SUPREME COURT OF QUEENSLAND

CITATION:	*Can Barz Pty Ltd & Anor v Commissioner of State Revenue & Ors* [2016] QSC 59
PARTIES:	**CAN BARZ PTY LTD AS CUSTODIAN OF THE DECLARATION OF CUSTODY TRUST FOR THE MEWCASTLE SUPERANNUATION FUND** (first applicant) **CHERYL BIRD and STEVEN SCOTT AS TRUSTEES OF THE MEWCASTLE SUPERANNUATION FUND** (second applicants) **v** **COMMISSIONER OF STATE REVENUE** (first respondent) **REBECCA WARREN and ROBERT BOYD WARREN** (second respondents) **EB SALES PTY LTD** (third respondent) **ATTORNEY-GENERAL OF QUEENSLAND** (intervenor)
FILE NO/S:	SC No 8965 of 2015
DIVISION:	Trial Division
PROCEEDING:	Originating Application
DELIVERED ON:	21 March 2016
DELIVERED AT:	Brisbane
HEARING DATE:	3 February 2016, 4 February 2016 and 5 February 2016
JUDGE:	Bond J
ORDER:	**The order of the court is that:** **It is declared that:** **1. the garnishee notices dated 4 and 9 September 2015 issued by the first respondent to the second respondents and the third respondent were invalid and were not effective to impose obligations on any of them to pay monies to the first respondent.** **2. the garnishee notice dated 9 September 2015 issued by the first respondent to the first applicant was invalid and was not effective to impose obligations on it to pay monies to the first respondent.** **3. neither the first applicant, nor the second respondents, nor the third respondent was obliged to pay to the first respondent any part of the proceeds**

of sale of the property situated at 57 Cowper Street, Bulimba more particularly described as Lot 2 on RP 111644, County of Stanley, Parish of Bulimba, Title Reference 14022043.

CATCHWORDS: TAXES AND DUTIES - INCOME TAX AND RELATED LEGISLATION - COLLECTION AND RECOVERY OF TAX - COLLECTION FROM PERSON OWING MONEY TO TAXPAYER - where first applicant held monies on trust for the second applicants who in turn held monies on trust for the beneficiaries of a self-managed superannuation fund - where second and third respondents owed monies to the first applicant - where Commissioner issued separate garnishee notices under s 50 of the *Taxation Administration Act* 2001 (Qld) to the second and third respondents in respect of debts owed by first and second applicants - whether the validity of the relevant garnishee notices are affected by the first and second applicants holding the monies on trust

Taxation Administration Act 2001 (Qld), s 50

DKLR Holding Co (No 2) Pty Ltd v Commissioner of Stamp Duties (NSW) [1980] 1 NSWLR 510, cited
DKLR Holding Co (No 2) Pty Ltd v Commissioner of Stamp Duties (NSW) (1982) 149 CLR 431, cited
Federal Commissioner of Taxation v Park (2012) 205 FCR 1, considered
Francis v NPD Property Development Pty Ltd [2005] 1 Qd R 240, cited
O'Sullivan v Commissioner of Stamp Duties [1984] 1 Qd R 212, cited
Re Octaviar Ltd (No 8) [2009] QSC 202, cited
Re Transphere Pty Ltd (1986) 5 NSWLR 309, cited
Suncorp Insurance and Finance v Commissioner Of Stamp Duties [1998] 2 Qd R 285, considered
Tricontinental Corporation Limited v The Commissioner of Taxation [1988] 1 Qd R 474, 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, considered

COUNSEL: P G Bickford for the applicants
J M Horton QC, with T Pincus, for the respondents
P J Dunning QC S-G, with A D Keyes, for the intervenor

SOLICITORS: Bourke Legal for the applicants
Crown Law for the respondents and intervenor

Introduction

[1] The applicants were, relevantly, liable to pay the Commissioner of State Revenue an amount under the *Payroll Tax Act* 1971 (Qld). That liability arose because, under the grouping provisions of the Payroll Tax Act[1], all the members of a group of persons which included the applicants had been rendered jointly and severally liable for an unpaid tax assessment which had been issued to one of their number. For present purposes, the applicants' liability to the Commissioner is not challenged[2].

[2] Where, under a state tax law, a debt is payable by a taxpayer, s 50 of the *Taxation Administration Act* 2001 (Qld) ("the Administration Act"), like its analogues in Commonwealth statutes[3], empowers the Commissioner, amongst other things, to issue a garnishee notice to a person who "is liable or may become liable to pay an amount to the taxpayer"[4].

[3] Such a notice operates to impose an obligation on the recipient (referred to as "the garnishee") to pay the Commissioner the amount which the garnishee had previously been obliged to pay to the taxpayer: *Tricontinental Corporation Limited v The Commissioner of Taxation* [1988] 1 Qd R 474 per Connolly J (with whom Shepherdson J agreed) at 476. Failure to comply with a valid notice without reasonable excuse is an offence (s 50(4)) but compliance means the garnishee will be taken to have acted under the authority of the taxpayer and all other persons concerned and will be taken to have satisfied the obligation to the extent of the payment (s 53).

[4] The first applicant, Can Barz Pty Ltd, held real estate on trust for the benefit of the second applicants, Cheryl Bird and Steven Scott as trustees of the Mewcastle Superannuation Fund. The Mewcastle Superannuation Fund is a self-managed superannuation fund as defined by s 17A of the *Superannuation Industry (Supervision) Act* 1993 (Cth) ("the SIS Act").

[5] Can Barz had contracted to sell the real estate. In the ordinary course, when the contract settled, Can Barz would have received monies from the real estate agent and from the purchasers and then paid those monies to Bird and Scott, it having received instructions from them so to do. Bird and Scott would have then held the monies they received from Can Barz in their capacities as trustees of the superannuation fund.

[6] Before settlement, the Commissioner issued garnishee notices pursuant to s 50 of the Administration Act –

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

2 The applicants had sought and failed to obtain a decision under s 74 of the *Payroll Tax Act* 1971 (Qld) that they be excluded from the group. In a separate proceeding heard at the same time as this proceeding, they sought judicial review of the decision to refuse exclusion. It was common ground that there was no reason this proceeding could not be determined and the reasons published before the determination of the judicial review application had occurred.

3 The current Commonwealth equivalent is s 260-5 of the *Taxation Administration Act* 1953 (Cth) and an earlier now repealed equivalent was s 218 of the *Income Tax Assessment Act* 1936 (Cth).

4 The equivalent provision in the *Taxation Administration Act* 1953 (Cth) stipulates that the Commissioner may issue a garnishee notice to a person if that person "owes or may later owe" money to the taxpayer: s 260-5(2).

(a) to the real estate agents and the purchasers seeking to have those persons pay to the Commissioner the monies which they would otherwise have paid Can Barz[5]; and

(b) to Can Barz, seeking to have Can Barz pay to the Commissioner monies which it would otherwise have paid Bird and Scott[6].

[7] The applicants seek declaratory relief that the garnishee notices purportedly issued by the Commissioner were invalid and ineffective[7].

[8] They contend that, on its proper construction, s 50 does not authorise the Commissioner to issue a notice to a garnishee in respect of monies which the garnishee is liable to pay a taxpayer, but the right to receive which is not beneficially held by the taxpayer. They argue that the purpose of the section is not to have paid to the Commissioner money which does not "belong" to the taxpayer. They argue that the monies concerned here were always monies the right to receive which was not beneficially held by the taxpayer and was not to be regarded as "belonging" to the taxpayer.

[9] The principal question in this proceeding is whether s 50 should be construed in the way for which the applicants contend.

[10] In the alternative, the applicants argued that giving effect to the garnishee notices would give rise to a matter arising under the Constitution or involving its interpretation[8]. As to this:

(a) The applicants contended that giving effect to the notices would meant there would be operational inconsistency[9] between s 50 of the Administration Act and the SIS Act and regulations made under it.

(b) That would be so because the exercise of the s 50 power to require payment of superannuation fund monies to the Commissioner in satisfaction of a state tax debt would be inconsistent with the requirements of the Commonwealth statute as to the manner in which the trustees of the superannuation fund were required to deal with the fund. The applicants contended the state law would be invalid or inoperative to the extent of the inconsistency.

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5 For the purposes of notices given on 4 September 2015, Can Barz as trustee was identified as "the taxpayer". The expression "taxpayer" is defined in Schedule 2 to the Administration Act as meaning a person who, under a tax law, has or had a tax law liability or may have a tax law liability. The expression "tax law liability" means a liability "under a tax law for tax or another amount…". The applicants did not press an argument appearing in their written submissions that their liability imposed under the grouping provisions should not be so regarded. There were also notices given on 9 September 2015, effectively given in the alternative, which identified as "the taxpayer" Bird and Scott as trustees.

6 For the purposes of this notice, Bird and Scott as trustees were "the taxpayer".

7 The applicants also sought ancillary relief, which although unnecessary to set out in full, included declarations in respect of the beneficial ownership of the real estate and the beneficial entitlement to the monies from the relevant real estate transaction.

8 The applicants gave appropriate notices pursuant to s 78B of the *Judiciary Act* 1903 (Cth).

9 Although the applicants' written submissions had not limited their argument to operational inconsistency, during oral submissions counsel conceded that their argument was so limited.

(c) The Solicitor-General for Queensland appeared on behalf of the Attorney-General for the State of Queensland to make submissions against the applicants' constitutional argument. The Commissioner adopted the Attorney's submissions.

(d) All parties agreed that the constitutional argument did not need to be determined if I accepted the applicants' argument as to the proper construction of s 50. Further, the Solicitor-General for Queensland submitted that if I accepted that argument, I should not proceed to consider the constitutional argument. No party submitted to the contrary.

[11] I turn first to identify the facts in a little more detail.

The facts

[12] By deed made on 31 January 2002 (which was varied by deed on 12 October 2011), Scott and Bird became trustees of the Mewcastle Superannuation Fund. It was a fund established for the sole purpose of providing retirement benefits for its members[10] or to their dependents if a member dies before retirement[11]. Scott and Bird were themselves the original members of the fund, but the trust deed permitted the appointment of additional members[12].

[13] It was clear that Scott and Bird did not presently have any beneficial interest in the assets of the fund because:

(a) in their capacity as trustees, they were obliged to comply with the superannuation law including the SIS Act[13] and were obliged and entitled to pay out to members or dependants only when the circumstances provided for in the trust deed or under the law had occurred[14];

(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 or beneficial interest in any asset of the fund, except to the extent stated in the deed[15]; and

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10 Mewcastle Deed, cl 2.

11 Mewcastle Deed, cl 95.

12 Mewcastle Deed, cl 9.

13 The terms "superannuation law" and "SIS Act" were defined at page 69 of the Mewcastle Deed. Cl 7 provided that the trustees must not do, or fail to do, anything as trustee of the fund which would result in a breach of law, including superannuation law.

14 Part F of the Mewcastle Deed contained the relevant clauses that stipulated the obligations and entitlements in respect of benefit payments to members or dependants. Relevantly, cl 72 provided that payment of "preserved payment benefits" (defined at page 68) must not be made where superannuation law does not allow the trustee to pay out; cl 73 stipulated the circumstances where a "preserved payment benefit" may be paid to a member or dependent in accordance with the Mewcastle Deed (and included at 73.7: "any other circumstance allowed by superannuation law"); cl 74 provided that, with the trustee's consent, a withdrawal of a "non-preserved amount" (defined at page 68) may be made by a member.

15 Mewcastle Deed, cl 3; cl 75 further provided that the "benefit entitlement" of a member, dependent or beneficiary will vest in accordance with superannuation law. "Benefit entitlement" is defined at page 66 to mean an amount which may become payable to a member, dependant or beneficiary (including a contingent right of payment) but to which that person has not become absolutely entitled.

(c) no party contended that any such circumstances had yet arisen which would operate under the law or the trust deed to confer any beneficial entitlement on Scott and Bird in relation to the fund or any part of it.

[14] Can Barz was incorporated in Queensland pursuant to the *Corporations Act* 2001 (Cth) on 18 June 2009 and Bird was (and is) its sole director and secretary.

[15] By deed dated 17 October 2011 entitled "Declaration of Custody Trust for the Mewcastle Superannuation Fund", Can Barz declared that it would hold on trust title in an investment property in Bulimba which Scott and Bird proposed to purchase on behalf of the Mewcastle Superannuation Fund. The interpolation of a custodian trustee was a consequence of provisions in the SIS Act regulating the circumstances in which trustees of a regulated fund under that Act might borrow monies for the purpose of acquiring an investment for the fund.

[16] Unsurprisingly the terms of the Custody Trust made clear that the beneficiaries of the trust (namely Scott and Bird as trustees of the Mewcastle Superannuation Fund) were absolutely entitled to the assets held by Can Barz on trust. Thus:

(a) cl 2 provided that any authorised investment acquired would be held by Can Barz on trust;

(b) cl 3 provided that Can Barz agreed it would maintain legal title to the authorised investment until the beneficiaries of the trust directed it;

(c) cl 6 provided that the beneficiaries of the trust had a beneficial interest in the assets held on trust and were absolutely entitled thereto as against Can Barz; and

(d) cl 7 provided that the beneficiaries of the trust could in writing direct Can Barz to transfer, or otherwise deal with, the assets held on trust and Can Barz was required to comply.

[17] The Bulimba property was acquired by Can Barz as contemplated and was held by it pursuant to the Custody Trust on trust for Scott and Bird of the Mewcastle Superannuation Fund. A similar arrangement occurred in relation to a property in the Northern Territory and that property was held by Can Barz in the same way. Both properties were mortgaged to National Australia Bank ("NAB"). On 23 July 2015, Can Barz as trustee contracted to sell the Bulimba property. Real estate agents held deposit monies. This contract was due to settle on 7 September 2015 but settlement was deferred by agreement to 16 September 2015.

[18] On settlement the real estate agents were liable to pay the deposit monies (less their commission) to Can Barz and the purchasers were liable to pay the balance of the purchase price to Can Barz or as it directed. But for the steps taken by the Commissioner in relation to tax owed under the Payroll Tax Act, to which I will shortly turn, on settlement NAB would have been paid out; the usual conveyancing expenses would have been met; and the balance of the deposit and purchase monies would have been remitted to Can Barz. Because Scott and Bird had given them a direction under cl 7 of the Custody Trust so to do, Can Barz would have been obliged to pay the monies to Scott and Bird. Scott and Bird would have been obliged to hold the monies received from Can Barz on trust on behalf of the Mewcastle Superannuation Fund.

[19] It is appropriate to turn to the steps taken by the Commissioner in relation to tax owed under the Payroll Tax Act.

[20] By letter dated 16 April 2015, the Commissioner (by an appropriate delegate) advised the applicants that the following persons should be regarded as grouped together under Part IV of the Payroll Tax Act:

(a) Mewcastle Pty Ltd;

(b) Can Barz;

(c) Mewcastle Internal Linings (Qld) Pty Ltd;

(d) Mewcastle Group Pty Ltd;

(e) Scott and Bird (together);

(f) Seabird (Aust) Pty Ltd;

(g) Scott;

(h) Bird;

(i) Bird and Samantha McKenna (together); and

(j) Scott and Samantha McKenna (together).

[21] On 16 April 2015, the Commissioner issued assessment notices to Mewcastle Pty Ltd and Mewcastle Internal Linings (Qld) Pty Ltd. Excluding penalty and interest, the assessment issued to Mewcastle Pty Ltd was to amounts of primary tax totaling in excess of $2.6 million. As I have already mentioned, it was common ground that as a matter of law under the Payroll Tax Act, the members of the group were jointly and severally liable for an unpaid assessment issued to another member of the group[16].

[22] In their written submissions the applicants submitted there might be some doubt as to whether that conclusion applied to Can Barz because no mention was made of Can Barz in its trust capacity in that letter. However in the course of argument they accepted that a trustee in his, her or its personal capacity and a trustee in his, her or its trustee capacity were not different persons (see *Suncorp Insurance and Finance v Commissioner of Stamp Duties* [1998] 2 Qd R 285 per Davies JA at 305-306) and that submission was not pressed.

[23] There had been communications between the applicants (by their solicitors) and the Commissioner (by her solicitors) on a number of matters relating to the tax debt. Amongst other things, the Commissioner had been apprised of the pattern of relationships between Can Barz and Bird and Scott and the relevant trust capacities of, on the one hand, Can Barz and, on the other, Bird and Scott[17].

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16 As the assessment encompassed the financial years 2007/08 to 2014/15 and Can Barz was not incorporated until June 2009, it may be that Can Barz is not liable for the full amount of the assessment issued to Mewcastle, but that does not matter for the disposition of the present proceeding.

17 On 16 June 2015 the solicitor for the applicants caused an application for the exclusion of Can Barz from the relevant group to be prepared and lodged with the Commissioner. The annexures to that application addressed

[24] On 3 September 2015, the Commissioner's delegate informed the applicants' solicitors that the Commissioner intended to issue a Garnishee Notice to the purchasers of the Bulimba property. On 4 September 2015, the Commissioner by its legal advisers were apprised of the details of the proposed disposition of funds on the settlement, then contemplated to take place on 7 September 2015. The applicants also advised the Commissioner of its argument that it was only assets held by a trustee in its own right which were available for satisfaction of its personal liabilities.

[25] The Commissioner served garnishee notices as follows:

(a) on the real estate agents and the purchasers –

(i) on 4 September 2015, identifying "the taxpayer" as Can Barz "ATF Declaration of Custody Trust for the Mewcastle Superannuation Fund";

(ii) on 9 September 2015 identifying "the taxpayer" as Bird and Scott "as Trustees of the Mewcastle Superannuation Fund"[18].

(b) on Can Barz "ATF Declaration of Custody Trust for the Mewcastle Superannuation Fund" on 9 September 2015, identifying "the taxpayer" as Bird and Scott "as Trustees of the Mewcastle Superannuation Fund".

[26] Prior to settlement, the Commissioner by her solicitors indicated that if it were held that the notice did not require the garnishee to pay an amount to the Commissioner, she would repay the amount to the applicants or as the Court directed. The result was that at settlement on 16 September 2015, the NAB was paid out; the usual conveyancing expenses were met; and the balance of the monies which would have been remitted to Can Barz were paid to the Commissioner.

The proper construction of s 50

[27] Section 50 relevantly provides as follows:

> **50 Collection of amounts from a garnishee**
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> (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.
>
> ….

- in some detail - the nature of the relationship between Can Barz as trustee and Bird and Scott as trustee. By email dated 4 September 2015 to the Commissioner's delegate and solicitor, the solicitor for the applicants rearticulated its submissions in respect of the nature of the relationship between Can Barz in its capacity as custodian trustee and Bird and Scott in their capacity of trustees of a regulated superannuation fund.

[18] Presumably this occurred because, having been apprised of Can Barz' argument, the Commissioner took the view that if that argument meant that the monies were not regarded as payable to Can Barz, they must be regarded as payable to Bird and Scott.

> (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*).
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> (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.
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> (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.
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> …
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> (7) The garnishee must comply with the garnishee notice unless the garnishee has a reasonable excuse.
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> Maximum penalty—40 penalty units.

[28] As I have mentioned, the information before the Commissioner at the time the garnishee notices were issued plainly revealed the pattern of relationships between Can Barz and Bird and Scott and the relevant trust relationships. It revealed that the monies which Can Barz sought to receive on settlement would necessarily be held on trust for Scott and Bird and that the monies Scott and Bird sought to obtain would necessarily be held on trust as part of the superannuation fund. Or, to put it another way:

(a) the choses in action which Can Barz held against, respectively, the real estate agent and the purchasers; and

(b) the chose in action which Scott and Bird had against Can Barz,

were all choses in action held on trust.

[29] The applicants contend that, on its proper construction, s 50 would not authorise the Commissioner to issue a notice to a garnishee in respect of monies which the garnishee is liable to pay a taxpayer, where the Commissioner knows that the taxpayer's right to receive payment is not beneficially held by the taxpayer. They argue that the purpose of the section is not to have paid to the Commissioner money which does not belong to the taxpayer.

[30] The applicants' argument finds support in observations to that effect made by Pagone J in *Ultra Thoroughbred Racing Pty Ltd v Commissioner of Taxation* (2013) 96 ATR 117; [2013] FCR 1300 at [7], where his Honour stated (emphasis added):

> 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 Administration Act] 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* (1996) 132 FLR 317, Steytler J said (at 328) 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 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.'**
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> 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, Carter J similarly observed (at

> 806-7) 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**.

[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.

[32] I observe[19]:

(a) The origin and still of the essence of a trust is an obligation owed by a person, the trustee, to exercise rights on behalf of another or for the accomplishment of some purpose, and where that obligation is in respect of property on behalf of another the beneficiary of that obligation has a right to enforce it against the trustee: *Suncorp Insurance and Finance v Commissioner Of Stamp Duties* [1998] 2 Qd R 285 per Davies JA at 305.

(b) Where a person obtains legal ownership of property and holds that property on trust for another, it is not uncommon for lawyers 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. This is imprecise and wrong.

(c) The key to understanding the error is to realise that an equitable interest is not carved out of a legal estate but impressed upon it: per Brennan J in *DKLR Holding Co (No 2) Pty Ltd v Commissioner of Stamp Duties (NSW)* (1982) 149 CLR 431. See the judgment of Hope JA in the New South Wales Court of Appeal decision in *DKLR Holding Co (No 2) Pty Ltd v Commissioner of Stamp Duties (NSW)* [1980] 1 NSWLR 510. Hope JA said at 518 to 519 (emphasis added):

> An unconditional legal estate in fee simple is the largest estate which a person may hold in land. Subject to qualifications arising under the general law, and to the manifold restrictions now imposed by or under statutes, the person seised of land for an estate in fee simple has full and direct rights to possession and use of the land and its profits, as well as full rights of disposition. An equitable estate in land, even where its owner is absolutely entitled and the trustee is a bare trustee, is significantly different. What is, perhaps, its essential character is to be traced to the origin of equitable estates in the enforcement by Chancellors of "uses" or "trusts"[.]
>
> …
>
> [A]lthough the equitable estate is an interest in property, its essential character still bears the stamp which its origin placed upon it. **Where the trustee is the owner of the legal fee simple, the right of the beneficiary, although annexed to the land, is a right to compel the legal owner to hold and use the rights which the law gives him in accordance with the obligation which equity has imposed upon him. The trustee, in such a case, has at law all the rights of the absolute owner in fee simple, but he is not free to use those rights for his own benefit in the way he could if no trust existed. Equitable obligations require him to use them in some particular way for the benefit of other persons**.

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19 During the course of argument all counsel accepted the correctness of these propositions.

…

In illustrating his famous aphorism that equity had come not to destroy the law, but to fulfil it, Maitland [in his Lectures on Equity] said of the relationship between legal and equitable estates in land: "**Equity did not say that the *cestui que trust* was the owner of the land, it said that the trustee was the owner of the land, but added that he was bound to hold the land for the benefit of the *cestui que trust*.** There was no conflict here."

(d) In *O'Sullivan v Commissioner of Stamp Duties* [1984] 1 Qd R 212 GN Williams J said (at 229 to 230):

It was asserted by the [trustees] that the transfers in question were transfers of the "bare legal estate" only. I cannot accept that proposition. By definition, a trust is an equitable obligation, binding the trustee to deal with property in respect of which he has either legal title or control, for the benefit of a beneficiary. The obligation is not only one *in personam*, but also one which is affixed to the property in question. Where there is a "bare trust", and the beneficiary is *sui juris*, the beneficiary may put an end to the trust by requiring the trustees to transfer the trust property to him. Against that background it is not unusual for lawyers to say that the equitable estate is vested in the beneficiary. But it must not be overlooked that at law the fee simple in land, being trust property, is vested in the trustee, and when the trustee conveys the property to the beneficiary, thereby putting an end to the trust, he conveys the fee simple to him. Particularly where the land is subject to the Real Property Act there can be no transfer of a bare legal interest as such …

(e) His Honour then cited with approval the passage from the judgment of Hope JA in the New South Wales Court of Appeal decision in *DKLR Holding Co (No 2) Pty Ltd v Commissioner of Stamp Duties (NSW)* set out above, describing it as "perhaps the best summation of the position": [1984] 1 Qd R 212 at 230. The analysis of Williams JA in this respect has been referred to with approval in the Court of Appeal: see per McPherson JA (with whom Williams JA agreed) in *Francis v NPD Property Development Pty Ltd* [2005] 1 Qd R 240 at [4].

(f) This analysis is not limited to land. In *Re Transphere Pty Ltd* (1986) 5 NSWLR 309 McClelland J analysed whether under the Companies (NSW) Code a receiver could be appointed of property held upon trust for other persons. His Honour observed (at 311) (emphasis added):

It is important to recognise the true nature and incidents of legal and equitable estates in property subject to a trust. They are clearly and succinctly described in the judgment of Hope JA in *DKLR Holding Co (No 2) Pty Ltd v Commissioner of Stamp Duties* [1980] 1 NSWLR 510 at 518-520. (His Honour's analysis is not affected by the decision of the High Court in that case — see 149 CLR 431.) I would not wish to detract from the value of Hope JA's exposition by trying to summarise it. But what is significant for present purposes is the imprecision of the notion that absolute ownership of property can properly be divided up into a legal estate and an equitable estate. **An absolute owner holds only the legal estate, with all the rights and incidents that attach to that estate. Where a legal owner holds property on trust for another, he has at law all the rights of an absolute owner but the beneficiary has the right to compel him to hold and use those rights which the law gives him in accordance with the obligations which equity has imposed on him by virtue of the existence of the trust. Although this right of the beneficiary constitutes an equitable estate in the property, it is engrafted onto, not carved out of, the legal estate.** Hope JA (at 519) illustrates the point by the following quotation from Maitland — *Lectures on Equity* 2nd ed (1949) at 17:

> '… Equity did not say that the *cestui que trust* was the owner of the land, it said that the trustee was the owner of the land, but added that he was bound to hold the land for the benefit of the *cestui que trust*. There was no conflict here.'

[33] I do not think that Pagone J intended any dissent from these principles. When one has regard to the decision of *Zuks v Jackson McDonald* to which his Honour 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 a right to have access to assets which the garnishee was not free to use for his own benefit.

[34] *Zuks* involved a case where there had been a valid equitable assignment of a debt owed to a taxpayer which had become effective prior to the time the Commissioner served a garnishee order in respect of the monies payable to the taxpayer in respect of the debt. The assignee contended that it had priority over the Commissioner in respect of the monies payable pursuant to the debt. The Commissioner contended that because the assignment was effective only in equity, and the monies were accordingly, legally payable to the taxpayer, the garnishee notices were effective to give the Commissioner a right taking priority over the assignee's equitable interest in the debt.

[35] Steytler J observed (at 321):

> These propositions assume that s 218, on its proper construction, entitles the Commissioner to require the recipient of a notice under that section to pay to the Commissioner the amount of a debt in which the taxpayer to whom it is owed no longer has any beneficial interest and, once received by the Commissioner, to retain that amount notwithstanding any claim thereto by the holder of the beneficial interest. That being so it is, I think, first necessary for me to consider whether the section should be construed in that way.

[36] His Honour noted that there was a substantial body of authority to support the proposition that, upon the proper construction of s 218, service of a garnishee notice under that section would not defeat a prior equitable charge. His Honour saw no difference in principle between cases in which there had been crystallisation of an equitable charge before a garnishee notice and the case before him (in which there had been a valid absolute equitable assignment before the garnishee notice)[20].

[37] Steytler J reached that conclusion based on a rejection of the construction of s 218 to which he had referred in the passage quoted at [35] above. The passage from his Honour's judgment which Pagone J quoted (see at [30] above) appears in context in the following passage (emphasis added):

> In this case the first defendant relies upon an absolute assignment of a debt which, because of the absence of notice to the debtor, was effective only in equity. However that assignment created, as between the assignor and assignee, a valid and effective title in the assignee: see *Gorringe v Irwell India Rubber & Gutta Percha Works* (1886) 34 Ch D 128 and *Comptroller of Stamps (Vic) v Howard-Smith* (1936) 54 CLR 614 at 622.

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20 For an analysis of the authorities which is consistent with Steytler J's views, see *Re Octaviar Ltd (No 8)* [2009] QSC 202, per McMurdo J at [44] to [48]. His Honour concluded that the authorities supported the proposition that where a floating charge granted by a taxpayer had crystallised before the garnishee notices were given, the Commissioner could not issue an effective garnishee notice in respect of a debt the subject of the charge, because once the floating charge had crystallised the monies the subject of the charge could not be regarded as in reality still owing to the taxpayer, notwithstanding the fact that as a matter of form the debt was still recoverable in the name of the taxpayer.

It seems to me that in such a case, on the proper construction of s 218 and having regard for the authorities to which I have referred, the Commissioner's entitlement to receive payment of the debts referred to in the notices should be found to be subject to the interest of the prior equitable assignee.

Like Brinsden J in *Commissioner of Taxation (Cth) v Lai Corporation Pty Ltd* (at 81), 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).

[38] The foregoing approach to the law is consistent with the decision of the Full Court of the Federal Court in *Federal Commissioner of Taxation v Park* (2012) 205 FCR 1. I make the following observations:

(a) *Park* was a case in which prior to settlement of sale of a property by a vendor taxpayer the Commissioner served a garnishee notice on the purchaser seeking payment of monies owed by the purchaser to the vendor taxpayer. The property was subject to a registered mortgage securing a debt owed by the vendor taxpayer to the registered mortgagee. By agreement the full amount sought by the mortgagee was paid into its solicitor's trust account without deduction at settlement, the solicitor agreeing not to release the amount comprising the disputed funds without the Commissioner's consent. On this basis, the mortgagee released its legal charge under the mortgage, and settlement occurred.

(b) Jessup and Katzmann JJ held (at [101]) that the mortgagee did not hold a beneficial interest in the proceeds of sale because they concluded that under a Torrens system mortgage, the mortgagee has a registered security over the land, not a beneficial interest in all moneys that become owing to the registered proprietor, even under a contract for the sale of such. Having taken that view of the mortgagee's entitlement, the majority did not find it necessary to consider the cases canvassed by *Zuks*. They found that the Commissioner's right to the monies took priority over the mortgagee's claim.

(c) Importantly, Siopsis J observed (at [52] to [54]):

> [52] The fourth principle, is that the 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 (*Tricontinental* at 482).
>
> [53] In the case of *Zuks v Jackson McDonald (a firm)* (1996) 33 ATR 40 at 48-50, Steytler J (as his Honour then was) reviewed in detail, a number of cases in which the courts had considered whether a s 218 notice could operate in respect of moneys which were not beneficially owned by the taxpayer because they were subject to an equitable charge. Steytler J observed:
>
> > 'It will be apparent from the aforegoing review of the case law that there is now 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.'
>
> [54] Those observations were made in the context of the consideration of decided cases where the third party's beneficial interest in the funds otherwise due to the taxpayer, arose by way of the

> operation of an equitable charge over the funds. However, the principle that the s 260-5 notice can only operate on the taxpayer's beneficial interest 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.

(d) Siopsis J dissented in the result, but only because his Honour took the view that the mortgagee did have an equitable charge over the proceeds of sale: see at [55] to [70].

[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 parliament 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.

The constitutional argument

[41] As I mentioned at [10] above, a constitutional issue would have arisen if I had rejected the applicants' argument.

[42] In light of the view that I have reached concerning the proper construction of s 50, it is unnecessary to rule upon the Constitutional argument.

Orders

[43] The result is that the applicants are entitled to declarations that the garnishee notices were not valid and were not effective to impose obligations on the garnishees to pay monies as they sought to do.

[44] Accordingly, it is declared that:

(a) the garnishee notices dated 4 and 9 September 2015 issued by the first respondent to the second respondents and the third respondent were invalid and were not effective to impose obligations on any of them to pay monies to the first respondent;

(b) the garnishee notice dated 9 September 2015 issued by the first respondent to the first applicant was invalid and was not effective to impose obligations on it to pay monies to the first respondent; and

(c) neither the first applicant, nor the second respondents, nor the third respondent was obliged to pay to the first respondent any part of the proceeds of sale of the property

situated at 57 Cowper Street, Bulimba more particularly described as Lot 2 on RP 111644, County of Stanley, Parish of Bulimba, Title Reference 14022043.

[45] I will hear the parties on the question of costs.