SUPREME COURT OF QUEENSLAND

CITATION:	*Commissioner of State Revenue v Can Barz Pty Ltd & Anor* [2016] QCA 323
PARTIES:	**COMMISSIONER OF STATE REVENUE** (appellant) **v** **CAN BARZ PTY LTD AS CUSTODIAN OF THE DECLARATION OF CUSTODY TRUST FOR THE MEWCASTLE SUPERANNUATION FUND** ACN 137 754 379 (first respondent) **CHERYL BIRD AND STEVEN SCOTT AS TRUSTEES OF THE MEWCASTLE SUPERANNUATION FUND** (second respondent) **ATTORNEY-GENERAL OF QUEENSLAND** (intervenor)
FILE NO/S:	Appeal No 3732 of 2016 SC No 8965 of 2015
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane – [2016] QSC 59
DELIVERED ON:	2 December 2016
DELIVERED AT:	Brisbane
HEARING DATE:	16 August 2016
JUDGES:	Morrison and Philippides and Philip McMurdo JJA Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Dismiss the appeal.** **2. Order the appellant to pay the respondents' costs of the appeal.**
CATCHWORDS:	STATUTES – ACTS OF PARLIAMENT – INTERPRETATION – where the second respondents are trustees of a superannuation fund – where the first respondent as custodian of trust property caused real property to be sold – where prior to settlement the appellant issued garnishee notices pursuant to s 50 *Taxation Administration Act* 2001 (Qld) ("TAA") to the property agent and purchasers requiring moneys to be paid to the appellant in satisfaction of tax debts due from the respondents to the appellant – where the respondents obtained declarations in the Trial Division that the notices were invalid – where the appellant contends that the learned primary judge erred in construing

s 50 TAA by having reference to similar but not identical statutes – whether on its correct construction s 50 TAA permits recovery of tax from trust property in order to satisfy tax debts of trustees which were incurred in another capacity

Income Tax Assessment Act 1936 (Cth), s 218
Superannuation Industry (Supervision) Act 1993 (Cth), s 62
Taxation Administration Act 1953 (Cth), s 260-5
Taxation Administration Act 2001 (Qld), s 50, s 51, s 52, s 53

Blacktown Concrete Services Pty Ltd v Ultra Refurbishing & Construction Pty Ltd (in liq) (1998) 43 NSWLR 484, cited
Can Barz Pty Ltd & Anor v Commissioner of State Revenue & Ors [2016] QSC 59, approved
Clyne v Deputy Commissioner of Taxation (1981) 150 CLR 1; [1981] HCA 40, cited
Deutsche Schachtbau-und Tiefbohrgesellschaft mbH v Shell International Petroleum Company Ltd [1990] 1 AC 295, cited
Deputy Commissioner of Taxation v Lai Corporation Pty Ltd [1987] WAR 15; [1986] WASC 403, cited
Elric Pty Ltd v Taylor (1988) 92 FLR 222, cited
Federal Commissioner of Taxation v Park (2012) 205 FCR 1; [2012] FCAFC 122, considered
Permanent Trustee Co Ltd v University of Sydney [1983] 1 NSWLR 578, cited
Tricontinental Corporation Ltd v Federal Commissioner of Taxation [1988] 1 Qd R 474; (1987) 73 ALR 433, considered
Ultra Thoroughbred Racing Pty Ltd v Commissioner of Taxation (2013) 96 ATR 117; [2013] FCA 1300, considered
Zuks v Jackson McDonald (1996) 132 FLR 317, cited

COUNSEL:	J M Horton QC, with T Pincus, for the appellant W Sofronoff QC, with P G Bickford, for the first and second respondents P Dunning QC SG, with A D Keyes, for the intervenor
SOLICITORS:	Crown Law for the appellant Bourke Legal for the first and second respondents Crown Law for the intervenor

[1] **MORRISON JA:** I have read the reasons of Philip McMurdo JA and agree with those reasons and the orders his Honour proposes.

[2] **PHILIPPIDES JA:** I agree with Philip McMurdo JA that the appeal from the declarations made by the learned primary judge should be dismissed with costs. Those declarations, relevantly, were that:

(a) the garnishee notices issued under s 50 of the *Taxation Administration Act* 2001 (Qld) (the TAA) were invalid and were not effective to impose obligations to pay money to the appellant (the Commissioner of State Revenue); and

(b) there was no obligation to pay any part of the proceeds of the sale of the Bulimba property to the appellant.

[3] The first respondent held the Bulimba property on trust for the second respondents (Ms Bird and Mr Scott) in their capacity as trustees for the Mewcastle Superannuation Fund. The Fund was a regulated fund under the *Superannuation Industry (Supervision) Act* 1993 (Cth) (the SIS Act) and established for the sole purpose of providing retirement benefits for its members or to their dependents if a member died before retirement. Ms Bird and Mr Scott were, themselves, the original members of the fund but the trust deed permitted the appointment of additional members. The interpolation of the first respondent was a consequence of the SIS Act provisions regulating the circumstances in which trustees of a regulated fund under that Act might borrow moneys for the purpose of acquiring an investment for the fund.[1]

[4] The first respondent contracted to sell the Bulimba property but, before settlement, the appellant, pursuant to s 50 of the TAA:

(a) issued two garnishee notices to third parties (the real estate agents and the purchaser of the property) seeking that they pay to the appellant moneys which would otherwise have been paid to the first respondent;[2] and

(b) issued a garnishee notice to the first respondent seeking that it pay the appellant moneys which would otherwise have been paid to the second respondents.

[5] The first garnishee notice served on the third parties identified "the taxpayer" as Can Barz "ATF Declaration of Custody Trust for the Mewcastle Superannuation Fund", while the second identified "the taxpayer" as Bird and Scott "as Trustees of the Mewcastle Superannuation Fund".[3]

[6] Leaving aside the steps taken by the appellant under s 50 of the TAA, the balance of the proceeds of sale (after repaying the mortgage on the property) would have been remitted to the first respondent and, because the second respondents had given a direction under the Custody Trust, the first respondents would have been obliged to pay those moneys to the second respondents to be held on trust for the Mewcastle Superannuation Fund.[4]

[7] For the purposes of the appeal, the respondents' liability to pay outstanding payroll tax to the appellant was not in dispute.[5] Further, there was no contest that the second respondents did not, at the time of the hearing below, have any beneficial interest in the assets of the Fund since:[6]

(a) in their capacity as trustees, they were obliged to comply with the superannuation law including the SIS Act and were obliged and entitled to pay out to members and dependents only when the circumstances provided in the trust deed or under the law had occurred; and

(b) in their capacity as members, the trust deed provided that the fund was vested in the trustees and no other person (including a member) had any legal beneficial interest in any asset of the fund, except to the extent stated in the deed.

[8] The appeal turns on the proper construction of s 50 of the TAA which specifies the circumstances by which a taxpayer's debt may be collected under a "garnishee notice" from "the garnishee". It relevantly provides:

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1 [2016] QSC 59 at [15].

2 The notice to the purchaser concerned the amount of that payment not otherwise payable to the mortgagee. The notice to the real estate agent concerned the payment of the deposit held by them.

3 [2016] QSC 59 at [25].

4 [2016] QSC 59 at [18].

5 See also the position at first instance: [2016] QSC 59 at [1].

6 [2016] QSC 59 at [13].

> "**50 Collection of amounts from a garnishee**
>
> (1) This section applies if—
>
> (a) under a tax law, a debt is payable by a taxpayer; and
>
> (b) the commissioner reasonably believes a person (the ***garnishee***)—
>
> (i) holds or may receive an amount for or on account of the taxpayer; or
>
> (ii) is liable or may become liable to pay an amount to the taxpayer; or
>
> (iii) has authority to pay an amount to the taxpayer.
>
> (2) Subsection (1)(b) applies even though the taxpayer's entitlement to the amount may be subject to unfulfilled conditions.
>
> (3) The commissioner may, by written notice given to the garnishee (the ***garnishee notice***), require the garnishee to pay to the commissioner by a stated date a stated amount (the ***garnishee amount***)."

[9] The argument put before the primary judge by the respondents was that, on its proper construction, s 50 would not authorise the Commissioner to issue a notice to a garnishee, in respect of moneys which the garnishee is liable to pay to a taxpayer, where the Commissioner knows the taxpayer's right to receive payment is not beneficially held by the taxpayer.[7] The respondents argued, by reference to what was said about garnishee notices under s 260-5 of Sch 1 to the *Taxation Administration Act* 1953 (Cth) in *Ultra Thoroughbred Racing Pty Ltd v Commissioner of Taxation* by Pagone J, that "[t]he purpose of the provision is not to have paid to the Commissioner money which does not belong to the taxpayer".[8] In *Ultra Thoroughbred Racing*, having considered the authorities concerning s 218 of the *Income Tax Assessment Act* 1936 (Cth) (which was in materially identical terms), Pagone J concluded that they established that the effect of s 260-5 "is to permit the Commissioner to require payment to the Commissioner of that which belongs to the taxpayer and not that which does not belong to the taxpayer".[9]

[10] In so concluding, Pagone J referred to *Zuks v Jackson McDonald*,[10] where an effective equitable assignment was held not to be defeated by the issue of a s 218 garnishee notice. Pagone J adopted what was said by Steytler J as to the purpose behind s 218 being to render:[11]

> "more effective the Commissioner's power to recover property of a taxpayer in payment of his or her unpaid tax rather than that of, in effect, picking the pocket of a third party (who might have acted entirely in good faith) in order to satisfy the obligation of a defaulting taxpayer."

[11] Pagone J also referred to *Tricontinental Corporation Ltd v Federal Commissioner of Taxation*,[12] where it was stated that "the purpose of s 218 was to permit the Commissioner

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7 [2016] QSC 59 at [29].
8 [2013] FCA 1300 at [7].
9 [2013] FCA 1300 at [7] (emphasis added).
10 (1996) 132 FLR 317 at 328.
11 [2013] FCA 1300 at [7], quoting (1996) 132 FLR 317 at 328.
12 (1986) 17 ATR 893 at 806-7.

to have access to a fund of money 'otherwise payable to the taxpayer' to effectively enforce payment of the taxpayer's income tax liability."[13]

[12] The primary judge expressed a difficulty in accepting the respondent's proposition in the "stark way" it was put (that the purpose of s 50 is not to have paid to the Commissioner money which "does not belong to the taxpayer"). This was because, as his Honour observed, "assets which a trustee holds on trust are still assets which are properly regarded as owned by (and, therefore, belonging to) the trustee" and "are not properly regarded as owned by or belonging to the beneficiary".[14] The primary judge identified the difficulty as being one of erroneously seeing legal and beneficial ownership "as though the trustee's ownership has been split into two types of ownership and that one of those types has passed to another person".[15] His Honour explained that key to understanding the error is to appreciate that "an equitable interest is not carved out of a legal estate but impressed upon it".[16]

[13] Having referred to well established authority as to the nature and incidents of legal and equitable estates in property, the primary judge concluded that Pagone J did not by his remarks intend any dissent from those principles and that Pagone J was referring to the question of whether or not "the debt still belonged to the taxpayer in equity".[17] The primary judge construed the phrase "liable to pay an amount to the taxpayer" in s 50 as "encompassing only circumstances in which the right to payment from the garnishee was legally and beneficially held by the taxpayer and the taxpayer was free to use the right in the taxpayer's own interest".[18]

[14] Senior counsel for the appellant sought to rely on two propositions in support of the appeal. Firstly, that the language of s 50 was such as to render it unnecessary, indeed impermissible, to inquire into the nature of the taxpayer's entitlement to the garnishee amount. It was thus contended one looked only to the issue of the liability as between the garnishee and the taxpayer. The inquiry ended once that liability was established. This argument focused on the differences between s 50 and its predecessor provisions and particularly on the introduction of the phrase "is liable to pay" and the requirement of "reasonable belief" on the part of the Commissioner. The authorities relied by the respondents were of no relevance in construing s 50.

[15] Secondly, it was argued, if the appellant failed in that proposition then the inquiry was said to be confined to whether there had been a prior disposition of property – it was only such "prior dispositions, including those recognised in equity as effective, which may not be garnisheed". Accordingly, if the authorities concerning provisions analogous to s 50 were relevant, they indicated that the nature of the inquiry was, in so far as equitable interests were concerned, restricted to whether there has been a disposition of an interest in the moneys including by way of an equitable assignment or charge but did not extend to exclude from the application of the garnishee provisions moneys which were the subject of a trust.

[16] As to the appellant's first contention that the primary judge erred in failing to find the statutory intention contended for by the appellant, the starting point must be that the garnishee process, as Philip McMurdo JA has explained, is a creature of statute.

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13 [2013] FCA 1300 at [7], quoting (1986) 17 ATR 893 at 806-7.
14 [2016] QSC 59 at [31].
15 [2016] QSC 59 at [32].
16 [2016] QSC 59 at [32], citing *DKLR Holding Co (No 2) Pty Ltd v Commissioner of Stamp Duties (NSW)* (1982) 149 CLR 431 per Brennan J.
17 [2016] QSC 59 at [33].
18 [2016] QSC 59 at [39].

Provisions such as s 50 are to be approached in accordance with established rules of statutory interpretation. One such rule is that against abrogation of common law doctrines unless the words of the statute expressly or necessarily require that result.[19] The many authorities on this point may be traced to O'Connor J's approval in *Potter v Minehan*[20] of the following passage from *Maxwell on the Interpretation of Statutes*:[21]

> "It is in the last degree improbable that the legislature would overthrow fundamental legislative principles, infringe rights, or depart from the general system of law without expressing its intention with irresistible clearness; and to give any such effect to general words, simply because they have that meaning in their widest, or usual, or natural, sense, would be to give them a meaning in which they were not really used."

[17] The legal assumption is now understood as part of the principle of legality. There can be no doubt that the legal assumption acts to protect both the common law *and* equitable principles from being overridden by the operation of relevant legislation unless there is a clear intention to do so.[22] That follows from the reference to "the general system of law" in *Potter*.[23] Thus, in *Minister for Lands and Forests v McPherson* it was said that in the absence of an unambiguous contrary intention in the statute, a statute should be interpreted so that it is consonant with the principles of equity.[24] This approach has been adopted in subsequent decisions including at appellate level.[25]

[18] The interpretation contended for by the appellant would require the overriding of general equitable principles as to the equitable interests in property. An interpretation that is consonant with the general law as to equitable property interests is to be preferred unless that interpretation is displaced by the legislation.

[19] The test for displacement of the presumption have been variously stated as requiring "clear and unambiguous words", words that are "unmistakeable and unambiguous" or where an intention "clearly emerges whether by express words or by necessary implication".[26] The principle of legality, as Gageler and Keane JJ noted in *Lee v New South Wales Crime Commission*:[27]

> "…ought not, however, to be extended beyond its rationale: it exists to protect from inadvertent and collateral alteration rights, freedoms, immunities, principles and values that are important within our system of representative and responsible government under the rule of law; it does not exist to shield those rights, freedoms, immunities, principles

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19 See D C Pearce & R S Geddes, *Statutory Interpretation in Australia*, 8th ed, LexisNexis Butterworths, Chatswood, NSW, 2014 at [5.28].

20 (1908) 7 CLR 277.

21 (1908) 7 CLR 277 at 304, quoting J A Theobold, *Maxwell on the Interpretation of Statutes*, 4th ed, Sweet & Maxwell, London, 1905 at 121.

22 See D C Pearce & R S Geddes, *Statutory Interpretation in Australia*, 8th ed, LexisNexis Butterworths, Chatswood, NSW, 2014 at [5.29].

23 (1908) 7 CLR 277 at 304.

24 (1991) 22 NSWLR 687 at 699-701 per Kirby P, with whom Mahoney and Meagher JJA agreed.

25 See *Re Brighton Hall Securities (in liq)* [2013] FCA 970 at [153] per McKerracher J; *Registrar of Titles v Mrsa* [2015] WASCA 204 at [32] per Martin CJ; *Binetter v BCI Finances Pty Ltd (in liq)* [2015] FCAFC 122 at [32]-[34] per Besanko, McKerracher and Pagone JJ.

26 See D C Pearce & R S Geddes, *Statutory Interpretation in Australia*, 8th ed, LexisNexis Butterworths, Chatswood, NSW, 2014 at [5.3]-[5.4]. In *X7 v Australian Crime Commission* (2013) 248 CLR 92 at [158], Kiefel J noted that to displace the presumption "[i]t will usually require that it be manifest from the statute in question that the legislature has directed its attention to the question whether to so abrogate or restrict and has determined to do so".

27 (2013) 251 CLR 196 at [313] and [317].

> and values from being specifically affected in the pursuit of clearly identified legislative objects by means within the constitutional competence of the enacting legislature.
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> …
>
> The interpretative strictures of the legality principle should not be applied so rigidly as to have a sclerotic effect on legitimate innovation by the legislature to meet new challenges to the integrity of the system of justice."

[20] There is nothing in the terminology of s 50 to suggest that the words "is liable or may become liable to pay" in relation to an amount payable to the taxpayer dispel the assumption that the established principles of equity remain intact. Certainly, there is no merit in the distinction to be drawn between "is liable to pay" and "entitlement". Indeed, the term "entitlement" appears in s 50(2) as referrable to the three circumstances identified in s 50(1)(b). Nor do the words "reasonable belief" alter matters.

[21] The appellant's submission, that the legislative intention that the primary judge was not prepared to attribute to the legislature, "was in fact what Parliament, by clear words, intended", cannot be accepted. The submission was premised on the proposition that the "possibility of money being payable to a taxpayer who would hold the funds on trust is obvious and could easily have been excluded [from the ambit of s 50] if the legislature had so intended" but was not. However, this misconceives the relevant legal assumption and turns it on its head.

[22] It is improbable that Parliament intended that the statutory process by which a party, such as the appellant, may collect moneys by the indirect means afforded by the garnishee process would operate to effect an alteration of substantive legal principles as to proprietary interests in the garnisheed amount. And, it is unsurprising that the authorities, to which Philip McMurdo JA has referred, have been careful to construe the provisions analogous to s 50 so as not to interfere with pre-existing interests. As Steytler J concluded in *Zuks v Jackson McDonald*,[28] after a detailed analysis of the case law when considering whether a s 218 notice operated in respect of moneys which were not beneficially owned by a taxpayer due to the existence of an equitable charge, there was "a substantial body of authority to support the proposition that, upon the proper construction of s 218, service of a notice under that section will not defeat a prior equitable charge".[29]

[23] I endorse the statement of Siopsis J in *Federal Commissioner of Taxation v Park*.[30] Although his Honour dissented from the majority in the outcome of the case, his Honour's statements[31] accord with the approach in *Zuks*.

[24] The authorities analysed by Philip McMurdo JA are of assistance when they are understood in the light of the statutory assumption against construing legislation as overriding established common law and equitable principles.

[25] For that reason, where legislation can be construed as consonant with such principles, that course should be preferred, unless there is a clear and unambiguous intention evident to the contrary.

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28 (1996) 132 FLR 317.
29 (1996) 132 FLR 317 at 327-328.
30 (2012) 205 FCR 1 at [52]-[54].
31 (2012) 205 FCR 1 at [52]-[54].

[26] Here, the phrase "is liable to pay" should, consistent with established equitable principles, be construed, as the primary judge found, as "encompassing only circumstances in which the right to payment from the garnishee was legally and beneficially held by the taxpayer and the taxpayer was free to use the right in the taxpayer's own interest".[32]

[27] As the primary judge correctly found, "the Commissioner must be taken to have reasonably known that at the time of the notices the taxpayer to whom the debt was owed did not have a full legal and beneficial interest in the debt".[33]

[28] Aware, perhaps, of the deficiencies in the appellant's two contentions in support of the appeal, senior counsel for the appellant for the first time raised a further contention in oral submissions in reply, to the effect that a member's tax liability could be discharged by a trustee of a superannuation fund. For the reasons stated by Philip McMurdo JA, that novel argument is without merit and must fail.

[29] **PHILIP McMURDO JA:** The question in this appeal is whether the garnishee procedure under the *Taxation Administration Act* 2001 (Qld) can be used to recover tax from trust property in order to satisfy tax debts of the trustees which were incurred not as trustees but in another capacity.

[30] In the judgment under appeal,[34] that question was answered in the negative. It was declared that certain garnishee notices which had been issued by the Commissioner of State Revenue were invalid and placed no obligation on the recipients to pay. By this appeal, the Commissioner argues that the primary judge (Bond J) erred in construing the provision by which a tax debt may be recovered from a garnishee, namely s 50 of the *Taxation Administration Act* 2001 (the "TAA"). The trustees, who are the second respondents to this appeal together with the respondent company, argue that his Honour was correct in concluding as he did. Alternatively, they contend, as they did before the primary judge, that if the Commissioner's interpretation of s 50 is correct, it is a provision which would be constitutionally invalid as having an operational inconsistency with laws of the Commonwealth which prevent the application of superannuation funds in the way for which the Commissioner argues. The Attorney-General of Queensland intervenes to resist that argument which the primary judge found unnecessary to decide because of his interpretation of s 50.

[31] For the reasons that follow, the primary judge was correct to make the orders which he did and the appeal should be dismissed.

The superannuation fund

[32] The second respondents, Ms Bird and Mr Scott, are the trustees of the Mewcastle Superannuation Fund. It is a regulated superannuation fund within the meaning of s 19 of the *Superannuation Industry (Supervision) Act* 1993 (Cth) (the "SIS Act"). The fund is governed according to a trust deed which provides (by cl 2) that the sole or primary purpose of the fund is to provide old age pensions to members on their retirement. The members, at least presently, are Ms Bird and Mr Scott.

[33] By cl 3 of the deed, the fund is vested in the trustees and it is provided that "No other person (including a member) has any legal or beneficial interest in any asset of the fund except to the extent expressly stated elsewhere in this deed." By the same clause,

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32 [2016] QSC 59 at [39].
33 [2016] QSC 59 at [40].
34 *Can Barz Pty Ltd & Anor v Commissioner of State Revenue & Ors* [2016] QSC 59.

the trustees must manage the fund in accordance with the deed, subject to compliance with "superannuation law" which is defined to include any law of the Commonwealth dealing with any aspect of superannuation or taxation in relation to superannuation or the lawful requirement of any Commonwealth body having responsibility in connection with the regulation of superannuation. By cl 7, the trustees must not do or fail to do anything as trustees of the fund that would result in a breach of a law, including a superannuation law.

[34] By cl 30 the trustees must establish certain types of accounts, namely an accumulation account or a pension account (or a combination of both), for each member or beneficiary for each class and an income account. A "beneficiary" is defined to mean a person immediately and absolutely entitled to a benefit under the deed in respect of a member and a "benefit" is defined to mean an amount payable out of the fund to or in respect of a member or beneficiary. Clause 31 specifies what may be credited to an accumulation account and cl 32 provides for the ways in which the trustees may debit such an account. For example, the trustees may debit such an account with a proportion of the expenses of the fund. Clause 32 also provides as follows:

> "32 The trustee may debit each of the following from the accumulation account of a member according to the class to which they are relevant:
>
> …
>
> 32.12 The amount of tax attributable to the member or a beneficiary of the member.
>
> …".

It is argued for the Commissioner that the tax which is sought to be recovered from Ms Bird and Mr Scott is an "amount of tax attributable to the member" such that these tax debts could be paid from the superannuation fund. I will return to that question.

[35] The income of the fund is regulated by clauses 35 to 38 of the deed. The trustees may credit the income and profits of the fund to the income account and by cl 36, they may debit the income account with the expenses of the fund (except those the trustees debit from a member's or beneficiary's accumulation or pension account). They may also debit the income account with "Tax payable or likely to become payable in respect of contributions, shortfall components, or income and profits of the fund, except tax the trustee debits from a member's or beneficiary's accumulation or pension account." The Commissioner does not argue that this provision (cl 36.2) would permit the subject tax to be paid from the income account. On no view is it tax of a kind within cl 36.2. Clause 37 also provides for tax as follows:

> "The trustee must make provision for the payment of any tax payable in relation to the taxable income of the fund and must deduct any tax that is payable and that has not already been deducted from the income account or an accumulation or pension account."

Again, the subject tax in this case, being not related at all to the superannuation fund, is not within that clause.

[36] The payment of benefits to a member is limited by, amongst others, cl 72 which provides that:

> "The trustee must not pay out to a member or a dependant of a member any preserved payment benefit that superannuation law does not allow the trustee to pay out."

A "preserved payment benefit" is defined to mean a benefit arising from a preserved payment, which is defined to mean a payment made to the fund which is required to be preserved under superannuation law if the fund is to be a compliant superannuation fund. Clause 73 permits the trustees to pay to a member (or, if applicable, a dependant of a member) a preserved payment benefit in circumstances such as where the member reaches the relevant age and retires from gainful employment or becomes totally and permanently disabled. Clearly the deed would not permit the trustees to pay the presently relevant tax liabilities of Ms Bird and Mr Scott from the fund by way of a payment of a preserved payment benefit. Clause 74 permits a member to withdraw any part of the "non-preserved amount in the member's accumulation account". There is no suggestion that this would facilitate the payment of the present tax debts.

[37] Clause 160 of the deed entitles the trustees to be reimbursed from the fund for all "expenses, taxes, levies, charges, fees and other amounts necessarily or reasonably incurred in acting as trustee under this deed." Clearly that provision would not allow the trustees to pay the presently relevant taxes because they are unrelated to the fund.

The Superannuation Industry (Supervision) Act

[38] By s 62 of the SIS Act, a trustee of a regulated superannuation fund must ensure that the fund is maintained solely for one or more of the "core purposes" and the "ancillary purposes" which are specified in that provision. Section 62(1) is as follows:

> "Sole purpose test
>
> (1) Each trustee of a regulated superannuation fund must ensure that the fund is maintained solely:
>
> (a) for one or more of the following purposes (the ***core purposes***):
>
> (i) the provision of benefits for each member of the fund on or after the member's retirement from any business, trade, profession, vocation, calling, occupation or employment in which the member was engaged (whether the member's retirement occurred before, or occurred after, the member joined the fund);
>
> (ii) the provision of benefits for each member of the fund on or after the member's attainment of an age not less than the age specified in the regulations;
>
> (iii) the provision of benefits for each member of the fund on or after whichever is the earlier of:
>
> (A) the member's retirement from any business, trade, profession, vocation, calling, occupation or employment in which the member was engaged; or
>
> (B) the member's attainment of an age not less than the age prescribed for the purposes of subparagraph (ii);

(iv) the provision of benefits in respect of each member of the fund on or after the member's death, if:

(A) the death occurred before the member's retirement from any business, trade, profession, vocation, calling, occupation or employment in which the member was engaged; and

(B) the benefits are provided to the member's legal personal representative, to any or all of the member's dependants, or to both;

(v) the provision of benefits in respect of each member of the fund on or after the member's death, if:

(A) the death occurred before the member attained the age prescribed for the purposes of subparagraph (ii); and

(B) the benefits are provided to the member's legal personal representative, to any or all of the member's dependants, or to both; or

(b) for one or more of the core purposes and for one or more of the following purposes (the ***ancillary purposes***):

(i) the provision of benefits for each member of the fund on or after the termination of the member's employment with an employer who had, or any of whose associates had, at any time, contributed to the fund in relation to the member;

(ii) the provision of benefits for each member of the fund on or after the member's cessation of work, if the work was for gain or reward in any business, trade, profession, vocation, calling, occupation or employment in which the member was engaged and the cessation is on account of ill-health (whether physical or mental);

(iii) the provision of benefits in respect of each member of the fund on or after the member's death, if:

(A) the death occurred after the member's retirement from any business, trade, profession, vocation, calling, occupation or employment in which the member was engaged (whether the member's retirement occurred before, or occurred after, the member joined the fund); and

(B) the benefits are provided to the member's legal personal representative, to any or all of the member's dependants, or to both;

(iv) the provision of benefits in respect of each member of the fund on or after the member's death, if:

(A) the death occurred after the member attained the age prescribed for the purposes of subparagraph (a)(ii); and

(B) the benefits are provided to the member's legal personal representative, to any or all of the member's dependants, or to both;

(v) the provision of such other benefits as the Regulator approves in writing.

(1A) Subsection (1) does not imply that a trustee of a regulated superannuation fund is required to maintain the fund so that the same kind of benefits will be provided:

(a) to each member of the fund; or

(b) in respect of each member of the fund.

(2) Subsection (1) is a civil penalty provision as defined by section 193, and Part 21 therefore provides for civil and criminal consequences of contravening, or of being involved in a contravention of, that subsection.

(3) An approval given by the Regulator for the purposes of subsection (1) may be expressed to relate to:

(a) a specified fund; or

(b) a specified class of funds."

That section is a civil penalty provision so that there are civil and potentially criminal consequences from its contravention.[35]

[39] Clearly s 62 precludes the application of the fund for the provision of a benefit to a member outside the circumstances of the retirement, attainment of a certain age or the death of a member. It thereby precludes the application of the fund in advance of any of those circumstances, to benefit a member by paying that member's debts, specifically in this case that member's tax debts which are unrelated to the fund. Section 62 puts paid to the Commissioner's submission that Ms Bird and Mr Scott could pay the presently relevant tax debts from the fund. The terms of the deed are subject to the operation of the SIS Act and, as the deed itself provides, any inconsistency between the two is to be resolved in favour of the Act.

[40] But something further should be said about cl 32.12 of the deed upon which the Commissioner relied in that submission. It permits the trustees to debit to a member's accumulation account "the amount of tax attributable to the member or a beneficiary of the member." That must be read with cl 36.2 and cl 37 to which I have referred, which indicate the meaning of the expression "attributable to the member" in cl 32.12. It is a reference to the member's proportionate responsibility for tax payable from a circumstance or event which involves the fund, such as (in cl 37) tax payable in relation to the taxable income of the fund. That is confirmed by the definitions of "tax" and "taxation" in the deed which are as follows:

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35 s 62(2).

> "Tax includes any form of taxation, surcharge, levy, duty or other government charge that the trustee is required to pay out of the fund, or a member, former member or beneficiary is required to pay.
>
> …
>
> Taxation includes any tax, charge, duty or levy of any type paid or payable by the trustee, or by a member, former member or beneficiary, in relation to any part of the fund."

The term "taxation" is limited, as thereby is the term "tax", to (relevantly) a tax "in relation to any part of the fund". Consequently the tax which is the subject of cl 32.12 cannot be a tax which is owed for events and circumstances which are unrelated to the fund, such as the tax debts in the present case.

Role of the first respondent

[41] By s 67 of the SIS Act, except in certain circumstances, the trustee of a regulated superannuation fund must not borrow money. One exception is where money is borrowed by an entity under s 67A, which provides that money may be borrowed to acquire a single asset which is held on trust by the borrowing entity for the trustee of the fund and where the lender may have recourse only to that asset. Pursuant to these provisions, the trustees caused the first respondent to hold certain real estate on trust for them as an asset of the fund.

[42] That land was sold by the first respondent and subject to the effect of the garnishee notices which are in question, the first respondent would receive the proceeds of sale upon trust for Ms Bird and Mr Scott, who would be entitled to be paid those proceeds as trustees of the superannuation fund. The first respondent is in all respects a trustee.

The Taxation Administration Act

[43] The first and second respondents became liable to pay to the appellant an amount under the *Payroll Tax Act* 1971 (Qld), in consequence of the grouping provisions of that act, whereby as (some of) the members of a relevant group they became jointly and severally liable for an unpaid tax assessment which had been issued to another member of the group.[36]

[44] At the time of the hearing in the trial division of this proceeding, the first and second respondents, in a separate proceeding, were seeking judicial review of a decision to refuse to exclude them from the group. But for the present case their liability to pay outstanding payroll tax was undisputed.[37]

[45] Section 50 of the TAA provides as follows:

> "50 Collection of amounts from a garnishee
>
> (1) This section applies if—
>
> (a) under a tax law, a debt is payable by a taxpayer; and
>
> (b) the commissioner reasonably believes a person (***the garnishee***)—

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36 *Payroll Tax Act* 1971 (Qld) ss 34(2), 42(2), 51A, 66-71 and 75.

37 The application for judicial review was subsequently dismissed: *Scott and Bird & Anor v Commissioner of State Revenue* [2016] QSC 132.

(i) holds or may receive an amount for or on account of the taxpayer; or

(ii) is liable or may become liable to pay an amount to the taxpayer; or

(iii) has authority to pay an amount to the taxpayer.

(2) Subsection (1)(b) applies even though the taxpayer's entitlement to the amount may be subject to unfulfilled conditions.

(3) The commissioner may, by written notice given to the garnishee (the ***garnishee notice***), require the garnishee to pay to the commissioner by a stated date a stated amount (the ***garnishee amount***).

(4) Without limiting subsection (3), the garnishee notice may require the garnishee to pay to the commissioner an amount out of each payment the garnishee is or becomes liable, from time to time, to make to the taxpayer.

(5) However, if, on the date for payment under the garnishee notice, the garnishee amount is not held for, or is not liable to be paid to, the taxpayer by the garnishee, the notice has effect as if the date for payment were immediately after the date the amount is held for, or is liable to be paid to, the taxpayer by the garnishee.

(6) The garnishee amount must not be more than the taxpayer's debt.

(7) The garnishee must comply with the garnishee notice unless the garnishee has a reasonable excuse.

Maximum penalty—40 penalty units.

(8) The commissioner must give to the taxpayer—

(a) a copy of the garnishee notice; and

(b) details in writing of the taxpayer's debt to which the notice relates.

[46] The first respondent contracted to sell the real property owned by it but had not settled that sale when the Commissioner issued notices pursuant to s 50 to the first respondent's selling agents and to the purchasers, seeking payment to the Commissioner of moneys which they would otherwise have paid the first respondent. Five days later the Commissioner issued further notices to the agents and the purchasers in the same terms as the original notices, save that Ms Bird and Mr Scott, rather than the first respondent, were shown as the taxpayers. On the same date the Commissioner also issued a notice to the first respondent itself, seeking to have it pay to the Commissioner the proceeds of sale which it would otherwise have passed on to Ms Bird and Mr Scott. The trial judge found that by the time the notices were issued, the Commissioner was aware of the trusts under which the respondents would have received the moneys. There being no dispute in this proceeding that each of the first and second respondents was a taxpayer by whom a debt was payable under a tax law, the condition in s 50(1)(a) was satisfied.

[47] The estate agents and purchasers were joined as respondents in the proceeding in the trial division, but were not parties to this appeal. They made no challenge to the notices and, in particular, that in terms of s 50(7) they had a reasonable excuse not to comply with the notices.

[48] By s 51 of the TAA, a garnishee notice has effect until the garnishee amount is paid or the Commissioner withdraws the notice. Section 52 provides for the withdrawal or reduction of the amount of a notice in the event that the taxpayer's debt is discharged or reduced.

[49] Section 53 provides for the effect of a payment by the garnishee as follows:

> "If the garnishee pays an amount to the Commissioner under a garnishee notice, the garnishee —
>
> (a) is taken to have acted under the authority of the taxpayer and all other persons concerned; and
>
> (b) if the garnishee is under an obligation to pay an amount to the taxpayer — is to be taken to have satisfied the obligation to the extent of the payment."

[50] By an interim agreement between all parties, when the sale of the property settled on 16 September 2015 the balance of the proceeds of sale, remaining after payment of the mortgagee and the expenses of the sale, were paid to the Commissioner. The Commissioner agreed that if it was held that the notices did not require the garnishees to pay the amounts to her, she would repay them or pay them to the first and second respondents or as the court directed.

The decision of the primary judge

[51] The trial judge described the argument for the first and second respondents, who were the applicants at first instance, as being that s 50 did not authorise the issue of a garnishee notice where, to the knowledge of the Commissioner, the taxpayer's right to receive payment was not "beneficially held by the taxpayer". The argument was that the purpose of s 50 was not to have paid to the Commissioner money which does not belong to the taxpayer.[38] His Honour observed that the argument found support in observations to that effect in relation to an analogous provision, which was made by Pagone J in *Ultra Thoroughbred Racing Pty Ltd v Commissioner of Taxation*[39] as follows:

> "The purpose of garnishee notices issued under s 260-5 is to enable the Commissioner to facilitate the recovery of tax payable by a taxpayer by requiring that money of the taxpayer be paid to the Commissioner. The purpose of the provision is not to have paid to the Commissioner money which does not belong to the taxpayer. The provisions analogous to those now found in s 260-5 of Sch 1 to the TAA were previously those in s 218 of the *Income Tax Assessment Act* 1936 (Cth) in materially similar if not identical terms. In *Zuks v Jackson McDonald (A Firm)* (1996) 33 ATR 40; 132 FLR 317; 96 ATC 4588, Steytler J said (at ATR 49; FLR 328; ATC 4596) of the purpose of such provisions:
>
> > 'The purpose behind s 218 seems to me to be that of rendering more effective the Commissioner's power to recover property

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38 [2016] QSC 59 at [29].

39 [2013] FCA 1300 at [7]; (2013) 96 ATR 117, 120.

> of a taxpayer in payment of his or her unpaid tax rather than that of, in effect, picking the pocket of a third party (who might have acted entirely in good faith) in order to satisfy the obligation of a defaulting taxpayer.'
>
> In that case the court held that an effective equitable assignment would not be defeated by the issue of a s 218 notice. In *Tricontinental Corporation Ltd v FCT* (1986) 17 ATR 803; 85 FLR 273; 86 ATC 4453, Carter J similarly observed (at ATR 806-807; FLR 276-277; ATC 4456) that the purpose of s 218 was to permit the Commissioner to have access to a fund of money 'otherwise payable to the taxpayer' to effectively enforce payment of the taxpayer's income tax liability. The authorities to which each case refers are consistent with that purpose and establish that the effect of s 260-5, and its preceding version in s 218, is to permit the Commissioner to require payment to the Commissioner of that *which belongs to the taxpayer and not that which does not belong to the taxpayer*."
>
> (emphasis added)

Pagone J was discussing garnishee notices issued under s 260-5 of Sch 1 of the *Taxation Administration Act* 1953 (Cth). That provision and the other to which his Honour referred, the former s 218 of the *Income Tax Assessment Act* 1936 (Cth) are similar garnishee provisions but, the appellant argues, materially different from s 50 of the TAA.

[52] As to that argument, Bond J said:

> "[31] I have difficulty accepting the proposition in the stark way in which the applicants put it because assets which a trustee holds on trust are still assets which are properly regarded as owned by (and, therefore, belonging to) the trustee. They are not properly regarded as owned by or belonging to the beneficiary."

His Honour then proceeded to discuss the nature of a trust, saying that it was incorrect "to talk about legal and beneficial ownership as though the trustee's ownership has been split into two types of ownership and one of those types has passed to another person". His Honour said that "the key … is to realise that an equitable interest is not carved out of the legal estate but impressed upon it", referring to Brennan J in *DKLR Holding Co (No 2) Pty Ltd v Commissioner of Stamp Duties (NSW)*.[40] Bond J then said that Pagone J had not intended to say otherwise and continued:[41]

> "When one has regard to the decision of *Zuks v Jackson McDonald* to which [Pagone J] referred, it is clear that he was referring to the question of whether or not the debt still belonged to the taxpayer in equity. And that was relevant because, like Steytler J in *Zuks*, Pagone J accepted a particular proposition concerning the intention of Parliament, namely that Parliament would not intend to give to the Commissioner

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40 (1982) 149 CLR 431, 474, cited by Bond J at [2016] QSC 59 at [32]. For the same proposition Bond J also set out part of the judgment of Hope JA in the decision in the New South Wales Court of Appeal in *DKLR Holding Co (No 2)* [1980] 1 NSWLR 510, 518-519 and referred to the approval of that reasoning by McPherson JA (with the agreement of Williams JA) in *Francis v NPD Property Developments Pty Ltd* [2005] 1 Qd R 244, 246 [4].

41 [2016] QSC 59 at [33].

> a right to have access to assets which the garnishee was not free to use for his own benefit."

(The reference to "garnishee" was obviously an intended reference to "the taxpayer").

[53] Bond J then discussed the judgment in *Zuks* and a decision of the Full Court of the Federal Court in *Federal Commissioner of Taxation v Park*,[42] before expressing his conclusions as follows:

> "[39] The result is that, like Steytler J in *Zuks*, I would not attribute to Parliament the intention that the Commissioner should be paid tax out of property which the Commissioner must have reasonably believed in equity did not belong to the taxpayer at the time of receipt of the relevant notice. To put the same proposition positively, where s 50 refers to "liable to pay an amount to the taxpayer" I would construe that phrase as encompassing only circumstances in which the right to payment from the garnishee was legally and beneficially held by the taxpayer and the taxpayer was free to use the right in the taxpayer's own interest. To take any other view would be to attribute intention to the [P]arliament in a way which I am not prepared to do.
>
> [40] As I have mentioned – see [23] and [28] above – the Commissioner had been apprised of the relevant facts. None of the garnishee notices can be regarded as garnishee notices in respect of which the Commissioner had a reasonable belief that the garnishee was "liable or may become liable to pay an amount to the taxpayer", because in each case the Commissioner must be taken to have reasonably known that at the time of the notices the taxpayer to whom the debt was owed did not have a full legal and beneficial interest in the debt."

[54] Bond J declared that each of the garnishee notices was invalid and not effective to impose obligations on the recipient to pay moneys. He further declared that none of the recipients was obliged to pay to the Commissioner any part of the proceeds of sale of the relevant property.

The appellant's arguments

[55] The appellant argues that the primary judge failed to construe s 50 according to its own terms rather than those of Commonwealth laws by which a similar but not identical power was conferred.

[56] The first of those provisions is s 218 of the *Income Tax Assessment Act* 1936 (Cth) (to which I will refer as "s 218") which relevantly provided as follows:

> "(1) The Commissioner may at any time, or from time to time, by notice in writing (a copy of which shall be forwarded to the taxpayer at his last place of address known to the Commissioner), require –
>
> (a) any person by whom any money is due or accruing or may become due to a taxpayer;

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42 (2012) 205 FCR 1.

(b) any person who holds or may subsequently hold money for or on account of a taxpayer;

(c) any person who holds or may subsequently hold money on account of some other person for payment to a taxpayer; or

(d) any person having authority from some other person to pay money to a taxpayer;

to pay to the Commissioner, either forthwith upon the money becoming due or being held, or at or within a time specified in the notice (not being a time before the money becomes due or is held) –

(e) so much of the money as is sufficient to pay the amount due by the taxpayer in respect of any tax and of any fines and costs imposed upon him under this Act, or the whole of the money when it is equal to or less than that amount; or

(f) such amount as is specified in the notice out of each of any payments which the person so notified becomes liable from time to time to make to the taxpayer, until the amount due by the taxpayer in respect of any tax and of any fines and costs imposed upon him under this Act is satisfied,

and may at any time, or from time to time, amend or revoke any such notice, or extend the time for making any payment in pursuance of the notice.

(2) Any person who fails to comply with any notice under this section shall be guilty of an offence."

[57] The second of those provisions is s 260-5 of the *Taxation Administration Act* 1953 (Cth) (to which I will refer as "s 260-5") which relevantly provides as follows:

"Amount recoverable under this Subdivision

(1) This Subdivision applies if any of the following amounts (the ***debt***) is payable to the Commonwealth by an entity (the ***debtor***) (whether or not the debt has become due and payable):

(a) an amount of a tax-related liability;

(b) a judgment debt for a tax-related liability;

(c) costs for such a judgment debt;

(d) an amount that a court has ordered the debtor to pay to the Commissioner following the debtor's conviction for an offence against a taxation law.

Commissioner may give notice to an entity

(2) The Commissioner may give a written notice to an entity (the ***third party***) under this section if the third party owes or may later owe money to the debtor.

Third party regarded as owing money in these circumstances

(3) The third party is taken to owe money (the available money) to the debtor if the third party:

(a) is an entity by whom the money is due or accruing to the debtor; or

(b) holds the money for or on account of the debtor; or

(c) holds the money on account of some other entity for payment to the debtor; or

(d) has authority from some other entity to pay the money to the debtor.

The third party is so taken to owe the money to the debtor even if:

(e) the money is not due, or is not so held, or payable under the authority, unless a condition is fulfilled; and

(f) the condition has not been fulfilled.

How much is payable under the notice

(4) A notice under this section must:

(a) require the third party to pay to the Commissioner the lesser of, or a specified amount not exceeding the lesser of:

(i) the debt; or

(ii) the available money; or

(b) if there will be amounts of the available money from time to time – require the third party to pay to the Commissioner a specified amount, or a specified percentage, of each amount of the available money, until the debt is satisfied.

When amount must be paid

(5) The notice must require the third party to pay an amount under paragraph (4)(a), or each amount under paragraph (4)(b):

(a) immediately after; or

(b) at or within a specified time after;

the amount of the available money concerned becomes an amount owing to the debtor.

Debtor must be notified

(6) The Commissioner must send a copy of the notice to the debtor.

Setting-off amounts

(7) If an entity other than the third party has paid an amount to the Commissioner that satisfies all or part of the debt:

(a) the Commissioner must notify the third party of that fact; and

(b) any amount that the third party is required to pay under the notice is reduced by the amount so paid."

[58] The appellant's argument emphasises a difference in s 50 of the TAA, in that it permits the Commissioner to issue a garnishee notice upon the basis of a reasonable belief as to the position between the garnishee and the taxpayer, rather than upon the basis of the fact of that position. From this it is submitted that there is an evident legislative intention "that the precise circumstances in which the garnishee is to pay amounts to the taxpayer are not critical, and that the legislature did not intend to compel close analysis of the technical legal arrangements concerning the taxpayer …".[43] It is further submitted that s 50 is different in that it provides a basis for issuing a notice where the garnishee is liable or may become liable to pay an amount, rather than an amount being "due or accruing", to the taxpayer.

[59] On the basis of these differences in language, it is submitted for the appellant that the authorities which have excluded the operation of s 218 and s 260-5 where the debt, although nominally owed to the taxpayer, is beneficially the property of another party, have no application to s 50. Consequently the present notices were permitted by s 50 notwithstanding the trust or trusts which affected the entitlement to the proceeds of sale.

[60] The appellant's alternative argument is that if s 50 is not materially different from those other provisions, none of the cases which have excluded their operation have involved the existence of a trust or trusts affecting the relevant moneys. Rather, those cases involved the operation of equitable assignments or charges.

The respondents' argument

[61] The respondent argues that the reasoning of the primary judge was correct. Further it is said that relevant to the interpretation of s 50 is the operation of s 62 of the SIS Act and s 116 of the *Bankruptcy Act* 1966 (Cth). As already discussed, s 62 limits the purposes for which a regulated superannuation fund may be applied, such that the trustees could not apply any part of the fund to meet the tax debts the subject of this case. By s 116(2)(d)(iii) of the *Bankruptcy Act*, the interest of the bankrupt in a regulated superannuation fund is excluded from the property which is divisible amongst the bankruptcy's creditors. In essence, each provision precludes the use of a member's interest in a superannuation fund to pay that person's creditors, until there is a benefit duly paid from the fund according to its terms and the laws regulating superannuation funds. Further, the respondents' argument emphasises the impermissibility, under the general law, of the use by trustees of trust funds for their own purposes rather than those of the trust.

[62] These restrictions upon the use of superannuation funds, either by trustees or members, it is argued, should not be affected by the interpretation of s 50 of the TAA for which the appellant contends.

Garnishee orders and trusts

[63] The procedure for attachment of debts by a garnishee order is a form of execution. It can be traced to the *Common Law Procedure Act* 1854 in England, from which came

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43 Appellant's amended outline of argument para 9a.

the provisions for garnishee orders in ss 51-61 the *Common Law Practice Act* 1867 (Qld).[44] The procedure was developed because before then, there was no means by which a judgment creditor could appropriate debts and moneys of the judgment debtor in the hands of a third party.[45]

[64] The garnishee process was not permitted to affect the rights of parties (other than the judgment debtor) in the debt owed by the garnishee. In *Blacktown Concrete Services Pty Ltd v Ultra Refurbishing & Construction Pty Ltd (in liq)*,[46] Santow J described the rights of the judgment creditor as against third parties having interests in that debt as follows:

> "However, the garnishor attached debts owed to the judgment debtor remains subject to such rights and equities as – pre-attachment – existed over the particular debt owed to the judgment debtor: see *Norton v Yates* [1906] 1 KB 112 following *Re Combined Weighing & Advertising Machine Co*. An example of such an equity would be a pre-existing fixed charge over property of the judgment debtor where it covered the debt owed by the garnishee to the judgment debtor: *Norton v Yates*; *Badeley v Consolidated Bank* (1888) 38 Ch D 238 at 257, per Cotton LJ; *Re London Pressed Hinge Co Ltd*; *Campbell v London Pressed Hinge Co Ltd* [1905] 1 Ch 576 at 581, per Buckley J; *Cairney v Back* [1906] 2 KB 746; *Relwood Pty Ltd v Manning Homes Pty Ltd [No 2]*.
>
> Where the charge is a floating one, an execution creditor takes free from a floating charge if, but only if, the execution is completed (*Re Opera Ltd* [1891] 3 Ch 260; *Robson v Smith* [1895] 2 Ch 118; *Evans v Rival Granite Quarries Ltd* [1910] 2 KB 979), or payment is made to avoid execution, prior to crystallisation of the charge …"

[65] And from the outset, courts were disinclined to allow the garnishee procedure to be used to affect trust property. Thus in *Roberts v Death*,[47] Cotton LJ said that just as "a Court of Equity always interfered to prevent goods which were held in trust from being taken in execution to satisfy the debt of the trustee", a garnishee order absolute should not be made where the money sought to be attached was trust money.

[66] More recently in *Deutsche Schachtbau-und Tiefbohrgesellschaft mbH v Shell International Petroleum Company Ltd*,[48] it was held that under the relevant procedural rule in England, the existence of a trust over the debt to be attached affected the court's discretion to refuse to make a garnishee order absolute. That rule provided for a hearing in which any person claiming an interest in the debt could be heard as to whether the order absolute should be made. Lord Goff of Chieveley said that in this context, if the debt was found to be payable to the judgment debtor as a trustee, the court would normally not make a garnishee order absolute.[49] In the same case when it was in the Court of Appeal, Woolf LJ (as he then was) said:[50]

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44 As traced by McPherson SPJ (as he then was) in *Relwood Pty Ltd v Manning Homes Pty Ltd (No 2)* [1992] 2 Qd R 197, 199-200 and more recently in the joint judgment of the High Court in *Bruton Holdings Pty Ltd (in liquidation) v Commissioner of Taxation* (2009) 239 CLR 346, 354-355 [23]-[26].

45 *Bruton Holdings Pty Ltd*, 354 [23].

46 (1998) 43 NSWLR 484, 497.

47 (1881) 8 QB 319, 323.

48 [1990] 1 AC 295.

49 [1990] 1 AC 295 at 351.

50 [1988] 1 Lloyd's Rep 164, 172.

> "If the judgment debtor is not beneficially entitled to the money owed by the garnishee, then in the normal case it would be wholly inappropriate to make a garnishee order absolute, even if there was jurisdiction to do so, since this could unjustly prejudice the third party who was beneficially entitled to the debt."

[67] In summary, because the remedy of a garnishee order is a form of execution by attachment of the judgment debtor's property, the remedy has been confined to prevent the pre-existing rights and equities of third parties, including beneficiaries under trust, from being affected. In turn, this has informed the interpretation of provisions such as s 218 of the *Income Tax Assessment Act* and s 260-5 of the *Taxation Administration Act* in the cases now to be discussed.

The authorities on s 218 and s 260-5

[68] In *Clyne v Deputy Commissioner of Taxation*,[51] the Commissioner served on a bank two notices under s 218, requiring it to pay to the Commissioner any money due or accruing or which might become due by the bank to the taxpayer to a certain amount. The taxpayer then had three interest bearing deposits which were repayable on future dates. The taxpayer, by deed, subsequently assigned those deposits to a third party and gave notice of the assignment to the bank. The High Court unanimously held that the Commissioner's entitlement to payment by the bank prevailed over that of the assignee of the debts. The judgments were concerned mainly with questions of the meaning of "the amount due by the taxpayer" in s 218(1)(d)(i) and the meaning of "due" in s 218(1)(a). But the judgment of Mason J has been extensively cited in subsequent cases which have considered the effect of a s 218 notice upon third party interests in the debt. Mason J there said:[52]

> "… I think that the effect of the service of a s 218 notice is to prevent a taxpayer from thereafter assigning a debt, the subject of the notice, so as to defeat the Commissioner's right to payment in accordance with the section. In this respect … I regard the effect of the notice as similar to that of a garnishee order. Indeed, the similarity between s 218 and the provisions for garnishee orders in Rules of Court is quite striking."

Similarly, in *Permanent Trustee Co Ltd v University of Sydney*,[53] Helsham CJ in Eq said that:

> "[A] s 218 notice given to a trustee can have no greater effect upon the right of a beneficiary to receive income than a garnishee order – it is in effect a statutory garnishee."

[69] *Deputy Commissioner of Taxation v Lai Corporation Pty Ltd*[54] involved the effect of s 38(1) of the *Sales Tax Assessment Act (No 1)* 1930 (Cth), which Burt CJ there described as for all practical purposes being in the same terms as s 218(1). The Full Court of the Supreme Court of Western Australia considered the effect of a notice under that provision as against a floating charge which had been granted by the taxpayer prior to, but which had crystallised after, the notice had been given. It was

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51 (1981) 150 CLR 1.
52 (1981) 150 CLR 1, 19.
53 [1983] 1 NSWLR 578, 584.
54 [1987] WAR 15, also reported as *Norgard v Deputy Commissioner of Taxation* (1986) 79 ALR 369; 86 ATC 4947.

held that the existence of the charge did affect the operation of the notice in requiring the debtor to pay the Commissioner. The court said that the position would have been different had the charge crystallised prior to the service of the notice. Burt CJ gave two reasons for that view, the first being that once the charge had become fixed, the Commissioner would have received the payment subject to the security, the second and alternative reason being that the same result would follow "by saying that to the extent of the security the debt although due is not payable to the taxpayer".[55]

[70] *Tricontinental Corporation Ltd v Federal Commissioner of Taxation*[56] involved a consideration of the effect of a floating, but not yet crystallised, charge upon notices under s 218. It was held that prior to crystallisation, the holder of the charge had no proprietary interest which could defeat the operation of a s 218 notice. Connolly J (with whom Shepherdson J agreed) said:[57]

> "Whether in a case in which a charge, which, as in this case, is expressed to be a floating charge, has crystallised, that fact would be sufficient to defeat a notice under s 218 of the *Income Tax Assessment Act* is, I think, not free from difficulty. In form at least, the money is still due or accruing to the taxpayer. The debenture holder enforces his rights by appointing a receiver who would demand and recover the debt in the name of the taxpayer. If the analogy with forms of execution such as garnishment be appropriate, then it might well be right to say that s 218 can only operate on the taxpayer's beneficial interest in the moneys. A more direct approach is to say that once a floating charge has crystallised, moneys the subject of the charge are no longer in reality owing to the taxpayer but to the chargee."

Connolly J considered that the second approach was supported by the judgment of Mason J in *Clyne*, where Mason J said:[58]

> "[I]f "due" does not mean "due and payable" then the Commissioner by giving a s 218 notice can require payment of a debt owing to the taxpayer which, but for the notice, would not become payable to him by reason of the supervening rights of a secured creditor, eg the crystallization of a floating charge before the debt becomes payable."

Upon the reasoning of Connolly J, a debt owing to the taxpayer which was subject to a fixed charge would not be, for the purposes of s 218, an amount which is due and payable to the taxpayer and could therefore not be the subject of a s 218 notice. Alternatively, Connolly J said, by analogy with garnishment, the notice could affect only a beneficial interest of the taxpayer in the debt.

[71] *Elric Pty Ltd v Taylor*[59] concerned the effect of a s 218 notice where a charge had crystallised prior to the notice being served. Thomas J (as he then was) granted an injunction to restrain a payment to the Commissioner upon the basis that the moneys the subject of the charge were not owing to the taxpayer but to the chargee.

[72] In *Zuks v Jackson McDonald*,[60] Steytler J (as he then was) reached the same conclusion as to the position between the holder of a prior equitable charge and the Commissioner

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55 [1987] WAR 15, 23.
56 [1988] 1 Qd R 474; (1987) 73 ALR 433.
57 [1988] 1 Qd R 474, 481; 73 ALR 433, 440.
58 (1981) 150 CLR 1, 16.
59 (1988) 92 FLR 222.
60 (1996) 132 FLR 317.

relying upon a s 218 notice. After a discussion of the authorities to which I have referred, Steytler J said:[61]

> "I consider that it would be a big step to conclude that parliament intended that the Commissioner should be paid his tax out of a debt which in equity had ceased to belong to the taxpayer at the time of receipt of the relevant notice. It is difficult to conceive that this could ever have been its intention. The purpose behind s 218 seems to me to be that of rendering more effective the Commissioner's powers to recover property of a taxpayer in payment of his or her unpaid tax rather than that of, in effect, picking the pocket of a third party (who might have acted entirely in good faith) in order to satisfy the obligation of a defaulting taxpayer (See, in this respect, s 15AA of the *Acts Interpretation Act* 1901 (Cth)."

[73] There are then two relevant decisions as to s 260-5. The first is *Federal Commissioner of Taxation v Park*,[62] where the taxpayer had owned real property which was subject to a mortgage and which was sold, leaving the proceeds of sale in dispute. Prior to settlement of the contract, the Commissioner had served a notice under s 260-5 on the purchasers. The mortgagee claimed that it had a prior claim which derived from its first mortgage on the land. The parties had reached an agreement by which the sale was able to be settled, to the effect that the amount in dispute would be paid to a solicitor's trust account pending the resolution of the dispute between the mortgagee and the Commissioner. The mortgage was released to permit settlement to occur. The court divided on the question of whether, under a Torrens system of mortgage, a mortgagee enjoys an equitable charge over the proceeds of sale. The majority (Jessup and Katzmann JJ) held that there was no equitable charge enjoyed by the mortgagee over the proceeds so that the Commissioner's claim succeeded. The third judge (Siopsis J) held otherwise, so that it is his Honour's opinion upon the effect of the s 260-5 notice which is presently relevant. Siopsis J said that the Commissioner, having served a s 260-5 notice, was to be regarded as being in a similar position to that of a person who had issued a garnishee notice.[63] It followed, he said, that "the debt the subject of the demand made in the s 260-5 notice, is subject to the rights and equities which already exist in respect of the debt …".[64] A further principle, according to Siopsis J, was that a demand made under a s 260-5 notice only applies to moneys that are payable to the taxpayer "in his or her capacity as beneficial owner".[65] His Honour there referred to *Zuks*, noting that the observations of Steytler J were made in the context of the operation of an equitable charge over the funds. Importantly for the present case, Siopsis J said:[66]

> "However, the principle that the s 260-5 notice can only operate on the taxpayer's beneficial interests in the claimed monies, would apply equally where the taxpayer did not hold the beneficial interest in the moneys claimed for some other reason, for example, because the moneys were trust funds, in respect of which the taxpayer was a trustee."

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61 (1996) 132 FLR 317, 328.
62 (2012) 205 FCR 1.
63 (2012) 205 FCR 1, 10 [46].
64 (2012) 205 FCR 1, 10-11 [47] citing *Norton v Yates* [1906] 1 KB 112, 121.
65 (2012) 205 FCR 1, 11 [52] citing *Tricontinental*, 482.
66 (2012) 205 FCR 1, 11-12 [54].

[74] In *Ultra Thoroughbred Racing Pty Ltd v Federal Commissioner of Taxation & Anor*,[67] the taxpayer was a part-owner of a racehorse who, under Racing Victoria rules, was alone entitled to receive any prize money. Under an agreement with the applicant company, the taxpayer's share of the winnings was not owned by him but by the applicant. The Commissioner issued a notice under s 260-5 to Racing Victoria requiring it to pay the taxpayer's share of winnings won by the horse. The applicant applied for an injunction to prevent Racing Victoria paying the money to the Commissioner on the basis that the money belonged to the applicant and was therefore outside the operation of s 260-5. That argument was upheld. Pagone J said that the arrangements between the applicant and the taxpayer established that any amount payable to him for the winnings of the horse "belonged to the applicant from inception". Pagone J discussed *Palette Shoes Pty Ltd (in liq) v Krohn*,[68] where the High Court considered the effect of an agreement between a manufacturer of shoes and a purchaser from the manufacturer, which included a clause requiring the manufacturer to pay to the plaintiff any money received by it for shoes which it had sold on the plaintiff's behalf. Pagone J noted that the High Court held that the clause did not effect an assignment of a debt, but was a "contractual provision which created a direct entitlement in the plaintiff over the money upon receipt by the manufacturer from the purchaser's customers".[69] It followed that because the winnings of the horse were money which, although required to be paid by the recipient of the notice to the taxpayer, did not belong to the taxpayer, the recipient was not required to pay the Commissioner.

[75] It can therefore be seen that courts have consistently applied limitations to the operation of s 218 and s 260-5 which were not expressed within those provisions and which involved some tension with their expressed terms. Thus in *Tricontinental*, in the passage which I have set out above at [70], Connolly J acknowledged that notwithstanding the existence of a fixed charge, the money was still "in form at least…due or accruing to the taxpayer", but said that a s 218 notice would not apply (where there was a fixed charge) because the moneys were "no longer in reality owing to the taxpayer but to the chargee." And similarly in *Ultra Thoroughbred Racing*, the prize money was due to the taxpayer, as between the taxpayer and Racing Victoria.

[76] In several decisions, it has been held that the interest of a third party in the subject moneys, although not affecting the legal entitlement of the taxpayer to payment from the recipient of the notice, prevails over that of the Commissioner upon the basis that the section could not apply to those moneys. Although some of these cases have compared the Commissioner's position with that of the holder of a fixed charge, it is apparent that there is a broader class of persons whose interests are not to be affected by the use of these provisions by the Commissioner. In *Park*, Siopsis J said that a notice could not affect moneys which were due to the taxpayer as a trustee and in *Ultra Thoroughbred Racing* Pagone J exempted money to which the taxpayer was not entitled because he was contractually obliged to pass on to the applicant. It is evident that this line of reasoning has been affected by a characterisation of the process, under s 218 or s 260-5, as an effective equivalent of the garnishee process under rules of court.

The interpretation of s 50 of the TAA

[77] Section 50 is one means for the recovery of unpaid tax. Another means for which s 45 provides is by a proceeding in a court of competent jurisdiction. If that course is

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67 (2013) 96 ATR 117; [2013] FCA 1300.
68 (1937) 58 CLR 1.
69 (2013) 96 ATR 117, 121 [10].

taken, then clearly the Commissioner has the remedies for the enforcement of a judgment under the *Uniform Civil Procedure Rules* and the *Civil Proceedings Act* 2011 (Qld). In particular, by s 90(2)(b) of that Act, an enforcement warrant may issue from the court for the "redirection to an enforcement creditor of particular debts, *belonging to* an enforcement debtor, from a third person …".[70] The remedy is described in identical terms in r 840(1) of the UCPR. Importantly, the only available debts are those which *belong to* the judgment debtor. That limitation, of course, has its history of the remedy of a garnishee order as I have discussed. From the outset courts were astute to prevent the process being abused by the judgment creditor having recourse to money which, had it been in the judgment debtor's hands, could not have been seized in execution of the judgment.

[78] Of course it is the distinct remedy which is conferred by s 50 which must be considered. But it is unlikely to have been intended that where the Commissioner does not seek to recover unpaid tax through and under the supervision of a court, but instead through the process of s 50, money should be available to the Commissioner which would be outside the reach of the court's process. The more likely intention is that, again, money should not be available to the Commissioner by this means which would not be available to her if in the hands of the taxpayer.

[79] That this same limitation should apply under s 50 is strongly indicated by the use of the word "garnishee" throughout s 50 and associated sections. Of course it is the entire text of s 50, read in the context of the Act, which must be considered. But the deliberate and consistent use of the term "garnishee" confirms what would in any event be apparent, which is the strong similarity between this process and the garnishee process. It is a means of access to money which, if it were in the taxpayer's hands, could be used to satisfy a liability for unpaid tax. This limitation upon the scope of available moneys is also indicated by s 50(2) which uses the expression "the taxpayer's entitlement to the amount" to describe each of the circumstances within s 50(1)(b).

[80] And the use of the term "garnishee" fortifies the impression that s 50 is not materially different from s 218 and s 260-5, as they have been interpreted. The differences as advanced by the appellant's argument are inconsequential. The suggestion that the terms of s 50 are materially different because a notice may be given, not where a set of certain circumstances exist, but where they are reasonably believed to exist, cannot be accepted. The argument suggested that in this way s 50 called for less precision in the engagement of the provision. Precision is required in that the power under s 50, affecting as it does the recipient of a notice with potential civil and criminal consequences, ought not to be exercised except by a strict adherence to the conditions of that power specified in the section. In this case, the Commissioner was apprised of the facts and there is no argument on her behalf that the notices were valid because of a reasonable belief.

[81] The limitations identified in the authorities on s 218 and s 260-5 are a consequence of the purpose of the statutory remedy. As in those cases, the purpose of the remedy in s 50 is to assist in the recovery of unpaid tax by providing recourse to money to which the taxpayer is entitled and which could be lawfully applied in payment of the tax if it were in the taxpayer's hands. The purpose of the statute is not to permit the recovery of tax by recourse to money which belongs to someone other than the taxpayer or which, for some other reason, could not be lawfully applied by the taxpayer in the payment of his or her own tax debt.

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[70] s 90(2)(b) (emphasis added).

[82] It is clear that the proceeds of the sale of the real property, if now in the hands of Ms Bird and Mr Scott, could not be seized in the enforcement of a judgment against them for the unpaid tax and nor would those moneys be available to their creditors if they were made bankrupt. Further and importantly, they could not choose to pay those moneys to the Commissioner because such a payment would contravene s 62 of the SIS Act as well as the terms of the deed. In no sense therefore would these moneys in the taxpayers' hands be available in any lawful way for payment of their tax debt. Just as these moneys would not have been accessible to the Commissioner under the garnishee process, so are they unavailable by means of s 50.

Conclusion and orders

[83] The primary judge was correct to hold that the various notices purportedly given under s 50 were invalid. The only amount or amounts upon which they could have operated were moneys which cannot be used lawfully in the payment of these debts. The appellant made no submission that in that event, there should be any change to the terms of the declarations made by the primary judge. It follows also that it is unnecessary to consider the respondents' argument of an operational inconsistency with the SIS Act.

[84] I would order as follows:

(1) Dismiss the appeal.

(2) Order the appellant to pay the respondents' costs of the appeal.