IN THE SUPREME COURT OF NEW ZEALAND

SC 55/2017
[2017] NZSC 118

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

Court: Elias CJ, William Young and O'Regan JJ

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

Judgment: 11 August 2017

JUDGMENT OF THE COURT

A The application for leave to appeal is dismissed.

B The applicant is to pay costs of $2,500 to the respondent.

REASONS

[1] The applicant, Chatfield & Co Ltd, applies for leave to appeal against the decision of the Court of Appeal.[1] In that decision, the Court of Appeal dismissed an appeal against a decision of the High Court.[2]

[2] In the High Court proceeding, Chatfield sought judicial review of a decision by the respondent, the Commissioner of Inland Revenue, to issue notices under s 17 of the Tax Administration Act 1994 requiring it to provide information to the Commissioner held on behalf of 15 corporate clients of Chatfield. Chatfield is the

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1 *Chatfield & Co Ltd v Commissioner of Inland Revenue* [2017] NZCA 148, (2017) 28 NZTC ¶23-015 (Harrison, French and Brown JJ) [*Chatfield* (CA)].

2 *Chatfield & Co Ltd v Commissioner of Inland Revenue* [2016] NZHC 2289, (2016) 27 NZTC ¶22-072 (Lang J) [*Chatfield* (HC)].

registered tax agent of the 15 clients. The Commissioner issued the s 17 notices because the Commissioner had received a request from the National Taxation Service (NTS) of the Republic of Korea for information relating to those companies. The request by the NTS was made pursuant to the Double Taxation Agreement currently in force between New Zealand and Korea. The s 17 notices required Chatfield to produce documents and records that it held on behalf of the 15 companies.

[3] Chatfield sought judicial review of the Commissioner's decision to issue the s 17 notices on two alternative bases.

[4] The first was that the Commissioner had breached Chatfield's legitimate expectation that the Commissioner would not issue the notices without first attempting to obtain the requisite information from the 15 taxpayers themselves. This legitimate expectation was said to be based on certain statements appearing in Operational Statement 13/02.[3]

[5] The second cause of action was that, in issuing the notices, the Commissioner had failed to take into account three relevant considerations. The first of these was the statements made in the Operational Statement. The second was "the limited nature of the information held by tax agents in New Zealand". The third was the terms of the Double Taxation Agreement currently in force between New Zealand and Korea.

[6] In the High Court, Lang J struck out the cause of action based on legitimate expectation and also the first two aspects of the cause of action based on failure to take into account relevant considerations. That meant that the only cause of action for which a trial was required was the allegation that the Commissioner had failed to take into account the terms of the Double Taxation Agreement, that being a relevant consideration in relation to the decision to issue the s 17 notices.

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[3] The Operational Statement was one of a series of such statements issued by the Commissioner to provide advice and guidance to taxpayers, their agents and interested third parties to assist in compliance with the law. It came into effect on 14 August 2013.

[7] Lang J considered a number of statements made in the Operational Statement but the focus of the argument was on paras [43] and [71]–[73] of the Operational Statement.

[8] Paragraph [43] states (correctly):

> 43. Nothing in section 17 precludes Inland Revenue from seeking information from multiple sources and from sources other than the affected taxpayer, whether before or after seeking the information directly from the relevant taxpayer.

[9] Paragraphs [71]–[79] deal with requests for information from tax agents. Paragraphs [71]–[73] provide:

> 71. Inland Revenue may seek certain information from tax agents under section 17 where it becomes aware of particular transactions or arrangements entered into by taxpayers in order to identify other taxpayers who may have entered into similar transactions or arrangements.
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> 72. In the first instance, Inland Revenue will attempt to identify those taxpayers without recourse to requesting information from tax agents. However Inland Revenue may ask tax agents likely to have involvement with the arrangements in question to provide a list of clients who may have entered into a particular (or similar) arrangement.
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> 73. These requests will only be made in limited circumstances and only where it is considered the transactions or arrangements are likely to involve tax avoidance or evasion, or other offences leading to prosecution for offences. Before making such requests to tax agents, investigators must first take all reasonable steps to obtain the necessary or relevant information from the taxpayer(s) or other third parties.

[10] The case for Chatfield was that the Operational Statement created a legitimate expectation that the Commissioner would not issue a s 17 notice requiring a taxation agent to produce documents until it had first sought the information from the taxpayer or other third parties. Lang J rejected this, holding that it was not reasonably arguable that the Operational Statement made any such promise or commitment. He considered that paras [71]–[79] dealt with situations where the Commissioner considers that transactions or arrangements constitute tax avoidance, tax evasion or other offences likely to lead to prosecution. They therefore have no relevance to the present case, where the information was sought at the request of a

foreign tax agency under a double taxation agreement. He noted that para [43] contained an express statement that there was nothing in s 17 precluding the Commissioner from obtaining information from multiple sources and from sources other than the affected taxpayer whether before or after seeking the information from the taxpayer.[4]

[11] In relation to the second cause of action, the argument that the Commissioner failed to take into account as a relevant consideration the terms of the Operational Statement was found not to be reasonably arguable for the same reason. The Operational Statement did not need to be taken into account because there was nothing in the Operational Statement referring to the manner in which the Commissioner will use s 17 to give effect to New Zealand's obligations under double taxation agreements with other countries.[5]

[12] The argument that the Commissioner failed to take into account the nature of the relationship between a tax agent and its clients was also found to be untenable. The Commissioner would have had no way of knowing the nature of the relationship between Chatfield and the 15 corporate clients to which the s 17 notices related.[6]

[13] In rejecting the case advanced by Chatfield on appeal in relation to legitimate expectation, the Court of Appeal also found that Chatfield's argument failed when applied to the plain words of the Operational Statement. The Court of Appeal expressly agreed with Lang J that paras [71]–[79] of the Operational Statement dealt with a limited category of information relating to tax avoidance or evasion or offences likely to lead to prosecution.[7] It noted the clear statement in para [43] of the Operational Statement and described as a correct legal recital of the Commissioner's power under s 17.[8] It also upheld Lang J's conclusion in relation to the first two aspects of the cause of action based on the failure to consider relevant considerations.[9]

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4 *Chatfield* (HC), above n 2, at [26]–[27].
5 At [31].
6 At [32].
7 *Chatfield* (CA), above n 1, at [24].
8 At [25].
9 At [29]–[33].

[14] Chatfield argues that the proposed appeal raises important issues relating to the legitimate expectation ground of judicial review as it relates to the tax context and argues that a number of subsidiary issues are important. It also argues that the appeal is a matter of general commercial significance because it raises questions about the relationship between operational statements and similar non-statutory statements made by the Commissioner and the Commissioner's statutory obligations. It argues that a substantial miscarriage of justice may occur if the appeal is not determined because the approach adopted by the Court of Appeal is likely to cause serious unfairness for affected taxpayers and others where the Commissioner decides to depart from non-statutory published statements, policies or advice.

[15] We do not consider that the application for leave meets the criteria for leave.[10] Whether the impact of non-statutory statements, policies and advice published by the Commissioner on the exercise by the Commissioner of statutory duties is a matter of public importance is not something we need to determine, because we think it is clear that the proposed appeal does not have a proper factual footing, in light of the concurrent findings by the Courts below as to the meaning of the relevant passages in the Operational Statement. We do not think it is arguable that the lower Courts have erred in that interpretation. In those circumstances we see no appearance of a miscarriage of justice. And, even if there were a point of public importance or general commercial significance, it would not have sufficient prospects of success to justify the grant of leave.

[16] We dismiss the application for leave to appeal.

[17] The applicant is to pay costs of $2,500 to the respondent.

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

[10] Senior Courts Act 2016, s 74; Supreme Court Act 2003, s 13.