IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

CIV 2004 409 001596

BETWEEN	CHESTERFIELD PRESCHOOLS LTD First Plaintiff
AND	DAVID JOHN HAMPTON Second Plaintiff
AND	DAVID JOHN HAMPTON, THERESE SISSON TRADING AS CHESTERFIELDS PARTNERSHIP Third Plaintiffs
AND	DAVID JOHN HAMPTON, THERESE SISSON TRADING AS CHESTERFIELDS PRESCHOOLS PARTNERSHIP Fiourth Plaintiffs
AND	ANOLBE ENTERPRISES LIMITED Fifth Plaintiff
AND	THE COMMISSIONER OF INLAND REVENUE Defendant

Judgment: 14 October 2009

JUDGMENT OF CHISHOLM J

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[1] On 7 December 2007 Fogarty J put the Commissioner on notice that he was considering contempt proceedings against the Department, or individuals within the Department, as a result of the issue of notices under s17 of the Tax Administration Act 1994. For reasons that are irrelevant for present purposes, Fogarty J ultimately referred the matter to me as Christchurch List Judge.

[2] I decided not to take any further action until the substantive litigation had been concluded. In due course I convened a telephone conference with Mr Hampton, representing the plaintiffs, and Mr Pike, representing the defendant on the contempt issue. Although an appeal to the Court of Appeal had been lodged by the defendant I decided that it was appropriate to commence my investigation. As requested, both sides have provided helpful memoranda stating their position, the factors that they consider support their position, and the documents they consider to be relevant.

[3] In broad terms the Commissioner's position is that while he accepts that the prudent course would have been for further directions to have been sought, it would be inappropriate for there to be a formal finding of contempt or for any penalty to be imposed. He has, however, apologised to the Court for issuing the s17 notices without taking the precaution of obtaining further directions.

[4] For the plaintiffs Mr Hampton does not accept that the apology is enough. He believes that the Commissioner's conduct in issuing the s17 notices constituted a flagrant contempt of Court. He emphasises that it carried serious consequences for the plaintiffs and Ms Sisson (Mr Hampton's former wife).

Background

[5] Although this proceeding has a long and complex history, a relatively brief outline will suffice.

[6] In 2004 the plaintiffs issued this proceeding seeking judicial review of numerous decisions of the Commissioner concerning taxation issues. Including penalties and interest, the amount involved is very considerable.

[7] During 2005 the Commissioner obtained a Mareva injunction and associated orders restraining the plaintiffs from disposing of, further encumbering, or otherwise dealing with various assets. On 15 December 2006 Fogarty J delivered a lengthy substantive judgment in which the Commissioner was directed to take certain steps and to reconsider specified penalties and interest. Subsequently the Commissioner

obtained pre-judgment charging orders over various properties associated with the plaintiffs.

[8] Later the plaintiffs made application to the Court for orders that would enable a mortgage held by Fidelity Life Assurance Company to be refinanced. By this time the borrowers were in default and the mortgagee was threatening to exercise its power of sale. The application was opposed by the Commissioner. After numerous adjournments it was heard by Fogarty J on 31 October 2007.

[9] By judgment delivered orally that day Fogarty J lifted the Mareva injunction and charging orders. Those orders were effectively replaced by Ms Sisson's undertaking to take control of the plaintiffs' properties for the purpose of facilitating the sale of certain properties and the refinancing of the Fidelity mortgage. Ms Sisson was also required to provide regular reports to the Commissioner.

[10] In the event the sale and refinancing did not take place and the mortgagee exercised its power of sale in relation to some properties. With the knowledge of the Court Ms Sisson purchased several properties. However, it was necessary for her to find finance. By 8 November she had obtained a conditional loan approval from General Finance, but the loan was ultimately declined on 4 December 2007. Between those two dates the Commissioner issued a s17 information request to that company (and also to some other potential financiers).

[11] In an affidavit sworn on 6 December 2007, which was filed in support of an application for the Court's approval to a refinancing proposal, Ms Sisson outlined those events and complained that the s17 information request was:

> *"… in contravention of the Court direction of Fogarty J that such action on the part of IRD, now that the various restrictive orders have been removed, would be viewed as tantamount to an action in contempt of Court".*

Ms Sisson alleged that the interference by IRD had soured the prospects of refinancing through General Finance or any other finance companies that had received a s17 notice, and that she had only been able to arrange short term finance from another source.

[12] On 7 December 2007 Fogarty J held a telephone conference. His Minute records:

> *"[7] In her affidavit Ms Sisson says that this Court made a direction that further s 17 information requests to parties involved in these transactions would be viewed as tantamount to an action of contempt of the Court. That direction is not recorded in the judgment of the Court of 31 October or in the telephone conference of 9 November. However, to my recollection, the substance of the proposition is correct. At the end of the hearing of 31 October concern was expressed by the applicants as to the past effect of information requests and to the possibility of there being more at this critical stage. I queried with counsel for the Crown the need for requests of third parties given the ability of the IRD to obtain information as a result of these orders from Ms Sisson and/or from Mr Andrews. I did express the view to Mr Shamy, in the presence of IRD personnel at the back of the Court, that any further s 17 information requests could be regarded as a contempt of Court. I may or may not have made it clear that the concern of the Court was that such notices would be contempt because they would have an effect contrary to that sought to be achieved by the judgment of this Court on 31 October."*

The Judge requested an explanation from the Commissioner and warned the Commissioner that he was now on notice that the Court was considering contempt proceedings.

[13] In response the Commissioner lodged an affidavit sworn by Ms Glass, a solicitor employed by the Commissioner who was present in Court on 31 October 2007. She deposed that after the Judge had finished delivering his judgment Mr Andrews (counsel for the plaintiffs) raised the issue of s17 notices. In response:

> *"The Court indicated that it might regard the use of a s17 notice in terms of Bluestone [the finance company that was contemplating providing finance at that time] as contempt, but then followed that comment by stating that the Court was not able to go that far. Accordingly, I wrote down "Contempt too far". I also wrote down "not limit s17" and put a circle around those words for emphasis."*

Ms Glass said that she heard nothing in the nature of a direction to the Commissioner not to use s17 notices or that their continued use would be a contempt. Her notes were attached to the affidavit.

[14] There was also an affidavit from Ms Mortimer, an IRD officer, explaining why the notice had been issued. Ms Mortimer challenges Ms Sisson's allegation that the notice was instrumental in General Finance's decision to decline finance.

[15] Those affidavits were supported by a memorandum from Mr Pike. He noted that there was no order or direction that s17 notices were not to be issued. However, he said that if it was the intention of the Court that s17 notices should not be issued the Commissioner regrets that he did not understand this to be the position.

[16] Obviously Fogarty J was not particularly impressed by the Commissioner's explanation. During a telephone conference on 5 February 2008 the Judge expressed *"considerable reservation"* at the adequacy of the explanations. He commented that the Court was not in a position to make orders prohibiting the Crown from exercising statutory discretions in the future. Mr Pike was invited to reconsider the Commissioner's position.

[17] On 4 March 2008 Fogarty J issued a Minute removing himself from any further involvement in the contempt matter.

[18] Subsequently Ms Sisson lodged an affidavit providing a detailed response to Ms Mortimer's affidavit which she described as misleading and selective. For reasons given in her affidavit Ms Sisson reiterated that IRD's actions had destroyed General Finance's confidence in dealing with the plaintiffs.

[19] Later Mr Pike lodged a further memorandum in which he traversed the history and provided a more detailed explanation about why the s17 notices had been issued. He also reported that inquiries had disclosed that the IRD officers and counsel from the office of the Christchurch Crown Solicitor (who was conducting the substantive litigation for the Commissioner) believed that the comments from the Court as to contempt *"had not crystallised to a firm view, much less a warning"*. He assured the Court that there was no deliberate act in contravention of the Court order and the apology given earlier was repeated.

Determination

[20] Given the seriousness of a finding of contempt, I do not consider that such a finding should be made without affording the parties an opportunity to be heard at a formal hearing. Consequently at this stage I am effectively screening the

information currently available to see whether it would be appropriate for the matter to proceed to a formal hearing.

[21] Before the Court could find that the Commissioner, or any of his officers, had committed a contempt it would need to be satisfied that:

(a) the Court had directed that s17 notices were not to be issued;

(b) such direction was clear and unambiguous: *Wilson v Davis* (High Court, Rotorua Registry, CIV 2006 463 000921, 12 June 2007, Fogarty J) at [11]; and

(c) the direction was wilfully disobeyed in the sense that the s17 notices were issued deliberately: *Siemer v Stiassny* [2008] 1 NZLR 150 (CA) at [10].

Notwithstanding the civil context, each of these elements would have to be proved beyond reasonable doubt: *Siemer v Stiassny* at [11].

[22] It is clear that there was no formal direction. While the Commissioner accepts that it was unwise for his officers to issue the notices without obtaining further directions from the Court, it is apparent from Mr Pike's memorandum that the Commissioner disputes that the comments of Fogarty J are capable of supporting a finding of contempt. Thus I proceed on the basis that the first two elements referred to in the previous paragraph are in issue.

[23] There does not appear to be any dispute that at the end of the hearing on 31 October 2007 counsel for the plaintiffs raised the issue of s17 notices and Fogarty J commented on the matter. While those comments were interpreted by Ms Sisson as a positive and authoritative direction not to issue any s17 notices, they were not interpreted in the same way by Ms Glass. For his part, while Fogarty J seems to have supported the substance of Ms Sisson's proposition he appears to have acknowledged that it might not have been clear that the underlying concern of the

Court was that such notices would have an effect contrary to what the judgment of 31 October was seeking to achieve.

[24] Given that situation it must be arguable, at least on the information currently available, that the observations of Fogarty J were not sufficiently clear and unambiguous to found a contempt. In that case a contempt could only arise if an intention to subvert the judgment delivered on 31 October 2007 could be demonstrated: *Arlidge, Eady & Smith on Contempt* (3rd edition) at 12-48. That would require a finding that the Commissioner and/or his officials deliberately set out to undermine the purpose of the judgment delivered by Fogarty J on 31 October. On the material currently available such a finding would be unlikely.

[25] A further consideration is whether a any penalty is likely to result if the Court found that a contempt had been established. The Commissioner has acknowledged that in all the circumstances he should have obtained directions, and he has apologised to the Court. While I appreciate that the issue of the notices appears to have affected the financing arrangements that Ms Sisson was attempting to put in place, it needs to be kept in mind that the underlying purpose of contempt is not to protect the private rights of parties to litigation, but to prevent interference with the administration of justice: *Attorney-General v Times Newspapers Limited* [1974] AC 275 per Lord Reid at 294. Even if a contempt was established I doubt that any penalty would be imposed.

[26] Given those factors I have decided that no useful purpose would be served by allowing the contempt issue to proceed any further. I should add, however, that I am not surprised that the actions of the Commissioner aroused considerable concern on the part of the plaintiffs and Fogarty J. Given that the contempt issue was mentioned by the Judge it was exceedingly unwise for the s17 notices to be issued without obtaining further directions from the Court. As Fogarty J observed, the information sought in the notices could have been sought through Ms Sisson and/or Mr Andrews. With the benefit of hindsight this now seems to be accepted by the Commissioner.

Outcome

[27] No further steps will be taken in relation to the contempt issue, which is now at an end. There will be no order as to costs.

Solicitors: Minter Ellison Rudd Watts, Wellington for Plaintiff
Raymond Donnelly & Co, Christchurch for Defendant