IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

I TE KŌTI MATUA O AOTEAROA
ŌTAUTAHI ROHE

CIV-2018-409-000263
[2018] NZHC 1654

BETWEEN	SHANE WARNER BUILDERS LIMITED Applicant
AND	COMMISSIONER OF INLAND REVENUE Respondent

Hearing: 6 June 2018

Appearances: R A Hearn for the Applicant
K I S Naik-Leong and Ms Patterson for the Respondent

Judgment: 5 July 2018

JUDGMENT OF NATION J

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[1] At 25 April 2018, Shane Warner Builders Ltd (the applicant) had tax arrears of $105,679.35. Since 2012, the applicant had regularly been unable to pay GST and PAYE when they were due. Approximately $106,000 of outstanding tax was written off in 2015 and 2016 by the Commissioner.

[2] On 31 January 2018, the Commissioner filed an application for the appointment of a liquidator. The applicant has taken no steps to oppose that application.

[3] In separate judicial review proceedings, the applicant sought declarations that the Commissioner erred in law and acted unreasonably by refusing to accept the applicant's proposals for payment of the outstanding tax over time, thereby declining its application for financial relief. Through an interlocutory application, the applicant

seeks a stay of the liquidation proceedings until final disposition of the judicial review proceedings.

[4] The applicant says that, if it is liquidated, it will be impossible to continue with the judicial review proceedings and those proceedings will be rendered worthless.

[5] The Commissioner opposes the application. He says the applicant is an insolvent company, has no defence to the liquidation proceedings, has no reasonable prospect of succeeding in the judicial review proceedings and has no position to preserve.

Legal principles

[6] Section 15 Judicial Review Procedure Act 2016 provides that, where the respondent is the Crown, a court may, where "it is necessary to do so to preserve the position of the applicant", make an interim order declaring that the Crown ought not to take any further action that is consequential on the exercise of a statutory power or institute or continue with any civil proceedings in connection with any matter to which the judicial review application relates.[1]

[7] In *Carlton and United Breweries Ltd v Minister of Customs*, the Court of Appeal held, in relation to the earlier s 8 Judicature Amendment Act 1972, the prospects of success in the review proceedings should be better than that there is a serious question to be tried, although it was not necessary to show there was a prima facie case.[2] The Court must be satisfied that an order is reasonably necessary to preserve the applicant's position. Only if that condition is satisfied is it necessary for the Court to consider whether it should exercise its wide discretion to make the orders sought.[3]

[8] Pursuant to the Act, it must be necessary to preserve the applicant's position before any of the discretionary factors may be taken into account. The Commissioner

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1 Judicial Review Procedure Act 2016, s 15(3)(b).
2 *Carlton & United Breweries Ltd v Minister of Customs* [1986] 1 NZLR 429 (CA).
3 Those principles were confirmed by the Supreme Court in *Minister of Fisheries v Anton's Trawling Co Ltd* [2007] NZSC 101, (2007) 18 PRNZ 754.

contends the applicant has no position to preserve because it is insolvent and it has taken no steps to defend the liquidation application.

[9] There is no dispute that the applicant has been unable to pay its GST and PAYE when they were due since 2012. The third statutory demand on which the current liquidation application is based was for $64,584.97 for GST and PAYE. Liability for that sum is not in dispute.

[10] The applicant says that the position it seeks is to preserve its right to have its application for financial relief considered fairly and in terms of the Tax Administration Act 1994 (TAA). The applicant accepts that the relief it seeks in the judicial review proceedings would not result in the debt being written off or the assessments altered. Rather, it says its application for financial relief, under s 177 TAA, would likely be accepted if considered in accordance with the law, with the result that its tax debts might be paid by instalments rather than immediately.

[11] The applicant acknowledges that, technically, a liquidator would be able to pursue the company's substantive judicial review application.[4] Nevertheless, it says it is inherently unlikely he/she would do so and irreparable damage to the company would be likely if a liquidator is appointed.

[12] Mr Hearn, for the applicant, referred to the judgment of Andrews J in *Berrytime Land Ltd v Commissioner of Inland Revenue* as providing support for argument that, while it might be technically possible for a liquidator to continue judicial review proceedings, interim orders might be necessary to preserve the company's position.[5] Andrews J however then went on to say it was necessary to consider what that "position is". This required consideration of the judicial review proceedings themselves and the statutory framework within which they had been brought. She then went on to consider the strengths and weaknesses of the company's claim for judicial review. She concluded that the company's case for establishing exceptional circumstances for judicial review proceedings could only be described as weak. She declined the application for interim orders under s 8 Judicature Amendment Act 1972.

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4 Companies Act 1993, s 260(2).

5 *Berrytime Land Ltd v Commissioner of Inland Revenue* (2009) 24 NZTC 23,453 (HC).

[13] To meet the threshold on the basis the applicant contends, the applicant must therefore establish it has not already had an opportunity to have its proposals considered fairly and, through the judicial review proceedings, there is a real possibility the Commissioner would be directed to consider the proposals afresh.

Background

[14] Ms O'Keeffe, a Customs Service Officer employed by the Commissioner, filed a detailed affidavit of 15 May 2018 recounting the Commissioner's dealings with the applicant since 2012.

[15] Mr Warner is the sole shareholder of the company. The company was required to file GST returns on a two-monthly basis, accounting for GST on a payments basis. PAYE employer schedules and employer deductions forms were to be filed monthly, with payments due by the 20th of the following month.

[16] The company was first notified of overdue GST on 23 March 2012. By 13 July 2012, the company's arrears for GST and PAYE were $3,507.46. Between 6 August 2012 and September 2013, the applicant's GST and PAYE arrears increased to $39,108.59.

[17] On 12 September 2013, Mr Warner agreed to pay $1,000 per month for arrears. Because of defaults with those payments, the Commissioner cancelled this instalment arrangement. By early February 2014, with penalties and interest, arrears totalled $48,196.34.

[18] The Commissioner issued a s 157 deduction notice requiring payments to be made from the applicant's bank account. On 20 February 2014, Mr Warner advised the Commissioner he was approaching the bank for a loan. The Commissioner agreed to cancel the s 157 deduction notice. The Commissioner also agreed that no penalties would be imposed for a period. There continued to be defaults.

[19] On 14 August 2014, Mr Warner was advised that arrears stood at $85,489.14. He was told that, if this sum was not paid in full, recovery action would be taken through legal proceedings.

[20] In October 2014, the case officer expressed to Mr Warner the seriousness of failure to account and that employer deductions are held in trust whereby they cannot be used for cash flow. The case officer said they were considering the possibility of prosecution. Outstanding PAYE deductions were then $76,152.37, outstanding GST was $24,571.86. There continued to be defaults both as to the filing of the applicant's 2014 income tax return and payment of PAYE for October 2014. Arrears continued to increase. In March 2015, tax arrears were $123,888.85. Mr Warner advised there would be a payment of $60,000.

[21] On 25 May 2015, the Commissioner accepted proposals made by Mr Warner. The applicant was to pay $60,000 within two weeks and $24,000 was to be paid over two years in $1,000 monthly instalments. The balance of $59,000 was to be written off. The instalment arrangement was to be set up on payment of the $60,000.

[22] Only $40,000 of the required $60,000 was paid promptly. In January 2016, $5,000 of the original $60,000 lump sum payment had still not been paid. There had been defaults with the $1,000 monthly instalment payments. The Commissioner nevertheless wrote off $63,000 on the basis it would not be recovered. In January 2016, the applicant's tax arrears totalled $70,964.76. A statutory demand was issued for that amount. The Commissioner then began liquidation proceedings.

[23] In July 2016, Mr Warner proposed paying $1,000 monthly for 22 months in full and final settlement of the applicant's tax arrears which then totalled $73,021.72. They settled on a counter offer where the Commissioner required $1,000 monthly for 36 months plus interest. There was a write-off of $38,890.

[24] In December 2016, there was a further write-off of $5,356.57. By that time, new arrears of $9,458.65 had accrued.

[25] In May 2017, new arrears were $22,876.51. A second statutory demand was issued. There was then communication between Mr Warner and the case officer because of confusion as to whether some of the payments he had been making had been allocated as he intended, either to current PAYE or to the instalment arrears arrangement.

[26] Since 2012, IRD case officers have frequently attempted to educate Mr Warner as to the importance of the company paying its tax when it was due, and the seriousness of keeping from the Commissioner PAYE tax which was due and GST paid to the company on the basis it would be returned to the Commissioner. It was also stressed to Mr Warner that, when the company did receive relief, either through having tax written off or through being allowed to pay arrears in instalments, this was conditional on it then paying current tax when it was due.

[27] In an affidavit of 1 May 2018, Mr Warner said "I have always intended that the company pays its tax in full. It cannot afford to do that immediately, but it offered to pay in full over time." He accepted that he had "not been good at keeping on top of this in the past". In its first proposal to the Commissioner of 9 April 2018, through its solicitor, the applicant accepted that its tax compliance had been unsatisfactory.

The liquidation proceedings and further applications for financial relief

[28] On 24 November 2017, a statutory demand requiring payment of $64,584.97 was issued and soon served.

[29] On 31 January 2018, the Commissioner filed the application to put the applicant into liquidation.

[30] In March 2018, the liquidation proceeding was adjourned. On 9 April 2018, the applicant's solicitors presented an application for relief (the first proposal). It was for payment of $65,000 by way of:

- a lump sum payment of $10,000 on 4 May 2018;
- a further lump sum payment of $5,000 by 31 May 2018; and
- ongoing monthly payments of $2,000 per month beginning 30 June 2018, increasing to $3,000 per month once the current arrangement concluded.

[31] On 11 April 2018, the case officer, Ms O'Keeffe, sent a letter to the applicant advising the 9 April 2018 proposal had been considered and declined. This decision was made on the basis of the applicant's history of failed instalment arrangements, its

history of failed lump sum payments agreed to as part of financial relief write-offs and the applicant's history of accruing new arrears on its account whilst under said instalment arrangements. She said:

> Although the company has advised that it will be working closely with an accountant and business advisor, no additional substantive information has been provided to give Inland Revenue confidence that this request for financial relief will resolve the non-compliance towards meeting ongoing tax obligations on top of instalment arrangement payments.

[32] There was a further adjournment of the liquidation proceedings to 26 April 2018 to allow the applicant and its solicitor to make a new proposal.

[33] On 23 April 2018, the applicant's solicitor, Mr Hearn, sent the Commissioner another proposal (the second proposal). This proposed:

- a $10,000 lump sum payment by the end of April 2018;
- a $5,000 payment by the end of May 2018;
- $2,000 per month from 30 June 2018 until paid in full;
- monthly instalments to increase to $3,000 per month when the current arrangement for $1,000 monthly payments for arrears was finished;
- the company's terminal tax liability would be met by 7 May 2018 and the company's terminal tax liability for 2017 of approximately $15,000 would be paid in full by the end of May; and
- a personal guarantee to support that proposal.

[34] Ms O'Keeffe went back with queries. She requested information as to where the funds for the terminal tax payments were coming from, evidence of the loan application for $45,000, information as to personal assets associated with the guarantee, and workings that would confirm the business could afford the instalment arrangements and meet ongoing obligations.

[35] On 24 April 2018, Mr Hearn responded. Mr Warner's listed assets totalled $66,591: a car $10,000, household chattels $34,950 and bank accounts $21,641. He

advised a loan application for $45,000 had been declined but asked that the proposal be considered on the basis of statements he had made that the company was profitable and the instalments it would pay amounted to $36,000 a year, which was less than the company's net profit.

[36] Ms O'Keeffe says she considered the proposal based on the information that had then been provided, and the Commissioner responded by 4.00 pm on 24 April 2018 as Mr Hearn, for the applicant, had requested. In that emailed letter of response dated 24 April 2018, she advised the applicant that its request for an instalment arrangement had been declined for the following reasons:

- the history of failed instalment arrangements;
- the history of failed lump sum payments agreed to as part of a financial relief write-off;
- the history of accruing new arrears on account whilst under an instalment arrangement; and
- there being no new evidence provided with this new request for an instalment arrangement that would give the Inland Revenue confidence that the applicant would be able to meet its instalment payments and current ongoing obligations.

[37] In support of its application for an interim order, the applicant filed an affidavit from its sole shareholder and director Mr Warner, and an affidavit from its accountant and tax agent, Michelle Tubb. Annexed to Mr Warner's affidavit were Ms O'Keeffe's executive summaries of information for the Commissioner to consider, the Inland Revenue recommendation, and the team leader review. Together, these set out the basis on which the Commissioner had made the decisions declining financial relief.

The errors alleged against the Commissioner

[38] In the judicial review proceedings, the applicant says the Commissioner erred in law or acted unreasonably in taking into account or failing to take into account factors set out in its statement of claim. I deal with those.

[39] Three of those factors, as alleged, were that the Commissioner:

> (a) Failed to take into account that some of the tax arrears were due to misapplication of payments by the Commissioner, and the punitive effect of the resulting interest and penalties on the balance owing.
>
> (b) Failed to take into account a payment made by the Applicant of approximately $15,000 on 20 April 2018.
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> …
>
> (d) Wrongly took into account that the Applicant had failed to provide information requested, when it had not failed to provide it and/or the information had not been requested.
>
> **Particulars:**
>
> Full details of assets to support guarantee
>
> Details of Mr Warner's bank account
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> 2018 financials / tax agent workings.

[40] Ms O'Keeffe's executive summary as to the second proposal referred to the company having total arrears of $91,000 and total new arrears of $79,000 over and above the instalment arrangement. The company had failed to make its first two provisional tax instalments for 2018 totalling $9,548, not included in the total debt already noted. She referred to earlier failures to make previous lump sum settlement payments as agreed, failure to meet terms and conditions of instalment arrangements by either defaulting or accruing new arrears. She said:

> The company has not provided any new evidence with this second proposal (to cease legal action) and has failed to provide requested financial statements (or workings from the tax agent), full documented details of the director's personal assets were requested to support the personal guarantees he has offered. Full details were not provided or details of the bank account noted where the director holds $21,000. The client's offer of lump sum payments totalling $20,000 by the end of May is still based on invoiced work. Although copies of these invoices have been provided there is no guarantee that the companies who have been invoiced will pay these invoices, allowing the client to make lump sum payments on offer. Although the client has advised that they will now be working with a tax agent/business adviser to file and pay returns, this is not enough to give IR confidence that they will be compliant moving forward. The second proposal initially included a lump sum of $45,000 by way of a loan. We have been notified today that the bank has declined this application and the lump sum of $45,000 is no longer on offer with this proposal.

[41] There is no suggestion that there had been any incorrect allocation of instalment payments at the time the statutory demand was issued in respect of defaults in payment of new tax. There was some suggestion that, after that demand had issued, payments that the applicant intended to make for new tax were allocated to the instalment arrangement. To the extent this happened, it was because of the way the payments had been coded by the applicant, not a mistake by the IRD. At the time the Commissioner declined the second proposal, the applicant was not asking for any funds that had been credited against the instalment arrangement to be transferred for the purpose of paying new tax.

[42] With the proposal of 23 April 2018, the applicant's solicitor began by acknowledging he had received an updated summary of account but said the applicant had paid "approximately $17,000" the day prior to receiving that information. It is apparent, from the requests she made for particular information as to various statements, that Ms O'Keeffe had considered all parts of that letter.

[43] It is clear, from the documents, that of primary concern to the Commissioner was that the applicant had:

> … failed to make previous lump sum settlement payments agreed as part of a proposal and failed to meet the terms and conditions of instalment arrangements by either defaulting or accruing new arrears.

[44] The Commissioner's decision was made based on her assessment of the history of the applicant's ability to meet its tax payment obligations, with respect to PAYE or GST where the applicant held funds in trust for the IRD. Although there is some dispute as to specific amounts, that dispute makes no material difference to the overall situation and the background to the Commissioner's decision. There is no dispute over the debt which was the basis for the liquidation proceedings.

[45] The way in which the company described the assets available to support the guarantee would have provided little reassurance that those assets would be of any value in supporting a guarantee.

[46] Another factor alleged against the Commissioner is that she:

(c) Wrongly took into account that the Applicant had failed to pay New Taxes on time on the basis such failures breached the terms of the Arrangement, when they did not.

[47] The record establishes that, when the Commissioner entered into previous arrangements for the payment of arrears by instalments, it was on the basis that, as well as paying those instalments, the applicant would pay new taxes when due. There is no dispute that there were defaults in the payment of new tax at the time the applicant had been allowed to pay arrears in instalments. Quite reasonably, that was a matter of significance to the Commissioner in rejecting the second proposal.

[48] Another alleged factor is that the Commissioner:

(e) Wrongly took into account that the Proposal included the offer of a $45,000 lump sum which was later retracted, when this was not the case.

[49] The applicant's second application was made in the emailed letter to the Commissioner's solicitor, sent at 1.58 pm on 23 April 2018. In that, the applicant set out various matters which it asked the Commissioner to take into account in considering the proposal and added:

> In addition, the company is in the process of applying for a lump sum loan of $45,000. It had hoped to receive confirmation of that by the close of last week, but has not had confirmation at this point in time. A response is expected within 24 hours. If approved, the lump sum will be paid to IRD in addition to the monthly instalments set out above.

[50] The IRD's solicitor responded with specific queries as to a number of statements that had been made with the proposal letter. These included a request for evidence of the loan application for $45,000. At 9.25 am on 24 April, the applicant's solicitor responded to those requests with information and said Mr Warner was still chasing the lender regarding a response to the application for the $45,000 loan. He said that, if it was through before 10.30 am, the lender's decision would be provided rather than the application form. At 9.58 am on 24 April 2018, he emailed the IRD and said the lending application had been declined but, in conjunction with that, said the proposal did not rely in any way on the receipt of financing, the loan had been sought "to make a further lump sum payment to IRD".

[51] The prospect of a loan being obtained and used to make an additional payment to the IRD was advanced to encourage the Commissioner to accept the proposal. The fact the loan was declined was relevant to the Commissioner in deciding whether or not it should effectively enter into an arrangement which would be tantamount to granting significant credit to the applicant to pay tax which was already overdue.

[52] Other errors alleged in the statement of claim are that the Commissioner:

> (f) Wrongly took into account that the company had an overdraft facility which was not offered in payment of the debt.
>
> (g) Failed to take into account that the Applicant had changed its behaviour towards compliance.
>
> (h) Found that there was no evidence that the Applicant had changed its behaviour towards compliance.
>
> (i) Failed to consider the Commissioner's obligations under sections 6A(3) and 176 of the TAA, and that the Proposal would result in collection of all taxes due to the Commissioner.
>
> (j) Failed to consider using the Commissioner's power under section 177(3) to counter offer or to request further information when considering the Proposal.

[53] In his emailed letter of 24 April 2018, the applicant's solicitor said that Mr Warner "advises he has a $20,000 bank overdraft facility which he can call on if needed to meet payments". In the recommendation leading to the decision, Ms O'Keeffe had noted simply that "the client makes reference to an overdraft facility which he can call on if needed. This has not been offered as an option for an additional lump sum payment."

[54] With the proposal of 23 April 2018, Ms O'Keeffe was advised "the company has approached the business consultant as previously indicated". To that, Ms O'Keeffe responded: "what exactly is the business consultant doing for the business". No further information was provided. In his affidavit of 1 May 2018, in support of the current applicant, Mr Warner said he had his "first meeting with him" on 31 April 2018.

[55] The matters referred to in paragraphs 17(f)-(j) of the statement of claim all required the Commissioner to exercise judgment as to the merits of the applicant's proposal.

[56] In *Raynel v Commissioner of Inland Revenue*, Randerson J in the High Court considered that a decision by the Commissioner, made in the performance of her broad care and management obligations under ss 6 and 6A of the TAA in relation to the collection of outstanding tax, is not generally amenable to judicial review.[6]

[57] In *Russell v Commissioner of Inland Revenue*, Asher J was considering the Commissioner's statutory power to accept an instalment officer.[7] He said:

> It has been noted that the Commissioner is given "broad management responsibilities" under the statute, and that a Court will be slow to interfere with discretionary decisions in relation to the recovery of outstanding taxation revenue, as such decisions involve the exercise of judgment within a statutory framework. Insofar as there is a sliding threshold of caution before Court intervention in an administrative decision, the threshold for an applicant in a case where the Commissioner makes a decision on a settlement proposal will be high, as it will be a decision involving a multi-faceted exercise of judgment and the application of a number of policy considerations set out in ss 6 and 6A of the Tax Administration Act 1994 ("the TAA"), and also factual commercial considerations including the particular factors in s 177B.

[58] The statements of principle in the High Court in both judgments were approved by the Court of Appeal in *Russell v Commissioner of Inland Revenue*.[8] Relevantly, in *Russell v Commissioner of Inland Revenue*, they were adopted at the interlocutory stage of proceedings on an application to strike out judicial review proceedings in which the applicant sought declarations that the decisions declining his proposals were invalid and an injunction preventing the Commissioner from taking any further steps to recover the debt.

[59] Mr Hearn acknowledged that a proposal does not have to be accepted just because it might result in a better tax recovery than continuing with enforcement proceedings but said the Commissioner must at least consider whether liquidation will be more beneficial to other taxpayers.

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6 *Raynel v Commissioner of Inland Revenue* (2004) 21 NZTC 18,583 (HC).
7 *Russell v Commissioner of Inland Revenue*, [2015] NZHC 754.
8 *Russell v Commissioner of Inland Revenue* [2015] NZCA 351, (2015) 27 NZTC 22-018.

[60] Section 6A(3) poses a duty on the Commissioner to collect over time the highest net revenue that is practicable within the law, having regard to:

(a) the resources available to her;

(b) the importance of promoting compliance, especially voluntary compliance, by all taxpayers with the Inland Revenue Acts; and

(c) the compliance costs incurred by tax payers.

[61] In *Raynel v Commissioner of Inland Revenue*, Randerson J stated:[9]

> [54] Sections 6 and 6A(3)(b) emphasise that there is a broader public interest in the integrity of the tax system and in ensuring that taxpayers meet their obligations. Taxpayers who comply with the requirements of the Inland Revenue Acts are entitled to expect that appropriate and (where necessary) firm action is taken against taxpayers who shirk their obligations. If not, complying taxpayers will justifiably perceive there is a lack of integrity in the system and an unfair burden is cast on those who conscientiously comply with their obligations. As well, as Master *Lang* pointed out, the voluntary compliance scheme which is central to the proper functioning of the Inland Revenue Acts will be placed in jeopardy unless all taxpayers know that the Commissioner will act firmly and resolutely with those who do not meet their obligations and have no reasonable excuse for doing so.
>
> [55] Ordinarily, where a higher net recovery will be achieved through a proposed compromise than by winding up or bankrupting a taxpayer and there are no countervailing considerations, the Commissioner's duty will be to accept the compromise. But there may be circumstances where, in order to preserve the integrity of the tax system and promote compliance by other taxpayers, the Commissioner will be justified in refusing an offer and, instead, taking enforcement proceedings. Where, for example, there has been a flagrant and on-going failure to comply with the taxpayer's obligations and where recovery is dubious or is likely to result only in a relatively minor proportion of the overall debt being recovered, the Commissioner may be justified in initiating or continuing enforcement proceedings to secure the wider interests identified by the legislation.

[62] There can be no doubt here that Ms O'Keeffe turned her mind to the recovery that might be obtained through agreeing to an instalment arrangement in preference to continuing with the liquidation proceedings. Her correspondence in relation to both the first proposal and the second proposal was directed at obtaining information which would assist in her decision-making regarding the prospects of both recovering

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9 *Raynel v Commissioner of Inland Revenue*, above n 6.

outstanding arrears and ensuring there would be compliance with future tax obligations.

[63] In his letter of 11 April 2018 for the applicant, Mr Hearn said the company's terminal tax liability would be met by 7 May 2018 and the company's terminal tax liability for 2017, of approximately $15,000, will be paid in full by the end of May. Ms O'Keeffe responded: "where is this money coming from – please provide evidence". Elsewhere in her response, she said "please provide workings that confirm the business can afford the instalment arrangement amount and ongoing obligations".

[64] The only specific information which the applicant provided in response were four invoices all dated 23 April 2018 due for payment 18 May 2018. Mr Hearn referred back to the information that had been provided in connection with the first proposal of 9 April 2018. No up to date accounts or budgets were provided with either proposal. With the proposal of 9 April 2018, Mr Hearn had said:

> The company's accountant has reviewed the proposal and based on information provided by Mr Warner considers that it is affordable and that the company will be able to maintain its ongoing tax compliance in addition to making the proposed payments on account of new arrears.

[65] In responding to the second proposal, Ms O'Keeffe wrote "please provide workings that confirm the business can afford the instalment arrangement amount and on-going obligations. Please provide evidence of what has changed."

[66] The company had a history of not meeting its tax obligations when they were due. Mr Hearn had said this was not through any intention to avoid paying tax. The background would have indicated to the Commissioner that it did not have the cashflow to be able to pay tax when it was due. It was in relation to that background that Ms O'Keeffe asked for evidence of what had changed. She had not asked for evidence as to how arrangements for the payment of tax had changed.

[67] In submissions, Mr Hearn submitted the Commissioner had made an error in failing to properly take into account the arrangements the company had put in place to make the accountant responsible for tax compliance rather than Mr Warner. These arrangements were, however, expressly referred to in the executive summary on which

the Commissioner's ultimate decision was based. The contemporaneous documents show that the information provided had been insufficient to satisfy the Commissioner there would be a change from the previous pattern and the applicant would have the resources to pay tax when it was due.

[68] The applicant further complains that the Commissioner did not make a counter-offer or allow the company 20 days to provide the information sought.

[69] Section 177(3) gives the Commissioner a wide discretion as to what she might do in response to a request for financial relief. The options included declining the request outright, obtaining further information or making a counter-offer.[10]

[70] In this case, the Commissioner did seek further information. Because of the impending hearing date on the liquidation proceedings, it was agreed between the applicant and the case officer that the information would be provided in time for the Commissioner to make a decision on 24 April 2018. The information was provided that morning.

[71] Section 177(3) placed no obligation on the Commissioner to seek any information or further information. She could have declined the request for relief outright. In these circumstances, it was not unfair for the Commissioner to have required information to be given within 24 hours, for the Commissioner to have then considered the request in light of the information provided and to have made her decision taking into account that information. There was thus no error in her not delaying making a decision for 20 days from when that information was provided.

[72] Through submissions, Mr Hearn also argued the Commissioner's decision-making process could be impugned on the basis of predetermination and apparent bias. For this submission, he relied on the fact that Ms O'Keeffe had said to Mr Warner on 20 November 2017 that the Commissioner would not be looking to consider another instalment arrangement in his case as the applicant had been unable to meet its current ongoing obligations.

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[10] Section 177(3)(a)-(d).

[73] That statement was made after new arrears in payment of PAYE and GST had arisen to the extent of some $41,000 in October 2017. Mr Warner had been telling Ms O'Keeffe of his attempts to arrange a loan. It is clear, from the context in which the statement was made, that it was said to ensure Mr Warner was under no illusions as to the need for his company to pay the arrears that were due.

[74] The evidence establishes that Ms O'Keeffe engaged with Mr Hearn over both the first and second proposals. She did not dismiss the second proposal out of hand, consistent with predetermination or bias. Instead, she responded seeking further specific information as to various points made in support of the proposal. Although she had authority to make a decision on the proposal herself, she had her recommendation peer-reviewed. The Commissioner also agreed to successive adjournments of the liquidation proceedings to allow time to the applicant to develop its proposal and for it to be considered by the Commissioner. None of this is consistent with predetermination or bias. The Commissioner's experience of the applicant, its previous non-compliance and breach of instalment arrangements, were quite reasonably going to be important in the decision the Commissioner made as to the second proposal.

[75] In her affidavit of 1 May 2018, the applicant's tax agent, Michelle Tubb, set out the role she was to have in ensuring monies received or retained for tax were held in a separate account and applied in payment of tax. Information in that detail was not provided to the Commissioner at the time she had to make her decision in the context of the ongoing liquidation proceedings. The information in the affidavit does not however materially alter the situation that the Commissioner had to consider in a way which might suggest fairness requires the Commissioner to take a fresh look at the proposal.

[76] On Ms Tubb's evidence, Mr Warner would still be responsible for invoicing the work he and his company were doing and obtaining payment on those invoices. He would thus have control over whether monies would be available for tax. Although the accountant was to agree with Mr Warner on a budget and a PAYE wage for Mr Warner that would leave sufficient cashflow in the business to meet IRD obligations, Mr Warner would still have access to that account, even if that would not be with the

accountant's agreement. With the proposed arrangement, he was not handing over signing authority for withdrawals to the accountant. The accountant said the company's ability to meet its ongoing tax obligations was dependent on the company trading profitably, maintaining its current profit levels and Mr Warner ceasing from taking drawings (as he had agreed to do).

[77] Ms Tubb had previously been the company's tax agent when there had been problems with tax compliance. Ms O'Keeffe said Mr Warner had a tax agent since 27 May 2011 but the company's compliance had not improved.

[78] With his affidavit of 1 May 2018, Mr Warner provided financial statements for the applicant for the year ended 31 March 2018. They included comparative figures for 2017. The statements had not been provided earlier to the Commissioner despite requests for workings that could confirm the applicant would be able to meet the proposed instalment arrangement and ongoing obligations.

[79] Ms O'Keeffe made comments as to those statements in her affidavit of 15 May 2018. She considered they appeared to show the applicant was trading while insolvent. Its current liabilities as at 31 March 2018 were significantly higher than current assets. The taxation liabilities shown in the financial statements as being current were put at $42,000. The Commissioner's record showed outstanding arrears at 31 March 2018 of $96,000. The applicant's profits were shown to have reduced from $42,547 in 2017 to $5,621 in 2018. Ms O'Keeffe was concerned that, although the applicant had a reasonable profit in 2017, it had not maintained the $1,000 per month instalment arrangement and kept up with current ongoing obligations over that time. She also noted that in 2018 Mr Warner had increased his annual remuneration by $24,036 in preference to repaying the Commissioner. Ms O'Keeffe said that her review of the financial statements further justified the decision that had been made declining the second proposal.

Overall assessment

[80] The applicant seeks interim relief to provide it with the opportunity to have its application for financial relief considered fairly and in terms of the TAA. It has already had that opportunity. The evidence from Mr Warner and the company's accountant,

filed in support of the application, is insufficient to indicate there is a real possibility that, if there was to be a further review by the Commissioner, the result would be any different.

[81] That is especially so when taking into account the further evidence provided by Ms O'Keeffe in an affidavit of 5 June 2018 in which she responded to the applicant's allegations as to the decision-making process and further explains how and why she recommended rejection of the second proposal.

[82] This is not a case where the applicant has a reasonable chance of succeeding on either the judicial review application or on the application to the Commissioner for financial relief.

[83] The applicant has therefore not satisfied me it has a position to preserve that would justify the granting of interim relief. Had that threshold been met, I would still have had to exercise my discretion as to whether to grant relief. In that regard, I acknowledge that at the hearing Mr Warner, through counsel, gave a personal undertaking that he would guarantee payment of the company's taxes falling due between now and when the judicial review proceedings would be finally determined and, if successful, the Commissioner had reconsidered the proposal. He would also guarantee monthly payments of $3,000 for arrears over that same period.

[84] I accept it is in the public interest that the Commissioner be able to carry out her statutory duties under the TAA, including completing enforcement action expeditiously. I accept the public interest in maintaining the integrity of the tax system, including the ability of the Commissioner to collect taxes when they become due. I consider that the integrity of the tax system will be undermined if the right of the Commissioner to enforce payment of an undisputed debt for unpaid tax through liquidation proceedings is frustrated by requiring the Commissioner to be a party to continuing judicial review proceedings which are without merit.

[85] When a company has deducted tax to pay PAYE and been paid GST by other taxpayers and then withheld such payments from the IRD, other taxpayers are entitled to expect the Commissioner would take a firm line, either in terms of securing recovery

of taxes or, if the Commissioner is not confident this will be achieved, through proceedings that will lead to the winding up of the company. For the Commissioner to permit a company to carry on in business when she is not confident it will meet its tax obligations would be to the detriment of other taxpayers and creditors.[11]

Conclusion

[86] The application for interim relief is declined.

[87] The respondent is entitled to costs on a 2B basis. If there is no agreement over this, a memorandum for the respondent is to be filed within four weeks, a memorandum for the applicant is to be filed within six weeks. Memoranda are to be no longer than four pages.

Solicitors:
Corcoran French, Christchurch
Copy to:
Commissioner of Inland Revenue, Wellington.

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[11] As Randerson J took into account in *Raynel v Commissioner of Inland Revenue*, above n 6, where the Commissioner was seeking to bankrupt the taxpayer and wind up his company where there were unpaid PAYE arrears, GST and income tax.