HIGH COURT OF AUSTRALIA

FRENCH CJ,
GUMMOW, HAYNE, HEYDON AND BELL JJ

BRUTON HOLDINGS PTY LIMITED (IN LIQUIDATION) APPELLANT

AND

COMMISSIONER OF TAXATION & ANOR RESPONDENTS

Bruton Holdings Pty Limited (in liquidation) v Commissioner of Taxation
[2009] HCA 32
26 August 2009
S158/2009

ORDER

1. *Appeal allowed with costs.*

2. *Set aside the orders of the Full Court of the Federal Court of Australia made on 25 February 2009, and in their place order that the appeal to that Court be dismissed with costs.*

On appeal from the Federal Court of Australia

Representation

S D Robb QC with D R Stack for the appellant (instructed by Nash O'Neill Tomko Lawyers)

A H Slater QC with R L Seiden and E Bishop for the first respondent (instructed by Australian Government Solicitor)

Submitting appearance for the second respondent

CATCHWORDS

Bruton Holdings Pty Limited (in liquidation) v Commissioner of Taxation

Taxation – Recovery of tax debts – Company deposited moneys with third party – Passage of creditors' resolution for winding up of company – Commissioner of Taxation ("Commissioner") issued notice under s 260-5 in Sched 1 to the *Taxation Administration Act* 1953 (Cth) ("Administration Act") requiring moneys held by third party be paid to Commissioner – Whether s 260-5 notice may be issued after commencement of winding up – Whether steps taken by Commissioner void and unenforceable as an "attachment" within meaning of s 500(1) of *Corporations Act* 2001 (Cth) – Relationship between s 260-5 and s 500(1).

Companies – Winding up – Creditors' voluntary winding up – Whether s 260-5 in Sched 1 to Administration Act applicable – Relationship between s 260-5 and s 260-45.

Words and phrases – "attachment", "property".

Bankruptcy Act 1966 (Cth), s 118.
Corporations Act 2001 (Cth), ss 5A(2), 9, 468(4), 500(1), 500(2), 501, 555, 569.
Legal Profession Act 2004 (NSW), s 255.
Taxation Administration Act 1953 (Cth), Sched 1, ss 260-5, 260-15, 260-20, 260-45, 260-50.

1 FRENCH CJ, GUMMOW, HAYNE, HEYDON AND BELL JJ. The ultimate question on this appeal from the Full Court of the Federal Court of Australia (Ryan, Mansfield and Dowsett JJ)[1] may be stated as follows.

2 Shortly before the creditors of the appellant, a company in voluntary administration, resolved that the company be wound up, the first respondent ("the Commissioner") issued an assessment assessing the company to tax of more than $7.7 million. After the passing of the resolution for winding up, the Commissioner lodged a proof of debt in the winding up but also issued a notice under s 260-5 in Sched 1 to the *Taxation Administration Act* 1953 (Cth) ("the Administration Act"). Section 260-5 appears in a Division which also contains particular provisions dealing with company liquidations. In its terms the notice ("the s 260-5 Notice") required the second respondent, a firm of solicitors ("Piper Alderman"), to pay to the Commissioner money the appellant had deposited with that firm[2]. Was Piper Alderman obliged to pay the Commissioner the amount demanded by the s 260-5 Notice from the sum standing to the credit of the company in the firm's trust bank account?

3 The primary judge (Allsop J) granted a declaration that the s 260-5 Notice was void[3]. The Full Court allowed an appeal by the Commissioner and the company in this Court seeks the restoration of the orders of the primary judge by the setting aside of the Full Court orders. For the reasons which follow, the appeal to this Court should be allowed.

Chapter 5 of the Corporations Act

4 It is convenient to turn first to provisions of Ch 5 of the *Corporations Act* 2001 (Cth) ("the Corporations Act") which had been enlivened with the passing of the resolution for the creditors' voluntary winding up of the appellant, that is to say, before the issue of the s 260-5 Notice.

5 Section 501 provides for the distribution of the property of a company on its winding up. It provides that:

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1 *Federal Commissioner of Taxation v Bruton Holdings Pty Ltd (in liq)* (2008) 173 FCR 472.

2 Piper Alderman entered a submitting appearance in this Court.

3 *Bruton Holdings Pty Ltd (in liq) v Commissioner of Taxation* (2007) 244 ALR 177.

> "Subject to the provisions of this Act as to preferential payments, the property of a company must, on its winding up, be applied in satisfaction of its liabilities equally and, subject to that application, must, unless the company's constitution otherwise provides, be distributed among the members according to their rights and interests in the company."

The term "property" is defined in s 9 as meaning:

> "any legal or equitable estate or interest (whether present or future and whether vested or contingent) in real or personal property of any description and includes a thing in action".

6 Section 555 of the Corporations Act gives further content to the requirement of s 501 that, on winding up, the company's property is to be applied "in satisfaction of its liabilities equally". It provides that:

> "Except as otherwise provided by this Act, all debts and claims proved in a winding up rank equally and, if the property of the company is insufficient to meet them in full, they must be paid proportionately."

7 Section 500 of the Corporations Act regulates execution and civil proceedings against a company or its property after the passing of a resolution for voluntary winding up. Sub-sections (1) and (2) of s 500 provide:

> "(1) Any attachment, sequestration, distress or execution put in force against the property of the company after the passing of the resolution for voluntary winding up is void.
>
> (2) After the passing of the resolution for voluntary winding up, no action or other civil proceeding is to be proceeded with or commenced against the company except by leave of the Court and subject to such terms as the Court imposes."

Section 468(4) applies to a winding up by the court and is relevantly in the same terms as s 500(1). These provisions have an ancestry which commences with s 163 of the *Companies Act* 1862 (UK) ("the 1862 Act")[4].

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4 25 & 26 Vict c 89.

8 Section 5A(2) of the Corporations Act provides that, subject to some exceptions that are not presently material, the provisions of Ch 5 of the Corporations Act regulating winding up, which include ss 500, 501 and 555, bind the Crown in right of the Commonwealth.

The critical issue

9 This is whether, after the passing of the resolution for the winding up of the appellant, the property of that company, which, subject to "preferential payments"[5], must be applied in the manner prescribed by ss 501 and 555 of the Corporations Act, could be diminished by the subsequent engagement of s 260-5 in Sched 1 to the Administration Act. The answer to that question requires consideration both of the relationship between the two statutes of the Commonwealth and also of the relationship between provisions of the Administration Act.

10 These reasons will demonstrate that the Commissioner's general power to issue a notice under s 260-5 is not available if a liquidator has been appointed to a company. In that latter circumstance, only the more particular provisions of s 260-45 of the Administration Act are engaged. That being so, there is no disruption of the operation of Ch 5 of the Corporations Act, and, in particular, no attachment to be rendered void by s 500(1).

The Administration Act

11 Something further should now be said respecting the provisions of Div 260 in Sched 1 to the Administration Act, beginning with the notice provisions in s 260-5 and then turning to s 260-45. The heading to Div 260 speaks of "[s]pecial rules about collection and recovery" of tax.

12 A notice under s 260-5 gives the Commissioner the right to recover from a third party an amount that the third party owes or may later owe to a taxpayer who is indebted to the Commonwealth for tax. It is established that the remedy given to the Commissioner by s 260-5 is available in respect of revenue obligations, which are given the character of "debts" by force of the Administration Act itself[6] and without prior curial determination.

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5 Chiefly the priority payments prescribed by s 556.

6 See *Deputy Commissioner of Taxation v Broadbeach Properties Pty Ltd* (2008) 82 ALJR 1411 at 1417 [26]-[29]; 248 ALR 693 at 700; [2008] HCA 41.

13 The third party is obliged to pay the Commissioner what is demanded by the notice; failure to comply with the notice is a criminal offence[7]. Section 260-5(3), read with s 260-15, provides, in effect, that the Commissioner has the right to give to the third party a valid receipt and discharge for money paid in compliance with the notice.

14 In these respects, a notice under s 260-5 operates in the manner in which, in *Hall v Richards*[8], Kitto J described a garnishee order as operating to attach a debt. Kitto J said:

> "Such an order, though not working an assignment or giving the judgment creditor any proprietary interest in the debt, yet gives him positive rights with respect to it which a creditor having no more than a judgment does not possess; not merely a negative right to prevent the judgment debtor from accepting payment of the debt or disposing of it, but positive rights for the recovery of what is owing on the judgment, namely a right to give a valid receipt and discharge for the money, and a right in case of non-payment to obtain execution against the garnishee: *In re Combined Weighing and Advertising Machine Co*[9]."

15 The provisions in s 260-5 and following have an ancestry beginning with s 50A of the *Income Tax Assessment Act* 1915 (Cth)[10] and including s 218 of the *Income Tax Assessment Act* 1936 (Cth) ("the 1936 Act"). In *Bluebottle UK Ltd v Deputy Commissioner of Taxation*[11] the Court described s 218 of the 1936 Act as containing "statutory garnishee provisions". Earlier, in *FJ Bloemen Pty Ltd v Federal Commissioner of Taxation*[12], Mason and Wilson JJ spoke of "the

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7 Section 260-20.

8 (1961) 108 CLR 84 at 92; [1961] HCA 34.

9 (1889) 43 Ch D 99 at 105, 106.

10 Inserted by s 32 of the *Income Tax Assessment Act* 1918 (Cth).

11 (2007) 232 CLR 598 at 632 [92]; [2007] HCA 54.

12 (1981) 147 CLR 360 at 375; [1981] HCA 27. See also the use of that expression by Fox J in *Huston v Deputy Commissioner of Taxation* (1983) 49 ALR 566 at 567.

garnishee power in s 218", and in *Clyne v Deputy Commissioner of Taxation*[13], Mason J remarked upon the "quite striking" similarity between s 218 and the rules of court respecting garnishee orders.

16 Section 260-45 deals specifically with collection and recovery of tax liabilities of companies from liquidators. Section 260-45 provides that the Commissioner must notify[14] the liquidator of the amount the Commissioner considers is enough to discharge any outstanding tax-related liabilities of the company. The section further provides, in effect, that the liquidator is obliged[15] to set aside from the assets of the company available to pay tax-related liabilities and other, non-priority, unsecured debts, the proportion of those available assets that would be applied in accordance with s 555 of the Corporations Act to meet the notified amount of tax-related liabilities. The liquidator is then further personally obliged[16] to discharge the outstanding tax liabilities of the company to the extent of the value of the assets the liquidator is required to set aside under the proportionate formula. Failure by the liquidator to comply with these obligations is a criminal offence[17].

17 There is thus disclosed by these provisions in Sched 1 to the Administration Act an example of a specific regime which, in cases where it applies, excludes more general provisions which otherwise might be engaged[18].

18 Counsel for the Commissioner referred to *Deputy Commissioner of Taxation v Broadbeach Properties Pty Ltd*[19] and to *Deputy Commissioner of*

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13 (1981) 150 CLR 1 at 19; [1981] HCA 40.

14 Section 260-45(3).

15 Section 260-45(6).

16 Section 260-45(7) and (8).

17 Section 260-50.

18 *Anthony Hordern & Sons Ltd v Amalgamated Clothing and Allied Trades Union of Australia* (1932) 47 CLR 1 at 7; [1932] HCA 9; *Minister for Immigration and Multicultural and Indigenous Affairs v Nystrom* (2006) 228 CLR 566 at 583-589 [44]-[59], 612 [149], 615-616 [162]-[165]; [2006] HCA 50. See also *Minister for Immigration and Citizenship v SZKTI* [2009] HCA 30 at [39]-[44].

19 (2008) 82 ALJR 1411; 248 ALR 693.

Taxation v Moorebank Pty Ltd[20]. The first case concerned the specific recovery provisions for disputed tax debts and the inapplicability thereto of the "genuine dispute" provision in s 459H of the Corporations Act. The second case decided that State limitation statutes were not "picked up" by the *Judiciary Act* 1903 (Cth) and rendered applicable to recovery of tax debts. These authorities may provide some support for a proposition that, in the event of a conflict, preference is given to specific schemes in the Administration Act to protect the revenue over the more general scheme of the Corporations Act. But what first must be identified is the relevant specific scheme in the Administration Act itself.

19 The conclusion that would otherwise follow from the making of the special provisions for liquidators that appear in s 260-45 (that the Commissioner's general powers under s 260-5 are not available if there has been a resolution passed for the winding up of a company or if an order for winding up by the court or for winding up in insolvency has been made) is at least reinforced, even required, by the application by s 5A(2) of ss 501 and 555 of the Corporations Act to the Crown in right of the Commonwealth.

20 The conclusion is further supported by the recognition that:

(a) the process for which s 260-5 provides falls within the expression "attachment" when used in s 500(1);

(b) the emphatic language of s 500(1) ("[a]ny attachment ... put in force against the property of the company after the passing of the resolution for voluntary winding up is void") is consistent with reading s 260-5 as not extending the Commissioner's general power to give such a notice to the particular circumstances for which s 260-45 makes special provision;

(c) before the *Taxation Debts (Abolition of Crown Priority) Act* 1980 (Cth) ("the 1980 Act") and in the period when the Crown retained priority for tax debts it was necessary to provide specially (by s 221(1)(b) of the 1936 Act[21]) that "notwithstanding anything contained in any other Act or State Act" the liquidator of a company being wound up was bound to apply the assets of the

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20 (1988) 165 CLR 55; [1988] HCA 29.

21 Introduced into that Act by the *Income Tax Assessment Act* 1942 (Cth), s 31, and repealed by s 5 of the 1980 Act.

company in payment of tax in priority to all other unsecured debts[22]; and

(d) the proportionate system established by s 260-45 for liquidations would be subject to adventitious disruption if the circumstance that a third party was indebted to the company gave to the Crown full garnishee rights under s 260-5; the extent of recovery of a tax debt owed by an insolvent company would depend upon the extent to which the assets of the company comprised debts owed by third parties and the speed with which the liquidator gathered them in; once so gathered the debts would be beyond the scope of the notice provisions and within the scheme of Ch 5 of the Corporations Act.

21 The result is that the present appeal discloses not a situation where the relevant provisions of the Corporations Act and the Administration Act are at odds and in need of reconciliation. Rather, the former assists in the construction of the latter[23].

22 It is, however, necessary to say something more as to consideration (a), that concerning the term "attachment" in s 500(1), and then to note some further factual matters founding issues which, while argued, do not arise for decision.

Attachment of debts

23 Section 500(1) of the Corporations Act uses the term "any attachment". An attachment was understood at common law as including the act or process of taking, apprehending or seizing, under a writ of *fieri facias*, chattels capable of sale to meet the entitlement of the judgment creditor[24]. However, at common law there was no remedy enabling a creditor after judgment to appropriate debts and moneys of the debtor in the hands of third parties; such assets were available for the satisfaction of creditors only under a bankruptcy or insolvency

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22 See *The State of Victoria v The Commonwealth* (1957) 99 CLR 575 at 613, 658; [1957] HCA 54; *Bank of New South Wales v Federal Commissioner of Taxation* (1979) 145 CLR 438 at 450-451; [1979] HCA 64.

23 See *Re Maritime Union of Australia; Ex parte CSL Pacific Shipping Inc* (2003) 214 CLR 397 at 411-412 [28]-[29]; [2003] HCA 43; *Re Wilcox; Ex parte Venture Industries Pty Ltd* (1996) 66 FCR 511 at 530.

24 *Halsbury's Laws of England*, 1st ed, vol 14, Title "Execution" at 44.

administration. Section 12 of the *Judgments Act* 1838 (UK)[25] proved to be of limited utility because it applied only to specific coin or notes which could be taken without assaulting the debtor and to debts secured by cheques, bills of exchange and other securities for money, which could easily be secreted.

24 This state of affairs was described in the Second Report of the Common Law Commissioners in 1853[26]. The Commissioners reported:

> "We are not aware of any process, either in the superior courts of law or equity, in suits between subject and subject, by which this [attachment of debts] can directly be done, though the course of proceeding under writs of execution at the suit of the crown[27], and by way of foreign attachment in the mayor's court of London[28] and some other cities, as well as in the courts of many foreign countries, shows that such a remedy would be practicable and useful."

25 In accordance with their recommendations a new remedy was provided by the *Common Law Procedure Act* 1854 (UK)[29] ("the 1854 Act"). The 1854 Act soon was copied in the Australian colonies[30].

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25 1 & 2 Vict c 110.

26 *Second Report of Her Majesty's Commissioners for Inquiring into the Process, Practice, and System of Pleading in the Superior Courts of Common Law*, (1853) at 38; reprinted in *British Parliamentary Papers, Legal Administration General*, (1971), vol 9, 165 at 204.

27 See Chitty, *A Treatise on the Law of the Prerogatives of the Crown*, (1820), Ch XII, Pt I, Sec VI, "Of seizing the Debts, Specialties, and Credits of the Crown Debtor, and herein of Extents in Chief, in the second degree, ie against Debtors to the Crown Debtor"; *Ling v The Commonwealth* (1994) 51 FCR 88 at 93.

28 See *The Mayor and Aldermen of the City of London v Cox* (1867) LR 2 HL 239 at 265 where Willes J, on behalf of the Judges, reported to the House of Lords that "foreign" did not mean "alien", but "merely not civic", as, for example, outside the jurisdiction of the Lord Mayor's Court in London.

29 17 & 18 Vict c 125, ss 60-67.

30 See *Common Law Procedure Act* 1857 (NSW), ss 26-33; *Supreme Court Procedure Act* 1855 (SA), ss 49-56; *Supreme Court (Common Law Procedure) Act* 1865 (Vic), ss 200-207; *Common Law Practice Act* 1867 (Q), ss 51-58.

26 Section 61 of the 1854 Act used the term "garnishee" to identify the third party and spoke of the debts being "attached". Thus, by the time of the introduction of s 163 of the 1862 Act, the ancestor of s 500(1) of the Corporations Act, the term "attachment" was in use to describe the then new statutory garnishee remedy. Speaking of the system introduced by the 1854 Act, Bowen LJ said that the garnishee order created an attachment of the debt[31].

The meaning of "attachment" in s 500(1)

27 The Commissioner submits that the term "any attachment" in s 500(1) of the Corporations Act does not extend to the operation of the s 260-5 Notice. The question is whether, given the subject, scope and purpose of Ch 5 of the Corporations Act, of which s 500(1) is part, the term "any attachment" has a more restricted meaning than that which it otherwise bears.

28 The service of a s 260-5 notice imposes upon the recipient an obligation to pay the amount specified therein to the Commissioner, renders it unlawful for the recipient to pay the creditor, invalidates any attempted assignment by the creditor after the receipt of the notice, and gives to the Commissioner the sole right to discharge the debtor and to sue the debtor upon non-payment[32]. Section 260-15, as explained above, protects the party paying under the notice. The appellant correctly submits that, as a matter of general understanding, these are indicia of an attachment.

29 Observations by von Doussa J in *Commissioner of Taxation v Donnelly*[33] ("*Donnelly*") are in point here. His Honour said:

> "It may be accepted that historically, and in present usage, the meaning of 'attachment' may extend to means other than a process of the court by which a debt is frozen or seized; the meaning may extend to similar procedures otherwise authorised by legal authority."

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31 *In re Combined Weighing and Advertising Machine Company* (1889) 43 Ch D 99 at 105.

32 *Clyne v Deputy Commissioner of Taxation* (1981) 150 CLR 1.

33 (1989) 25 FCR 432 at 446. See also the reasons of Burchett J in *Re Edelsten* (1988) 84 ALR 547 at 560-561.

The essential point, to adapt what was pointed out by Willes J in *The Mayor and Aldermen of the City of London v Cox*[34], is that the third party debtor "is safe" in making the payment, whether that safety be by reason of the protection of a curial order or the operation of statute, such as s 260-15 of the Administration Act.

30 However, the Commissioner relied upon the conclusion reached by the Full Court that s 500(1) is limited to "curial attachments".

31 Section 163 of the 1862 Act was enacted in the following terms:

> "Where any Company is being wound up by the Court or subject to the Supervision of the Court, any Attachment, Sequestration, Distress, or Execution put in force against the Estate or Effects of the Company after the Commencement of the Winding-up shall be void to all Intents."

This section does not contain words of limitation which would indicate that its operation was limited to curial attachments. Furthermore, there appears to be no decision, before that currently subject to this appeal, which has held that s 500(1), or any of the preceding provisions to the same effect, is limited in operation to curial attachments.

The reasons of the Full Court

32 The Full Court, in holding that s 500(1) was so limited, stated that[35]:

> "the need for certainty in the law can best be recognised by applying the decision in *Donnelly* to s 500".

The Full Court in *Donnelly*[36] concluded that "attachment", in s 118 of the *Bankruptcy Act* 1966 (Cth) ("the Bankruptcy Act"), is confined to attachments by curial order and does not extend to non-curial charges created by notices issued under s 218 of the 1936 Act. However, subsequently, the Full Court in *Macquarie Health Corp Ltd v Commissioner of Taxation*[37] noted the

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34 (1867) LR 2 HL 239 at 267.

35 (2008) 173 FCR 472 at 497 [72].

36 (1989) 25 FCR 432.

37 (1999) 96 FCR 238.

"considerable force" of the contention that the decision in *Donnelly* does not apply to what is now s 468(4) of the Corporations Act[38]. The contention applies with equal force to s 500(1).

33 Section 118 of the Bankruptcy Act is a special provision dealing with the payment to the trustee in bankruptcy of the proceeds of certain executions and attachments by a creditor within six months before, or after, the presentation of a petition. The corresponding provision in the Corporations Act is found in s 569.

34 Section 118 contains several features, upon which the Full Court relied in *Donnelly* in reaching its decision, which are not present in s 500(1). First, the legislative history of s 118 indicates that it is confined to curial attachments; when it was introduced it included a reference to a creditor who had "instituted proceedings to attach a debt". Secondly, s 118 links attachments with executions against property and proceedings to enforce a charge, all of which are court procedures to enforce judgments. Thirdly, the amount to be paid to the trustee under s 118(1) is to be reduced by the taxed costs of the execution or attachment. None of these features are present in s 500(1). Indeed, s 500(1) includes the non-curial remedy of distress.

35 The legislative history of s 500(1) is distinct from that of s 118 of the Bankruptcy Act and contains no indication that its operation is limited to curial attachments. Section 118 is derived from s 92 of the *Bankruptcy Act* 1924 (Cth), which in turn was derived immediately from s 40 of the *Bankruptcy Act* 1914 (UK). In *McQuarrie v Jaques*, Dixon CJ noted that the predecessors to s 92, which "come from the English *Bankruptcy Acts* 1883 and 1890", were introduced to remedy the conflicting priorities created by the operation of the doctrine of relation back when an execution had been levied upon the bankrupt's property, after the act of bankruptcy, but before the fiat or commission in bankruptcy[39]. Section 500(1), on the other hand, only applies after the passing of a resolution for voluntary winding up and there is no "relation back" period of its operation.

36 Thus the features of s 118 which led the Full Court in *Donnelly* to decide that its operation should be confined to curial attachments are absent from s 500(1) and the decision in *Donnelly* is to be distinguished.

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38 (1999) 96 FCR 238 at 266-267 [109]-[118].

39 (1954) 92 CLR 262 at 269-272; [1954] HCA 76.

37 The Full Court in this case attached importance to the use of the term "attachment" in s 569 of the Corporations Act, which expressly refers to the taxation of costs. And s 569 has a shared legislative history with s 118 of the Bankruptcy Act. The particular confinement of the term "attachment" in s 569 of the Corporations Act which follows from both its text and history is not indicative of the meaning of "any attachment" in s 500(1).

38 An examination of s 500(1), and Ch 5 of the Corporations Act of which it forms part, does not reveal any reason to restrict the meaning of the expression "any attachment" employed in the section and it should be given the meaning explained earlier in these reasons. This extends to curial and non-curial attachments, including those effectuated by notices issued pursuant to s 260-5 in Sched 1 to the Administration Act.

39 Accordingly, and contrary to the holding by the Full Court, the term "any attachment" in s 500(1) does not have a restricted meaning which would exclude the operation of a valid notice given under s 260-5. That conclusion supports the proposition that, as a matter of construction, the power conferred on the Commissioner by s 260-5 does not extend to the case of a company in liquidation. The tension which would otherwise exist if a provision of one statute avoided a notice issued under another does not arise. As explained earlier, the Commissioner's general powers under s 260-5 are not available if there has been a resolution passed for the winding up of a company or if an order for winding up has been made.

The facts

40 Something more should be said respecting the facts of this case. This is necessary in order to show that the appeal may be decided without embarking upon all the questions raised by the submissions.

41 The appellant was incorporated on 27 May 1997 and its sole purpose was to act as trustee of the trusts of a settlement made by deed dated 8 July 1997 ("the Trust Deed") and known as the Bruton Educational Trust ("the Trust"). The income and capital were to be applied by the trustee for charitable purposes (cl 3). On 28 April 2006, the Commissioner disallowed the objection by the appellant to the refusal of its application for endorsement as a tax exempt entity. The appellant challenged that outcome by application made to the Federal Court on 23 June 2006. Piper Alderman acted for the appellant in that Federal Court litigation.

42 Over a period beginning on 26 October 2005 and ending on 28 February 2007, the appellant paid to Piper Alderman some $470,000 to be held in its trust account on account of costs and disbursements of that litigation. On 28 February 2007 administrators of the appellant were appointed pursuant to s 436A of the Corporations Act. By force of cl 10.2(b) of the Trust Deed the entry into administration brought about the termination of the trusteeship of the appellant pursuant to the appointment made by the Trust Deed. No replacement trustee has been appointed.

43 The appellant was not entitled to charge any remuneration, but, by force of cl 13 of the Trust Deed, the appellant has a lien on the trust assets for all liabilities, costs and expenses properly incurred by it in administration of the Trust. Further, even without that express provision, the appellant has rights of recoupment or exoneration in respect of all obligations incurred by it in that administration. These rights were supported by a lien over the whole of the trust assets which amounted to a proprietary interest therein[40] and they survived the appellant's loss of office as trustee[41]. The amount so secured to the appellant has yet to be determined.

44 On 26 March 2007 the Commissioner issued to "the Trustee for Bruton Educational Trust" an assessment for the year ending 30 June 2004 in the sum of $7,715,873.73, and due for payment on 30 April 2007.

45 On 30 April 2007 the appellant was placed into liquidation following passage of a creditors' resolution under s 439C of the Corporations Act. The two administrators were appointed joint liquidators. The date of commencement of the winding up was 28 February 2007, the day on which the administration began[42]. On 8 May the Commissioner lodged a proof of debt for the sum of the assessment issued on 26 March.

46 On 9 May 2007, Piper Alderman received the s 260-5 Notice dated 8 May and issued by the Commissioner in reliance upon s 260-5 of the Administration

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40 *Chief Commissioner of Stamp Duties (NSW) v Buckle* (1998) 192 CLR 226 at 245-246 [47]-[49]; [1998] HCA 4.

41 *Dimos v Dikeakos Nominees Pty Ltd* (1996) 68 FCR 39; *Glazier Holdings Pty Ltd (in liq) v Australian Men's Health Pty Ltd (in liq)* [2006] NSWSC 1240.

42 Corporations Act, s 513B(b) and s 513C(b).

Act. This recited that Piper Alderman owed money to the appellant and the indebtedness of the appellant to the Commonwealth of $7,715,873.73 and required payment to the Commissioner of $447,420.20.

47 The *Legal Profession Act* 2004 (NSW) governed the relationship between the appellant and Piper Alderman. Section 255 of that statute required Piper Alderman to pay the moneys to or in accordance with the direction of the appellant. On its part, the appellant had, in respect of the obligation of Piper Alderman to account under s 255, the proprietary interest given by the lien described above. This proprietary interest would appear to be "property" of the appellant protected by s 500(1) of the Corporations Act against any attachment put in force against it during the winding up. Both the primary judge[43] and the Full Court[44] so held.

"Property" and s 500(1)

48 Particular questions may arise in the winding up of a trustee corporation which also conducted non-trust activities by reason of which there are third party creditors who seek access by subrogation to the lien of the trustee over trust assets[45]. Those questions do not arise in the present litigation.

49 However, the Commissioner fixes upon the circumstance that the appellant has its lien for recoupment or exoneration, and upon the further circumstance (which the appellant contests but may be assumed for present purposes) that the Commissioner is likely to be the only creditor admitted to proof, to make several submissions which would deny scope for the operation in this case of s 500(1).

50 The Commissioner emphasises that the tax debt has not been paid so that the appellant's right at best is to exoneration not recoupment from the assets of the Trust and that the Commissioner is subrogated to the exercise of that right, with no prospect of any excess being left for the appellant. It is said to follow that the "property" represented by that right is not that of the appellant and s 500(1) has not been enlivened.

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43 (2007) 244 ALR 177 at 187 [51].

44 (2008) 173 FCR 472 at 494 [61].

45 See *Jacobs' Law of Trusts in Australia*, 7th ed (2006), §2114.

51 It is unnecessary to rule upon those submissions. This is for several reasons. The first is that for the reasons given above which concern the construction of the Administration Act, the remedy available to the Commissioner on the facts of this case was that under the regime for liquidations (s 260-45), not the garnishee regime provided by s 260-5. Secondly, the Commissioner takes inconsistent positions in making the above submissions. The garnishee regime, in its terms, only applies if the third party owes money to the taxpayer (s 260-5(2), (3)), yet the Commissioner denies that the third party, the appellant, had any "property" within the broad meaning of "property" for the operation of s 500(1) of the Corporations Act.

Orders

52 The appeal is allowed with costs, the orders made by the Full Court of the Federal Court of Australia on 25 February 2009 are set aside and in their place the appeal to the Full Court is dismissed with costs.