IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2016-404-765
CIV-2019-404-1360
CIV-2019-404-1604
[2019] NZHC 3110

BETWEEN	CULLEN GROUP LIMITED Applicant
AND	THE COMMISSIONER OF INLAND REVENUE Respondent

Hearing: 14 November 2019

Appearances: J W A Johnson and W L Porter for the applicant
H W Ebersohn and M A Cook for the respondent

Judgment: 29 November 2019

JUDGMENT No 3 OF PALMER J
(Enforcement of costs)

The judgment was delivered by me on Friday, 29 November 2019 at 2.30pm.
Pursuant to Rule 11.5 of the High Court Rules

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Registrar/Deputy Registrar

Counsel/Solicitors:
Wynn Williams, Auckland
Crown Law, Wellington

Summary

[1] On 12 March 2019, I dismissed Cullen Group Ltd's challenge to an assessment of tax avoidance by the Commissioner of Inland Revenue. The Court of Appeal will hear Cullen Group's appeal in February 2020. The parties agreed Cullen Group was liable to the Commissioner for costs in the High Court of $505,399.55, though that would likely change if its appeal succeeds. The Commissioner issued a statutory demand to Cullen Group to pay that debt and then applied to put Cullen Group into liquidation. Cullen Group applies to stay enforcement of the costs award, to set aside the statutory demand and to stay the liquidation proceeding.

[2] I decline the application to stay enforcement of the costs award. The costs award, owing for almost eight months, should not be enough to tip Cullen Group into insolvency and liquidation unless those controlling Cullen Group, including in particular Mr Eric Watson, wish it to do so. And a party owing costs under a judgment cannot force a stay of the judgment by effectively threatening its own liquidation. If Cullen Group wishes to avoid liquidation it should pay the relatively minor costs award in the time it still has to do so. If it cannot, it should be liquidated. Without a stay of enforcement of the costs award, there is no substantial dispute about whether it is a debt Cullen Group owes, so I decline to set aside the statutory demand and I decline to restrain the liquidation proceeding.

What happened?

Proceedings and applications

[3] On 12 March 2019, I dismissed Cullen Group's challenge to the Commissioner of Inland Revenue's assessment of tax avoidance.[1] In summary, I said:

> [1] Mr Eric Watson moved from New Zealand to the United Kingdom in 2002. He restructured his business affairs so his shares in Cullen Investments Ltd (CIL) were replaced by loans owed by Cullen Group Ltd (Cullen Group) to conduit companies in the Cayman Islands, Modena Holdings Ltd (Modena) and Mayfair Equity Ltd (Mayfair). Modena and Mayfair were not, legally, "associated persons" with Cullen Group, so the arrangement fell within the provisions of the Approved Issuer Levy (AIL) tax regime. Accordingly, Cullen Group paid AIL at two per cent of the $397 million of interest it paid Modena

1 *Cullen Group Ltd v Commissioner of Inland Revenue* [2019] NZHC 404.

and Mayfair, rather than Non-Resident Withholding Tax (NRWT) at 15 per cent.

> [2] The Commissioner of Inland Revenue assessed Cullen Group as having avoided $59.5 million of NRWT while it paid $8 million in AIL. She assessed the net tax owing as $51.5 million. Use of money interest on that amount came to an additional $60.5 million as at 27 August 2018. Penalties have not yet been quantified. Cullen Group challenges the Commissioner's assessment. It says the arrangement restructured Mr Watson's affairs in order to achieve certainty about his change of tax residency from New Zealand to the United Kingdom and to plan for application of the United Kingdom's laws governing remittance of foreign-sourced income.
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> [3] Parliament enacted the AIL regime with the objective of encouraging investment in New Zealand, by reducing the cost of New Zealand residents borrowing from non-residents. The arrangement here introduced no new funds into New Zealand. It restructured shares in one New Zealand company (CIL) into loans to another New Zealand company (Cullen Group), which were assigned to overseas entities (Modena and Mayfair) in form but not substance. Mr Watson retained a high degree of control over the relevant entities and was on both sides of the loans. I do not consider the arrangement was within the contemplation and purpose of Parliament in enacting the AIL regime. It had a more than merely incidental purpose or effect of altering the incidence of tax. It was a tax avoidance arrangement and void against the Commissioner. The Commissioner counteracted the tax advantage lawfully and was not time barred in doing so. I dismiss Cullen Group's challenge. Cullen Group is liable for the $51.5 million of tax plus use of money interest and penalties accordingly.

[4] The amount of core tax, and use of money interest as at April 2019, stood at $114,659,029.08.[2] On 9 April 2019, Cullen Group appealed the judgment. The appeal is scheduled to be heard by the Court of Appeal on 18 and 19 February 2020. The parties also agreed costs and disbursements should be awarded to the Commissioner in the sum of $505,399.55. On 11 April 2019, I so ordered.

[5] On 27 June 2019, the Commissioner served Cullen Group with a statutory demand for the amount of the costs award, which had remained unpaid. On 9 July 2019, Cullen Group applied to set aside the statutory demand and to stay enforcement of the costs award. There was no extension of the time for compliance with the statutory demand. On 8 August 2019, the Commissioner commenced a liquidation proceeding. Cullen Group applies to restrain publication of the advertisement of the liquidation proceeding and to stay any further proceedings until the application to set aside the statutory demand had been finally determined.

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2 Affidavit of Alla Tchernova, 16 September 2019, at [12].

[6] The parties agreed that I should hear Cullen Group's three applications together:

(a) to stay enforcement of the costs award;

(b) to set aside the statutory demand; and

(c) to restrain publication of the advertisement of the liquidation proceeding and stay any further proceedings until the application to set aside the statutory demand has been finally determined.

Current position on costs

[7] Mr William Gibson is a senior executive of Cullen Investments Ltd, a subsidiary of Cullen Group. In an affidavit of 8 July 2019, he explained why Cullen Group had not paid the costs award. He said Cullen Group did not have sufficient liquid assets to pay it but was in the process of attempting to sell debt owed to it by Hart Acquisitions, in the United States, to a third party which would enable it to pay.[3]

[8] On 31 October 2019, Mr Gibson provided an updating affidavit advising that Hart has been experiencing commercial difficulties and is now negotiating to sell its assets to an identified private equity firm.[4] The agreement is expected to be signed before the end of this year with settlement in February 2020. If it is, it would see about US$1 million paid to Cullen Group. Mr Gibson provides supporting emails and says Cullen Group is willing to discuss any options to secure the Commissioner's position in the meantime, for example by assigning to the Commissioner a sum equivalent to the costs award so it would be paid to her directly once Hart's sale settles.[5] Mr Gibson also says that, once transaction details are finalised, Cullen Group will need to consider whether disclosure to Kea Investments Ltd is required, under a notification injunction of the High Court of England and Wales in favour of Kea Investments.

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3 Affidavit of William Gibson, 8 July 2019, at [14], [16].
4 Updating Affidavit of William Gibson, 31 October 2019, at [3].
5 At [4].

The costs award

Law regarding stay of the costs award

[9] Rule 12(3) of the Court of Appeal (Civil) Rules 2005 provides that, pending determination of an appeal, the court appealed from may, on an interlocutory application, order a stay of execution of the whole or part of a decision under appeal. In *Sullivan v Wellsford Properties Ltd,* Gordon J held this Court has the power, under either its inherent jurisdiction or r 12, to stay a judgment that has not been appealed.[6] I agree. As is the case here, the plaintiffs had appealed a substantive judgment and sought a stay of a costs judgment they had not appealed.

[10] The Court of Appeal has held that, in considering a stay, the starting point is that a successful party is entitled to the fruits of its judgment.[7] The court must then balance the competing rights of the party who has obtained judgment against the need to preserve the appellant's position in the event of an appeal succeeding. The court must be able to do justice between the parties, whatever the outcome of the appeal. The relevant considerations include, relevantly:

(a) whether the appeal may be rendered nugatory by lack of a stay;

(b) the bona fides of the appellant as to the prosecution of the appeal;

(c) whether the successful party will be injuriously affected by the stay;

(d) the effect on third parties;

(e) the novelty and importance of questions involved;

(f) the public interest in the proceeding;

(g) the overall balance of convenience; and

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6 *Sullivan v Wellsford Properties Ltd* [2018] NZHC 708, (2018) 24 PRNZ 20 at [14]–[19].

7 *Brook Valley Community Group Inc v Brook Waimarama Sanctuary Trust* [2017] NZCA 377, (2017) 23 PRNZ 598 at [10].

(h) the apparent strength of the appeal.[8]

[11] The Court also held that, when interim relief is sought in addition to a stay, the appellant's prospects of success on appeal are a factor, as is the balance of convenience as it is understood in the interim injunction context, as well as the overall justice of the case.[9]

[12] There is authority that, in general, it will often be appropriate that a money judgment should be paid and a stay not granted unless security is provided.[10] In *SKIDS Program Management ltd v McNeil,* Woodhouse J considered it preferable not to set down a general rule to this effect.[11] I agree there is no general rule, but I consider it is likely that consideration of the above factors will usually, but not always, result in that outcome. Furthermore, in *Walker v Castlereagh Properties Ltd*, Associate Judge Osborne held that costs judgments require consideration beyond that which applies to money judgments generally.[12] He stated the justice of a case where the unsuccessful party appeals and bears costs in the interim will "most often (albeit not invariably) favour the successful respondent".[13]

Submissions

[13] Mr Johnson, for Cullen Group, submits it is actively pursuing its appeal in good faith, both because it believes it is correct and for "commercial reasons" which appear to be related to potential proceedings against professional advisers. He submits application of the anti-avoidance provision is uncertain and contentious, relying on the Supreme Court's 2008 judgment in *Ben Nevis Forestry Ventures Ltd v Commissioner of Inland Revenue*, so it cannot be said its appeal is without merit.[14] He submits the evidence shows Cullen Group can pay the costs award but cannot pay it immediately. He says he cannot say the Commissioner will certainly be paid on a particular day, but

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8 *Walker v Castlereagh Properties Ltd* [2015] NZHC 907, [2015] NZAR 944 at [53].
9 *Brook Valley Community Group Inc v Brook Waimarama Sanctuary Trust*, above n 7, at [11].
10 *Contributory Mortgage Nominees Ltd v Harris Road No 10 Ltd* (2006) 22 NZTC 19,752 (HC) at [8]; *Keung v GBR Investment Ltd* [2010] NZCA 396, [2012] NZAR 17 at [12].
11 *SKIDS Program Management Ltd v McNeil* HC Auckland CIV-2010-404-1696, 20 December 2011 at [13].
12 *Walker v Castlereagh Properties Ltd*, above n 8, at [42].
13 At [44].
14 *Ben Nevis Forestry Ventures Ltd v Commissioner of Inland Revenue* [2008] NZSC 115, [2009] 2 NZLR 289.

Cullen Group's intention is to have the transaction agreed by the end of 2019 which will see the Commissioner paid by the end of February 2020. He submits it is difficult to see how requiring the Commissioner to wait longer to be paid the costs would injuriously affect her and there is little risk Cullen Group's assets will be dissipated in the meantime. On the other hand, he submits, if the stay is not granted, there is a real risk Cullen Group would not be able to pursue its appeal as it will be likely placed in liquidation. He submits that would render the appeal nugatory and distinguishes this case from the authorities cited. It is unlikely, he submits, a liquidator would pursue the appeal. Mr Johnson disputes the Commissioner's submission that the tax structure was set up to ensure that consequences of an adverse judgment would be avoided.

[14] Mr Ebersohn, for the Commissioner, submits one factor towers over all other factors against granting the application: an effect flowing out of the tax avoidance arrangement at the heart of this case is the immunisation of Cullen Group from the adverse effects of the Court's judgment. This is because the arrangement resulted in a debt, that was never meant to be paid and would eventually be transformed into debts secured over Cullen Group's assets, insulating Mr Watson from an adverse ruling on the avoided tax and associated court costs. If Cullen Group were to succeed in a proceeding against a third party, he submits any return would go straight to Mr Watson via a General Security Agreement. Mr Ebersohn submits, on that basis, the interests of justice do not support relief. He infers the wider group of companies, to which Cullen Group belongs, can afford to pay the relatively small costs award, if it so wishes, it has had eight months to do so and he submits it should do so. He also submits the appeal is without merit.

Should I stay enforcement of the costs award?

[15] Cullen Group has appealed the substantive judgment but not the costs award based on it. If its appeal of the substantive award is successful, the costs award would inevitably be reconsidered. The Commissioner does not seek to enforce the substantive judgment under appeal but does seek to enforce the costs award.

[16] I do not consider the merits of the appeal weigh particularly in either direction. It is not a hopeless appeal. But there are not strong prospects of success. I do not

consider there is much public interest in the appeal, however much private interest there is. Contrary to Mr Johnson's submission, tax avoidance law is now well-settled and the questions involved here are not particularly novel.

[17] The factor weighing most heavily in favour of a stay is that the appeal of the substantive judgment may be rendered nugatory if a stay of the costs award is not granted, because liquidation will inevitably follow, preventing the appeal. But I have doubts about this. Cullen Investments Ltd (CIL) is a subsidiary of Cullen Group. CIL's financial statements for the year ending 31 March 2017 indicate it has substantial assets of almost $148 million as well as total liabilities of just over $73 million.[15] CIL's total operating expenses that year were $6.3 million including $2.6 million of salary costs. Cullen Group's statements for the same year show a total operating expense of over $21 million.[16]

[18] The costs award of some $500,000 that has been owing for almost eight months should not be enough to tip Cullen Group into insolvency and liquidation unless those controlling it, including in particular Mr Eric Watson, wish it to do so. I do not make any findings about arrangements outside of those which I examined in the substantive judgment. But the high degree of control by Mr Watson I found in that judgment over the relevant related entities, suggests it is likely to be up to him whether Cullen Group is liquidated as a result of a $500,000 debt.[17]

[19] This is not a satisfactory basis on which Cullen Group can found an argument that its appeal would be rendered nugatory without a stay. It appears only to be nugatory if Cullen Group, or Mr Watson, wishes it to be. But a party owing costs under a judgment cannot force a stay of the judgment by effectively threatening its own liquidation. Rather, that appears to be a reason in favour of liquidation, and against a stay, to enable enforcement of the judgment. That is particularly so given the parties agree the case law holds that a money judgment, particularly a costs judgment, should be paid and a stay not granted unless security is provided. No credible security is offered here; only an email indicating an intention to reach

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15 Affidavit of Alla Tchernova, 16 September 2019, at Exhibit N.
16 Affidavit of Alla Tchernova, 16 September 2019, at Exhibits K (draft) and L.
17 *Cullen Group Ltd v Commissioner of Inland Revenue*, above n 1, at [14].

agreement to realise an asset in the United States this year. The potential realisation would have to be notified to the High Court of England and Wales which has imposed freezing orders over Cullen Group. The potential realisation would occur, if it does, around the time the appeal is to be argued in the Court of Appeal.

[20] I do not consider the balance of convenience or the overall justice of the case requires a stay. If Cullen Group wishes to avoid liquidation it should pay the relatively minor costs award in the time it still has to do so. If it cannot, as I find below and as its counsel acknowledged was likely, it should be liquidated.

The statutory demand

Law regarding setting aside the statutory demand

[21] Section 290 of the Companies Act 1993 empowers a Court to set aside a statutory demand, including on the basis it is satisfied there is a substantial dispute about whether or not the debt is owing or due or "on other grounds". The onus is on the applicant to show, in relation to the first of those, that there is arguably a genuine and substantial dispute as to the existence of the debt.[18] The second comes down to the Court's judgement as to whether the creditor's entitlement is outweighed by some factor making liquidation plainly unjust and "must be confined to cases which clearly justify departure from the fundamental principle that insolvency should bring the end of a company's existence".[19]

[22] Two New Zealand High Court judgments have approved a Federal Court of Australia statement in *Remote Camps Australia Pty Ltd v Hazeldean Pty Ltd* in respect of a similar Australian provision. It said "the law is crystal clear that a company cannot establish a 'genuine dispute' about the existence of the amount of a debt to which the demand relates where there is a judgment debt which, while it may be the subject of an appeal to a higher court, has not been stayed so far as the operation of that judgment is concerned …".[20]

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18 *Confident Trustee Ltd v Garden and Trees Ltd* [2017] NZCA 578 at [16].

19 *Commissioner of Inland Revenue v Chester Trustee Services Ltd* [2003] 1 NZLR 395 (CA) at [3], [48].

20 *Bristol Forestry Venture Ltd v Commissioner of Inland Revenue* [2013] NZHC 2384, (2013) 26 NZTC ¶21-031 at [41] and *Joint Action Funding Ltd v Eichelbaum* [2016] NZHC 2919 at [21], citing *Remote Camps Australia Pty Ltd v Hazeldine Pty Ltd* [2012] FCA 130 at [25].

Submissions

[23] Mr Johnson submits that, if the costs decision is stayed, it must follow that the statutory demand should be set aside. He acknowledges that, if the costs decision is not stayed, it is likely the statutory demand will not be set aside.

[24] Mr Ebersohn submits that there is no substantial dispute the debt for court costs is owed and due, notwithstanding the appeal, relying on the New Zealand High Court cases which rely on *Remote Camps Australia Pty Ltd.* He submits there are only a handful of exceptions where a company will not be wound up when it has failed to pay a debt and none of these have been relied upon or apply here. He submits setting aside the statutory demand will facilitate Cullen Group's efforts to avoid the consequence of the Court's judgment, which is not in the interests of justice.

Should I set aside the statutory demand?

[25] No. Without a stay of enforcement of the costs award, there is no substantial dispute about whether it is a debt Cullen Group owes. As Mr Johnson acknowledged was likely, in the absence of a stay, I decline to set aside the statutory demand.

The liquidation proceeding

Relevant law

[26] Rule 31.11 of the High Court Rules 2016 provides a defendant company, facing liquidation, may apply for an order restraining publication of the required advertisement and an order staying any further proceedings in relation to the liquidation. This is treated as an application for an interim injunction.

[27] For an interim injunction to be granted, the applicant must establish there is a serious question to be tried and the balance of convenience and overall justice of the case favours an injunction being granted.[21] In *Nemisis Holdings Ltd v North Harbour Industrial Holdings Ltd,* Wallace J held a court has inherent jurisdiction to stay winding-up proceedings where the debt founding the proceedings is the subject of

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[21] *NZ Tax Refunds Ltd v Brooks Homes Ltd* [2013] NZCA 90, (2013) 13 TCLR 531 at [12]; *Cabco Group Ltd v Bartlett* (2009) 6 NZELR 500 (HC) at [30].

genuine dispute or there are clear and persuasive grounds for a stay.[22] The onus is on the applicant and the decision is never made lightly. It is normally necessary to demonstrate something more than the balance of convenience. The governing consideration is whether the proceedings suggest unfairness or undue pressure.

[28] The timeframes in part 31 of the High Court Rules, governing liquidation, are deliberately short, to avoid unnecessary delay. Rule 31.20 provides that, if a person entitled to file a statement of defence fails to do so within the prescribed time, as Cullen Group has done here, that person must not be allowed to appear at the hearing without an extension of time or special leave of the court. The High Court has previously held that leave to file a statement of defence to a liquidation application, out of time, should not be granted unless the applicant shows it has an arguable defence and is solvent.[23]

Submissions

[29] Mr Johnson submits it cannot be right that the liquidation proceeding can continue while the application to set aside the statutory demand has not been finally determined. He acknowledges that if the statutory demand is not set aside, restraint of liquidation is unlikely. But he submits, if I do not dismiss the application for a stay of the statutory demand, it would be open to me to stay the liquidation proceeding for 25 working days to allow Cullen Group to accelerate its efforts to liquidate the Hart loan to meet its liability to the Commissioner. Otherwise, he submits there should be a brief period, by say 10 February 2020, by which Cullen Group can file its statement of defence in the liquidation proceeding, since it has not met the deadline to do so due to oversight.

[30] Mr Ebersohn submits, should the Court not stay the costs judgment and not set aside the statutory demand, there is no serious question to be tried. He submits neither the balance of convenience nor the overall interests of justice favour enabling Cullen Group to avoid the consequences of the costs judgment. He submits Cullen Group

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22 *Nemisis Holdings Ltd v North Harbour Industrial Holdings Ltd* (1989) 1 PRNZ 379 (HC) at 385.

23 *Commissioner of Inland Revenue v New Orleans Hotel* (2011) Ltd [2017] NZHC 2500 at [57]; *Fresh Cut Flower Wholesalers Ltd v The Living and Giving Gift Company Ltd* (2001) 16 PRNZ 173 at [9].

was required to file its statement of defence in the liquidation proceeding by 10 September 2019 and there is no reason for the extent of the lateness given counsel for the Commissioner advised counsel for Cullen Group of the requirement on 21 October 2019. He submits the time should not be extended because it has no arguable defence and is hopelessly insolvent. He points to Cullen Group's financial statements showing negative equity of $203,414,083.[24] He submits the amount could be paid if Cullen Group did not structure is affairs so the debt sits in a now insolvent company. He points to the salary bill in CIL's statements of $2.6 million in the year ended 31 March 2017.[25] He submits any statement of defence is purely for the purposes of delay and an abuse of process. Rather, the Commissioner seeks the matter to be set down for determination at the first available hearing date 10 working days after this judgment.

Should I restrain the liquidation proceeding?

[31] As Mr Johnson again acknowledged was likely, as I decline the other applications, I also decline to restrain the liquidation proceeding. If the costs award debt is paid before the liquidation application is determined, then that will have its own effect on liquidation. If it is not, there is no serious question to be tried.

[32] Neither do I extend the deadline of 10 September 2019 for Cullen Group to file a statement of defence. It has given no reason for that failure other than oversight. The Commissioner reminded Cullen Group of the obligation, through counsel, on 21 October 2019. Cullen Group has not demonstrated it has an arguable defence or is solvent.

Result

[33] I decline the applications to stay enforcement of the costs award, to set aside the statutory demand and to restrain publication of the advertisement of the liquidation proceeding and stay any further proceedings until the application to set aside the statutory demand has been finally determined.

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[24] Affidavit of Alla Tchernova, 16 September 2019, at [16]–17].

[25] Financial statements for Cullen Investments Ltd for year ending 31 March 2017, exhibit "N" to affidavit of Alla Tchernova, 16 September 2019, at p 4.

[34] I award costs and reasonable disbursements to the Commissioner in opposing the applications to stay enforcement of the costs award and to set aside the statutory demand, as sought, on a 2B basis.

Palmer J