

IN THE SUPREME COURT OF NEW ZEALAND

SC 56/2011
[2011] NZSC 96

BETWEEN	JOHN GEORGE RUSSELL Applicant
AND	TAXATION REVIEW AUTHORITY First Respondent
AND	THE COMMISSIONER OF INLAND REVENUE Second Respondent

Court: Elias CJ, Blanchard and Tipping JJ

Counsel: Applicant in Person
P J Gunn for First Respondent
M J Ruffin, C R Gwyn and R J Wallace for Second Respondent

Judgment: 26 August 2011

JUDGMENT OF THE COURT

- A The application for leave is dismissed.**
B The appellant must pay the second respondent's costs of \$2,500.

REASONS

[1] The applicant seeks leave to appeal a decision of the Court of Appeal dated 19 April 2011.¹ In it, the Court of Appeal dismissed an appeal from Cooper J in the High Court² declining Mr Russell's application for judicial review of the Taxation Review Authority's refusal to recuse himself from hearing Mr Russell's personal tax challenge on the grounds of apparent bias.³

¹ *Russell v Taxation Review Authority* [2011] NZCA 158, (2011) 25 NZTC 20-044..

² *Russell v Taxation Review Authority* (2009) 24 NZTC 23,284 (HC).

³ *Case Z3* (2009) 24 NZTC 14,027 (TRA).

[2] While the judicial review proceedings were under way, the substantive decision of the Taxation Review Authority proceeded and after being determined against Mr Russell, was appealed to the High Court. The allegations of bias which were behind the judicial review application were not pursued in the substantive proceedings, which were determined on the basis of facts which were not in dispute. The points in issue in the substantive determination and subsequent appeal were whether there was a tax avoidance arrangement from which Mr Russell obtained tax advantage. The Taxation Review Authority's decision on these issues was the subject of an appeal by way of rehearing determined by Wylie J.⁴ A further appeal to the Court of Appeal on the substantive determination is pending.

[3] The Court of Appeal acknowledged that there was a basis for Mr Russell's objection to Judge Barber hearing the case but did not need to decide whether he should have recused himself because of the view it took that any basis for challenge had been overtaken by the High Court rehearing of the merits of the challenge to the tax assessment. There was no question of the decision of Wylie J who heard the appeal being tainted by bias both because no such allegation was made against that Judge and because the facts applied were established by agreement. The question whether the Taxation Review Authority should have recused himself was accordingly treated by the Court of Appeal as moot.

[4] In making its determination, the Court of Appeal did not regard Mr Russell as having been estopped from raising the question of bias on judicial review because of his failure to take the point in the substantive challenge. Rather, it came to the conclusion on the merits that the judicial review proceedings went nowhere because of the rehearing on the substantive challenge.

[5] In a case where apparent bias could contaminate further appeal (such as where the Taxation Review Authority had made disputed findings of fact not able to be adequately cured on appeal), judicial review of the decision by the Taxation Review Authority not to recuse himself might well have remained open. That was not the position in the present case. In the circumstances, the Court of Appeal was correct to regard any taint as having been overtaken by the substantive appeal. There is no

⁴ *Russell v Commissioner of Inland Revenue (No 2)* (2010) 24 NZTC 24,463 (HC).

appearance of any error necessitating this Court entertaining further appeal on the judicial review proceedings.

[6] The principles governing apparent bias have been the subject of recent consideration by this Court in *Saxmere Company Limited v Wool Board Disestablishment Company Limited*.⁵ The Court of Appeal correctly applied the principles in *Saxmere*. There is therefore no matter of general or public importance in the proposed appeal.

Solicitors:
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⁵ [2009] NZSC 72, [2010] 1 NZLR 35.