

IN THE HIGH COURT OF NEW ZEALAND  
AUCKLAND REGISTRY

CIV-2011-404-7225

CIV-2012-404-0307

[2012] NZHC 1441

UNDER parts 18 and 19 of the High Court Rules

IN THE MATTER OF Sections 251 and 292 of the Companies Act 1993

BETWEEN JENNINGS ROADFREIGHT LIMITED  
(IN LIQUIDATION)  
Plaintiff

AND BORIS VAN DELDEN AND ROY  
HORROCKS AS LIQUIDATORS OF  
JENNINGS ROADFREIGHT LTD (IN  
LIQ)  
Second Plaintiff

AND COMMISSIONER OF INLAND  
REVENUE  
Defendant

Hearing: 7-8 May 2012

Appearances: C Mansell for First and Second Plaintiffs  
H Schoonraad for Commissioner

Judgment: 22 June 2012

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**JUDGMENT OF ASSOCIATE JUDGE DOOGUE**

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*This judgment was delivered by me on  
22.06.12 at 4.30 pm, pursuant to  
Rule 11.5 of the High Court Rules.  
Registrar/Deputy Registrar*

*Date .....*

***Counsel:***

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## Introduction

[1] The liquidators of the plaintiff have brought applications under ss 251 and 292 of the Companies Act 1993 (“CA”) to recover payments deducted by the Commissioner of Inland Revenue (“the Commissioner”), pursuant ss 157 and 167 of the Tax Administration Act 1994 (“TAA”). The plaintiff, Jennings Roadfreight Limited (in liquidation), was a duly registered company carrying out business as a freight provider. The plaintiff went into liquidation on 24 March 2011 at 11 am. Between deduction and payment, these funds were held in a suspense account at the Bank of New Zealand (“BNZ”).

[2] The following is the chronology of essential dates as they affect the dealings between the Commissioner, the BNZ, and the plaintiff:

15 March 2011	The Inland Revenue Department (“IRD”) serves notice pursuant to s 157 TAA on the BNZ.
24 March 2011	9.13 AM: \$10,214.82 deducted and moved to BNZ suspense account (“ <b>the first deduction</b> ”).
24 March 2011	<b>11.00 AM: company placed into liquidation.</b>
24 March 2011	12:41 PM: BNZ deducts \$7,896.46 from company’s bank account (“ <b>the second deduction</b> ”).
24 March 2011	BNZ deducts \$44.24 from company’s bank account (time unspecified).
29 March 2011	BNZ deducts \$8,622.28 from company’s bank account (“ <b>the third deduction</b> ”).
29 March 2011	BNZ pays \$17,917.56 to the Commissioner.
29 March 2011	BNZ pays \$216.20 to the Commissioner.
29 March 2011	BNZ pays \$21.76 to the Commissioner.
30 March 2011	First proof of debt filed by IRD. No reference to PAYE.
31 March 2011	BNZ pays \$8,622.28 to the Commissioner.
11 April 2011	IRD realises that PAYE was payable upon processing plaintiff’s tax return.
04 October 2011	IRD files amended proof referring to PAYE.

[3] The BNZ paid a total of \$26,777.80 to the Commissioner following the company going into liquidation. When the Commissioner gave the BNZ notice of the deduction, there was initially a delay while the BNZ sought advice on whether it was obliged to deduct funds from the account of its customer, the plaintiff, and pay them to the Commissioner. The deduction notice specified that the funds were required to meet liabilities that the company had with them, except GST and student loan repayments.

[4] While it was awaiting legal advice on the issue, the BNZ removed funds from the plaintiff's account and transferred them to a BNZ suspense account. From this point, the plaintiff lost control of those funds. BNZ then paid the funds held in the suspense account to the Commissioner in the period 29–31 March.

[5] The Commissioner did not initially file a claim for PAYE with the liquidators. The funds that it received from the BNZ were applied in reduction of the plaintiff's GST liabilities. The Commissioner's explanation was that when the first proof of debt was filed, its staff were not aware that the plaintiff owed PAYE. They only became aware of this fact upon processing a PAYE return for the month ending 28 February 2011. There were delays in processing that return. This partially explains why the Commissioner did not mention PAYE until April 2011, when it filed its amended proof of debt. Despite these background considerations, it has been established that the company was obliged to pay PAYE on 20 February 2011 and 5 March 2011, for the period ending 28 February 2011.

### **The Plaintiff's Claims**

*Setting aside the first deduction — s 292 of the Companies Act*

[6] The liquidators seek to set aside the payment of \$10,214.82 ("the first deduction"), on the basis of s 292 of the CA. This amount was deducted from the plaintiff's account before liquidation. Relevantly, the section provides:

#### **292 Insolvent transaction voidable**

- (1) A transaction by a company is voidable by the liquidator if it—
  - (a) is an insolvent transaction; and

- (b) is entered into within the specified period.
- (2) An insolvent transaction is a transaction by a company that—
  - (a) is entered into at a time when the company is unable to pay its due debts; and
  - (b) enables another person to receive more towards satisfaction of a debt owed by the company than the person would receive, or would be likely to receive, in the company's liquidation.
- [(3) In this section, transaction means any of the following steps by the company:
  - (a) conveying or transferring the company's property;
  - (b) creating a charge over the company's property;
  - (c) incurring an obligation;
  - (d) undergoing an execution process;
  - (e) paying money (including paying money in accordance with a judgment or an order of a court);

...

- (4A) A transaction that is entered into within the restricted period is presumed, unless the contrary is proved, to be entered into at a time when the company is unable to pay its due debts.

...

- (5) For the purposes of [subsections (1) and (4B)], specified period means—
  - (a) The period of 2 years before the date of commencement of the liquidation together with the period commencing on that date and ending at the time at which the liquidator is appointed; and

...

[7] The plaintiff submits, and it is undisputed by the IRD, that the first deduction meets the requirement of s 292 of the CA, given that it:

- a) Occurred at a time were the company was unable to meet its due debts;

- b) Enabled the Commissioner to receive more towards a debt than it would otherwise have in the liquidation. At the time of liquidation, employees had filed unpaid employee claims of \$37,710. Those claims and the liquidator's fees rank ahead of the Commissioner's preferential claim.<sup>1</sup> Therefore, any funds voided would be first applied to the employees' claims; and
- c) Occurred within two years of the date of liquidation.

*Setting aside of the second and third deductions – s 251 of the CA*

[8] The plaintiff takes the position that the second and third deductions (of \$7,896.46 on 24 March 2010, and of \$8,622.28 on 29 March 2010, respectively) were made after the liquidation commenced. The plaintiff seeks to recover those deductions under s 251 of the CA. They argue that s 251 prevents a creditor, including the Commissioner, from retaining the benefit of an attachment of a debt, on the basis that the debt did not attach before liquidation.

**The Commissioner's position**

[9] In answer to the plaintiff's application to set aside the first deduction under s 292 of the CA, the Commissioner seeks to establish that it has rights arising out of s 157 or s 167 TAA, to the effect that the either the plaintiff or the BNZ was holding the funds in trust for it prior to liquidation.

[10] In answer to the plaintiff's applications to set aside the second and third deductions under s 251 of the CA, the Commissioner seeks to establish that s 251 does not apply to the process under s 157 of the TAA.

**Section 167 of the Tax Administration Act**

[11] Section 167 relevantly provides:

167 Recovery of [tax and payments] from employers [or PAYE intermediaries]

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<sup>1</sup> Companies Act 1993, s 312 and sch 7.

- (1) [Every amount of tax or combined tax and earner-related payment withheld or deducted] under the PAYE rules ... shall be held in trust for the Crown, and any amount so held in trust shall not be property of the employer liable to execution, and, in the event of the bankruptcy or liquidation of the employer or of an assignment for the benefit of the employer's creditors, shall remain apart, and form no part of the estate in bankruptcy, liquidation, or assignment.
- (2) [When an amount of tax or combined tax and earner-related payment has been withheld or deducted] under the PAYE rules ... and the **employer has failed to deal with the amount of the [tax or payment withheld or deducted (or any part of it) in the manner required by subsection (1) or the PAYE rules**, the amount of the tax or payment] for the time being unpaid to the Commissioner shall, in the application of the assets of the employer, **rank as follows**:
  - (b) Where the employer is a company, upon the liquidation of the company, the amount of the [tax or payment] shall have the ranking provided for in Schedule 7 to the Companies Act 1993 (whether or not the company has been incorporated or registered under that Act); and

.....
- (3) This section shall apply notwithstanding anything in any other Act, and in particular s 308 of the Companies Act 1955 shall apply subject to this section

[12] The Court of Appeal considered s 167 in *Commissioner of Inland Revenue v Smith*.<sup>2</sup> The central matter in issue in *Smith* was whether the trust would only come into effect where the employer had held the funds in a separate account. The Court of Appeal concluded that a separate account was not necessary for the trust to arise. The fund into which the PAYE monies have been paid is impressed with a trust in favour of the Commissioner, to the extent of the monies so retained.<sup>3</sup> The Court also stated:<sup>4</sup>

Section 167 (2) of [the Tax Administration Act 1994] does mean that in the present case, *the trust came to an end on the liquidation of the company*. As the PAYE deductions had not been set aside in a separate account, it is unnecessary to consider whether the trust would have come to in the end if they had been so set aside. Section 167 (2) of the Tax Administration Act can have no application in the present case because the Commissioner was paid the amount of the deductions prior to the date of the liquidation.

(Emphasis added)

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<sup>2</sup> *Commissioner of Inland Revenue v Smith* [2000] 2 NZLR 147 (CA).

<sup>3</sup> At [11].

<sup>4</sup> At [13].

[13] There was considerable argument about whether the deductions from the company's account were related to PAYE. The plaintiff submitted that because the Commissioner was not aware that the taxpayer owed PAYE, the Commissioner could not rely on s 167. Furthermore, the plaintiff submitted that, as the funds would not have been received but for s 167 being applied in reduction of the plaintiff's GST liabilities, the Commissioner could not rely on s 167 to answer the plaintiff's claim for the funds to be returned in relation to its PAYE liabilities.

[14] I do not accept either of these propositions. The trust securing payments arises as a matter of law. It comes into existence at the point where an employer retains deductions from an employee's wages. Section 167 does not make the existence of the trust contingent on the Commissioner's state of mind, or the occurrence of an event such as return being filed by the employer, or the Commissioner assessing that PAYE is actually owed.

[15] It is undisputed that the plaintiff retained the tax portion of the wages paid to the employees. The fact that the company furnished PAYE returns for February 2011 implicitly acknowledged that such amounts had been retained. The returns also establish that the amount of the retention does not exceed the amount of the deductions actually made by the BNZ.

[16] It is clear that by the time that the liquidation commenced, the funds had not been paid to the Commissioner. The funds had been transferred by the BNZ to a suspense account pending a decision being made as to whether it would pay them to the Commissioner.

[17] It would appear that the effect of this section is to protect the interest of the Commissioner in PAYE deductions until such time as the Commissioner receives them. If the Commissioner has not received the PAYE deductions by the time liquidation occurs, the protection of s 167 is lost. That appears to be what is meant by s 167(2) when it speaks of the case where the:

[E]mployer has failed to deal with the amount of the [tax or payment withheld or deducted (or any part of it) in the manner required by subsection (1) or the PAYE rules...

[18] If the Commissioner does not receive the funds by the time the liquidation commences, then his position is the less favourable one of being a creditor of the company in the liquidation, albeit a preferential creditor.

[19] In the light of the last conclusion in the above paragraph, it is difficult to see that s 167(1) of the TAA has any effect on the outcome in this case. The trust would operate to prevent the employer dealing with the funds while under his control in a way that is inconsistent with its obligations under s 167, which are, broadly, to pay the money to the Commissioner as part of the return process provided for in the PAYE rules. But if the money is out of the employer's possession and beyond its reach, the trust imposed on the plaintiff has no relevance. Section 167(2), in expressly providing for what should happen if the employer fails to deal with the amount of PAYE withheld in the manner required by the PAYE rules, makes it clear that the trust has no relevance after the the company goes into liquidation. Therefore, the Commissioner cannot rely on s 167(1) of the TAA.

#### **Section 157 of the Tax Administration Act**

[20] The Commissioner sought to defend his position by relying on s 157 of the TAA. That section provides as relevant:

157 Deduction of tax from payments due to defaulters

- (1) Where a taxpayer has made default in the payment to the Commissioner of any income tax (or a part of any income tax) or any interest under Part 7 payable by the taxpayer or any civil penalty (or a part of any civil penalty) incurred by the taxpayer, **the Commissioner may from time to time by notice ... require any person to—**

(a) **Deduct or extract**, in one sum, from any amount that is, or becomes, an amount payable in relation to the taxpayer such sum as is equal to the lesser of—

(i) The amount that, according to the notice, is required to be deducted or extracted:

(ii) The amount that, at the time at which the deduction or extraction is required to be made in compliance with the notice, is the amount payable in relation to the taxpayer:

...



- (8) The sum deducted or extracted from any amount in accordance with a notice under this section shall be deemed to be held in trust for the Crown, and, without prejudice to any other remedies against the debtor or any other person, shall be recoverable in the same manner in all respects as if it were income tax payable by the debtor.

(Emphasis added)

[21] The Commissioner takes the position that s 157(8) applies, and that all the funds were held in trust on its behalf, and were therefore beyond the reach of the liquidators.

[22] As well as the trust created by virtue of section 167 of the TAA (already discussed), s 157(8) also creates a trust. The s 157(8) trust fixes the status of a deducting party as the trustee of the Commissioner. The period of duration of that trust is not contained in s 157. Section 167 of the TAA makes reference to a trust, relating to the capacity in which the employer holds the PAYE funds. The trust under s 167 ends on liquidation occurring. It is implicit in the submissions for the Commissioner that s 157 should be construed differently, as meaning that a deducting party (in this case, the BNZ) holds the funds in a trust that under endures past liquidation.

[23] I do not accept that the legislature would have intended such a result, for the following reasons. First, a different conclusion would involve the proposition that there is some aspect of the subject matter of s 157 that justifies viewing the statutory trust that arises under that section differently from the one that arise under s 167. That is because the s 167 trust must come to an end on liquidation. Section 167 deals with the circumstance where the taxpayer has retained PAYE funds and failed to deal with them as the PAYE rules and legislation provide. The operation of s 167 covers the circumstance where the funds are held in the taxpayer's bank account. The section would seem to apply to a circumstance of the present kind. Therefore, it leads to an enquiry as to why the legislature might have thought it necessary to enact for an additional trust arising under s 157. The explanation would seem to be that while the funds remain in the taxpayer's possession, s 167 is declaratory of the trust on which the taxpayer holds them. However, if there has been an attachment under s 157, and a third party (in this case, a bank) has possession of the funds while they were being transferred to the Commissioner. During that phase, the s 157 trust

protects the funds from interception by other creditors and possibly secures them against other claims. Such an explanation for why the trust arises in s 157 can be put forward without needing to infer that the s 157 trust endures past the point where a liquidation commences.

[24] That point is important when it comes to considering, as I do next, the provisions of s 251 of the CA.

[25] It is also important to bear in mind the fact that the deducting party is a trustee under s 157(8) leaves us with little guidance about what rights the Commissioner has as beneficiary. The trust is the instrument by which the Commissioner is enabled to take the advantage of the rights accruing to him as a result of the debt attaching. If a section of the CA enables the liquidator to unwind the entire process of the attachment of the debt, the fact that the deducting party was a trustee pursuant to s 157(8) of the TAA is irrelevant. The trust is there to protect the debt from, amongst others, other creditors of the taxpayer-debtor. The fact that a trust is constituted by operation of s 157(8) of the TAA is not decisive of whether the Commissioner is entitled to “retain” the benefit of the attachment of the debt — a matter that is dealt with in s 251 of the CA. It may however be relevant to another issue in this case which is whether or attachment has been completed for the purposes of s 251. In other words, the fact that the trust is impressed upon the property held by the taxpayer’s debtor does not automatically preclude s 251 from applying. Whether s 251 does or does not apply in the circumstances of this case is the next matter that I consider.

### **Section 251 of the Companies Act**

[26] As the chronology at the beginning of the judgment shows, on 15 March 2011 the Commissioner served a notice on BNZ pursuant to s 157 of the TAA, requiring the BNZ to make a single deduction from the funds held for the plaintiff in an amount of “the lesser of \$294,214.82, or all the available funds”. Subsequently, three payments were made from the plaintiff’s account to the BNZ suspense account. One payment of \$10,214.82 preceded the company going into liquidation.

[27] The plaintiff's claim is that the Commissioner is unable to retain these funds because they were "an attachment" within the meaning of s 251 of the CA. Section 251 provides, as relevant:

251 Restriction on rights of creditors to complete execution, distraint, or attachment

(1) Subject to subsection (3) of this section, **a creditor is not entitled to retain the benefit of any execution process, distress, or attachment over or against the property of a company unless the execution process, distress, or attachment is completed before—**

(a) The passing of a special resolution under [section 241(2)(a) or a resolution under section 241(2)(d)] appointing a liquidator of the company, or the date on which the creditor had notice of the calling of a meeting at which such a resolution was proposed, whichever occurs first; or

(b) The passing of a resolution by the board of a company under section 241(2)(b) of this Act appointing a liquidator or [sic: of] the company, or the date on which the creditor had notice of the calling of a meeting at which such a resolution was proposed, whichever occurs first; or

(c) The making of an application to the Court under section 241(2)(c) of this Act to appoint a liquidator of the company.

...

(4) For the purposes of this section,—

(a) An execution or distraint against personal property is completed by seizure and sale:

(b) An attachment of a debt is completed by receipt of the debt:

(c) An execution against land is completed by sale, and, in the case of an equitable interest, by the appointment of a receiver.

(5) Nothing in this section limits or affects section 292 of this Act.

(Emphasis added)

[28] The issues that arise under these sections are the following:

- a) Is the amount that the BNZ extracted from the plaintiff's account protected in the hands of the Commissioner by reason of s 157(8) of the TAA? This issue has been discussed above, to the conclusion that the s 157(8) trust ends upon liquidation.
- b) Did an "attachment" within the meaning of s 251 of the CA occur?
- c) Was attachment "completed" within the meaning of s 251 by the time the liquidation commenced?

**Did "attachment" under s 251 of the Companies Act occur?**

[29] The first issue is whether the process under s 157 of the TAA is an "attachment" within the meaning of s 251 of the CA. If so, there was an "attachment" in the circumstances of this case. Before discussing the matter further, it should be noted that there may be a different answer to this question depending upon which of the purported attachments is under consideration.

[30] "Attachment" is commonly regarded as being a type of execution, and therefore conditional upon the earlier entry of judgment. Mr Schoonrad, for the Commissioner, submitted that the usual meaning of the word "attachment" is to refer to an execution process of the High Court. I note in that regard that in the High Court Rules, the process of "attachment" is referred to in Part 17 — the section of the Rules dealing with the enforcement of judgments. However, it is not necessarily the case that the way the term is used in the High Court Rules is the meaning that the legislature intended when the term was adopted in section 251.

[31] The use of the term in that sense in the High Court Rules does not constitute a distinguishing circumstance that would persuade the Court that a creditor in the Commissioner's position under s 157 should be in a more favourable position than other creditors who are engaging in "attachment" of debts. That, after all, would be the consequence of accepting the interpretation for which the Commissioner contends.

[32] I now turn to the authorities.

[33] Counsel referred me to two cases in which the term has been considered in its statutory context. In *Anzamco Ltd (in liq) v Bank of New Zealand*, Barker J held that:<sup>5</sup>

I see no reason why the general provision forbidding attachment, distress or execution should not apply to a statutory right of attachment such as possessed by the Commissioner. The section binds Crown and the Commissioner as an agent of the Crown.

[34] Furthermore, the High Court of Australia in *Bruton Holdings Pty Ltd (in liq) v Federal Commissioner of Taxation* considered a similar provision to s 251 of the CA, and concluded that “attachment” meant both curial and non-curial attachments, and therefore, would not have a restricted meaning that would exclude the operation of a valid notice given under the Australian equivalent of s 167 of the TAA.<sup>6</sup>

[35] This wider interpretation of “attachment” as including the process under s 157 would place the Commissioner in exactly the same position as other creditors, and is therefore supportive of the general approach of distribution of property of insolvent companies in accordance with the statutory priorities under sch 7 of the CA. There is no general presumption of which I am aware that, when interpreting legislation of this kind, the legislature intended that the Commissioner should occupy a more favourable position than other creditors. In broad terms, s 251 of the CA is designed to prevent unsecured creditors gaining priority over other unsecured creditors for no reason other than that they have managed to get a head start in enforcing their debts. Interpreting the s 157 of the TAA process as constituting “attachment” under s 251 of the CA is consistent with this policy of not putting the Commissioner in a more favourable position in relation to other creditors.

[36] I would conclude, therefore, that the Commissioner’s receipt of a debt which has been deducted under s 157 can constitute “attachment” over or against the company’s property, under s 251(1) of the CA.

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<sup>5</sup> *Anzamco Ltd (in liq) v Bank of New Zealand* (1982) 5 NZTC 61,249 at 61, 256.

<sup>6</sup> *Bruton Holdings Pty Ltd (in liq) v Federal Commissioner of Taxation* [2009] HCA 32, 72 ATR 856 at 864, 865.

**Was the attachment process under s 157 Tax Administration Act completed by the time the liquidation commenced?**

[37] Section 251(4)(b) of the CA provides that an attachment of a debt is completed by receipt of the debt. For the plaintiff's argument under s 251 to succeed, it must be proven that the Commissioner received the payment before the plaintiff went into liquidation.

[38] When the BNZ received the deduction notice, it removed the funds from the plaintiff's account and placed them in its own account (the suspense account), pending a decision of whether or not to pay it to the Commissioner. Clearly, from the point where the funds were paid into the suspense account, legal control of and access to the funds moved from the plaintiff to the BNZ.

[39] But the key issue that is whether the point to which matters had progressed constituted the Commissioner "receiving" the debt as per s 251(4)(b).

[40] There are two issues that bear upon the proper interpretation of the statutory language. First, any interpretation must give effect to the plain wording of this section. The task of interpretation is not to be approached with any presumption in mind, whether for or against the Commissioner. There is no doubt that s 157 of the TAA was enacted to equip the Commissioner with a type of charging order that was simple to put into effect. It did not require, for example, that judgment be obtained before the charge could be put into operation. Such considerations, though, do not inform the issue of at what point the legal mechanism provided by s 157 took effect.

[41] The complicating feature is the involvement of a third party, the bank, in the transactions between the Commissioner and the taxpayer. Generally, the transfer of property to a trust, through a declaration of a trust or in some other way, is generally irrevocable. There is no reason to believe that the statutory trust under s 157 is any different. There is nothing in the statutory language to suggest the trust is reversible. If it turns out that the Commissioner required a deduction that exceeded the amount of the taxpayer's liability, the position would have to be adjusted by a repayment. No doubt once the BNZ placed the money into the suspense account, it was beyond

the reach and control of the plaintiff. The BNZ, though, was not in the position of an agent who could give a discharge of the debt by receiving the money. The section constituted the BNZ as a trustee of the Commissioner. The BNZ had to account to the Commissioner for the money. If it did not, the Commissioner could enforce the debt as if it were income tax payable by the BNZ.<sup>7</sup> This, in my view, suggests that the BNZ's actions in extracting money from the plaintiff's account and holding it in a suspense account did not, in terms of section 251(4)(b) CA amount to "receipt of the debt" by the Commissioner.

[42] The broad legislative intention underlying s 157 of the TAA was to provide the Commissioner with a process to enforce debts owed by taxpayers. It did not have an additional object of conferring on the Commissioner immunity from the restrictions on attaching debts that other creditors were subject to. The attachment of the debt had not yet completed by the time the liquidation occurred.

[43] Counsel did not make reference to authority concerning the issue of when the point is reached at which it can be said that "receipt of the debt" has occurred. One authority that deals with this question is the English case of *Butler v Wearing*.<sup>8</sup> The case was concerned with circumstances where the garnishee, under an order of the court, paid the amount into court to abide further order. Manisty J referred to earlier authority, including *Ex parte Pilers*, *In re Curtoys*, that a garnishor could only retain proceeds of the attachment under a garnishee order where payment is actually been received.<sup>9</sup>

[44] In *Butler v Wearing*, a garnishee paid the sum into court because a third party had made a competing claim to the debt. The claimant had not received the money by the time that a receiving order was made. The Court concluded that this was insufficient to amount to receipt of the debt, and that actual payment of the attached debt before the order of adjudication was required. The Court decided that a constructive receipt, as when the money is paid into court subject to further order, was not sufficient. It was Manisty J's view that the legislature's intention was to

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<sup>7</sup> Tax Administration Act 1994, s 157(8).

<sup>8</sup> *Butler v Wearing* (1885) 17 QBD 182.

<sup>9</sup> *Ex parte Pilers*, *In re Curtoys* (1881) 17 Ch D 653.

"put the law upon a very simple and plain foundation".<sup>10</sup> The decision was subsequently followed in *George v Thompson's Trustee*, which was another case of a payment into court under a garnishee summons.<sup>11</sup>

[45] When interpreting the term "receipt of the debt" as it applies to a situation arising from the exercise of the Commissioner rights under s 157 of the TAA, the reasoning behind the English authorities is compelling. It is difficult to give effect to the term as meaning anything other than actual payment. There is no other meaning that suggests itself. The section is not, for example, concerned with receipt of a debt by means of a process of assignment of a chose in action. In any event, there never was a transfer of the debt to the Commissioner: the statutory debt for unpaid tax was merely his to sue on.

[46] The alternative is that attachment was completed by the BNZ placing the money in a suspense account. This could only be so if it were possible to identify receipt by BNZ as constructively amounting to receipt by the Commissioner. The process pursuant to which the money passed into the BNZ's possession (by means of the transfer into the suspense account) was established by the statute, and accordingly, the legal consequences of a receipt by the bank must be found in the express words of the statute as supplemented by any legitimate implied obligations and powers. One consideration is that statutory trustees in the BNZ's position only possessed the money for the limited purpose of passing it on to the Commissioner. There was nothing that the BNZ could do, or did, beyond taking that step. It did not have power to deal with the funds on behalf of the party who was beneficially entitled to it, namely the Commissioner. It did not have power to give a receipt that would release the plaintiff from further obligation to the Commissioner to the extent of the funds received. There are no other characteristics of the trusteeship of the bank that might indicate that the legislature intended that receipt by the bank ought to be deemed to be the equivalent of receipt by the Commissioner.

[47] The conclusion I reach is that the Commissioner was not in receipt of the debt by the time the liquidation commenced, and therefore the attachment was not

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<sup>10</sup> *Butler v Wearing*, above n 8, at 187.

<sup>11</sup> *George v Thompson's Trustee* [1949] Ch 322.



completed. The result is that the Commissioner does not have the right to retain the funds that the BNZ passed to him after the liquidation occurred.

**Result of the foregoing conclusions**

[48] The Commissioner is not entitled to retain any of the sums that were paid out to him by the BNZ. Under s 248(1) of the CA, the plaintiff's assets have come under the liquidators' control from the date the liquidation commenced. The liquidators are entitled to those assets, which are to be used to pay creditors in accordance with the statutory priorities.

[49] Nor does the fact that amounts were deducted pursuant to a notice given under s 157 of the TAA assist the Commissioner, because the payments that were received from the BNZ took place after liquidation had commenced, and therefore are caught by s 251 of the CA.

[50] The entire amount of \$26,777.80 that the Commissioner has received via the BNZ ought to be paid to the liquidators. In the plaintiff's statement of claim dated 8 November 2011, judgment is sought for \$16,518.74. The liquidators of the plaintiff will have judgment for the latter sum accordingly.

[51] Similarly, the parties should confer on the matter of costs and if they are unable to agree file memoranda not exceeding five pages within 14 days.

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J.P. Doogue  
Associate Judge

IN THE HIGH COURT OF NEW ZEALAND  
AUCKLAND REGISTRY

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REVENUE  
Defendant

Hearing: 7-8 May 2012

Appearances: C Mansell for First and Second Plaintiffs  
H Schoonraad for Commissioner

Judgment: 13 July 2012

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**JUDGMENT TWO OF ASSOCIATE JUDGE DOOGUE  
(RECALLING JUDGMENT DATED 22 JUNE 2012)**

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*This judgment was delivered by me on  
13.07.12 at 4.30 p.m., pursuant to  
Rule 11.5 of the High Court Rules.*

*Registrar/Deputy Registrar*

*Date.....*

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JENNINGS ROADFREIGHT LIMITED & Anor (IN LIQUIDATION) V COMMISSIONER OF INLAND  
REVENUE HC AK CIV-2011-404-7225 [13 July 2012]

[1] Two matters have been drawn to my attention which require correction in the judgment in this proceeding.

[2] The first matter is that in paragraph [50] the amount for which judgment is to issue is to be \$26,733.56. As well, there is no requirement to refer to the figure in the plaintiff's statement of claim and that can be deleted. Another minor change is required to paragraph [50] as well so that the paragraph in the judgment is replaced with the following paragraph:

[50] The entire amount of \$26,733.56 that the Commissioner has received via the BNZ ought to be paid to the liquidators. The liquidators of the plaintiff will have judgment for that sum accordingly.

[3] A change is also required to paragraph [37]. In the second sentence the opening words should read: "For the *defendant's* argument ..." (emphasis added) etc. Subject to those corrections the judgment dated 22 June 2012 stands.

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J.P. Doogue  
Associate Judge