

**IN THE HIGH COURT OF NEW ZEALAND  
AUCKLAND REGISTRY**

**CIV-2009-404-2640**

UNDER THE COMPANIES ACT 1993

BETWEEN THE COMMISSIONER OF INLAND  
REVENUE  
Plaintiff/Respondent

AND MANAGED FASHIONS LIMITED  
Defendant/Applicant

Hearing: 1 October 2009

Appearances: Mr C K Wood for Plaintiff/Respondent  
Mr S Judd for Defendant/Applicant

Judgment: 1 October 2009

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**(ORAL) JUDGMENT OF LANG J**  
**[on application for stay of proceeding and for leave**  
**to file a statement of defence out of time]**

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Solicitors:  
Crown Solicitor, Auckland  
Ladbrooks Solicitors, Auckland  
Counsel:  
Mr S R G Judd, Auckland

[1] In this proceeding the Commissioner of Inland Revenue seeks an order placing Managed Fashions Limited in liquidation. It does so on the basis that Managed Fashions Limited has failed to comply with a statutory demand served upon it claiming the sum of \$1,910,421.74. The demand comprises core tax assessments of \$61,072 and penalties thereon of \$1,845,898.47.

### **Application for stay of proceeding**

[2] Managed Fashions Limited has now applied for an order staying the proceeding. It seeks to have it stayed pending determination of a judicial review proceeding that it has filed in this Court under CIV-2009-404-1193. It contends that a favourable decision in that proceeding is likely to remove its liability to pay the additional tax and penalties that form by far the greatest component of the Commissioner's claim.

[3] There is, however, no dispute regarding the core debt of \$61,072.

[4] There is no evidence before the Court that Managed Fashions Limited has the ability to pay that sum. It is well above the threshold that would enable the Court to place the company in liquidation. For this reason alone the application for stay cannot succeed.

### **Application for leave to file statement of defence out of time**

[5] Managed Fashions Limited has also applied for an order granting it leave to file a statement of defence out of time. It wishes to defend the liquidation proceeding on the basis that the additional tax and penalties are subject to a genuine dispute.

[6] It argues that there is no evidence that the Commissioner has ever made a decision in terms of s 398(5) of the Income Tax Act 1976. That section provides as follows:

(5) In any case in which an assessment is not made until after the due date of the tax, or is increased after the due date of the tax, **and the Commissioner is satisfied that the taxpayer has not been guilty of**

**neglect or default in making due and complete returns for the purposes of that tax**, the Commissioner shall in his notice to the taxpayer of the assessment or amended assessment, or in any subsequent notice, fix a new date for the payment of the tax or of the increase, as the case may be, and the date so fixed shall be deemed to be the due date of that tax or increase for the purposes of subsection (2) or subsection (4) of this section: (Emphasis added)

[7] This issue may never need to be considered, because until Managed Fashions Limited pays the core tax or satisfies the Court that it has the ability to do so, the issue will be irrelevant. The company will be placed in liquidation because it has not been able to prove its solvency.

[8] In case, however, Managed Fashions Limited pays the core debt or satisfies the Court that it has the ability to do so, I need to consider the application for leave to file an amended statement of defence in a little greater detail.

[9] The debt owing by Managed Fashions Limited to the Commissioner has now been established in a series of decisions beginning in the Taxation Review Authority and ending in the Court of Appeal. Related proceedings also went to the Privy Council, but Managed Fashions Limited was not party to that aspect of the litigation. The Court of Appeal has upheld the Commissioner's assessment and it may be that that is ultimately an answer to the argument for Managed Fashions Limited.

[10] This issue does not appear to have been raised by Managed Fashions Limited in any earlier proceedings. It may be that it is now precluded from relying on this as a ground for disputing its liability to the Commissioner. There is, however, a dearth of evidence in relation to the Commissioner's decision under s 398(5).

[11] When Associate Judge Doogue dismissed an application by Managed Fashions Limited for an order setting aside the statutory demand, he did so on the following basis *Managed Fashions Limited v CIR* HC AK CIV 2008 404 3018 2 April 2009:

[20] Mr Wood drew my attention to the decision of Courtney J in *NTH Douglas & Ors, Applicant v Commissioner of Inland Revenue & Others* HC AK, CIV 2003-404-006359, 16 February 2009. In that judgment, Courtney J referred to s 398(5) of the Income Tax Act 1976. This section only applies where the Commissioner is satisfied that the taxpayer has not been guilty of

‘wilful neglect or default in making due and complete returns for the purposes of that tax’. If the Commissioner is not so satisfied, then he is not required in his notice of assessment, or amended assessment, or any subsequent notice to fix a new date for the payment of the tax.

[21] In this case, the Commissioner, Mr Wood said, was not so satisfied. As a result, the due date for payment of the tax assessed to the applicant was as set out in s388 and the Eighth Schedule to the Income Tax Act 1976. For taxpayers with balance dates within the months from March to September inclusive, the due date is 7 February in the following calendar year. The Commissioner having advised no due date means the due date for payment of the tax was therefore set by operation of statute. If that is so, then the extra tax could be assessed from the point when it acquired the status of being unpaid, that is from 7 February in the following calendar year.

[12] Counsel for Managed Fashions Limited points out that the Associate Judge appears to have based his decision on a submission made by counsel for the Commissioner. Neither counsel was able to direct me to any actual evidence of the Commissioner’s decision, whether in this proceeding or in the proceeding before the Associate Judge.

[13] It seems to me that the Commissioner’s decision must be a matter that is readily capable of proof. Indeed, during the hearing Mr Wood advised me that he had the Commissioner’s written decision in a document on his file, albeit affixed to the end of a legal opinion. It seems to me that the Commissioner can readily answer this point by filing evidence that discloses the Commissioner’s decision without needing to disclose the contents of the legal opinion.

[14] I am concerned at the prospect of finally determining this proceeding on the basis of an application for leave to file a statement of defence out of time. That would have the effect of finally determining the proceeding without full evidence and argument being advanced as to the merits from both perspectives. I have also been forced to have regard to the material on the file relating to the application to set aside the statutory demand notwithstanding the fact that at present it is not, technically speaking, evidence in this proceeding.

[15] I consider that the most appropriate manner in which to deal with this issue is to grant leave to file the statement of defence and to give both parties time to file such further evidence as they deem fit in the liquidation proceeding. I also consider that it would be appropriate for the material on the statutory demand proceeding to

form part of the evidence in the liquidation proceeding, so that there is no bar to the Judge who hears the liquidation proceeding having resort to that material. It would also obviate the need to reproduce material which is already available on another Court file.

### **Result**

[16] For these reasons I dismiss the application for stay of the liquidation proceeding. I grant leave to Managed Fashions Limited to file a statement of defence provided it does so within seven days.

### **Directions**

[17] I now direct:

- a) The statement of defence is to be filed and served within seven days of today's date, namely by 8 October 2009.
- b) Any further evidence to be filed on behalf of the Commissioner is to be filed and served no later than 22 October 2009.
- c) Any evidence in response on behalf of Managed Fashions Limited is to be filed and served no later than 5 November 2009.

### **Next event**

[18] The proceeding is to be listed for mention in a Miscellaneous Companies List on 13 November 2009 at 11.45am.

## **Costs**

[19] By agreement, costs in relation to today's applications are reserved.

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Lang J