IN THE SUPREME COURT OF NEW ZEALAND

SC 96/2010
[2010] NZSC 155

BETWEEN	CHESTERFIELDS PRESCHOOLS LIMITED First Applicant
AND	DAVID JOHN HAMPTON Second Applicant
AND	CHESTERFIELDS PARTNERSHIP Third Applicant
AND	CHESTERFIELDS PRESCHOOLS PARTNERSHIP Fourth Applicant
AND	ANOLBE ENTERPRISES LIMITED Fifth Applicant
AND	COMMISSIONER OF INLAND REVENUE Respondent

Court: Elias CJ, McGrath and William Young JJ

Counsel: D J Hampton in person and on behalf of other Applicants
M S R Palmer for Crown

Judgment: 16 December 2010

JUDGMENT OF THE COURT

The application for leave to appeal and the associated application for directions are dismissed with costs of $2,500 to the respondent.

REASONS

[1] This case arises out of a long-standing dispute between the applicants and the Commissioner of Inland Revenue (Commissioner) around complaints by the applicants that the Commissioner:

(a) had not honoured informal arrangements made as to the taxation (mainly GST) liabilities of the applicants;

(b) had failed to act with reasonable diligence and celerity in progressing audits and processing GST returns;

(c) had behaved unreasonably over the re-registration for GST purposes of one of the applicants (Anolbe Enterprises Ltd);

(d) had acted unreasonably over the proposed remission of penalties and attempts to recover from the applicant their total tax indebtedness.

[2] In a judgment delivered on 15 December 2006 (the first review judgment), Fogarty J found generally in favour of the applicants.[1] He set aside a June 2004 decision by the Commissioner declining the remission (under s 182 of the Tax Administration Act 1994) of additional tax. He required the remission issue to be reconsidered and gave certain directions (under s 4(5) of the Judicature Amendment Act 1972) as to that reconsideration. These directions imposed constraints on the Commissioner to ensure that the reasonable expectations of the applicants were not frustrated. Relevant to the required reconsideration was the Judge's apparent view that the Commissioner was required to remit additional tax to the extent necessary to ensure that the resulting impost was proportionate to the breaches on the part of the applicants and his conclusion that if the conditions for remission stipulated in s 182 could not be satisfied, the Commissioner should resort to his more general powers under ss 6 and 6A of the Tax Administration Act.

[3] The reconsideration directed by Fogarty J resulted in a decision made on 5 June 2007 by an Inland Revenue Department officer (Mr R K Budhia). Mr Budhia's role was not easy. His reconsideration was obviously required to

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1 *Chesterfields Preschools Ltd v Commissioner of Inland Revenue* (2007) 23 NZTC 21,125 (HC).

accord with the law (including limitations provided for in s 182 of the Tax Administration Act as to the power to remit additional taxes). But he also had to give effect to Fogarty J's first review judgment which was never appealed by the Commissioner.

[4] The result of Mr Budhia's reconsideration was that the total indebtedness of the applicants was reduced, but not by much. This lead to a further judgment of Fogarty J delivered on 25 November 2008 (the second review judgment) in which he again found substantially for the applicants.[2] He concluded that Mr Budhia had been wrong in a number of respects. So he set-aside the decision of Mr Budhia and directed further reconsideration. And associated with this further reconsideration he gave further directions. In the course of his judgment, he indicated that the Commissioner was under a positive duty to achieve a result under which the penalties were proportionate to the breaches.

[5] The Commissioner appealed against the second review judgment,[3] but with distinctly limited success. This was on issues which are not themselves subject to further challenge before us. The concerns of the applicants are rather directed to the interpretation which the Court of Appeal placed on Fogarty J's comments as to proportionality and also to what the Court described as "guidance" in relation to the processes which should be followed by the Commissioner. Some of this guidance was reasonably prescriptive and based on the Court's interpretation of the first review judgment.

[6] The proposed appeal thus is not directed to what are specified by the Court of Appeal as its formal determinations. This has resulted in argument as to whether there is a right of appeal.[4] In the present context there is scope for argument that the guidance provided by the Court (which we treat as including its views on the proportionality issue) is sufficiently prescriptive in terms to amount to directions for

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2 *Chesterfields Preschools Ltd v Commissioner of Inland Revenue* (2009) 24 NZTC 23,148 (HC).

3 This appeal (*Commissioner of Inland Revenue v Chesterfields Preschools Ltd* [2009] NZCA 253, CA800/2008) was heard with a number of related appeals but no issue arises in relation to those appeals.

4 See *Arbuthnot v Chief Executive of Department of Work and Income* [2007] NZSC 55, [2008] 1 NZLR 13; *Walls v Calvert & Co* [1994] 1 NZLR 424 (CA) referring to *Lake v Lake* [1955] P 336, [1955] 2 ALL ER 538 (CA); *Amalgamated Builders Ltd v Nile Holdings Ltd* (2000) 14 PRNZ 652 (CA); and *Caie v Attorney-General* [2006] NZAR 379 (CA).

the purposes of s 4(5)(b) of the Judicature Amendment Act. For this reason, we propose to address the merits of the application.

[7] As the Court of Appeal recognised, the first review decision could well have been subject to a successful appeal. The exercise required of Mr Budhia was unusual to say the least and we think it unlikely that similar exercises will be required in the future. The whole case is thus extremely very fact specific and has practically no precedential value.

[8] The merits of the competing positions have now been fully reviewed twice by Fogarty J and by the Court of Appeal. Leaving aside perhaps the proportionality issue, the proposed arguments do not raise any substantial issue of principle and we are not persuaded that there is an appearance of error in relation to the Court of Appeal judgment such as could give rise to a miscarriage of justice.

[9] In relation to the proportionality issue, the judgment of the Court of Appeal indicates that the applicants were not arguing for a general requirement of proportionality in relation to additional tax. Rather they were contending for a proportionality assessment by reference to what the Court of Appeal described as "inordinate delays on the part of the Commissioner and the related assurances and comfort given by him to the taxpayers".[5] Such an exercise, once carried out, would ensure that additional tax will be reduced to that portion of the total assessed which was referable to "the fault of the taxpayers".[6] And this is exactly what they are entitled to in terms of the Court of Appeal judgment.

[10] For those reasons we are not persuaded that an appropriate basis has been made out for granting leave to appeal.

[11] We note that the applicants have sought directions from this Court relating to the alleged late discovery of documents. The issue over the late discovery of documents was dealt with by Fogarty J in his second review judgment by a direction that it could be dealt with as part of the reconsideration he directed. The applicants

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5 At [86].
6 At [86].

did not appeal against that direction. So the application for directions is also dismissed.

Solicitors:
Crown Law Office, Wellington for Respondent