 57(3), which makes a member of an unincorporated body jointly and severally liable for all the tax payable by the body during that person's membership. A "member" is defined in s 2 as *including* a partner, a joint venturer, a trustee, or a member of an unincorporated body. The Commissioner submitted that in s 57(3) it should be read as also including a receiver of a member. Once more, and in common with the High Court and the Court of Appeal, we decline to accept this argument. It again involves reading into the statute something which is certainly not implicit. Those expressly designated as members by the definition are all persons who would be the owners of the assets of, or a share or interest in, the unincorporated body. It is a stretch too far to treat as a member for the purposes of s 57 someone like a receiver who has no legal or beneficial entitlement to any such assets or share or interest – in this case, to the assets of the partners. And it would involve the imposition of a receiver's personal liability in circumstances where s 58, directed, inter alia, at the position of insolvency administrators, does not do so.

[28] Furthermore, a significant unfairness might be created if we were to accept either of the Commissioner's arguments. When one partner of a firm had a receiver appointed of its individual assets, including its interest in a partnership, the receiver would seemingly then be rendered liable for all the GST obligations of the partnership in its future transactions but might have no ability to cause the member to exit the partnership (assuming that under the terms of the partnership agreement it did not terminate ipso facto on the appointment) and no ability to prevent the incurring of GST liability by the firm in respect of the future transactions. Allan J rejected the Commissioner's contention in the High Court for this reason.[21] We agree with him. It is one thing to impose liability for GST under s 58 on receivers appointed in respect of the assets of a partnership and able to control those assets. It is quite another to make them personally responsible merely because of the membership in the partnership of the partner in respect of whose individual assets they are appointed.

[29] Mr Goddard attempted to bolster his arguments by drawing attention to some situations in which, he said, there would be undesirable results unless they were

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[21] At [45].

adopted. He instanced, first, a situation in which a receiver is appointed of the business of a company (thereby becoming its specified agent) and subsequently sells that business to a partnership in which the company retains a substantial interest. He said that the receiver would then escape liability for GST on post-sale trading of the partnership but that the secured creditor would benefit if the business succeeded. But this is a scenario unlikely to occur in practice since the other partner would risk being exposed to 100 per cent of any losses of the new partnership as well as to its GST liability, given the continuing assumed insolvency of the hypothetical company. And it is to be expected that, if the restructuring had tax avoidance as one of its purposes or effects, the Commissioner could invoke the avoidance provision in the Act, s 76, and treat the arrangement as void.[22]

[30] Next, Mr Goddard submitted that on the death of a natural person who was a member of a partnership which was carrying on a taxable activity (in a case where the terms of the partnership agreement overrode s 36 of the Partnership Act 1908), unless the member's personal representative were liable for GST, nobody would be liable in respect of that partner's share in respect of the partnership's future activity. But the partnership and the other member(s) would be liable.[23]

[31] The third illustration of a problem area was where a company with an interest in a partnership went into liquidation and there were post-liquidation partnership GST obligations that could not be proved in the liquidation. It was submitted that if the Act is not read so as to have the effect that they become expenses of the liquidator, no one would be liable for them under s 57(3) and (5). For the same reason as we have given in relation to the position of a receiver of a partner, we do not think that it would be fair to impose such liability on a liquidator. And again, the partnership and the other partner(s) would remain responsible for all the partnership's ongoing GST liabilities.

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22 It has not been suggested for the Commissioner that what occurred in the present case constituted avoidance.

23 In addition, subs (3A) of s 57 provides that "the member's estate is severally liable in due course of administration for tax payable by the unincorporated body to the extent that it remains unpaid".

[32] For these reasons, it has not been shown by the Commissioner at this stage of the case that the GST Act made the receivers personally liable for the GST payable on the sale of the forestry assets of CNIFP.

Is the GST recoverable by any of the appellants?

(a) Who paid the GST?

[33] We will therefore proceed on the assumption that the receivers were not personally liable for the GST. We must accordingly consider whether any of the appellants can recover it from the Commissioner. We begin with an important issue of fact. Who paid the GST? Was it a payment made by the debtor?

[34] The appellants say that it is arguable that the GST component of the price was paid by the purchasers to Messrs Stiassny and Graham, as receivers of the partners, they having arranged this payment to themselves so as to be able to protect their personal position by exercising their right to indemnity out of the charged assets; and that it was therefore not the partnership but the receivers who made the payment to the Commissioner, doing so in order to discharge the personal liability they then mistakenly believed they had, or might have, for the GST.

[35] This factual issue requires an examination of the documentation, in particular of the security documents under which the receivers were appointed (a pre-PPSA mortgage debenture), the sale and purchase agreement of 10 October 2003 and a deed entered into the same day between (a) FCNZ and CITIC, as partners of CNIFP, (b) the receivers and (c) BNZ, called a Deed of Application of Sale Proceeds. The object of the examination which follows is to see whether the documentation leaves any room for argument at trial that the GST component of the sale price was received other than by the partnership or on its behalf, and thus not paid by the partnership or on its behalf. The appellants say that it is possible that there may still be found banking records relating to the opening of the account into which the GST component was paid, and on which the cheque to the Commissioner was later drawn, which might support their contention that the receivers personally received and paid the GST sum. Despite the time which has elapsed and the efforts expended on this

litigation, no such banking records have yet been located. The faint possibility that they may actually exist will need to be considered against what we find in the documents now before the Court, which also include the cheque received by the Department, the GST invoice issued to the purchasers, the GST return made in respect of the taxable period in which the sale occurred and the NOPA filed by the receivers as the first step in their attempt to reclaim the GST.

[36] The debenture was given in 1996 by FCNZ and CITIC (together with certain other borrowers with whom we are not concerned). It required that the proceeds of any disposal of charged assets should be paid into an account nominated by the security trustee (BNZ). After the occurrence of an enforcement event (which it is agreed had occurred before the sale of the forestry assets), there was to be no withdrawal from the account except as authorised by the security trustee.

[37] The starting point in analysing the later documents, which came into existence in 2003, must be that the forestry assets belonged to the partnership. It had legal title to them. The agreement for their sale was entered into by FCNZ and CITIC (called in the document "the vendors") said to be acting through their receivers, who signed it on their behalf. The fact that it was nevertheless a sale by the partnership is, however, evidenced in recital A which records that the vendors "carry on forestry operations and activities ... in a partnership". So when the agreement speaks of the vendors it is referring to the continuing partnership between them. In his submissions to us, Mr Simpson, speaking for all the appellants, confirmed that the partnership was indeed the vendor. He said that in deciding to sell the forestry assets the receivers were acting either in their capacity as the board of the partnership or were exercising their powers as receivers of the partners under the partnership deed to unanimously resolve that the partnership assets be sold.

[38] Clause 3.2 of the sale agreement required the purchaser to pay to the vendors (the partnership) on settlement, inter alia, the GST in accordance with cl 4.2(a). Clause 3.3 provided that the vendors were entitled to receive both the purchase price and the GST sum. Clause 4 dealt with GST. As relevant to this case it said:

4.1 GST – Payable by Purchaser

GST payable by the Receivers (whether or not as Specified Agent[24]) or the Vendors in respect of the transaction evidenced by this agreement shall be payable by the Purchaser in addition to the Purchase Price in the manner specified in clauses 4.2 and 4.7.

4.2 Timing of payment

(a) The GST amount shown in the Tax Invoice issued by the Receivers under clause 4.4 shall be payable by the Purchaser to the Vendors or the Receivers at Settlement by way of payment to a bank account nominated by the Receivers, written details of which will be provided by the Receivers to the Purchaser at least three Business Days prior to the Settlement Date; and

(b) GST adjustments will be made in accordance with clause 10.

…

4.4 Tax Invoice

The Receivers (whether or not as Specified Agent) shall issue to the Purchaser a Tax Invoice in respect of the transaction evidenced by this agreement at settlement.

4.5 Supply by the Partnership[25]

The parties agree that, for the purposes of clause 4, the transaction evidenced by this agreement is treated as being from either the CNIFP or the Receivers (whether or not as Specified Agent) to the Purchaser.

…

4.10 GST – Vendor's liability for CNIFP

For the avoidance of doubt, for the purposes of this agreement, any liability or obligation of a Vendor arising as a result of any transaction described in this agreement in respect of GST or related interest or penalties shall include any and all such liability or obligation arising as a result of section 57(3) of the GST Act.

4.11 Payment

Notwithstanding anything in this agreement, payment by the Purchaser of an amount payable under this clause 4 (including as contemplated by clause 4.2(b)) into the bank account/s nominated by the Receivers in writing will satisfy the Purchaser's obligations in respect of that amount under this agreement to the Vendors and the Receivers (whether or not as Specified Agent).

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[24] "Specified Agent" was defined in cl 1.1 as "the Receivers as specified agents *of the CNIFP* under s 58(1A) of the GST Act" (emphasis added).

[25] The agreement contained the standard provision that headings should not affect interpretation.

[39] What emerges from cl 4 is that the GST component was to be paid by the purchasers whether or not the receivers were personally liable for it, and that it was to be paid to a bank account to be nominated by them. They were required to issue a tax invoice and, for the purposes of GST, the transaction was to be treated as being either from the partnership or from them (possibly as specified agents of the partnership). The definition of "specified agent" *of the CNIFP* rather suggests that the parties were agreeing that, to the extent that in law the supply might be viewed as one made by the receivers, that was because of their control of the partnership, not their control of each partner.

[40] However that may be, it is clear that the tax invoice was issued in the name of the partnership only and, even more significantly, that the nominated bank account, as shown by the cheque for the GST, was styled as a partnership account – "For Central North Island Forestry Partnership (Receivers A/C)". As the Court of Appeal said,[26] the styling of the account by reference to the receivers seems merely to have been an indication that the receivers controlled the partnership's asset in the account.

[41] So, from the perspective of the purchasers, everything pointed to a payment of the GST to the partnership. The Deed of Application of Sale Proceeds actually confirms that this was to be the position. It defined the bank account into which the GST was to be paid as "the CNIFP bank account in Auckland as advised to the Purchaser by CNIFP under the terms of the Sale Agreement" and it required the receivers to retain the GST payment in that account (a partnership account as advised *by the partnership*) to pay the "GST output tax obligations of the vendors under the Sale Agreement or of the Receivers as Specified Agent for those vendors or otherwise". In this deed, "specified agent" is defined as having its meaning in the GST Act but that reference still seems merely to have been recognising a possibility that the receivers might be specified agents of the partnership. The deed, to which the security trustee, BNZ, was a party, is plainly intended to enable implementation of the agreement by the receivers as persons in practical control of the partnership by making the GST payment for the partnership, which would incidentally discharge any personal liability the receivers might have under the Act.

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[26] At [48].

[42] The GST invoice does not advance the appellants' argument, for it was issued in the name of the partnership with no reference to the receivers.[27] The NOPA was certainly framed so as to dispute the GST liability of the receivers as if they had personally paid the GST, but it was filed some weeks after the payment and is inconsistent with the contemporaneous documentation. It appears to be an attempt to recast what had actually happened.

[43] Our examination of the documents leads us to the conclusion, in agreement with the Courts below, that it is simply not arguable that the GST payment was made otherwise than from a partnership bank account with funds to which it had title. The documents do not at all support the view that the receivers were making the payment from funds held in their own names. That would always have been unlikely, both because the receivers were not appointed in respect of the partnership and because it is well-settled law that a privately appointed receiver is not entitled to have the assets over which the appointment is made transferred into the receiver's name.[28] We are not persuaded that there is any realistic possibility that there may belatedly be discovered some bank records which contradict our conclusion. The styling of the bank account on the cheque rather speaks for itself.

[44] The finding that the payment was made by the partnership and not by the receivers means that the claim under the Tax Administration Act must fail. The GST return was in relation to that payment, not to any payment by the receivers. It did not operate as an assessment of the receivers. Their NOPA challenging an assessment of themselves was therefore ineffective.

[45] There remain, however, claims for recovery based on the priority of the secured creditors and on the fact that the payment was made because of a mistake made by the receivers or because they were, in practical terms, compelled to make it.

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[27] It had the partnership's tax number but that is of no moment because the Commissioner requires a receiver to use the same number as the entity in respect of whom the receiver is appointed.

[28] *Re Scottish Properties Ltd* (1977) 2 ACLR 264 (NSWSC).

(b) The secured creditors' priority claims

[46] The appellants say that, even if the partnership did have legal title to the proceeds of sale and made the payment of the GST, then because those proceeds (the only available asset) were insufficient to discharge the obligations owing by the partnership to the secured creditors (there being, in other words, no equity for the debtor), they were to be viewed as held on a bare trust for the secured creditors, and so, in equity, the payment to the Commissioner utilised their property, which they can recover. The appellants refer to cases decided before the advent of the PPSA which show that a secured creditor has a proprietary interest in assets over which it holds a fixed charge, with the debtor having only an equity of redemption;[29] that the charge attaches to the proceeds of sale of the assets;[30] and that, if the debtor receives the proceeds, they are held by it as a trustee for the secured creditor.[31]

[47] There is, however, an obstacle standing in the way of this argument, namely the PPSA regime and in particular s 95, which says:

> **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

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29 *Buchler v Talbot* [2004] UKHL 9, [2004] 2 AC 298 at [29]–[30], [51] and [72].

30 *Agnew v Commissioner of Inland Revenue* [2001] UKPC 28, [2001] 2 AC 710 at 729 and see PPSA, s 45.

31 *Bank of New Zealand v Elders Pastoral Ltd* [1992] 1 NZLR 536 (CA) at 538 per Cooke P and at 539 per McKay J.

(c) a debit, a transfer order, an authorisation, or a similar written payment mechanism executed by the debtor when the payment was made.

"Knowledge" is described for the purposes of the PPSA in s 19(1)(a) in terms of actual knowledge of a fact or the receipt of a notice stating the fact.

[48] The appellants agree that the Commissioner was a creditor who received payment of a debt owing by a debtor (the partnership) and that the payment was made through the use of a negotiable instrument (the cheque). But they still seek to overcome s 95 by arguing that if, as we have held, the payment was made using funds in a partnership bank account, nevertheless, in circumstances where at common law the partnership had only a bare legal title to the chose in action represented by the credit balance in the bank account from which the cheque was drawn, the payment was not debtor-initiated, that is, it cannot be treated under s 95 as a payment by the debtor partnership.

[49] As the Court of Appeal has pointed out,[32] however, this argument founders because the PPSA has introduced, in the place of the general law, an entirely new set of rules governing priorities in the case of an insolvency. Section 95 is one of the priority rules. It gives the creditor "priority over a security interest" in the funds paid to the creditor, in the intangible (the chose in action) that was the source of the payment and in the negotiable instrument (the cheque) used to effect the payment.

[50] Such equitable title as BNZ or CNI might have had under their security interests outside the PPSA regime can no longer govern the position.[33] The Supreme Court of Canada, in *Bank of Montreal v Innovation Credit Union*,[34] has observed that through "a compendium of rules" (which under our statute includes s 95), a PPSA regime establishes priority in particular circumstances. It does not rely on either the common law notion of title or the equitable concepts of beneficial interest or equity

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32 At [55]–[60].

33 A "security interest" is defined in s 17(1)(a) as an interest in personal property created or provided for by a transaction that in substance secures payment or performance of an obligation without regard to the form of the transaction and the identity of the person who has title to the collateral.

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

of redemption to resolve priority disputes. Instead, for interests that come within the scope of the Act, the PPSA rules prescribe priority rankings:[35]

> ... 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.

That this is intended to be the position in New Zealand is made plain by the Long Title to our Act:

> An Act to reform the law relating to security interests in personal property and, in particular,—
>
> ...
>
> (b) to provide for the determination of priority between security interests in the same personal property; and
>
> (c) to provide for the determination of priority between security interests and other types of interests in the same personal property;
>
> ...

[51] Giving the unanimous judgment of the Court in *Bank of Montreal*, Charron J commented:[36]

> While some of the historical forms of security created equitable rather than legal interests, the effect of the *PPSA*'s functional approach, which covers all of these antecedent security interests, is to treat them all equally as "security interests" under the *PPSA*.

She explained that:[37]

> ... having a *PPSA* security interest in collateral does not give a creditor full right and title to the collateral. Rather, a *PPSA* security interest gives the secured creditor an interest in the property to the extent of the debtor's obligation. Upon the debtor's default, the secured creditor has no interest in the collateral beyond the satisfaction of the debtor's obligation as well as reasonable costs of seizing and disposing of the collateral to satisfy the obligation … .

[52] That is true even when, as here, the proceeds would be exhausted in satisfying the obligation to the secured creditors. In such a case, when priorities are being determined under the PPSA rules, there is no concept of the debtor holding a

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35 At [19].
36 At [42].
37 At [43].

bare legal title in trust for the secured creditor. On the contrary, s 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 the Act relating to rights, obligations and remedies. Any secured creditor simply has a security interest whose priority depends upon the rules. The position is unaffected by the level of the indebtedness. Any payment made by or on behalf of the debtor from the proceeds of sale of the collateral is a debtor-initiated payment for the purposes of s 95.

[53] It was necessary to have that section in the Act, along with s 94 (which applies to payments in money), so as to ensure that a person who has given a charge over their assets is able to carry on business and pay the creditors of the business. Sections 94 and 95 are, broadly speaking, intended as a replacement for the former position under a floating charge (before its crystallisation) now that there is a new regime where all security interests are treated as being at all times fixed in nature and there are no longer any securities which are recognised as operating as floating charges. Speaking of equivalent provisions in Canada, a commentator, NW Caldwell, has said:[38]

> The policy reason for including this section in the *PPSA* is rooted in a practical understanding of business. Debtors must be able to pay creditors. These subsections provide a debtor, under a security interest in money, instruments or accounts, with the ability to pay other creditors with the payment being subject to the interests of the secured creditor.

If this was not the case, Caldwell observed, many debtors would be unable to pay their creditors and it would cause security interests in all present and after-acquired property to have a suffocating effect on the ability of a debtor to conduct its business. It would be highly unlikely that, without this provision, creditors would accept encumbered funds as payment of a debt. In other words, it can be said that if there were a danger that a secured creditor could reclaim payments made by the debtor, it would be difficult for the debtor to obtain credit.

[54] It may seem curious that s 95 can, subject to matters yet to be considered, give the Commissioner a priority for his unsecured debt in the circumstances of this case where the partnership was insolvent. But there is nothing in s 95 (or in s 94)

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[38] NW Caldwell "Security Interest in Proceeds: Account Consolidation and the *PPSA*" (1995) 59 Sask L Rev 165 at 170.

which disqualifies a payment just because it was made during an insolvency. Nor is it a requirement of either of the sections that the payment be made in the ordinary course of business. It was no doubt assumed that, as a practical matter, payments would not without good reason be made out of the normal priority order once an insolvency had occurred, because those administering the insolvency would ensure that this did not happen.

[55] The appellants submit, however, that they have a claim against the Commissioner for recovery of a payment made out of the proper order of priority which is not barred by s 95. They say that the Commissioner cannot rely on s 95 because he had actual knowledge or notice when he received the GST that the payment to him was in breach of the terms of the security interests in the proceeds of sale held by BNZ and CNI and that he has not acted in accordance with the requirements of s 25 of the PPSA:

> **25 Rights or duties that apply to be exercised in good faith and in accordance with reasonable standards of commercial practice**
>
> (1) All rights, duties, or obligations that arise under a security agreement or this Act must be exercised or discharged in good faith and in accordance with reasonable standards of commercial practice.
>
> (2) A person does not act in bad faith merely because the person acts with knowledge of the interest of some other person.

The essence of the appellants' contention is that when the Commissioner received the payment, he had actual knowledge or a notice of the competing claims of BNZ and CNI, the grounds of their claims having been stated in their letters of protest which were received by the Commissioner before the payment of the GST was made to him. Put another way, they say that he had actual knowledge or a notice of more than the security interests of BNZ and CNI and so is not protected by s 95(2) and cannot assert his priority under s 95(1). They say that because of his knowledge he did not receive the payment in good faith and is not protected by s 25(2).[39]

[56] There is some limited Canadian case law and commentary suggesting that a lack of good faith under provisions corresponding to s 25 must involve some active

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[39] It was not suggested that, if the Commissioner acted in good faith, he nevertheless failed to act in accordance with reasonable standards of commercial practice.

misleading conduct or deception on the part of the creditor whose interest is impugned: that more is required to be established than a passive reception with knowledge of another's rights.[40] We have decided, however, against examining that proposition. It was not the subject of argument or citation by counsel, and it would not be determinative in this case, for we are satisfied that the appellants' argument concerning the state of the Commissioner's knowledge must fail on the facts.

[57] A recipient creditor is not prevented from asserting a priority under s 95(1) simply because it had knowledge of the existence of a competing security interest. That must be taken to include also any knowledge the creditor had of the terms of the competing security interest. But the protection of that provision would not extend to a creditor with actual knowledge or notice at the time of receipt that a payment is being received in breach of the security agreement. (A creditor could in fact have gained knowledge or notice of a breach without necessarily becoming aware of the detailed terms of the security agreement.) The Australian equivalent provision states expressly that the subsection does not immunise the creditor against knowledge of a breach,[41] and we consider that s 95(2) implicitly has the same limitation. It accords with the sense of the section and is consistent with s 53 which provides for a buyer or lessee of goods sold in the ordinary course of business to take them free of a security interest over them unless the buyer or lessee knows that the sale or lease constitutes a breach of the security interest.

[58] In this case, however, when the matter is correctly approached by asking what, objectively, the Commissioner must have understood at the time of receipt of the GST payment, it is not shown, even arguably, that he knew of anything more than that there were security interests of BNZ and CNI under which they were each

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[40] *Carson Restaurants International Ltd v A-1 United Restaurant Supply Ltd* [1989] WWR 266 (SKQB); *Canadian Imperial Bank of Commerce v AK Construction (1998) Ltd* [1995] 8 WWR 120 (ABQB); *Strathcona Brewing Co v Eldee Investment Corp* (1994) 17 Alta LR (3d) 405 (ABQB); and *Furmanek v Community Futures Development Corp of Howe Sound* (1998) 162 DLR (4th) 501 (BCCA), and see Darcy L MacPherson and Edward D (Ned) Brown "Fraud and Knowledge of a Pre-Existing Security Interest under the *Personal Property Security Act*: Guidance from Other Jurisdictions for Manitoba Courts and Practitioners" (2009) 35 Man LJ 201.

[41] Section 69(2) of the Personal Property and Securities Act 2009 (Cth):

> (2) Subsection (1) does not apply if, at the time of the payment, the creditor had actual knowledge that the payment was made in breach of the security agreement that provides for the security interest.

claiming a priority and were thus asserting that he was not entitled to receive the payment ahead of them. But it is not to be inferred that the Commissioner consequently knew that the payment was a breach of those security interests. It is not said that he had seen their terms and there is nothing to suggest – indeed it is not pleaded – that he did not honestly believe at that time that he had the priority under s 58 (or s 57) for which he has consistently argued all the way up to this Court, or honestly believe that what was paid to him was anything other than a payment of partnership funds from a partnership account to discharge a GST debt owing by the partnership to the Crown (and for which, as he believed, the receivers had personal liability) as a consequence of the taxable supply made when its forestry assets were sold. If payment was being made by the partnership in order to discharge a liability of its specified agents under s 58, it would not have appeared to be in breach of any security agreement, despite what the secured creditors were saying, since the specified agents would, on that footing, have the usual first right of recourse to the proceeds of sale to cause the partnership to discharge their personal liability for the GST. On the basis of what must have been the Commissioner's understanding, the situation was quite different from one in which a payment is mistakenly made to an ordinary creditor who knows at the time of receipt that a secured creditor is claiming the money from the insolvent debtor under its security. Such a creditor would normally have no plausible basis for being able to assert a belief in its own priority in the insolvency and therefore might face difficulty in relying upon s 95(1).

[59] Likewise, it is not arguable that the Commissioner failed to receive the payment in good faith.

[60] The Commissioner is therefore entitled to invoke s 95 in order to claim priority.

(c) Claims for recovery of payment made by mistake or under compulsion

[61] The appellants have submitted that, even if s 95 would give the Commissioner a priority over the secured creditors, that does not prevent any of them from arguing their case as a claim for recovery of the GST as a payment made by mistake or under compulsion. We agree that a claim of this nature remains

possible provided that the claimant is doing more than simply relying upon the priority of its security interest. It would not be barred *by the section*, for example, if the receivers intended to cause the partnership to pay one creditor but by accident paid another. Then the claim for recovery would be unrelated to any priority.

[62] We should say at once, also, that if, as presently appears to be the position, the receivers were not personally liable for the GST, we agree that they were making a mistake about the law when they caused the partnership to make the payment. They wrongly thought they were personally liable for the GST and therefore were acting in accordance with the requirements of the law and as they were entitled to do to protect their personal position. Of course they did not simply blunder. They presumably could see arguments both ways concerning their personal liability. They appear to have carefully considered their position, taken legal advice and decided that the GST should be paid so as to avoid possibly incurring penalties and interest. But that does not mean that in causing the payment to be made they were not mistaken about their legal position. In hindsight, it now appears that their belief in the danger to which they were exposed was mistaken. It is well-settled that someone who makes a payment acting on a view of the law which a court later declares to be wrong may be able to recover it.[42] The existence of a doubt, at the time of payment, about whether a payment should be made – whether it was legally required – does not disqualify the payer from asserting that it was paid under a mistake. Lord Hoffmann gave an apt illustration in *Deutsche Morgan*:[43]

> Contestants in quiz shows may have doubts about the answer ("it sounds like Haydn, but then it may be Mozart") but if they then give the wrong answer, they have made a mistake.

He continued:

> The real point is whether the person who made the payment took the risk that he might be wrong. If he did, then he cannot recover the money.

And later he said:[44]

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

43 *Deutsche Morgan Grenfell Group plc v Inland Revenue Commissioners* [2006] UKHL 49, [2007] 1 AC 558 at [26].

44 At [27].

> I would not regard the fact that the person making the payment had doubts about his liability as conclusive of the question of whether he took the risk, particularly if the existence of these doubts was unknown to the receiving party. It would be strange if a party whose lawyer had raised a doubt on the question but who decided nevertheless that he had better pay should be in a worse position than a party who had no doubts because he had never taken any advice, particularly if the receiving party had no idea that there was any difference in the circumstances in which the two payments had been made. It would be more rational if the question of whether a party should be treated as having taken the risk depended upon the objective circumstances surrounding the payment as they could reasonably have been known to both parties, including of course the extent to which the law was known to be in doubt.

The Commissioner does not claim that the receivers were content to take the risk that they might be wrong.

[63] There are two ways in which the partnership's claim can be viewed. The first is as an assertion of the priority of the secured creditors. It is the receivers appointed by them who have caused the claim to be made, with the intention of paying the recovered moneys over to the secured creditors. So viewed, the claim runs foul of s 95. The second way of looking at the claim is to see it simply as a means of recovering a payment made by mistake to the wrong creditor – to someone who would not have been paid but for the mistake – and in which the partnership is not relying upon any priority, the accounting to the secured creditors being merely consequential upon the recovery. We prefer the latter view. Although the receivers are directing it, the claim for recovery is, under the PPSA, a claim by the partnership. What it may later be caused to do with any recovered amount does not alter that position. Accordingly, s 95 does not defeat the claim.

[64] But that conclusion does not avail the appellants, for the partnership's claim must nevertheless fail on the restitutionary principles laid out in Robert Goff J's classic exposition in *Barclays Bank*:[45]

> (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*

[45] *Barclays Bank Ltd v W J Simms Son & Cooke (Southern) Ltd* [1980] 1 QB 677 (QB) at 695 (emphasis added).

> *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.

[65] The partnership did owe the Crown the amount of GST which it paid to the Commissioner. Therefore the Commissioner gave good consideration in accepting its payment in discharge of the debt. Brennan J remarked in *David Securities*:[46]

> If a defendant has a right to receive a payment, whether under a statute, in discharge of a liability owing to him or pursuant to a contract, a mistake by the plaintiff in making the payment does not convert the receipt into an unjust enrichment. To the extent that a payment satisfies a defendant's right to receive it, the defendant gives good consideration and is not unjustly enriched.

[66] The appellants receive no assistance from what Robert Goff J described as a "footnote" to his proposition (2)(b):[47]

> 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 … .

There can be no suggestion that the Commissioner induced the mistake – he made no demand for payment. And to share the payer's mistake, not appreciating that it was a mistake, as the Commissioner did here, is not to be aware of it. Counsel for the Commissioner submitted, in addition, that good faith is not a requirement of a defence of good consideration and that no case supports such a requirement, but we do not need to pursue this as we have found that the Commissioner did receive the money in good faith.

[67] The appellants also say that the payment is recoverable because it was paid only because of the pressure imposed on the receivers by the tax legislation. The receivers feared that if the GST was not timeously paid and it should transpire that they were in fact personally liable for it, they would personally be subjected to very

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[46] *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353 at 392 (footnotes omitted).

[47] *Barclays Bank*, above n 45, at 695.

substantial interest and penalty liability. After all, they say, the unpaid amount would have been $127.5 million. The appellants referred the Court to statements made in the House of Lords in *Woolwich Equitable*[48] that payments made out of fear of tax penalties and interest were paid under a form of compulsion and recoverable. In that case Lord Browne-Wilkinson said that in cases concerned with payments extracted ultra vires by persons who in virtue of their position could insist on a wrongful payment as a precondition to affording the payer his legal rights (payments colore officii) were merely examples of a wider principle, namely:[49]

> ... that where the parties are on an unequal footing so that money is paid by way of tax or other impost in pursuance of a demand by some public officer, these moneys are recoverable since the citizen is, in practice, unable to resist the payment save at the risk of breaking the law or exposing himself to penalties or other disadvantages.

That was, however, a case in which it had been found after payments of tax had been made to the Revenue that the regulations requiring them to be made were unlawful. The Crown had no right at all to receive them, for they were not due and payable. The Crown was unjustly enriched at the expense of the payer. In the other cases cited by the appellants in which repayment was ordered,[50] it had also been found that, as in *Woolwich*, the Crown had no lawful claim to the moneys paid: there was no indebtedness of the payer. In the present case, in contrast, the GST was due and payable. There was no unlawful demand by the Commissioner. More importantly, the claim again fails because the Crown gave good consideration by accepting the payment in discharge of a debt which the partnership did owe. There was no unjust enrichment of the Crown at the expense of the partnership.

[68] BNZ and CNI additionally say, in support of their separate claim, that they conferred a benefit on the Crown since the money used was money to which they were entitled. Accordingly, they submit, the Crown was unjustly enriched at their expense. But this amounts to no more than an assertion of their priority as secured creditors, to which s 95 is a complete answer on the facts of this case.

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48 *Woolwich Equitable Building Society v Inland Revenue Commissioners* [1993] AC 70 (HL).

49 At 198.

50 *Mason v State of New South Wales* (1959) 102 CLR 108 and *Waikato Regional Airport Ltd v Attorney-General* [2003] UKPC 50, [2004] 3 NZLR 1.

[69] The receivers, for their part, can make their claim only on behalf of the partnership or on behalf of the secured creditors. They did not personally make the payment. They can achieve no more than the other claimants.

Conclusions

[70] It has not been shown by the Commissioner at this stage of the case that the receivers were personally liable for the GST. The payment was made by the partnership. On the basis that the receivers were not personally liable, it was made because of a mistake by them. But it is not recoverable from the Crown. The claim of the partnership for recovery of a payment made by mistake or under compulsion fails because the Commissioner gave good consideration. The claim of the secured creditors fails because of s 95. The receivers have no independent claim.

[71] It will be seen that our reasoning has been throughout along similar lines to that in the very able judgment of Randerson J for the Court of Appeal.

Result

[72] The appeal is dismissed with costs of $40,000 payable to the respondent, together with his reasonable disbursements as fixed by the Registrar.

Solicitors:
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Bell Gully, Auckland for Fourth Appellant
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