IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2014-404-001281
[2015] NZHC 754

UNDER	the Judicature Amendment Act 1972
BETWEEN	JOHN GEORGE RUSSELL Applicant
AND	COMMISSIONER OF INLAND REVENUE Respondent

Hearing: 12 February 2015

Counsel: S Judd QC for Applicant
P Courtney and N Leong for Respondent

Judgment: 17 April 2015

JUDGMENT OF ASHER J

This judgment was delivered by me on Friday, 17 April 2015 at 4.45pm pursuant to r 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Solicitors:
Crown Law, Wellington for Respondent.

Copy to:
Applicant.

Introduction

[1] John George Russell has been assessed to owe tax of $5,692,665.90 for the period 31 March 1985 to 31 March 2000. That amount owed has greatly increased through the application of penalties and interest. He has had summary judgment entered against him in the amount of $367,204,207.41 plus costs and disbursements. He has made instalment payment proposals and a lump sum proposal which have been declined by the Commissioner of Inland Revenue ("the Commissioner"). He has issued these judicial review proceedings seeking declarations that the decisions declining his proposals were invalid, and an injunction preventing the Commissioner from taking any further steps to recover the debt.

[2] In this decision I must determine an application brought by the Commissioner for orders striking out the proceedings.

A short history

[3] The assessment that Mr Russell owed tax of $5,692,665.90 was made on the basis that he had been involved in an intricate scheme of companies, partnerships and trusts that operated through the 1985–2000 period that had the effect of reducing and avoiding tax that was otherwise payable. The factual matrix of this tax avoidance arrangement that it was found Mr Russell had devised, was described in the High Court as being of "labyrinthine complexity".[1] Mr Russell's scheme is summarised in a number of judgments, including the Court of Appeal decision in *Russell v Commissioner of Inland Revenue.*[2]

[4] Mr Russell unsuccessfully challenged the assessments of his personal tax in various proceedings. These culminated in the dismissal of his application for leave to appeal to the Supreme Court[3] against a Court of Appeal decision[4] dismissing an appeal against a High Court decision,[5] in turn dismissing an appeal from the Taxation Review Authority decision.

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1 *Russell v Commissioner of Inland Revenue* (2010) 24 NZTC 24,463 (HC) at [7].
2 *Russell v Commissioner of Inland Revenue* [2012] NZCA 128, (2012) 25 NZTC 20,120.
3 *Russell v Commissioner of Inland Revenue* [2012] NZSC 73, (2012) 25 NZTC 20,140.
4 *Russell v Commissioner of Inland Revenue* (CA), above n 2.
5 *Russell v Commissioner of Inland Revenue* (HC), above n 1.

[5] This proceeding for judicial review was filed on 23 May 2014. The statement of claim asserted that Mr Russell made an offer to the Commissioner on 27 September 2006 that he would make instalment payments towards the assessments of $1,000 per week, which was refused. It also pleaded that on 9 December 2012 Mr Russell again proposed to pay tax debt by instalments of $1,000 per week for the rest of his life or until bankruptcy or mental incapacity, and this was declined on 26 August 2013. It was pleaded further that Mr Russell made an alternative offer on 2 September 2013 to pay a lump sum of $150,000 which he could borrow against further income on the basis that the balance would be remitted, and that this was declined by letter of 13 September 2013. It was claimed that if the offer of 27 September 2006 had been accepted by the Commissioner, the Commissioner would have received revenue from Mr Russell of approximately $419,000 and would still be receiving $1,000 per week.

[6] The decisions that are the subject of the review are the three decisions refusing Mr Russell's three proposals. I will refer to these collectively as "the decisions".

[7] There are no details about the Commissioner's reasons for the 27 September 2006 decision, as the alleged proposal and refusal arose in a judicial settlement conference before the Taxation Review Authority, which was privileged. There is, however, detail as to the Commissioner declining the 9 December 2012 proposal. The reasons were set out in an internal memorandum of 10 July 2013 from a senior technical advisor at Inland Revenue to a collections officer and principal advisor ("the memorandum"). The memorandum was acted on by Mr Steve Whittaker, the Acting Collections Manager, who had delegated authority to exercise the power to decline an instalment offer. There is an executive summary in the memorandum of the reasons for declining the offer which were then discussed in greater detail in the body of the letter. The summary provides as follows:

> 4. In terms of section 176(2) the Commissioner is required to recovery [sic] tax to the extent that it is an efficient use of resources and won't place the taxpayer in serious hardship. An instalment arrangement can be made in terms of section 177B but the Commissioner can decline the offer if it would not maximise recovery.

5. Any amount not recovered under the arrangement would need to be considered for a write off in terms of section 177C. However this also states that when a shortfall penalty for taking an abusive tax position is imposed the debt cannot be written off.

6. The offer proposed is not a realistic offer. Given the Commissioner's inability to write off any portion of the debt, even if late payment penalties are suspended for the duration of the arrangement the interest component alone would continue to grow at a faster rate than what Mr Russell is proposing.

7. Any instalment arrangement is meant to provide certainty to both the Commissioner and the taxpayer. However in this case the "$1000 per week until death" offer provides no certainty or finality for either the Commissioner or Mr Russell. Mr Russell's statement that it could be substantial as the arrangement could last 20 years is simply not plausible given he is already 78 years old.

8. Mr Russell's financial affairs are complex with associated companies and trusts for which Mr Russell has provided little or no information. His use of circular corporate shareholdings and trust arrangements has allowed him to accumulate wealth in his trusts for the benefit of his family while at the same time declaring little personal income. Further investigation needs to be done to look at these structures and gifts that Mr Russell has made to the trusts.

9. Mr Russell's does not have a good compliance history. Mr Russell's debt has arisen from tax avoidance assessments of which Mr Russell has been in court for the best part of 30 years fighting the Commissioner's claims of tax avoidance for his clients and now his own affairs. Further the companies that he is personally associated to do not have good return filing history and there are some question marks over his wife's true affairs as well.

10. This arrangement would be an inefficient use of recourses given the debt would grow faster than payments made. Given the lack of certainty, the lack of information, the concerns about Mr Russell's true financial circumstances, the inability to write a portion of the debt off and the compliance history it is recommended that the proposal be declined and the Commissioner's [sic] moves to bankruptcy proceedings.

[8] The Commissioner's letters of 26 August 2013 and 13 September 2013 are consistent with these reasons.

[9] The format of the amended statement of claim of 26 June 2014 is to set out a number of criticisms of the Commissioner's actions under the heading "causes of action". The submissions of the parties were more focussed on broader propositions of the lawfulness and reasonableness of the Commissioner's decisions. I propose to broadly follow the specific allegations in the statement of claim to see whether a

reasonably arguable cause of action is disclosed. I will then consider the more general propositions that the judicial review proceeding is an abuse of process, the issue of delay, and the mandatory nature of some of the orders sought, as well as the submission of Mr Russell that there is issue estoppel. In the course of this I will consider the claims of unlawfulness and unreasonableness.

Strike outs and judicial review proceedings

[10] The criteria to be applied in a strike out application are well settled. In *Attorney-General v Prince and Gardner* the Court of Appeal held:[6]

> A striking-out application proceeds on the assumption that the facts pleaded in the statement of claim are true. That is so even although they are not or may not be admitted. It is well settled that before the Court may strike out proceedings the causes of action must be so clearly untenable that they cannot possibly succeed; the jurisdiction is one to be exercised sparingly, and only in a clear case where the Court is satisfied it has the requisite material; but the fact that applications to strike out raise difficult questions of law, and require extensive argument does not exclude jurisdiction.

[11] Particular care is required in areas of law where the law is confused or developing.[7] However, this does not mean that every statement in a pleading must be accepted without examination. Provided the challenge to a pleading is based on uncontested or uncontestable material the Courts will engage with the facts more freely. In this case certain background factual material has been placed before the Court without objection.

[12] There is no doubt that decisions by the Commissioner in exercising her or his discretionary statutory powers under the Act including the power to accept an instalment offer, are subject to judicial review.[8] However it was noted in the assessment context by the Court of Appeal in *Westpac Banking Corporation v Commissioner of Inland Revenue*[9] that allowing collateral challenge to assessments through judicial review can provide scope for gaming and diversionary behaviour.[10]

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6 *Attorney-General v Prince and Gardner* [1998] 1 NZLR 262 (CA) at 267 (citations omitted).
7 *Couch v Attorney-General* [2008] NZSC 45, [2008] 3 NZLR 725 at [33].
8 *Raynel v Commissioner of Inland Revenue* (2004) 21 NZTC 18,583 (HC) at [74]; and *Rogerson v Commissioner of Inland Revenue* (2005) 22 NZTC 19,260 (HC) at [5].
9 *Westpac Banking Corporation v Commissioner of Inland Revenue* [2009] NZCA 24, [2009] 2 NZLR 99.
10 At [62].

It has also 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.[11] 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. Judicial review cannot be used to second guess decisions that are made within the boundaries of that broad discretion.

[13] I recognise that given the conventions that limit factual disputes in the context of judicial review, there is a danger that judicial review strike out applications can lead to unfortunate duplication of the hearing process. A defendant may unsuccessfully argue that there is no case to answer in strike out proceedings whilst succeeding on essentially the same considerations in the substantive hearing, where the onus is on the plaintiff to prove the claim on the balance of probabilities. The first hearings could, in such circumstances, have been replication and a waste of time. There will be cases, however, where the strike out jurisdiction can save cost and delay. It is to be noted that in this case there are signals that the road to hearing the case substantively will not be straightforward, with discovery issues possibly arising, and Mr Russell having indicated a wish to cross-examine.

[14] In considering the various grounds put forward in support of the judicial review, I bear in mind that this is a judicial review proceeding where the rightness or wrongness of the decision is not the issue. At issue is whether there had been jurisdictional or procedural failures, or failures in considering relevant or irrelevant matters, or a decision made that is so irrational it cannot be justified.

[15] Ms Courtney for the Commissioner argued that Mr Russell's application could not succeed as the statement of claim disclosed no arguable cause of action,

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[11] *Raynel v Commissioner of Inland Revenue*, above n 8, at [73].

and was an abuse of procedure and a collateral attack designed to resist bankruptcy proceedings. Mr Judd QC for Mr Russell submitted that it was arguable that the three decisions declining Mr Russell's settlement proposals were not in accordance with the provisions of the TAA that deal with collecting over time the highest net revenue that is practicable within the law, as continuing to litigate against Mr Russell would not lead to any recovery of revenue. Mr Russell owns no assets.

Claim that decision not consistent with collecting highest net revenue

[16] I refer to the relevant sections in the TAA in force at the time. Section 176 of the TAA provided:[12]

> **176 Recovery of tax by Commissioner**
>
> (1) The Commissioner must *maximise the recovery of outstanding tax from a taxpayer*.
>
> (2) Despite subsection (1), the Commissioner may not recover outstanding tax to the extent that—
>
> (a) recovery is an inefficient use of the Commissioner's resources; or
>
> (b) recovery would place a taxpayer, being a natural person, in serious hardship.
>
> (emphasis added)

[17] There are, however, other relevant provisions. Section 6 provided:

> **6 Responsibility on Ministers and officials to protect integrity of tax system**
>
> (1) Every Minister and every officer of any government agency having responsibilities under this Act or any other Act in relation to the collection of taxes and other functions under the Inland Revenue Acts *are at all times to use their best endeavours to protect the integrity of the tax system*.
>
> (2) Without limiting its meaning, **the integrity of the tax system** includes—
>
> (a) *Taxpayer perceptions of that integrity*; and
>
> (b) The rights of taxpayers to have their liability determined fairly, impartially, and according to law; and

[12] This was the section in force at the time of the decisions of 10 July 2013 and 6 September 2013.

(c) The rights of taxpayers to have their individual affairs kept confidential and treated with no greater or lesser favour than the tax affairs of other taxpayers; and

(d) *The responsibilities of taxpayers to comply with the law*; and

(e) The responsibilities of those administering the law to maintain the confidentiality of the affairs of taxpayers; and

(f) The responsibilities of those administering the law to do so fairly, impartially, and according to law.

(emphasis added)

[18] Section 6A is also relevant:

6A Commissioner of Inland Revenue

…

(3) In collecting the taxes committed to the Commissioner's charge, and *notwithstanding anything in the Inland Revenue Acts, it is the duty of the Commissioner to collect over time the highest net revenue that is practicable within the law having regard to—*

(a) The resources available to the Commissioner; and

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

(c) The compliance costs incurred by taxpayers.

(emphasis added)

[19] Section 177B relates specifically to instalment arrangements and provided:

177B Instalment arrangements

(1) The Commissioner must not enter into an instalment arrangement with a taxpayer to the extent that the arrangement would place the taxpayer in serious hardship.

(2) The Commissioner may decline to enter into an instalment arrangement if—

(a) to do so *would not maximise the recovery of outstanding tax from the taxpayer*; or

(b) the Commissioner considers that the taxpayer is in a position to pay all of the outstanding tax immediately; or

(c) the taxpayer is being frivolous or vexatious; or

(d) the taxpayer has not met their obligations under a previous instalment arrangement.

…

(emphasis added)

[20] It is significant that s 6A(3) imposes an overarching duty on the Minister to collect the highest net revenue that is practicable over time. Given that the reference is to "over time" and compliance of "all" taxpayers, the focus is on taxpayers generally and not specific to a particular taxpayer. Under this duty a specific factor that the Commissioner must have regard to is the importance of promoting compliance, especially voluntary compliance, by all taxpayers in the Inland Revenue Acts. This duty applies under s 6A(3) "notwithstanding anything in the Inland Revenue Acts". The TAA is listed as an Inland Revenue Act in the Act's schedule, and s 6A(3) prevails over the other provisions in the Act including s 177B.[13]

[21] A general observation can be made at the outset. By virtue of the specific provisions of s 6A(3) the general obligation to collect the highest net revenue over time that is practical is paramount. In doing so the Commissioner must have regard to promoting compliance by all taxpayers. It is a general duty that overrides consideration of the circumstances particular to the taxpayer (although those circumstances are relevant to the exercise of the Commissioner's powers as set out in other provisions such as s 177B). It can be seen that there can be a tension between collecting the best return over time, and collecting the best return from a taxpayer. Acceding to a small offer from an insolvent taxpayer may send the wrong message to defaulters generally and not be in the interests of collecting the highest return from taxpayers generally over time, even if there were not other assets available for execution. It may also be contrary to promoting compliance with all taxpayers. The taxpayer specific considerations that are set out in the TAA and other Inland Revenue statutes, bow before s 6A(3). The particular commercial merits of a proposal being accepted are not definitive, and are subject to the Commissioner's paramount duty to collect the maximum amount long term and promote general compliance.

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[13] See *Raynel v Commissioner of Inland Revenue*, above n 8, at [49].

[22] Similar submissions to those put forward on behalf of Mr Russell in seeking judicial review because of a refusal to accept a proposal, were considered in the leading High Court decision of *Raynel v Commissioner of Inland Revenue*. In that case Randerson J rejected the application. He said in relation to the possibility of a compromise arrangement with a taxpayer:

> [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.
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> [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.

[23] Section 177B(2) must be read with the broader public interest purposes set out in ss 6 and 6A(3)(b). Even when a compromise offer may promise a higher return than enforcement, there may be circumstances where to preserve the integrity of the tax system and promote compliance by other taxpayers the Commissioner, in accordance with the duties set out in s 6A(3), may be justified in refusing an offer. This is particularly so, it might be thought, when what is offered is only a very small portion of the tax owed, and when there has been a flagrant and ongoing failure to comply. The relationship of the amount of the offer to the amount of the overall debt of the taxpayer to the Commissioner, is relevant.[14] The paramount obligation to collect the highest net revenue in the long term can be defeated if taxpayers who owe

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[14] *Raynel v Commissioner of Inland* Revenue, above n 8, at [55].

vast amounts can insist that an offer that is very small, and bears little relation to the real indebtedness, be accepted.

[24] In *Rogerson v Commissioner of Inland Revenue,*[15] *Mclean v Commissioner of Inland Revenue*[16] and *Clarke v Commissioner of Inland Revenue*[17] judicial review attempts by taxpayers to challenge decisions to reject proposals by the Commissioner failed, and the principles set out in *Raynel* were approved and applied. The legislative provisions and the weight of case law have settled the approach to be adopted to challenges such as that of Mr Russell. This is of relevance in the context of a strike out. There is not uncertainty in the law, of the type which might make a Court cautious to assume that a cause of action would not succeed. I do not accept Mr Judd's submission that the *Raynel* line of cases can be distinguished on the facts because Mr Russell was not guilty of fraud or inadequate or no returns. The moral culpability of the taxpayer can be of only peripheral relevance, and the scale and complexity of Mr Russell's avoidance places his transgressions in a serious category.

[25] Thus I do not accept in general the proposition that an offer to pay a sum by instalments or a lump sum must be accepted when the alternative is uncertain enforcement proceedings. On each occasion there will be a judgment by the Commissioner, but it will often be the case that the Commissioner is aware that there is not a full understanding of the taxpayer's affairs, and that there is the possibility of a greater recovery than the offer following bankruptcy. The Official Assignee, particularly when faced with persons who over a long period have avoided paying a lot of tax, can form the view that it is worth taking the risk of going down the enforcement route and possibly recovering nothing, rather than accepting a low offer which would only constitute a tiny percentage recovery of the total potential recovery. In those circumstances the wider interests referred to in the legislation of promoting compliance may justify continuing enforcement, in order to protect the integrity of the tax system.

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15 *Rogerson v Commissioner of Inland Revenue*, above n 8.
16 *Mclean v Commissioner of Inland Revenue* (2005) 22 NZTC 19,231 (HC).
17 *Clarke v Commissioner of Inland Revenue* (2005) 22 NZTC 19,165 (HC).

[26] I will now consider the causes of action in the amended statement of claim, to see whether they are reasonably arguable in terms of r 15.1 of the High Court Rules.

Inconsistency with achieving highest net revenue (paragraph 32(a))

[27] Turning to the undisputed facts of this case, at paragraph 6 of the executive summary it was noted that the interest component alone on the debt would continue to grow at a faster rate than the instalments at the rate Mr Russell was proposing. Further, given that Mr Russell was 78 years old, it was clearly a relevant consideration that the payments of $1,000 per week offered little certainty of finality. It was a fact that on Mr Russell's proposal the interest on the debt would accrue faster than the instalments reduced it. The Commissioner also took into account the complexity and unknown nature of Mr Russell's affairs and his use of circular corporate shareholdings and trust arrangements to accumulate wealth. She could legitimately take into account Mr Russell's poor compliance history in making the assessment.

[28] Thus it can be said that this first and important ground put forward by Mr Russell is certain to fail. It was open to the Commissioner to conclude that it was consistent with achieving the highest net revenue that a specific offer was so small that it would be better for the collection of revenue generally, to reject it, even if it might offer the best possible commercial return. The decision was to reject an offer to pay a tiny proportion of the overall debt. The lump sum payment of $150,000 was 0.04 percent of the full debt and 2.63 per cent of the original debt of $5,692,665.90. It can be regarded as reflecting to an extent Mr Russell's assessment of the value of the alternative instalment proposal, which while worth $52,000 a year, was under Mr Russell's control and would inure for his lifetime only.

An instalment arrangement would maximise recovery and was consistent with duty to recover the maximum outstanding tax (paragraph 32(d) and (e) of the amended statement of claim)

[29] Paragraph 32(d) of the amended statement of claim refers to non-compliance by the Commissioner with the duty to maximise recovery of the outstanding tax in s 177B. Mr Judd argued that there was a failure to take into account the provisions of this section. However, that section was specifically referred to at paragraph 4 of

the Commissioner's memorandum, and it is set out in full at paragraph 41. There can be no doubt that it was taken into account. The particular aspect of the Commissioner's concerns was expressed at paragraph 72 of the memorandum:

> The complexity of Mr Russell's business affairs, the circularity of the shareholdings, the moment of funds and his lack of transparency in the provision of information about the companies and trusts means we do not have the required level of certainty that the proposal is the best option to maximise revenue.

[30] The decision that there was too much uncertainty to warrant a decision that acceptance of the offer would maximise recovery was entirely open to the Commissioner in these circumstances. It is referrable to the need in s 177B(2)(a) to consider whether the instalment proposal would maximise the recovery of outstanding tax from Mr Russell. Pushing execution might produce a better result. The fact that the other s 177B(2) factors were not considered seriatim does not mean the decision was flawed; they were only matters that could be considered. Further, as outlined above, the Commissioner had a duty to consider broader issues of the overall integrity of the tax system.

[31] Against this uncontested background of the considerations taken into account by the Commissioner in the 2013 decisions to reject the instalment offer and the lump sum, this ground must fail. I decline to exhaustively analyse the Commissioner's documents line by line. The broad bones behind the 2013 decisions are clearly displayed. No reasonably arguable cause of action is disclosed. The claim in paragraph 32(e) of failing to collect the highest net revenue over time must fail for the same reason.

Costs of continuing to litigation an inefficient use of resources (paragraph 32(b))

[32] This second ground in the amended statement of claim at paragraph 32(b), which is closely allied to the first, again pre-supposes that the Commissioner proceeding to execute the judgment against Mr Russell would be a waste of time. It was entirely open to the Commissioner to form the view that there could well be some recovery, and that could be more than was offered. If Mr Russell was made a

bankrupt, further investigation might well show structures and gifts of relevance to recovery, as stated in paragraph 8 of the executive summary.

[33] Essentially Mr Russell is arguing that the grounds set out in s 177B(2) for a Commissioner declining to enter into an instalment arrangement were not made out. However, as noted earlier those requirements must be seen in the broader context of the Act, and in particular the context of the Commissioner having to maximise the recovery of outstanding tax over time. This is the issue that is specifically referred to on several occasions in the memorandum of 10 July 2013. The Commissioner had grounds to consider that it was an efficient use of resources to proceed to execute the judgment against Mr Russell by bankruptcy proceedings or other execution. Moreover, the Commissioner was of the view that the proposals would not maximise the recovery of tax from Mr Russell (s 177B(2)(a)) as a better return might be achieved by enforcement.

[34] The Commissioner did not rely on the alternative grounds for declining to enter an instalment agreement set out in s 177B(2)(b)-(d) so the pleading at paragraph 32(c) of the amended statement of claim that there was no basis for the Commissioner to conclude that they existed, cannot in itself give rise to a claim.

Decision not reasonable or rational (paragraph 32(f))

[35] It is a ground in paragraph 32(f) of the amended statement of claim that the decision to decline the instalment proposal and continue with enforcement proceedings to promote taxpayer compliance or secure the wider interests in the legislation was "not reasonable or rational". A number of the particulars put forward in support of this aspect of the claim[18] relate back to Mr Russell's claim that the income was not earned or received by him but by companies, and that by assessing him personally rather than the companies the Commissioner made it impossible for him to pay the tax because he had not earned the income on which the tax was calculated. The complaint was that the Commissioner had decided to reconstruct 15 years worth of income unreasonably in one single reconstruction, and that it was

[18] See paragraph 32(f)(i)–(v) of the amended statement of claim.

wrong to require a person to pay tax on income that the person did not earn or receive.

[36] None of these factors relate directly to the decision to reject the instalment proposal. Although Mr Judd submitted that Mr Russell was not seeking to challenge the assessments, his complaints under this head relate to the fairness of the Commissioner's decision to seek payment of the tax due, rather than his decision on the proposal. That decision cannot be assailed in the judicial review proceeding, and there cannot be a back door challenge by reverting back to the circumstances of the assessment and asserting that it was unfair or there were mitigating circumstances, and that the circumstances should have been taken into account in considering the proposals. The assessments have already been fully tested by the Courts, Mr Russell has been found to be liable for a large sum of money even without the addition of penalties and interest, and has exhausted all his remedies.

[37] Mr Russell should have paid the tax when it was due, and can therefore fairly be required to pay the tax now. If he does not do so the inevitable consequences of default in meeting a judgment follow, and cannot be stopped just because Mr Russell is still dissatisfied with the original decision relating to his liability. This claim which relates back to the fairness of the already tested assessments must fail.

Failure to take into account the fact that it was the Commissioner's decision to assess income not received by Mr Russell and which he could not recover, as a reason he could not pay tax (paragraph 32(g))

[38] As in the previous ground, this allegation in the statement of claim effectively invites a reconsideration of the decision made by the Commissioner to claim all the tax from Mr Russell personally. As I have said, this issue has been exhaustively litigated and Mr Russell has no further rights of challenge and cannot raise the issue yet again in this judicial review proceeding. For the same reason the allegation of a failure to consider that the income was not earned cannot support the claim.

The refusal to accept the instalment proposals was motivated by the improper purpose to bankrupt the applicant and other irrelevant considerations and was a decision no rational person could have made (paragraph 32(h) and (i)).

[39] It is alleged that no rational or reasonable person would decline the offer of $1,000 per week and that this decision was motivated by the desire to bankrupt Mr Russell as well as the negative opinion Inland Revenue officers held of him. This is in effect a reiteration of the earlier claim that it made no sense to not accept the proposal, and it was not consistent with collecting the highest net revenue to decline the proposal. The fact is the proposal was to pay a very small amount of money, and a tiny proportion of the debt. The Commissioner set out a number of very good reasons in the memorandum as to why such a small proposed payment when compared to the debt should not be accepted, and any argument that no rational or reasonable person could have reached the decision to reject is certain to fail.

[40] There is no evidence that the decision to reject the proposal was influenced by any irrelevant or improper factors. The possible recovery if bankruptcy proceedings were brought compared to the amount recovered if Mr Russell's proposed arrangement was accepted, was an entirely relevant consideration. Therefore this claim, and the preceding claims, can all be seen as certain to fail.

Disproportionally severe treatment or punishment in breach of s 9 of the New Zealand Bill of Rights Act and an excessive fine in breach of the Bill of Rights Act 1688 (paragraph 32(j) and (k))

[41] Section 9 of the New Zealand Bill of Rights Act 1990 ("the NZBORA") provides:

> **9 Right not to be subjected to torture or cruel treatment**
>
> Everyone has the right not to be subjected to torture or to cruel, degrading, or disproportionately severe treatment or punishment.

[42] Mr Judd argued that the ongoing demands of the Commissioner for payment constitute a disproportionately severe treatment or punishment. In *Taunoa v Attorney-General*[19] the Supreme Court held that s 9 was concerned with conduct

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[19] *Taunoa v Attorney-General* [2007] NZSC 70, [2008] 1 NZLR 429.

which is to be utterly condemned as outrageous and unacceptable in any circumstances. The conduct proscribed by s 9 is of great seriousness.[20] Given that the phrase "disproportionately severe" appears alongside torture, cruelty and conduct with degrading effect, such conduct, if it occurs in New Zealand, could fairly be categorised as "inhuman".[21]

[43] There have been some instances where there have been claims under s 9 of the NZBORA in the taxation context. Such arguments have been dismissed as having "no substance" [22] or "no merit whatsoever".[23] The Commissioner puts forward no physical threat of any sort whatsoever to Mr Russell. It is nonsensical to suggest that the Commissioner, in proceeding to bankrupt Mr Russell, is acting in a way which could be equated with torture or cruel and degrading treatment or punishment. Bankruptcy proceedings are lawfully and properly pursued by creditors in New Zealand courts and common law courts on an every day basis. The fact that the sum may be very large and that the debtor has no ability to pay it has never been a bar to a creditor proceeding. The Courts retain certain discretions, for example, the general discretion as to whether or not to declare a debtor bankrupt.[24]

[44] Article 1 of the Bill of Rights Act 1688 provides that excessive fines should not be imposed. In *Marsh v Attorney-General* the Court held that the prohibition on cruel and unusual punishments, found in the same article, was exclusively concerned with the conduct of Judges in enforcing the criminal law, and therefore extended only to judicially imposed punishments.[25] The debt owed by Mr Russell, comprising the core tax debt as well as penalties and interest, arises out of the operation of statute. Even if this debt amounted to a "fine", it was not judicially imposed.

[45] Mr Judd also argued that the Commissioner failed to take into account Mr Russell's rights not to be subjected to disproportionate severe treatment or punishment, or to be subjected to excessive fines. As neither of these rights was

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20 At [171].
21 At [176].
22 *Re Singh ex parte Commissioner of Inland Revenue* (2002) 20 NZTC 17,943 (HC) at [51].
23 *Hardie v Commissioner of Inland Revenue* (2010) 24 NZTC 24,161 (HC) at [29].
24 Insolvency Act 2006, ss 11 and 37.
25 *Marsh v Attorney-General* [2010] 2 NZLR 683 (HC) citing *Ingraham v Wright* (1977) 430 US 651.

affected by the Commissioner's actions in the current case, they cannot be relevant considerations.

[46] Mr Judd referred to two cases where taxpayers had succeeded in obtaining judicial review against the Commissioner. These were *W v Commissioner of Inland Revenue*[26] and *Chesterfields Preschools Ltd v Commissioner of Inland Revenue*.[27] *W v Commissioner of Inland Revenue* turned on particular facts where the Commissioner failed to consider matters relating to the taxpayer. The case involved a claim of serious hardship under s 177 of the TAA, which required an assessment of whether serious hardship as defined by the Act was established in the individual circumstances of that particular taxpayer. The Court held that a decision as to whether serious hardship was established was different in kind from a "care and management" decision such as the decision to reject an offer to settle the taxpayer's liability.[28] *Chesterfields* involved various established "neglects" by the Commissioner, resulting in the Commissioner failing to exercise his powers for their proper purpose. The Commissioner also failed to meet the taxpayer's reasonable expectations that his liabilities were negotiable based on previous offers by the Commissioner to settle the indebtedness. Both of these cases are fact specific and involved errors by the Commissioner that are not present in the current case, which concerns the exercise of the Commissioner's discretion as to whether to accept Mr Russell's proposals.

[47] These rights based claims must fail.

Failure to give adequate or rational reasons (paragraph 33)

[48] Mr Judd argued that the Commissioner failed to give adequate reasons for the decision not to accept Mr Russell's instalment proposals. The extent of the obligation to give reasons for a decision depends upon the nature and context of the decision.[29]

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26 *W v Commissioner of Inland Revenue* (2005) 22 NZTC 19,602 (HC).
27 *Chesterfields Preschools Ltd v Commissioner of Inland Revenue* (2007) NZTC 21,125 (HC).
28 At [24].
29 See *R v Awatere* [1982] 1 NZLR 644 (CA) at 649; *Bell v Victoria University of Wellington* HC Wellington CIV-2009-485-2634, 8 December 2010 at [78]; and Philip A Joseph *Constitutional and Administrative Law in New Zealand* (4th ed, Brookers, Wellington, 2014) at [25.4.11].

[49] In this case, the Commissioner set out reasons for refusing to accept the instalment arrangements in the letter of 26 August 2013, and reasons for refusing to accept the lump sum proposal in the letter of 13 September 2013. The letter of 26 August 2013 stated that the instalment did not provide certainty, and that the amount of interest that would accrue would significantly exceed the proposed payment. Accordingly, accepting the proposal would be an inefficient use of resources and would not maximise recovery. The letter of 13 September noted that the offer to settle the debt by lump sum payment would also not maximise recovery. Although the reasons given in each letter are relatively brief, both letters summarise key reasons for rejecting the proposals which are set out more fully in the internal memorandum of 10 July 2013. These letters sufficiently set out why Mr Russell's proposals were rejected based on the applicable statutory framework.

[50] No details of the judicial settlement conference of 27 September 2006 have been provided to this Court. Presumably, oral reasons for rejecting the proposal were given at the conference. Nothing more could be expected. In any event, the Commissioner reconsidered the same proposed instalment arrangement in the August 2013 decision. As a decision-maker will be required often to reconsider the matter afresh where an application for judicial review has been successful,[30] this fresh consideration would have been sufficient.

Abuse of process

[51] I am also of the view that these judicial review proceedings are an abuse of the Court's process. In this context when there is an issue of bankruptcy the date of service of a creditor's application can be a crucial date for calculating the period in which the Official Assignee can reach back and cancel insolvent transactions.[31] There is a public interest in proceedings to enforce civil debts being allowed to proceed through the courts in a timely manner and for such proceedings not be subjected to undue delay.

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30 See for example *Attorney-General v Tamil X* [2010] NZSC 107, [2011] 1 NZLR 721 at [101].
31 See Insolvency Act 2006, ss 193 and 194.

[52] Mr Russell obtained an interim stay to prevent the Commissioner commencing bankruptcy proceedings, relying on these proceedings.[32] Proceedings which prevent bankruptcy proceedings being pursued can thereby place transactions out of the period and can reduce the effectiveness of the bankruptcy process, to the detriment of the fair administration of justice and commerce generally. It is patent that it must be in the public interest that the Commissioner is able to expeditiously carry out the duties imposed by the revenue acts including pursuing and completing enforcement action, and not be stalled by challenges to his refusal to accept minimal settlement offers. I respectfully agree with the comment of Courtney J in *Commissioner of Inland Revenue v Ben Nevis Forestry Ventures Ltd*:[33]

> It ought not to be the case that apparently insolvent companies owing large amounts of tax can simply not pay while at the same time continuing to engage the Commissioner in costly and time-consuming litigation. That is a spectacle that surely undermines the tax system and risks bringing it into disrepute in the eyes of other taxpayers.

[53] It is also of relevance in finding there to be abuse of process that the original declining of the instalment payment proposal was made in September 2006. Mr Russell did not provide reasons to explain why he did not challenge the 2006 decision. The fact that the applicant waited some seven years and six months before bringing a proceeding challenging that decision in itself is indicative of an abuse of procedure. Judicial review proceedings challenging earlier decisions must be brought reasonably promptly for the judicial review application process to work efficiently and fairly.[34] These proceedings have been issued following the exhaustion by Mr Russell of his orthodox legal challenges to the Commissioner's assessment against him. The earlier delay and the pursuit now of this proceeding is indicative of this being an abuse of procedure.

[54] Further, the attempt in the statement of claim to challenge indirectly yet again the fact that Mr Russell was assessed, is a misuse of the judicial review procedure, and an indication that the proceedings as a whole are an abuse.

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32 *Russell v Commissioner of Inland Revenue* [2014] NZHC 2034, (2014) 26 NZTC 21,095 [*Russell v Commissioner of Inland Revenue* (stay proceedings)].

33 *Commissioner of Inland Revenue v Ben Nevis Forestry Ventures Ltd* [2014] NZHC 1746 at [43].

34 See the commentary in GDS Taylor and RM Taylor *Judicial Review: a New Zealand perspective* (3rd ed, LexisNexis, Wellington, 2014) at [5.36].

[55] I conclude that this judicial review proceeding appears to be aimed at preventing the bankruptcy processes from proceeding in the usual way. It has no merit. It can be seen as an abuse of the Court process.

Mandatory orders sought

[56] Given my decision that there are no arguable causes of action, and the proceeding is an abuse of procedure, it is not necessary to dispose of the Commissioner's submission that no relief should be granted because what was sought was a mandatory declaration.

Issue estoppel

[57] In *Russell v Commissioner of Inland Revenue*[35] Andrews J made an interim order in favour of Mr Russell preventing the Commissioner from taking steps to have him adjudicated bankrupt, to last "only until the Commissioner's application to strike out the judicial review proceeding is determined".[36]

[58] When that application was heard, the Commissioner had already filed an application to strike out the judicial review proceeding, but it had not been determined. Andrews J granted an interim order preventing the Commissioner from taking steps to have Mr Russell adjudicated bankrupt. She did that to preserve his position. She stated:

> [41] In the light of the fact that the Commissioner has applied to strike out the judicial review application, which has not yet been heard, it is not appropriate that I comment in any detail on the strength or weakness of Mr Russell's case. However, it can be said that, on the face of the matters put before me, I could not conclude that his case is so hopeless that his application for an interim order should be dismissed, before the application to strike out, where the strength of the case is focussed on, is heard.

[59] Mr Judd argued that this finding constituted an issue estoppel. Andrews J having determined that the causes of action were not hopeless, that issue could not be re-litigated in an application to strike out, and had to go to a full hearing. Ms Courtney argues that Andrews J did not determine the strike out issue.

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35 *Russell v Commissioner of Inland Revenue* (stay proceedings), above n 30.
36 At [46].

[60] I agree. There is no doubt that Andrews J, when she made her decision, was not in fact determining the strike out application. In the extract above she specifically eschews any comment on the strengths or weaknesses of the strike out. What she was saying in her decision was that the case was not so patently hopeless that the bankruptcy proceeding should be allowed to proceed before the application to strike out was heard. She was prepared to make orders which would ensure that application could be heard.

[61] If indeed, as Mr Judd submits, she was determining that the causes of action were sufficiently sound to survive a strike out, she would have said so. In fact she said the exact opposite. She was making no determination on the merits of the application, and she clearly contemplated that the application to strike out would proceed whether there were arguable causes of action would be fully considered and a decision made. Indeed the decision of Andrews J can only be understood on the basis that the hearing of the application to strike out would inevitably follow. There is no issue estoppel.

Conclusion

[62] A Court does not lightly strike out a proceeding, and there must be particular caution when evaluating the merits of causes of action against a matrix of facts in a judicial review proceeding. But this decision will save unnecessary cost and delay. The application can be heard against a background of factual certainty as to the procedure adopted and the Commissioner's consideration of the issue, and a clear line of cases where the nature of the Commissioner's power to accept proposals has been determined by the Courts. The application of these uncontestable facts and the clear law shows that the causes of action are plainly untenable, as they seek to confine the broad discretion given to the Commissioner to a narrow and incorrect reading of s 177B.

[63] Moreover, the attempt to re-litigate yet again issues that have been finally determined after Mr Russell has exhausted all his rights of challenge, the delay in bringing the proceeding and the lack of merit in all the claims, show the application to be an abuse of procedure. The Commissioner's application must be granted.

Result

[64] The application to strike out is granted. This claim is struck out.

Costs

[65] Costs submissions are sought within 14 days from the Commissioner and within 28 days from Mr Russell.

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Asher J