IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2010-404-7387

BETWEEN	GRANT EDWARD BURNS AND RICHARD DALE AGNEW Applicants
AND	THE COMMISSIONER OF INLAND REVENUE First Respondent
AND	STRATEGIC FINANCE LIMITED (IN RECEIVERSHIP) AND STRATEGIC NOMINEES LIMITED (IN RECEIVERSHIP) Second Respondent

Hearing: 27 June 2011
(Heard at Auckland)

Counsel: C. Murphy - Counsel for Applicants
N.H. Malarao and N.M.H. Whittington - Counsel for First Respondent
M.V. Robinson and B.J. Steed - Counsel for Second Respondents

Judgment: 10 August 2011 at 4:00 PM

JUDGMENT OF ASSOCIATE JUDGE D.I. GENDALL

This judgment was delivered by Associate Judge Gendall on 10 August 2011 at 4.00 pm under r 11.5 of the High Court Rules.

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Introduction

[1] Before me is an application by the applicants as liquidators of Takapuna Procurement Limited (in liquidation) (the company), previously a property development company, for directions under s 284(1)(a) of the Companies Act 1993 as to the proper characterisation of certain funds held by the liquidators on behalf of the company. The proper treatment of those funds will determine how they should be distributed. The funds in question presently held by the liquidators (the collected funds), as I understand the position, total $782,108.18.

[2] The collected funds can be categorised as follows:

(a) Refunds to the company from the North Shore City Council (the Council) of:

  i. Payments made earlier by the company to the Council for development contributions ($451,176.94);

  ii. Bonds paid earlier by the company to the Council ($3,000);

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

(c) Various funds held by the company's solicitors which relate to the earlier property development undertaken ($158,581.38).

[3] The second respondents, Strategic Finance Limited (in receivership and in liquidation) and Strategic Nominees Limited (in receivership) (collectively Strategic) are the only remaining secured creditors and the first respondent, the Commissioner of Inland Revenue (the Commissioner), is the only preferential creditor of the company. Both the Commissioner and Strategic seek, after payment of the liquidators' costs, payment of the balance of the collected funds. Whether the funds are paid to the Commissioner or Strategic essentially turns on the meaning of "accounts receivable" in Schedule 7 to the Companies Act 1993, a defined term in the Personal Property Securities Act 1999 (PPSA). The Commissioner and Strategic both contend that Schedule 7 to the Companies Act 1993 accords them priority. If the collected funds are accounts receivable or "proceeds" of accounts receivable

("proceeds" also being a defined term), the Commissioner's claim has priority pursuant to the statutory preference regime encapsulated in s 312 and Schedule 7 to the Companies Act 1993. Otherwise, the rights of Strategic as secured creditors under their General Security Agreement (GSA) will prevail (subject to the position in respect of the GST refund discussed below). The liquidators therefore apply to this Court for directions as they are not certain about the correct application and operation of s 312 and Schedule 7.

Background

[4] The company was previously in business as a property developer in the Auckland region. Part of its business involved the development of a property at Anzac Avenue, Takapuna known as "Shoalhaven" (the Shoalhaven Development). The company's directors were Messrs Robert and Kelly McEwan. Both were adjudicated bankrupt as of 26 February 2009 and 20 May 2009 respectively.

[5] On 18 July 2008 the Commissioner filed liquidation proceedings against the company and six other of Messrs McEwan's companies. The company was placed into liquidation on 21 November 2008 by order of this Court and the applicants appointed as liquidators.

[6] Previously, Strategic had advanced funds to the company for the completion of the Shoalhaven Development. The company granted Strategic a GSA which was registered on the Personal Property Securities Register (registered on 22 May 2003 and re-registered on 4 April 2008) along with a second registered mortgage over the Shoalhaven Development property. Strategic claims that, at the date of liquidation, it was owed in excess of $4,800,000.00 plus accruing interest and costs under these securities. The liquidators say that Strategic have in fact filed a proof of debt claim in the sum of $7,056,000.00.

[7] The Commissioner lodged its claim as a preferential creditor which the liquidators have accepted at $3,625,493.51. This relates to GST arrears owing by the company plus interest and penalties.

The Collected Funds

[8] The development contributions refund noted at [2](a)(i) above arose out of contributions paid in the past by the company to the Council. Those contributions had been required by the Council from developers on development project approvals, essentially to help fund infrastructure in the region. In *Neil Construction Limited v North Shore City Council* [2008] NZRMA 275 this Court found that the Council had erred in asserting that the grant of specified resource consents would automatically trigger these development contributions charges. Following that decision, the Council reviewed and amended its development contributions policy. The refunded amounts totalling $451,176.94 were the difference between development contributions that had been paid in the past on various company projects and the Council's later reassessment of the correct level of those contributions.

[9] Bonds are a standard requirement for approval of a development project by the Council. Developers such as the company in the present case are required to pay a bond to ensure that work undertaken by it complies with the Council's standards. Bonds are refunded after the Council considers a development is compliant and the $3,000.00 post-liquidation payment made to the company here was such a bond refund.

[10] The GST refund of $169,349.86 noted at [2](b) above was a payment made to the company post-liquidation in error by the Commissioner. More on that is provided at para [15] and following below.

[11] The funds noted at [2](c) above held by the company's solicitors, Carter Atmore, relate in part to three separate sale and purchase agreements for units at the Shoalhaven Development. Those sales were to a Mr Ian Newman to Red Sea Properties Limited and to Lateott Limited.

[12] Mr Newman, Red Sea Properties and Lateott paid deposits of $40,600.00, $15,108.75 and $41,200.00 respectively to Carter Atmore pursuant to their individual sale and purchase agreements for Shoalhaven Development units. Carter Atmore continued to hold those funds on trust for the company at the time of

liquidation and post-liquidation, they transferred them to the liquidators (plus interest) on request.

[13] Carter Atmore also received and held certain other funds. These represented first, a refund of unused Body Corporate levies, secondly, rental payments received from Quinovic Property Management, thirdly, rental of one unit retained by the company at the Shoalhaven Development, fourthly, reimbursement funds from the Investors Forum New Zealand Limited, fifthly, money held subsequent to a settlement between the company and a purchaser over remedial works required for one of the units and lastly, a refund held for overpayment of general rates, water charges and legal fees.

The Issues

[14] As I have noted above, the present application for directions by the liquidators seeks guidance from the Court on how to categorise the collected funds on the basis that this will determine their disposition between the competing interests.

[15] The first issue concerns the $169,349.86 GST refund provided to the company in error by the Commissioner. Essentially the Commissioner's position is that he has a proper claim to these monies paid by mistake under restitution principles or alternatively the liquidators should be directed to return the funds to the Commissioner under the rule in *In re: Condon* (1874) 9 Ch App 609(CA).

[16] In response, counsel for Strategic contends that the Commissioner has no proprietary interest in the GST refund monies for three reasons:

(a) There was no relevant mistake;

(b) Even if there was a mistake, there is no proprietary remedy available; and

(c) The rule in *In re: Condon* does not apply here.

[17] The liquidators in their present application seek the guidance of the Court regarding the GST refund monies as a separate issue in light of the competing positions taken here by Strategic and the Commissioner.

[18] The second issue relates to all the categories of collected funds and raises the question whether the liquidators are required to pay these amounts (or any part of them) to the Commissioner as a preferential claimant under s 312 Companies Act 1993 rather than to Strategic as secured creditors holding a GSA over the company's assets.

[19] In this regard s 312 Companies Act 1993 states:

> **312 Preferential Claims**
>
> (1) The liquidator must pay out of the assets of the company the expenses, fees, and claims set out in Schedule 7 to this Act to the extent and in the order of priority specified in that Schedule and that Schedule applies to the payment of those expenses, fees and claims according to its tenor.
>
> (2) Without limiting clause 2(1)(b) of Schedule 7 to this Act, the term **assets** in subsection (1) of this section does not include assets subject to a charge unless the charge is surrendered or taken to be surrendered or redeemed under section 305 of this Act.

[20] Schedule 7 makes provision for preferential claims on a company liquidation and provides in clause 1(5) for payment to the Commissioner of GST, PAYE and other stipulated forms of unpaid taxation as a general priority payment.

[21] On this, clause (2) of Schedule 7 provides in part (emphasis added):

> **(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

…........

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

[22] Clause 2(2) of Schedule 7 states that "**account receivable**" has the same meaning as that term has in the PPSA. Section 16 of the PPSA deals with this and provides:

> **16 Interpretation**
>
> (1) In this Act, unless the context otherwise requires,—
>
> …
>
> **Account receivable** means 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:

[23] In a relatively recent decision of this Court *Commissioner of Inland Revenue v Northshore Tavern Ltd (in liquidation)* (2008) 23 NZTC 22,074 (*Northshore Tavern*), Associate Judge Hole, in dealing with a similar issue to the one before this Court, held that "accounts receivable" under cl 2(1)(b)(i) of Schedule 7 are limited to book debts of the company in liquidation and thus in that case the monies in dispute, not being book debts of the company, were not to be paid to the Commissioner as a preferential creditor but went to a secured creditor under its GSA.

[24] In the present case, the arguments raised by the respondents Strategic and the Commissioner concerning the GST refund and in suggesting that Schedule 7 accords each priority as to all the collected funds, raise three main issues:

1. With regard to the $169,349.86 funds received from the Commissioner as a GST refund, what is the effect of the Commissioner's error in crediting that money to the company?

2. Is the decision of Associate Judge Hole in *Northshore Taverns* correct? In other words are "accounts receivable" limited to book debts or trade credit accounts?

3. Under the definition adopted in issue two, are the collected funds held by the liquidators here "accounts receivable"?

Counsels' Submissions and My Decision

[25] I now turn to consider each of those issues in turn.

Issue one: The Commissioner's GST Refund Mistake

[26] On 28 November 2008 (some seven days after the company was placed into liquidation) the Commissioner received a GST return from the company (prepared not by the liquidators but it seems by Mr Robert McEwan, a director of the company) for the period ending 31 October 2008. According to that return, total sales and income for the period amounted to $1,474.02 and purchases amounted to $1,525,622.76. The result was a claim for a GST refund for the period of the $169,349.86. Under s 46(6) of the Goods and Services Tax Act 1985 the Commissioner has a right to set off any credit available against tax that is payable by that person.

[27] Mr Whati Rameka (Mr Rameka), a Team Leader within the National Collections Enforcement Unit within the Inland Revenue Department has filed an affidavit in this proceeding sworn 4 March 2011 in which he deposes at 5.5:

> .... it is the IRD's policy and practice to invoke the Commissioner's right under s46(6) of the Goods and Services Tax Act 1985 and apply any GST refunds against outstanding GST or other tax debts. As the refund sought in the present case related to a pre-liquidation period, it should not have been released to TPL (or its liquidators). It should have been set off against the TPL's existing GST debts.

[28] Mr Rameka further deposes that the officer employed by the Commissioner for the Inland Revenue Department (the IRD) who reviewed the company's filed GST return did not realise that the company had outstanding GST debts and released the GST refund. The refund was mistakenly approved on 3 December 2008 (less than two weeks after the company had been placed into liquidation).

[29] As I have noted above, before me Mr Malarao, counsel for the Commissioner, submitted that due to this mistake, the Commissioner has a claim to

the money in question under restitution principles or alternatively, the liquidators should be directed to return the funds under the rule in *Re Condon*.[1]

[30] In response, Mr Robinson, counsel for Strategic, submitted that the Commissioner has no proprietary interest in the funds for the three reasons I have set out at [16] above, these being:

(a) There was no relevant mistake;

(b) Even if there was a mistake, there is no proprietary remedy available; and

(c) The rule in *In re: Condon* does not apply.

[31] At the outset, I need to say that I am satisfied that the rule in *In re: Condon* ought to apply in the present case. For that reason I begin with that rule. Brookers Company and Securities Law at CA 260.04 outlines the rule in this way:

> **CA260.04 Court-appointed liquidators**
>
> A liquidator appointed under Court order is an officer of the Court and must act in a manner consistent with the highest principles. As a result, a rule of law has developed which provides that liquidators will not be permitted to take advantage of the strict legal rights payable to them if to do so would mean that they were acting unjustly, inequitably, or unfairly: *Re Condon, ex p. James* (1874) 9 Ch App 609. See also *Re Cider (New Zealand) Ltd (in liq); Official Assignee v Grainger* [1936] NZLR 374. In *Re Condon*, a trustee in bankruptcy was ordered to repay money paid under mistake of law even though under English law such a mistaken payment could not normally have been recoverable.

[32] The following summary of the rule was cited with approval by Temm J in *Official Assignee v Westpac Banking Corporation*:[2]

> The Official Assignee being an officer of the Court, is bound to do the fullest equity, and will, in a proper case, be ordered to do so. There is, in certain circumstances, imposed on him an even higher standard of conduct which would require him to abstain from asserting legal, and even equitable, rights.

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[1] (1874) 9 Ch App 609 (CA).

[2] (1993) 4 NZBLC 102,939 (HC).

[33] In *Ex parte Simmonds* Lord Esher MR further said:[3]

> A trustee in bankruptcy has always been treated as an officer of the Court of Bankruptcy, and the Court will order him to act in an honourable and high-minded way, and so it was laid down by James and Mellish, L.JJ., in *Ex parte James.*

[34] A liquidator is also captured under this rule.[4] In *Official Assignee v Westpac Banking Corporation* a customer, Mr Wall who was declared bankrupt, held two accounts with the respondent bank. In the Napier branch of the bank Mr Wall owed close to NZ$1m. In an Australian branch he had a modest credit of A$11,834.76. The Official Assignee contacted the Australian branch and requested that the bank transfer the Australian funds to the Napier branch in the Official Assignee's name. The bank complied. However, upon the funds arriving with the Napier branch, the bank informed the Official Assignee that it would not release the funds and instead claimed that it was entitled to set-off between the two accounts under s 93 of the Insolvency Act 1967. The bank filed no formal proof of the debt with the Official Assignee.

[35] The Judge was satisfied initially that once the transfer occurred, the funds belonged to the Official Assignee and so the bank had no right to set-off under s 93. However, the bank had made a mistake in transferring the money. The Court found that the provisions of s 93 are mandatory. The bank had to balance out credits and debits for the ultimate creditor to claim against the bankrupt's estate only for the balance of the account. By not averting to its rights and duties prior to transferring any remaining credit to the Official Assignee, the bank was in error.

[36] In those circumstances, the Judge concluded that it would be unfair for the creditor to obtain a benefit just because of that mistake.

[37] In the present case there was without question a regrettable mistake. By the employee at the IRD transferring the GST refund to the company (as he had erroneously recorded "NIL" under the category marked "Outstanding debt/returns"

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[3] (1885-86) LR 16 QBD 308 at 312 (CA).

[4] *In re Cider (NZ) Ltd* [1936] NZLR 374 at 377.

in the company's IRD records when it actually had huge outstanding GST debts), the company then received the refund after it had been placed into liquidation (a liquidation made on the application of the Commissioner), when the Commissioner, in fact, had a right to set-off the refund under s 46(6) of the Goods and Services Tax Act 1985 but did not do so. In those circumstances, the liquidators obtained that money as a windfall and through a clear mistake.

[38] Notwithstanding that mistake, Strategic asserts three reasons why the decision in *Official Assignee v Westpac Banking Corporation* is distinguishable in the present case and therefore that the rule in *Re Condon* should not apply here:

1. The defendant in *Official Assignee v Westpac Banking Corporation* had a *mandatory* right to set-off. Here, Strategic says the Commissioner merely has a discretionary right to set-off and, by not having exercised that right, he cannot now have the benefit of another bite at the cherry;

2. In the present case, the Commissioner has elected to prove its debt (including this GST amount) in the liquidation and that disqualifies it from the rule in *Re Condon*;[5] and

3. The mistake must be genuine and not reckless.[6] Here the Commissioner has been reckless in that the IRD did not take the required precautions before paying the refund.

[39] With regard to the first, I consider that the existence, or not, of a mandatory right to set-off is of no moment. In the present case it is clear from the affidavit of Mr Rameka that the Commissioner would have exercised his right under s 46(6), and indeed his IRD employee would have too, had he had knowledge of the large debt owed by the company at the time that the refund was issued on 3 December 2008. Further, there is nothing in the authorities to which I have been referred by counsel which suggest that this rule ought only to apply where there was a law prohibiting

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[5] *In re Cider (NZ) Ltd* [1936] NZLR 374 (SC).

[6] *Re Byers, ex parte Davies* [1965] NZLR 774 (SC).

the payer from so doing before first establishing its own entitlement to the money. To limit the rule in that way would remove it from its fundamental principle: that the Court may order its officers to act in an honourable and high-minded way.

[40] With regard to Strategic's second argument, before me Mr Robinson relied on the following passage from Smith J *In re Cider (NZ)* at 377:

> In the first place, Grainger's claim is really one for the withdrawal from the liquidation of assets to the value of Grainger's unpaid wages. But Grainger has proved in the liquidation for a dividend from the assets in the liquidation, and a claim based upon such a proof seems to me to be inconsistent with an application to withdraw assets from the liquidation. In my opinion, Grainger should be taken to have elected to rest upon his rights as a proving creditor, and that in itself is sufficient to prevent him from succeeding, at least in the present proceedings.

[41] In the present case I accept that the Commissioner has endeavoured to prove the entirety of its debt due from the company. However, the decision *In re Cider(NZ)* in my view is distinguishable from the present case. In *In re Cider* an application for directions was made by the Official Assignee as the liquidator of Cider (NZ) Ltd. Cider (NZ) Ltd employed Mr Grainger the creditor as a manager and leased premises from a Mr Rout. A receiver was appointed by debenture-holders of the company and entered into possession and carried on the business. Mr Grainger did not receive any wages, and Mr Rout received no rent, for the period during which the receiver was in possession. Mr Grainger petitioned for the winding-up of Cider (NZ) Ltd and a winding-up order was duly made by this Court. The receiver accordingly paid the debenture-holders and reported to the liquidator to whom the receiver sent the balance of cash held. Messrs Grainger and Rout both proved in the liquidation for their debt owed.

[42] Messrs Grainger and Rout claimed that they were entitled to preferential payment. As compared with the present case, however, and indeed that in *Official Assignee v Westpac Banking Corporation*, the real claim in *In re Cider (NZ)* was for payment from the dividend. In *In re Cider (NZ)* the receiver had a discretion to pay outgoings as it saw proper. The receiver declined to exercise his discretion in favour of either Mr Grainger or Mr Rout. There was no error on the part of the receiver. Therefore, Messrs Grainger and Rout could not point to a select fund that was paid to the liquidators in error which was otherwise earmarked for them. Rather, they sought to argue that *some* of the funds paid to the liquidators ought to have been

directed to them. Here, however, there is a particular and identifiable sum of money which has been transferred to the liquidators, clearly in error. In those circumstances, I am not satisfied that it is inconsistent with the Commissioner's proof of debt to seek a withdrawal of that pot of funds from the liquidation.

[43] With regard to the third argument by Strategic here, Mr Robinson submitted that Perry J in *Re Byers*, emphasised at 781 that the rule in *Re Condon* would only apply where there is:[7]

> a genuine unilateral mistake of fact made in circumstances where the normal precautions have been taken and there has been no reckless conduct which would disentitle the applicant from seeking to be relieved of the results of his own carelessness.

[44] Mr Robinson submitted that as the Commissioner did not take the required precautions before paying the refund here he should not be entitled to use the rule to defeat Strategic's secured interest in the company's assets. I agree that the rule should not be used to save a party from their own reckless conduct. However, I am satisfied that in the present case, as in *In re Thomas Horton*,[8] what has happened is a mere clerical error. In that case, a mortgagee exercised his power of sale in respect of a property owned by a bankrupt. The debt in respect of which the mortgagee sale was sought amounted to £6,700. In error the mortgagee's solicitor gave the security an estimated value of £7,800 (it should have been £6,800). The mortgagee bought in at the sale and tendered a draft conveyance to the Registrar at £6,800 (the debt plus £100 to cover expenses). The Registrar insisted upon the estimated value being inscribed in the conveyance as the price at which the land was bought. At that point the solicitor discovered that he had inadvertently added £1,100 instead of £100 to the declared debt. The Deputy Official Assignee insisted upon the higher price. Alpers J directed the Deputy Official Assignee not to take advantage of the mistake, that mistake being a mere clerical one.

[45] In my view, the circumstances in the present case surrounding the mistaken payment of the GST refund are materially the same as those in the *Official Assignee*

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[7] [1965] NZLR 774 (SC).

[8] [1925] NZLR 739 (SC).

v Westpac Banking Corporation case noted at [34] above. I am therefore satisfied that it would be unfair and unconscionable for the liquidators here to retain the GST refund funds, effectively received as a form of windfall. Regardless, therefore, of the legal characterisation of the funds, or the classification of those funds under Schedule 7 to the Companies Act 1993, I direct that the liquidators are to return the wrongly paid $169,349.36 funds received from the Commissioner by way of the company's GST refund.

[46] That disposes of the first issue to be determined in this case. It is therefore unnecessary for me to consider the Commissioner's further arguments on this aspect, these being to a claim to recover these mistakenly paid monies either as a proprietary claim under the law of restitution or on some other basis such as the company as payee being a mere constructive trustee of the monies clearly identified as paid under a mistake.

[47] I turn now to the second issue before the Court noted at [24] above.

Issue two: the decision in Northshore Taverns

A. <u>Background</u>

[48] Before embarking on an overview and discussion of this Court's decision in *Northshore Taverns* some context is necessary.

[49] As noted above, preferential creditors (like the Commissioner here), on liquidation of a company are entitled to be paid pursuant to s 312 and Schedule 7 to the Companies Act 1993 from the proceeds of "accounts receivable" in priority to certain creditors (like Strategic here) who hold security interests such as Strategic's GSA in those "accounts receivable".

[50] In defining "accounts receivable" in Schedule 7 to the Companies Act 1993 to have the same meaning as is ascribed to those words in the PPSA, it is important here as a starting point to consider the position under that Act.

[51] The PPSA was enacted to provide a broad-based approach to the recognition of a security interest. The PPSA thus removes the former distinction between a fixed and floating charge which was the basis on which the preferential creditor system

operated previously. The history of the preferential creditor system is relatively well traversed.[9] As to the reason why the assets to which preferential creditors gained priority were generally narrow, Lord Millett stated at [54] in *Buchler v Talbot*:

> It would clearly have been inappropriate to allow unsecured but preferential debts to be paid out of assets charged by way of fixed charge in priority to the claims of the holder of the charge. This would have been an unwarranted interference with the property rights of the charge holder. By making it very difficult for businesses to raise money on the security of their assets it would also have been contrary to the interests of both lenders and borrowers. But the development of the floating charge, which enabled a company to grant a charge over the whole or substantially the whole of its undertaking, and which was still of recent origin in 1883, changed the picture. The existence of a floating charge deprived the preferential creditors of much of the benefit which the 1883 and 1888 Acts were intended to give them. It enabled the charge holder to withdraw all or most of the assets of an insolvent company from the scope of the winding up and leave the liquidator with little more than an empty shell and nothing with which to pay preferential debts. Accordingly the Preferential Payments in Bankruptcy Amendment Act 1897 made the preferential debts payable if and so far as necessary out of the proceeds of a floating charge in priority to the debt secured by the charge.

[52] Prior to the enactment of the PPSA, cl 9 of Schedule 7 to the Companies Act 1993 provided:

> 9. The claims listed in each of clauses 2, 3, 4, and 5 of this Schedule—
>
> (a) Rank equally among themselves and must be paid in full, unless the assets are insufficient to meet them, in which case they abate in equal proportions; and
>
> (b) So far as the assets of the company available for payment of general creditors are insufficient to meet them, have priority over the claims of persons in respect of assets which are subject to a floating charge and must be paid accordingly out of those assets.
>
> For the purposes of this clause, the term floating charge includes a charge that conferred a floating security at the time of its creation but has since become a fixed or specific charge.

[53] Assets subject to a floating charge were typically book debts and stock in trade, but by no means were limited to those categories. No precise definition of the term "book debt" was attempted. However, it was generally said of a book debt:[10]

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[9] See *Buchler v Talbot* [2004] UKHL 9, [2004] 2 AC 298 and *Covacich v Riordan* [1994] 2 NZLR 502 (HC).

[10] *Independent Automatic Sales Ltd v Knowles and Foster* [1962] 3 All ER 27 (HL) at 34.

> if it can be said of a debt arising in the course of a business and due or growing due to the proprietor of that business that such a debt would or could in the ordinary course of such a business be entered in well-kept books relating to that business, that debt can properly be called a book debt whether it is in fact entered in the books of the business or not.

[54] A Personal Property Securities Act for New Zealand was first proposed in the late 1980s by way of extensive work undertaken by the New Zealand Law Commission (Personal Property Securities Act for New Zealand (NZLCR8, 1989)).

[55] The foundation of the proposed Act was article 9 of the Uniform Commercial Code which had been adopted in all 50 states of the United States of America. The real thrust for reform came from the fact that article 9 had been successfully implemented in many of Canada's states, in materially similar legislative regimes to our own. In its proposed Act, the Law Commission suggested the following definition of account receivable:

> (1) In this Act unless the context otherwise requires
>
> …
>
> "account receivable" means a monetary obligation not evidenced by chattel paper, or by a negotiable instrument or by a security, whether or not it has been earned by performance;

[56] In its commentary to the proposed Act, the Law Commission said at 79:

> Viewed most generally, the statute distinguishes three broad categories of property. Tangible property other than a written document will constitute inventory, equipment, crops or consumer goods. Property comprised of a written document will qualify as chattel paper, documents of title, securities, instruments or money. Property not embodied in a tangible item or document qualifies as accounts receivable or general intangible.

[57] The Law Commission went on to state at 80:

> Account receivable describes, for example, the right to payment which a supplier of goods or services 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". Accounts receivable are a type of "intangible", the term used by the statute to describe incorporeal personal property which is not represented by either a tangible item or document.

[58] As reported by the Commerce Select Committee, the Bill that it considered was based mainly on the Saskatchewan Personal Property Securities Act 1993.[11] On the Bill's second reading, however, the Member responsible for the Bill, the Hon Max Bradford, noted that the Bill arises out of the Law Commission's report.[12] The Member then went on to state, as relevant:[13]

> Some of the main features of the new regime are as follows. … Fourthly, the floating charge security device will become redundant under the Bill. The Bill will provide a functional equivalent to the old floating charge debenture security.

[59] The interpretation adopted for "accounts" in the Saskatchewan Personal Property Security Act 1993 is almost identical to that adopted by the New Zealand Law Commission. In the *Saskatchewan and Manitoba Personal Property Security Act Handbook* Ron Cumming, Carswell, Calgary (1995) the authors record at [2[1](b)]:

> An account is a sub-category of "intangible" as defined in the Act. The more traditional term "book debt" has been replaced by "account", since in many cases debts are no longer recorded in the books but rather on computer tapes and disks. The usage also conforms to the business term "accounts receivable" used by the business community when referring to monetary obligations arising out of the sale of goods or services. In order to fall within the definition, a right need not be a current debt; and in order to be assigned, an account need not be earned. An account cannot come into existence until there is a legal relationship (*e.g.*, a contract) under which the account can be earned by performance. For most purposes under the Act, the time when an account comes into existence is not important. However, it is significant for some purposes. See, *e.g.*, section 7(2).

[60] Back in New Zealand, the Commerce Committee addressing the order of distribution on insolvency to be retained, said, at (ix):

> We were advised that the current consequential amendment to the 7th Schedule of the Companies Act 1993 alters the order of distribution on insolvency. This was not intended. The 7th Schedule of the Companies Act 1993 deals with preferential claims in a company liquidation. Clause 9 of the 7th Schedule sets out the order of payment of preferential claims.
>
> We recommend that the consequential amendment to clause 9 of the 7th Schedule of the Companies Act 1993 and the consequential amendments to other Acts be changed to provide that the assets that will be subject to preferential claims are those which the

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[11] Personal Property Securities Bill 1998 (251-2) at ii.

[12] (8 December 1998) 574 NZPD 14423.

[13] (8 December 1998) 574 NZPD 14423.

parties intended could be sold or disposed of in the ordinary course of business. This amendment is to provide a formula for retaining the current order of distribution on insolvency without referring to the soon-to-be-obsolete terms of fixed and floating charges.

[61] It is important to place that statement of the Committee in context. The Bill, on its referral to the Committee, provided the following amendment to cl 9(b) of Schedule 7 to the Companies Act:

> (b) So far as the assets of the company available for payment of general creditors are insufficient to meet them, -
>
> (i) Have priority over the claims of any person who has a security interest in respect of the company's inventory, accounts receivable, 'equipment', and 'after-acquired property', other than a purchase money security interest in that property; and
>
> (ii) Must be paid accordingly out of those assets.
>
> For the purposes of this clause, the terms 'accounts receivable', 'after acquired property', 'equipment', inventory', 'purchase money security interest', and 'security interest' have the same meanings as in the Personal Property Securities Act 1998.

[62] The Committee recommended the following amendment: (additions in bold)

> (b) So far as the assets of the company available for payment of general creditors are insufficient to meet them, -
>
> (i) Have priority over the claims of any person who has a security interest**, other than a purchase money security interest, in the company's property that is not prohibited or restricted by the security agreement relating to the security interest from being sold or otherwise disposed of in the ordinary course of the company's business**; and
>
> (ii) Must be paid accordingly out of those assets.
>
> For the purposes of this clause, the terms 'purchase money security interest', **'security agreement'**, and 'security interest' have the same meanings as in the Personal Property Securities Act 1998.

[63] The Committee's report was tabled on 26 July 1999. Between 9 December 1998 and 26 July 1999, Fisher J released his first instance decision in the High Court in *In re Brumark Investments Ltd (in receivership)*.[14] At issue before Fisher J was the priority under s 30 of the Receiverships Act 1993 and whether there was a fixed or floating charge over an asset. In that case, Fisher J considered that:

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[14] (1999) 19 NZTC 15,159 (HC).

> The central feature of a floating charge is that pending crystallisation or contrary direction the chargor has a general licence to dispose of the charged property in the ordinary course of its business.

[64] It seems that this dicta led the Committee to revisit its proposed amendment of what assets a preferential creditor may be paid out from. The Bill in its final form was given Royal Assent on 14 October 1999. Coincidentally on that same day, the Court of Appeal overturned Fisher J's decision.[15] In doing so, the Court of Appeal stated at [29]:

> We consider that the general principle remains that if the true nature of the arrangement is that the chargor is free to deal with the charged book debts the charge cannot be a fixed charge. That does not involve (as Fisher J suggests) characterising the charge over the book debts by reference to what may be done with the proceeds. It involves determining whether or not the charged book debts are under the control of the chargee.

[65] Subsequently, the Court of Appeal's decision was upheld on the advice of the Privy Council.[16]

[66] Prior to the PPSA coming into force (which was to be 1 May 2002 as directed by Order in Council) Parliament passed the Personal Property Securities Amendment Act 2001. By s 13 of that Act, Parliament amended cl 9 to be in materially the same form in which cl 2 of Schedule 7 is now (i.e. that a preferential creditor has preference over accounts receivable and inventory).

[67] The amendment was introduced under Standing Order 302(1) to the Business Law Reform Bill before the select committee considering that Bill.[17] At 10, the Commerce Committee discussed its proposed amendment to cl 9: (references omitted)

> **Preferential creditor provisions**
>
> We recommend amendments with respect to the preferential creditor provisions to provide greater certainty and better protection for preferential creditors than currently provided in the legislation. Preferential creditors are creditors with a statutory priority ahead of floating charge creditors and unsecured creditors in a liquidation or

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[15] [2000] 1 NZLR 223 (CA).

[16] [2002] 1 NZLR 30.

[17] Business Law Reform Bill 2000 (319-2) at 8.

> receivership. Preferential creditors include the Inland Revenue Department for unpaid PAYE or GST, and employees for unpaid wages or holiday pay.
>
> One of the key features of the Act is that it treats all security interests equally by doing away with the distinction between fixed and floating charges. A consequence of this change is that it will no longer be possible to provide for preferential creditors to rank behind fixed charges and ahead of floating charges.
>
> The issue was addressed in the Act by defining a floating charge without using the term, and giving preferential creditors priority over security interests that fit that definition. The problem with that approach is that the definition was based on the High Court *Brumark* case under which a bank had been able to achieve a charge over book debts that ranked ahead of preferential creditors. The Court of Appeal has since reversed the High Court decision in Brumark making it harder for banks to gain priority over book debts ahead of preferential creditors.
>
> The concern is that the current formulation in the Act based on the High Court finding is too loose and is out of line with the later decision of the Court of Appeal. It will be easier for creditors to use the wording in schedule 1 of the Act to gain priority ahead of preferential creditors than it would be under the latest common law authority.
>
> The solution proposed by the [Ministry of Economic Development (the ministry)] looks to substance over form. Inventory and accounts receivable (each a defined term under the Act) are constantly changing assets that may be described as "classic floating charge assets". The policy before the Act was passed, and that is continuing while the Act is not yet in force, is that assets subject to a floating charge should be available to preferential creditors. The proposed amendments are intended to give preferential creditors priority over all security interests over inventory and accounts receivable.
>
> We invited submissions from three organisations on the proposed changes to the provisions to allow expert comment in order to tidy up the amendments proposed by the ministry. The Law Society and Institute of Chartered Accountants of New Zealand (ICANZ) each agreed with the proposal to give preferential creditors priority ahead of security interests over inventory and accounts receivable. The Law Society describes the proposal as the "best approximation of the status quo". The Financial Services Federation agrees that the Act as it currently stands could lead to "some secured creditors gaining priority over preferential creditors in circumstances where they would not have done so previously." [i.e. where the security agreement does prohibit or restrict sales or other dispositions in the ordinary course of business] The Law Society and ICANZ made various detailed drafting comments and we have incorporated most of these suggestions into the new part and schedule 1.
>
> We recommend the amendment of the formulation of the rule in the seventh schedule of the Companies Act 1993 to provide that preferential creditors have priority over security interests that are not purchase money security interests, and that are over inventory and accounts receivable. There are also similar amendments to the other legislation dealing with preferential creditors referred to in schedule 1. These amendments will avoid the uncertainties created by trying to precisely mirror the current law, and will remove the possibility for avoidance that the current formulation may allow.

[68] The Hon Paul Swain, the then Minister of Commerce commented on the Committee's consideration of the Business Law Reform Bill before it was split into

various bills including the Personal Property Securities Amendment Bill (No 2) by Supplementary Order Paper 115:[18]

> The bill, as reported back by the select committee, amends the preferential creditor regime. In an insolvency, it gives creditors such as employees, in relation to wages and holiday pay, and the Inland Revenue Department, in relation to PAYE and GST, priority over some secured creditors. We all know that. But the intention is to preserve the status quo after the Personal Property Securities Act comes into force.
>
> The changes are needed because the Personal Property Securities Act abolishes the distinction between fixed and floating charges that the preferential creditor regime was based on.
>
> The amendments in the bill did not recognise the special position of factors, and would have made them subject to preferential creditors. The Supplementary Order Paper gives factors priority over preferential creditors, and I have checked with the officials to make sure that that keeps factors in the position that they are in under the current law. I have also checked to make sure the Supplementary Order Paper [which was introduced to remedy a problem which was identified that the bill did not preserve the status quo for factors] does not put employees or other preferential creditors in any position that is different from where they are now. That is something, I think, inadvertently occurred as a result of the report back of the select committee. We have had advice from the factoring industry that there was a problem here.

[69] Supplementary Order Paper 129 was introduced by the Member. That Order Paper, agreed to on 4 April 2001 introduced sub-subparagraph (C) into, what is now, cl 2(1)(b)(i).

B. <u>The decision in *Northshore Taverns*</u>

[70] It was against that background that Associate Judge Hole, in this Court, considered the meaning of "account receivable" in *Northshore Taverns*.

[71] In *Northshore Taverns* the liquidators of a company that had previously run a tavern/bar discovered that a number of Northshore Tavern's over-the-counter Eftpos sales receipts (which amounted to $525,471.31) had been transferred from Northshore Tavern's Eftpos machine direct to the bank account of a third party, (TTTL). The third party, TTTL, had sold its business and its solicitors advised Northshore Taverns' liquidators that it held sale proceeds but only the sum of $179,004.09. The liquidators made a demand for that fund and the solicitors paid that amount to them.

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[18] (4 April 2001) 591 NZPD 8753 at 8756.

[72] Northshore Taverns had originally acquired finance from the National Bank. That indebtedness was refinanced though Westpac. The debt to Westpac was repaid through funds acquired from Sure Developments Limited (SDL). SDL did not appreciate that it might have obtained rights of subrogation to the securities previously held by Westpac. So, on the liquidation of Northshore Taverns, it filed with the liquidators a claim as an unsecured creditor.

[73] Subsequently, SDL claimed a right to be subrogated to Westpac's GSA. Accordingly, it was, if its claim was accepted by the Court, Northshore Taverns' only secured creditor. The Commissioner also filed a claim with the liquidator as preferential creditor.

[74] First, Associate Judge Hole was satisfied that SDL was entitled to be subrogated to the interest of Westpac under the GSA and notwithstanding that it had claimed as an unsecured creditor, leave was granted to prove as a secured creditor.

[75] Second, and as the main issue in the case, Associate Judge Hole turned to consider therefore, whether the $179,004.09 fund constituted an "account receivable" for the purposes of Schedule 7 to the Companies Act 1993.

[76] In doing so, the Associate Judge considered that the appropriate starting point was s 5 of the Interpretation Act 1999 and the requirement that the meaning of an enactment must be ascertained from its text and in light of its purpose. At [29] Associate Judge Hole noted:

> Not only is the Court required to consider the text of the enactment but also its purpose. It may also consider such matters as, in this case, the expression being defined, viz. "account receivable". When one looks at the two words "account receivable" the word "account" would seem to mean a trading account. In other words, a book debt.

[77] His Honour considered that "accounts receivable" was merely an updated term for "book debt". He went on to say that there is support for the narrow view, (i.e. that the expression "accounts receivable" here is limited to book debts), from the Law Commission's report *Personal Property Securities Act for New Zealand* at 80 (recorded above at [56] and [57]):

[78] His Honour then went on to discuss at [32]-[35]:

> The draft definition in the report for "account receivable" is contained in p 20 of the report and reads as follows:
>
> > A monetary obligation not evidenced by chattel paper, or by a negotiable instrument or by a security, whether or not it has been earned by performance.
>
> That wording is almost identical to the definition of "account receivable" in the Personal Property Securities Act. Plainly, the definition contained in the Act came from the report.
>
> The discussion in the report incorporates the philosophy expressed by the Canadian commentators: the expression "account receivable" updates the term "book debt"; but does not alter the essential nature of an account receivable.
>
> For these reasons, regardless of how the fund is categorised, I consider that the fund does not constitute an "account receivable". It is not a book debt or a trade credit account. No one suggested that it could be. It does constitute a secured interest in terms of the general security agreement. It is not available for the unsecured creditors.

C. Analysis of "accounts receivable"

[79] Turning now to an analysis of what is the proper meaning of the expression, "accounts receivable", I note that s 5 of the Interpretation Act 1999 provides in full:

> **5 Ascertaining meaning of legislation**
>
> (1) The meaning of an enactment must be ascertained from its text and in the light of its purpose.
>
> (2) The matters that may be considered in ascertaining the meaning of an enactment include the indications provided in the enactment.
>
> (3) Examples of those indications are preambles, the analysis, a table of contents, headings to Parts and sections, marginal notes, diagrams, graphics, examples and explanatory material, and the organisation and format of the enactment.

[80] In *Commerce Commission v Fonterra Co-operative Group Limited* the Court observed that s 5 makes text and purpose "the key drivers" of statutory interpretation.[19] There, Tipping J continued at [22]:

> 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 also be cross-checked against purpose in order to observe the dual

[19] [2007] NZSC 36, [2007] 3 NZLR 767 at [22].

> 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.

[81] Before me, Mr Robinson for Strategic submitted that the interpretation of the words "accounts receivable" as they are expressed in the Companies Act 1993, cannot be ascertained by reference to the purpose of the PPSA. In support he cited the decision of the English Court of Appeal in *Re Wood's Estate* (1886) LR 31 Ch D. 607 and that of the Privy Council in right of Australia in *Producers' Co-operative Distributing Society Limited v Commissioner of Taxation (NSW)*.[20] I accept that care must generally be taken in using the scheme of an enactment to interpret a provision in another. However, I repeat that s 5 requires that the meaning of an enactment must be ascertained from its text and in the light of its purpose. Here, the purpose of cl 2 is inextricably linked with the PPSA. The very scheme to the PPSA is fundamentally integral to the meaning of accounts receivable in cl 2. That is because the purpose of incorporating accounts receivable was in order to gain consistency between the two Acts as the concept of fixed and floating charges was to be abolished by the PPSA. To have the prospect of a different meaning for the term in two different enactments which are both concerned with the same issue would create an absurdity. Therefore, it is necessary to determine the purpose of the PPSA. It is in the light of that purpose and from the text that the meaning of accounts receivable is to be ascertained.

[82] A caution to that approach has been expressed by the Court of Appeal in *Northland Milk Vendors Association Inc v Northern Milk Ltd* in that it is proper for the Court to fill gaps left by Parliament but only if it is beyond any real doubt that it is necessary to give effect to Parliament's intention.[21] Fogarty J also noted in *Talley v Fowler*:[22]

> Section 5 of the Interpretation Act does not enable the Court to run roughshod over the text of a provision. The text still must be capable of bearing the meaning justified

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[20] (1947) 75 CLR 134 at 137.

[21] *Northland Milk Vendors Association Inc v Northern Milk Ltd* [1988] 1 NZLR 530 (CA) at 538.

[22] HC Wellington CIV-2005-485-117, 18 July 2005 at [51].

> by its purpose. In any event, running roughshod over the text has to raise a serious question as to whether or not the Court properly understands its purpose."

[83] Relevant to this case, however, is the principal that an implied limitation may be read into a broad provision where to read the term in its literal and broad sense would be at odds with the purpose of the Act. As Lord Diplock said in *Jones v Wrotham Park Settled Estates Ltd*, qualifications can be read into a statute to avoid unworkability or absurdity or the frustration of Parliament's purpose, but in doing so the following conditions must be met:[23]

> First, it [must be] possible to determine from a consideration of the provisions of the Act read as a whole what the mischief was that it was the purpose of the Act to remedy; secondly it [must] be apparent that the draftsmen and Parliament had by inadvertence overlooked, and so omitted to deal with, an eventuality that required to be dealt with if the purpose of the Act was to be achieved, and thirdly it [must be] possible to state with certainty what were the additional words that would have been inserted by the draftsmen and approved by Parliament had their attention been drawn to the omission before the Bill passed into law.

[84] If those conditions cannot be met, as Fogarty J further noted in *Talley* at [56]:

> Where upon close analysis a Court finds, as it has here, that there is no relevant purpose then it is necessary to fall back on the text of the provision. When falling back on the text of the provision, where it is capable of two or more constructions, or applications, it is important that the construction must not create a public mischief or an injustice.

[85] A plain reading and construction of the expression "accounts receivable" from its text, in my view must provide a broad definition, given the requirement in the PPSA that it is to be a <u>monetary obligation</u> that is not evidenced by chattel paper, an investment security, or by a negotiable instrument.

[86] In the face of that broad plain wording, and the natural and ordinary meaning of the wide expression "monetary obligation", Mr Robinson for Strategic responded by endeavouring to argue that the intention of Parliament to maintain the status quo here is clear (i.e. not to change the assets out of which a preferential creditor may be paid). I identify five factors which he raised which might tend here to support that conclusion. However, for the reasons I outline below, I find that none are determinative such that Parliament's intention to limit is clear, in the words of Lord Diplock, and I can state with certainty that the words "book debts" would have been

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[23] [1980] AC 74 at 105 (HL).

inserted into the definition of "accounts receivable" to limit the expression "a monetary obligation".

[87] First, Mr Robinson refers to the Commerce Committee's attempts to maintain the status quo with regard to the assets out of which a preferential creditor may be paid. In its first attempt, in 1998, the Commerce Committee endeavoured to codify the nature of a floating charge asset, as defined by Fisher J. That, I agree shows a concerted attempt by the Committee to maintain the status quo and not to alter the position of preferential creditor's vis-à-vis secured creditors. Of course, however, that approach was not enacted. The Commerce Committee made another attempt at drafting cl 2 in 2000. The second attempt used the terms "inventory" and "accounts receivable" as they are "classic floating charge assets". Thus, on one interpretation those concepts are limited to what is generally considered to be subject to a floating charge. However, I consider there is a reasonable argument that the Committee was alive to the broader effect of adopting "accounts receivable" as a term. The Committee records that the Law Society described the proposal as the "best approximation of the status quo", thus there is an explicit acknowledgment of the fact that the status quo could not be maintained expressly. Indeed, even if I am wrong about that, the Committee's redraft in 1998 was still not limited as narrowly as Mr Robinson for Strategic contends and Associate Judge Hole found. More types of intangible property would have been subject to the tests proposed by Fisher J, or indeed the Court of Appeal, than merely book debts. There certainly does not appear to be any argument that Parliament intended to limit the types of intangible property which the Commissioner as a preferential creditor could access.

[88] Secondly, the Hon Paul Swain emphasised in his speech before the Committee of the House when considering the Business Law Reform Bill that the intention of the PPSA was to preserve the status quo. However, I consider his statements to be limited to the context in which he was addressing the Committee: the Act's affect on "factors" (i.e. those who provide factoring services). That acknowledged affect led to the Member's tabling of Supplementary Order Paper 129. Therefore, I do not read that Member's comments as an express statement that "accounts receivable" are limited to, necessarily, what a preferential creditor had access to prior to enactment of the PPSA. Indeed, the status quo was not maintained

in other ways. For example, the definition of "accounts receivable" excludes chattel paper which, prior to the PPSA, was a security interest that was available to a preferential creditor. Further, the Hon Max Bradford, the Member responsible for the PPSA in 1998, noted that the Bill will provide a "functional equivalent" to the old concept of a floating charge. Thus the term "accounts receivable" was not to be an exact translation, for that would be impossible, but the next best alternative.

[89] Thirdly, in considering the specific words used, the learned Associate Judge found at [29], that the word "account" tends to suggest that the focus is on a trading account or book debt. With respect, I consider that focussing on the word "account" cannot assist the argument that a narrow interpretation is required here. First, the definition provided is "a monetary obligation". That is sufficiently broad to suggest that no such narrowing was intended. Secondly, in the Canadian enactments the word "account" is used, unaccompanied by "receivable". On this aspect, the authors of *The Ontario Personal Property Security Act: Commentary and Analysis* comment as follows:[24]

> The term "account" is new. The old Ontario Act used the expression "book debts" … but did not define it. "Book debts" was abandoned because the term is no longer appropriate in an age of computerized record keeping and also because there was no justification for restricting the secured party's rights in accounts to those debts that had been recorded in some particular manner.
>
> …the Ontario definition covers "*any* monetary obligation …" (emphasis added), whatever its source. It therefore appears to embrace every conceivable type of indebtedness, subject only to the limited exceptions in s. 4(g), (h) and (i) of the Act [equivalent to s 23(e)(x), (viii) and (iii) respectively of the New Zealand Act] and to the exclusion of documentary debts, *vis.* chattel paper, instruments and securities. The definition is wide enough to include an account with a bank or other depository institution …

[90] Of course, the Ontario Act provides that "account" refers to *any* monetary obligation, rather than simply *a* monetary obligation. Nevertheless, I accept the comments made by Professor Gedye in his article noted below that there has never been any suggestion in Canada that this difference (the majority of Canadian

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[24] Jacob S Ziegel and David L Denomme *The Ontario Personal Property Security Act: Commentary and Analysis* (2nd ed, Butterworths, Toronto, 2000) at [1.2] (footnotes omitted).

enactments have adopted the same approach as the New Zealand definition) has any significance.[25]

[91] Fourthly, the Associate Judge, at [34] considered that in Canada the expression "account" updates the term "book debt". Again, for the reasons discussed above, in my respectful view, the Associate Judge is in error. While it appears that the use of "account" was in part to modernise the concept of "book debt",[26] it has also broadened the scope of securities subject to the Act.

[92] Fifthly, the Law Commission's commentary, as recorded at [57] above, is noted. There, the Law Commission records that the term account receivable is "the equivalent of the New Zealand expression book debt". In response to Associate Judge Hole's use of the Law Commission's statement, Professor Gedye argues that the Commission was not intending to suggest that book debts and accounts receivable were synonymous.[27] Rather, Professor Gedye argues, the statement that the two concepts are equivalent was made in the context of the example that a book debt is one of a variety of possible types of accounts receivable. I need to say, however, that I do not find Professor Gedye's comment on that statement convincing. Nevertheless, and in any event, the Law Commission's proposed Act is clearly an adaptation of the Canadian experience. For the reasons expressed above, the Canadian experience is not one of limiting the interpretation of the expression "account". That comment of the Law Commission must be taken in context, that context being the interpretation of a scheme whereby the concept of book debt has been abandoned in favour of an altogether different concept, that of an account receivable.

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[25] Mike Gedye "What is an "Account Receivable"?" (2009) 15 NZBLQ 170 at 171.

[26] Although I note that the draft proposed by the Law Reform Commission of Saskatchewan proposed in 1977 had materially the same definition of "account" as it currently does and I do not imagine that electronic book keeping was much provided for in that draft.

[27] Mike Gedye "What is an "Account Receivable"?" (2009) 15 NZBLQ 170 at 174.

[93] In the alternative, Mr Robinson for Strategic urged me not to depart from the decision of this Court in *Northshore Taverns*. Mr Robinson referred me to the decision of Heron J in *Re Ramsay* to the effect that:[28]

> The doctrine of precedent in any case dictates that the Court should be reluctant to [depart from an earlier decision of the same Court].

[94] Mr Robinson urged that this point is particularly important in the context of an issue of statutory interpretation. In support of that argument, he referred me to the Court of Appeal decision in *Dahya v Dahya* at 155-156 where the Court stated:[29]

> Yet it could not be right for this Court to overrule a prior decision of its own, even when sitting on a later occasion with five Judges, merely on the ground that on a finely balanced point of statutory construction the later Bench preferred a different view. Some more cogent reason must be necessary to justify departure from such degree of certainty as the doctrine of stare decisis achieves. I do not think it would be wise to attempt in this case any exhaustive statement of the kind of reasons that may be sufficient, nor even any statement going beyond what is enough for deciding the present case. Obviously the length of time for which the earlier decision has stood (in this case six years, not a long period) is one relevant factor. Another must be the nature of the issue with which the decision is concerned.

[95] While that may be the case, it is also clear that a Court of co-ordinate jurisdiction cannot blindly follow a case where the subsequent judge is of the view that the original decision was wrong.[30] In the present case, with respect, I am of that view. In addition to the matters outlined above, for the following reasons I respectfully disagree with the conclusions reached by Associate Judge Hole in *Northshore Taverns* and I consider that the words "accounts receivable" ought to be interpreted broadly.

[96] First, the definition of "accounts receivable" is also relevant to other aspects within the PPSA. For example, accounts receivable can also constitute proceeds of collateral secured by a security interest. Although the PPSA automatically gives a secured creditor a security interest in the proceeds of the creditor's original

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[28] [1992] NZAR 351 (HC).

[29] [1991] 2 NZLR 150 (CA).

[30] See *Halsbury's Laws of England* (5th ed, 2009) vol 11 Civil Procedure at [98].

collateral,[31] the priority of the secured creditor's proceeds claim can depend upon whether or not the security interest in the proceeds is perfected. If "accounts receivable" is given a narrow meaning, these proceeds secured by a security interest will be unperfected in respect of financial obligations that are not "accounts receivable" and may lose priority. There is no discussion in the history of the Act that it intended to limit the scope of this part of the Act.

[97] Secondly, as defined "accounts receivable" is on its face a broad term. As noted by Cooke P in *McKenzie v Attorney-General* there is a "general principle of statutory interpretation that strict grammatical meaning must yield to sufficiently obvious purpose".[32] In the present case, I cannot reconcile the clear, broad wording of the definition in s 16 PPSA with the arguments that it should be narrowed. I am not satisfied that Parliament can be said to have overlooked narrowly defining "accounts receivable" such that it can be said that the term should be construed narrowly. Further, I take the view that what Parliament attempted to do here was to replicate the Canadian model as being the next best alternative to the status quo. That is evident from the exclusions under s 23(e)(vii) of the PPSA. As noted by William Young J in *Waller v New Zealand Bloodstock Ltd* "the only point in exempting an interest from the operation of the Act is if that interest would otherwise be subject to the Act".[33] By sub-paragraphs (iii) (vii) and (ix) of s 23(e) the PPSA does not apply to a transfer of an unearned right to payment under a contract to a person who is to perform the transferor's obligations under the contract, a transfer of a right to damages in tort or an assignment of a single account receivable or negotiable instrument in (partial) satisfaction of a pre-existing indebtedness respectively. If account receivable was limited to the concept of book debt those limitations would not be required. And those limitations appear also, generally, in the Canadian Acts. There, the term "account" has been interpreted broadly, as discussed above at [89]. If the New Zealand approach was intended to

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[31] Personal Property Securities Act 1998, s 45(1)(b).

[32] [1992] 2 NZLR 14 at 17.

[33] [2006] 3 NZLR 629 at [126].

adopt a more limited definition of "accounts receivable" either such limits to the scope of the PPSA would be unnecessary or many more would be required in order to make the intent of Parliament clear.

[98] That reasoning must also follow with regard to the phrase "whether or not that obligation has been earned by performance" in the definition of "accounts receivable". As submitted by Mr Whittington for the Commissioner, the phrase is explicable only as illustrating that monetary obligations which arise in circumstances other than by performance of a corresponding obligation are within the definition of "accounts receivable". I agree.

[99] Thirdly, overwhelming New Zealand academic opinion appears to be in favour of a broad interpretation of the expression "accounts receivable".[34]

[100] Fourthly, again as submitted by Mr Whittington, the history of the legislation, as outlined above, suggests that Parliament has rejected, on more than one occasion, an "ordinary course" test and rather preferred the present test based on the type of collateral. That much is also clear from the repetition of the PPSA preferring substance over form. If the concept of "accounts receivable" was limited to book debts, that would require maintaining a consideration of the "ordinary course of business" test, rather than the question of the substance as to whether it is a monetary obligation. Indeed, by limiting consideration to "book debts" would also further limit the "ordinary course" test because, of course, "book debts" were not the only

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[34] Mike Gedye "What is an "Account Receivable"?" (2009) 15 NZBLQ 170; Peter Eady and Adam Jackson *PPSA – a review four years on* (paper presented to the New Zealand Law Society, October 2006) at 7; Linda Widdup and Laurie Mayne *Personal Property Securities Act: A Conceptual Approach* (revised ed, LexisNexis, Wellington, 2002) at xvii; but see the authors' comment at [30.23] and in (Butterworths, Wellington, 2000) at [30.36]; Michael Whale "Corporate Insolvency Update, Personal Property Securities Act Issues" (Auckland District Law Society, 24 February 2011) at 33; Thomas Gault (ed) *Gault on Commercial Law* (online looseleaf ed, Brookers) at [8A.2.08(1)(a)]; Barry Allan *Personal Property Securities Act 1999: Act & Analysis* (Brookers, Wellington, 2010) at [2.9.1(1)]; Roger Tennant Fenton *Garrow and Fenton's Law of Personal Property in New Zealand Volume 2: Personal Property Securities* (7th ed, LexisNexis, Wellington, 2010) at [5.2.8]; Peter Blanchard and Michael Gedye *Private Receivers of Companies in New Zealand* (LexisNexis, Wellington, 2008) at [7.06].

property which could be subject to a floating charge. Further, as Professor Gedye notes, there was considerable ambiguity surrounding "book debts".[35] Some cases provide a wide interpretation,[36] and others a narrow.[37]

[101] I am satisfied, therefore that the expression "accounts receivable" is not limited to book debts. A book debt will be a subset of account receivable, in so far as it is a monetary obligation. However, I am satisfied that a book debt is not synonymous with an account receivable. The only limits on "monetary obligation" are the exclusions contained in the definition and those contained in s 23 of the PPSA. I add an additional caveat to that definition. I note that s 23 provides that the PPSA does not apply to an interest created or provided for any of the transactions identified in paragraph (e). Mr Whittington for the Commissioner submits that s 23 does not necessarily limit the scope of account receivable per se. I accept that Schedule 7 to the Companies Act 1993 only looks to the *definition* of accounts receivable in the PPSA, and not the operation of accounts receivable under the PPSA. However, in light of my discussion above at [81], I consider that if I was to ignore the operation of s 23 under the definition of accounts receivable, that would create a nonsense between the Companies Act 1993 on the one hand and the PPSA on the other. The purpose of the Companies Act 1993 referring to the definition of accounts receivable under the PPSA is to have continuity between the two schemes. Inconsistency between the two Acts, in my view, would be undesirable.

D. The present funds

[102] In light of the above definition of accounts receivable I now turn to consider whether the collected funds at issue in the present case might in fact constitute "monetary obligations that are not evidenced by chattel paper, an investment security, or by a negotiable instrument."

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[35] Mike Gedye "What is an "Account Receivable"?" (2009) 15 NZBLQ 170 at 176.

[36] *Motor Credits v Wollaston* (1929) 29 SR (NSW) 227.

[37] *Robertson v Grigg* (1932) 47 CLR 257.

[103] First, I turn to consider the development contribution funds and interest ($451,176.94). As noted above, these funds represented amounts reimbursed to developers following a review of the Council's earlier policy requiring these contributions, subsequent to a decision of this Court.[38] The Council's review determined that developers should be partially refunded under the Council's 2004 and 2006 policies plus interest at a rate of 8.4 per cent per annum compounding from the date that the contribution was paid.

[104] The contributions the company had paid on its developments in the past were reassessed when the 2009 development contribution policy came into effect on 1 July 2009. The sum of $356,536.36 plus interest of $92,343.08 was refunded to the liquidators on 7 August 2009. A further $2,297.50 was received on 29 January 2009. I note that in his first affidavit, Mr Burns the first named applicant liquidator deposed that the $2,297.50 was received as a refund for overpayment of rates. However, Mr Burns later clarified in a second affidavit that, following further enquiries with the Council, the $2,297.50 was received as a further refund of development contributions.

[105] Due to the Court's decision in *Neil Construction*, as I see it, the company was entitled to restitution, as the Council was unjustly enriched due to its earlier demands for excessive contributions. The company therefore was to receive back funds which it was always entitled to. It was not reimbursed for loss, for that is the object of damages. Mr Robinson for Strategic, however, submitted that restitutionary-based obligations are not monetary obligations. Against that, Mr Whittington for the Commissioner argued that they are still a monetary obligation. A claim for money based in restitution is a personal claim and not proprietary.[39] Therefore, the right is a chose in action. While I consider that this action is different in kind from an action

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[38] *Neil Construction Limited v North Shore City Council* [2008] NZRMA 275 (HC).

[39] *Martin v Pont* [1993] 3 NZLR 25 (CA) at 30.

for damages in tort,[40] (in that case while the wrong was perpetuated in the past, the monetary obligation arises to compensate for the future) both are fundamentally a chose in action for a monetary obligation. Indeed, to find otherwise, in my view, would unfairly prejudice a preferential creditor, because the funds out of which the Council was enriched (i.e. a bank account[41]) would have been assets from which a preferential creditor would otherwise be paid.

[106] In the alternative, Mr Robinson for Strategic argued that these funds arise in connection with the company's interest in land.[42] However, arising out of *Neil Construction*, the company obtained a personal right to claim for return of its monies, for it was the company that was unjustly dispossessed of its funds. That right is not a claim in rem arising out of the land itself. I am satisfied that s 23(e)(iii) PPSA cannot exclude personal rights arising out of a connection with land in circumstances such as the present.[43] For example, but for s 23(e)(viii), I do not read s 23(e)(iii) as excluding a right for damages for, say, the tort of trespass, from the scope of the PPSA. The purpose of s 23(e)(iii) is to avoid a double up of registration regimes. Real property has its registration regime under the Land Transfer Act 1952 and the Property Law Act 2006. Hence rights arising out of real property are excluded.

[107] Mr Robinson's second alternative argument here is that the funds are not subject to Schedule 7 to the Companies Act 1993 as, in his submission, any priority derived under cl 2 is confined to the accounts receivable existing when the

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[40] See Linda Widdup and Laurie Mayne *Personal Property Securities Act: A Conceptual Approach* (revised ed, LexisNexis, Wellington, 2002) at [4.4] for a discussion of why damages for actions in tort are excluded by s 23(e)(vii).

[41] See my discussion at [113] below.

[42] Personal Property Securities Act 1999, s 23(e)(iii).

[43] See Michael Gedye, Ronald C C Cumming and Roderick J Wood *Personal Property Securities in New Zealand* (Brookers, Wellington, 2002) at [23.6] and Linda Widdup and Laurie Mayne *Personal Property Securities Act: A Conceptual Approach* (revised ed, LexisNexis, Wellington, 2002) at [4.16]-[4.21].

liquidation commenced. Mr Robinson relies on the statement of the authors of *Private Receivers of Companies in New Zealand*.[44] The authors of *Personal Property Securities in New Zealand* discuss at [7.06]:[45]

> the question whether or not an asset of the company is classed as an account receivable in respect of which preferential claims have a priority is to be determined as at the date of commencement of the receivership. Many, if not most, sales by a receiver will produce accounts receivable. For example, if a receiver sells a machine owned by the company and allows the purchaser to pay for it on a deferred basis, with title passing to the purchaser in the meantime, the debt owing by the purchaser is certainly an account receivable. But it cannot be the case that such a debt arising during the receivership is subject to preferential claims when the asset from which it sprang was not [i.e. not inventory]. The priority is confined to the accounts receivable existing when the receivership commenced. Conversely, if the same sale had occurred prior to the receivership, for example, during a pre-receivership work-out, and the debt of the purchaser was unpaid at the date of the receivership, it would be an account receivable which was subject to preferential claims.

[108] While I accept that this statement is not directly on point as it is, strictly, discussing the point at which an item may be considered an account receivable for preferential creditor purposes rather than the point at which an asset is to be considered an account receivable, I consider the statement is equally applicable to the latter. In other words, the point in time at which property must be classified is the time that a company is placed into liquidation or receivership. An asset will only, therefore, be subject to the preferential creditor regime if it was an account receivable, i.e. a monetary obligation owed to the company, at the time of the liquidation. In the present case the company was placed into liquidation on 21 November 2008. The time at which the company's right to repayment arose was, at the latest, 21 March 2007, the date on which Potter J released her judgment in *Neil Construction* (I express no view as to whether the interest may have arisen at the date of payment or the point at which *Neil Construction* was decided as either date was prior to the appointment of the liquidators). Therefore, the obligation to repay arose prior to the liquidation and so was an account receivable at the time of liquidation.

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[44] Peter Blanchard and Michael Gedye *Private Receivers of Companies in New Zealand* (LexisNexis, Wellington, 2008) at [7.06].

[45] References omitted.

[109] I now turn to consider the bond funds ($3,000). On this Mr Whittington submitted that the bonds were treated in the company's balance sheet as an asset. At [53] above, I noted that the historical test as to whether something was a book debt generally referred to whether that property would or could be entered in well-kept books. Here, that is certainly the case. As it is clear from the history of the PPSA that a book debt is a subset of an account receivable, I am satisfied that the bond funds here are a monetary obligation for the purposes of Schedule 7 to the Companies Act 1993.

[110] Finally, I turn to consider the various funds held by Carter Atmore. Mr Whittington submitted that the funds held by Carter Atmore are no different in concept to funds held in a bank account or deposit account which fall within the definition of accounts receivable.[46]

[111] In response, Mr Robinson for Strategic, argued that whether the various funds are accounts receivable depended, however, on their individual categorisation. He separated the funds into the deposits received, the body corporate levy funds, the rental payments, the investor forum funds, the Kleehammer funds and "miscellaneous funds" which included legal fees and a refund from the Council for overpayment of general rates and water charges.

[112] As I noted above at [108], I have accepted Mr Robinson's submission that categorisation of property as an account receivable must occur here at the time of the liquidation. Obviously, the same considerations must follow for the funds held by Carter Atmore. Whatever those funds were previously, at the time liquidation commenced, they were clearly funds held by the company's solicitors. That

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[46] Which are likely to be seen as an accounts receivable: Peter Blanchard and Michael Gedye *Private Receivers of Companies in New Zealand* (LexisNexis, Wellington, 2008) at [7.06]; Linda Widdup and Laurie Mayne *Personal Property Securities Act: A Conceptual Approach* (revised ed, LexisNexis, Wellington, 2002) at xvii and [5.29]; Michael Gedye, Ronald C C Cumming and Roderick J Wood *Personal Property Securities in New Zealand* (Brookers, Wellington, 2002) at [16.1.28] and [17.8].

conclusion finds further support, in my view, in the statement by the authors of Private Receivers of Companies in New Zealand:[47]

> The position in relation to rental falling due to the company on assets which it leases to others would appear to be the same. Rent already due at the commencement of the receivership is an existing account receivable from which preferential claims are payable. But a debt for rent falling due during the receivership, that is, not yet due for payment at the date of the receivership, derives from the turning to account of an asset not susceptible to such a claim, which cannot be made in respect of it any more than it could be made against the proceeds of the sale of the asset by the receiver.

[113] I am of the view that a debt held for a client by one's solicitor in a trust bank account is an account receivable. It is, at its most fundamental, an obligation that the solicitor will pay the client company on demand. Accordingly, I am satisfied that these funds are a monetary obligation which constitutes an account receivable here.

Conclusion

[114] It follows therefore that, in my view, each category of the collected funds held by the liquidator at issue in the present application constitutes a "monetary obligation" in terms of s 16 PPSA or its proceeds and is thereby an "account receivable" in terms of Schedule 7 Companies Act 1993 and the Commissioner's claim here to those collected funds has priority pursuant to the statutory preference regime.

[115] Directions are therefore made pursuant to s 284 (1)(a) Companies Act 1993 as follows:

(a) The applicant liquidators are to pay to the Commissioner the entire collected funds as a preferential creditor of the company entitled to those funds in priority to Strategic as secured creditor.

(b) In so far as it may be required the applicant liquidators are, in any event, to return to the Commissioner the $169,349.36 GST refund monies paid wrongly to the liquidators as outlined at para [45] above.

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[47] References omitted.

[116] There are two further matters at issue in the present case. The first is the liquidator's application for an order that their reasonable costs and disbursements be met in connection with gathering and preserving the collected funds, obtaining directions and/or distributing the monies in priority to any other payments. That application is not opposed by the Commissioner. Strategic's position as I understand it is that, while it agrees in principle with the application, details of those fees and expenses should be adduced by the liquidators and any submissions by the respondents considered before payment is approved by the Court. Strategic also does not agree that all of the liquidators' general costs in conducting the liquidation of the company should be met from the funds.

[117] I note that at paragraphs 84 and 85 of his first affidavit, the liquidator Mr Burns deposes:

> The liquidators have incurred, and continue to incur, costs in association with running the liquidation, preserving the Company's assets (including for present purposes the Collected Funds) and considering the issues associated with the treatment of the Collected Funds.
>
> In the circumstances, the liquidators respectfully request that their reasonable costs in conducting the liquidation of the Company (including the costs of and associated with this application) be met from the Collected Funds before any other form of distribution is made.

[118] Under cl 1 of Schedule 7 to the Companies Act, a liquidator is first required to pay:

> (a) the fees and expenses properly incurred by the liquidator in carrying out the duties and exercising the powers of the liquidator, and the remuneration of the liquidator; and

[119] I am not certain what claims Strategic contemplates that the liquidators may claim for. I am satisfied that the order, as requested by the liquidators in their application for directions, ought to be granted and, accordingly, the liquidators reasonable costs and disbursements be met in connection with gathering and preserving the funds, obtaining directions and/or distributing the monies in priority to any other payments. I also note that given the outcome of this application and the reality that the assets available will be insufficient to pay the Commissioner's entire claim, Strategic will, in effect, not be affected by any claim that the liquidators have to costs paid out of the company's assets. The Commissioner has not provided any submissions as to the liquidator's costs. I therefore provide the parties with leave to

apply to this Court should there be any disagreement as to what the liquidators' claim as reasonable costs here.

[120] The final matter is the question of costs between the respondents. The Commissioner seeks Strategic to pay its costs for this appearance. I accept that the Commissioner has been successful here. However, I am also satisfied that this proceeding concerned a matter of some interest to the commercial community and the wider public and Strategic acted reasonably in pursuing its opposition to the Commissioner's claim. Indeed, Strategic had a decision of this Court on its side. In that event I consider that costs of the respondents should lie where they fall.

[121] Finally and, in addition, an order is now made that (if not met under Schedule 7 Companies Act 1993) the applicant liquidators' reasonable costs and disbursements in connection with the present application, and in connection with gathering and preserving the collected funds, obtaining these directions and/or distributing the monies, are to be paid from the collected funds in priority to any other payments.

'Associate Judge D.I. Gendall'