IN THE COURT OF APPEAL OF NEW ZEALAND

CA633/2015
[2017] NZCA 326

BETWEEN	THERESE ANNE SISSON Appellant
AND	THE COMMISSIONER OF INLAND REVENUE First Respondent
	CHESTERFIELDS PRESCHOOLS LIMITED (IN LIQ) Second Respondent

Hearing:	27 June 2017
Court:	Brown, Dobson and Brewer JJ
Counsel:	Appellant in person P J Shamy and S Kinsler for Respondent
Judgment:	28 July 2017 at 11.30 am

JUDGMENT OF THE COURT

A **The application to adduce further evidence is granted in respect of the NZI Limited email of 16 March 2016 and the market appraisal of 854 Colombo Street. The application is otherwise declined.**

B **The appeal is allowed on the condition that within 15 working days of this judgment the appellant pays into the High Court at Christchurch the amount of $109,675.22. Subject to the condition being satisfied, the liquidation order is set aside and the proceeding remitted to the High Court for rehearing.**

C **There is no order as to costs.**

REASONS OF THE COURT

(Given by Brown J)

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Introduction

[1] Chesterfields Preschools Ltd (CPL) was put into liquidation by the order of the High Court in *Commissioner of Inland Revenue v Chesterfields Preschools Ltd*,[1] it having failed to comply with a statutory demand for $1,231,940.11 served by the Commissioner of Inland Revenue (the Commissioner). The appellant, Ms Sisson,[2] appeals that decision, contending that CPL is not insolvent and that the Commissioner's claim for unpaid tax, interest and penalties is disputed.

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1 *Commissioner of Inland Revenue v Chesterfields Preschools Limited* [2015] NZHC 2440, (2015) 27 NZTC 22-029 [*Liquidation judgment*].

2 Ms Sisson, who is a director of CPL, was joined as a party in order to pursue this appeal: *Commissioner of Inland Revenue v Chesterfields Preschools Ltd (in liq)* [2015] NZHC 2667.

[2] The Commissioner responds that CPL is precluded by the doctrine of res judicata from asserting that the claim is in dispute in view of an earlier judgment of this Court in *Commissioner of Inland Revenue v Chesterfields Preschools Limited*.[3] Our consideration of this appeal therefore necessitates a review of the prior litigation between CPL and the Commissioner.

Litigation history in brief

[3] Mr Hampton and his former wife, Ms Sisson, were involved for several years in various business ventures run through a number of different entities including, in addition to CPL, Chesterfields Partnership, Chesterfields Preschools Partnership and Anolbe Enterprises Ltd. In several litigation episodes described in the following narrative, a number of those entities were plaintiffs together with Mr Hampton personally. We will refer to them collectively as the taxpayers.

[4] The taxpayers' escalating indebtedness to the Commissioner was attributable in significant part to the way in which their tax affairs were intertwined. As Fogarty J explained in the first judicial review decision:[4]

> [138] The revenue legislation does provide for entities to make tax returns as a group and as between them offset tax losses and make subvention payments. Because this was a mixture of limited liability companies, partnerships and personal taxpayers, husband, wife, and sister, the group entity provisions do not apply. But for practical purposes Mr Hampton seems to have sought to operate all aspects of the family ventures as a group for tax purposes. The core income generating activity are two preschool businesses, a bed and breakfast venture (about to start trading) and some property development, in progress.
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> [139] This combination of a casual approach to filing returns and paying tax in arrears, and a myriad of related parties' dealings, overlaid by Departmental suspicion, has led to a quite extraordinary outcome of indebtedness.

[5] The present appeal concerns CPL alone. It commenced operations in September 1993, having acquired the property at 396 Manchester Street, Christchurch, and the preschool business operated there in July 1993.

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3 *Commissioner of Inland Revenue v Chesterfields Preschools Ltd* [2010] NZCA 400, (2010) 24 NZTC 24,500 [*Second judicial review decision (CA)*].

4 *Chesterfields Preschools Ltd v Commissioner of Inland Revenue* (2007) 23 NZTC 21,125 (HC) [*First judicial review decision*].

[6] It appears that CPL's tax self-assessments based on tax returns it filed were either not disputed by the Commissioner or, where disputed, were resolved in the Commissioner's favour. Hence in the Commissioner's view those tax assessments were not capable of challenge pursuant to s 109 of the Tax Administration Act 1994.

[7] A number of proceedings were filed for the liquidation of CPL, either initiated by or supported by the Commissioner, but CPL was never wound up as the proceedings were resolved by debt payments.[5] In April 2004 the Commissioner served on CPL a statutory demand demanding payment of the sum of $620,545.94 which comprised:

PAYE, GST, Income Tax	$318,787.53
Late payment penalties	$190,119.86
Interest	$171,781.28
(Payments)	($60,142.73)
	$620,545.94

The Commissioner also commenced summary judgment proceedings against Mr Hampton and the two partnerships.

[8] CPL's solicitors filed an application to set aside the statutory demand on 18 May 2004. An affidavit in support by Mr Hampton explained his view that a substantial dispute existed as to whether CPL owed the Commissioner the amount demanded.

First judicial review proceeding

[9] In 2004 the taxpayers filed a judicial review proceeding, the tenor of which is captured in the following from the resulting judgment of Fogarty J:[6]

> [1] This is a difficult case. The events are spread over a long period of time. There are numerous taxpayers' accounts. The "taxpayers" have been trying to take full advantage of every strategy possible to reduce tax. The

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5 At [141].

6 *First judicial review decision*, above n 4. The figure of approximately $4 million was the level of debt in November 2006: at [5].

> "taxpayers" accounts have now got quite out of hand. Against core assessments in excess of $900,000, there is now a total liability on paper of about $4 million, the additional $3 million being made up of late payment penalties and interest. The plaintiffs seek judicial review on numerous past decisions of the Commissioner.
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> …
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> [30] At the heart of the plaintiffs' grievances in this case are several contentions that the Commissioner has not kept arrangements or should have accommodated the plaintiffs more effectively with earlier recognition of refunds of GST. As part of recognition of the refunds, penalties should be remitted on the accounts which were to benefit from the refunds.

[10] The figure of $3,393,822.55 (calculated by the Commissioner as at 3 May 2006) was spread among the taxpayers as follows:[7]

Chesterfields Partnership	$1,209,019.67
Chesterfields Preschool Ltd	$969,857.28
Chesterfields Preschool Partnership	$242,770.82
Anolbe Enterprises Partnership	$249,211.87
Mr Hampton	$722,963.20
	$3,393,822.55

[11] The amount of $969,857.28 claimed to be payable by CPL comprised:[8]

Total assessments	$387,347.43
Late payment penalties	328,942.06
Interest	325,737.39
Payments	72,169.60

[12] On 25 January 2005 the taxpayers filed a notice of claim in the Taxation Review Authority (TRA). It was a voluminous document of some 120 pages. The Commissioner filed an application for transfer of the challenge proceeding to the High Court and sought an order for consolidation with the judicial review proceeding (the statement of claim in which was 121 pages).

[13] Noting that it was common ground that the proceedings before the TRA and in the High Court overlapped, Fogarty J ruled:[9]

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7 At [3]–[4].
8 At [4].
9 *Chesterfields Preschools Ltd v Commissioner of Inland Revenue (No 2)* (2005) 22 NZTC 19,500 (HC).

> [56] In the totality of all the circumstances I think there is a serious argument that lodging proceedings before the Taxation Review Authority when there are all these proceedings before the High Court is quite inefficient, if not itself threatening to unfairly prevent the Commissioner of Inland Revenue from enforcing the tax statutes. These proceedings will be and are transferred to the High Court.

[14] Also before the Judge was an application to consolidate, with the judicial review proceeding, various other proceedings, including the applications for summary judgment against some taxpayers[10] and the opposition by CPL to the Commissioner's statutory demand.[11] Fogarty J considered that the proceedings could not be consolidated in a formal sense because they were too different in character. However in lieu of formal consolidation he directed that the various proceedings were to be placed under his case management, that the judicial review proceeding would be heard first and that the other cases would be case managed in order to be ready to proceed immediately after the judicial review hearing.[12]

[15] In the substantive judgment delivered on 15 December 2006 (the first judicial review decision) Fogarty J found generally in favour of the taxpayers. The Judge recognised that Mr Hampton was "to put it mildly, an extremely difficult 'taxpayer' to deal with",[13] who expected to be able to move credits from one taxpaying entity to another on the strength of handwritten letters filed from time to time. The Judge recorded that the Inland Revenue Department (IRD) officers were highly suspicious of many of the transactions which accounted in large part for halts which were placed on the GST refund credit returns,[14] later summarising his view in this way:[15]

> [12] The IRD officers were sceptical of a number of GST input credit claims. They were sent off to audit for vetting, where they languished for years. Had the IRD accepted the GST inputs and then booked them to account at an appropriate and much earlier date from the date of acceptance then there would have been a very large reduction in the interest and penalties. The total indebtedness of the plaintiffs would be much reduced from the amount the Commissioner is now claiming and upon which he is seeking judgment.

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10 At [7] above.
11 At [8] above.
12 *Chesterfields Preschools Ltd v Commissioner of Inland Revenue*, above n 9, at [57].
13 *First judicial review decision*, above n 4, at [144].
14 At [144].
15 In the second judicial review decision: *Chesterfields Preschools Ltd v Commissioner of Inland Revenue (No 2)* (2009) 24 NZTC 23,148 (HC) [*Second judicial review decision (HC)*].

[16] In the first judicial review decision, Fogarty J found that while the taxpayers did not establish the "arrangements" with the IRD contended for, Mr Hampton had received sufficient assurances or commitments from IRD officers that, for all practical purposes, had the same effect as arrangements.[16]

[17] The judgment set aside a decision by the Commissioner declining remission (under s 182 of the Tax Administration Act 1994) of additional tax. It required the remission issue to be reconsidered and gave directions as to that reconsideration which, given the events which followed, we set out verbatim:[17]

> 4. Make a decision under s 182 of the [Tax Administration Act], as preserved by Taxation (Remedial Provisions) Act 1999, s 103, treating the historic correspondence and meetings from and with Mr Hampton as substantive requests for remission, in respect of all the plaintiffs, received before 23 September 1997, and in so doing recognise that Mr Hampton was led to believe that the GST input claims he was lodging would be considered and decisions made upon them and refunds lodged to the best advantage of the plaintiffs.
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> 5. Make a decision under s 183A, as to remission in respect of the period that has elapsed while this litigation has been proceeding.

[18] As the Supreme Court later commented, those directions imposed constraints on the Commissioner to ensure that the reasonable expectations of the taxpayers were not frustrated.[18] The Court noted that:[19]

> Relevant to the required reconsideration was the Judge's apparent view that the Commissioner was required to remit additional tax to the extent necessary to ensure that the resulting impost was proportionate to the breaches on the part of the applicants and his conclusion that if the conditions for remission stipulated in s 182 could not be satisfied, the Commissioner should resort to his more general powers under ss 6 and 6A of the Tax Administration Act.

[19] The debt collection proceedings against the taxpayers were adjourned pending the outcome of compliance with the directions.[20] The Commissioner did not appeal the first judicial review decision.

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16 At [14].
17 *First judicial review decision*, above n 4, at [159].
18 *Chesterfields Preschools Ltd v Commissioner of Inland Revenue* [2010] NZSC 155, (2011) 25 NZTC 20-017 at [2].
19 At [2].
20 *First judicial review decision*, above n 4, at [159].

Second judicial review proceeding

[20] The reconsideration directed by Fogarty J resulted in a decision made on 5 June 2007 by an IRD officer, Mr Budhia. The result of Mr Budhia's reconsideration was that the total indebtedness of the taxpayers was reduced, but not by much. As at 11 September 2008 the total liability of CPL, according to the IRD, was $1,508,354.46.

[21] However, Fogarty J considered that there were serious grounds for contending that Mr Budhia's decision did not accord with the directions in the first review judgment. In the context of an application by the taxpayers to set aside injunctions, the Judge indicated that one way to challenge that decision was by way of a further application for judicial review.[21]

[22] The taxpayers accordingly brought a second application for review, which resulted in a further judgment of Fogarty J (the second judicial review decision).[22] Again, the Judge found substantially for the taxpayers, observing that "[n]on-compliance pervaded the analysis and decision making that went to the Commissioner's purported compliance with the directions" in the first judgment.[23] Concluding that Mr Budhia had been wrong in a number of respects, the Judge set that decision aside, together with any consequential decisions, and directed further reconsideration in the following terms:[24]

> 2. The Commissioner is redirected to act upon the December judgment and to reconsider the matters in accordance with the Court's directions in that judgment, being bound to the reasons of that and this judgment.

The stay of debt collection proceedings remained in place.[25]

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21 *Chesterfields Preschools Ltd v Commissioner of Inland Revenue* HC Christchurch CIV-2004-409-1596, 31 October 2007.
22 *Second judicial review decision (HC)*, above n 15.
23 At [90].
24 At [118].
25 At [96].

The Court of Appeal decision

[23] The Commissioner appealed against the second judicial review decision contending that he had fully complied with the first judicial review decision and that the second judicial review decision wrongly reinterpreted and extended the first. The majority (Glazebrook and Chambers JJ) allowed the appeal but only to a limited extent, specifically in relation to Anolbe Enterprises Ltd.[26] Baragwanath J would have allowed the appeal in full except in one respect.

[24] In the Court of Appeal the Commissioner filed an affidavit dated 5 June 2009 of Mr Doubleday, a senior investigator in the IRD Large Enterprises Unit in Christchurch. Annexed were schedules comprising 41 pages prepared by Mr Doubleday providing a detailed summary of the tax debts of the taxpayers as at July/September 2008 and historical movements in each tax account since the indebtedness first arose.

[25] At [8.1] the affidavit set out a table summarising the taxpayers' overall tax indebtedness by entity as at July/September 2008 which we reproduce only so far as it referred to CPL:

		[A]	-[B]	-[C]	=[D]
Entity	Tax Type	Debt Total by Entity by Tax Type	Chch HC Challenge	Default Assessments	Not Disputed Not Challenged
CPL	Total	$1,467,585.23	$0.00	$70,078.09	$1,397,507.14

[26] Although the majority indicated that the first judicial review decision could well have been subject to a successful appeal and stated that it should be treated as confined to its unusual facts, they emphasised that their judgment was predicated on the fact that the Commissioner was bound by the findings of fact and law in that judgment because he did not appeal against it.[27] The majority observed:

> [90] While the Judge had upheld the decision not to remit penalties under s 183A made by the Commissioner on 9 June 2004, he does appear to have expected the Commissioner to reconsider the position, taking into account the delays, the assurances and comfort given which gave rise to the

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26 *Second judicial review decision (CA)*, above n 3, at [178].

27 At [149].

"reasonable expectations" that the sums owing were negotiable and the deteriorating financial position of the taxpayers.

[91] In our view, what the first judicial review judgment required in this regard was for the Commissioner first to assess: the level of inordinate delay, being delay that cannot be explained by the needs of the investigation (noting the particular care that must be invested in any investigation which may result in criminal charges); ordinary workload pressures; any failures of the taxpayers to provide information; any conflicting instructions given; the reasonable suspicion with which the transactions were regarded; and the sheer complexity and confusion surrounding these taxpayers' affairs. The Judge was then expecting that some portion of the penalties for the period of inordinate delay would be remitted (using ss 6 and 6A of the [Tax Administration Act] if necessary). This direction does not seem to have been limited to the amounts actually in dispute but related more widely to the accounts of the taxpayers generally.

[92] As Dr Harley, counsel assisting the Court, submitted, the Judge seems to have had in mind a certain minimum percentage of penalties that should be remitted to take account of the Commissioner's responsibility for the level of penalties and to take into account the effect of the litigation and the taxpayers' financial circumstances. We do not read this as suggesting that this deteriorating financial situation was in any way the fault of the Commissioner. Indeed, such a finding could not rationally have been made.

[93] Given the long history of this matter, rather than undertaking the laborious process of consideration set out above, a pragmatic course may be merely to reduce penalties by a certain percentage across the board. In this regard, a reduction of 15% would, in our view, more than fulfil the requirements of the first judicial review judgment. In saying this, we are not to be taken as mandating this pragmatic approach. Rather we raise it as an alternative solution. It is for the Commissioner to choose whether or not he wishes to adopt this pragmatic approach.

(Footnotes omitted.)

[27] In relation to remission of some portion of the penalties, noted in [91], this Court made two comments:[28]

(a) First, given the confusing nature of the taxpayers' affairs and their clear defaults, the Court thought that considerable leeway would be accorded to the Commissioner in this regard. The fact that the taxpayers could have used their resources to pay tax (but chose to await the outcome of the investigations) was noted to be a relevant consideration.

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28 At n 106 and 107.

(b) Second, the Court considered that only a portion of penalties should be remitted, even for the period of inordinate delay, as the taxpayers could clearly have paid the taxes rather than waiting for the result of the investigation.

[28] The Court did not consider that the stay of enforcement should continue, stating:

> [146] Fogarty J has restrained the Commissioner from collecting any of the taxation owed by the taxpayers until the first judicial review judgment has been complied with. In our view, this is unreasonable. The Commissioner should be able to collect immediately (at the least) the core tax owing which is not in dispute (and some portion of the associated penalties).
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> [147] We had hoped to have the Commissioner provide calculations in this regard (on the most favourable assumptions for the taxpayers) but it did not prove possible in the timeframe. If these calculations can be provided to the High Court, however, we would expect the order would be varied to allow immediate collection of the undisputed core tax and some associated penalties.
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> (Footnote omitted.)

In relation to the calculations mentioned in the first sentence of [147] the Court stated:[29]

> Given that these penalties relate to core tax which is not under dispute we would have thought that the percentage of any write off of penalties for inordinate delay of the Commissioner would be very small, even taking into account that the Commissioner is bound by the first judicial review judgment. We also see no reason why the normal rules as to collection should not apply to tax (and penalties) in dispute.

[29] Regrettably the judgment did not provide any indication, at least in relation to CPL, as to what the Court considered was the amount of the "undisputed core tax" or the amount of "some associated penalties".

[30] An application by the taxpayers for leave to appeal to the Supreme Court was declined, the Court commenting:[30]

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29 At n 175.

30 *Chesterfields Preschools Ltd v Commissioner of Inland Revenue*, above n 18 (footnotes omitted).

> [8] The merits of the competing positions have now been fully reviewed twice by Fogarty J and by the Court of Appeal. Leaving aside perhaps the proportionality issue, the proposed arguments do not raise any substantial issue of principle and we are not persuaded that there is an appearance of error in relation to the Court of Appeal judgment such as could give rise to a miscarriage of justice.
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> [9] 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.

Other proceedings

[31] Before narrating the events subsequent to the judicial review proceedings, it is convenient to note three other proceedings instituted by CPL and other taxpayers against the Commissioner.

[32] First, in May 2008 the taxpayers filed a statement of claim alleging misfeasance in public office by the Commissioner, Mr Shamy (counsel for the Commissioner), the Attorney-General and various IRD officers. The Commissioner's application for strike-out was declined by Associate Judge Osborne.[31] On review that decision was largely upheld by Fogarty J.[32] However, on appeal this Court struck out the misfeasance claim against the Commissioner and Mr Shamy and stayed the claim against the remaining defendants until it was repleaded by a lawyer holding a current practicing certificate and leave was granted by a High Court Judge.[33] That claim remains stayed.

[33] Secondly, on 3 September 2008 the taxpayers filed a statement of claim against the Commissioner alleging the pursuit of malicious civil proceedings. The High Court struck out the bulk of the claim, leaving CPL as the sole remaining

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31 *Chesterfields Preschools Ltd v Commissioner of Inland Revenue* (2011) 25 NZTC 20-092 (HC).
32 *Chesterfields Preschools Ltd v Commissioner of Inland Revenue* [2012] NZHC 1302.
33 *Commissioner of Inland Revenue v Chesterfields Preschools Ltd* [2013] NZCA 53, [2013] 2 NZLR 679.

plaintiff.[34] On 9 October 2012 Associate Judge Osborne refused Mr Hampton's application to represent CPL in that claim,[35] and it remains stayed pending representation.

[34] Thirdly, on 29 October 2009 the taxpayers commenced a proceeding in the High Court (the NOPA proceeding).

The Commissioner's recalculation

[35] After considering the Court of Appeal's judgment the Commissioner elected to adopt the "pragmatic approach" pursuant to the powers under ss 6 and 6A of the Tax Administration Act. Using the schedules prepared by Mr Doubleday in July 2008 for the base figure to be adjusted by 15 per cent as suggested by this Court, the Commissioner determined the level of indebtedness of CPL to be $1,199,835.11, calculated as follows:

Debt owing as per the schedules as at July 2008		$1,467,585.23
Less 15% reduction	$197,472.03	$197,472.03
Sub total still due		$1,270,113.20
Less default assessments		$70,278.09
Amount for which recovery action can be taken		$1,199,835.11

[36] The Litigation Management Director for IRD notified CPL of the Commissioner's proposed approach in a letter dated 27 July 2012, in which she further explained the intention to cancel total penalties and interest in the period 31 July 2008 to 25 May 2011 in the sum of $470,810.11:

> Additionally, and to offer some finality to matters, once the 15% reduction has been made the Commissioner intends to cancel any penalties and interest imposed subsequent to that date. This would effectively fix the level of indebtedness. This extra step is not required by the Court of Appeal but is consistent with resolving matters between the parties. It is considered that, if the 31 July 2008 date is adopted, then the use of resources saved by such a course would justify removal of the subsequent penalties and interest.

[37] In a lengthy letter in response dated 17 August 2012 Mr Hampton declined what he described as the said Commissioner's "settlement offer", stating:

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[34] *Chesterfields Preschools Ltd v Commissioner of Inland Revenue* [2012] NZHC 394, (2012) 25 NZTC 20-112.

[35] *Chesterfields Preschools Ltd v Commissioner of Inland Revenue (No 6)* [2012] NZHC 2629, (2012) 25 NZTC 20-147.

> The plaintiffs respectfully consider that it is unsafe for the taxpayers to rely on the adverse findings of the judgments as the sole ground or basis for determining the terms of settlement, given the unresolved complaints of maladministration, and the fact the evidence of alleged maladministration conduct and the efforts of the plaintiffs to resolve their complaints and the payment of their tax accounts without waiting for audit decisions on the various GST refund claims, are yet to be tried by the Courts. These are factors for investigation and determination by the High Court at trial.

[38] The Litigation Management Director responded in a letter of 25 September 2012, recording the Commissioner's stance that civil claims in tort were not relevant to CPL's obligation to pay tax, and noting the intention to proceed to implement the proposal on the basis set out in the letter of 27 July and recommence debt recovery proceedings against CPL.

[39] By memorandum dated 19 August 2014 the Commissioner applied to the High Court to lift the stay on debt recovery proceedings.[36] The memorandum summarised the tax owing by CPL at key decision points and at that date of application in this manner:

1st JR, 3 May 2006	$969,857.28
2nd JR, 11 September 2008	$1,508,354.46
Position at July 2008	$1,467,585.23
Current position	$1,199,835.11
Relief allowed	$197,472.03

The Commissioner explained that she had stopped further penalty and interest accumulation after July 2008 and she drew attention to the exchange of correspondence in July and August 2012 concerning the recalculation of the debts.

[40] On 23 September 2014 Fogarty J issued a minute granting the Commissioner's application to lift the stay on debt recovery proceedings.

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[36] At a hearing before Fogarty J on 30 July 2014 the Judge advised that such an application could be made by way of memorandum.

The new statutory demand

[41] A conference convened before Associate Judge Osborne on 27 November 2014 addressed the case management of the proceeding relating to the Commissioner's 2004 statutory demand against CPL. In a subsequent minute dated 1 December 2014 the Associate Judge commented:

> [15] I note that this is a very unusual case because of the Stay which had been in place. The underlying demand is now ten years old. Although I did not discuss the matter with the parties at the conference, it occurs to me that a fresh demand might be considered appropriate (although I emphasise that I do not in any sense determine that a fresh demand is actually required). A consideration for the Commissioner must be whether the amounts set out in the table to the statutory demand totalling $620,545.94 are still accurate. If not, the Commissioner may see fit to withdraw that demand without prejudice to the costs of this present proceeding and to replace it with an up-to-date demand.

The minute directed that, in the event the Commissioner elected to proceed on a new statutory demand, any application to set it aside was to be filed and served within 10 working days of service.

[42] On 5 December 2014 the Commissioner served a fresh notice of statutory demand on CPL demanding payment in the sum of $1,231,940.11 detailed in an attached schedule as follows:

> Details of how the debt is made up is shown in the attachments to the Commissioner's letter dated 27/7/12
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> | | |
> |---|---|
> | GST | $447,876.24 |
> | Inc | $759,247.46 |
> | Less penalty and interest reductions from clear periods | -$7,288.59 |
> | Debt owing and collectable | $1,199,835.11 |
> | Total costs from three court orders | $32,105.00 |
> | **Total debt currently claimed** | $1,231,940.11 |

[43] As CPL did not comply with the statutory demand within the requisite period or bring an application to set aside the statutory demand, on 5 February 2015 the Commissioner filed the proceeding seeking liquidation of CPL. Mr Hampton obtained an adjournment of the proceeding while he sought legal representation and

a release of frozen funds for that purpose. However a subsequent application filed by Mr Hampton seeking an order to restrain advertising and to stay any further proceedings in relation to liquidation was not progressed because Mr Hampton did not have leave to represent CPL.

[44] Following a conference on 1 April 2015, in a minute dated 13 April 2015 Associate Judge Osborne made timetable directions, including that any statement of defence be filed by 5 May 2015, and allocated a hearing date of 13 May 2015. The hearing date was subsequently changed to 18 June 2015.

[45] On the day prior to the hearing CPL filed an application for leave to file a statement of defence out of time. The application was supported by an affidavit of Mr Hampton sworn on 15 June 2015 which provided details of ANZ Bank deposits and of a freehold property at 854 Colombo Street, Christchurch. That application was opposed by the Commissioner, who filed an affidavit of Mr Doubleday dated 18 June 2015 in support.[37]

The High Court judgment

The Commissioner's further evidence

[46] Although there is no reference to it in the judgment, it appears that at the hearing of the liquidation application Associate Judge Osborne requested the Commissioner to provide further evidence concerning CPL's debt as follows:[38]

(a) the affidavit of Mr Doubleday, including the schedules, that was before this Court in the appeal against the second judicial review decision;

(b) an approximation of CPL's debt as at 2006; and

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[37] Referred to in *Liquidation judgment*, above n 1, at [39].

[38] This information appears in a memorandum of counsel for the Commissioner dated 2 July 2015.

(c) the core tax owed by CPL (noted to be distinct from the "core tax plus shortfall penalties" figure in column C of Table B attached to the Commissioner's letter of 27 July 2012).

[47] We infer that the focus in the second information request on 2006 was because the first judicial review decision was delivered on 15 December 2006. Concerning the third request, the relevant portion of Table B attached to the Commissioner's letter of 27 July 2012 had stated:

B Tax Type	*C* Core tax plus shortfall penalties	*D* All other penalties and interest	*E* Payments etc	*F* Refunds and transfers	*G* Net owing as per the Dept's schedules as at July 2008
GST	$472,365.60	$546,527.40	($441,978.02)	$19,563.55	$596,478.53
INC	$269,981.07	$744,594.91	($83,452.20)	-$60,017.08	$871,106.70
ACC	$19,034.65	$6,961.71	($124,924.88)	$98,928.52	$0.00
SEA	$5,797.45	$6,368.04	($2,351.36)	-$9,814.13	$0.00
PAY	$353,393.57	$34,138.90	($362,705.13)	-$24,827.34	$0.00
SLE	$15,566.02	$1,121.93	($11,051.55)	-$5,636.40	$0.00
Totals:	**$1,136,138.36**	**$1,339,712.89**	**($1,026,463.14)**	**$18,197.12**	**$1,467,585.23**

[48] In the course of preparing the calculations of CPL's debt as at 2006, the Commissioner identified an arithmetical error in the calculation of the 15 per cent reduction of interest and penalties. The Commissioner sought an extension of time to file the evidence until 2 July 2015.

[49] On 2 July 2015 the Commissioner filed an affidavit of Mr A J Brighty which, in relation to the second information request, stated that the debt as at 2 July 2015, with penalties and interest stopped at December 2006, but still allowing the 15 per cent reduction suggested by the Court of Appeal, was $827,304.62 calculated as follows:

Summary	**as at 22/7/08**	**as at 10/12/06**
Income Tax	$759,247.46	$592,399.53
GST	$336,502.27	$242,193.68
ACC	($1,044.25)	($1,044.25)
SEA	($955.21)	($955.21)
PAY	($5,120.84)	($5,120.84)

SLE	($168.29)	($168.29)
Total collectable debt	**$1,088,461.14**	**$827,304.62**

[50] The Commissioner also filed a further affidavit of Mr Doubleday, the annexures to which included his June 2009 affidavit and schedules thereto.[39] While stating that the schedules prepared by the Commissioner as at 22 July 2008 were correct as at that date, Mr Doubleday advised that some 18 months after the schedules were prepared a GST tax credit of $102,777.77 was transferred to three GST periods. Hence the following correction was required:

> The effect of this transaction on the 15% relief calculation is that the total debt as at 22nd July 2008 will be reduced by the tax credit amount, and the penalties and use of money interest will be reduced for the period from 1 December 2007 through to 22nd July 2008. That is, there is $102,777.77 of debt which as a result of the offset (effective 1 December 2007), is now no longer subject to penalty and interest accumulation.

[51] He went on to explain, apparently in response to the Judge's third information request, how the revised core unpaid tax figure as at 22 July 2008 was calculated:

> Core tax is the assessed tax, either by the taxpayer or as reassessed by the Commissioner. The core tax is $347,183.66. Core tax is just one of the components making up the total tax arrears of the company as shown below:
>
> | | |
> |---|---|
> | As at 22nd July 2008 the Commissioner was seeking to recover unpaid tax totalling | **$1,397,307.14** |
> | That figure has been reduced by the effects of the 1 December 2007 tax credit | ($102,777.77) |
> | Consequential reduction in penalties and interest | ($10,113.16) |
> | **Revised July 2008 unpaid tax debt** | **$1,284.416.21** |
> | This revised figure has been reduced by the 15% relief recommended by the Court of Appeal | ($195,955.06) |
> | **Amended July 2008 Tax Debt** | **$1,088,461.15** |
>
> This figure is broken down into two components:
>
> Core Tax (i.e. Assessed Debt as returned and/or

[39] See [24]–[25] above.

reassessed by CIR)	
	$347,183.66
Late Payment Penalties, Incremental Late Payment Penalties and Use of Money Interest	$741,277.49
	$1,088,461.15

[52] The affidavit did not explain the way in which the "core tax" figure of $347,183.66 was derived or how it related to the figures in Column C of Table B to the Commissioner's letter of 27 July 2012 referred to in the Associate Judge's enquiry.

CPL's grounds of defence

[53] At the hearing Associate Judge Osborne reserved his decision on CPL's application to file a defence out of time. In his judgment he proceeded to address CPL's four grounds of defence:[40]

(a) it was solvent;

(b) the amount the Commissioner claimed was not an assessment of tax and was not payable by CPL;

(c) the amount the Commissioner claimed was disputed; and

(d) there remained outstanding issues between the Commissioner and CPL as to liability which required the intervention of the Court.

The conclusions on (a), (c) and (d) are material to this appeal.

CPL's solvency

[54] The Associate Judge did not consider there was a serious issue as to CPL's insolvency, succinctly analysing CPL's contention that it was solvent in this way:

> [31] By his affidavit Mr Hampton referred to financial details under a heading "Solvency of CPL". The details do not establish that [CPL], taking

[40] *Liquidation judgment*, above n 1, at [29].

> into account the debt to the Commissioner, is solvent, either in a balance sheet or a cashflow sense.
>
> [32] While Mr Weaver for [CPL] submitted that the company is "balance sheet solvent", that conclusion appears to have been reached by ignoring the core debt to the Commissioner. The submission also fails to address the fact that [CPL] is plainly insolvent on a cashflow basis, in that it is unable to meet such expenses as the interest which will be accruing on the debt to the Commissioner.

The judgment did not identify the amount of the "core debt" which CPL owed to the Commissioner.

A dispute as to the amount claimed

[55] The Associate Judge noted that the context of his consideration was not an application to set aside a statutory demand but an application for CPL's liquidation. He referred to this Court's decision in *Bateman Television Ltd v Coleridge Finance Company Ltd*[41] for the proposition that, while the procedure of petition for a winding up order is not usually a satisfactory one to dispose of the question whether a particular debt is owing, an order will be made if it is patent that there is sufficient owing to found a petition and that the company is insolvent, even though there might be a bona fide dispute concerning the precise indebtedness. The Associate Judge concluded:

> [47] In this case, Mr Hampton, in response to the Commissioner's recalculations and the statutory demand process, has not proposed any arrangement as to payment of what was accepted by Mr Hampton personally in the Court of Appeal as the undisputed core debt. Instead, his responses indicate that he requires some form of settlement of intended cross claims, either before payment of outstanding tax, or to be brought into account as some form of set-off.
>
> [48] The way in which Mr Hampton presented the taxpayers' case in the Court of Appeal and the findings of the Court itself, are a complete answer to the present assertion of a dispute by way of defence. There are at least three aspects to this:
>
> (a) The ground of defence raised — that the amount claimed in the statutory demand is disputed — is of itself an insufficient defence in terms of the authorities I have cited.
>
> (b) The taxpayers conducted themselves in the judicial review proceedings, including through their appeal, upon the basis

[41] *Bateman Television Ltd v Coleridge Finance Company Ltd* [1969] NZLR 794 (CA) at 819–820.

that the core tax was not under dispute, and should not be permitted to resile from that position.

(c) The judgment of the Court of Appeal expressly recognising that the Commissioner should be able to collect immediately at the least the core tax owing and some portion of the associated penalties, is a binding conclusion, pursuant to which this Court has lifted the stay which previously operated to prevent debt collection.

[56] Consequently the Associate Judge concluded that the amount indisputably owed by CPL must, on any approach, be substantial. In addition he noted the expectation of the Court of Appeal that an appropriate outcome would be that the taxpayers would meet core tax together with 85 per cent of accrued penalties.

Outstanding issues between the Commissioner and CPL

[57] CPL had argued that pending the resolution of the TRA proceeding it ought not to be put into liquidation by reason of the tax liabilities which were the subject of the Court of Appeal hearing. It argued that the TRA proceeding had not been consolidated with the first judicial review and was not heard following the first judicial review. The TRA proceeding therefore remained on foot with the legal consequence that the tax liability of CPL was deferred pursuant to s 138I of the Tax Administration Act.

[58] The Commissioner responded that, regardless of the way in which the TRA proceeding may have been "parked", the decisive answer to CPL's contention lay in the doctrine of res judicata.

[59] The Associate Judge traced the conclusions in the first and second judicial review decisions of Fogarty J and in the judgment of the Court of Appeal, concluding in this way:

> [64] Upon the basis of that process, the Court of Appeal went so far as to recognise the finality which would now attach to the core tax liability and some portion of the associated penalties by observing that the Commissioner should now be able to collect those immediately. While the Court of Appeal necessarily left the process of lifting the stay to the High Court, Glazebrook and Chambers JJ again noted their expectation that, upon the calculations being provided to the High Court, the stay would be lifted so as to allow the Commissioner to effect immediate collection of the undisputed core tax and some associated penalties.

> [65] All this indicates an expectation of finality. The elements required for an issue estoppel are met. There is no merit in Mr Hampton's implicit suggestion that there remained room for the expectation on the part of any party that a remedy for some aspect of the Commissioner's or Department['s] earlier conduct should now, through TRA processes be addressed and somehow taken into account.
>
> (Footnotes omitted.)

[60] In those circumstances, Associate Judge Osborne considered it was unnecessary to embark upon an investigation into the precise level of CPL's liability because the existence of a substantial and disputable debt entitled the Commissioner to an order of liquidation.[42]

The notice of appeal

[61] The grounds of appeal against the making of the liquidation order are extensive and include contentions that:

(a) the whole of the debt the subject of the liquidation proceeding is in dispute;

(b) a tax challenge proceeding is extant in the TRA, which is intended to resolve the dispute;

(c) a NOPA proceeding is extant in the High Court that is also intended to resolve the dispute;

(d) in the event the dispute is resolved in the TRA proceeding and/or the NOPA proceeding in favour of CPL, there is no debt that could be claimed to be due and owing and CPL would be owed a refund of moneys paid to the Commissioner;

(e) the Associate Judge erred in law by stating that the Court of Appeal had come to final decisions on issues that had been raised in the TRA proceeding and applying the principle of res judicata;

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42 *Liquidation judgment*, above n 1, at [66].

(f) the Associate Judge erred in law and fact by applying a 15 per cent reduction in penalties in the absence of a determination of the issues in the extant TRA proceeding and NOPA proceeding; and

(g) the Associate Judge erred in law by assuming jurisdiction to hear a liquidation proceeding while the TRA and NOPA proceedings remain extant.

[62] The notice of appeal also asserted that the Associate Judge erred in relying on a statement in the Court of Appeal's decision that core tax assessments were not in dispute and therefore a debt was owing. The notice asserted:

> 4.1.1 The company paid the core tax payments. In breach of an arrangement for cancellation/remission of penalties the creditor applied the core tax payments to penalties rather than cancellation of the penalties pursuant to the arrangement;
>
> 4.1.2 The core tax owing is in dispute: incorporated in that dispute (referred to in the TRA and NOPA proceedings) is the failure of the creditor to disclose the evidence of an arrangement and the allegation that the statutory steps taken by the creditor to enforce recovery of the disputed debt amounted to an abuse of process subsequently causing the destruction of the assets of the company.
>
> 4.1.3 The reason the core tax had not been [a]ffected was because the creditor allocated payments toward interest/penalties instead of core tax.

Application to adduce further evidence

[63] The submissions filed by Ms Sisson in advance of the hearing made reference to supplementary volumes of the case on appeal. Their content gave rise to concerns on the part of the Commissioner that much of the material in those supplementary volumes was not in evidence in the High Court. The issue was discussed in a telephone conference on 14 June 2017 when directions were made concerning the form of the case on appeal and any application for leave to adduce new evidence.

[64] The following day Ms Sisson filed an application for leave to adduce the following further evidence:

> … affidavits of Therese Anne Sisson, (the appellant), dated 16 June 2017, David [J]ohn Hampton, dated 31 October 2007, William John Palmer, dated

16 October 2008 and Karen Faye Whitiskie, dated 31 August 2005, relating to questions of fact concerning the following matters that have occurred after the date of the decision appealed from:

1.1 The HarcourtsGold market appraisal to the appellant, dated 2 October 2016, of the property situated at 854 Colombo Street following demolition of the earthquake damaged dwelling on that property;

1.2 The written communication of admission, made by the Commissioner of Inland Revenue, (the Commissioner), to the appellant on 15 January 2016, of non disclosure of notes, (referred to in the review judgments as the Aronsen file notes), over the years from 1996 to 2006, and the Commissioner's previous denial of non disclosure of those notes over the years from 2005 to 2015;

1.3 The NZI offer of settlement dated 16 March 2016 in relation to the earthquake destruction of the dwelling located on the property at 854 Colombo Street.

1.4 The Official Information Act 1982 request, dated 6 April 2017, to the Commissioner and the Commissioner's response dated 5 May 2017, in relation to the complaint of non disclosure of the Aronsen file notes made in letter [of] 27 July 2007, and referral of that complaint for investigation on or about 20 August 2013 by The Honourable Todd McClay, Minister of Revenue, to the Commissioner.

[65] Ms Sisson's affidavit comprised two substantial volumes containing as exhibit A an NZI Ltd letter of 16 March 2016 and as exhibit B the two supplementary case on appeal bundles. In order to provide the maximum time for hearing argument on the appeal itself, we received that evidence on a provisional basis and indicated that we would rule on the application to adduce the evidence when delivering judgment.

[66] As the dates of most of the documents in exhibit B demonstrate, the great majority of those documents are not fresh and hence do not satisfy the criteria for new evidence on appeal.[43] Indeed in the case of the affidavit of Mr Palmer dated 16 October 2008 we infer that it is the affidavit which Fogarty J declined to read in the second judicial review proceeding.[44]

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[43] *Paper Reclaim Ltd v Aotearoa International Ltd* [2006] NZCA 59, [2007] 2 NZLR 1 at [6]; *Airwork (NZ) Ltd v Vertical Flight Management Ltd* [1999] 1 NZLR 641 (CA) at 649–650; and *Rae v International Insurance Brokers (Nelson Marlborough) Ltd* [1998] 3 NZLR 190 (CA) at 192.

[44] *Second judicial review decision (HC)*, above n 15, at [102] and [107]. Likewise the Court of Appeal: *Second judicial review decision (CA)*, above n 3, at [109(e)] and n 126.

[67] Further, because we do not consider them relevant to any issue arising on the appeal, we decline to receive in evidence the more recent material described as:

(a) email string associated with Commissioner's admission of non-disclosure conduct;

(b) Official Information Act request to Commissioner dated 6 April 2017; and

(c) the Commissioner's response to the OIA request dated 5 May 2017.

[68] The two documents which we agree to accept into evidence on appeal are:

(a) the NZI Limited email of 16 March 2016; and

(b) the market appraisal of 854 Colombo Street.

The High Court's conclusion on CPL's solvency

[69] It may well be the case that CPL is insolvent. However, before an order for liquidation of a company may be made, it is necessary for a Court to be satisfied that the company is insolvent. Where there has been a failure to meet a statutory demand, there is a presumption that a company is unable to pay its debts and the onus falls on the company to prove the contrary.[45] In the present case we have a concern as to the manner in which the solvency analysis was undertaken, in particular the reliance placed on what was described as the undisputed "core debt".

[70] The order for liquidation was made on the footing that the amount "indisputably owed" by CPL must on any approach be substantial.[46] Because of the existence of a substantial indisputable debt it was considered to be unnecessary for the Court to embark upon an investigation into the precise level of CPL's liability.[47] The submission for CPL that it was balance sheet solvent was rejected on the basis

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45 Companies Act 1993, s 287.
46 *Liquidation judgment*, above n 1, at [49].
47 At [66].

that the proposition ignored the "core debt" to the Commissioner.[48] It was further noted that Mr Hampton had not proposed any arrangement as to payment of what Mr Hampton had accepted in the Court of Appeal was the "undisputed core debt".[49]

"Core tax" and "core debt"

[71] Unfortunately, both in the course of the evidence and in some of the judgments in this matter, there has been a degree of imprecision of language, notably in the use of the expressions "core tax" and "core debt". There have also been a number of at least potentially ambiguous statements in evidence both as to the amounts which are said to be not in dispute and as to the figures which constitute "core tax".

[72] As earlier noted, it is not clear what amount this Court in 2009 contemplated as the "core tax" which CPL owed to the Commissioner and which was not disputed. We did not have before us the record of the 2009 appeal. However we do have Mr Doubleday's affidavit of 5 June 2009 as a consequence of the Associate Judge's request to the Commissioner for further evidence. With reference to CPL Mr Doubleday stated that the figure $1,397,507.14 was not disputed and not challenged.[50] But that does not appear to have been CPL's position. Further, the amount which the Commissioner seeks has reduced more than once since then.

[73] In annexure E to his June 2009 affidavit Mr Doubleday provided a brief commentary with respect to the debt of each taxpayer and the availability of known assets against which the Commissioner might eventually obtain judgment for the taxpayer's outstanding tax indebtedness.

[74] His discussion of CPL commenced with a chart that stated that the even higher figure of $1,467,585.23 was "not disputed/not challenged". It proceeded to discuss CPL's core tax liability:

> 20 The core tax liability assessed to [CPL] (i.e. excluding interest and penalties) totalled $1,136,138.36 and is not disputed or challenged.

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48 At [32].
49 At [47].
50 See [25] above.

> Of this total the amount of $412,375.06 (36%) (relating solely to GST and including shortfall penalties) had previously been reassessed by the Commissioner, and determined in the Commissioner's favour by the Taxation Review Authority.
>
> 21 Total payments made by [CPL] and credited against its tax accounts totalled $1,026,463.14 (see page 16 of schedules). Over 50% of all payments made by the company were obtained as a consequence of, in the course of, or in response to litigation (see pages 26 and 27 of the schedules).
>
> 22 A comparison of core tax debt with payments made results in a shortfall or underpayment of the core tax amounting to $109,675.22. However, a history of underpayment, together with late payment of payments that were made, have given rise to the impost of use of money interest and late payment penalties increasing the unpaid debt still further. As at 25 July 2008 the undisputed and unchallenged debt of [CPL] totalled $1,467,585.23 (as above). While the impost of penalties and use of money interest is high the decision not to pay tax on time is a decision of the company's … alone. The growing unpaid tax debt arises from a persistent failure in respect of multiple tax types, over a period of twelve or more years to file returns on time and pay the resulting tax debts on time and that in circumstances where the underlying business for much of the time was successful and well capable of honouring its tax obligations on a timely basis and where the asset base of the plaintiffs was growing at the expense of the Revenue.

[75] Mr Doubleday concluded by noting that CPL had a property at 854-858 Colombo Street which was encumbered by a mortgage to the National Bank. Commenting that in the then climate properties were expected to realise nowhere near outstanding tax debt, the view was expressed that CPL was insolvent and had been for some time.

[76] Before proceeding further, it is convenient to note the source, within the material already referred to, of the various figures that were mentioned by Mr Doubleday:

(a) $1,467,585.23 is the July 2008 total debt in column G at [47] above;

(b) $1,397,307.14 is derived by subtracting $70,278.09 (being the default assessments) from the figure in (a);[51]

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[51] See [35] above.

(c) $1,199,835.11 is derived by subtracting $197,472.03 (being the IRD's 15 per cent reduction) from the figure in (b);[52]

(d) $1,088,461.15 reflects the reduction for the $102,777.77 tax credit as shown at [51] above;

(e) $827,304.62 is Mr Brighty's calculation which assumed penalties and interest stopped at December 2006;[53]

(f) $109,675.22 (the "core tax" figure in Annexure E to Mr Doubleday's June 2009 affidavit) is the differential between $1,136,138.36 (core tax plus shortfall penalties) and $1,026,463.14 (payments) shown in columns C and E respectively at [47] above.

[77] The derivation of the "core tax" figure of $347,183.66 in Mr Doubleday's July 2015 affidavit is not apparent to us. We observe however that it falls between the assessment figure in the schedule attached to the 2004 statutory demand[54] and the total assessments figure recorded in the first judicial review judgment.[55]

[78] To the extent to which this Court's judgment descended to figures, it was primarily directed to Chesterfields Partnership and, to a lesser extent, Anolbe Enterprises Limited. The judgment did not identify the amount of CPL's "core tax"[56] or the amount (if it is different) which Associate Judge Osborne recorded Mr Hampton accepted in this Court was the "undisputed core debt".[57] In the absence of any specific evidence acknowledging a figure greater than $109,675.22 as the amount of core tax that was accepted as not then in dispute, we are satisfied that the core tax which should be treated as having been accepted as not in dispute was that figure, $109,675.22.

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52 See [35] above.
53 At [49] above.
54 See [7] above.
55 See [11] above.
56 *Second judicial review decision (CA)*, above n 3, at [147].
57 *Liquidation judgment*, above n 1, at [47].

CPL's assets

[79] Mr Hampton's affidavit of 15 June 2015 noted that all CPL's business, financial and accounting records had been destroyed in the Christchurch earthquakes.

[80] Mr Hampton deposed that term deposits at the ANZ Bank were held in trust by Ms Sisson on behalf of CPL in the amounts of $148,875.54 and $24,154.38, those figures being corroborated by an email from an ANZ Bank manager annexed. With reference to the property at 854 Colombo Street Mr Hampton stated:

> 82 CPL has not traded for some years but still holds a property that is subject to an insurance claim.
>
> 83 Apart from the debt to Minter Ellison Rudd Watts, solicitors, (MERW), and the disputed liability to Inland Revenue, CPL has no other significant liabilities and the property is mortgage free.
>
> 84 The property is a valuable freehold asset, situation at 854 Colombo Street in the inner city of Christchurch which has a current rateable land value of approximately $790,000.00.
>
> 85 The property is subject to an IAG (NZ) Limited, (IAG), insurance claim in the sum of approximately $1.8 million with respect to the building on the property which was destroyed in the two major Christchurch earthquakes.
>
> 86 IAG and EQC have paid approximately $830,000.00 to date in partial settlement of the insurance claims. The payment paid off the mortgage with the surplus being held on term deposit at the ANZ Bank …
>
> (Footnote omitted.)

[81] On the face of it, that evidence suggested that as at 15 June 2015, after deduction of the debt to Minter Ellison Rudd Watts of approximately $84,000.00, CPL had assets of $879,029.92.

[82] In addition, an email from NZI of 16 March 2016, which was exhibit A to Ms Sisson's affidavit of 16 June 2017, indicated that an insurance pay-out of $138,064.77 was still to be disbursed.

[83] The total assets of $1,017,094.60 is thus slightly shy of the revised figure of $1,088,461.15 referred to in Mr Doubleday's July 2015 affidavit that reflected the

tax credit of $102,777.77. It exceeds by a wide margin Mr Brighty's figure as at 2006.[58]

[84] So far as concerns that tax credit, Mr Doubleday's affidavit of 2 July 2015 would appear to indicate that the amount was not applied entirely in reduction of core tax but that a not insignificant proportion was allocated to shortfall penalties or penalty interest.

Conclusion

[85] The Associate Judge commenced by noting that, the Commissioner having served a statutory demand and CPL having failed to meet it, CPL was presumed to be unable to pay its debts unless the contrary was proved.[59] His conclusion that CPL had failed to do so rested on his view that CPL's assertion of solvency appeared to ignore the "core debt" to the Commissioner.[60] However the amount of that core debt was not specified, nor was the amount of the "undisputed core debt" accepted as such by Mr Hampton in the Court of Appeal.[61] Further, there is no reference to the Associate Judge's request for further information or to the information provided in response, namely Mr Brighty's and Mr Doubleday's affidavits. Nor is there reference to the tax credit which resulted in the further reduction in the amount claimed by the Commissioner.

[86] However, even if the Commissioner's calculations remained unchallenged either as to methodology or accuracy (a matter to which we refer at [104] below), the fact of the matter is that the difference between the revised debt claim and CPL's asset position appears to be comparatively narrow. The variability in the figures relied on by the Commissioner and the unchallenged value of CPL's assets meant that it was at least open to doubt that the Court could properly make a liquidation order by adopting the approach recorded at [66] of Associate Judge Osborne's judgment.

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58 At [49] above.
59 *Liquidation judgment*, above n 1, at [30].
60 At [32]–[33].
61 At [47].

[87] In these circumstances we consider that, subject to a condition discussed below, the proper course is to allow the appeal, set aside the liquidation order, and remit the matter back for rehearing in the High Court where greater scrutiny can be given to the figures of both sides.

[88] That order is conditional on Ms Sisson, on behalf of CPL, paying into the High Court at Christchurch within 15 working days of this judgment the amount of $109,675.22. Had CPL successfully applied to set aside the statutory demand we consider that a condition to that effect would have been imposed.[62] Given our view at [78] above, it is proper that that amount should be paid without further delay.[63]

[89] It would not be appropriate, however, to remit the proceeding to the High Court without first addressing a number of other contentions in the notice of appeal, in particular the implications of the earlier Court of Appeal decision and the status of what are described as the TRA and NOPA proceedings.

Alleged outstanding issues between CPL and the Commissioner

[90] The thrust of the remaining contentions in the notice of appeal was that this Court's decision was not a final decision on the fact or extent of CPL's liability to the Commissioner, that the doctrine of res judicata did not therefore apply and the Associate Judge's analysis was consequently in error. Ms Sisson contends that both the fact and extent (if any) of any liability of CPL remains to be resolved in the TRA proceeding or the NOPA proceeding or both.

[91] The Commissioner supports the Associate Judge's conclusion that this Court's judgment conveyed an expectation of finality and his view that the elements required for an issue estoppel were met.[64] The Associate Judge stated:[65]

> It is inescapable that the range of taxpayers' grievances which the Court required the Commissioner to take into account in reconsidering penalties had been finally identified. Otherwise Glazebrook and Chambers JJ would

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62 Per s 290(7) of the Companies Act.

63 In imposing that condition we have not overlooked Ms Sisson's submission in her introductory document dated 26 June 2017, that as a consequence of the arithmetical error identified at [48] and [50] above, the amount of core tax should have been only $6,898.22.

64 *Liquidation judgment*, above n 1, at [65].

65 At [63].

> not have expressed a view as to what level of remission would adequately reflect the impact of the Commissioner's and Departmental conduct. The Commissioner was to exercise his statutory responsibility to consider remission taking those matters into account.

[92] This Court made it quite plain that, had they been sitting on appeal from the first judicial review decision, they may have taken a different approach from that of Fogarty J. The Court indicated that, as the appeal before them was not an appeal against the first judicial review decision, they did not need to consider:[66]

(a) whether they would have upheld the finding that an in-substance arrangement existed in the face of repeated non-compliance by the taxpayers in their failure to pay accepted taxation obligations; and

(b) whether in the light of that non-compliance it was open for the taxpayers to rely on the equivocal comments of various IRD officers as being representations as to the continuation of an arrangement the terms of which they knew they had breached.

[93] The Court further stated that, absent the first judicial review decision, they would have accepted the Commissioner's submissions that:[67]

(a) a refusal to exercise powers under ss 6 or 6A of the Tax Administration Act would not normally be a prime candidate for review proceedings;

(b) the finding in the first judicial review decision equating a decision not to collect tax with an implied arrangement to remit penalties was surprising;

(c) it would have been rare for the powers under ss 6 and 6A of the Tax Administration Act to be used to remit penalties in circumstances where s 183A does not apply.

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66 *Second judicial review decision (CA)*, above n 3, at [151].
67 At [152]–[153].

[94] The Court also observed that, in a voluntary compliance and self-assessment regime, 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 have been.[68]

[95] Nevertheless, this Court accepted that the Commissioner was bound by the first judicial review decision in which Fogarty J had found that two in-substance arrangements existed between the taxpayers and the Commissioner and that the Commissioner was partly responsible for the taxpayers' delays in payment, a finding based on departmental delays and related assurances given to Mr Hampton.[69] The Commissioner was therefore required to reconsider the write-off of penalties.

[96] In its summary of conclusions the Court stated:[70]

> The first judicial review judgment required the Commissioner to reconsider the taxpayers' affairs on the basis that there were two in-substance arrangements. It also required the Commissioner, in his reconsideration of the taxpayers' liabilities, to apportion blame for the delays and remit or cancel penalties to reflect the department's share of the responsibility for the delays and also the related assurances given to Mr Hampton. The Commissioner failed to do this. Fogarty J was thus correct to hold in the second judicial review judgment that the Commissioner had erred in these respects.

[97] Significantly, however, a footnote to the second sentence in that conclusion stated:[71]

> However, see above at [93] for the pragmatic course that could be taken to fulfil the requirements of the first judicial review judgment.

Paragraph [93] of this Court's judgment is set out at [26] above.

[98] That pragmatic course was not an approach which the Court required the Commissioner to take. The Court made it clear that it was for the Commissioner to decide whether or not he wished to adopt the pragmatic approach as an alternative to what the Court described as the laborious process of consideration. However, as

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68 At [154].
69 At [148(b)].
70 At [148(c)] (footnote omitted).
71 At n 177.

Associate Judge Osborne observed,[72] it was an approach which this Court implicitly approved as an alternative solution.

[99] This Court treated itself as seized of the scope of all the taxpayers' arguments that challenged the correctness of assessments and the imposition of penalties and interest. If the taxpayers sought to challenge their liability for 85 per cent of the penalties in any context after this Court's judgment, the Commissioner could avail herself of this Court's determination that 85 per cent would be lawfully recoverable. In our view, while it was ultimately for the Commissioner to choose the path to take, the approved pragmatic approach was an integral part of the Court's decision and the doctrine of res judicata applies to it.

[100] While, having considered Fogarty J's two judicial review decisions, we entertain some reservations about this Court's evaluation of an "across the board" 15 per cent reduction in "penalties" as the appropriate measure of the adjustment required to reflect Fogarty J's unchallenged findings, we have no jurisdiction to revisit that issue.

[101] As the majority noted at the commencement of their judgment, the binding nature of a final decision is not dependant on its being correct in fact or law.[73] The majority helpfully quoted the observation of Millett J that the principle of res judicata "gives effect to the policy of the law that the parties to a judicial decision should not afterwards be allowed to re-litigate the same question, even though the decision may be wrong".[74]

[102] It follows that, notwithstanding Fogarty J's initial directions when transferring the TRA proceeding into the High Court,[75] issues that were ultimately addressed and resolved by this Court may not be revisited again in the so-called TRA proceeding or the NOPA proceeding. Those proceedings do not live on in isolation from the previous conclusions reached by this Court.

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72 *Liquidation judgment*, above n 1, at [61].
73 *Second judicial review decision (CA)*, above n 3, at [4].
74 *Crown Estate Commissioners v Dorset County Council* [1990] Ch 297 (Ch) at 305.
75 See [14] above.

[103] However, while this Court's approval of an across the board 15 per cent reduction in "penalties" was a final decision as to the appropriate measure of adjustment, the Court was not able to make any determination of the correctness of the calculation required.[76] It envisaged that the calculations would be provided to the High Court in support of a request for a variation of the order for stay of enforcement.

[104] While the stay was duly lifted in response to the Commissioner's memorandum of 19 August 2014,[77] it does not appear that there has been any actual determination by the High Court, or any other Court, as to the precise amount of the reduction and the consequent level of CPL's indebtedness.

[105] In our view, while bound by the 15 per cent reduction measure, it remains open to CPL to test the accuracy and methodology of the Commissioner's calculation. That calculation, as this Court noted at [147], is to be on the most favourable assumptions for the taxpayers. It also needs to reflect the correct amount of core tax and the appropriate adjustment to core tax necessitated by the arithmetical error concerning the GST refund.[78] For the avoidance of doubt, these are issues which CPL is entitled to advance at the hearing before the Associate Judge.

[106] Finally we note that, while not explicit on the point, the notice of appeal appears to convey the implication that in CPL's solvency analysis the Court should be required to include potential damages claims associated with the alleged failure of the Commissioner to disclose information. In that connection we note the phrasing of the second of the contentions set out at [62] above, which may have been included with an eye to the extant (albeit stayed) misfeasance[79] and malicious civil proceedings[80] claims.

[107] We do not accept that CPL may rely on such potential claims as an off-set or counterclaim against such amount as it owes the Commissioner for core tax and

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76 See *Second judicial review decision (CA)*, above n 3, at [147]; and [28] above.
77 See [39] above.
78 See [50] above.
79 At [32] above.
80 At [33] above.

penalties. Were it otherwise, then the recovery of unpaid tax would have had to await the conclusion of those dormant claims. Clearly that was not the intention of the majority in ruling that the stay on enforcement was to be lifted.

Result

[108] The application to adduce further evidence on appeal is granted in respect of the NZI Limited email of 16 March 2016 and the market appraisal of 854 Colombo Street. The application is otherwise dismissed.

[109] The appeal is allowed on the condition that within 15 working days of this judgment Ms Sisson pays into the High Court at Christchurch the amount of $109,675.22. Subject to the condition being satisfied, the liquidation order is set aside and the proceeding remitted to the High Court for rehearing.

[110] As Ms Sisson is self-represented, there is no order as to costs.

Solicitors:
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