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IN THE SUPREME COURT OF NEW ZEALAND
I TE KŌTI MANA NUI

SC 12/2021
[2021] NZSC Trans 8

BETWEEN **CHESTERFIELDS PRESCHOOLS LIMITED (in Liquidation)**
First Appellant

THERESE ANNE SISSON
Second Appellant

AND **COMMISSIONER OF INLAND REVENUE**
Respondent

Hearing:	22 June 2021
Coram:	William Young J O'Regan J Ellen France J
Appearances:	B M Russell and J C Wedlake for the First Appellant Second Appellant appears in Person supported by D Hampton as McKenzie friend P J Shamy and S M Kinsler for the Respondent

ORAL LEAVE HEARING

WILLIAM YOUNG J:

Ms Sisson, you're appearing in person?

MS SISSON:

I am, Sir.

WILLIAM YOUNG J:

And who is your McKenzie friend?

MS SISSON:

It is Mr Hampton.

WILLIAM YOUNG J:

Thank you.

MR SHAMY:

Shamy, Sir. I appear for the Revenue along with Mr Kinsler.

WILLIAMS J:

Thank you, Mr Shamy. Okay, Ms Sisson. Sorry.

MR RUSSELL:

May it please the Court, counsel's name is Russell and I appear with Ms Wedlake for the liquidators of Chesterfields Preschools Limited.

WILLIAMS J:

Good. Okay, thank you. Right, Ms Sisson.

MS SISSON:

Sir, if I just hand up, may I hand these to counsel?

WILLIAM YOUNG J:
We've got it. Yes, thanks.

MS SISSON:
Sir, I've handed up some written submissions and, may it please the Court, I'll just speak to that. So I'll start at paragraph 3 and it starts with the review of the application to strike out the misfeasance with Justice Fogarty, and the core of the conduct referred to is the now admitted non-disclosure of the Aronsen file notes in the context of negotiations and court proceedings to resolve and settle the issue of the existence of the Aronsen arrangement, over an extraordinary period of six years from 1999 to 2006. No explanation has ever been offered for the non-disclosure over such an extraordinary period without rectification.

The taxpayers were unable, in the first instance, to settle the Aronsen arrangement at the earliest opportunity when they desired to do so in 1997. So this refers to the negotiations between Mr Hampton and Mrs Thornley where there is the file note referred in Justice Fogarty's misfeasance judgment, paragraphs 36 to 37. Mrs Thornley, the debt collection officer, wanted to wait until the GST investigation had concluded by the audit office before any payments were made to GST under the repayment arrangement. According to her memorandum dated 18 July 1997, she extended the period of the arrangement to accommodate that outcome and only accepted a substantial payment of $50,000 on account in part settlement of the arrangement after being pressed by the taxpayers who had come in on consecutive days on the 16th and 17th of July 1997 to make payment.

Nothing further happened on the part of the Commissioner's audit office in 1997 and most of 1998. Then in October 1998, although the GST investigation had not concluded and without any consultation or communication with the taxpayers, Mr Barry, debt collection officer, was authorised by the Revenue to commence recovery action against the taxpayers in breach of the Aronsen repayment arrangement. Up until that time it appeared to the taxpayers that although the GST audit processes were

taking an inordinate length of time even by that standard, the Commissioner's officers were abiding by the Aronsen arrangement. There was no question that the plaintiffs, taxpayers, were ready, willing and able to settle that Aronsen arrangement at any time without the necessity to engage in enforcement proceedings. However, Mr Barry did not approach the taxpayers from the perspective that they were lawfully abiding by the Aronsen repayment arrangement during the GST investigation.

So Mr Barry issued the statutory – this was the first statutory demand against Chesterfields Preschools in November 1998. So as any reasonable taxpayer would do in the circumstances of the existence of the Aronsen arrangement, on the 27th of November 1998 they disputed the demand and sought further particulars of the composition of the claim to ascertain whether the penalty claims calculated in the demand notice complied with the expectations under what the taxpayers understood as the Aronsen arrangement.

From then on from that 1998 period the taxpayers then lodged a series of complaints that the penalty calculations in the statutory demand did not comply with the Aronsen repayment arrangement and sought disclosure of the Aronsen file notes. In my affidavit dated the 22nd of July 2019 filed in support of the application for stay at exhibit G there's a brief outline of some of those disclosure requests that were made from at least the nineteen ninety n – 2001 period. Here the request for disclosure occurred on 18 December 1998, 29 January 1999 and 24 February 1999.

In response, Mr Barry withheld disclosure of the Aronsen file notes and issued liquidation proceedings against the company on 16 January 1999.

On 2nd March and 17 March following unsuccessful negotiations with Mr Barry, the taxpayers on account paid the $133,378.12 in full in two instalments.

During the remainder of 1999 through to 2004, the taxpayers continued to assert the existence of and the Commissioner's breach of the AA in all

High Court enforcement proceedings and settlement negotiations supervised by Judge Barber in the Taxation Review Authority from 2001 to 2003, and settlement negotiations undertaken by Buddle Findlay in 1999, 2003 to 2004. During the settlement negotiations the taxpayers paid all amounts requested to be paid by the Commissioner on account pending resolution and settlement of the issue: the 133,000 claimed in the statutory demand on 2nd and 17 March 1999, 70,000 on 11 November 1999, 150,000 on 17 July 1999 and 125,000 on 13 July 2001 in the Taxation Review Authority.

As observed by Justice Fogarty in agreement with Mr Pike QC, counsel for the Commissioner: "At least from 1999, several senior officers from the Revenue realised that they had a problem and that there needed to be resolution to resolve it. A senior officer authorised the opening of without prejudice negotiations to settle that issue," and in the context of the first and second judicial review Justice Fogarty has referred to the negotiations that took place from 2000 onwards, paragraph 114.

However, as now acknowledged by the Commissioner, the two officers authorised to engage settlement negotiations, Messrs Doubleday and Kettley, did not disclose the existence and contents of the Aronsen file notes during negotiations from 1999 to 2004.

It is this core of conduct which falls particularly to be examined in the –

WILLIAM YOUNG J:
You don't need to read the whole thing, Ms Sisson –

MS SISSON:
Thank you, Sir.

WILLIAM YOUNG J:
– because we are looking for sort of a 45-minute hearing. It's so we have a rough idea, not necessarily all the details.

MS SISSON:

I have timed it to 45 minutes if…

WILLIAM YOUNG J:

Yes…

MS SISSON:

Perhaps I'll pick out some – I'll highlight some of the major points, Sir. I think we get down to it at paragraph 13. The earlier part of this was more to do with the narrative and the genesis of what occurred around the failure to disclose these Aronsen file notes, and at paragraph 13 –

ELLEN FRANCE J:

Can I just check? So when you talk about the "core of conduct" are you referring to the non-disclosure? Is that right?

MS SISSON:

I am referring to the non-disclosure. Justice Fogarty was talking about the Aronsen arrangement and he also, at paragraph 10 of that judgment referred to above, he was basically saying that the discovery of the Aronsen arrangement was critical to the findings in favour of the plaintiffs in the judicial review proceedings.

So at paragraph 13, the "core of conduct which falls particularly to be examined" in the application of the proportionality assessment exercise. Now the Court of Appeal 2010 undertook a proportionality assessment exercise and the Supreme Court referred to that at paragraph 9. They said: "In relation to the proportionality issue, the judgment of the Court of Appeal indicates that the applicants were not arguing for a general requirement of proportionality in relation to additional tax. Rather they were contending for a proportionality assessment by reference to what the Court of Appeal described as 'inordinate delays on the part of the Commissioner and the related assurances and comfort given by him to the taxpayers'. Such an exercise, once carried out, would ensure that additional tax will be reduced to

that portion of the total assessed which was referable to 'the fault of the taxpayers'. And this is exactly what they are entitled to in terms of the Court of Appeal judgment."

So part of this proportionality exercise, what is being asserted is that in terms of this proportionality exercise the non-disclosure conduct, the delay in providing that disclosure is incorporated in that assessment, and the issue of this is there could not – the issue that could not be dealt with by the Court of Appeal 2010, Supreme Court and later courts was that the non-disclosure had in fact not occurred. Well, sorry, the non-disclosure had been denied by the Commissioner of Inland Revenue right up until 2016. So it was not a delay factor that could have been taken into account by the Court of Appeal 2010.

So going through paragraph 13 –

O'REGAN J:
But it could have been in 2017, presumably?

MS SISSON:
Sorry?

O'REGAN J:
It could have been in 2017 and 2019?

MS SISSON:
It could have been, Sir, but as referred to in the submissions further down the Court of Appeal 2017 did not take it into account. They did not admit the evidence of that acknowledgement of non-disclosure. They decided to effectively set aside the liquidation on other grounds. So it was not necessary for that Court 2017 to take that into account. But yes, you're correct, Sir, in saying that the 2017 Court could have if they wanted to but they decided on other grounds. The complaint today is that the 2020 Court of Appeal erred by failing to take this significant issue into account.

So if I can just turn to the paragraph 13, attached to my affidavit exhibit L is the draft amended misfeasance statement of claim prepared by John Billington QC as exhibit L.

WILLIAM YOUNG J:
Sorry paragraph what? Paragraph 13 did you say?

MS SISSON:
Yes, paragraph 13 of the submission.

WILLIAM YOUNG J:
My paragraph 13 is on page 4 of your…

MS SISSON:
Yes I have page 4. Sorry Sir: "The non-disclosure is a delaying factor which was all the more extraordinary because the officers controlling the negotiations for resolution continued the non-disclosure in all court proceedings and statutory applications for relief during the period 1999 to 2006."

Traversed through (i) to (x) the various enforcement proceedings taken by the Commissioner Inland Revenue referred to in the amended misfeasance statement of claim during this period of non-disclosure and they were the first liquidation, January 1999, the second liquidation, August 1999, the third liquidation May 2000, the fourth liquidation, 12 May 2000.

WILLIAM YOUNG J:
You don't need to read them all out.

MS SISSON:
And the quite importantly the freezing orders, which were granted in 2005. So these all occurred prior to the final disclosure 2006 of the Aronsen arrangement. So: "The failure of the Commissioner's officers dealing with the taxpayers in those Court and statutory processes to rectify the non-disclosure

at the earliest opportunity prevented the taxpayers from being able to settle the Aronsen arrangement at the earliest opportunity in 1999, or at any time subsequently, despite their regular payments on account made at the request of the Commissioner while negotiations continued."

And effectively the taxpayers were unable to settle the Aronsen arrangement because they could not prove the existence of that arrangement in the Court and statutory processes. "This inability to settle the AA while the non-disclosure continued over the years 1999 to 2006 had a disastrous effect on the tax accounts of the taxpayers. Penalties continued to climb out of control, and the taxpayers were unable to seek the intervention of the High Court or the Taxation Review Authority to establish the existence of the Aronsen arrangement and resolve their rights thereunder."

So: "Under section 183A(1A) of the Tax Administration Act 1994, the non-disclosure from 1999 to 2006 was an event or circumstance beyond the control of the taxpayers in attempting to settle the Aronsen arrangement at the earliest opportunity in 1999, arising from the fault of the Commissioner's officers engaging the settlement negotiations… from 1999 to 2004. Applying the principles of 183A(1A) in the proportionality assessment exercise, the penalties arising from 1999 to 2006 it is submitted should be remitted since the Commissioner failed to fully and properly rectify the extraordinary non-disclosure event or circumstance at any time prior to 2006."

18. "The penalties arising prior to 1999 were subject to the protections for the taxpayers arising from the ordinary operation of the Aronsen arrangement, being attributable to the inordinate of the GST investigation and associated extension of the arrangement in 1997 by the Commissioner's officers and related assurances and comfort. The proportionality assessment exercise applies to remit the pre-1999 penalties, thereby fulfilling the purpose and protections of the AA in favour of the taxpayers."

19. “The Court of Appeal,” it is submitted, “erred in not considering how the non-disclosure relating to the AA affected the calculations on the grounds set out below.

The taxpayers’ complaint of non-disclosure prior to 2004 was denied by the Commissioner of Inland Revenue in the Court of Appeal 2010 judicial review proceeding.

The disputed complaint was not able to be determined in the jurisdiction of the judicial review.

The Court of Appeal 2010 did not consider and take into account the inordinate delay of the non-disclosure in the fault-based proportionality assessment and calculations.

The Commissioner, although inordinately delaying the admission until 2016, nevertheless responsibly admitted the non-disclosure of the Aronsen file notes prior to 2004. The admission was made within the period the taxpayers still continued to challenge the Commissioner’s methodology and calculations in applying finding and directions of the Court of Appeal 2010 judgment to the proportionality assessment. The taxpayers’ challenge was unresolved at the time the admission was made.

The admission of non-disclosure prior to 2004, and particularly during 1999 to 2004, is now, it is submitted, an undisputed event or circumstance which is able to be taken into account in the proportionality assessment exercise, being an inordinate delay factor attributable to the fault of the Commissioner within the spirit and ambit of the proportionality assessment.

In terms of the judicial review rationale underlying the taxpayers’ right to the proportionality assessment exercise, the Commissioner’s admissions of non-disclosure automatically triggers the requirement to take into account the inordinate delay of non-disclosure in the proportionality assessment exercise at the time the admission was made. The admission of non-disclosure meets

the criterion of the proportionality assessment for inclusion as a fault factor, namely, inordinate delay, fault, and lack of full and frank mitigation/rectification. This proposition is considered further in the submissions below addressing the principles for remission pursuant to section 183A(1A).

Based on the reasoning and finding of the High Court and Court of Appeal 2010, in determining the right of the taxpayers to a proportionality assessment exercise, it is submitted the Commissioner has no residual discretion not to include the admitted inordinate delay of non-disclosure as a factor to be taken into account and to make the adjustment to the penalties and interest arising from the non-disclosure during the period 1999 to 2004, coupled with the additional finding by the High Court that there was no disclosure during discovery from 2004 until June 2006, which has to all intents and purposes effectively extended the total non-disclosure period 1999 to mid-2006.

In failing to recognise that the Commissioner did not have a discretion not to take into account the now admitted non-disclosure, the Court of Appeal 2020 erred in itself not considering how the inclusion of the non-disclosure delaying factor affected the calculation of the amount owing to the Commissioner.

The adjustment in the proportionality assessment exercise for the penalties and interest attributable to the non-disclosure during the period 1999 to 2006 is substantial and accounts for virtually the whole of the debt claimed by the Commissioner in the liquidation proceedings."

So at footnote 35, I'll just quickly refer to that, this is a calculation of tax paid by Chesterfields Preschools, assessments made and the balance surplus. It's based on Mr Doubleday's tax schedules. The payments made total over the period $1,026,000. The assessments are $1,136,000 less – there are adjustments for an omitted assessment. Total tax assessed by the Commissioner $1,372,000, and CPL's total paid undisputed tax balance surplus $106,000.

So: "183A(1A) is the mechanism or methodology," which is submitted, "by which the admitted non-disclosure adjustment is measured in the proportionality assessment. In terms of section 183(1A), the event or circumstance of non-disclosure was solely the fault and responsibility of the Commissioner's officers dealing with the taxpayers over the period of settlement negotiations – "

WILLIAM YOUNG J:

So what we're really trying to do, I know you're giving us a huge amount of detail, what we're trying to do is get a handle on how this all bears on the ultimate figure that the Commissioner has claimed. Now so far I understand that you say the penalties before 1999 should be remitted because of inordinate delay in the GST investigation. Is that right?

MS SISSON:

It goes further than that. What we're saying –

WILLIAM YOUNG J:

Can I just – because I'm sort of getting a mass of information which I'm, no doubt a problem with advanced age, I'm finding it hard to digest quickly. Am I right in saying you say that the penalties before 1999 should be remitted because of delay in the GST investigation?

MS SISSON:

Not quite. That was a decision of the Court was that penalties would be remitted because of the delay in the GST investigation. That was part of the judicial review package. What I'm saying now is that the non-disclosure conduct of the Commissioner of Inland Revenue should be taken into account, the delay, in providing disclosure should be taken into account in the calculation of tax in that proportionality assessment, and penalties should be remitted from 1999 as a result of the failure to disclose.

WILLIAM YOUNG J:

All right, just pause there. Are there any penalties imposed before 1999 that are still in issue?

MS SISSON:

Yes, and that is as a consequence of the order and rules because –

WILLIAM YOUNG J:

Yes, I just want to know, are you saying that there are penalties that have been taken into account which ought not to have been because of, you say they should have been remitted because of a delay in the GST investigation.

MS SISSON:

Yes, they should have been remitted before the delay in the GST investigation, which was already part of the judicial review decision, but I'm saying –

WILLIAM YOUNG J:

I'm not really interested in the other case –

MS SISSON:

– but I'm saying now, as a result of a delay in the non, in providing disclosure to the taxpayers so that they could settle the Aronsen arrangement –

WILLIAM YOUNG J:

Sorry that's a different, sorry, you're running everything together. I'm just trying to take it quietly, a bit at a time. One component, as I understand it, is penalties before 1999.

MS SISSON:

Yes.

WILLIAM YOUNG J:

All right. Now what was the date of the Aronsen arrangement?

MS SISSON:

It was 1994/1995. It was extended by Ms Thornley in 1997.

ELLEN FRANCE J:

So what was the total period that it covered?

MS SISSON:

The actual Aronsen arrangement, I'm submitting it covered a period from 1994 through to 2007, and that was the period where the $150,000 of the GST refunds were finally paid. The balance of that 150,000 was finally paid in 2007.

WILLIAM YOUNG J:

Okay. I'm still finding it hard to put numbers to consequences here. Is it possible simply to say what are the penalties that you say have been taken into account in terms of the calculation of the final figure which ought not to have been. So rather than the account saying, tax assessments, amounts paid, et cetera…

MS SISSON:

I think if we go to footnote 35, what we have there is what CPL is saying that it has a core tax surplus. So if we say that the total amount sought by the Commissioner of Inland Revenue in terms of the liquidation proceeding should be remitted because all of it is effectively penalty repayment.

WILLIAM YOUNG J:

So are we looking at the shortfall penalty payment of 53,000?

MS SISSON:

Well that shortfall penalty repayment is actually disputed. Where that came about was in the TRA Mr Hampton, I understand, was threatened with 100% shortfall penalties, and agreed to that shortfall penalty payment. So effectively, and in essence, the submission of CPL is that the whole of the amount claimed in this liquidation proceeding is penalties and interest and all

of it should be remitted on the basis of the failure to disclose those critical file notes and impede the company from –

WILLIAM YOUNG J:

It's not so much non-disclosure is it because Mr Hampton must have known about the Aronsen arrangement.

MS SISSON:

But it's one thing knowing, it's another thing –

WILLIAM YOUNG J:

It's not acting on it, it's not non-disclosure so much as not acting on it. Is that right?

MS SISSON:

No. What is being alleged is that the Commissioner of Inland Revenue deliberately withheld…

WILLIAM YOUNG J:

From the Courts?

MS SISSON:

From Mr Hampton –

WILLIAM YOUNG J:

But he knew, he must have –

MS SISSON:

– the disclosure request and the Court and –

WILLIAM YOUNG J:

But Mr Hampton must have known about it because it was an arrangement made with him, wasn't it?

MS SISSON:

He knew about an arrangement. He had absolutely no concept of what Mr Aronsen might have written in that file note. The file notes were so critical. They were the corroborating evidence. I think the example of it was when that original 183A application was made in the judicial review Justice Fogarty pointed out at paragraph 114 Buddle Findlay made that application for relief from remission of penalties not on the basis of an Aronsen arrangement but on other bases because the Aronsen arrangement did not – the corroborating evidence of that did not exist. Mr Hampton had nothing to bring to the Court or the TRA to say: "Well, I," to the Court, "I have this arrangement and nothing more could have been done that was done to try and settle this."

There is an affidavit of Mr Willy Palmer where he actually does discuss this. That affidavit was not read in the context of the judicial review proceedings because of the nature of the dispute and that the Commissioner had always denied there was an Aronsen arrangement. They denied the arrangement, they denied –

O'REGAN J:

But the arrangement was with the taxpayer. So you're saying it was an agreement with the taxpayer?

MS SISSON:

Yes.

O'REGAN J:

But the taxpayer didn't know it had agreed to it. Is that what you're saying?

MS SISSON:

No. Mr Hampton understood loosely what type of understandings there were. He had an expectation that, you know, there would be a deferral of collection, that penalties would be remitted as soon as the GST audit had completed their investigation. So he had –

O'REGAN J:

So he knew there was an arrangement?

MS SISSON:

He understood loosely the concept. He did not have evidence.

O'REGAN J:

Well, had he agreed to it?

MS SISSON:

Sorry?

O'REGAN J:

Had he agreed to it? How could it be an arrangement if he hadn't agreed to it?

MS SISSON:

Well, he had. He had agreed –

O'REGAN J:

So he agreed to something but he didn't know it existed?

MS SISSON:

No. I'm saying there was no knowledge that the Aronsen, that the corroborating evidence existed. It's talking about there was non-disclosure of the critical file notes that could establish Mr Hampton's position to the Court to the TRA.

WILLIAM YOUNG J:

But the complaint is really that the Commissioner didn't act on the Aronsen arrangement.

MS SISSON:

Well, they denied it. They denied it existed. They denied throughout the judicial review –

O'REGAN J:

But what we need to know is if the Commissioner had acted on it what would the outcome have been? That's…

MS SISSON:

If the Commissioner had?

O'REGAN J:

Had acted upon it.

MS SISSON:

If the Commissioner –

O'REGAN J:

If the Commissioner had disclosed it and acted upon it.

MS SISSON:

Yes, if the Commissioner had disclosed and acted on the Aronsen arrangement, this would have been settled at the earliest opportunity 1997 or 1999 or at any time, through the TRA, proceeding in front of Justice Barber 20 2001 to 2003. This was settled. Mr Hampton was in constant negotiations with the Commissioner of Inland Revenue, it's set out at 114 of the first judicial review, and he was trying to get resolution. The problem was the Commissioner of Inland Revenue delayed inordinately through its audit processes in processing the GST refunds. I think – and if we – and some of those refunds were paid after 2007. I'll refer you to the paragraph where it's – paragraph 50, where the Aronsen arrangement arose from the inordinate delay of the GST investigation of the various substantial refunds totalling $150,000 which the taxpayers had elected to apply to their tax liabilities rather than receive in a cash payout, and it just goes on further to say, Mr Aronsen considered it would be unethical to pursue collection of the tax liabilities." At the footnote, 56, it refers to the references where those refunds were referred to in the judicial review. So they're itemised there and that was the issue.

ELLEN FRANCE J:

Sorry, for myself, what I am trying to understand is what that means in terms of the proportionality. What you say that means in terms of the proportionality exercise.

MS SISSON:

In terms of the proportionality exercise what I'm saying is because the Commissioner delayed in that disclosure of the Aronsen arrangement so that it could not be proved, or could not be settled at the earliest opportunity, all of the penalties in relation to this liquidation proceeding claimed by the Commissioner of Inland Revenue should be remitted under that proportionality exercise, utilising the principles of section 183A(1A) of the Tax Administration Act 1994.

So I realise in terms of time, if I can just turn the Court to paragraph 54, at page 20. "It is submitted that the non-disclosure substantially undermined the purpose and effectiveness of the taxpayers' protections under the AA and the taxpayers' reasonable expectations of the Commissioner's administration of the AA."

Critically in the judicial review proceedings the Commissioner's officers, and particularly Mr Brighty, the Court of Appeal refers to a 2010 at paragraphs 104 to 108, go through Mr Brighty's assessment of the tax position for the Commissioner of Inland Revenue. "Mr Brighty considered that there was no AA in existence that the Commissioner was required to adhere to. The taxpayers were considered to be deliberate blatant tax payment defaulters who deserved to be subject to the harsh penalty regime to the fullest extent without respite, with no prospect of remission. Therefore, despite the taxpayer's belief that they were being protected under the arrangement while awaiting the outcome of the GST investigation, according to Mr Brighty, who had no dealings with the taxpayers at all, none of those protections were ultimately provided to the taxpayer."

And at paragraph 56: “A particular concern of the CA2010 was that the taxpayers clearly had the resources to pay the taxes covered by the protections of the AA while awaiting the outcome of the GST investigation which had become inordinately delayed indefinitely. The CA2010 considered that it was reasonable for the taxpayers to have paid the taxes to settle the AA rather than waiting for the result of the GST investigation. The failure to do so was considered to be unreasonable and that only a portion of the penalties should be remitted.”

Paragraph 57: “However, these considerations were based on the evidence of Mr Brighty, at paras [104] to [108] of the CA2020 judgment, who had not disclosed to the High Court and Court of Appeal the extraordinary failure of the Commissioner's officers dealing with the taxpayers to disclose the existence and contents of the Aronsen file notes over the years of negotiations from 1999 to 2004.”

Paragraph 58: “In failing to disclose this vital info1mation to the judicial review courts, Mr Brighty avoided having to deal with the obvious flaw to his them, namely that the taxpayers had attempted, from 1997 to settle the AA and pay the taxes under the arrangement before the outcome of the GST investigation to avoid penalties accumulating out of control, but it was impossible for the taxpayers to settle the AA while the officers dealing with the taxpayers from 1999 to 2006, denied the existence of the arrangement; did not disclose the information in the Aronsen file notes… applied all core tax payments agianst the penalties accruing as if the arrangement did not exist; issued the enforcement action to collect the accruing penalties as if the arrangement did not exist.”

Paragraph 59: “In the light of the now admitted non-disclosure from 1999 to 2006, the attempts of the taxpayers to settle the AA and pay their taxes under the arrangement can be viewed in the true context of trying to cope with the delays caused by these obstacles that were beyond the control of the taxpayers.”

Those are my submissions unless there are further questions.

WILLIAM YOUNG J:
Thank you Ms Sisson. Mr Shamy?

MR SHAMY:
May it please the Court. There is no additional submission by the Revenue, taking the minute on its face, no further submissions are being prepared, but if further submissions are required the Revenue will file those, Sir, subsequent to this.

WILLIAM YOUNG J:
Well I guess, I mean we've got a mass of information that's been put before us, but it's in a way that doesn't, it's not particularly accessible. So the complaints that have been effectively upheld by the Courts against the Commissioner are what? The delays in the GST investigation and non-compliance with the Aronsen arrangement?

MR SHAMY:
Yes Sir. I think the, what I was going to do was to take your Honour to the 2010 Court of Appeal decision, which I think quite neatly summarises the judicial review process in the lower court.

WILLIAM YOUNG J:
So where do we find that? That's presumably in the leave file somewhere?

MR SHAMY:
It should be Sir. The 2010 decision, Sir, is referred to and I'm sure that it should be in your file. It's at paragraph 148 –

WILLIAM YOUNG J:
I know it's referred to, I don't know that I can lay my hands on it that easily. Carry on.

MR SHAMY:

It starts Sir on conclusions on judicial review appeal.

WILLIAM YOUNG J:

What paragraph?

MR SHAMY:

Paragraph 148 Sir. So there it quite neatly determines what was found on the first and second judicial reviews in front of Justice Fogarty. The Court then took, at paragraph 149, the somewhat unusual step of commenting on the first judicial review decision because, of course, that hadn't been appealed and the Court made the point that it was effectively res judicata and those matters couldn't be argued again. But predominantly, Sir, the sense of that commentary is that the Court probably wouldn't have found these arrangements.

WILLIAM YOUNG J:

I mean that may well be right, but it's a bit late in the day for that.

MR SHAMY:

Yes Sir, look, I accept that, but the point that is, I think, still quite relevant Sir is that at paragraph 154 they make the general comment, which is that in this type of system "it is difficult to envisage other circumstances where penalties associated with core tax that a taxpayer knows is owing and which he or she has deliberately not paid would be remitted, whatever the actions of the Commissioner had been."

So what this case was, Sir, is somewhat unique, and I accept that Sir, that it can't be revisited, but the importance, coming back to this issue of the disclosure of these notes or non-disclosure, is firstly, Sir, that the arrangements that were found by the first judicial review were before the Court. So in substance those arrangements were there, the Aronsen arrangement, the Thornley arrangement, they're all referred to. The disclosure was given by way of discovery, Sir, at the first judicial review.

The Revenue does not accept there was late discovery or late disclosure. It was made available and I think as his Honour Justice O'Regan pointed out, Mr Hampton should have been aware of it anyway because he alleged there was an agreement. But it was certainly canvassed in the first judicial review, and in the second judicial review, and that's on the face of the decisions. So the substance of these arrangements is well and truly before the Court, and what the Court did in the High Court was to grant relief based on the impact of those arrangements. I think that's quite a relevant point when you're considering non-disclosure of some notes. If there'd been non-disclosure, and these arrangements had never been before the Court, there was nothing about them at all, then I would suggest there would be a problem. However, this is not novel. These notes were there, but importantly the arrangements were before the Court, and they were translated through into the 2010 Court of Appeal decision, which looked at those arrangements, and came to the conclusion, as the Court will be aware, that 15% reduction in penalties and interest would be appropriate, leaving, of course, the core tax an 85% of penalties and interest, and it's also, I think, important to note that the Court of Appeal did not say or accept that the failure of the taxpayers' businesses was due to the Revenue, which is specifically noted in the Court of Appeal decision.

So the point being, Sir, I think is that in substance these arrangements were clearly there. So what the appellant is saying, well because we didn't have the notes, somehow we were prejudiced –

WILLIAM YOUNG J:
Well they had the notes presumably from discovery from the judicial review, sorry, the second judicial review.

MR SHAMY:
The first Sir. The first judicial review.

WILLIAM YOUNG J:
The first?

O'REGAN J:

But that discovery didn't include the notes though?

MR SHAMY:

Well I think it did Sir because there were a number of amendments to the statement of claim in the first judicial review where the Aronsen matter was pleaded. But it was certainly in the second judicial review.

ELLEN FRANCE J:

Where do we…

O'REGAN J:

The case that's been put to us is that there was an act of hiding of these notes until 2017.

MR SHAMY:

No Sir, that is certainly not accepted. The position of the Revenue, Sir, is that they were discovered.

ELLEN FRANCE J:

Is there anything in Justice Fogarty's second judicial review decision, does he refer to that?

MR SHAMY:

In the second review, sorry Ma'am I just need to lay my hands on it. So his Honour deals with the issue of disclosure, this is in the reported decision at (2009) 24 NZTC at paragraph 104, you'll see there Ma'am that it's dealt with there by the Judge saying that there was this affidavit of Mr Palmer which wasn't read, but importantly in this case his Honour says that he cannot reach a decision on it and he calls for, he gives leave for further affidavits and submissions to be filed at paragraph 110. That's the impact of the late disclosure. Now that was never done and I think that was something that was picked up when the 2010 Court of Appeal decision was appealed to this court in the leave application. At paragraph 11 of the leave application.

Yes paragraph 11 of that leave application effectively says that the appellant had sought directions from this court in terms of disclosure, and says that it's not able, it's not right for an appeal given that it was an appeal to the Court of Appeal and it's not a matter that this court would determine. So those were refused. But the point is, is that the appellant was given the opportunity to advance whatever could be advanced, but in the 2010 Court of Appeal decision as to these notes, the Court of Appeal did note what their potential impact could be and…

O'REGAN J:
This is the 2010 Court of Appeal?

MR SHAMY:
The 2010 decision, Sir, beginning at paragraph 109 of the 2010 decision, there's a footnote at footnote 125 and that refers to subparagraph (e) there further up on the page where: "The late discovery of the Aronsen notes was seen as a relevant factor to be taken into account in the Commissioner's reconsideration. Leave was reserved to apply to open this matter up to further argument and for the High Court to read the affidavits on the subject."

Now the footnote at 125 records the Commissioner's position. The Commissioner denies that these were discovered late and says in any event the taxpayers were aware of the content of those notes. The Court is "unable to make any findings on this given that it was not fully dealt with by the High Court. We do remark, however, that it is 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 and we have some difficulty in understanding the relevance after the litigation commenced".

So again, with respect, I think that supports what is the Commissioner's position that the key here is the substance of those arrangements was before all the Courts that have dealt with this matter. The actual late disclosure if there was, which is not accepted, has no relevance.

But the other issue is, I think, that when the Court is looking to determine in terms of a liquidation, the issue is around solvency, the issue is around is there some form of substantial dispute. Obviously, there must be evidence of a substantial dispute or there must be some finding. Here, of course, there wasn't. There's never been any finding on that. So there was nothing for either the High Court to determine nor for the Court of Appeal to determine as to its impact. It's not for, with respect, the Court, when it's dealing with a liquidation, to try and look at the merits or otherwise of an almost amorphous type claim as this, that there was somehow an impact, when in fact the arrangements themselves were before the Court, in my submission.

ELLEN FRANCE J:

Well, one way of putting it is that the sorts of things that are addressed in the misfeasance claim the Court of Appeal in the 2020 second liquidation judgment has treated as quite separate, but the argument, I think, is that there are underlying issues that are reflected in that claim that should have been factored into the proportionality exercise and I'm not sure I understand fully what the Commissioner's response to that is.

MR SHAMY:

Well, I think, Ma'am, the issue is is that, as I say, I don't think the impact has ever been formally ruled upon in terms of the non-disclosure but in terms of proportionality would it not be the arrangements themselves as to them not being complied with which is what the High Court initially was highly critical of, this giving the measure of comfort to the taxpayer, this allowing them to rely on these positions when they were, when they should have been placing money in different accounts for the maximum benefit of the taxpayer.

ELLEN FRANCE J:

Well, let's assume that there has been a delay in disclosure or some non-disclosure. Why might that not feed into the proportionality exercise?

MR SHAMY:

Would it though, with respect, Ma'am, need to have some impact in terms of the accumulation of penalties and interest? And sorry, Ma'am, to be circular, but the real impact in the Revenue's submission was taken care of in terms of the arrangements contained within the notes. It's not that, again as Justice O'Regan said, if there was an agreement Mr Hampton should have known, and that was always the problem with this argument, in my respectful opinion, from the taxpayers. But in any event the arrangements themselves were before the Court. The Court looked at them and found in favour of the taxpayers that they should have been applied. So that means that there is no detriment to the taxpayer because the Court has said they should have been applied and because they weren't there has been a greater incidence of penalties and interest, there's been delay, all these types of things, plus the litigation. There was to be credit given over the period of litigation. So all of that, Ma'am, was wrapped up, if you like, in the Court of Appeal in 2010 by saying these are the matters and we say, or we suggest to the Revenue, that 15% would meet all of that.

ELLEN FRANCE J:

Well, I suppose then the question is, well, 15% of what, to some extent, isn't it, and I'm not clear from the material you've provided just quite how that has been worked out.

MR SHAMY:

Sorry, Ma'am, the?

ELLEN FRANCE J:

Well, there's been a reduction in penalties, hasn't there?

MR SHAMY:

Yes, Ma'am.

ELLEN FRANCE J:

By the 15%.

MR SHAMY:

Yes, Ma'am.

ELLEN FRANCE J:

So if you could just explain to me over what years, or point me to somewhere where I can see that clearly.

MR SHAMY:

Perhaps the neatest summary of it, Ma'am, because this involved significant evidence in both 2010 in terms of tax periods and huge amount of –

ELLEN FRANCE J:

Yes, yes. No, I understand that.

MR SHAMY:

Which I would be here for a while trying to go through those with you, Ma'am, but I'd suggest that perhaps the best summation of how it was dealt with is in fact in the most recent Court of Appeal decision where the history of the matter has gone through, as in the history of the proceedings, and the references made to how the lower court, Justice Osborne, comes to the view that this is the appropriate debt. So that goes through and looks at how the 15% was applied but also, Ma'am, there were additional credits given, or reductions, because the Revenue took the view, for example, they stop the clock was referred to you'll see in that decision. So there was a significant amount of penalty that was remitted by simply stopping their impost from a particular time, which is covered. So I think reference is made to all of that in quite a neat place in that Court of Appeal decision, the decision of Justice Venning, which is referring to what his Honour, Justice Osborne, relied upon in the lower court.

The only other suggestion I could make to your Honour is that there were affidavits filed before the High Court in the liquidation proceedings which are quite lengthy, and they are by Mr Doubleday and Mr Brighty who also figures in those judgments, Ma'am. They could be provided. They set out in far more

detail how this was done. So it took quite some time and it relied on schedules that had been prepared and schedules are referred to in the 2010 Court of Appeal decision.

So I apologise, Ma'am. It's not a simple exercise for me to go through it all but I think it is neatly summarised in the 2010, sorry, in the most recent Court of Appeal decision.

O'REGAN J:
The position that's against you seems to be that what was disclosed belatedly altered the understanding of what the Aronsen arrangement actually was and that if that had been known the Court of Appeal in 2010 would probably not have concluded in the way it did.

MR SHAMY:
As I say Sir –

O'REGAN J:
As I understand it that's what Ms Sisson is putting to us, that when they found out, when they were given these file notes that changed their understanding and they think it would have changed the Court's understanding of what the Commissioner had committed to do in the Aronsen arrangement, and how that would have impacted on penalties.

MR SHAMY:
Sir, in the 2010 Court of Appeal decision, which was an appeal from the second judicial review, the statement of claim filed by the taxpayers pleaded specifically the notes. So the notes were before, as I've said earlier, not only before the High Court but they were before the Court of Appeal. So, and again there's been reference I think to 2017 or 2016, being the date when the Revenue accepted that somehow there'd been late disclosure, that is not accepted. A number of the matters, with respect to Ms Sisson, that have been spoken to today are factual matters which are not accepted by the Revenue. But the short point, Sir, is that all this was before the

Court of Appeal in 2010. The follow-on effect, or the flow-on effect from that is that that view has been upheld subsequently, in subsequent Court of Appeal decisions. Even the decision that overturned the initial liquidation order, the problem there was determining what actually was the quantum which hadn't been put specifically before the lower court. But the methodology, 15%, all of those issues, they were seen as appropriate. There was also the discussion, Sir, regarding res judicata, which is the point I wish to make here because a lot of the matters referred to, for example, the TRA proceedings, the earlier NOPA in 2009, and even the most recent on in 2018 that is referred to, which was attempted to be provided at the liquidation, or the second liquidation hearing, to a large extent they were relitigating matters that had been determined hence the view of the current Court of Appeal and the previous Court of Appeal as well, that they were determined in 2010, because they weren't before the Court. And you'll see the comments, Sir, in terms of the 2018 NOPA, which was submitted this raises new matters around non-disclosure. That was in the wrong format, but apart from that Ms Sisson didn't have the ability or the standing to present the NOPA because she, the company was in interim liquidation. So that's how it was approached in the lower court, and in the Court of Appeal.

So the end result, as far as the Commissioner is concerned, is that there is no, with great respect, merit in this argument that somehow this would have led to further reduction, or indeed, as I understand the argument, and I've heard it a number of times now over the years, what it should have done is wiped the debt completely.

O'REGAN J:
The submission Ms Sisson has made to us is that what was disclosed eventually, and I think it was 2017, was information that she and Chesterfields had not known about before, and you're saying that's factually incorrect?

MR SHAMY:
That's incorrect because it's in the pleading in the second judicial review. It's pleaded, the notes are pleaded.

ELLEN FRANCE J:

Well is it clear from the 2010 Court of Appeal judgment that the arrangement referred to is that that's the full extent of it? I'm looking at the discussions from around paragraph 36 onwards.

MR SHAMY:

Sorry Ma'am, I'm not trying to be circuitous but if looking at – if you look at the first, perhaps start with the first judicial review, Ma'am, where these file notes were quoted in the High Court decision. So this is again, sorry, the Tax Cases Report and it begins at about paragraph 86 which was an arrangement reached with Mr Aronsen. This is Justice Fogarty in his first decision, and if you follow it through you'll see in capital type the actual notes.

ELLEN FRANCE J:

Well, I suppose I'm looking at 42, paragraph 42 of the 2010 Court of Appeal judgment which refers to Mr Aronsen's affidavit in the first judicial review proceedings disputing he'd reached any agreement or arrangement, and then the Judge's comment in relation to that. So that doesn't suggest that at least at that point in time there being full disclosure because he's disputing an arrangement.

MR SHAMY:

Well, no, Ma'am, I think they're different points. There had been full disclosure given. What the point was is there was no agreement reached. That was the argument from the Revenue. And the second argument was that even if there was an agreement, an arrangement, it had been breached, because, you see, the Aronsen arrangement wasn't the only one that was put forward. There was another one with a Ms Thornley that's referred to, another one that I think refers to a Mr Nemo. So there were a number, Ma'am, that were put forward. But Mr Aronsen's affidavit, as I recall it, didn't dispute that there were discussions or that he'd made file notes, and, as I say, they're referred to in the decision, the first and second judicial review. What was disputed was that there was any arrangement as such, but obviously that wasn't successful in terms of an argument. But with respect, Ma'am, I don't

think it suggests that they hadn't been disclosed or hadn't been disclosed in total. It –

WILLIAM YOUNG J:
And Justice Fogarty, did he find that there was an arrangement as alleged by Chesterfields with Mr Aronsen?

MR SHAMY:
Yes, Sir, he found, and that's why, Sir, sorry, I started with some comment in the 2010 decision about the first decision because I know it's res judicata but the Court of Appeal said there that – well, my sense of it, Sir, is that they weren't particularly comfortable with those findings. But, of course, it wasn't appealed.

WILLIAM YOUNG J:
Okay, thank you, Mr Shamy.

MR RUSSELL:
May it please the Court, very briefly, the liquidator was first appointed in October of 2015 and we have been acting since then. The matter identified in this Court's minute ahead of the hearing very much identified matters, a time period well before the liquidator's appointment, but – so I didn't anticipate having to say much today and as – but if the discussion evolved to traverse close to the liquidator's appointment, which has been six years, then I might have had something to say to assist but as that hasn't occurred I don't have anything to add other than just to support the submissions for the Commissioner.

There is one matter that wasn't perhaps covered and that's just the reference in the 2010 decision of this Court, [2010] NZSC 155. That was an application for leave to appeal the 2010 Court of Appeal's decision and that, at paragraph 11 of that judgment, addresses in part the question of the late discovery of documents. I just wanted to draw that to your Honour's attention. Those are my submissions.

WILLIAM YOUNG J:

Thank you Mr Russell. Ms Sisson?

MS SISSON:

May it please your Honours. Just a couple of matters in reply. I think there may be a misunderstanding as the period of non-disclosure. So the non-disclosure occurred from 1999 to 2006. At paragraph 42 of the first judicial review judgment, sorry, of the Court of Appeal 2010, refers to Mr Aronsen's affidavit being filed. That was for the first judicial review. So there was an affidavit of Mr Aronsen that was filed, it was dated, I understand from memory, the 26th of May 2006. It was served on Chesterfields on the 26th of June 2006. That was about a couple of weeks before, prior to the first judicial review hearing. When Mr Shamy referred to pleadings being altered midst that hearing, that was as a result of the actual disclosure of the content of those file notes, and Justice Fogarty has referred at paragraph 10 of the application to strike out the misfeasance judgment, he has said that the disclosure of those file notes for that first judicial review hearing, and the second, was a massive factor in favour of the plaintiffs. The fact is, without the ultimate, albeit late, disclosure of that file note, there would have been no prospect at all of success in that judicial review proceeding. The issue is –

O'REGAN J:

Earlier on you said to us that the Court of Appeal, when it came to its conclusion about the 15% being a rough and ready way of dealing with this matter, hadn't taken into account the non-disclosure of the file notes because they came after 2010, and now you're saying they were disclosed before then.

MS SISSON:

I, perhaps Sir, I do apologise. It was probably the way I communicated that issue to the Court. What I was referring to that was not before the Court of Appeal 2010 was the acknowledgement of a lengthy period of non-disclosure from 1999 to 2004. That –

O'REGAN J:

Why wasn't it before the Court of Appeal? If the disclosure had happened in 2006 everybody knew how long the non-disclosure had been, so why wasn't the Court of Appeal informed of it?

MS SISSON:

It's that the Commissioner had denied to the Court of Appeal 2010 that there had been ongoing non-disclosure up until that point. Probably the easiest way to do this is to refer, I'll just read out very briefly paragraph 109(e) of the Court of Appeal judgment which says: "The late discovery," so they're just talking about –

O'REGAN J:

Sorry which paragraph of which judgment?

MS SISSON:

It's paragraph 109(e) of the Court of Appeal 2010, and it says: "The late discovery of the Aronsen notes was seen as a relevant factor to be taken into account in the Commissioner's reconsideration." So Justice Fogarty had accepted that suddenly, through this Aronsen affidavit, there was late disclosure of these absolutely critical file notes that had been withheld all of the years during the negotiations, attempts to settle.

WILLIAM YOUNG J:

But it could only be late discovery in the context of this judicial review proceedings, couldn't it?

MS SISSON:

Absolutely Sir, so that was the period only from 2004, when the judicial review proceedings were applied, through October 2004, where the Commissioner did not disclose the absolute critical file notes in their affidavit of discovery in October 2004, through to suddenly there is an affidavit filed by Mr Aronsen for the first judicial review proceeding, served June 2006. So this is the first time

that this arrangement or as the Court of Appeal 2010 referred to it "in substance arrangement". In my written submissions at paragraph 50 –

O'REGAN J:

But the Court of Appeal in 2010 was aware of it.

MS SISSON:

Yes, they were aware, but what –

O'REGAN J:

And they recorded that that was something that had occurred in the first judicial review, which wasn't before them, or was that in the second judicial review? So 109(3) is summarising Justice Fogarty's judgment in the second judicial review, is that correct?

MS SISSON:

That is correct Sir, but just to be absolutely categorically clear, the file notes were available for the first judicial review. So that is where Mr Shamy –

O'REGAN J:

So why are you coming to us today and saying something new has arisen?

MS SISSON:

Because if we turn to footnotes 125 and 126, which are referred to in paragraph 109(e) it says at 125: "The Commissioner denies that these were discovered late and says in any event that the taxpayers were aware of the content of those file notes. We are unable to make any findings on this given that it was not fully dealt with by the High Court. We do remark, however, it is 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…"

The Court of Appeal 2010 were not fully precognizant of the non-disclosure, the impact on the negotiations with the Commissioner of Inland Revenue

through 1999 to 2004 when the litigation commenced. So I just hope that that clarifies…

So the period of non-disclosure was from 1999 to 2006. The taxpayer could not prove the existence of that arrangement until it was disclosed in 2006, despite trying to settle the Aronsen arrangement from 1999 to 2006.

WILLIAM YOUNG J:
Thank you. We will take time to consider our judgment and deliver it in writing in due course.

COURT ADJOURNS: 11.17 AM