IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

I TE KŌTI MATUA O AOTEAROA
ŌTAUTAHI ROHE

CIV-2015-409-000043
[2019] NZHC 272

UNDER	the Companies Act 1993
BETWEEN	COMMISSIONER OF INLAND REVENUE Plaintiff
AND	CHESTERFIELDS PRESCHOOLS LIMITED (in interim liquidation) First Defendant
AND	THERESE ANNE SISSON Second Defendant

Hearing: 29 -30 October 2018

Appearances: P Shamy, S M Kinsler and C L Russell for Plaintiff
B M Russell and J C Wedlake for First Defendant
T A Sisson (Second Defendant) in person with
D Hampton (as McKenzie friend)

Judgment: 26 February 2019

Reissued: 7 May 2019

JUDGMENT OF JUSTICE OSBORNE
(on liquidation application)

Introduction

[1] The Commissioner of Inland Revenue asserts that by reason of tax indebtedness Chesterfields Preschools Ltd (now in interim liquidation) (CPL) is a debtor. She seeks CPL's liquidation.

[2] The Commissioner commenced this proceeding in 2015 – she relied upon the statutory presumption of CPL's insolvency arising through CPL not having satisfied the requirements of a statutory demand. CPL had been served with a statutory demand on 5 December 2014.

[3] On 6 October 2015 this Court, following a defended hearing, made an order putting CPL into liquidation ("the 2015 liquidation judgment").[1]

[4] Therese Sisson was subsequently joined as a second defendant in this proceeding to enable her to pursue an appeal. Her appeal was successful ("the liquidation appeal judgment").[2] The Court of Appeal allowed the appeal (against the order of liquidation) on condition that Ms Sisson within 15 working days paid into the High Court account a sum of $109,675.22.[3] Ms Sisson subsequently successfully appealed the Court of Appeal's conditional order to the Supreme Court.[4] The Supreme Court found that the condition imposed by the Court of Appeal had been based on an incorrect assumption. The Supreme Court allowed the appeal by consent. The Court of Appeal's order setting aside the liquidation judgment was quashed. The Supreme Court made an order (in its place) setting aside the liquidation order and remitting the proceeding to this Court for rehearing.

[5] The rehearing took place on 29 - 30 October 2018. This is the judgment upon that rehearing.

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

2 *Sisson v Commissioner of Inland Revenue* [2017] NZCA 326, (2017) 28 NZTC 23-023 ("the liquidation appeal judgment").

3 The liquidation appeal judgment, above n 2, at [109].

4 *Chesterfields Preschools Ltd (in liq) v Commissioner of Inland Revenue* [2017] NZSC 176.

[6] In the meantime, interim liquidators were appointed to CPL by this Court on 15 December 2017.[5]

The issues for determination

[7] The Commissioner asserts that she is a creditor of CPL in relation to an outstanding tax debt of $1,088,461.15. In addition, she is a judgment creditor (for court costs) for $32,105. She further asserts that she is entitled to rely upon contingent debts totalling $587,389.01.

[8] The Commissioner asserts that CPL is insolvent. She invokes the presumption under s 287 Companies Act 1993. She asserts that Ms Sisson has not established that CPL can meet the cash-flow test of solvency. To the extent that Ms Sisson would rely upon the asset position of CPL, the Commissioner says that any prospective realisation of assets is insufficient to negate the presumption of insolvency. She further asserts that, in any event, the prospective realisation of assets which are essential to the continuation of CPL's business should not be taken into account in the determination of insolvency.

Ms Sisson's pleading

[9] Ms Sisson pleads in relation to the following matters:

(a) *Claimed debt*

Ms Sisson asserts that the debt claimed by the Commissioner is not owed on the ground that it was and remains open to CPL to test the accuracy and methodology of the Commissioner's calculation of a 15 per cent reduction of penalties.[6]

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5 *Commissioner of Inland Revenue v Chesterfields Preschools Ltd* [2017] NZHC 3172, (2017) 28 NZTC 23-046.

6 Ms Sisson relies upon the conclusions and directions contained in the liquidation appeal judgment, above n 2, at [105].

Ms Sisson does not dispute the core tax assessments (although by this pleading she means the core tax as assessed by herself rather than by the Commissioner).

Ms Sisson disputes the penalty accrual debt claims of the Commissioner by reason of:

(i) a Notice of Proposed Adjustment ("NOPA") lodged on 31 January 2018;

(ii) a Taxation Review Authority proceeding commenced by CPL as TRA no 001/05 as subsequently transferred to the High Court; and

(iii) a civil proceeding commenced by CPL against the Commissioner in this Court in 2009, currently stayed.

(b) *Assessment in relation to GST on sale of 856 - 858 Colombo Street ($85,118.16)*

Ms Sisson pleaded the absence of an assessment by the Commissioner in relation to this GST.

(c) *Ownership of insurance proceeds (including GST)*

Ms Sisson pleaded the absence of an assessment by the Commissioner in relation to the estimated GST on insurance proceeds and pleaded that the ownership of the insurance proceeds remained in dispute on an appeal to the Court of Appeal.

(d) *Advance of $280,000 by Commissioner to CPL's liquidator in relation to insurance proceeds litigation (this advance being an item included by the Commissioner in her list of claimed contingent debts of CPL)*

Ms Sisson pleads that the claimed debt should not be taken into account having regard to the appeals.

(e) *Service of statutory demand*

Ms Sisson pleaded the Commissioner was aware at the time the Commissioner issued her demand (5 December 2014), that the amount claimed was disputed by reason of proceedings relating to an earlier statutory demand.

(f) *CPL's asset position*

Ms Sisson pleaded that by reason of vesting orders made by this Court,[7] CPL has available for realisation a property at 854 Colombo Street valued at approximately $1m and the balance of an insurance claim for damage to the 854 Colombo Street property (stated to be the balance of a claim for $1,872,000). Ms Sisson pleads that by reason of these assets, CPL is balance-sheet solvent in that it can pay its current financial demands from assets currently realisable.

History of this proceeding

The appeals

[10] The Commissioner's application for an order putting CPL into liquidation has been re-heard by reason of the judgments of the Court of Appeal and Supreme Court.

[11] The relevant history of the litigation is best captured in the Court of Appeal's identification (in the liquidation appeal judgment) of the "history in brief". The Court of Appeal introduced its judgment by recording that Ms Sisson had appealed the

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7 *Chesterfields Preschools Ltd (in liq) v Sisson* [2017] NZHC 181.

liquidation order upon the basis that CPL was not insolvent and that the Commissioner's claim for unpaid tax, interest and penalties was disputed. The Court recorded that the Commissioner had opposed the appeal upon the basis that CPL was precluded by the doctrine of res judicata from asserting that the claim was in dispute by reason of the Court of Appeal's previous judgment in *Commissioner of Inland Revenue v Chesterfields Preschools Limited* ("the judicial review appeal decision (CA)").[8]

[12] The Court of Appeal then summarised the litigation history:[9]

> **Litigation history in brief**
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> [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.
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> [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:[10]
>
> > [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.
> >
> > [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.
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> [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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> [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

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

9 The liquidation appeal judgment, above n 2.

10 *Chesterfields Preschools Ltd v Commissioner of Inland Revenue* (2007) 23 NZTC 21,125 (HC) ("the first judicial review decision (HC)").

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. 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:

> [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 "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:

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:

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:

> [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 and the opposition by CPL to the Commissioner's statutory demand. 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.

[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", 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, later summarising his view in this way:

> [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.

[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.

[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:

> 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. The Court noted that:

> 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. The Commissioner did not appeal the first judicial review decision.

Judicial review appeal 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.

[22] The taxpayers accordingly brought a second application for review, which resulted in a further judgment of Fogarty J (the judicial review appeal decision). 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. 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:

> 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.

The Court of Appeal decision

[23] The Commissioner appealed against the judicial review appeal decision contending that he had fully complied with the first judicial review decision and that the judicial review appeal 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. 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. 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 "reasonable expectations" that the sums owing were negotiable and the deteriorating financial position of the taxpayers.
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> [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.
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> [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.
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> (Footnotes omitted.)

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

(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.

(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).
>
> [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.
>
> (Footnote omitted.)

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

> 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:

> [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. On review that decision was largely upheld by Fogarty J. 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. 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 plaintiff. On 9 October 2012 Associate Judge Osborne refused Mr Hampton's application to represent CPL in that claim, 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:

> 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. 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.

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
>
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.

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:

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

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

(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. 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 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:

(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 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* 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

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 judicial review appeal 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.)

The basis upon which the appeal against the liquidation order succeeded

[13] The Court of Appeal noted that the order for liquidation had been made on the footing that the amount (of core debt) was "indisputably owed" by CPL must have been on any approach substantial.[11] Accordingly, the High Court had not embarked upon an investigation of the precise level of CPL's liability.

[14] In its judicial review appeal decision the Court of Appeal had identified the approach to calculation of CPL's taxation debt which would make the calculated debt lawfully recoverable. That was identified as involving a 15 per cent reduction of interest and penalties which had accrued beyond CPL's core tax figure.

[15] On the appeal from the liquidation judgment, the Court of Appeal upheld the High Court's determination that the approach to assessment identified in the judicial review appeal decision (CA) constituted as between the parties a final decision on the extent of CPL's liability, to which the doctrine of res judicata applies.[12]

[16] The Court of Appeal confirmed that the finality achieved through its judicial review appeal decision (CA) also precluded the revisiting of issues raised by the so-called TRA proceeding and the NOPA proceeding.[13]

[17] The Court of Appeal further confirmed that CPL was not entitled in the context of the liquidation proceeding to rely on such potential damages claims as they were the subject of the ordinary proceeding commenced by CPL in this Court which were subsequently stayed.[14]

[18] The Court of Appeal admitted two additional documents into evidence on appeal. They related to CPL's asset position. The first was a 2016 email from NZI Ltd which indicated that an insurance payout of $138,064.77 was still to be disbursed to CPL.[15] The second document was a 2016 market appraisal of the property at 854

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11 Liquidation appeal judgment, above n 2, at [56].
12 Liquidation appeal judgment, above n 2, at [99].
13 Liquidation appeal judgment, above n 2, at [102].
14 Liquidation appeal judgment, above n 2, at [106] – [107].
15 Liquidation appeal judgment, above n 2, at [68] and [82].

Colombo Street.[16] Consequently the Court of Appeal found CPL's total assets to be worth $1,017,094.60.[17] As the Court of Appeal noted, that total assets figure was slightly shy of the total collectable debt assessed by IRD's Adrian Brighty in July 2015 ($1,088,461.15) and well above the debt figure originally assessed by Mr Brighty in 2006 ($827,304.62).

[19] Ultimately, the Court of Appeal allowed the appeal upon the basis that there did not appear to have been any actual determination by the High Court as to the precise amount of CPL's indebtedness. Implicitly, the Court of Appeal was recognising that, on the evidence, it was possible that CPL might be able to meet its debt to the Commissioner, once precisely quantified, through resort to its available assets.

[20] The Court of Appeal's key summarised conclusions as to the need for this Court to determine the precise level of CPL's indebtedness, are contained towards the end of the liquidation appeal judgment:

> [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. 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, 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. For the avoidance of doubt, these are issues which CPL is entitled to advance at the hearing before the Associate Judge.

[21] Accordingly, the task for this Court is to determine the Commissioner's liquidation application upon the basis of the statutory provisions and the application

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16 Liquidation appeal judgment, above n 2, at [68] and [80] – [81].
17 Liquidation appeal judgment, above n 2, at [83].

of the usual principles. But there is a required focus in terms of the Court of Appeal's judgment upon allowing CPL to test the accuracy and the methodology of the Commissioner's calculations, with the calculations being based on the assumptions most favourable for the taxpayers. This Court's rehearing, in considering the correct amount of core tax, is also to take into account an arithmetical error concerning a GST tax credit of $102,777.77 identified by Lieuwe Doubleday.[18] The Court of Appeal anticipated that, on a rehearing, greater scrutiny would be given to the figures of both sides.[19]

The Commissioner's figures

[22] The Commissioner stands by the amended July 2008 tax debt figure of $1,088,461.15 identified by Mr Doubleday, and summarised in the liquidation appeal judgment at [51] (above at [12]). Mr Doubleday's calculation made provision for the adjustment of core tax (for the effects of the 2007 GST tax credit issue). He thereby adjusted the Commissioner's 22 July 2008 total by $112,890.93.

[23] For the purpose of subsequent reconsideration, the Commissioner adopted schedules prepared as at 22 July 2008 which Mr Doubleday has deposed to be correct (subject to the GST tax credit amendment). The Commissioner had elected not to collect a sum of $70,078.09 (being tax owing under default assessments made in the absence of GST returns) and $200 (being late filing penalties). The combination of the correct schedule entries and the Commissioner's allowances produced the Commissioner's revised 22 July 2008 "unpaid tax debt" of $1,284,416.21.[20]

[24] Mr Brighty has given evidence (supported by his and Mr Doubleday's schedules) as to the Commissioner's "stopping the clock" with effect from July 2008. From that date, the Commissioner in effect cancelled all subsequent accruing penalties and interest. She has since abided by the re-calculation of interest and penalties to that date as communicated to CPL in late July 2008. Mr Brighty has explained the Commissioner's rationale for adopting the July 2008 date. The Court of Appeal in the judicial review appeal decision (CA) had required the Commissioner to consider the

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18 Liquidation appeal judgment, above n 2, at [48] – [50] and [105].
19 Liquidation appeal judgment, above n 2, at [87].
20 As referred to in the Court of Appeal judgment at [51] (see paragraph [12] above).

remission of penalties incurred while the judicial review litigation was proceeding.[21] The Commissioner had regard to the period of litigation which commenced at the beginning of 2005 and which ended with the Commissioner's notification to CPL on 27 July 2008 of recalculations. As it transpired, the Commissioner's July 2008 recalculation did not bring finality to the litigation between the parties. Mr Brighty had deposed (uncontradicted) that through the continued "stopping of the clock" concession as at July 2008, the relief afforded under the concession for the period July 2008 to October 2015 amounted to approximately $1,852,000.

[25] As reflected in the liquidation appeal judgment at [51], the Commissioner in applying a 15 per cent reduction had allowed remission of $195,955.06 out of an "unpaid tax debt" of $1,284,416.21.[22] In other words, the 15 per cent relief calculated in July 2012 was applied not only to filing penalties, late payment penalties and the use of money interest ("UOMI"), but also to amounts of tax which had been self-assessed by CPL or assessed or reassessed by the Commissioner.

[26] The Court of Appeal recognised the degree of confusion which had arisen in previous decisions (including in the liquidation judgment) in relation to the use of the terms "core tax" and "core debt".[23] Mr Brighty, in his subsequent evidence, has recognised that "core tax" is not a term which occurs in either the Income Tax Act 2007 or the Tax Administration Act 1994 (TAA). He deposes that the term "core tax" is usually used to describe the amount of tax assessed or reassessed by the Commissioner or self-assessed by the taxpayer when the tax return is first filed with the Commissioner. Mr Brighty explains that the term is used to distinguish the amount "assessed" from other components of a tax debt such as additional tax, late filing penalties, late payment penalties, UOMI and costs. Mr Brighty adds that "core debt" is similarly not a term which occurs in the income tax legislation. He describes it as a term commonly describing unpaid tax plus penalties plus interest (meaning the whole debt the taxpayer has relating to a specific tax type and period).

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21 Judicial review appeal decision (CA), above n 8, at [145].
22 Above at [12].
23 Liquidation appeal judgment, above n 2, at [71] – [78].

[27] The division between core tax and other calculated liabilities assumed particular significance in the liquidation judgment. In the judicial review appeal decision (CA), the Court of Appeal had recorded that there was core tax owing which was not in dispute.[24] On the hearing of the liquidation application, it was argued for CPL that the total amount claimed by the Commissioner was not payable as an assessment of tax. Counsel for CPL argued that tax had not been assessed in the letter of 27 July 2012 by which the Commissioner notified CPL of her calculations. This Court held that the 27 July 2012 letter did not function as an "assessment". The Court explained:[25]

> The unpaid tax debts date back to the period 2000 to 2003 (for GST) and 1997 to 2003 (for income tax). The last GST payment on account was received by the Commissioner in June 2004 and the last income tax payment on account was received in July 2000. The core tax liabilities were a combination of self-assessed debt (by Chesterfields) and re-assessed debts (by the Commissioner). The core tax had all been assessed.

[28] Mr Doubleday's evidence and calculations identified the core tax (which he defined to be "assessed debt as returned and/or reassessed by Commissioner of Inland Revenue") as being $347,183.66 of the total of $1,088,461.15 calculated as the amended July 2008 tax debt (after a 15 per cent reduction of the revised July 2008 unpaid tax debt figure).[26] Mr Doubleday identified a balance of $741,277.49 as comprising late payment penalties, incremental late payment penalties and UOMI.

[29] The Court of Appeal subsequently observed that Mr Doubleday's affidavit explained neither the way in which the "core tax" figure of $347,183.66 was derived nor how it related to figures in the Commissioner's letter of 27 July 2012.[27]

[30] The judgment of this Court in the liquidation proceeding treated Mr Doubleday's 22 July 2008 core tax figure of $347,183.66 as being the undisputed core tax, for the reasons set out at [38] – [40] of the liquidation judgment.[28]

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24 Judicial review appeal decision (CA), above n 8, at [146] – [147].
25 2015 Liquidation judgment, above n 1, at [38].
26 Liquidation appeal judgment, above n 2, at [51].
27 Liquidation appeal judgment, above n 2, at [52].
28 2015 Liquidation judgment, above n 1.

[31] That led this Court, when applying the solvency test in relation to liquidation, to observe that the submissions of counsel for CPL that the company was "balance-sheet solvent" appeared to have been reached by ignoring the core debt. In other words, approaching matters on a balance sheet basis, assets claimed by CPL may arguably have been sufficient to satisfy the debt to the Commissioner in relation to the recalculated "non-core debt", but CPL had not pointed to any additional asset value which might deal with the core debt.

[32] In its judgment, the Court of Appeal noted that the High Court liquidation judgment did not identify the amount of the "core debt" which CPL owed to the Commissioner.[29] The Court of Appeal also noted that Mr Doubleday in his affidavit evidence had not explained the way in which the 22 July 2008 core tax figure of $347,183.66 was derived.[30] The Court of Appeal further noted that it was unclear what amount the Court of Appeal itself in 2009 contemplated as the undisputed "core tax".[31] The judicial review appeal decision (CA) (although referring to undisputed "core tax") did not identify a particular figure as undisputed.

[33] In the liquidation appeal judgment, the Court of Appeal, having noted that Mr Doubleday's affidavit had not explained how his "core tax" figure of $347,183.66 had been derived, identified a core tax figure stated by Mr Doubleday to be $109,675.22 in an affidavit filed in June 2009.[32]

[34] Having regard to the absence of any explanation by Mr Doubleday's figure which he attributed to core tax ($347,183.66), the Court of Appeal concluded that the $109,675.22 was the figure which should have been accepted as undisputed core tax.[33] On that basis, the Court of Appeal allowed Ms Sisson's appeal on condition that she paid into the High Court within 15 working days the amount of $109,675.22.[34]

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29 Liquidation appeal judgment, above n 2, at [54].
30 Liquidation appeal judgment, above n 2, at [52].
31 Liquidation appeal judgment, above n 2, at [72].
32 Liquidation appeal judgment, above n 2, at [47] and [76](f).
33 Liquidation appeal judgment, above n 2, at [78].
34 That condition itself subsequently falling away by reason of the later judgment of the Supreme Court: *Chesterfields Preschools Ltd (in liq) v Commissioner of Inland Revenue,* above n 4.

The Commissioner's subsequent evidence

The task for the Commissioner

[35] The liquidation appeal judgment, by setting aside the liquidation order, left it to this Court to determine the precise level of CPL's indebtedness to the Commissioner in the light of CPL's original total indebtedness (that is core tax together with other imposts) less such sum as falls to be deducted (on the 15 per cent reduction basis) by the Commissioner in accordance with accurate calculations and appropriate methodology.[35]

Mr Doubleday's verifying affidavit

[36] By her amended statement of claim, the Commissioner alleges that CPL is indebted to the Commissioner (as at 16 February 2018) in the sum of $1,088,461.15, being the figure previously provided in evidence in 2009 and calculated up to the July 2008 cut-off date.[36] In addition, the Commissioner alleges that CPL had contingent debts of an additional $587,389.01 and was a debtor for court costs in the sum of $32,105.

[37] Mr Doubleday by his initial affidavit verified those allegations. On 10 April 2018, Mr Doubleday swore a further affidavit. The affidavit was provided to address the fresh evidence adduced in the Court of Appeal and to update some matters of valuation and realisation. The affidavit did not address matters relating to the precise calculation of CPL's indebtedness.

[38] Mr Brighty provided a further affidavit dated 11 April 2018. It is this further affidavit of Mr Brighty that directly addressed the issues raised in the Court of Appeal judgment. In particular, Mr Brighty recorded that his affidavit was intended to deal with four matters:

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35 2015 liquidation judgment, above n 1, at [104] – [105].
36 Liquidation appeal judgment, above n 2, at [51].

(a) to identify the correct amount of the core tax and particularly, the correct amount of core tax after adjustment of the tax credit which arose after the 2008 Schedules were completed;

(b) the accuracy and methodology of the calculation of the 15 per cent reduction in interest and penalties based on the most favourable assumptions for the taxpayer allowed by the Court of Appeal in its 31 August 2010 judgment;

(c) the Commissioner's decision to not impose further interest and penalties after July 2008, described as "stopping the clock"; and

(d) the consequent level of the CPL's indebtedness (after the 15 per cent relief and the stopping the clock relief).

[39] Mr Brighty dealt with each of these topics in turn. These are the relevant paragraphs and tables from his affidavit):

> **Identification of the correct amount of the core tax**
>
> 22. The subtotal debt of $1,088,461.13 included in the Commissioner's amended statement of claim dated 16 February 2018 is made up of tax owing for seven income tax periods and fifteen GST periods. In only one income tax period and one GST period has a payment been made. The whole amount of core tax assessed for the remaining six income tax periods and 14 GST periods is still owing.
>
> 23. The core tax for the 1999 year income tax period was assessed at $33,000.00. A payment of $33,333.33 was made on 21 July 2000. In terms of the ordering rules the payment is to be allocated to the interest and late payment penalties accrued first, leaving $16,813.95 available to offset against the core tax. This means that the core tax owing was reduced to $16,186.05. That sum is still owing as no further payment has been made for this tax period.

Payment	21/7/2000		$33,333.33
Less	Interest accrued	$6,962.81	
	Late payment penalties accrued	$9,556.57	
	Sub-total	$16,519.38	$16,519.38
	Available to be offset against core tax		$16,813.95
Original core tax			$33,000.00
Core tax still owing			$16,186.05

24. In the GST period ended 31 July 2000 net credits of $57,860.13 (part of the credit input tax claim from the period ended 30 November 2007) were transferred to the period with a date of availability of 1 December 2007. The core tax as assessed was $27,596.25. At the effective date of availability interest accrued to that date was $44,761.42 and late payment penalties accrued amounted to $45,461.74 – a combined total of $90,223.16. In terms of the ordering rules the whole of the payment would be offset against the interest and late payment penalties, and none would be available to offset against the core tax. This means that the whole of the core tax is still owing as no further payment has been received.

25. Therefore the core tax still owing is:

6 income tax periods	$193,329.69
1999 income tax period	$16,186.05
14 GST periods	$96,640.27
GST period ended 31/7/2000	$27,596.25
Total core tax owing	$333,752.26

26. The core tax had not previously been split out as it was considered unnecessary with the Court of Appeal in 2010 having effectively sanctioned the Commissioner to collect the core tax and 85% of the interest and penalties.

27. In Mr Doubleday's affidavit dated 10 April 2018 he lists in a table at paragraph 19 details of the various periods with tax still outstanding and in the third column shows the core tax (prior to the adjustment arising from the GST period ended 30 November 2007) as totalling $380,065.43. To get to my figure above:

Total core tax as per Mr Doubleday's affidavit para 19	$380,065.43
Less – core GST for periods now cleared	
31/03/2000	$22,322.33
31/05/2000	$7,176.89
Less part of payment offset against core income tax 1999	$16,813.95
Total core tax owing	$333,752.26

Accuracy and methodology of the 15% reduction

28. The factual background to the extensive litigation between the Defendant, parties connected with the Defendant (the Taxpayers) and the Commissioner is set out fully in the Liquidation Judgment at [3] – [18].

29. Briefly, proceedings were commenced in 2004 and 2005 to recover tax debts and in response the Taxpayers filed a tax challenge in the Taxation Review Authority. This tax challenge was transferred to the High Court by way of a decision of Fogarty J on 13 September 2005. It was then "paused" while two judicial review proceedings ran their course.

30. In the first judicial review proceeding, the High Court directed the respondent to reconsider certain decisions relating to the Taxpayers'

tax affairs. In a decision of 5 June 2007, referred to in judgments of the High Court and Court of Appeal as the "Bhudia decision", the Commissioner attempted to give effect to the High Court's directions. Most of the Bhudia decision was then set aside by the High Court on 25 November 2008 in a judicial review appeal on the basis the Bhudia decision failed to adequately implement the directions from the First Judicial Review Judgment.

31. The Judicial Review Appeal Judgment was appealed to the Court of Appeal. In its 2010 judgment, the Court of Appeal suggested at paras 91 – 93:

> [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 TAA 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.
>
> (Emphasis added)

32. The adoption of the Court of Appeal's pragmatic approach of 15% reduction allowed for a simpler cleaner calculation together with the possibility of bringing some finality to the litigation as the Supreme Court had refused to hear an appeal against the Court of Appeal's 2010 decision.

33. The Court of Appeal described the pragmatic approach as being "merely to reduce penalties by a certain percentage across the board". This "across the board" adjustment has been taken to mean that we simply take all the periods and revenues that apply to this taxpayer, whether open or closed, add up all the penalties (late filing, late payment, additional tax) and all the interest charged to all these

periods, and simply take 15% of that total. That gives a 15% reduction in the total interest and penalties.

34. I have prepared a table to show the calculation of the 15% reduction. I have taken the initial details from the Schedules; in particular pages 015 and 016 as those pages show separately the amounts for each revenue, and also from page 018 as that page shows the details relating to the GST default assessments.

35. The table does not show any of the core tax for the various revenues only the various interest and penalties to which the 15% reduction is to be applied.

36. I have shown the figures by revenue: Income Tax first, then GST and then the four other revenues together – ACC, SEA, PAY, SLE. Details of the different penalties and interest are shown and totalled. That is then reduced by the debt being excluded (late filing penalties for Income Tax and the interest and penalty on the default assessments for GST), leaving a net total of penalties and interest for the respective revenue. I then calculate 15% of that net total. In the case of the GST, the total penalties and interest has been reduced by the credit of penalty and interest that arises from the GST period ended 30/11/07 adjustment made in 2010.

37. In dealing with the GST default assessments, as the debt for these assessments is not included in our collection action, the interest and penalties have been excluded from the 15% reduction calculations. All the details relating to the GST default assessments as included on page 018 of the Schedules are broken into three years, the years ended 31 March 2006, 2007 and 2008. The totals shown in the table therefore are the individual totals for each year. The late payment penalty total for column K is the individual total for each of the three years ended 31 March 2006, 2007 and 2008 added together, and the same for the interest in column L.

38. The table:

Chesterfields Preschool Ltd

15% calculation on penalties and interest

Column		***Amount***	
Income Tax		***from page 015***	
J	additional tax	$69,389.15	
K	late payment penalty	$325,003.24	
L	use of money interest	$350,202.52	
subtotal	penalties and interest	$744,594.91	
Less			
LFP			
2004	late filing penalty	-$50.00	
2005	late filing penalty	-$50.00	
2006	late filing penalty	-$50.00	
2007	late filing penalty	-$50.00	
subtotal		-$200.00	
net total	penalties and interest	$744,394.91	
15% relief			$111,659.24
GST		***from page 015***	
I	late filing penalty	$79.87	
J	additional tax	$8,288.89	
K	late payment penalty	$247,321.45	
L	use of money interest	$290,837.19	
subtotal	penalties and interest	$546,527.40	
Less			
default assessments		***from page 018***	
K	late payment penalty	$11,765.08	
L	use of money interest	$11,267.62	
subtotal		$23,032.70	
credit penalty and interest arising from p/e 30/11/07 adjustment		$10,113.17	
subtotal		$33,145.87	
net total	penalties and interest	$513,381.53	
15% relief			$77,007.23
other revenues		***from pages 015 and 016***	
ACC			
J	additional tax	$3,030.42	
K	late payment penalty	$2,542.27	
L	use of money interest	$1,389.02	
total	penalties and interest	$6,961.71	
SEA			
J	additional tax	$1,315.84	
K	late payment penalty	$3,033.92	
L	use of money interest	$2,018.28	
total	penalties and interest	$6,368.04	
PAY			
J	additional tax	$19,273.59	
K	late payment penalty	$9,817.60	
L	use of money interest	$5,047.71	
total	penalties and interest	$34,138.90	
SLE			
J	additional tax	$265.49	
K	late payment penalty	$598.46	
L	use of money interest	$257.98	
total	penalties and interest	$1,121.93	
grand total of the 4 totals	penalties and interest	$48,590.58	
15% relief			$7,288.59
total 15% relief			**$195,955.05**

Proof

credit penalty and interest arising from p/e 30/11/07 adjustment	$10,113.17	
15% thereof		$1,516.98
Total 15% relief as per 15% letter dated 27/7/12		***$197,472.03***

39. One thing that can be noticed is that the figures on the extreme right do not appear to add up, looking just at the cents we have 24c + 23c + 59c which equals $1.06 or just looking at the cents 06c whereas my total is 05c. Please see Appendix 2 for an explanation of this.

40. The end result is that the first three figures on the right are those used in the amended proof of debt filed with the liquidator previously and with the amended statement of claim. If the 15% relief ($1,516.98) applicable to the reduction in penalties and interest arising from the GST adjustment made in 2010 is added back, then I come to the figure first advised to the Defendant in the letter of 27 July 2012 signed by Karen Whitiskie advising of the 15% relief granted – see end of page 2 of that letter. A copy of this letter is attached as Appendix 3.

41. Page 016 of the Schedules shows the total debt owing at July 2008 as $1,467,585.23. This sum reduced by the late filing penalties (INC) and the default assessments (GST) reduces the total to $1,199,835.11 – see Appendix 3, the first attachment thereto (Table A).

42. It can be seen that the figure in the letter of 27 July 2012 at the end of page 2, $1,199,835.11, is that brought to account in the amended statement of claim in line 4 of the table at [4]. That figure, as a result of the adjustment arising from the GST period ended 30 November 2007, is then reduced by the input tax credit of $102,777.77 plus the interest and penalties ($10,113.17) that are automatically removed. However, we had previously allowed a 15% reduction in relation to the amount of $10,113.17, so that 15% reduction now needs to be reversed, an amount of $1,516.98. In the amended statement of claim the net difference between the two figures ($8,596.21) is what is deducted in relation to the interest and penalties from the debt able to be collected – see the line "Less net reductions in penalties and interest arising through the above adjustments".

43. The Commissioner opted to base the 15% reduction calculations on the Schedules as those Schedules were before the Court of Appeal when it made its 2010 decision giving the Commissioner the option of using the 15% pragmatic approach.

44. The rationales for using the date of the Schedules are administrative ease and better use of the Commissioner's resources. These reasons carry weight as the decision to use the pragmatic option is an exercise of the Commissioner's powers under s 6A of the TAA. As part of using ss 6 and 6A of the TAA the Commissioner is to have regard to the resources available to her.

45. The reconstructing of the Schedules at another date would be very resource intense. It took an expert investigator about 6 months to put together the Schedules which involved overnight data runs extracting entries relating to multiple taxpayers, multiple revenues, multiple periods and multiple entries within a period (sometimes in the hundreds), then the consolidation of that data into each period with totals of the interest and various penalties per period, the display of the all that data in a reasonably presentable manner, while all the time trying to grasp the general confusing state of the Taxpayers' affairs as noted by the courts.

46. The Chesterfields litigation by this point had already consumed significant departmental and litigation resources and the probability of fully recovering the tax owed across the group appeared "poor". It was considered the resources needed to reconstruct new Schedules, was not warranted.

47. When the Court of Appeal made its decision in 2010, it did not infer that the Commissioner could not continue to impose interest and penalties until the unpaid tax was paid in full or written off as unrecoverable. Say for example we had used the date of the First Judicial Review Judgment as the date the 15% relief should be applied and, as the Commissioner was entitled to do, then continued to accrue penalties and interest until payment in full or write off as unrecoverable.

48. In such a case, applying the 15% relief at the date of the First Judicial Review Judgment would give a smaller amount of relief than applying it to the date of payment in full or date of write off as unrecoverable. This can be seen from the following table which, for ease of calculation, is based on the rate of late payment penalties that applied to income tax and PAYE prior to the new Compliance and Penalties regime that came into effect with respect to periods commencing on or after 1 April 1997. The rate of penalty was 10% compounding six monthly.

49. The table:

Amount of core tax			$1,000.00
Additional Tax starts 8/2/06			
8/02/2006	10%	$100.00	$1,100.00
8/08/2006	10%	$110.00	$1,210.00
	subtotal	$210.00	
17/12/2006	**less 15%**	**$31.50**	$1,178.50
8/02/2007	10%	$117.85	$1,296.35
8/08/2007	10%	$129.64	$1,425.99
8/02/2008	10%	$142.60	$1,568.58
8/08/2008	10%	$156.86	$1,725.44
8/02/2009	10%	$172.54	$1,897.99
8/08/2009	10%	$189.80	$2,087.78
8/02/2010	10%	$208.78	$2,296.56
8/08/2010	10%	$229.66	$2,526.22
8/02/2011	10%	$252.62	$2,778.84
8/08/2011	10%	$277.88	$3,056.73
allocated	Core	$1,000.00	
	penalties	$2,056.73	

Amount of core tax			$1,000.00
Additional Tax starts 8/2/06			
8/02/2006	10%	$100.00	$1,100.00
8/08/2006	10%	$110.00	$1,210.00
8/02/2007	10%	$121.00	$1,331.00
8/08/2007	10%	$133.10	$1,464.10
8/02/2008	10%	$146.41	$1,610.51
8/08/2008	10%	$161.05	$1,771.56
8/02/2009	10%	$177.16	$1,948.72
8/08/2009	10%	$194.87	$2,143.59
8/02/2010	10%	$214.36	$2,357.95
8/08/2010	10%	$235.79	$2,593.74
8/02/2011	10%	$259.37	$2,853.12
8/08/2011	10%	$285.31	$3,138.43
	subtotal	$2,138.43	
10/08/2011	**less15%**	**$320.76**	$2,817.66
allocated	core	$1,000.00	
	penalties	$1,817.66	

50. The figures on the left show the original core tax as a $1000 with two lots of 10% penalty prior to the date of the First Judicial Review Judgment, the allowing of the 15% relief at that date, then with us

> continuing to accrue penalties for the next five years, with a grand total then owing of $3,056.73. (There is no significance to the period stopping at 8 August 2011, I just picked a date far enough advanced to have a number of subsequent penalties but not to include too many subsequent penalties).
>
> 51. The figures on the right show the original core tax as a $1000 with 10% penalties right through to the 8 August 2011 at which stage the 15% relief is allowed, this shows a grand total then owing of $2,817.66.
>
> 52. Thus the relief is greater when the 15% relief is allowed at a later date if we are continuing to accrue penalties, rather than at the earlier date.

Ms Sisson's evidence

[40] Ms Sisson provided the sole affidavit evidence for herself.

[41] In her affidavit, she first referred to a fresh NOPA which she had purported to lodge with the Commissioner's legal representative on 31 January 2018. The notice purported to relate to the determination of CPL's core tax liability. It is unnecessary to examine Ms Sisson's evidence in that regard further. She has not demonstrated any basis upon which the NOPA would be valid – while she has standing in this proceeding by reason of having been joined as a defendant, she has no current standing to act on behalf of CPL in relation to matters such as challenges to assessments. Furthermore, matters relating to CPL's core tax liability exist by reason of historical assessments and decisions and do not involve any fresh assessment. What is under scrutiny is the correct calculation of CPL's tax liabilities upon the basis of those historical assessments.

[42] Ms Sisson then addressed the Commissioner's evidence as to "stopping the clock" and the correct amount of core tax. In relation to those matters, Ms Sisson deposed:

> *Stopping the clock*
>
> 6. At paragraph 59 of Mr Brighty's affidavit, Mr Brighty refers to paragraph [145] of the decision of the Court of Appeal and infers that the Court of Appeal therefore required CPL to bear full responsibility for the delay in payment occurring during the period of the litigation up until 2008, and the Commissioner is to bear the responsibility for the delay thereafter. I believe the approach of Mr Brighty was not contemplated by the Court of Appeal in 2010 and fails to take account the following factors known to the Commissioner:

6.1 Stopping the clock in 2008, thereby making CPL liable for all penalties during the period of litigation to that point, is contrary to the reasoning of Justice Fogarty on this issue, which was affirmed by the Court of Appeal at paragraph [145]. Mr Brighty's reasoning fails to take into account the stay that operated from 2004 to 2014 to suspend liability for payment and the effect of the freezing orders from 2005 to 2018 that prevented the taxpayers from dealing in their assets. Mr Brighty also appears to have failed to take into account the success of the taxpayers in the litigation to the point the clock is stopped, namely, the first judicial review proceedings from 2004 to 2006 leading to the first judicial review judgment, the success of the taxpayers in the interlocutory judgment in 2007 leading to the judicial review appeal proceeding, the success of the taxpayers in judicial review appeal judgment, and the success of the taxpayers in the costs judgments;

6.2 Mr Brighty appears to reason that making CPL liable for penalties up to 2008 is justified by the apparent concession and saving of wiping all penalties past that point. However, I doubt that it escaped the notice of Mr Brighty, in considering the question of solvency, that the consequence of his decision to impose full liability on CPL for penalties during the period of litigation to 2008 is that the effect of the exponential rate of penalty accumulation after 2008 on those penalties accumulated to 2008 is such that recovery of penalty accumulated for any significant period after 2008 is unlikely in any event.

6.3 However, I believe that there is no proper basis for Mr Brighty apportioning fault to CPL in the accrual of penalties after 2008, on which any concession might then be considered. Mr Brighty appears to have failed to take into account that the delays from 2008 were attributable to factors under the control of the Commissioner. These factors included:

(a) the Commissioner's decision to appeal the review appeal judgment to the Court of Appeal, leading to the judgment of the Court of Appeal in which the Commissioner was held by the Supreme Court to have had distinctly limited success;

(b) the failure of the Commissioner following the 2010 judgment to promptly make the core tax payment calculations expected by the Court of Appeal to support an application for the stay to be lifted, despite the Court of Appeal in 2010 signalling the urgency of doing so;

(c) the continued application of the freezing orders from 2008 to the present day;

(d) the Commissioner's reliance on the freezing orders in preventing CPL from taking any step to raise finance to pay its estimated calculation of tax liability on account, resulting in the Supreme Court quashing the liquidation order in judgment delivered on 23 November 2017.

6.4 Mr Brighty also failed to take into account in his affidavit and his reasoning in relation to "stopping the clock" that when the stay was lifted in 2014, the Commissioner had still not provided the core tax payment calculations for CPL that had been urgently requested by the Court of Appeal in 2010, and continued that failure into the application for liquidation of CPL in 2015. CPL was successful in the appeal of the liquidation on the ground that failure required this rehearing.

6.5 Accordingly, I believe the delays after 2008 are attributable to the actions and omissions of the Commissioner following the judgment of the High Court in 2008.

The correct amount of the core tax

7. Under the heading "Identification of the correct amount of the core tax" Mr Brighty in the following paragraphs, (paras 22 to 27), explains how he and Mr Doubleday calculated the core tax owing figure to be $333,752.26 using the methodology of the ordering rules.

8. However, in adopting that methodology it is apparent that they gave no consideration to complying with the findings and expectations of the Court of Appeal in upholding the judicial review appeal judgment.

9. The limitation of the Inland Revenue systems to cope with the requirements of the Aronsen arrangement under ss.6 and 6A of the Act was acknowledged by the Commissioner, (at footnote 160 of the Court of Appeal 2010 judgment) which automatically applies the ordering rules. The practical difficulty of suspending the automatic operation of the ordering rules by the Revenue systems to comply with the decision to suspend collection of tax under the Aronsen arrangement appeared to be managed by Commissioner in sending to CPL "period not yet finalised" tax statements excluding any tax figures for the 09/93 and 03/95 GST periods during the years of delay in finalising these periods under the Aronsen arrangement.

10. The Court of Appeal in 2010 requested calculations "to show (at the least) the core tax owing which is not in dispute on the most favourable assumptions to CPL and some portion of the associated penalties" adjusted to reflect the deferrable/non-deferrable tax distinction.

11. The example of Chesterfields Partnership was used as illustrative to show that it required as a starting point a schedule of the core tax assessments and payments without penalties, applying the most favourable assumptions. Such a schedule for CPL would have shown the Court of Appeal the extent of compliance of CPL in making its payments in terms of the Aronsen arrangement and subsequent decisions of the Commissioner's officers concerning the arrangement. However, the Commissioner was unable to provide to the Court of Appeal these calculations for CPL in the time available.

12. I believe the methodology of the ordering rules adopted by Messrs Brighty and Doubleday is contrary to the taxpayers' legitimate expectations under the Aronsen arrangement, held by the review

judgments to equate to an assurance and comfort that the taxes of CPL were uncollectable while awaiting finalisation of various GST refund credits and excused to an extent the taxpayers failure to pay. For CPL the GST refund credits awaiting finalisation were the 09/93 GST period of $52,748.00, finalised in February 2000, and the 03/95 GST period of $59,518.00, finalised in November 1998.

13. Messrs Doubleday and Brighty nevertheless applied the ordering rules to apply payments of core taxes to collect the penalties and interest from 1993, effectively collecting the penalties as they were incurred immediately, disregarding the effect of the Aronsen arrangement in breach of the findings of the review judgments. The knock-on effect of the ordering rules to apply payments of core tax to penalties in breach of the Aronsen arrangement, was to leave balances of core tax apparently unpaid in later years, which according to Messrs Doubleday and Brighty equated to $333,752.26.

14. Mr Brighty gave two examples in his affidavit showing how the ordering rules applied to the tax payments of CPL. At paragraph 23, he provided the calculations in relation to the 1999 year income tax period assessed at $33,000.00, which showed that in breach of the Aronsen arrangement a large portion of the core tax payment had been applied to penalty under the ordering rules.

15. At paragraph 24, Mr Brighty shows that for the GST period ended 31 July 2000 core tax assessment at $27,596.00, the core tax payment of $57,860.13 made in November 2007 was applied under the ordering rules to offset penalties and interest in combined total of $90,223.16 for that period as result of the ordering rules, leaving the whole of the core tax assessment unpaid. The unpaid penalties of $32,363.03, ($90,223.16 less $57,860.13) and the resulting unpaid core tax of $27,596.00 continued to accumulate penalties under the ordering rules.

16. Mr Brighty identified (at para 27) the total effect of the ordering rules applied to CPL in breach of the Aronsen arrangement as being represented by Mr Doubleday's table at paragraph 19 of Mr Doubleday's affidavit dated 1 December 2017.

17. The problem of the application of automatic ordering rules of the Revenue systems and the inability of the Revenue systems to account for CPL's payment compliance with Aronsen arrangement created havoc in the tax accounts for CPL as shown in the tax schedules provided by Mr Doubleday. As explained by Mr Hampton in the Taxation Review Authority proceeding, where the dispute was intended to be resolved with disclosure of the Aronsen file notes, over time it became impossible for CPL to work out from the tax statements issued by the Department the true tax liability of CPL under the Aronsen arrangement. CPL became reliant on the amounts of tax calculated by the Department from to time required to be paid on account during negotiations to keep its payments up to date. CPL duly paid those amounts that were requested by the Department from time to time to be paid while the processes for resolution of the dispute continued. The dispute resolution process intended by Judge Barber to be resolved in the Taxation Review Authority, from 2001 to 2003,

was frustrated and thwarted by the Department's decision not to disclose the Aronsen file notes in that proceeding, leading to the necessity of the judicial review proceeding in 2004. The circumstances giving rise to the judicial review proceedings are discussed below at paragraphs 23 of 61 of my affidavit.

Core tax and payments schedule

18. Over the years of the process of dispute resolution, the Commissioner refused to provide a schedule of the dates of CPL's core tax payments assessments, payments and period by period tax balance in compliance with the Aronsen arrangement in terms of the findings in the judicial review proceedings. This issue was encapsulated by Justice Fogarty in the 2009 Costs judgment, as follows:

> The Commissioner submits that it does not matter because the plaintiffs are insolvent. That is a bland and facile proposition because it contains within it the proposition that they are insolvent because of the huge amount of tax, due to penalties and interest which the Commissioner contends they owe. Yet we do not know how much they owe to the Commissioner. One thing is clear. The "core tax" that they owe is a relatively modest amount. By core tax I exclude accumulated penalties and interest. The Commissioner refuses to approach the matter that way, relying on the proposition that once interest and penalties are debited by operation of the statutory provisions they become uncollected tax. That is right in one sense but obscures the issues defined in [155] following findings of fact that for considerable periods of time the Commissioner's officers failed to comply with statutory timetables to assess claims, and considered it unethical to attempt recovery proceedings, etc, as is more fully set out in the first judgment.

19. The Court of Appeal upheld the findings of Justice Fogarty in the first judgment:

> [125] We do note, however, that the first judicial review judgment held that the Commissioner had to accept a share of the blame for the taxpayers' defaults and that the decision not to collect tax (and the related assurances) were effectively held to have excused (at least to a degree) the taxpayers' failures to pay.
>
> [112] The Judge then went on to consider whether the directions set out at [82](c) and (d) had been complied with. He noted that Mr Budhia considered that there was no case for any further remission of penalties for the taxpayers. The Judge considered that, in coming to that conclusion, Mr Budhia (and Mr Brighty) had misapplied the first judicial review judgment. The Judge said that the comment by Mr Brighty set out at [98] that a deferral of recovery action did not equate to a repayment arrangement was inconsistent with the first judicial review judgment. He held that the first judicial review judgment meant that the taxpayers could rely on the deferral of recovery action to excuse their failure to make timely payment.

20. The Court of Appeal further held, (the emphasis is that of the Court of Appeal):

> [78] Further, Mr Hampton had been given comfort that mounting penalties would be remitted and had a reasonable expectation, based on the settlement offers made by the Commissioner, that his position, and that of his associated entities, was negotiable. These findings were particularly related to the period between 1993 and 1998 but were not, in our view, limited to that period.
>
> [71] The Judge added that the Commissioner needed to appreciate that "rightly or wrongly for long periods of time, particularly between 1993 and 1998, the various officers were treating the debts as uncollectable because of the pending audit assessments of the GST inputs". Audit did not make its decisions promptly and in some, if not most, cases did not make decisions at all in respect of the disputed GST refunds. The Judge said:
>
> > Mr Hampton was given comfort in that respect, and became naively confident his claims would prevail, and that the mounting penalties would be remitted.
>
> [72] The Judge held:
>
> In the round, Mr Hampton had reasonable expectations that his and his associated entities' total liabilities to the Commissioner were negotiable. The Commissioner was prepared to make significant offers to settle in 2000, 2001 and 2002 onwards.
>
> [74] The Judge said:
>
> Broadly, between 1993 down to at least 1998 the officers responsible for debt collection did not feel it was ethical to attempt debt collection while audit was examining the merit of the input claims. If these input claims were recognised they would carry interest calculated from the date they would have been paid but for the investigation. Further, they would have been credited against debits in various of the associated taxpayer accounts. Further, there was an undoubted readiness on the part of the officers to wipe penalties pertaining to those debit accounts, the payment of which would have been significantly resolved had the GST refunds been acknowledged.

21. As noted by the Court of Appeal in 2017, at paragraph [29]:

> [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".

22. Despite the expectation and urgency of the Court of Appeal in 2010, the Commissioner has still not provided a core tax and payments

> schedule in the liquidation proceeding that would have assisted the Court in this consideration. I have prepared a Table, (the Table), extracting from the tax schedules provided by Mr Doubleday in his affidavit dated 1 December 2017, the dates of CPL's core tax assessments for each tax type, excluding penalties, the dates of credits and payments, and the period by period tax balance. The Table conforms with the calculations expected by the Court of Appeal.
>
> 23. The Table is attached to my affidavit as exhibit "A".

[43] The table which Ms Sisson exhibited as "A" is set out as Schedule "A" to this judgment.

[44] On the basis of Ms Sisson's table, she asserts that CPL had unpaid core tax of $26,213 at the time that the Commissioner's initial liquidation proceeding was stayed pending CPL's first application for judicial review.

[45] In the balance of her 28 August 2018 affidavit, Ms Sisson dealt with the history of dealings with IRD under a heading "why were the judicial review proceedings necessary?" She concluded with some material as to the TRA and NOPA proceedings and as to the insurance claim.

Commissioner's reply evidence

[46] Mr Doubleday filed an affidavit in reply to Ms Sisson's affidavit. Mr Doubleday referred to nine affidavits of himself and Mr Brighty filed between 2009 and 2018 in which the Commissioner's quantification of the debt and modifications to the debt had been set out. Mr Doubleday recorded that, with few exceptions, the calculated debt has remained unchanged since July 2008. He referred to the extensive tax schedules produced for the High Court and the Court of Appeal in 2009, culminating in the Court of Appeal's 2010 judgment.

[47] Mr Doubleday referred in particular to Ms Sisson's Table "A".[37]

[48] Mr Doubleday deposed in relation to that evidence:

> 23. In her table, Ms Sisson sets out to calculate the core tax and payments attributable to the tax accounts of CPL using my schedules. Annexure

[37] Schedule A of this judgment.

"H1" is a complete copy of the original 2009 schedules, in colour, on A3 size paper. Ms Sisson's table does not accommodate the compliance behaviours of CPL and its related parties and the statutory sanctions which arise when a person does not pay tax and so omits:

a. Interest and penalties imposed by operation of law;

b. Account transfers between tax accounts of related parties. (For example, the GST credit of $52,748 arising in the period ended 30 September 1993 was transferred to offset debt in Chesterfields Partnership at the request of Mr Hampton for all but $7,261 of that credit).

c. Shortfall penalties imposed in the GST tax accounts for the GST periods ended 31/7/97, 30/11/97, 31/3/98, 31/07/98, 30/11/98, 31/5/99, 31/7/99 and 30/11/99. (These were imposed for filing an obviously incorrect return. These shortfall penalties were agreed to by CPL and formed part of the consent orders issued by the Taxation Review Authority) [Annexure "I"].

d. The calculation of the balance of the tax owing by CPL (including the core assessments, payments and penalties and interest has been fully explained the affidavits referred to above).

[49] Mr Doubleday replied to Ms Sisson's evidence as to the calculation of "core tax":

The Correct amount of "core tax"

55. The calculation of the 15% relief allowed for by the Court of Appeal represents a reduction in the amount of unpaid tax owing at July 2008. As noted above, these July 2008 figures were before the Court of Appeal and contained in schedules that encapsulated in a single document CPL's returns and payments history. No payments have been made to reduce this debt since June 2004. The only changes to the debt figures which were before the Court of Appeal arise:

a. from the GST tax credit (with an effective availability date of 1 December 2007) allowed by the Commissioner in respect of the purchase of 854 Colombo Street. This property was repurchased by Ms Sisson (as trustee for CPL) at the Fidelity Life mortgagee sale in November 2007. Ms Sisson initially claimed an input tax credit in her name and after a dispute which was resolved December 2009 it was agreed (i.e. after the schedules had been prepared) that CPL would receive entitlement to the tax credit; and

b. the quantification of the 15% relief calculation permitted by the Court of Appeal.

56. These figures were also before the High Court in the 2015 liquidation proceedings.

57. The debt is comprised of unpaid GST arising in the periods from July 2000 through to March 2003 and unpaid Income Tax arising in the periods from 1997 through 2003. The "core" amount of the tax debt is quantified in tax returns filed by CPL or re-assessed by the Commissioner following investigation. To it is added further tax owing as a result of the imposition of statutory penalties for late payment and use of money interest. The aggregated debt is reduced by any transfers, payments on account and the 15% relief permitted by the Court of Appeal.

58. The 15% relief calculation is based on all penalties ever levied against CPL including additional tax, late payment penalties, and Use of Money Interest, but excluding shortfall penalties imposed by Barber J in the Taxation Review Authority (as a result of the consent memorandum dated 11 August 2003, consented to by CPL).

[50] Mr Doubleday also replied to Ms Sisson's evidence as to "stopping the clock", deposing:

Stopping the clock

25. With respect to CPL there are two issues where specific and targeted relief have been provided and any "other matters" are more than covered by the 15% relief allowed by the Court of Appeal. Adrian Brighty's paper dated 12 April 2007 [Annexure "J"] prepared prior to the 2nd Judicial Review proceeding sets out the specific relief provided at that time which was subsequently added to by adoption of the Court of Appeal's Scenario 2 approach, and the 15% global relief calculation.

26. With respect to CPL, the first specific issue concerns the late processing of CPL's 31 March 1995 GST return tax credit (a refund of some $59,518.41). The GST credit arose in respect of the March 1995 GST return period and had an effective "availability" date of 1 April 1995. The refund was transferred forward against CPL debt arising in later periods and this meant that if CPL had access to the funds earlier it could have advanced the sums to related parties to settle parts of their older debts earlier. The tax credit was used to settle (albeit at a later date) tax due and owing by CPL so the issue for relief was more focussed on the opportunity cost of not being able to use the funds for other purposes. In keeping with the guidance provided by the High Court the relief provided by the Commissioner was to reduce the older tax debt of Chesterfields Partnership by some 21 months. In total some 34 months of interest relief was provided to Chesterfields Partnership this being to the best advantage of the taxpayers. This specific relief was granted before other relief, including the 15% calculation.

27. As a general comment with respect to related parties and tax credits, where the fate of a tax credit was determined at a late date, and where

no payment had been made in expectation of offset of the tax credit, then when a tax credit is applied against debt it is always applied at the earliest effective date it would ever have been available (i.e. the first day after the end of the Tax return period to which the tax credit claim relates). Thus, for example, a GST return (disclosing a refund claim) filed in February 2010, in respect of a GST return period ended 30 November 2007, would be available 1 December 2007. This means that where no payment on account has been made, there is no prejudice to the taxpayer where the relevant penalties which accrued (perhaps in other tax accounts as a result of the failure to use the tax credit) are effectively reversed when the tax credit is applied at the "effective date of availability".

28. The 15% relief permitted by the Court of Appeal was on top of specific targeted relief.

29. The second issue concerns the period of time involved in the litigation. The Court of Appeal in [2010] NZCA 400 stated at paragraph 145:

> "While the taxpayers could have paid at least the tax that was not in dispute the fact they did not do so cannot, in terms of the reasoning of the first judicial review judgment, be placed totally at their door. The Court, (and the Commissioner) must take some responsibility. We agree with Fogarty J that the fact that the taxpayers were largely successful in the first judicial review is relevant in that regard."

30. The issue of course was what proportion of blame belonged to the Commissioner. The Court of Appeal in paragraph [93] concluded that:

> "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 judgement."

31. CPL has not paid any tax since 2004 (1 December 2007 tax credit excepted). Through its directors it has attempted to evade the payment of tax through shifting assets to other parties. The company continues its pattern of non-compliance through its failure to file returns and failure to account for GST on property sales, and to account for GST on insurance proceeds. Nothing prohibited CPL from making payments on account of debt by consent e.g. via an agreed variation to the freezing orders. It has chosen not to pay.

32. The High Court released the stay on collection by minute dated 23 September 2014 [Annexure "K"]. The Court of Appeal considered the stay on collection a relevant factor.

33. The Commissioner ultimately adopted the pragmatic approach. The schedules before the Court of Appeal documented the compliance history of the company from CPLs inception to July 2008 and were the only figures before the Court to inform its assessment of the justice of the 15% proposal.

34. The schedules were also before the High Court in the 2015 liquidation hearing before his Honour Associate Judge Osborne. It was through

rechecking of these figures, in the lead up to the hearing, that omission of the 1 December 2007 GST input tax credit was identified by the Commissioner, and the quantification of the debt adjusted accordingly. These adjusted figures and calculations were available to CPL in the liquidation proceeding. The statements of account issued to CPL accurately quantify the debt owed. In the absence of payment from CPL the Commissioner does not understand Ms Sisson's point that CPL was prejudiced by the amendment to the debt quantification.

35. The recovery action commenced in 2004 was largely determined by the Court of Appeal in 2010 through that Court's judgment in [2010] NZCA 400, but for final quantification of the relief. Quantification of relief was communicated to CPL in 2012. That is a period of some eight years. The Commissioner stopped further imposition of penalties and use of money interest from July 2008 (i.e. a mid point). This latter adjustment was partly to cover giving some relief from penalties and interest during the litigation and partly to bring some finality to the quantum of the debt figures.

36. Today, in 2018, 14 years after recovery action was initiated, the Commissioner has yet to collect. 'Stopping the clock' is a relief mechanism and administrative method of convenience adopted by the Commissioner to stop the further imposition and aggregation of late payment penalties and use of money interest. Late payment penalties and use of money interest is a statutory sanction against those who fail to comply voluntarily. CPL's behaviour warrants further impositions. Accordingly the relief from 2008 to the present day is significant. Absent payment there is no reason why further sanctions should not be imposed.

37. Other matters for relief would include the effect of any assurances the High Court considered had been given to CPL. When considering this aspect the Commissioner is mindful of her attempts through prosecution action to incentivise tax return compliance, and litigation to recover unpaid tax. For example with respect to debt collection it is worth noting that from 1998 through to 2003 CPL was very profitable and absent payments to Inland Revenue, the following recovery action eventuated:

    a. M23/99 (March 1999) the first liquidation proceeding resulted in a payment of $133,278.12 by CPL on account of unpaid taxes.

    b. M388/99 (November 1999) the second liquidation proceeding resulted in a payment of $70,000 on account of unpaid taxes;

    c. M95/2000 yet another liquidation proceeding gave rise to a payment by CPL on account of unpaid taxes of $150,000.

38. Recovery of core tax, additional taxes, late payment penalties and use of money interest were features of the debt recovered, and are confirmed in these judgments. In fact none of the debt was disputed as that term is used in the Tax Administration Act.

39. The only debt that was disputed by CPL involved Taxation Review Authority hearings and these were disputes initiated by the Commissioner after an investigation (refer paragraph 23 above). All other debt was based on returns filed by CPL itself or based on tax positions agreed by CPL.

40. Taxation Review Authority proceedings in June 2001 and August 2003 gave rise to payments by CPL on account of unpaid taxes of $125,000 and two amounts of $26,850 (total $53,700). A consent memorandum of June 2001 confirmed CPL's liability for the underlying tax impost. An 11 August 2003 consent memorandum specifically confirmed the liability of the company for 20% shortfall penalties, and acceptance by the company of penalties and use of money interest in relation to the disputed debt.

41. Litigation has enabled the Commissioner to collect just over 50% of the tax debts ever owed by CPL. CPL has only ever paid around 25% or less of its debts voluntarily.

42. Freezing orders have been necessary to protect the Commissioner's interests in debt recovery. The company has a history of non-compliance when it comes to tax payments and absent the freezing orders the Commissioner considers her prospects of collection would be limited.

43. The 15% relief figure is on top of the specific actions taken above.

44. The Court of Appeal in [2010] NZCA 400 did not consider that all the penalties and interest should be remitted, and noted at footnote 107 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 and, as we noted above, this is a relevant consideration (even in terms of the first judicial review judgment)".

45. The Court of Appeal also noted at footnote 108:

> "that the reductions should not necessarily be the same for all taxpayers"

46. The specific and general reductions applied by the Commissioner are significant, as I now set out.

47. Mr Hampton (the sole director and shareholder of CPL until his bankruptcy) was adjudicated bankrupt on 5 June 2013. He was a partner in Chesterfields Partnership and Chesterfields Preschools Partnership. The Commissioner subsequently filed proofs of debts to the Official Assignee.

48. The tax debts (excluding disputed debts) comprised:

    a. Mr Hampton debt owing (after 15% relief): $793,773.37

b. Chesterfields Preschool Partnership debt (after 15% relief): $321,345.17

c. Chesterfields Partnership (after 15% relief and specific relief): $44,229.66

49. Mr Hampton was also the sole director of Anolbe Enterprises Limited which was liquidated by Court order on 18 June 2015 with tax debts owing of $46,754.21

50. Unpaid related party debt (after reliefs) therefore totalled: $1,206,102.41

51. These debts arise after deduction of the 15% amounts listed below:

a. Mr Hampton: $112,038.83

b. Chesterfields Preschools Partnership: $41,241.47

c. Chesterfields Partnership (per letter 27 July 2012): $8,703.46

d. Anolbe Enterprises Limited: $5,186.09

52. This amounts to a total 15% related party relief of $167,169.85

53. In addition to the above, specific relief was provided via:

a. 34 months reduction in Chesterfields Partnership penalties: $52,933.12;

b. The adoption of Scenario 2 recommended by the Court of Appeal which reduced the Partnership debt by $1,445,545.16;

c. Stopping of penalty and interest from July 2008 to date (not quantified).

54. In the context of the judicial review proceedings, general relief was provided as a "package" but specific relief was also provided as noted above. Ultimately, the relief provided to CPL's related parties through the bankruptcy of Mr Hampton (including his interest in Chesterfields Partnership, Chesterfields Preschools Partnership and liquidation of Anolbe Enterprises Limited), quite apart from the specific reliefs provided to CPL, is considerable.

[51] Mr Doubleday expressly refrained from replying to other aspects of Ms Sisson's affidavit upon the basis that those matters were beyond the scope of the rehearing of this liquidation application as directed by the Court of Appeal.

The interim liquidators' evidence

[52] Malcolm Hollis is one of the interim liquidators of CPL appointed by this Court on 15 December 2017.[38]

[53] Mr Hollis has filed an affidavit. He recorded his understanding that Ms Sisson (who had shortly before filed her written submissions) was intending to submit that there is outstanding litigation involving CPL which was relevant to the liquidation application.

[54] Mr Hollis recorded that the interim liquidators had been invited by the Commissioner to consider discontinuing various proceedings before this Court. Mr Hollis recorded his view that none of the proceedings (commenced by CPL) had any reasonable prospect of success and that, in any event, CPL had no funds available to continue the "historical litigation". Nevertheless, Mr Hollis had declined to discontinue any of the proceedings given the continuing litigation in relation to CPL's liquidation.

Ms Sisson's affidavit in reply

[55] Ms Sisson filed an affidavit on the eve of the hearing in reply to Mr Hollis' affidavit. Ms Sisson set out her reasoning as to why it would be premature to form any view as to the prospects of success of CPL's various proceedings.

Ms Sisson's additional document

[56] At the hearing, Ms Sisson sought to have introduced in evidence a photocopy of the first page of an IRD Goods and Services Tax (GST) statement of account (Goods and Services Tax) dated 16 July 1994. Her purpose in providing that document was to support a figure which she had entered into her table of "CPL tax schedules". The statement of account refers to a credit of $10,042 from another taxpayer's account on 1 April 1993. That is a credit which Ms Sisson has claimed for CPL in her tax schedule.

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[38] *Chesterfields Preschools Ltd,* above n 5.

[57] Ms Sisson did not satisfactorily explain why this supporting document had not been properly exhibited in evidence when she provided in August 2018 the affidavit which brings the $10,042 figure into account. Furthermore, the photocopy produced is an incomplete document, there being an entry on it which indicates that the statement is continued on a next page.

[58] I provisionally took the document in in order to consider it. Having done so, I refused to accept it in evidence as an incomplete document, leaving aside issues arising from its attempted late introduction.

The task for the Court

[59] The state of account between CPL as taxpayer and the Commissioner has been the subject of such lengthy dispute and litigation that a discussion of even the most recent years' litigation is lengthy.

[60] With this rehearing of the Commissioner's liquidation application, the Court is nonetheless required to focus on the factual issues which arise when a liquidation application is to be determined.

[61] When this Court initially heard the liquidation application and made an order liquidating CPL in 2015, there was a relatively recent challenge by the taxpayer to the appropriateness of the Commissioner's response to the Court of Appeal's judicial review appeal judgment requiring the Commissioner to recalculate the tax owing upon a reconsideration of penalties (guided by the possibility of a pragmatic approach involving a 15 per cent reduction). In short, the ultimate debt position as between CPL and the Commissioner was to be determined by that process (subject to the right of CPL to test the accuracy and methodology of the Commissioner's calculations).

[62] The added complication at the time of the judicial review appeal lay in the fact that all collection of tax owed by CPL had from 25 November 2008 been stayed until the requirements of the judicial review appeal judgment had been met. When the Court of Appeal came to determine the judicial review appeal, with its findings as to the taxpayers' continuing complaints and the adequacy of a 15 per cent reduction of penalties, the Court saw fit to deliver a judgment dealing not only with issues as to the

ultimate taxation liability of CPL but also the Commissioner's obligation to collect what was owing beyond argument. This need to make appropriate provision for the interim collection of tax was addressed by the Court of Appeal thus:[39]

> Stay
>
> [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).

[63] Consequently, the stay was lifted. The Commissioner was able to proceed with this liquidation application. Following the hearing of that application in 2015 this Court found, primarily upon the basis of Mr Brighty's evidence as to the state of CPL's account (after application of a 15 per cent reduction of penalties and interest (other than short-fall penalties)) that CPL had a substantial, indisputable debt which entitled the Commissioner to the order of liquidation she sought. The liquidation judgment did not focus upon or analyse the distinction between "core debt" and other imposts such as penalties and interest. The focus of the Court of Appeal's discussion of indisputable core tax (and some penalties) in that part of the Court of Appeal's 2010 judgment concerning the lifting of the stay was upon the Commissioner's collection of what was clearly not beyond dispute. That particular context was the payment of the debt by the taxpayer to the Commissioner. In the absence of payment of the debt, the Commissioner was entitled to pursue liquidation through service of a statutory demand and subsequent application. In electing to pursue that course, the Commissioner moved the necessary focus from the interim collection of a particular debt (indisputable core tax plus something more) to the solvency of CPL measured against its indebtedness to its creditor (the Commissioner).

[64] The Court here must accordingly focus on the matters which the creditor must establish in order to obtain an order of liquidation. One of those matters, on the facts of this case, is the total amount of CPL's debt to the Commissioner (established on the balance of probabilities). The identification of a particular figure of core debt (which would have been relevant in the interim debt collection situation were the

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[39] The judicial review appeal decision (CA), above n 8, at [146].

Commissioner to have sought to enforce payment of that portion of the debt) falls away in significance. What the Commissioner is required to establish is the figure of total indebtedness, arrived at by accurate calculation and methodology in relation to all elements.

The Court's liquidation jurisdiction

Liquidation – the statutory regime

[65] The Commissioner invokes the Court's power under s 241(4)(a) of the Companies Act to put CPL into liquidation if CPL is unable to pay its debts.

[66] To bring this application the Commissioner must establish in terms of s 241(2)(c)(iv) that she is a creditor whether in relation to accrued debt or in relation to contingent or prospective debt.

[67] It is appropriate that the Court consider such a liquidation application by reference to three main questions:[40]

(a) Is the plaintiff a creditor?

(b) Is the defendant unable to pay its debts?

(c) How should the Court's residual discretion be exercised?

Is the Commissioner a creditor of CPL?

[68] While Ms Sisson, through her statement of defence, denied that CPL owes any debt to the Commissioner, her evidence (focused on core tax) was CPL owed $6,898.22 (without consideration of penalties and interest).

[69] Furthermore, the Commissioner is a judgment creditor (in relation to costs judgments) in the sum of $32,105 (together with accruing interest).

[70] It is accordingly established that the Commissioner is a creditor of CPL.

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40 *Cable Price (NZ) Ltd v Taimona Haulage Ltd* [2016] NZHC 828 at [2].

Is CPL unable to pay its debts?

[71] The statutory demand issued by the Commissioner was not complied with by CPL. There arose the rebuttable presumption that CPL is unable to pay its debts.[41]

[72] It was accordingly for CPL (or Ms Sisson) to establish in this proceeding that CPL is able to pay its debts.

[73] In this context it is necessary to first consider what the level of debt owed by CPL to the Commissioner is.

CPL's debt to the Commissioner

Evidence

[74] The logical starting point for consideration of CPL's debt lies in the detailed tables prepared by the Commissioner's officers in relation to each tax type on a strictly chronological basis. Those provide, for each period, the full details of assessments and shortfall penalties followed by other imposts including late payment penalties and UOMI. Significantly, Ms Sisson in compiling her own table (Table "A") extracted her starting figures and dates from the Commissioner's schedules.[42]

[75] As explained by Mr Brighty, the Commissioner elected not to pursue collection of a sum of $70,078.09 representing tax (GST) owed under default assessment made in the absence of GST returns. She also elected not to collect $200 representing late filing penalties.

[76] Next, the Commissioner dealt with the GST tax credit of $102,777.77 discussed in the liquidation appeal judgment. That tax credit, and the consequential reduction in penalties and interest ($10,113.16) were then taken into the Commissioner's calculations as to the revised July 2008 unpaid tax debt.

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41 Companies Act 1993, s 287(a).
42 See Schedule A of this judgment.

[77] The Commissioner's tables further itemise the manner in which penalties and UOMI, as statutorily provided for, were brought into account and accrued. Subsequent penalties accrued every month on a compounding basis.

[78] Mr Brighty's evidence is that under the penalty regime used, there was no ordering rule as to whether the Commissioner should treat a payment as going against core tax first or against penalties first. As Mr Brighty deposed, the particular approach was irrelevant. Both core tax and penalties were legally liable to be paid and were able to be sued for. Subsequent penalties were calculated on the total still owing as the penalties were calculated on a compound basis so that whichever was paid up first had no bearing on the calculation of subsequent penalties.

[79] Mr Doubleday's evidence explains how tax credits were applied to the benefit of CPL by applying them at the earliest effective date that they would have been available.

[80] Upon the completion of the Commissioner's tables, the Commissioner then elected to adopt the pragmatic approach endorsed by the Court of Appeal by applying a 15 per cent global relief calculation.

[81] Finally, as explained by Mr Doubleday, the Commissioner also viewed the selection of a date on which to "stop the clock" as a further relief mechanism. In short, the Commissioner selected July 2008. As a consequence, CPL (notwithstanding the absence of any payment since the stay was lifted) has had the significant benefit of relief from the further accrual (after 2008) of late payment penalties and UOMI. On Mr Brighty's evidence, the stopping of the clock at July 2008 meant that by October 2015, the total relief granted to CPL was roughly $1.852 million, representing slightly more than half the interest and penalties.[43]

Discussion – the amount of the debt owed by CPL to the Commissioner

[82] As a result of the judicial review appeal decision (CA), the Commissioner was required to provide her spread-sheeted calculations in a way that the taxpayer could

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[43] Affidavit of Adrian James Brighty, 11 April 2018, at [59] – [60], at [52].

check, with the calculations to take into account the Commissioner's decision on the remission of penalties under s 183A Tax Administration Act 1994.[44] The Commissioner was entitled to elect on a pragmatic basis to effect remission of penalties (and interest) by a reduction of 15 per cent across-the-board.[45] The Commissioner's calculations (taking into account a 15 per cent across-the-board remission) were completed and provided to CPL in 2012. The calculations were completed again in spreadsheet form (supported by schedules and print-outs of statements of account).

[83] As this Court's subsequent liquidation judgment records, Mr Hampton for CPL did not respond by 17 August 2012 to the approach adopted by the Commissioner.[46] Rather, Mr Hampton focused on the prior conduct of the Commissioner and IRD and stated that the taxpayers (that is, CPL and Anolbe Enterprises Ltd) were focusing on the costs of achieving legal redress and resolution in relation to their maladministration proceedings.

[84] The stay which had previously been in place preventing the Commissioner from taking debt collection steps was subsequently rescinded. The lifting of the stay flowed from the observation of the Court of Appeal that if the Commissioner's recalculations could be provided to the High Court, the Court of Appeal expected the stay to be varied to allow immediate collection of the undisputed core tax and some associated penalties.[47] There was accordingly a focus at that point in allowing the Commissioner a significant interim recovery of debt (even if some balance of the total debt was left to be recovered at a later point).

[85] In commencing steps towards CPL's liquidation in 2014, the Commissioner nevertheless issued a statutory demand for the full calculated debt (identified at 4 December 2014 as $1,239,940.11 (including the $32,105 costs orders)).

[86] In its 2015 liquidation judgment, the High Court focused on the core tax liability and a portion of associated penalties as referred to in the Court of Appeal's

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44 The judicial review appeal decision (CA), above n 8, at [91] – [93].
45 The judicial review appeal decision (CA), above n 8, at [93].
46 2015 liquidation judgment, above n 1, at [14] – [17].
47 The judicial review appeal decision (CA), above n 8, at [147].

judicial review appeal decision. The High Court therefore did not make a determination as to the precise level of CPL's tax liability.

[87] Ms Sisson's appeal succeeded upon the basis that the "undisputed core debt" referred to by the Court of Appeal in 2010 had not been accepted by CPL.[48] The liquidation application was remitted to this Court for "greater scrutiny [to] be given to the figures of both sides".[49]

[88] With the time that has passed, the interim focus on a figure of core debt for interim debt collection purposes has been overtaken. All the Commissioner's calculations have been available for consideration for some years. This Court is in a position, in the light of the evidence filed and submissions made, to reliably scrutinise the figures and contentions of both sides.

Input data

[89] The data put into the Commissioner's spreadsheets and tables have been available for inspection since the schedules and tables were produced. The spreadsheets identify each component necessary to arrive at a correct final calculation.[50] Ms Sisson has not suggested that the Commissioner did not identify the correct categories for data entry.

[90] In her submissions, Ms Sisson identified two items of data which she submitted were incorrect or unreliable.

[91] One was the Commissioner's alleged failure to bring into account a sum of $10,042 as a transfer to CPL's account on 1 April 1993. Ms Sisson sought to address this item in her oral submissions at the hearing. It does not fall for consideration here

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48 The liquidation appeal judgment, above n 2, at [85].

49 The liquidation appeal judgment, above n 2, at [87].

50 In relation to CPL, the columns identify respectively tax type; the tax year in question; the tax days by which payment was late; the payments made in the tax year; the tax as returned; any increase assessed by Commissioner; tax assessed by Commissioner; any late filing penalty; any additional tax; any late payment penalty; any UOMI; the total tax before payment/credits; any payment/disbursements credited to the period; any amount refunded; any transfers to and from the period; the total debt as at 25 July 2008.

as I have (for the reasons identified at [57] – [58] above, excluded from evidence the document upon which Ms Sisson would have based her submission.

[92] Ms Sisson's second submission (addressed in her written synopsis) related to a GST return tax credit of $59,518.41.

[93] The issue arises because a GST return tax credit of that sum would have been available to CPL from 1 April 1995 but the Commissioner has treated it in the calculations completed in the light of the judicial review appeal decision (CA) as available to the related entity, Chesterfields Preschools Partnership (a partnership of Mr Hampton and Ms Sisson).

[94] The allocation of that tax credit to the Partnership rather than to CPL was explained by Mr Doubleday as follows:

> 26. With respect to CPL, the first specific issue concerns the late processing of CPL's 31 March 1995 GST return tax credit (a refund of some $59,518.41). The GST credit arose in respect of the March 1995 GST return period and had an effective "availability date of 1 April 1995. The refund was transferred forward against CPL debt arising in later periods and this meant that if CPL had access to the funds earlier it could have advanced the sums to related parties to settle parts of their older debts earlier. The tax credit was used to settle (albeit at a later date) tax due and owing by CPL so the issue for relief was more focussed on the opportunity cost of not being able to use the funds for other purposes. In keeping with the guidance provided by the High Court the relief provided by the Commissioner was to reduce the older tax debt of Chesterfields Partnership by some 21 months. In total some 34 months of interest relief was provided to Chesterfields Partnership this being to the best advantage of the taxpayers. This specific relief was granted before other relief, including the 15% calculation.

[95] Mr Doubleday's reference to "the best advantage of the taxpayers" has its origins in finding made in the first judicial review proceeding that Mr Hampton (dealing with the Commissioner on behalf of himself and his related entities[51]) had been led to believe that GST input claims he was lodging would be considered and decisions made upon them and refunds lodged to the best advantage of the **various**

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[51] The related entities were CPL, Mr Hampton and Ms Sisson, Chesterfields Partnership, Chesterfields Preschools Partnership and Anolbe Enterprises Ltd.

taxpayers (emphasis added).[52] The High Court ordered relief on that basis, with that aspect of the Court's direction not altered on appeal.

[96] Ms Sisson did not file evidence responding to Mr Doubleday's explanation of the allocation of the 1995 GST return tax credit (to the Chesterfields Partnership rather than to CPL). She has not identified any factual material to indicate that the Commissioner's treatment of the 1995 GST return tax credit was other than to the best advantage of the various taxpayers viewed as a group.

[97] Rather, Ms Sisson in her written synopsis stated:

> My reading of that statement is that Mr Doubleday is alerting the company to a decision of the Commissioner made at some unknown time to ultimately transfer the credit of $59,518.41 away from the company to Chesterfields Partnership. If this is what Mr Doubleday is meaning to convey then, firstly, this is the first time to my knowledge that the decision has been notified to the company and the Court, and secondly, surprisingly, such a transfer has not been made with the consent of the company or the approval of the Court in the review proceedings. There may, however, be some other interpretation and I await clarification from the Counsel for the Commissioner before commenting further.

[98] Accordingly, the emphasis in Ms Sisson's submission was upon two matters. First, there was no evidence of a direction by CPL to make the refund available for the Chesterfields Partnership to use (at an earlier date than CPL would have been able to). Secondly, there had not been "approval of the Court in the review proceedings".

[99] The first complaint (as to a lack of specific direction by CPL to transfer the refund) ignores the historical situation which the judicial review decisions were addressing. The Courts were dealing with proceedings involving all the related entities against a background of transactions in which transfers between accounts had regularly occurred. The High Court's direction in its first judicial review decision (affirmed on appeal) was that the Commission's recalculation of the individual taxpayer's positions was to be carried out on the basis which was most favourable to the taxpayers, that is the taxpayers viewed as a group. Mr Doubleday's evidence

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[52] See first judicial review decision (HC), above n 10, at [159]; judicial review appeal decision (CA), above n 8, at [82].

establishes why the transfer of the 1995 GST return tax credit to the Chesterfield's partnership complied with the Court's direction.

[100] Ms Sisson's second complaint, that the transfer has not been approved by this Court in the judicial review proceedings, makes an assumption that such approval was required. It was not. Rather, what was directed in the judicial review proceedings was a calculation and remission exercise on the part of the Commissioner. The Commissioner was not required, before pursuing debt collection or similar procedures, to obtain through judicial review a declaration or other relief endorsing the correctness of her calculations and approach to remission. As the liquidation appeal judgment records, it is in the context of this rehearing of the liquidation application that this Court is to determine the precise level of CPL's indebtedness (taking into account the precise amount of the remission effected by the Commissioner).[53]

[101] I am satisfied on the evidence adduced by the Commissioner that items of data entered into the calculation of CPL's statement of account are correct.

Actual and potential common law claims

[102] In 2008 CPL (and related entities) filed two sets of proceedings alleging misfeasance in public office and pursuit of malicious civil proceedings. To the extent those proceedings are live, they remain stayed.[54]

[103] In her notice of appeal against the liquidation judgment, Ms Sisson included material which implied that the analysis of CPL's solvency should take account of such potential damages claims.[55] The Court of Appeal held that such potential claims were not to be brought into account (that is in relation either to the Commissioner's calculation remission exercise or in the liquidation context). The Court stated:[56]

> 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 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.

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53 Liquidation appeal judgment, above n 2, at [104].
54 As recorded in the liquidation appeal judgment, above n 2, at [32] – [33].
55 Liquidation appeal judgment, above n 2, at [106].
56 Liquidation appeal judgment, above n 2, at [107].

[104] In accordance with the Court of Appeal's ruling, the Commissioner in her calculations has not taken into account any potential liability (which she denies) arising from the potential common law claims. Nor has Ms Sisson in her statement of defence or in her submissions submitted that any such actual or potential claims are relevant in the present context. They are not.

The NOPA and TRA proceedings

[105] In 2005 CPL (and related entities) had filed a notice of claim in the Taxation Review Authority (TRA) (the year after the taxpayers had commenced their first judicial review proceeding), the TRA proceeding was then transferred to the High Court.[57] In the ensuing years the TRA proceeding was effectively parked while other litigation was pursued.

[106] In 2009, CPL and related entities commenced a proceeding in the High Court concerning a NOPA.

[107] In the first liquidation hearing, counsel for CPL submitted that CPL ought not to be put into liquidation pending resolution of the TRA proceeding.[58] In its liquidation judgment, the High Court concluded that the judicial review appeal decision (CA) had contained an expectation of finality as to the fact and extent of CPL's liability to the Commissioner. There was found to be an issue estoppel which precluded CPL from having addressed through TRA processes a remedy for some aspect of the Commissioner's or departmental earlier conduct.[59]

[108] In appealing the liquidation judgment, Ms Sisson submitted that both the fact and extent (if any) of any liability for CPL to the Commissioner remained to be resolved in the TRA proceeding or the NOPA proceeding or both.[60]

[109] The Court of Appeal (while quashing the liquidation order) directly addressed the finality issue and concluded:[61]

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57 As summarised in the liquidation appeal judgment, above n 2, at [12] – [14].
58 2015 liquidation judgment, above n 1, at [50] – [51].
59 2015 liquidation judgment, above n 1, at [65].
60 Liquidation appeal judgment, above n 2, at [90].
61 Liquidation appeal judgment, above n 2, at [102].

> It follows that, notwithstanding Fogarty J's initial directions when transferring the TRA proceeding into the High Court, 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.

[110] In reaching that conclusion the Court of Appeal noted that the Court had in the first judicial review decision (CA) 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.[62]

[111] In her statement of defence filed in this proceeding Ms Sisson has pleaded that the penalty accrual debt claims are in dispute because of both the TRA proceeding and the NOPA proceeding.

[112] Similarly in her synopsis of submissions, Ms Sisson developed the proposition that there remained available to CPL (and its related entities) through the TRA proceeding and the NOPA proceeding the right to contend that there had been in the conduct of the Commissioner and/or the IRD an overriding illegality which entirely vitiated the assessments of penalties.[63] Ms Sisson further submitted that if, through the TRA proceeding and/or the NOPA proceeding, CPL were able to establish that there had been overriding illegality, the penalty "assessments" would thereby be "vitiated and extinguished".

[113] In her written synopsis Ms Sisson then recorded:

> That outcome does not violate the pragmatic approach suggested by the Court of Appeal as an abuse of process of the Court, or the *doctrine of res judicata,* since if the Challenge is upheld by the TRA, then it is the Commissioner's own overriding illegality that vitiated and extinguished the assessments of penalties on which the pragmatic approach would otherwise have applied.
>
> If the company is successful in the TRA in establishing that there are no valid assessments of penalties on which the 15% per cent, can be applied, so that it is not liable to pay the disputed penalty debts, then there is nothing further to be received from the company by the Commissioner.

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62 Liquidation appeal judgment, above n 2, at [99].

63 Ms Sisson invoked the Court of Appeal judgment in *Yan v Mainzeal Property and Construction Ltd (in rec and in liq)* [2014] NZCA 190.

[114] Ms Sisson's submission therefore is that the Court should recognise that through the TRA proceeding (and the NOPA proceeding) there may yet be a determination which means that CPL will owe no penalties or interest to the Commissioner.

[115] Ms Sisson's submission cannot stand alongside the Court of Appeal's judgments. It has been found that the appropriate measure of adjustment (having regard to the impugned behaviour of the Commissioner and the IRD) would be achieved through an across the board 15 per cent reduction in "penalties". This Court is not permitted to revisit that determination of the appropriate measure of adjustment.

NOPA lodged on 31 January 2018

[116] By her statement of defence (27 July 2018) Ms Sisson alleged that the Commissioner's penalty accrual debt claims were disputed also by reason of a NOPA lodged on 31 January 2018.

[117] In her affidavit, Ms Sisson has deposed as to lodging a NOPA on 31 January 2018 with the Commissioner's legal representative but she has not exhibited the document in question. She recognises in her affidavit that the Commissioner responded in March 2018. The Commissioner rejected the filing of the NOPA by reason of the fact that interim liquidators had been appointed to CPL.

[118] It is sufficient to dispose of this ground of defence that the document in question has not been produced in evidence. The Court is unable to determine whether, even were the document to have been lodged with legal effect, whether it identifies any further line of argument or defence which has not otherwise been dealt with or excluded.

[119] On the eve of this hearing, Ms Sisson filed a further affidavit. To it, she annexed a new document in the form of a NOPA dated 29 October 2018.

[120] I refuse to take this aspect of Ms Sisson's evidence into account. The draft document comprises some 40 pages of detail, narrative and submission. In the circumstances in which, as an exhibit, it was filed on the eve of the hearing, without

explanation as to why it could not have been filed in a timely manner in accordance with timetable directions, it would have been inappropriate to require counsel for the Commissioner to present meaningful submissions upon it.

[121] To the extent that the document contained any assertions otherwise justified by the evidence before the Court, it was open to Ms Sisson to have covered those matters in her submissions.

[122] The Court upon this basis has not considered in detail the document exhibited by Ms Sisson. On an initial inspection of the document it appears likely that examination of its subject matter would have been precluded by the Court of Appeal's judgments concerning the non-revisiting of the TRA proceeding and the NOPA proceeding. In the introductory paragraph to the 29 October 2018 standard form (of the NOPA), there appears the following question and answer:

> What is the change you want?
>
> What is the amount of the change you want made to the assessment?
>
> Refer to First Amended Notice of Claim filed in tax Challenge proceeding 2005-409-1967.

Neither Ms Sisson nor Mr Shamy for the Commissioner took me to any comparative analysis of the factual assertions contained in CPL's TRA and NOPA proceedings as compared with the content of the 29 October 2018 document. That said, a superficial reading of the 29 October 2018 document suggests that it contains assertions of the historical matters which Ms Sisson and Mr Hampton have consistently raised when impugning the conduct of the Commissioner and the Department.

[123] The intention of Ms Sisson to have a new NOPA served upon the Commissioner takes CPL's defence no further.

1 December 2007 tax credit

[124] In its liquidation judgment, the Court of Appeal identified the 1 December 2007 GST tax credit of $102,777.77, together with the consequential reduction in

penalties and interest ($10,113.16) as calculated by Mr Doubleday.[64] The Court of Appeal confirmed that that appropriate adjustment was to be made to the Commissioner's calculations.[65]

[125] The evidence establishes that the Commissioner in her updated calculations has incorporated the tax credit (with consequential reduction in penalties and interest).

Application of 15 per cent relief

[126] This Court is bound by the recognition by the Court of Appeal in the judicial review appeal decision (CA) (as confirmed in the Court of Appeal liquidation judgment) that a reduction of 15 per cent of penalties and interest across the board would more than fulfil the requirements of the first judicial review judgment.

[127] The evidence establishes that the Commissioner adopted and applied that approach in reduction of penalties and interest.

Methodology of the 15 per cent reduction

[128] It was in Mr Brighty's affidavit evidence that the Commissioner's methodology of applying the 15 per cent remission was explained. The Commissioner adopted the date of 31 July 2008 as the date on which to "stop the clock". The Commissioner's methodology was then to apply the 15 per cent reduction as at that date to the various interest in penalties accruing according to each revenue (income tax; GST; ACC; SEA; PAYE; SLE). By reference to detailed explanatory tables, Mr Brighty then demonstrated that were the Commissioner to have adopted a date for remission earlier than July 2008 (such as the date of the first judicial review judgment (CA)), there would have been a smaller amount of relief than applying it to the date of payment in full or the date of write-off as unrecoverable. Mr Brighty's evidence demonstrates that the relief becomes greater when the 15 per cent relief is allowed at a later date, given the accrual of penalties and UOMI.

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64 Liquidation appeal judgment, above n 2, at [50] – [51].
65 Liquidation appeal judgment, above n 2, at [105].

[129] Ms Sisson did not challenge Mr Brighty's evidence in this regard either through her own evidence or submissions.

[130] I am satisfied on the evidence that the Commissioner's methodology in applying a remission as at 31 July 2008 was to the taxpayer's best advantage.

Stopping the clock

[131] Through the decision made by the Commissioner in completing calculations up to 31 July 2008 and calculating 15 per cent remission as at that date, the Commissioner at the one time addressed two matters.

[132] First, she made a decision, as Mr Brighty puts it, "to not impose further interest and penalties after 2 July 2008". Put another way, the Commissioner's remission decision involved remitting all penalties and UOMI which would otherwise have accrued after July 2008. That was not a decision required by any of the judicial review decisions. The consequential relief, while it has not been the subject of a calculation, has been valuable to CPL having regard to the rates and compounding which would have otherwise applied.[66]

[133] Secondly, the Commissioner (through the adoption of the 31 July 2008 date) addressed the Court of Appeal's requirement that there should be a remission of penalties and UOMI applied to an appropriate period.

[134] The Court of Appeal in the judicial review appeal decision (CA) required:[67]

> As a separate exercise, the Commissioner should consider the remission of penalties incurred while the litigation was proceeding. In this regard, the fact that the Commissioner has not been able to collect the tax because of High Court orders is relevant. While the taxpayers could have paid at least the tax that was not in dispute the fact they did not do so cannot, in terms of the reasoning of the first judicial review judgment,[174] be placed totally at their door. The Court (and the Commissioner) must take some responsibility. We agree with Fogarty J that the fact that the taxpayers were largely successful in the first judicial review is relevant in that regard.

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66 See Mr Brighty's evidence, above at [81].

67 The judicial review appeal decision (CA), above n 8, at [145].

[135] The judicial review litigation had commenced in early 2005. Mr Doubleday in his affidavit explained why the Commissioner had adopted a July 2008 cut-off date:

> The Court of Appeal clearly inferred that the Court, the Commissioner and the Taxpayers all bore some responsibility for the delay occurring while the litigation was continuing. Thus some level of interest and penalties were still able to be charged for the period of litigation. Based on the period of litigation starting at the beginning of 2005 and ending when we had finalised the work arising from the litigation together with notification to the Defendant (27 July 2012), then stopping the clock at July 2008 cuts out slightly more than half the interest and penalties that accrued during this period.

[136] In other words, the Commissioner by adopting the 31 July 2008 calculation date, relieved CPL from all the penalties and UOMI which had occurred in the last four years of what might be described as the period of litigation. The Commissioner then applied the 15 per cent across the board remission to the earlier period of litigation (early 2005 to July 2008).

[137] Having regard to the passage in the Court of Appeal's 2010 decision just cited,[68] the Commissioner would have been justified in applying the 15 per cent remission to a period lasting much longer than 2 July 2008. The approach she adopted means (as Mr Brighty's evidence indicates) that the level of remission during the period that the litigation was proceeding was several times greater than the 15 per cent remission recognised as appropriate by the Court of Appeal.

[138] Ms Sisson attacked the Commissioner's adoption of the 31 July 2008 calculation date by reference to another passage in the judicial review appeal decision (CA).

[139] By reason of the stay imposed on debt collection by the High Court in the context of the judicial review proceedings, the Commissioner had been unable to collect any sum on account of the debt (whether the core tax or otherwise) which was asserted to be owing.

[140] In its 2010 judgment, the Court of Appeal reviewed the requirements which had been imposed upon the Commissioner by the High Court in its first judicial review

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68 The judicial review appeal decision (CA), above n 8.

decision. The Commissioner was to consider the remission of penalties under s 183A of the TAA.

[141] In the judicial review appeal decision (CA) the Court of Appeal observed:[69]

> With regard to s 183A the task [of the Commissioner] was to assess the extent of remission of penalties that should occur during the period of the litigation. This reconsideration would need to take into account, we assume, the fact that there was a bar on the collection of taxation imposed by the Court during this period.

[142] In her submissions, Ms Sisson noted that the stay on debt collection (referred to in the passage from the Court of Appeal judgment as "a bar", had been in place from 2004.

[143] Ms Sisson submitted that the Court of Appeal's reference to the Commissioner needing to take into account the existence of the bar removed any discretion of the Commissioner to stop the clock later than 2004.

[144] Ms Sisson's submission cannot be upheld when the Court of Appeal's judgment and in particular its conclusion as to the appropriate level of remission are considered. As the Court of Appeal's paragraph discussing the first High Court judicial review decision indicates,[70] the High Court had directed that the reconsideration **take into account** the fact that the stay was in place (emphasis added). The Court of Appeal then referred to the various other matters which the Commissioner was required to assess.[71] The Court of Appeal then concluded that part of its judgment with its determination that a reduction of 15 per cent of penalties (and UOMI) across the board would more than fulfil the requirements of the first judicial review judgment. The Court of Appeal judgment expressly refers to remission of penalties "during the period of the litigation".[72] It is clear from a reading of the Court of Appeal judgment that the considerations taken into account by the Court of Appeal in identifying the 15 per cent remission figure included the fact that there had been a bar on the collection of taxation imposed during the period of litigation.

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69 The judicial review appeal decision (CA), above n 8, at [89].
70 The first judicial review appeal decision (HC), above n 10.
71 The judicial review appeal decision (CA), above n 8, at [90] – [91].
72 The judicial review appeal decision (CA), above n 8, at [89].

[145] The Commissioner's approach to stopping the clock as at 31 July 2008 cannot be criticised as failing to comply with the court's requirements identified in the judicial review proceedings.

Ms Sisson's table of CPL tax schedules

[146] The Court has not been assisted by the methodology adopted by Ms Sisson in compiling her table of tax schedules. The Commissioner's central obligation (beyond compiling factually accurate data) was to consider remission of penalties and interest. The Commissioner's voluminous spreadsheets and tables presented all the relevant data beginning with assessments, identifying subsequent items including payments and accruing penalties and interest, and leading to balances owed. The remission of penalties and interest was then applied based on that data.

[147] What Ms Sisson's table analyses is highlighted on a final page to her table in which she summaries "total payments" and "total assessments".

[148] Ms Sisson has not through her evidence produced the comprehensive analysis of CPL's tax position, taking into account penalties and interest, which would have demonstrated any error in the Commissioner's process of calculation relating to the remission of penalties and interest.

Conclusion

[149] I am satisfied that the Commissioner's calculations of indebtedness and the methodology adopted in those calculations met the requirements enunciated in the judgments in the judicial review proceedings. In particular I am satisfied that in addition to CPL's liability for Court costs ($32,105 together with interest), CPL has a tax liability to the Commissioner as alleged in the amended statement of claim of $1,088,461.13.

Other indebtedness claimed by Commissioner

Summary

[150] By her amended statement of claim, the Commissioner asserted that there are also other sums to be taken into account in the assessment of CPL's indebtedness. These are:

Estimated GST on sale of 856 – 858 Colombo Street	$85,118.16
Estimated GST on insurance proceeds	$117,667.25
Use of money interest	$104,603.60
Advance to interim liquidators of CPL	$280,000.00

[151] The Commissioner asserts her entitlement to proceed on this application as a creditor by reason of the provisions of ss 240 and 303 Companies Act. By those provisions the term "creditor" includes persons who are entitled to claim a debt or liability, present or future, certain or contingent. Section 241(2)(c)(iv) expressly provides for the making of an application for liquidation by a creditor (including any contingent or prospective creditor).

[152] Section 288(4) Companies Act provides that the Court, in determining whether a company is unable to pay its debts, may take into account the company's contingent or prospective liabilities.

[153] These various liabilities, asserted in the Commissioner's amended statement of claim, were the subject of explanation in Mr Doubleday's affidavit evidence. In his written synopsis Mr Shamy for the Commissioner adopted Mr Doubleday's explanations in submitting that these additional sums should be included in the sum treated as owing to the Commissioner for the purposes of determining CPL's solvency or insolvency.

GST on 856 – 858 Colombo Street ($85,118.16)

[154] Mr Doubleday deposes:

> On 17 August 2010 CPL sold the property at 856 – 858 Colombo Street (at the insistence of the ANZ bank) at auction for $802,000.00. CPL did not account for GST on the sale in the GST return period ended 30 September 2010 despite prompting from the Commissioner. In the absence of returns from CPL the Commissioner considers that the GST liability after allowance for costs due 29 October 2010 amounts to $85,118.16.

[155] Ms Sisson by her statement of defence pleaded both that the Commissioner has not issued any assessment in relation to the alleged GST liability and that the transaction involved an exempt supply pursuant to s 14(1)(d) Goods and Services Tax Act 1985.[73]

[156] Ms Sisson's evidence did not appear to touch on the allegations as to the GST position on the Colombo Street sale. In her oral submissions she repeated what was alleged in her pleading.

[157] The factual matters which would have brought CPL within the scope of the exemption under the Goods and Services Tax Act (such as the prior use of the property) are matters within the peculiar knowledge of Ms Sisson and/or Mr Hampton. In the absence of evidence from them on those matters, the Commissioner (in relation to this potential GST debt) falls within the extended definition of "creditor" (including as it does any contingent or prospective creditor). The $85,118.16 figure may be brought into account in determining CPL's solvency.

GST on insurance proceeds ($117,667.25)

[158] In his evidence Mr Doubleday explained this claimed contingent debt:

> CPL has received insurance proceeds at various times from EQC and NZI (IAG) totalling $936,906.89 and did not account for GST on the receipts. The insurance receipts are subject to GST per s5(13) GST Act 1985. GST is due and payable in the GST return periods ended 31 July 2011, 30 September 2011, 30 November 2011, 31 January 2012, 31 May 2012, 31 January 2013, 31 March 2013 and 31 May 2013. This totals $117,667.25.

[159] In her statement of defence, Ms Sisson stated that no assessment has been issued by the Commissioner in relation to the estimated GST on insurance proceeds

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[73] Section 14(1)(d) deals with the sale of dwellings which have been used for at least the preceding five years before the date of supply exclusively for rental or leasing for accommodation purposes.

and ownership of the insurance proceeds is in dispute in current proceedings on appeal to the Court of Appeal.

[160] In her affidavit, Ms Sisson stated:

> Further steps in relation to the insurance claim are being considered by the Court of Appeal in the context of the appeal of the interim liquidation order. As the Commissioner and interim liquidator have filed evidence in this proceeding on the subject, I believe it is appropriate to update the Court on the circumstances of the impact of the insurance claim on the health of my seriously ill daughter, Olivia.

[161] In subsequent paragraphs Ms Sisson expanded upon those matters of health. She explained that full settlement of the insurance claim on terms acceptable to the High Court pending final resolution of the tax dispute would offer the chance to provide housing for her daughter while at the same time maximising assets available to CPL to meet the claims of the Commissioner.

[162] The nature of the issues identified in relation to the GST on insurance proceeds was not further identified by Ms Sisson in the evidence. By the time this liquidation hearing proceeded, the Court of Appeal had dismissed Ms Sisson's appeal against the appointment of the interim liquidators (having regard to the fact that this hearing was to proceed shortly).

[163] At this hearing, Ms Sisson volunteered further information as to the insurance policy in question having been taken out by herself and held in trust for the company. Those matters are not in evidence in this proceeding. What does not appear to be in dispute is that insurance proceeds relate to an insurance policy which may have been held for the benefit of CPL.

[164] In these circumstances, the Commissioner in relation to this claimed debt also falls within the extended definition of "creditor". The claimed debt may accordingly be taken into account in this context.

Use of money interest (UOMI) on claimed debts ($104,603.60)

[165] In his initial evidence, Mr Doubleday provided a calculation of the UOMI which will have accrued on the debts claimed on account of GST calculated to have

been $88,173.51 as at 28 February 2017. In his subsequent evidence Mr Doubleday updated that calculation, the UOMI interest calculation, to 16 February 2018 being $104,603.60.

[166] Ms Sisson did not take issue in either her pleadings or her evidence with the Commissioner's contention that UOMI would be accruing in the event that either or both the GST claims were established.

[167] Just as the Commissioner qualifies as a creditor in relation to those claims, so too she qualifies in relation to the UOMI which would have accrued pursuant to the provisions of the TAA.

Advances by Commissioner to liquidator relies also upon an advance made to the liquidator

[168] Mr Doubleday gave evidence as to that item:

> Legal action was required by the liquidator to secure the assets of the company from Ms Sisson. Litigation has been a feature of the liquidation to date and the Commissioner has advanced funds to the liquidator in anticipation of realisation of CPL's assets and settlement of its debts. The significant costs awards against Ms Sisson and related parties reflects (sic) the lack of merit in these proceedings.

[169] Ms Sisson by her statement of defence challenged the Commissioner's entitlement to have the $280,000 taken into account in this proceeding. She pleaded:

> The advance of $280,000.00 to the liquidator by Inland Revenue is related to a proceeding commenced by the liquidator for determination of disputed ownership of the insurance proceeds and the property at 854 Colombo Street. The proceeding is under appeal to the Court of Appeal. The advance was made while the liquidation order was under appeal. The appeal of the liquidation order was successful and the matter directed for this rehearing. Costs awarded to the Commissioner and the liquidator in the disputed ownership proceeding are also under appeal. The advance was not disclosed to the second defendant or the Court at the time of the proceeding and appeal. Prior consent was not sought from the second defendant or the Court for such a substantial advance to be made while the appeal of the liquidation order was continuing and the claim of the Commissioner was disputed. The issue of the company's liability for recovery of the advance in those circumstances is relevant to the grounds of appeal and is to be pursued in the prosecution of the appeals.

[170] Ms Sisson did not give evidence in support of that pleading. The Court is not able to determine whether any of the matters pleaded by Ms Sisson might impact on the Commissioner's entitlement to recover the sum made available to CPL as a loan.

[171] On the evidence adduced, the Commissioner has lent to CPL a sum of $280,000. There is no basis on the evidence adduced to conclude that this additional sum is not to be treated as a debt. It is indebtedness to be taken into account as established (rather than contingent or prospective) debt.

Resulting debt figures

[172] The resulting debt figures as proved by the Commissioner are:

(a)	Established debt	
	(a) Tax liabilities	$1,088,461.15
	(b) Court costs	$32,105.00
	(c) Loan to CPL	$280,000.00
		$1,400,566.15
(b)	Contingent or prospective debts	
	(a) GST on 856 – 858 Colombo Street	$85,118.16
	(b) GST on insurance proceeds	$117,667.25
	(c) UOMI as at 16 February 2018	$104,603.60
		$307,389.01

[173] For the purposes of assessing CPL's solvency or insolvency the Court must recognise the established debt figure of $1,400,566.15 and the Court may take into account the figure of $307,389.01 for contingent or prospective debts.

Discussion – inability to pay debts

The statutory regime

[174] The Commissioner invokes the power of the Court under s 241(4)(a) of the Companies Act to appoint a liquidator of a company if it is satisfied that the company is unable to pay its debts.

[175] Because CPL failed to comply with the statutory demand issued by the Commissioner the Commissioner relies upon the presumption of insolvency under s 287 of the Act.

[176] By her statement of defence Ms Sisson did not deny the Commissioner's allegations that the statutory demand had been served on CPL on 5 December 2014 or that CPL had failed to comply with the statutory demand. She made allegations by way of memorandum that she would be relying on grounds contained in a 2007 setting aside application. Ms Sisson pleaded that the Commissioner was aware that the amount claimed in the statutory demand was disputed at the time the demand was issued.

[177] The matters pleaded by Ms Sisson did not contain any denial of the facts (as alleged by the Commissioner) that a demand was issued to CPL and was not met by CPL. The Commissioner's allegations in relation to the statutory demand were therefore admitted by Ms Sisson.[74] Ms Sisson's allegations as to other steps taken by Mr Hampton and as to the Commissioner's alleged awareness of a dispute do not detract from those deemed admissions.

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[74] See High Court Rules, r 5.48(3).

The cashflow test of solvency

[178] The assessment required by the Court was that identified by the Court of Appeal in *Yan v Mainzeal Property & Construction Limited* (in rec and liq):[75] the test is one of solvency, not liquidity. A temporary lack of liquidity may not equate to insolvency if the debtor is able to realise assets or borrow funds within a relatively short time frame in order to meet its liabilities as they fall due. The Court of Appeal adopted the test identified by Barwick CJ in the High Court of Australia's decision in *Sandell v Porter*.[76] In that case his Honour referred to a possibility that a debtor may be able to procure money for repayment of a debt by realisation by sale or by mortgage or pledging of assets within a relatively short time. He continued:

> The conclusion of insolvency ought to be clear from a consideration of the debtor's financial position in its entirety and generally speaking ought not to be drawn simply from evidence of a temporary lack of liquidity. It is the debtor's inability, utilising such cash resources as he has or can command through the use of his assets, to meet his debts as they fall due which indicates insolvency.

[179] In *Yan,* the Court of Appeal concluded this part of its discussion with the observation that a realistic commercial approach to the assessment of solvency is required.[77]

Balance sheet solvency

[180] It is established that the s 241(4)(a) test of ability to pay debts involves primarily a "cashflow" test of solvency to be contrasted with the "balance sheet" test of solvency. As it was adopted by Plowman J in *Re Tweeds Garages Limited*.[78]

> In [such cases where a company is unable to meet the current demands on it] it is useless to say that if its assets are realised there will be ample to pay 20 shillings in the pound: this is not the test. A company may be at the same time insolvent and wealthy. It may have wealth locked up in investments not presently realisable; but although this may be so, yet if it had not assets available to meet its current liabilities it is commercially insolvent and may be wound up.

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75 *Yan*, above at n 63, at [59].
76 *Sandell v Porter* (1966) 115 CLR 666 (HCA) at 670.
77 *Yan,* above n 63, at [60].
78 *Re Tweeds Garages Limited* [1962] Ch 406, at 410, citing J B Lindon and others, *Buckley on the Companies Acts* (13th ed, Butterworth & Co, London, 1957) at 460.

[181] By her statement of defence, Ms Sisson pleaded that CPL is balance sheet solvent. She pleaded in particular that the balance sheet solvency arises through the availability of two assets:

(a) 854 Colombo Street, Christchurch with the liquidator having estimated its market value to be approximately $1,000,000.

(b) An insurance claim for $1,872,000, the claim having been partially paid, representing 50 per cent of the claim, with the balance to be accounted for provided certain terms of the cover are complied with.

[182] By her pleading Ms Sisson refers to vesting orders made by the High Court in relation to these assets and there being an appeal concerning the vesting orders.

[183] The Commissioner filed a reply to the affirmative allegations in the statement of defence. In particular she pleaded:

(a) She admitted 854 Colombo Street, Christchurch, is vested in CPL but says the market value is approximately $1,151,150 (GST exclusive).

(b) She said there is uncertainty as to the value of any remaining entitlement under the insurance claim against NZI/IAG.

(c) She pleaded that IAG as at 16 March 2016 advised that $138,064.77 is the residual amount payable under the insurance policy.

[184] The Commissioner further denied that the vested assets of CPL are sufficient to meet the debts owed by CPL to the Commissioner.

Evidence of CPL's financial position

[185] CPL is in interim liquidation. It is common ground that it has not been in a position to meet debts as they fall due. The business of the company (as a preschool operator) has not operated for many years. All that CPL has from which to meet its debts are any assets over which it may establish its ownership.

[186] In the initial evidence filed for CPL in this liquidation proceeding, Mr Hampton deposed that CPL had not traded for some years but still held a property that was subject to an insurance claim. He identified the property as 854 Colombo Street, with a then rateable land value of approximately $790,000. He deposed that the property was subject to an IAG (NZ) Limited insurance claim in the sum of approximately $1,800,000 in relation to the building on the property which had been destroyed in the Christchurch earthquake sequence. He recorded that IAG and EQC had paid approximately $830,000 to date in partial settlement of the insurance claims. The payment had paid off the mortgage with the surplus being held at that time (June 2015) in deposits at the ANZ bank ($148,875.54 and $24,154.38).

[187] In the affidavit filed by Mr Doubleday on the application to appoint an interim liquidator (which was admitted to be read also in this proceeding), he addressed matters relating to 854 Colombo Street. At that time of the interim liquidation application, Ms Sisson had a proposed sale of 854 Colombo Street on the open market at $875,000. Ms Sisson also placed on record a proposal made to NZI/IAG that there be paid to CPL $900,000 in settlement of all insurance claims.

[188] On the figures available at that time (1 December 2017) Mr Doubleday estimated the net proceeds potentially available upon the realisation of those two assets being:

(a)	854 Colombo Street section sale	$875,000.00
	Less GST (estimated)	$114,130.00
	Costs of sale (estimated)	$5,870.00
	Subtotal	$120,000.00
	Net proceeds available to satisfy creditors	$755,000.00
(b)	NZI/IAG insurance claimed by Ms Sisson	$900,000.00
	Less GST (estimated)	$117,391.00

Net proceeds available to satisfy creditors	$782,608.00

[189] On that basis, combining the two figures ($755,000 and $782,608) CPL would still fall short of realising sufficient sums to discharge its indebtedness to the Commissioner.

[190] By the time the Commissioner filed her additional evidence for this rehearing (the affidavits being sworn in April 2018), fresh evidence had been admitted into the proceeding through the Court of Appeal's 28 July 2017 judgment. As identified in the liquidation appeal judgment, the fresh evidence was:

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

(b) A market appraisal of 854 Colombo Street.[79]

[191] The NZI email of 16 March 2016 recorded that the insurance pay out yet to be disbursed to CPL was $138,064.77.

[192] The "market appraisal" of 854 Colombo Street was an appraisal by a real estate agent (Harcourts Gold) dated 2 October 2016 which indicated "a market value" for the property. It was not a valuation by a person qualifying as an expert.

[193] For this rehearing, the Commissioner obtained a valuation report of the 854 Colombo Street property from a registered valuer, Mark Dow. Mr Dow's report, valuing the property as at 5 April 2018, was that its value was $910,000 (plus GST if any). Mr Dow in his report then also took into account a possible premium if the property were to be sold to the adjoining owner. Mr Dow estimated a premium of around 10 per cent might be achievable, indicating a sale price to the adjoining owner of around $1,151,150 (including GST).

[194] On the basis of this evidence Mr Doubleday calculated the asset position of CPL as at 10 April 2018 to be:

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79 Liquidation appeal judgment, above n 2 at [68].

(a)	854 Colombo Street	$1,151,150.00
	Less GST	$144,900.00
	Costs of sale (estimated)	$35,000.00
	Net proceeds available to satisfy creditors	$971,250.00
(b)	Residual (NZI) insurance entitlement	$138,064.77

[195] If that evidence is accepted the most favourable outcome for CPL is that asset realisation in due course might achieve funds of $1,109,314.77 for CPL.

[196] By her subsequent statement of defence, Ms Sisson did not take issue with the value ascribed by the Commissioner to the Colombo Street property. She referred without criticism to the liquidators' estimated market value of $1,000,000 (by inference the value exclusive of GST). That is the value supported by Mr Dow's valuation.

[197] In her statement of defence Ms Sisson went on to identify the insurance claim which she pleaded to be a claim "for $1,872,000". Her pleading then acknowledges that the claim has been partially paid "representing 50 per cent of the claim".

[198] Ms Sisson in her affidavit for this rehearing did not provide any additional evidence as to the value of the residual insurance claim. Accordingly the most recent evidence she has provided in that regard is the NZI email which puts the residual insurance entitlement (as identified by Mr Doubleday) at $138,064.77.

[199] Ms Sisson's evidence is accordingly consistent with the latest updated figures as provided through Mr Doubleday's affidavit which indicates a value of unrealised assets of $1,109,314.77. That falls well short of the established debt of CPL to the Commissioner, being $1,400,566.15. It is still further short of the figure including contingent and perspective indebtedness of $1,707,955.16, which includes the $307,389.01 which this Court may take into account in assessing CPL's insolvency.

Conclusion as to solvency

[200] Ms Sisson focused her assertion of CPL's ability to pay its debts on the proposition that CPL is balance sheet solvent.

[201] On the evidence, CPL clearly is not balance sheet solvent. Even were there to be made available to CPL further time to realise its two remaining assets, the realisations would not enable CPL to clear its indebtedness. This is not a case where there has been a temporary lack of liquidity. The lack of liquidity has been long-standing and cannot be resolved through realisation of assets. There has never been any suggestion that the non-trading company would be in a position or willing to raise funds by means other than asset-realisation to discharge the indebtedness to the Commissioner.

[202] Ms Sisson has not rebutted the presumption that CPL is unable to pay its debts.

The Court's discretion

[203] The Commissioner has established the basis upon which the Court may make an order of liquidation. At this point the Court has an unfettered discretion as to whether to make such an order.

[204] Ms Sisson did not direct her submissions to the exercise of the discretion. Her submissions were focused upon the earlier stage of analysis and in particular the proposition that the Commissioner's calculations and methodology in the exercise of remitting penalties, were invalid or inaccurate.

[205] Against the background of the huge volume of evidence which has been filed during the course of this proceeding, I do not discern any basis upon which the Court might now appropriately refuse to make an order liquidating this company which for a long period has not been trading and is substantially insolvent.

[206] To the extent there exist other matters in the background which have not been focused upon in this judgment, they uniformly reinforce the appropriateness of liquidation. CPL does not have an effective governance structure. Because of the

personal insolvency situations of both Mr Hampton and Ms Sisson there is no immediate prospect of either of them resuming an active role in the governance of CPL.

[207] As this judgment indicates, CPL has proceedings before this Court which have either been stayed or not progressed over a number of years. The indefinite subjecting of other parties to litigation is undesirable. Liquidators who are experienced in assessing the realistic value of things in action can be expected to appropriately decide whether to continue to pursue claims in the interest of the company.

[208] This is not a case where there are known to be other creditors, let alone creditors who have opposing views.

Outcome

[209] The Commissioner has established the grounds for making an order of liquidation. There are no matters informing the Court's discretion which cut across the appropriateness of a liquidation order.

Costs

[210] There will be orders fixing the Commissioner's costs and requiring the second defendant to pay them. The order in relation to the interim liquidators' costs will be that they be reserved. That is because the liquidators may consider they do not need an order as to costs given the entitlement they have in relation to remuneration as a result of the order of interim liquidation. In the event that for any reason the interim liquidators wish to have a costs order made their memorandum is to be filed and served within 10 working days.

Orders

[211] I order:

(a) There is an order of liquidation. The order is timed at 4.50 pm today.

(b) The liquidators appointed are Malcolm Grant Hollis and Wendy Ann Somerville.

(c) The liquidators' remuneration is approved at the rates set out in their consent dated 1 December 2017, subject to final approval of fees by the Court at the end of the liquidation.

(d) The liquidators may exercise their powers individually.

(e) The second defendant is to pay to the Commissioner the costs of the steps in the proceeding (to the extent they have not previously been the subject of an order) on a 2C basis plus disbursements to be fixed by the Registrar. There is a certificate for second counsel.

(f) The costs and disbursements of the interim liquidators in relation to the rehearing are reserved, with the Court's order in the event that the interim liquidators do not file a memorandum in relation to costs within 10 working days being that there will be no order as to costs.

Osborne J

Solicitors:
Meredith Connell, Wellington
Lane Neave, Christchurch
Counsel: P Shamy, Christchurch
Copy to: T A Sisson, Christchurch

SCHEDULE A

CPL Tax Schedules - assessments and payments
(GST on bulk funding imposed)

Date	Assessment						Payment	Total
	SLE	PAYE	GST	ACC	SEA	INC		
1993								
31/08/1993		2,557						'2,557
30/09/1993		2,647	(52,748)					(47,544)
31/10/1993		3,589						(43,955)
27/11/1993							(8,622)	(52,577)
30/11/1993		3,398	9,098					(40,081)
17/12/1993							(2,945)	(43,026)
31/12/1993		3,065						(39,961)
1994								
31/01/1994		2,360	2,529					(35,072)
28/02/1994		3,169						(31,903)
31/03/1994		3,856	10,032	1,950		25,666	(10,042)1	(441)
20/04/1994							(3,219)	(3,660)
30/04/1994		3,093						(567)
20/05/1994							(3,777)	(4,344)
31/05/1994		2,633	2,533					822
20/06/1994							(2,733)	(1,911)
30/06/1994		3,320						(1,409)
12/07/1994							(10,000)	(8,591)
19/07/1994							(3,123)	(11,714)
31/07/1994		3,765	13,017					5068
20/08/1994							(3,600)	1,468
31/08/1994	45	3,236						4,749
20/09/1994							(3,000)	1,749
30/09/1994	30	3,958	2,984					8,721
20/10/1994							(3,000)	5,721
31/10/1994		3,354						9,075
17/11/1994							(16,000)	(6,925)
20/11/1994							(4,127)	(11,052)
30/11/1994		3,653	12,954					5,555
20/12/1994							(4,400)	1,155
31/12/1994		5,068						6,223
1995								
20/01/1995							(6,000)	223
31/01/1995		2,553	2,021					4,797
28/02/1995		3,372						8,169
20/03/1995			(59,518)				(6,000)	(57,349)
31/03/1995		4,368		3,577	1,766	18,163		(29,475)
20/04/1995							(3,600)	(33,075)
30/04/1995		3,550						(29,525)
31/05/1995		3,538	2,504					(23,483)
30/06/1995	45	4,605						(18,833)
19/07/1995							(3,588)	(22,421)
31/07/1995	73	3,465	2,084					(16,799)

CPL Tax Schedules - assessments and payments
(GST on bulk funding imposed)

Date	Assessment						Payment	Total
	SLE	PAYE	GST	ACC	SEA	INC		
20/08/1995							(4,000)	(20,799)
31/08/1995	88	3,515						(17,196)
30/09/1995	133	4,533	3,378					(9,152)
20/10/1995							(3,490)	(12,642)
31/10/1995	74	3,711						(8,857)
20/11/1995							(8,000)	(16,857)
21/11/1995							(19,730)	(36,587)
30/11/1995	104	4,055	14,126					(18,302)
20/12/1995							(4,000)	(22,302)
31/12/1995	78	6,754						(15,470)
1996								
20/01/1996							(8,000)	(23,470)
31/01/1996	111	3,038	436					(19,885)
20/02/1996							(4,000)	(23,885)
28/02/1996	177	4,519						(19,189)
31/03/1996	243	5,858	4,947	4.069	1,197	(177)		(3,052)
30/04/1996	299	4,386						1,633
31/05/1996	279	5,825	1,595					9,332
20/06/1996							(21,503)	(12,171)
30/06/1996	208	4,587						(7,376)
5/07/1996							(19,510)	(26,886)
20/07/1996							(4,795)	(31,681)
31/07/1996	175	4,427	16,196					(10,883)
20/08/1996							(4,602)	(15,485)
31/08/1996	244	5,084						(10,157)
20/09/1996							(5,328)	(15,485)
30/09/1996	222	3,715	4,527					(7,021)
20/10/1996							(5,600)	(12,621)
31/10/1996		3,889						(8,732)
20/11/1996							(3,889)	(12,621)
30/11/1996	246	4,825	9,441					1,891
31/12/1996	514	5,924						8,329
1997								
17/01/1997							(5,171)	3,158
20/01/1997							(6,438)	(3,280)
31/01/1997	189	3,550	(148)					311
20/02/1997							(3,777)	(3,466)
28/02/1997	307	4,331						1,172
20/03/1997							(4,615)	(3,443)
31/03/1997	313	4,708	10,421	3,552		9,346		24,897
30/04/1997	380	5,236						30,513
20/05/1997							(10,637)	19,876
31/05/1997	429	6,890	6,817					34,012
20/06/1997							(7,331)	26,681

CPL Tax Schedules - assessments and payments
(GST on bulk funding imposed)

Date	Assessment						Payment	Total
	SLE	PAYE	GST	ACC	SEA	INC		
30/06/1997	388	5,661						32,730
17/07/1997							(50,000)[3]	(17,270)
20/07/1997							(6,050)	(23,320)
31/07/1997	351	5,496	24,761					7,288
20/08/1997							(5,848)	1,440
31/08/1997	476	5,292						7,208
20/09/1997							(5,766)	1,442
30/09/1997	358	5,492	3,054					10,346
20/10/1997							(5,971)	4,375
31/10/1997	625	7,008						12,008
20/11/1997							(7,633)	4,375
30/11/1997	465	5,643	16,354					26,837
20/12/1997							(6,115)	20,722
31/12/1997	797	8,289						29,808
1998								
20/01/1998							(9,086)	20,722
31/01/1998		5,427	5,358					31,507
20/02/1998							(5,427)	26,080
28/02/1998	555	5,935						32,570
20/03/1998							(6,490)	26,080
31/03/1998	546	6,037	22,142	4,240	1,569	8,740		69,381
20/04/1998							(6,583)	62,798
30/04/1998	573	5,991						69,362
31/05/1998	639	7,765	2,790					80,556
30/06/1998	660	6,301						87,517
31/07/1998	703	7,317	29,236					124,773
20/08/1998							(20,000)	104,773
31/08/1998	573	5,734						111,080
30/09/1998	414	5,674	5,726					122,894
20/10/1998							(12,397)	110,497
31/10/1998	463	7,459						118,419
20/11/1998							(7,923)	110,496
30/11/1998	355	5,631	27,600					144,082
31/12/1998	575	8,520						153,177
1999								
13/01/1999							(5,764)	147,413
20/01/1999							(9,093)	138,320
31/01/1999	242	4,474	5,531					148,567
2/02/1999							(4,476)	144,091
3/02/1999							(75,000)	69,091
28/02/1999	355	5,857						75,303
17/03/1999							(58,000)	17,303
19/03/1999							(278)	17,025
20/03/1999							(6,246)	10,779

CPL Tax Schedules - assessments and payments
(GST on bulk funding imposed)

Date	Assessment						Payment	Total
	SLE	PAYE	GST	ACC	SEA	INC		
31/03/1999	490	7,360	10,835	1,384	1,263	33,000		65,111
30/04/1999		706						65,817
5/05/1999							(706)	65,111
6/05/1999							(706)	64,405
31/05/1999		706	18,420					83,531
30/06/1999		872						84,403
9/07/1999							(9,391)	75,012
31/07/1999			29,173					104,185
5/08/1999							(872)	103,313
31/08/1999		706						104,019
30/09/1999		698	(5,235)					99,482
12/10/1999							(706)	98,776
20/10/1999							(698)	98,078
15/11/1999							(70,000)	28,078
20/11/1999							(872)	27,206
31/10/1999		872						28,078
30/11/1999		698	25,763					54,539
14/12/1999							(2,038)	52,501
20/12/1999							(698)	51,803
31/12/1999		872						52,675
2000								
20/01/2000							(872)	51,303
31/01/2000		698	4,855					57,356
20/02/2000							(698)	56,658
29/02/2000		698						57,356
20/03/2000							(698)	56,658
31/03/2000		872	22,322	110		62,886		142,848
5/04/2000							(185)	142,663
17/04/2000							(10,672)	131,991
30/04/2000		702						132,693
20/05/2000							(702)	131,991
31/05/2000		702	7,176					139,869
30/06/2000		878						140,747
14/07/2000							(1,263)	139,484
21/07/2000							(150,000)	(10,516)
31/07/2000		702	27,596					17,782
20/08/2000							(702)	17,080
31/08/2000		702						17,782
20/09/2000							(702)	17,080
30/09/2000		878	6,188					24,146
31/10/2000		702						24,848
30/11/2000		702	23,021					48,571
31/12/2000		878						49,449
2001								

CPL Tax Schedules - assessments and payments
(GST on bulk funding imposed)

Date	Assessment						Payment	Total
	SLE	PAYE	GST	ACC	SEA	INC		
31/01/2001		702	4,697					54,848
28/02/2001		702						55,550
31/03/2001		878	21,600	149		52,954		131,131
20/04/2001							(878)	130,253
30/04/2001		702						130,955
20/05/2001							(702)	130,253
31/05/2001		702	6,211					137,166
20/06/2001							(702)	136,464
30/06/2001		878						137,343
13/07/2001							(125,000)	12,342
20/07/2001							(878)	11,464
31/07/2001		702	3,703					15,869
20/08/2001							(702)	15,167
31/08/2001		878						16,045
30/09/2001		702	7,134					23,881
31/10/2001		702						24,583
12/11/2001							(702)	23,881
26/11/2001							(702)	23,179
30/11/2001		878	3,543					27,600
31/12/2001		1,303						28,903
2002								
31/01/2002		702	2,630					32,235
28/02/2002		702						32,937
19/03/2002							(702)	32,235
31/03/2002		878	985			37,326		71,424
16/04/2002							(878)	70,546
29/04/2002							(985)	69,412
30/04/2002		702						70,263
20/05/2002							(702)	69,561
31/05/2002		878	5,670					76,109
20/06/2002							(878)	75,231
30/06/2002		702						75,933
20/07/2002							(702)	75,231
31/07/2002		702	(4,368)					71,565
20/08/2002							(702)	70,863
31/08/2002		878						71,741
20/09/2002							(878)	70,863
30/09/2002		702	2,903					73,468
20/10/2002							(702)	73,766
31/10/2002								73,766
30/11/2002			2,903					76,669
31/12/2002								76,669
2003								
31/01/2003			2,903					76,572

CPL Tax Schedules - assessments and payments
(GST on bulk funding imposed)

Date	Assessment						Payment	Total
	SLE	PAYE	GST	ACC	SEA	INC		
28/02/2003								76,572
31/03/2003			2,903			22,076		104,551
30/04/2003								104,551
31/05/2003								104,551
30/06/2003								104,551
31/07/2003								104,551
11/08/2003							(26,850)	77,701
31/08/2003								77,701
12/09/2003							(26,850)	50,851
30/09/2003								50,851
31/10/2003								50,851
30/11/2003								50,851
31/12/2003								50,851
2004								
31/01/2004								50,851
28/02/2004								50,851
31/03/2004								50,851
30/04/2004								50,851
	s.157 notice issued claiming CPL sum in default $722,654.37							
31/05/2004							(13,109)	37,742
10/06/2004							(283)	37,459
11/06/2004							(261)	37,198
14/06/2004							(1,645)	35,553
15/06/2004							(843)	34,710
16/06/2004							(1,396)	33,314
17/06/2004							(796)	32,518
18/06/2004							(1,306)	31,212
20/06/2004							(1,540)	29,672
24/06/2004							(842)	28,830
25/06/2004							(575)	28,255
28/06/2004							(471)	27,784
29/06/2004							(908)	26,876
30/06/2004							(435)	26,441
1/07/2004							(228)	26,213
31/07/2004								26,213
31/08/2004								26,213
30/09/2004								26,213
31/10/2004								26,213
30/11/2004								26,213
31/12/2004								26,213
2005								26,213
2006								26,213

CPL Tax Schedules - assessments and payments
(GST on bulk funding imposed)

Date	Assessment						Payment	Total
	SLE	PAYE	GST	ACC	SEA	INC		
2007								
31/01/2007								26,213
28/02/2007								26,213
31/03/2007								26,213
30/04/2007								26,213
31/05/2007								26,213
30/06/2007								26,213
31/07/2007								26,213
31/08/2007								26,213
30/09/2007								26,213
31/10/2007								26,213
30/11/2007			236,111				(236,111)	26,213
1/12/2007			(102,777)					(76,564)
31/12/2007								(76,564)
2008								(76,564)
2009								(76,564)
2010								(76,564)
30/11/2010								(76,564)
2011								(76,564)
2012								(76,564)
2013								(76,564)
31/03/2013								(76,564)
2014								(76,564)
2015								(76,564)
2016								(76,564)
2017								(76,564)