**IN THE SUPREME COURT OF NEW ZEALAND**

**SC 6/2016**
**[2016] NZSC 113**

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| BETWEEN | GARRY ALBERT MUIR<br>Appellant |
| AND | THE COMMISSIONER OF INLAND REVENUE<br>Respondent |

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| Hearing: | 22 August 2016 |
| Court: | Elias CJ, William Young, Arnold, O'Regan and Ellen France JJ |
| Counsel: | Appellant in person<br>T G H Smith and S J Leslie for Respondent |
| Judgment: | 26 August 2016 |

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**JUDGMENT OF THE COURT**

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**A** **The appellant's application for leave to amend the grounds of appeal is dismissed.**

**B** **Leave to appeal is revoked.**

**C** **The appellant is to pay costs of $6,000 to the respondent, plus reasonable disbursements.**

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**REASONS**

(Given by Arnold J)

[1] The appellant, Dr Muir, was granted leave to appeal to this Court[1] on two questions, namely whether the Court of Appeal[2] was right:

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1 *Muir v Commissioner of Inland Revenue* [2016] NZSC 90, (2016) 27 NZTC ¶22–060.

2 *Muir v Commissioner of Inland Revenue* [2015] NZCA 591, (2015) 27 NZTC ¶22–034 (Harrison, Dobson and Gilbert JJ) [*Muir* (CA)].

(a) to find that the appellant could not arguably pursue claims for the 1999 and following tax years in reliance on sub-pt EH of the Income Tax Act 1994 (the Act); and

(b) to award costs on an indemnity basis against the appellant.

Monday 22 August 2016 was allocated as the date for hearing the appeal.

[2] The appellant then filed an application to amend the grounds of appeal by deleting [1](a) above and substituting the following:

(a) to prevent the appellant (i) claiming deductions for payments made in the 2009 year in reliance on ss BD 2(1) and/or EW 31; or (ii) challenging the imposition of penalties or the existence of bona fides in any year, where those claims could not have been advanced in *Ben Nevis*.

The respondent, the Commissioner of Inland Revenue, opposed this application.

[3] By minute dated 9 August 2016, the Court directed that, at the hearing scheduled for 22 August 2016, it would hear argument on (i) the appellant's application to amend his grounds of appeal; and (ii) whether the Court should revoke leave to appeal. In the latter context, the Court directed the parties' attention to its judgment in *LFDB v SM*,[3] in which the Court's power to revoke leave is discussed.

[4] The present appeal concerns proceedings which are one of the many sets of proceedings which have arisen out of the so-called Trinity scheme, which this Court held in *Ben Nevis Forestry Ventures Ltd v Commissioner of Inland Revenue* was a tax avoidance scheme.[4]

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3 *LFDB v SM* [2014] NZSC 197, (2014) 22 PRNZ 262.

4 *Ben Nevis Forestry Ventures Ltd v Commissioner of Inland Revenue* [2008] NZSC 115, [2009] 2 NZLR 289. See also *Commissioner of Inland Revenue v Redcliffe Forestry Venture Ltd* [2012] NZSC 94, [2013] 1 NZLR 804; and *Bradbury and Peebles v Commissioner of Inland Revenue* [2014] NZSC 174 (leave).

[5] By way of background to the appeal, the appellant initiated challenges to his income tax assessments for the years ending 31 March 1997 to 31 March 2006 inclusive. Among other things, he argued that the assessments were invalid because they were calculated under sub-pt EG of the Act rather than in accordance with the accrual rules under sub-pt EH.[5] Because the assessments were void, the appellant argued, the Taxation Review Authority had no jurisdiction to deal with the challenges.[6] For her part, the respondent applied to strike out the appellant's challenges, on the ground that it was not open to the appellant to challenge the assessments in light of this Court's decision in *Ben Nevis*.[7]

[6] Judge Barber held that he did have jurisdiction to deal with the challenges and struck the proceedings out.[8] The appellant applied to recall the judgment, but Judge Barber refused that application.[9]

[7] The appellant then appealed to the High Court against Judge Barber's substantive decision and his recall decision. The appeals were heard in conjunction with the respondent's application to strike out other challenges brought by the appellant and others to assessments for the 1997 and 2007 to 2010 tax years. Faire J granted the respondent's application to strike out the proceedings and dismissed the appeals.[10]

[8] Faire J described the appellant's "major contention" in opposition to the strike out and in support of his substantive appeal as being that "the Trinity Scheme required analysis under subpart EH of [the Act] and not under subpart EG …".[11] Faire J considered that the appellant was a privy to the earlier decisions of the courts relating to the Trinity scheme, so that the principle of issue estoppel applied, and that in any event the challenges and substantive appeal were an abuse of process.

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5 Judge Barber in the Taxation Review Authority described the sub-pt EH contention as the "essence" of the appellant's case: see *Muir v Commissioner of Inland Revenue* [2011] NZTRA 2, (2011) 25 NZTC ¶1–006 at [18] and [68].

6 At [14].

7 At [12].

8 At [92].

9 *Muir v Commissioner of Inland Revenue* [2011] NZTRA 6, (2011) 25 NZTC ¶1–010.

10 *Muir v Commissioner of Inland Revenue* [2015] NZHC 792, (2015) 27 NZTC ¶22–004.

11 At [30].

[9] The appellant then appealed to the Court of Appeal.[12] The appellant submitted that he was, arguably, not a privy to the decision of this Court in *Ben Nevis* for the 1997 and 1998 tax years and that he could, arguably, pursue claims for deductions from 1999 onwards by relying on sub-pt EH.[13] Accordingly, his various challenges should not have been struck out. The Court of Appeal rejected these contentions and dismissed the appeal.

[10] As can be seen from this brief outline of the course of these proceedings, the contention that the Trinity scheme had been wrongly assessed under sub-pt EG of the Act and should properly have been assessed under sub-pt EH was at the heart of the appellant's case in the Courts below. This was reflected in the first of the questions identified in this Court's grant of leave.[14] Now, the appellant no longer wishes to pursue the sub-pt EH argument, but seeks to raise another argument not previously raised at any stage of the proceedings, hence his application for amendment.

[11] In oral argument, the appellant accepted that, given the nature of the new argument foreshadowed by his amendment application, the leave to appeal granted by this Court should be revoked, a concession which was correctly made. The 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] The respondent applied for costs on an indemnity basis. We do not consider that an award of costs on this basis is appropriate. Leave to appeal was granted because the issue raised by the appeal is an important one, namely the operation of the doctrines of issue estoppel and abuse of process in the context of tax proceedings. The respondent accepts this. On reflection, however, the appellant changed tack, reaching the view that he could not pursue the sub-pt EH argument but could pursue his alternative argument. In the course of the hearing, however, he came to the realisation that he cannot properly advance his new argument at this late

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12 *Muir* (CA), above n 2.
13 At [6].
14 See above at [1].

stage of these proceedings. In these circumstances, we consider that an award of $6,000 plus reasonable disbursements is appropriate.

Solicitors:
Crown Law Office, Wellington for Respondent