IN THE COURT OF APPEAL OF NEW ZEALAND

CA395/2017
[2018] NZCA 129

BETWEEN	GARRY ALBERT MUIR Appellant
AND	COMMISSIONER OF INLAND REVENUE Respondent

Hearing:	21 March 2018
Court:	Winkelmann, Courtney and Mallon JJ
Counsel:	R B Hucker and J E Tomlinson for Appellant S J Leslie and G H H Gordon for Respondent
Judgment:	30 April 2018 at 11.30 am

JUDGMENT OF THE COURT

A The appeal is dismissed.

B The appellant is ordered to pay costs to the respondent for a standard appeal on a band A basis.

REASONS OF THE COURT

(Given by Mallon J)

Introduction

[1] Dr Muir appeals a High Court decision of Associate Judge Bell granting summary judgment in favour of the Commissioner of Inland Revenue (the Commissioner) for unpaid income taxes, interest and penalties for the years ended

31 March 1997 to 31 March 2010 totalling $8,179,830.94 (the summary judgment).[1] This appeal is a further step in Dr Muir's extended efforts to challenge the Commissioner's assessments of Dr Muir's tax liability for those years.

[2] The assessments arise out of a scheme (known as the Trinity scheme) which Dr Muir designed. Under the scheme Dr Muir invested in a loss-attributing qualifying company, Redcliffe Forestry Venture Ltd (Redcliffe). Redcliffe claimed substantial deductions, under subpart EG of the Income Tax Act 1994 (the Act) (and its successors), that it passed to Dr Muir. Dr Muir offset these deductions against his taxable income. The Commissioner disallowed these deductions.[2]

[3] Dr Muir's challenges to his income tax assessments for the 1997 to 2010 years were stayed pending the final determination of the legitimacy of the Trinity scheme. This determination proceeded by way of test cases on the Commissioner's assessments for the 1997 and 1998 years for a number of entities and individuals which had invested in the Trinity scheme. Dr Muir was not one of the individuals included in the test cases. The test cases reached the Supreme Court which held the scheme was a tax avoidance arrangement.[3]

[4] Following that determination, Dr Muir pursued his challenges to the Commissioner's assessments of his tax liability before the Taxation Review Authority (the Authority) and the courts. The present appeal concerns whether the Associate Judge had jurisdiction to determine the Commissioner's summary judgment application when the High Court had yet to determine whether there were extant challenge proceedings under Part 8A of the Tax Administration Act 1994.

Background

[5] There have been many stages to the litigation involving the Trinity scheme. However, for present purposes, the key stages are as follows.

---

1 *Commissioner of Inland Revenue v Muir* [2017] NZHC 1413, (2017) 28 NZTC 23–019.

2 Other entities and individuals had also invested in the Trinity scheme. They similarly claimed their losses as deductions from their taxable income. The Commissioner disallowed the deductions.

3 *Ben Nevis Forestry Ventures Ltd v Commissioner of Inland Revenue* [2008] NZSC 115, [2009] 2 NZLR 289 at [148] [*Ben Nevis*].

[6] 19 December 2008: The Supreme Court confirmed in a test case the Trinity scheme was a tax avoidance arrangement.[4] The decision concerned the 1997 and 1998 tax years. The deductions had been claimed under subpart EG of the Act (depreciation). The Supreme Court held those deductions satisfied the ordinary meaning of the provisions under which they were claimed. However, the use of those provisions was not within Parliament's purpose and contemplation. The Commissioner had correctly treated them as void.

[7] 1 February 2011: In TRA 42/03, 105/04, 23/05, 54/05 and 38/07, the Authority struck out Dr Muir's challenge proceeding for the years 1997–2006.[5] Dr Muir had contended the claimed deductions should have been considered under subpart EH of the Act (financial arrangements). The Authority considered the Supreme Court in *Ben Nevis* had determined subpart EG applied but the scheme was nevertheless void because it was a tax avoidance arrangement. This decision had finally determined all matters as between the parties to that case and their privies which included Dr Muir. Issue estoppel therefore precluded Dr Muir from challenging the Commissioner's assessments, his challenge proceedings were an abuse of process, and the proper basis on which the deductions should have been considered were moot because the scheme was a tax avoidance arrangement.

[8] 22 April 2015: In CIV-2011-404-1132, Faire J struck out Dr Muir's proceeding in the High Court challenging the Commissioner's assessment of his income tax for the years 1997 and 2007–2010 (the Commissioner's strike out application).[6] Faire J also dismissed Dr Muir's appeal from the Authority's decision.[7] Dr Muir contended subpart EH was mandatory and the Commissioner's assessments for him were invalid. Faire J considered the Supreme Court in *Ben Nevis* had finally decided the appropriate analysis of the Trinity scheme. This meant there was an issue estoppel as against the parties and their privies. He considered Dr Muir was a privy, as the architect of, and investor in, the scheme and through his control of Redcliffe. As such *Ben Nevis* was binding on him and his proceeding was an abuse of process.

---

4 *Ben Nevis*, above n 3.
5 *Muir v Commissioner of Inland Revenue* [2011] NZTRA 2.
6 *Muir v Commissioner of Inland Revenue* [2015] NZHC 792, (2015) 27 NZTC 22–004.
7 Faire J also dismissed an appeal from the Tribunal's decision declining an application for recall.

[9] 8 December 2015: The Court of Appeal dismissed Dr Muir's appeal from Faire J's decision.[8] Dr Muir contended he was not a privy to the *Ben Nevis* decision which was for the 1997 and 1998 years. The Court of Appeal disagreed. It held *Ben Nevis* created an issue estoppel against Dr Muir for the 1997 and 1998 tax years. It was always open for the parties to have claimed deductions under subpart EH in those proceedings and it was an abuse of process to now attempt to litigate issues which could have been determined in the previous proceeding. For the 1999 and subsequent tax years, it would be an abuse of process to allow Dr Muir to pursue his challenge because he would inevitably fail. That was because, even if the deductions were lawful under subpart EH, the deductions would remain part of a tax avoidance arrangement given the findings in *Ben Nevis*.[9]

[10] 20 July 2016: The Supreme Court granted leave for Dr Muir to appeal the Court of Appeal's decision on the 1999 and subsequent tax years.[10] The grant of leave was on the question of whether the doctrines of issue estoppel and/or abuse of process operated to prevent Dr Muir from pursuing his subpart EH argument for the 1999 and subsequent tax years.[11] Dr Muir then sought to amend his grounds of appeal. He no longer sought to rely on his subpart EH argument applied to the 1999 and following tax years. He wished to contend he was not prevented from claiming deductions under two other provisions for the 2009 year, nor from challenging the imposition of penalties or the existence of bona fides in any year.

[11] 26 August 2016: The Supreme Court held Dr Muir had correctly conceded the leave to appeal it had granted should be revoked. This was because Dr Muir no longer wished to pursue his subpart EH argument which had been the subject of the grant of leave. The Supreme Court explained the consequence of this as follows: "[t]he consequence is that the decision of the Court of Appeal will stand, and the appellant's proceedings will remain struck out in their entirety."[12]

---

8 *Muir v Commissioner of Inland Revenue* [2015] NZCA 591, (2015) 27 NZTC 22–034.
9 The Court of Appeal also ordered costs against Dr Muir on an indemnity basis.
10 *Muir v Commissioner of Inland Revenue* [2016] NZSC 90, (2016) 27 NZTC 22–060.
11 The Supreme Court also granted leave on the decision to award indemnity costs against Dr Muir.
12 *Muir v Commissioner of Inland Revenue* [2016] NZSC 113, (2016) 27 NZTC 22–067 at [11] per Arnold J.

[12] 26 August 2016: In TRA 42/03, 105/04, 23/05, 54/05 and 38/07, Dr Muir forwarded an amended statement of claim to the Authority relating to the 1998 to 2006 income tax years. This pleading raised matters which were said to mean no valid assessments had been made by the Commissioner for those years.[13] The Authority refused to accept the proceeding for filing (because his earlier proceeding had been struck out).

[13] 29 August 2016: In CIV-2011-404-1132, Dr Muir filed an amended statement of claim in the High Court relating to the 1997 and 2007–2010 income tax years. This pleading also relies on new matters (that is, not subpart EG and EH of the Act) that are said to give rights of deduction.[14] The High Court Registrar accepted the amended statement of claim for filing.[15]

[14] 14 September 2016: The Commissioner filed in the High Court an application to review the Registrar's acceptance for filing of the amended statement of claim in CIV-2011-404-1132.

[15] 8 November 2016: Dr Muir filed in the High Court an application for judicial review of the Authority's decision not to accept the amended claim in TRA 42/03, 105/04, 23/05, 54/05 and 38/07.

[16] 5 December 2016: The Court of Appeal dismissed Dr Muir's application (dated 7 November 2016) for recall of its 8 December 2015 decision.[16] It considered the merits of the Commissioner's strike out application "have been finally determined by the Supreme Court. This Court is now *functus officio*."[17]

---

13 Arising out of a pleading referring to a payment in money's worth of $5,200,000 by Redcliffe to Trinity in July 2009 under an agreement between Southern Lakes Forestry Joint Venture and Trinity dated 23 July 2009.

14 Associate Judge Bell notes the amended pleadings both refer to a payment in money's worth of $5,200,000 by Redcliffe to Trinity in July 2009 under an agreement between Southern Lakes Forestry Joint Venture and Trinity dated 23 July 2009.

15 The Commissioner filed a memorandum, at the registry's request, detailing the procedural history of the case. The High Court then directed that any challenge to the acceptance for filing of the amended statement of claim would need to be made on appropriate application.

16 *Muir v Commissioner of Inland Revenue* [2016] NZCA 579.

17 At [3].

[17] 23 June 2017: In the High Court, Associate Judge Bell granted the Commissioner's summary judgment against Dr Muir for $8,179,830.94 being unpaid taxes, interest and penalties for the years 1997 to 2010. It is the appeal from this judgment that is presently before us. Associate Judge Bell held the evidence submitted by the Commissioner proved the amount of the debt claimed. The issue was whether it was due and owing. Dr Muir contended it was not on the basis there had not been a final determination of his tax assessment while he had amended challenge proceedings yet to be determined. Associate Judge Bell held there had been a final determination. More particularly:

(a) The Commissioner contended the day of determination of final liability of Dr Muir's assessments for the 1997 and 1998 years was 20 July 2016 when the Supreme Court refused leave to appeal for those two years. This meant the 30 days for payment expired on 19 August 2016.

(b) The Commissioner contended the day of determination of final liability of Dr Muir's assessment for the 1999–2010 years was 26 August 2016 when the Supreme Court revoked leave to appeal for those years. This meant the 30 days for payment expired on 25 September 2016.

(c) Dr Muir contended the day of determination of final liability had not arrived because he continued to have proceedings pending before the Authority and the High Court challenging the assessments. He was entitled to file his amended pleadings because his pleadings had been struck out but had not been finally determined on their merits.

(d) Associate Judge Bell considered the High Court, Court of Appeal and Supreme Court had all made it clear that the proceedings, not just the pleadings, were at an end. Once a proceeding was at an end it was not possible to file fresh pleadings in the same proceeding.

(e) Because the proceeding had been struck out on procedural grounds (rather than on its merits) Associate Judge Bell then asked whether Dr Muir could start a fresh challenge proceeding. He concluded

Dr Muir could not. Pursuant to s 138B(1)(c) of the Tax Administration Act, any challenge proceedings had to be brought within two months following the issue of the relevant notice of assessment (the response period). Here the last assessment was issued on 28 March 2013. Therefore, the proceedings filed on 29 August 2016 were well out of time.

(f) Exceptional circumstances under s 138D of the Tax Administration Act for commencing a proceeding after the response period did not exist. Dr Muir had not applied to the Authority or the Court for orders permitting him to bring such proceedings. The evidence did not give rise to any arguable case of exceptional circumstances. Dr Muir was seeking to raise arguments which could have been included from the outset and fresh challenge proceedings at this stage were abusive.

(g) Associate Judge Bell considered he had jurisdiction to determine if there existed challenge proceedings under Part 8A of the Tax Administration Act and when the day of determination of final liability arose, even though an Associate Judge does not have jurisdiction over those challenge proceedings. He was not making any finding on the correctness of the assessments (which was a matter for the hearing authority). While sometimes a court hearing a tax collection proceeding may wish to await the outcome of another proceeding before deciding whether the deferral period had come to an end, it was not appropriate to do so here – the other proceedings were doomed to fail.

(h) Associate Judge Bell declined an adjournment application to await the outcome of the upcoming two High Court proceedings (that is, those before Toogood and Jagose JJ). He considered those proceedings were pointless and the taxes had clearly fallen due.[18]

---

[18] He also declined an adjournment on the grounds counsel had only recently been instructed. He also declined a recusal application made on the ground of apprehended bias.

[18] 29 August 2017: In the High Court, Toogood J granted the Commissioner's application to review the Registrar's decision to accept Dr Muir's amended statement of claim dated 29 August 2016.[19] The Judge was satisfied the amended statement of claim could not be filed because the proceeding had been brought to an end when Faire J struck out the proceeding. The Judge agreed with Associate Judge Bell in the summary judgment that although Faire J had referred to striking out the proceeding, there was no doubt he intended to dismiss the proceeding as he had held that it was an abuse of the Court's process. The appellate courts confirmed unequivocally that the proceedings were at an end. This meant the Registrar's acceptance of the amended statement of claim was a nullity. Tendering the amended pleading was an abuse of the Court's process. Accordingly, the Registrar was directed to remove the pleading from the file and return it to Dr Muir.

[19] 29 November 2017: In the High Court, Jagose J dismissed Dr Muir's application for judicial review of the Authority's refusal to accept the amended claim tendered to it.[20] The Judge referred to Associate Judge Bell's decision that it had already been determined that Dr Muir's proceedings in the Authority and in the Court were at an end.[21] It was therefore not possible to file an amended pleading.[22]

[20] Appeals have been filed from the decisions of Toogood and Jagose JJ. The appeal from the decision of Toogood J is set down to be heard on 31 May 2018 (CA549/2017). The appeal from the decision of Jagose J is yet to be set down but is currently awaiting an application for fixture (CA16/2018).

---

19 *Muir v Commissioner of Inland Revenue* [2017] NZHC 2082, (2017) 28 NZTC 23–029. This judgment also dealt with an amended pleading which another party involved in the Trinity scheme had sought to file but which had been rejected by the Registrar. The hearing took place on 3 July 2017, that is, in the month after the summary judgment application was heard and granted by Associate Judge Bell.

20 *Muir v Taxation Review Authority* [2017] NZHC 2932.

21 Citing Associate Judge Bell's summary judgment decision at [44] which referred to the decisions of the Authority, the High Court, the Court of Appeal and the Supreme Court which struck out the pleadings.

22 *Muir v Taxation Review Authority*, above n 20, at [15].

The statutory provisions

[21] The Commissioner's assessment of tax (a disputable decision), [23] can be disputed only under Part 8 or Part 8A of the Tax Administration Act. Section 109 provides:

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

[22] For present purposes the relevant procedure is Part 8A. Section 138B provides for the challenge proceedings to be commenced "in a hearing authority".

[23] The challenge proceeding must be commenced within "the response period following the issue of the relevant notice of assessment".[24] If "a hearing authority considers that exceptional circumstances apply, the hearing authority may … allow [the taxpayer] to commence a challenge … after the response period".[25]

[24] Section 138P provides the powers of a hearing authority hearing a challenge as follows:

> **138P Powers of hearing authority**
>
> (1) On hearing a challenge, a hearing authority may—
>
> (a) confirm or cancel or vary an assessment, or reduce the amount of an assessment, or increase the amount of an assessment to the extent to which the Commissioner was able to make an assessment of an increased amount at the time the Commissioner made the assessment to which the challenge relates; or
>
> (b) make an assessment which the Commissioner was able to make at the time the Commissioner made the assessment to

---

23 Tax Administration Act 1994, s 3.
24 Section138B(1)(c).
25 Section 138D(1).

> which the challenge relates, or direct the Commissioner to make such an assessment.

[25] A hearing authority is the Authority or the High Court.[26] It is accepted that an Associate Judge is not a "hearing authority" for the purposes of Part 8A.

[26] The effect of bringing a challenge under Part 8A is to defer the due date for the payment of tax. Specifically, "deferrable tax" is defined as the amount to which a taxpayer "makes a competent objection under Part 8 or that the person challenges under Part 8A."[27] The period of deferral ends "at the expiry of the day that, in relation to the deferrable tax is the day of determination of final liability".[28] A taxpayer is not liable to pay the deferrable tax until the 30th day after the date of determination of final liability.[29]

[27] For a challenge under Part 8A, the "day of determination of final liability" means (so far as is presently relevant):[30]

> **3 Interpretation**
>
> …
>
> **day of determination of final liability—**
>
> …
>
> (b) for the purposes of Part 8A, means—
>
> …
>
> (iii) if a challenge is determined by a Taxation Review Authority in its general jurisdiction, and not by a court, the day on which the Authority determines the challenge.
>
> (iv) if a challenge is determined by a court, whether or not by way of appeal, the day on which the challenge is finally determined, whether in those proceedings or in a subsequent appeal.

[28] Recovery of unpaid tax is dealt with under Part 10 of the Tax Administration Act. Section 156 provides that all unpaid tax is recoverable by the Commissioner on

---

26 Section 3.
27 Section 3.
28 Section 3.
29 Sections 3,138I and 142F.
30 Section 3.

behalf of the Crown "by suit" in the Commissioner's name. It further provides that the District Court has jurisdiction to determine proceedings brought by the Commissioner to recover tax whatever the amount involved. That provision does not exclude the High Court's jurisdiction. Here the Commissioner elected to file the summary judgment application in the High Court.

Appeal

[29] Dr Muir contends the Associate Judge exceeded his jurisdiction on the summary judgment application. He contends that only a hearing authority as defined in the Tax Administration Act can determine if there are extant challenge proceedings under Part 8A of that Act such that the tax remains deferrable. It will be for the Court of Appeal, hearing the appeals from the decisions of Toogood and Jagose JJ, to decide if the amended claims (filed in the Authority and the High Court on 26 and 29 August 2016) are to be the subject of a Part 8A hearing.[31]

[30] Dr Muir contends that, if the Court of Appeal finds the amended claims could be filed, then the effect of the Associate Judge's decision is to find payable tax which the hearing authority is charged with determining *de novo*.[32] He contends the earlier courts proceeded on the mistaken basis that the Trinity scheme continued in existence after 2009 when it had not. The promises to pay in 2048, which were a part of that scheme, no longer exist. Dr Muir no longer wishes to claim the deductions and subpart EH prevents them from being claimed. Without those deductions, the challenged assessments will fail *in limine*: no deduction will exist to void and no penalty tax will be payable. Dr Muir will have to pay income tax but this will be less than the amount for which summary judgment has been awarded.

[31] We do not accept the Associate Judge exceeded his jurisdiction. The arguable defence Dr Muir raised to the summary judgment was that his challenge proceedings had not been finally determined. The Associate Judge was therefore considering whether it was reasonably arguable that Dr Muir's challenge proceedings were at an

---

31 The Court of Appeal would be a hearing authority for the purposes of Part 8A.

32 Because in the striking out cases (Faire J's decisions and the appeals to the Court of Appeal and Supreme Court) it was the pleading (High Court Rules 2016, r 15.1(1)), rather than the proceeding (r 15.2) which was struck out.

end following the Supreme Court's decision of 26 August 2016. He was interpreting that decision (and the decisions which led to it) in finding that they had been finally determined. In doing so, he was not assuming any jurisdiction over the challenge proceedings.

[32] In support of his submission Dr Muir's counsel relied on the discussion of Part 8A challenges by McGrath J in *Tannadyce Investments Ltd v Commissioner of Inland Revenue*.[33] In that discussion McGrath J said:

(a) Challenge proceedings under Part 8A must be filed in a hearing authority, which is defined as either the Authority or the High Court.[34]

(b) Section 138P sets out the powers of a hearing authority when considering a challenge.[35]

(c) A hearing authority has all the usual powers to deal with preliminary issues ahead of, and separately from, other matters of challenge. For example, to give directions for the just and expeditious determination of the challenge.[36]

(d) The effect of s 109 is that no assessment may be disputed in any court or in any proceedings on any ground except in proceedings taken under the Act. And:[37]

> It is clear that by means of s 109 Parliament was concerned to ensure that disputes and challenges capable of being brought under the statutory procedures were brought in that way and were not made the subject of any other form of proceeding in a court or otherwise.

---

33 *Tannadyce Investments Ltd v Commissioner of Inland Revenue* [2011] NZSC 158, [2012] 2 NZLR 153. He also referred to subsequent decisions discussing that case such as *Charter Holdings Ltd v Commissioner of Inland Revenue* [2016] NZCA 499, (2016) 27 NZTC 22–075 and *Skinner v R* [2016] NZSC 101, [2017] 1 NZLR 289.

34 At [50].

35 At [50].

36 At [51].

37 At [53].

[33] These comments are about bringing and determining challenge proceedings. They are about what a taxpayer must do if he or she wishes to challenge an assessment and who has authority to determine those proceedings. The Associate Judge's decision did not determine any challenge proceeding or make any procedural or preliminary decisions ahead of a determination on challenge proceedings. He found the challenge proceedings had already been finally determined by the courts (that had jurisdiction). He therefore found, in his summary judgment jurisdiction on the Commissioner's debt recovery proceeding, that the due date for payment of the tax had passed and the tax was unpaid. In so doing, he did not exceed his jurisdiction.

[34] We accept, however, that a potential timing difficulty arises because the summary judgment has been heard in advance of the decisions of Toogood and Jagose JJ and any appeal from those decisions. It was theoretically possible that Toogood and Jagose JJ would have found the amended pleadings should not be struck out and should have been accepted for filing. That would have resulted in potentially inconsistent decisions in the High Court as to whether there were challenge proceedings afoot.

[35] Similarly, it is theoretically possible that the Court of Appeal, hearing the appeals from the decisions of Toogood and Jagose JJ, will allow those appeals. If that were the outcome, the Associate Judge would have erred in finding the tax was due. However, in the meantime, we would have dismissed Dr Muir's appeal from the Associate Judge's decision on the basis that an Associate Judge can decide whether challenge proceedings have been finally determined by a hearing authority.

[36] It was ultimately a matter of judgment for the Associate Judge whether, because of the potential timing difficulty, to grant an adjournment of the summary judgment application (potentially with a direction that it be heard with those proceedings). He was entitled to make an assessment of the prospects of the outstanding proceedings in the High Court when deciding to refuse an adjournment.

He was not required to grant an adjournment if his assessment was that a final determination had been made and further proceedings were not permitted.[38]

Result

[37] The appeal is dismissed.

[38] We order costs against Dr Muir for a standard appeal on a band A basis. The Commissioner did not seek certification for a second counsel and it is accordingly not made.

Solicitors:
Hucker & Associates, Auckland for Appellant
Crown Law Office, Wellington for Respondent

[38] Otherwise judgment on the tax due might be perpetually on hold – Dr Muir could file further amended pleadings or fresh challenge proceedings the day before the hearing date of the present appeals and contend they need to be heard before judgment on the tax due could be entered.