

**BETWEEN**

**MICHAEL PETER STIASSNY**

**GRANT ROBERT GRAHAM**

First Appellants

**FORESTRY CORPORATION OF  
NEW ZEALAND LIMITED  
(IN RECEIVERSHIP)**

Second Appellant

**CITIC NEW ZEALAND LIMITED  
(IN RECEIVERSHIP)**

Third Appellant

**CNI FOREST NOMINEES LIMITED**

Fourth Appellant

**BANK OF NEW ZEALAND LIMITED**

Fifth Appellant

**AND**

**COMMISSIONER OF INLAND REVENUE**

Respondent

Hearing: 27 September 2012

Court: McGrath J  
William Young J  
Chambers J  
Gault J  
Blanchard J

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

---

**CIVIL APPEAL**

---

**MR SIMPSON:**

May it please Your Honour, we've agreed I'll introduce all of the appellants' counsel since there's a number of us. So, my name is Simpson and I appear with Mr Simcock, Mr Wilson and Professor Watts for the fourth appellant.

5 Mr Crotty appears for the first to third appellants, and –

**McGRATH J:**

Just before you go through, I'd just like to be quite sure which is Mr Crotty.

10 **MR SIMPSON:**

So, Mr Crotty.

**McGRATH J:**

Thank you.

15

**MR SIMPSON:**

And Mr McKay and Mr Burt for the BNZ, the fifth appellant.

**McGRATH J:**

20 All right, thank you, gentlemen.

**MR GODDARD QC:**

May it please the Court, I appear with my learned friend, Mr Ebersohn, for the respondent.

25

**McGRATH J:**

Thank you very much. Now, Mr Simpson, you're kicking off, are you?

**MR SIMPSON:**

30 Yes. Although there are many of us, in fact only two of us will be addressing you other than answering any questions that Your Honours may have.

**McGRATH J:**

Can I just raise a couple of preliminary matters myself, Mr Simpson? First, counsel I hope are aware that we have to conclude the hearing by 3 o'clock tomorrow.

5

**MR SIMPSON:**

Yes.

**McGRATH J:**

10 Secondly, the Court would be assisted if the appellants, despite the order in which the submissions came in, were to address both statutory issues and recovery issues before we hear from the respondents. Is that what you had in mind?

15 **MR SIMPSON:**

Yes, we're happy to do that, Sir.

**McGRATH J:**

20 Right, and while on this aspect it's for you, we usually find it helpful to hear fairly early on about the statute, but if you've – if that's not the way you want to do it, because I suspect the second counsel will be dealing with the statutes, that's all right, but that's just the way we usually encourage counsel to address us.

25 **MR SIMPSON:**

Yes, Sir. I will be dealing with the PPSA and restitutionary issues and I deal with the PPSA fairly early and will take you to the statute. My friend, Mr Simcock, will deal with the question of whether the receivers are personally liable for the GST.

30

**McGRATH J:**

I'm sorry, that's what I really was focusing on with the statute, yes.

**MR SIMPSON:**

Yes, and –

**McGRATH J:**

5 How do you envisage to handle the order of that?

**MR SIMPSON:**

We thought we would deal with that last, if that's...

10 **McGRATH J:**

If that's the way you want to do it, we certainly don't want to interfere, but we'll see how we get on. We may start coming to asking you some questions about the GST Act –

15 **MR SIMPSON:**

Thank you.

**McGRATH J:**

– despite what you've just said.

20

**MR SIMPSON:**

So as Your Honours will be aware, this case concerns a claim for recovery of a GST payment of 127 and a half million dollars by all of the appellants. That payment was made, we say, by the first appellants, the receivers, to the  
25 Commissioner on the mistaken assumption that they were personally liable for the GST, and I make two observations there. First, the payment was made to discharge the receivers' obligation for GST, not the obligation of the CNIFP, that's the partnership, and, second, the receivers had no authority, certainly from the fourth appellant, the second chargeholder, CNI Nominees, to do  
30 otherwise. So I will take you to the relevant security shortly. But they provide for the proceeds of sale of the security to be applied first to the discharge of receivers' liabilities and expenses, so to the extent the receivers have a liability for GST they have first dibs on the money, but there is no provision in the debenture, the security trustee or an intercreditor agreement for any of

those funds to be applied either by the receivers or the partnership in satisfaction of a partnership unsecured liability.

Now both the High Court and the Court of Appeal have accepted that the receivers were not liable for GST. It follows that the appellants have a prima facie case that the payment was made under a mistake. Nevertheless, the Court of Appeal reversed the judgment of the High Court and held that the claim could not succeed and should be struck out and this finding was made notwithstanding these facts. The receivers paid the GST on the mistaken assumption they were personally liable and they had no option. They were facing the risk of substantial penalties and use of money interest. They could not seek a binding ruling from the Commissioner and any ruling from the Commissioner would, in any event, not bind the secured creditors. They could not obtain a judgment from the Court by way of declaratory judgment that would determine the issue before the payment was due. So they had no choice but to pay the GST and then seek to recover it.

Furthermore, the fourth appellant, CNI Nominees, as second chargeholder, gave prior notice to the Commissioner, the receivers and the BNZ as first chargeholder, that they formally protested the payment of the GST and in their letter of protest specifically advised the Commissioner that the monies that were to be used to pay the GST was subject to their second charge, and subsequently a similar letter was issued by the BNZ as first chargeholder, and, thirdly, the receivers within the statutory time limit prescribed in the Tax Administration Act filed a notice of proposed adjustment, NOPA-ing their own return and in that NOPA specifically addressed the issue of their personal liability for GST and protested that liability.

Now in its judgment the Court of Appeal held that the receivers of the second appellants, these are the partners of the partnership, that's FCNZ and CITIC but not the Central North Island Forest Partnership, could not maintain their action because they had suffered no loss; FCNZ and CITIC could not maintain their action because the Commission gave them good consideration for the GST payment, that is satisfaction of their liability for GST; and that the

secured creditors could not maintain their action because they had not acted under a mistake nor made any payment; and that none of the appellants could succeed because their claim was barred by section 95 of the PPSA; and the Commissioner had received the payment in good faith without knowledge of any mistake despite the prior receipt of written protest letters from the two chargeholders, and as a consequence the Court struck the claim out.

Now we say that's a surprising outcome for these reasons. No ground is given for striking out the first cause of action, which is simply a tax challenge proceeding challenging the receivers' liability for GST.

**WILLIAM YOUNG J:**

But it was that they found that the payment was made by the partnership, and if the partnership made the payment and filed the return then the challenge is hopeless because the partnership owed the money.

**MR SIMPSON:**

Well –

**WILLIAM YOUNG J:**

I mean, doesn't this turn on who paid the money, or who made the return?

**MR SIMPSON:**

If – there's a short answer. If the receivers paid the money, there's a short answer, but if the partnership paid the money, that is not the end of the matter.

**CHAMBERS J:**

But the partners did pay it, didn't they? The partnership did pay the money if one looks at the cheque. I know it says, "The partnership name bracket receivers' account close bracket" which rather indicates perhaps that even the receivers at that stage effectively thought the partnership was in receivership, but it was the partnership that got the proceeds of sale, and it was the partnership that then accounted to the Commissioner.

**MR SIMPSON:**

Yes, and this is the obstacle that we have not overcome throughout the earlier hearings. We say that's not the case. Now we do not have evidence before the Court about who opened and owned that bank account. We do not know,  
5 for example, whether that's a partnership bank account into which partnership monies were paid or whether it was a receivers' bank account, that is, receivers of the two partners who opened a bank account in which to hold partnership monies, but –

10 **WILLIAM YOUNG J:**

Sorry, but just – I mean there are two questions here. One is who paid the money –

**MR SIMPSON:**

15 Yes.

**WILLIAM YOUNG J:**

– which Justice Chambers has raised with you. But the other one is you say the Court of Appeal didn't give a reason for striking out the challenge  
20 proceedings. What I'm suggesting to you is that if the partnership paid the money and filed the return, which is what the Court of Appeal found, then that's an end of the challenge proceedings, because the partnership does owe the money.

25 **MR SIMPSON:**

The partnership does owe the money, but the tax challenge proceeding does not contest that and doesn't take issue with the partnership owing the money.

**WILLIAM YOUNG J:**

30 Yes, but if the partnership paid the money, to put it simply, and filed the return then the return is unchallengeable because it's correct. Do you agree with that or not?

**MR SIMPSON:**

No.

**WILLIAM YOUNG J:**

5 Well, why don't you agree with it?

**MR SIMPSON:**

Because the return was filed by the receivers –

10 **WILLIAM YOUNG J:**

No, but that's – you're ducking the question. Let's assume that the return is filed by the partnership –

**MR SIMPSON:**

15 Yes.

**WILLIAM YOUNG J:**

– the money's paid by the partnership, and it's judged as a partnership liability, which is what the Court of Appeal's found.

20

**MR SIMPSON:**

Yes.

**WILLIAM YOUNG J:**

25 It seemed a story on the challenge.

**MR SIMPSON:**

It is.

30 **WILLIAM YOUNG J:**

Yes. So, to say the Court of Appeal didn't give a reason for dismissing the challenge proceedings as wrong, they did find the money was paid by the partnership, the return was made by the partnership, end of story.



**MR SIMPSON:**

Yes, but how can they do that on the basis of a pleading?

**CHAMBERS J:**

5 Because the document we have shows that the goods and services tax return was returned by the partnership registration number as given.

**MR SIMPSON:**

10 No, but the practice in receivership is that receivers always use the GST number of the entity, they never have their own GST number.

**CHAMBERS J:**

Of course they – I agree.

15 **MR SIMPSON:**

So that proves nothing.

**WILLIAM YOUNG J:**

20 Well, it's not conclusive in itself. But, I mean, there are the two questions, and you keep on going back to the, to who paid the money, but providing we can be satisfied that the money was paid by the partnership and the GST return was on behaviour of the partnership, that is end of story, isn't it?

**MR SIMPSON:**

25 It is. And I say that you simply cannot do that, when we look at the return and the cheque, because using the partnership's GST number is in accordance with established receivership practice, and I think there's...

**WILLIAM YOUNG J:**

30 There's a tax information bulletin, is there that you refer to.

**MR SIMPSON:**

There is, yes. So that sees nothing, and Mr Simcock can address that issue. And when you look at the cheque it is ambiguous as to whether, is this a

partnership account or is it a receiver's account in which to hold partnership money? And when you then look at the other additional matters that we point to, why would the BNZ authorise the payment of an unsecured partnership debt? When you look at the deed of application of proceeds, it's clear the focus is on extinguishing the liability of the receivers, more importantly, most of this money would have gone to CNI Nominees, a second chargeholder. It gave no consent for anyone to spend its money, other than in accordance with a waterfall tier and the security documents, and that give no one permission to pay an unsecured debt of the partnership's.

10

**McGRATH J:**

Coming back to the account, are you saying that evidence is required to clarify the nature of the account –

15 **MR SIMPSON:**

Yes.

**McGRATH J:**

– and of the proceeds within the account –

20

**MR SIMPSON:**

And over the last –

**McGRATH J:**

25 – or is that not something we can determine as a matter of law on the material before us?

**MR SIMPSON:**

30 Yes, yes, I do. And I have, over the last few days, Your Honour, attempted to try and get further information about that account. And if Your Honour will accept this much from the bar – I'm not intending to give evidence, but just by way of background – we know this much, that the, when the assets were sold – and we'll see this when we look at the sale agreement – they were, the purchase price was split into two components. The lion's share of it,

excluding GST, was paid in US dollars into a US account opened by the receivers specifically for that purpose, and the money went from the purchaser into the US account and then to the BNZ. The GST component came in New Zealand dollars into another account specifically opened by the receivers, it went on deposit for a month over the Christmas break, it then came into a different account, an 00 account, again opened by the receivers, and from there eventually paid to the Commissioner. Now, what we do not know is whether those accounts were partnership accounts or receivers accounts, and I have not been able to establish that over the last few days. But I do say this, that you cannot simply look at that cheque, as the High Court and the Court of Appeal has done, and simply say, "Because it has the words, 'Central North Island Forest Partnership' on it, it must have been a partnership account, and one –

15 **CHAMBERS J:**

Well, how could it have not gone to a partnership account? Because it was the partnership entitled to the money.

**MR SIMPSON:**

20 No. This situation would never happen normally, and for this reason. It was always known to the secured creditors that the proceeds of sale was less than the secured debt, and there is no way a chargeholder would discharge their security other than on a settlement basis, where the money either is paid to them directly or paid to someone to look after it on their behalf, and in this case it was the receivers.

**WILLIAM YOUNG J:**

But if they were exercising the power of sale, then they're liable. If the chargeholders exercise the power of sale direct, they're liable.

**MR SIMPSON:**

30 I agree. But this isn't a – but even if it's a mortgagor sale, which it is here, a mortgagee's still not going to release their security without payment.

**WILLIAM YOUNG J:**

But, well, yes, but they have to, because under sections 5, 2 and 17, a mortgagee selling is liable for GST.

5 **MR SIMPSON:**

A mortgagor sale.

**WILLIAM YOUNG J:**

Yes, I know, but, sorry, but I meant, but if it's a mortgagee, the –

10

**MR SIMPSON:**

Oh...

**WILLIAM YOUNG J:**

15 But why would a mortgagor sell if it's going to be left with a GST liability it can't address? I mean, the receivers, if they were unhappy about it, could have said, "Well, you guys exercise the power of sale yourselves."

**MR SIMPSON:**

20 Well, that begs the question – if the partnership is in receivership, we've always conceded it's end of case. If the partnership is not in receivership – and there are a number of strong indications that that is the case, and for the purpose of this application the Commissioner's been prepared to accept that that's the case – then the, I mean, the partnership's insolvent, so it doesn't  
25 really matter that there's going to be a GST liability incurred that won't be satisfied. The partnership has no future, so that is just a consequence of being insolvent. Somebody's not going to be paid; in this case the parties say that an unsecured Commissioner should not be paid rather than a secured creditor with first-ranking priority and fixed charges registered against the  
30 assets.

**WILLIAM YOUNG J:**

But the more you say, "The secured creditors were controlling the process –

**MR SIMPSON:**

No, sorry, not controlling the process –

**WILLIAM YOUNG J:**

5 Yes, no, controlling what happens to the money. The more you say they control the money, the more it look, more, the partnership becomes a cipher –

**MR SIMPSON:**

Well –

10

**WILLIAM YOUNG J:**

– and the less, you know, the more you engage with other arguments that are, as to, bear on the liability of the receivers to pay.

15 **MR SIMPSON:**

Well, we know this much: the receivers of the partners appointed themselves to the Board of the partnership and thereby took control, and then engaged in a sale process. Clearly, because they were pointed to the BNZ, it's clear they were reporting to the BNZ in the way that receivers ordinarily do. And we see  
20 from the deed of application of the sale proceeds that when it, that before the settlement occurred there was an agreement between the BNZ and the receivers about GST and how it might be paid. But most of this money would go to the second security holder, and they had no involvement whatsoever. In fact, I was acting for them at the time and all they were told is, "The assets  
25 have been sold, there's no money for you, and we need the release of your debentures and mortgages," and those releases were provided. So, CNI Nominees as second chargeholder had no say or control whatsoever in the sale process. But BNZ's role was no more than any secured creditor would do when appointing a receiver: you let the receiver do their job and,  
30 when it comes time to release your securities, you impose conditions to ensure that the money flows back to you and it isn't leaked out to pay an unsecured creditor. And the only reason the BNZ allowed the GST to be paid in this case is because both the BNZ and receivers believed the receivers were personally liable and –

**WILLIAM YOUNG J:**

But that's not what the deed says. The deed says both provides for payments, irrespective of whether the receivers were liable.

5 **MR SIMPSON:**

No, it's – what it says is – I'll just get that...

**WILLIAM YOUNG J:**

10 Doesn't it say, "Pay the GST either, on the basis either that it's a receiver's liability, a vendor's liability or otherwise"?

**MR SIMPSON:**

Yes, but the issue there was that the receivers, while they believed on advice that they were liable, did not know how that liability would necessarily arise. It could be a partnership liability, for which the receivers were also liable, or it could be a receiver's liability. And again, when we come to talk about the GST component, we'll hear that in our view of the Act it switches off the liability of the taxpayer and turns on the liability of the receiver so that only one is ever liable in the circumstances. So when they came to this problem, the receivers could not get unequivocal advice, "Will this be a direct liability to us or will it be a liability coming to us via the partnership, so we're going to do whatever is required to remove our exposure, whether it's directly our liability or via the partnership." So that's all that's about. There was no incentive for anyone to pay an unsecured Commissioner liability for GST and no one was authorised to do it, and I think the Court needs to approach it with that in mind. We're talking about a huge amount of money with secured creditors looking at a major loss, and if it is a mortgagor sale then they were entitled, in their view, to sweep up all of funds, so the only time you would allow an unsecured tax liability to be paid ahead of you if you thought you had to, and the only time that would occur was if you thought the receivers were liable.

15  
20  
25  
30

**BLANCHARD J:**

Mr Simpson, can I just be clear on what you're saying is arguably the position in relation to this bank account from which the GST payment was made.

You're saying it was a receiver's account and that the receivers were the receivers of the two partners.

**MR SIMPSON:**

5 I'm certainly saying the latter. I can't yet say the former. We haven't got all the documents. So I cannot yet say it was definitely an account owned by the partnership but I do say this: the Court is not yet in a position to say it was a partnership account. We don't know. What we do know is the account was opened by the receivers but we do not know whether it was opened as a  
10 partnership account or a receiver's account. But I take it Your Honour's question is, "Well, how could it be a receiver's account if the partnership's not in receivership?" Is that the question?

**CHAMBERS J:**

15 And in any event, mustn't it – even if it were the receiver's account, the money could have got there. It would still – the money was actually owed to the partnership, wasn't it?

**MR SIMPSON:**

20 Vis-à-vis the partnership and the purchaser, yes, but not as between the partnership and the secured creditors.

**McGRATH J:**

And that's another head of argument.

25

**MR SIMPSON:**

That's another head of argument and with in my submission very strong authority that when you sell an asset the equity of redemption's gone. If there's a surplus above the amount owing to the secured creditor then there's  
30 an equity to hold that surplus on trust for the debtor, but in our case we don't have that either, so in my submission if the money had gone into a partnership bank account, the partnership would have bare legal title to that money and hold it as trustee for the secured creditors. If it went straight into the receiver's

account then the receivers have legal title and the partnership has nothing, and that's how –

**BLANCHARD J:**

5 I'm not sure I agree with the former. In fact, Professor Gedye and I have said something different to that in our text, a passage of the text which nobody seems to have picked up dealing with voidable preferences, and in that we were critical of the Australian case law and critical of *Cripps v Lakeview Farm Fresh Ltd (in rec)* [2006] 1 NZLR 238.

10

**MR SIMPSON:**

Well... I haven't, you're right, Your Honour, I haven't seen that passage, but it –

15 **BLANCHARD J:**

Well, to help you, it's paragraph 11.18. To be fair to you, you probably didn't pick it up because it's dealing with –

**MR SIMPSON:**

20 Voidable preferences.

**BLANCHARD J:**

– voidable preferences.

25 **MR SIMPSON:**

And I can see in a voidable preference context as I think it was Justice Kirby did in *Sheahan v Carrier Air Conditioning Pty Ltd* [1997] HCA 37; (1997) 189 CLR 407.

30 **BLANCHARD J:**

Yes. We say he got it right.



**MR SIMPSON:**

Yep. I would suggest, Your Honour, the situation is different when you're looking at a voidable preference situation from where you're looking at competition between a secured creditor and a debtor. So one must ask, as the House of Lords did in *Buchler v Talbot* [2004] AC 298, when assets are sold I think it's clear that the equity of redemption in the asset has gone, and then you've got to ask, "Well, who has first claim on the proceeds," and it must be the fixed chargeholder. So if he takes his first charge out and there's nothing left then what can be left for the debtor? It can only be an equity in the surplus, if there is one, and if there is no surplus then what is left? And those are authorities that I would like to take Your Honours to in due course.

**McGRATH J:**

Well, perhaps I think if we can pick it up and look at it further then if necessary.

**MR SIMPSON:**

Now there was a loose end which is where I thought Your Honour, Justice Blanchard, was going to which is well, if the partnership's not in receivership how can the partner – how can the receivers of the partners open a bank account in their own name and put the partnership money in it, and the answer is that the assets of the partners and the partnership were secured and the debentures and the intercreditor agreement and the security trust deeds all establish this waterfall regime as to where – how the proceeds of sale of these charged assets are to be applied, and number one is receiver's liabilities and expenses.

**BLANCHARD J:**

But the money was never being paid qua partners, was it? It was either being paid to the partnership or, on your argument, to the receivers in relation to their personal liability.

**MR SIMPSON:**

Yes, their personal liability as receivers of the partners. So they have a – as receivers of the partners, they have a right of indemnity from all of the charged assets including the assets of a partnership to which they had not been appointed because they're still caught by the securities. So you don't need to be a receiver appointed to an asset to have a right of indemnity against that asset. That right of indemnity arises by virtue of the securities over the asset, not by virtue of the appointment of the receiver over that asset. So as long as you have a receiver appointed over any of the three debtors – I'll use that in a loose term; obviously the partnership isn't an entity as such – but as long as a receiver is appointed to any entity or over any asset, it has a right of indemnity for all its liabilities against all of the secured assets.

**BLANCHARD J:**

But the purchaser can't have believed that it was making a payment to the partners. It would either, surely, have thought that it was making a payment to the partnership or, on your argument, to the receivers because they were going to be personally liable and so they would make the payment to the Commissioner. I don't see the middle position is arguable.

20

**MR SIMPSON:**

And I'm not arguing it, Sir, sorry. I may have – I have not made myself clear.

**BLANCHARD J:**

Well, if that's the case, it was either a partnership account or an account of the receivers personally, and it doesn't look like the latter. It looks strongly like the former.

**MR SIMPSON:**

Well, if you believe you're personally liable for the GST, you've gone to the first chargeholder and got their permission to take a portion of the proceeds and to apply it to your personal liability for GST, one of the things you might do is open a bank account in your name or in the partnership's name to hold the proceeds of sale as receivers, not of the partnership, but as the receivers

who are facing that personal liability and who are making a payment to the revenue, you might open an account to hold that partnership money, but you're the one making a payment. You're paying your own GST liability and seeking indemnity from the partnership assets. So you might open an  
5 account that says "CNIFP Receivers Account" so it's – you're holding that as receivers, because you've got no other capacity. That's the only capacity in which you're indemnified under the security documents. You might then put partnership money in it because it's the only money available to meet that liability. So my submission remains that –

10

**BLANCHARD J:**

How is this ever going to get explained? You're suggesting there are documents but this all looks a bit ex post facto to me.

15 

**MR SIMPSON:**

Well, there'll be documents establishing the opening of that account, so the receivers will need to –

**BLANCHARD J:**

20 

Well, why aren't they available?

**MR SIMPSON:**

Well, the issue about who made the payment and from which bank account has become more important as time has gone on, and perhaps in my naïveté,  
25 Sir, I thought it was sufficient that we plead that the receivers made the payment, because that is their view. But the Courts have rejected the pleading by simply looking at the cheque, and we're scrambling to pull documents that relate back to two thousand and –

30 

**BLANCHARD J:**

Well, the cheque does rather seem to speak for itself.

**MR SIMPSON:**

Well, but see you've got to ask then, "What does the word 'receiver's account' mean, if the partnership's not in receivership? And even if the partnership –

5 **CHAMBERS J:**

It strongly suggests, I may say, that everybody thought that the partnership was incapacitated for the purposes of section 58.

**MR SIMPSON:**

10 Well, there are documents going both ways, there are – certainly even this morning I received copies of letters to the BNZ from the receiver saying, "We've been appointed as receivers of CITIC and FCNZ and we need to open accounts in the name of those, and also we need to take control of the partnership bank account," but they make it clear in those letters that they  
15 control the partnership by virtue of appointing themselves to the Board, not by virtue of them being appointed as receivers of the partnership. The notices of appointment of the receivers only ever talk about appointment of receivers to the two partner companies, not to the partnership.

20 **McGRATH J:**

I think Justice Chambers is putting "incapacitated" to you in the residual sense of the section.

**MR SIMPSON:**

25 Yes, "capacited" we say means, it's referring to individuals, so it's mental incapacitation. But again, Mr Simcock can address that issue.

**CHAMBERS J:**

I think, in retrospect, it would have been more helpful if we had done what  
30 Justice McGrath said, and absolutely got on top of the GST Act before. We've sort of come in two-thirds of the way along the track, to some extent. But still...

**MR SIMPSON:**

Well, let's pause there and...

**McGRATH J:**

5 It's over to you, Mr Simpson.

**MR SIMPSON:**

Well...

10 **McGRATH J:**

I've made it clear that we want to hear the argument the way you want to present it.

**MR SIMPSON:**

15 Yes.

**McGRATH J:**

If you're looking over, I sense, at Mr Simcock, if you want to reflect on – do you want to reflect on that, you're very, and to have a bit of time now, that's  
20 fine, but in the end it's, we want you to present the argument as you think you best can.

**MR SIMPSON:**

I really would prefer to proceed as we have. I mean, when we sought leave,  
25 the GST liability of the receivers was not an issue and leave was not granted to argue that issue, even though the Commissioner sought leave to cross-appeal on it. So we have come here primarily concerned with the issues we've been debating, so –

30 **McGRATH J:**

Look, I don't really actually want to go into the history of how it is you came to present the submissions in the order you've done. That's done, we've got everything on the table now, I hope, including a matter we've, two matters we've mentioned ourselves. If I hear you saying you want to proceed as

you've originally planned to do, that's fine, and I don't think we should or will be questioning that

**MR SIMPSON:**

5 Okay.

**McGRATH J:**

– and disrupting you from your train of thought.

10 **WILLIAM YOUNG J:**

The leave judgment makes it perfectly clear the Commissioner's entitled to argue that the receivers were personally liable.

**MR SIMPSON:**

15 Yes, but it's not the key issue that we're here for. The key issue we're here for is what we lost, the grounds we lost on in the Court of Appeal.

**BLANCHARD J:**

20 It may not be what you're here for, but you're facing an argument from the Commissioner that the Court of Appeal could have decided –

**McGRATH J:**

You have to uphold the judgment on two points in that.

25 **BLANCHARD J:**

– it the same way.

**MR SIMPSON:**

We do, we do.

30

**McGRATH J:**

Now just – would you like some time to think about this? I mean, I don't – you're welcome to have that. Otherwise my inclination is we get on with it.

**MR SIMPSON:**

Well, my preference is to carry on, but I am sensing that I'm facing some resistance, and I'd be naïve just to box on in those circumstances.

5 **McGRATH J:**

Would you like to have a word with your team about this? In which case –

**MR SIMPSON:**

Well, if I just have just a minute?

10

**McGRATH J:**

– we're happy to withdraw for five minutes or...

**MR SIMPSON:**

15 That would be great, thank you.

**McGRATH J:**

Right, well, that's what we'll do.

20 **COURT ADJOURNS: 10:34 AM**

**COURT RESUMES: 10.42 AM**

**MR SIMPSON:**

25 Yes, well, we will deal with the GST Act now and then come back to the PPSA and the restitutionary issues later. There's just one point I did want to emphasise and that is this is a strike-out application and ordinarily a respondent wouldn't expect to be required to put a lot of evidence in to back up a pleading. It is something that is for trial and we say the absence of  
30 evidence about the bank accounts is really something that's not for today. But anyway, I'll...

**McGRATH J:**

Yes, thank you.

**MR SIMCOCK:**

Thank you, Sir. My submission is that the respondent's case is essentially one that requires words to be omitted from the specific words of the Act or other words to be read in, and that is not something that should be allowed to happen where we're talking about the personal liability of individual people. The Act works, in my submission, perfectly coherently, and we'll go through that. As it is, it is extending substantially its meaning to achieve the Commissioner's purpose and by doing so creates the possibility of there being two taxpayers liable for GST in the same situation, not just subsidiarily liable but two registered persons, a central theme of the Act.

I would also say as an opening remark that there is no inherent priority for either the Commissioner or secured creditors in respect of GST. We'll come to cases, one of which Justice Blanchard has ruled in, where that point is made. There is no natural priority for the Commissioner, nor is there any natural priority for the secured creditors. It's a question of what happened in the particular transaction and how does the Act apply to that. That's what the Privy Council and the Court of Appeal has said.

I will cover this in more detail later, but the Law Commission has also made an examination of whether there is a natural priority for GST and decided that there is not one and it should not favour the Commissioner automatically. So I don't want any sense in this instance that there should be some natural payment to the Commissioner when GST has been collected by the vendor or parties on behalf of the vendor if secured creditors have, according to the legislation, a priority, and there are instances when priorities are quite clearly spelt out in the legislation.

The Act works fundamentally on the basis of who are registered persons and who conduct taxable activity. Unfortunately, in terms of the way the GST Act has been presented to you, it's in two volumes. Part of it is in the Commissioner's bundle of authorities and part of it's in my volume 5, which I think I have to...



Well, I can turn first to my appellant's bundle, volume 5, tab 45, section 8, which is the imposition of tax.

**WILLIAM YOUNG J:**

5 Sorry, your bundle 45 – your tab 45.

**McGRATH J:**

It's called the appellant's supplementary bundle, I think. Is that the one?

10 **MR SIMCOCK:**

Appellant's bundle of authorities, volume 5, it's called. It's perhaps the smallest of all of them.

**McGRATH J:**

15 Right, thank you.

**MR SIMCOCK:**

Tab 45, the second page. The pages aren't numbered but it's printing number 56 on the bottom of it. Section 8 is the central provision of this Act imposing the liability, and you'll see in subsection 1, towards the bottom of it, that tax is charged on the supply of goods or services by a registered person in the course or furtherance of a taxable activity. So you've got two central planks there, registered persons and those who are carrying on taxable activities, and there are deeming provisions I don't need to take you to who's registered. If somebody is carrying on a taxable activity, they're deemed to be registered, but the Act imposes liability on registered persons. Section 51, which I don't need to take you to, which – says who is to be registered, and that's in the Commissioner's volume 1, tab 1, if you do want to see it, at page 184. I'll read it. It just says, "Subject to this Act, every person who carries on any taxable activity and is not registered becomes liable to be registered." So there's another provision that deems them to be registered.

20  
25  
30

The point I want to move onto though is that there's then part 9 of the Act which deals with a series of special cases. Again, just because of the way I

think the Commissioner saw what was relevant to him, only part of that part 9 has been put in his bundle and two of the earlier sections, 55 and 56, are in mine, page 204, it begins.

5 I'm not going to go through these in detail at the moment but suffice to note that these are dealing with what happens in special cases as to who the registered persons are. If you've got a group of companies, you are permitted to nominate a member of that group to be the registered persons and the others are not entitled to be registered. If you have branches of a group, then  
10 a branch can simply be registered as well as the group being registered. Fifty seven we're going to be very familiar with, and 58 –

**CHAMBERS J:**

Just as a matter of interest, under section 55 or section 56, groups of  
15 companies and branches, is there every the possibility of more than one entity being liable, as there is in the partnership situation, section 57?

**MR SIMCOCK:**

I think without turning off the liability of the other members of the group that  
20 would have arisen, but they have specifically turned it off, I don't think there's a subsidiary liability as there is with partners. I'll check that actually, because if the registered person doesn't pay, it may well be that other members of the group are residually liable, that's what happens for –

25 **CHAMBERS J:**

Yes, that's what I was interested in, as to –

**MR SIMCOCK:**

That's what happens for income tax.

30

**CHAMBERS J:**

– whether there was some equivalent.

**MR SIMCOCK:**

(7) or (7)(b), a proviso. Yes, my friend has pointed out, on page 207, the proviso to subsection (7), it says it provides all member of the group shall remain liable jointly and severally. But in terms of –

5

**CHAMBERS J:**

So there is another exception to your fundamental principle, that there –

**MR SIMCOCK:**

10 I don't see it as an exception.

**CHAMBERS J:**

– can only ever be one person liable for the GST.

15 **MR SIMCOCK:**

Only ever – one person who has a prime liability. I acknowledge that there are subsidiary liabilities, but you first have to have a prime liability, and that attaches to registered persons. Yes, in the case of partners, they have a liability if they're partners in a registered person. But the "registered person" definition and concept is what drives this legislation.

20

**McGRATH J:**

Is your concept of primary and subsidiary liability really saying anything more than that certain persons are liable for tax payable by another person?

25

**MR SIMCOCK:**

But you have to have the other person first, and that's the registered person.

**McGRATH J:**

30 Yes, it's just that the words "primary" and "secondary" – but is it saying anything more than that, that it is another person's liability?

**MR SIMCOCK:**

No, no, I'm not. But you have to have a registered person first.

**MCGRATH J:**

Yes, I mean, I'm not wanting to draw any more of this, other than just to get out of my mind the particular – or make sure I've got the idea correct in my mind.

5

**MR SIMCOCK:**

And what –

**CHAMBERS J:**

10 Although there would be absolutely nothing to stop what you're referring to as the "secondary person" just simply choosing to pay the particular GST liability.

**MR SIMCOCK:**

15 It will only have arisen if there was a registered person who had that liability in the first place.

**CHAMBERS J:**

Correct, but any of them could pay.

**MR SIMCOCK:**

20 In the case of unincorporated bodies, the members of that body are not registered and cannot be registered if the unincorporated body is registered, so they could not file the return. They could physically pay, but they can't file a return, they're not registered.

25

**WILLIAM YOUNG J:**

The return here would only be filed by the partnership, because it's only the partnership that's registered, so it must be a partnership return.

**MR SIMCOCK:**

30 It's – as my friend noted and as one of Your Honours noted, there is a practice dictated by the Commissioner that when an unincorporated body goes into receivership, the receiver continues to use that body's registration number. But the return becomes the receiver's return, in my submission.

**WILLIAM YOUNG J:**

Well, have we got a copy of the tax information bulletin?

**MR SIMCOCK:**

5 I was looking for that earlier, and I don't think we do.

**WILLIAM YOUNG J:**

All right. But just leave that aside for the moment. The person who's  
10 secondarily liable doesn't have to file a return, presumably, the person just  
who's secondarily liable, just pays.

**MR SIMCOCK:**

No, they may be required to file a return under section 57(5), mightn't they?  
They would presumably return it using the number of the partnership –  
15

**WILLIAM YOUNG J:**

Sorry, 57(5)?

**MR SIMCOCK:**

20 They are required to do everything required to be done by the body under the  
Act. So if the partnership failed –

**WILLIAM YOUNG J:**

Yes, no, but the members aren't receivers. I mean, this is – what I'm saying  
25 here is that it's this highly different issue, isn't it? The receivers had – the  
partnership had an obligation to file a return.

**MR SIMCOCK:**

Yes.  
30

**WILLIAM YOUNG J:**

There was nothing in the receivership of the partners which cut across that, it  
was a statutory obligation enforceable by presumably a minor criminal offence  
that the return had to be filed?

**MR SIMCOCK:**

Yes.

**WILLIAM YOUNG J:**

5 And that return had to be filed by the partnership?

**MR SIMCOCK:**

No, that's where I –

10 **WILLIAM YOUNG J:**

Yes, but the partnership did have an obligation to file a return.

**MR SIMCOCK:**

Not if the receivers believed that they had –

15

**WILLIAM YOUNG J:**

No, but it's got nothing to do with what the receivers believed –

**MR SIMCOCK:**

20 Yes, it does, because the turning on and off point that I'm about to come to and Mr Simpson alerted to is that if the receivers had become the specified agents of the partnership –

**WILLIAM YOUNG J:**

25 Oh, yes, but leave that aside for a moment, just –

**MR SIMCOCK:**

I know, that's the central point. It turns off the liability of the partnership, and the partnership doesn't have a liability to file a return, the receivers do.

30

**WILLIAM YOUNG J:**

But it's only if the partnership was incapacitated.

**MR SIMCOCK:**

No. Well, in a more general sense, if it's in receivership first.

**WILLIAM YOUNG J:**

5 Okay, but say it's not incapacitated, because you don't want it to be incapacitated?

**MR SIMCOCK:**

No.

10

**WILLIAM YOUNG J:**

Okay. So let's just work on your assumption, it's not incapacitated.

**MR SIMCOCK:**

15 It's not incapacitated, yes, it has to file a return.

**WILLIAM YOUNG J:**

It has to file a return.

20 **MR SIMCOCK:**

Yes.

**WILLIAM YOUNG J:**

It's only – that an obligation of partnership –

25

**MR SIMCOCK:**

Yes.

**WILLIAM YOUNG J:**

30 – it's an obligation the receivers really have to pursue on its behalf, because it doesn't cut across any obligation they have to secured creditors.

**MR SIMCOCK:**

But if they believe –

**WILLIAM YOUNG J:**

No, I'm not interested in what they believe.

**MR SIMCOCK:**

5 – erroneously –

**WILLIAM YOUNG J:**

But I'm not interested in what they believe, I'm interest in the externalities and the requirement.

10

**MR SIMCOCK:**

Yes.

**WILLIAM YOUNG J:**

15 So it follows, doesn't it, that the return must be a partnership return?

**MR SIMCOCK:**

It follows that the partnership, without any further thoughts on the receiver's part, will be liable to file a return.

20

**WILLIAM YOUNG J:**

Yes, and as they did.

**MR SIMCOCK:**

25 We say the receivers did, because –

**WILLIAM YOUNG J:**

Well –

30 **MR SIMCOCK:**

– they believed they had to.



**WILLIAM YOUNG J:**

Well, yes, but that's sort of in, at the sort of, the turgid internal thought processes that are on one side of the debate. But just look at what happened. Not incapacitated, you say, obligation, which is I think enforceable by it – so  
5 it's a minor criminal offence not to file a return, isn't it?

**McGRATH J:**

Yes.

10 **WILLIAM YOUNG J:**

So the partnership, if not incapacitated, had to file a return, and it did.

**MR SIMCOCK:**

Yes.

15

**WILLIAM YOUNG J:**

And so –

**MR SIMCOCK:**

20 No, I'm not agreeing that it did, because you haven't – the other externality is that the receivers –

**CHAMBERS J:**

So the partnership committed an offence then, did it?

25

**MR SIMCOCK:**

Not if the receivers believed, erroneously –

**CHAMBERS J:**

30 But how can their belief change what the legal obligation was of the partnership? That's the point Justice Young's putting to you. Their internal thought processes can't alter what legally the partnership was required to do.

**MR SIMCOCK:**

All right, I will accept that the partnership had a liability to file the return, but I will not accept that it did file the return. It may or may not have, that's the central debate in this issue.

5

**WILLIAM YOUNG J:**

But the only reason for saying that it didn't is because, on your analysis, the receivers thought that the partnership was incapacitated and they had a personal liability.

10

**MR SIMCOCK:**

Yes.

**WILLIAM YOUNG J:**

15 But if they were right then of course you lose the case for other reasons.

**MR SIMCOCK:**

Yes. But that mistaken belief is this central issue.

20 **WILLIAM YOUNG J:**

But if they were wrong, if they had known the true position as you say it is, exactly the same thing would have happened as did happen, that is, the return would have been filed on behalf of the partnership.

25 **MR SIMCOCK:**

If they – no –

**WILLIAM YOUNG J:**

Say they had taken your advice, Mr Simcock, before this unhappy event took  
30 place –

**MR SIMCOCK:**

Well, can I just –

**WILLIAM YOUNG J:**

– you would have said, “No, the company’s not, the partnership’s not incapacitated, but it must file a return because that’s its obligation,” presumably –

5

**MR SIMCOCK:**

Yes, yes.

**WILLIAM YOUNG J:**

10 – that would be the advice you say should have been given, and the –

**McGRATH J:**

Do you mind giving an audible answer –

15 **MR SIMCOCK:**

Yes, yes.

**McGRATH J:**

– because we get a transcript after this, and I certainly want to make that  
20 you’ve got a full opportunity to answer everything, but we do need an answer.

**WILLIAM YOUNG J:**

So, if correctly advised, the receivers would have, at least as far as the return is concerned, done exactly what they did in fact do?

25

**MR SIMCOCK:**

If they had been correctly advised, they would have filed a return on behalf of the partnership. But –

30 **WILLIAM YOUNG J:**

Which would have probably looked exactly like the return that was filed. The externality’s got to be the same.

**MR SIMCOCK:**

It may have –

**McGRATH J:**

5 Just let Mr Simcock finish.

**MR SIMCOCK:**

It may have.

10 **McGRATH J:**

But, you're saying, you had a qualification to that?

**MR SIMCOCK:**

15 Yes. The fact that it looks the same doesn't mean that it is the same, in fact it  
doesn't, that does not mean that the partnership filed that return. If the  
receivers believed they had a liability, then under section 58 they have to file a  
return. It would look the same, because of this practice of the receivers  
adopting the same GST number as the partnership, or as the incapacitated  
20 person in the general sense, it would look the same, but it would be their  
return. So, in my submission, you cannot look at the return and simply say,  
"That must be a partnership return."

**CHAMBERS J:**

So did the receipt –

25

**BLANCHARD J:**

Have we got the return?

**MR SIMCOCK:**

30 Yes.

**CHAMBERS J:**

We have got the return.

**MCGRATH J:**

Yes, we have.

**CHAMBERS J:**

5 It's in volume 2, tab 11. So do the receivers not assert, Mr Simcock, that they did breach the Act by failing in their capacity as the managers of the partnership to file a return?

**MR SIMCOCK:**

10 I don't know, but they would concede that.

**CHAMBERS J:**

I think I've forgotten who exactly is acting for the receivers – Mr Crotty is.

15 **MR SIMCOCK:**

Mr Crotty, yes. We're acting for the second debenture holder and have had, prior to the same and at all times subsequently, the view that the partnership was not in receivership, there were therefore no obligation, personal obligation on the receivers to have paid, and that they should not have paid and we  
20 have the right to recover that money.

**WILLIAM YOUNG J:**

The return's at page 142 of volume 2.

**MCGRATH J:**

25 Tab 12.

**WILLIAM YOUNG J:**

Well, what's the tax information bulletin actually saying? It says they have to use the same GST number?  
30

**MR SIMCOCK:**

Yes, you are directed to use the same GST number as the...

**WILLIAM YOUNG J:**

But you don't have to say you're the partnership though, do you?

**MR SIMCOCK:**

5 You have to notify the Commissioner if you have become a specified agent.

**WILLIAM YOUNG J:**

Yes.

10 **MR SIMCOCK:**

The notifications in this case were that they had become receivers of the two partner companies, there was no notification in respect of the partnership, because –

15 **WILLIAM YOUNG J:**

Can we, will you – can we have a look after the morning adjournment at the TIB and its...

**MR SIMCOCK:**

20 Yes, Sir. If we can turn to sections 57 and 58, which are in volume 1 of the Commissioner's bundle, respondent's bundle, volume 1, tab 1, page 199? This is another in the series of special cases. The draftspeople for this piece of legislation had to decide what to do with unincorporated bodies and, as I have said in my written submissions, it is not automatic as to how to treat  
25 partnerships, there's been a great deal of debate worldwide, the fact that there is a natural common law situation of partners being the ones who are actually carrying on the business of a partnership and the partnership is a fiction, a legal, it's not a legal entity, I mean, "fiction" is too strong a word, doesn't mean that tax legislation will automatically follow that common law position, and I  
30 have – I don't propose to take you through it – but in my written submissions referred to extensive debate that occurred for about 15 years in New Zealand as to how to treat partnerships for income tax purposes, and they came to a conclusion quite the opposite of what the draftspeople and the GST Act did. Here it was to say that, and contrary to common law, and it may well be

because it's convenient to go to one unincorporated body instead of all the members of it directly, but they have said that that body will be treated as an entity and that the members will not be able to be registered. So if we look at 57(2), and I'm sure you're familiar with this by now, "Where an unincorporated  
5 body that carries on any taxable activity," there's already an assumption there that that's a possibility – my friend, I think, would say, "Well, that, you can't have that, because unincorporated bodies don't. The members of it do, but this –

10 **CHAMBERS J:**

I don't know that Mr Goddard does say that, but still...

**McGRATH J:**

Is the position really that the partnership is given statutory personality –

15

**MR SIMCOCK:**

Yes.

**McGRATH J:**

20 – a legal fiction, if you like –

**MR SIMCOCK:**

Yes.

25 **McGRATH J:**

– in relation to registration?

**MR SIMCOCK:**

Yes.

30

**McGRATH J:**

But it's not, but its continuing unincorporated status and lack of legal personality is reflected in everything else?

**MR SIMCOCK:**

Except that the “everything else” is not particularly important. The registration is –

5 **McGRATH J:**

Well, but that I’m yet to make any assessment on.

**MR SIMCOCK:**

Yes.

10

**McGRATH J:**

But that just seems to be what the Act has done, it’s taken the common law position as the basis, it’s change its, it’s given legal personality for registration purposes, but it hasn’t done anything else, it that – that's how I read it.

15

**MR SIMCOCK:**

But “registration purposes” for the way this Act operates is crucial, it was a –

**McGRATH J:**

20 Yes.

**CHAMBERS J:**

But it’s not really in the case of section 57, is it? It is crucial as to who has the primary liability and who must file the return, but it’s heavily qualified by  
25 subsection (3) and subsection (5), which preserves the common law position, that the individual partners remain jointly and severally liable, notwithstanding the fact that they’re not registered persons.

**MR SIMCOCK:**

30 Yes, they don’t – they have that – and I continue to use the word “secondary liability” because Your Honour used the word “primary liability” – you need a registered person. Yes, there are –



**CHAMBERS J:**

You do.

**MR SIMCOCK:**

5 – and because, in my submission, that's how the Act operates. They are the people who get input credits and pay GST as an output liability, the members don't, and if you look at subsection (2)(a), "The members of that body shall not themselves be registered or liable to be registered." It's, in my –

10 **CHAMBERS J:**

Yes, well, they don't want two registered people, each claiming credits, for instance.

**MR SIMCOCK:**

15 Yes.

**CHAMBERS J:**

But if the registered person fails in his or her or its obligations, the partners must pick up those obligations.

20

**MR SIMCOCK:**

Yes.

**BLANCHARD J:**

25 It's a bit like the arrangements for suing, where partnerships are able to sue and be sued in the partnership name, with the liability being that of the partners who make up the partnership, so there's no rocket science in this.

**MR SIMCOCK:**

30 No, there isn't. I'm just submitting that, in terms of the scheme of the Act, these special cases have made decisions as to who are registered persons, because that's where – we go back to section 8 – liability attaches to a registered person carrying on –

**CHAMBERS J:**

Yes, but it seems to me, to use Justice Blanchard's analogy, it's really no different from what the High Court rules provide, which is an administrative advantage that you can sue in the name of the firm, and the Act itself also  
5 says that of course, but you could – it's administrative convenience.

**MR SIMCOCK:**

Well, in my submission, it's much more than that, it goes to the structure of this Act, it is part of the group of special cases. It may well have been  
10 originally a convenience in the draftsman's mind, "Yes, we want to go to one person," but it doesn't make it as simplistic as saying it's an administrative convenience and therefore should be given some lesser role or lesser purpose, as my friend, I think, suggests, in terms of the scheme of the legislation. Having decided for whatever reason that partnerships are the  
15 entities to be registered and partners are not, you then, when you come to section 58, have a flow-on consequence. In the language that's already been alluded to, what section 58 does is to turn off the liability of the original registered person and to make the specified agent the new registered person. So again the way in which the Act works is to focus on who now is a  
20 registered person, and it's – whatever the reason for deciding to make unincorporated bodies registered persons, it fits completely by them saying when those persons become incapacitated somebody else becomes a registered person and, particularly in section 58(1)(a), during the agency period the incapacitated person is not treated as carrying on a taxable activity.  
25 So their liability has been turned off.

**CHAMBERS J:**

Even though presumably they do remain the registered person.

**MR SIMCOCK:**

No, they don't.

**CHAMBERS J:**

Well, don't they, because the specified agent is simply treated as being a registered person. The specified agent doesn't become the registered person.

5

**MR SIMCOCK:**

In my submission, absolutely the specified agent does. You cannot have two registered persons.

10 **WILLIAM YOUNG J:**

But it doesn't say that the incapacitated person ceases being registered. You don't have to be carrying on a taxable activity continuously to be registered, do you?

15 **MR SIMCOCK:**

In order to be liable for GST you do which –

**WILLIAM YOUNG J:**

Yes, but to be registered.

20

**MR SIMCOCK:**

Well, you have to be registered and carrying on a taxable activity.

**CHAMBERS J:**

25 Yes, and doesn't the effect of section 58 say when you've got an incapacitated person, that person remains registered but is not carrying on the taxable activity and therefore is not liable for GST? The specified agent, on the other hand, is treated as if it were a registered person and the agent becomes the person who takes on the taxable activity during the period of the  
30 agency. Isn't that the way it works?

**MR SIMCOCK:**

I don't think that's the way it's ever been understood. I think –

**BLANCHARD J:**

That's the way it reads.

**MR SIMCOCK:**

5 I –

**WILLIAM YOUNG J:**

The specified agent isn't treated as being "the" registered person. The specified agent is treated as being a registered person.

10

**MR SIMCOCK:**

Carrying on the taxable activity of the incapacitated person?

**WILLIAM YOUNG J:**

15 Yes.

**CHAMBERS J:**

This may all be explained in the tax information bulletin that Justice Young's –

20 **MR SIMCOCK:**

No, that's three lines long.

**CHAMBERS J:**

It's not? I see.

25

**MR SIMCOCK:**

It's really of very little assistance.

**CHAMBERS J:**

30 Right.

**MR SIMCOCK:**

But we'll see it.

**McGRATH J:**

Yes, Mr Simcock, do you say that the use of the word “treated” is in effect a deeming provision?

5 **MR SIMCOCK:**

Yes.

**McGRATH J:**

So it’s – so we can deal with it as a statutory fiction, if you like –

10

**MR SIMCOCK:**

Yes.

**McGRATH J:**

15 – the same as we would with any other deeming provisions?

**MR SIMCOCK:**

Yes.

20 **McGRATH J:**

Just a modern –

**CHAMBERS J:**

25 I don’t know if it matters though whether it’s “treated” or “deeming”. The point is the agent himself does not get their own GST number, for instance.

**MR SIMCOCK:**

Only because of this directive from the Revenue.

30 **CHAMBERS J:**

Well, which follows the Act there –

**WILLIAM YOUNG J:**

Well, no, perhaps they should – well, I suppose it could be dealt with either way, couldn't it? You could say they're a different registered person, they should have a different number, or you can say it's the same taxable activity  
5 so therefore it's the same number and the TIB seems to have adopted the second option.

**MR SIMCOCK:**

Yes.

10

**WILLIAM YOUNG J:**

I mean, there would –

**CHAMBERS J:**

15 But –

**MR SIMCOCK:**

If there are two registered persons then without that TIB the receivers would have had to get their own number.

20

**CHAMBERS J:**

Well, I wonder about that, but the crucial point is you want everyone under the same number because the taxable activity actually continues. It's just who's doing it that, who's responsible for it, that changes, and these changes will  
25 happen during tax periods, and what section 58 provides is the agent is liable on with respect to that taxable activity within the period for which he or she is responsible. The actual registered person remains liable for the balance but – so you wouldn't want, it seems to me, the numbers changing or anything else, because it's the same taxable activity by the same entity, it is simply that  
30 different people have responsibility for payment of the GST.

**MR SIMCOCK:**

It's not the same taxable activity. The receiver becomes treated – so I'd say becomes a registered person – carries on the taxable activity, and in the last part of the –

5 **CHAMBERS J:**

Correct, it's the same taxable –

**MR SIMCOCK:**

The incapacitated person is not treated as carrying it on, so they –

10

**CHAMBERS J:**

Right, so they're not liable for that part of the period. But it's the same taxable activity, it's just that the entity has a different mind controlling it.

15 **MR SIMCOCK:**

It has, in my submission – and I still use this language, even if it's only focused on that the fact that there's no taxable activity being conducted – the partnership's liability is turned off and the receiver's is turned on, and you don't have two people liable at the same time.

20

**CHAMBERS J:**

Well, I agree that the partnership's liability is "turned off", to use your expression, and that follows from 1(a) because the incapacitated person is not to be treated as carrying on the taxable activity and therefore under section 8 the tax isn't imposed, but it is nonetheless the case that the agent is still carrying on that registered person's taxable activity for the period of the agency.

25

**MR SIMCOCK:**

30 That may well be a correct interpretation, but I don't think it changes my argument that for the purpose of the legislation you have one entity who has to pay GST, partnership pre-receivership or pre-incapacity – we'll just talk about partnerships in this, describing all unincorporated bodies for this

purpose – and receiver, if they are appointed to the partnership, post-incapacity, you don't have two at the same time. And, in my submission, my friend's proposition that section 58 ought to be read more largely because of a suggestion that section 57 is somehow just an administrative provision and ought to be read down, would lead to two entities having a prime liability for tax, because he says a registered person, in terms of section 58, ought to include the partners, who are at common law carrying on the activity, notwithstanding section 57, you should read 58 as if section 57 didn't exist, because it's just an administrative provision. And I'm saying that's just fundamentally wrong, these provisions all have their proper purpose, the Act works as a coherent whole, treating 57 and 58 with equal respect. If you are not incapacitated, 57 applies, if you are incapacitated, 58 applies, and not both.

15 **McGRATH J:**

Well, he certainly characterises section 57 as being of an administrative nature, but I think it's really the wider purpose he sees in this collection of provisions that he brings to bear under section 5 of the Interpretation Act –

20 **MR SIMCOCK:**

Yes.

**McGRATH J:**

– to clarify registered persons. I think that's – I mean, we've got to focus, I think, as you're emphasising, on the meaning of "registered person", but it's a contextually based enquiry, isn't it?

**MR SIMCOCK:**

Yes. But –

30

**CHAMBERS J:**

Of course these –



**MCGRATH J:**

While the administrative point may have some, is certainly something Mr Goddard mentions, it's really a wider purpose of the collection of provisions point that I think he's putting particular emphasis on.

5

**MR SIMCOCK:**

And my view of the purpose is that the sections work perfectly well, read normally, without reading section 58 as saying, "We have to read into it a purpose of treating a registered person as a wider entity, the partners, than would be natural, once 57 is also read," because the two sections work together, they are perfectly coherent, you don't need to take an administrative or wider purpose of section 57 saying, "It's just for convenience, and therefore when you come to section 58 you can treat the partners as if they were registered." You will end up in that situation with having two entities –

10  
15**CHAMBERS J:**

What about the suggestion the Court put out in its minute this week that there may be a slightly simpler way of just regarding the partnership here as –

20

**MR SIMCOCK:**

Incapacitated.

**CHAMBERS J:**

– an incapacitate person?

25

**MR SIMCOCK:**

I don't accept that proposition. I think that "incapacity" in this provision means mental or physical incapacity, I think it's referring to individuals. I have a number of dictionary definitions, to extent that they are helpful. They all suggest that they're talking about physical or mental incapacity of people, not of entities, and the Act doesn't –

30

**WILLIAM YOUNG J:**

But that's not the context of the definition, is it?

**MR SIMCOCK:**

Well, I was just going –

**WILLIAM YOUNG J:**

5 I mean, it starts with death and then goes on to metaphysical incapacity and then there's a general reference to incapacity.

**MR SIMCOCK:**

Well, that's what a specified agent does.

10

**WILLIAM YOUNG J:**

Yes.

**MR SIMCOCK:**

15 But first you have to have a incapacitated person.

**WILLIAM YOUNG J:**

But that's the definition of "incapacitated person". It starts with "death", doesn't it?

20

**CHAMBERS J:**

Yes, it does.

**MR SIMCOCK:**

25 "Death, liquidation, receivership."

**WILLIAM YOUNG J:**

Then you've got the metaphysical incapacities.

30 **MR SIMCOCK:**

Well, I don't know that –

**WILLIAM YOUNG J:**

Non-physical.

**MR SIMCOCK:**

I don't know that –

**WILLIAM YOUNG J:**

5 Non-physical.

**MR SIMCOCK:**

Well...

10 **WILLIAM YOUNG J:**

I mean, not the sort of incapacities that affect a living organism –

**MR SIMCOCK:**

Well –

15

**WILLIAM YOUNG J:**

– ie, death, insanity, physical. That's what I mean by –

**MR SIMCOCK:**

20 But incapacity, at its very least must cover what is certainly not metaphysical if you are mentally or physically unable to act.

**WILLIAM YOUNG J:**

Well, absolutely, absolutely.

25

**MR SIMCOCK:**

So it must cover that.

**WILLIAM YOUNG J:**

30 Yes.

**McGRATH J:**

I think you've got an issue that you'd have to deal with, I suppose, in terms of a justum generis interpretation in looking at it. But could you tell us in your

own words – and we'll let you do that without coming in – why it is that you say, "Incapacity is to be confined to mental and physical incapacity"? So just, you've as long as you like to tell us that.

5 **MR SIMCOCK:**

Yes. Well, I don't think it'll take very long, because I haven't had very long to research it, but I have two reasons. One, I think its natural meaning is talking about physical or mental incapacity of individuals. The second is, there is no need, in terms of the way this section has to operate, to extend it beyond that  
10 meaning. It is possible for unincorporated bodies to be put into both receivership and liquidation. I accept that if that had not been possible it might have been thought necessary to use the general "incapacitated" to extend to those bodies. But all of the incorporated bodies can be put into receivership or liquidation. Receivership is anticipated by section 42, which  
15 deals with pre-event tax liability – it's on page 170, a few pages before we were looking. "If a person is an unincorporated body on the appointment of a receiver, on behalf of any person," so the Act at least contemplates – and the law too, in my submission –

20 **CHAMBERS J:**

Sorry, which –

**MR SIMCOCK:**

We're at tab 1 of volume 1 still.

25

**McGRATH J:**

Page 170?

**MR SIMCOCK:**

30 Yes.

**McGRATH J:**

And the paragraph C of...

**MR SIMCOCK:**

C.

**CHAMBERS J:**

5 Thank you.

**McGRATH J:**

Yes.

10 **MR SIMCOCK:**

“If a person is an incorporated body on the appointment of a receiver to that body –

**BLANCHARD J:**

15 But isn't that merely reflecting the preferential claims provisions in the Receiverships Act?

**MR SIMCOCK:**

20 But it's recognising that – that's its purpose of being included in this list, yes, but it's recognising that unincorporated bodies can go into receivership, and that's the only point I'm making, that the reference to incapacity in section 58 is not necessary, you don't have to extend it, to cover receiverships. One of the concerns may have been, does section 58 cover all of the situations in terms of this, the unincorporated bodies, the other special case that precedes  
25 it? And it might have been thought that if it wasn't possible for those unincorporated bodies to be dealt with by the earlier words, “Liquidation or receivership,” you'd need that catch-all concept of incapacity to deal with it, and, in my submission, you don't. Section 17(a) of the Judicature Act says that associations – a definition which includes partnership, company or other  
30 body corporate or unincorporated body – may be put into liquidation by a Court. So I think unincorporated bodies can be dealt with by the other language of this section.

**CHAMBERS J:**

Well, I agree it could have been put into receivership but, in practice, did it make any difference whether this partnership was put into receivership or not? Because the two partners were in receivership, the receivers of those  
5 two partners obviously had to take control over this asset, being an asset of the partners, and to realise the asset for the benefit of the partners and of course the security holders. Did it make a blind bit of difference whether the partnership itself was put into receivership? The receivers would have acted in exactly the same way that they did act, because the partnership was, in  
10 truth, unable to continue in business.

**MR SIMCOCK:**

Well, it may have been able to continue in business, I have...

15 **CHAMBERS J:**

Well, in the same way that a company in receivership may be able –

**MR SIMCOCK:**

Yes, but for, for many years –  
20

**CHAMBERS J:**

– to continue in business, but they're nonetheless regarded as incapacitated, even though they may be able to continue.

25 **MR SIMCOCK:**

Yes, by this definition, yes, they are.

**CHAMBERS J:**

Yes.  
30

**MR SIMCOCK:**

But that's because the word "incapacity" is the defined term, it doesn't – it then goes on to specify why that means. They're only recognised as being incapacitated because this section says so.

**MCGRATH J:**

We'll take the break in a few minutes, but I just want you to be able to finish –

**MR SIMCOCK:**

5 Well, I think I can make one –

**McGRATH J:**

– on incapacity, on your position.

10 **MR SIMCOCK:**

Yes.

**McGRATH J:**

I mean, I'm not saying you've finished your argument on this but –

15

**MR SIMCOCK:**

Yes.

**McGRATH J:**

20 So just go on on that.

**MR SIMCOCK:**

Well, I think the second point is that, in terms of "specified agent", which is the person who becomes treated as being as the registered person, so you need  
25 not just incapacity about a specified agent, you have to be picked up by the words, "Or otherwise as agent for or on behalf of or instead of an incapacitated person."

**McGRATH J:**

30 Yes.

**MR SIMCOCK:**

Well, these agents, the receivers, were not the agents of the partnership, they were the agents of the partners and, yes, they could control the partnership –

**BLANCHARD J:**

Well, that's not right, because they appointed themselves as the Board of the partnership, and in that capacity they were acting as agents for the partnership.

5

**MR SIMCOCK:**

Well, is that any more so than a director or manager? They don't – you don't bring those people in to become specified agents.

10 **BLANCHARD J:**

Yes, but –

**WILLIAM YOUNG J:**

But their managers are the directors of an entity that's not otherwise  
15 incapacitated.

**MR SIMCOCK:**

But what happened here was that this partnership had been managed by a Fletcher company, and for some period after the receivership that manager  
20 continued as an individual. Then the receivers came along and – as I say, not immediately – they appointed themselves to be the manager. You would not have said, even after the receivers had been appointed, that that manager was a specified agent. He is able to control the affairs of the partnership in the same way as a director could or a manager could, and the receivers, in  
25 my submission, are in no different a position.

**McGRATH J:**

Now is that a convenient time to take the adjournment?

30 **MR SIMCOCK:**

Yes, it is, Sir.

**McGRATH J:**

Right, thank you, Mr Simcock.



**COURT ADJOURNS: 11.30 AM**

**COURT RESUMES: 11.48 AM**

**MR SIMCOCK:**

- 5 There was a request that we might provide the TIB. We've been unable to locate it. We thought we had the right one and it proves not to be, so that may have to come after lunch.

**MCGRATH J:**

Thank you.

10 **MR SIMCOCK:**

- If I could just before moving on make two – couple of further points in respect of this agency point. If you've got a subsidiary in a group of companies and you have a receiver appointed to the one company in the group, subsidiaries are not automatically incapacitated, even if the receivers appointed themselves as directors of those subsidiaries it wouldn't make the subsidiaries
- 15 incapacitated.

**BLANCHARD J:**

Well they may not be insolvent, whereas a partnership which has every member of the partnership insolvent is certain insolvent.

20 **MR SIMCOCK:**

Yes.

**BLANCHARD J:**

And incapacitated.

**WILLIAM YOUNG J:**

- 25 What capacity does it have for autonomous action?

**MR SIMCOCK**

It has the capacity to carry on as the manager originally appointed did carry on after the receivers were appointed.

**WILLIAM YOUNG J:**

5 But only with the leave and licence of the receivers.

**MR SIMCOCK:**

Yes.

**WILLIAM YOUNG J:**

10 So it has no autonomy, it's entirely a creature of the security holders and receivers isn't it?

**MR SIMCOCK:**

15 Yes it is, somebody else is controlling it, other than its original manager or board but I don't accept that that makes it incapacitated particularly in this instance where it wasn't the partnership to whom the receiver was appointed but the partners, a step behind the partnership and yes through that mechanism they had the ability to control what the partnership did. I don't think it's incapacitated in the sense used by this section.

**McGRATH J:**

20 Are you giving that word an ordinary meaning or are you giving it the meaning of incapacitated in relation to how the previous incapacitations, if I can put it that way, are spelt out?

**MR SIMCOCK:**

25 I'm giving it – if dictionary meanings are ordinary meanings, then I'm giving it those meanings and I have some of those here if that's helpful to you. Their meanings suggest that it is talking about individuals with physical or mental incapacity.

**McGRATH J:**

I would've thought naturally it was talking about an absence of capacity, a lack of capacity without necessarily going into the particular nature of the body but –

5 **MR SIMCOCK:**

And in my submission this partnership had capacity.

**McGRATH J:**

10 Yes well that's – I understand that's what you're submitting yes. But look, I mean over to you if you think that the definitions are going to forward your argument.

**MR SIMCOCK:**

No I don't think they do I think they just say what I've said.

**McGRATH J:**

No.

15 **MR SIMCOCK:**

And earlier point was made about the return and was this the partnership's return or the receivers' return, if I could just return to that for a moment. The receivers believed they had a liability to pay – to file a return. So when the return was filed they were believed it was at – well their return. If they are  
20 mistaken as to that –

**WILLIAM YOUNG J:**

And just help be again, what was the section under which they thought they were liable?

**MR SIMCOCK:**

25 I've not seen their advice, we're not acting for them but understand that it is either section 58 or section 57. Perhaps not being clear as to why they were liable but nevertheless advice that they –

**WILLIAM YOUNG J:**

If you look at page 247 of volume 2 of the case on appeal. That's the deed relating to the application of the sale of the proceeds and of course 3.a.i or little one I suppose. So it says, "The receivers shall retain the GST payments to pay GST output tax obligations of the vendors under the sale agreement or of the receivers as specified agents of those vendors or otherwise". So there are three possible basis of liability identified, one is a vendor's liability, one is a personal liability and then three the sort of omnium gatherum, however else it might arise. So it's not a very specific belief.

10 **MR SIMCOCK:**

No but as I understood my – Mr Simpson's submissions earlier we understand and that's all we can do, we were not privy to this document.

**McGRATH J:**

But we have an affidavit, don't we, that speaks of liability being assumed?

15 **MR SIMCOCK:**

Yes.

**McGRATH J:**

Yes but I don't think any basis for the assumption has been given to the material I've read.

20 **MR SIMCOCK:**

As I understand it was on legal advice.

**McGRATH J:**

Yes, sorry that's right, they got legal advice and they assumed they had liability and that's what we're working.

25 **MR SIMCOCK:**

Yes.

**WILLIAM YOUNG J:**

But we also know that within about a month they were NOPA-ing their own return.

**MR SIMCOCK:**

5 Yes we, acting for the – my firm acting for the –

**WILLIAM YOUNG J:**

Fletcher interest.

**MR SIMCOCK:**

10 - second security holder never held the view that the advisors to the receivers did. So we immediately protested and I don't know whether we persuaded them that their advice was wrong and they ought to protect the position with a NOPA or it was just a matter of security to do so.

**WILLIAM YOUNG J:**

15 But just looking at that deed, the form of the return is perfectly consistent with one of the two options identified in the deed, one of the three options identified in the deed.

**MR SIMCOCK:**

Yes.

**WILLIAM YOUNG J:**

20 That is a vendor's obligation that the return is intended to address.

**MR SIMCOCK:**

25 Yes but I think Mr Simpson told the Court this morning that our understanding and as I say we were not party to this deed, is that however the receivers might have been liable the wording here was to protect their liability either directly or through the partnership that caused them to file the return and that they believed they were filing their return and the point I wanted to make is that if they are mistaken it doesn't suddenly become the partnership's return and that return hasn't been filed. If you looked at –

**WILLIAM YOUNG J:**

It's a sort of a slightly an *Alice in Wonderland* world isn't it?

**MR SIMCOCK:**

I don't think so. If you looked at the –

5 **WILLIAM YOUNG J:**

*Alice Through the Looking Glass* world I should say actually.

**MR SIMCOCK:**

If the receivers had filed a return which was in error, seriously in error, the partnership would not have wanted to have assumed those errors, they  
10 wouldn't want that return to suddenly become theirs once the mistake is revealed.

**WILLIAM YOUNG J:**

But what you're saying is essentially, absolutely by mistake the receivers – by two mistakes the receivers did the right thing. They were mistaken as to their  
15 personal liability, so they thought a return had to be filed but they filed the form in the wrong language and therefore –

**MR SIMCOCK:**

No, language that would not have changed when we find the TIB.

**WILLIAM YOUNG J:**

20 Wouldn't they have filed it as – in their own names as receivers as specified agents for this partnership with the same GST number, isn't that –

**MR SIMCOCK:**

Yes.

**WILLIAM YOUNG J:**

25 Yes well that's what they didn't – so they didn't do that, they just filed it as a partnership return, so that's the second mistake.

**MR SIMCOCK:**

No they filed in – whatever the reality would have been the return would've been the same. It would've looked the same but it doesn't mean it was filed.

**WILLIAM YOUNG J:**

- 5 Wouldn't it have said, "The receivers as specified agents for the CNIFP partnership"?

**MR SIMCOCK:**

It could have but I think in terms of this TIB they just pick up the number –

**CHAMBERS J:**

- 10 I don't think it would've done what Justice Young has suggested because it overlooks the fact there is one GST return for a taxable period.

**WILLIAM YOUNG J:**

For a taxable activity.

**CHAMBERS J:**

- 15 And for a taxable period and almost inevitably when one gets into this incapacity specified agent situation, part of the period will be the responsibility of the partnership itself, part of the period will be the responsibility of the specified agent but it doesn't matter, you have the one return for the entire period in the name of the partnership.

**MR SIMCOCK:**

20 I don't think that's right Sir. If –

**CHAMBERS J:**

Well are you suggesting there would need to be two –

**WILLIAM YOUNG J:**

- 25 But this – if it wasn't incapacity it would've gone on for years here wouldn't it?

**MR SIMCOCK:**

It did.

**WILLIAM YOUNG J:**

Yes.

5 **MR SIMCOCK:**

If incapacity in the loosest sense is an accurate description.

**McGRATH J:**

Sorry Chambers, you were interrupted.

**CHAMBERS J:**

10 Well what I was going to follow, if I'm not correct in what I'm saying are you saying that two returns would need to be filed in respect to a particular taxable period?

**MR SIMCOCK:**

15 If the period of agency as it's described in section 58 had expired during a taxable period, yes.

**CHAMBERS J:**

And what's the authority for that proposition?

**MR SIMCOCK:**

That the period of agency.

20 **CHAMBERS J:**

That there would need to be two returns covering different parts of the same period?

**MR SIMCOCK:**

25 Because what section 58 is doing and in my submission should not be expanded to do other things likely, is imposing a personal liability on individual



people. Receivers are individuals. If the period of agency comes to an end, their liability comes to an end, they will want to file a return.

**CHAMBERS J:**

5 Okay so let's suppose it came to an end, are the taxable periods still two months generally speaking?

**MR SIMCOCK:**

It can be two months, six months or a year.

**CHAMBERS J:**

10 Let's say it's two months and it comes to an end, the period of agency, comes to an end three weeks into that month. If your argument is right, when does the agents have to file the return and account for GST for the period of the agency, under the Act?

15 **MR SIMCOCK:**

I don't know whether there's a broken period which triggers a second or a different –

**CHAMBERS J:**

20 Well, that's my point.

**MR SIMCOCK:**

– a different date.

25 **BLANCHARD J:**

There's a problem here, isn't there, which you can no doubt tell us about, that the – take an ordinary trading business, forget about sale of a large asset, just an ordinary trading business. If the incapacity occurs halfway through the period, personal liability starts for the, let us say the received, but the return, if  
30 it's covering the normal period, is, produces a result, a net balance of GST payable. Now that net balance is going to be different if you do the calculation simply from the point when the incapacity occurs. How's that handled?

**MR SIMCOCK:**

I believe that broken returns, broken period returns, are possible.

**BLANCHARD J:**

- 5 You'd have to have it, wouldn't you, because otherwise how would you ever work out what the receiver was liable for and what they weren't liable for. It could be very unfair to a specified agent, at the beginning of the period.

**MR SIMCOCK:**

- 10 I think it's clear. I think GST is triggered on taxable events. We've seen in the *Rob Mitchell Builder Ltd (In liquidation) v National Bank of New Zealand Ltd* (2004) 21 NZTC 28,397 case that, where liquidation was the issue, that a sale agreement had been entered into prior to liquidation. It didn't amount to a GST event, so no GST liability was triggered, and somebody else, the  
15 liquidator, actually became liable, but –

**CHAMBERS J:**

- I think the answer to Justice Blanchard's question may be provided by section 58(1)(c), so the receiver would be entitled to deduct, make corrections  
20 for the period prior to the receivership's commencement, but I haven't followed that through as to how that reads into 46(7), but –

**MR SIMCOCK:**

- And has not been previously deducted.  
25

**WILLIAM YOUNG J:**

But that's really an allowance for output, input tax from prior periods, isn't it?

**MR SIMCOCK:**

- 30 Yes.

**WILLIAM YOUNG J:**

But just –

**MR SIMCOCK:**

I don't think it's a difficulty –

**WILLIAM YOUNG J:**

5 No.

**MR SIMCOCK:**

– in terms of the specified agent's liability. Triggering events will be able to be discerned or ascertained post-receivership.

10

**WILLIAM YOUNG J:**

Can I just make sure I understand it? Say a company goes into receivership halfway through a period. The output tax that has fallen due in relation to the first half of the period is an unsecured creditor.

15

**MR SIMCOCK:**

Yes.

**WILLIAM YOUNG J:**

20 The GST return, however, must be filed by the specified person for the whole period, specified agent for the whole period, but there would be an apportionment as to which output tax was properly the liability of the specified agent?

25 **MR SIMCOCK:**

Well, I think, but only that, that the incapacitated person would file their own return for the period up to the date of incapacity and the receiver's liability would commence only after that, so there would be –

30 **WILLIAM YOUNG J:**

Yes, so, but the incapacitated person would probably do it by the receiver?

**MR SIMCOCK:**

Possibly.

**WILLIAM YOUNG J:**

Yes, not necessarily but probably.

**BLANCHARD J:**

5 Yes, well, the receiver would have an obligation to –

**MR SIMCOCK:**

Yes.

10 **BLANCHARD J:**

– do the return that the person had failed to do, even though the receiver was not personally liable for the result.

**MR SIMCOCK:**

15 Yes. I'm obliged to my friend for pointing out a section that is not in the bundle, section 15E, which I'll read and then we'll provide to you. Subsection –

**CHAMBERS J:**

20 15E, did you say?

**MR SIMCOCK:**

Fifteen, capital E. I don't think it's – I think we've copied the whole of the GST Act.

25

**CHAMBERS J:**

Yes, well, I've got this statute here and there doesn't seem to –

**McGRATH J:**

30 When was section 15E passed?

**CHAMBERS J:**

I've got a 15AB...

**MR SIMCOCK:**

2007.

**McGRATH J:**

5 In part 3 of the Act?

**MR SIMCOCK:**

Part 3, yes.

10 **CHAMBERS J:**

15 capital E. Well, it's not in –

**McGRATH J:**

It's in a bound, reprinted statutes, if Thomson Brookers haven't –

15

**CHAMBERS J:**

It's not in the 2012. It goes 15A, 15AB –

**McGRATH J:**

20 I was going to check if it's in a Bill rather than an Act...

**MR SIMCOCK:**

It's been in the Act –

25 **CHAMBERS J:**

– then 16.

**MR SIMCOCK:**

30 The strangest proposition would be that it's gone now. But what it says is that you have broken periods, when these event occur you have broken periods.

**BLANCHARD J:**

Well that certainly is not surprising.

**CHAMBERS J:**

No.

**McGRATH J:**

5 Well that – I think we can move on.

**MR SIMCOCK:**

10 Yes. I think, in terms of what I wanted to say else in respect of section 58, it's just this, that the appointment of receivers to partners does not, if those partners are not carrying on any taxable activity, make them liable for anything. Only if, by my friends' arguments or by an extension of what "incapacitated" means from what I'm suggesting it means, could the receivers in this case have any liability under section 58, yes, either because it's extended to give some general sense to how the scheme of the Act ought to  
15 work together, or –

**BLANCHARD J:**

20 Well, the receivers wouldn't become agents of the partnership simply by being appointed receivers of the partners, that's what you're saying, isn't it?

**MR SIMCOCK:**

That's what I'm saying. And where the –

**BLANCHARD J:**

25 And that must be right.

**MR SIMCOCK:**

30 Yes. And where the partners have no taxable activity, the receivers have no liability under section 58, that's all I'm saying.

**CHAMBERS J:**

What about Mr Goddard's alternative argument on the non-exclusive nature of the definition of "member"? What would be – can you think of downsides

there would be if we were to adopt that alternative argument and treat the liability under section 57(3) as including the receiver of a member?

**MR SIMCOCK:**

5 I think the first and most significant downside is that you would also bring in other people, like directors or managers of a members. I don't see why an extension would be limited to receivers. The definition of "member" is simply referring to those people who need to be treated as members, because they have liability under section 57, but it's entirely consistent with partner, joint  
10 venturer or a trustee of a trust. If you extended to mean a receiver of a member, then I don't know why the extension wouldn't also apply to other people controlling the member, and that's just not right.

**McGRATH J:**

15 So "member" bears its ordinary meaning in this context, which is –

**MR SIMCOCK:**

It's a defined term, Sir.

20 **McGRATH J:**

– when you talk of members of a partnership. Oh, it's a defined –

**MR SIMCOCK:**

It's a defined term.

25

**McGRATH J:**

Yes.

**CHAMBERS J:**

30 But non-exclusively defined.

**MR SIMCOCK:**

No.

**McGRATH J:**

Yes, no, that's right, yes.

**MR SIMCOCK:**

5 If I might – well, I should say this, that the arguments here as to the extended  
definition of “registered person” or “member” would seem equally to apply to  
one partner in a partnership if that entity was put into receivership or is  
otherwise incapacitated and I don't think there should be any acceptance of a  
view that one partner in a partnership should take the whole partnership. The  
10 partnership doesn't become incapacitated just because one partner does.

**BLANCHARD J:**

Well if the other's insolvent then they're responsible for the partnership debt,  
so there wouldn't be an incapacitation.

**MR SIMCOCK:**

15 No, I'm just – I agree with that but I'm saying that in terms of trying to find a  
meaning for “registered person” in section 58 or “member” as it's used in 57,  
the logic would suggest that it's equally applicable to any member of a  
partnership and if just one out of several got into difficulty I don't think it would  
be right to treat the receiver of that member as being a receiver of the  
20 partnership because of these extended concepts.

**CHAMBERS J:**

But that wouldn't follow on that argument because on Mr Goddard's  
alternative argument the receiver would be liable only for that member's share  
of the joint and several liability.

**MR SIMCOCK:**

25 Yes but I think the concept of extending who is a member or extending who is  
a registered person should logically equally apply to one member of a  
partnership getting into difficulty.



**CHAMBERS J:**

It seems to me the best argument against Mr Goddard's alternative one is that the problems arising from incapacity have been specifically dealt with in section 58, so it's to that section one ought to look but that might not help you  
5 then under section 58.

**MR SIMCOCK:**

Well if you decide that incapacity has a wider meaning than I'm suggesting then it doesn't help me but otherwise it does because I think the scheme is entirely coherent, the scheme of the Act is entirely coherent, 57 and 58 can be  
10 read quite well together, you don't have to extend 58 as if section 57 wasn't there. That's going way beyond any notion of what the official assignee case would suggest as a purposive meaning of the legislation. That case where the Court of Appeal said what they ought to be able to do is to solve a problem in section 42 by giving the legislation a purposive meaning but  
15 section 42 was entirely explicable within it, I think the Court of Appeal's judgment is right, it's very straightforward, it was simply trying to discern whether if somebody was a member of a partnership and they were bankrupt and the partnership might have otherwise been incapacitated then two sections could have applied and yes that's true, they could have but I don't  
20 think it needs a notion of we need to have a purposive extension of the reading of this section in order to achieve that result and I certainly don't think you should then say, in terms of 57 and 58, we'll read 57 as if – 58 sorry, as if 57 didn't apply at all, as if this part of the Act wasn't there. The sections work perfectly well as they naturally read.

25

I made the point earlier that there have been other cases where the issue of claims by creditors and the Commissioner have been in issue. Those cases at the highest level are *Edgewater Motel Ltd v Commissioner of Inland Revenue* [2005] 3 NZLR 289 (PC) and then a *Rob Mitchell* case which  
30 His Honour Justice Blanchard wrote or co-wrote the judgment on in the Court of Appeal.

The *Edgewater* case was about priorities; was GST payable by, I was going to say a liquidator, but a mortgagee, ahead of two secured creditors, ahead of the revenue or not? And Your Honours if you have my submissions which were put in, the supplementary submissions, I'm at page –

5 **McGRATH J:**

Yes, part 6 submissions, yes, in response to part 6.

**MR SIMCOCK:**

Yes, yes. I'm on page 10 at paragraph 29. So this case was dealing with a property sold under a mortgagee sale, section 5, that application and  
10 section 17, as opposed to a sale by a mortgagor and the Court found that there was a statutory liability to pay GST ahead of the secured creditors. As I've noted there in the middle of the page, "It was noted that if the mortgagor had sold the property both the first and second mortgagees would have been entitled to insist of payment in full before releasing their security. The Crown  
15 would've enjoyed no priority against either of them". Counsel for the second mortgagee then asked, "Why should the position be different because the sale was by the mortgagee rather than the mortgagor?" And the Court said, "Their Lordships consider that the answer to this rhetorical question is because that is what the relevant section says" and I think that's an entirely appropriate way  
20 to discern questions of priorities, what does the law say, not any natural sense of priority for the Commissioner or conversely for the secured creditors.

In the recent Court of Appeal judgment of *Simpson & Ors v Commissioner of Inland Revenue* [2012] NZCA 126 (CA) which Your Honour's referred us to for  
25 another reason, which I'll come to, the Court there I think rather gave a sense that there was a natural priority in favour of the Commissioner and I want to dispel that view and disagree with the comments made. They say in respect of –

**BLANCHARD J:**

30 Do we have that?

**MR SIMCOCK:**

It's referred to in your minute, so I don't know whether you have it or not. My friend has some copies.

**McGRATH J:**

- 5 It would be helpful. Madam Registrar could you circulate this. That's the Court of Appeal judgment.

**CHAMBERS J:**

Where did you want us to look Mr Simcock in the case?

**MR SIMCOCK:**

- 10 At paragraph 48 Sir on page 143. I'm just looking for where the *Edgewater* case itself is.

**CHAMBERS J:**

It's somewhere, I know because I've read it. It's tab 9 in volume 2 of the respondent's –

- 15 **MR SIMCOCK:**

It's another example of wonderful simplicity on the part of the Privy Council if I might suggest, really one page only they dismiss this issue.

- 20 Paragraph 48 of the Court of Appeal judgment in *Simpson* says, "Indeed the decisions in *Edgewater* make it plain that there is no policy in the GST Act of protecting secured creditors and far from being an unsecured creditor, the Commissioner is in a better position than secured creditors with respect to GST" and I want to disagree with that inference from *Edgewater*, that isn't said in *Edgewater*. All *Edgewater* says, as I've just alluded to, is the GST Act tells  
25 you who has priority and who doesn't, and that's simple. The answer to the rhetorical question is "because that's what section 17 says". It's not a sense of the Commissioner ought to have a priority. If the Act gives him one, he can. If it doesn't, he won't.

**MCGRATH J:**

I don't think anyone is disputing that.

**MR SIMCOCK:**

5 I'm only taking –

**McGRATH J:**

It's a question of what the Act means, you know.

10 **MR SIMCOCK:**

Yes. I'm only cavilling at what the Court of Appeal might have been implying in its paragraph 48, that's all.

**WILLIAM YOUNG J:**

15 What I suspect they're getting at is that on the whole where the time of supply is after a security is crystallised, using that term rather loosely, on the whole the output tax is payable by or in one way or other going to be debited to the security holder, and that's the general pattern of the sections. They do it very specifically but that's the general pattern, I think.

20

**MR SIMCOCK:**

Well, I don't know that that's right, even, Sir, as a general pattern. I think there's an acknowledged difference between mortgagor sales and mortgagee sales.

25

**WILLIAM YOUNG J:**

The exception, where it's not entirely congruent with what I'm saying, is where an insolvent mortgagor sells off his own bat.

30 **MR SIMCOCK:**

Well, that's an entirely factually realistic assumption –

**WILLIAM YOUNG J:**

Yes, yes.

**MR SIMCOCK:**

– isn't it?

**WILLIAM YOUNG J:**

5 Well, maybe, although it may be the mortgagor may say, "Well, no, you" – because often a mortgagee will step in but – and it may be that if the mortgagor is in fact by this stage just a creature of the mortgagee, perhaps the mortgagee should be paying GST.

10 **MR SIMCOCK:**

Yes, but if it is a mortgagor sale and truly is –

**WILLIAM YOUNG J:**

Yes, that is an exception.

15

**MR SIMCOCK:**

– that is a –

**WILLIAM YOUNG J:**

20 But I'm really talking about when securities are crystallised, when a sale occurs effectively at the instance of a security holder.

**MR SIMCOCK:**

In that situation, the Act's clear.

25

**WILLIAM YOUNG J:**

Yes.

**MR SIMCOCK:**

30 There is a liability on the security holder. It's very clear. All I'm saying is it's equally clear if that's not the situation for there to be no priority for the Commissioner and for the Privy Council to have said that. They didn't – they –

**WILLIAM YOUNG J:**

And the moral argument is, well, you know, the Commissioner is paying out an input tax credit on the other side of the transaction and that's why the suggestion is floated sometimes loosely that the GST should be paid on the other side of the equation.

**MR SIMCOCK:**

And I think that's perhaps all it is in the Court of Appeal is a loose suggestion. I should note that this situation that we're in now will not occur again. The law has been changed. The Commissioner recognised that it was sometimes one-sided. There was generally an input tax credit available to a purchaser and he wasn't always getting it back from vendor. So now these transactions, any transaction involving land, is treated as a zero-rated supply so that a purchaser doesn't get an input credit.

**CHAMBERS J:**

When does that apply?

**MR SIMCOCK:**

Whenever there's land involved in a sale, and it changed about two years ago, I think. So this case has no ongoing precedential value in terms of collecting money for the revenue. This won't happen, couldn't happen again.

**CHAMBERS J:**

Just so I've understood you there, are you saying that in all circumstances now, land, sales of land, is zero rated?

**MR SIMCOCK:**

Yes.

**CHAMBERS J:**

I see.

**MR SIMCOCK:**

It wouldn't apply if somebody wasn't registered in the first case. Where – I think the simple proposition's where somebody would have got an input credit and the Commissioner might have missed out on getting an output payment  
5 made to him, those transactions are now zero rated. Wherever land is involved in a sale, whether land simpliciter or land with other assets, that result occurs. So this – if it's found that the security holders here get priority over the revenue, that's, in our submission, what the legislation provides for, and if you think that that's an unfortunate mismatch then that can't occur  
10 again. If it's an unfortunate mismatch but nevertheless what the law says, and in my submission that's what you should find, that mismatch won't happen again, that's all I'm saying.

**CHAMBERS J:**

So if this transaction had taken place in the last year it would've been zero  
15 rated would it?

**MR SIMCOCK:**

Yes, yes. My friend just pointed out a complication that there may not be any sale of land here because although it looks like land these are forestry licences.

**20 McGRATH J:**

They're trees, yes.

**MR SIMCOCK:**

Well they're licences.

**McGRATH J:**

25 They're Crown Forestry licences, yes.

**MR SIMCOCK:**

Yes. So maybe my statement is not right I'm sorry, not –

**McGRATH J:**

Let's move on.

**MR SIMCOCK:**

5 In the *Rob Mitchell* case, so I can turn to page 11 of my submissions, there were competing priorities between a liquidator and a mortgagee and what had happened was that a sale of land had been entered into prior to liquidation, a company going into liquidation but no GST output liability, oh I beg your pardon, which gave rise to a GST output liability. So the triggering event occurred prior to liquidation.

10

Before settlement the company went into liquidation and the liquidator completed the sale but there was no further GST event, so the liquidator got all the money, it settled but the GST trigger had occurred prior to liquidation and the Court found that the time of supply was before the liquidators appointment, the IRD was an unsecured creditor. The liquidator argued that for the mortgagee to receive all of the sale proceeds and not have a liability for GST in respect of those proceeds was unfair, partly because a conclusion in favour of the mortgagee meant that different consequences follow depending on whether the sale is conducted by an insolvent mortgagor or by a mortgagee under a power of sale and Justices Blanchard and Tipping said, "Considerations of equity or fairness have little or no weight in a tax case but in any event counsel's arguments misstate the position. The bank, the mortgagee, is receiving in priority to other creditors, including the Commissioner, no more than is secured to it under its mortgage. As to the different consequences, depending on whether it is the mortgagee or the mortgagor who sells, the first response must be that even if this were undesirable the distinction is one clearly drawn by the Act" and I completely agree with those views. I'm saying here there ought to be no sentiment that the Commissioner should win in terms of equity or fairness. If the Act provides he wins that's fine.

25

30

**McGRATH J:**

And again no one's disputing that.



**MR SIMCOCK:**

Thank you Sir. I think I will deal with this, I think we've touched on it already, this no double liability point. The Act should not be interpreted to give rise to two entities having registered, or prime liability if I can continue to use that  
5 phrase, registered status or taxable activity liability at the same time.

**CHAMBERS J:**

And I think the error lies in your calling it primary and secondary liability. Is that in truth with a partner's liability that it's secondary? You don't have to sue the partnership first or anything of that sort and only if the partnership doesn't  
10 pay other partners liable, that is not, it seems to me, the structure of section 57.

**MR SIMCOCK:**

Well with respect Sir I think it is. The liability is on the registered person. We've seen in section 58 that the tax liability is on the registered person  
15 carrying on a taxable activity. The partners are expressly not in that capacity.

**CHAMBERS J:**

They're not registered but that's a different point entirely and under section 57(3) they have a joint and several liability.

**MR SIMCOCK:**

20 One which is triggered, if I may –

**CHAMBERS J:**

Despite this section, in other words this overrides subsection 2, despite, that's the way it starts. This is the governing one, "A member is jointly and severally liable with other members for all tax". Now there –

**MR SIMCOCK:**

25 "Payable by the unincorporated body".

**CHAMBERS J:**

Correct.

**MR SIMCOCK:**

“Payable by the unincorporated body”.

**WILLIAM YOUNG J:**

5 But there’s nothing to suggest the liability is only triggered if the unincorporated body defaults.

**CHAMBERS J:**

Doesn’t pay.

**MR SIMCOCK:**

No I’m not suggesting that, I’m simply –

10 **CHAMBERS J:**

Right well the moment you’re not suggesting that, it’s an error to keep talking about secondary liability.

**MR SIMCOCK:**

15 Okay I’m – if a temporal context is relevant you must first have a liability for the unincorporated body. You can’t have a liability for the partners simpliciter because they are not registered persons and are not carrying on the taxability.

**CHAMBERS J:**

Well they both spring into existence at the same time, this liability.

**MR SIMCOCK:**

20 Because of the actions of the unincorporated body, not because of any actions of the partners.

**McGRATH J:**

25 I think we all really have a common understanding. I think we clarified it earlier that you were – primary and secondary responsibility is no doubt a term that’s used in your expert field but it’s not in the way we would normally understand the term but I think we understand what’s being said.

**MR SIMCOCK:**

Yes. You have one entity under 57 who is carrying on, who is registered and carrying on a taxable activity and that gives rise indeed to its liability and to its members. If section 57 is turned off by 58 then you have other entities,  
5 receivers or liquidators who are the entities with the first liability for carrying on the taxable activity. The only entities with the liability for carrying on taxability. The partnership is turned off. You cannot have, in my submission, both being liable for tax at the same time and I want to note that in the *Rob Mitchell* case that's what Their Honours Blanchard and Tipping said in a different context, I  
10 understand that completely.

On page 14 of my submissions I would like to read what they said, "Even if the mortgagee were liable" this is this –

**McGRATH J:**

15 Paragraph 40 I think you're saying.

**MR SIMCOCK:**

Paragraph 40, page 14.

**McGRATH J:**

It's page 11 for us.

**MR SIMCOCK:**

I beg your pardon, right at paragraph 40. "Even if the mortgagee were liable for GST there was nothing in the GST Act which would relieve the mortgagor of its obligation to account for GST. This would therefore lead either to a double recovery of the GST or recovery against the mortgagee with a residual  
25 claim against the mortgagor. This would clearly be an uncertain and unsatisfactory outcome and can be contrasted with that arising on a mortgagee sale, where section 17(2)" and I think it's meant to be 17(1), "explicitly removes any GST obligation upon the mortgagor" and I'm saying that exclusion of the possibility of a double recovery equally applies to  
30 receivers if they are deemed to have an extended – a liability on the

extension, my friend would suggest under 58, if the partnership's also got a liability in 57, which would happen here because the partnership is registered and hasn't had its taxable activity turned off, if it's not in receivership.

5 Perhaps the only other point I need to address is the one raised by Your Honours in your memorandum yesterday or the day before, about section 5(2). The question posed was whether 5(2) could apply to this transaction. It's been agreed between us for, I don't know, seven years or so that it doesn't, but that doesn't answer your question. The IRD says that it  
10 doesn't, in a Tax Education Office newsletter of 1991, which I can give to you...

**WILLIAM YOUNG J:**

Did the IRD contend for this interpretation in the *Simpson & Downes* case?

15

**MR GODDARD QC**

Mr Ebersohn appeared for the Commissioner, so perhaps he can help with that.

20 **McGRATH J:**

Yes, Mr Ebersohn.

**MR EBERSOHN:**

We'd idly contended that it applied on the 5(2) and section 17 applied on the  
25 facts of *Simpson & Downes*, not that it applied necessarily in the context of *Stiassny*.

**WILLIAM YOUNG J:**

Well, they were slightly different circumstances.

30

**MR SIMCOCK:**

Yes, substantially different.

**CHAMBERS J:**

So you've got a relevant tax bulletin for us, have you.

**MR SIMCOCK:**

5 Yes, again I think that I'm going to have to provide it for you after lunch.

**McGRATH J:**

Thank you.

10 **MR SIMCOCK:**

What it –

**WILLIAM YOUNG J:**

Sorry, what's the guts of it?

15

**MR SIMCOCK:**

It says, "Does section 5(2) apply to receivers? No. Section 5(2) would seem to have no application in most cases of sale of property by a receiver of a company. This is because receivers are normally agents of the company and section 60 provides that the principal and not the agent making the supply of the principal is deemed to make the supply."

20

**WILLIAM YOUNG J:**

It doesn't really engage with the language of section 5(2).

25

**MR SIMCOCK:**

No.

**WILLIAM YOUNG J:**

30 Because on a literal interpretation of section 5(2) this property was sold under powers exercisable by the receivers on account of debt owed to someone else.

**MR SIMCOCK:**

Well, I don't agree with that, Sir. I think what –

**WILLIAM YOUNG J:**

5 Well, what part of it's wrong?

**MR SIMCOCK:**

They –

10 **WILLIAM YOUNG J:**

Just looking at section 5(2). Section 17(1) is slightly different, but I –

**MR SIMCOCK:**

Section 17(1) just follows from 5(2), you need –

15

**WILLIAM YOUNG J:**

Yes, but just look at 5(2) first.

**MR SIMCOCK:**

20 Yes. Have the receivers – well, first of all let's deal with *Simpson & Downes*  
because –

**WILLIAM YOUNG J:**

No, no, just look at the language, please.

25

**MR SIMCOCK:**

All right.

**WILLIAM YOUNG J:**

30 Because I just want to – well, what strikes me about the language is its  
passive tense, its passive voice. It's not, do the receivers sell the land, it's  
was the land sold under the powers?

**MR SIMCOCK:**

I've just got to ensure that we have 5...

**MR GODDARD QC**

5 Yes, it's under – in our volume 1, tab 1.

**WILLIAM YOUNG J:**

It's in the respondent's bundle at page 37 of tab 1.

10 **CHAMBERS J:**

Well, the first part is fulfilled, isn't it? Goods were acquired by a person, which were sold.

**WILLIAM YOUNG J:**

15 And assume the first person is the partnership, does that fit the section?

**MR SIMCOCK:**

Yes, assuming the first person is the partnership.

20 **WILLIAM YOUNG J:**

Its land was sold under power exercisable by the receivers.

**MR SIMCOCK:**

No.

25

**WILLIAM YOUNG J:**

Why not?

**MR SIMCOCK:**

30 Because the receivers weren't receivers of the partnership –

**WILLIAM YOUNG J:**

But they're not – it's not, did the receivers sell its land. Its land was sold by reason of powers conferred on the receivers by, A, the security agreements, and, B, their appointment as receivers.

5

**MR SIMCOCK:**

No. They didn't need to turn to their appointment documents in order to do this. They had become the managers of the partnership and could effect, as agent – well, hadn't become managers of the partnership because the, they're only appointed to the partners. But through that appointment they got to control the partnership.

10

**WILLIAM YOUNG J:**

But they got that appointment through the exercise of the powers. I mean, it depends on how literally, how broadly you take it.

15

**MR SIMCOCK:**

No, well, it depends how far back you go. When they came to sell the land, they did not need to turn to their debenture document and say, "We are exercising a power given to us by our appointment documents," they were then the managers of the partnership in the same way as a Fletcher Challenge executive had been.

20

**WILLIAM YOUNG J:**

Have we got the agreement for sale and purchase? We must have.

25

**MR GODDARD QC**

Yes. Case on appeal, volume 2, tab 25.

30

**MR SIMCOCK:**

I'm just advised that they were appointed to the Board of the partnership by virtue of the partnership agreement, not by virtue of their appointment documents to the partners. But the sale agreement –



**CHAMBERS J:**

Although all the assets of the partnership were subject to their control, weren't they?

5 **MR SIMCOCK:**

Once they had been –

**CHAMBERS J:**

Once they were appointed receivers of the partners?

10

**MR SIMCOCK:**

No, no.

**CHAMBERS J:**

15 Why not? Because they were, the partnership was entirely the asset of the two companies of which they were the receivers.

**MR SIMCOCK:**

Well, there were other assets of those companies, but in –

20

**CHAMBERS J:**

Yes, but the partnership –

**MR SIMCOCK:**

25 Was an asset.

**CHAMBERS J:**

– was an asset, subject to their receivership.

30 **MR SIMCOCK:**

No, they were appointed to the partners.

**CHAMBERS J:**

I know, but what were the assets of the partners? The assets of the partners included their 100 percent share –

5 **MR SIMCOCK:**

Yes.

**CHAMBERS J:**

– of the partnership and all its property.

10

**MR SIMCOCK:**

Well, the residual interest in whatever the partnership had, if –

**CHAMBERS J:**

15 Correct.

**MR SIMCOCK:**

– if a partner's interest is –

20 **CHAMBERS J:**

Yes, but their duty was to get in those assets for the benefit of the security holders.

**MR SIMCOCK:**

25 The security holders had securities over both the partners and their residual interest assets and the partnership had granted charge over its assets. They were not appointed in respect of the second charge. Yes, they had the ability, once they were partners, receivers of the partners, to effect control, but they didn't for a long time, they left the manager there, then at some stage they  
30 took over the management, through the partnership agreement.

**WILLIAM YOUNG J:**

The vendors are actually the two partners here, aren't they?

**MR SIMCOCK:**

Yes, yes.

**WILLIAM YOUNG J:**

5 Each liable in receivership and in each case the agreement's signed by the receivers, as such.

**MR SIMCOCK:**

Yes.

10

**WILLIAM YOUNG J:**

So how would it be different from any, from a sale of assets by a company in receivership effected by receivers as the company's agent? And that's effectively what's happened here, isn't it?

15

**BLANCHARD J:**

Isn't it more equivalent to the situation in which receivers of a parent company are not receivers of the subsidiary but procure their appointment as Board members of the subsidiary and then, in that capacity, proceed to sell the subsidiary's assets?

20

**MR SIMCOCK:**

Exactly, Sir.

25 **WILLIAM YOUNG J:**

But that doesn't look – I mean, it may be that no one would have turned their mind to this, but that's not quite what they've done here, because if that had been done here the vendor would be the partnership and the agreement would have been signed by its, by its Board. Now, it might be odd if anything turns on this.

30

**MR SIMCOCK:**

Well, I think in terms of an asset of this sale, the purchaser would have wanted the partners to sell, the partners are the legal entities capable of

effecting the sale. I think if you just had the name of the partnership as a firm, with its – which could have occurred and may well do routinely for smaller assets...

**WILLIAM YOUNG J:**

- 5 Does that suggest that the partnership's been wound up, if the individuals are selling its assets?

**MR SIMCOCK:**

No.

**WILLIAM YOUNG J:**

- 10 Because if it hasn't, what right do they have to sell?

**MR SIMCOCK:**

Because they are managers of those, of that partnership.

- 15 We were talking about section 5(2) and I did want to go back to *Simpson* in terms of analysing the language of section 5. That case involved a lender, a debenture holder, to a company which was itself a mortgagee. Fortress is the name of the debenture holder and CMI is the name of the mortgagee. Have you got that case now?

**McGRATH J:**

- 20 Yes.

**MR SIMCOCK:**

- 25 So what Fortress did was to appoint a receiver over the debenture, its debenture, over CMI and CMI had previously lent money to purchases or buildings or houses who had given mortgages. The power of appointment of the receiver put the receivers into CMI, so that's the exercise of the power that had occurred to give them status as receivers of the mortgagee, so they're now controlling the mortgagee. The powers of sale which was an issue in that case and where the Court quite simply and correctly in my view said was the one being exercised in terms of 5(2), was the power under the mortgages and

the receivers didn't exercise that power, they didn't exercise any power in their appointment document, the debenture, they as agents of the mortgagee caused the mortgagee to exercise its powers. So they're simply agents. The mortgagee, CMI, exercised powers.

5

The question in the case was do the receivers have a personal liability as well as the mortgagee having a liability. It was accepted that the mortgagee had a liability under section 5, the residual interest was whether the receivers had a personal liability as well.

10 **WILLIAM YOUNG J:**

It's a double – two layers of security which makes the case slightly awkward.

**MR SIMCOCK:**

Two layers of security.

**WILLIAM YOUNG J:**15 

And the difficulty with the argument there is that on a literal approach to section 5(2) both the mortgagee and the receivers would've been the second person, which you say is antithetical to the one person, one liability approach.

**MR SIMCOCK:**20 

Yes. Well, no I think it's simpler than that. I don't see the receivers as exercising any power of sale that they have, they're exercising a power of sale that their mortgages, the securities they own give them.

**WILLIAM YOUNG J:**25 

But that focuses on, I suppose who does the selling rather than what the power – whether the sale – whatever sale and whoever affects it are operating under powers conferred by documents intended to provide security for money.

**MR SIMCOCK:**

Well I think it's focussing on what power, not just who does it but what power they are invoking in order to do it. The receivers who are appointed under a

debenture have certain powers under that debenture. They didn't need to turn to them to achieve the sale that had –

**WILLIAM YOUNG J:**

5 It rather looks as though they did though doesn't it, on the way the agreement was executed?

**MR SIMCOCK:**

In our case?

**WILLIAM YOUNG J:**

Yes, 321.

10 **MR SIMCOCK:**

Well they had securities under the –

**WILLIAM YOUNG J:**

15 But they're not acting as the Board of the partnership when they enter into this agreement, if you look at page 321. I'm not sure it matters. It would be odd if liability turned on how the document was headed but they seem to have been acting qua receivers rather than qua the Board of the partnership and if someone said to them, "By what right or power did you sign this document?" They would have had to have to said, "Well under the securities and under our power of appointment, we have the power to do it, the right to do it".

20 **MR SIMCOCK:**

I don't think they need to refer to any power in their appointment documents to give them that right, they control the partners and use that control to effect.

**WILLIAM YOUNG J:**

Well I understand the point you're making.

25 **BLANCHARD J:**

They were permitting the partners to sell.

**MR SIMCOCK:**

Yes.

**BLANCHARD J:**

So they weren't acting perhaps in their capacity as board members.

5 **WILLIAM YOUNG J:**

Well they are acting as receivers aren't they? That's how they sign.

**MR SIMCOCK:**

Well those two companies legally, if you simply look at their name, once they're in receivership, we have to call them that. They are the partners, they  
10 are the vendors, so by saying in receivership is simply –

**CHAMBERS J:**

Yes but it was the firm's assets still. Why wasn't it the firm, the partnership that sold?

**MR SIMCOCK:**

15 I can only suggest that for bigger transactions purchasers want to look to people who –

**CHAMBERS J:**

But they could look to them under the Partnership Act, that would've made the liability of the partners clear.

20 **BLANCHARD J:**

Do we have the partnership deed?

**MR SIMCOCK:**

All I know is that practically in a firm when we want to sell desks and computers, the manager does it. When we enter into a lease, a bigger  
25 transaction, all the partners sign individually.

**BLANCHARD J:**

Well because they're going to be signing it for personal liability anyway.

**MR SIMCOCK:**

That's because the lessor wants to be. You wouldn't be content with a lease  
5 in the name of –

**BLANCHARD J:**

But I was wondering whether the partnership deed had rules in it about how large a transaction should be transacted but we don't seem to have the partnership deed.

10 **MR SIMCOCK:**

No we don't.

**WILLIAM YOUNG J:**

You would say that's because it's a strike out and it's all a bit previous.

**MR SIMCOCK:**

15 Yes. The signatories to this agreement are by the receivers as its attorney, attorneys for the partners. That's just factually, whether that makes any difference I don't know.

**BLANCHARD J:**

Well in any case the vendors were the partners.

20 **MR SIMCOCK:**

Yes.

**BLANCHARD J:**

Not the receivers, qua receivers.

**MR SIMCOCK:**

25 Yes and that's what I was saying before, the name of the vendors has to include "In receivership" so that doesn't give you any clue.



**WILLIAM YOUNG J:**

Well your argument, I mean this argument, your argument gets some support when you look at section 17(1) because the second person under section 5(2) must be the same person as the person selling the goods under section 17(1) and one would more naturally say in relation to 17(1) that the sale is by the company rather than by the receiver, although in a loose sense you could say the receiver sold all the assets and realised them for the benefit of the company or whatever. So there's a loose –

**MR SIMCOCK:**

I accept that completely. The press may well report this as the receivers have sold the Central North Island forests but that's not legally – I think unless you have further questions for me, those are my submissions.

**McGRATH J:**

Thank you very much, Mr Simcock. Mr Simpson do you want to make a start on your resumption?

**MR SIMPSON:**

I am conscious of the time.

**McGRATH J:**

You've got six minutes.

**MR SIMPSON:**

Time's a bit tight. I think we could get a few things done in that time. I'd like to begin just by walking through some of the documents in the case on appeal. If we begin with volume 2 and go to tab 14. That's the affidavit of Mr Gibson. In paragraph 2 he says that he was – the first plaintiffs were appointed receivers and managers of the property of the second and third plaintiffs. In paragraph 8, he says, "Having sought legal advice, receivers assumed they were personally liable for the GST amount and if it was not paid by the due date substantial penalties and interest accruing on that amount." He talks about them being in a difficult position because they

couldn't satisfy the assumed liability to pay GST to the IRD and the secured creditors at the same time and they were concerned about penalties, and then in 10 he says, "Consequently the receivers decided to pay the GST amount but also file a NOPA in respect of the GST amount. A NOPA was filed to  
5 ensure the liability of the receivers to pay the GST amount to the Commissioner could be challenged."

**WILLIAM YOUNG J:**

That suggests that when they paid the GST they were conscious that the  
10 issue was in doubt –

**MR SIMPSON:**

Yes.

15 **WILLIAM YOUNG J:**

– rather than that they believed they owed it.

**MR SIMPSON:**

I don't think that matters. I'll come to it –  
20

**WILLIAM YOUNG J:**

Yes, I understand that, but the language that sort of makes me bridle slightly is the positive assertion it's paid under a mistake or under an assumption. I mean, they must have appreciated that it was at least arguable either way.  
25

**MR SIMPSON:**

Yes, but with no options. I think they thought more likely than not they were liable. It was not 100% certain. Very little is in the law, as you know, and they knew that if they did not pay it the consequences were dire.  
30

**WILLIAM YOUNG J:**

Was there any correspondence with the Inland Revenue Department? Was there any demand from the Inland Revenue Department?

**MR SIMPSON:**

No, and that won't matter either. There's several cases we've referred to that say you don't need a demand in a tax consequence. The legislation is the demand.

5

**McGRATH J:**

So, Mr Simpson, going back to paragraph 8, we don't have the legal advice. We just have that basic statement?

10 **MR SIMPSON:**

That's all we have. I haven't seen that either, Sir.

**McGRATH J:**

They speak about seeking legal advice. It doesn't actually say it was obtained  
15 but, I mean, we'd be –

**MR SIMPSON:**

I understand it was obtained. I wonder if we could then turn to the next tab, which is the debenture. It's – we've only got the first debenture. Well, I  
20 understand the terms are substantially similar between first and second debentures, and then if we go to page 172 of the case on appeal, its clause 10 talks about the proceeds of enforcement. "All monies received or recovered by the receiver or by the security trustee under or by virtue of this deed will be applied in the manner and sequence determined by the security  
25 trustee. In the absence of such determination, such monies will be subject to the discharge of any liabilities having priority for the secured indebtedness applied in accordance with clause 6 of the security trust deed."

If we then go to 177, it's a series of covenants that bind the security grantors,  
30 so the partners in the partnership, and 13.5.2 says that, "Each charging company will hold on trust for and pay into such accounts as nominated by the security trustee the proceeds of all book debts comprised within the charged assets and the proceeds of sale of any other charged assets expressed to be subject to a fixed charge created by 3.2 if those proceeds are not immediately

applied to payment of secured indebtedness.” So there is a covenant that when those assets were sold the partners and the partnership were obliged to pay it into a separate account, and then 13.5.3 provides that, “The charging company shall be entitled to make withdrawals from the account in the ordinary course of business, provided that following the occurrence of an enforcement event,” and that’s certainly where we are, “and while it’s continuing, the charging company will not make any withdrawal from such a nominated account except to the extent authorised by the security trustee.” Then if we go to 181...

10 **CHAMBERS J:**

Well there you have a classic definition, one might have thought, of incapacity. They couldn’t do anything with this. They were entirely beholden to the security holder from the moment of the enforcement event.

**MR SIMPSON:**

15 Well only in a very limited respect. Only in this respect.

**CHAMBERS J:**

Well this respect covers everything.

**MR SIMPSON:**

Well no Sir because for –

20 **CHAMBERS J:**

They can't do a thing.

**MR SIMPSON:**

Well for two years they carried on business as a forestry company through the manager, another Fletchers company that conducted the management. The business carried on exactly as it had done prior to the appointment of receivers to the partners.

**BLANCHARD J:**

But presumably that was authorised by the security trustee.

**CHAMBERS J:**

As being the best way of realising the asset.

**MR SIMPSON:**

5 But not by the security trustee. Presumably the receivers allowed it to continue to occur as controllers of the partners because they could have, having now appointed themselves to the board of a partnership, done something else.

**WILLIAM YOUNG J:**

10 But that must have been with the approval of the chargeholders because otherwise no money could be paid out could it?

**MR SIMPSON:**

Well you've still got your ordinary course of business provision there.

**WILLIAM YOUNG J:**

Once an enforcement event occurs.

15 **MR SIMPSON:**

Oh yes.

**CHAMBERS J:**

Once the enforcement event, that's the point, ordinary course of business stopped.

20 **MR SIMPSON:**

I would submit that there's a distinction between a restriction on activities and incapacity. In this case the receivers did appoint themselves to the board of the partnership. They didn't need to, they could've allowed the status quo to continue and for the existing board to continue to run as it had done  
25 previously.

**WILLIAM YOUNG J:**

But how could it have paid anything out or done anything? How could the existing board have done anything without the leave and the sanction of the chargeholders?

5 **MR SIMPSON:**

That's true but that doesn't make it incapacitated. I mean for example if I have a house with a mortgage on it, there may be, if the mortgage, the debt secured by the mortgage exceeds the sale proceeds I can't sell the house without the bank's consent but it doesn't mean I'm incapacitated.

10 **BLANCHARD J:**

You're in a bit of trouble.

**MR SIMPSON:**

I am trouble but this the concern I had before, insolvency doesn't make you incapacitated because if it does that mean that the directors of an insolvent  
15 company now become specified agents because they're the ones that are now carrying on the business and if the directors aren't specified agents what's the difference between the directors of an insolvent company –

**WILLIAM YOUNG J:**

Well they probably are liable anyway though aren't they? They're going to be  
20 liable for reckless trading or –

**MR SIMPSON:**

Well that assumes other things doesn't it Sir? I mean often insolvency is not known until later but the company – if the company is insolvent that might not be known for six months but if Your Honour's right that being insolvent makes  
25 you incapacitated, incapacitation exists anyway.

**McGRATH J:**

Mr Simpson we'll take the adjournment when it's convenient for you.

**MR SIMPSON:**

I think we'll stop now Sir. I can finish this debenture when we get back.

**McGRATH J:**

We'll adjourn till 2.15, at that stage I'd appreciate an update on how our time  
5 is going.

**MR SIMPSON:**

Yes I am going to have to travel very quickly through – I think I'm going to struggle to finish today but I will do my best.

**COURT ADJOURNS: 1.04 PM**

10 **COURT RESUMES: 2.16 PM**

**MR SIMPSON:**

Sir, we've handed out the tax information bulletin and the relevant passages on page 14, first column, three paragraphs down. That's the TIB that covers  
15 the use of the incapacitated persons registration, GST registration number, and the other is the TO newsletter, and it's page 7, the paragraph on the left-hand column under the heading, "Sale by Receiver".

Now the other thing I wanted to touch on –

20

**WILLIAM YOUNG J:**

Sorry, what's the bit in the TIB that you rely on?

**MR SIMCOCK:**

25 It was the question of whether the Commissioner has previously sought to apply five two to receivers.

**WILLIAM YOUNG J:**

No, it's – I mean, that's the tax information bulletin about the GST on receiver  
30 and incapacitated persons, sorry.

**MR SIMCOCK:**

On page 14, it begins on page 13, application of legislation at the bottom of the right-hand column, and the last paragraph of that section, “Specified agents must notify Inland Revenue that they are carrying out a taxable activity and the circumstances. Inland Revenue will keep a record of the start of the agency period. The GST registration number remains the same.”

**CHAMBERS J:**

That’s interesting. It does refer to illness there. “Death or illness of the registered person”, which rather supports your contention as to the meaning of “otherwise incapacitated”.

**MR SIMCOCK:**

Incapacitated, yes.

**WILLIAM YOUNG J:**

You said this before lunch but I’ve forgotten, did the receivers tell the IRD that they were acting as specified agents when carrying on the taxable activity?

**MR SIMCOCK:**

No. They told them that they’d been appointed as receivers of the partners but not – didn’t say anything in respect of the partnership because they didn’t have any capacity in respect of that at all.

**McGRATH J:**

Thank you.

**MR SIMPSON:**

There was one point I wanted to make in relation to incapacitation and that is that we talked before lunch whether the restrictions on the use of funds that had to be paid into a bank account once an enforcement event occurred and the inability to use those funds, whether that or, for example, insolvency could create incapacitation, but my submission is that it needs to be much more clearer than that whether one is incapacitated or not. It can’t be contextual



because it has consequences for the party who is deemed to be the specified agent. They begin incurring personal liability for GST and the law could not allow a situation to arise where that liability began because we're on the border of or on the edge of insolvency and flipped in and out of it and therefore the specified agent began incurring liability on and off. And it's interesting, when you look at these provisions, that incapacitation is also linked to the appointment of a specified agent, because if you don't have a specified agent there's no consequence of being incapacitated, in terms of there's no one to then assume that personal liability. Which does suggest that we're looking at some sort of official appointment, either a receiver, liquidator, personal representative, bankruptcy, some event with some appointment being appointed over your affairs, so that that person then begins taking responsibility for running those affairs and, if it's due to incapacitation, then taking responsibility. So –

15

**CHAMBERS J:**

Would a company in respect of which all the directors resigned be an incapacitated company?

20

**MR SIMPSON:**

Not in a meaningful way under this Act, because there's no specified agent. So there's no one to assume liability for the unpaid GST.

**CHAMBERS J:**

25

Right.

**MR SIMPSON:**

So whatever incapacitation means –

30

**CHAMBERS J:**

Yes, so no one would be entitled to act, yes.

**MR SIMPSON:**

– I think it has to be linked to an appointment of someone taking control of your affairs.

5 **CHAMBERS J:**

And what would that Act be in the case of illness of a registered person?

**MR SIMPSON:**

10 Ah, well, if you were mentally incapacitated you had a personal representative appointed.

**CHAMBERS J:**

Yes.

15 **MR SIMPSON:**

Nobody else has – I mean, apart from the Official Assignee in bankruptcy, nobody else has that control over your affairs. The statutory manager's another example. If you had a statutory manager appointed over an individual or a company or a partnership, I think that possibly picks up, and it's a form of  
20 incapacitation, it's not expressly covered. But I don't, in my submission, it certainly can't be said to be incapacity. Just because you're insolvent or these restrictions are starting to bite down on how you spend your money, you still don't have someone now running your affairs. And in our case, while the receivers were appointed to the partners, they were not appointed in that  
25 capacity to run the partnership, they just changed the Board members. There used to be a man called Mr Bernie Fuller, who was on the Board, and no doubt representatives of CITIC and FCNZ, and they were replaced by the receivers, not as receivers but using the powers of appointment under the partnership agreement. So there was no use of enforcement powers to take  
30 control, it was the use of partnership agreement powers. In that same way that if I was incapacitated and someone was appointed to run my estate, they're not controlling Bell Gully, they'd have to get appointed to the Board before they do that.

**CHAMBERS J:**

I have wondered if we're slightly hamstrung here because we don't have the partnership deed to know what powers the board of management...

5 **MR SIMPSON:**

If Your Honours are minded to receive it, I could certainly have it filed, yes, filed in Court.

**McGRATH J:**

10 We'll get back to you on that.

**MR SIMPSON:**

Thank you. Right, I think I was up to, still going through the debenture document, and I was at 181 of volume 2 of the case on appeal. And  
15 clause 15.2 at the base of that page contains the indemnification of reimbursement provision, "Each charging company reimburses and, on demand, will reimburse on a full indemnity basis this very trustee and each receiver for all expenses, including those incurred in connection with." The receiver's powers are on 205. Probably not much to look at there, they're the  
20 usual powers, there's nothing particularly peculiar about this debenture, but there would be no need for the receivers to exercise any of these powers to cause the partnership to sell its assets.

Now the next document is on tab – tabs 16 and 17 deal with the appointment  
25 of receivers, the appointment documents or the notifications are in tab 17, and then there's the deed of application of sale proceeds in tab 18, and although Justice Young took us to some of these provisions earlier, there is a just a couple of others that I wanted to refer. 242 of the case on appeal has the recitations on this deed, and there are a number I wanted to point. Recital B,  
30 security trustee holds the debenture, recital D, "Since their appointment, the receivers have or may have become liable for the receivers' liabilities, for which the receivers are entitled to be indemnified," and that includes the GST liability but not the GST liability we're concerned with here, I'll come to that in a minute. F, upon settlement – sorry, E talks about the sale and then F,

“Upon settlement, under the sale agreement, FCNZ and CITIC are to transfer substantially all of the charged assets in respect of which the receivers are entitled to be indemnified for the receivers’ liabilities and are to receive in substitute for those charged assets so transferred the purchase price plus  
5 GST. The deed records the agreement, understanding of the parties, as to the application by the receivers of the purchase price received by the receivers and the protection of the receivers’ entitlement to be indemnified from the purchase price following settlement under the sale agreement.” So  
10 this is all dealing with a situation where the receivers are concerned about their liability for GST and an arrangement with the BNZ, as first chargeholder, how the proceeds will be used.

**CHAMBERS J:**

Can I just ask you this: given that the charged assets include all the assets of  
15 the partnership, why doesn’t the Board of the partnership simply cease to function in the same way the Board of Directors ceases to function, the moment the receivers are appointed, so that in truth everything done is done by the receivers with regard to charged assets qua receivers.

20 **MR SIMPSON:**

Are you asking that as a matter of law why doesn’t that happen –

**CHAMBERS J:**

As a matter of law.

25

**MR SIMPSON:**

– or as a matter of fact?

**CHAMBERS J:**

30 As a matter of law.

**MR SIMPSON:**

As a matter of law. I think the best illustration of that was the one made by Justice Blanchard. It’s a bit like a parent company going into receivership,

has no impact on the subsidiaries, they carry on outside receivership, untouched, they can be sold, maybe the receivers will appoint themselves as directors to the Board, but those subsidiaries are in no way – and I'll use that word "incapacitated" – in no way affected by the appointment of receivers to the parent company, they function normally.

**CHAMBERS J:**

No, I don't think the analogy is the same there, because they have different legal entities. But here, all the assets of the partnership were charged assets –

**MR SIMPSON:**

Yes.

**CHAMBERS J:**

– in terms of the security documents. The receivers are appointed and have complete control over all charged assets.

**MR SIMPSON:**

No, no – sorry, no, they're not. They're only appointed over the assets of the two partners that fall outside the partnership. All they have in terms of partnership is the individual partners' interests in the partnership, the equity.

**CHAMBERS J:**

Yes, but that's –

**BLANCHARD J:**

And their separate charges.

**MR SIMPSON:**

Yes, there are. There's mortgages over the Crown Forestry licences –

**BLANCHARD J:**

No, that's not what I meant. They're separate charges to each of – sorry, from each –

5 **MR SIMPSON:**

Yes.

**BLANCHARD J:**

– of the partners.

10

**MR SIMPSON:**

Yes, there are, yes.

**BLANCHARD J:**

15 They're not one charge over the partnership.

**MR SIMPSON:**

No, that's right.

20 **WILLIAM YOUNG J:**

What was the role of the BNZ as security trustee?

**MR SIMPSON:**

25 There was a syndicate of banks that provided the first ranking secure debt, the primary debt, 500 US million –

**WILLIAM YOUNG J:**

Oh, I see, so it's unrelated to the –

30 **MR SIMPSON:**

– and they just held the securities on behalf of the syndicate.

**WILLIAM YOUNG J:**

Right. So it's only the first ranking securities?

**MR SIMPSON:**

That's a party to this document?

**WILLIAM YOUNG J:**

5 Yes, it's role as security trustee is in relation only to the first ranking securities.

**MR SIMPSON:**

Exactly, and CNI Nominees has equivalent capacity for the second ranking  
lenders, so it held the second ranking securities on the same basis. And this  
10 is one of the reasons why we say, despite what's in this document, neither the  
partnership, the partners or the receivers had any authority from the second  
ranking secured creditor to pay this money to the Commissioner, and to the  
extent the lion's share of the amount we're talking about here belongs to it,  
there was just a complete lack of authority, and I think that may be relevant  
15 when we come to talk about Justice Blanchard's commentary on the *Sheahan*  
case and the *Cripps* case because this is a situation where the only time the  
receivers could pay the GST with authority is when they're paying their own  
liability for GST.

20 Now I think we've already seen the – clause 2.1 on page 247, there's  
acknowledgements there. “The receivers are entitled to be indemnified from  
the charged assets for the receivers' liabilities. The receivers are entitled to  
be indemnified from the corresponding purchase price for the receivers'  
liabilities. The receivers' entitlement to be indemnified for the receivers'  
25 liabilities from the charged assets and the purchase price ranks in priority  
ahead of the security trustee's rights and entitlements under the debenture to  
the charged assets and/or the purchase price, the provisions of this deed to  
comprise the irrevocable determination by the security trustee as to the  
application by the receivers of the purchase price received by them for the  
30 purpose of clause 10.1 of the debenture.” And then we have these monies in  
3.1(a). We have the – we'll find, when we look at the sale agreement, the  
purchase price divided into two, US dollars for most of it, the GST component  
NZ dollars, flowing into separate bank accounts opened by the receivers and

then onto the BNZ for the US dollar amount and onto the Commissioner for the NZ dollar amount.

5 Now there are references in clause 4.2 to GST liabilities but – and also in 5.8 – but they relate to trading GST liabilities, so we need to be less concerned about those. They are for those not reimbursed out of the sale price. Then tab 19 is –

**McGRATH J:**

10 I see that NZ CNIFP bank account's a defined term.

**MR SIMPSON:**

15 Yes. There's two. There's the NZ CNIFP account means the CNIFP account, bank account, in Auckland as advised to the purchaser by the CNIFP under the terms of the sale agreement, and I think the US one's got a similar definition. Yes, it does. So under the sale agreement, the receivers had to notify the purchaser of what those bank accounts were so they could make the payment. I will come to the sale agreement shortly.

20 Tab 19 is the protest letter issued by me for CNI Nominees and the second ranking security holders. The last two paragraphs make it clear that those parties were claiming a prior entitlement to those funds under the charges, so this isn't just a situation where the Commissioner knew we had charges. It's a situation where the Commissioner knew that the second chargeholder was saying, "That money's mine and somebody's breaching my security and I reserve my right to sue for it." So that will become relevant when we look at one of the subsections to section 95 and also to the restitutionary remedy because we say this is sufficient notice to deprive the Commissioner of good faith which we say is a prerequisite to the good consideration defence. And  
25  
30 there's a me-too letter from the BNZ in tab 20.

The intercreditor agreement is under tab 23. This agreement is the governing document as between the first and second ranking security holders. If one goes to 284, it sets out how the proceeds are to be applied. So 11.1, it covers



expenses of enforcement, including those of the receivers and the security trustee, and then it goes to the first ranking security trustee and then the second ranking security trustee. And then we have the sale agreement on the last tab. I think we've seen the recitals in (a) and (b).

5

Now if we go to 349, clause 4.1, "GST payable by the receivers, whether or not a specified agent, or the vendors in respect of the transaction evidenced by this agreement shall be payable by the purchaser in addition to the purchase price in the manner specified in 4.2 and 4.7." And it's got the timing of the payment, "The GST amount shown in the tax invoice issued by the receivers shall be payable by the purchaser to the vendors or the receivers at settlement by way of a payment to a bank account nominated by the receivers, written details of which will be provided by the receivers to the purchaser at least three days before settlement." And then 4.4 provides for the receivers issuing a tax invoice to the purchaser. "The parties agree that" – 4.5 – "The parties agree that for the purpose of clause 4 the transaction evidenced by this agreement is treated as being from either the CNIFP or the receivers to the purchaser." And then 4.9, the vendor's responsibilities. "As between the vendors, receivers and the purchaser, the vendors and the receivers are not obliged to pay any GST or interest or penalties thereon or relating thereto or to take any steps to minimise liability in respect of GST or interest or penalties thereon and relating thereto until a" –

**BLANCHARD J:**  
25 Mr Simpson, 4.4, if the receivers were not specified agents, what capacity – what was their capacity when they were issuing a tax invoice? Who were they issuing it for?

**MR SIMPSON:**  
30 If they were issuing it, it could only be as principals. I think what we have here –

**BLANCHARD J:**  
The tax was due to them?

**MR SIMPSON:**

Yeah, and I'm not suggesting that's what was happening, but we're talking about a huge amount of money for two individuals and I think what we're seeing here is very conservative drafting to make sure that no matter how things fall out, this agreement's covering the situation.

**BLANCHARD J:**

Do we have the tax invoice?

10 **MR SIMPSON:**

Not here. No, no, it's not in the evidence.

**BLANCHARD J:**

So we don't know whose name it was issued in?

15

**MR SIMPSON:**

We'll endeavour to find out overnight.

4.10, "For the avoidance of doubt, for the purposes of this agreement, any liability or obligation of a vendor arising as a result of any transaction in this agreement in respect of GST shall include any or liability arising as a result of section 57(3) of the Act."

I think that's probably as far as we need to go. So those are the relevant documents out of the case on appeal, but I think what those – two things come from those documents that are key, in my submission. One is there's no authority for anyone to pay the Commissioner an unsecured partnership debt and, two, one can see through these documents that the primary concern at the forefront of the receivers' mind was were they liable for GST and how did they extinguish that liability? There's no real suggestion there that – or no basis, certainly on a strike-out application, to find that the receivers were relaxed about paying an unsecured debt of the partnership. It was all driven at paying off their personal liability.

Now I'm very conscious of time and the size of our case books, so I'm going to try and pass through my written synopsis as quickly as I can. If I'm going too slow in an area, if Your Honours could move me on, and –

5 **McGRATH J:**

We have, of course, as you know, we have read it all –

**MR SIMPSON:**

Yes.

10

**McGRATH J:**

– and so that's appropriate.

**MR SIMPSON:**

15 And similarly if I'm going too quickly on an area or there's something with which you wish to disagree, or challenge me over, then please do. What I tried to do in 3.3 is set out a number of principles that I obviously got no traction on with the Court of Appeal and so I think in the Court of Appeal we were relying largely on *Buchler v Talbot* and the *Ultraframe (UK) Ltd v Fielding*  
20 [2005] EWHC 1638 case, the first being a House of Lords and the second English Court of Appeal. We've now filled out the submissions with additional authorities and additional propositions. A number of them aren't that controversial and I can pass through them quite quickly but the first one probably is relatively controversial because while I think it could be accepted  
25 that a secured creditor has a proprietary interest in assets over which it holds a fixed or a floating charge upon its crystallisation, so either a fixed charged or a crystallised floating charge and the debtor only has an equity of redemption, it becomes more problematical when those assets are sold, whether by the mortgagor or the mortgagee and the proceeds are less than the amount of the  
30 secured debt.

Now my submission is this, if the funds are held in a bank account owned by the debtor, then they must still have legal title to those funds because there's just a simple debtor and creditor relationship between the bank with whom

that accounts been issued and the debtor. So they certainly hold a legal interest but in my submission it's a bare legal interest and they hold the funds on trust for the secured creditor because the secured creditor is the only party entitled to those funds and so in *Ultraframe* the English Court of Appeal held  
5 that once you sell an asset the equity of redemption's gone because that equity of redemption is all about redeeming the fixed asset of the charge and clearing it and once it's been sold there's simply nothing to redeem and all that you've got left is an equity in any surplus but if there is no surplus, there's a deficit, then there is nothing else for the debtor to have an interest in. So it  
10 would only have bare legal title.

If, on the other hand, the funds are paid into some other party's bank account, such as a receiver's bank account or a mortgagee's bank account, then in my submission the mortgagor has nothing, they have no legal title, they have no  
15 equitable title, they have no equity of redemption. They have no interest in the funds and normally you would get to that result because any mortgagee discharging any security, whether a mortgagor sale, mortgagee sale or receivership sale will say, "I will give you a discharge of my security when you give me a bank cheque for the proceeds and I'll attend a settlement and we'll  
20 do a swap" and that was how it would normally be done.

Now in this case there's a slight complication because we've got a partnership outside receivership, two partners in receivership with those partners looking to extinguish a personal liability for GST under the indemnity and then the  
25 bank and a second secured holder who has had no involvement in the sale process. So one can see from that deed that the receivers were given control of the funds subject to specific instructions from the BNZ as to what they were to do with it and I think from memory, I'll just check this, yes the instruction in 3.1 regarding the payment of the GST payment is not a power from the BNZ  
30 to the receivers, it's a mandatory direction.

**CHAMBERS J:**

What are we looking at at the moment?

**MR SIMPSON:**

Sorry, 247 of the volume 2 of the case on appeal.

**CHAMBERS J:**

Oh 247, thank you. Yes.

5 **MR SIMPSON:**

So if we look at 3.1, "Upon the receivers receiving settlement payment cleared funds on settlement, the receiver shall apply the settlement payments they receive in the following manner" and then in A(1), "Receivers shall retain the GST payment to pay the GST output tax".

10 **WILLIAM YOUNG J:**

Does seem to contemplate it's a partnership bank account.

**MR SIMPSON:**

Sorry you've missed me Sir. How do you draw that?

**WILLIAM YOUNG J:**

15 Upon its receipt into the New Zealand CNIFP bank account.

**MR SIMPSON:**

Yes that's that defined term, means the CNIFP bank account Auckland as revised by the purchaser by the CNIFP under the terms of the settlement agreement.

20 **WILLIAM YOUNG J:**

So it does suggest it's a CNI.

**MR SIMPSON:**

It's suggestive of it absolutely and it may well be as a matter of fact it was and we just cannot tell you. What we can tell you is that it was an account that the  
25 receivers opened not a pre-existing pre-receivership account. What we don't know is whether it was taken out in their name as the account holders or whether it was the partnership account but the title to the account is certainly

ambiguous. We'll see as we go on, in my submission it ultimately makes no difference whether the funds went into a partnership bank account or a receivers' account. A receivers' account makes it easier for us but we still believe there are – we can get home if it went into the partnership account.

5

I wonder if we could just then briefly turn to *Buchler v Talbot*, it's in tab 6 of our first volume of authorities and at paragraph 29 on page 309, there are two paragraphs there I wanted to read. This actually concerns a floating charge crystallising rather than a charge that was always a fixed charge as here but the paragraphs nevertheless are helpful and it says, "When a floating charge crystallises it becomes –

10

**McGRATH J:**

Sorry which paragraph?

**MR SIMPSON:**

Paragraph 29 on page 309. "When a floating charge crystallises it becomes a fixed charge attaching to all the assets of the company which fall within its terms. Thereafter the assets subject to the floating charge form a separate fund in which the debenture holder has a proprietary interest. For the purpose of paying off the secure debt it is his fund. The company has only an equity of redemption, the right to retransfer of the assets when the debt secured by the floating charge has been paid off. It is –

20

**CHAMBERS J:**

What's the point at looking at English authority though when we have the PPSA?

**MR SIMPSON:**

The PPSA doesn't alter this concept of what do you have left when you sell the secured asset. Section 45 of the PPSA makes it clear that the charge then attaches to the proceeds of sale. If the proceeds of sale are less than the debt, what is there left? And that's why this is relevant and the PPSA doesn't change that.

30

**WILLIAM YOUNG J:**

Well this is all very relevant to the position of the receivers, the position of the partnership and the position of the secured creditors but to slightly rephrase what Justice Chambers has put to you, does it really matter to people who are  
5 outside that little group of people? Can't they simply rely on the fact that however it's come about they've got a cheque?

**MR SIMPSON:**

Well the first thing, whose cheque is it? Second, is it a debtor initiated payment of the debtor's debt or is this a receivers initiated payment of a  
10 receiver's liability.

**BLANCHARD J:**

Well that's taking us to section 95 which I think is where Justice Young wanted to go when he suggested this isn't very relevant.

**MR SIMPSON:**

15 Well it is relevant in my submission because it demonstrates that at the end of the day it's the bank's money, it's the secured creditor's money and so –

**WILLIAM YOUNG J:**

You could say that in any case where section 95 operates, couldn't you?

**MR SIMPSON:**

20 Yes you could.

**WILLIAM YOUNG J:**

I mean section 95 doesn't sort of mean anything unless someone's missing out.

**CHAMBERS J:**

25 Absolutely.

**MR SIMPSON:**

Well you could only say that where there's a shortfall and there's no equity of redemption left and then yes that's right but I keep coming back to this point, you normally don't have that situation arising because if the proceeds of the sale of the security are insufficient to clear the debt, the debtor's never going to get its hands on that money. The security holder is always going to take control of the money. So it's not going to rob section 95 of effect, in fact where we are going is going to put reasonable boundaries around section 95 because how can the Commissioner hang on to this payment when it knew that it was somebody else's money.

Well you could only say that where there's a shortfall and there's no equity of redemption left and then yes that's right but I keep coming back to this point, you normally don't have that situation arising because if the proceeds of the sale of the security are insufficient to clear the debt, the debtor's never going to get its hands on that money. The security holder is always going to take control of the money. So it's not going to rob section 95 of effect, in fact where we are going is going to put reasonable boundaries around section 95 because how can the Commissioner hang on to this payment when it knew that it was somebody else's money.

**WILLIAM YOUNG J:**

Well it didn't know.

**MR SIMPSON:**

It did.

**WILLIAM YOUNG J:**

Because all it knows is someone's bleating about it.

**MR SIMPSON:**

Well that's enough.

**WILLIAM YOUNG J:**

No but that's not knowledge. All it knows is there's a possible dispute.



**MR SIMPSON:**

No it knows more than that. The security holder said, "This money is subject to my prior charge and you have no right to be paid it and I want it back".

**CHAMBERS J:**

5 But did that letter come before?

**MR SIMPSON:**

Yes before, a month before.

**CHAMBERS J:**

Before it got the cheque?

10 **MR SIMPSON:**

Yes.

**CHAMBERS J:**

I see.

**WILLIAM YOUNG J:**

15 But you have got the problem that with the provisions in the PPSA that say that knowledge of another interest isn't fraud or is not of good faith.

**MR SIMPSON:**

20 Knowledge of a security isn't enough but it's one thing to know I receive a payment and I know that out there there's a, in this case a debenture floating over all the assets, that doesn't mean I have to return it but when the debenture holder writes to me a month beforehand and says, "You're going to be paid some money, that's my money, you were never entitled to it, you shouldn't have been paid it and I want it back", that's a different sort of notice.

**WILLIAM YOUNG J:**

25 You could have sought an injunction I guess.

**MR SIMPSON:**

No.

**WILLIAM YOUNG J:**

Before payment.

5 **MR SIMPSON:**

Well then we'd have to give an undertaking as to damages and ultimately if the receiver is personally liable for this GST, the penalties and use of money interest would be horrendous.

**WILLIAM YOUNG J:**

10 Yes but I mean you could have, I mean you weren't entirely sort of necessarily passive observers in this, that you did have options.

**MR SIMPSON:**

The only option that wasn't an arid option was the one exercised.

**WILLIAM YOUNG J:**

15 But you could have obtained an injunction but you would have had to go on risk for the consequences.

**MR SIMPSON:**

20 Huge risk, yeah and I don't think we would get that injunction because a Court would say well the party potentially liable here is the receivers and the particular subsidiary entitled to the money is CNI's nominees, that's just a bare security holding, so that's got no –

**WILLIAM YOUNG J:**

Well someone with money would have to give an undertaking.

**MR SIMPSON:**

25 Well I can tell you we would not have got Mr Stiasny and Mr Graham's arrangement or a satisfaction – they would not have been satisfied with any undertaking offered by Fletcher Forests.

**CHAMBERS J:**

And that's because they thought there was a very real chance that they were liable which rather cuts across your continued assertion that everybody knew this was a mistake. Certainly even the receivers didn't know it, they thought  
5 they probably were liable to pay it.

**MR SIMPSON:**

But that's the mistake.

**WILLIAM YOUNG J:**

It's absolutely right. I mean they know it's uncertain, I mean I know it's a  
10 whole lot of semantic issues.

**MR SIMPSON:**

Not but the example that was, Lord Hoffman I think in the *Deutsche Morgan Grenfell Group Plc v IRC* [2007] 1 AC 558 case was if I'm in a quiz show and someone asked me is this Handel or Mozart, I think I've got the –

**CHAMBERS J:**

Haydn.

**MR SIMPSON:**

Haydn and Mozart and I said, "Oh I'm not sure, Mozart", I've made a mistake. I wasn't sure but I still made a mistake. Now here is large national law firm  
20 saying to the receivers, "We think you're probably liable for 127 million". We're not saying it's absolutely clear. I mean where can you get that sort of opinion, "We think you're likely liable for 127 million plus penalties". Who's not going to pay it in those circumstances?

**CHAMBERS J:**

25 Well why don't we, Mr Simpson, in view of time, it's entirely up to you but it really does seem to me we should get onto section 95. Let's assume you're right about all this for current purposes, how nonetheless do you get round section 95?

**MR SIMPSON:**

So we say that, well if I'm right here then I'm saying we don't have a debtor initiated payment so we just never get into section 95, that's the first point. That's the easy route. So you would have to accept my principles to get there  
5 and perhaps for time sake we could just say well if you prove that it's the bank's money and receivers are making the payment of their liability then it's not a debtor initiated payment, 95, there's no application.

**WILLIAM YOUNG J:**

So why is it not a debtor initiated payment?

10 **MR SIMPSON:**

Well because for us to be even talking you've already decided that the receivers were mistaken and they're not liable for GST and therefore they're not debtors.

**BLANCHARD J:**

15 But if the payment is made by the partnership then it has to be a payment made by the debtor even if there was a security interest over the whole thing which exceeded in value or in nominal amount the amount that was available. It's still a payment by a debtor even if the funds are charged.

**MR SIMPSON:**

20 Well it's not a payment by the debtor if it's paid out of a receiver's account because the receivers have legal title to the money and for these reasons the debtor's got nothing left to pay. So that would be – and you can't say the receiver's the agent of the partnership because the partnership is not in receivership and the partnership doesn't have authority to authorise the  
25 receivers to pay this money on behalf, pay out the second ranking security holder's money away. So the partnership doesn't have authority, it can't cloak the receivers with authority, so the receivers can't be making the payment as its agent.

**CHAMBERS J:**

It seems to be ridiculous we're having this argument without knowing whose account that was. I mean I know you say, "Well we're in strike out" but it would be ridiculous to say, "Oh well we must let you go to trial because it may  
5 turn out it was the receivers' bank account".

**MR SIMPSON:**

Well I accept Your Honour's criticism and that is my responsibility but this was a restitution reclaim, section 95 wasn't an issue for us, it's been brought up and in our submission we don't need to know who owns the bank account  
10 so –

**CHAMBERS J:**

But let's suppose – but what is the answer to Justice Blanchard's proposition, if it was the partnership's bank account?

**MR SIMPSON:**

15 Then whose debt were they paying?

**CHAMBERS J:**

Well we're assuming that you're right at this stage that it's not the receivers' debt, so it must be the partnership's debt.

**MR SIMPSON:**

20 No, no but they were paying the receivers' debt, that's what they were intending to do. They thought the receivers were liable, they were paying –

**CHAMBERS J:**

But the debt on the supposition we are making, the debt under the statute was the partnership's.

**MR SIMPSON:**

25 But if I pay you money to pay off a debt of Justice Blanchard's and it turns out Justice Blanchard doesn't owe you a debt but Justice McGrath does, you can't say, "Oh well that's a payment by Justice McGrath" or even a payment by me

of my debt. I paid his debt. He might've given me money to pay the debt he owes you. You can't say, "Well I don't think you owe me any money so I'm going to now appropriate this money in a different way".

**CHAMBERS J:**

- 5 Well I think I can say that under section 95. If the money came out of the partnership account and the partnership owed the debt and it was received by the creditor, the creditor has priority.

**MR SIMPSON:**

Only if it's paying the debtor's debt.

10 **WILLIAM YOUNG J:**

This is the *Alice Through the Looking Glass* problem though isn't it?

**MR SIMPSON:**

It's not really.

**CHAMBERS J:**

- 15 It is. Where somehow we can look into the minds of people and looking into their minds can somehow undo what section 95 is all intended to do.

**MR SIMPSON:**

- Can I suggest the only reason you have that concern is because you've got a cheque with CNIFP written on it and a GST return that looks exactly the same  
20 whether it's a partnership return or a receivers' return and I'm sympathetic to that.

**WILLIAM YOUNG J:**

Well I don't agree with that because the NOPA that your receivers put in it looks rather different doesn't it?

25 **MR SIMPSON:**

It's solely focussed on receivers' liability.

**WILLIAM YOUNG J:**

Yes but they describe themselves as receivers don't they?

**MR SIMPSON:**

5 Well they were receivers of something. They were receivers of the two partners.

**WILLIAM YOUNG J:**

But they use the same number.

**MR SIMPSON:**

10 Well they have to. But look why we don't have the bank account, we have a lot of documentation here which is clearly directed as receivers organising the payment of monies to extinguish their own liability and in my submission section 95 cannot bite this payment, even if it comes out of the partnership's money and the partnership's bank account, if it didn't seek to pay off a partnership debt because then it's not a debtor initiated payment. Debtor  
15 initiated payment is about debtors paying off their own debts, not paying off third party debts.

**WILLIAM YOUNG J:**

But you rest this argument really on the internal thought processes and the internal communications of the –

20 **CHAMBERS J:**

Well we're not sure who actually.

**WILLIAM YOUNG J:**

But of the group of people that you represent as opposed to what the externalities look like.

25 **MR SIMPSON:**

Well that's only a consequence of this TIB that says you've got to use the GST number. I don't think – I understand what you're saying but that's really

a consequence of the administrative regime rather than any fault on our part.  
I mean perhaps –

**CHAMBERS J:**

Well can I ask you this then Mr Simpson, if it is the case that under section 95  
5 you can look into the minds of somebody as to what it was they thought they  
were doing, who is it that is the relevant person whose mind we're looking into  
in this case?

**MR SIMPSON:**

10 The payers.

**CHAMBERS J:**

And who were they?

15 **MR SIMPSON:**

Well, I say the receivers, but I can't point to it.

**CHAMBERS J:**

Well, for all we know, Mr Stiasny did – what do we know about what  
20 Mr Stiasny thought?

**MR SIMPSON:**

We have the affidavit that we looked at a little earlier from Mr Gibson, who  
was the person running the receivership of the partners, and he says – it's  
25 that paragraph we looked at earlier – "We sought legal advice, thought we  
were personally liable" – "assumed we were personally liable", then in 9, "The  
receivers were in a difficult position because they could not satisfy both the  
assumed liabilities." "The receivers assumed they would be personally liable  
for these payments. Consequently," in paragraph 10 – sorry, I should have  
30 given you a page number. It's 146. "Consequently the receivers decided to  
pay the GST amount but also file a NOPA in respect of the GST amount."  
That's what we've got.



**CHAMBERS J:**

Anyway, it's their minds that are the relevant ones for the purposes of this argument. Is it Mr Stiasny and his co-receiver?

**MR SIMPSON:**

5 Yes. Now that's the first defence to 95, that we never get there because we don't have a debtor-initiated payment. The second is section 95 never extinguished the law of restitution. So if it's a mistaken payment, you can get it back, and we are not saying there's a mistake by the payer as to priorities. That's – because Justice Young's right, you would be always able to undo  
10 section 95. You could just say, "Oh, well, I'm a prior secured creditor and this must have been a mistake. Can I have my money back?" The mistakes here, and I'll just turn to it, is that, one, the receivers were personally liable for the GST, and two, as a consequence, they were entitled to pay the GST. Those are the mistakes.

15

**WILLIAM YOUNG J:**

Aren't they mistakes as to priorities?

**MR SIMPSON:**

20 No.

**WILLIAM YOUNG J:**

Well, if they were right in their views then the payment to the IRD had priority. Because they were wrong, it didn't have priority. Isn't it just – aren't they just  
25 the other sides of the coin to what is a mistake about who had a prior claim for this money?

**MR SIMPSON:**

No, it's about a mistake as to who the correct payer is, who the debtor is. It's  
30 got –

**WILLIAM YOUNG J:**

But –

**MR SIMPSON:**

The effect is the same. The effect is that because the receivers thought they were liable then they therefore have this prior right of indemnity that trumps everybody's charges, but that's not the mistake we're pointing to. The  
5 mistake we're pointing to is that they actually thought they were personally liable and therefore entitled to pay it. That is a different mistake, fundamentally different. So for most circumstances where a debtor pays – let's say they thought they'd paid off the bank and they weren't aware that there was another account that was cross-guaranteed, and then they paid  
10 money to an unsecured creditor, neither that party nor the secured creditor can come along and say, "Oh, well, you've made a mistake here," because that's just about priorities, and if that was the case you could undo 95, but here we're saying it's a mistake as to even whether that particular party was liable for the amount and it's only if they're liable that they have an ability to  
15 pay authority. So they were mistaken about liability and authority, not priority, and that's the mistake the Court of Appeal made. They say that this is just a mistake about priorities and if that's the case 95 has no teeth. That's not right.

**CHAMBERS J:**

20 Well, isn't there a flaw in your argument though in that the effect of section 95 is where that section is applicable, and let's assume it is for the moment, it alters priorities?

**MR SIMPSON:**

25 No.

**CHAMBERS J:**

It –

**MR SIMPSON:**

30 I don't think it does.

**CHAMBERS J:**

Well, it says, by statute, it will have priority over a security interest. So that's its effect. By statute, priorities are altered.

5 **MR SIMPSON:**

But that cannot deprive the law of restitution and mistaken payments to recover that money.

**CHAMBERS J:**

10 Why not?

**MR SIMPSON:**

Well –

15 **CHAMBERS J:**

It's designed to give protection to creditors in situations where the debtor has initiated the payment. The creditor knows the moment he gets the money, if section 95 applies, he does not need to worry about anybody else's priority.

20 **MR SIMPSON:**

Well, what about if he's knowingly assisting a breach of trust? There's got to be some boundaries around this. If that creditor was in cahoots with a debtor to get paid –

25 **WILLIAM YOUNG J:**

Well, then, it wouldn't be in good faith, would it?

**MR SIMPSON:**

You mean section 25?

30

**WILLIAM YOUNG J:**

Yes, it's section – is it section 25 or – 25.

**MR SIMPSON:**

25(1).

**CHAMBERS J:**

5 Sorry, which section is it, Justice Young?

**MR SIMPSON:**

25(1).

**WILLIAM YOUNG J:**

10 25(1) and (2).

**CHAMBERS J:**

Do we have that?

15 **MR SIMPSON:**

Yes, sorry, tab 2 of volume 1, page 37.

**WILLIAM YOUNG J:**

20 There must be a good faith exception to section 95 and it seemed from your point of view the awkward thing is that it's qualified by the assertions that someone doesn't act in bad faith merely because they know of the interests of some other person or are aware of some other security interest.

**MR SIMPSON:**

25 Yes. We –

**BLANCHARD J:**

30 It's got to be something different from a bad faith exception though because that wouldn't necessarily capture all the kinds of situations that arise where somebody might have an obligation to disgorge but there's no bad faith element. Surely the ring-fence on this is whether the purpose of the section changing the priorities is being impugned, but if the claim doesn't have that kind of basis, if it's got its own separate basis like there's been a mistake

which has got nothing to do with priorities, nothing to do with securities, or that there's been the example you've given, that kind of thing, then I would have thought the section wouldn't be intended to apply, but if the claim is merely a way of circumventing the new priority that Justice Chambers has pointed out  
5 then the section would bar it.

**MR SIMPSON:**

Yes.

10 **BLANCHARD J:**

I'm not putting it very elegantly but...

**MR SIMPSON:**

No, I understand. It's very well put, yeah.

15

**WILLIAM YOUNG J:**

But say I have – say the receivers make a payment to someone because they think that they're liable and in fact they're not at all, well, they're entitled to get that back as money paid under mistake of fact for reasons that have got  
20 nothing to do with security documents.

**MR SIMPSON:**

That's right.

25 **WILLIAM YOUNG J:**

But if the reason they think they're not liable is because in fact someone with a security document has got a better claim than they thought that person did then section 95 works, doesn't it?

30 **MR SIMPSON:**

Yes.

**WILLIAM YOUNG J:**

This comes back to the question as to whether the mistake is about priority.

**MR SIMPSON:**

I think so, yep.

**CHAMBERS J:**

5 Yes, so doesn't it – we get – I accept those qualifications that have been put on my bald proposition, so doesn't it come back to the fact the one sort of mistake you can't have is a mistake about priority, because that is completely barred by section 25 – 95, and your mistake is actually just a mistake about priorities.

10

**MR SIMPSON:**

No, it's not, and I'll come back to that, but can I, just before I do, say one other thing? The trouble with a mistake about priority is the very point my learned friend Mr Goddard's making. If I owe the creditor money and I make a  
15 mistake about priority, but I owe the money, I can't get it back anyway under the law of restitution because good consideration's passed, and we accept that, that if you pay a debt you actually owe, the fact that it was a mistaken payment about any other mistake doesn't get the money back, that's clear from the authorities. The only then qualification is, but if it's paid with a lack of  
20 good faith, do you also have, apart from providing good consideration for the payment if you're the creditor, do you also have to act in good faith? And we say, based on Lord Justice Goff's judgment in *Barclays Bank Ltd v W J Simms Ltd* [1980] 1 QB 677 and various other cases, but it is not settled law that, that good consideration also requires bona fides. So again, if it's just  
25 a mistake of priorities, restitution won't apply to save you anyway, unless there's bad faith, and then section 25 nicely works with that bad faith exception and you might be able to get your money back.

**BLANCHARD J:**

30 There's a curious aspect here. Assume your argument's correct, the Commissioner has to give the money back, so the receivers, you would say, get that money back. What do they then do with it? The purchaser would be entitled to say, "Hey, under the agreement that was paid to be used for GST, there's a closed trust now, give it back to me."

**MR SIMPSON:**

This is the argument that the Court of Appeal ran with from the Commissioner about windfall. You've increased the price by –

5 **BLANCHARD J:**

No, it's not a windfall argument. It's the purchaser's right to say, "I agreed to pay X dollars and the GST on it."

**MR SIMPSON:**

10 Yes.

**BLANCHARD J:**

"There is no GST being paid on it, therefore I am entitled to the money back again," or, "You give it back to the Commissioner again."

15

**MR SIMPSON:**

Well, no, the – you can pay GST, but there was no promise or assurance given that a secure creditor wouldn't intercept that GST.

20 **BLANCHARD J:**

Well, don't know about that, looking at the agreement. Certainly there's no overt promise –

**MR SIMPSON:**

25 Yes.

**BLANCHARD J:**

– but I'd be pretty angry if I was the purchaser and I've found that I'd been asked to pay an extra sum for GST which was never paid.]

30

**MR SIMPSON:**

You're going to get a GST credit, you're going to be completely agnostic.

**WILLIAM YOUNG J:**

Well, there's a timing difference, but that's all, isn't it?

**MR SIMPSON:**

5 Oh, nothing.

**WILLIAM YOUNG J:**

Quite a lot on –

10 **MR SIMPSON:**

So you don't mind, you've suffered no loss, you've got your money back by way of the credit process. I would have thought that all the – I could not imagine the purchaser would be bothered either way.

15 Now, Justice Chambers, I just need to address the issue about what sort of mistake is it? I'm struggling to work out how I can present this another way. I think –

**CHAMBERS J:**

20 Well, your mistake is, the way you categorise it is the mistake was the receivers paid it and they didn't mean to pay it.

**MR SIMPSON:**

25 No, they paid it because they thought had a liability to pay it and therefore were authorised to pay it under those provisions and the debenture and the intercreditor agreement. So it's about liability, "Do I have a liability to pay this GST?" and capacity, "Can I," or authority, "Can I pay it?" and they mistaken on both counts because one follows the other. It has very little to do with priorities. I know the consequences that you're effectively recovering the  
30 money but relying on a security, but what we're really relying on in those debenture documents is not so much the first charge but primarily the fact that this is a liability that the receivers have got and the debenture then authorised to sweep money out of the partnership and towards the Commissioner, which they could not do, even with that deed of application and process, they could



not do if it was not a personal liability, because they never got CNI's Nominees' permission to do it. And one of the things that I mention in a series of principles that I came to is that if you've got a charge over the money then there can be no dealing with that charge, once it's fixed, without a breach, and

5 if that's – this is principle 4 – and if the party that receives it, as they didn't – *Bank of New Zealand v Elders Pastoral Ltd* [1992] 1 NZLR 536 (CA); *Elders Pastoral v Bank of New Zealand* [1991] 1 NZLR 385 (PC) and *Re Tamaki Manufacturing Ltd; Stiassny v CIR* (1998) 18 NZTC 13,550 – had knowledge of the existence of that security and the restrictions contained

10 within it, and in our case, while they didn't have notice of the specific restriction, they were registered instruments, so there's notice to the world, and furthermore the second chargeholder had actually written to them telling them that this was money that was charged and was being paid out in breach of that charge, so they had notice.

15

And principle 5 takes us on a little bit further, which says, "Well, you're a Commissioner of Taxation and you receive funds prior to those charges, with notice, then you're effectively receiving them subject to a trust."

20 **WILLIAM YOUNG J:**

But those sort of arguments do – when you put it in that way, you do seem to come up against the policy of section 95. If the complaint is that the money was subject to a trust, which it has priority to the unsecured debt, then that does look like a sort of a mistake that doesn't get much traction in relation to

25 section 95.

**MR SIMPSON:**

Yes, I – while I'm – remember that 95 was replacing this concept of floating charges, where historically with a floating charge you, companies could

30 continue to trade and pay debts and people could take that money without worrying about –

**WILLIAM YOUNG J:**

Yes.

**MR SIMPSON:**

– having to give them back because they were subject to fixed charges, they were floating. And this, when we brought in the PPSA we did away with floating charges so we needed some equivalent mechanism to allow trading to carry on. But I struggle with this concept of why should the credit receiving a section 95 payment be allowed to keep it if they knew before they got it that it was being paid out in breach of a charge. So not just the –

**WILLIAM YOUNG J:**

10 Well, they don't know – you sort of use language loosely – they know that someone thinks that might be the case or someone claims that's the case.

**MR SIMPSON:**

15 Well, that is enough, on the authorities. I mean, it wasn't just, "I've got a charge," it's, "I've got a charge that attaches to that money, you shouldn't be paying it, I'm protesting it and I reserve the right to sue on it."

**WILLIAM YOUNG J:**

20 But isn't this what section 25(2) and section 95(2) are addressed to?

**MR SIMPSON:**

No, 25(2) just is targeted at knowledge of a charge. So if I register a debenture, you might do a search and say, "Well, I'm dealing with Smith & Co and because we trade with them and we incur big debts let's have a look at their credit position," and I get a credit report which says they've got a debenture in favour of the BNZ. Now, the fact that I get paid doesn't mean that I'm on notice and therefore lack good faith just because I know they've registered a debenture over their assets. But if the day before I get paid a large account the BNZ says, "It's crystallised, all the money's charged, we think they're about to pay you, if they do they're paying our money," remember, it's supposed to be held in a separate bank account, so we're saying, "This is our money and you're about to be paid it, so now you're on notice that there's a breach." Now, it may or may not be true, but we're not worried about the situation –

**CHAMBERS J:**

But the interesting thing from the Commissioner's point of view is he did not know what the attitude of the receivers was, nor did he know what the attitude of the Board of the partnership was and, indeed, even now we don't know  
5 what their attitude actually was. All he knows is some third party was disputing it.

**MR SIMPSON:**

But that is the right party, it's the party who has the proprietary interest in the  
10 funds.

**CHAMBERS J:**

Well, he didn't know that.

**MR SIMPSON:**

But, Sir, that's equivalent to saying, "If someone steals my money, we should be interested in the mind of the person who was stealing it when they pay it to a third party. We don't care about the fraudster's mind, we're concerned with the owner's mind and whether you have notice of the owner's interest." If  
20 somebody's defalcating money, their state of mind's irrelevant. And it's the same here. If the receivers are paying without authority, their state of mind does not come into this, it's purely a question of, one, does the second ranking security holder have a second ranking security that's crystallised over this money? Because, if it doesn't, it can write all the protest letters it likes, it's  
25 got no claim. But if it does, the fact that it's put notice on the Commissioner before he gets the money means he now lacks the requisite element of bona fides –

**CHAMBERS J:**

But you didn't have power to control the receivers, other than through the security documents.

**MR SIMPSON:**

But that's control.

**CHAMBERS J:**

Yes but the fact that you were protesting doesn't mean anything. If you didn't like what the receivers were doing, your only power was to remove them and put in new receivers.

5 **MR SIMPSON:**

No we don't have that power, we're second ranking.

**CHAMBERS J:**

Well there you are.

**WILLIAM YOUNG J:**

10 Or you could apply for an injunction.

**MR SIMPSON:**

None of these things work. The only thing that works is notifying the intended recipient of the funds so that you're depriving him of good faith.

**BLANCHARD J:**

15 Mr Simpson what does knowledge of the security interest mean in section 95(2)?

**MR SIMPSON:**

Knowledge that there is a security interest.

**BLANCHARD J:**

20 And its contents?

**MR SIMPSON:**

Yes I think so.

**BLANCHARD J:**

Which might mean a statement of the amount owing.

**MR SIMPSON:**

Yes but that doesn't deprive you of good faith because if, it's hard with the Commissioner because they don't do credit checks, but anyone dealing with the partnership might have undertaken searches and found out that back in  
5 1996 they registered these mortgagees and debentures over their assets but the fact that while the partnership's carrying on business in the normal way and you're receiving payments, doesn't mean anything, it doesn't deprive you of any good faith. No one knows whether the charges are crystallised or whether there's any payment out in breach of those securities. So there's no  
10 reason for bad faith any more than when I pay my power company money and they seem to know that I've got a mortgage over my house, they've got no reason to think there's any breach going on that deprives them of good faith but if my bank writes to the power company a week before I pay my power bill and says, "I've taken money or I'm misappropriating money in breach of a  
15 mortgage. I've sold my house in a deceptive way, forged a discharge of the mortgage, I've got the money and I'm about to pay my power bill" and they put the power company on notice that we own that money and you're being paid it and we're protesting it, then the company does lack good faith.

20 So there's a huge difference between bare knowledge of the existence of a security and knowledge that money is being paid out in breach of that security and that's what we have here and that's where they lacked good faith.

I'm just trying to find where it's useful to go next. There has been some  
25 suggestion in the Commissioner's submissions that our claim is a claim in REM. Can I just – page 25 of my submission, 11.4 I give you reference to the, right down the bottom of the page, to *Lipkin Gorman (a firm) v Karpnale Ltd* [1991] 2 AC 548. That case and *ANZ Banking Group v Westpac*, if I can give you a reference just to note down, *ANZ Banking Group v Westpac* [1988] 164  
30 CLR662 673, both of those cases, the first one was a House of Lords decision, I'll try and find you the page number while we talk. Yes it's page 572 of Lord Gough's judgment in the *Lipkin* case. Both talk about because we can't trace the actual money because the money has gone into the government's coffers that these are personal claims not REM claims.

Another point that I thought we should just touch on is the alternative restitutionary remedy of payments made under compulsion to a revenue authority. So that picks up at 9.3 on page 19 of the submissions. It's based around *Woolwich Equitable Building Society v IRC* [1993] AC 70. There are a couple of cases that I've cited there. At 9.6 I've given you the reference to *Mason v State of New South Wales* (1959) 102 CLR 108 and that also touches on the *Atchison* case in the US and there's one other called *Frank Investments* and if I can give you the citation for that as well.

**WILLIAM YOUNG J:**

10 Some of these cases I guess concern invalid statutes don't they?

**MR SIMPSON:**

Yes.

**WILLIAM YOUNG J:**

15 And is it in relation to invalid statutes that the cases say the statute is its own demand?

**MR SIMPSON:**

Yes.

**WILLIAM YOUNG J:**

20 So are there cases where money's been recovered on the basis of it was demanded *colore officii* without having actually been demanded?

**MR SIMPSON:**

Where the tax act is valid is *intra vires*?

**WILLIAM YOUNG J:**

Yes.

25 **MR SIMPSON:**

I don't think so and there is a point of difference there I see that.

**McGRATH J:**

So *Frank Investments* were you going to give us –

**MR SIMPSON:**

I will yes. It's *Frank Investments* [2012] UK SW 19 and it's paragraphs 75 to  
5 80, it's Lord Walker and Lord Sumption 172 to 174.

Now there are several issues I want to cover off before we finish this  
afternoon. The first is the good consideration defence requires bona fides and  
then to respond to the Commissioner's claim and the Court of Appeal's finding  
10 that all of the appellants fall between stalls, so that in fact, although everybody  
who could be joined plaintiffs to this proceeding have been joined, in fact none  
of us have a restitutionary claim for the various reasons set out in the  
judgment. But just before I take you through those issues, are there – I'm  
conscious I passed over a good deal of material in my submissions and I just  
15 wanted to make sure that I covered everything that Your Honours wanted to  
hear from me on those points.

**WILLIAM YOUNG J:**

Just one point, if the Court were to conclude that the return was made on  
behalf of the partnership and the money was paid by the partnership, is that  
20 end of story or not?

**MR SIMPSON:**

No, no. So we've still got the restitutionary claim.

**WILLIAM YOUNG J:**

It's pretty much undermined though isn't it? Because on this hypothesis the  
25 Commissioner has given good consideration and there was no relevant  
mistake affecting the liability of the partnership to the Commissioner or  
perhaps there was. All right, so you say that even on that hypothesis there's  
still a restitutionary claim?

**MR SIMPSON:**

Yes. Without those two findings we say we side step section 95. So our case is much easier with those two findings, we're in section 95 and then we have to rely on restitution.

5 **CHAMBERS J:**

Restitution or section 25 or a combination?

**MR SIMPSON:**

10 Either, alternative, both options are available and we argue for both. We say, first you could say a section 25 obviously, while you're still talking about 95 and then failing that the restitutionary remedies. But in all cases if it's payment of a partnership liability we really do need to show bad faith at that point. When it's a payment of receiver's liability it's much easier because we don't have a debtor initiated payment but once we cross that threshold, Justice is right, that we've got to deal with that bad faith point to get home.

15

Sorry to go back to those eight principles that I had in page 7 and 8 but were there any of those that I need to specifically address?

20

I would suggest that you have a look at *Ultraframe*. We have put that in that volume 6 that we handed up today which talks about the extinguishment of the equity of redemption although there is a couple of other cases there and I don't think that can really now be that contentious, although it didn't seem to get much favour with our Court of Appeal. Justice Randerson, who actually wrote the judgment for the Court of Appeal, was the judge in *Davison v Westpac* HC Auckland CP 490/98, Randerson J, 5 November 1998, who said that once you've sold an asset the equity's gone. All right...

25

**McGRATH J:**

I think, you know, that it's not easy to answer a question of the kind you've just put to us.

30



**MR SIMPSON:**

I know.

**McGRATH J:**

5 You know, what is it that you need to know more about? But what I'd say –

**MR SIMPSON:**

I was just – if there was something burning that I hadn't covered off then this is a good time.

10

**McGRATH J:**

But you'll have a chance in reply –

**MR SIMPSON:**

15 I will.

**McGRATH J:**

– if the pot's got stirred at all by Mr Goddard, and it may well be.

20 **MR SIMPSON:**

In 9.1 I cover the principles of restitution and I don't intend to take you through those.

I would ask that you have a look at the *Elders Pastoral* decisions, particularly  
25 the Court of Appeal one and the second *Elders Pastoral* case, which does talk about the level of knowledge you need. So that was a case where Elders received money from a farmer who'd given prior security to the BNZ and in that case it was enough that they knew of the existence of the security. That meant they had – because the security had been registered, they had notice  
30 of the restrictions on payment of funds and were held to then have sufficient knowledge of the breach to create that right of claim by the BNZ.

In paragraph 9.12, I refer to the case of *Felt & Textiles of New Zealand Ltd v R Hubrich Ltd (in rec)* [1968] NZLR 716. It's tab 27 in volume 3, and in that

case, it's 718, and Justice Richmond held – this is at line 45 on 718 – “The indebtedness of the respondent to the appellant was incurred at a time when the respondent was truly its own master. The indebtedness of the appellant to the respondent was incurred at a time when the respondent was acting not as  
5 a free agent but for the benefit of a bank which then had a fixed charge on a calculating machine and by the terms of the debenture would acquire an equitable assignment of the purchase price immediately the sale took place. The position of the respondent was analogous to that of a trustee. In substance the appellant was not simply dealing simply with the company but  
10 with the company and the debenture holder.” So that's possibly of some assistance when we continue to take the line that this was not a debtor-initiated payment.

Now in section 10 of my submissions on page 22 we deal with the various  
15 capacities in which the parties are suing. So the first was the receivers and we say they would have a right to recover the money if it was their own payment to satisfy their own debt because they effectively then paid as principals. So they paid thinking they had personally – they were personally liable for GST so they were paying as principals and seeking indemnity or  
20 reimbursement from the charged assets under that debenture provision we talked about. So if they were mistaken, they can recover as principals and they have that right of action. Notwithstanding the fact that they will have to in turn account for that to the debenture holders, they still have that right.

25 If they were suing as trustees or agents for the secured creditors, then we say *Marshall Futures Ltd v Marshall* [1992] 1 NZLR 316 provides sufficient authority for the proposition that even a trustee who's been guilty of trust, breach of trust, can sue for the recovery of the trust property. So they would be entitled to sue in this case for the recovery of the funds to account for them  
30 to the secured creditors.

And the same applied in *Commissioner of State Revenue (Victoria) v Royal Insurance Australia Ltd (1994) 182 CLR 51* where the Chief Justice held that where a tax had been wrongly imposed and passed on by an insurance

company to its policyholders, the company could nonetheless sue for the recovery of the wrongly paid tax as a constructive trustee provided it satisfied the Court that it would account to the policyholders for those recoveries.

- 5 And similarly if the receivers were suing as trustees or agents for the CNIFP then on a similar context they can sue as agents for that recovery.

Then in BNZ and CNI Nominees, can these two secured creditors sue? And the claim here is they didn't make any payment and they didn't make any  
10 mistake. I've set out some texts, references from Birks, Professor Birks, on this, but I did find a couple of cases that were quite helpful and one I wanted to take you to was *Agip (Africa) Ltd v Jackson* [1990] EWCA Civ 2 (21 December 1990). It's also in volume 6. It's under tab 48, a decision of the English Court of Appeal, and in this case the plaintiff oil company held a  
15 US dollar account in Tunisia where it carried on business and it signed payments orders on its bank that were fraudulently altered by its chief accountant. The chief accountant altered the name on it, and as a consequence the Tunisian bank arranged for a British bank to make a payment to a British company, and the funds were then stolen, and they  
20 initially tried to sue the Tunisian bank for recovery of the payment but failed, and then they brought a claim against the directors of the company that had received the funds and sought their recovery, and one of the defences raised by the defendants was, "Well, you're not the right party to sue because in fact the bank that paid us, paid us before it recovered the money from you so  
25 there was a debtor/creditor relationship between us. They were the payer, not you, so you can't sue for the recovery of the money and you didn't make any mistake," and – perhaps 561 of the judgment, under the heading, "Right to Sue". "Agip's claim was for money paid under a mistake of fact. The defendant's contention was that Agip had disclosed no title to sue. The base  
30 of that contention was that the relationship between the banker and the customer was one of debtor and creditor. When the customer paid money into the bank, the ownership of the money passed to the bank. The bank could do what it liked with it. What the bank undertook to do was to credit the amount of the money to the customer's account and to honour his drafts and

to – and – or other proper directions in relation to it. Thus it is said when Banque du Sud,” that’s the oil company’s banker, “paid Baker Oil,” which was the recipient, “it had no authority to do so on behalf of Agip because the order for payment was forged. Further the Banque du Sud paid with its own money.

5 In terms of the mechanism of payment what happened was no different from what would have happened if the order was not forged but genuine. Banque du Sud paid the collecting bank and debited Agip’s account at Banque du Sud. In practical terms, the Banque du Sud paid with Agip’s money in both cases and, indeed, in both cases intended to do so. In both cases the  
10 substance of the matter was that the money standing to the credit of Agip’s account was paid to a third party in accordance with the order or supposed order, as the case may be, of Agip. The direction was to pay from Agip’s account. To say that the payment was that of the Banque du Sud’s own funds, while true as far it goes, only tells half the story. The banker’s  
15 instruction is to pay from the customer’s account. He does so by a payment from his own funds and a corresponding debit. The reality is a payment by the customer, at any rate in a case where the customer has no right to require a re-crediting of his account. Nothing passes in specie, the whole matter is  
20 dealt with by accounting transactions, partly in a paying bank and partly in a clearing process.” And then five lines from the bottom, “Banque de Sud had no intention of paying with its own money. The substance of it’s intention, which it achieved, was to pay with Agip’s money. The order, after all, was an order to pay with Agip’s money. I agree therefore with the view of  
25 Justice Millett that the fact remains the Banque du Sud paid out the plaintiff’s money and not its own.” Now, in this case the receiver’s intention was to use the proceeds of sale of the secured assets to pay the debt, but at all times it was the secured creditors money and, in my submission, they should be entitled to sue for its recovery under a mistake, notwithstanding the fact that they were not the payers.

30

**CHAMBERS J:**

If we are with you, Mr Simpson, how far is it appropriate for us to go in our judgment, given this is the strikeout?

**MR SIMPSON:**

My own view is that prudence would suggest you do the minimum necessary, conscious that this is our most senior Court and what you say will be influential to a trial Judge when this proceeding goes to trial. So, trying to be  
5 even-handed about it, I wonder whether you do the minimum and then it can be dealt with afresh by a Judge who has all of the evidence in front of him, as opposed to being overshadowed by a judgment of the Supreme Court with only very incomplete evidence in, I think, quite a rushed hearing, with some time constraints. So that would be my preference.

10

Issue 10 on page 26 deals with the last group of appellants, which is the two partners suing for the recovery of the monies, and in that sense they would be suing as trustee, so they, so this covers the situation where, to take the two assumptions that Justice Young put to me that the payment was made  
15 out of the partnership's bank account, whether to pay a receiver's liability or a partnership's liability. Because we say, for the reasons I advanced with those eight principles, that the partnership holds the funds as be a trustee, the beneficiary of that trust is the secure creditors, they have the proprietary interest, so this is just an example of the trustee suing for the recovery, just  
20 like it was with the receivers. So, that *Marshall* case is an obvious example, but I think that's pretty settled law.

Now, issue 11 is the requirement for good faith for the defence of good consideration. Are Your Honours familiar with the summary of principles in  
25 Lord Justice Goff's judgment in *Barclays v Simms*, or, is it worth us visiting that? It's in tab 21 in volume 2. I won't take you through all the reasoning, but he has a helpful summary of the principles, on page 695 of the judgment, and I'll just take you through it. So starting from about three lines down after paragraph B, "From this formidable line of authority certain simple principles  
30 can, in my judgment, be deduced. If a person pays money to another under a mistake of fact in our law which causes him to make the payment he is prima facie entitled to recover as a payment, is money paid under a mistake of fact? His claim may, however, fail if, A, the payer intends that the payer shall have the money at all events, whether the fact be true or false or is deemed in

law so to intend, B, that payment is made for good consideration, in particular if the money is paid to discharge and does discharge and did owe to the payee or a principal on whose behalf he is authorised to receive the payment by the payer or by a third party by whom he is authorised to discharge the  
5 debt or, C, the payee has changed his position in good faith or is deemed in law to have done so.”

**CHAMBERS J:**

And why doesn't 2(b) apply here?

10

**MR SIMPSON:**

Well, he then goes on to add some qualifications, but I was just looking at B for a moment, because it occurred to me he does talk there about, “Or a principal on whose behalf he is authorised to receive the payment.”

15

**CHAMBERS J:**

The payment here was made for good consideration, in that it discharged a debt owing to the payee by a third party –

20 **MR SIMPSON:**

Yes.

**CHAMBERS J:**

– by whom he was authorised to discharge the debt.

25

**MR SIMPSON:**

Well, that's the problem we've got here, because if it was a payment by – assuming the receivers aren't liability, because we're not here if it is –

30 **CHAMBERS J:**

Yes, yes.

**MR SIMPSON:**

– if the partnership's liable then, for good consideration to apply it has to be a payment on behalf of a principal – sorry, or a principal on whose behalf he is authorised to receive the payment, or by a third party by whom he's  
5 authorised –

**CHAMBERS J:**

No, owed to the payee, the Commissioner –

10 **MR SIMPSON:**

Yes.

**CHAMBERS J:**

– by a third party, the partnership, by whom he's authorised to discharge the  
15 debt –

**MR SIMPSON:**

And that's the problem, the partnership has no authority.

20 **CHAMBERS J:**

Well, this is where I just – it did have authority.

**MR SIMPSON:**

From whom?

25

**CHAMBERS J:**

Under the terms of the Board of the partnership, had authority to run the partnership.

30 **MR SIMPSON:**

But they have no more authority than the partnership has, and the partnership has given away the freedom to pay unsecured debts from the proceeds of fixed charged assets.

**WILLIAM YOUNG J:**

But isn't this looking at it – I mean, I might be wrong, but isn't the Judge there looking at it from the point of view of the payment as between the payer and the payee and what the payee's view of it is? Is the payee entitled to take this  
5 money, from the point of view of the payee, from the person who's paying it to discharge the debt of a third party? Actually it's not a particularly easy passage.

**MR SIMPSON:**

10 No, it's not.

**BLANCHARD J:**

But I would have thought there can be no doubt that if the partnership is the third party, the partnership has authorised the payment. Maybe it shouldn't  
15 have done –

**CHAMBERS J:**

Maybe it shouldn't have, but it did.

**MR SIMPSON:**

20 Well, no it didn't, the BNZ authorised the payment.

**BLANCHARD J:**

Well, the BNZ –

25

**MR SIMPSON:**

Doesn't have authority – well, it has authority for the –

**BLANCHARD J:**

30 Yes, but the payment was made in this scenario by the receivers, they had the authority of the partnership. After all, they were controlling the partnership.

**MR SIMPSON:**

Yes, but they have no more authority than the partnership does.



**BLANCHARD J:**

Well, that's bringing in external authorities. I don't think – we shouldn't read this like a statute.

5 **MR SIMPSON:**

No.

**BLANCHARD J:**

10 But I don't think Lord Goff, as he became, was thinking about authorities from persons outside the trio of payee, payer and third party.

**MR SIMPSON:**

15 No, I think – but what he's talking about is a payment by a third party – sorry, a payment by the payer that's been authorised by a third party to discharge a debt of that third party, and –

**BLANCHARD J:**

Well, here the trio would be the Commissioner, the receivers and the partnership.

20 **MR SIMPSON:**

Yes, it's just that in those, amongst those trio nobody had authority or the one we're missing is the owner of the funds.

**BLANCHARD J:**

25 Yes that might be so, I accept that perhaps there is an argument that is so but I don't think that's what this is talking about.

**MR SIMPSON:**

30 No and this was a snapshot of where the law had developed and obviously it's continued to develop much further on in this but what we have not yet seen I think in any of the cases that we found and we've found a number, are situations where this particular qualification, which I must admit I hadn't noted before, arises where we have a payment using a party's funds and a payer

somehow has control of those funds, whether that's the CNIFP or the receivers and they're making a payment to discharge the debt of the partnership and there's no authority to do that. It may well be that that's where the law of restitution will continue to develop to block the defence of good consideration because no good consideration can be given if there's no authority to discharge the debt in the first place. Anyway it's a distraction that we should – that's not why I'm here so we'll –

**McGRATH J:**

Mr Simpson I take it that we don't need to go further into the footnotes?

10 **MR SIMPSON:**

Yes we do.

**McGRATH J:**

*Aiken v Short*(1856) 1 H & N 210, 25 LJ Ex 321 (HL) in particular.

**MR SIMPSON:**

15 The main one I was coming to was the exception about good faith.

**McGRATH J:**

Down by H.

**MR SIMPSON:**

This is found on the statement of principle – sorry yes you're right, it's, "However if the payee has given good consideration for the payment, for example, by accepting the payment in discharge of debt owed to him by a third party on whose behalf the payer is authorised to discharge it, the transaction may be set aside and so provide no defence to the claim if the payer's mistake was induced by payee or possibly even where the payee, being aware of the payer's mistake, did not receive the payment in good faith". Now the sort of knowledge that's talked about there is being aware of the payer's mistake. We can't point to knowledge on the Commissioner of the mistake by the receivers about their personal liability. That wouldn't have

been apparent until the NOPA was filed a month later, although I need to talk about that as well.

**BLANCHARD J:**

And if it was a mistake it was one the Commissioner appears to have shared.

5 So it can hardly be aware of a mistake.

**MR SIMPSON:**

Yes. But there are a number of cases which suggest that the requisite knowledge to deprive a payee of good faith needn't be so narrowly confined and it's just simple knowledge of a breach of a security or any sort of relevant  
10 knowledge that would deprive a payee of good faith.

**BLANCHARD J:**

What's your best case on that? Sorry if I'm asking you to go back over something you've already told us.

**MR SIMPSON:**

15 It's probably *Lloyds Bank v Independent* and the *Lipkin* case that I mentioned earlier at tab 34 at page 580. Now I must say that the Commissioner relies on *Aiken v Short* and *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353 but in *Aiken v Short* which was one of the foundational cases that Lord Goff refers to when he was giving his judgment is that good  
20 faith never got discussed in that case so it was only discussion about consideration and that's a trick we have to watch when we look at a number of the authorities. So often the facts don't raise good faith, it's purely an issue of consideration and one's got to watch you don't fall into the trap of thinking that therefore there is no issue about good faith or requisite requirement – no  
25 requirement for bona fides, it's just that in many of these cases it doesn't arise in the facts but those two certainly raise it. There is no settled authority, the point is yet to be resolved.

Now the *Lloyds Bank v Independent Case* [2001] Queens Bench at 110 and  
30 the relevant page are at 130 and 133.

**McGRATH J:**

Have we got that?

**MR SIMPSON:**

5 No and I will make sure it's here tomorrow. Now one of the things I wanted to talk about is how mistaken you need to be. Sorry, someone just handed up to me also the reference to the *Guardian Trust and Executors Co of NZ Ltd v Public Trustee* [1942] NZLR 294 case in paragraph 13.7, so there's two there and look at the footnote 7 and 8 on page 29 of that judgment. That page number can't be right. Oh my footnotes sorry, my footnotes at 7 and 8.

10

Sorry I appreciate I'm bouncing around a bit but I'm trying to cut this short so it's a bit of a scramble. *Deutsche Morgan* is worth just a look at, that's at tab 22 of bundle 2 and this is really to pick up Justice Young's comments about are you mistaken and are you in doubt and at 570, paragraph 25 at the bottom of that page, "There is some authority for the view that a state of doubt does not amount to a mistake" cites *Burrows*, "In the *Kleinwort Benson* case my noble and learned friend Lord Hope said a state of mind is different from that of a mistake, a state of doubt is different from that of a mistake. A person who pays when in doubt takes the risk that he may be wrong and that is so whether the issue is one of fact or one of law. This was a very compressed remark in the course of discussion of other matters and I do not think that Lord Hope could have meant that a state of doubt was actually inconsistent with making a mistake. Contestants in quiz shows may have doubts about the answer, sounds like Haydn but then it may be Mozart but if they then give the wrong answer, they have made a mistake. The real point is whether the person who made the payment took the risk that he might be wrong. If he did then he cannot recover the money. Speaking for myself I think there is a parallel here with a question of whether a common mistake officiates a contract". In fact probably worth also reading paragraph 27 but I won't take that now.

15  
20  
25  
30

**CHAMBERS J:**

Forgive me if I am totally, have missed something on this but is there in fact authority that these other common law concepts, apart from section 25, apply as defences, if you like, for section 95?

**5 MR SIMPSON:**

No. In relation to our particular Act, no not that I'm aware of. I'm not sure the Commissioner's really ever taken issue with that point. I think they've always accepted that equity still has a part to play in section 95 and that there are – a mistake case outside a mistake on priorities would be, my friend can correct  
10 me if I'm wrong, but I think he's accepted that section 95 didn't purport to or intend to exclude the common law and equitable principles relating to recovery of payments, yes if they're not found on security interest.

I see we are 4 o'clock by my watch. What I'd like to do is –

**McGRATH J:**

15 Yes go on.

**MR SIMPSON:**

What I'd like to do is for us to close now and it would give me a chance just to review everything overnight to see whether there's anything significant that I've missed and if not then I'll be finished, that will be it but it has been a real  
20 scramble through.

**McGRATH J:**

No, look I understand that and you've no doubt not helped by your accommodating the Court's desire to reverse the order which we much appreciate. So how are we and perhaps I should – I don't want you to go  
25 away but I should just see how Mr Goddard thinks we at that stage.

**MR GODDARD QC:**

I think Sir that if my learned friend doesn't have any more or only a very brief, you know, moment clarifying one or two things then we will be fine.

**McGRATH J:**

No need to sit at 9.30?

**MR GODDARD QC:**

5 My learned friend is indicating some enthusiasm for that and I suspect that the reality is that he may have one or two things he wants to comment on in the morning, having reviewed matters overnight. If he has from 9.30 to 10, then starting at 10 I am quite confident that I will be able to finish in time for him to have a reasonable reply before three Sir.

10 **MR SIMPSON:**

I think that's prudent Sir. I know in the Court of Appeal we got very pressed.

**McGRATH J:**

We don't want that to happen.

**MR SIMPSON:**

15 Yes and I don't want that, yes.

**McGRATH J:**

Mr Simpson, I'll just ask you this that you've made a couple of suggestions, I think I'm right in saying that you might hand up material. I think the partnership agreement was one and I'm not quite so sure about more details  
20 of the bank account in which the cheque came. Were you offering or – offering anything more about it? Perhaps you just clarify what it is that you had in mind.

**MR SIMPSON:**

I can't give you anything on that.

25 **McGRATH J:**

On the bank account?

**MR SIMPSON:**

No. I know I can lay my hands on a partnership agreement. It may not be available tomorrow but I'll try but I can certainly file it when I return to the office but I'll have someone try and dig it out in the morning.

**5 McGRATH J:**

Thank you. Did you have any objection to that going in Mr Goddard?

**MR GODDARD QC:**

Not at all Sir and the other document that His Honour Justice Blanchard asked about was the tax invoice and similarly if my learned friend is able to put his  
10 hands on a copy of the tax invoice I would be only too happy for the Court to have that.

**McGRATH J:**

Well I think if my colleagues are comfortable.

**CHAMBERS J:**

15 I can't work out why the bank account is so difficult to get. There must have been a form filled out at the time the account was open.

**MR SIMPSON:**

Probably not Sir because I would've thought the receivers would've been setting up accounts like this all the time. They probably just ring the bank and  
20 say, "We need these accounts set up" but we have tried over the last few days and what I have had so far is almost decipherable, so it doesn't mean much to me. So we'll continue to work on it and all it has is the account holder's name which for the relevant account is Central North Island Forest Partnership (Receiver's Account) which doesn't really shed light any further than what we  
25 already know. So I'm still working on that but I doubt whether we'll have anything tomorrow and I suspect it will be something that requires oral evidence, not just simply a form.

**McGRATH J:**

Thank you that's fine. May I take it that Mr Crotty and McKay are not at the moment prompted to make submissions themselves or Mr Baird for that matter.

**5 COURT ADJOURNS: 4.03 PM**



**COURT RESUMES ON FRIDAY 28 SEPTEMBER 2012 AT 09.31 AM****McGRATH J:**

Mr Simpson I'm not going to intrude too much into your half hour. Justice Chambers has a couple of things he'd like to mention and ask you  
5 about and can I just say we'll take the mid-morning break at the normal time.

**CHAMBERS J:**

I thought Mr Simpson if I just put a couple of propositions to you now rather than break into your precious time. I may be totally wrong on what I'm about to put to you but this is why I would like your comment. It seems to me you  
10 have made two propositions among another of others, one the receivers had no realistic alternative but to pay the GST and secondly, that the receivers paid the money under a mistake and that that, coupled with the fact that they had no realistic alternative, should now entitle them to a restitutionary remedy and I'd just like to put two things with regard to those propositions. As to the  
15 first, it does seem that the receivers were faced with a situation under which their lawyers were telling them the IRD was entitled to the GST in priority to the security holders and perhaps IRD was telling them the same and the security holders' lawyers were telling them that they were entitled to the GST. Now in those circumstances it does seem to me there were realistic  
20 alternatives, the receivers could have sought declaratory relieve under section 34 of Receiverships Act and got that relief pretty quickly and just held the money in the meantime and if the High Court had ruled the money was to go the security holders there would've been no problem. If it had ruled that it was to go to Inland Revenue, well they could probably have negotiated with  
25 Inland Revenue about penalties and interest but in any event that would have been a legitimate expense of the receivership which the security holders would have had to bear, after all they're the ones who caused the need for the declaration.

30 So I put that to you as a proposition that there was a realistic alternative and if I may just then go on to that, the second proposition, assuming there was a mistake, aren't they, in any event, barred a restitutionary remedy by the

change in position on IRD's part and that, you'll remember we looked at those propositions in Lord Goff's judgment, we concentrated on two but three is the change of position and there was of course a change of position because the Commissioner released the liability of the partnership and the partners and it doesn't mean that the security holders are therefore left without remedies. It seems to me there were three remedies that the security holders had, one, they could have applied for directions immediately under section 34. Secondly, they could have wound – they could have put the companies into liquidation and if the receivers had done the wrong thing they could have got money back potential under the voidable preference regime, assuming it applies to receivers and thirdly, they of course could sue the receivers for paying out to the wrong creditor. The authority for that proposition, Blanchard paragraph 11.15. So they're not left, therefore, without remedies.

So therefore even if a restitutionary remedy were not available others might be. Now that's a very long proposition but I did think if you could perhaps show me any flaws in what I have put to you.

**MR SIMPSON:**

Okay, in relation the declaratory relief, that could not be obtained in the requisite timeframe and whatever the High Court held, whatever the Court of Appeal, the prospects of that running all the way through the appeal process was pretty high have regard to the amount owing and I'm not even sure it would be suitable for a declaratory judgment because it is very fact specific. I mean we've already talked, even in the last 24 hours, about the additional evidence that would be required about where the funds came from and so on. But you would have to get the IRD and the two secured creditors on board to co-operate to try and get this issue resolved as quickly as possible and we were only scratching the surface of the complexity of this claim. I mean there are a whole range of other issues about securities being fixed and floating and what's fixed and what's floating and so on. So there are other issues to be resolved that I don't believe could've been resolved in a declaratory judgment context but certainly not in any timeframe that would have been acceptable. This GST was due in March of 2004, so the receivers had less than two

months to sort themselves out and even with the best will in the world you could not have got through a declaratory judgment and all appeals in that timeframe and you only need one party to appeal to be the undoing for the receivers, so they couldn't pay in confidence.

5

In relation to the change of position, the Revenue must change its position before – oh sorry going back, I think it is now settled law that the change of position defence also requires bona fides, that's probably more settled than good consideration defence. So it's an absolute requirement that you have no  
10 notice of a superior claim to the funds and the Commissioner knew that before he received the money and you must have changed your position before you have notice. So that defence is simply not available to the Commissioner.

The third point is the other remedies. Well I've talked about applying for  
15 directions. Liquidating the companies, I'll give that a bit more thought and maybe come back to you on that. In terms of suing the receivers, we're talking about \$127 million, that's a very substantial claim to pursue Mr Stiasny and Mr Graham for. I doubt whether they have those funds.

**WILLIAM YOUNG J:**

20 Well they may have indemnities anyway mightn't they?

**MR SIMPSON:**

I doubt whether they have insurance for that and indemnities from the banks will be subject to carve outs. I should also make the point that it's wrong to assume that everybody was speaking with one voice. So the receivers and  
25 the BNZ thought that the GST was payable. It was CNI nominees that had a different view and it was BNZ that appointed the receivers and provided indemnity. So I cannot imagine the BNZ being willing to indemnify the receivers to pay money to CNI nominees and incur this significant GST exposure for the benefit of the second ranking charge holder when BNZ had a  
30 different view.

**CHAMBERS J:**

Okay, thank you very much.

**WILLIAM YOUNG J:**

5 Can I just ask you a question relating to the tax invoice and I'm really just trying to get a feel for the case in the round. It rather looks as though the business is sold as a going concern, just looking at what's been sold here and in reality you're selling growing trees, so it could easily have been categorised as the sale of a going concern in which case there would've been no GST. It would've been zero rated.

10 **MR SIMPSON:**

I'm not sure entirely about this but I think my firm attempted to persuade the receivers that it was a sale as a going concern and be zero rated but – I think that's right isn't it? Yes, but they wouldn't have a bar of that, so it never proceeded on that basis. I can't take it further.

15 **WILLIAM YOUNG J:**

It's just that if it had there wouldn't have been this problem.

**MR SIMPSON:**

20 No, no. There's two points that I wanted to make about the invoice. First, contrary to what I told you yesterday, I see there are freehold properties in there, so this would have been a zero rated sale if we were under the current regime.

**WILLIAM YOUNG J:**

But only as to 2.6 million isn't it?

**MR SIMPSON:**

25 No once you've got a freehold property the entire becomes zero rated.

**WILLIAM YOUNG J:**

Okay.

**MR SIMPSON:**

The second thing is that the invoice is unremarkable, so clearly it is in the name of the Central North Island Forest partnership but, as Mr Goddard will be submitting, the receivers don't have any entitlement to call for the assets of the entity in receivership, had it been in receivership, to be transferred into its name. Those assets remain with the entity in receivership. So it has to be the transferor of the assets and therefore the vendor under the agreement and therefore because it is the vendor it has to be the party that issues the tax invoice. So we have this untidy fiction in the legislation that the principal has to be the vendor, has to issue the tax invoice and collect the GST but section 58 switches off that principal's liability for GST and switches on the liability of its specified agent. So although the principal has to invoice and collect the GST, it's the specified agent that's responsible for paying it.

**WILLIAM YOUNG J:**

15 But is that right?

**MR SIMPSON:**

Yes.

**WILLIAM YOUNG J:**

Isn't this – aren't we getting back in Through the Looking Glass here because if you simply assume it's the partnership that's dealing with it, then this is entirely appropriate, isn't it?

**MR SIMPSON:**

Yes.

**WILLIAM YOUNG J:**

25 As is the return that was filed, as is the payment. If you assume that the receivers were liable as specified agents, one would've expected them to have issued the invoice in their names but using the partnership GST number.

**MR SIMPSON:**

But as between the purchaser and the vendor, the purchaser will be saying, “Well I haven’t got any contract with you Mr Receiver, my contract is with the party that owns these assets and that is the CNIFP. So the CNIFP is my  
5 party, I’m not interested in a tax invoice from a third party” and you say Looking Glass, yes there is this untidy fiction in the GST Act because if we just look at a vanilla company in receivership situations, if we can avoid the complexities of partnership here, when a company is in receivership it is still the company that sells the asset. The receivers are like directors, they are  
10 signing the documents on behalf of the company, they are making the decisions for the company but the company still owns the assets, they’re in it – the title name is the company’s name, the receivers have no right to call for a transfer, therefore the company has to be the vendor and issue the tax invoice and collect the GST.

**15 WILLIAM YOUNG J:**

But that – well let’s have a look at section 58. “The person who becomes a specified agent, is treated as being the registered person carry on the taxable activity incapacitated person”. Wouldn’t – I mean it doesn’t really matter providing the GST is going to be paid. I mean it’s only when there’s a dispute  
20 about it later but if you’re a sort of punctilious specified agent wouldn’t you say, “Well since I’m the person who’s treated as carrying on the taxable activity I better issue the GST invoice in my own name”, using the GST number and referring to the incapacitated person?

**MR SIMPSON:**

25 Yes but this section only alters the relationship between the principal, the receiver and the Commission. It in no way alters the relationship between the company in receivership and the rest of the world.

**WILLIAM YOUNG J:**

Yes it does because the company – the purchaser is only, entitlement to a  
30 GST invoice has to be integrated with the obligation to supply a GST invoice under the Act doesn’t it?

**MR SIMPSON:**

But remember the TIB we looked at yesterday makes it clear that the receiver uses the GST number.

**WILLIAM YOUNG J:**

5 I agree.

**MR SIMPSON:**

But it doesn't make the receiver the vendor in a contract.

**WILLIAM YOUNG J:**

I agree.

10 **MR SIMPSON:**

And the receiver can't pass title to the goods or services or whatever's being sold because they don't have title to them.

**WILLIAM YOUNG J:**

15 Yes I agree but I don't know that really answers the perhaps rather technical issue as to who should issue the GST invoice?

**MR SIMPSON:**

20 Yes. Well what I'm told is that this is standard practice. So receivers of entities in receivership will still, when they sell the assets, enter into the contract in the vendor company's name and issue a GST invoice the vendor company's name.

**WILLIAM YOUNG J:**

And no one worries providing the GST is paid.

**MR SIMPSON:**

Exactly.

25 **WILLIAM YOUNG J:**

It's only –

**MR SIMPSON:**

It is untidy but that's the way the legislation operates and it's how everyone's working and the only thing that resolves the problem is the requirement that the receivers on their appointment issue a notice to the Commissioner telling  
5 him that they are now the specified agent responsible for the GST, so that the Revenue knows who they are to look for and so when a payment comes in with a tax return, they know that while it's using the debtor company's GST number, this is now in fact a receiver's return, a receiver's payment and a receiver's liability.

10 **WILLIAM YOUNG J:**

But that didn't happen here.

**MR SIMPSON:**

Didn't happen here, although, well sorry I don't think it happened. A full notice wasn't issued. I don't know what the notice the Revenue had that the  
15 partnership – well the partnership wasn't in receivership. They got notice about the partners being in receivership, that's right.

So that's probably as far as I can take the tax invoice. The other document we've handed up is the partnership agreement and Your Honour  
20 Justice Blanchard was interested about what this provides in terms of authority required to sell assets and there's just a couple of clauses. If I can take you to page 6, clause 5.1 and 5.2, they set out the establishment of the management board and the membership of that board and each partner is entitled to appoint members proportionally to their interest in the partnership.  
25 And then the key clause is paragraph 8, clause 5.8E, which says, "The following matters require the unanimous approval of board members" and item E is the sale or disposition of –

**BLANCHARD J:**

Sorry I –



**MR SIMPSON:**

Sorry have I lost you?

**McGRATH J:**

What page are you on?

5 **MR SIMPSON:**

Page 8.

**BLANCHARD J:**

The page numbers are a bit hard to see.

**MR SIMPSON:**

10 Sorry, clause 5.8 and it's 5.8E that we're concerned with here.

**CHAMBERS J:**

15 So is it your proposition Mr Simpson, that when Messrs Stiassny and Graham decided to sell to KT were they exercising their power as board members under paragraph 5.8E or were they exercising their powers as receivers of the two companies?

**MR SIMPSON:**

Either as board members or as receivers of the partners not exercising their powers as receivers but exercising the powers of partners to unanimously resolve to sell.

20 **CHAMBERS J:**

Well which is a matter of law of those two?

**MR SIMPSON:**

25 Well I don't know the answer to that and it probably doesn't matter, in that either, take my firm, the entire partnership could unanimously pass a resolution to by a computer system or our management board could do so. Both of them have authority. There are some transactions that can only be approved by the entire partnership and the rest is delegated to a board. Here

were see in the partnership agreement the board does have requisite authority to sell, so they don't need to go to the entire partnership but the receivers have both.

**WILLIAM YOUNG J:**

5 So it doesn't matter.

**MR SIMPSON:**

It doesn't matter.

**WILLIAM YOUNG J:**

Because there's only two.

10 **MR SIMPSON:**

And I don't know which they purported to exercise and maybe they weren't bothered to make a distinction.

Can I – what I wanted to do this morning in the time remaining is –

15 **McGRATH J:**

Well that time remaining has to take account of the fact that we've prompted you. We may be having a short lunch hour but as far as I'm concerned your half might be underway but not by much.

**MR SIMPSON:**

20 Starting now. Okay, all right, I'll be as quick as I can in any event. What I wanted to do was just look at the pleadings for a moment and then give you a summary overview of what our position is, that won't take long and then deal with half a dozen discrete points that seem to be troublesome and again I hope they won't take long. So we should be able to do that in about  
25 20 minutes.

So the pleading, if we can look at the third amended draft pleading, which is tab 4 of volume 1 of the case on appeal and if I can take you to page 4, which

is part of the background, paragraph 3.4 of that pleading, where we set out the four mistake that we say the receivers and the CNIFP mistakenly made.

**WILLIAM YOUNG J:**

5 Sorry you'll have to give me the page again, I took a while to find the right volume.

**MR SIMPSON:**

That's all right, it's page 56, it's tab 4 and why I'm taking you to this paragraph which sets out the mistakes is that you'll see no reference, well the primary reference here is to about liability and entitlement. So the first is the receivers  
10 were personally liable for the GST. Second, GST was a first priority claim on the CNIFP assets and the proceeds of sale of those assets, which ranked ahead of secured creditors and that's because it's a receiver's expense. Third, the receivers and/or the CNIFP were required by law to pay the GST amount in priority to the senior debt and the junior debt and fourth, the  
15 receivers were therefore entitled to be indemnified.

So it's largely about liability and priority. Now yesterday I think I made a concession that one could not seek a restitutionary remedy on a mistake of priorities because it might seriously erode the scope the section 95. I want to  
20 take that back and the reason is that and I did touch on this, in the majority of cases it will make no difference, first because the payer will not have made a mistake, they would, and I use this phrase "ordinary course of business", ordinarily one would be paying an unsecured creditor ahead of secured creditors because the company or the entity is continuing to trade normally  
25 and it's not in trouble and one can't imagine too many situations arising where a debtor would pay an unsecured creditor ahead of a secured creditor when there was an insolvency event that changed the landscape but even when it did, ordinarily good consideration would come back from the recipient of the fund, so again there would be no restitutionary remedy. The only exception  
30 would be in those circumstances where there's an absence of good faith or there's notice of a competing claim being given to the recipient prior to the funds being received which would then deprive him of their rights under

section 95 and section 25 virtually gives them that remedy anyway but it's quite appropriate, in my submission, that section 95 should not remove the entitlement of a prior chargeholder or someone with superior entitlement to recover payments when the recipient of those payments lacks bona fides to keep them anyway. So our mistake about priorities, if that exists and has an ability to recover a payment notwithstanding section 95, does not really rob it of its scope but merely continues to put reasonable boundaries around that section and achieve a just and fair outcome.

10 But furthermore in our case, the reason why any mistake about priorities is not critical to our case is this, if we looked at our situation where there were no secured creditors, so we'll take them out of the equation and instead Mr Stiasny and Mr Graham had looked to their own estate to pay that \$127 million payment, it couldn't be suggested by the Commissioner that there wouldn't be an entitled to recover those monies, if they had paid them under a mistake. Of course they'd be entitled to them back. The relevance of the BNZ and CNI nominee securities is not so much about recovering the money but once it has been recovered, where it goes when it's redistributed. This is about the receivers clawing money that they paid that they shouldn't have paid, when they get it back the securities will determine now what do they do with the funds. So if they've used their own funds, they just keep them, because there are secured creditors they must now give them to somebody else but it's not because there's securities that they've made a mistake, the mistake is that they thought they were personally liable and that they were entitled to use somebody else's money to pay that liability. And that's why we say priorities is not the relevant mistake in this case. I know we've got some references to priorities in this paragraph but if you took those out and left the remaining mistakes about personal liability and entitlement to be indemnified, which is A and D, we would still have a good claim for restitution.

**BLANCHARD J:**

But that's in fact the way you put it yesterday.

**MR SIMPSON:**

I did think I made a concession at some stage and I wanted to clear that up that I've taken that back.

5 The other point I wanted to note and just in passing, the second cause of action is pleaded on the basis that it was a receiver's payment, the third cause of action is on the basis that it's a CNIFP payment. I believe that will be a contentious issue at trial and so we have to cover both off and I wanted to summarise our position in this regard as follows.

**10 WILLIAM YOUNG J:**

Just pause there. If it's a receiver's payment then your challenge process is all you need isn't it?

**MR SIMPSON:**

Yes it is.

**15 WILLIAM YOUNG J:**

So you don't need the other claims, in fact they just complicate it.

**MR SIMPSON:**

Well that's going to be my point and I was coming to that a little later to talk about that first cause action but let's touch on it now. What we say is this, the  
20 Court needs to decide or a Court needs to decide at some stage how does the tax challenge proceeding under the Tax Administration Act link with section 95 rights because if I'm a taxpayer who has a potentially very large tax payment, I'll pay it because I have to, to avoid the penalties and use of money interest and perhaps even an enforcement proceeding by the Commissioner if he  
25 thinks I am liable for the tax and then I have to issue my tax challenge proceeding and I have two months from the filing of my return to then file that tax challenge proceeding. Now it seems to me odd if the statute gives me that two month timeframe and it says this is the only mechanism you can challenge that tax liability, you can't judicially review and you can't do anything  
30 else, they've always been struck out, this is the only mechanism to challenge

that tax liability and then the Commissioner can say well I gazump that with section 95.

**WILLIAM YOUNG J:**

5 The Commissioner's not gazumping it with section 95, the Commissioner is saying to the receivers, "You're not the taxpayer". I don't know if they said that initially but that's what they're now.

**MR SIMPSON:**

No it's not what they're now Sir. They are still saying -

**WILLIAM YOUNG J:**

10 Well I think in terms – they're saying the receivers were liable that as far as the return is concerned and the payment is concerned, the taxpayer was the partnership, the payer was the partnership and the receivers can't challenge that return and the associated deemed assessment because they're a  
15 different group of people. That's what I understand the position to be. The argument to be I should say.

**MR SIMPSON:**

But they're, I mean what we'll hear from Mr Goddard fairly early this morning will be, no the specified agent – receiver's the specified agent, therefore he is the taxpayer that's liable for the tax. So it remains very much a relevant  
20 cause of action in this case. Now if ultimately the Court concludes the receiver never made the payment and it wasn't a payment of the receiver's liability but only of the partnership's liability then I accept the first cause of action falls away because it is only directed at receiver's liability, nobody denies the partnership is liable.

25 **WILLIAM YOUNG J:**

But you don't need to worry about section 95 if you've got a challenge because there's a statutory entitlement to get the money back.

**MR SIMPSON:**

Well that's not the Commissioner's position.

**WILLIAM YOUNG J:**

No, I think the Commissioner would accept that if your challenge succeeds, ie it's held that it's a partnership, that it was a receiver's return, a receiver's payment, the receivers weren't liability, I think the Commissioner would have  
5 to accept the receivers get the money back.

**MR SIMPSON:**

Well it's probably best Mr Goddard answers that when he's on his feet but I'd like to hear that.

10 So in fact Your Honours anticipated the first scenario, so if it's a payment by the receivers using monies in their account, then we don't have a debtor-initiated payment and the first cause of action is the relevant method of challenge.

15 Second scenario, it's a payment to discharge the receiver's liability regardless of who paid it. Then again we say we don't have a debtor-initiated payment because the receiver is not the party liable and so it's not a debtor-initiated payment and in that case the Commissioner had notice of the payment by the receivers because we've got the "in receivership" on the cheque, so they have  
20 some notice, some enquiry that this is a receiver's payment.

Third scenario, it's a payment by the CNIFP to pay a CNIFP liability and then we have a debtor-initiated payment. The fourth proposition is that in all cases if the Commissioner lacks good faith then section 25 provides us with a  
25 counterpoint to section 95.

**WILLIAM YOUNG J:**

What could the Commissioner have done but accept the cheque?

**MR SIMPSON:**

I think he should accept the cheque and retain the cheque but agree that if the  
30 Court makes findings that the receivers are liable, is to hand the cheque back and that's the issue.

**WILLIAM YOUNG J:**

So it's good faith as to not paying the money back as opposed to bad faith in receipt of it?

**MR SIMPSON:**

5 Yes, it's – well an absence of good faith in refusing to return the monies if the receiver is correct that they're not liable for GST and some of the authorities in our bundle, it actually talks about the lack of good faith being retention of the money rather than receipt, yes.

10 In all cases the funds are recoverable as a mistaken payment. So it doesn't matter whether it's a receiver's payment or a partnership payment, it's all recoverable as a mistaken payment but in the case of a payment by the partnership to discharge a partnership liability we have to show notice depriving the Commissioner of the good faith.

15

Now there's now just some loose ends for me to tidy up. The first is dealt with in NOPA point. On page 22 of my submissions, in paragraph 9.12, we respond there to the set-off argument raised by the Commissioner which is this, that even if the payments were made under a mistake, because the

20 Commissioner is entitled to be paid the GST he has a legal right of set-off as between his obligation to return the funds and the obligation owed to him by the partnership to pay the GST and the reason that we refer to *Felt & Textiles of New Zealand Ltd v R Hubrich Ltd* (in rec) and *Guinness Plc v Saunders* [1988] BCLC 43, is that there's no mutuality for set-off. If we accept the

25 principles in my issue 1, that means even if the funds are paid from a bank account belonging to the partnership, the partnership only has bare title to those funds and holds them on trust for the secured creditors and *Felt & Textiles* is an example of a case where a party attempted to set up or establish a set-off to reduce the purchase price that they were paying on the

30 sale of –

**WILLIAM YOUNG J:**

But there the entity had gone into receivership.



**MR SIMPSON:**

Yes.

**WILLIAM YOUNG J:**

As opposed to here where it hasn't.

5 **MR SIMPSON:**

But there's still a lack of mutuality. You can't set-off a debt that you owe to a party – sorry let me get this right, the Commissioner can't set-off an obligation owed to him by the partnership against funds that the partnership is only holding as a trustee for somebody else.

10 **WILLIAM YOUNG J:**

This is sort of the clash between a pre-PPSA sort of analysis of the situation and a post-PPSA analysis isn't it?

**MR SIMPSON:**

I don't think so. I mean there are those cases that talk about, and  
15 commentaries, about how the PPSA has changed some of the rules and it's  
no longer as property based and the law was previously and the  
Commissioner will take us to a case called *Bank of Montreal v Innovation  
Credit Union* [2010] 3 SCR 3, that I'll save my comments for until reply but  
ultimately those comments and I think Your Honour had a dissenting judgment  
20 in *Agnew v Bloodstock*.

**WILLIAM YOUNG J:**

Yes, this really is the transition though.

**MR SIMPSON:**

Yes well this is transition because these transactions were post PPSA,  
25 pre-PPSA, these are old style debentures and mortgages.

**CHAMBERS J:**

Do you have any authority in support of the proposition you've just made  
which is contrary to what Mr Goddard has put in para 7.14 of his submissions,

which again refers to *Bank of Montreal and Gedye , Cuming and Wood, Personal Property Securities Law in New Zealand* pp 341-345.

**MR SIMPSON:**

Well *Bank of Montreal* is an odd case in that it concerned this situation, a  
5 debtor had granted a PPSA style security to one creditor but had not  
perfected it by registration. I then granted an old style security under a  
banking Act to another party and then later perfected the first security by  
registration and the Court there had to decide which had priority, the PPSA  
10 security or the banking security and the Court said that - they made some  
comments on which Mr Goddard places reliance about the PPSA not being an  
old style property security and so on but the key thing in that case is the Court  
ultimately ruled that the PPSA security had priority and they did so in an old  
style property fashion. What they said was that when the debtor came to  
15 grant the second security, all they had left was a charged asset so they could  
only grant security over a charged asset and effectively that's the same as  
saying effectively they charged the equity of redemption and that's a very  
similar analysis to the sort of analysis we're relying on here. So I don't see  
*Montreal* as shedding much light or advancing matters too much.

20 But most of the cases that I have read in the commentaries about the PPSA  
has done and how ownership rights are less relevant now, are really focused  
or directed at retention of title clauses or leases for a year where they're not  
traditionally regarded as securities and where the owner of the property is now  
regarded as a security holder, rather than an owner and I understand that and  
25 have no difficulty with it but I don't see how it is at all relevant to what we have  
here. Surely the PPSA, it certainly doesn't expressly purport to do so and in  
my submission doesn't impliedly attempt to do so, to do away with concepts  
like equity of redemption and all the law we're relying on which says when you  
sell an asset and all that's left is proceeds that are exceeded by the debt, that  
30 the original debtor has no interest in those funds. I mean if the PPSA does  
away with that, then what are the principles that are going to government that  
situation? Why should a debtor have any interest in the proceeds of sale of

an asset that are completely overrun by the amount of the secured debt they owe to a first chargeholder.

**WILLIAM YOUNG J:**

They don't. It's only if there's someone else who intrudes that securities and priorities become important. That's between the debtor and the security holder, the security prevails.

**MR SIMPSON:**

But that's my point. What we have been struggling to persuade any Court to accept so far is that this wasn't the partnership's money.

10 **WILLIAM YOUNG J:**

Well that may or may not be right. I mean it's right from your viewpoint which, I mean your eight principles or whatever don't really engage with the PPSA.

**MR SIMPSON:**

But if –

15 **WILLIAM YOUNG J:**

There was nothing to prevent the partnership creating and perfecting a security over that money ahead of the securities held by the bank and the second security holders. Nothing external, of course it would be a breach of the obligations between the partnership and the security holders.

20 **MR SIMPSON:**

No but what I'm saying is when we are trying to – if we accept as between the security holder and the partnership, it's not the partnership's money because they've got no equity of redemption and there's no surplus for them to attach to. That is relevant when you come to say well is it a debtor-initiated payment because if it's not initiated and it's not a debtor payment because it's not the debtor money, then how can it be a debtor-initiated payment. So I see this as still highly relevant .

**CHAMBERS J:**

Is the short answer to my question though, no there is not yet any authority that –

**MR SIMPSON:**

5 Oh sorry.

**CHAMBERS J:**

- post-PPSA the company merely had a bare legal interest, the equitable interest lying with the security holders which is your basic proposition. Is there any authority that says that so far?

**10 MR SIMPSON:**

No, no there's not. The closest we have is the *Bank of Montreal* in saying that all you have left is a charged asset which is suggestive of this – well consistent with my principle that a security, you take the asset and you're eroding away what belongs to the debtor with granting of securities and he  
15 only has what's left, which is why in that case they concluded that the second security holder did not get priority over the first even the first security had not been perfected because all the debtor had to charge was a charged asset.

**WILLIAM YOUNG J:**

But is the *Bank of Montreal* complicated because there's a federal statute in  
20 there which the Court took the view, as it were, cut across or went over the top of the provincial PPSA legislation?

**MR SIMPSON:**

It sits outside because you've got – no the bank, the Federal Banking Act couldn't cut across. What you had is a PPSA security competing with a  
25 non-PPSA security, so I think it was dealt with outside the context of a PPSA because the Act didn't govern a non-PPSA security.

Sorry, now I did promise to finish quickly, so just let me check my last few points. Just because time's passing, can I just ask Your Honours, in terms of  
30 the notice point, to look at the two judgments in *Elders Pastoral v Bank of*

*New Zealand*, the first is in tab 15, it's the earlier Privy Council decision and then the second one is tab 11, which a subsequent Court of Appeal decision, different case but both of them have very useful passages about what notice is required to be passed to the Commissioner before he lacks the relevant  
5 bona fides to be a bona fide payee for value. This is the point that we were making yesterday. The Commissioner actually has quite an amount of knowledge here. It's got in a cheque that's got, "Receiver's account" written on it but most importantly it knows more than what is in the proviso or the subsection to section 95 that there's an existing security. It does know that  
10 there's an allegation of breach of that security and what the *Elders* cases say is that it was on enough to be on enquiry and if it doesn't make enquiries then the Commissioner cannot hold itself out as a bona fide payee for value and I suppose what I would say is what more could CNI nominees have disclosed to the Commissioner at that stage to put it on notice beyond what it had? It  
15 told it had a security, it told that the funds were subject to the security, it told them that it was in breach of that security, that it was opposed to the payment and that it was reserving right to claim it back. I'm not sure what reasonable additional information CNI nominees could have disclosed to the Commissioner at that stage to put it on notice and certainly in my submission  
20 there was enough to put the Commissioner on enquiry and he made no enquiries and must live with the consequences.

Now two points remain. In the last paragraph of my synopsis on page 30 I refer to the *Rob Mitchell* case to deal with this windfall point which I don't  
25 recall featuring much in the discussion in the Court of Appeal but it is one of the reasons for the Court of Appeal's decision. The *Rob Mitchell* decision has, in paragraph 27, some – a ruling by the Court of Appeal from Justice Blanchard which I think dispels the windfall argument but there are two other cases that if I could just refer you to, they're in the bundle, one is  
30 *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349; *Kleinwort Benson Ltd v Birmingham City Council* [1997] QB 380 which is in tab 33 and the relevant page number is 401 and the other is the *Commissioner of State Revenue v Royal Insurance Australia Ltd* which is tab 31 and if you could look at pages 71, 75 and 78. I think all of those cases provide pretty sound

authority that there is no relevant windfall here that would deprive the appellants of a claim.

5 The last point I want to make was the duress point and Justice Young raised  
with me the absence of, or that the cases concerning the recovery of tax on  
duress grounds have all concerned cases where the tax is found to be  
ultra vires and that is right and so we are pushing the point, this is more novel.  
But the point I wanted to make is that because of the penalty and use of  
10 money interest pressure in this case, the receivers have been put in a  
situation where no other commercial party would ever have the same power  
faced with two competing claims, secured creditors and the Revenue, they  
have paid the Revenue because they had no real choice and that is because  
of the very serious consequences and that, in my submission, does put the  
Commissioner in quite a different standing to any other commercial party and  
15 in those circumstances, in my submission, it is arguable that these duress  
principles still apply in that a payment has been made to someone who is not  
entitled to it and they have gained a priority to which they are not entitled and  
at the correct party's expense, solely because of the existence of these –

**CHAMBERS J:**

20 So section 95 can never be availed of by the Commissioner?

**MR SIMPSON:**

I think that's probably too sweeping.

**CHAMBERS J:**

25 Well wouldn't that follow from yours? Because all the Commissioner has  
done is relied on the statute here. You're the people who decided or the  
receivers are the people who decided they had to pay because of the  
statutory requirements, it therefore would follow from your argument that the  
Commissioner, through no fault of his own but simply because the statute is  
worded as it is, is always subject to a duress claim?

**MR SIMPSON:**

Well the – only in a situation like this and what makes it particularly acute here is the amount. I mean I think you might struggle to argue duress if we're talking about, you know, tens of thousands of dollars because there's not the same duress element there. It's because of the size of the tax that we have a  
5 duress situation in this –

**CHAMBERS J:**

But people are always paying tax which they may dispute but they feel they've got to do it.

10 **MR SIMPSON:**

But it is only going to arise when the taxpayer has uncertainty as to who they are to pay and there are two competing claims. It doesn't apply to any other situation.

**WILLIAM YOUNG J:**

15 And there's the complication here that there are two potential payers, there's either the partnership or the receivers, because in most cases one just pays the tax, NOPAs the return and you get the money back if you're successful.

**MR SIMPSON:**

Yes. I think that's all for me Sir, thank you.

20 **MR GODDARD QC:**

Sir, I have a short road map of my oral submissions and a supplementary bundle, mostly fixing the problems caused by the usual gremlins in our main bundle and adding one or two more things. If I could just hand that up to the Court through Madam Registrar. And I propose to divide my oral submissions  
25 into three parts: first the Commissioner's primary argument in relation to the personal liability of the receivers to pay the GST; second, a response to the issues raised in the Court's minute of 25 September; and third, the submissions on why, even if the receivers are not personally liable for the GST, the amount is unrecoverable, essentially the section 95 PPSA issue.

Turning to the question of the personal liability of the receivers, the Commissioner's argument turns very much on the purpose of the relevant provisions seen in the context of the purpose of the Act, and as this Court observed in *Commerce Commission v Fonterra Co-Operative Group Ltd* 5 [2007] NZSC 36, [2007] 3 NZLR 767, text and purpose are the twin drivers of statutory interpretation and the Interpretation Act does not privilege one over the other. They must always both be taken into account. On this issue, in the Courts below, great emphasis has been placed on text and on the suggestion that the Commissioner's approach strains the text of sections 57 and 58. 10 What I'm going to endeavour to explain in my submissions is the way in which the approach adopted in the Courts below strains the purpose of these provisions beyond breaking point, takes them to places to which they were never meant to go and that, in fact, when one bears carefully in mind both text and purpose, the best interpretation, the one that is truest to the statute read 15 in that way, is the interpretation contended for by the Commissioner.

**McGRATH J:**

You're putting that in quite strong terms, more strongly than I think it's usually put. The text sets some limitations, doesn't it? The words can't have a 20 meaning that the text won't bear.

**MR GODDARD QC:**

No, any more than the text should not be allowed to take one to a place that the policy of the statute simply will not bear. At the end of the day, one can 25 end up with exceptional cases like *Northland Milk* where purpose really does result in a reading in the interstices of the statute that goes well beyond the text. We're not in that space here and I don't need to go to those links in order to justify the interpretation that I'm suggesting. I will provide a textual rationale for giving effect to the policy argument.

30

**McGRATH J:**

That's what I've been looking at.



**MR GODDARD QC:**

I'm not inviting the Court to step outside that familiar and comfortable framework. But I will, for example, be suggesting that this is one of those cases where the familiar introductory words in an interpretation section, unless the context otherwise requires, which we must all have read 10,000 times but usually without requiring them to do much work, actually are needed here in order to make sections 57 and 58 work together in harmony in a way that's sensible. Because the argument focuses very much on the purpose of the legislation, I'm going to very quickly skip through some of the key provisions in the Act, and that's my item one on my road map. Then I'm going to look at two, the position of a receiver of a company, and three, the application of the GST Act to a partnership, and in relation to each of two and three I'm going to pause and ask, "Why?" Why does the Act treat a receiver or other specified agent in that way, and, section 57, the application of the Act to a partnership, why? What is the purpose of section 57? What is it meant to do and, very importantly, what is it not meant to do, because, and this is another important part of my purpose submission, it is just as much part of the purpose of a provision to understand what it is not meant to do as it is to understand what it is meant to do and to give what, in my submission, to anticipate things a little, is a provision introduced into the Act merely for administrative convenience, to simplify the prosaic task of preparing and filing one GST return rather than many where a partnership carried on business. That practical, administrative provision should not be treated as achieving significant shifts in the substantive liability for tax that would arise in the absence of that provision. It doesn't do so in ordinary circumstances and it shouldn't be treated as doing so where a partner becomes incapacitated.

So the legislation, as my learned friend, Mr Simcock said, unfortunately, in order to get a really good run at the legislation, one needs to look either at both volumes that contain extracts or, better still, at a complete version of the Act and it seems that even Your Honour, Justice Chambers', consolidated version isn't quite that because section 15E...

**CHAMBERS J:**

I have – we have –

**MR GODDARD QC:**

5 – is indeed part of the Act, and –

**CHAMBERS J:**

We have found –

10 **MR GODDARD QC:**

I text several sources. I was quite puzzled by that and it is indeed the relevant provision in relation to split returns, but somewhere out there there is a complete Goods and Services Tax Act to be found and if one goes through it the critical provisions are, and I think probably the easiest version to work  
15 from is my authorities, volume 1, and I've mentioned briefly the provisions that aren't in here, beginning in section 2, "Interpretation", and as I said a moment ago, unusually I want to begin by noting that in the normal way subsection 1 on page 7 does indeed begin in this Act, other than section 12, unless the context otherwise requires, and then a set of definitions, and I am going to  
20 come back to the context later on, and then the two definitions that are of particular importance here are firstly over on page 13 the definition of "member". That's an inclusive definition, not an exhaustive one. "Member" includes a partner, a joint venturer, a trustee or a member of an unincorporated body, and I will be suggesting shortly that it also includes a  
25 specified agent acting on behalf of one of those, that it has to be read as it should be read, most naturally as including not only partners, joint venturers, trustees, but also specified agents of those persons who stand in the shoes of those persons for tax liability purposes.

30 **McGRATH J:**

That really is a matter of ordinary meaning, you're saying that, is it, as opposed to a defined meaning?

**MR GODDARD QC:**

Both as a matter of ordinary meaning – yes, as a matter of ordinary meaning and as a matter of purpose, that –

5 **McGRATH J:**

Yes.

**MR GODDARD QC:**

– the provisions don't work unless you read it in that way.

10

**McGRATH J:**

Well, you – yes, you don't even know, need to go that far, I suppose, because if you have an inclusive definition –

15 **MR GODDARD QC:**

Yes.

**McGRATH J:**

– you can just rely on ordinary meaning, because it's not excluding –

20

**MR GODDARD QC:**

The question of –

**McGRATH J:**

25 – other meanings, any other meaning.

**MR GODDARD QC:**

Yes, it doesn't exclude other meanings. One still needs to work out what should still be treated as within the scope of the phrase. That it includes those things doesn't mean that –

30

**McGRATH J:**

Well, there's context in –

**MR GODDARD QC:**

– one has free reign –

**McGRATH J:**

5 Sure.

**MR GODDARD QC:**

– and in order to work out what is sensibly brought within it, I think one can properly, one ought to look to purpose.

10

**McGRATH J:**

Yes.

**CHAMBERS J:**

15 Wouldn't it have to be purpose because the whole notion of a specified agent is an entirely statutory construction for the purpose of this Act?

**MR GODDARD QC:**

I think that's the most natural way of reading it, yes, and of approaching it, and  
20 again it comes back to the point that's been made in so many cases on the interpretation of contracts and statutes recently that text has no meaning divorced from its context and divorced from the purpose for which it's uttered and that legislation is a purpose of utterance every bit as much as ordinary speech. So I think even the dichotomy "text and purpose" actually is a little  
25 bit artificial.

So "member", the one definition I wanted to refer to, and then over on page 15, "registered person", which is defined as meaning a person who is registered or is liable to be registered under this Act, and my submission will  
30 be that "registered person" in section 58 also needs to be read as including a person who would be required to be registered but for the operation of section 57.

Coming over then to, oh and perhaps just worth noting the definition of –

**CHAMBERS J:**

No I don't think registered person needs any amendment does it?

**WILLIAM YOUNG J:**

5 Yes it does because it's the incapacitated person, has to be a registered person.

**MR GODDARD QC:**

10 You can't have a specified agent unless you've got a registered person carrying on a taxable activity into whose shoes the specified agent steps. So I think the best reading of the statute involves both of those. I think you can get there just with "member" but that becomes a little bit - the relationship between the two provisions remains difficult.

**CHAMBERS J:**

But a person who becomes a specified agent under 58.1A doesn't thereby become a registered person.

**15 MR GODDARD QC:**

No.

**CHAMBERS J:**

It's simply that they're treated as a registered person.

**WILLIAM YOUNG J:**

20 An incapacitated person has to be a registered person.

**MR SIMPSON:**

25 Yes His Honour Justice Young is right, if we look at section 58, just jumping ahead there, incapacitated person means a registered person who dies or goes into liquidation and so on and so forth. So there must be a registered person there and that's where the plaintiff appellants say, "Well you never had a registered person. The partners were not registered persons because the only taxable activity – the only business activity was the partnership's activity and section 57 tells us that they must not be registered in respect of it. And

these two readings really go hand in hand and are, in my submission, well within the normal bounds of the interpretative exercise.

5 I was going to just note in passing the definition of “unincorporated body” on page 18, unincorporated body of persons bring a wide range of bodies, partnership, joint venture and the trustees of a trust. Section 5 defines the meaning of the term “supply” and contains in subsection 2 one of the provisions referred to in the Court’s minute, the provision that dovetails with section 17.1 and deals with sale of goods of the first person by a second  
10 person under a power exercisable by that second person.

Now I will come later to the circumstances in which the Commissioner might argue that this applies but that has not been a feature of the argument presented in the context of this strike out application and that’s partly because  
15 of the way the claim has been pleaded by the plaintiffs and an appreciation on the part of the Commissioner that that might turn on factual matters which were not suitable for determination at that stage. It’s possible that that was an unduly conservative approach but I’ll explain why it was adopted in a little while.

20

Also I think perhaps it’s important by way of context for the Commissioner’s approach to note that if the Commissioner is right about the way that sections 57 and 58 operate, then that approach will apply even if just one partner in a partnership becomes incapacitated, goes into receivership or  
25 goes into liquidation. That receiver, that liquidator will be jointly and severally liable for the partnership GST, whereas the possibilities raised in the Court’s minute would be relevant only where the whole partnership was incapacitated. So it’s a much narrower range of situations, an approach of much more limited significance and on this strike out application, the Commissioner’s approach  
30 has been the more general one and if that’s right we just never get to the question of whether in this special case one can also say that this particular partnership is incapacitated, that just doesn’t matter.

The term “taxable activity” is defined in section 6. My learned friend took the Court to that yesterday, it’s not in my bundle but it defines a taxable activity as an activity carried on continuously or regularly by any person involving the supply of goods and services and obviously on the fact of it, where a partnership carries on a taxable activity, each partner is carrying that activity on as a matter of ordinary partnership law and so in the absence of a provision treating the partners as if they were not carrying on a taxable activity, section 6 would apply to each partner in a partnership. Since every partner –

10 **WILLIAM YOUNG J:**

Or the absence of the person, yes, creating a separate legal personality for the unincorporated, yes.

**MR GODDARD QC:**

And because, yes and because –

15 **WILLIAM YOUNG J:**

Unincorporated body.

**MR GODDARD QC:**

- it’s an unincorporated body each partner carries on the business of the partnership through their agents, the other partners and thus the starting point as far as we’ve got in the Act so far when one reads, “Taxable activity means any activity carried on continuously or regularly by any person” one would think oh ho, so when we have an unincorporated body such as a partnership carrying on a taxable activity, that means every partner is carrying it on. We get later to the provisions that modify that for administrative convenience purposes but not, in my submission, for substantive purposes.

Section 8, which my learned friend also took the Court, imposes goods and services tax on supplies and as he noted it imposes the tax on supplies in New Zealand of goods or services by a registered person in the course of

further taxable activity. So that's where the concept of a registered person comes into play.

5 Next relevant provision is section 17, that is in my bundle and that, on page 105, special returns. I could perhaps have noted in passing in section 15E, the meaning of "end of taxable period" which provides for split returns and section 16, "taxable period returns" which imposes the obligation to file returns in respect of each taxable period and as the Court noted yesterday it is, of course, an offence to fail to file a return required under section 16 and the  
10 offence is created by section 143(1)(b) of the Tax Administration Act 1994, which is not in the bundle and if Your Honours were to go and look at that provision, you would see that there's an offence of failing to file a return under any tax law. Tax law included the Inland Revenue Acts as defined, the Inland Revenue Acts include the Goods and Services Tax Act and so if you chase  
15 down that trail of nested definitions, ultimately it turns out that it is indeed as the Court rightly anticipated, an offence to fail to file a return that's due.

**WILLIAM YOUNG J:**

It's not an offence not to pay tax is it?

**MR GODDARD QC:**

20 I think that's right Sir.

**WILLIAM YOUNG J:**

There's just a penalty regime.

**MR GODDARD QC:**

25 There are penalties and use of money interest and other consequences that follow from that but the offence relates to failing to provide information or to file certain returns. Section 143 is the absolute liability offences which include filing of returns. There are certain other offences under the Tax Administration Act which involve mental elements.



So obligation to file returns imposed on registered persons in respect of the activities that they carry on and that's important because as the Court noted yesterday, on the plaintiff's case which is that the partnership was not in receivership, was not incapacitated, it continued to be a registered person, it  
5 continued to have an obligation to file returns and what we see is indeed a return which was filed in pursuance of that obligation. There can be no suggestion that that return was a receiver's return, consistent with their case as pleaded. Their case as pleaded is that the partnership was not in receivership, was not an incapacitated person, remained a registered person.  
10 If that's right –

**WILLIAM YOUNG J:**

But their case is that it should construed as a receiver's return on the basis that that's the only reason they – well I suppose they had to file a return anyway.

15 **MR GODDARD QC:**

Yes Sir they had to file a return and even if they thought they were personally liable because of their responsibilities as receivers of the partner companies, nonetheless the partnership had to file a return and their liability was then triggered. So it still makes no sense to –

20 **CHAMBERS J:**

Where is the return again? It's in volume 2.

**McGRATH J:**

No. Oh yes it is sorry.

**CHAMBERS J:**

25 Sorry?

**McGRATH J:**

No you're right, it is, it's in volume 2.

**CHAMBERS J:**

Volume 2, tab 12.

**MR GODDARD QC:**

Tab 12 Your Honour.

5 **CHAMBERS J:**

On the appellant's argument which is that it was the receivers – that this money belonged to the security holders, how would that document – would the document still have exactly the same figures on it or would it have different figures on it?

10 **MR GODDARD QC:**

Their case doesn't affect how these returns would be prepared or filed because their case is that the partnership was throughout carry on taxable activities as a registered person and was never incapacitated.

**CHAMBERS J:**

15 So it would've filed exactly the same. Would it just have sent a letter saying, "I'm not making payment of the 124 million because someone else's got -", is that how they would've done it?

**MR GODDARD QC:**

20 What they could've done is to file this return which must be a return of the partnership. The partnership was obliged on their case to file the return and it has the partnership's name on it and that's really I think the end of the matter and then if someone else was paying, what one would do would be yes to write a letter saying, "Here is a cheque from Messrs Stiassny and Graham".

**CHAMBERS J:**

25 Well of course on their argument they would've filed a return in exactly this form but it would not have been accompanied by a cheque and presumably some explanation would've been given to the Commissioner as to why it wasn't being paid.

**MR GODDARD QC:**

The Commissioner would've told that the partnership has no money unfortunately and therefore can't pay this but –

**CHAMBERS J:**

5 So that's what an insolvent person does?

**MR GODDARD QC:**

Yes but if they wanted to then protect their position they would write saying, "But we apprehend that we may be personally liable and we are concerned about that, we therefore enclose a cheque to stop any risk of penalties accruing, interest accruing. This is our personal cheque, we actually think that the better view is that we are not liable and we will be taking steps to recover that sum from you".

10

**WILLIAM YOUNG J:**

Can I just explore this in a little bit of detail. Looking at this return probably, I mean it may be just a technicality but strictly speaking if this was a specified person's return wouldn't that be apparent on its face? Wouldn't you say, "We're treated as a registered person, Messrs Stiassny Graham, as specified agents for Central North Island Forest Partnership GST number" whatever it is. If that's what you thought it was.

15

20 **MR GODDARD QC:**

Yes that would, in my submission, make sense but I don't think we need to be too held up by that because it is not part of the primary argument presented by either party before this Court that this should have been a specified agent's return in respect of the partnership.

25 **WILLIAM YOUNG J:**

But it is. What the appellants are saying is, we thought – well they're not necessarily saying it so much with the return.

**MR GODDARD QC:**

No.

**WILLIAM YOUNG J:**

But they're certainly saying it in relation to the payment.

**MR GODDARD QC:**

They can't sensibly say it in relation to the return because it's an integral part  
5 of their case that the partnership was not in receivership. They accept that if  
the partnership was incapacitated –

**WILLIAM YOUNG J:**

Yes but this is the Through the Looking Glass. They say, "We thought that we  
were liable as specified – that we were specified agents and therefore we,  
10 well one or another the return had to be filed but that's why we've paid.

**MR GODDARD QC:**

It's very difficult to see how the receivers could suggest that they were liable  
as specified agents of the partnership in circumstances where they had never  
given the notice required under section 58 in respect of the partnership, as my  
15 learned friend confirmed. The misconception, if there was one, must have  
been that they were liable by virtue of their status as specified agents of each  
company and therefore stood in the shoes of each company for the purposes  
of sections 57(3) and (5).

**WILLIAM YOUNG J:**

20 How could they challenge that view? How could they make a payment but  
reserve their rights in relation to that?

**MR GODDARD QC:**

There are a number of steps they could have taken. All three approaches  
outlined by His Honour Justice Chambers would have been open to them.  
25 The elementary one of writing to the Commissioner to say, "We are in doubt  
about this but in order to prevent interest and penalties accruing, we would be  
minded to pay and litigate later if you will agree to refund the money if we are  
successful", is one that could've been taken or some sort of undertaking of  
that kind.

**BLANCHARD J:**

Given the Commissioner's attitude in the case it sounds likely they wouldn't have got very far with that because the Commissioner could always have indicated that the money would be refunded if it turned out that there was no liability.

**MR GODDARD QC:**

We're in a somewhat counterfactual environment here. An agreement of that kind was entered into in *Simpson*, the other case that was almost the subject of an appeal to this Court but which I understand is now not coming to this Court. There are situations in which such agreements have been entered into and in particular if the step of taking proceedings that Your Honour Justice Chambers, in anticipating of the payment were taken but it was obvious that time was insufficient to obtain the guidance of the Court on that then it is certainly a real possibility that some sort of understanding might have been entered into but that's not what happened. The receivers were of the view that they were personally liable and with a first ranking creditor that considered they were liable, as my learned friend has also confirmed helpfully this morning, proceeded to pay and the question then is what are the consequences of that?

**WILLIAM YOUNG J:**

Just what I'm interested in is how could they have preserved their right of challenge? Presumably they could've filed a return in their own names as specified agents and paid the tax and the NOPA-ed it and that would've been – they would've been able to challenge the assessment of themselves.

**MR GODDARD QC:**

If their concern was liability as specified agent of the partnership, yes they could've done exactly that.

**WILLIAM YOUNG J:**

Having filed the return in the name of the partnership, there was probably no way they could persist with a challenge process because the payment isn't really a – does that give rise to a challenge?

**5 MR GODDARD QC:**

No it doesn't. One can have a challenge either in respect of an assessment or a disputable decision and if we need to get into the finer detail of the disputes process then I might ask Mr Ebersohn to deal with that but broadly speaking the Commissioner could make a – disputable decision includes an interpretation by the Commissioner of a tax law. So if the Commissioner said, "My interpretation is that you are liable" then that would be a disputable decision that could be the subject of a challenge. So for example – yes that's probably as far as we need to take it. So that decision could itself be the subject of a challenge.

**15 WILLIAM YOUNG J:**

But their own disputable decision.

**MR GODDARD QC:**

No.

**WILLIAM YOUNG J:**

20 It's not quite like – it hasn't got an automatic assessment like a return produces.

**MR GODDARD QC:**

It doesn't work the other way. You can't NOPA your own interpretation of the Act, you can only propose an adjustment to return.

**25 WILLIAM YOUNG J:**

Or a decision, disputable decision.

**MR GODDARD QC:**

Yes of your own that you've made. So this return which, on the basis of the plaintiff's theory of the case, because we're asking about, you know, is their first cause of action maintainable? On the plaintiff's theory of the case which  
5 is that the partnership was not in receivership or otherwise incapacitated, the partnership was obliged to file a return, the return correctly assesses the tax payable by the partnership and there is no conceivable basis on which the return could be set aside and that's why the first cause of action is completely misconceived, cannot succeed. The question of whether the Commissioner's  
10 interpretation of the Act saying, "You are liable as specified agent of the companies is wrong" could be the subject of a challenge but that's not the challenge that's been brought.

**WILLIAM YOUNG J:**

But that possibly could be the subject of a straight claim for recovery of money  
15 paid under mistake of fact.

**MR GODDARD QC:**

And that's where we come to the two questions that have been the subject of argument before this Court and the Courts below. First of all, were the receivers in fact liable so there was no mistake, and second, if there was a  
20 mistake of fact, is the money recoverable in circumstances where a debt was due and has been paid? And I'll deal with both of those.

So section 17, "Special Returns". As I mentioned before, it dovetails with 5(2), where goods are deemed to be supplied by a person pursuant to section 5(2),  
25 the person selling the goods, whether or not a registered person, furnishes a special return and pays the amount of tax charged on the supply, and if this matter, if the appeal were to succeed and this matter were to go further, then it is possible that 5(2) and 17(1) would apply. That would, for reasons I'll come to in a moment, depend on some additional factual material.

30

Section 42 provides for recovery of tax. Again, just provides as one would expect. Subsection (1), "Tax payable by any person shall be recoverable as a

debt due to the Crown”, and subsection (2) provides for the preference that GST has in the context of an insolvency, ranking ahead of unsecured creditors but not, as my friends have said quite rightly, secured creditors.

5 Then section 51, which provides for persons making supplies in the course of a taxable activity to be registered, and I’m just not sure – I’m afraid that’s not in the bundle either but it provides that anyone who after the relevant date carries on any taxable activity and is not registered, becomes liable to be registered in certain circumstances, basically where they make supplies in  
10 excess of a particular threshold, and section 51B provides that certain persons are treated as registered even though they have not in fact registered, and Your Honours will remember that, of course, the definition of “registered person” includes both people who are registered and people who are liable to be registered. So 51B is an addition to that, and, for example,  
15 includes in subsection (1)(a), “A person who is not otherwise a registered person but who supplies goods or services, representing that tax is charged on the supply.” If you say you’re charging someone GST, you hold yourself out as a registered person, then you’re treated as a registered person and you’re liable to account for the tax accordingly.

20

And then we come to the two provisions that are the focus of this appeal, sections 57 and 58: 57, concerned with unincorporated bodies, and 58, personal representative, liquidator, receiver, et cetera.

25 It’s, in some ways, easier to begin with section 58 and to look at the position of a receiver of a company, my item two in the road map, and that’s dealt with in paragraphs 6.1 to 6.7 of my written submissions.

We have, looking at section 58, definitions in subsection (1), the “agency  
30 period”, that’s really self-explanatory. “Incapacitated person”, a registered person, so that’s someone who is or is liable to be registered or who is treated as registered under 51B, who dies or goes into liquidation on receivership, or becomes bankrupt or incapacitated. Now, first of all, just dealing with this question of what “incapacitated” means, in my submission it’s not confined to



natural persons, the general term at the end, and that's illustrated by, for example, the possibility of statutory management. It's hard to imagine being more incapacitated than by the appointment of a statutory manager and that applies to both corporations and natural persons.

5

**WILLIAM YOUNG J:**

That's provided for in section 15E, is it, or not, because section 15E is a rather bad-fitting, companion section to this, isn't it?

10 

**MR GODDARD QC:**

Yes.

**WILLIAM YOUNG J:**

Rather awkwardly fitting.

15

**MR GODDARD QC:**

Just trying to find it again.

**WILLIAM YOUNG J:**

20 

Was it amalgamations? I can't recall.

**MR GODDARD QC:**

25 

It refers to amalgamations. I don't think it does refer to statutory management, but I'm just trying to find it. It did strike me, reading it, that it – the list of circumstances in which it applies did not mesh –

**WILLIAM YOUNG J:**

Very well, no.

30 

**MR GODDARD QC:**

– tidily with those, specifically, it talks about, "Natural person dies or is made bankrupt"; "The company goes into liquidation or receivership or ceases to exist on amalgamation". So those are the –

**CHAMBERS J:**

It doesn't deal with other possible methods of incapacity.

**MR GODDARD QC:**

5 Of becoming incapacitated, and yet it's quite clear that there is some general category of incapacity contemplated by section 58 beyond 15E, and conversely, of course, amalgamation is not a source of incapacity, so they don't exactly match in the circumstances with which they are dealing.

10 But statutory –

**McGRATH J:**

You could read it, of course, as saying that the first part of it, liquidation receivership, deals with corporate entities and then it's moving to personal  
15 entities, so it's only dealing with personal incapacities. I'm just now trying to work on context.

**MR GODDARD QC:**

20 Which – I don't think that works in 58 because you begin with "dies", which is personal –

**McGRATH J:**

Yes, sorry.

25 **MR GODDARD QC:**

– and then you flick to corporate –

**McGRATH J:**

Thank you, yes.

30

**MR GODDARD QC:**

– and then you've got personal bankruptcy and then you've got incapacitated. So there's no genus –

**McGRATH J:**

No, thank you, that's fixed that.

**MR GODDARD QC:**

5 And incapacitated, I think, is a general, residual category that could apply to either legal or natural persons and does, in my submission, justify a factual inquiry into the remaining, the continuing capacity, of either a natural person or a legal person.

10 **McGRATH J:**

Sorry, just what meaning would you give the word? Can you just express that in terms of your own mental dictionary?

**MR GODDARD QC:**

15 No longer having the capacity to conduct their own affairs, which meshes neatly –

**CHAMBERS J:**

So –

20

**MR GODDARD QC:**

– with the idea that a specified agent is appointed in their stead to manage those affairs.

25 **CHAMBERS J:**

So statutory management may come within that so far as a company is concerned, or even individuals?

**MR GODDARD QC:**

30 Or a natural person, Your Honour.

**CHAMBERS J:**

So statutory management may be an example, would you agree?

**MR GODDARD QC:**

Yes.

**CHAMBERS J:**

5 And what about Mr Simpson's somebody under, who has somebody appointed in respect of them under the PPPR Act or whatever it's called?

**MR GODDARD QC:**

Absolutely. So that's a natural person who's incapacitated.

10

**CHAMBERS J:**

Would you agree that to be incapacitated for these purposes, given the context of section 58, there would have to be somebody else appointed or entitled by law to act in their stead?

15

**MR GODDARD QC:**

I don't know that it's necessary in order for a person to be incapacitated that there is such an appointee, but the provision –

20

**CHAMBERS J:**

But in the context...

**MR GODDARD QC:**

– cannot operate unless – even in the context, I think “incapacitated” might be a more general term, so one might be incapacitated for some time in terms of legal capacity of a natural person before a specified agent is appointed, but the section operates only during the agency period, which is the date on which someone becomes entitled to act as a specified agent through to when they cease to do so.

30

**CHAMBERS J:**

But the section no doubt envisages that that is going to be a fairly clear-cut assessment that can be made as to –

**MR GODDARD QC:**

The appointment –

**CHAMBERS J:**

5 – when the agency period – when the agent is appointed there must be –

**MR GODDARD QC:**

Yes –

10 **CHAMBERS J:**

– something that –

**MR GODDARD QC:**

– and that’s why I say you don’t need to know with absolute precision when  
15 someone is incapacitated provided that you know with precision when a  
specified agent begins and ceases to act, because that is the timeframe to  
which this section is tied, and one would, I’d have thought, always know that  
with precision.

20 **BLANCHARD J:**

So there really has to be somebody coming in to take control of the situation,  
because otherwise you won’t know. The – Mr Simpson, very fairly I thought,  
raised the spectre for company directors whose companies have become  
insolvent but they haven’t gone into receivership or liquidation and how would  
25 they know that they’ve become liable to register as specified agents.

**MR GODDARD QC:**

And it seems to me that when one reads the definition of specified agent, “A  
person carrying on the taxable activity in a capacity as a personal  
representative, liquidator or receiver, that obviously can't apply to directors or  
30 otherwise as agent for or on behalf or in the stead of an incapacitated person”,  
the appointment, the role must be linked to the incapacity and must involve  
stepping in to administer their affairs, having regard to that lack of capacity.

**BLANCHARD J:**

And do you say that there's been a stepping in here?

**MR GODDARD QC:**

I say that that would require a factual enquiry into what actually happened in  
5 respect of the appointment and any understandings that were reached about  
the extent to which the provisions in the debenture that Your Honour drew  
attention to preventing dealings were relaxed to enable this partnership to – if  
contract can deprive an entity of capacity so too it must be able to restore it to  
some point. Clearly there were some consents or agreements reached which  
10 are not before the Court to enable the partnership to trade on for some years  
notwithstanding the enforcement event that occurred and that's why the  
approach has been taken that we don't yet know enough at this stage of the  
proceeding to form a view on whether the partnership was incapacitated by  
reason of the appointment of receivers and the occurrence of an enforcement  
15 event.

**CHAMBERS J:**

So both suggestions made by the Court in its minute are fact dependant and  
not suitable for adjudication on a strike out?

**MR GODDARD QC:**

20 The question of whether the partnership was an incapacitated person certainly  
falls into that category. I will be suggesting that, and this is my paragraph 9 of  
my road map, that if the Court were to consider that it's arguable that the GST  
was paid by the receivers then that has implications for analysis of who sold  
and who received the proceeds.

25 **CHAMBERS J:**

Well you wait till you get to para 9.

**MR GODDARD QC:**

So that may actually be open here but neither of these arguments has been  
advanced below and that was because of two factors really. First of all an  
30 apprehension that they were to a greater or lesser degree fact dependent and

second, because they both turn on the very special circumstances of this partnership where both partners were in receivership and the receivers were the same persons and the charge was created in respect of each company and the partnership in the same single debenture. There was one charging document which dealt with all of that, so the charge was coextensive, the receivers were the same.

**McGRATH J:**

Well so it's a one off case you're saying, is that what essentially you're saying? I don't quite – if you are, I don't quite understand why that would be a reason for not advancing it.

**MR GODDARD QC:**

Because there is an answer of more general application which resolves this case without needing to enquire into facts and which will provide helpful guidance to the Commissioner and others in a wider range of circumstances, for example where just one partner is incapacitated.

**McGRATH J:**

Well I hear you saying the Commissioner would prefer to have the case resolved in her favour on that basis but that doesn't necessarily answer my question as to why the one off situation isn't advanced as an alternative backstop provision, given there is a bit of money of significance here.

**MR GODDARD QC:**

And it would be a trial, as I say in my note but the two reasons, fact dependant and of less general relevance and focusing more carefully on the fact dependant issue, I can see a way in which one of those might potentially not be fact dependent so much as applicable on one of two scenarios, you know, so the Commissioner says it is obvious from the pleadings and from the documents, background documents before the Court that the payment was made by the partnership. The plaintiff appellants say well no it's at least arguable that it was made by the receivers. It seems to me that on reflection it is open to advance the section 5, section 17 argument on that alternative

hypothesis. So there is a factual issue but nonetheless one can say well whatever factual scenario applies there is a complete legal answer. So that can be presented in that way and that's what I will do in a moment but the question of the partnership being incapacitated, we have to date proceeded  
5 on the basis that that would involve a factual enquiry and therefore isn't suitable for determination now but it certainly would be part of the Commissioner's case were the matter to go further.

**McGRATH J:**

All right, we've got a bit more.

10 **MR GODDARD QC:**

Yes.

**McGRATH J:**

I'll ponder that.

**MR GODDARD QC:**

15 So back in section 58 we've looked at the meaning of incapacitated person, "A registered person who dies goes into liquidation or receivership" and specified agent, "A person who carries on a taxable activity in a capacity as a person or representative" and so on, "Of an incapacitated person or otherwise as agent for or on behalf of or in the stead of an incapacitated person". And then we  
20 have subsection 1A, despite sections 5(2) and 60 and 5(2) of course is the provision in relation to exercise of powers of sale and this trumps that and effectively reverses the presumption that would otherwise operate in 5(2) about who was carrying on the taxable activity, where this section applied. 60 we don't need to worry about it's auctioneers and things like that which are not  
25 relevant here.

So despite section 5(2) a person who becomes a specified agent is treated as being a registered person carrying on the taxable activity of the incapacitated person during the agency period and the incapacitated person is not treated  
30 as carrying on the taxable activity during the period. So this provision which is



broadly can be described I think as a deeming provision, treats the person, the registered person, is tied to the existence of a specified agent who carries on the taxable activity of the incapacitated person. That specified agent is then treated as a registered person and the incapacitated person is not  
5 treated as carrying on the taxable activity. It doesn't say the incapacitated person is not treated as a registered person and that's because one could have an incapacitated person carrying on a number of taxable activities, a charge over only one group of assets associated with one business and an appointment of a receiver in respect of that activity only while others  
10 continued. So you can be incapacitated for some purposes but not for others through a receivership in particular but – so you've got to focus activity by activity on how this works. We don't have that complication here.

And then – and that's what 1B points out really, if a person becomes a  
15 specified agent that's been appointed to carry on part of the incapacitated person's taxable activity only, subsection 1A applies only to the part of the taxable activity that the person's been appointed to carry on. 1C and 1D deal with the time period and overlaps and the ability to claim input credits.

20 Perhaps worth noticing the other context in which section 58 can operate and that's where a mortgagee is in possession of land or other property. So a mortgagee for example takes possession of an office building and is receiving rent in respect of that, what subsection 2 provides is that the Commissioner may deem the mortgagee to be a registered person. So that's not automatic,  
25 unlike subsection 1A where a specified person is appointed but there's a deeming power and then we have the notice provision referred to in subsection 3 that any person who becomes a specified agent or is mortgagee in possession carries on a taxable activity of the mortgagor has to tell the Commissioner and that enables the Commissioner to know who they must  
30 deal with in the case of a specified agent and to turn their minds to whether to exercise the subsection 2 power in the case of a mortgagee in possession.

Just pausing there, the fact that there is a deeming provision, a discretion under subsection 2 does rather suggest that the mere fact that a mortgagee

has taken possession of charged assets does not incapacitate the mortgagor in respect of the taxable activity represented by that asset carried on using that asset and that's an issue that might need to be explored if the mere fact that a charge had become, if fixed that an enforcement event had occurred was relied on as resulting in incapacity, are we in a subsection 1A or subsection 2 situation?

What we do know is that notice was given by the – no that no notice was given by Messrs Stiasny and Graham under subsection 3 in respect of the partnership and the partners did not otherwise carry on taxable activities so there would have been no cause on their theory of the situation to give notice in respect of the partner companies, I think under subsection 3. Oh no sorry on the plaintiff's theory there wouldn't have been on the receivers' understanding there might well have been.

15

So what is the purpose of section 58? Why is it in the Act? And there are two overlapping answers to this question. The first is that a person administering the estate, the business assets of someone carrying on a taxable activity and those who benefit from that administration, cannot take the benefit of ongoing trading or disposal of assets without accepting responsibility for the costs of that ongoing administration, including the GST obligations that results from it and this is really a manifestation of a very old and very well established principle. It's discussed in all the leading texts on receivership and on securities law. There's a helpful discussion in Blanchard & Gedye at paragraph 6.04 referring to *Latham v Greenwich Ferry Co* (1895) 72 LT 790. decision of Mr Justice Kekewich, really a very long time ago, setting out that general principle that you can't come along to take the benefit of a sale or realisation of assets without also accepting that you will bear the burden of the costs of realisation and GST from ongoing trading activities or disposals, once one has embarked on an enforcement process or an administration of an estate process is very much part of the cost of that realisation, part of the cost of the administration of the estate.

30

It arises from the management of the relevant assets for the benefit of the entitled persons and they cannot be heard to say, "Well we want the proceeds but not to shoulder the costs". So that's the first reason and the second reason is that the public purse shouldn't be exposed to the ongoing cost of an  
5 insolvent or otherwise incapacitated person issuing GST invoices, issuing tax invoices which entitle third parties to claim an input credit but with the GST paid by those third parties flowing to the estate or to the secured creditor, not to the public purse, otherwise one ends up with a significant transfer from the revenue from taxpayers to the secured creditor over potentially a very  
10 extended period of time during which the incapacity continues and that would be a perverse and peculiar result.

If we think of this sale, for example Your Honour raised the question of what about this being treated as zero rated for GST, if we think about the response  
15 of the purchasers, if the receivers had seen some attraction in the suggestion of my learned friend's client that this should be a zero rated transaction and then gone to the purchaser and said, "Well we think this should be zero rated for GST" what would the purchasers have been willing to pay for the assets? And the answer is that they would have been willing to pay the GST exclusive  
20 amount that appears in the tax invoice which is the economic cost to them of this transaction.

**WILLIAM YOUNG J:**

I mean I know this is not this case but I still find it hard to see why it wasn't just zero rated, treated as a sale of a going concern?

25 **MR GODDARD QC:**

It would have been neutral so far as the purchasers were concerned because they –

**WILLIAM YOUNG J:**

Well there would've been no GST. So neither way –

**MR GODDARD QC:**

And in a situation where there was a positive desire to take advantage of the argument now advanced by the appellants here one could see why there would be a preference on the part of the vendors or the secured creditors for this approach because it creates the possibility of a 12 and half percent, as it then was, windfall to them.

**WILLIAM YOUNG J:**

But that doesn't seem to have been the purpose though.

**MR GODDARD QC:**

10 That, on the basis of the receivers and the first ranking creditors' understanding of the position, that also can't explain why it was done and so we're left speculating but the potential for deliberate structuring of transactions in the way I've just described, a secured creditor would positively – if the Court were to confirm, this Court were to confirm the interpretation of the Act –

**15 WILLIAM YOUNG J:**

Well it creates an asymmetry that's right for exploitation.

**MR GODDARD QC:**

– it creates an asymmetry which is capable of – absolutely, in a whole raft of ways. One is that it's much more attractive not to identify the sale as a sale of going concern because you immediately add 15% to the amount that flows through to the secured creditor but there are others and as I say in the two bullet points under my 4.1, I'm getting a little ahead of myself – oh not let me come to that later. It creates an asymmetry which would be capable of exploitation in a range of ways and so too does the interpretation of how this provision fits with section 57 adopted by the Courts below. So I'm getting ahead of myself.

So those two concerns, first the basic concern that you can't have the upside of carrying on a taxable activity on behalf of an incapacitated person without accepting the costs and second, that it is not part of the policy of the Act that

for an indefinite and potentially very protracted period, a long receivership or a long incapacity of a natural person, you would have money flowing from the public purse to third parties acquiring assets or services from the incapacitated person's business, claiming input credits but with the GST  
5 flowing elsewhere.

That second reason highlights the differences between the scenario to which section 58 has addressed and the scenario that my learned friend Mr Simcock put some emphasis on of a sale by a mortgagor on the cusp of insolvency.  
10 Let me just touch on why section 58 makes sense despite the accepted fact that if a mortgagor sells the secured creditor can insist on receiving the whole of the proceeds and the mortgagee can insist on receiving the whole of the proceeds and is not liable for the GST. First of all that only becomes an issue, there is only the sort of asymmetry that would otherwise exist systematically in  
15 the section 58 situation where one is on the cusp of insolvency if the mortgagor is insolvent and has been failing to meet obligations then one can expect that they will reasonably promptly be bankrupted or be put into liquidation and section 58 will bite and the risk of asymmetry disappears. Conversely, if they are solvent then it doesn't matter that the secured creditor  
20 says, "Well I must receive the whole of the proceeds from the sale because the mortgagor will have other assets out of which to meet the GST obligation". The issue, the asymmetry that my learned friend says, "Well the Act tolerates this asymmetry" only arises on the cusp of insolvency in a short window beforehand. It's a one-off or very limited risk and importantly it's one which  
25 the registered person has no financial incentive to exploit, to bring about because they don't mind whether they owe the money to the secured creditor or to the Revenue, they're equally unattractive outcomes is perhaps the best way of describing it. That's very different from the situation that would otherwise arise in the context of a receivership or a liquidation or a bankruptcy  
30 where there's the potential for exploitation of an asymmetry with money flowing from the public purse through to a secured creditor to whom the specified agent is answerable. So that's why we have section 58, it addresses those two risks.

Turning back now to section 57, in my submission this is indeed a very prosaic provision included to simplify the administration of the Act, very like the High Court Rules in relation to suing a firm in the firm name, not intended to procure any substantive change to the responsibilities and obligations of partners in a firm and we see that in the way the provision is structured, subsection 2, “Where an unincorporated body that carries on any taxable activity is registered pursuant to this Act the members shall not themselves be registered or allowed to be registered in relation to the carrying on of that taxable activity. The supply of goods or services made in the course of carrying on that taxable activity deemed for the purpose of this Act to be supplied by that body and by not by a member of the body” and then certain inconsequential fleshing out details of that, “D the registration shall be in the name of the body and a change of members has no effect for the purposes of this Act”.

15

But then critically, subsections 3 and 5, “Despite this section” so despite everything that we’ve just read, “A member is jointly and severally liable with other members for all tax payable by the unincorporated body during the taxable periods or part when the person is a member of the body”. So the position that would obtain under this Act in respect of the partners of my learned friend’s firm for example, in the absence of section 57, is that they would all be carrying on the taxable activity of provision of legal services and they would all be liable for the GST and they would all have to be registered and the only bit of that that section 57 is meant to affect is, and they would all have to be registered because it’s silly to have every partner of a large law firm registered in respect of that firm’s activity. It makes much more sense to have one registration in the firm name, it is administratively convenient but just as each partner is liable on the lease, each partner is liable on the firm’s bank account, each partner is liable to their clients in contract and in tort in respect of the services provided, so too each partner is liable to pay the GST and that this is not confined to financial obligations is underscored by subsection 5, subject to subsection 6 which doesn’t apply, which is concerned with bodies that are not partnerships, “Where anything is required to be done pursuant to

this Act by or on behalf of an unincorporated body it shall be the joint and several liability of all the members to do any such thing”.

5 So again the common law position that would obtain that every member of the firm would have to file a GST return is actually preserved. Of course if the partnership does it, through the partnership staff or if any one partner does it then the obligation has been discharged and no one else needs to file more but there are multiple concurrent obligations to file a GST return imposed on each partner in a firm and far from that – so they are multiple obligations to file  
10 the same return because for administrative convenience you only have to have one but everyone is obliged to do this.

So the scheme of section 57 very clearly is not to alter in any way the substantive liabilities that would attach to members of a firm by virtue of the  
15 operation of all the other provisions of the Goods and Services Tax legislation. It is solely to simplify the practical administration of GST obligations in respect of the activity carried on by that unincorporated body by saying, “You need only have one registration and you need only have one return and you need only send one cheque but all of you are responsible for doing all of those  
20 things. All of you are responsible for registering, all of you are responsible for filing returns and all of you are responsible for paying the GST”.

**McGRATH J:**

In addition to the unincorporated body which has its own legal personality in this respect?

25 **MR GODDARD QC:**

Which doesn't have legal personality.

**McGRATH J:**

Only has it for registration purposes?

**MR GODDARD QC:**

Even for registration purposes it doesn't have legal personality, it's just treated as if it had.

**McGRATH J:**

5 Well if it is deemed, does that not mean it is deemed to have legal personality.

**CHAMBERS J:**

Treated. oh sorry that's section 58.

**MR GODDARD QC:**

It's treated as – there is no deeming.

10 **BLANCHARD J:**

The registration is in the name of the body, it's not changing legal personalities.

**MR GODDARD QC:**

15 Yes. Thank Your Honour that's what I was trying to say. There's no deeming of it as being a person. The definition of "person" is the familiar broad definition from so many New Zealand statutes which includes an unincorporated body but again that doesn't mean it's a legal person or treated as being one.

**McGRATH J:**

20 It is a person, is it not, for the purposes of registration?

**MR GODDARD QC:**

Yes because person –

**McGRATH J:**

But that's all.



**MR GODDARD QC:**

That's right. "Person" is defined to include a company, an unincorporated body of persons, a public authority and a local authority.

**McGRATH J:**

- 5 Yes, so you could say, couldn't you, that it has legal personality for the purposes of registration provisions applying to it?

**MR GODDARD QC:**

- 10 I think that is still an expression that has within it the seeds of the capacity to mislead, to take one off on a journey somewhere that one ought not to go. It is better rather I think just to come back subsection 2, paragraphs D and E to which His Honour Justice Blanchard steered me very kindly a moment ago -

**McGRATH J:**

You prefer Justice Blanchard's characterisation.

**MR GODDARD QC:**

- 15 - and say all it says is you can register in the name of the body and that a change of members doesn't affect that registration. So for the purpose of this Act alone you can register in the firm name or for example the Trustees of the Thorndon Chambers Trust and that is a perfectly good registration but there's no deeming of that as it being a separate person and if anything the way in  
20 which subsections 3 and 5 operate rather underscores that there is no meaningful separate personality and separate obligor under this Act.

**McGRATH J:**

- 25 I think what you're really saying is don't get the concept of personality involved just because the definition of a person includes an unincorporated body and it's relevant to registration.

**MR GODDARD QC:**

Yes that is exactly what I'm saying Sir only rather better than I said it. I wonder if the fact that I have had to rely on the Court to answer the last

two questions the Court has asked me is an indication that now is a good time for a cup of coffee.

**COURT ADJOURNS: 11.29 AM**

**COURT RESUMES: 11.47 AM**

5

**MR GODDARD QC:**

Your Honour, I've looked at the text and purpose of each of sections 57 and 58 separately and that brings us to item four on my road map, the question, "What happens if a partner becomes incapacitated? How do we put them  
10 together?" and this is a question of real practical importance that needs to be resolved in a way that is consistent with both the text and the purpose of the provisions. It's quite helpful, I think, to approach this by asking first, "Well, how would section 58 operate in this situation in the absence of section 57, what would it do?" And the answer is in the absence of section 57 each  
15 partner in the firm would be carrying on the relevant taxable activity, each partner would be required to be registered, and so, when a partner became incapacitated, for example, as the result of appointment of a receiver or a liquidator, the section 58 would bite, an agency period would begin in respect of that taxable activity, the receiver, say for simplicity, would, by virtue of  
20 subsection 1(a) be treated as being a registered person carrying on the taxable activity of the partner company during the agency period, and the partner company would not be treated as carrying on the taxable activity. So you would treat all the partners, except that one, as continuing to carry on the activity, and the receiver of the insolvent partner as also carrying on that  
25 activity, and that all makes perfect sense in terms of the policy of section 58 and the policy of the whole of the rest of the Act with one exception, which is administrative inconvenience. It's silly because you would have all the partners and the receiver having to be registered in respect of the same activity, having to file returns, having to pay the GST, and it's that practical  
30 inconvenience that, in my submission, section 57 should be addressing, no less, but also no more. One would expect to see section 57 operate in this context in a way which relieved the receiver of the obligation to register in respect of the firm's activity just as section 57 relieves all other members of

the firm of the obligation to register but which does not affect the substantive liability to tax that would otherwise exist applying ordinary principles of partnership law and the whole of the rest of the Act, but, the appellants say and the Courts below accepted, the text of the provisions compels a different  
5 conclusion and the reason that it is said that that is not the result is that one should read section 57 first, come to the conclusion that each partner is not registered or liable to be registered in respect of the firm's activity, and is treated as not carrying on the taxable activities of the firm, with the result that when we come to apply section 58 the member of the firm is not a registered  
10 person and therefore is not an incapacitated person and the receiver therefore is not a specified agent and does not step into the tax obligation shoes of the member.

So absent incapacity, section 57 has no effect on substantive liabilities. All  
15 the members of the firm remain liable, but, the appellants say and the Court accepted below, where a member of the firm, a partner in a partnership, is incapacitated, there is a substantive effect because section 57 requires us to treat the incapacitated person as the member and the result is, in respect of the firm, that subsections (3) and (5) apply not to the receiver but to the  
20 incapacitated person who is jointly and severally liable with other members for tax payable and is required to do all the things that members, that the unincorporated body, is required to do. It is a little odd to see the Act imposing an obligation on an incapacitated person to do things which the unincorporated body is required to do when, by hypothesis, it lacks the  
25 capacity to do that any more, so subsection (5) simply no longer works. It makes no sense in relation to the incapacitated person. One can say, "Well, it is the incapacitated person, the company, that" –

**WILLIAM YOUNG J:**

30 You need a – it only doesn't work if there is a, I suppose, there's a specified agent and that specified agent, what, has to be carrying out the taxable business on behalf of the or in the stead of.

**MR GODDARD QC:**

Carrying on the taxable activity in the stead of the registered – yes. So that's why, in my submission, one needs to say that the section 58 definitions are effectively read before one turns to apply section 57 and one then applies  
5 section 57 to work out the practical consequences. That's the right way –

**CHAMBERS J:**

The one disconnect that I see of reading the word "member" as you've suggested comes with section 57(3A) where you've got a member who dies.  
10 The member's estate is merely severally liable, not jointly and severally liable, whereas on your reading of subsection (3) the member's estate would have been jointly and severally liable.

**MR GODDARD QC:**

15 Subsection (3A), as I understand it, applies to the liability in respect of tax prior to the point of death, and I think that's –

**CHAMBERS J:**

Oh, I see.  
20

**MR GODDARD QC:**

– apparent from 3B, so I think that's concerned with a different time period.

**CHAMBERS J:**

25 Due – for tax payable. You think that's just dealing with pre-death?

**MR GODDARD QC:**

Yes, it stops the liability at death and then 3B goes on to say and by "death" we actually mean when you tell us you've died, which, if that was a more  
30 general – a provision of more general effect would be very welcome but I think it's confined to tax consequences.

**CHAMBERS J:**

Oh, I see, okay.

**MR GODDARD QC:**

For all other purposes, you remain, I think, expired. I did –

**CHAMBERS J:**

5 It does also, I can see your definition – it is also, as it were, “fairer”, in that sense, on remaining members who are not incapacitated –

**MR GODDARD QC:**

Yes.

10

**CHAMBERS J:**

– of the partnership because they can still look to –

**MR GODDARD QC:**

15 Someone who has a firm claim on the assets under administration to share the load –

**CHAMBERS J:**

Correct. To share the load.

20

**MR GODDARD QC:**

– under this Act. That’s right. So it works in every way in terms – both as between the Commissioner and the specified agent, the receiver or liquidator or personal representative, and as between that person and other members of  
25 the firm. That, the reading of the Court below, produces peculiar results, is, I think, even more apparent if we consider other forms of incapacity, and I didn’t range this widely below but it was really the Court’s minute which prompted me to think harder about incapacity and all the guises in which it comes and how section 58 would work in that situation. Consider, for example, a natural  
30 person who dies. On the Commissioner’s reading of the two provisions, the personal representative – and assuming that death doesn’t dissolve the partnership, which is a result that can be provided for in a partnership agreement and often is, where, for example, the partnership carries on a valuable activity, a property-owning partnership, for example – so it doesn’t

dissolve the partnership, partnership continues, personal representative by virtue of section 58, the Commissioner says, is a specified agent carrying on the taxable activity, is liable but nonetheless the firm continues to have a registration, provide a single tax return, but the personal representative is  
5 liable under subsections (3) and (5) of section 57. It's not easy to understand who would be liable on the appellants' approach. They – in the receivership case they say it's all right, it's the company, but the problem, once you have a natural person who dies, is who can be the member who is jointly and severally liable with the other members? The estate is not a legal person. It  
10 makes no sense to speak of the estate as being the member who is jointly and severally liable with other members. So if the personal representative of the deceased is –

**WILLIAM YOUNG J:**

15 But that is the estate, isn't it? I mean, if someone dies and the partnership continues, the estate must be a partner.

**MR GODDARD QC:**

No, the personal representative holds –  
20

**WILLIAM YOUNG J:**

Oh, well, the personal representative stroke estate.

**BLANCHARD J:**

25 Well, it may dissolve the partnership.

**WILLIAM YOUNG J:**

Yes, of course it may, yes.

30 **MR GODDARD QC:**

It may dissolve the partnership, but if the partnership agreement provides, under section 36, I think it is, of the Partnership Act, that death doesn't dissolve the partnership, and where partnership interests are valuable assets

that are intended to be devolved, that is quite commonly the case, then the position is that the personal representative steps into the shoes of the –

**WILLIAM YOUNG J:**

5 But I'm not sure I really understand why this is a problem. Assume the partnership doesn't pay the GST or – well, let's assume that because that's – and the Commissioner says, "Okay, we want the GST to be paid by the members," why can't the Commissioner just look straight to the extant partner and the estate of the deceased partner?

10

**MR GODDARD QC:**

And the personal representative. The question is who do you sue? You have –

15 **WILLIAM YOUNG J:**

You sue the personal representative.

**MR GODDARD QC:**

20 Yes, but the only reason you can sue the personal representative is because subsection 57, subsection (3), renders them jointly and severally liable and they are a specified agent under section 58.

**CHAMBERS J:**

25 No, no, is that right, though, because on your supposition that the partnership continues, the personal representative of the deceased partner would become the partner and therefore a member?

**WILLIAM YOUNG J:**

30 And in any event is responsible for the debts that are accrued in the course of the executorship.

**MR GODDARD QC:**

Only usually if they've incurred those debts. You've got –

**WILLIAM YOUNG J:**

Yes.

**MR GODDARD QC:**

5 And they may not have taken any active step unless they're treated as a partner in the firm. I didn't want to get into the niceties of the administration of estates here but the fact that personal representatives deceased persons are included within the scope of section 58 suggests that it's not quite as simple as Your Honour was suggesting and it's not the case that the personal representative simply steps, for all purposes, into the shoes of the deceased  
10 without the need for any statutory provision to that effect. The Act proceeds on the basis that the section 58 is needed to achieve that result. It will only do that if, in respect of the firm's activities, if it's read in the way I've suggested.

Liquidation is another example. Let me see if I can do that quickly. Again the  
15 answer that the appellants give as to why there is no problem if the receiver is not caught by a section 57(3) and (5) is never mind the company is. Now that's not a very reassuring answer in circumstances where a company has gone into receivership and is insolvent and it's an answer that's inconsistent with both purposes of section 58 that I identified earlier but there are even  
20 greater practical difficulties where the incapacity is liquidation rather than receivership because in that situation to say, "Oh well it's the company in liquidation to which subsections (3) and (5) apply and you can prove in the liquidation" doesn't work because you can only prove in a liquidation for liabilities incurred before the date of liquidation. That's an elementary  
25 proposition of the law of company liquidation. I provide references in 4.3 of my note to some of the provisions of the Companies Act that provide for that, provide explicitly, for example, that the value of a claim must be ascertained as at the date of liquidation and contain machinery provisions that all assume that those obligations exist at that time and that is because after the date of  
30 liquidation, the only obligations of the company that can be recovered out of its assets, new obligations, are obligations incurred by the liquidator as expenses of the liquidation and so here it seems to me we're faced with a particularly stark choice, either the sections 57(3) and (5) apply to the



liquidator and the liquidator is then entitled and required to pay these GST amounts as expenses of the liquidation in the order of priority specified in the seventh schedule, I think I've got that right, to the Companies Act or there is no method of recovery in respect of the partner company's share of the GST liability under section 57 and consistent with the policy of section 58, it makes perfect sense for the liquidator who is administering all of the insolvent company's assets for the benefit of creditors to be required to meet the costs of realisation of those assets, including the costs of trading on through the partnership where that is the most advantageous way of realising the value of the asset represented by the share in the partnership.

**CHAMBERS J:**

There's one difficulty with your suggested interpretation, the fact that the definition of "specified agent" is restricted to sections 46, 55 and 58.

**MR GODDARD QC:**

No because I don't need specified agent to mean anything other than what it means here. It is the meaning that it carries in subsection 1(a) of this section that is important to my argument. It's the meaning of the term "registered person" that I need the Court to adopt a purpose of approach to in here and there's no – and then the term in section 57 that my argument focuses on is the term "member" not the term "specified agent".

**CHAMBERS J:**

I know, I know. Well doesn't your argument just require – I thought your argument was just 57(3).

**MR GODDARD QC:**

And I think that that is one way of reaching this result, to say simply that "member" which is an inclusive definition, must include the specified agent.

**CHAMBERS J:**

Well that's why I then said the trouble is "specified agent" is not in itself in any way used.

**MR GODDARD QC:**

But it's not a term that's used in 57 either, so I don't –

**BLANCHARD J:**

5 But I may be missing a point here but what if, as is the case here I think, the member is not carrying on itself any taxable activity?

**MR GODDARD QC:**

10 Well that's where again I say that the question of whether it's carrying on a taxable activity has to be looked at apart from section 57. So you apply section 58 before applying section 57. The only reason that each partner here is treated as not carrying on a taxable activity is because of the operation of section 57 for reasons of administrative convenience.

**CHAMBERS J:**

15 Well that's what I was wondering. Can't you put it rather than you read 58 before 57, why can't you just read it? The common law applies. It's what the common law or the Partnership Act applies, is what you look at first, then you look at 57.

**MR GODDARD QC:**

I think – yes I think you can adopt that approach. So you can say well –

**CHAMBERS J:**

20 So do you need 58 at all, is what I'm really asking you? Other than perhaps to some extent the definition of specified agent.

**MR GODDARD QC:**

Yes.

**CHAMBERS J:**

25 But I'm not even sure you really need that because aren't you really saying that the common law would say that if a partnership, if a partner – a partnership continues notwithstanding the incapacity, to use that word loosely for a moment, of a partner.

**MR GODDARD QC:**

Yes.

**CHAMBERS J:**

5 If it continues the general law is, tell me if I'm wrong, that those who are continuing members have liabilities at common law. So if a liquidator continues, the liquidator would have responsibilities, so here if a receiver continues. Now is that argument not right?

**MR GODDARD QC:**

That's not quite right.

10 **CHAMBERS J:**

Not right, okay.

**MR GODDARD QC:**

15 Because the liquidator doesn't succeed to the assets of the company in liquidation in the same way that a person or representative succeeds to the assets of a natural person who dies. The liquidator is the agent of the company. The company remains the member of the firm and the question becomes for what obligations taken on by the firm is the liquidator responsible? Now –

**CHAMBERS J:**

20 So is what you're saying to me that for the purposes of making the liquidator responsible for GST you do definitely need section 58 as well as section 57(3)?

**MR GODDARD QC:**

25 It's certainly not the case that as a matter of common law one would treat a liquidator or a receiver as a member of the firm of which the company in liquidation and receivership is a member. The reason I say that they should be treated as a member for the purposes of this provision is because of the policy of the Act in relation to the incidents of GST liability where a receiver or liquidator is appointed.

**BLANCHARD J:**

The company in liquidation is, I suppose, incapable of incurring debt provable against its assets so the liquidator who is doing it or permitting it to be done would have to be treated as the member of the partnership but that is a  
5 different situation from a receivership perhaps.

**MR GODDARD QC:**

No, I think Your Honour's absolutely right that the issue is starkest in relation to a liquidation and for the reasons Your Honour's outlined it is necessary for  
10 the liquidator to be treated as the member if there is to be any responsibility in respect of that interest in the partnership for GST.

**BLANCHARD J:**

Mmm.  
15

**MR GODDARD QC:**

And there is no reason to treat this as operating differently as between liquidators and receivers. The scheme of the legislation is the same. So the reason I brought liquidation into it was to provide an even more striking  
20 example of why it is necessary to read the Act in this way. The –

**CHAMBERS J:**

What I'm trying to find out, I think, is to see what the implications are of your suggested definition of "member". Now – and I want to test it in situations  
25 other than a receivership, so taking the case of a partner which is a company that goes into liquidation –

**MR GODDARD QC:**

Yes.  
30

**CHAMBERS J:**

– on your definition that you gave us of "member", the liquidator would be liable –

**MR GODDARD QC:**

Yes.

**CHAMBERS J:**

5 – under section 57(3).

**MR GODDARD QC:**

And five.

10 **CHAMBERS J:**

And five. So –

**MR GODDARD QC:**

And would be entitled to recover that as a first claim on the assets of the  
15 company in liquidation –

**CHAMBERS J:**

So what I'm really asking you is –

20 **MR GODDARD QC:**

– as an expense of the liquidation.

**CHAMBERS J:**

– in that situation does section 58, the substantive provisions of section 58,  
25 have any role to play at all on your argument?

**BLANCHARD J:**

You're really looking at the liquidator as liquidator, not as specified agent. It's  
because of the liquidator's unusual position that you would, I would have  
30 thought, imposed liability directly under section 57 on the liquidator, because  
otherwise there's no liability on anyone, which is ridiculous.

**MR GODDARD QC:**

Yes, that's right, but in –

**BLANCHARD J:**

But that is a different situation.

**MR GODDARD QC:**

5 Well, in my submission it's not, because the suggestion that one would impose liability not on the receiver but on the company is equally ridiculous in context in light of the purpose of the Act and in light of the equivalence between receivers and liquidators for all non-partnership obligations.

10 **BLANCHARD J:**

But the company can continue to incur liability in receivership.

**MR GODDARD QC:**

Not without –

15

**BLANCHARD J:**

Debts are provable against the company.

**MR GODDARD QC:**

20 No, it can't without the consent of the receiver where the receiver is appointed in respect of the whole of the business and undertaking which is the norm position. The default position under the Receiverships Act is that all the powers of the board are suspended –

25 **BLANCHARD J:**

Well, I'm not sure about that. It's certainly the case that a company in liquidation can't incur debts provable against itself, at least I think that's the law.

30 **MR GODDARD QC:**

Yes.

**BLANCHARD J:**

But I'm not sure that you can say that – quite the same of a company in receivership. The mere fact that the receiver didn't do something about terminating the partnership would, in any event, be an indication of approval of  
5 the incurring of the ongoing liability which therefore would be provable against the company.

**MR GODDARD QC:**

The – I'm just trying to find the relevant provisions in the Receiverships Act,  
10 but the – and not succeeding on the fly here and now, but the...

**BLANCHARD J:**

Well, there's section 31. That might be what you're grasping for. "Powers of receiver on liquidation".  
15

**MR GODDARD QC:**

That's got – yeah, on liquidation or bankruptcy and they cease to be the agent of the company but operate normally as a principal except with leave, and I was also thinking of 32 which deals with the contracts on which a receiver is  
20 personally liable, and that includes a contract entered into by the receiver in the exercise of any of the receiver's powers, but it is tied to contracts rather than a –

**BLANCHARD J:**

25 Yes, and the partnership is a pre-existing contract. It – the partnership –

**MR GODDARD QC:**

Yes.

30 **BLANCHARD J:**

– contract isn't entered into by the receiver.

**MR GODDARD QC:**

Absolutely. The question of whether new contracts entered into by the partnership should be regarded as entered into by the receiver is a question that I think the answer is probably –

5

**BLANCHARD J:**

But it could be continuing to incur liabilities under an existing partnership obligation.

10 **MR GODDARD QC:**

Well, a pre-receivership or pre-liquidation obligation under which certain liabilities that were contingent become certain accrue is, of course, still a pre-receivership, pre-liquidation obligation and can – and raises no difficulties. The situation of a post-receivership commitment entered into by the partnership and the extent to which the receiver is personally liable is a very interesting and difficult question, I think, but the normal provision in debentures now and general security agreements, following appointment of a receiver, is that the authority of the board to manage the company except for the, you know, for very limited purposes is terminated and the board cannot incur new obligations on behalf of the company. So I think we have a situation that is, for all practical purposes, equivalent to that of the liquidator, and certainly, when we come back to the policy of the legislation, it simply makes no sense to suggest that if an activity is carried on by an incapacitated person as a sole trader then, as soon as there's a specified agent in place, a receiver appointed, and it's perhaps worth bearing in mind that receivers could be appointed in respect of the activity of a natural person as well, not just a company, but as soon as the receiver is appointed they're responsible for the whole of the GST consequences of continuing trading, but if the same business activity is carried on in partnership with someone else, even as to 10%, then on the appellant's approach the receiver escapes all liability, and that's my example, the second bullet point in my 4.1. Consider the situation where a company has a business perhaps operating a coffee cart in Wellington. A receiver is appointed and carries on the business for six months. For those first six months it's quite clear that section 58 would



apply and the receiver would be personally liable for all GST that falls due in respect of the trading during that six-month period. Suppose then that the business – that the receiver finds someone who is prepared to take on a 25% share in the business. They want to sell all of it but they can only find  
5 someone who's willing to take on 25% at first, perhaps the barista who can afford that much and no more, and so they say, "Right, let's establish a partnership. We'll retain 75%, which we'll still try to sell to someone else. You can take 25%." The business is sold to that partnership in which the company has a 75% interest. On the appellant's approach, the receiver would have no  
10 further obligations in respect of GST liabilities of that business.

**WILLIAM YOUNG J:**

But the partnership would.

15 **MR GODDARD QC:**

The partnership would but if the –

**WILLIAM YOUNG J:**

– and one could expect the 25% partner to ensure that the GST was paid.

20

**MR GODDARD QC:**

But the whole point of section 57(3) and (5) is that you can look to all the partners to discharge the GST obligation and that would be defeated by a transaction of this kind because you would find yourself looking at the  
25 company, which is an insolvent shell, not the receiver, where the day before the sale you could look to the receiver, and my submission is that there's absolutely no coherent policy rationale for that shift in responsibility. No one has yet identified any sensible reason why a transaction of this kind, under which a 25% interest passes to someone else in exactly the same business,  
30 should magically mean that the receiver has a zero percent responsibility for ongoing GST, even though they retain the 75% share in the business through the partnership and if it's successful will obtain the fruits of that for their secured creditor.

So it makes absolutely no sense. It produces a wide range of perverse and exploitable anomalies and one can get there in a number of ways, most simply by saying “member” must be read as meaning the class of persons who otherwise bear responsibility for the taxable activities of the member  
5 company or individual member. You have to read “member” as including specified agents of the member for this to work.

I have also suggested a reading of section 58 in which applies section 58, putting to one side section 57 and then apply section 57 in order to get to the  
10 same result through that path. There are two paths to this outcome which is the only sensible outcome and to say that this involves a measure of straining, I think was the word that the Court of Appeal used, of the text is not a conclusive objection to this approach because the Court’s approach doesn’t just strain, it defeats, it breaks the purpose and the best way of reconciling  
15 text and purpose, giving effect to both, is to read the text in the way I’ve suggested.

**WILLIAM YOUNG J:**

There are other ways perhaps that are sensible from your point of view outcome could be achieved that wouldn't necessarily require the language to  
20 be wrenched at all. Might it be possible to say well this is an arrangement that has the effect of tax avoidance or a tax advantage ie by not rating this as a going concern and thus creating an asymmetry, irrespective of the actual intention was? Wouldn't that perhaps give rise to a tax liability?

**MR GODDARD QC:**

25 That is in relation to the scenario I described a moment ago a post-receivership transaction.

**WILLIAM YOUNG J:**

Yes and I’m really thinking about this one.

**MR GODDARD QC:**

Well in relation to this one it's a little difficult to see how the partnership could be described as having the purpose or effect of avoiding tax in circumstances where it produced no tax effects at all when entered into.

**5 WILLIAM YOUNG J:**

Yes well it did because it generated, I'm not sure how broad the arrangement is, but it generated an input.

**MR GODDARD QC:**

Oh the sale Your Honour means?

**10 WILLIAM YOUNG J:**

Yes the sale. I mean to – in a situation where one would have thought that zero rating was a legitimate option, to structure an arrangement so that it produces on the one hand \$127 million GST input credit tax – input tax credit but no liability on the other might generate issues irrespective of what the intention was, actual intention was of the parties.

**MR GODDARD QC:**

There are certainly situations in which transactions designed to exploit the anomalies that I've just identified would I think be avoidance arrangements.

**WILLIAM YOUNG J:**

**20** But say they just do exploit the anomaly even though not designed to do so.

**MR GODDARD QC:**

**25** That would, yes it would depend on the tax effects of the transaction and whether one could describe that as more than incidental and I suspect that often the incidental argument would be a barrier, it would be a perfectly ordinary commercial transaction which just did produce that effect. So I think, I don't want to obviously preclude the possibility of an argument that some transactions of this kind would be tax avoidance for the purpose of this legislation but I do think that it's not going to be an answer in every case because it would mean that many plain vanilla commercial transactions

entered into for perfectly good commercial reasons and where this tax result was simply incidental to the pursuit of that would nonetheless produce peculiar results very favourable to a secured creditor and very disfavourable to the public purse.

5 **McGRATH J:**

And I am right in saying, aren't I, there is no anti-avoidance provision in this legislation?

**WILLIAM YOUNG J:**

I suggest there is.

10 **MR GODDARD QC:**

There is in the GST legislation, again *Harrow* case for example was concerned with those provisions.

**McGRATH J:**

That's right.

15 **BLANCHARD J:**

But that's not being raised anyway.

**MR GODDARD QC:**

Not in this case no.

**WILLIAM YOUNG J:**

20 A deliberate exploitation of asymmetry is likely to give rise to a 76 issue.

**MR GODDARD QC:**

Yes.

**WILLIAM YOUNG J:**

25 And it might not have to be deliberate it may just be one that occurs because purpose is objective.

**MR GODDARD QC:**

Yes on the other hand an interpretation of the Act which removes the anomaly, removes the potential for that sort of exploitation and means that one doesn't have to go through a tax avoidance analysis in every case in order to produce the sensible result in every case, is in my submission a much better approach.

**WILLIAM YOUNG J:**

Right.

**MR GODDARD QC:**

I am going to deal very briefly with the issues raised in the Court's minute of 25 September. I wanted to begin by emphasising that the allegations referred to in my paragraph 6, that the partner companies were in receivership, that the partnership was not, the assets were owned and sold by the partnership and it was the partnership that received the proceeds accepted for the purposes of the strike out application but may be an issue if the matter goes to trial. There could well be an issue about the effect of the appointment instruments against the backdrop of the debenture which creates, without distinguishing between the companies and the partnership, a charge over all assets of the companies, including partnership assets and so there are a range of issues that could arise about whether in fact the partnership was in receivership and also about – so various things that would need to be explored.

But the Commissioner has been content to proceed on this application below on the basis that those allegations are to be treated as correct but if the partnership sold the assets and received the proceeds, however, it must also have paid the GST out of those proceeds. You can't have one without the other and that if the partnership paid the GST out the proceeds, then it can't get back the money which it paid in discharge of its admitted debt.

30

Consistent with that argument and an acceptance for the purpose of the strike out application that it was the partnership that sold the assets, the

Commissioner's proceeded on the basis that sections 5(2) and 17(1) don't apply, that the sale was by the partners, not by the receivers in the exercise of a power of sale but if the Court considers that it's arguable and as the plaintiff suggests the GST was paid by the receivers, then on that approach the  
5 receivers must have sold the assets and received the proceeds, otherwise how could they pay them away and perhaps that was done in the exercise of a power of sale under the charge delegated by the security holder or otherwise. In any event sections 5(2) and 17(1) would apply and the receivers would be personally liable for the GST by virtue of these provisions. That's a  
10 possibility. It's not the Commissioner's preferred approach but it is an argument that's available.

And then the question of whether otherwise, apart from being in receivership, the CNIFP was an incapacitated person, if the matter goes further the  
15 Commissioner might argue that the combination of enforcement event and the effective control by the receivers of the partnership was such that it was an incapacitated person and the receivers were specified agents of the partnership but that I think would require a factual enquiry into the extent, to the manner and extent to which they took control.

20

Coming on then to recovery of the GST payment, the Court asked my learned friend, Mr Simpson, yesterday, when we're applying section 95, whose mind do we look at? Whose state of mind do we consider when asking whether a payment is a debtor initiated payment? And that's I think a very important  
25 question and the answer must be that the application of section 95 PPSA which is in volume 1 of my materials under tab 2 on page 75, must be assessed by reference to the facts as they appear to the payee. In my written submissions I refer to the texts and the Canadian cases that discuss the purpose of section 95 and in particular the facilitation of ordinary commerce,  
30 the ability of a creditor, an unsecured creditor, who is paid by a debtor to take a debtor initiated payment and treat it as a firm receipt, a receipt that's not liable to be disturbed later by reference to a prior ranking security interest, in the interests of facilitating commerce. And that policy goal would be defeated if facts relating to the payment that were not apparent to the payee

determined whether or not the payment was a debtor-initiated payment, because, I mean, you couldn't know. The whole point of section 95 is to give certainty to the recipient of such payments and to ensure that they can proceed thereafter on the basis that the debt has been satisfied and that the money is theirs to use in their business.

If it was possible to come along and say, "Oh, no, when we made this payment we thought we were wearing our green hat, not our red hat", and that has certain consequences, that would mean that section 95 could not operate to deliver the certainty which is its core rationale.

So in my submission, this is my 11.1, for section 95 purposes the question of who makes the payment has to be assessed by reference to the facts as they appear to the payee, and when we look at the facts known to the Commissioner as recipient of this payment, what we have is a GST return filed by the partnership in its name, using its number, and necessarily so. Then a payment by cheque, and if we look at that cheque in volume 2 of the case on appeal under tab 13, what it says is for Central North Island Forestry Partnership and then in brackets, "Receiver's account". On its face it's a payment for the Central North Island Forestry Partnership. The rider in brackets, "Receiver's account", can't mean anything more than a similar tab in relation to a company which simply tells you that the company is under the control of the receivers but nonetheless it is the company whose account it is and that is making the payment.

If David Goddard Coffee Limited in receivership is in receivership and the receivers open a bank account, they do so as agents of the company. It's the company's account. You might well receive a cheque that read, "David Goddard Coffee Limited (Receiver's Account)". That would not be an indication that the cheque, that the account, was an account of the receivers. It would be an indication that it was an account of the company but administered by the receivers.

**CHAMBERS J:**

Why under your 11.1 in section 95 does it make – why does it have to be as they appear to the payee? Why isn't it just a matter of fact as to whether a debt has been paid and whether it's debtor-initiated, et cetera?

5

**MR GODDARD QC:**

Because of the purpose of section 95 which is to enable the payee to receive with confidence a payment and not worry about security interests that might come along and trump it later. If whether something was a debtor-initiated payment to which section 95 applied turned on facts not apparent to the payee, section 95 couldn't work. You could find yourself sand-bagged later as the result of something you didn't know.

10

**WILLIAM YOUNG J:**

Well, it's externalities really, isn't it? It's – you're looking at the externalities, you know, the –

15

**MR GODDARD QC:**

Yes.

20

**WILLIAM YOUNG J:**

– about what's in the cog, what's in the public area between the two parties. You're not particularly – you would say you're not particularly interested in the internal thought processes of the receivers, the BNZ and the –

25

**CHAMBERS J:**

I can well understand –

**MR GODDARD QC:**

Yes.

30

**CHAMBERS J:**

– that. I'm just raising why one would also be remotely interested in the internal thought processes of the creditor.



**MR GODDARD QC:**

Oh, no, that's not what I was meaning to suggest, Your Honour. It's not the thought process of the creditor. It's the external –

5 **BLANCHARD J:**

As they objectively appear.

**MR GODDARD QC:**

Yes, thank you, Sir.

10

**CHAMBERS J:**

Yes, well, no, I fully accept that.

**MR GODDARD QC:**

15 Yes. It's as it objectively appears to the payee.

**CHAMBERS J:**

Yes.

20 **MR GODDARD QC:**

Yes. That must be how –

**BLANCHARD J:**

Well, why point to the payee, just as they objectively appear?

25

**McGRATH J:**

Keep it objective. Don't introduce the subjective element.

**MR GODDARD QC:**

30 Because of the fact that there may be documents passing between the payer and third parties which –

**BLANCHARD J:**

Ah, well...

**MR GODDARD QC:**

– suggest what the payer was hoping to achieve by the transaction. So I want to exclude –

5 **BLANCHARD J:**

Well, you'd be looking at what the payee must objectively have understood.

**MR GODDARD QC:**

Yes, I'm very happy to put it in those terms.

10

**WILLIAM YOUNG J:**

Just what – it's pretty limited. It may include the GST invoice because the Commissioner may have required that before paying out the input tax credit.

15 **MR GODDARD QC:**

Although there's no allegation to that effect.

**WILLIAM YOUNG J:**

Yes, but, I mean, it – it's a document that doesn't have to go to the  
20 Commissioner unless requested –

**MR GODDARD QC:**

Normally, no.

25 **WILLIAM YOUNG J:**

– but when you say, "Kindly give me \$127 million", you may have to buttress that. Secondly – so that's – it's possible. I mean, that's a possible thing that may be in the common area; secondly, there's the return; thirdly, there's the cheque; and that's all.

30

**CHAMBERS J:**

That's all you need.

**WILLIAM YOUNG J:**

Plus, I suppose, you've got the protests.

**MR GODDARD QC:**

5 Yes, but the protests don't suggest that the payment is made by anyone other than the partnership. They simply say, "You're going to get some money and we have a prior claim to it", but that's exactly what the unsecured creditor who receives the payment is entitled to disregard by virtue of section 95, subsection (2).

10

**CHAMBERS J:**

You didn't get a protest from the partnership or the receivers, did you?

**MR GODDARD QC:**

15 No.

**CHAMBERS J:**

So –

20 **MR GODDARD QC:**

There was no indication from them until the NOPA came after that stage –

**CHAMBERS J:**

Yes.

25

**MR GODDARD QC:**

– by which stage payment had been received and the debt of the partnership had been satisfied and therefore released, consideration had been given, and to say that notice of a competing security interest and a claim by the security  
30 holders that they have a prior ranking claim to the money means that section 95 doesn't apply is just impossible to reconcile with subsection (2) which says subsection (1) applies whether or not the creditor had knowledge of the security interest at the time of the payment. It may be the security interest in the money which otherwise would rank ahead of the payment. You

can simply disregard the existence of prior security interests, and if the PPSA –

**CHAMBERS J:**

5 And it seems to me you also had the comfort, insofar as it's relevant at all, that you had no indication that the partnership or the receivers, or its board of management, in any way was disputing your entitlement.

**MR GODDARD QC:**

10 Yes.

**CHAMBERS J:**

I mean, this was a third party –

15 **MR GODDARD QC:**

Yes.

**CHAMBERS J:**

– out there who was saying, “It's really mine.”

20

**MR GODDARD QC:**

Yes, exactly. So on the objectively apparent indicia –

**CHAMBERS J:**

25 That's why I can't quite understand why the receivers, to protect themselves, didn't, if they were at all concerned, didn't seek the protection of getting a Court direction, but...

**MR GODDARD QC:**

30 And that's – I mean, it's an interesting question but not one that –

**CHAMBERS J:**

No.

**MR GODDARD QC:**

– needs to trouble the Court because it didn't happen. So as I say in 11, there's just no reason from the Commissioner's perspective, looking at the objectively apparent facts, any reason to think there's anything other than a payment by the CNIFP, although admittedly one that security holders were vociferously asserting should not have been made, and if it's appropriate to look further then that conclusion is supported by, in terms of matters before the Court, the pleading as to who owned and sold the assets and received the proceeds, the agreement, the deed of application of sale proceeds, and I won't go to it but the reference is case 2, tab 18, pages 244 and 247, which define the NZ CNIFP account as an account of the CNIFP at Auckland.

**CHAMBERS J:**

What I'm still not clear on from your argument is this. What are the exceptions to section 95 conferring statutory priority on the debtor-initiated payment?

**MR GODDARD QC:**

Any claim in relation to the payment that is not founded on the priority of the security holder. So if, for example, a payment –

**CHAMBERS J:**

So mistake would be an exception?

**MR GODDARD QC:**

Mistake about whether an obligation existed at all. A claim under the Fair Trading Act in relation to the circumstances in which the payment obligation was made wouldn't be affected in any way by section 95.

**WILLIAM YOUNG J:**

Say the receivers made the payment and they made the payment because they thought they were liable, that would be a mistake that would permit recovery, wouldn't it?

**MR GODDARD QC:**

No, oh subject to defences such as good consideration. Does Your Honour mean prima facie before turning to defences?

**WILLIAM YOUNG J:**

5 Yes prima facie but section 95 wouldn't be engaged by that would it?

**MR GODDARD QC:**

It would depend –

**WILLIAM YOUNG J:**

10 Because the primary – I mean priorities would be in the background but their real motivation was we're paying because we're liable.

**MR GODDARD QC:**

No in my submission that is a mistake about priorities because the question really becomes the order in which different obligations should be paid. So that is –

15 **WILLIAM YOUNG J:**

Say they think they've got a personal liability, wouldn't that be the sort of mistake as between payer and payee which would normally give rise to a restitutionary claim?

**MR GODDARD QC:**

20 Certainly true that normally if you pay someone under the mistaken belief that you have an obligation to do so, then you are entitled to recover the money you pay, yes.

**WILLIAM YOUNG J:**

25 So say I pay, I pay to A a debt owed by B because I mistakenly think I'm liable on a guarantee –

**MR GODDARD QC:**

Yes, yes.

**WILLIAM YOUNG J:**

– I could probably recover that, even though it did pro tanto at the time serve to discharge the debt of B to A.

**MR GODDARD QC:**

- 5 You would have a prima facie claim to recover but if you paid and it did in fact discharge the debt because you paid with the authority of the obligor then you couldn't recover it and that is a very important exception here because as the Court observed yesterday, there can be no question but that even if this was a payment by the receivers it was done with the authority of the partnership.
- 10 They were the governing mind of the partnership and to suggest that they did something without acquiescing in it and we're concerned here with authority in the sense of the law of agency, the law of contract, not authority in the sense of proprietary interests in assets because those proprietary interests in assets are precisely what section 95 tells us not to worry about.

15

- So in my 12, I was running through the other reasons to think that this is a payment by the partnership and 12.3 and 13 really go together, basic principles of law in receivership and agency. I think it's common ground that receivers have no title to, no ability to call for a transfer of the assets of a
- 20 company in receivership, a fortiori that must apply to the partnership which was not even in receivership. The only relationship between Messrs Stiassny and Graham and the partnership on the plaintiff's case is that they were the members of its board and it is certainly not the case that the members of the board of a partnership are entitled to call for a transfer of the assets to it or to
- 25 sue on behalf of the partnership in circumstances where the partnership itself could not and I'll come back to that agency point later. And there is no pleading or evidence, to the extent that's relevant at this stage, of any intermediate dealing with the funds after receipt by the partnership and before payment to the Commissioner. So this idea that it was a payment by the
- 30 receivers personally is very hard to reconcile with the pleading that the proceeds were received by the partnership and the next thing that happened was that some of those were paid to the Commissioner. In the absence of any factual pleading of a further dealing, just makes no sense to say that they

were received by the partnership but then magically, without any intervening event, were suddenly the receivers' money and were paid away by them.

I then note at 14, a proposition that I don't think is especially controversial,  
5 that when it comes to determining competing claims under the Personal  
Property Securities Act, the answer doesn't depend on questions of title, legal  
or equitable. Your Honour Justice Young referred in the *New Zealand  
Bloodstock* case to legal notions as they were prior to the PPSA and said that  
those don't help us when it comes to a priority contest under the PPSA  
10 anymore and that must be right. The long title of the Act and the initial  
provisions make clear that the law, it's an Act that's intended to reform the law  
about competing priorities and to set out a code for resolving these issues and  
in the section 95 space, when we ask what is meant by a debtor initiated  
payment and the impact that has on a security interest recognised by the Act,  
15 we are in territory that is codified by this Act and it is not appropriate, it is in  
fact confusing and unhelpful to reach back to some of the pre-PPSA notions.  
When we see that, for example, that that's the intention, if we look back at the  
long title on page 12 of the PPSA, "An Act to reform the law relating to  
security interests and personal property and in particular provide for creation  
20 and enforceability of security interests, provide for determination of priority  
between security interests" and then C, "To provide for the determination of  
priority between security interests and other types of interests in the same  
personal property" and that's exactly what section 95 is doing. It's in part 8,  
"Priority of other interests in collateral". It's common ground that the proceeds  
25 of sale were collateral to which a security interest attached, to which the  
bank's security interest attached. The question is the Commissioner entitled  
to retain the money received notwithstanding the prior security interest? And  
all of these claims are just attempts, in various forms of fancy dress, to assert  
the security interest.

30

The answer to whether the secured creditors can say, "No that's my money,  
give it to me", is provided by section 95 and it's a question that has to be  
answered without reference to all the delightful knowledge in relation to



floating charges and crystallisation and equities of redemption that we so delighted in pre-PPSA.

5 Having answered that question in relation to a direct claim by the secured creditors and said no you can't invoke your security interest, it just makes no sense to say that someone else can pop up as their agent or that the payer can pop up and say, "Oh no we were mistaken as to who we should have paid first, we paid out of the order of priorities", which is basically the allegation here and as a result the payment should be disturbed. The whole point of 10 section 95 is that payment out of the order of priorities cannot be disturbed and trying to present a claim by the secured creditors to get their money back in reliance on their security interest in the various increasingly complex ways in which the appellants have sought to do so cannot, consistent with the text and purpose of section 95, be allowed to trump that clear provision. So that's 15 my 15 really, that the claim by the secured creditors is precluded by section 95 of PPSA and you can't dress those claims up as mistake claims.

The receivers have no claim of their own to the money. There is no pleading of any transaction or dealing that would have vested title to the money in the 20 receivers and, in accordance with ordinary principles, these receivers had no claim either to the money of the companies because they were just receivers or a fortiori to the money of the partnership. Now there's some suggestion well if they don't have a claim of their own maybe they have a claim on behalf of a principal, either the secured creditors or the partnership but rather than 25 going through the convoluted analytical process suggested in that context by the appellants, it makes much more sense to cut to the chase and just look at whether each principal has a claim because obviously an agent can't have a better claim for a principal than the principal has themselves and that's why I've taken these three principals and say let's look at each in terms of the 30 claims it could make as a principal, let's not get distracted by questions of agency and who can sue on whose behalf. As I say a claim by the secured creditors can't succeed because of section 95, the receivers just have no claim as a principal to any of this money and nothing has been pleaded which could found such a claim and of course the relief sought is not a payment to

them to keep, as my learned friend accepted in his argument, the consequences of a payment to them would be that the money is passed on to the secured creditors. Indeed the claim based on the money being paid by the receivers under a mistake, the second cause of action in the third amended statement of claim seeks by way of relief a direction that BNZ and 5 CNI nominees as the senior and junior security trustees have a prior entitlement to the proceeds and payment either to the receivers to be passed on or direct to the secured creditors. And the partnership cannot recover a payment which discharged its GST liability. Despite the submissions made by 10 the appellants, this really seems obvious it was the partnership that made the payment itself.

The proposition that a taxpayer can have an undisputed liability for tax, pay the tax and then say, “Ah, what a terrible mistake, I’d like it back please” and 15 succeed is a surprising one and what is much less surprising is that no authority has been identified by the appellants to support the proposition that a payment made by mistake which discharges a debt of the payer can subsequently be recovered. If I owe money to my learned friend Mr Simpson and my learned friend Mr Ebersohn and I mean to pay Mr Ebersohn because 20 over the last few days he’s been very helpful to me, whereas my learned friend keeps disagreeing with me and so I’m not going to pay him, at least not this week, I’m going to pay Mr Ebersohn but I get the bank account numbers mixed up and by mistake I pay Mr Simpson, I cannot get the money back. I’ve paid by mistake someone to whom I owed a debt, the debt has been 25 discharged and my learned friend Mr Simpson can keep my money and it’s Mr Ebersohn who has a beef with me and who will no doubt make application to me to remedy that mistake, not by recovering the money from Mr Simpson but by parting with still more and there is a case to that effect where you pay the wrong creditor by mistake. There are very helpful discussions of this in –

30 **CHAMBERS J:**

Which is that case sorry?

**MR GODDARD QC:**

It's referred to in *Mason and Carter, Restitution Law in Australia* (1995). In volume 2 of my authorities, *Mason and Carter*, the Australian restitution text, is under tab 21 and the relevant paragraph is paragraph 440, beginning on  
5 page 167, so it's quite a way in and it's headed, "Monies due anyway", money paid was actually due under a contract between the – there can be no recovery on the ground of mistake unless the contract itself is held void for mistake or rescinded but otherwise set aside. Corollary of the principle of restitution of all respects of contractual allocation of risk in a transaction. The  
10 restriction extends to money due under a tortious liability or under statute and there is a reference to a very helpful discussion of that proposition in *David Securities* which is also included in my casebook. A reference to the very similar –

**CHAMBERS J:**

15 I am interested in that because that is how it seems to me, although it's been categorised as mistake, what Messrs Stiassny and Graham did was they weighed a risk that one set of lawyers was right against another set of lawyers and they did exactly what they meant to do and it just so happens that on – and they may right yet, they may be entirely right with what they did but it may  
20 be the risk has turned out to go the other way but it's not a mistake in the sense that one normally uses that term.

**MR GODDARD QC:**

Absolutely Your Honour and if this matter were to go to trial I would of course – there would of course be evidence from Messrs Stiassny and Graham about  
25 their state of mind and I would anticipate cross-examining them on the documents to which the Court has been taken in part, to establish that was precisely the position that they were aware of different views, they were concerned to ensure that whoever was right, they did not face personal liability and so whoever was right they wanted the GST paid so that there was  
30 no risk of the Commissioner coming after them.

**WILLIAM YOUNG J:**

They wanted to be able to recover it if it wasn't payable, one would assume.

**MR GODDARD QC:**

That is one of the issues that will be explored at trial but to answer –

5 **WILLIAM YOUNG J:**

Well at least we should assume that in the meantime.

**MR GODDARD QC:**

Well that's what I was going to say, these would all be matters of enquiry and that's why it didn't seem to me that it was possible to deal with the case on the  
10 basis that there was no mistake at the strike out stage, rather the question was if there was a mistake would the money be recoverable. So there's a range of arguments that would arise at trial but there are two basic reasons why the Commissioner says we shouldn't get there, one, that the receivers were right to think they were liable and it's common ground that if that's the  
15 position the case comes to an end. Second, that even if they were wrong the money was paid by the partnership and cannot be recovered. Now that has become a more complicated argument since – in the amended statement of claim filed by the plaintiffs it was actually pleaded that it was the partnership that made the payment and then when the implications of that were identified  
20 from the Commissioner's perspective, the pleading was modified to the one we see now and the plaintiffs are perfectly entitled to do that. It would be fair to say that at the point where that was the argument it seemed very clear and very simple that there was another absolute answer to the case. I'm now required to say that the Court can find that it is not arguable that the payment  
25 was made by anyone other than the partnership and in my submission that is the right conclusion but the world was an even simpler world when that was actual the basis on which the plaintiffs were proceeding.

In any event I say there are lots of things that would require investigation at  
30 trial but there are two reasons why we don't need to go that far. And so coming back to the question Your Honour Justice Chambers asked me, at the

very foot of the text, “A person with two creditors who intending to pay one mistakenly pays the other cannot recover the money paid”. And a discussion of *Aiken v Short* and that’s consistent with the *Barclays Bank* decision which is really the leading decision on this point by Mr Justice Robert Goff as he then  
5 was who writes with a certain authority on these matters and the two editions of *Goff and Jones* that are included in my authorities, the seventh, extracts from the seventh edition under tab 19 and the eighth edition under tab – 19 is the seventh and 20 is the eighth edition. Both accept that *Aiken v Short* and other cases where an existing obligation is discharged by mistake do not  
10 found a claim to recover the money. They differ only in the way in which they explain why that result is reached. And I think that rather than launching into that now it might be better for me to spend five or 10 minutes on that, if the Court is happy for me to do so after the lunch adjournment.

**McGRATH J:**

15 Perhaps we’ll just see, how much do you have, I’ll then ask Mr Simpson how he sees the matter.

**MR GODDARD QC:**

Subject to any questions the Court may have from me, a matter that it’s always difficult to give a firm estimate of, I think I just have those five or 10  
20 minutes. I’d like to talk a little bit about the reasons why the partnership can’t recover the money by reference to – I think I’ll just go to the eighth edition of *Goff & Jones* probably and leave the Court to read my written submissions and the cases and then I’ll stop. So 10 minutes.

**McGRATH J:**

25 Mr Simpson, how long will you need for reply?

**MR SIMPSON:**

Thirty to 40 minutes.

**McGRATH J:**

Any other people interested in replying? No, well on that basis we probably ought to come back at 2 o'clock. The 3 o'clock finishing time is a hard deadline.

5 **MR GODDARD QC:**

Then 2 o'clock would be preferred if that's all right with Your Honours.

**COURT ADJOURNS: 1.00 PM**

**COURT RESUMES: 2.00 PM**

10

**MR GODDARD QC:**

Your Honour, the defence of good consideration in 10 minutes or less. Starting now. Tab 19 of volume 2 of my authorities. I'm going to begin with the seventh edition of Goff & Jones, then known as *The Law of Restitution* (7<sup>th</sup> ed, 2007) because a little bit of a run-up I think is helpful. If I could ask the Court to turn to page 885 of the text, chapter 41, "Good Consideration". There are a number of striking things about the evolution of this work from the seventh to the eighth edition. One is the change of title. There are not very many text books, I think, that have renamed their subject from *The Law of Restitution* to *The Law of Unjust Enrichment* between editions. Another striking fact is that a defence identified as a distinct defence and meriting its own chapter in the seventh edition is described as not being a separate defence at all in the eighth, which just goes to show what can happen when one relinquishes control of one's text book.

25

**BLANCHARD J:**

Or even when one is still in control.

**WILLIAM YOUNG J:**30 

There was a change here.

**MR GODDARD QC:**

There was, but let me go through it because I'm not sure that the substance of what is said in relation to the relevant cases is different. So chapter 41, "Good Consideration", the first paragraph talks about bona fide purchase being a  
5 defence to a personal claim, and then, the second paragraph continues, "However there is another defence distinct from that of bona fide purchase which is a defence to a personal claim." There's a reference to the passage of His Lordship, Mr Justice Goff, in *Barclays Bank v Simms*, to which my learned friend took the Court. It's a defence that payments made for good  
10 consideration, in particular, if the money is paid to discharge, and does discharge, a debt owed to the payee, in our case by the payer. That's the accepted rationalisation of *Aiken v Short*. The case is described and I won't go through that. Over the page, top of the page, the Chief Baron and Baron Platt held that, "The money which the defendant got from her debtor  
15 was actually due to her, and there can be no obligation to refund it", and some other decisions to similar effect discussed, including, from the middle of the page, the case referred to by my learned friend yesterday, *Lloyds Bank v Independent Insurance Company*. My learned friend I think said he was going to provide copies of that and I just can't remember whether that happened or  
20 not, but it is another nice illustration of the principle. The Court of Appeal, as noted in that paragraph, following the dicta in *Barclays Bank v Simms*, held that the bank's claim to recover money which it paid because of a mistaken belief that cheques payable to its customer's credit had been cleared so it thought it held cleared funds, it paid, and the money was paid with the  
25 authority of the bank's customer to discharge the debt to the defendant, and the Court of Appeal held that the defendant had given good consideration, the debt had been repaid with the authority of the bank's customer, whose debt it was, and that meant that the defence of good consideration had been made out. Moreover there was a change of position in the form of an irreversible  
30 detriment since it's not clear, it was said, that satisfaction of the bank's claim would have revived the debt owed by the customer.

Then over the page, a number of questions about the scope of the defence of good consideration have not been definitively answered. The first and second

are not relevant here. It's the third the appellants have put in issue, "Must the defendant act in good faith?" The learned authors of the text question whether good faith is a requirement. Three lines down, "Arguably she (the defendant) still provided good consideration for she surrendered a valid claim.

5 If the plaintiff's only cause of action was against the rogue, how could the defendant's misconduct be a relevant consideration?" "Nonetheless," the author said, "a Court may be tempted to conclude that good faith is an integral part of the defence and to follow the American restatement which accepts that discharge for value is a good defence provided that the transferee made no  
10 misrepresentation" – well, there's no suggestion here that the Commissioner made any misrepresentation – "and did not have notice of the transferor's mistake." That's important because what "bad faith" means in this context is notice of the mistake, notice at the time the payment is made and the good consideration is given that it is being made under a mistake, and the  
15 conflation by the appellants of notice of the mistake and notice of the security interest is illegitimate. The sort of notice they are talking about, notice of the security interest, is not the type of notice, not the type of bad faith, that is in issue where the complaint is that a payment was received that was made under a mistake, and although good consideration was given, there was no  
20 good faith, and that's important because it's this attempt to create a sort of patchwork quilt of bits of different causes of action that is the fundamental problem with the appellant's approach in this field.

Over the page on 888, there's reference to *Barclays Bank v Simms* and  
25 Mr Justice Robert Goff being of the opinion that the defendant will not act in good faith if the payer's mistake was induced by the payee, obviously, or possibly, His Lordship said, "even where the payee was aware of the payer's mistake", so that's the sort of good faith/bad faith issue that we're concerned with. So that's discussed in the following paragraph.

30

What is the analysis of the learned authors of the eighth edition? If we turn over to the next tab and begin in –



**WILLIAM YOUNG J:**

Can I just stop you there?

**MR GODDARD QC:**

5 Your Honour.

**WILLIAM YOUNG J:**

Mr Simpson suggested that you could have absence of good faith in retention of money, but –

10

**MR GODDARD QC:**

That –

**WILLIAM YOUNG J:**

15 – in a sense that's – doesn't sit that well with these cases because the banks or the defendants continue to retain money even though they know it was paid in mistake later, by reason of knowledge later gained.

**MR GODDARD QC:**

20 There are situations where a volunteer can receive money and then become aware of a mistake pursuant to which it was paid and as a result be disentitled from retaining it, but this is not our case here, in my submission. If there is a good faith requirement at all, it must be that at the time of receipt of the payment and at the time when the good consideration is given there is a lack  
25 of good faith. Otherwise the debt is gone and it is not a – there is no absence of good faith in saying, "No, I am not going to return this because I have foregone my claim against you. The debt has been satisfied and that is that", and that's captured quite nicely in the way this issue is analysed in the eighth edition of Goff and Jones. If we come over to tab 20, page 21 of the  
30 text, chapter 2, "Justifying grounds". Introduction about English law providing a claimant will be entitled to restitution if he can show a defendant was enriched at his expense, and the circumstances are such the law regards this enrichment as unjust. For example –

**WILLIAM YOUNG J:**

I'm sorry, I've lost you here. What page?

**MR GODDARD QC:**

5 I'm sorry, Your Honour. I'm under tab 20 on the very first page, at  
paragraph 201. I'm just reading the introductory words. A claimant has a  
prima facie right to restitution when he's transferred a benefit to a defendant  
by a mistake, among other things. "Nevertheless the defendant can escape  
liability if another legal rule entitles him to keep the benefit and this rule  
10 overrides the rule generated by the law of unjust enrichment which holds that  
the defendant should make restitution." Then a couple of helpful sentences,  
"For example, a claimant may have paid money to a defendant by mistake but  
the payment may be irrecoverable if the claimant was required to pay by  
statute", our case, "or by contract. Although the claimant has a prima facie  
15 claim in unjust enrichment, the defendant's enrichment is justified by the  
statute or contract with the result that the claimant's right to restitution is  
nullified." And then – and there's a discussion of the way in which statutes  
can have that result in paragraphs 2.07 and 2.08, and if we look at 2.08,  
page 23, under the heading, "Statute requires the claimant to benefit the  
20 defendant", "Where a statute requires a claimant to transfer a benefit to a  
defendant, the Courts can usually be expected to hold that the defendant's  
enrichment is justified by the statute so that no claim in unjust enrichment will  
lie to recover the benefit even if the claimant can show that he made a  
mistake or transferred the benefit for some other reason that would normally  
25 lead the Courts to hold that the defendant's enrichment was unjust." If I pay  
my provisional tax in the mistaken belief that the – I have been paid by some  
of my instructing solicitors and have cleared funds in my account, and it turns  
out that the cheques does not clear, the Commissioner can say, "Well, I'm  
sorry, Mr Goddard, I am going to keep that amount. You may have paid it  
30 under mistake but you owed it to me and that's the end of the matter". The  
issue is discussed again at page 720 of the text under the heading "Good  
Consideration", *Barclays Bank Ltd v W J Simms Ltd*. These explained, there's  
a reference at 29.18 to *Lloyds Bank v Independent Insurance* and then 29.19  
is where the change of approach surfaces. "In previous editions of this work

good consideration was treated as a distinct defence within the law of unjust enrichment. However, we doubt that it has a role to perform that cannot be performed by other principles. In two party cases –” and that’s our case if the payment was made by the partnership, “Where a claimant pays money to a defendant to discharge a legal obligation that he owes the defendant, any claim to recover the money could be met by the response that the defendant’s enrichment is justified by the legal right that he had to receive the money, hence the case would fall within the scope of the principles outlined in chapters 2 and 3” and we looked at chapter 2 a moment ago. And no question of good faith arises in that context, you’re simply saying, “Look you owed me money, you’ve paid me money, you’ve discharged your debt, I am entitled to keep this money”.

Moreover, the learned authors go on, “Even if that were not enough to bar the claim” and in my submission it is, “the defendant would also be entitled to rely on the change of position defence discussed in chapter 27 having released its legal right against the claimant in exchange for the payment and again at a time before there was any notice of any relevant mistake.

So those are the principles that would bar this claim even if the receivers were not personally liable and they bar it not only in the simple case where the partnership paid the money to discharge its GST obligation but also in the three party case where the receivers pay to discharge the partnership’s obligation with the authority of the partnership with the result that the debt is discharged. Good consideration has been given, in my submission no question of good faith arises, that’s not a requirement of the defence, but if it is there is simply no allegation that the Commissioner knew of a mistake. There is an allegation that the Commissioner had been put on notice of a security interest but that’s different and it’s a complaint that is precluded by section 95 of PPSA.

Unless the Court has any questions in relation to any of my submissions, those are my submissions.

**McGRATH J:**

No, thank you.

**MR SIMPSON:**

It's probably best I just deal with this as discrete topics. The first issue was in  
5 relation to the GST Act, section 57 and 58 issues, the Commissioner referred  
to the difficulties that would arise in a partnership situation where the partners  
were liquidators or individuals and one died or went into liquidation and what  
would the position be in those cases, the Commissioner's contention being  
10 that because a company can't incur a liability post-liquidation there would be  
no one to sue and my response to that is that, well first I don't accept that a  
company in liquidation can't incur a liability and two examples that come to  
mind that if the liquidator discontinued a pre-liquidation proceeding, perhaps  
on the basis that it couldn't be funded and a costs award was made, there's  
15 an example of a post-liquidation liability that's been incurred and another  
would be if they owned a dam for example and the dam collapsed  
post-liquidation, there would be tort claims arising. So you can incur liabilities.  
I accept immediately that –

**WILLIAM YOUNG J:**

You can't trade?

20 **MR SIMPSON:**

You can't trade, you can't incur voluntary contractual liabilities, they will be  
liquidator's liabilities. The difficulty we come here is what happens if there's  
five partners, one goes into liquidation and the other four have power under  
the partnership agreement, assuming the partnership is carrying on, to do  
25 other things such as sell property and incur a GST liability, in my submission  
rather than relying on sections 57 and 58 to decide that the liquidator should  
be liable in all cases, it would be better to rely on the common law position as  
to when a liquidator becomes liable for a debt incurred by a partner in  
liquidation or a partner in receivership rather than the blunt instrument of a  
30 specified agent and that's particularly so, for example, in a receivership where  
there's no guarantee the receivership is going to extend to all of the assets of

the company. As here there are excluded assets that fall outside the receivership. So one wouldn't want a receiver of assets to incur liability for GST as a specified agent for dealings with assets outside the scope of the receivership. So better the common law deals with when – sorry we know  
5 that the partners are going to be liable anyway, so the companies themselves can be responsible for the GST on these transactions, as can the estate of a deceased partner. It should be for the common law to decide when an executor or a receiver or a liquidator or any other person or representative should pick up liability for that situation.

10

Now then turning to section 95, without wanting to repeat what's already been said, we say this is a strike out application where the documentary evidence before the Court makes it clear that the receivers were concerned about extinguishing their personal liability. Mr Gibson says that the receivers filed  
15 the GST return, that's consistent with a NOPA that refers to "our return". They say that they paid the GST.

**WILLIAM YOUNG J:**

The NOPA is rather after the fact though isn't it?

**MR SIMPSON:**

20 Yes but one could suggest that the NOPA had been drafted to try and address this issue. I mean nobody raised 95 until the proceedings had been issued, 2007, 2008. So the NOPA hadn't been prepared to try and deal with a 95 issue.

**WILLIAM YOUNG J:**

25 No and I understand that. The NOPA was prepared to give a foundation for a claim by the receivers that they were the parties who had the assessment against them.

**MR SIMPSON:**

30 It was certainly filed to preserve that ability. I'm not sure when the receivers filed the NOPA they had an intention of joining this proceeding, in fact they

were very resistant to doing so initially but it was to at least preserve the position in case ultimately it transpired that there was no GST payable by them, they didn't want to be caught with having paid it away then facing claims by the secured creditors.

5

The point was made in paragraph 12 and 13 of Mr Goddard's road map that the pleading as to who owned and sold the assets supports the claim that it was a payment by the partnership. The agreement provided for payment into an NZ CNIFP account and the basic principles of law of receivership being those which say that a receiver can't call for a transfer of the assets. Now that's really in substance a submission that the receivers had no mechanism for getting hold of the money or authority to pay a GST payment on their own behalf. In my submission in fact the converse is true. So we know that the partnership owns the asset, so the partner has to be the vendor, the partnership has to be the vendor, can't be the receivers and that is pleaded in the proceeding that it was the CNIFP that sold the assets. But once the proceeds come in, we've seen from the debenture documents that I took you to, that the funds had to be paid into a special account and couldn't be paid out of that account by partnership without permission of the secured creditors.

20 **CHAMBERS J:**

That was done, wasn't it at the demand of the partnership and the -

**MR SIMPSON:**

No.

**CHAMBERS J:**25 

That the money be paid because they were entitled to the money under the agreement for sale and purchase.

**MR SIMPSON:**

Sorry I'm a bit confused. Who was entitled to the money?

**CHAMBERS J:**30 

The partnership, the partners as the vendors.

**MR SIMPSON:**

The partnership was entitled to the money from vis-à-vis the purchaser.

**CHAMBERS J:**

Yes.

5 **MR SIMPSON:**

But vis-à-vis the receivers and the secured creditors, absolutely not. Those securities we looked at yesterday made it clear that when you sell an asset the money has to go into a special and separate bank account and you, the partnership, cannot touch it without our consent. The only people that could  
10 demand that money were the two groups: the secured creditors, because it was their money, and the receivers, because they had a right of indemnity that I also took you to in the debentures.

So when we're talking about who had authority to gain access to the funds, it's  
15 not the partnership. It's the receivers and the secured creditors. Now my friend says –

**CHAMBERS J:**

Well, it's the receivers, isn't it, technically, and the receivers, of course, have  
20 obligations to apply the money in accordance with law and in accordance with the security documents. It seems to be a constant theme of your argument that somehow the security holders were running the show.

**MR SIMPSON:**

25 But that's what the documents provide, Sir. They – the debenture we looked at yesterday said that the proceeds of sale of the assets have to be paid to the security trustee, not the receiver, and the security trustee then has to sort out the priority, and if you look at that deed of application of proceeds you'll see that it says, "This is how the money's to be spent and this is the binding  
30 determination made by the security trustee under clause", I think it's 10.1, "of the debenture."

**WILLIAM YOUNG J:**

But it does say that the money that we're interested in goes into a New Zealand CNIFP account.

5 **MR SIMPSON:**

And that's because when one looks at the waterfall of payments that the security trustee has to expend the money on, at the top of the list is receivers' liabilities.

10 **WILLIAM YOUNG J:**

Yes, I understand that.

**MR SIMPSON:**

So that's why, between the receivers and the BNZ, the agreement is the  
15 money comes in in two tranches. "The US dollar account comes straight to  
us, BNZ, as first security trustee, and we'll apply it in accordance with the  
waterfall, but the New Zealand dollars, the GST amount, well, that – we  
accept receivers, that's your first charge. You've got a right of indemnity", and  
that's pleaded in our pleading, that they've got a right of indemnity that was  
20 exercised and that the funds therefore had to be applied in accordance with  
the various provisions. So the suggestion that there's, as it says in 13 of the  
road map, there's no pleading or evidence of any intermediate dealing with  
the funds after receipt by the CNIFP, is simply not true.

25 **CHAMBERS J:**

I can't quite follow on your argument why all the money would not have gone  
to the security holders, because if everyone had been properly advised on  
your point, on your argument, the money was never going to be paid to the  
Commissioner because you were owed more. So why wasn't it all going to  
30 the security holders? Why was it being divided?

**MR SIMPSON:**

Because it has to go to – well, because the people in charge of the sale, the  
receivers and the BNZ, are saying, "We think there is this receivership liability



so, CNI, there is no money for you, the second debenture holder.” So we’re – unfortunately we’re now looking with hindsight at a situation –

**CHAMBERS J:**

5 I know but –

**MR SIMPSON:**

– where we’re saying the receivers aren’t liable after all.

10 **CHAMBERS J:**

So what you’re really saying – this is my point – what you’re really saying is a mistake was made by everyone from day one and it’s reflected by the agreement with KT.

15 **MR SIMPSON:**

Exactly. Other than CNI Nominees. Remember Mr Simcock told you yesterday that the BNZ and the receivers were of the view that there was this GST liability of the receivers so they were structuring things to pay that liability. It was the second security holder, when advised of the sale –

20

**CHAMBERS J:**

I know.

**MR SIMPSON:**

25 – who said –

**CHAMBERS J:**

I know.

30 **MR SIMPSON:**

– “Hang on, there’s a mistake.”

**CHAMBERS J:**

But you were trying to put to us a moment ago that this dividing it up into two parts was entirely logical. I'm saying on your argument it wasn't logical; it was a mistake.

5

**MR SIMPSON:**

Now, with my CNI hat on, yes. With my receivers and BNZ hat on back in 2003, it was entirely logical what they were doing.

10 **WILLIAM YOUNG J:**

On the basis of their beliefs.

**MR SIMPSON:**

On the basis of their beliefs.

15

**WILLIAM YOUNG J:**

But presumably they think that they are the specified agents of the partners and that therefore they're going to cop a liability if the partnership doesn't pay, which would be a very good reason why they would procure the partnership to pay.

20

**MR SIMPSON:**

Well, you've seen the deed of application of proceeds.

25 **WILLIAM YOUNG J:**

Yes.

**MR SIMPSON:**

It puts it as we've got a receiver's liability, we've got a right of indemnity, we're going to make things sort themselves out so that liability goes away. Whether we have to do it by paying our receiver's liability for the GST or the partnership liability for GST, we're going to pay the liability to get rid of our exposure as receivers. So they weren't sure whether the liability would come directly to them or indirectly via the partnership but they had to clear it off.

30

**CHAMBERS J:**

I think there would've been real question marks from the purchaser too if the agreement had been structured in the way you suggest. The purchaser would've said, "Hold on why am I paying GST and it's all going to a security holder and not to the Commissioner?"

**MR SIMPSON:**

Well the – even if the purchaser had raised the issue, the answer would've been we have to charge you for GST. Now if a security holder gazumps us that's because of the way the GST Act works and securities work. You can't use that as a ground for resisting payment and as we talked about yesterday, the purchaser doesn't mind, they're getting their GST credit. So they're quite neutral.

**CHAMBERS J:**

But they might be a lot more nervous is what I'm suggesting, if they didn't see the money as going –

**MR SIMPSON:**

Well they must have been on notice because everyone knew that the partnership was insolvent and there must have been an issue here as to whether there was enough to pay off the secured debts because there were really no other creditors, just the Commissioner and the two secured creditors, that's it.

**CHAMBERS J:**

Yes, the agreement would have given them reassurance that the money was coming to New Zealand because it was seen as being different from the rest.

**MR SIMPSON:**

But the Commissioner couldn't withhold the GST credit simply because he didn't get the GST from the vendor.

**WILLIAM YOUNG J:**

Might have made him a bit anxious.

**MR SIMPSON:**

Yes, it may well have, yes. Now there are – none of this, of course, alters the law of restitution and there were two points I wanted to make here. One doesn't need to have notice of the mistake before the payment is made. It  
5 may well be a situation where you make a payment and it takes several weeks or months before you find out you've made a horrible mistake but the law has never said the mistake has to be known by the payee or that they have to know it beforehand. The only time you need to have notice of a mistake before payment is where you've got a good consideration defence  
10 and you're raising the counter to that which is a lack of bona fides or notice of, in this case according to Mr Goddard, a mistake, we say and I'll come to this later that bona fides means notice of adverse claims as well but I'll deal with that a little later.

15 So it's important that when we're not relying on a good faith element either under 25 or restitution that recognition is given of the fact that the payee doesn't need to know about the mistake and they certainly don't need to know, nobody needs to know about the mistake until after the event. In fact *Deutsche Morgan* talks about payments made under a mistake of law. The  
20 mistake of law won't be known until a Court finally determines that the law is not as it was mistakenly believed to be.

**WILLIAM YOUNG J:**

That's a mistake as to liability isn't it?

**MR SIMPSON:**

25 Well mistake as to anything.

**WILLIAM YOUNG J:**

Well isn't there going to be a difference between a mistake as to the liability of at least the payer to the payee and a mistake as to some collateral issue.

**MR SIMPSON:**

Well restitution says as long as it's the – you wouldn't have made the payment but for the mistake, it can be anything.

**WILLIAM YOUNG J:**

- 5 Yes but if the mistake is as to liability, then it follows that there wasn't any money owed.

**MR SIMPSON:**

Yes.

**WILLIAM YOUNG J:**

- 10 That's the point I'm making.

**MR SIMPSON:**

- Yes, yes and that might be a mistake of law, it might be a combination of factors or in this case it will be a combination, for example, as has been foreshadowed, one of the issues will be whether the partnership was in receivership and if it is the receivers will have been liable and that's both a fact and law issue.
- 15

- I then wanted to touch very briefly on the points made by the Commissioner regarding the inability of the three groups of appellants to sue. The first was the secured creditors and I referred Your Honours to *Agip* as an example of where the secured creditors can sue for recovery. The second is the receivers themselves and I gave you *Marshall*. It must be the case that if a trustee pays funds away by mistake to one of their creditors that they actually hold on trust for a beneficiary, they can recover that payment as trustee, even though they'll have to account for the recovery to the beneficiary and that's that in *Commissioner of Taxation v Insurance* case that I talked about where the Court in Australia said, "We might want an undertaking from the claimant that they will pay it away the recoveries to the rightful owners but they can still recover".
- 20
- 25

And then there was the example of the CNIFP, what happens if it paid the GST and Mr Goddard gave the example of paying money to me when he meant to pay it to Mr Ebersohn, even though he owed us both the money and it's pretty straightforward and useful illustration but of no application here. Let  
5 me give you another illustration that's closer. Perhaps Mr Ebersohn's busy so he asked Mr Goddard to do him a favour and pick up a salary packet in cash from Crown Law. Mr Goddard does so, Mr Goddard owes me money. In a fluster he instructs his secretary to deliver the package of money to me when he meant to deliver it to Mr Ebersohn. He then realises his mistake, calls  
10 Harry and says, "Oh I'm sorry I've sent your money to Ralph and I owe him some money" and Harry then calls me and says, "There's a package coming over, it's my money and I want it back. Mr Goddard didn't mean to give it to you or whether he says that or not, it's just it's my money". Now are we seriously suggesting in those circumstances that Mr Ebersohn or Mr Goddard  
15 can't sue me for its recovery? Even though the only thing I may have been told was that the money was Mr Ebersohn's. I may not have been told that Mr Goddard had acted under a mistake, just that it's Mr Ebersohn's money. I cannot keep it in good faith in those circumstances, I am on notice and it's with that that I think it's going too far to rely on the passage from Lord Goff's  
20 judgment in *Barclay* to say that a requirement for bona fides in the good consideration defence needs to be a particular type of bona fides. In the context in which he was talking it was logical to talk about lack of bona fides because you caused the mistake or knew of the mistake but it's going too far to say they were closed categories. It surely must also be permissible to raise  
25 absence of bona fides where you know that there is a superior and competing claim over the funds.

**WILLIAM YOUNG J:**

No, no, no or you know there's a claim. You don't know it's superior.

**MR SIMPSON:**

30 You know it's – okay you know there's a claim that's alleged to be superior. Because if it's not –

**WILLIAM YOUNG J:**

But you also know that the receivers are paying the money anyway and that even though they've been notified of this.

**MR SIMPSON:**

5 Yes but again an example I gave, it can't matter whether it was Mr Goddard that called me or Mr Ebersohn that called me to tell me it was Mr Ebersohn's money. I lack good faith when somebody tells me. It could've been the secretary who made the – who took the garbled instruction from Mr Goddard to deliver the package. It doesn't matter how I learnt. It might have had a  
10 payslip in it that said it was Mr Ebersohn's money. As long as I have notice that it's not a payment that Mr Goddard was entitled to make to me, I lack good faith.

The final thing I wanted to cover off was, what is a mistake and  
15 Mr Justice Chambers it's directed to a comment you made earlier that this wasn't a mistake in the traditional sense or in the sense that arises in a restitutionary context and I gave you *Deutsche Morgan* before which was the Handel –

**CHAMBERS J:**

20 I see that in *Goff and Jones*, *Deutsche Morgan* is doubted but –

**MR SIMPSON:**

Well I wanted to refer you to, sorry I'll just grab it, *Kelly v Solari* (1841) 152 ER 24, it's one of the foundational cases that Lord Goff referred to in *Barclays Bank*.

25 **McGRATH J:**

Volume?

**MR SIMPSON:**

It's volume 2 of our bundle and tab 18 and if you turn to page 26 of the judgment, it's Baron Park's judgment and if we start – there's a reference to  
30 *Milnes v Duncan* (1827) 6 B&C 671 about half way through Baron Park's

judgment and as the next sentence says, “If indeed the money is intentionally paid without reference to the truth or falsehood of the fact, the plaintiff meaning to waive all inquiry into it, and that the person receiving shall have the money in all events whether the fact be true or false, the latter is certainly  
5 entitled to it, but if it is paid under the impression of the truth of a fact which is untrue, it may generally speaking be recovered back, however careless the party paying may have been in omitting to use due diligence to inquire into the fact, in such a case the receiver was not entitled to it nor entitled to have it.” Now this in *Deutsche Morgan* and the other cases that have had to deal with  
10 what is a mistake are to this effect, that where you’re agnostic, you don’t care, in our case, whether I’m liable or not I don’t care, I’m just going to pay the money, then that is not a mistake, but here – and with all questions of law there is never certainty. There is always doubt and one cannot say it falls outside the scope of mistake because you have residual doubts about what  
15 you’re about to do.

That’s all I have. Unless Your Honours have any questions of me, I’ll let Mr Simcock finish on the GST provisions. Thank you.

20 **MR SIMCOCK:**

Thank you. Just a couple of – several points about GST. There was discussion about legal personality and whether partnerships were just treated as being bodies for the purposes of section 57. If you look at section 51,  
25 which is the liability to register, subject to this Act every person who carries on any taxable activity becomes liable to be registered. It is assumed that that will cover a partnership. It’s given personality by this provision. It’s not the partners. They may have had it and it’s taken away by section 57, but in my view the partnership – this whole Act proceeds on the basis that a partnership, or an unincorporated body, can have personality and indeed does.

30

**McGRATH J:**

Well, “person” has a defined meaning –



**CHAMBERS J:**

Sorry, I haven't quite followed that. Wouldn't section 51 if on its own mean that every partner would have to – oh, it includes an unincorporated body of persons.

5

**MR SIMCOCK:**

Yes, "person" is –

**CHAMBERS J:**

10 But you, as a partner, or a now former partner of Bell Gully, you were nonetheless carrying on a taxable activity of providing legal services, you personally, weren't you?

**WILLIAM YOUNG J:**

15 Well, you'd say no.

**MR SIMCOCK:**

Well, I'd say for the purpose –

**WILLIAM YOUNG J:**

20 No, because it's section 57.

**MR SIMCOCK:**

I'd say for the purpose of this Act no.

25

**CHAMBERS J:**

Ah, but that's because of –

**MR SIMCOCK:**

30 57.

**CHAMBERS J:**

– 57, but if one's just looking at 51 you would be having to register, wouldn't you, if 57 wasn't there?

**MR SIMCOCK:**

If 57 wasn't there, yes.

**CHAMBERS J:**

5 Well, wasn't that Mr Goddard's point, that you start by looking at what the law was and then 57 realises that that would be administratively extremely awkward because –

**MR SIMCOCK:**

10 But I think if "person" includes an unincorporated body of persons, go back to the definition, you can read section 50 –

**CHAMBERS J:**

Well, both of you would be. Bell Gully would be and so would David Simcock  
15 be, and so what 57 then does is say, "Well, you don't all have to do it. Just Bell Gully can do it", the actual registration.

**MR SIMCOCK:**

I'm trying to find the definition of "taxable activity" because that too includes  
20 this notion that a... Yes it says, section 6, it says, "Inactivity carried on continuously or regularly by any person" and that could include the individual – could be read as including the individual partners. It could also be read as for the purposes of this Act because this in my view it the scheme of the Act that person is the unincorporated body.

25

If I perhaps don't pursue that point but make an additional one in terms of what 57 is. It seems, in my learned friend's submission, to be simply an administrative provision. I don't accept that. I think that the whole of the Act is a construct. I think Sir you raised the suggestion that section 58 was itself  
30 determining what would happen in certain situations. I won't go so far as to say it's all artificial but it's all statute made, it's all fitting a scheme. Section 57 is no different in that regard from the rest of the Act. There's nothing natural about this whole regime, though in my submission it's going far too far to suggest that section 57, for some reason by itself, stands out as being

different and simply for administrative purposes when the whole of the Act is designed to raise money for the Commissioner. It all works coherently.

5 And if I pursue that point a little in terms of these bodies or events which my learned friend has suggested might cause anxiety as to how 57 and 58 work together and just to re-emphasise a point my friend Mr Simpson made about estates.

**CHAMBERS J:**

10 They don't really have to work together in that sense. I know in this case we've been looking at them because they both have some relevance but they don't – they're not actual natural bed fellows, are they, they're dealing with different things. One is dealing with the situation where you've got some incapacity, the other's dealing with the quite different problem of partnership.

**MR SIMCOCK:**

15 Yes indeed but we're exploring the incapacity of an unincorporated body, that's why we're needing to read 57 in order to understand 58. How does 58 apply to an unincorporated body? All I'm suggesting is it goes too far to –

**CHAMBERS J:**

20 We're also exploring, aren't we, incapacitated members of an unincorporated body?

**MR SIMCOCK:**

25 Well if I can just turn to that because there were some suggestions that were some situations where the Act would let people off. There wouldn't be a recovery if there were some incapacitated members and somehow their personal representatives weren't liable. Death was one of them. I think Your Honour Justice Chambers referred to section 57(3)(a). It was suggested that if somebody dies there's nobody to pay the tax. Well there is a reference to the estate here being liable and continuing to be liable. So I think that covers that situation. Another example was if a receiver is conducting a business by  
30 himself, he's liable and he joins with a partner, Justice Young noted that the

partnership would become liable, that's true, that is the answer. If that new partner was not content with the capacity of the existing partner, or his new partner, the receiver, entity in receivership to pay, he would nevertheless have his own personal liability for 100%. He may decide not to join the partnership  
5 because of the incapacity of the receiver to pay or he may rely on his indemnity in terms of his partnership relationship with that entity in receivership to recover. The Commissioner is not going to miss out and if it was structured so that the new partner was an entity that couldn't pay it was simply a shell company and there was no intention to do it, it was all a  
10 construct then the avoidance provisions would apply. So I don't think in any way you need to extend the definitions of registered person in 58 to achieve the results my learned friend was contending for.

**CHAMBERS J:**

Have you been able to think of any disastrous or unusual consequences  
15 which would flow or might flow from Mr Goddard's expanded definition of "member"?

**MR SIMCOCK:**

I think directors and managers are in the same position as receivers. They are people in control of an entity and if they too were treated as members,  
20 then you would have extended the definition substantially to other people beyond the present definition of member and you are – you've got to remember –

**CHAMBERS J:**

I don't think so, would you, because his definition doesn't go further than  
25 saying a member of a partnership might include the liquidator of one of the partners or a receiver of one of the partners or the official assignee. It doesn't go further than that.

**MR SIMCOCK:**

Well I think you asked and explored whether section 57 could stand on its  
30 own. If you just look at the definition of "member" and it should be able to

stand on its own if my learned friend's suggestion is correct, then member is not just the entity but is the person who is controlling the entity. If that's a receiver and it said because of that controlling position they become a member then I think it would equally apply to others who control that entity and it shouldn't. This Act – remember we're imposing personal liability on individuals in section 58. We've got to be very careful to limit that to those who it needs to impose personal liability on and in my submission there are no gaps that need filling. There may be a result that the Commissioner doesn't win in every case but unless that's been constructed for, I think that's just the natural result of the legislation.

**WILLIAM YOUNG J:**

Why does it have to be – just as a matter of interest, why would it have to be constructed for? Wouldn't it be enough if it was the effect, if there was a tax avoidance effect under section 76?

**15 MR SIMCOCK:**

Yes I think my learned friend was right to suggest that there are limits to that in terms of ordinary course incidental.

**WILLIAM YOUNG J:**

If this had been done deliberately.

**20 MR SIMCOCK:**

Then there might've been an issue. That's a construct, that's what I was saying, using another word for deliberate action.

There was parcel of reference to the return and its form. In my submission it would have been the same whether it was a partnership return or a receiver's return. The NOPA says it's a receiver's return. That's what's been pleaded, that's what should be taken heed of. So the receivers, in filing it, believed they were filing it to meet their obligation, mistakenly but nevertheless their obligation.

**WILLIAM YOUNG J:**

Do I take it that the Commissioner's law, as it were engaged with the NOPA rather than saying, "Aha, wrong objector"?

**MR SIMCOCK:**

- 5 Yes I don't think there's been any suggestion of wrong objector throughout this proceeding, yes.

**WILLIAM YOUNG J:**

Up until now.

**MR SIMCOCK:**

- 10 Yes. I may be a mere tax lawyer and find these things simpler than others but I used to find it a very simple proposition in this case, the receivers believed they had an obligation, they filed the return, they paid and as Justice Young noted they've NOPA-ed, that should be the end of the matter.

**WILLIAM YOUNG J:**

- 15 I didn't say the last bit.

**MR SIMCOCK:**

- Okay. Then I say it. The receiver should be entitled to the money back. They paid. They note that they were wrong. They win as any other taxpayer does. They get the money back. If that's not right and they didn't pay then  
20 section 95 gets invoked but the protests were made before the money was received by the Commissioner by both security holders, and then I defer to those who know much more about restitution than I do to say that's the issue there. But two simple propositions. One, receivers paid, they can get the money back. If they didn't, the good faith defence should apply, and there  
25 should be limits to section 95. Thank you.

**McGRATH J:**

Thank you, Mr Simcock. Thank you, counsel. That concludes the hearing and we will reserve our decision.