IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

CIV-2016-409-000040
[2017] NZHC 859

BETWEEN	CHESTERFIELDS PRESCHOOLS LIMITED (IN LIQUIDATION) Plaintiff
AND	THERESE ANNE SISSON Defendant
	THE COMMISSIONER OF INLAND REVENUE Intervener

Hearing: 1 May 2017

Appearances: B M Russell and K M Kendrick for Plaintiff
Defendant Appears In Person
S M Kinsler and C L Russell for Intervener - Commissioner of Inland Revenue

Judgment: 2 May 2017

JUDGMENT OF GENDALL J

Introduction

[1] The defendant in this proceeding CIV-2016-409-40 Therese Anne Sisson (Ms Sisson) has applied to set aside a judgment dated 16 February 2017 granting by consent orders sought by the plaintiff Chesterfields Preschools Limited (In Liquidation) (Chesterfields). The judgment has since been sealed.

[2] Both Chesterfields and the intervener in this proceeding, the Commissioner of Inland Revenue (the Commissioner), oppose the present application on the basis that Ms Sisson's case does not fall within the limited circumstances in which such a sealed judgment can be overturned, given that as the judgment has been sealed, recall under r 11.9 of the High Court Rules is not available.

[3] Reopening of a judgment obtained by consent such as the one issued here is one of the few recognised exceptions to the principle that once a judgment is sealed it must stand for better or worse, subject of course to any further rights of appeal.

[4] Generally the starting point must be the finality of litigation. This endorses the public interest in there being an end to litigation as well as the private interests of affected parties in not being subject to vexatious litigation.

[5] It is clear from the authorities, however, that absolute finality is unsafe and there are circumstances in which the Court may invoke its inherent jurisdiction to set aside a judgment. The issue here is whether this is one of those cases where the circumstances are such that the judgment in question should be set aside.

Background facts

[6] The hearing of this proceeding CIV-2016-409-40, together with related proceedings (being CIV-2016-409-185, CIV-2016-409-304 and CIV-2016-409-637) commenced in this Court on 13 February 2017. It continued to the fourth day of the hearing when, on that date, 16 February 2017, all matters were concluded with Ms Sisson first, choosing as the plaintiff to discontinue proceedings CIV-2016-409-185 and CIV-2016-409-304 she had brought, and secondly, signing a consent memorandum agreeing to the orders sought by the plaintiff in the present proceeding CIV-2016-409-40. In addition, Ms Sisson's review of a judgment of Associate Judge Osborne in this Court striking out CIV-2016-409-637 was dismissed.

[7] So far as the present proceeding CIV-2016-409-40 was concerned, on 16 February 2017 I issued an oral judgment in favour of the plaintiff Chesterfields against Ms Sisson in terms of Chesterfields' second statement of claim and made a number of orders by consent.

[8] It is useful here to set out fully those consent orders made at para [3] of the 16 February 2017 judgment which I now do:

> (a) An order is made vesting the property at 854 Colombo Street, Christchurch in the plaintiff under s 52(1)(h) Trustee Act 1956.

(b) An order is made vesting the insurance proceeds described in the second amended statement of claim in the plaintiff and a direction is now made that the funds in ANZ Term Deposit Accounts:

(i) 088056229/1000; and

(ii) 088056229/1001

are to be transferred to an account to be stipulated by the liquidators of the plaintiff under s 59(1)(g) Trustee Act 1956.

(c) An order is now made vesting any and all residual entitlements under the insurance policies referred to in the second amended statement of claim into the plaintiff under s 59(1)(g) Trustee Act 1956.

(d) The freezing orders made by this Court on 16 March 2015 in *Commissioner of Inland Revenue v Chesterfields Preschools Limited* (HC) Christchurch CIV-2004-409-1043 are lifted to allow the vesting in orders [3](a), (b) and (c) noted above to occur, but otherwise are to remain in force at this point in respect of the proceeds of the sale of 67 Augusta Street, Christchurch, held by the Official Assignee.

(e) An order is made that caveat No. 10006337.1 placed on the title to the property at 854 Colombo Street, Christchurch, by the Registrar General of Land to enable the property to be transferred to the applicant is removed.

(f) Costs and disbursements are awarded with respect to this proceeding against the defendant Ms Sisson in favour of the plaintiff Chesterfields Preschools Limited (In Liquidation) and the Intervener the Commissioner of Inland Revenue. The amount of such costs and disbursements is to be determined by this Court subsequently as noted below.

[9] On 3 March 2017 Ms Sisson filed in this Court her present application to set aside this consent order. The grounds specified in the application to justify the setting aside order sought were outlined as follows:

1. That there was a lack of informed consent in signing the memorandum of consent dated 16 February 2017 and no opportunity to obtain legal advice.

2. That the defendant was suffering a disability at the time the consent memorandum was signed after three and a half days of trial and had lost functioning.

3. The defendant was a self-represented litigant in complex, consolidated proceedings.

4. The defendant did not properly read or understand the terms of the settlement other than that vesting orders were being agreed to and

was not immediately provided with a copy of the memorandum of consent to reflect.

5. On receipt of a copy of the memorandum of consent on 16 February 2017 by the Court the defendant immediately notified the Court and Counsel that the defendant did not agree with the terms of the settlement.

6. The defendant sought the consent of the plaintiff and intervener in respect of the application to set aside the terms of the consent order.

7. The basis of the claim against me was flawed and the consent was vitiated on the ground of mistake.

[10] In support of her application to set aside the consent orders, Ms Sisson has sworn an affidavit filed 3 March 2017. Relevantly, this affidavit deposes in part:

Day four of the hearing – 16 February 2016 [sic] [16 February 2017]

26. On 16 February 2016 [sic], I after difficulty sleeping, I woke up exhausted, overwhelmed and distressed. I walked through High Court security with my jacket inside out until it was brought to my attention.

27. I was stressed at the prospect of giving evidence and being cross-examined without counsel. I gave my opening on the insurance issue and the Court wanted to know why I was not agreeing to the vesting orders. I felt as if I was not functioning well.

28. After giving submissions on the insurance opening.

29. I sought a brief adjournment to ensure that the latest brief of evidence I had filed was the brief that I was reading from and it also became apparent that I would be giving oral evidence on some matters raised by the Commissioner of Revenue. I was worried that I would forget to respond to those matters.

30. During this adjournment, and while Mr Hampton went out of the Court room to see the registrar to swear and sign his affidavit attaching the proposed sale and purchase agreement in relation to the insurance proceeds, I was approached by counsel for the Liquidator with a pre-prepared written consent memorandum.

31. The conversation started with "You heard what the Judge said this morning he is going to make the vesting orders, this is going to get much worse. I have a consent order here this will be much better. Counsel was holding up page 2 of the consent, the signatory page only. He then said, don't listen to him, meaning Mr Hampton, sign the consent it will be much better. Don't wait for Mr Hampton, we haven't got much time. I agreed that it was going to get ugly and said I am willing to sign the vesting orders. I was so exhausted.

32. While counsel led me over to the desk he held the document, put it on the desk I glanced at the first page then flipped the first page over

and showed me where to sign on the second page. I did not take the opportunity to have possession of the document on my own and to read the document properly before signing it.

33. Counsel for the liquidator then took the document away and did not give me a copy. I wasn't feeling well and felt tired, non-functioning and helpless. All this took place within a few minutes and while Mr Hampton was at the registrar's desk on the ground floor of the courthouse.

34. If I had been functioning normally I would have sought further time on the adjournment, read the document or located Mr Hampton and asked for a copy of the pre-prepared document to go over in private. I would not have signed the document in the terms prepared by Counsel for the liquidator without amendment.

35. I do not believe that this was an informed consent. I have handwritten notes of the events of the day that were prepared on 16 February 2017.

36. Later the Judge asked whether this was an unqualified consent I responded that I was agreeing to the vesting orders including the future entitlements and this was now the responsibility of the Liquidator. I did reserve my position regarding the appeal. I was left feeling that my position was hopeless. I did not have a copy of the consent memorandum.

37. Later that afternoon the registrar sent through a copy of the memorandum of consent. When I read it I realised that it was more than a consent to the vesting orders. I wrote to the Court and counsel retracting my agreement to the terms of the consent and the following day emailed counsel for the liquidator and Commissioner of Revenue.

Events after 16 February 2017

38. On 20 February the Court issued the Judgment by consent.

…

40. On 22 February 2017, I attended the Doctor. I was unable to see the doctor before then as I did not have the money to pay for an earlier visit due to the freezing orders. The first available appointment time that I could afford was the Wednesday morning of the 22nd February 2017. Annexed and marked "A" is a true copy of the letter from my doctor.

…

42. (sic) I am opposed to sealing of the orders on the basis that I do not agree with paragraphs 13, 33 and 34 of the first cause of action of the second amended statement of claim.

43. (sic) I did not have the opportunity of properly reading the memorandum of consent and was not aware that I was agreeing to

> the clauses above. I believed I was agreeing to the vesting orders in favour of the Liquidator.

[11] Significantly, I repeat from para 42 of her affidavit, Ms Sisson's statement that she is opposed to the sealing of the orders in this proceeding on the basis that:

> I do not agree with paragraphs 13, 33 and 34 of the first cause of action of the second amended statement of claim.

[12] But, she does go on to specifically acknowledge at the second sentence of para 43 of her affidavit that:

> I believed I was agreeing to the vesting orders in favour of the Liquidator.

[13] Clearly, the orders which I made by consent outlined at para [8] above were principally orders vesting the 854 Colombo Street property, and certain insurance proceeds and residual insurance entitlement relating to this property into the name of Chesterfields as liquidator. It is without question that this was to enable Chesterfields to deal with the property, and the insurance proceeds. It must be presumed this was on the basis that Chesterfields was the absolute owner entirely, and free to deal with these assets as it thought fit. Indeed, there is no suggestion before the Court otherwise, and actually before me at the hearing of the present application yesterday, Ms Sisson confirmed her agreement to this course of action.

[14] And, this also appears to me to be precisely what Ms Sisson had agreed to in her 3 March 2017 affidavit, a position which she has not endeavoured to resile from in any way.

[15] Her claim at para [42] of her 3 March 2017 affidavit is simply that she does not agree with paras 13, 33 and 34 of Chesterfields' first cause of action. This is somewhat puzzling as it does not seem to relate in any way to the vesting orders which were made by consent.

[16] It is useful to set out the gist of paras 13, 33 and 34 of Chesterfields' first cause of action that are the subject of Ms Sisson's complaint here, which I now do:

> 13. Any assertion by the defendant that she does not hold the Property on trust for the plaintiff, instead that the defendant holds the

> Property on trust for the Anolbe Family Trust, or any other party, is a sham defence, designed to defeat the interests of the creditors of the plaintiff.
>
> …

and:

> 33. The Anolbe Family Trust has no ownership interest in the Property, whether legal or beneficial, and has therefore suffered no loss as a result of the earthquake damage to the Property.

and:

> 34. Any claim by the Anolbe Family Trust on any residual entitlements under the Insurance Policies is without substance, and is recently invented.

Law

[17] As I have noted above, there is no jurisdiction under the High Court Rules for recall of a judgment once it is sealed – r 11.9. The Court however does have an inherent jurisdiction to recall a sealed judgment. This situation where a judgment has been sealed is discussed in *Herron v Wallace*.[1] The jurisdiction is a broad one and is described as a residual source of power which the Court may draw upon as necessary whenever it is just and equitable to do so.

[18] On these aspects, at para [33] of *Herron* the Court said:

> There are some established categories of exception to the finality of litigation:
>
> (i) A slip or omission may be rectified;
>
> (ii) A judgment may be set aside, usually by separate action, where it was obtained by fraud;
>
> (iii) A case may be reopened where fresh evidence not previous available as come to light which is material to the outcome of the case;
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> (iv) A judgment obtained by consent may be reopened; and
>
> (v) A supplementary judgment may be given to cover a matter not previously dealt with.

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1 *Herron v Wallace* [2016] NZHC 2426.

[19] In *Jones v Borrin*[2] the High Court confirmed that:

> The High Court has an inherent jurisdiction to set aside consent orders on grounds analogous with contractual principles.

[20] The ultimate test is always where the interests of justice lie. Consent orders are likely to be set aside where the underlying agreement is tainted by duress, undue influence, unconscionability or mistake. Similarly, the Court has jurisdiction to set aside consent orders even where the underlying agreement is not tainted if the interests of justice so require. But having said that, consent orders "are not easily disturbed" and the overriding consideration is whether it is in the interests of justice to do so – *Kain v Hutton*.[3]

Parties' submissions and my decision

[21] In her present application Ms Sisson appears to seek to set aside the consent order on the basis that the claim against her was flawed and her consent was vitiated on the grounds of mistake, misunderstanding or lack of informed consent. Her arguments however also appear to rely on notions of general unfairness or duress.

[22] As I have noted above, Ms Sisson has exhibited to her 3 March 2017 affidavit an unsigned letter from her general practitioner Dr Mark Cohen which is dated some six days after the consent memorandum was signed. It concerns the state of Ms Sisson's health. The facts it notes are largely similar to those disclosed in an earlier report from Dr Cohen dated 28 November 2016 which were set out in a judgment I issued in this proceeding on that date under [2016] NZHC 2855. This medical certificate, as I see the position, is not enough to establish that Ms Sisson was mentally incapable of giving proper consent when she did on 16 February 2017. Nor, in my view, does it bring the present application within the circumstances which would establish a cognitive impairment or some condition rendering Ms Sisson liable to undue influence or any especial vulnerability here.

[23] And, in any event, at the hearing before me yesterday Ms Sisson confirmed first, that she was under no particular impairment when completing her 3 March

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2 *Jones v Borrin* [1989] 3 NZLR 277 at 246.
3 *Kain v Hutton* [2007] 3 NZLR 349 (CA) at [230].

2017 affidavit in support of her present application and secondly, that she did not resile from any matters or comments contained in that affidavit or the application itself.

[24] Next, I need to say at this point that I am satisfied by a significant margin that the circumstances in this case strongly point to there being no genuine need for the orders sought by Ms Sisson to be granted here. I find at the outset there is nothing unjust or inequitable about the consent judgment given on 16 February 2017 or the circumstances in which it came to be given. Reopening the consent judgment in my view would not be in the interests of justice in this case. Whilst Ms Sisson states in her application that "the basis of the claim against me was flawed" clearly I determined otherwise in my costs judgment issued in this Court under [2017] NZHC 553 where I said at [24]:

> Ms Sisson acted unreasonably in that her entire claim lacked merit…the fact too that Ms Sisson pursued a defence in this proceeding that entirely lacked merit was obvious and incontrovertible from the outset.

[25] Even it if was able to be established that Ms Sisson had been suffering from a disability or some real cognitive impairment at the time the consent memorandum was signed, I found that her litigation in this case was entirely without merit and, that said, it is simply not in the interests of justice to reopen the judgment in question.

[26] Further, in her 3 March 2017 affidavit in support of the present application Ms Sisson expressly stated at [43] "I believed that I was agreeing to the vesting orders in favour of the Liquidator". There was and is no mistake, misunderstanding or lack of informed consent on her part in agreeing to the consent judgment which made these vesting orders. This is confirmed further at para [4] of Ms Sisson's present application where she states:

> The defendant did not properly read or understand the terms of the settlement <u>other than that vesting orders were being agreed to</u> and was not immediately provided with a copy of the memorandum of consent to reflect.
>
> (Emphasis added)

[27] It cannot be disputed that Ms Sisson clearly understood the key point of the one page consent memorandum that she was agreeing to the vesting orders that

followed. It could not be said there was any misunderstanding on her part as to what she was agreeing to. Indeed, she has acknowledged this herself in both the application and her supporting affidavit, and in her submissions before me at the hearing of her application yesterday.

[28] Ms Sisson and the McKenzie Friend who assisted her throughout this litigation, Mr Hampton, over many years up to the present have proved to be very experienced litigants and well capable of representing their interests in this Court and in other Courts. Ms Sisson was herself a barrister and solicitor and, as I understand it, Mr Hampton has also had legal training. Although in her application Ms Sisson states that she was a self represented litigant in what was complex, consolidated proceedings, in light of the matters I outline here and in the preceding para [27], I am satisfied that it cannot be in the interests of justice to reopen the judgment here.

[29] On 16 February 2017 from my recollection following the adjournment when the consent memorandum was presented to me Mr Hampton was in Court at that time. There is nothing before me to indicate that Ms Sisson did not have an opportunity to talk with Mr Hampton at the time, or indeed for Mr Hampton to discuss matters with Chesterfields' counsel if desired. I note too that I spent some time at this stage to discuss with Ms Sisson in open court whether in fact she had fully and openly understood and agreed to the matters outlined in the consent memorandum. Having done this, I was satisfied with her responses that she did.

[30] At the same time as Ms Sisson signed the consent memorandum, she also discontinued the proceedings she had brought, involving these parties, noted at para [6] above under CIV-2016-409-185 and CIV-2016-409-304. As I understand the position, Ms Sisson has not applied to restore those proceedings.

[31] Finally, I am satisfied there has been no breach of established contractual principles such that setting aside of the consent order here would be appropriate. Ms Sisson's allegation that there was a lack of informed consent on her part in signing the consent memorandum is not supported by cogent evidence here. Her claim, too, to be suffering under a disability at the time such that she did not properly

read or understand the terms of the consent orders, is not supported by compelling evidence of her impairment.

[32] And, in any event, the terms of the consent memorandum are clear on their face. In giving the oral judgment I did on 16 February 2017 I also set out those consent orders in full detail, such that both Ms Sisson and Mr Hampton were listening and aware of the orders made. In this way, Ms Sisson's consent was "affirmed".

[33] I am satisfied too that there that there is no evidence before the Court that the consent agreement has resulted from undue influence through improper pressure, or that the agreement itself was unreasonable for Ms Sisson. Nor can it be said here that there is evidence before the Court of any improper threat, duress or other conduct which might have affected Ms Sisson, nor is she able to establish unconscionability through Chesterfields seeking to take advantage of weakness on her part. Finally, there is nothing before me to indicate that agreement was reached here by the parties by reason of mutual mistake.

[34] Lastly, it is useful in this case to set out in full the penultimate submission advanced to me yesterday by Ms Russell, counsel for Chesterfields, which I now do:

> [15] It is submitted that the defendant (Ms Sisson) properly consented to judgment because she knew that the case against her was very strong. She was about to face cross-examination under oath (including from a former Crown Prosecutor) during which she would have had to attempt to explain a great deal of statements made by her under oath and in memoranda filed in this Court which were completely inconsistent with the position that she was advancing in her defence of this case. She faced the risk of findings of perjury or contempt of Court. Those inconsistent documents are explained in the opening submissions of the parties and in the pleadings. Finally faced with this reality, Ms Sisson understandably consented to the orders that had been sought. She said in Court at the costs hearing on 17 March 2017 "To be honest I just couldn't take any more". Unfortunately she has now changed her mind for reasons which are not clearly expressed.

[35] In my view, these comments may well be relevant to the situation that developed in this case and have some force in explaining what occurred here.

Result

[36] In conclusion, for all the reasons I have outlined above I find there has been no injustice or inequity in this case which would enable this Court to exercise its inherent jurisdiction to set aside my 16 February 2017 judgment or the orders made therein. Ms Sisson has been quite unable to make out in any of the grounds she has endeavoured to advance the necessity for or the appropriateness of recalling or reopening that judgment.

[37] Her application to set aside the consent judgment is therefore dismissed.

Costs

[38] As to costs, counsel for Chesterfields and the Commissioner seek costs here. Given that Ms Sisson has failed entirely with her present application, I see no reason why costs should not follow the event in the normal way and be awarded to Chesterfields and the Commissioner as the parties who succeeded in opposing this application.

[39] An award of costs and disbursements is therefore made against Ms Sisson in favour of Chesterfields and the Commissioner, the costs to be calculated on a category 2B scale basis together with reasonable disbursements (if any), each as approved by the Registrar.

…………………………………………
Gendall J

Solicitors:
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Copy to Ms Sisson