

IN THE SUPREME COURT OF NEW ZEALAND

**SC 87/2014
[2014] NZSC 174**

BETWEEN CLIVE RICHARD BRADBURY AND
GREGORY ALAN PEEBLES
Applicants

AND COMMISSIONER OF INLAND
REVENUE
Respondent

SC 90/2014

BETWEEN ACCENT MANAGEMENT LIMITED
Applicant

AND ATTORNEY-GENERAL
First Respondent

COMMISSIONER OF INLAND
REVENUE
Second Respondent

SC 103/2014

BETWEEN CLIVE RICHARD BRADBURY AND
GREGORY ALAN PEEBLES
Applicants

AND JUDICIAL CONDUCT
COMMISSIONER
Respondent

Court: Elias CJ, William Young and Arnold JJ

Counsel: G J Judd QC for Applicants SC 87/2014 and SC 103/2014
G A Muir for Applicant SC 90/2014
K L Clark QC and R L Roff for Respondent SC 87/2014
K L Clark QC and S J Leslie for Respondents SC 90/2014
D J Goddard and L Theron for Respondent SC 103/2014
L J Taylor QC for His Honour Justice Venning in SC 103/2014

Judgment: 2 December 2014

JUDGMENT OF THE COURT

- A** **The applications for leave to appeal are dismissed.**
- B** **Costs are reserved. If the respondents wish to obtain orders for costs they should apply within 14 days setting out in detail the orders sought. If such applications are made, the applicants may respond within a further 14 days.**
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REASONS

Introduction

[1] This judgment addresses three related applications for leave to appeal:

- (a) *Bradbury v Commissioner of Inland Revenue* (SC 87/2014);
- (b) *Accent Management Ltd v Attorney-General* (SC 90/2014); and
- (c) *Bradbury v Judicial Conduct Commissioner* (SC 103/2014).

All involve proceedings which, in one way or another, are sequels to the judgment of this Court in *Ben Nevis Forestry Ventures Ltd v Commissioner of Inland Revenue*¹ which addressed the Trinity tax avoidance scheme. In the case of the first two applications, the underlying claims seek to impeach the *Ben Nevis* result. The High Court and Court of Appeal have concluded that the same is true of the third application.² All applications form part of a broader pattern of litigation commenced by participants in the Trinity scheme based on the premises that:

¹ *Ben Nevis Forestry Ventures Ltd v Commissioner of Inland Revenue* [2008] NZSC 115, [2009] 2 NZLR 289.

² *Muir v Judicial Conduct Commissioner* [2013] NZHC 989, (2013) 26 NZTC 21-019 at [174]; and *Bradbury v Judicial Conduct Commissioner* [2014] NZCA 441, (2014) NZTC 21-099 at [108].

- (a) the *Ben Nevis* litigation was decided on the wrong legal basis as it should have been determined under subpart EH of the Income Tax Act 1994; and
- (b) the trial Judge was biased.

The subpart EH argument – an overview

[2] Before the *Ben Nevis* litigation got underway, both the Commissioner of Inland Revenue and the taxpayers were aware of the possible application of subpart EH. Neither, however, relied on subpart EH in the High Court³ and Court of Appeal⁴ stages of the case.⁵ In the Supreme Court, Accent Management (but not the other appellants) unsuccessfully sought to rely on subpart EH.⁶

[3] Since then there have been three attempts to challenge the result arrived at in *Ben Nevis* by reference to subpart EH:

- (a) Judicial review proceedings in respect of the Commissioner's original assessments. The claim was dismissed by Keane J as an abuse of process.⁷
- (b) A contention that the High Court judgment in *Ben Nevis* was obtained by fraud (presented on the basis that the Commissioner, in not invoking subpart EH, presented a false case). This claim was rejected by this Court in *Commissioner of Inland Revenue v Redcliffe Forestry Venture Ltd*.⁸
- (c) The proceedings giving rise to *Accent Management Ltd v Attorney-General* (SC 90/2014), in which Accent Management claims

³ *Accent Management Ltd v Commissioner of Inland Revenue* (2005) 22 NZTC 19,027 (HC).

⁴ *Accent Management Ltd v Commissioner of Inland Revenue* [2007] NZCA 230, (2007) 23 NZTC 21, 323.

⁵ See *Ben Nevis*, above n 1, at [151].

⁶ At [150]–[151].

⁷ *Accent Management Ltd v Commissioner of Inland Revenue* (2010) 24 NZTC 24,126 (HC).

⁸ *Commissioner of Inland Revenue v Redcliffe Forestry Venture Ltd* [2012] NZSC 94, [2013] 1 NZLR 804.

that the decision of the High Court in *Ben Nevis* was unlawful because subpart EH was not applied.

Judicial bias – an overview

[4] The contention that the trial Judge was biased was first raised in the context of an attempt to have the Judge disqualify himself from dealing with issues associated with costs. This argument, which was based on the Judge's involvement with a forestry venture, was advanced before, and dismissed by, the Court of Appeal in *Muir v Commissioner of Inland Revenue*.⁹ Subsequently, more extensive arguments to the same effect have been advanced.

[5] The current argument proceeds on the basis that there were irregularities (associated with the Land Settlement Promotion and Land Acquisition Act 1952) in the set-up and a later restructuring of the forestry venture and that the Judge was beholden to the Commissioner of Inland Revenue on the basis that stamp and gift duty liabilities were incurred but not met. *Bradbury v Commissioner of Inland Revenue* (SC 87/2014) involves an attempt to set aside the High Court judgment in *Ben Nevis*¹⁰ for bias on this basis.

[6] The contention that the Judge was biased also provides at least the context for complaints against the Judge to the Judicial Conduct Commissioner, albeit that these complaints also encompass allegations as to the accuracy of the Judge's responses to the allegations against him and at times have encompassed contentions that the investment and what the complainants say were associated difficulties should have been disclosed when the Judge assumed judicial office and that the consent of the Chief High Court Judge to his involvement was required but not obtained. *Bradbury v Judicial Conduct Commissioner* (SC 103/2014) involves judicial review of the dismissal by the Judicial Conduct Commissioner of these complaints.

⁹ *Muir v Commissioner of Inland Revenue* [2007] NZCA 334, [2007] 3 NZLR 495.

¹⁰ *Accent Management Ltd v Commissioner of Inland Revenue*, above n 3.

[7] With that background in mind, we turn now to address the three applications for leave to appeal.

Bradbury v Commissioner of Inland Revenue (SC 87/2014)

[8] In the High Court the applicants sought an order setting aside the High Court judgment in the Trinity litigation on the basis of bias.¹¹ A protest to jurisdiction by the Commissioner was upheld by Katz J and the applicants' appeal to the Court of Appeal was dismissed.¹² Both courts concluded that the High Court does not have jurisdiction to set aside for bias an earlier High Court judgment which has been upheld on appeal.¹³ On the approach adopted by the Court of Appeal, the bias argument can only be addressed by this Court either on a further application for leave to appeal or, more plausibly, an application to recall the *Ben Nevis* judgment.¹⁴

[9] The applicants accept that the upholding of the High Court judgment on appeal by the Court of Appeal and Supreme Court may be material to the willingness of the High Court to set aside that judgment but contend that it does not operate so as to exclude the jurisdiction to do so.

[10] It should be borne in mind that the appeals to both the Court of Appeal and Supreme Court were by way of rehearing. The position of the applicants is that if the High Court judgment is set aside, the judgments of the Court of Appeal and Supreme Court would fall away, as nullities, a position which indicates that the proceedings are a collateral attack on this Court's decision in *Ben Nevis*. The drift of the judgment in *Redcliffe* is very much against the applicants on this point. Leaving aside the special case of judgments obtained by fraud,¹⁵ there is no authority supporting the position taken by the applicants.

¹¹ *Ben Nevis Forestry Ventures Ltd v Commissioner of Inland Revenue* [2013] NZHC 2361, (2013) 26 NZTC 21-032.

¹² *Ben Nevis Forestry Ventures Ltd v Commissioner of Inland Revenue* [2014] NZCA 350, (2014) NZTC 21-086.

¹³ *Ben Nevis Forestry Ventures Ltd v Commissioner of Inland Revenue*, above n 11, at [32]; *Ben Nevis Forestry Ventures Ltd v Commissioner of Inland Revenue*, above n 12, at [45].

¹⁴ *Ben Nevis Forestry Ventures Ltd v Commissioner of Inland Revenue*, above n 12, at [45] and [47].

¹⁵ See *Commissioner of Inland Revenue v Redcliffe Forestry Venture Ltd*, above n 8, at [28]–[33].

[11] In this context, we see no point of public and general importance in the proposed appeal and no appearance of a miscarriage of justice.

Accent Management Ltd v Attorney-General (SC 90/2014)

[12] The underlying claim is that the High Court heard the Trinity case as a hearing authority under the Tax Administration Act and that when it decided the case without reference to subpart EH, it did so by reference to provisions of the Income Tax Act which were inapplicable. The contention is that implementation of the judgment would involve the collection of tax otherwise than as authorised by Parliament and that the judgment should be set aside as unlawful.

[13] Although the primary focus of the *Redcliffe* litigation was the allegation of fraud, some of the appellants (including Accent Management) also advanced a nullity argument which is either the same as, or at best only inconsequentially different from, the contention which forms the basis of the proposed appeal. This argument was addressed in the Supreme Court's judgment in *Redcliffe* in this way:¹⁶

The nullity contention rests on two propositions:

- (a) The true legal position was that the case was governed by subpart EH; and
- (b) The failure to apply it deprived the High Court of jurisdiction to confirm the assessment.

Proposition (a) is of course the proposition that underpinned the allegation of fraud. It is subject to the same objection as we have identified in that context, namely it is challenging conclusions of this Court, on a matter of law, which it was competent to address. For the reasons previously given the High Court has no power to recall or set aside its judgment on the questions of law which have been the subject of appellate decision.

[14] The proposed appeal does not raise any issues of public or general importance and there is no appearance of a miscarriage of justice.

Bradbury v Judicial Conduct Commissioner (SC 103/2014)

[15] The allegations against the Judge were fully and painstakingly addressed by the Judicial Complaints Commissioner who, in the course of his investigation,

¹⁶ At [44].

interviewed not only the Judge but also a number of the other participants in the venture. The application for review in relation to that decision of the Judicial Conduct Commissioner was dismissed by Goddard J both on the merits and as being an abuse of process (as being in substance a collateral attack on the *Ben Nevis* judgment).¹⁷ In dismissing the appeal from that judgment, the Court of Appeal upheld her conclusions.¹⁸

[16] Although the subject matter of the proposed appeal is undoubtedly of public importance – as it involves complaints against a judge – the case primarily involves the application of the Judicial Conduct Commissioner and Judicial Conduct Panel Act 2004 to the very particular facts of the present case. The underlying arguments as to the merits do not raise any issue of public or general importance and we see no appearance of a miscarriage of justice.

[17] The conclusion that the judicial review proceedings were an abuse of process involved the application of long established, albeit general, principles. The Court of Appeal concluded that the proceeding was “part of an extended course of conduct directed at reopening the earlier litigation”.¹⁹ In this respect, too, the proposed appeal does not raise a question of public or general importance and there is no appearance of a miscarriage of justice.

Awards of indemnity costs

[18] At a number of steps in the proceedings to which we have referred, orders for indemnity costs have been made against the applicants which they wish to challenge. We see nothing in the proposed arguments which would warrant the grant of leave to appeal.

Disposition

[19] The applications for leave to appeal are dismissed. Costs are reserved. If the respondents wish to obtain orders for costs they should apply within 14 days, setting

¹⁷ *Muir v Judicial Conduct Commissioner*, above n 2, at [163] and [189].

¹⁸ *Bradbury v Judicial Conduct Commissioner*, above n 2, at [98] and [108].

¹⁹ At [108].

out in detail the orders sought. If such applications are made, the applicants may respond within a further 14 days.

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