IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

SC 34/2019
[2019] NZSC 84

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

Court:	Glazebrook and O'Regan JJ
Counsel:	P H Courtney for Applicant R A Rose and J G Bassett for Respondents
Judgment:	7 August 2019

JUDGMENT OF THE COURT

A The application for leave to appeal is dismissed.

B The applicant must pay costs of $2,500 to the respondents.

REASONS

[1] The respondents (Chatfield) applied for judicial review of a decision of the Commissioner to issue notices under s 17 of the Tax Administration Act 1994 (the TAA) requiring Chatfield to furnish information to the Commissioner that it held in relation to specified clients of the firm. Chatfield succeeded in the High Court and

the notices were quashed.[1] The Court of Appeal dismissed the Commissioner's appeal.[2] The Commissioner now seeks leave to appeal to this Court.

[2] The background to the High Court decision was, in brief, as follows:

(a) The Korean National Taxation Service (NTS) commenced an investigation into the affairs of a Korean national who was resident in New Zealand, Mr Huh.

(b) The NTS made a request under art 25 of the New Zealand-Korea Double Tax Agreement (the DTA) for information relating to certain New Zealand companies with which Mr Huh was said to be associated.[3]

(c) In order to obtain the requested information the Commissioner issued 15 notices under s 17 of the TAA requiring Chatfield to furnish documents held on behalf of the companies.

(d) There has been protracted proceedings between the parties, as summarised in the Court of Appeal's judgment.[4]

(e) In the High Court decision to which this application for leave relates, the Court dealt with Chatfield's application for judicial review of the Commissioner's decision to issue the s 17 notices.

[3] The Commissioner wishes to pursue in this Court a number of issues that the Courts below decided against her. She argues they are matters of general or public

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1 *Chatfield & Co Ltd v Commissioner of Inland Revenue* [2017] NZHC 3289, [2018] 2 NZLR 835 (Wylie J) [*Chatfield* (HC)].

2 *Commissioner of Inland Revenue v Chatfield & Co Ltd* [2019] NZCA 73, (2019) 29 NZTC ¶24-007 (Asher, Brown and Gilbert JJ) [*Chatfield* (CA)].

3 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 70 (signed 6 October 1981, entered into force 22 April 1983). See Double Taxation Relief (Republic of Korea) Order 1983.

4 *Chatfield* (CA), above n 2, at [15]–[21].

importance and that it is therefore necessary in the interests of justice for the Court to hear and determine the proposed appeal.[5]

[4] The Commissioner wishes to argue that her decision is not justiciable. The Courts below concluded it was. The Commissioner cited in support of her argument:

(a) the dual nature of the DTA as both domestic legislation and a treaty subject to public international law; and

(b) the difficulty that the availability of judicial review would pose for the Commissioner in responding in a timely way to requests for information under DTAs.

[5] The Courts below rejected this, finding that the judicial review sought by Chatfield did not involve interpretation of any statutory rules other than s 17 of the TAA and the relevant articles of the DTA and that the matters in issue were not matters of higher policy or politically fraught.[6]

[6] As an alternative to that submission, the Commissioner wishes to argue that any review by the Courts should be "circumscribed", reflecting the points set out above, at [4]. She wishes to argue the Courts below were wrong to review the correctness of the approach of the Competent Authority (the official responsible for exchanges of information with New Zealand's treaty partners) to the NTS's request. The Court of Appeal characterised the Court's task as reviewing whether the Commissioner and the Competent Authority had interpreted and applied New Zealand law correctly.[7]

[7] We are not satisfied that either of these arguments meets the test for the grant of leave. We do not consider that the argument that the Court cannot review the Competent Authority's exercise of his or her powers and determine whether the Competent Authority correctly applied New Zealand law has sufficient prospect of success to justify a further appeal.

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5 Senior Courts Act 2016, s 74(1) and (2)(a).
6 *Chatfield* (HC), above n 1, at [40]; and *Chatfield* (CA), above n 2, at [38]–[45].
7 *Chatfield* (CA), above n 2, at [52].

[8] The Commissioner wishes to raise a further issue relating to the principles of treaty interpretation. She says the Courts below interpreted the reference in art 25 of the DTA to "necessary" in the phrase "the Contracting States shall exchange such information as is necessary for carrying out the provisions of this Convention" too narrowly. The affidavit sworn by the Competent Authority, Mr John Nash, used the terms "necessary or relevant" and "foreseeably relevant", the latter term being the test set out in the Convention on Mutual Administrative Assistance in Tax Matters.[8] It is also the formulation used in the current model bilateral tax convention published by the Organisation for Economic Co-operation and Development (OECD).[9] The "necessary" wording in art 25 of the DTA reflected the OECD model convention as it stood at the time the DTA was signed in 1981.[10]

[9] The Commissioner wishes to argue that the Courts below erred in their interpretation of art 25. The Commissioner says that, properly interpreted, there is little difference between a test of "necessary" and the tests applied by Mr Nash. We accept that the interpretation of the DTA may give rise to points of public importance given their international and domestic law status. But, for reasons we will come to, we do not see the interpretation issues as capable of altering the outcome in the present case, and for that reason we do not consider that leave for a further appeal on that issue is justified.

[10] The Commissioner also argues the Court of Appeal erred in identifying what the Competent Authority is required to do in responding to a request for information under a DTA. In fact, the Court of Appeal largely accepted the Commissioner's position on this issue.[11] Its finding against the Commissioner was based on the actual wording of Mr Nash's affidavit, which makes the point specific to the facts of this case. No matter of public importance or commercial significance arises.

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8 Convention on Mutual Administrative Assistance in Tax Matters, as amended by 2010 Protocol (opened for signature 1 June 2011, entered into force 1 March 2014). See Double Tax Agreements (Mutual Administrative Assistance) Order 2013.

9 Organisation for Economic Development and Co-operation *Model Double Taxation Convention on Income and on Capital* (OECD Publishing, 2017) at 45, art 26(1).

10 Organisation for Economic Development and Co-operation *Model Double Taxation Convention on Income and on Capital* (OECD Publishing, Paris, 1977) at Annex I, art 26.

11 *Chatfield* (CA), above n 2, at [74]–[75].

[11] An issue arose in the High Court about the disclosure of the request received from the NTS to the Court and possibly to Chatfield or its counsel or to an amicus curiae. This issue had arisen in earlier litigation between Chatfield and the Commissioner and had been resolved in the Commissioner's favour.[12] But the changes made to Chatfield's judicial review challenge since the issue was considered in those earlier proceedings meant that it was necessary to address it afresh.

[12] The detailed chronology of the development of this issue appears in the Court of Appeal judgment.[13] Ultimately, the High Court decided disclosure to it without disclosure to Chatfield or its counsel was unacceptable.[14] As the NTS did not authorise the Commissioner to disclose the letter of request to anyone other than the Court, no disclosure was made. The High Court Judge observed that the Commissioner had not been as candid in her conduct of the case as might have been expected.[15] The Court of Appeal did not associate itself with that observation but agreed that, as the relevant documents had not been disclosed, the only information available to the Court to assess the legality of the process followed was Mr Nash's affidavit.[16] That brought into focus the references in Mr Nash's affidavit to "necessary or relevant" and "foreseeably relevant" in contrast to the "necessary" standard in the DTA.

[13] The Commissioner wishes to challenge on appeal the lower Courts' insistence on disclosure in order to properly evaluate the existence or otherwise of proper grounds for the s 17 notices. We accept that a number of issues of public importance potentially arise from a consideration of that issue. But we see the argument that the Commissioner wishes to pursue (in essence, that the Court should resolve the concerns raised by Chatfield against it without being able to refer to the key document, which was in the Commissioner's possession) as having insufficient prospect of success in the present case to justify putting Chatfield to the expense and inconvenience of a further appeal.

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12 See *Chatfield & Co Ltd v Commissioner of Inland Revenue* [2015] NZHC 2099, (2015) 27 NZTC ¶22-024; *Chatfield & Co Ltd v Commissioner of Inland Revenue* [2016] NZHC 1234, (2016) 27 NZTC ¶22-053; *Chatfield & Co Ltd v Commissioner of Inland Revenue* [2016] NZCA 614, (2016) 27 NZTC ¶22-084; and *Chatfield & Co Ltd v Commissioner of Inland Revenue* [2017] NZSC 48, (2017) 28 NZTC ¶23-010.

13 *Chatfield* (CA), above n 2, at [54].

14 *Chatfield* (HC), above n 1, at [70]–[73].

15 At [89].

16 *Chatfield* (CA), above n 2, at [87].

[14] We are satisfied that it is not in the interests of justice to grant leave to appeal in this case. We therefore decline leave.

[15] We award costs to Chatfield of $2,500.

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