Fisk v Attorney-General

High Court Wellington CIV-2015-485-664; [2016] NZHC 479
3 February, 21 March 2016
Brown J

Property — Personal property — Security over personal property — Receivership — Priority — Unpaid Customs duty — Whether Customs charge over property has priority over other security interests — Customs Act 1913, ss 128, 223; Law Reform Act 1936, s 9; Land Transfer Act 1952, s 104; Customs Act 1966, ss 154, 154B; Good and Services Tax Act 1985, ss 1(3), 12; Child Support Act 1991, s 169; Receiverships Act 1993, ss 30, 34; Companies Act 1993, ss 9, 16, 305, 305(1)(a), 305(1)(b), 305(1)(c), 305(3)(b), 305(9), 312, 313, sch 7; Biosecurity Act 1993, s 128; Tax Administration Act 1994, s 169; Customs Amendment Act 1995; Customs and Excise Act 1996, ss 2, 8, 86(1), 86(6), 87(1), 97, 97(1), 97(2), 97(3), 98, 98(1), 98(1)(c), 98(1)(e), 98(2), 99, 99(3), 99(3)(a), 99(6), 99(8), 100, 101, 102, 212, 213, 225(1)(k), 286(1)(dd); Personal Property Securities Act 1999, ss 22, 23, 44, 74, 109, Part 9; Interpretation Act 1999, s 5; Insolvency Act 2006, ss 243, 244, 246(3), 246, 247, 248, 249, 250; Customs and Excise Regulations 1996, regs 86, 87; British Columbia Wages Act 1962

The applicants are receivers of NZ Aerial Mapping Ltd (NZAM), who were appointed by the Bank of New Zealand under a general security agreement which attached to a camera that NZAM purchased in 2012. BNZ's security interest attached as soon as NZAM purchased the camera. The camera was imported into New Zealand in 2014, upon entry it became subject to customs duty. Usually goods are held by customs until the duty is paid. However NZAM deferred paying duty under the Deferred Payment Scheme established under s 97(1) Customs and Excise Act 1996. The respondent had a charge over the camera under s 97(1) Customs and Excise Act 1996, which arose on the date of importation of the camera into New Zealand in 2014.

NZAM experienced cashflow difficulties and only paid part of the customs duty. The cashflow difficulties ultimately led to NZAM being placed into receivership. At that time NZAM owed a total of $53,521.44 to Customs, and $4,192,000 to BNZ.

Customs purported to make a preferential claim in NZAM's receivership. The applicants sought directions under the Receivership Act

1993 seeking an Order that BNZ's security interest in the camera ranked in priority to the Customs charge. They advocated for a "first in time" priority rule. Customs contended that it was evident from the scheme of the Customs and Excise Act that the Customs charge prevailed over other security interests.

Held (the Comptroller of Customs and not the Receivers had priority to the proceeds of sale)

1 The Crown is subject to the Personal Property Securities Act 1999 (PPSA) unless in a particular case it can claim an entitlement to priority by statute or agreement.

2 A Customs charge under s 97(1) Customs and Excise Act is a charge beyond the application of the PPSA, as it is excluded by s 23(b) PPSA.

3 The PPSA does not deal with priority contests involving non-consensual security interests.

4 In s 97(2) Customs and Excise Act Parliament has conferred on the Chief Executive a broad power in relation to charged property to the extent of the unpaid duty. The security interests of other creditors are subservient to that extent.

5 While the PPSA is the later legislation, s 97(2) Customs and Excise Act has not been impliedly repealed, as s 23(b) PPSA provides that the PPSA does not apply to charges created under other statutes.

6 A Customs charge under s 97(1) Customs and Excise Act takes priority over other security interests. In this case the Customs charge over the camera had priority over the BNZ's general security agreement, notwithstanding that the general security agreement attached to the camera earlier in time than the date of creation of the charge.

Board of Industrial Relations v Avco Financial Services Realty Ltd [1979] 2 SCR 699 (SCC) distinguished.

Cases referred to in judgment

Abercrombie v Burns [1943] NZLR 699 (SC).

Board of Industrial Relations v Avco Financial Services Realty Ltd [1979] 2 SCR 699 (SCC).

Commerce Commission v Fonterra Co-operative Group Ltd [2007] NZSC 36, [2007] 3 NZLR 767.

Dunphy v Sleepyhead Manufacturing Co Ltd [2007] NZCA 241, [2007] 3 NZLR 602.

Grant v Waipareira Investments Ltd [2014] NZCA 607, [2015] 2 NZLR 725.

Healy Holmberg Trading Partnership v Grant [2012] NZCA 451, [2012] 3 NZLR 614.

Homeplan Realty Ltd v Avco Financial Services Realty Ltd (1977) 81 DLR (3d) 289 (BCCA).

J and P Ingram Ltd v Collector of Customs (Cook Islands) [1966] NZLR 393 (SC).

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

Terminals (NZ) Ltd v Comptroller of Customs [2013] NZSC 139, [2014] 1 NZLR 121.

Toll Logistics (NZ) Ltd v McKay [2011] NZCA 188, [2011] 2 NZLR 601.

Text referred to in judgment

Barry Allan *The Personal Property Securities Act 1999: Act & Analysis* (Brookers, Wellington, 2010) at [2.13].
Brookers Insolvency Law & Practice (Loose leafed, Brookers 2007) at [CA 305.02].
Law Commission *Company Law Reform and Restatement* (NZLC R 9 1989) at [701].
Paul Heath and Michael Whale (eds) *Heath and Whale on Insolvency* (online looseleaf ed, LexisNexis) at [14.37], [20.35(b)], 20.35(c).
Peter Blanchard and Michael Gedye *The Law of Private Receivers of Companies in New Zealand* (LexisNexis Wellington 2008) at [8.01], [8.05].
R I Carter (ed) *Burrows & Carter Statute Law in New Zealand* (5th ed, LexisNexis, Wellington, 2015).
Roderick J Wood and Michael I Wylie "Non-Consensual Security Interests in Personal Property" (1992) 30 Alta L Rev 1055 at 1072–1073.

Application

This was an application for directions under the Receivership Act 1993.

TC Stephens and *SF Kennedy* for the appellants.
HW Ebersohn and *LS Kean* for the respondent.

BROWN J.

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The issue

[1] This case concerns a competition for priority over the proceeds of sale of an aerial camera between:

(a) the receivers (the applicants) of the camera owner, NZ Aerial Mapping Ltd (NZAM), who were appointed by the Bank (of New Zealand (BNZ) under a general security agreement (GSA) which attached to the camera on the date of its purchase on 11 December 2012 (the BNZ's security interest); and

(b) the Customs Department (Customs) pursuant to a charge over the camera under s 97(1) of the Customs and Excise Act 1996 (the C&E Act) which arose on the date of importation of the camera on 23 February 2014 (the Customs charge).

[2] It is common ground that:

(a) prior to the release of the camera without payment of duty pursuant to a Deferred Payment Scheme, Customs held a possessory lien over the camera, which lien took priority over the BNZ's security interest;[1]

(b) under s 44 of the Personal Property and Securities Act 1999 (the PPSA) BNZ's security interest attached as soon as NZAM purchased the camera and that consequently BNZ's security interest attached to the camera prior to the Customs charge coming into existence;

(c) despite the release of the camera, Customs had a charge on the camera under s 97(1) until the duty was fully paid.

[3] However the applicants contend that from the date of release of the camera BNZ's security interest ranked in priority to the Customs charge. By contrast, Customs contends that even after release of the camera, the C&E Act, read in conjunction with reg 87 of the Customs and Excise Regulations 1996 (the C&E Regulations), continued to confer on the Customs charge priority over the BNZ's security interest.

The facts

[4] On 12 May 2005 NZAM entered into a GSA with BNZ. NZAM granted BNZ a security interest over all NZAM's present and after-acquired property, and over all personal property in which NZAM had rights, whether at that time or in the future.

[5] On 6 May 2005 BNZ had registered a financing statement on the Personal Property Securities Register.

[6] On 11 December 2012 NZAM purchased the camera from a Canadian company, Optech Incorporated. On that date BNZ's security interest attached to the camera and was perfected by virtue of the pre-existing financing statement. NZAM used the camera as an item of equipment in its business to carry out high-precision aerial surveying.

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1 The applicants accept that s 102 creates a form of statutory possessory lien for goods in the possession of Customs.

[7] Over a year later, on 23 February 2014, NZAM imported the camera into New Zealand through its agent, DHL Global Forwarding (New Zealand) Ltd.

[8] Upon entry into New Zealand, the camera became subject to customs duty. The value for duty declared for the camera was $438,272.00. The amounts declared for insurance and freight were $110.00 and $588.00 respectively. On the basis of these amounts, duty in the form of GST (at the rate of 15 per cent) was payable to Customs in the amount of $65,851.62. An additional Customs' charge of $40.77 brought the total amount of duty payable to $65,892.39.

[9] Usually goods are held by Customs until the duty is paid. However NZAM operated a Deferred Payment Account under the Deferred Payment Scheme established by Customs pursuant to s 86(6) of the C&E Act. The Deferred Payment Scheme enables approved importers to obtain release of their goods without paying cash on each importantly. Instead, an approved importer can defer paying duty until the 2011 of the month following the month of importation, and then settle all duty due for the preceding month with a single payment.

[10] In order to obtain approval for admission to the Deferred Payment Scheme, importers need to supply Customs with various details, including the credit limit required and evidence of the registration of any security in terms of the PPSA. In certain circumstances Customs requires security to be given- typically in the form of a bank guarantee for a sum equivalent to the anticipated deferred charges for any two consecutive months. Customs did not require security from NZAM in establishing NZAM's Deferred Payment Account.

[11] Given that the camera was imported into New Zealand on 23 February 2014, the duty on the camera became payable under NZAM's Deferred Payment Account on 20 March 2014.

[12] NZAM failed to pay the duty on the due date. At the time NZAM was experiencing cashflow difficulties because of the non-payment of customer invoices relating to contracts in Saudi Arabia. NZAM subsequently made two part-payments of $10,000.00 to Customs on 19 and 23 June 2014.

[13] NZAM's cashflow difficulties ultimately led to NZAM being placed into receivership. On 2 July 2014 BNZ appointed the applicants as receivers and managers of the company pursuant to the terms of the GSA.

[14] Under s 87(1) of the C&E Act, unpaid duty begins to accrue additional duty from the due date of payment. As at the date of the receivers' appointment NZAM owed a total of $53,521.44 to Customs. As at the date of appointment NZAM also owed $4,192,000.00 to BNZ, the total amount of which was secured by BNZ's GSA.

[15] On 4 July 2014 Customs purported to make a preferential claim in NZAM's receivership in respect of the outstanding duty pursuant to Customs' rights under s 101 of the C&E Act and sch 7 of the Companies Act 1993. At the same time Customs drew attention to the fact of the Customs charge under s 97(1) over the camera and made inquiry of the receivers about the camera's location.

[16] Following discussions between the receivers and Customs, the parties reached an arrangement on 1 August 2014 whereby the receivers would sell the camera and retain the proceeds for whichever party had priority to the camera. On 13 November 2014 the receivers sold the camera to a third party.

[17] On 25 August 2015 the applicants filed the present application for directions pursuant to s 34 of the Receivership Act 1993 seeking an order that BNZ's security interest in the camera under the GSA ranked in priority to the Customs charge. The grounds were, in essence, that BNZ's security interest had already attached to the camera and had been perfected at the date on which the Customs charge came into being.

[18] Customs' notice of opposition contended that it was evident from the scheme of the Act that the Customs charge prevailed over other security interests, drawing attention in particular to ss 97–102 and 213 of the C&E Act and to s 23(b) of the PPSA.

An overview of the issue

[19] One of the objects of the reform by the PPSA of the law relating to security interests in personal property was provision for determination of questions of priority between security interests in such property.

[20] The Crown is subject to the PPSA unless in a particular case it can claim an entitlement to priority by statute or agreement. The change in the Crown's position is usefully summarised in *The Law of Private Receivers of Companies in New Zealand*:[2]

> All common law priority of the Crown in New Zealand has been abolished by statue in a corporate insolvency. Under a rule of great antiquity the Crown enjoyed a prerogative right, when there were insufficient assets of a debtor to pay all creditors, to receive payment of its unsecured debt before other unsecured creditors of the same class. But s 9 of the Companies Act 1993 now provides that the whole of that Act binds the Crown. Thus Crown claims are subjected to the scheme of priorities in ss 312 and 313 of the Companies Act. These sections incorporate Schedule 7, as it applies to receiverships by s 30(2) of the Receiverships Act. Similarly, s 22 of the Personal Property Securities Act says that that Act binds the Crown. Therefore, unless by statute or by agreement the Crown has a secured position or a priority, it will be an unsecured creditor but with such preferential status as is given by s 30(2) and Schedule 7, and its security interests will rank under the Personal Property Securities Act according to the priority rules of that Act: ...

[21] By reference to an Albetia Law Review article analysing the Canadian approach to the resolution of priority questions involving non-consensual security interests,[3] the applicants proposed a three stage framework for determining the competition for priority:

(a) First determine if the PPSA provides a rule resolving the priority competition?

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2 Peter Blanchard and Michael Geyde *The Law of Private Receivers of Companies in New Zealand* (LexisNexis, Wellington 2008) at [8.01].

3 Roderick J Wood and Michael I Wylie "Non-Consensual Security Interests in Personal Property" (1992) 30 Alta L Rev 1055 at 1072–1073.

(b) If the answer to (a) is no, determine whether a non-PPSA legislative or common law priority rule confers priority upon the non-consensual security interest?
(c) If the answer to (b) is no, priority is determined according to the order of attachment of the competing security interests.

[22] With reference to the first stage, while s 22 states that the PPSA binds the Crown, s 23 includes in the list of circumstances when the PPSA does not apply the following:

> (b) a lien (except as provided in Part 8), charge, or other interest in personal property created by any other Act (other than section 169 of the Tax Administration Act 1994 and sections 169 and 184 of the Child Support Act 1991) or by operation of any rule of law:

[23] It is common ground that the Customs charge under s 97(1) is a charge created by a statute other than the PPSA. Hence it is a charge beyond the application of the PPSA.
[24] Turning to the second stage, Customs' contention is that the C&E Act not only imposes the charge but also contains a legislative priority rule conferring priority on the s 97 charge over any other interest. The Customs' case focuses on the scheme of the C&E Act and reg 87(1).
[25] The applicants' riposte is that such a conferral of priority, as distinct from the creation of the charge and attendant enforcement mechanisms, is not evident from the features of the legislation on which Customs relies.
[26] Consequently the parties agree that the central issue is a question of statutory interpretation, namely does the C&E Act (and reg 87(1)) confer priority on the s 97 charge over other security interests?
[27] While the dispute focuses on the second stage, it is convenient also to note the applicants' position on the final stage of the framework. Given that the PPSA does not deal with priority contests involving non-consensual security interests, the applicants recognise that the means to resolve the contest must be found elsewhere. In reliance on Canadian jurisprudence they advocate a "first in time" priority rule. Hence, because BNZ's security interest in the camera attached before the Customs charge came into being, the applicants contend that BNZ's security interest prevails over the statutory charge.
[28] Reverting to the second stage inquiry, as Barry Allan has observed:[4]

> Difficult questions of priority arise when a charge from outside the PPSA is set up in contest with security interests recognised and prioritised by the PPSA; in an ideal world, the statute providing for such a charge would provide a means for determining the resulting conflict. ...

[29] Before turning to consider the parties' arguments, it is convenient therefore to introduce the relevant key features of the legislation.

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4 Barry Allan *The Personal Property Securities Act 1999: Act & Analysis* (Brookers, Wellington, 2010) at [2.13].

The particular statutory framework

[30] Under s 12 of the Goods and Services Tax Act 1985 (the GST Act),[5] goods and services tax (GST) is imposed on goods that are imported into New Zealand. The definition of "duty" in s 2 of the C&E Act includes tax levied under s 12 of the GST Act.

[31] Part 8 of the C&E Act addresses the assessment and recovery of duty. Section 86(1) provides that the duty on all goods imported constitutes, immediately on importation of the goods, a debt due to the Crown. Section 102(1) provides that no person is entitled to obtain release of goods from the control of Customs until the sum payable by way of duty on the goods is paid in full, except as provided in the C&E Act or in cases approved by the chief executive.[6] Section 86(6) noted earlier[7] permits the chief executive to approve the deferment of payment of duty and to determine a duty accounting period.

[32] Goods on which duty has become due and payable but is unpaid are "uncustomed goods".[8] It is an offence knowingly and without lawful justification to be in possession or custody of goods that a person knows are uncustomed goods. Similarly in respect of the sale of such goods, s 213(1) provides:

> **213. Purchase, sale, exchange etc of uncustomed goods** — (1) Every person commits an offence who knowingly and without lawful justification purchases, sells, exchanges, or otherwise acquires or disposes of, goods that the person knows are uncustomed goods ...

[33] Customs also places reliance upon the fact that one of the circumstances in which goods are forfeited to the Crown is where uncustomed goods are found in any place.[9]

[34] The issue of recovery of unpaid duty is addressed in different provisions dependent on whether or not the unpaid duty is a charge on the goods.

Charged goods: recovery of unpaid duty

[35] Section 97 materially provides:

> **97. Duty a charge on goods** — (1) Subject to subsection (3), the duty on any goods shall constitute a charge on those goods until fully paid.
>
> (2) Subject to the provisions of this section, if any duty charged on any goods under this section is due and unpaid, the chief executive may, whether or not the property in the goods has passed to a third party, take possession of the goods, and sell them or any part of them in satisfaction or part satisfaction of the charge.
>
> (3) Subsection (1) shall not apply as against a purchaser of the goods for valuable consideration and without knowledge that the duty was owing but had not been paid.

[36] The rights and duties of the chief executive in respect of charged goods are detailed in s 99 which applies in the circumstances outlined in s 98:

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5 Section 12 of the GST Act is deemed by s 1(3) of that Act to be part of the C&E Act.
6 And subject to such securities as the chief executive may require.
7 At [9] above.
8 C&E Act, s 2(1).
9 C&E Act, s 255(1)(k).

98. Application of section 99 — (1) Section 99 applies to the recovery of unpaid duty that is due m relation to goods by —

(a) an individual who is bankrupt; or

(b) a company that is in liquidation; or

(c) a company in respect of the property of which a receiver has been appointed in circumstances to which section 30 of the Receiverships Act 1993 applies; or

(d) an unincorporated body of persons (including a partnership or a joint venture or the trustees of a trust) that is put into liquidation; or

(e) an unincorporated body of persons (including a partnership or a joint venture or the trustees of a trust) in respect of the property of which a receiver is appointed by the High Court—

where the unpaid duty is a charge on the goods.

(2) In any case to which section 99 applies, the provisions of section 305 of the Companies Act 1993 and sections 243, 244, and 246 to 250 of the Insolvency Act 2006 shall not apply.

99. Rights and duties of chief executive in recovery of duty — (1) In any case to which this section applies, the chief executive shall notify the Official Assignee or the liquidator or the receiver, as the case may be, that the unpaid duty constitutes a charge on the goods in accordance with section 97.

(2) Every notice under subsection (1) shall be given within 60 days after, —

...

(b) in the case of a company, the date of the notice in the *Gazette* of the commencement of the liquidation, or of the appointment of a receiver, as the case may be; or

...

or, if there is a dispute as to whether section 97(3) applies, within 30 days after the dispute is resolved or determined.

(3) If any duty to which this section applies is due and unpaid, the chief executive may —

(a) realise the property subject to the charge; or

(b) value the property subject to the charge and claim in the bankruptcy, liquidation, or receivership, as the case may be, in accordance with the provisions of section 101 of this Act, for the balance of the unpaid duty (if any); or

(c) realise the property subject to the charge and claim in the bankruptcy, liquidation, or receivership, as the case may be, in accordance with the provisions of section 101 of this Act, for any balance of the unpaid duty after deducting the amount realised; or

(d) surrender the charge to the Official Assignee or the liquidator or the receiver, as the case may be, for the general benefit of creditors and claim in the bankruptcy, liquidation, or receivership, as the case may be, in accordance with the provisions of section 101 of this Act, for the whole debt.

(4) If the chief executive values the property subject to the charge and claims for the balance of unpaid duty (if any) in accordance with subsection (3)(b) of this section, the valuation and claim must —

(a) contain full particulars of the valuation and claim; and

(b) contain full particulars of the charge; and

(c) identify any documents that substantiate the claim and the charge.

(5) The Official Assignee or the liquidator or the receiver, as the case may be, may require production of any document referred to in subsection (4) of this section.

(6) Where the chief executive realises the property subject to the charge, the provisions of any regulations made under section 286(1)(dd) of this Act shall apply.

(7) Where a claim is made by the chief executive under subsection (4) of this section, the Official Assignee, liquidator, or receiver, as the case may be, must —

(a) accept the valuation and claim; or

(b) reject the valuation and claim in whole or in part, but, —

(i) where a valuation and claim is rejected in whole or in part, the chief executive may make a revised valuation and claim within 20 days of receiving notice of the rejection; and

(ii) the Official Assignee, liquidator, or receiver, as the case may be, may, if he or she subsequently considers that a valuation and claim was wrongly rejected in whole or in part, revoke or amend that decision.

(8) Where the Official Assignee, liquidator, or receiver, as the case may be, —

(a) accepts a valuation and claim under subsection (7)(a) of this section; or

(b) accepts a revised valuation and claim under subsection (7)(b)(i) of this section; or

(c) accepts a valuation and claim on revoking or amending a decision to reject a claim under subsection (7)(b)(ii) of this section, —

the Official Assignee, liquidator, or receiver, as the case may be, may, unless the chief executive has realised the property, at any time, redeem the charge on payment of the assessed value.

(9) The Official Assignee, the liquidator, or the receiver, as the case may be, may at any time, by notice in writing, require the chief executive, within 30 days after receipt of the notice, to —

(a) elect which of the rights referred to in subsection (3) of this section the chief executive wishes to exercise; and

(b) if the chief executive elects to exercise the right referred to in paragraph (b) or paragraph (c) or paragraph (d) of subsection (3) of this section, exercise the right within that period.

(10) If —

(a) the chief executive fails to give notice to the Official Assignee or the liquidator or the receiver, as the case may be, in accordance with subsection (1) of this section within the time specified in subsection (2) of this section; or

(b) having been required to make an election in accordance with subsection (9) of this section, the chief executive fails to do so within the time specified in that subsection, —

the chief executive shall be taken to have surrendered the charge to the Official Assignee, or liquidator, or receiver, as the case may be, under subsection (3)(d) of this section for the general benefit of creditors and the chief executive may claim in the bankruptcy, liquidation, or receivership, as the case may be, in accordance with the provisions of section 101 of this Act.

(11) Where the chief executive has surrendered a charge under subsection (3)(d) of this section or is taken as having surrendered a charge under subsection (10) of this section, the chief executive may, with the leave of the Court or the Official Assignee or the liquidator or the receiver, as the case may be, and subject to such terms and conditions as the Court or the Official Assignee or the liquidator or the receiver, as the case may be, thinks

fit, at any time before the Official Assignee, liquidator, or receiver, as the case may be, has realised the property charged, —

(a) withdraw the surrender and rely on the charge; or

(b) submit a new claim under this section.

[37] It will be noted that s 99(3) echoes the structure of s 305 of the Companies Act which is disapplied by s 98(2) in any case to which s 99 applies.

Dispersal of proceeds of sale

[38] Under s 286(1)(dd) of the C&E Act, regulations may be made prescribing the manner by which the chief executive may exercise any power to sell goods under the C&E Act and the manner (including the order of priority) in which the proceeds of sale shall be dispersed.

[39] Regulation 86 of the C&E Regulations provides for sale by tender or by auction. Regulation 87(1) states:

> **87. Dispersal of proceeds of sale** — (1) Except as may be provided in the Act, the proceeds of any sale made pursuant to regulation 86 are to be dispersed in the following manner and order of priority:
>
> (a) in payment of any costs and expenses incurred by the Customs in the storage or sale of the goods:
>
> (b) in payment of any duty that may be owing in respect of the goods:
>
> (c) in payment of Customs controlled area or other charges:
>
> (d) in payment of any freight costs due in respect of the goods if written notice claiming such freight costs has been given to the chief executive:
>
> (e) the residue of any proceeds shall be paid to the person, appearing to the chief executive, to be entitled thereto.

Recovery of unpaid duty where there is no charge

[40] Where Customs does not have a charge on goods in respect of unpaid duty the position is governed by ss 100 and 101:

> **100. Application of section 101** — Section 101 applies to the recovery of unpaid duty —
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> (a) that is owing by —
>
> ...
>
> (iii) a company in respect of the property of which a receiver has been appointed in circumstances to which section 30 of the Receiverships Act 1993 applies; or
>
> that does not constitute a charge on goods; or
>
> (b) that the chief executive is entitled to claim under this section pursuant to section 99.
>
> **101. Ranking of duty** — (1) Unpaid duty to which this section applies shall be paid in accordance with the following provisions of this section.
>
> ...
>
> (4) In the case of a company in respect of the property of which a receiver is appointed in circumstances to which section 30 of the Receiverships Act 1993 applies, the amount of duty to which this section applies shall be paid in accordance with the requirements of section 30(2) of the Receiverships Act 1993.
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> ...
>
> (7) This section applies notwithstanding anything in any other Act.

(8) Nothing in this section or in section 97 or section 99 of this Act derogates from section 102 of this Act.

A broader legislative context

[41] From 1913[10] to 1994 the Customs legislation contained a succinct provision providing for a charge on goods in respect of unpaid duty. Section 154 of the Customs Act 1966 stated:

> **154 Duty a charge on goods** — (1) The duty on any goods shall constitute a charge on those goods until fully paid.
>
> (2) If any duty so charged on any goods is due and unpaid, the Collector may take possession of the goods, and sell them or any part of them in satisfaction or part satisfaction of the charge.

[42] The change proposed in the Law Reform (Miscellaneous Provisions) (No 3) Bill drew a distinction between those goods to which a charge for unpaid duty applied and other goods. The goods which were to qualify for a charge were goods:

(a) the property in which was held by the person liable to pay the duty; and
(b) that had not been incorporated into any other goods by any process.

The proposed s 154A addressed the "ranking of duty in other cases".

[43] The Bill as reported from the Justice and Law Reform Committee was substantially changed to a form similar to that now found in ss 99 and 101 of the C&E Act.

[44] Speaking at the Second Reading of the Bill on 15 March 1995 the Minister of Justice, the Honourable DAM Graham, said:

> The remaining nine measures now before the House are primarily of a technical or tidying-up nature. The committee has made a number of relatively minor amendments to these measures, which I will comment on briefly. Under the Customs Act the Customs Department has a charge over goods for any customs duty payable in respect of them. The amendments in the Bill as introduced sought to clarify when the charge applied and when it did not, in which case unpaid duty has a preferential unsecured ranking in bankruptcy, liquidation, or receivership. The amendments have been revised so that the charge is not exercisable against bona fide purchases for valuable consideration. The changes also align the position of customs with that of other secured creditors, under the new companies legislation, who have the option of standing on their security or surrendering it.
>
> I should also clarify that these amendments are without prejudice to a general insolvency law review that will among other things go back to first principles in looking at Crown preferential debts.

The Bill was passed as the Customs Amendment Act 1995.

[45] The Explanatory Note to the Customs and Excise Bill described the provisions of the current legislation in this way:

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10 Customs Act 1913, s 128.

> *Clauses 90 and 91* provide that, subject to one exception, the duty on any goods constitutes a charge on those goods until fully paid. The exception is that the charge will not apply as against a purchaser of the goods for valuable consideration and without knowledge that the duty was owing but unpaid.
>
> *Clauses 92 and 93* apply where a person owing duty has become insolvent and the Customs has a charge on the goods on which duty is unpaid. *Clause 93* sets out the rights and duties of the Chief Executive as a secured creditor in these circumstances.
>
> *Clauses 94 and 95* apply where a person owing duty has become insolvent and the Customs does not have a charge on the goods on which duty is unpaid or the Chief Executive, in exercising his or her rights and duties under *clause 93*, is entitled or obliged to recover duty under the clause.
>
> The clause provides that the Customs is treated as a preferential creditor in relation to the recovery of unpaid duty.
>
> These provisions are to the same effect as sections 154 to 154B of the Customs Act 1966 that were enacted by the Customs Amendment Act 1995.

[46] The PPSA came into force on 1 May 2002. There was no amendment made to the C&E Act contemporaneously with the introduction of the PPSA. The change to the treatment of the interests of "preferential creditors" is helpfully explained in *Heath and Whale on Insolvency*:[11]

> Prior to the implementation of the Personal Property Securities Act 1999 on 1 May 2002, a company receiver who had been appointed under a floating charge (or a fixed charge that conferred a floating charge at the time it was created) was, pursuant to s 30 of the Receiverships Act, required to pay "preferential creditors" out of the assets that were subject to the floating charge before paying the appointing creditor. In effect, "preferential creditors" were given priority over floating charge holders ...
>
> With the implementation of the Personal Property Securities Act, and the consequent demise of the floating charge, it was necessary to put a receiver's obligation to pay preferential creditors out of floating charge assets on some other basis. Accordingly, s 30 was amended (and further amended) so it now provides that a receiver must pay preferential creditors out of assets that are the subject of a security interest that (s 30(1)):
>
> (a) is over all or any part of the company's accounts receivable and inventory ...; and
> (b) is not a purchase money security interest that has been perfected at the time specified in s 74 of the Personal Property Securities Act; and
> (c) is not a security interest that has been perfected under the Personal Property Securities Act at the time of the receiver's appointment and that arises from the transfer of an account receivable for which new value is provided by the transferee
>
> These amendments were intended to do away with the role of the now redundant floating charge in determining whether a receiver was obliged to

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11 Paul Heath and Michael Whale (eds) *Heath and Whale on Insolvency* (online looseleaf ed, LexisNexis) at [14.37].

> pay preferential creditors while at the same time replicating as far as possible the prior outcomes. The result intended by the section is that a receiver appointed under a general security agreement over present and after-acquired assets, such as is usually taken by banks and which is the most common way a receiver is appointed, must pay preferential creditors out of inventory and accounts receivable before paying the appointing creditor from such assets. However, if a receiver were appointed under a perfected purchase money security interest, or if a receiver were appointed by a perfected purchaser of specific accounts receivable, no obligation to pay preferential creditors is intended to arise.

[47] With reference to the consequences for the Customs charge of the demise of the floating charge the applicants drew attention to the following analysis in *The Law of Private Receivers of Companies in New Zealand*:[12]

> Section 101(4) of the Customs and Excise Act directs that in the case of a company in respect of which a receiver is appointed in circumstances to which s 30 of the Receivership Act applies (that is, an appointment under a security agreement that created or provided for a security interest over all or part of the company's accounts receivable and inventory, not being a purchase money security interest perfected in accordance with s 74 of the Personal Property Securities Act or arising from a perfected transfer of an account receivable for new value), the unpaid duty is to be paid in accordance with the requirements of s 30(2). So the duty is preferential in the priority laid down by Schedule 7 of the Companies Act.
>
> But the Collector of Customs also has another remedy. Section 97(1) of the Customs and Excise Act provides for the duty to constitute a charge on the goods until fully paid. The Collector may take possession of them and sell them in satisfaction or part satisfaction of the charge. Where the duty is owed by a company in receivership, however, the receiver must be notified that the unpaid duty is a charge on the goods within 60 days after the appointment of the receiver. The Collector may then realise the property subject to the charge or value it and in either case claim the balance of unpaid duty. There is provision for challenge to the valuation. If notice is not given in due time, the Collector is taken to have surrendered the charge.
>
> Unfortunately, although these provisions establish the Collector's priority as a preferential creditor, they do not deal with the priority of the charge as against such creditors or other secured creditors, including the party who appointed the receiver. Those sections which relate to the Collector's charge were enacted at a time when floating charges were common in respect of assets of the kind likely to attract the unpaid duty. It may well have been considered that if the statutory charge attached before crystallisation it would have priority. *But now that the Personal Property Securities Act regime provides for security interests akin to fixed charges over such assets, that assumption seems no longer valid. The position would therefore appear to be that the statutory charge ranks behind any security interest existing at the time the Collector's charge came into being, in which case in practice the Collector's priority depends upon his status as a preferential claimant.* [Emphasis added.]

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12 Above n 1, at [8.05].

The parties' contentions

The applicants' case

[48] Unsurprisingly the applicants placed reliance on the highlighted passage above, noting that the same type of priority contest has been the subject of judicial and academic discussion in Canada. After introducing the three stage framework discussed above,[13] they noted that Wood and Wylie observe that in priority competitions between consensual security interests and non-consensual security interests, the consensual interest is usually the first to be created.

[49] Accordingly, it is said, Canadian statutes have often included special language which purports to give the non-consensual security interest priority, and courts in Canada have tended to apply a very strict reading of these provisions because they deprive secured creditors of their pre-existing property rights. The submissions reviewed the leading case of *Board of Industrial Relations v Avco Financial Services Realty Ltd*[14] where the Supreme Court of Canada upheld a decision of the Court of Appeal for British Columbia[15] which ruled that a statutory charge under the then British Columbia Payment of Wages Act 1962 did not take priority over two prior bank mortgages.

[50] The submission stated:

> 3.12 In certain cases, the response of Canadian legislatures to the *Avco* approach has been what Wood and Wylie describe as a process of "Darwinian" adaptions of statutes in order to ensure survival (priority) of the non-consensual security interests, with the result that the relevant non-consensual security interest becomes drafted tightly enough to survive close judicial scrutiny.

[51] The applicants then argued that judicial insistence on clear and unambiguous legislative priority rules serves two sound policy goals. It vindicates the principle that Parliament needs to be clear if it is to take away property rights without compensation. Secondly, unclear priority rules impose a number of social costs including consequences for the availability and price of credit and the expense of litigation.

[52] Turning to the legislation, it was the applicants' position that the C&E Act is silent on the question of priority between the Customs charge and other securities. They submitted that:

(a) the point of ss 98 and 99 is to deal with the interaction of the status of the chief executive as both a security holder and a preferential unsecured creditor in ce1iain insolvency scenarios;
(b) provisions such as s 305 of the Companies Act and s 99 of the C&E Act are not constitutive of secured creditors' substantive rights in relation to their securities. Such rights are found elsewhere, for example, in s 109 of the PPSA; and

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13 At [21].
14 *Board of Industrial Relations v Avco Financial Services Realty Ltd* [1979] 2 SCR 699 (SCC).
15 *Homeplan Realty Ltd v Avco Financial Services Realty Ltd* (1977) 81 DLR (3d) 289 (BCCA).

(c) the policy underlying ss 98 and 99 is to require secured creditors to make an election between their security and participation in a process that is for the benefit of unsecured creditors.[16]

[53] The applicants contended that the point of ss 100 and 101 is to specify that the chief executive may make a preferential claim for unpaid duty in bankruptcies, liquidations and certain types of receiverships, provided that the chief executive does not also hold or rely on a s 97 charge over goods in respect of the amount of duty for which the preferential claim is made. They acknowledged that those provisions, together with sch 7 of the Companies Act and s 30 of the Receiverships Act, establish the chief executive's priority over other secured creditors as preferential creditor in those insolvency scenarios. However they submitted that those explicit priority provisions in respect of the chief executive's unsecured status stand in contrast to the silence about priority in respect of the s 97 charge.

[54] Turning to s 286(1)(dd), the applicants contended that the "order of priority" contemplated is one which relates only to the proceeds of sale (if any) which Customs is entitled to retain and they argued that reg 87 must be construed in that context. They advanced two reasons why the section does not authorise regulations prescribing substantive priority rules for competition between Customs and the holders of other consensual and non-consensual security interests:

(a) Parliament would not have left the substantial question of competition between security interests to be dealt with as a technical detail in regulations; and

(b) the payment waterfall in reg 87 applies only where the chief executive exercises the power of sale. If the goods were realised by another secured creditor, the regulation would not be engaged. The point was made that it would be very unusual for the priority of security interests to be determined differently depending upon the identity of the person conducting the sale.

[55] The applicants identified s 104 of the Land Transfer Act 1952 (which applied at the time reg 87 was made) as an analogue for reg 87:

> **104. Application of purchase money** — (1) The purchase money to arise from the sale by the mortgagee of any mortgaged land, estate, or interest shall be applied —
>
> (a) Firstly, in payment of the expenses occasioned by the sale:
>
> (b) Secondly, in payment of the money then due or owing to the mortgagee:
>
> (c) Thirdly, in payment of subsequent registered mortgages or encumbrances (if any) in the order of their priority:
>
> (d) Fourthly, the surplus (if any) shall be paid to the mortgagor.

[56] The point was made that s 104 deals with the dispersal of proceeds from a mortgagee sale by a mortgagee who has exercised a power of sale, that it applies to any mortgagee (including subsequent

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16 *Brookers Insolvency Law & Practice* (Looseleaf, Brookers 2007) at [CA 305 .02].

mortgagees) but that, like reg 87, s 104 is silent about prior mortgagees and does not provide for dispersal of proceeds to them. They argued that the analogue shows that a dispersal of proceeds provision is different from a substantive priority provision and can deal with the dispersal of proceeds by a person exercising a power of sale without comprehensively addressing the question of substantive priorities. The applicants submitted that, unlike the C&E Act, where Parliament intends a statutory charge to take priority over other interests it says so in the statute.[17]

Customs' case

[57] Customs' primary submission was that the Customs Act sets out by whom and how powers in respect of charged property are to be exercised and, with reg 87, the priority in which payments from the proceeds of the realised property should be made. It submitted that laws concerning charges or other securities over assets usually give the power to take control of and realise such assets to the secured creditor, given that it has a priority claim to the proceeds. It was said that this makes sense as the party with priority should have the responsibility for looking after its own interests, including taking the necessary steps and incurring the costs involved.

[58] Customs contended that through ss 97(2) and 98(2) the power to realise the goods is removed from receivers and placed with Customs. It rejected the applicants' proposition that provisions such as s 305 of the Companies Act and s 99 of the C&E Act are not constitutive of secured creditors' substantive rights in relation to their securities.

[59] Among other points, Customs emphasised that:

(a) pursuant to s 97(2) Customs can take possession of and sell the goods even if the goods are in the possession of a liquidator or receiver;
(b) the C&E Act envisages that only Customs will realise the property. A secured creditor who sells uncustomed goods knowing that Customs is seeking to realise the goods will contravenes s 213(1);
(c) the applicants' submission (that the regulation-making power in s 286(1)(dd) does not authorise the making of substantive priority rules) ignores the words "including the order of priority"; and
(d) regulation 87(1)(d) and (e) demonstrate that the regulation is not concerned solely with internal priorities.

[60] The argument was then made that an acceptance of the applicants' interpretation, that secured creditors rank in priority to Customs in respect of uncustomed goods, would lead to absurd consequences where the s 97 charge was over an asset that formed part of the debtor's inventory. The proposition advanced was that, because on the applicants' approach a secured creditor with a prior perfected security interest would have a priority claim to the inventory asset despite the

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17 Examples given were the Tax Administration Act 1994, s 169; Child Support Act 1991, s 169; Biosecurity Act 1993, s 128; Law Reform Act 1936, s 9.

Customs charge, then the secured creditor would be placed in a better position and Customs in a worse position than would apply if Customs had no charge on the inventory asset.

[61] With reference to the applicants' statutory interpretation argument, Customs contended that there is no authority in New Zealand for reading down legislative provisions in the extreme manner suggested. Customs maintained that the modern New Zealand trend is towards a purposive interpretation where the words of the legislation are read in their fullest context with a view to giving effect to the purpose of the legislation.[18]

[62] In response to the proposition that non-consensual provisions restrict property rights and are unduly harsh, Customs pointed out that duty is merely a cost of bringing property into New Zealand, which property adds to the security of the secured creditor (being after-acquired property). It further argued that in certain circumstances an importer can claim back the duty paid as a GST refund.

[63] The proposition was advanced that, if a secured creditor has a prior claim over the uncustomed goods with the consequence that the duty remains unpaid, then taxpayers would end up sponsoring the secured creditor to the extent of any GST refund. It followed in Customs' view that what the applicants were contending for was not so much to protect BNZ's property rights but rather to protect the taxpayer-funded benefit for the secured creditor who appointed the applicants.

Analysis

Principles of statutory interpretation

[64] The approach to the interpretation of statutes in New Zealand is well-settled. As the Supreme Court stated in *Commerce Commission v Fonterra Co-operative Group Ltd*:[19]

> [22] It is necessary to bear in mind that s 5 of the Interpretation Act 1999 makes text and purpose the key drivers of statutory interpretation. The meaning of an enactment must be ascertained from its text and in the light of its purpose. Even if the meaning of the text may appear plain in isolation of purpose, that meaning should always be cross-checked against purpose in order to observe the dual requirements of s 5. In determining purpose the Court must obviously have regard to both the immediate and the general legislative context. Of relevance too may be the social, commercial or other objective of the enactment.

[65] Those principles apply to taxation statutes such as the C&E Act. Addressing a submission about the implications of an observation made in *Stiassny v Commissioner of Inland Revenue*,[20] the Supreme Court in *Terminals (NZ) Ltd v Comptroller of Customs* stated.[21]

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18 R I Carter (ed) *Burrows & Carter Statute Law in New Zealand* (51st ed, LexisNexis, Wellington, 2015).

19 *Commerce Commission v Fonterra Co-operative Group Ltd* [2007] NZSC 36, [2007] 3 NZLR 767.

20 *Stiassny v Commissioner of Inland Revenue* [2012] NZSC 106, [2013] 1 NZLR 453 at [23]. The Court there said: "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

> [39] Under s 5(1) of the Interpretation Act 1999, the text of a provision is to be construed in light of its purpose. Taxation statutes are construed purposively in the same manner as any other statute, as this Court indicated in the passage quoted above. The comment about "fair construction" was not intended as a gloss on that principle. It was a reference back to there being no presumption in favour of either party and to the purposive construction accorded to all statutes ....

[66] Although the applicants did not explicitly advocate a departure from those established principles, their reference to the "Darwinian" adaption and the desirability for judicial insistence on clear and unambiguous legislative priority rules[22] conveyed an echo of the argument advanced in the *Terminals* case.[23]

[67] In my view the Canadian approach does not provide a basis for what I consider would amount to an inappropriate gloss on the established principles. I do not consider that the New Zealand authorities cited by the applicants[24] provide support for such an approach.

The C&E Act

[68] There is no specific purpose provision in the C&E Act. The long title simply explains that the statute reforms the law relating to customs, excise and other duties and provides for the administration and enforcement of Customs controls at the border. The New Zealand Customs Service is a government department established under s 5 to administer the statute.

[69] As earlier noted[25] provisions relating to the assessment and recovery of duty are contained in Part 8. Section 86(1) provides that the duty on all goods imported constitutes, immediately on importation, a debt due to the Crown.

[70] Since the Customs Amendment Act 1995[26] a distinction has been drawn between the secured and preferential unsecured status of Customs in respect of goods on which duty is unpaid. There is no disagreement about the fact and effect of the priority provision ins 101 in respect of the chief executive's unsecured status.[27]

[71] The present contest relates to the meaning and consequences of the provisions relating to charged goods.[28] In relation to charged goods, under s 99 Customs has options similar to those available to secured creditors under s 305 of the Companies Act and s 243 of the Insolvency Act 2006 reflecting the alignment referred to by the Minister on the Second Reading debate in 1995.[29]

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construction, must be taken to impose that tax in the circumstance of the case".

21 *Terminals (NZ) Ltd v Comptroller of Customs* [2013] NZSC 139, [2014] 1 NZLR 121.

22 At [50]–[51] above.

23 *Terminals (NZ) Ltd v Comptroller of Customs*, above n 21 at [37].

24 *Healy Holmberg Trading Partnership v Grant* [2012] NZCA 451, [2012] 3 NZLR 614 at [55]–[58]; *Toll Logistics (NZ) Ltd v McKay* [2011] NZCA 188, [2011] 2 NZLR 601 at [60].

25 At [31] above.

26 See [43]–[44] above.

27 See [40] and [53] above.

28 See [35]–[38] above.

29 See [44] above.

Section 305

[72] Writing in the context of the Companies Act, *Heath and Whale on Insolvency* note that secured creditors are entitled to apply their securities in discharge of whatever liability of their debtors they think fit.[30] If a secured creditor holds securities not specifically applicable to any particular debt the creditor is therefore entitled as against the liquidator to apply the proceeds in discharge of whatever debt the creditor thinks fit. Section 305 is said to attempt to reconcile the needs of efficient administration of liquidation with reasonable opportunity for recognition of secured creditors' claims.[31]

[73] That reconciliation was explained in *Dunphy v Sleepyhead Manufacturing Co Ltd* as follows:[32]

> The scheme of Part 16 of the Companies Act is to exclude from the ambit of the liquidation property which is subject to a charge. The Act contemplates that secured creditors will operate independently of the liquidation, unless they decide to surrender their security in terms of s 305(1)(c).

[74] Recently the Court of Appeal in *Grant v Waipareira Investments Ltd* analysed the position in this way:[33]

> [28] ... the Act in s 305 contains a separate regime for secured creditors which gives them priority in respect of the realisation of their security independently of the liquidation unless they surrender their security. Secured creditors have the three powers conferred by s 305(1), namely to:
>
> (a) realise the property the subject of the charge relied on; or
> (b) value the property subject to the charge and claim in the liquidation as an unsecured creditor for the balance; or
> (c) surrender the charge to the liquidator for the general benefit of creditors and claim as an unsecured creditor for the whole debt. ...
>
> [34] ... it is clear from this analysis of the relevant provisions of the Act that a secured creditor will remain a secured creditor under the Act unless and until the creditor's charge is surrendered in one of the two identified ways. In the absence of a surrender in accordance with either s 305(1)(c) or s 305(9), the creditor will remain secured and entitled to realise property subject to the charge under s 305(1)(a) or s 305(l)(b).

Points of difference in s 99

[75] The applicants argued that the rights of the chief executive to take possession of and sell goods the subject of as 97 charge are not found ins 99(3) but ins 97(2). While I accept that contention, it does not advantage the applicants' case. Whereas s 305(1)(a) and s 243(1)(a) both conclude with the phrase "if entitled to do so", the power of sale recognised in s 99(3)(a) is both certain and broad. Subject to the exception of a purchaser for value with no knowledge that duty was owed and

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30 Above n 11, at [20.35(b)].
31 Above n 11, at [20.35(c)]; Law Commission Company *Law Reform and Restatement* (NZLC R9 1989) at [701].
32 *Dunphy v Sleepyhead Manufacturing Co Ltd* [2007] NZCA 241, [2007] 3 NZLR 602 at [43].
33 *Grant v Waipareira Investments Ltd* [2014] NZCA 607, [2015] 2 NZLR 725.

unpaid,[34] the power to take possession and sell may be exercised by the chief executive even where not just possession of but property in the goods has passed to a third party.

[76] In the case of liquidations and bankruptcies, the exercise of such a broad right could potentially set the chief executive on a collision course with other secured creditors who might elect to exercise the rights recognised ins 305 of the Companies Act and ss 243–244 of the Insolvency Act. It is on account of that potential conflict that, in my view, s 98(2) provides that those sections shall not apply in any case to which s 99 applies.

[77] The applicants argued that s 98(2) disapplies s 305 only insofar as that section would otherwise govern the recovery of duty by the chief executive. They maintained that the chief executive's s 305 entitlement is replaced with the set of rights and obligations found in s 99 but that the rights of other secured creditors remain unaffected by s 98(2).

[78] I do not agree with the argument that the disapplication of s 305 is confined to the chief executive. Section 98(2) states that s 305 shall not apply "in any case to which s 99 applies". Such a case is defined ins 98(1) to be the scenario where the duty unpaid by the specified entities is a charge on the goods. While s 98(2) applies only where there is unpaid duty on charged goods, there is no sound basis in my view for substantially qualifying the subsection by the addition of the words "to the chief executive".

[79] A further significant feature of the C&E regime is that the powers ins 99(3) may be exercised not only in liquidations and bankruptcies but also in receiverships of the types recognised in s 98(1)(c) and (e). Hence, as Customs submitted, even if the charged property is in the possession of a receiver (who usually will have been appointed under a GSA by a secured creditor)[35] the chief executive can take possession of the property and sell it.

[80] Furthermore, as the concluding words of s 97(2) state, the sale of such property is to be "in satisfaction or part satisfaction of the charge". There is no qualification reflecting an obligation to defer to a security of greater priority over the property sold instead of receiving the sale proceeds in satisfaction of the charge.

[81] The view that by virtue of ss 97(2) and 98(2) the chief executive has effectively[36] an unqualified right to take possession of and sell charged goods, and is under no obligation to first account to a receiver representing an earlier in time consensual secured creditor, gains support in my opinion from the redemption power in s 99(8). It would be odd for a receiver to be able to redeem the charge by paying to the chief executive the assessed value, only to then demand the repayment of that sum on the strength of the priority security of the secured creditor by whom the receiver was appointed.

[82] A conclusion that ss 97(2) and 98(2) in combination confer on the chief executive an unqualified power to sell charged goods and to

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34 C&E Act, s 97(3).
35 See [46] above.
36 Subject to s 97(3).

apply the proceeds of sale in whole or part satisfaction of the charge is reinforced by ss 99(6) which provides the C&E Act mechanism equivalent to s 305(3)(b) and s 246(3). Section 99(6) states that regulations made under s 286(1)(dd) shall apply to the realisation of property subject to the charge.

[83] It may be viewed as unusual to provide in regulations a provision for priority of payments which in other contexts is contained in the relevant statute. However that is what the legislature has plainly done in s 286(1)(dd) in permitting the making of a regulation prescribing both the manner of sale of goods and "the manner (including the order of priority) in which the proceeds shall be dispersed".[37]

[84] The applicants contended that the "order of priority" which s 286(1)(dd) contemplates is one which relates only to the proceeds of sale which Customs is entitled to "retain", namely any proceeds of sale which are not exhausted in discharging the debt of another security holder of greater priority.

[85] In support of that proposition they argued that Parliament can scarcely have contemplated regulating priority competitions between other security interest holders whose security interests have nothing to do with the C&E Act. They went on to say:

> And if Parliament intended to confer priority on s 97 charges over other consensual and non-consensual security interests, it would say so expressly in the empowering Act. Parliament would not leave this type of substantive question as something to be dealt with as a technical detail in regulations.

[86] However in s 97(2) Parliament has conferred on the chief executive a broad power in relation to charged property to the extent of the unpaid duty. The subsection does not say in so many words that the security interests of other creditors are subservient to that extent but, that appears to be the logical consequence of the chief executive's power.

[87] While reg 87 provides the specifics of the payment waterfall, the "substantive question" as to priority is governed by s 97(2) and is not left to be dealt with as a technical detail in regulations. That conclusion also provides the answer to the applicants' second line of argument, to the effect that the priority of security interests would be determined differently on the assumption of a realisation by another secured creditor.

[88] I acknowledge the applicants' argument that ss 98 and 99 do not apply to all insolvency scenarios. An example cited, to which it is said s 30 of the Receiverships Act does not apply, is a receivership solely in respect of equipment. Similarly attention was drawn to situations where a secured creditor simply exercises its enforcement rights under Part 9 of the PPSA rather than through the appointment of a receiver.

[89] I accept that in such cases ss 98 and 99 do not apply. Nor do I consider that it was intended that they should. For that would involve more than the alignment which was the objective of those provisions.[38] However I consider that in such scenarios Customs' position is

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37 At [39] above.
38 See [44] and [71] above.

nevertheless secured by s 97(2) which makes it clear that the right to take possession and to sell the relevant property is only avoided when the property has been acquired by a purchaser for valuable consideration and without knowledge that duty was owing and unpaid.

[90] I am not persuaded by the suggestion that as s 109 of the PPSA is the later legislation, then s 97(2) is to be treated as having been impliedly repealed. I do not consider that such an argument is sustainable in the face of the provision in s 23(b) that the PPSA does not apply to charges created under other statutes.[39]

[91] It remains to consider s 213[40] in respect of which the applicants make some valid points. First, they note that s 97 charges are latent and are not found on any public register. It is conceivable therefore that receivers may sell property before a s 99(1) notice is communicated to them and, being unaware of the existence of a charge, they would not have the requisite knowledge element. Secondly they point out that s 213(1) applies to uncustomed goods. However where goods are released under the Deferred Payment Scheme there is a period between importation and the 20th of the month following the month of importation when duty is not due and payable. Hence during that period goods are not uncustomed goods and their sale would not contravenes 213(1).

[92] Those points are recognised in Customs' careful framing of the implications of s 213, namely that a secured creditor who sells uncustomed goods knowing that Customs is seeking to realise the goods will contravenes 213(1).[41] But drawing the circumstances of the exposure to liability in that precise manner does not materially advance the broader proposition that only Customs may realise the property.

[93] However the applicants proceed to invoke s 213(1) in support of their own stance, drawing attention to the inclusion of the phrase "without lawful justification". They submit:

> ... A secured creditor is presumably lawfully justified by the provisions of Part 9 of the PPSA to realise the goods subject to its security. The same presumably applies for a receiver exercising rights under the provisions of a general security agreement and in accordance with the Receiverships Act.

[94] The meaning of an equivalent phrase has only received passing consideration previously[42] in the context of the differently worded s 223 of the Customs Act 1913[43] where the existence of a lawful justification was an alternative defence to absence of knowledge that the goods were uncustomed.

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39 At [22] above.
40 At [32] above.
41 At [59](b) above.
42 *Abercrombie v Burns* [1943] NZLR 699 (SC) at 704; J and *P Ingram Ltd v Collector of Customs (Cook Islands)* [1966] NZLR 393 (SC) at 396.
43 Section 223 stated:
"223. Possession of uncustomed goods or prohibited imports — Any person found in possession of any uncustomed goods or of any prohibited imports shall be liable to a penalty of one hundred pounds, unless he proves —
(a) That he obtained possession thereof without knowledge that they were uncustomed goods or prohibited imports; or
(b) That he obtained possession thereof with some other lawful justification."

[95] How are ss 212(1) and 213(1) to be reconciled with s 97(2)? The applicants' contention has to be that, even with knowledge that duty has become due and is unpaid, it is legitimate for a secured creditor or a receiver to retain custody of and to sell the property. Such an entitlement would be inconsistent with the right conferred on the chief executive by s 97(2) to take possession of the goods and sell them even if property in those goods has passed to a third party.

[96] It is difficult to conceive that Parliament could have intended to provide for such contradictory entitlements which would likely bring the chief executive and a secured creditor into conflict on the fate of uncustomed goods. Consequently I do not accept the submission that lawful justification exists for the purposes of ss 212 and 213 by reason only of the fact that a creditor has security over the property possessed or sold.

Conclusion

[97] My analysis of the text of the material provisions of the C&E Act leads me to the view that the Customs charge in s 97(1) takes priority. over other security interests. The task of cross-checking that meaning against purpose is a more elusive exercise.[44]

[98] The underlying philosophy of the enforcement provisions is that no person should obtain the release of goods from Customs until the sum payable by way of duty is paid in full. There is at least some merit in Customs' contention that duty is in effect the price of bringing property into New Zealand and that that price should be paid first. Furthermore it is the legislative intention that the charge should provide a measure of security specific to the imported property, in contrast to the unsecured, albeit preferential, status of the chief executive where no charge exists.

[99] The discussion in *The Law of Private Receivers of Companies in New Zealand* recognises that the Customs charge may have had priority in the days of the floating charge but opines that that "assumption" seems no longer valid since the introduction of the PPSA regime which provides for security interests akin to fixed charges.[45] To my mind that perspective does not sufficiently take into account the exemption from the PPSA in s 23(b) of statutory charges under other statutes.

[100] Where that charge secures the price of entry of the goods to the market and the duty paid may be the subject of a refund in due course,[46] it is not easy to discern a commercial imperative which would support a contrary purpose.

[101] Indeed the consequence of the Customs charge being defeated in the competition for priority would simply provide a disincentive for the commercial accommodation in the form of the Deferred Payment Scheme. Customs could simply avoid the risk of the s 97(2) charge being defeated by another security interest by adopting an absolutist approach to the effect of the general rule in s 102(1). Again, that outcome would not appear to promote any social or commercial legislative objective.

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44 *Commerce Commission v Fonterra Co-operative Group Ltd*, above at [64].
45 At [47] above.
46 At [62] above.

[102] For these reasons my analysis of both the relevant text of the C&E legislation and its purpose, so far as it can be divined, leads me to the conclusion that the Customs charge over the camera had priority over the BNZ's GSA, notwithstanding that the GSA attached to the camera earlier in time than the date of creation of the charge. Hence the answer to the second question in the applicants' proposed framework is in the affirmative.[47]

[103] Accordingly Customs is entitled to the proceeds of the sale of the camera to the extent necessary to satisfy the charge.

[104] If the parties are unable to reach agreement on costs, Customs is to file a memorandum by 15 April 2016 and the applicants are to file a memorandum m response by 9 May 2016.

Reported by: Zannah Johnston, *Barrister and Solicitor*

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47 At [21] above.