Inland Revenue
Te Tari Taake

CASE SUMMARY

Appeals by Chesterfields Preschools Ltd dismissed by the Court of Appeal

Decision date: 22 December 2020

CSUM 21/05

CASE

Chesterfields Preschools Ltd & Sisson v CIR & Ors [2020] NZCA 686

Sisson & Chesterfields Preschools ltd v CIR & Ors [2020] NZCA 687

Sisson & Chesterfields Preschools ltd v CIR & Ors [2020] NZCA 689

LEGISLATIVE REFERENCES

Companies Act 1993

Insolvency Act 2006

High Court Rules 2016

LEGAL TERMS

Liquidation, Bankruptcy, stay of enforcement, recall of judgment

Summary

This is a group of 11 appeals by Chesterfields Preschools Ltd ("CPL") and Therese Sisson. These appeals were heard together by the Court of Appeal. The Court issued three judgments covering all 11 appeals. In summary the judgments are

[2020] NZCA 686 Liquidation and related matters judgment;

[2020] NZCA 687 Vesting order and related matters judgment; and

[2020] NZCA 689 bankruptcy and related matters judgment.

The Commissioner and other respondents were successful in every appeal.

Impact

There is useful guidance on the application of High Court Rule 5.61 (1) in the liquidation process in [2020] NZCA 686. This overturns an earlier approach in *CIR v The Fishing Company Ltd* (2011) 25 NZTC 20-016 (HC).

Also, in [2020] NZCA 686, the Court confirmed High Court Rule 17.29 that provides for a stay of enforcement does not apply to liquidation orders. This is consistent with its approach to bankruptcy orders (see *Hampton v Minter Ellison Rudd Watts* [2020] NZCA 291).

These judgments represent a major step towards the final resolution of the lengthy CPL litigation which has been going on since 2004.

Facts: [2020] NZCA 686 Liquidation and related matters judgment

CPL was placed into liquidation by the High Court in 2015. CPL appealed this decision and ultimately the Supreme Court set aside the liquidation order and referred the case back to the High Court for re-hearing ([2017] NZSC 176). CPL was put into interim liquidation to preserve its assets ([2017] NZHC 3172) pending re-hearing of the actual liquidation. After the re-hearing CPL was once again put into liquidation in 2019 ([2019] NZHC 272). It is this second liquidation that was appealed by Ms Sisson on behalf of CPL. CPL argued:

- It was an abuse of process to put it into liquidation prior to the resolution of a misfeasance claim CPL had against the CIR. Once the misfeasance (called the MASOC) was resolved in CPL's favour it would also resolve the liquidation proceedings; and
- The debt was incorrectly calculated by CIR and CPL was, accordingly, able to pay its debts.

Additionally, CPL (by Ms Sisson) argued there was tax litigation at the TRA and various unanswered NOPAs (issued by CPL) that needed to be resolved before the liquidation should proceed.

Issues

Should the appeal of the liquidation of CPL be allowed?

Decision

The Court of Appeal rejected Ms Sisson's reliance on any alleged existing tax litigation and the NOPAs on the basis these had been previously considered and resolved by the Court: ([2017] NZCA 326) at [99] to [101]). The Court also rejected any reliance on later NOPAs as these were issued by Ms Sisson after CPL went into liquidation. This meant she lacked the authority to issue any NOPAs on behalf of CPL.

The court also rejected the possibility of set off against the CIR's claimed tax debt by reason of the potential damages CPL may get under the MASOC. The Court recognised s 310 Companies Act 1993 which allowed the set off of a claim made by a creditor of a liquidated company and a counter claim by the liquidated company against the same creditor. But the Court rejected some case law (*CIR v The Fishing Company Ltd* (2011) 25 NZTC 20-016) to the effect that s 310 Companies Act applied prior to the company being put into liquidation. At [37] the Court confirmed that **section 310 Companies Act only takes effect AFTER the company was in liquidation. This approach meant High Court Rule 5.61 (which expressly precludes arguing any set off or counter claim in proceedings to recover taxes) applies BEFORE the company goes into liquidation.**

In addition, the Court recognised the MASOC was stayed by the High Court and that stay had not been lifted. It was at best a contingent, unliquidated claim. The Court also did not consider it appropriate that the merits of the MASOC be considered in proceedings to determine CPL's ability to pay its debts. Finally, both the Court of Appeal and the Supreme Court had rejected the suggested potential MASOC claim could be set off against the CIR's claim: [2017] NZCA 326 at [106]-[107]; [2017] NZSC 168 at [11].

The Court then considered the calculation of the debt claimed by the CIR. CPL had no income having ceased business many years ago but did hold assets. The Court at [100] concluded that CPL has assets of $1,138,064.77 and debts (actual and contingent) of $1,395,805.16 leaving a short fall of $257,785.39. The Court was satisfied CPL was insolvent and properly placed into liquidation. Of note here:

- The issue regarding quantum of debt essentially revolved around the amount of interest and penalties the CIR could charge CPL after June 2004. This is factually unique to the circumstances of this litigation. On the facts, the Court concluded that the CIR could charge interest and penalties after June 2004 and that the CIR had correctly calculated the balance of tax, including interest and penalties, owing (reduced by 15% to give effect to the first judicial review decision as allowed for by the Court in a 2010 decision ([2010] NZCA 400). There was no Court expectation the CIR would simply stop charging penalty and interest after June 2004 (although the CIR did stop charging interest and penalties in 2008 of her own volition).

- In quantifying the debt, the Court took account of contingent debts owed to the CIR but expressed some doubt whether sums advanced to the liquidators could be regarded as a debt of CPL. The Court considered these were more in the nature of a loan to the liquidator to be repaid from the assets of CPL, but the loans were not debts of CPL.

Ms Sisson also argued the liquidation could be stayed using High Court Rule 17.29 as the liquidation was an enforcement process. The Court rejected this submission saying Rule 17.29 applied to one party enforcing a judgment that created a debt or other liability against another party and not to a judgment that changed the status of a party which was the effect of a liquidation. The Court also stated (at [109]): "The effect and consequences of a liquidation order are provided for by the provisions of pt 16 of the Companies Act. They are quite different to the steps a creditor may take to enforce a judgment debt. There is no enforcement process in relation to the liquidation order. There is, therefore, nothing to stay under r 17.29."

The Court also relied on its reasoning in the earlier decision in *Hampton v Minter Ellison Rudd Watts* [2020] NZCA 291.

Ms Sisson, on behalf of CPL had also made interlocutory applications in the High Court to remove freezing orders (and an associated caveat on a certificate of title) over the assets of CPL. These applications were dismissed by the High Court on the basis Ms Sisson lacked standing to make the applications and that the applications were not part of the liquidation proceedings which should not have been accepted for filing. Ms Sisson appealed. The Court of Appeal accepted the High Court's conclusion that Ms Sisson lacked standing and any application to remove a caveat should have been made by way of originating application. appeal. The Court also noted that, having confirmed the liquidation of CPL, there was no justification for giving Ms Sisson any control of CPL's assets.

Facts: [2020] NZCA 687 Vesting order and related matters judgment

By consent the High Court made a vesting order, vesting assets of CPL in the hands of the liquidator ([2017] NZHC 181]) which was sealed by the (now) respondents in the appeal. The assets had previously been held by Ms Sisson on trust for CPL. The appellants unsuccessfully sought the recall of that order ([2017] NZHC 859). The appellants then appealed the High Court decision not to recall the vesting order. The appellants did not appeal the making of the vesting order directly.

Issues

Should the appeal of the refusal to recall the vesting order be allowed?

Decision

The Court concluded that once an order has been sealed by the Court it cannot normally be recalled unless the Court exercises its inherent jurisdiction (that the judgment should be recalled due to duress, undue influence, unconscionability or mistake). The ultimate test is where the interest of justice lies (*Herron v Wallace* [2016] NZHC 2426).

The appellant sought the orders be set aside:

- **Pending the resolution of the misfeasance claim against the CIR.** The Court accepted the High Court's conclusion that the misfeasance was irrelevant to the recall of the vesting order. This was because the vesting order is concerned with the ownership of CPL's assets and the alleged misfeasance is not relevant to that matter. Further, due to her bankruptcy, Ms Sisson's interest in any misfeasance claim was now held by the Official Assignee and did not revest in her on her discharge. More generally the misfeasance claim was now in the hands of the liquidator of CPL who does not intend to pursue it.
- **Pending the appeal of the liquidation**. As the appeal of the liquidation was unsuccessful this ground failed.
- The consent was compromised by Ms Sisson's illness at the time and because she did not fully understand what she was consenting to. The Court did not accept that Ms Sisson's illness impaired her ability to consent to the vesting orders. It also considered there was no evidence she did not fully understand what she was consenting to when agreeing to the making of the vesting orders. The Court agreed

> with the High Court that Ms Sisson's litigation was "entirely without merit" giving another reason not to allow her appeal.

Facts: [2020] NZCA 689 bankruptcy and related matters judgment

Ms Sisson had costs awarded against her by the High Court for an unsuccessful attempt to set aside the liquidation of CPL ([2016] NZHC 2367) and to stay the liquidation order ([2016] NZHC 2368). The High Court added her to the relevant proceedings so she could appeal on behalf of CPL.

CPL (now in liquidation) sought to recover the costs awarded against Ms Sisson. This led to Ms Sisson's bankruptcy by CPL (in liq). Ms Sisson appealed her bankruptcy on the grounds it was a tactical move by the liquidators and CIR to remove her standing to represent CPL and to prevent her pursuing a misfeasance claim against the CIR.

She also appealed a decision not to stay the bankruptcy to allow her to pursue a stay of CPL's liquidation. Ms Sisson argued the two proceedings were closely related and the determination of the liquidation would be determinative of the stay application in her own bankruptcy.

Issues

Should the appeal of Ms Sisson's bankruptcy be allowed?

Decision

The Court reminded itself the liquidation appeal had been dismissed. Consequently, Ms Sisson's bankruptcy appeal must also fail.

> [21] In the liquidation judgment we have dismissed the liquidation appeal. It follows that Ms Sisson's challenge to the adjudication order must also fail. It rests on the premise that the company, whose claim it is, should not be wound up before the misfeasance claim is resolved. She does not otherwise challenge the quantum of the costs award or its underlying premise, which was that she lacked standing to bring the setting aside proceeding on behalf of the company in liquidation.

Ms Sisson argued the existence of a set off (based on the anticipated successful outcome of the misfeasance claim) which the Court should have considered when considering making her bankrupt. She highlighted s 254 of the Insolvency Act 2006.

The Court noted at [22] that "Section 254 of the Insolvency Act is in identical terms to s 310 of the Companies Act 1993 but there is one critical difference; r 5.61 of the High Court Rules does not exclude setoff, for this is a not a claim by the Commissioner for recovery of taxes." However, the claim of set off was rejected on three grounds:

- The statutory set off occurs after the company is liquidated. The possibility of set off will not prevent the liquidation order being made. (*Although not expressly stated in the judgment, it is a necessary implication that this is also true of s 254 of the Insolvency Act as the Court expressly recognised s310 Companies Act is identical to s 254 Insolvency Act*.)
- "[T]here is an absence of the mutuality that s 254 of the Insolvency Act requires. A setoff for purposes of s 254 requires mutual dealings between the bankrupt and the party to whom the bankrupt is indebted. In this case, that other party is the liquidators, to whom the costs are owed. But the setoff which Ms Sisson relies upon is against the Commissioner." (at [24])
- There was no substance to Ms Sisson's claim the liquidators were usurpers or mere instruments of the CIR.

About this document

These are brief case summaries, prepared by Inland Revenue, of decisions made by the Taxation Review Authority, the District Court, the High Court, the Court of Appeal or the Supreme Court in matters involving the Revenue Acts. For Taxation Review Authority matters, names have been anonymized. The findings of the court described in a case summary will no longer represent current law where the matter has been successfully appealed or subsequent amended legislation has been enacted.