IN THE FIJI COURT OF APPEAL

Civil Jurisdiction

Civil Appeal No. 56 of 1984

Between:

COMMISSIONER OF INLAND REVENUE Appellant

and

A.N.Z. BANKING GROUP Respondent

M.J. Scott for the Appellant
B.C. Patel for the Respondent

Date of Hearing: 13th March, 1985
Delivery of Judgment: 20th July, 1985

JUDGMENT OF THE COURT

At all material times the respondent was registered as mortgagee of the leasehold estate of Sunlover Hotel Limited ("the Company") in a parcel of land containing 9 acres 3 roods 33 perches situate in the Tikina of Nadi. The mortgage was registered with the Registrar of Titles on 5th March, 1973 and particulars of the charge created by it were registered in the office of the Registrar of Companies on 14th February, 1973. Originally the mortgage secured $500,000 but by 31st December, 1976 it had been upstamped to secure $625,000. The mortgage was a first charge upon the estate of the company in the land.

On 7th March, 1979 the appellant caused to be registered against the company's interest in the land a charge pursuant to section 75(6) of the Income Tax Act, 1974. The amount of the charge was $27,783.62.

On 19th June, 1980, the appellant caused to be registered a charge pursuant to section 76(6) of the Income Tax Act, 1978.

On 20th February, 1981 the appellant obtained an order of the Supreme Court authorising the sale of the property to satisfy the charges but no sale in pursuance of the order was ever made.

On 22nd March, 1982 one Paul Harvey Quinn filed a petition to wind up the company and an order for winding up was made on 9th July, 1982.

In 1982 the respondent, in exercise of the power of sale contained in its mortgage, sold the company's interest in the land to Colony Club (Fiji) Limited. The transfer giving effect to the sale was executed on 30th December, 1982 and registered on 3rd January, 1983.

The appellant took the view that the charges it had over the company's interest in the land took priority over the respondent's mortgage. Prior to the registration of the transfer the appellant entered into an agreement with the respondent that on payment to him of $75,000 by the respondent he would cause satisfactions of the charges to be entered on the register. It was further agreed that the priority question would be litigated and that the destination of the $75,000 would be determined by such litigation.

On 9th September, 1983 the respondent extracted a summons seeking :

1. a declaration that Mortgage 127411 constituted a first charge on the mortgaged property in priority to the charges.

2. An order that the defendant refund to plaintiff the sum of $75,000 paid by the plaintiff to the defendant on 12th January, 1983.

3. An order that the defendant pay interest on the $75,000 at the rate of $13.50 per centum per annum from the 12th day of January, 1983 until the said sum is refunded.

4. The costs of the action.

In the court below, the learned Judge granted the relief sought save that instead of orders for payment as prayed in paragraphs 2 and 3 he made declarations that the appellant was not entitled to the $75,000 and that the respondent was entitled to interest as claimed.

The appellant contended in this Court and in the court below that the transfer executed by appellant on 30th December, 1982 was, by virtue of the provisions of section 172 of the Companies Act (Cap. 216), void in that it was a disposition of the property of the Company made after the commencement of the winding up which had not been validated by order of the Court. Section 172 provides :

> " In a winding up by the court any disposition of the property of the company made after the commencement of the winding up, unless the court otherwise orders, shall be void. "

If the words of the section are construed in their primary meanings they are of the widest import and are applicable for the entire duration of the winding up

and to each and every disposition of property made during its currency. And they would apply to each and every disposition the liquidator was minded to make during the currency of the liquidation. That, of course, cannot be. The prime business of the liquidator is to dispose of the property of the Company. His power to do so is express and it is not dependant for its validity on the approbation of the Court. It is to be found in subsection (2)(a) of section 190 (Cap. 216) which provides :

> " The liquidator in a winding-up by the court shall have power 'to sell the real and personal property and things in action of the company in public auction or private contract, with power to transfer the whole thereof to any person or company, or to sell the same in parcels'. "

Coincidental with this conferment of power is the withdrawal of power of the directors of the Company - re Farrows Bank Ltd. (1921) 2 Ch. 173.

It accordingly follows that after the making of the winding up order the directors are bereft of power to make dispositions but the liquidator has power so to do without the imprimatur of the Court. There is thus major limitation to the meaning of the section when its words are construed in their primary meaning and accordingly recourse must be had to other means of discerning the intentions of Parliament.

Lord Wrenbury in the Viscountess Rhondda's claim (1922) 2 A.C. 339 at p. 397 had this to say :

> " In construing the Act it must be borne in mind, of course, that complete generality is not necessarily to be attributed to general words. The limitations upon a proposition of that kind are best found in the masterly judgment of Turner L.J. in Hawkins v. Gathercole 6 D.M. & G.1 (p. 20). The dominant purpose in construing a statute is to ascertain the intent of the legislature, and this may be done in any one of three ways. First by considering the

> cause and necessity of the Act. Secondly, by comparing one part of the Act with another, and, thirdly (and this is most indefinite) sometimes by foreign (meaning extraneous) aids so far as they can justly be considered to throw light on the subject. "

The "cause and necessity" of section 172 is readily apparent. The assets in winding up are (subject to the rights of secured creditors and certain other creditors to be paid in priority) in trust for the benefit of all creditors and must be distributed upon this footing of equality - re Oriental Co., ex parte Scinde Railway Co. (1874) 9 Ch. App. 557 at 559. The purpose of the section is the better to achieve these ends.

The point of time connoted by the words "the commencement of the winding up" in the section is, by virtue of the provisions of section 174 the same as "the time of presentation of the petition".

Section 174 provides :

> "(1) Where, before the presentation of a petition for the winding up of a company by the court, a resolution has been passed for the voluntary winding up, the winding up shall be deemed to have commenced at the time of the passing of the resolution, and unless the court, on proof of fraud or mistake, thinks fit otherwise to direct, all proceedings taking in the voluntary winding up shall be deemed to have been validly taken.
>
> (2) In any other case, the winding up of a company by the court shall be deemed to commence at the time of the presentation of the petition for the winding up. "

Section 172 accordingly applies to the period between the time of presentation of the petition and the date of the making of the winding up order with the

result that dispositions of the Company's property including chores in action during such period are void unless the Court otherwise orders. And indeed, the original provision section 153 of the Companies Act, 1863 (U.K.) expressly limited its operation to dispositions made between the happening of those events. And Lord Cairns L.J. in re Wiltshire Iron Company (1868) L.R. Ch. App. 443 at p. 446 described the provision as "a wholesome and necessary provision, to prevent, during the period which must elapse before a petition can be heard, the improper alienation and dissipation of the property of a company in extremis. In the corresponding provision in the Companies (Consolidation) Act, 1908 (Section 205(2)) the temporal provision was altered merely to read "after the commencement of the winding up ..." and the same wording is to be found in the corresponding section in this country now under consideration.

The original section (section 153 of the 1863 Act) and the present section each have the same commencement point in time. The original section enured until the date of making of the order; the present section is silent on that aspect. But with the directors powers ceasing and the liquidators powers commencing from the date of the making of the order, we think that notwithstanding the difference in the wording in the two sections, there is a strong likelihood that each has reference only to the period between the time of the filing of the petition and the date of the winding up. And, if that be so, the transfer, having been executed subsequent to the winding up order, does not come within the purview of the section. We are fortified in that tentative view by reference to the following cases: In re Park Ward & Co. (1926) 1 Ch. 828 in which Romer J. treated section 153 of the original Act and section 205(2) of the 1908 Act as being to the same effect; Miles Aircraft Ltd. Application of Barclays Bank (1948)

Ch. 188 in which Vaisey J. ascribed to the section both in its original form and its present form the same object, and In re Clifton Place Garage Limited (1977) 1 Ch. 477 in which Megarry J. speaking of the section in its present form said (at p. 482) :

> " The general purpose of the section is conveniently stated in the classic judgment of Lord Cairns in In re Wiltshire Iron Co. Ltd., Ex Parte Pearson (1868) 3 Ch. App. 443. Speaking of the section as it originally appeared in the Act of 1862, he said, at p. 446 :
>
> > 'The 153rd section no doubt provides that all dispositions of the property and effects of the company made between the commencement of the winding up (that is the presentation of the petition) and the order for the winding up, shall, unless the court otherwise orders, be void ....'. "

Mr. Scott drew our notice to a note in Strebel's Company Law and Precedent (2nd Ed.) in which the learned author contrasting the 1908 section with the original section wrote -

> " The present section, however, unlike the old one does not apply only between the date of the petition and that of the order and it would seem that the court now has jurisdiction to authorise or validate dispositions made after the winding up order, but in pursuance of a contract before such order. "

No authority was cited in support of the proposition which, in any event, is very tentatively advanced.

The passage we have emphasised indicates that the difference - if there be a difference - is a narrow one. It merely relates to a contract made within but not perfected within the period. We think that the passage tends to confirm that the present section relates

only to transactions between the time of presentation of the petition and the date of the order for winding up.

A decision to contrary effect cited by Mr. Scott is re Dittmer Gold Mines Ltd. (No. 3) (1954) Q.S.R. 275 in which Townley J. held that a memorandum of mortgage executed after the order for winding up was a disposition of the property of the company which fell within the scope of the Queensland equivalent of section 172. The mortgage was executed by the debenture holder to itself pursuant to a clause in the debenture which appointed it the attorney of the company to execute in its favour "mortgages and other assurances deemed necessary for more perfectly securing the debt". Indeed, the security so executed was taken to make good deficiencies in the debenture containing the power.

Townley J. said that he had "found no case with" a disposition "made after the winding up order as distinct from one made between the presentation of the petition and the making of the order" and he allowed that such a disposition must of necessity be rare. However, he made no attempt to construe the section and merely contented himself by saying that he could see no reason why the section should not apply to such a case.

The point under consideration arose also in Krextile Holdings Pty Ltd. v. Widdows; re Brush Fabrics Proprietary Limited (1974) V.R. 689 in which Gillard J., referring to section 227 of the Companies Act, 1961 (which was in terms identical with the provisions considered in the Dittmer Gold Mines (No. 3) case (supra)),. had this to say at p. 969 :

> " I am disposed to agree with a submission of Mr. Hogg who appeared for the liquidator, that a practical interpretation of section 227 should be made so that the section will operate in a commercial way. The difficulty arises from

the use of the expression 'after the commencement of the winding up'. The reason for the introduction of these words has been judicially determined over a century ago, but patently the expression must be reconciled with other provisions of the Companies Act 1961 ..... If the words should be applied literally, there appears to be a commencement date prescribed by section 223 for the provisions of the section to operate but there is no finishing date. Accordingly there is no pre-determined period of time with a commencement date and finishing date during which the section operates. The period is open ended.

Pursuant to section 233, the liquidator after the order for winding up, is entitled to custody or control of the company's property and it would be a contempt of court for anyone to attempt to interfere with his possession of the company's property .....

Hence, it would appear the prime purpose of introducing the above provision was to invalidate dispositions between the filing of the petition which, by section 233, is deemed to constitute the commencement of the winding up proceedings and the making of the order when, of course, section 233 would become operative. But, clearly, in terms, the operation of the section would not come to an end with the making of the order. I am, therefore, of the opinion that Dr. Pannam was quite correct when he submitted that the legislative intention was that the provisions of such section continued to operate in any of the prescribed matters during the period, but only during the period of the winding up process.

Furthermore, section 227 must be read subject to the provisions of section 236(2)(c) which empowers the liquidator to 'sell the seal and personal property and things in action of the company .... with power to transfer the whole thereof to any person or company or to sell the same in parcels'. Again, the liquidator is empowered by section 236(2)(k) to 'do all such other things as are necessary for winding up the affairs of the company and distributing its assets'. It is true by section 236(3) the exercise of such powers is under the control of the court, but unless the court is moved by a creditor or a contributory, the liquidator may, for the purpose of exercising his true powers set out above, disregard the provisions of section 227. Having regard to this view of the provisions in the Act in relation to

> the liquidator, equally in my view section 227 must be read down subject to section 243. "
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> (Section 243 empowered the court to grant a stay of the winding up).

This passage throws into bold relief the point now under consideration but we are disposed to the view that the learned judge, despite having noted several reasons within sections 236 and 243 for "reading down" the apparent open ended provisions of section 227 which manifest themselves on a literal construction, proceeded to apply the literal construction when he held in the passage we have emphasised that "in terms" the operation of the section would not come to an end with the making of the order. And in addition to our reservations we note that the observations of the learned judge on the matter are clearly obiter.

We do not propose to endeavour to decide the point first because it was not fully argued before us and secondly we find ourselves able to dispose of the case on a consideration of the point we now come to consider, namely, whether a secured creditor of a company in liquidation is independent of the liquidation and his rights not liable to be cut down by any exercise or purported exercise of the jurisdiction conferred by section 172.

Section 259 of the Companies Act (Cap. 216) provides :

> " In the winding up of an insolvent company the same rules shall prevail and be observed with regard to the respective rights of secured and unsecured creditors ..... as are in force for the time being under the law of bankruptcy with respect to estates of persons adjudged bankrupt ..... "

Section 9 of the Bankruptcy Act (Cap. 48) provides :

> "(1) On the making of a receiving order the official receiver shall thereby be constituted receiver of the property of the debtor, and thereafter, except as directed by this Act, no creditor to whom the debtor is indebted in respect of any debt provable in bankruptcy shall have any remedy against the property or person of the debtor in respect of the debt, or shall commence any action or other legal proceedings unless with the leave of the court and on such terms as the court may impose.
>
> (2) But this section shall not affect the power of any secured creditor to realize or otherwise deal with his security in the same manner as he would have been entitled to realise or deal with it if this section had not been passed. "

The applicability of the New Zealand equivalent of subsection (2) to situations akin to the present one was considered in re Securitibank Ltd. (1980) 2 N.Z.L.R. 714 at p. 724 where Barker J. said :

> " The submissions of counsel for all the secured creditors proceeded on the assumption (accepted by Mr. Farmer) that section 307 of the Companies Act 1955 applied the bankruptcy rules relating to secured creditors' claims to a winding up. This assumption is quite valid; consequently section 3(3) of the Insolvency Act 1967 must apply in a winding up situation. "

And indeed Mr. Scott, in his submissions concerning the observations of the learned judge in the court below concerning section 259, cited authority (re Leng (1895) 1 Ch. 652, 657) for the proposition that "rules" in that section encompassed "sections" of the Bankruptcy Act and allowed that subsection (2) of section 7 was of application.

Apart from this statutory provision there are a line of cases which in our opinion make it clear that mortgagees are persons entirely outside the purview of the winding up.

In re David Lloyd, Lloyd v. David Lloyd & Co. (1877) 6 Ch. D. 339 James L.J., at p. 345 said :

> " A mortgagee is to my mind .... an independent person and his rights ought not to be interfered with because his mortgagors have chosen to become insolvent ..... "

In re Longdendale Cotton Spinning Company (1978) 8 Ch. D. 150 at 154 Lord Jessel M.R. said :

> " The mere fact that a winding up order has been made makes no difference and does not confer upon the company the right of preventing a mortgagee from realising his security; and for that proposition I have the authority of the Court of Appeal in In re David Lloyd & Co., an authority which emphatically negatives the existence of any such right. "

A statement to like effect in more general terms fell from Kay L.J. in Strong v. Carlyle Press (1893) 1 Ch. 268 at p. 276 :

> "We must treat the mortgagees as being persons outside the winding up. "

And in the same case, at p. 274, Lindley L.J. said :

> " The mortgagees here are prima facie the holders of valid mortgages; they claim under deeds which have not been impeached. On the face of them they are quite regular and there is no reason at present for saying that they are in any degree invalid. Under these circumstances the mortgagee says 'My interest is in arrear. I want a receiver'. If he holds valid debentures and his interest is in arrear, he is entitled to a receiver, and he has got an

order for a receiver. Now the fact that the mortgagor is a company, which has since been ordered to be wound up, does not in any way affect the rights of mortgagees. "

(Our emphasis).

There are also modern statements to like effect. In In re Aro Co. Ltd. (1980) 1 All E.R. 1067 Templeman L.J. delivering the judgment of a Court of Appeal comprising Stephenson and Brandon L.J.J. and himself, said :

" A secured creditor is in a position where he can justly claim that he is independent of the liquidation since he is enforcing a right not against the company but to his property - see re David Lloyd & Co. a case under the predecessor to section 231. A striking illustration of the principle is to be found in Re Wanser (1891) 1 Ch. 305) under the same section. A landlord of Scottish property began proceedings after a winding up order for sequestration of the company's goods on the premises in order to answer for future rent. North J. allowed the sequestration to continue, being satisfied that under Scottish law the landlord was a secured creditor at the date of commencement of the winding up, and therefore in the same position as a mortgagee. "

In Sowman v. David Samuel Trust Ltd. (1978) 1 W.L.R. 22 Goulding J. referring specifically to section 227 (which is to like effect as section 172) had this to say :

" ..... The view of the authorities which I have just stated is also fatal, I think, to Mr. Monckton's alternative submission that the sale by the receiver is a disposition of the company's property avoided by section 227 of the Companies Act 1948. In truth the rights and powers given by the debenture are themselves property, but not property of the company and if they are not extinguished by the fact of the winding up, then enforcement or exercise is not within the scope of section 227 at all. "

(Our emphasis).

Mr. Scott sought to distinguish the English cases on the footing that whereas in the United Kingdom a mortgage of land involves a conveyance of the legal estate to the mortgagee, in Fiji a mortgage does "not operate as a transfer of land or of the estate or interest therein, charged". We think that distinction is of no present moment. The authorities show that the principle enunciated in them applies with equal force to debentures as to mortgages of land. It is not the nature of the property charged or mortgaged which is the factor which takes the transaction outside the ambit of section 172; rather it is the nature of the personal property made up of the powers and rights given by the mortgage or the debenture, as the case may be. That personal property is the property of the mortgagee or of the debenture holder and the exercise of these powers is a use by the mortgagee of his own property and not the property of the company.

That the principle is of application in situations where a mortgage is but a charge finds illustration in In re Asiatic Electric Pty Ltd. (1970) 2 N.S.W.R. 612 at p. 614 where Street J. said :

> " ..... The secured creditor has property rights, in the form of his security that exist outside and above the winding up. The fact of his security and its property content, unless challengeable on some particular ground available in the winding up, is unaffected by the making of a winding up order. The secured creditor has his property rights under his security. He is entitled to employ them to the total exclusion of any inroads by the liquidator or ordinary creditors except insofar as any particular inroad may be authorised by a specific provision in the Act, such as, for example, the provisions governing certain priorities as to wages and otherwise where the secured creditors' receiver has gone into possession under a floating charge. "

In Magart Pty Limited (in liq.) v. Westpac Banking Corporation & Anor (judgment delivered on 6

November, 1984 and noted in (1984)) 2 A.C.L.C. 709 Helsham C.J. had to consider section 368 of the Companies (New South Wales) Code which is ipsissima verba with section 172. And he held (p. 712) that :

> " .... whatever meaning the word 'disposition' may have when used in the phrase 'any disposition of property of the company' in section 368, it does not include the process by which a person with a beneficial interest in the property obtains that property, or the proceeds of its realisation, from the company at a time when he is entitled to have it. In all reality a person would not normally be described as disposing of his property when he hands it over to another to whom he had previously promised to deliver it on the happening of a certain event when that event occurs. This is only another way of stating in legal terms the proposition that the word 'disposition', when used with reference to property, normally has the meaning of connoting a change in the beneficial ownership of an asset by transfer or other type of dealing. I am indebted to the editors of the Australian Law Journal for collecting some cases on this topic (48 A.L.J. 460); see also per Jacobs J.A. in Roache v. Australian Mercantile Loan & Finance Co. Ltd. (No. 2) (1968) 1 N.S.W.R. 384 at p.388; Grimwade v. F.C. of T. (1949) 78 C.L.R. 199. I can see no reason why that approach should not be adopted in relation to section 368. "

And later, at page 713, the learned judge said that his decision accorded with the rationale that lies behind section 368 and after citing what he rightly described as the locus classicus of that which is to be found in the words of Lord Cairns in In re Wiltshire Iron Co. Ltd. (1868) 3 Ch. App. 443 at p. 446 which we have earlier cited in this judgment, he went on to say :

> " What lies behind the section is the prevention of the improper alienation and dissipation of the company's property. I do not believe it was intended to reach out to transactions by which a secured creditor receives assets covered by his security at a time when he was entitled to have them.

To hold otherwise would mean that assets covered by a fixed charge, or their monetary equivalent, could not with impunity be taken by or paid to the person having the benefit of the charge at any time after the commencement of the winding up. Anything done by the company or a receiver to pay the chargee or transfer assets to the chargee would be void. No bank or other person holding a charge under which moneys had become payable could take payment without the precaution of obtaining what is known as a validating order. I do not believe that section 368 was intended to operate in that way.

Perhaps this conclusion is only another way of stating that retrieval of property the subject of a charge by a chargee when he is entitled to have it is not to be categorised as a disposition of the property of the company within the meaning of section 368. "

And further, on the same page and on page 714 :

" I take the view that the phrase 'any disposition of the property of the company' in the context of section 368 relates to something done with property that the company is free to deal with. I do not think that there is a disposal of property of the company when there is a dealing by someone who is really someone other than the company and who has the right to say how it is to be dealt with, and whatever interest the company has in that property gives it no control or management over the property nor power to interfere. The control, which in the words of Barwick C.J., Mason and Jacobs JJ. (F.C. of T. v. Barnes (1975) 133 C.L.R. 483 at p. 492) enables a receiver appointed under a floating charge 'to reduce the assets and undertaking of a company into a fund out of which a particular debt or in some cases all the debts of the company, secured and unsecured, are to be paid if the fund so far extends' hardly seems consonant with avoidance of his actions as being dispositions of property of the company if he acts (see also D.F.C. of T. v. A.G.C. (Advances) Ltd. (1984) 2 A.C.L.C. 599; (1984) 1 N.S.W.L.R. 29). The fact that it has been deemed necessary by separate statutory provision specifically to declare void any attachment, sequestration, distress or execution put in force against the property of the company after the commencement of the

winding up by the court, may tend to lend support to this view (section 368(3)). "

We adopt these statements and hold them mutatis mutandis, to express the law of Fiji. And accordingly we reject the contrary submissions advanced on behalf of the appellant.

The fourth ground of appeal which concerns one of Mr. Scott's two main arguments, reads :

"4. That the learned Supreme Court Judge erred in law in holding that relevant statutory trust moneys did not enjoy priority over Respondent's debt, and were not payable in full by the Respondent to the Appellant. "

The amounts owing to the appellant in respect of which the two charges were registered were in respect of PAYE tax deducted by the company from the wages of employees but not paid to the appellant and Hotel Turnover Tax payable by the Company.

Section 82 of the Income Tax Act Cap. 201 provides that :

"All amounts deducted by any person pursuant to the provisions of any regulations mde under the provisions of section 81 '- which has to do with PAYE tax - ' shall be deemed to be held in trust by such person for the Crown and shall not be subject to attachment in respect of any debt or liability of the said person and in the event of any liquidation, assignment or bankruptcy the said amounts shall form no part of the estate in liquidation, assignment or bankruptcy but shall be paid in full to the Commissioner before any distribution of the property is made. "

By the Hotel Turnover Tax Act (Cap. 202) there was established and levied a tax "on all the turnover of a hotel". The Act was amended on 25th June, 1981, by

Act No. 6 of that year which inserted a new section 9 which provided that :

> "All amounts of turnover tax payable by any proprietor of a hotel under the provisions of this Act shall be deemed to have been collected by him and held in trust for the Crown and shall not be subject to attachment in respect of any debt or liability of such hotel proprietor in the event of the liquidation or bankruptcy of the hotel proprietor, or of any assignment for the benefit of his creditors, or in any other event, and the said amounts shall not form part of the estate of the hotel proprietor in liquidation or bankruptcy or part of any such assignment, but shall be paid in full to the Commissioner before any distribution of property is made. "

Mr. Patel submitted that the hotel turnover tax which was made the subject of the charge had become due and payable before the 25th June, 1981, and that accordingly no statutory trust in respect of them could have arisen. Mr. Scott submitted that notwithstanding the provisions of section 9, the essential nature of the relationship between the company and the appellant in respect of that part of any revenue received by the company which became payable as turnover tax was that of trustee and cestui que trust. We accept that submission.

Mr. Scott's starting point was section 259 of the Companies Act, 1945 (being the Act in force at the relevant time) which provided in summary that in a winding up the same rules concerning the respective rights of secured and unsecured creditors apply as are in force for the time being under the law of bankruptcy. Although the section refers to "rules" it was common ground that the provisions of both the Bankruptcy Act and rules apply.

Section 40 of the Bankruptcy Act provides, so far as is relevant :

"40. The property of the bankrupt divisible amongst his creditors, and in this Act referred to as the property of the bankrupt, shall not comprise the following particulars :

(a) property held by the bankrupt on trust for any other person; "

So far as PAYE tax is concerned the law requires the employer to deduct the appropriate tax from the employees emoluments and account for it to the Commissioner. Section 82 of the Act applies, and it reads :

" All amounts deducted by any person pursuant to the provisions of any regulations made under the provisions of sections 81 and 107 shall be deemed to be held in trust by such person for the Crown and shall not be subject to attachment in respect of any debt or liability of the said person and in the event of any liquidation, assignment or bankruptcy the said amounts shall form no part of the estate in liquidation, assignment or bankruptcy but shall be paid in full to the Commissioner before any distribution of the property is made. "

In the case of Hotel Turnover Tax, the hotel guest is primarily liable, but it is payable by and recoverable from the hotel proprietor.

Mr. Scott's basic submission was that because of the trust provisions in section 82, and its counterpart in the Hotel Turnover Tax Act, the charges created by section 76(3) and later registered by the Commissioner pursuant to section 76(6) take priority over the bank's mortgage because of the operation of the bankruptcy rules. He allowed that section 76(3) would not of itself, give priority but submitted that the trust provisions combined with that subsection gave priority "by statutory inference". Mr. Patel submitted, and we agree, that in fact a failure to account for PAYE tax does not give rise to a charge under section 76(3) because the company was not "the person liable to pay the same" in terms of that subsection; and although failure to pay hotel turnover

tax would give rise to such a charge, at the time of registration of the present charges there was no trust provision in force in respect of such tax. That aside, Mr. Scott relied on two cases in support of his argument. The first was re Arnold Trading Co. Ltd. [1983] N.Z.L.R. 445 (C.A.) in which the question at issue was whether section 46 of the New Zealand Sales Tax Act conferred priority upon the Collector of Customs ahead of a debenture holder in respect of tax owing by a company in respect of goods sold by it before the appointment of the debenture holder's receiver. Mr. Scott submitted that case to be an authority for the proposition that statutory provisions in no material respect dissimilar to section 82 of Fiji's Income Tax Act gave implied absolute priority to tax designated as trust moneys as against prior secured creditors. The section under consideration in Arnold read :

> " Appointment of receiver to be notified to Collector, and receiver to provide for payment of tax -
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> (1) Where a receiver is appointed of the property of a wholesaler or of a manufacturing retailer (such wholesaler or retailer hereinafter in this section referred to as the taxpayer), the receiver shall, within 14 days after his appointment, give notice thereof -
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> (a) In the case of a licensed taxpayer, to the Collector for the district specified in the licence; and
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> (b) In the case of any other taxpayer, to the Collector for any district in which the business of the taxpayer is being carried on, -
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> and shall, before disposing of any of the assets of the taxpayer, set aside out of the assets such sum as appears to the Collector to be sufficient to provide for any sales tax that is payable by the taxpayer and any sales tax that will become payable in respect of goods that have been sold by the taxpayer before the appointment of the receiver :

Provided that the receiver may convert any of the assets of the taxpayer to cash where this is necessary for the sole purpose of enabling him to set aside that sum.

(2) The person appointed a receiver as aforesaid shall be liable for the payment out of the assets of the taxpayer of any sales tax that is or thereafter becomes payable as aforesaid, and, if he fails to comply with any of the provisions of subsection (1) of this section, shall also be personally liable for the payment of such sales tax.

(3) Where 2 or more persons are appointed receivers of the property of any taxpayer as aforesaid, the obligations and liabilities attaching to a receiver under this section shall attach to all such persons jointly and severally, subject to a right of contribution between themselves as in cases of contract. "

The critical issue in the case was the meaning to be given to the expression "the assets of the taxpayer" as used in section 46(2) it being argued that it referred only to assets remaining in the receiver's hands after discharging the obligation under the debenture. The Court rejected that submission, not on the basis of "trust" or "statutory inference of priority" but on the plain meaning of the words of a section which bears no resemblance whatever to section 82. The only comment of any assistance in the judgment, - and it does not help Mr. Scott's cause - is that a taxing statute ought not to be construed as making inroads into the ordinary rights of the subject in the absence of a clear intention so to do.

The second case was Re Westmoreland Box Co. Ltd. (in liquidation), Crawshaw v. Commissioner of Inland Revenue [1968] N.Z.L.R. 826 (C.A.). That concerned PAYE tax and the question was whether the Commissioner on the liquidation of a company was entitled to receive unpaid tax deductions ahead of the holder of a floating charge.

In Westmoreland the Court of Appeal was considering section 31 of the Income Tax Assessment Act, 1957 which read :

> " (1) The amount of every tax deduction made under this Part of this Act shall be held in trust for the Crown; and any amount so held in trust shall not be property of the employer liable to execution, and, in the event of the bankruptcy or liquidation of the employer or of an assignment for the benefit of the employer's creditors, shall remain apart, and form no part of the estate in bankruptcy, liquidation, or assignment.
>
> (2) Where a tax deduction has been made under this Part of this Act and the employer has failed to deal with the amount of tax deduction or any part thereof in the manner required by subsection (1) of this section or the other provisions of this Part of this Act, the amount of the tax deduction for the time being unpaid to the Commissioner shall, in the application of the assets of the employer upon the bankruptcy or liquidation of the employer or upon an assignment for the benefit of the employer's creditors, rank, without limitation in amount and notwithstanding anything in any other Act, in order of priority immediately after preferential claims for wages or other sums payable to or on account of any servant or worker or apprentice or articled clerk, and in priority to all other claims. "

Mr. Scott submitted that the Court had held that section 31(1) which is materially the same as section 82 in the Fiji legislation would have given priority but for the provisions of section 31(2) which has no equivalent in Fiji. We do not find that to be the effect of the judgment. The Commissioner did not attempt to bring himself within section 31(1) as there had been no actual or notional separation of the moneys deducted into a trust fund. Section 31(2) therefore became operative and unpaid deductions became a charge on the property of the employer pursuant to section 32. And that charge was subject to existing mortgages and encumbrances. In the Fijian legislation failure to

deduct or pay is dealt with under section 93 of the Act. On failure the person liable to pay becomes liable for the amount due plus a penalty as if the same were tax payable by such person, and the provisions of specific sections, including section 76, apply. It follows that the employer's real and personal property becomes chargeable. Section 93 does not provide that the trust provision of section 82 will apply to the deductions not accounted for. In our view Westmoreland does not help the appellant's cause.

We agree with Mr. Patel that section 82 is not a "priority" section. It merely protects from distribution or attack a fund actually or notionally set aside. If there is no such fund no question of trust arises. Section 93 then comes into play and the employer's property may be charged. There is no reference in the charging provisions of section 76 to the charge having priority over existing mortgages and encumbrances, and indeed Mr. Scott conceded that section 76 standing alone would not give the Commissioner priority.

We therefore reject Mr. Scott's "priority through trust" argument.

In the result, the appeal fails and it is dismissed. The appellant is ordered to pay the respondent's costs.

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Vice President

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Judge of Appeal

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Judge of Appeal