

**IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY**

**CIV-2015-409-000043
[2015] NZHC 2667**

BETWEEN THE COMMISSIONER OF INLAND
REVENUE
Plaintiff

AND CHESTERFIELDS PRESCHOOLS
LIMITED (IN LIQ)
Defendant

Conference: 29 October 2015

Counsel: S M Kinsler for Plaintiff
T A Sisson (seeking to intervene)
B M Russell for Defendant (in liquidation) (excused from
attendance)

Judgment: 29 October 2015

**JUDGMENT OF ASSOCIATE JUDGE OSBORNE
on recall of judgment and joinder of a new party**

[1] Ms Sissons has made an interlocutory application to join parties and a second application for recall of the judgment dated 6 October 2015.

Recall of judgment

[2] On 6 October 2015, I gave judgment putting Chesterfields Preschools Ltd into liquidation.¹ It is this judgment which Ms Sisson seeks to have recalled.

[3] Rule 11.9 authorises recall of a judgment. The leading statement of principles relating to recall is found in the judgment of Wild CJ in *Horowhenua County Council v Nash (No 2)*.² His Honour recognised three categories of case in

¹ *The Commissioner of Inland Revenue v Chesterfields Preschools Ltd* [2015] NZHC 2440.

² *Horowhenua County v Nash (No 2)* [1968] NZLR 632 (SC) at 633 per Wild CJ.

which recall is appropriate, the third being where for some very special reason justice requires that the judgment be recalled. In *Aotearoa Kiwifruit Export Ltd v ANZ National Bank Ltd*,³ Associate Judge Bell found this third category of reason to exist where there was a need for a director/shareholder to be appointed if appeal rights in relation to the liquidation of the company were not to be thwarted.⁴ I adopt Associate Judge Bell's conclusion.

[4] Ms Sisson is the director of Chesterfields. She wishes to pursue an appeal from the judgment for the purposes of enabling her to pursue an appeal.

[5] Responsibly, the Commissioner has not opposed the recall of judgment. The Commissioner accepts the existence of a "very special reason" by reason of Associate Judge Bell's conclusion.

[6] A procedural hiccup had occurred which might have appeared to stand in the way of the recall of judgment, namely that a formal order was sealed. It transpires that the order was sealed after the interlocutory application for recall was filed. Leave of the Court to seal the judgment was not obtained. My impression is that the Deputy Registrar overlooked the interlocutory application which had been received. The result is that r 11.11(3) High Court Rules applied so that the judgment ought not to have been sealed until the application for recall of the judgment was determined.

[7] Responsibly, Mr Kinsler accepts that the sealing of the judgment does not present an impediment. He referred me to the judgment of Heath J in *AIC v DE*.⁵ Upon a review of authority, his Honour concluded that the sealing of an order without leave of a Judge, contrary to the terms of r 11.11(3), is a nullity and the Court has jurisdiction to set aside the sealed order. I adopt that finding.

Orders

[8] I order:

³ *Aotearoa Kiwifruit Export Ltd v ANZ National Bank Ltd* HC Tauranga, CIV-2011-470-697, 3 February 2012.

⁴ At [20].

⁵ *AIC v DE* [2013] NZHC 2663.

- (a) The sealed order of the judgment dated 6 October 2015 is set aside, and is to be removed from the Court file;
- (b) The judgment dated 6 October 2015 is recalled for the purpose of joining Therese Anne Sisson;
- (c) Therese Anne Sisson is joined as a party to this proceeding and she is to be identified as second defendant in relation to the proceeding itself and, if she chooses, as appellant in any appeal from the judgment.

Remaining interlocutory application

[9] Ms Sisson also sought an order joining as a party David John Hampton in his capacity as a trustee shareholder of Chesterfields.

[10] I adjourn this remaining aspect of the interlocutory application to a hearing at **8.30 am, 17 November 2015 by telephone (Associate Judge Osborne) (one hour reserved)**. The hearing will be vacated if Ms Sisson earlier abandons the application to join Mr Hampton.

[11] There has been discussion, in the light of the unopposed joinder of Ms Sisson which is effected by this Minute, as to whether there any longer exists any “very special reason” to also join Mr Hampton. That is a matter for Ms Sisson to discuss further with Mr Hampton. She indicates that she will in any event be now proceeding to file an appeal pursuant to the orders I am making.

[12] Directions are needed for the eventuality that Mr Hampton decides to pursue his joinder.

[13] I direct:

- (a) Ms Sisson is promptly to discuss with Mr Hampton his proposed joinder;

- (b) In the event Ms Sisson and Mr Hampton decide not to pursue his joinder, a memorandum formally abandoning that part of the application which seeks to have Mr Hampton joined is to be filed and served by *5 November 2015*;
- (c) If Mr Hampton's joinder is being pursued, the affidavit evidence in support of his joinder is to be filed and served by *5 November 2015*;
- (d) At the same time the applicant (whom I will regard as Mr Hampton for this purpose) is to file and serve his submissions (to be no longer than five pages) (Court's copy to be in duplicate), together with a bundle of all authorities referred to in the submissions (excluding any authorities referred to for straightforward and uncontentious propositions);
- (e) The respondent shall file and serve not later than *9 November 2015* the respondent's submissions (to be no longer than five pages (Court's copy to be in duplicate), together with a similar bundle of all authorities.

Associate Judge Osborne

Solicitors:
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The Insolvency and Trustee Service, Christchurch (G Slevin)
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