IN THE COURT OF APPEAL OF NEW ZEALAND

CA315/2016
[2016] NZCA 614

BETWEEN	CHATFIELD & CO LIMITED Appellant
AND	COMMISSIONER OF INLAND REVENUE Respondent

Hearing: 30 November 2016

Court: Harrison, Cooper and Asher JJ

Counsel: R A Rose for Appellant
P H Courtney and M J Bryant for Respondent

Judgment: 16 December 2016 at 1 pm

JUDGMENT OF THE COURT

A The appeal is dismissed.

B The appellant must pay the respondent costs for a standard appeal on a band A basis and usual disbursements.

REASONS OF THE COURT

(Given by Cooper J)

[1] Chatfield & Co Limited (Chatfield) appeals against a decision of Ellis J declining an application for discovery of material exchanged pursuant to the Double Taxation Agreement between New Zealand and the Republic of Korea. The application was made orally to the Judge when she conducted a callover of the judicial review list in Auckland.

The High Court proceeding and its genesis

[2] The substantive proceeding in which the application for discovery was advanced is an application for review of decisions made by the Commissioner of Inland Revenue (the Commissioner) to issue notices under s 17 of the Tax Administration Act 1994 (TAA) to various parties for whom Chatfield was the "tax agent" for the purposes of ss 3 and 34B of the TAA.

[3] Article 25 of sch 1 to the Double Taxation Relief (Republic of Korea) Order 1983 (the DTA) enables the contracting states (Korea and New Zealand) to exchange information relevant to the administration of the taxation regimes of both countries with particular reference to the avoidance of double taxation and tax evasion. In this case, procedures contemplated under the DTA were initiated by the National Tax Service of the Republic of Korea (the NTS) in May 2014. The information requested by the NTS related to 21 New Zealand taxpayers. Some of the information sought was able to be provided from the Commissioner's existing records. In addition, an officer employed by the Commissioner searched for information relating to the taxpayers held by the Companies Office and Land Information New Zealand, as well as looking for other publicly available sources of information. By these means, all of the information requested by the NTS concerning five of the taxpayers was able to be obtained and provided to the Korean authorities.

[4] To fully respond to the request, it was thought necessary to take further steps. Officials decided that they would serve notices on Chatfield under s 17 of the TAA requiring the provision of the information requested by the NTS that was not available from other sources. On 7 October 2014 15 notices were issued to furnish information under s 17.

[5] At the time the notices were issued, Chatfield was registered as the tax agent of the companies concerned. The information requested included copies of financial statements, agreements for sale and purchase, settlement statements relating to property sales, share transfer documents, bank remittance certificates for share and property sales, and reasons for the change in ownership of certain properties.

[6] Following receipt of the notices it was agreed that Chatfield and the companies to whom the notices were addressed should seek professional advice. An extension of time for responding to the notices was sought. During November and December 2014, the solicitors acting for the taxpayer companies, Bell Gully, corresponded with the IRD on the taxpayers' behalf. Subsequently, Chatfield itself instructed Bell Gully and further correspondence ensued. During this process Bell Gully queried the basis upon which the Commissioner had issued the notices. In a letter of 27 November 2014, Bell Gully wrote:

> Turning to the Letters, we trust that it is accepted by the [Inland Revenue] Department that their issue must be the product of the lawful exercise of the Department's powers. Should the Letters not have been issued according to law, the Letters would be ineffective to command compliance.
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> In this regard we note that each one of the Letters states that the information sought is requested pursuant to article 25 of the double tax agreement between New Zealand and the Republic of Korea. Accordingly, we would be grateful if we could be advised of the basis why the Department considered that article 25 justified issue of the Letters.
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> We further trust that the Department accepts that it would be premature for the Companies to comply with the Letters until such time as the legality of the Department's request is apparent. The Companies along with all other citizens have a right to privacy albeit subject to modification according to law.

[7] In a response of 3 December 2014 Ms Forrest, an Investigations Team Leader employed by the Commissioner, responded:

> The Notices were validly issued under s 17 of the Tax Administration Act 1994. The information requested in the Notices is necessary and relevant for the purposes of administering or enforcing the Inland Revenue Acts as outlined in s 17(1) of the Tax Administration Act 1994. The Commissioner has therefore exercised her power under s 17 for a proper purpose.
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> The Notices also state that information requested is sought as a result of Schedule 1, Article 25 of the Double Taxation Relief (Republic of Korea) Order 1983.

[8] Bell Gully asserted amongst other things that the notices had not been lawfully issued to Chatfield. This assertion was advanced on various grounds. Issue of the notices was said to be contrary to s 21 of the New Zealand Bill of Rights Act 1990, a breach of natural justice and a breach of a legitimate expectation shared by the companies and Chatfield. It was further alleged there had been unjustifiable

involvement of a tax agent in its clients' affairs and failures by the Commissioner to protect the integrity of the tax system and to follow the Department's own protocols for the issue of s 17 notices. Bell Gully claimed that the notices should have been issued to the companies as their proper recipient.

[9] The various claims made were rejected by the Commissioner and Chatfield commenced an application for review under the Judicature Amendment Act 1972 on 13 May 2015. On 4 June 2015 the proceeding was called in the judicial review list in the High Court at Auckland. In a minute she issued that day, Ellis J recorded that there was a question as to whether the Commissioner could be required to disclose to Chatfield communications between the Korean and New Zealand authorities that gave rise to the s 17 notices.[1] At that stage, the Commissioner had sought a direction from the Court under s 70 of the Evidence Act 2006 that disclosure would not be required on the ground that the communications related to matters of state. That application was set down for hearing before Ellis J on 11 June 2015.

[10] Argument on that issue led to a reserved judgment delivered on 1 September 2015.[2] In her judgment, Ellis J recorded that Chatfield had sought copies of documents exchanged between the NTS and the Commissioner. Chatfield asserted it needed to see the documents as they would show the reasons for the Commissioner's decision and the procedures that were followed, those being matters relevant to the application for review. She also recorded that the Commissioner had sought a direction under s 70 of the Evidence Act that they not be disclosed.

[11] After discussing the arguments advanced by the parties, Ellis J stated her view that the NTS should be asked specifically whether or not there was consent to the disclosure sought.[3] She further observed:

> [77] If consent is, as a consequence of this judgment, now specifically sought and refused, then ss 69 and 70 of the [Evidence Act] may come into play. More particularly, I consider that the Commissioner could, at that point, legitimately seek a direction from the Court under one or other of those sections. The Court would then need to consider whether the public

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1 *Chatfield & Co Ltd v Commissioner of Inland Revenue* HC Auckland CIV-2015-404-1013, 4 June 2015 (Minute of Ellis J) at [4].

2 *Chatfield & Co Ltd v Commissioner of Inland Revenue* [2015] NZHC 2099, (2015) 27 NZTC 22-024.

3 At [75].

> interest in disclosure of the information was outweighed by the public interest in withholding it. The need for that balancing exercise suggests that it would be prudent for at least brief reasons to be given by Korea for any refusal.

[12] She noted that if the NTS sought to maintain secrecy, then the matter would need to be reconsidered by her. She thought that at that point it might be necessary for her to see the documents concerned and noted:[4]

> As will be evident from my discussion above, however, I am unattracted by the proposition that, simply because the request is made pursuant to a DTA, the request and any associated documents must be confidential, insofar as the affected taxpayers (or their proxies) are concerned.

[13] The Judge directed counsel for the Commissioner, Mrs Courtney, to file and serve a memorandum advising the outcome of any inquiries made.[5]

[14] On 14 October 2015, Mrs Courtney filed two memoranda on behalf of the Commissioner. One was "open" and the other "confidential". In the former, counsel advised that the NTS claimed confidentiality for each of the exchanged documents (including its request) maintaining that it was necessary for carrying out the provisions of the DTA and the domestic laws of Korea, and because the investigation on which it was engaged was incomplete. Further, it was said that the NTS request was for information not obtainable in the normal course of the administration of Korea.

[15] We have not seen the confidential memorandum but note from a minute of Ellis J issued on 19 May 2016 that, amongst other things, it outlined the specific responses received from the NTS explaining the reasons why confidentiality was claimed for each of the documents concerned.[6] In the balance of her minute, Ellis J discussed competing interests relevant to the question of disclosure before stating that she proposed to make an order under s 69 of the Evidence Act that the

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4 At [79].
5 At [80].
6 *Chatfield & Co Ltd v Commissioner of Inland Revenue* HC Auckland CIV-2015-404-1013, 19 May 2016 (Minute of Ellis J) at [1].

documents were confidential and not to be disclosed.[7] However, she gave the parties five working days to provide any submissions they wished to make on that issue.[8]

[16] Extensive written submissions were filed by Bell Gully on behalf of Chatfield on 26 May 2016 to which the Commissioner responded on 2 June 2016. After considering the submissions Ellis J delivered a further judgment on 9 June 2016.[9]

[17] In the second High Court judgment, Ellis J expressed her agreement with submissions that had been made by Ms Rose on behalf of Chatfield that the matter was not appropriately addressed under ss 69 or 70 of the Evidence Act.[10] She accepted that the relevant statutory provisions were contained in s 81(3) of the TAA, as explained in *BNZ Investments Ltd v Commissioner of Inland Revenue*.[11]

[18] Ellis J proceeded to record that the Commissioner wished to maintain confidentiality in accordance with the wishes of the NTS, whom she referred to as having provided "a cogent explanation of why confidentiality is claimed".[12] She then noted that discovery is not as of right in judicial review proceedings and observed that "general discovery principles require that documents sought in discovery must (at a minimum) be relevant to some justiciable issue".[13] Ellis J went on to quote extensively from a decision of the Singapore Court of Appeal, *Abu v Comptroller of Income Tax*.[14] The passages quoted supported her view that it would not be open to Chatfield to ask the Court to interrogate in review proceedings whether the information sought by the NTS was:

> (a) necessary for carrying out the provisions of the DTA or of the domestic laws of Korea; and

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7 At [14].
8 At [15].
9 *Chatfield & Co Ltd v Commissioner of Inland Revenue* [2016] NZHC 1234, (2016) 27 NZTC 22-053.
10 At [8].
11 *BNZ Investments Ltd v Commissioner of Inland Revenue* [2008] NZSC 24, [2008] 2 NZLR 709.
12 *Chatfield & Co Ltd v Commissioner of Inland Revenue*, above n 9, at [12]. We assume that was a reference to information contained in the confidential memorandum filed by the Commissioner.
13 At [14].
14 *Abu v Comptroller of Income Tax* [2015] SGCA 4, [2015] 2 SLR 420 at [38]–[45].

(b) obtainable under the laws or in the normal course of the administration of Korea.

Ellis J also thought it would not be open for Chatfield to interrogate the specific legal reasons now given by the NTS for claiming confidentiality.[15] She directed as a consequence that the relevant documents were not required to be disclosed.[16]

The appeal

[19] Submissions filed by the parties for the purposes of the present appeal have dealt extensively with the relevant principles that might be applied in deciding whether or not to order discovery of documents relevant to a request such as that made by the Korean authorities in this case. However, on the view we take, the matter is to be approached on a different and simpler basis.

[20] Discovery in judicial review proceedings, as Ellis J noted, is not available as of right. Section 10 of the Judicature Amendment Act provides that a conference may be called to give directions in relation to an application for review. Under s 10(2)(i), the presiding judge at such a conference may require any party to make discovery of documents. But the power is discretionary and therefore in marked contrast from the position that applies in an ordinary proceeding. In the latter case, r 8.5(1) of the High Court Rules requires a judge to make a discovery order for a proceeding unless he or she considers that the proceeding can be justly disposed of without any discovery.

[21] Since 1 February 2012, the High Court Rules have provided for two kinds of discovery, namely "standard discovery" and "tailored discovery".[17] Standard discovery requires each party to disclose documents that are or have been in that party's control and are documents on which the party relies, or adversely affect that party's or another party's case, or support another party's case.[18] The intention was to replace the previous rule with one that was narrower in scope. Formerly, under

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15 *Chatfield & Co Ltd v Commissioner of Inland Revenue*, above n 9**Error! Bookmark not defined.**, at [21] and footnote 14.

16 At [22].

17 High Court Rules, r 8.6.

18 Rule 8.7.

what was commonly known as the *Peruvian Guano* test, the obligation was to disclose documents that were or might be relevant to issues in the proceeding, or may lead to a train of inquiry.[19] But the references in the new rule to the cases of the parties means that relevance will still be a hallmark of what has to be discovered. As with evidence, the relevance of a document for discovery purposes must be assessed having regard to the pleaded claim.

[22] In the present case, the matter comes before this Court on an amended statement of claim following a judgment delivered on a strike-out application by Lang J.[20] The Judge struck out the first cause of action pleaded by Chatfield in the High Court. In that cause of action, Chatfield had sought to advance its argument that it had a legitimate expectation under an operation statement, known as OS 13/02,[21] that the Commissioner would not issue a notice under s 17 of the TAA seeking to obtain information from a taxpayer's tax agent unless the Commissioner had first sought the information in question either from the taxpayer itself or from another third party such as a bank. We do not need to set out the Judge's reasoning in full. It is sufficient if we quote the following:

> [28] The complete absence of any reference in OS 13/02 to the promise or commitment upon which Chatfield relies means that the ground for review based on denial of legitimate expectation cannot succeed. It is not reasonably arguable given the wording used in OS 13/02.

[23] The key pleading in the second cause of action in the amended statement of claim was as follows:

> 46. In making the decision to issue the 2014 Notices to Chatfield, the Commissioner failed to consider the:
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> (a) terms of and operational procedure outlined in OS 13/02, especially with respect to requests made of tax agents;
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> (b) limited nature of the tax agent/client relationships; and
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> (c) the DTA, and in particular the terms of Article 25 of Schedule 1 to the DTA.

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19 Named after *The Compagnie Financiere et Commerciale du Pacifique v The Pervuian Guano Co* (1882) 11 QB 55 (CA).

20 *Chatfield & Co Ltd v Commissioner of Inland Revenue (No 2)* [2016] NZHC 2289, (2016) 27 NZTC 22-072.

21 Graham Tubb *Operational Statement: Section 17 notices* (Inland Revenue, OS 13/02, 14 August 2013).

[24] Lang J, however, also struck out sub-paragraphs (a) and (b) of paragraph 46.[22] This left as the sole effective pleading an allegation that in making the decision to issue the s 17 notices to Chatfield the Commissioner failed to consider "the DTA, and in particular the terms of Article 25 of Schedule 1 to the DTA."

[25] The difficulty that immediately arises for Chatfield is that it is clear that the Commissioner did consider the terms of art 25 of sch 1 to the DTA. It was only by virtue of art 25 that the Commissioner was able to issue the notices which she did under s 17 of the TAA.

[26] Section 17(1) of the TAA provides:

> **17 Information to be furnished on request of Commissioner**
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> (1) Every person (including any officer employed in or in connection with any department of the government or by any public authority, and any other public officer) shall, when required by the Commissioner, furnish any information in a manner acceptable to the Commissioner, and produce for inspection any documents which the Commissioner considers necessary or relevant for any purpose relating to the administration or enforcement of any of the Inland Revenue Acts or for any purpose relating to the administration or enforcement of any matter arising from or connected with any other function lawfully conferred on the Commissioner.

[27] It is common ground that in issuing the notices pursuant to the request received from the NTS that the Commissioner issued the notices for a purpose relating to the administration or enforcement of the Inland Revenue Acts.

[28] At the hearing Ms Rose endeavoured to particularise the pleading in paragraph 46 orally, by referring to particular provisions of art 25. The Article provides as follows:[23]

> Article 25
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> Exchange of information
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> 1. The competent authorities of the Contracting States shall exchange such information as is necessary for carrying out the provisions of

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22 Chatfield has appealed against the High Court strike out decision.

23 Double Taxation Relief (Republic of Korea) Order 1983, sch 1.

> this Convention or of the domestic laws of the Contracting States concerning taxes covered by the Convention insofar as the taxation thereunder is not contrary to the Convention, as well as to prevent fiscal evasion. The exchange of information is not restricted by Article 1. Any information received by a Contracting State shall be treated as secret in the same manner as information obtained under the domestic laws of that State and shall be disclosed only to persons or authorities (including courts and administrative bodies) involved in the assessment or collection of, the enforcement or prosecution in respect of, or the determination of appeals in relation to, the taxes covered by the Convention. Such persons or authorities shall use the information only for such purposes. They may disclose the information in public court proceedings or in judicial decisions.
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> 2. In no case shall the provisions of paragraph 1 be construed so as to impose on a Contracting State the obligation:
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> (a) to carry out administrative measures at variance with the laws and administrative practice of that or of the other Contracting State;
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> (b) to supply information which is not obtainable under the laws or in the normal course of the administration of that or of the other Contracting State;
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> (c) to supply information which would disclose any trade, business, industrial, commercial or professional secret or trade process, or information, the disclosure of which would be contrary to public policy (ordre public).

[29] Ms Rose noted that under art 25(1), the competent authorities are obliged to exchange only information that is "*necessary* for carrying out the provisions of this Convention or of the domestic laws of the Contracting States concerning taxes covered by the Convention".[24] We took her to be suggesting that, if discovery is obtained of the documents exchanged by the NTS and the Commissioner, Chatfield might then be in a position to demonstrate that the NTS request did not involve something that could be said to be "necessary" for the purposes envisaged by the article. This proposition, unaccompanied by any particularity, indicates that Chatfield is "fishing". It is an unpersuasive basis on which to seek an order under s 10(2)(i) of the Judicature Amendment Act.

[30] Insofar as art 25(2) is concerned, Ms Rose noted that under para (a), art 25(1) is not to be construed so as to impose on a contracting state the obligation to carry out administrative measures at variance with the laws and administrative practice of

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[24] Emphasis added.

that or the other contracting state. Ms Rose noted that amongst the material that had been sought in some of the notices issued by the Commissioner was material referring to years outside limitation periods arising under the relevant Korean laws. She referred to material subject to five and 10 year limitation periods. However, to the extent that there are notices that extend further back in time than envisaged by the relevant limitation periods, that will be plain on the face of the notices that are already in Chatfield's possession. That is not a reason for making an order for discovery under s 10.

[31] The fundamental point to be made, however, is that the pleading as it stands makes an assertion that is apparently incorrect on its face since it is clear that the Commissioner did take art 25 into account.[25] If there are particular respects in which it could be said she did not do so (and these particulars make an order for discovery appropriate) they have not been pleaded. Either way, we can see no basis in the pleading as it currently stands to justify the making of a discretionary order for discovery under s 10.

[32] We accept, as Ms Rose submitted, that there are important issues at stake when the Court is asked to order discovery in a case involving a request made by a foreign state under a double taxation agreement. But those issues are not addressed in a vacuum. The extent to which discovery may be obtained must be governed by the pleading and in New Zealand, where an application for review may be filed as of right without any requirement for leave, we see no reason why any application for discovery should not be assessed according to the issues made relevant by the pleading. Here it is plain that, when examined against the surviving pleaded cause of action, the documents for which discovery is sought have not been shown to be relied on by Chatfield, or to adversely affect its case or to adversely affect or support another party's case.

[33] Applying that approach in the present case has the result that the appellant has not established any basis upon which an order for discovery should be made.

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[25] It is not clear to us why the Commissioner has not cross-appealed against the High Court strike out decision.

Result

[34] Although our reasons differ, we uphold the result reached in the High Court decision. The appeal is dismissed.

[35] The appellant must pay the respondent costs for a standard appeal on a band A basis and usual disbursements.

[36] We add this postscript. It appears the Commissioner has not taken any steps to enforce Chatfield's compliance with the s 17 notices which were issued over two years ago. Mrs Courtney was unable to offer any explanation for this inactivity other than to refer to the existence of this litigation. It is for the Commissioner to decide what steps should be taken, but we record the observation made at the hearing that we do not view Chatfield's application for judicial review as operating, of itself, to defer or stay the statutory processes available to her to secure the company's performance of its obligations.

Solicitors:
Bell Gully, Auckland for Appellant
Crown Law Office, Wellington for Respondent