IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2014-404-001281
[2014] NZHC 2034

UNDER	the Judicature Amendment Act 1972
BETWEEN	JOHN GEORGE RUSSELL Applicant
AND	THE COMMISSIONER OF INLAND REVENUE Respondent

Hearing: 11 August 2014

Appearances: S Judd for Applicant
P Courtney and K Nik-Leong for Respondent

Judgment: 26 August 2014

(RESERVED) JUDGMENT OF ANDREWS J
[Application for interim relief]

This judgment is delivered by me on 26 August 2014 at 4pm
pursuant to r 11.5 of the High Court Rules.

....
Registrar / Deputy Registrar

Introduction

[1] The Commissioner of Inland Revenue has obtained judgment against Mr Russell for approximately $367 million, and now intends to begin proceedings to have him adjudicated bankrupt. Mr Russell has issued a proceeding for judicial review against the Commissioner, and has applied for an interim order to prevent the Commissioner from taking steps to have him adjudicated bankrupt. The issue before me is whether an interim order should be made.

Background

Assessments

[2] In January 2003, pursuant to s 99 of the Income Tax Act 1976 and ss BG1 and GB1(1) of the Income Tax Act 1994, the Commissioner assessed Mr Russell for taxation in the years 1985 to 2000, having determined that he was a party to, and affected by, arrangements said to constitute tax avoidance. In the main, the arrangements concerned the activities of Commercial Management Limited, Mahalo Limited, and the Commercial Management Partnership. The Commissioner assessed Mr Russell for income tax and penalties (including "abusive tax shortfall" penalties pursuant to s 141D of the Tax Administration Act 1994 ("the TAA")) which, together with interest, amounted to $75,298,475.54 ("the assessments").

[3] Mr Russell challenged the assessments in the Taxation Review Authority, in hearings occupying 64 days between October 2005 and April 2009. His challenge failed and the assessments were confirmed in a decision issued on 17 September 2009.[1]

[4] Mr Russell appealed to the High Court. His appeal was dismissed in a judgment delivered by Wylie J on 3 September 2010.[2] His Honour noted that as at 28 April 2010, the amount claimed by the Commissioner, including penalties and interest, was $138,796,819.38. Mr Russell appealed to the Court of Appeal, which

---

1 *Case Z19* (2009) 24 NZTC 14,217.

2 *Russell v Commissioner of Inland Revenue (No. 2)* (2010) 24 NZTC 24,463 (HC).

dismissed his appeal.[3] On 13 August 2012, the Supreme Court dismissed Mr Russell's application for leave to appeal to that Court.[4]

[5] With his application for leave to appeal to the Supreme Court having failed, Mr Russell has exhausted all avenues of challenge to the assessments. The Commissioner then began enforcement action against him. On 10 June 2014, Associate Judge Doogue gave summary judgment against Mr Russell in favour of the Commissioner for unpaid tax, interest, and penalties totalling $367,204,207.41 (being the balance owing at that time).[5]

Application for judicial review

[6] On 23 May 2014 (three days before the hearing of the application for summary judgment) Mr Russell filed proceedings seeking judicial review ("the application for judicial review"). The application relates to the Commissioner's refusal to accept Mr Russell's offers to settle his tax liability by instalment payments ("the instalment payment proposals"):

(a) On 27 September 2006, at a judicial settlement conference before the Taxation Review Authority (Judge Barber presiding), Mr Russell offered settlement of all litigation on the basis that he would accept liability for the core tax (minus penalties and interest); he would make a lump sum payment of $50,000; and undefined weekly payments for the rest of his life. That offer was rejected by the Commissioner on 15 November 2006.

(b) On 9 December 2012, Mr Russell offered to pay $1,000 a week, until his death, bankruptcy, or mental incapacity. That offer was rejected by the Commissioner on 26 August 2013.

(c) On 2 September 2013, Mr Russell offered payment of $150,000, on the basis that the balance of the debt was written off.

---

3 *Russell v Commissioner of Inland Revenue* [2012] NZCA 128, (2012) 25 NZTC 20,120.
4 *Russell v Commissioner of Inland Revenue* [2012] NZSC 73, (2012) 25 NZTC 20,140.
5 *Commissioner of Inland Revenue v Russell* [2014] NZHC 1296, (2014) 26 NZTC 21,074.

(d) That offer was rejected by the Commissioner on 13 September 2013.

[7] In his statement of claim for judicial review, Mr Russell alleges that the Commissioner's decisions to reject his instalment payment proposals were not made fairly, reasonably, or in accordance with the relevant provisions of the TAA. I record that at the hearing of Mr Russell's application for an interim order, Mr Judd confirmed on his behalf that he does not in fact rely on the Commissioner's rejection of the offer made in 2006.

[8] Mr Russell has also applied for interim relief under s 8 of the Judicature Amendment Act 1972 by way of the following order:

> Prohibiting the commencement of and staying the continuation of any application for summary judgment, any bankruptcy proceedings or any other enforcement proceedings by the respondent against the applicant relating to tax assessments made against the applicant for the 1985-2000 income tax years pending the outcome of the application for judicial review.

[9] Interim relief is sought on the grounds that the order is necessary to preserve Mr Russell's position and is in the interests of justice. The application for interim relief is opposed by the Commissioner.

[10] The Commissioner has applied to strike out the judicial review proceeding. Mr Russell has filed a notice of opposition to that application. As far as I am aware, that application has not yet been set down for hearing.

Jurisdiction to make interim orders

[11] Section 8 of the Judicature Amendment Act 1972 provides that "the Court may, if in its opinion it is necessary to do so for the purpose of preserving the position of the applicant", make an interim order for certain purposes. Those purposes include "prohibiting or staying any proceedings, civil or criminal, in connection with any matter to which the application for review relates".[6] An order may be made subject to terms and conditions, and may be expressed to continue until

---

[6] Judicature Amendment Act 1972, s 8(1)(b).

the application for review is finally determined, or until such other date or event as the Court specifies.[7]

[12] In *Carlton & United Breweries Limited v Minister of Customs*, Cooke J set out the approach to take on an application for interim relief as follows:[8]

> Of course I am not suggesting that there should be any general rule that a prima facie case is necessary before interim relief can be granted under s 8. In general, the Court must be satisfied that the order sought is necessary to preserve the position of the applicant for interim relief – which must mean reasonably necessary. If that condition is satisfied … the Court has a wide discretion to consider all the circumstances of the case, including the apparent strength or weakness of the claim of the applicant for review, and all the repercussions, public or private, of granting interim relief.

[13] In his judgment in *Carlton & United Breweries*, Richardson J said that:[9]

> Section 8 of the Judicature Amendment Act 1972 does not mandate any particular approach to the statutory test of whether an interim order is necessary for preserving the position of the applicant. The legal answer must depend on an assessment by the Judge of all the circumstances of the particular case. Clearly the nature of the review proceedings will be material. So will the character, scheme and purpose of the legislation under which the impugned decision was made. And appropriate weight must of course be given to all the factual circumstances including the nature and prima facie strength of the applicant's challenge and the expected duration of an interim order. Nor should the residual discretion under s 8 be circumscribed by reading qualifications into the broad language of the section.

[14] Previous High Court judgments concerning applications for interim relief appear to demonstrate a difference of approach as to the place for consideration of the merits of the applicant's case for judicial review. In *Safe Water Alternative New Zealand Incorporated v Hamilton City Council*, Kós J described the *Carlton & United Breweries* approach as a two-stage enquiry of first determining whether it is necessary to grant interim relief to preserve the applicant's position, then considering whether it is appropriate to grant the relief sought.[10] His Honour went on to note that in the case before him, the parties had taken a three-stage approach, with a new first stage of considering whether there is a "real contest" between the parties.

---

7 Section 8(3).
8 *Carlton & United Breweries Limited v Minister of Customs* [1986] 1 NZLR 423 (CA) at 430.
9 At 430–431.
10 *Safe Water Alternative New Zealand Incorporated v Hamilton City Council* [2014] NZHC 1463 at [18].

His Honour saw nothing wrong in principle with that but observed that "the relevant strength of an applicant's case should only be considered as part of the final discretionary stage".[11] In that case, however, his Honour noted that the Council, in effect, conceded that there was a "real contest".[12]

[15] However, in *International Heliparts NZ Ltd v Director of Civil Aviation*, Gendall J considered that the test is simply whether interim orders are necessary to preserve the applicant's position.[13] His Honour said (after referring to *Carlton & United Breweries*):[14]

> I do not consider that this is a case where the Court has to express any view as to whether a 'prima facie' case has been reached so that a threshold requirement exists (ie that the plaintiff's claim has merit in fact and law)… The test is simply that which is provided under s 8(1) namely whether interim orders are necessary 'for the purpose of preserving the position of the applicant'.

[16] I prefer not to adopt the three-stage test described in *Safe Water*. It is not consistent with *Carlton & United Breweries*, and appears to require consideration of the merits of the applicant's case twice: first to decide if there is a "real contest", and secondly to decide whether to exercise the discretion to grant interim relief. The Court of Appeal in *The Director of Civil Aviation v Air National Corporate Ltd* did not criticise the High Court's approach in that case of considering the strength of the applicant's case in the context of the discretion.[15]

[17] This was also the approach taken by Whata J in *Hampton v Canterbury Earthquake Recovery Authority*, where his Honour first determined whether an order was necessary to preserve the applicant's position (in that case, it was an order to prevent imminent demolition of a dwelling) then considered the apparent strengths and weaknesses of the applicant's case, together with all other relevant considerations, in the context of deciding whether to exercise his discretion to make the orders sought. His Honour did not accept a submission that it would be open to

---

11 At [19].
12 At [20].
13 *International Heliparts NZ Ltd v Director of Civil Aviation* [1997] 1 NZLR 230 (HC).
14 At 236.
15 *The Director of Civil Aviation v Air National Corporate Ltd* [2011] NZCA 3, [2011] NZAR 152 at [25]–[26].

him to find that an order was not necessary to preserve the applicant's position on the basis that his case was so hopeless that he had no position to preserve.[16]

Submissions

[18] Mr Judd acknowledged that as summary judgment has been given against Mr Russell, the application for interim relief must be confined to seeking an order prohibiting the commencement or continuation of any bankruptcy or other enforcement proceedings. He submitted that an interim order to that effect is necessary to protect Mr Russell's position of not being a bankrupt. Bankruptcy would subject Mr Russell to a significant change in status (second only, he submitted, to being sentenced to a term of imprisonment), in which his assets and affairs would be taken over by the Official Assignee, and he would be subject to restrictions on travel and involvement in business matters.

[19] In particular, he submitted, bankruptcy would mean that Mr Russell could not pursue the judicial review application. However, if he were to succeed in that application, the Commissioner could be required to accept Mr Russell's instalment proposal, or at least to give fresh consideration to it. Mr Judd submitted that Mr Russell has (at the least) a contestable case. He further submitted that the Court should exercise its discretion in favour of making an interim order. Mr Russell should be allowed his day in Court, and any delay caused to the Commissioner's intended bankruptcy proceeding is not (in the light of the time taken by the Commissioner to issue the assessment, the long period covered by the assessments, and the duration of the subsequent litigation) such as to cause significant prejudice.

[20] Finally, Mr Judd stressed both in his written and in his oral submissions that in bringing the judicial review application, Mr Russell is not attacking the assessments. He acknowledged that Mr Russell cannot mount any further challenge to the assessments. The judicial review proceeding is concerned solely with the exercise of the Commissioner's powers and duties in relation to instalment payment proposals.

---

[16] *Hampton v Canterbury Earthquake Recovery Authority* [2012] NZRMA 139 at [19]–[20].

[21] For the Commissioner, Mrs Courtney submitted that Mr Russell has no "position" that needs to be preserved, so an interim order should not be made. The Commissioner has a judgment against Mr Russell for a significant sum, he has not paid that sum or any part of it, and the Commissioner is entitled to apply to have him adjudicated bankrupt.

[22] Mrs Courtney submitted that Mr Russell does not have a contestable case for judicial review: the courts are slow to interfere with the proper exercise of the Commissioner's discretion and duties relating to the recovery of outstanding tax, and the Commissioner properly exercised her discretion to decline to accept Mr Russell's instalment payment proposal.

[23] Mrs Courtney further submitted that even if Mr Russell does have a contestable case for judicial review, the Court should not exercise its discretion to make an interim order, because it is in the public interest that the Commissioner carries out her duties. Mr Russell poses a significant risk to the integrity of the New Zealand tax system, and the application for judicial review is, in reality, a collateral attack on the Court's judgments confirming the assessments. Finally, she submitted that if Mr Russell is adjudicated bankrupt, the judicial review application could be pursued by the Official Assignee, if that were considered appropriate.

Is an interim order necessary to preserve Mr Russell's position?

[24] As noted in *Carlton & United Breweries*, "necessary" means "reasonably necessary".[17] The first question to consider is what "position" it is that Mr Russell seeks to preserve. Mr Judd submitted that it is "the legal status of not being bankrupt". Mrs Courtney submitted that the "position" is Mr Russell's ability to pursue the judicial review application.

[25] I accept Mr Judd's submission. The status of not being bankrupt incorporates more than the ability to pursue legal proceedings. As Mr Judd submitted, bankruptcy adjudication effects a significant change in a person's status. While its effect may not be second only to being sentenced to imprisonment, it is nonetheless a significant

---

[17] See *Carlton & United Breweries*, above n 8 at 430.

change, incorporating restrictions on the bankrupt's ability to manage his own affairs.

[26] Next, is an interim order reasonably necessary to preserve Mr Russell's position of not being bankrupt? I am satisfied that it is. The Commissioner has a judgment against him and, in the absence of an interim order preventing her from doing so, can and will pursue bankruptcy proceedings.

[27] Accordingly, I conclude that an interim order is necessary to preserve Mr Russell's position. Without an order, he will be bankrupted.

Should an interim order be made?

[28] This is a far more difficult issue, and it requires a consideration of, among other things, the application for judicial review.

[29] I refer first to the Commissioner's powers and duties as to the collection of income tax, as set out in the TAA. The following observations rely heavily on the analysis by Randerson J in *Raynel v Commissioner of Inland Revenue*.[18] Section 6(1) of the TAA makes it the responsibility of every Minister or Government Officer having responsibilities relating to the collection of taxes to use their best endeavours to protect the integrity of the tax system. Section 6(2) provides that "integrity of the tax system" includes (as relevant to the present matter):

(a) Taxpayer perceptions of that integrity (s 6(2)(a));

(b) The responsibility of taxpayers to comply with the law (s 6(2)(d)); and

(c) The responsibilities of those administering the law to do so fairly, impartially, and according to law (s 6(2)(f)).

[30] Section 6A imposes particular duties on the Commissioner. Section 6A(3) provides that:

---

18 *Raynel v Commissioner of Inland Revenue* (2004) 21 NZTC 18,583 (HC) at [44]–[67].

> In collecting the taxes committed to the Commissioner's charge, and notwithstanding anything in the Inland Revenue Acts,[19] it is the duty of the Commissioner to collect over time the highest net revenue that is practicable within the law having regard to —
>
> (a) the resources available to the Commissioner; and
>
> (b) the importance of promoting compliance, especially voluntary compliance, by all taxpayers with the Inland Revenue Acts; and
>
> (c) the compliance costs incurred by taxpayers.

[31] In *Raynel*, Randerson J observed regarding s 6A:[20]

> [51] The cases have emphasised that the Commissioner has a wide managerial direction as to the best means of obtaining the highest net return in the field of tax recovery: …
>
> [52] Where the public interest in collecting taxes would be better served by a compromise agreement with the taxpayer than by the exercise of the range of enforcement powers available to the Commissioner, such a compromise is regarded as being within the broad managerial discretion of the Commissioner. But the considerations relevant to the exercise of the Commissioner's duty are not limited to issues of practicality, resources, and costs. Importantly, the Commissioner is also required by s 6A(3)(b) to have regard to the importance of promoting compliance (especially voluntary compliance) by all taxpayers with the Inland Revenue Acts.
>
> (references omitted)

[32] Section 176(1) provides that the Commissioner must maximise the recovery of outstanding tax from the taxpayer. However, s 176(2) provides (as relevant in the present case) that:

> (2) Despite subsection (1), the Commissioner may not recover outstanding tax to the extent that—
>
> (a) recovery is an inefficient use of the Commissioner's resources; or
>
> …

[33] Section 177 allows a taxpayer to apply for financial relief. One form of relief is "by requesting to enter into an instalment arrangement with the Commissioner" (s 177(1)(b)). On receipt of such a request, the Commissioner may accept the request, seek further information, make a counter-offer, or decline the request (s 177(3)).

---

19 Which includes the Tax Administration Act: see TAA section 3 and the Schedule to the TAA.

20 *Raynel v Commissioner of Inland Revenue*, above n 18 at [51]–[52].

[34] Section 177B deals with instalment arrangements. Section 177B(2) is particularly relevant. It provides:

> (2) The Commissioner may decline to enter into an instalment arrangement if—
> (a) to do so would not maximise the recovery of outstanding tax from the taxpayer; or
> (b) the Commissioner considers that the taxpayer is in a position to pay all of the outstanding tax immediately; or
> (c) the taxpayer is being frivolous or vexatious; or
> (d) the taxpayer has not met their obligations under a previous instalment arrangement.

[35] Finally, I refer to s 177C, as to writing off outstanding tax. While s 177C(1), (1BA), (1B), (1C), (1D), and (2) refer to situations where the Commissioner must or may write off tax, s 177C(3) provides that the Commissioner must *not* write off outstanding tax (inclusive of any shortfall penalties), if a taxpayer is liable to pay, in relation to the outstanding tax, a shortfall penalty for an abuse tax position or evasion or a similar act.

Mr Russell's case for judicial review

[36] Mr Judd submitted that the Commissioner's power to decline Mr Russell's instalment payment proposal is set out in s 177B(2), and does not include any reference to protecting the integrity of the tax system, or promoting compliance with the Inland Revenue Acts (which are provided for in ss 6 and 6A, respectively). He submitted that in relation to instalment payment proposals, Parliament has given particular (and unequal) weight to maximising recovery.

[37] He further submitted that none of ss 177B(2)(a) to (d) apply to Mr Russell: there was no reasonable basis on which the Commissioner could conclude that she would recover more tax by bankrupting Mr Russell than by accepting the instalment payment proposal, or that Mr Russell was in a position to pay all of the outstanding tax immediately, or that he was being frivolous or vexatious, or that he had failed to meet his obligations under a previous instalment arrangement. Accordingly, there is no rational or reasonable basis on which the Commissioner could have declined the instalment payment proposal.

[38] Mr Judd submitted that Mr Russell has, at the very least, a contestable case that the Commissioner failed to comply with her duties regarding the instalment payment proposal, and acted unlawfully in declining it.

[39] Mrs Courtney submitted that it is apparent from the Commissioner's memoranda setting out her consideration of Mr Russell's instalment payment proposals that both the 9 December 2012 and the 2 September 2013 proposals were declined for essentially the same six reasons:

(a) Mr Russell's outstanding tax including abusive tax shortfall penalties which, pursuant to s 177C(3) cannot be written off.

(b) The proposal was not realistic, as it would not even cover accruing interest;

(c) The proposal provided no certainty or finality.

(d) Mr Russell does not have a good compliance history. The present debt had arisen from tax avoidance assessments and Mr Russell had been engaged in litigation for the best part of 30 years fighting the Commissioner's claims of tax avoidance for his clients and then his own affairs. Companies with which he is associated do not have a good return filing history.

(e) The arrangement would be an inefficient use of resources, given that the debt would grow faster than payments made.

(f) Overall, not pursuing bankruptcy would not maximise recovery, and would be an inefficient use of the Commissioner's resources.

[40] Mrs Courtney submitted that Mr Russell does not have a contestable case that the Commissioner acted unlawfully in declining the instalment payment proposal.

[41] In the light of the fact that the Commissioner has applied to strike out the judicial review application, which has not yet been heard, it is not appropriate that I

comment in any detail on the strength or weakness of Mr Russell's case. However, it can be said that, on the face of the matters put before me, I could not conclude that his case is so hopeless that his application for an interim order should be dismissed, before the application to strike out, where the strength of the case is focussed on, is heard.

Remaining discretionary factors

[42] The remaining discretionary factors are delay, possible prejudice to the Commissioner and, in particular, the public interest in maintaining the integrity of the tax system and in the Commissioner carrying out her duties, and the Commissioner's submission that the judicial review proceeding could be pursued by the Official Assignee.

[43] I do not accept Mrs Courtney's submission that a factor counting against a stay is that the Official Assignee could pursue the judicial review proceeding if Mr Russell were bankrupted. This was a speculative submission – there being no evidence that the Official Assignee would pursue the proceeding – and as Mr Judd submitted, the nature of the judicial review proceeding is such that the Official Assignee would be unlikely to see any benefit in pursuing it. The interest in pursuing it lies with Mr Russell, not the administrator of his estate.

[44] As to delay this is, without question, a tax dispute with a very long history. The tax arrangements which constituted tax avoidance were entered into between 1985 and 2000. The Commissioner issued assessments in January 2003. The hearing of Mr Russell's challenge by the Taxation Review Authority did not begin until October 2005, and the hearings before the Authority continued until April 2009. Mr Russell's appeals against the Authority's determination continued until August 2012. It is now between 29 and 14 years since the tax arrangements, and five years since the Commissioner's assessments were confirmed by the Authority.

[45] I accept that "delay" cannot be determinative to conclude that a stay should not be granted. However, I also accept that the extremely long time it has already taken to determine tax issues between the Commissioner and Mr Russell is prejudicial to the public interest in maintaining the integrity of the tax system, and to

the Commissioner carrying out her duties to administer the tax laws. Accordingly, if there is to be further delay as a result of a stay of the bankruptcy proceedings, it should be for as short a time as possible.

[46] Having considered the factors set out above, I have concluded that an interim order should be made prohibiting the Commissioner from commencing bankruptcy proceedings against Mr Russell, pending further order of the Court. However, that order is to last only until the Commissioner's application to strike out the judicial review proceeding is determined. In the event that the Commissioner succeeds in the application to strike out, I would expect the stay to be removed.

[47] Mr Judd applied for costs in favour of Mr Russell, if interim orders were made. I do not consider this to be an appropriate case for an order for costs at this stage. Rather, costs will be reserved, pending further order of the Court.

____

Andrews J