IN THE COURT OF APPEAL OF NEW ZEALAND

CA553/2011
[2013] NZCA 357

BETWEEN	STRATEGIC FINANCE LIMITED (IN RECEIVERSHIP & IN LIQUIDATION) AND STRATEGIC NOMINEES LIMITED (IN RECEIVERSHIP) Appellants
AND	DAVID JOHN BRIDGMAN AND CRAIG ALEXANDER SANSON First Respondents
AND	COMMISSIONER OF INLAND REVENUE Second Respondent

Hearing:	27 March 2013
Court:	Arnold, Stevens and White JJ
Counsel:	M J Tingey and T B Fitzgerald for Appellants No appearance for First Respondents P W O'Regan and N M H Whittington for Second Respondent
Judgment:	9 August 2013 at 10.30 am

JUDGMENT OF THE COURT

A **The application by the appellants for leave to adduce further evidence is declined.**

B **The appeal is allowed in respect of the engineering and construction bonds of $3,000 which are payable to the appellants, but in all other respects the appeal is dismissed.**

C The appellants are to pay the second respondent's costs for a standard appeal on a band A basis and usual disbursements. We certify for two counsel.

REASONS OF THE COURT

(Given by White J)

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Introduction

[1] This appeal involves a dispute between the appellants, Strategic Finance Ltd (in rec and in liq) and Strategic Nominees Ltd (in rec), (Strategic), the only remaining secured creditors in the liquidation of Takapuna Procurement Ltd (Takapuna), and the second respondent, the Commissioner of Inland Revenue, (the Commissioner), the only remaining preferential creditor in the liquidation. The dispute relates to various categories of funds totalling $782,108.18 plus accrued interest held by the first respondents, David Bridgman and Craig Sanson (the liquidators of Takapuna) who abide the Court's decision.

[2] Strategic claim that their general security agreement (GSA) over Takapuna's personal property entitles them to all the funds held by the liquidators essentially because under the relevant provisions of the Companies Act 1993 the Commissioner's claim as a preferential creditor is limited to "book debts" and therefore does not include most of the categories of funds at issue. Strategic also claim on the basis of other legal principles that one of the categories, namely a GST refund of $169,349.86, released by the Commissioner to Takapuna "in error" after the liquidation, should not in any event be repaid to the Commissioner.[1]

[3] In the High Court Associate Judge Gendall rejected Strategic's claims and ordered that all the funds be paid to the Commissioner.[2] The grounds for his decision were:

(a) it would be unfair and unconscionable for the GST refund of $169,349.86 to be retained by the liquidators;[3]

(b) the expression "accounts receivable" in sch 7, cl 2(2) of the Companies Act is not limited to book debts;[4] and

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1 Restitution and the rule in *Re Condon, ex parte James* (1874) LR 9 Ch App 609 (CA).
2 *Burns v Commissioner of Inland Revenue* (2011) 10 NZCLC 264,885 [the High Court decision].
3 At [45].
4 At [101].

(c) the funds held by the liquidators of Takapuna are "accounts receivable" and therefore payable to the Commissioner as the only preferential creditor.[5]

[4] Strategic challenge each of these grounds, but advance their appeal first through grounds (b) and (c). Ground (a) arises only if Strategic are successful in their challenge to grounds (b) and (c). A central question for our determination is the meaning of the term "accounts receivable" for the purposes of the regime established under the Personal Property Securities Act 1999 (the PPSA). As the assets of Takapuna are insufficient to meet the Commissioner's preferential claim without recourse to the personal property the subject of Strategic's GSA, the question is whether the funds of $782,108.18 held by the liquidators are available to meet the Commissioner's claim in priority to Strategic's security interest.

[5] We first set out the background to the appeal, which is largely undisputed, before addressing the issues raised by Strategic.

Background

[6] Takapuna was a property developer whose business included a development in Takapuna called Shoalhaven. Strategic provided Takapuna with a loan facility of up to $10,988,000 plus capitalised interest and fees for the development which was secured by the GSA, dated 20 May 2003, and a second mortgage registered over the Shoalhaven property. The GSA, which gave Strategic security over all of Takapuna's "present and after-acquired personal property, and all of [Takapuna's] present and future rights in relation to any personal property", was registered on the Personal Property Securities Register.[6]

[7] On 21 November 2008 the High Court at Auckland put Takapuna into liquidation on the application of the Commissioner.[7] Messrs Grant Burns and

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5 At [108]–[109] and [113].
6 On 22 May 2003 and re-registered on 4 April 2008.
7 *Commissioner of Inland Revenue v Takapuna Procurement Ltd* HC Auckland CIV-2008-404-4659, 21 November 2008.

Richard Agnew of PricewaterhouseCoopers (PwC) were appointed as liquidators, but they were subsequently replaced by the first respondents.[8]

[8] In the course of the liquidation of Takapuna the liquidators received proofs of debt from:

(a) Strategic claiming $7,056,000 under their securities; and

(b) the Commissioner claiming $3,625,493.51 as a preferential creditor for GST arrears plus interest and costs.

[9] The liquidators have collected funds totalling $782,108.18 plus accrued interest comprising the following four different categories:

(a) refunds to Takapuna from the North Shore City Council (the NSSC) of:

(i) development contributions paid earlier by Takapuna to the Council ($451,176.94);

(ii) bonds paid earlier by Takapuna to the Council ($3,000);

(b) the GST refund of $169,349.86 released by the Commissioner of Inland Revenue to Takapuna "in error"; and

(c) various funds held by Takapuna's solicitors ($158,581.38).

Development contribution refunds ($451,176.94)

[10] These funds, which were received by the liquidators from the NSCC, were refunds of development contributions paid by Takapuna to the NSCC prior to the liquidation. The contributions were required from developers on development project approvals under NSCC 2004 and 2006 development contributions policies.

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8 *Strategic Finance Ltd (in rec) v Bridgman* CA553/2011, 19 March 2012.

[11] In March 2007 the High Court decided in judicial review proceedings not involving Takapuna that the NSCC had made a number of errors of law in adopting its development contribution policies.[9] The Court did not, however, address matters of relief or remedy and no declaration of invalidity was made.[10] Instead it was left to the parties to negotiate those matters in light of the principles in the judgment.

[12] There is no evidence before this Court of any negotiations between the parties to the judicial review proceeding as to relief or remedy. Nor is there any evidence of any decision having been made by the NSCC to make any refunds to Takapuna prior to its liquidation on 21 November 2008.

[13] The evidence establishes, however, that after the liquidation of Takapuna the following steps were taken by the NSCC:

(a) on 29 January 2009 the NSCC refunded to the liquidators overpaid development contributions of $2,297.50;

(b) on 1 July 2009 the NSCC reassessed the development contributions paid under the 2004 and 2006 policies and resolved to pay the difference between the amounts paid by Takapuna and the amounts payable under the reassessed policies (plus interest); and

(c) on 7 August 2009 the NSCC refunded the development contributions of $448,879.08 to the liquidators.

Engineering and construction bonds ($3,000)

[14] Prior to the liquidation, Takapuna paid engineering and construction bonds to the NSCC in connection with the Shoalhaven development. In accordance with standard practice, the bonds were refunded after the NSCC concluded that the development was compliant with the council development code. This occurred on 15 January and 16 April 2009, that is, after the liquidation of Takapuna.

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9 *Neil Construction Ltd v North Shore City Council* [2008] NZRMA 275 (HC) at [289]–[291].

10 See at [2] and [294].

GST refund ($169,349.86)

[15] On 3 December 2008, shortly after Takapuna was put into liquidation, the Commissioner repaid $169,349.86 in respect of claimed GST overpayments that Takapuna had made in the period before its liquidation.

[16] Although Takapuna was put into liquidation on 21 November 2008, one of its directors filed Takapuna's GST return for the period ending 31 October 2008 on 28 November 2008. The return showed that Takapuna was entitled to a refund of $169,349.86 in respect of GST overpayments in the period before its liquidation.

[17] Notwithstanding the fact that at that time Takapuna's GST payment arrears exceeded $3,600,000, the Inland Revenue Department employee who reviewed Takapuna's GST return of 28 November 2008 arranged for the refund of $169,349.86 to be paid.

[18] The Commissioner's position is that, even if the refund is not, as the High Court concluded, an "account receivable", the refund was paid by mistake and that she therefore has a proper claim to the money under restitution principles or alternatively the liquidators should be directed to return the funds under the rule in *Re Condon*.[11]

[19] Strategic take issue with the Commissioner's position and the findings of the Associate Judge. Strategic also seek to rely on a PwC file note dated 10 December 2008 recording a telephone conversation between an employee of PwC and an employee of the Inland Revenue Department relating to the GST refund, a copy of which was provided to this Court by counsel. The Commissioner strongly opposes this Court admitting the file note in evidence or giving any weight to it as it was not in evidence in the High Court and was not the subject of an application to this Court for leave to adduce further evidence.[12] At the hearing of the appeal we indicated that we would receive the file note on a de bene esse basis and rule on its admissibility in

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11 *Re Condon*, above n 1.

12 Under the Court of Appeal (Civil) Rules 2005 [the Rules], r 45(1).

our judgment. We address this issue and the factual background to this ground of appeal later.[13]

Carter Atmore funds ($158,581.38)

[20] These funds were held by Carter Atmore, Takapuna's former solicitors, in their trust account on behalf of Takapuna and comprised:

(a) body corporate levies of $28,021.88 refunded to Carter Atmore on behalf of Takapuna (in liquidation) on 4 December 2008 by the body corporate managers for the Shoalhaven development;

(b) deposits paid for the purchase of units in the Shoalhaven development prior to the liquidation: two by purchasers whose deposits were forfeited when their contract was cancelled and one by a purchaser whose contract was amended and whose deposit was applied to the purchase price of a property from Takapuna;

(c) rental payments paid by Quinovic Property Management Ltd before the liquidation for rental properties managed for Takapuna;[14]

(d) sourcing fees totalling $10,187.38 reimbursed from Investors Forum NZ Ltd and settlement funds in relation to another Shoalhaven unit, both paid to Carter Atmore prior to liquidation; and

(e) "miscellaneous funds" consisting of refunds for overpayment of general rates, water charges and legal fees.

[21] The case for Strategic is that none of the four categories of funds (the development contribution funds, the engineering and construction bonds, the GST refund and the Carter Atmore funds) constituted "accounts receivable" by Takapuna as at the date of its liquidation. They are therefore not available for the Commissioner as a preferential creditor under s 312 of the Companies Act and

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13 Below at [117]–[118].

14 High Court decision, above n 2, at [112].

remain subject to Strategic's GSA. Nor is the GST refund recoverable by the Commissioner on the basis of restitution principles or the decision in *Re Condon*.

[22] As the issues raised on the appeal arise in the context of Strategic's GSA and the preferential creditor regime, it is convenient to describe the nature and scope of the GSA and the preferential creditor regime before turning to the interpretation of the relevant statutory provisions.

Strategic's GSA

[23] Strategic's GSA was designed to provide Strategic with the broadest possible security for their loan facility over Takapuna's personal property. Strategic, which made the advance to Takapuna (a development company) through Strategic Nominees Ltd, their finance company, were concerned to ensure that in the event of Takapuna being unable to meet its loan repayment obligations they had access to all of Takapuna's personal property. The GSA was therefore in standard form, creating a security interest under the PPSA over both Takapuna's "present and after-acquired personal property" and all of Takapuna's "present and future rights in relation to any personal property".[15]

[24] The GSA contains the broad PPSA definition of "personal property" as including chattel paper, documents of title, goods, intangibles, investment securities, money, and negotiable instruments.[16] As the inclusive nature of this definition[17] and the further definitions of each of the included items[18] indicate, the scope of the expression "personal property" is broad.[19] For present purposes we note that it encompasses, but is clearly not limited to, "accounts receivable". As Mr Tingey

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15 Personal Property Securities Act [PPSA], s 17.

16 Clause 2(j) of the general security agreement [the GSA]; PPSA, s 16.

17 JF Burrows and RI Carter *Statute Law in New Zealand* (4th ed, LexisNexis, Wellington, 2009) at 417–421.

18 Section 16: the PPSA provides for three broad classes of collateral which are intended to be mutually exclusive and comprehensive of all personal property not otherwise excluded from the PPSA by the operation of s 23: "goods", which consist of the sub-categories of "consumer goods", "inventory" and "equipment"; five classes of "documentary" or "quasi-intangible" securities: "chattel paper", "documents of title", "negotiable instruments", "investment securities" and "money"; and "intangibles" – the residual category which includes "accounts receivable".

19 Linda Widdup *Personal Property Securities Act: A Conceptual Approach* (3rd ed, LexisNexis, Wellington, 2013) at 71. For a discussion of the limits of "personal property" and "questionable" personal property, see Widdup at 11–19.

submitted, "accounts receivable" is a sub-category of "intangibles" which is in turn a category of "personal property" under the PPSA.[20]

[25] The GSA does not contain a definition of "after-acquired personal property". The PPSA definition of "after-acquired property" as meaning personal property acquired by a debtor after the security agreement is made will therefore be applicable.[21] It was assumed in the High Court,[22] and by the parties on appeal, that the liquidation of Takapuna did not prevent Strategic's GSA from attaching to such property. As the assumption is consistent with both the PPSA requirements relating to attachment,[23] and the scheme of Part 16 of the Companies Act,[24] we proceed on the same basis.[25]

[26] Neither the GSA nor the PPSA contains a definition of the expression "present and future rights in relation to any personal property".[26] The expression is clearly intended to widen the scope of Strategic's security and would include at least all "interests" in personal property within the broad meaning of the term "security interest" under the PPSA. The term is defined in s 17(1)(a) as meaning:

> ... 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—
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> (i) the form of the transaction; and
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> (ii) the identity of the person who has title to the collateral ...

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20 Section 16.

21 Section 16. See also ss 43–44.

22 High Court decision, above n 2, at [3].

23 PPSA, s 40(1)(b).

24 Companies Act, ss 248(2), 312 and 313; *Dunphy v Sleepyhead Manufacturing Co Ltd* [2007] NZCA 241, [2007] 3 NZLR 602 at [43].

25 Under the old regime the crystalisation of a floating charge did not prevent a floating charge which covered future assets from applying to assets acquired after the charge crystallised: *N W Robbie & Co Ltd v Witney Waterhouse Co Ltd* [1963] 1 WLR 1324 (CA); *Ferrier v Bottomer* (1972) 126 CLR 597; and *Elders Pastoral Ltd v TAS Enterprises Ltd* HC Hamilton CP39/86, 11 June 1987. Such a charge would not, however, extend to monies recovered by a liquidator pursuant to provisions proscribing preferences: *Re Yagerphone Ltd* [1935] Ch 392 (CA); *NA Kratzman Pty Ltd (in liq) v Tucker (No 2)* (1968) 123 CLR 295; and *Re Hibiscus Coast Marine Centre Ltd (in liq)* (1986) 3 NZCLC 99,615 (HC) (the justification for this exception has, however, been questioned: Michael Gedye "What is an 'Account Receivable'?" (2009) 15 NZBLQ 168 at 176).

26 Although the Law Commission anticipated the use of security agreements which: "provide simply that the debtor grants a security interest in 'all present and after-acquired property'": Law Commission *A Personal Property Securities Act for New Zealand* (NZLC R8, 1989) at 111.

[27] The broad scope of the meaning of "security interest" is reinforced by the provisions in the PPSA relating to security interests in after-acquired property[27] and the proceeds of personal property.[28] A security interest in collateral that is dealt with or otherwise gives rise to "proceeds" continues in the collateral,[29] unless the secured party expressly or impliedly authorised the dealing, and extends to the proceeds.[30]

[28] The question whether the reference in the GSA to "present and future *rights*" (emphasis added), as distinct from "interests", extends the scope of the GSA further does not arise in this case and was not argued. If it had arisen, it might have been necessary to consider the scope of the PPSA and whether, notwithstanding the PPSA, it was open to the parties to extend their agreement beyond the scope of the Act.[31] While, as permitted by the PPSA,[32] Strategic and Takapuna contracted out of the enforcement provisions of the PPSA,[33] it is at least doubtful whether they could either contract out of, or effectively extend, the scope of other provisions of the Act.[34] We do not, however, need to decide these questions.

[29] Applying the relevant definition provisions of the GSA and the PPSA, we have little difficulty in concluding that all of the funds in dispute in this case constituted after-acquired personal property or the proceeds of such property over which Strategic's GSA provided a security interest. The development contribution refunds, the engineering and construction bonds and the GST refund were all the personal property of Takapuna received by the liquidators of Takapuna after the liquidation of Takapuna. The Carter Atmore funds were also the personal property of Takapuna held by Carter Atmore in their trust account prior to the liquidation.

[30] On this basis under the terms of Strategic's GSA and the relevant provisions of the PPSA Strategic have a security interest in all of the disputed funds entitling them as the remaining secured creditors of Takapuna to receive the funds from the

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27 Sections 43–44.
28 Sections 45–47.
29 Section 16: "identifiable or traceable personal property".
30 Section 45.
31 Section 23. See also *Saulnier v Royal Bank of Canada* 2008 SCC 58, [2008] 3 SCR 166.
32 Section 107.
33 GSA, cl 25.
34 Section 35 provides as a starting point that the parties' agreement will be effective in its own terms, unless it is inconsistent with statute.

liquidators unless their rights as secured creditors are defeated by the Commissioner as the remaining preferential creditor or, in the case of the GST refund, the Commissioner's other claims.

[31] The Commissioner did not really challenge the view that Strategic would be entitled to receive the funds if the Associate Judge's decision is not upheld. Mr O'Regan did submit that if the funds were not "accounts receivable" as claimed by Strategic, then Strategic would not be entitled to them under the GSA, but this submission was made in the context of responding to Strategic's submissions on the interpretation of the term "accounts receivable" and not in the context of the interpretation and application of the GSA and PPSA to the categories of personal property held by the liquidators after the liquidation of Takapuna.

[32] The crucial issues on this appeal therefore relate to the nature and scope of the preferential creditor regime and the Commissioner's claims in respect of the GST refund. Is Strategic's entitlement as the remaining secured creditor defeated?

The preferential creditor regime

[33] Statutory regimes conferring preferential creditor status on various categories of creditors in the bankruptcy of individuals and the receivership or liquidation of companies have been in place in New Zealand for many years.[35] The categories of preferential creditor have included the Official Assignee, receivers and liquidators in respect of their costs and expenses, employees in respect of their wages and the Commissioner in respect of unpaid tax, including GST. While there have been

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[35] Initially legislation granted preferential creditors priority over other unsecured creditors, but the development of the floating charge – first recognised in *Re Panama, New Zealand and Australian Royal Mail Co* (1870) 5 LR Ch App 318 (CA) – which enabled a company to grant a charge over substantially the whole of its assets led to legislation for the priority for the payment of preferential debts from the proceeds of a floating charge. In respect of personal insolvency see: Bankruptcy Act 1867, ss 216–217; Bankruptcy Act 1883, s 137; Bankruptcy Act 1892, s 120; Bankruptcy Act 1908, s 120; Insolvency Act 1967, s 104; Insolvency Act 2006, s 274–275. In respect of companies: Companies Act 1882, s 172; Companies Amendment Act 1890; Companies Act 1903, s 260; Companies Act 1908, s 260, Companies Amendment Act 1928, s 2; Companies Act 1933, s 159; Companies Act 1955, ss 205, 209P(c), 229(5) and 286 and sch 8C; and Companies Act 1993 ss 234, 312 and sch 7.

suggestions that the Commissioner's preferential status should not be retained,[36] these views have not been accepted by Parliament.[37]

[34] In the case of a company receivership or liquidation, amounts owed to preferential creditors are given priority in two different situations:

(a) If the assets of the company are sufficient to meet the claims of preferential creditors without recourse to any personal property of the company the subject of a security interest under the PPSA, the preferential creditors will be paid ahead of all unsecured creditors.[38]

(b) But, if the assets are insufficient to meet the claims, they will rank ahead of secured creditors with security interests in respect of certain prescribed categories of personal property.[39]

[35] Prior to the amendment of the Companies Act to bring it into line with the PPSA, the prescribed categories of personal property comprised the assets which were the subject of "a floating charge" and included a charge that conferred a floating security at the time of its creation but had since become a fixed or specific charge.[40] A floating charge provided a lender with security over a debtor company's personal property, including its inventory, bank accounts and deposits, book debts

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36 Law Commission *Priority Debts in the Distribution of Insolvent Estates Advisory Report to the Ministry of Commerce* (NZLC SP2, 1999) at [248].

37 Current categories of preferential creditors a liquidation consist of: (1) claims by employees for unpaid wages and salaries, holiday pay, redundancy compensation and outstanding deductions for reimbursement of lost wages and employee Kiwisaver contributions; (2) claims by layby sale creditors and holders of liens over company documents and costs related to creditors' compromise meetings; and (3) Crown claims for GST, PAYE, withholding tax and customs duties, see Liesle Theron "The Liquidation Process" in Paul Heath and Michael Whale (eds) *Insolvency Law in New Zealand* (LexisNexis, Wellington, 2011) 397 at [16.36].

38 The preferential creditor regime is contained in sch 7 of the Companies Act.

39 Sub-clauses 2(1)(b)(i)(B) and (C) of sch 7 (and their iterations under related legislation) recognise that under the pre-PPSA law some interests in inventory (such as retention of title clauses) and accounts receivable (such as assignments of single accounts receivable) took priority over preferential creditors. The PPSA approximations of those interests (purchase money security interests and transfers of a single account receivable) replicate, as far as possible, the earlier position. No such interests arise in this case.

40 Companies Act, sch 7, cl 9 (as it then was); Companies Amendment Act 1999; and Personal Property Securities Amendment Act 2001.

and other debts.[41] The charge was described as "floating" because the debtor company was left free to deal with its "circulating assets" until some future event such as default on the debt secured or liquidation.[42]

[36] It was the "long-troubling" distinction between fixed and floating charges,[43] particularly in the context of disputes between secured and preferential creditors, that led to the enactment of the PPSA and the accompanying amendment of the Companies Act. A new preferential creditor regime thereby replaced the reference to assets secured by "a floating charge" with the reference to "accounts receivable and inventory".[44] This amendment had the consequence of narrowing the scope of the assets available for preferential creditors from all aspects of personal property the subject of a floating charge to the two specific categories of "accounts receivable" and "inventory". Other categories of personal property, such as "chattel paper", "investment securities" and "negotiable instruments", are not included.

[37] The new regime also abrogated the floating/fixed charge distinction, at least within the confines of the registration and priority regime regulating security interests in personal property.[45] Security distinctions are now based on the economic substance of a transaction. The new focus is on the type of property secured, not the type of security.[46] As the Supreme Court has made clear, principles and concepts developed prior to the PPSA have limited relevance now.[47] This means that we do not accept Mr Tingey's submission that much assistance is still to be obtained from

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41 Peter Blanchard and Michael Gedye *Private Receivers of Companies in New Zealand* (LexisNexis, Wellington, 2008) at [1.03]; Rizwaan Mokal "Liquidation Expenses and Floating Charges – the Separate Funds Fallacy" [2004] LMCLQ 387 and for example *Commissioner of Inland Revenue v Agnew* [2000] 1 NZLR 223 (CA) at [3]; affirmed by the Privy Council: *Commissioner of Inland Revenue v Agnew* [2002] 1 NZLR 30 (PC).

42 *Re Spectrum Plus* [2005] UKHL 41, [2005] 2 AC 680 at [107]; John Walsh (ed) *Insolvency Law and Practice* (online looseleaf ed, Brookers) at [CA312.03]. The floating charge became ubiquitous in Commonwealth jurisdictions prior to the enactment of personal property securities legislation: Michael Gedye "The Structure of New Zealand's 'New' Priority Debts Regime" (2003) 9 NZBLQ 220 at 223 and 226; Mokal, above n 41; *Buchler v Talbot* [2004] UKHL 9, [2004] 2 AC 298; and Blanchard and Gedye at [1.12]–[1.13].

43 *Commissioner of Inland Revenue v Agnew*, above n 41, at [1].

44 See below at [73]–[74].

45 The use of the terms "fixed charge" and "floating charge" are not abolished as such. Post-PPSA, the language of the traditional floating charge can still be used. The PPSA continues to recognise all forms of security interest that existed prior to the Act. The continued existence of the floating charge is expressly confirmed by s 17(3). However, there is no need to fit post-PPSA security interests into the old forms.

46 PPSA, s 17(1).

47 *Stiassny v Commissioner of Inland Revenue* [2012] NZSC 106, [2013] 1 NZLR 453 at [49].

consideration of the "floating charge" concept and the decision in *Buchler v Talbot*,[48] which is now in large part only of historical interest.

[38] The parties did not dispute that the crucial date for determining whether the funds at issue in fact constituted accounts receivable or inventory will be the date of the appointment of the receiver or liquidator. We refer to this point further below.[49]

[39] Against this background, we now turn to address the specific question of statutory interpretation relating to the meaning of the term "accounts receivable".

The meaning of "accounts receivable"

[40] There is also no dispute that, by virtue of s 312 and sch 7, cl 1(5)(a) of the Companies Act, the Commissioner has a preferential claim on Takapuna in liquidation for the GST arrears of $3,625,493.51 as a general priority payment. Whether the Commissioner is entitled to all or any of the $782,108.18 held by the liquidators depends first on whether those funds constitute "accounts receivable" under sch 7, cl 2(1) of the Companies Act which provides:

> **2 Conditions to priority of payments to preferential creditors**
>
> (1) The claims listed in each of subclauses (2), (3), (4), and (5) of clause 1—
>
> (a) rank equally among themselves and, subject to any maximum payment level specified in any Act or regulations, must be paid in full, unless the assets of the company are insufficient to meet them, in which case they abate in equal proportions; and
>
> (b) in so far as the assets of the company available for payment of those claims are insufficient to meet them,—
>
> (i) have priority over the claims of any person under a security interest to the extent that the security interest—
>
> (A) is over all or any part of the company's **accounts receivable** and inventory or all or any part of either of them; and

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48 *Buchler v Talbot*, above n 42.

49 At [61] and [86].

(B) is not a purchase money security interest that has been perfected at the time specified in section 74 of the Personal Property Securities Act 1999; and

(C) is not a security interest that has been perfected under the Personal Property Securities Act 1999 at the commencement of the liquidation and that arises from the transfer of an **account receivable** for which new value is provided by the transferee for the acquisition of that **account receivable** (whether or not the transfer of the **account receivable** secures payment or performance of an obligation); and

(ii) must be paid accordingly out of any **accounts receivable** or inventory subject to that security interest (or their proceeds).

(Emphasis added.)

[41] Clause 2(2) then provides:

> For the purposes of subclause (1)(b), the terms **account receivable**, **inventory**, **new value**, **proceeds**, **purchase money security**, and **security interest** have the same meaning as the Personal Property Securities Act 1999.[50]

[42] The term "account receivable" is defined in s 16 of the PPSA as:

> a monetary obligation that is not evidenced by chattel paper, an investment security, or by a negotiable instrument, whether or not that obligation has been earned by performance.

High Court decision

[43] Associate Judge Gendall concluded that the term "accounts receivable" was not limited to book debts. He first discussed the position under the PPSA,[51] then considered the relevant legislative history[52] and the High Court decision in *Commissioner of Inland Revenue v Northshore Taverns Ltd (in liq)*,[53] where

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50 Regarding the use of "account" and "accounts", we note the rule that the singular includes the plural: Interpretation Act 1999, s 33.

51 High Court decision, above n 2, at [50]–[59].

52 At [60]–[69].

53 *Commissioner of Inland Revenue v Northshore Taverns Ltd (in liq)* (2008) 23 NZTC 22,074 (HC).

Associate Judge Hole held that "accounts receivable" was limited to "book debts",[54] before turning to analyse the expression itself in the context of well-established principles of statutory interpretation and the submissions for the parties.[55]

Submissions for Strategic

[44] For Strategic, Mr Tingey submits that principles of statutory interpretation and the legislative history support the view that "accounts receivable" means "book debts" rather than literally any obligation quantifiable in money. Mr Tingey relies in particular on the history of the preferential creditor regime in both England and New Zealand, the nature of the changes required by the introduction of the PPSA, the purpose of the Companies Act and the legislative history of sch 7. He submits that the Associate Judge's approach is contrary to the clear intention of the drafters and represents a significant change in the law which would be arbitrary, commercially severe and deprive owners of property of valuable rights.

[45] Mr Tingey submits that, consistent with the language, policy and legislative history of sch 7, "accounts receivable" means "book debts". He refers in particular to the ordinary meanings of "accounts receivable" and "monetary obligations", Parliament's intentions and the approach of the High Court in other cases.[56] He suggests that the "book debts" definition does not face any of the problems posed by the Associate Judge's approach. Finally, he submits that Strategic's proposed definition does not create any complications for the PPSA and that the Associate Judge erred in attempting to define the term in the Companies Act by reference to the meaning the term might have in the PPSA context.

Our approach

[46] We recognise, as Associate Judge Gendall did,[57] that the meaning of "accounts receivable" depends on the text of the relevant provisions read in light of

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54 High Court decision at [70]–[78].
55 At [79]–[101].
56 *Commissioner of Inland Revenue v Northshore Taverns Ltd (in liq)*; *Eagle v Petterson* HC Auckland CIV-2011-404-7387, 16 December 2011; and *Petterson v Gotland (No 3)* [2012] NZHC 666 at [5].
57 High Court decision at [79]–[80].

their purpose, the objects of the legislation and their context, interpreted in a realistic and practical manner in order to enable them to work.[58] The latter requirement is particularly important in the context of this legislation which must be applied by busy receivers and liquidators. We therefore start with the text of the relevant provisions before considering their purpose and legislative history and the decisions and principles of statutory interpretation relied on by Mr Tingey.

Text

[47] Parliament has decided that "for the purposes of subclause (1)(b)" of cl 2 the terms "**accounts receivable**, **inventory**, **new value**, **proceeds**, **purchase money security interest**, and **security interest**" in sch 7, cl 2(2) of the Companies Act are to have "the same meanings" as in the PPSA.[59] We agree with Mr O'Regan that this provision could not be clearer. It expressly adopts the PPSA definitions of those terms for the purposes of sch 7, cl (2)(1)(b) of the Companies Act. They are to have "the same meaning" in both statutes.

[48] As the Associate Judge held,[60] and Mr O'Regan submits, the interpretation principle of "referential definition" rather than the different principle of "incorporation by reference" has been adopted by Parliament in this case.[61] The latter principle and its supporting authorities relied on by Mr Tingey are simply not applicable.[62]

[49] This also means that, contrary to Associate Judge Hole's decision in *Northshore Taverns*,[63] and Mr Tingey's submissions, the meanings given to the defined terms in the PPSA are incorporated into the Companies Act. How the words are used in the context of the PPSA is not only the starting point but also the end

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58 Interpretation Act, s 5, *Commerce Commission v Fonterra Co-operative Group Ltd* [2007] NZSC 36, [2007] 3 NZLR 767 at [22] and *Northland Milk Vendors Assoc Inc v Northern Milk Ltd* [1988] 1 NZLR 530 (CA) 538; and Burrows and Carter, above n 17, at 205.

59 Companies Act, sch 7, cl 2(2).

60 High Court decision at [101].

61 Burrows and Carter at 423; FAR Bennion *Bennion on Statutory Interpretation* (5th ed, LexisNexis, London, 2008) at 572 and 758–759.

62 *Re Wood's Estate* (1886) 31 Ch D 607 (CA); *Down v R* [2012] NZSC 21, [2012] 2 NZLR 585 at [23].

63 *Commissioner of Inland Revenue v Northshore Taverns Ltd (in liq)*, above n 56, at [29]–[35].

point.[64] The terms are not to be given a different meaning in the context of the Companies Act.

[50] We do not, however, agree with Mr O'Regan that in this case the referential definition does not import the exclusions to that definition from other parts of the PPSA. Here the referential definition refers not simply to the definitions in s 16 of the PPSA but to the meanings of the terms in the Act itself. This means that the meanings are to be ascertained from the PPSA read as a whole.

[51] Considering the text of the definition of "account receivable" in the context of cl 2(1)(b) of sch 7 of the Companies Act, the short answer is that the term has the meaning given to it in s 16 of the PPSA which we have already set out.[65]

[52] The text of the definition in s 16 makes it plain that "accounts receivable" are not limited simply to "book debts", especially as "book debts" are usually considered to be a subset of receivables.[66] If Parliament had intended to limit "accounts receivable" to "book debts", it would have done so expressly. The fact that Parliament has not done so is particularly significant given that the operative parts of sch 7 of the Companies Act are, as already noted, replicated in a number of statutes dealing with formal insolvency processes or quasi-insolvency processes.[67]

[53] In determining the meaning of the term "accounts receivable" in the Companies Act it is therefore necessary to consider the meaning of the definition in s 16 of the PPSA. Three features of the text of the definition in s 16 are to be noted:

(a) there must be "a monetary obligation";

(b) but not one "evidenced by chattel paper, an investment security, or by a negotiable instrument"; and

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64 *Mayor of Portsmouth v Smith* (1885) 10 App Cas 364 (HL) at 371.

65 Above at [42].

66 Fidelis Oditah *Legal Aspects of Receivables Financing* (Sweet & Maxwell, London, 1991) at 20–32; Gedye, above n 25, at 173.

67 For example, Property Law Act 2007, s 153; Receiverships Act 1993, s 30; and Insolvency Act 2006, ss 274–275.

(c) the obligation need not have been earned by performance.

[54] Putting aside obligations evidenced by chattel paper, an investment security or a negotiable instrument, each of which is separately defined in the PPSA and none of which is relevant in this case, we consider that "monetary obligation" in the context of the PPSA means an existing obligation imposed on, or assumed by, one party to pay a certain sum of money to the other party on a specific or ascertainable future date. An obligation of this nature will involve an existing liability on the part of the first party which is legally enforceable by the second party. Each of the essential elements of the term "monetary obligation" is supported by reference to relevant dictionary definitions and legal texts.

[55] The use of the adjective "monetary", which means relating to money or currency,[68] excludes non-monetary obligations such as an obligation for specific performance or an obligation to deliver or restore property. As pointed out in *Mann on the Legal Aspect of Money*,[69] monetary obligations primarily exist where the debtor is bound to pay a fixed, certain, specific or liquidated sum of money. A liquidated obligation generally includes both debts in the classical sense and executory obligations of a monetary character, such as an obligation to pay the price of goods not yet delivered.[70]

[56] The need for an existing liability to pay and a matching legally enforceable right to recover the payment is recognised by the relevant accounting standards which state that:[71]

> ... one party's contractual right to receive (or obligation to pay) cash is matched by the other party's corresponding obligation to pay (or right to receive).

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68 John Simpson and others (eds) *Oxford Dictionary* (online ed, Oxford University Press). Section 16 of the PPSA defines money for the purposes of the PPSA as "currency authorised as a medium of exchange by the law of New Zealand or of any other country".

69 Charles Proctor (ed) *Mann on the Legal Aspect of Money* (7th ed, Oxford University Press, Oxford, 2012) at [3.03].

70 *Webb v Stanton* (1883) 11 QBD 518; *Sturdy Components Pty Ltd v Burositzmobelfabrik Friedrich W Dauphin GmbH* [1999] NSWSC 595.

71 *International Accounting Standard 32 Financial Instruments: Presentation* (International Accounting Standards Board, IAS 32, 1 January 1996) Appendix, AG4.

[57] When "monetary" and "obligation" are read together, it is also clear that the liability must be to pay an identifiable sum on an ascertainable date. This will include a claim of that nature based on debt statute or money had and received.[72] A possible liability to pay an unidentifiable sum at an unascertainable future date will not suffice.[73]

[58] The fact that in terms of the definition the monetary obligation "need not have been earned by performance" confirms that existing monetary obligations that are not earned by performance under a contract are within the definition. Such obligations will include those that exist under deed, statute or by virtue of a court order, independently of any need for performance.

[59] Recognition of obligations which are not dependent on the need for performance does not mean, however, that an obligation that requires performance in order to come into existence will be recognised. The absence of performance in that case will simply mean that there is no obligation in existence.

[60] We therefore do not accept Mr Tingey's submission that the definition includes wholly executory contracts under which monetary obligations have not yet been earned by performance. An executory contract exists when the parties have exchanged promises to perform certain obligations in the future but have not yet performed them.[74] No monetary obligation arises until performance by which the other party earns the right to be paid occurs. For an amount to be "receivable", it must be currently owed to a party who is entitled to expect its payment without undertaking further performance. In the absence of any obligation being earned, there will be no existing obligation and therefore no account receivable.

[61] The adjective "receivable" and the express provision that the obligation need not already have been earned also reinforce the need to focus on the existence of the obligation at the relevant time, that is, in this case, the date of liquidation. An

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72 *OPC Managed Rehab Ltd v Accident Compensation Corporation* [2006] 1 NZLR 778 (CA) at [40]–[51].

73 Compare *Marren (Inspector of Taxes) v Ingles* [1981] 1 WLR 983 (HL) and *New Zealand Venue and Event Management Ltd v Worldwide NZ LCC* [2013] NZCA 130.

74 John Burrows, Jeremy Finn and Stephen Todd *Law of Contract in New Zealand* (4th ed, LexisNexis, Wellington, 2012) at [4.2.1].

obligation that may arise in the future when there is performance in terms of the contract will not be included because once a company is in liquidation (or a person is insolvent) there may be no prospect of performance justifying payment.

[62] In the event of liquidation or insolvency, performance may become impossible. An executory obligation will therefore not suffice in this context. This distinction is recognised in *Goode on Payment Obligations in Commercial and Financial Transactions* where it is noted that the difference between existing and contingent rights and obligations may be material.[75] Typically, an existing right to payment is one which is definite, even if maturing in the future, whereas a contingent claim is one which may not materialise.[76] The latter does not therefore constitute an existing monetary obligation. There is no existing liability to pay and no matching legally enforceable right to receive.

[63] Accordingly we do not accept Mr O'Regan's submission that "monetary obligation" includes an existing right to claim damages in tort or equity. In the absence of a judgment of the court, such claims do not involve an existing liability to pay with a matching legally enforceable right to receive. The existence of a claim against a director of a company for reckless trading or misappropriating company property, which Mr O'Regan suggested might also fall within the definition, does not mean that the director is under an existing monetary obligation to pay.

[64] We recognise that claims for money had and received may be in a different category because such claims involve recovery of a debt due which may constitute an existing monetary obligation.[77] We do not, however, need to decide this issue as there is no suggestion that Takapuna had any relevant claim of this nature. Thus we do not need to consider the effect of s 23(e)(vii), which excludes transfers of claims for tort damages from the scope of the PPSA, and the view of William Young J in *Waller v New Zealand Bloodstock Ltd* relied on by Mr O'Regan.[78] As Professor

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75 Charles Proctor (ed) *Goode on Payment Obligations in Commercial and Financial Transactions* (2nd ed, Thompson Reuters, London, 2009) at 26–29.

76 At 26.

77 *OPC Managed Rehab Ltd v Accident Compensation Corporation*, above n 72.

78 *Waller v New Zealand Bloodstock Ltd* [2006] 3 NZLR 629 (CA) at [125]–[127].

Gedye has pointed out, s 23(e)(vii) appears to have been included in the PPSA out of an abundance of caution.[79]

Purpose

[65] In this case the clearest indication of the purpose of the definition of "accounts receivable" in the Companies Act is the language used by Parliament in the statutory provisions.[80] By adopting a definition from the PPSA, a new statute with a totally new regime for personal property securities,[81] and by eschewing any reference in the definition to "book debts", Parliament has made it clear that, for the purpose of the liquidation and preferential creditor provisions of the Companies Act, the term "accounts receivable" is to be given the same meaning in both statutes and that the meaning is not limited to "book debts".[82]

[66] Our approach to the interpretation of the definition of "accounts receivable" in s 16 of the PPSA is consistent with and supported by the purpose of that definition in the PPSA. The focus is on the substance or existence of the underlying monetary obligation, which is the subject of the security interest rather than on the previous "floating" nature of the form of the interest.[83]

Scheme of PPSA

[67] Our approach to the interpretation of accounts receivable is also consistent with other provisions of the PPSA. The wide interpretation we prefer is consistent with the proper operation of other aspects of the PPSA, such as the perfection of a creditor's interest in the proceeds of original collateral, and s 17 which provides that transfers of accounts receivable are deemed security interests. It would be anomalous if transfers of monetary obligations that were not book debts did not constitute security interests under the PPSA.

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79 Gedye, above n 25, at n 13.
80 *Stiassny v Commissioner of Inland Revenue*, above n 47, at [23].
81 PPSA, s 4; Widdup, above n 19, at 1–4.
82 Gedye, above n 25, at 172–175.
83 At 173–174; Michael Gedye, Ronald C C Cuming and Roderick J Wood *Personal Property Securities in New Zealand* (Brookers, Wellington, 2009) at 10–13; Widdup, above n 19, at 8.

Legislative history

[68] The meaning of the term "accounts receivable" based on its text and purpose is supported by its legislative history. First, it is the legislative history of the PPSA rather than the Companies Act which is primarily relevant.

[69] Second, the PPSA, which is modelled on Canadian provincial legislation,[84] was enacted to rationalise New Zealand's law relating to securities over personal property. It constituted a significant commercial law reform.[85] Principles and concepts developed prior to the PPSA have limited relevance now.[86] Provisions in the Companies Act with counterparts in the PPSA should be interpreted consistently with the PPSA.[87]

[70] Strategic relies on the following passage from the Law Commission's report as evidence that accounts receivable are restricted to the scope of book debts:[88]

> Account receivable describes, for example, the right to payment which a supplier of goods becomes entitled upon performance. The term is the equivalent of the New Zealand expression "book debt." Computerised record keeping has made the adjective "book" misleading. "Receivable" more accurately describes the direction of the entitlement than does the term "debt"...

[71] As Professor Gedye has noted, however, the context of this passage indicates that it should not be read over-literally as indicating that the Commission considered that the two terms were synonymous.[89] In stating that the term "book debt" had been replaced by the term "account receivable", the meaning, in context, was that the historic term book debt had been subsumed into the modern term account

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84 The New Zealand Law Commission used as a model the then Personal Property Security Bill of British Columbia (subsequently the Personal Property Security Act RSBC 1996 c 359): Law Commission *A Personal Property Securities Act for New Zealand*, above n 26, at 9. The Commerce Select Committee indicated it considered the PPSA was based mainly on the Saskatchewan Personal Property Security Act 1993 SS c P-6.2: Personal Property Securities Bill 1998 (251-2) (select committee report) at ii.

85 Gedye, Cuming and Wood at 1.

86 *Stiassny v Commissioner of Inland Revenue*, above n 47, at [49].

87 *Dunphy v Sleepyhead Manufacturing Co Ltd*, above n 24, at [36]–[37].

88 Law Commission *A Personal Property Securities Act for New Zealand* at 80.

89 Gedye, above n 25, at 172–173.

receivable.[90] This is implicit in the final sentence of the extract from the Law Commission report.

[72] Third, to the extent that the legislative history of the Companies Act is relevant, the history and purpose of the preferential creditor regime does not require a narrowing of the definition.

[73] With the PPSA's abolition of the concepts of "fixed" and "floating" charges in favour of a single definition of "security interest", it became necessary to amend sch 7 to remove the reference to "floating charge". We agree with Associate Judge Gendall that the language of the amendments was changed to reverse the decision of the High Court in *Re Brumark Investments Ltd (in rec)*,[91] which dealt with issues relating to fixed and floating charges.[92] The High Court had held that it was possible to create a fixed charge over both existing book debts and future choses in action. As a result of that decision, the rights of the debenture holder to the book debts in question prevailed over the rights of preferential creditors in that case. The current wording was enacted to ensure that the availability of "accounts receivable" for preferential creditors would not be dependent on the wording of the particular instrument which creates the security interest.

[74] The changes were explained by the responsible Ministers in Parliament during the enactment of the respective amendments.[93] They emphasised that there was no intention to alter "the priority rankings" and that the intention was to preserve "the status quo" so that employees and other preferential creditors were not put in any position that was different from where they were under the old regime. The select committee report on the Personal Property Securities Bill stated that the intention of the new Act was to retain the order of distribution on insolvency.[94]

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90 Gedye, Cumming and Wood at 52.

91 *Re Brumark Investments Ltd (in rec)* (1999) 19 NZTC 15,159 (HC); *Agnew v Commissioner of Inland Revenue* [2000] 1 NZLR 233 (CA); and *Agnew v Commissioner of Inland Revenue* [2002] 1 NZLR 30 (PC).

92 Personal Property Securities Amendment Act 2001, above n 40; High Court decision, above n 2, at [60]–[66].

93 (8 December 1998) 574 NZPD 14425–14426; (4 April 2001) 591 NZPD 8756.

94 Personal Property Securities Bill 1998 (251-2) (select committee report) at ix.

[75] Mr Tingey relied strongly on the Ministers' speeches in support of his submission that Parliament intended to replicate the existing law as closely as possible by ensuring that preferential creditors maintained their priority "in respect only of circulating assets typically covered by a floating charge, namely accounts receivable and inventory".

[76] We agree with Mr O'Regan that Mr Tingey's submission draws too much from the Ministers' speeches which related to priority rankings of security interests rather than to the identification of the assets to be available for preferred creditors in the event of there being insufficient funds available in a liquidation. The Ministers were not asserting that preferential creditors would be paid out of assets identical to those from which they were paid under the previous legislation.

Unintended adverse consequences?

[77] We do not agree with Mr Tingey that the Associate Judge's interpretation is wrong because it leads to unintended adverse consequences.

[78] First, for the reasons we have already given, we do not consider that a claim against a director of a company for misappropriating company property constitutes an "account receivable". In the absence of a judgment against the director, there will be no existing enforceable monetary obligation. Mr Tingey's concern on this count is therefore misplaced.

[79] Second, we do not consider it to be of concern that, if a company agreed to sell the entirety of its business for value immediately before liquidation, the proceeds of sale would be an "account receivable" as the purchaser would be under an existing enforceable obligation to pay. In practical terms it is unlikely that a sale of the whole business would have occurred in the ordinary course of the seller's business and without the lender's consent.[95] If such a sale had occurred with the lender's consent, then there is no reason why the proceeds of sale should not be viewed as "accounts receivable" in the same way as they would previously have been the subject of a

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[95] PPSA, s 53; *Stockco Ltd v Gibson* [2012] NZCA 330, (2012) 10 NZBLC 99-709 at [48].

floating charge over the seller's assets and thus available for preferential creditors in the absence of sufficient funds available on a liquidation.

[80] We are not satisfied that adopting the PPSA definition of "account receivable" results in an arbitrary change in the law or is commercially severe and deprives owners of property of valuable rights. The purpose of the preferential creditor regime is to restrict the rights of secured creditors in relation to preferential creditors in the manner mandated by the statute.

Academic commentary

[81] Finally, on this issue, we note that the interpretation favoured by the Associate Judge in this case, rather than the approach adopted in *Northshore Taverns*, is supported by academic commentary.[96]

Summary

[82] Accordingly, in our view, the term "accounts receivable" in sch 7, cl 2(1) of the Companies Act has the same meaning as given in s 16 of the PPSA, namely "a monetary obligation that is not evidenced by chattel paper, an investment security, or by a negotiable instrument, whether or not that obligation has been earned by performance".

[83] Under this definition any "monetary obligation" that is not expressly excluded is included. In this context a "monetary obligation" is an existing legal obligation on another party to pay an identifiable monetary sum to the company on an ascertainable date. The obligation must be legally enforceable by the company (at the date of the receivership or liquidation) on the basis that the other party has an existing liability to make the payment.

[84] The definition includes, but is not limited to, debts or "book debts". Also included are other legally enforceable rights under deeds, statutes and court

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[96] Widdup, above n 19, at 77–80; Michael Whale "Personal Property Securities Act Issues" (paper presented to Auckland District Law Society Corporate Insolvency Update Intensive Conference, February 2011); Gedye above n 25.

judgments whether or not earned by performance. Money held in a bank account will be an "account receivable" because the bank will be under a legally enforceable obligation to pay the money to the account holder.[97]

[85] A mere right to claim will not be included within the definition until it is converted into a legally enforceable obligation by a judgment of a court.

Application of definition to the funds

[86] This definition may be applied to the funds at issue on the undisputed basis that the crucial date for determining whether the funds constituted "accounts receivable" is the date on which Takapuna was placed into liquidation, namely 21 November 2008. While the PPSA does not explicitly specify the date, the date on which a receiver or liquidator is appointed is generally adopted as the relevant date in relevant legislation,[98] and has been accepted in other cases,[99]and by the authors of the New Zealand text on receivership.[100] We agree with that approach.

Development contribution refunds

[87] As at 21 November 2008 the High Court had decided that the NSCC had made errors of law in adopting its 2004 development contributions policy (carried-over into its 2006 policy) under which Takapuna had previously paid its development contributions. While the High Court had not invalidated the policies or granted any relief or remedy, there is no doubt that the errors of law identified by the High Court meant that the contributions had been wrongly paid and were refundable to Takapuna.

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97 *Re Bank of Credit and Commerce International SA (in liq) (No 8)* [1998] AC 214 (HL); *Flexi-Coil Ltd v Kindersley District Credit Union Ltd* (1993) 107 DLR (4th) 148 (SKCA); *Foley v Hill* (1848) 2 HLC 28, 9 ER 1002 (HL); Thomas Gault (ed) *Commercial Law* (online looseleaf ed, Brookers) at [8A.2.08(1)(a)]; Gedye, above n 25, at 171; Gedye, Cumming and Wood, above n 83, at [16.1.28] and [17.8]; and Oditah, above n 66, at 23–24.

98 Companies Act, sch 7, cl 6; Goods and Services Tax Act 1985, s 42(2)(a) and (b). Tax Administration Act 1994, s 167.

99 *Gibbston Downs Wines Ltd v Perpetual Trust Ltd* [2012] NZHC 1022; *Sperry Inc v Canadian Imperial Bank of Commerce* (1985) 17 DLR (4th) 236 (ONCA); *Canadian Imperial Bank of Commerce v Melnitzer (Trustee of)* (1993) 23 CBR (3d) 161 (ONCJ).

100 Blanchard and Gedye above n 41, at [7.06].

[88] On the basis of the principle of law established by the majority decision of the House of Lords in *Woolwich Equitable Building Society v Inland Revenue Commissioners*,[101] which is part of the law of New Zealand,[102] the contributions were refundable by NSCC to Takapuna as of right. As Lord Goff said in *Woolwich*:[103]

> ... money paid by a citizen to a public authority in the form of taxes or other levies paid pursuant to an ultra vires demand by the authority is prima facie recoverable by the citizen as of right.

And Lord Slynn said:[104]

> Accordingly I consider that Glidewell and Butler-Sloss LJJ [in the Court of Appeal] were right to conclude that money paid to the revenue pursuant to a demand which was ultra vires can be recovered as money had and received. The money was repayable immediately it was paid.

[89] Applying this principle means that from at least the time of the High Court decision on 21 March 2007 Takapuna was entitled to recover the unlawful development contributions paid to the NSCC. Consequently, as at the date of Takapuna's liquidation, there was an existing legal obligation on the NSCC to refund the contributions to Takapuna. The refunds were an identifiable monetary sum and were already repayable. Takapuna was legally entitled to enforce the NSCC's obligation on the basis that the NSCC had an existing liability to make the refunds.

[90] Contrary to the submission for Strategic, the fact that the NSCC did not "reassess" Takapuna's development obligations and make the refunds until after the liquidation does not alter the application of the *Woolwich* principle. The contributions were refundable because as a result of the High Court decision they were unlawful, not because the NSCC decided to refund them. They were refundable at least from the date of the High Court decision.

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101 *Woolwich Equitable Building Society v Inland Revenue Commissioners (No 2)* [1993] AC 70 (HL); see also *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349 (HL); and *Deutsche Morgan Grenfell Group plc v Inland Revenue Commissioners* [2007] 1 AC 558 (HL).

102 *Laws of New Zealand* Restitution (online ed) at [63]; *Waikato Regional Airport Ltd v Attorney-General* [2003] UKPC 50, [2004] 3 NZLR 1; *Stiassny v Commissioner of Inland Revenue*, above n 47, at [67].

103 At 177.

104 At 204.

[91] The refunds of the development contributions therefore constituted monetary obligations within the definition of "accounts receivable" and should be paid to the Commissioner as the remaining preferential creditor.

Engineering and construction bonds

[92] Unlike the development contributions, the engineering and construction bonds of $3,000 were not paid by Takapuna to the NSCC on the basis of a policy subsequently held to be unlawful. The bonds were lawfully received by the NSCC to secure the performance of resource consents and were not refundable to Takapuna unless and until the NSCC was satisfied that the Shoalhaven development complied with the NSCC standards.[105]

[93] As the NSCC was not satisfied that the development complied with its standards until after the liquidation of Takapuna, the bonds were not repaid until then. Prior to that time the bonds were not refundable.

[94] As at the date of the liquidation of Takapuna, they were therefore not an existing monetary obligation of the NSCC. Takapuna had no legally enforceable right to recover the bonds on that date and the NSCC had no liability to repay the bonds. Furthermore, in the event that the NSCC was ultimately not satisfied that the development complied with its standards, the bonds would not be refundable at all.

[95] Contrary to the submissions for the Commissioner, we do not accept that the bonds were within the definition on the contended basis that:

(a) Takapuna had treated them in its balance sheet as an asset;[106] and

(b) conditional obligations are covered.

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105 Resource Management Act 1991, ss 108(2)(b) and 108A.

106 The Associate Judge noted the Commissioner's submission to the same effect: High Court decision, above n 2, at [109].

[96] The fact that Takapuna may have treated the bonds as an asset in its balance sheet does not in law impose an existing enforceable obligation on the NSCC to repay the bonds prior to being satisfied that is conditions were met.

[97] Accordingly, we consider that the bonds were not existing monetary obligations within the definition of "accounts receivable". When they were subsequently paid by the NSCC to the liquidators of Takapuna the preferential creditor priority did not extend to them and they remained subject to Strategic's GSA.

GST refund

[98] As at the date of the liquidation of Takapuna, the Commissioner was under no obligation to pay a GST refund to Takapuna. On the contrary, as at that date Takapuna's GST arrears exceeded $3,600,000. The Commissioner had a statutory right of set-off in respect of any GST refund claim under s 46(6) of the Goods and Services Tax Act 1985 which provides:

> (6) If, but for this subsection, a registered person would be entitled to an amount as a refund under section 19C(8) or 20(5) or 45 or 78B(5)(c) or under the Tax Administration Act 1994, or as a payment of interest under Part 7 of the Tax Administration Act 1994, the Commissioner may apply the amount, in accordance with a request under section 173T of the Tax Administration Act 1994 or in the absence of a request in such order or manner as the Commissioner may determine, in payment of—
>
> (a) tax that is payable by the person:
>
> (b) an amount that is payable by the person under another Inland Revenue Act.

[99] The fact that after the liquidation of Takapuna the Inland Revenue Department received a GST return from Takapuna seeking a GST refund and, overlooking the statutory right of set-off, paid the refund to the liquidators in accordance with s 20(5) and s 46(1) of the Goods and Services Tax Act does not mean that there was a retrospective obligation to do so.[107] The existence of the GST arrears and the right of set-off meant that the Commissioner was not under a legally

[107] In particular s 46(1) did not require the Commissioner to make the refund at the date of liquidation.

enforceable obligation to make the GST refund payment. Takapuna had no right to recover that refund.

[100] Accordingly, the GST refund was not an existing monetary obligation within the definition of "accounts receivable". This conclusion does not mean, however, that the GST refund paid in error to the liquidators is irrecoverable by the Commissioner on other grounds. We consider those grounds later.[108]

Carter Atmore funds

[101] Strategic do not dispute that as at the date of the liquidation of Takapuna the funds were in the trust account of Carter Atmore who were Takapuna's lawyers.[109] Nor do they dispute that the funds referred to above at [20(a)] were due to Takapuna on that date, even though they were not received until shortly after the liquidation. In terms of s 110(1) of the Lawyers and Conveyancers Act 2006, Carter Atmore therefore held these funds in its trust bank account on behalf, of and at the direction of, Takapuna.

[102] We agree with Mr O'Regan that these funds are therefore no different in concept to funds held by a bank in a bank account or a deposit account for a company.

[103] As already discussed,[110] money in the Carter Atmore trust account will be an "account receivable" because Carter Atmore, like a bank, will be under a legally enforceable obligation to pay the money to the company.[111]

[104] Contrary to Mr Tingey's submission, the fact that Takapuna was already the beneficial owner of the funds makes no difference. The fact that the PPSA does not provide for any form of collateral in this context other than money and accounts receivable is instructive. As submitted by the Commissioner, the fact that the funds may have been beneficially owned by Takapuna does not alter the legal state of

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108 Below at [108].
109 Above at [20(b)], [20(c)], [20(d)] and [20(e)].
110 Above at [84].
111 *Fletcher v Eden Refuge Trust* [2012] NZCA 124, [2012] 2 NZLR 227 at [73]–[88]. None of the exceptions indicated in that case apply.

affairs. If it did, solicitors' trust accounts could become a haven for funds which an insolvent company sought to keep from preferential creditors.

[105] The conclusion of Associate Judge Hole in *Northshore Taverns* that funds in a solicitor's trust account were not accounts receivable at the date of liquidation was therefore wrong.[112]

Summary

[106] For the reasons we have given, we conclude that the development contribution refunds and the Carter Atmore funds were accounts receivable on 21 November 2008 when Takapuna was put into liquidation, but that the engineering and construction bond and GST refund were not. We therefore turn to address the Commissioner's other arguments justifying repayment of the GST refund.

Recovery of the GST refund

[107] The Associate Judge decided that the GST refund paid by the Inland Revenue Department to Takapuna "in error" was recoverable on the basis of the rule in *Re Condon*[113] and therefore did not address the Commissioner's argument that the refund was also recoverable under restitution principles. As already noted, the Commissioner relies on both arguments on appeal.[114] We therefore propose to consider them both.

Re Condon

[108] It is common ground between the parties that under the rule in *Re Condon* liquidators appointed under Court order, who are officers of the Court and obliged to act in a manner consistent with the highest principles, are not permitted to take advantage of the strict legal rights available to them if to do so would mean that they were acting unjustly, inequitably, or unfairly.[115]

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112 See above at [49] and [82].
113 *Re Condon*, above n 1.
114 Above at [18].
115 See also *Re Cider (New Zealand) Ltd (in liq)* [1936] NZLR 374 (SC) and John Farrar and Susan Watson (eds) *Company and Securities Law* (online looseleaf ed, Brookers) at [CA260.04].

[109] As Mr O'Regan points out, the rule has been applied to cases involving payments made to trustees in insolvency situations as a result of mistakes of law and mistakes of fact.[116] It has also been applied in such cases in New Zealand.[117]

[110] The Associate Judge held that applying this rule in the present case required the liquidators of Takapuna to repay the GST refund.[118] It would have been unfair for the creditor to obtain a benefit just because the Commissioner's mistake was the result of a "mere clerical error" and the facts of the case were therefore analogous to the decision in *Re Thomas Horton*.[119]

[111] Strategic challenge the application of the rule in this case on three alternative grounds:

(a) *Re Condon* cannot apply to the GST refund because it was subject to Strategic's security interest. The liquidators' duties to the Court cannot affect Strategic's existing proprietary interest in the property.

(b) As the Commissioner has elected to prove for her debt in the liquidation, she cannot now rely on *Re Condon*.[120]

(c) As the High Court erred in finding that the Commissioner made a relevant "mistake", it would not be inequitable to insist on the strict

legal position. In respect of this ground Strategic also relies on the PwC file note of 10 December 2008.

[112] For the following reasons, we do not accept Strategic's challenges to the Associate Judge's decision on any of these grounds.

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116 *Re Tyler, ex parte the Official Receiver* [1907] 1 KB 865 (CA); *Re Thellusson, ex parte Abdy* [1919] 2 KB 735 (CA).

117 *Re Thomas Horton* [1925] NZLR 739 (SC); *Re Buyers, ex parte Davies* [1965] NZLR 774 (SC); and *Official Assignee v Westpac Banking Corporation* (1993) 4 NZBLC 102,939 (HC).

118 High Court decision, above n 2, at [26]–[44].

119 *Re Thomas Horton*.

120 *Re Clark (A Bankrupt), ex parte the Trustee v Texaco Ltd* [1975] 1 WLR 559 (Ch D); *Re Modern Terrazzo (in liq)* [1998] 1 NZLR 160 (HC) at 188.

[113] First, the existence of Strategic's security interest does not prevent the rule in *Re Condon* from applying. The rule applies to Takapuna's liquidators as officers of the Court and impacts on their duty to distribute funds collected. As Strategic permitted the liquidators to realise any assets subject to its GSA as its agents,[121] Strategic's conscience is necessarily similarly affected and it would be inappropriate in those circumstances for Strategic to obtain a windfall of $169,349.86. If the Commissioner had exercised the set-off, the money would never have passed to Takapuna.

[114] Second, the fact that the Commissioner has proved for the entirety of her debt in the liquidation of Takapuna does not constitute an election preventing the Commissioner from relying on *Re Condon*. It is not a question of the Commissioner seeking to upset the pari passu distribution required when the liquidation estate is to be divided amongst unsecured creditors, as occurred in *Re Cider*,[122] *Re Modern Terrazzo*,[123] and *Re Gozzett*.[124] Here the Commissioner is not receiving a preference in terms of sch 7, cl 2(1)(b), she is only receiving what she would ordinarily have got but for this mistake. Again, if the rule is not applied, Strategic would receive a windfall.

[115] Third, the Associate Judge did not err in finding that the Commissioner made a "mistake" that justifies the application of the rule. We agree with the Commissioner that there is no evidence of any reckless conduct in making the refund that should disentitle her from relief. The unchallenged evidence for the Commissioner establishes that the relevant Inland Revenue Department employee merely overlooked the fact that Takapuna had a significant GST debt with the unfortunate result that the $169,349.86 was mistakenly paid out. We consider that it is not now open to Strategic to suggest that the conduct was reckless in the absence of any cross-examination of the employee.[125]

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121 *Dunphy v Sleepyhead Manufacturing Co Ltd*, above n 24.
122 *Re Cider*, above n 115.
123 *Re Modern Terrazzo (in liq)*.
124 *Re Gozzett* [1936] 1 All ER 79 (CA).
125 Evidence Act 2006, s 92.

[116] In particular, we do not accept that the PwC file note should be admitted in evidence on appeal or that, if it were, it would alter our conclusion on this issue. The file note does not meet the requirements for admissibility on appeal as it is not fresh or cogent evidence.[126] The file note was available at the time of the hearing in the High Court, but was not adduced in evidence by the then counsel for Strategic. A letter from the liquidators to the Commissioner, also provided to this Court by counsel for Strategic, states that the note was made available to both parties and discussed at the time of the High Court hearing. No adequate explanation was given as to why Strategic chose not to produce the note in the High Court.

[117] The file note purports to record a conversation between an employee of PwC and an employee of the Inland Revenue Department (not the one who made the refund decision) in which the latter, on being informed of the receipt of the GST refund cheque, is recorded as having said "Oh, you are rich! Go ahead and bank it". Even assuming that the file note is an accurate and complete record of the conversation, we do not consider that it converts the employee's error in making the refund into a "reckless" one.

[118] It is also relevant in this context that the GST refund claim was made after the liquidation of Takapuna by one of its directors and not by the liquidators. It is unlikely that the liquidators would have made the claim at all once they discovered the total GST arrears. Indeed in the letter the liquidators suggest that the conversation recorded in the note is inconsistent with Strategic's contention that its conscience was not engaged when it received the refund. Further, if the liquidators had made the claim the Inland Revenue Department would have been on notice of the liquidation and the employee would have been unlikely to have made the error.

[119] Although it has not been necessary to decide the restitution issue in this case, far from demonstrating that the consciences of the liquidators were unengaged, their agents' perfunctory investigation, which was noted but not taken any further, appears

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[126] Rules, r 45(1); *Paper Reclaim Ltd v Aotearoa International Ltd* [2006] NZSC 59, [2007] 2 NZLR 1; *Erceg v Balenia Ltd* [2009] NZCA 48, [2009] NZCCLR 32; *Airwork (NZ) Ltd v Vertical Flight Management Ltd* [1999] 1 NZLR 641 (CA); *Rae v International Insurance Brokers (Nelson Marlborough) Ltd* [1998] 3 NZLR 190 (CA).

to indicate an awareness of the Commissioner's mistake and a less than forthcoming response to it.[127]

[120] For these reasons we agree with the Associate Judge that the liquidators are obliged by the rule in *Re Condon* to pay the mistaken GST refund of $169,349.86 to the Commissioner.

Restitution principles

[121] In view of our conclusion as to the application of the rule in *Re Condon* it is strictly speaking unnecessary for us to consider the Commissioner's alternative argument based on restitution principles. But having heard submissions from the parties we do address the argument briefly.

[122] The Commissioner referred to older English authorities for the proposition that where one party receives a mistaken payment from another, in some circumstances the payer has a proprietary remedy because a constructive trust is created.[128] The existence of such a remedy is a matter of unresolved controversy in New Zealand. New Zealand courts have in the past indicated a preparedness to make the remedy available.[129] This Court in *Fortex Group (in rec and in liq) v MacIntosh* has, however, put the future of the "so-called remedial constructive trust" remedy in doubt.[130]

[123] This Court declined to make any final decision as to whether the remedy formed a part of the law of New Zealand or whether the distinction between remedial

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127 We note for completeness that no estoppel would be raised on the alleged facts: see Piers Feltham, Daniel Hochberg and Tom Leech *Spencer Bower on Estoppel by Representation* (4th ed, LexisNexis, London, 2004) at 211–213; and James Every Palmer "Equitable Estoppel" in Andrew Butler (ed) *Equity in Trusts in New Zealand* (2nd ed, Thompson Reuters, Wellington, 2009) 601 at [19.2–19.5].

128 *Chase Manhattan Bank NA v Israel-British Bank (London) Ltd* [1981] Ch 105 (CA); *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669 (CA) (although the latter case is arguably explicable on other grounds).

129 *Elders Pastoral Ltd v Bank of New Zealand* [1989] 2 NZLR 180 (CA); *Liggett v Kensington* [1993] 1 NZLR 257 (CA) in which Gault and McKay JJ considered the remedy available) not doubted on appeal: *Re Goldcorp Exchange Ltd (in rec)* [1994] NZLR 358 (PC).

130 *Fortex Group (in rec and in liq) v MacIntosh* [1998] 3 NZLR 171 (CA) at 172–173.

and institutional constructive trusts is significant. It did, however, confirm that unconscionability would be the underlying principle for the remedy in any case.[131]

[124] The chief objection to the restitutionary proprietary remedy is that the juristic basis of the remedy of unconscionability is too open-ended and offends against settled insolvency rules on too loose a basis by according priority via constructive trust.[132] This discretion to vary proprietary rights may be undesirable. It has been suggested that it is proper that "[t]he insolvency road is blocked off to remedial constructive trusts, at least when judge driven in a vehicle of discretion".[133]

[125] In *Fortex Group* it was noted that the question of the place of the remedial constructive trust in New Zealand should be "left to another day" with the warning that caution should be exercised "in proceeding to do anything which would disturb the settled pattern of distribution in an insolvency".[134] That day will be one in which the issue is of central importance to a decision of this Court, rather than peripheral as in the present case.

[126] For these reasons we prefer not to determine this issue in this case when it is unnecessary for us to do so.

Result

[127] The appeal is allowed in respect of the engineering and construction bonds of $3,000 which are payable to Strategic, but in all other respects the appeal is dismissed.

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131 At 175–177.

132 At 176 per Gault, Keith and Tipping JJ.

133 *Re Polly Peck (No 2)* [1998] 3 All ER 812 (CA); Peter Watts "Restitution" [1995] NZ L Rev 395 at 396. It has been suggested that the existence of the established restitutionary claim recognises that the mistaken windfall is unconscionable, but that there is not sufficient unconscionability to "justify the payer's extraction from the 'fly-paper' of insolvency" (that is, the general pool of creditors). Arguably, the plaintiff payer's position is no more invidious than that of unsecured tort, contract or other claimants.

134 *Fortex Group* at 182 per Blanchard J.

[128] In view of the minor level of Strategic's success, Strategic are to pay the Commissioner's costs for a standard appeal on a band A basis and usual disbursements.

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