IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

SC 12/2021
[2021] NZSC 83

BETWEEN	CHESTERFIELDS PRESCHOOLS LIMITED (IN LIQUIDATION) First Applicant
	THERESE ANNE SISSON Second Applicant
AND	COMMISSIONER OF INLAND REVENUE Respondent

SC 17/2021

BETWEEN	THERESE ANNE SISSON Applicant
AND	CHESTERFIELDS PRESCHOOLS LIMITED (IN LIQUIDATION) Respondent

SC 18/2021

BETWEEN	THERESE ANNE SISSON Applicant
AND	CHESTERFIELDS PRESCHOOLS LIMITED (IN LIQUIDATION) Respondent

Hearing:	22 June 2021
Court:	William Young, O'Regan and Ellen France JJ
Counsel:	T A Sisson in person B M Russell and J C Wedlake for Chesterfields Preschools Ltd (in liq) P J Shamy and S M Kinsler for Commissioner of Inland Revenue
Judgment:	12 July 2021

JUDGMENT OF THE COURT

A The applications for leave to appeal are dismissed.

B The application for leave to adduce further evidence is dismissed.

C The applicant must pay costs of $3,000 to the Commissioner and $1,500 to Chesterfields Preschools Ltd (in liq) plus usual disbursements.

REASONS

Introduction

[1] The applicant, Ms Sisson, seeks leave to appeal against three Court of Appeal judgments which collectively dismissed 11 appeals against judgments of the High Court.[1] Reflecting the three Court of Appeal judgments, the applications before this Court relate to the following: (1) the liquidation of Chesterfields Preschools Ltd (CPL), a company associated with Ms Sisson and her former husband, Mr Hampton (SC 12/2021); (2) the vesting of property in CPL (SC 17/2021); and (3) Ms Sisson's personal bankruptcy (SC 18/2021).

[2] As we shall discuss, the primary focus of the applications concerns the liquidation of CPL. That aspect raises issues about the way in which the Commissioner of Inland Revenue's claim for unpaid tax, interest and penalties is calculated. We held an oral hearing directed to one aspect of the calculation. Ms Sisson's case in essence is that, if the tax debt is correctly calculated, CPL is not insolvent.

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1 *Chesterfields Preschools Ltd (in liq) v Commissioner of Inland Revenue* [2020] NZCA 686 (Miller, Venning and Katz JJ) [Second liquidation appeal judgment]; *Sisson v Chesterfields Preschools Ltd (in liq)* [2020] NZCA 687 (Miller, Venning and Katz JJ) [Vesting orders judgment]; and *Sisson v Chesterfields Preschools Ltd (in liq)* [2020] NZCA 689 (Miller, Venning and Katz JJ) [Bankruptcy judgment].

Background

[3] Ms Sisson, Mr Hampton and the Commissioner have a lengthy litigation history. That history is set out in detail in the liquidation judgment which is the subject of the first of the leave applications.[2] Although it will be necessary in this judgment to provide more by way of background material than is usually the case in a leave judgment, at this point it is sufficient just to note the key events. We do so largely adopting the summary in the Commissioner's written submissions.

[4] CPL operated a preschool business in Christchurch. It was one of a number of business entities associated with Ms Sisson and Mr Hampton. They have had ongoing interaction with the Commissioner over tax debts relating to the various entities for some time. We can begin the narrative with reference to a statutory demand, served on CPL by the Commissioner in April 2004, for a debt of $620,545.94 comprising unpaid tax, late payment penalties and interest. CPL applied to set aside the demand, disputing the amount demanded. A range of related litigation followed, before CPL was eventually put into liquidation on 6 October 2015 (the first liquidation order).[3]

[5] The related litigation in the initial period included two judicial review proceedings.[4] Further, in May 2008, CPL and associated entities filed a statement of claim alleging misfeasance in public office by the Attorney-General, the Commissioner and various other officers. The claim was stayed until repleaded by a lawyer holding a current practising certificate and leave was granted by the High Court (the misfeasance claim).[5] Ms Sisson advises that the claim has been repleaded in accordance with this direction but it remains stayed.

[6] Returning to the liquidation proceedings, Ms Sisson, a director of CPL, was joined as a party to enable her to pursue an appeal. After a partially successful appeal

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2 Second liquidation appeal judgment, above n 1, at [6].

3 *Commissioner of Inland Revenue v Chesterfields Preschools Ltd* [2015] NZHC 2440, (2015) 27 NZTC ¶22-029 [First liquidation judgment]. This was following a failure to comply with a fresh statutory demand.

4 *Chesterfields Preschools Ltd v Commissioner of Inland Revenue* (2007) 23 NZTC 21,125 (HC) [First judicial review judgment]; and *Chesterfields Preschools Ltd v Commissioner of Inland Revenue (No 2)* (2009) 24 NZTC 23,148 (HC) [Second judicial review judgment].

5 *Commissioner of Inland Revenue v Chesterfields Preschools Ltd* [2013] NZCA 53, [2013] 2 NZLR 679 [CA misfeasance judgment]. The claim was struck out as against the Commissioner and a solicitor who acted for the IRD.

to the Court of Appeal from the first liquidation order,[6] this Court ultimately set the first liquidation order aside by consent on 23 November 2017.[7] The matter was remitted to the High Court for rehearing.

[7] On 15 December 2017, CPL was put into interim liquidation.[8] Then, on 26 February 2019, CPL was once more put into liquidation by Osborne J in the High Court (the second liquidation order).[9] Ms Sisson unsuccessfully appealed against that second liquidation order to the Court of Appeal (the second liquidation appeal judgment).[10]

The liquidation of CPL: SC 12/2021

[8] In the second liquidation appeal judgment, which is the subject of the present application, the Court of Appeal determined four appeals. The notice of application in relation to this judgment is directed to the dismissal of Ms Sisson's appeal contending that the second liquidation order should be set aside. With one minor qualification, we do not address the other three appeals dealt with in the judgment which were, relatively, of secondary importance.[11]

Submissions

[9] As we have foreshadowed, the primary argument in relation to the second liquidation order is that the Commissioner has miscalculated the tax debt owing by CPL. Ms Sisson's case is that if the debt was properly calculated there would be a "modest balance" left to pay in the situation where CPL has "a substantial unencumbered property asset" to draw on, estimated at the time of the liquidation rehearing to have a value of $1m. In developing the submissions on this point, Ms Sisson says that the calculation does not comply with the requirements of the

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6 *Sisson v Commissioner of Inland Revenue* [2017] NZCA 326, (2017) 28 NZTC ¶23-023 [First liquidation appeal judgment].

7 *Chesterfields Preschools Ltd (in liq) v The Commissioner of Inland Revenue* [2017] NZSC 176 [SC 2017 judgment].

8 *Commissioner of Inland Revenue v Chesterfields Preschools Ltd* [2017] NZHC 3172, (2017) 28 NZTC ¶23-046.

9 *Commissioner of Inland Revenue v Chesterfields Preschools Ltd (in interim liq)* [2019] NZHC 272 [Second liquidation judgment].

10 Second liquidation appeal judgment, above n 1.

11 See below at [25].

earlier judgments in the context of the taxpayers' largely successful judicial review litigation. Rather, CPL has been treated as a deliberate late payer. Further, Ms Sisson challenges the application of the ordering rules.[12] Ms Sisson explains that the ordering rules operated to require all accumulated penalties to be paid in the unpaid GST periods under investigation before any core tax payment would be applied to the underlying core tax balances. She says the Commissioner's approach breached a contrary arrangement agreed between Mr Hampton and the IRD (the Aronsen arrangement).

[10] Ms Sisson also contends that, in calculating the amounts owing, insufficient account has been taken of both non-disclosure by the Commissioner of the Aronsen file notes in the period prior to litigation as well as late discovery in the context of the litigation. In a similar vein, it is contended that the Court erred in its approach to CPL's claim based on misfeasance in public office. That claim exceeds the debt and the argument is that CPL should not have been placed in liquidation before the claim could be heard.

[11] As is apparent from this brief summary, the submission that the Court of Appeal has erred has a number of strands. The key point to note is that if one or more of these arguments was successful this would call into question various aspects of the calculation including the July 2008 cut-off date[13] and, as well, raise the need to take into account delays attributable to the issues with disclosure. Ms Sisson says the issues with disclosure mean that penalties incurred from 1999 to 2006 should be remitted.

[12] For all these reasons, Ms Sisson wishes to argue on appeal that CPL should not have been placed into liquidation. To put the submissions in context, it is necessary first to say a little more about the litigation history.

Additional contextual material

[13] Sometime after the first statutory demand was issued in April 2004, the taxpayers (CPL and other entities in which Ms Sisson and Mr Hampton were involved)

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12 Ms Sisson also says the Commissioner erred in not treating CPL's approved GST refund credits as payments of core tax.

13 See below at [15].

sought judicial review of a number of the Commissioner's decisions (the first judicial review proceeding). At the heart of this proceeding were, relevantly, the contentions that the Commissioner had:

(a) not honoured informal arrangements made regarding the tax (mainly GST) liability of the taxpayers;[14]

(b) failed to act with reasonable diligence and celerity in progressing audits and processing GST returns; and

(c) acted unreasonably over the proposed remission of penalties and attempts to recover from the taxpayers their total tax indebtedness.

[14] In a judgment delivered on 15 December 2006, the first judicial review application was decided generally in favour of the taxpayers.[15] Fogarty J set aside the Commissioner's decision to decline the remission of additional tax and directed the Commissioner to reconsider remission. A reconsideration was undertaken and resulted in a decision which reduced the total indebtedness of the taxpayers, but not significantly. The taxpayers sought a further judicial review of that decision and the Judge again found substantially in their favour (the second judicial review proceeding). This was on the basis that the reconsideration did not comply with the directions in the first judicial review decision.[16]

[15] The Commissioner appealed against the second judicial review decision to the Court of Appeal, contending the reconsideration complied with the first judicial review decision. In its 2010 judgment, the Court of Appeal largely found in favour of the taxpayers.[17] The majority said that what was envisaged by the first judicial review judgment was for penalties "to be reduced to the extent that they had accrued as a result of the inordinate delays by the Commissioner and comfort given by him to the

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14 Relevantly, an arrangement made by Mr Aronsen, an officer of the Inland Revenue Department, with the taxpayers, referred to as the Aronsen arrangement.

15 First judicial review judgment, above n 4.

16 Second judicial review judgment, above n 4.

17 *Commissioner of Inland Revenue v Chesterfields Preschools Ltd (No 2)* [2010] NZCA 400, (2010) 24 NZTC 24,500 [CA 2010 judgment].

taxpayers" (what Ms Sisson refers to as the "proportionality exercise").[18] The majority suggested that, as a "pragmatic" alternative which would meet the requirements of the first judicial review judgment, the Commissioner might choose to adopt an "across the board" 15 per cent reduction of penalties.[19] The Commissioner adopted the suggested approach applying a 15 per cent reduction in penalties and interest calculated as at July 2008. No penalties were imposed for the period after July 2008.

Our assessment

[16] The issues arising in relation to this aspect of the applications are unique. They reflect both the particular litigation history and the particular facts of this case. No question of general or public importance or of commercial significance accordingly arises.[20] Rather, the central issue for us is whether the approach taken by the Court of Appeal to the calculation of the tax debt gives rise to the appearance of a miscarriage of justice in the civil sense such that it is in the interests of justice for the Court to hear the proposed appeal.[21]

[17] We mean no disservice to the detail in the written and oral submissions when we say that whether there is an appearance of a miscarriage of justice really turns on whether anything raised by Ms Sisson suggests that the Court of Appeal was wrong in its interpretation of the requirements for the tax calculation set out in that Court's earlier 2010 judgment. We interpolate here that, to the extent that Ms Sisson challenges the appropriateness of the 15 per cent reduction, that argument has no prospects of success. As the Court of Appeal said in its 2017 judgment, CPL was bound by the 15 per cent reduction measure, albeit it could "test the accuracy and methodology of the Commissioner's calculation".[22] We add that we also need to consider the effect of Ms Sisson's argument about the disclosure issues and the interrelationship between the misfeasance claim and the liquidation decision.

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18 At [86]. See also at [91].
19 At [93].
20 Supreme Court Act 2003, s 13(2)(a) and (c); Senior Courts Act 2016, s 74(2)(a) and (c).
21 Supreme Court Act, s 13(2)(b); and Senior Courts Act, s 74(2)(b). See also *Junior Farms Ltd v Hampton Securities Ltd (in liq)* [2006] NZSC 60, (2006) 18 PRNZ 369.
22 First liquidation appeal judgment, above n 6, at [105].

[18] The Court of Appeal rejected Ms Sisson's argument about the calculation. Based on a close analysis of the 2010 judgment, the Court did not accept that the 2010 Court had mandated that the Commissioner could not charge penalties after June 2004. Observations from the 2017 judgment were also cited as consistent with that position. The Court also held that the 2010 Court intended the 15 per cent reduction to apply to penalties and interest rather than just core tax, such that adopting a methodology of ordering was permitted.

[19] Finally, the Court referred to the evidence of the calculations showing that CPL had been relieved from all penalties and use of money interest for the period from July 2008 to October 2015, totalling some $1.852 million in relief.[23] The Court accepted the Commissioner's calculation of the tax debt ($1,088,461.15) and concluded that the evidence supported the conclusion that CPL was not able to pay its tax debts as it had not answered the statutory demand and that sum was outstanding. In addition, the Court took into account other contingent or prospective debts concluding that the High Court was correct to find that, as well as being unable to pay its debts as they fell due, CPL was balance sheet insolvent. There was accordingly no reason to exercise the discretion to decline to put CPL into liquidation.

[20] None of the matters raised by Ms Sisson call into question this assessment of the requirements of the 2010 judgment. As is clear both from the passages discussed by the Court and from the 2010 judgment more generally, there was an expectation that the Commissioner would have "considerable leeway" given both the "very confusing nature of the taxpayers' affairs and their clear defaults".[24] Further, it was noted that "only a portion of penalties should be remitted even for the period of inordinate delay as the taxpayers could clearly have paid the taxes rather than waiting for the result of the investigation".[25] We add that, in terms of overall justice, the evidence before the 2020 Court showed that stopping the clock as at July 2008 "cut out slightly more than half the interest and penalties accrued during the relevant period of the litigation".[26]

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23 Second liquidation appeal judgment, above n 1, at [85].
24 CA 2010 judgment, above n 17, at [91], n 106.
25 At [91], n 107.
26 Second liquidation appeal judgment, above n 1, at [86].

[21] We turn then to Ms Sisson's argument, emphasised in her oral submissions, that the calculation of the debt should have taken into account what she says was the non-disclosure and late discovery of the file notes concerning the Aronsen arrangement.[27] Despite requests in 1998 and 1999, Ms Sisson says disclosure did not occur. This, she says, frustrated the taxpayers' efforts to settle at the earliest opportunity in circumstances where early resolution would have led to a lower level of indebtedness. Ms Sisson says the Commissioner had earlier denied non-disclosure in the judicial review proceedings, including in the appeal before the Court of Appeal in 2010 but that, in an exchange with her in 2016, the Commissioner accepted the non-disclosure during the period of settlement negotiations.[28] She says the 2020 Court of Appeal failed to consider non-disclosure as a delay factor relevant to the "proportionality exercise".[29]

[22] Further, although judicial review proceedings were instituted in 2004, Ms Sisson says full discovery of the notes was delayed and did not occur until 2006. She says this too is relevant to the calculation.

[23] In the 2010 judgment, the Court noted that the Commissioner denied discovery was late and said "the taxpayers were aware of the content of those file notes".[30] The Court said it was not able to make findings on this as it was not dealt with fully by the High Court but observed that it was "difficult to see how any late discovery of the file notes (even if that were the case) can affect penalties arising before the litigation commenced".[31] The Court indicated it also had "some difficulty in understanding the relevance after the litigation commenced (and how it could be ruled upon without having read the affidavits)".[32] Nothing was raised with us in the oral argument adequately addressing these difficulties and this Court would similarly have insufficient basis for resolving the factual position.

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27 In oral argument the Commissioner denied that there had been late disclosure or late discovery.

28 This exchange is included in the affidavit which Ms Sisson seeks leave to adduce in evidence before us.

29 Ms Sisson says this delay factor could not be considered by the Court of Appeal in 2010 because the Commissioner had denied non-disclosure up until 2016.

30 CA 2010 judgment, above n 17, at [109(e)], n 125.

31 At [109(e)], n 125.

32 At [109(e)], n 125.

[24] In terms of the broader non-disclosure aspect, we see it as being at the heart of the misfeasance proceedings. But the argument that the liquidation order was premature and should have awaited the outcome of those proceedings faces a number of impediments such that we are satisfied that it has insufficient prospects to warrant leave. This argument was rejected by the Court of Appeal in its 2017 judgment.[33] Leave to appeal on this point was declined.[34] In addition, nothing raised by Ms Sisson suggests any apparent error in the 2020 Court of Appeal's assessment of the legal position.[35] As the Court said, at its best, this is a contingent and unliquidated claim. It is for the liquidator to decide whether to pursue it. Finally, the misfeasance proceedings are currently stayed and the stay would still need to be lifted by the High Court.

[25] For these reasons, we see no appearance of a miscarriage of justice in the Court of Appeal's approach. As we are dismissing the application for leave to appeal in relation to the liquidation order, Ms Sisson's proposed appeal against the freezing order on CPL's assets referred to in CA390/2019 has no prospects of success.

Vesting orders: SC 17/2021

[26] In the vesting order judgment, the Court of Appeal dismissed four appeals.[36] The first of these dismissed an appeal from a decision refusing to recall a previous decision vesting certain property in CPL by consent (CA285/2017). The other three related to costs (CA683/2017, CA684/2017, and CA685/2017).

Background

[27] In terms of the background to the vesting orders, we need only note that, in August 2001, a property at 854 Colombo Street, Christchurch, was transferred from CPL to Mr Hampton for no consideration, to refinance a mortgage. Mr Hampton held the property on trust for CPL until 2007. In October 2007, a court order was made permitting the property to be transferred from Mr Hampton to Ms Sisson at a

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33 First liquidation appeal judgment, above n 6.

34 *Chesterfields Preschools Ltd (in liq) v The Commissioner of Inland Revenue* [2017] NZSC 168 at [11].

35 That assessment applies equally to Ms Sisson's argument based on r 5.61 of the High Court Rules 2016 dealing with set-off.

36 Vesting orders judgment, above n 1.

mortgagee sale auction to prevent it being sold at undervalue. The High Court subsequently clarified that the property was to be held by Ms Sisson as trustee, for the benefit of the beneficial owner, CPL, pursuant to undertakings given by Ms Sisson (the trust order).

[28] In early 2016, the liquidator for CPL applied under the Trustee Act 1956 for orders vesting the property and associated insurance monies in CPL. Ms Sisson opposed the application. Her primary defence was that she held the property on trust for another entity, the Anolbe Family Trust, not CPL. However, on the fourth day of the hearing, 16 February 2017, Ms Sisson signed a consent memorandum agreeing to the vesting orders. Gendall J then delivered a judgment making the vesting orders by consent.[37] The judgment vested the property and associated insurance proceeds and entitlements in CPL and ordered costs against Ms Sisson.

The proposed appeal

[29] Broadly, the challenges to Gendall J's refusal to recall the vesting decision reiterate some of the themes of the arguments discussed above relating to the effect of the disclosure issues and the inability to have the misfeasance claim resolved ahead of other proceedings. For example, Ms Sisson wishes to argue that the approach in the High Court was predicated on the refusal, on the first day of the vesting orders hearing, to allow Ms Sisson to raise a counterclaim based on the disclosure issues. The premise of the argument is that non-disclosure tainted the right to enforce the trust order.

[30] The Court of Appeal rejected this argument on the basis that no appeal had been filed against the making of the trust order so it remained in place. Further, the Court considered it would not be in the interests of justice to recall the consent orders pending resolution of the misfeasance claim "given the formidable obstacles Ms Sisson will face in progressing such claims".[38] Those obstacles included the fact there had been no appeal from the decision of the High Court that the misfeasance allegations were not relevant to the vesting proceeding, and that the misfeasance claim was stayed. Given the dismissal of the liquidation appeal, it was for the liquidators of

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37 *Chesterfields Preschools Ltd (in liq) v Sisson* [2017] NZHC 181.
38 Vesting orders judgment, above n 1, at [24].

CPL to decide whether or not to pursue the misfeasance proceeding. We see no apparent error in the Court of Appeal's assessment of these matters.

[31] To the extent Ms Sisson's arguments on this aspect reflect a concern about the costs orders, there are insufficient prospects of success to warrant a grant of leave on this basis. As the Court of Appeal noted, the costs awarded pursuant to the vesting orders proceeding, which she was unable to pay and which led to her bankruptcy, pre-dated the order adjudicating Ms Sisson bankrupt on 23 June 2017. Accordingly, only the Official Assignee can pursue such an appeal now and the Assignee does not consider there is any basis for disputing the costs awards. We add that, similarly, the argument that the Court of Appeal was wrong not to consider Ms Sisson's submission that the consent orders should be stayed or set aside until the liquidation appeal was determined has insufficient prospects of success to warrant a grant of leave.

Bankruptcy: SC 18/2021

[32] In the bankruptcy judgment, the Court of Appeal dismissed the appeal against: the refusal to halt adjudication in bankruptcy (CA310/2017); the adjudication in bankruptcy (CA404/2017); and the costs order (CA682/2017).[39] In the leave application in relation to this judgment, Ms Sisson accepts, as the Court of Appeal held, that her application regarding the bankruptcy "rests entirely on the fate of the … application for leave to appeal the liquidation judgment". As leave to appeal has not been granted in relation to the liquidation judgment, we need not consider this application further. The criteria for leave to appeal are not met.

Application to file further evidence

[33] Finally, Ms Sisson applies for leave to file an affidavit dated 22 July 2019. She says the affidavit is relevant as, amongst other matters, it sets out material relating to non-disclosure. We accept the submissions for the respondent, liquidators and Official Assignee, in resisting this application, that leave to adduce this evidence should not be granted as the evidence is not fresh and we are not satisfied there are any exceptional circumstances justifying its admission.

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39 Bankruptcy judgment, above n 1.

Result

[34] The applications for leave to appeal are dismissed. The application to adduce further evidence is dismissed. The applicant must pay costs of $3,000 to the Commissioner and $1,500 to Chesterfields Preschools Ltd (in liq) plus usual disbursements. The Official Assignee filed submissions on insolvency issues but was not named as a party.[40] We therefore make no costs award in favour of the Official Assignee.

Solicitors:
Lane Neave, Christchurch for Chesterfields Preschools Ltd (in liq)
Crown Law Office, Wellington for Commissioner of Inland Revenue and Official Assignee

[40] Counsel for the Official Assignee was excused from appearance at the leave hearing.