IN THE SUPREME COURT OF NEW ZEALAND

SC 9/2017
[2017] NZSC 48

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

Court: Arnold, O'Regan and Ellen France JJ

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

Judgment: 11 April 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, is the registered tax agent in respect of 15 companies having their registered offices in New Zealand. In 2014, the Commissioner of Inland Revenue received a request from the National Taxation Service (NTS) of the Republic of Korea (Korea) for information relating to those companies. The request was made under a double taxation agreement between New Zealand and Korea.[1] The Commissioner gathered some information from public sources but sought additional information from the companies directly, by

[1] Convention Between the Government of New Zealand and the Government of the Republic of Korea for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income 1773 UNTS 69 (signed 6 October 1981, entered into force 22 April 1983); see Double Taxation Relief (Republic of Korea) Order 1983.

issuing notices under s 17 of the Tax Administration Act 1994 (TAA). Chatfield then issued judicial review proceedings challenging the issuance of the notices.

[2] There were two causes of action. The first alleged that the Commissioner had breached a legitimate expectation held by Chatfield that the Commissioner would adhere to statements of intent made in an operation statement known as OS 13/02. The second alleged that the Commissioner failed to take into account three relevant considerations when making the decision to issue the s 17 notices.

[3] In the context of the proceedings, Chatfield sought copies of documents exchanged between the Commissioner and the NTS, including a copy of the original request. The Commissioner refused to provide copies, on the basis that they were not relevant to the issues in the proceedings and, in any event, related to matters of state in terms of s 70 of the Evidence Act 2006. Korea indicated that it claimed confidentiality in the information and opposed its release to Chatfield. Ultimately, Ellis J ruled that the information was confidential and should not be disclosed.[2]

[4] In addition to this, the Commissioner had applied to strike Chatfield's proceedings out, on the basis that they were not reasonably arguable. Lang J struck out the first cause of action in its entirety.[3] In relation to the second cause of action, the Judge concluded that the case in respect of two of the three alleged relevant considerations was unarguable and struck out those aspects of the claim. He did, however, allow the case to proceed on the third of the alleged relevant considerations.[4] This was that the Commissioner had decided to issue the s 17 notices without taking into account relevant terms of the double tax treaty between the two countries, in particular, art 25.

[5] Chatfield appealed against Ellis J's decision declining its application for discovery of the material exchanged pursuant to the double tax treaty. In dismissing the appeal, the Court of Appeal noted that discovery in judicial review cases is not as

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2 *Chatfield & Co Ltd v Commissioner of Inland Revenue* [2016] NZHC 1234, (2016) 27 NZTC 22-053, to be read in conjunction with Ellis J's earlier judgment: *Chatfield & Co Ltd v Commissioner of Inland Revenue* [2015] NZHC 2099, (2015) 27 NZTC 22-024.

3 *Chatfield & Co Ltd v Commissioner of Inland Revenue* [2016] NZHC 2289, (2016) 27 NZTC 22-072 at [37].

4 At [37].

of right but is a matter of discretion.[5] The Court noted that the Commissioner had in fact considered art 25, so that it was important that the alleged failings were properly particularised. They were not, however. The Court characterised the application as "fishing"[6] and concluded:

> [32] We accept … 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.
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> [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.

[6] Section 13(4) of the Supreme Court Act 2003 provided that the Supreme Court must not give leave to appeal on an interlocutory matter unless it is satisfied that it is in the interests of justice to have the proposed appeal heard and determined before trial.[7] For Chatfield, Ms Rose raises a number of points which might, in other circumstances, raise issues of a type that would warrant this Court's attention, even pre-trial. But in the particular circumstances of this case, the issue is straightforward. The Court had a discretion whether or not to order discovery. In considering whether to exercise the discretion, the Court had to consider whether the materials sought were "relevant" given the only remaining live issue, namely whether the Commissioner considered art 25 when making the decision to issue the s 17 notices. The Court concluded that, on the pleadings, they were not. That is a matter of the application of settled principles to a particular fact situation rather than a matter with which it is necessary that this Court engage.

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5 *Chatfield & Co Ltd v Commissioner of Inland Revenue* [2016] NZCA 614, (2016) 27 NZTC 22-084 at [20].

6 At [29].

7 The Supreme Court Act 2003 continues to apply to this application despite its repeal, by virtue of the transitional provisions of the Senior Courts Act 2016: sch 5, cl 10.

[7] Accordingly, the application for leave to appeal is dismissed. The applicant must pay costs of $2,500 to the respondent.

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