IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

SC 41/2018
[2018] NZSC 81

BETWEEN	GARRY ALBERT MUIR Applicant
AND	COMMISSIONER OF INLAND REVENUE Respondent

Court: Elias CJ, William Young and Ellen France JJ

Counsel: R B Hucker for Applicant
S J Leslie for Respondent

Judgment: 29 August 2018

JUDGMENT OF THE COURT

A The application for leave to appeal is dismissed.

B Costs of $2,500 are awarded to the respondent.

REASONS

The issue between the parties

[1] In issue is a judgment of Associate Judge Bell in which he entered summary judgment in favour of the Commissioner of Inland Revenue against the applicant for unpaid taxes, interest and penalties for the 1997–2010 tax years.[1] The applicant's appeal against that judgment was dismissed by the Court of Appeal[2] and the applicant now seeks leave to appeal to this Court.

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1 *Commissioner of Inland Revenue v Muir* [2017] NZHC 1413 [*Muir* (Bell AJ)].

2 *Muir v Commissioner of Inland Revenue* [2018] NZCA 129 (Winkelmann, Courtney and Mallon JJ) [*Muir* (CA)].

[2] The Commissioner's claim is founded in tax assessments for the tax years in question. The applicant challenged all of the assessments under Part 8A of the Tax Administration Act 1994. For the 1998–2006 assessments, the challenges were lodged with the Taxation Review Authority. The other assessments were challenged in the High Court.

[3] Under the Tax Administration Act, there is a deferral of liability in respect of assessments which are challenged. This deferral comes to an end on the "day of determination of final liability" which is relevantly defined in s 3 as:

> (iv) if a challenge is determined by a court, whether or not by way of appeal, the day on which the challenge is finally determined, whether in those proceedings or in a subsequent appeal: …

Under s 142F, a taxpayer is liable to pay tax which is due on the 30th day after the last day of the deferral period which, as noted above, will be the day of determination of final liability.

[4] The challenges against the 1998–2006 assessments were struck out by the Authority on 1 February 2011.[3] On 22 April 2015, Faire J decided an appeal against the Authority's decision of 1 February 2011 at the same time as he dealt with an application by the Commissioner to strike out challenge proceedings by the applicant for the 1997 and 2007–2010 assessments.[4] Faire J struck out the challenges to the 1997 and 2007–2010 assessments and dismissed the applicant's appeal from the Authority's 2011 decision. In doing so, he concluded that further prosecution of the challenge proceedings would be an abuse of process given the decision of this Court in *Ben Nevis Forestry Ventures Ltd v Commissioner of Inland Revenue*.[5] An appeal against his judgment was dismissed by the Court of Appeal on 8 December 2015.[6]

[5] On 20 July 2016, the applicant's application for leave to appeal to this Court was dismissed in relation to the 1997 and 1998 tax years but allowed in relation to the

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3 *[Muir] v Commissioner of Inland Revenue* [2011] NZTRA 2, (2011) 25 NZTC ¶1-006.
4 *Muir v Commissioner of Inland Revenue* [2015] NZHC 792, (2015) 27 NZTC ¶22-004.
5 *Ben Nevis Forestry Ventures Ltd v Commissioner of Inland Revenue* [2008] NZSC 115, [2009] 2 NZLR 289.
6 *Muir v Commissioner of Inland Revenue* [2015] NZCA 591, (2015) 27 NZTC ¶22-034.

1999–2010 tax years.[7] This grant of leave was, however, revoked on 26 August 2016.[8] The Court noted, "[t]he consequence is that the decision of the Court of Appeal will stand, and the appellant's proceedings will remain struck out in their entirety".[9]

[6] Pausing at this point, the leave and revocation decisions of this Court might be thought to have determined the challenges which had been made by the applicant. If so, this would mean that:

(a) The "day of determination of final liability" of the applicant's tax liabilities for the 1997 and 1998 tax years was 20 July 2016 (when leave to appeal in respect of those years was declined) and, for the 1999–2010 tax years was 26 August 2016 (when the revocation decision was made).

(b) The amounts assessed for those years became due 30 days after those dates.

(c) At the expiry of the 30-day periods, it was open to the Commissioner to recover the amounts assessed.

[7] In issue in the case is thus whether the leave and revocation decisions of this Court finally determined the challenges then before the Court. As to this the applicant seeks to argue that all that happened in the litigation referred to in [4]–[5] is that his pleadings were struck out but the proceedings remained alive with the result that he is entitled to pursue the proceedings on the basis of amended pleadings, providing those pleadings do not rest on assertions which are inconsistent with the reasoning in *Ben Nevis*.

The applicant's primary argument

[8] The applicant's contention is that the 20 July and 26 August 2016 decisions were not final determinations of the challenges.

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7 *Muir v Commissioner of Inland Revenue* [2016] NZSC 90, (2016) 27 NZTC ¶22-060.
8 *Muir v Commissioner of Inland Revenue (No 2)* [2016] NZSC 113, (2016) 27 NZTC ¶22-067.
9 At [11].

[9] Consistently with his position – that is that the challenge proceedings remain alive – the applicant filed, or attempted to file, amended statements of claim with the Authority and in the High Court. This attempt was unsuccessful in the case of the Authority which rejected the amended statement of claim on the basis that the challenge proceeding had been struck out. An amended statement of claim was, however, accepted by the High Court. The applicant then applied to the High Court to review the Authority's rejection of his amended statement of claim and the Commissioner applied for a review of the Registrar's acceptance of the amended statement of claim in the High Court challenge proceedings.

[10] Pausing at this point, the applicant was out of time under s 138B(1)(c) of the Tax Administration Act to file new challenges. This is because the last assessment had been issued on 28 March 2013 and challenges must be brought within two months of the issue of a notice of assessment.[10] Under s 138D, this time limit does not apply if the hearing authority is satisfied that there are exceptional circumstances which justify not commencing a challenge within the response period. The applicant, however, has not directly sought to invoke s 138D, presumably because:

(a) this would at least imply a concession that the initial challenges had been finally determined; and

(b) there would be some difficulties in establishing exceptional circumstances of a kind which would warrant an extension of time.[11]

The approach of Associate Judge Bell

[11] The summary judgment application came on for hearing prior to the determination of the two applications referred to above at [9].

[12] Associate Judge Bell entered judgment for the Commissioner on the basis that the challenges had been finally determined on 20 July and 26 August 2016. As we will note later, the applicant contends that this approach involved a prejudgment of the issues which were then still to be decided in the proceedings referred to above at [9].

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10 The response periods are set out in s 89AB of the Tax Administration Act 1994.

11 See the definition of "exceptional circumstances" in s 138D(2).

We disagree. Although Associate Judge Bell referred to those proceedings as "pointless and doomed to fail",[12] our reading of his judgment is that he did not in fact seek to predict the outcome of those proceedings; rather he addressed, on its merits, whether summary judgment could be entered against the applicant.

Subsequent decisions in respect of the challenge proceedings

[13] Associate Judge Bell's view that the other proceedings were "pointless and doomed to fail" has, at least as matters currently stand, been borne out by subsequent events as:

(a) On 29 August 2017, Toogood J granted the Commissioner's application in respect of the amended statement of claim filed in the High Court and directed the Registrar to remove it from the file and return it to the applicant.[13]

(b) On 29 November 2017, Jagose J dismissed the applicant's application to review the decision of the Authority.[14]

Both judgments proceeded on the basis that the proceedings in which the applicant had sought to file the amended pleadings were already at an end.[15]

The appeal to the Court of Appeal in respect of the summary judgment decision

[14] Somewhat awkwardly, the appeal to the Court of Appeal against the judgment of Associate Judge Bell was not linked with the applicant's appeals against the judgments of Toogood and Jagose JJ. The Court nonetheless dismissed the appeal against the entry of summary judgment on the basis that while it is "theoretically possible" that the appeals against Toogood and Jagose JJ might succeed[16] – in which

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12 *Muir* (Bell AJ), above n 1, at [54]. The applicant had argued that the Associate Judge should not decide the case while the applicant still had what he contended were live challenge proceedings. The "pointless and doomed to fail" comment was a response to that argument. The Associate Judge also expressed views as to whether the applicant could invoke s 138D. This was unnecessary as the applicant has not directly sought to do so.

13 *Muir v Commissioner of Inland Revenue* [2017] NZHC 2082 [*Muir* (Toogood J)].

14 *Muir v The Taxation Review Authority* [2017] NZHC 2932 [*Muir* (Jagose J)].

15 *Muir* (Toogood J), above n 13, at [12]; and *Muir* (Jagose J), above n 14, at [14]–[15].

16 *Muir* (CA), above n 2, at [35].

case there would be a defence to the summary judgment claim – the Associate Judge had been entitled to form his own conclusion as to whether the dates of final determination of liability had arrived.[17]

The current position

[15] The appeals to the Court of Appeal from the judgments of Toogood and Jagose JJ have been heard, but judgment has been reserved.

[16] There are thus two current streams of litigation:

(a) The summary judgment proceedings which are now before us. As noted, in this proceeding the fundamental question is whether the 2016 decisions of this Court "finally determined" the challenge proceedings.

(b) The other proceedings (the appeals against the judgments of Toogood and Jagose JJ). In these proceedings, the issue is whether it remains open, despite the 2016 judgments, for the applicant to continue the challenge proceedings on the basis of amended pleadings.

[17] By filing challenges to the relevant tax assessments, the applicant triggered to the deferral provisions of the Tax Administration Act. The deferrals came to an end when the challenges were "finally determined". If, as a result of the judgments referred to in [4]–[5] the challenge proceedings were at an end, it must follow that the challenges had been "finally determined"; this because, at that point there were no live challenges before the Court. This is all the more so as any further challenge is now out of time. All of this means that the key issue in both streams of litigation is whether the challenge proceedings have been brought to an end.

The application for leave to appeal from the judgment of the Court of Appeal on the summary judgment appeal

[18] The applicant's position is that our starting point for the assessment of the present application is that the question whether his challenges remain live "must be

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[17] At [35].

taken to be justiciable" pending determination by the Court of Appeal of the second appeal. He also argues that:

(a) Associate Judge Bell in substance determined the challenge proceedings and that such a collateral determination is inconsistent with the scheme of Part 8A of the Tax Administration Act; and

(b) the Court of Appeal's recognition of the possibility that the other appeals might be resolved in favour of the applicant was inconsistent with upholding the judgment of Associate Judge Bell.

A request for additional submissions

[19] By minute of 2 August 2018, we sought further submissions for the applicant as to:

(a) whether the challenge proceedings remained on foot after the decisions of this Court in July and August 2016; and

(b) the possible application of the res judicata principles to the proceedings before Toogood and Jagose JJ, and the later and still undetermined, appeal to the Court of Appeal against those decisions. The minute made it clear that what was in issue was whether Associate Judge Bell's judgment gave rise to a res judicata, precluding the possibility of the currently undetermined appeal being determined in favour of the applicant.

[20] Further submissions were received on 10 August. In them counsel for the applicant engaged with the first of the requests primarily by:

(a) claiming that this involved "relevant contested facts" in respect of an issue still sub judice and which was likely to come to this Court on an application for leave to appeal from the party who is unsuccessful in the Court of Appeal; and

(b) submitting that the *Ben Nevis* decision did not give rise to an estoppel or res judicata preventing the applicant from advancing the grounds relied on in the amended statements of claim referred to in [9].

Counsel dealt with the second request with the assertion that a judgment which is susceptible to appeal (as Associate Judge Bell's judgment then was) does not give rise to a res judicata.

Our approach

[21] It was open to Associate Judge Bell to take the approach he did. The question whether the challenge proceedings had been finally determined was fairly and squarely before him and he was entitled to determine it. It does not matter that the substantially same question was before the Court in other proceedings. Nor was he required to determine the question by seeking to predict the way in which the other proceedings would be determined.

[22] Instead, his judgment (unless successfully challenged) creates a res judicata and thus controls the results in the other litigation stream. This – that is a res judicata approach – has the advantage of addressing squarely the awkwardness generated by parallel sets of proceedings winding their ways through the courts. It also addresses the awkwardness of the Court of Appeal's recognition that it was possible that the other appeal might be allowed. If that were the case, there would be a defence to the summary judgment claim and an apparent inconsistency between that recognition and the upholding of a summary judgment premised on the conclusion that there was no arguable defence.

[23] As we have noted, the applicant's argument is that Associate Judge Bell's judgment did not create a res judicata because of its susceptibility to appeal. Although it is possible to find authority to this effect, there is substantial authority for the view that a judgment is relevantly final for the purposes of res judicata even if susceptible

to being reversed or varied on appeal.[18] In any event, this argument completely falls away if the current application is dismissed because the corollary of such dismissal is that Associate Judge Bell's judgment is no longer susceptible to appeal.

[24] The grant of summary judgment turns on the conclusion that the challenge proceedings have been finally determined, which in turn is premised on the finding that the judgments referred to in [4]–[5] above resulted in the challenge proceedings, and not just the pleadings, being struck out. Contrary to the way in which the applicant's submissions address the point, this conclusion does not rest on principles of res judicata or estoppel. Instead it rests on the simple proposition that the striking out of a proceeding means that that proceeding has been determined and cannot be revived by the filing of a further statement of claim.

[25] Given the way in which the judgments were expressed, particularly the Supreme Court's revocation decision, the conclusion that the proceedings were at an end might be thought to be reasonably obvious. As will be apparent, the applicant did not fully engage with our invitation to address this point. And in any event, the question arises in a context which is so specific to the very particular procedural background which we have summarised that it does not rise to a question of public or general importance.[19] Nor do we see any appearance of a miscarriage of justice.

[26] Accordingly the application for leave to appeal is dismissed. Costs of $2,500 are awarded to the respondent.

Solicitors:
Hucker & Associates for Applicant
Crown Law Office, Wellington for Respondent

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18 *Scott v Pilkington* (1862) 2 B & S 11 at 41, 121 ER 978 at 989 (QB); *Nouvion v Freeman* (1889) 15 App Cas 1 (HL) at 10–11; *Wakefield Corporation v Cooke* [1904] AC 31 (HL) at 36; *Marchioness of Huntley v Gaskell* [1905] 2 Ch 656 (CA); and *Colt Industries Inc v Sarlie* (No 2) [1966] 3 All ER 85 (CA). Some of these cases involve the enforcement of foreign judgments; but there is no apparent reason why the underlying res judicata principle should not be the same as between foreign and domestic judgments. See also K R Handly *Spencer Bower and Handley: Res Judicata* (4th ed, LexisNexis, London, 2009) at [5.19]–[5.21].

19 Senior Courts Act 2016, s 74(2)(a); and Supreme Court Act 2003, s 13(2)(a).