IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

CIV-2017-409-000125
[2017] NZHC 1410

BETWEEN	CHESTERFIELDS PRESCHOOLS LTD (IN LIQ) Judgment Creditor
AND	THERESE ANNE SISSON Judgment Debtor

Hearing: 12 June 2017

Appearances: B M Russell and K E Barry for Judgment Creditor
T A Sisson (in person)

Judgment: 23 June 2017

JUDGMENT OF ASSOCIATE JUDGE OSBORNE
[in bankruptcy proceedings]

Introduction

[1] The judgment creditor (Chesterfields) by its liquidator applies for Ms Sisson's adjudication in bankruptcy. She committed an act of bankruptcy when she did not comply with a bankruptcy notice issued in February 2017. The debt is an interlocutory costs and disbursements order of this Court made on 20 October 2016.

[2] The Court has heard two applications.

[3] First, Ms Sisson applied for an order under s 38 Insolvency Act 2006 (the Act) halting Chesterfields' application for an adjudication order. I heard that application first. I orally dismissed the application with reasons to follow. Those reasons are contained in this judgment.

[4] Secondly, Chesterfields applies for Ms Sisson's adjudication in bankruptcy. Ms Sisson opposes that application. This is my reserved judgment in relation to that application.

Recusal

[5] At the first call of the adjudication application and again at the commencement of this hearing, Ms Sisson orally requested that I recuse myself from hearing her application and the adjudication application. She referred to the fact that I have previously conducted numerous hearings involving her and associated entities. She stated that she had "lost confidence in the Court".

[6] On 19 May 2017, I ruled on that request in the following terms:

> I decline to recuse myself from hearing matters relating to Ms Sisson. I have been involved in numerous matters involving case management and interlocutory and substantive hearings related to Ms Sisson and associated entities. The various rulings and judgments, while numerous and for the most part against Ms Sisson's position, have simply required the Court to apply relevant statutes and well settled principles. There is no basis to suggest that there might be actual or apparent bias in my continuing to deal with matters involving Ms Sisson if they again arise.

[7] As it happened, the first available hearing date was before Associate Judge Matthews (on 12 June 2017). The applications were adjourned to that date for hearing. Ms Sisson at that point indicated that she also objected to Associate Judge Matthews' hearing any case involving her and asked that he be recused. I indicated to her that that was a matter she would have to take up with Associate Judge Matthews.

[8] It transpired that by reason of other subsequent commitments of Associate Judge Matthews, the hearing was re-allocated to me. When Ms Sisson appeared at the hearing, she expressed her surprise that I and not Associate Judge Matthews was presiding. She renewed her request that I recuse myself. I again declined, referring to the reasons set out in my earlier refusal of her request.

The interlocutory costs judgment

How it arose

[9] Chesterfields was put into liquidation by order of this Court on 6 October 2015 (the liquidation judgment).[1]

[10] Following the liquidation judgment, Ms Sisson (the sole director of Chesterfields), on her unopposed application, was joined as a party to the liquidation proceeding to enable an appeal against the liquidation judgment to be pursued on behalf of Chesterfields.[2]

[11] The appeal against the liquidation judgment is for hearing in the Court of Appeal on 27 June 2017.

[12] In the meantime, the liquidators of Chesterfields identified real property and insurance proceeds as assets of Chesterfields. They commenced a proceeding for orders vesting those items of property in Chesterfields. Ms Sisson applied for orders staying enforcement, the vesting order proceeding and another proceeding (in the latter proceeding, Ms Sisson herself was applicant). The ground of each application was that Ms Sisson had commenced a proceeding against the Commissioner of Inland Revenue (the Commissioner) by which she sought to have the liquidation of Chesterfields overturned. Upon the Commissioner's application, this Court subsequently struck out that proceeding.[3] It had been common ground between Ms Sisson and counsel for the Chesterfields liquidators that Ms Sisson's grounds for stay would fall away if the Court were to grant the strike out application. Consequently, the stay applications were also dismissed.[4] The Court ordered Ms Sisson to pay the costs and disbursements of the interlocutory applications to Chesterfields, subsequently fixed at $7,853 ("the costs order").[5]

---

1 *Commissioner of Inland Revenue v Chesterfields Preschools Ltd (in liq)* [2015] NZHC 2440, (2015) 27 NZTC 22-029.
2 *Commissioner of Inland Revenue v Chesterfields Preschools Ltd (in liq)* [2015] NZHC 2667.
3 *Sisson v Commissioner of Inland Revenue* [2016] NZHC 2367.
4 *Chesterfields Preschools Ltd (in liquidation) v Sisson* [2016] NZHC 2368, at [8] – [11].
5 *Chesterfields Preschools Ltd v Sisson,* above n 4, at [18](e).

The unmet bankruptcy notice

[13] After the costs were fixed, Chesterfields had a bankruptcy notice in relation to the costs served on Ms Sisson. She did not make any payment. And she did not apply for an order setting aside the bankruptcy notice. On the case she puts forward here, she could not have applied for an order setting aside the bankruptcy notice because she herself cannot assert a cross-claim against Chesterfields.

[14] Ms Sisson thereby committed an available act of bankruptcy on 20 March 2017. Chesterfields, by its liquidators, filed its adjudication application on 31 March 2017.

Ms Sisson's concerns summarised

[15] What Ms Sisson now asserts, both in support of her halt application and in opposition to the adjudication application, is that there is unfinished business as between Chesterfields (and associated entities) and Ms Sisson on the one hand and the Commissioner on the other.

[16] By her notice of opposition to the adjudication application, Ms Sisson asserts that:

(a) from 1996 there had been on the part of the Commissioner maladministration including non-disclosure conduct which the Commissioner failed to investigate;

(b) the conduct caused damage to Chesterfields and associated entities; and

(c) these matters were the subject of a challenge by the taxpayers under the Tax Administration Act 1994 in a Taxation Review Authority proceeding which was transferred to this Court in 2005 (the TRA proceeding).[6] The TRA proceeding remains on foot, albeit (by reason

[6] *Chesterfields Preschools Ltd v Commissioner of Inland Revenue* TRA01/05; *Chesterfields Preschools Ltd v Commissioner of Inland Revenue* CIV-2005-409-1967.

of the transfer) in this Court.

[17] The linking of the Commissioner's asserted liability to Chesterfields' liquidators is set out by Ms Sisson in two paragraphs in which she states:

- The Commissioner of Inland Revenue Department has sought and seeks to enforce costs and disbursements in circumstances where the Commissioner of Inland Revenue is in breach of its (sic) undertaking.

- The Liquidator (sic) in the proceedings is the alter ego of the Commissioner of Inland Revenue and accordingly the liquidator's claim is inextricably linked to and is compromised by the conduct of the Commissioner in breach of the rule of law.

[18] In the grounds set out in her Notice of Application (for Stay), Ms Sisson further sets out why the Court ought to stay the adjudication application pending the hearing of her appeal against the liquidator judgment:

- The appeal of the liquidation is to be heard on 27 June 2017.

- It would be prejudicial and unfair to allow the liquidator (sic) to proceed while the Court of Appeal is seized of the issue of the validity of the order for liquidation and standing in relation to the proceeding may be compromised by a decision to bankrupt.

- It is not in the interests of Justice for such an order for adjudication to be made.

The application for an order halting Chesterfields' application

Ms Sisson's amended application

[19] Ms Sisson's initial stay application failed to set out the enactments or principles of law on which she relied. But her supporting affidavit identified a number of the provisions in the High Court Rules and the Court of Appeal (Civil) Rules which deal with the stay of proceedings or enforcement. None is directly in point.

[20] Mr Russell, for Chesterfields, identified in his synopsis filed before the hearing the inapplicability of the various stay provisions referred to in Ms Sisson's

synopsis. Mr Russell nevertheless recognised that the Court has jurisdiction under s 38 of the Act to halt an adjudication application.

[21] In that light, Ms Sisson orally sought leave at the start of the hearing to amend her stay application so as to rely on s 38 of the Act. In the absence of opposition, I granted leave to Ms Sisson to proceed on the basis of a halt application so amended.

[22] Whereas the predecessor provision (s 26(7) Insolvency Act 1967) empowered the Court to *stay* adjudication applications, the 2006 Act, in s 38 and related sections, adopts the terminology of *halting* adjudication applications. I adopt the observation of the authors of the commentary in *Brooker's Insolvency Law & Practice,* where they observe that the change of the wording appears to be simply an attempt to modernise the language in the legislation.[7] Cases decided under the former provision will continue to provide guidance on the application of s 38.

[23] As to the flexibility of the discretion under s 38 (and before it, s 26(7) of the 1967 Act), I respectfully adopt the observations of Associate Judge Bell in *Re Bank of New Zealand, ex parte Koroniadis.*[8] His Honour there observed:[9]

> The section is in general terms. It does not set out any particular matters that the court must take into account when considering an application to halt an adjudication application. If Parliament has not set out particular matters which the courts must take into account, it would be inappropriate for the courts themselves to formulate fixed rules as to the exercise of the discretion. It seems clear that Parliament intended the discretion to be flexible. It allows the courts to take into account varying circumstances which may take different weight according to each case.

[24] In parallel with the stay jurisdiction provided under High Court Rules and other instruments, s 42 of the Act specifically permits the Court to halt or refuse an adjudication application where the judgment or order underlying the bankruptcy notice is the subject of an appeal. Similarly, by s 43 of the Act, the Court may halt an adjudication application when there is a question as to whether the debt is owed or as to the amount of the debt.

---

7 *Brooker's Insolvency Law & Practice* (online looseleaf ed, Thomson Reuters) at [IN 38.02].
8 *Re Bank of New Zealand, ex parte Koroniadis* [2013] NZHC 2865.
9 At [11].

[25] Where those specific situations do not arise (as here), a judgment debtor needs to invoke the Court's broader jurisdiction under s 38 of the Act.

[26] As Mr Russell noted, a debtor may resort to s 38 where they have a claim against a third party which would (if successful) satisfy the debt upon which the bankruptcy notice was issued. Mr Russell referred to *Re Kroon ex parte Westpac Banking Corporation* as a case in which the existence of a third party claim was found insufficient to justify a halt to the adjudication application.[10] Associate Judge Doogue there noted that the third party claim involved very substantial amounts of money and might take a long time to conclude.[11]

[27] The Court's approach to third party claims (by reference to earlier authorities) is aptly summarised in the *Laws of New Zealand (Personal Bankruptcy and Insolvency)* commentary, where it is stated:[12]

> Debtors often seek the Court's indulgence to have the use of this general power to halt (stay) proceedings where the debtor claims an action against a third party which could get in enough money to meet the debt of the applicant creditor and possibly other creditors.[13] The Court will consider whether the debtor should be given time to prosecute that action in determining whether to grant an order halting (staying) proceedings on the creditor's application for bankruptcy.[14] Such requests usually fail, as the existence of a claim against a third party is not a basis for refusing the creditor's application, once he or she has established the statutory criteria for seeking the adjudication order.
>
> (with the two footnotes below reproducing the *Laws of New Zealand* footnotes).

Analysis – the pending appeal

[28] The stated ground of Ms Sisson's halt application is that her appeal against the order liquidating Chesterfields is to be heard by the Court of Appeal on 27 June

---

10 *Re Kroon ex parte Westpac Banking Corporation* HC Auckland, CIV-2006-404-4720, 24 April 2007.

11 At [82].

12 K Crossland (ed) *Laws of New Zealand (Personal Bankruptcy and Insolvency)* (Reissue 1) (LexisNexis, Wellington, 2010) at 123.

13 *Re Twidle* [1916] NZLR 748, [1916] GLR 533 (SC) and *Ellis v NZI Finance Ltd* CA 253/89, 24 July 1990.

14 *Re Twidle*, above n 13, and *Ellis v NZI Finance Ltd*, above n 13. It is suggested that the length of time needed to prosecute the debtor's action will be a factor to be taken into account. Another factor will be the ability on adjudication of the Assignee to impugn transactions which might not be impugned if an application for bankruptcy was halted (stayed) beyond the period within which the Assignee could act to set aside such transactions

2017. Ms Sisson submits that were she to be adjudicated bankrupt in the meantime, her standing in the appeal will be compromised. Consequently, she submits, it would be prejudicial and unfair to allow the liquidators, in the meantime, to pursue her adjudication in bankruptcy.

[29] I will first consider the standing point. Ms Sisson did not develop this ground in her written synopsis. In the course of her oral submissions, she noted that the Official Assignee (in the event of Ms Sisson's bankruptcy) would be unlikely to engage in the appeal. In that event, given the time remaining, Ms Sisson submitted that the Commissioner, as respondent on the appeal, will object to her standing. Ms Sisson noted that the Court of Appeal has waived provision of security for the costs of the appeal by reason of Ms Sisson's financial position.

[30] While Ms Sisson is clearly concerned that, in the event of her intervening bankruptcy, the Commissioner may attempt to impede the hearing of the appeal, the matters she raises do not of themselves prevent her being heard on the appeal. She (by reason of her joinder) is a party in the appeal proceeding. She was joined in her capacity as someone able to present argument on behalf of Chesterfields. She was not joined in relation to her personal interest. Her bankruptcy would not operate to cut across her joinder. The appeal proceeding is not affected by the statutory halt provision under s 76 of the Act. Proceedings which are by that provision automatically halted on adjudication are those *to recover any debt provable in the bankruptcy*.[15]

[31] Secondly, the Court of Appeal's dispensing with security for costs appears unlikely to have any impact on Ms Sisson's ability to pursue the appeal.[16] Ms Sisson's impecuniosity is likely to have been a significant factor in the Registrar's decision to dispense with security, and Ms Sisson's adjudication in bankruptcy does nothing to affect the factual circumstances of her impecuniosity. The making of an

---

15 Insolvency Act 2006, s 76(1).

16 Rule 35(6) Court of Appeal (Civil) Rules empowers the Registrar, if satisfied that the circumstances warrant it, to make various orders including the dispensing with security. In *Reekie v Attorney-General* [2014] NZSC 63, [2014] 1 NZLR 737 at [27] – [44], the Supreme Court examined the factors which bear on the circumstances in which the Registrar should dispense with security on grounds of impecuniosity.

order of adjudication does not of itself constitute a ground for the revisiting of the Registrar's decision to dispense with security.

[32] In conclusion, I am not satisfied that Ms Sisson's adjudication in bankruptcy would affect her standing to pursue her appeal.

Impecuniosity – the issue before the Court of Appeal – the lack of substantive merit

[33] The issue before the Court of Appeal is whether the liquidation order should have been made. Were the appeal to be granted, it would not affect the validity of the costs order (and other costs orders made at the same time). Regardless of the outcome of the liquidation appeal, Ms Sisson will remain indebted to Chesterfields and the Commissioner pursuant to those costs orders.

[34] Ms Sisson does not have either an application for review or an appeal in relation to the costs orders running parallel to her appeal in relation to Chesterfields' liquidation.[17] On 12 June 2017, the day of this hearing, Ms Sisson applied to the Court of Appeal for an extension of time to appeal the (20 October 2016) costs orders. These matters were this week adverted to by Cooper J in a judgment of the Court of Appeal dismissing Ms Sisson's application for a stay of the adjudication proceeding (following my oral decision refusing the halt application). The Court noted the "belated nature of the attempt to appeal the costs judgments" and that "there was no extant appeal at the time the Associate Judge made his order [dismissing the halt application]".[18]

[35] Even were Ms Sisson granted leave to pursue an appeal against the costs orders out of time, Ms Sisson has not pointed to any basis upon which the costs order flowing from her unsuccessful strike out application should be reversed.

[36] As the reasons judgment on the strike out application indicates, Ms Sisson's proceeding which was struck out was misconceived and without hope of success.

---

[17] It appears from Ms Sisson's oral submissions that she had intended to challenge the costs orders but failed to file the necessary papers for either review or appeal within time. She advised the Court at this hearing that on 9 June 2017, she had filed fresh documents applying for an extension of time to appeal.

[18] *Sisson v Chesterfields Preschools Ltd (in liq)* [2017] NZCA 257 at [11].

Absent a viable proceeding, her consequential stay applications (as she conceded) also had to be dismissed.[19] Regardless of any success which might occur in later substantive proceedings against the Commissioner, there would be no basis upon which to reverse the interlocutory costs orders so incurred.

[37] Having regard to these matters, neither of the grounds set out by Ms Sisson in her notice of application is established. As she has not sought to amend her grounds, that is sufficient to dispose of her application.

[38] This conclusion is, as a matter of the Court's discretion, reinforced by the situation which confronts creditors of Chesterfields. At the time of Chesterfields' liquidation, the company was clearly insolvent in both the balance-sheet and cash-flow senses. It continues to be so.

[39] Since the liquidation order was made, the liquidators have appropriately incurred costs in resisting Ms Sisson's applications pursuant to which the costs orders were made. The interlocutory costs orders became payable when fixed.[20] The liquidators had a responsibility to get in the assets of Chesterfields. Failing a debtor's satisfaction of her debt, Chesterfields is entitled, if there is evidence of insolvency, to pursue that debtor's bankruptcy so that the Assignee will have control of Ms Sisson's (bankrupt) estate.

[40] Ms Sisson, in pursuing a halt, places emphasis upon the different outcome she might achieve for Chesterfields if:

(a) Chesterfields' liquidation is set aside;

(b) Ms Sisson is not bankrupted; and

(c) Ms Sisson instead is able to have Chesterfields pursue a new proceeding of the nature previously struck out (when commenced in Ms Sisson's name).[21]

---

19 *Sisson v Commissioner of Inland Revenue* [2016] NZHC 2367.
20 Rule 14.8(1)(b) High Court Rules.
21 Above at [12].

[41] Ms Sisson's submissions overlook or disregard the fact that Chesterfields was insolvent at the time the liquidation order was regularly made. A significant part of Chesterfields' unsatisfied indebtedness (beyond the very substantial tax liabilities which had merged in judgment) arose through the attempts of the taxpayers (including Ms Sisson) to identify and pursue through further litigation what they perceived to be unsatisfied liabilities of the Commissioner. In the normal course, a liquidator cannot be faulted for promptly moving to get in the liquidated company's assets for the benefit of creditors or, failing that, taking steps to have an insolvent debtor bankrupted or liquidated. The incidental benefit to the company in liquidation, of not facing further costs of continued litigation, is of obvious benefit to the company in liquidation (and potentially its creditors). It is a valid consideration to be weighed by the liquidators in their decision-making.

[42] Ms Sisson in her submissions sought to taint the decision of the liquidators to pursue her bankruptcy by developing the grounds set out in her notice of opposition (summarised above at [16]). The entire emphasis of those grounds related to conduct of the Commissioner from 2005, which has been the subject of numerous proceedings and judgments of the Courts. More recently, (following a judgment of the Court of Appeal's judgment in 2010),[22] the taxpayers' taxation liabilities were the subject of reassessment by the Commissioner. The Commissioner remitted penalties to an extent which met the reasonable requirements recognised by a majority of the Court of Appeal. If Chesterfields, notwithstanding its previously unsuccessful attempts to reduce its indebtedness to the Commissioner, can point to a remaining, viable argument, it is an argument of the most tenuous kind. The Court of Appeal (in 2010) expressly recognised that the Commissioner was to be able to collect immediately at least the core tax owing (and not put into dispute by the taxpayers) and some portion of associated penalties.

[43] The taxpayers (including Ms Sisson) have failed in repeated attempts to resuscitate arguments aimed at eliminating the debt which Chesterfields owes to the Commissioner. Two of the taxpayers (Ms Sisson and Mr Hampton) are through that endeavour now themselves substantial debtors of Chesterfields. There is significant

---

[22] *Commissioner of Inland Revenue v Chesterfields Preschools Ltd* [2010] NZCA 400, (2010) 24 NZTC 24,500.

benefit for Chesterfields in having the independent and expert view of Court-appointed liquidators (rather than aggrieved shareholders/directors) in control of decisions as to what is in the interests of Chesterfields and its creditors.

[44] Ms Sisson submits that this is not a case in which the independence of the liquidators can or should be assumed. Her attack on the independence of the liquidators is spelt out in her detailed grounds of opposition in the submission that the liquidators are the alter ego of the Commissioner. On that basis, as her notice of opposition states, Ms Sisson submits:

> … accordingly the liquidator's (sic) claim is inextricably linked to and is compromised by the conduct of the Commissioner in breach of the rule of law.

[45] Ms Sisson's grounds of opposition do not identify any underlying factual basis for the grounds so stated. Nor does any affidavit evidence filed by Ms Sisson identify such underlying factual material.

[46] In her oral submissions, Ms Sisson submitted that the liquidators, by taking steps to enforce liabilities which arise out of taxation matters governed by the Tax Administration Act 1994, have duties which correspond to those of the Commissioner under the Act. This is so, she submits, because the liquidators are "officers of any government agency having responsibilities under the Tax Administration Act or any other Act in relation to the collection of taxes and other functions under the Inland Revenue Acts", as those words appear in s 6 Tax Administration Act. Ms Sisson notes that the main area of dispute between herself and the Commissioner relates to "serious maladministration" on the part of the Commissioner and her officers. She submits any claim of the liquidators is tainted to the same degree as the Commissioner's claims.

[47] Ms Sisson's submission mischaracterises the functions of the liquidators in having Chesterfields pursue this bankruptcy proceeding. They act as liquidators, officers of the Court, duly appointed under the Companies Act. Chesterfields' status as a creditor in this bankruptcy proceeding flows from a judgment debt, not a sum any longer claimed to be owing whether under the Tax Administration Act or any related Inland Revenue Act.

[48] The judgment debt of Ms Sisson to Chesterfields is untainted by any allegation of maladministration on the part of the Commissioner which Ms Sisson may seek to pursue. It is the right of Chesterfields (indeed the responsibility of the liquidators) to seek to get in that asset.

[49] Ms Sisson's notice of opposition has this concluding paragraph:

> As a result of the failure to investigate the Complaint, the enforcement of the costs and disbursements by the Commissioner and liquidator is excessive, inappropriate, unfair, punitive, and/or manifestly unjust, constitutes an improper exercise of the Commissioners (sic) powers, and is repugnant to the public interest.

[50] For the reasons stated, even were the taxpayers to have a viable, remaining complaint of maladministration against the Commissioner (which I do not find), Ms Sisson has not established a tenable basis for the linking of any impropriety to Chesterfields or its liquidators.

[51] The (judgment) indebtedness of Ms Sisson to Chesterfields is established. Ms Sisson has not rebutted the presumption of insolvency arising from her failure to meet the bankruptcy notice. The matters asserted by Ms Sisson as making it appropriate that the Court, in its discretion, nevertheless refuse to make an order of adjudication fall far short of justifying such a step.

[52] This conclusion in relation to the substantive merits (or lack thereof) of Ms Sisson's grounds of opposition constitutes a further compelling reason for refusing to halt the bankruptcy proceeding.

Outcome – halt application

[53] Ms Sisson's application for an order halting this proceeding was accordingly dismissed orally for the above reasons.

The adjudication application

Analysis

[54] In considering Ms Sisson's halt application, the Court has necessarily considered the substantive merits of Chesterfields' adjudication application and Ms Sisson's substantive grounds of opposition (above at [33] – [52]).

Outcome – adjudication application

[55] Chesterfields is entitled to an order adjudicating Ms Sisson bankrupt.

Costs

[56] Costs must follow the event.

[57] I heard submissions from Mr Russell and Ms Sisson as to costs and disbursements at the conclusion of their other submissions.

[58] Mr Russell submitted that in the event an adjudication application was made there should be an award of costs on a 2B basis together with an uplift of 50 per cent.[23]

[59] Under r 14.6(3)(b)(ii), the Court may order a party to pay increased costs if that party has pursued an unnecessary step or an argument which lacked merit.

[60] That is clearly the case here. There was merit in neither the application for a halt order nor the opposition to the adjudication order.

[61] The costs order will reflect those matters.

Orders

[62] I order (in addition to the order made orally on 12 June 2017):

(a) Therese Anne Sisson is adjudicated bankrupt.

---

[23] High Court Rules, Category 2 under r 14.3(1) and band B under r 14.5(2).

(b) The bankrupt is to pay to the plaintiff the costs of the adjudication application and of her application for an order halting this proceeding on the basis of a 2B calculation with a 50 per cent uplift and together with disbursements to be fixed by the Registrar.

(c) The order is timed at 12.30 pm.

Associate Judge Osborne

Solicitors:
Lane Neave, Christchurch
Official Assignee

Copy to: T A Sisson, Christchurch