IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

CIV 2004-409-001596

BETWEEN	CHESTERFIELDS PRESCHOOLS LTD First Plaintiff
AND	DAVID JOHN HAMPTON Second Plaintiff
AND	CHESTERFIELDS PARTNERSHIP Third Plaintiff
AND	THE COMMISSIONER OF INLAND REVENUE Defendant

Hearing: 30 September 2009

Appearances: D J Hampton and T Sisson (In Person)
R Wallace for Commissioner of Inland Revenue

Judgment: 30 September 2009

JUDGMENT OF FOGARTY J

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[1] The plaintiffs in these proceedings have filed an application inviting this Court to make further decisions on a number of matters which I summarise:

1. In respect of a claim arrangement in August 1993.

2. In respect of a settlement arrangement negotiated between Mr Coleman for the Commissioner and the third plaintiff confirmed with a consent order in December 1992.

3. To give effect to what is described as a decision of intention by Mr Aronsen in 1994 and also the plaintiff applies for the sham issues discussed in the second judgment of this Court (2009) 24 NZTC 23,148 to be set down for hearing in the High Court.

[2] I have heard first this morning an application by the defendant for orders striking out this application. This application essentially argues that this Court is functus officio. Secondly, the plaintiffs are estopped by the principles of res judicata including issue estoppel. Thirdly, the plaintiffs did not appeal the judgment of 2006 or seek leave to appeal out of time. Fourthly, there are procedures internally under the Tax Administration Act 1994 which the plaintiff has not invoked and with which they have not complied.

[3] I do not think that it is necessary in this judgment to record the history of this litigation. There are numerous decisions recording it at various levels. Very briefly, this notice of motion is filed in the first set of judicial review proceedings commenced in 2004. That resulted in a judgment in favour of the plaintiffs given on 15 December 2006: (2007) 23 NZTC 21,125). That judgment made provisions for relief in paragraph [159] directing the Commissioner to do certain things and in sub-paragraph 7 of [159] leave was reserved for further directions.

[4] The Commissioner set about responding to that judgment. The plaintiffs were dissatisfied with the response. The response is referred to between the parties as "the Budhia" decision and in a judgment that I delivered: *Chesterfields Preschools Ltd And Ors v The Commissioner of Inland Revenue* HC CHCH CIV 2004-409-001596 31 October 2007, in the context of dealing with applications by the plaintiffs to set aside a mareva injunction, I canvassed in paragraphs [43] and [44] the various ways in which the decision of Mr Budhia could be challenged:

> [43] For all these reasons I consider that there are serious grounds for challenging the June 2007 decision of Mr Budhia. That challenge could be by way of judicial review where it would be argued that he had failed to take into account considerations made relevant by paragraphs of the judgment that I have cited and potentially other paragraphs, in other words that he had placed too much weight on the last paragraph [159] setting out the directions without appreciating them in the light of the findings made in the main text.

> [44] The second alternative is to simply argue that the decision of June 2007 simply does not give effect to the judgment and possibly seek further directions, leave being reserved under Clause 7 of the relief package. Another alternative is to take the matter up internally by way of a NOPA and a fourth and final alternative, much to be encouraged, is to negotiate a solution, go to mediation or some kind of alternative dispute resolution on the matter.

[5] Effectively these two paragraphs list the following modes of challenge:

1. Judicial review

2. Seek further directions ([159] 7)

3. Take the matter up internally by way of a NOPA

4. Some form of alternative dispute resolution

[6] About a year later I commenced hearing the second application for judicial review which challenged Mr Budhia's decision. I released a judgment on that on 25 November 2008 (2009) NZTC 23,148, again in favour of the plaintiffs, setting the decision of Mr Budhia aside and redirecting the Commissioner to go back to discharging the directions given in the 2006 judgment. That 2008 judgment which the parties called "second review" was appealed to the Court of Appeal. The appeal is due to be heard by the Court of Appeal 25-27 May 1010.

[7] By a decision of 25 August 2009 ([2009] NZCA 373) the Court of Appeal made an order staying the execution of the orders made by this Court in the second judgment and further orders that I had made giving effect to that judgment on 1 May:

> **A Order staying execution of the orders made by the High Court on 25 November 2008 in *Chesterfield Preschools Ltd v Commissioner of Inland Revenue* (2009) NZTC 23,148 and the orders made by the High Court on 1 May 2009 in *Chesterfield Preschools Ltd v Commissioner of Inland Revenue* (2009) 24 NZTC 23,504 pending the determination of the appellant's appeals against those orders.**

[8] In that judgment of 25 August the Commissioner withdrew effectively an application for a stay of any further proceedings in the High Court and the Court

formally ordered as part of that judgment that that application is dismissed. So, following that decision of 25 August we have the plaintiffs' application for determination of separate decisions of hearing lodged on 1 September being the application I referred to at the beginning of this judgment.

[9] It became apparent in the course of the written argument that the plaintiffs justified bringing this application in proceedings CIV 2004-409-0001596 by reason of relying on the need for further directions reserved in paragraph [159] sub-paragraph 7. It needs to be kept in mind that the first judgment was not appealed by the Commissioner. So the Commissioner is not in a position to obtain a stay of that judgment.

[10] This Court has now been informed in the course of this hearing that prior to the commencement of the second judicial review which was commenced after the judgment I have referred to delivered on 31 October the plaintiffs had actually filed a notice of proposed adjustment (NOPA) in response to the decision of Mr Budhia. This is a document over which there is a dispute between the plaintiffs and the Commissioner as to whether or not it is in truth a NOPA. It is dated 20 July 2007. This NOPA disputes a number of rulings of Mr Budhia and the same disputes are contained in a document filed in these proceedings also on 1 September 2009 entitled "The Plaintiffs' Separate Decision of Questions for Determination".

[11] Mr Hampton has advised me that in an affidavit that he filed in the High Court he had informed the Court some time prior to the hearing of the second judicial review of the existence of this NOPA. In the hearing this morning he argued that the NOPA relied on a distinction between disputable determinations and exercises of discretion, a distinction drawn in the TAA, see s 3 definition of disputable decision:

> **disputable decision means -**
>
> (a) An assessment:
>
> (b) A decision of the Commissioner under a tax law, except for a decision-
>
> (i) To decline to issue a binding ruling under Part 5A; or

(ii) That cannot be the subject of an objection under Part 8; or

(iii) That cannot be challenged under Part 8A; or:

(iv) That is left to the Commissioner's discretion under sections 89K, 89L, 89M(8) and (10) and 89N(3)

[12] He argued this morning that the NOPA can be seen as pursuing disputable decisions which could be addressed using the processes of the TAA, whereas the second judicial review pursued challenges to the exercise of discretion which could not be pursued by way of NOPA. There is no reference to that distinction in my judgment of 31 October 2007 when I laid out the various options available to pursue the challenge to Mr Budhia's decision. As I have already noted there is a reference to taking the matter up internally by way of a NOPA and it is possible that I had been informed from the bar that there was a NOPA in existence. There is no reference in my judgment of 25 November 2008 on the second judicial review that there had been any decision by the plaintiffs to partly challenge the decision of Mr Budhia by the TAA procedures using the NOPA issued in July and partly by way of judicial review.

[13] Mr Hampton has argued this morning that the Commissioner would have understood that distinction; and that it was drawn in an affidavit that had been filed. But he agrees that he cannot recall it being drawn to my attention by counsel in the second judicial review hearings.

[14] The fact that the distinction may have been drawn in an affidavit filed in Court but not drawn to my attention in the oral hearings does not mean that the Court has notice of it. The filing of an affidavit in a Registry does not mean that the contents of the affidavit have been "heard" or otherwise considered by a Judge. Any reliance on an affidavit has to be made in open Court unless the parties have agreed, with the Judge, that the dispute be heard on the papers. There are a number of reasons for this but briefly, the tradition of the need to rely in open Court on materials that one advances to the Judge is rooted in the principle of open justice, sometimes also called the principle of orality. The principle is that so far as possible the parties and the public can see justice being done, can watch as arguments are put to a Judge seeing how the Judge responds to them, and indeed until recent years

judgments were always delivered orally, as I am doing today, so that the parties can also see the Judge explaining his or her decisions.

[15] I dwell on this point because one of the principal arguments of Mr Wallace is that the plaintiffs in the applications before the Court today are seeking to argue matters that they could have pursued in the second judicial review. He relies on this passage from the Privy Council in *Hoystead v Commission of Taxation* [1926] AC 155 at 165:

> Parties are not permitted to begin fresh litigations because of new views they may entertain of the law of the case, or new versions which they present as to what should be a proper apprehension by the Court of the legal result either of the construction of the documents or the weight of certain circumstances. If this were permitted litigation would have no end, except when legal ingenuity is exhausted. It is a principle of law that this cannot be permitted, and there is abundant authority reiterating that principle. … the same principle – namely, that of setting to rest the rights of litigants, applies to the case where a point, fundamental to the decision, taken or assume by the plaintiff and traversable by the defendant, has not been traversed. In that case also a defendant is bound by the judgment, although it may be true enough that subsequent light or ingenuity might suggest some traverse which had not been taken. The same principle of setting parties' rights to rest applies and estoppel occurs.

[16] He also relies on a similar statement found in *Neylon v Dickens* [1987] 1 NZLR 402 at 409:

> Here the general principle applies that the Court should not allow issues to be raised which are so clearly part of the subject-matter of earlier litigation that it would be an abuse of process to allow a new proceeding to be started in respect of them.

[17] Those are relevant authorities but are dicta which simply restate an ancient principle that has been in place for a long time, sometimes called "merger of cause of action in a judgment". Now we are not really talking about causes of action here and that is why it is appropriate to cite *Hoystead*. But the principle is that where a range of arguments are available to a party seeking relief from a superior Court the party has to make a decision whether to run all the arguments or some of them, but cannot go back for a second turn if the arguments it preferred to run with have not worked. If some available arguments are to be pursued elsewhere they need to be brought to the notice of the parties and the Court.

[18] There is a second argument that this principle applies here to prevent the plaintiffs from now going back to sub-paragraph 7 of paragraph [159] of the first decision granting relief. But I have been satisfied in the course of oral argument that it would be premature to make a judgment upon it. This is because of the appeal pending in the Court of Appeal. As I apprehend it, having heard a sketch of the argument in the hearing in Wellington on 1 May 2009, one of the arguments of the Commissioner is that these disputes should not have proceeded by way of judicial review in any event.

[19] In my judgment delivered on that date I said it was too late for the Commissioner to raise that argument (2009) 24 NZTC 23,504.

[20] If the Court of Appeal takes a different view then it may be that there is life yet in the NOPA that was filed or alleged to have been filed in July 2007. Alternatively, depending on how the Court of Appeal treat the 2006 judgment, which was not appealed, and how they treat the second 2008 judgment, which is appealed, it is possible that there may be some life left yet in bringing the NOPA issues for hearing via further directions under paragraph [159] 7. There is no doubt that in the second judicial review judgment I intended to leave the whole of paragraph [159] of the first judgment in place.

[21] It is appropriate that I should say that I think there is a significant argument against the granting of leave to pursue the matters cast in the NOPA directions on the first judgment, because of the way in which the second judicial review process was followed. I think there is a serious argument to do so would be an abuse of process.

[22] I am probably repeating myself but I am saying that I am simply not going to make a decision on that ground inasmuch as abuse of process might be a different ground from merger of argument in judgment. I do not think actually it is a second ground. It is just another way of stating the same principle.

[23] I fall back on the first argument in fact raised by Mr Wallace and that is that I am now functus officio. Certainly, I agree that at the present time I am effectively functus officio in respect of the two judicial review judgments and will be at least

until the Court of Appeal has delivered its judgment on appeal from the second judicial review judgment.

[24] I apprehend the reason why the Court of Appeal declined to make an order preventing stay of any proceedings in the High Court is that it is always open to any party to commence new proceedings. Whether or not those proceedings would, however, be stayed as being in breach of res judicata, issue estoppel, or otherwise an abuse of process, is another question.

[25] Accordingly, it seems to me that the appropriate response to the Commissioner's application for strike out is to provide the remedy of stay rather than strike out pending the decision of the Court of Appeal.

[26] Accordingly, this Court stays any consideration of the plaintiffs' application for determination of separate decision of questions and for a hearing date to resolve sham issues dated 1 September 2009 down to release of the judgment of the Court of Appeal on the second judicial review and expiry of the time for seeking leave to appeal to the Supreme Court.

[27] Costs are reserved.

Solicitors:
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