IN THE HIGH COURT OF NEW ZEALAND
TAURANGA REGISTRY

CIV-2008-470-808
CIV-2008-470-809

UNDER	the Companies Act 1993
BETWEEN	THE COMMISSIONER OF INLAND REVENUE Plaintiff
AND	BERRYTIME LIMITED Defendant

AND BETWEEN	THE COMMISSIONER OF INLAND REVENUE Plaintiff
AND	BERRYTIME LAND LIMITED Defendant

Hearing: 26 March 2009
(Heard at Rotorua)

Appearances: Mr Dickey for plaintiff
Mr Patterson for the defendants

Judgment: 3 April 2009 at 4 p.m.

JUDGMENT OF ASSOCIATE JUDGE DOOGUE

This judgment was delivered by me on
***03.04.09 at 4 pm**, pursuant to*
Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Date……………

Solicitors:
Meredith Connell Solicitors, P O Box 2213, Auckland - by facsimile: 336 7629
Mr K J Patterson, P O Box 13006, Tauranga - by facsimile: 07 579 0404

[1] The Commissioner has filed a claim for an order placing two related companies into liquidation, Berrytime Limited and Berrytime Land Limited. I shall refer to them respectively as "Berrytime" and "Berrytime Land". The companies are involved in early childhood education. They are apparently related to, or have business dealings with an Australian entity broadly known as "ABC", which provides early childhood education services.

[2] The two defendants are New Zealand companies. They are, therefore, subject to New Zealand tax laws. The plaintiff says that the companies have not paid their due tax. Counsel for the plaintiff in his submissions summarised the position as follows:

> 1.1. As at 1 January 2008, Berrytime's self-assessed GST debt was $3,485,330.55**…**
>
> 1.2. On 5 June 2008, further returns for Berrytime were filed for the return periods between 1 November 2008 and 29 February 2008. The self-assessed GST liability for Berrytime in respect of these returns was $1,298,195.62……
>
> 1.3. The Commissioner did not receive any payments for the self-assessed GST debt at the time that these returns were filed ……….
>
> 1.4. On 13 June 2008, a GST return for Berrytime for the period ended 30 April 2008 was filed. A GST refund of $1,418,391.63 was claimed...
>
> ………..
>
> 1.9 As at 1 September 2008, Berrytime's self-assessed GST debt was $3,365,134.54 **(refer Affidavit of Pat To, para 11)**. This GST debt was pleaded in the Commissioner's statement of claim and is deemed correct and indisputable by virtue of s109 of the Tax Adminstration Act..
>
> …..
>
> 1.12 Even if Berrytime's GST refund claims for the May 2008 and June 2008 returns are correct, the core GST liability of Berrytime will be $1,892,359.14. This is excluding penalties and interest which have accrued.
>
> 1.13 Berrytime has acknowledged a core liability of approximately $1,400,000 (refer Affidavit of Bevan Spalding in Support of Notice of Opposition to Interlocutory Application for Urgent Fixture and Ancillary Orders sworn 3 October 2008, para 31). Despite this acknowledgement, the Commissioner has received no payments in respect of the Berrytime GST debt.
>
> 1.14 As at 26 November 2008, Berrytime's total GST debt, including penalties and interest (as is required to be added by the penalties and interest regime in the

> TAA), owed to the Commissioner is at least $4,098,008.40 (refer Affidavit of Lynette Rachel Baines sworn 27 November 2008, para 7 & Exhibit B).

[3] I interpolate that the last figure assumes for the purposes of argument that Berrytime's claims for GST refunds are accepted as correct.

[4] Berrytime does not dispute the figures. As I explain below, Berrytime considers that there is a substantial dispute as to whether it should have to pay the amounts claimed.

[5] It is clear that Berrytime has substantial liabilities for tax dating from 2007 and again there is no doubt that the company has for lengthy periods failed to pay substantial amounts of indebtedness owed to the Commissioner.

[6] As to Berrytime Land, after referring to various returns and payments, Mr Dickey submitted:

> 1.21 As at 26 November 2008, taking into account these subsequent returns, Berrytime Land's core GST debt is $805,414.86. Berrytime Land's total GST debt, including penalties and interest (as is required to be added by the penalties and interest regime in the TAA) is $832,373.05 (refer Affidavit of Lynette Rachel Baines sworn 27 November 2008, para 7 & Exhibit B).

[7] In the case of Berrytime Land, the Commissioner has not offered any evidence concerning the position as to income tax.

[8] The Commissioner did not elect to follow the procedure of serving statutory demands on the defendants, which would have raised a presumption of inability to pay debts under s 287 of the Companies Act 1993. Rather, he elected to proceed in a different way. He sought to establish that the company is unable to pay its debts by relying on the general circumstances disclosed by the evidence. Essentially, the Commissioner took the position that the companies had not paid their due debts, that there could be no dispute that they owed the debts and therefore an inference was available that the reason for non-payment was that they were not able to pay their debts.

[9] As well as relying on inability to pay debts, the Commissioner included in his statement of claim the grounds furnished by s 241(4)(b) and (d) being, respectively, persistent or serious failure to comply with of the Companies Act; and the just and equitable ground. The result has been that the proceedings took on some complexity not normally present in enforcement proceedings.

[10] Having established that the debts are owing as a result of the process of self-assessment, the Commissioner invoked s 109 of the Tax Administration Act 1994, to which I will make further reference below. Essentially, it provides that certain determinations of the Commissioner cannot be called into question in proceedings.

[11] The next issue that I want to say something about by way of introduction concerns what is the appropriate insolvency test. I accept the submission of Mr Patterson for the defendant that it is a 'cashflow' insolvency test that is important.

[12] The issues, as they have been formulated by the defence, are essentially that the taxpayers have invited the Commissioner to carry out an amendment to the assessments – that is the 'self-assessments - pursuant to s 113 of the Tax Administration Act 1994. That sections provides as follows:

> 113 Commissioner may at any time amend assessments
>
> (1) [Subject to [[sections 89N and 113D]], the Commissioner may from time to time, and at any time, amend] an assessment as the Commissioner thinks necessary in order to ensure its correctness, notwithstanding that tax already assessed may have been paid.
>
> (2) If any such [amendment] has the effect of imposing any fresh liability or increasing any existing liability, notice of it shall be given by the Commissioner to the taxpayer affected.

[13] The plaintiff has declined to amend the assessments although requested by the defendants to do so.

[14] In this judgment I will examine the issue of whether the Commissioner has succeeded in establishing that the defendants are unable to pay their debts within the terms of s 241(4)(a) of the Companies Act as the first part of my enquiry. I will give some consideration to the issue of amendment under s 113 of the Tax Administration

Act as well. The relevance of that matter is that if there appears to be a reasonable likelihood that the Commissioner will be ordered to amend the assessments, then that will give rise to a question of whether there are extant indisputable liabilities which the defendants have not paid, thus giving rise to the inference that the plaintiff seeks to draw of an inability to pay debts.

[15] It is only if the Commissioner has not succeeded in establishing inability to pay debts on the part of the defendants that I will go on and consider the failure to comply with the Companies Act and the third ground, which is the "just and equitable" ground. First, though, I will make reference to the relevant provisions of the legislation.

The provisions of the Tax Administration Act 1994 ("the Act")

[16] The plaintiff's position at the hearing before me was that the defendants cannot dispute liability for the amounts that I mentioned earlier, some $4m in the case of Berrytime and approximately $830,000 in the case of Berrytime Land. The plaintiff relies on provisions of the Tax Adminstration Act for that conclusion.

[17] Section 109 of the Act provides as follows:

> [109 Disputable Decisions deemed correct except in proceedings
>
> Except in objection proceedings under Part 8 or a challenge under Part 8A,
>
> (a) No disputable decision may be disputed in a court or in any proceedings on any ground whatsoever; and
>
> (b) Every disputable decision and, where relevant, all of its particulars are deemed to be, and are to be taken as being, correct in all respects.]

[18] I am satisfied that because of the provisions of s 3(1) of the Act, Mr Dickey is correct when he submits that a 'disputable decision' includes an assessment. I will make further comments concerning those provisions subsequently.

[19] Next, it is clear that the provisions of s 109 govern the position where the Court is dealing with an application to place a company in liquidation and appoint

liquidators. Such proceedings are ‘proceedings’ - but not ‘objection proceedings’ - within the meaning of s 109.

[20] The defendants’ position is that the refusal of the Commissioner not to amend the assessments pursuant to his power under s 113 is amenable to judicial review. The day before this matter came on for hearing, both defendants filed proceedings for judicial review in the Tauranga High Court and there was included with those proceedings applications for interim relief under s 8 of the Judicature Amendment Act 1972. As I understand it, the companies’ position is that the Commissioner ought to have acceded to their request to consider amending the assessments under s 113, and the Commissioner’s refusal to do so is to be questioned in the judicial review proceedings. It seems to be implicit in the companies’ approach that judicial review, if successful, could result in the Commissioner being compelled to amend the assessments to take into account certain additional transactions which were entered into by the companies, which would have the consequence of reducing or expunging in whole the debts which have arisen out of the assessments.

[21] The defendants’ submission is that certain transactions ought to be treated differently from the way the defendants treated them when preparing their self-assessments. What were treated as payments attributable to income are in fact of a different character, and the various transactions have now been corrected by means of credit notes passed between various entities.

[22] Mr Patterson told me that it has become evident to the companies that the amounts that that they initially believed they should pay by their own assessments now appears to have been wrong, and that Berrytime is in fact required to pay only $137,319.71 and Berrytime Land $550,892.82.

[23] In his submissions, Mr Patterson placed great stress on the Commissioner’s Standard Practice Statement issued in May 2007 by the Inland Revenue, which gives guidance as to the basis on which the Commissioner would exercise his discretion under s 113. Mr Patterson referred to paragraph [19] of the Practice Statement which says:

> 19. Taxpayers may make amendment requests pursuant to s 113 irrespective of whether disputes have been initiated in respect of other issues relating to the assessments.

[24] He also referred to paragraph 30(b) of the Practice Statement which provides:

> (b) The Commissioner must take into account all relevant factors when considering amendment requests. (please see paragraphs 23-27 of this SPS for a discussion of the care and management considerations). Once the amend requests are identified, the Commissioner will initially examine then to ascertain all the relevant factors that may affect the decision to investigate claims that assessments are in error and to amend the assessments. For example, the length of time that has passed since the errors were made may be a relevant factor, as it may become more difficult to independently verify the matters included in the taxpayer's request. However, this will not necessarily determine whether or not the Commissioner will amend the assessments.

[25] He also referred me to paragraph [35] of the Standard Practice, which said that when considering amendment requests the Commissioner must take into account all relevant factors and merits on a case by case basis.

[26] Mr Patterson also drew to my attention a letter that the Commissioner's employee wrote to the defendants' accountants on 11 September 2008. This letter noted that the Department's officer had completed his review of the GST periods ending 30 April 2007 and 30 June 2007 to 31 October 2007. It confirmed that the application to amend those terms had been declined 'due to the voluntary disclosure not complying with the requirements of the Standard Practice Statement'. The letter then noted that if the client provided the necessary and relevant documentation to support the amendments then "your firm can look at resubmitting another application for amendment".

[27] It would seem that the defendants' position is that the Commissioner did not make a correct decision when it first dealt with an application to amend the assessments.

[28] Mr Patterson referred to evidence that as recently as 4 February 2009 there had been a meeting between both sides, at which accountants and lawyers were

present and where there was a discussion as to whether the self-assessments had in fact been correct or whether the proposed amended figures were correct.

[29] Mr Patterson submitted that the Commissioner could not, consistent with his obligations to properly exercise the power in s 113, at the same time institute proceedings to prosecute a claim to recover debts owed arising out of the amendment which the taxpayer was requesting the Commissioner to amend under s 113 and when the Commissioner himself (through an employee, of course) had expressly noted that the defendants could make a further application to have their case considered under s113. He said that at the very time that the investigations staff for the Inland Revenue were carrying on these discussions, another "arm" of the Commissioner (this is the way that Mr Patterson summarised it) was seeking to enforce what were plainly defective self-assessments.

[30] There was limited argument before me on how the power to judicially review could be relevant to exercise of the jurisdiction that I have under the Companies Act to deal with liquidation applications. It is obvious that the power to judicially review cannot be exercised in the course of proceedings of the kind before me. Further, it is plain that I have to proceed on the basis that the assessments shall stand until a Court of competent jurisdiction sets them aside. The result is that the taxpayers, as a result of the tax legislation, remain indebted to the Commissioner unless and until the assessments are set aside by way of judicial review. That being so, the existence of the debts and the admitted fact that they have not been paid are available as evidence that the company is unable to pay its debts. That the non-payment of debts have such evidential force is established by the decision of *Re Taylor's Industrial Flooring Ltd* (1990) 8 ACLC 3,081. In that case a company applied to have a winding-up petition proceeding against it struck out. This was on the basis of an alleged oral agreement for credit terms, as well as an argument that the failure to issue a statutory demand against it meant that evidence that the company was unable to pay its debts would be insufficient to support a winding-up petition. At first instance, this argument was upheld, with the Judge saying the difficulty could be avoided by the issue of a statutory demand. On appeal, however, it was held that if a debt was due, undisputed, and unpaid, a failure to pay was itself evidence of an inability to pay.

[31] Although the argument was not put to me in these terms, the defendants have to be able to show that the pending application for judicial review has relevance to the present application in that, if the assessed returns are eventually the subject of successful judicial review proceedings, the very debts the plaintiff relies on will be expunged. The proposition would also involve the assertions that there is a reasonable prospect of a successful outcome in the judicial review proceedings and that, given in these circumstances, it would be wrong for this Court to proceed with proceedings based on the assessed liability to the plaintiff and that the Court should either defer a decision until the outcome of the judicial review is known, or exercise its discretion against ordering liquidation.

[32] I would accept that there will be circumstances where it would be unjust for the Court to exercise the jurisdiction to liquidate a company without first giving the company the opportunity to prosecute judicial review proceedings. But whatever the circumstances in which the Court might come to such a conclusion, I am firmly of the view that this is not such a case. The main reason for coming to that conclusion is because, as Mr Dickey pointed out, the circumstances will be rare in which the taxpayer can demonstrate the state of affairs which entitles a Court to grant judicial review, notwithstanding the provisions of s 109 of the Tax Administration Act. The difficulties that stand in a taxpayers way were summarised in *Westpac v CIR* [2009] NZCA 24 to which Mr Dickey made extensive reference. I do not intend to cite from the decision of Young P at any length but it will suffice to refer to paragraph [59] of the judgment where the Court said:

> [59] We think it appropriate to continue to apply the established principles as to judicial review in tax cases. We accept that judicial review is available where what purports to be an assessment is not an assessment. Associated with this, we accept that judicial review is available in exceptional cases and thus may be available in cases of conscious maladministration (as was recognised in *Futuris*). We can reconcile this with ss 109 and 114 on the basis that in such cases (ie no genuine assessment or conscious maladministration) what is challenged is either not an assessment, or at the least, not the sort of assessment which the legislature had in mind in enacting those sections. On this basis we see the availability of judicial review as depending on the claimant establishing exceptional circumstances of a kind which results in the amended

assessment falling outside the scope of ss 109 and 114 and thereby not engaging those sections.

[33] My conclusion is that there is no basis upon which I could conclude that the taxpayers in this case have any real prospect of obtaining the remedies in a judicial review and that is the end of the issue.

[34] That leaves for consideration the question of whether the Commissioner has succeeded in establishing that the company is unable to pay its debts. The company has owed very substantial amounts for a long time. For example, Berrytime became indebted to the Commissioner in the sum of $1,595,458.86 as far back as 30 November 2007. It has had no justification for refusing to pay that debt. It is a fair and reasonable inference that it has not paid this debt because it cannot.

[35] To counter this inference, the primary evidence that Mr Patterson relied upon to demonstrate solvency were two balance sheets purporting to show the position of the two companies as at March 2008. These documents were put forward in an affidavit sworn by a tax manager who had been retained to assist the companies, Mr Bevan Spalding. He said that these 'draft balance sheets' had been received from the companies. Mr Spalding accepted that he was not able to verify the accuracy of the information relied upon to produce the draft balance sheets, or to verify the accuracy of the balance sheets themselves. So the position is that an unknown person has produced documents purporting to be balance sheets. No information has been provided as to:

a) The source of the data on which the balance sheets are based;

b) Whether the person who drew them up has any qualifications for doing so;

c) Whether that person has followed correct accounting procedures and whether the balance sheets comply with the appropriate financial reporting standards and other matters.

[36] Because of their shortcomings, the documents are valueless from an evidential point of view. As well, they are now one year old and offer little assistance in assessing the solvency of the two companies as at the date of the hearing.

Conclusion

[37] It is my judgment that the acts and omissions of the company speak volumes. The most common reasons why companies do not pay their tax is because they cannot do so and the inference that I draw from all of this is that the company cannot in fact pay its debts as they fall due. They are therefore insolvent in terms of s 241 of the Companies Act 1993.

[38] That being my conclusion, there is no requirement that I consider the alternative two grounds advanced by the plaintiff.

[39] Rather than make orders placing the companies in liquidation immediately, I will adjourn the proceedings until 10 a.m. on 7 April 2009 when the proceedings will be called before me in the High Court at Auckland. If the company is able to make payment in that time, then no doubt the parties will advise me. If the company has not made payment then updated certificates of unpaid debt will be needed.

[40] I will hear the parties briefly on the matter of costs at the conclusion of the next hearing.

J.P. Doogue
Associate Judge