IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA74/2023
[2023] NZCA 403

BETWEEN	VERONICA HOEBERECHTS Appellant
AND	COMMISSIONER OF INLAND REVENUE Respondent

Court: Gilbert and Courtney JJ

Counsel: Appellant in Person
KIS Naik-Leong for Respondent

Judgment: (On the papers) 28 August 2023 at 3.30 pm

JUDGMENT OF THE COURT

A The application for leave to appeal the High Court leave decision is declined.

B We make no order as to costs.

REASONS OF THE COURT

(Given by Courtney J)

Introduction

[1] In November 2017 the Accident Compensation Corporation (ACC) made a lump sum payment to Ms Hoeberechts pursuant to an order of the District Court. The Commissioner of Inland Revenue treated the payment as having been received entirely in the tax year ending 31 March 2018 and liable to be taxed accordingly. Ms Hoeberechts challenged the assessment. She argued that because the payment

related to a three-year period for which the ACC had wrongly refused to accept liability for a claim, the payment should be treated, for tax purposes, as accruing over that period.

[2] The Taxation Review Authority (TRA) dismissed Ms Hoeberechts' challenge.[1] The last day for appealing the TRA's decision was 1 November 2021. Ms Hoeberechts filed her notice of appeal, and an application for special leave extending the time to appeal, on 10 November 2021.[2] Campbell J declined the application for special leave on the ground that the proposed appeal was clearly hopeless (the extension decision).[3] Ms Hoeberechts applied unsuccessfully under s 56(3) of the Senior Courts Act 2016 (SCA) for leave to appeal the extension decision (the leave decision).[4]

[3] Ms Hoeberechts has applied to this Court for leave to appeal, apparently in respect of the leave decision.[5] The Commissioner opposes the application, proceeding on the basis that leave was required under s 56(5) of the SCA to appeal the extension decision. However, no appeal lies from a decision of the High Court refusing leave to appeal under s 56(3).[6] Instead, the correct jurisdictional pathway is for Ms Hoeberechts to appeal the extension decision, and she does not need leave to do so.

Background

The payment by ACC

[4] Ms Hoeberechts suffered an injury in 2014 and made a claim for weekly compensation under the Accident Compensation Act 2001. The ACC refused her claim. Between 2014 and 2017 the Ministry of Social Development (MSD) paid

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1 *Case 2/2021* [2021] NZTRA 3, (2021) 30 NZTC 6-001.

2 High Court Rules 2016, r 20.4. The documents were initially filed on 8 November 2021 but without the necessary filing fee. They were accepted for filing for filing on 10 November 2021. The Commissioner was served on 11 November 2021.

3 *Hoeberechts v Commissioner of Inland Revenue* [2022] NZHC 2200, (2022) 30 NZTC 25-021 [Extension decision].

4 *Hoeberechts v Commissioner of Inland Revenue* [2023] NZHC 1 [Leave decision].

5 Ms Hoeberechts' application sought "special leave to appeal to the Court of Appeal on decision [2023] NZHC 1 (5 January 2023)".

6 *Crichton v Green* [2018] NZCA 247 at [26]. In that case the applicant sought to appeal a decision of the High Court refusing leave under s 60 of the Senior Courts Act 2016. However, given the similarities between the procedure prescribed in s 60(2) and that set out in s 56(3) and (5), the reasoning in *Crichton* applies equally to decisions of the High Court refusing leave under s 56(3).

Ms Hoeberechts a taxable benefit. In 2017 the District Court ordered the ACC to pay Ms Hoeberechts $188,386.95 in arrears.

[5] The ACC paid $38,386.65 to the MSD in respect of the taxable benefit payments Ms Hoeberechts had received and treated the balance (approximately $150,000) as a PAYE payment. Because the Commissioner assessed the payment as having been received during the tax year ending 31 March 2018, the ACC paid tax to Inland Revenue on that basis and paid the balance to Ms Hoeberechts.

[6] The Commissioner's assessment resulted in an unusually high income for the 2018 year. Had it been treated as accruing over the period from 2015 to 2018, as Ms Hoeberechts contended for, the tax liability would have been lower. In dismissing Ms Hoeberechts' arguments, the TRA concluded that the applicable statutory provisions[7] and the relevant case law were clear that the payment was to be treated as having been received for tax purposes in the year in which it was paid.[8]

The extension decision

[7] In seeking an extension of time to appeal the TRA's decision, Ms Hoeberechts explained that her delay was caused by the COVID-19 restrictions in place at the time. The Judge accepted this explanation.[9] He also accepted that the delay had not caused any prejudice to the Commissioner.[10] However, although those factors favoured extending the time to appeal, the Judge concluded that the appeal could not possibly succeed, essentially for the reasons given by the TRA.[11] He therefore exercised his discretion against extending the time to appeal.

The leave decision

[8] The Judge considered that the extension decision was made on an interlocutory application and s 56(3) of the SCA therefore required Ms Hoeberechts to obtain leave to appeal it.[12] Ms Hoeberechts argued that she did not need leave because — contrary

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7 Income Tax Act 2007, s BD3(2).
8 *Case 2/2021*, above n 1, at [24]–[31].
9 Extension decision, above n 3, at [18].
10 At [19].
11 At [20] and [48].
12 Leave decision, above n 4, at [3].

to her previous understanding — she had filed her appeal within the requisite period and had therefore never required an extension of time. For this, she relied on r 1.18 of the High Court Rules 2016, arguing that the Court registry had been closed for filing as a result of COVID-19 restrictions and the time for filing did not run until the registry was open. Alternatively, she argued that leave should be granted under s 56(3).

[9] The Judge rejected the first argument. He considered that, because documents could be filed electronically or by post under the Protocol for Alert Level 3 then in place,[13] the closure of the registry's public counter did not affect the obligation to file documents within the required time.[14] In any event, regardless of whether the registry was closed or not, Ms Hoeberechts was still obliged to serve the notice of appeal on the Commissioner within the requisite time and had not done so.[15]

[10] The Judge then considered whether leave should be granted under s 56(3) on the basis of whether there was an arguable error of law and whether the asserted error was of sufficient importance (either generally or to Ms Hoeberechts) to warrant the cost and delay of the appeal.[16] The Judge did not accept that there was any arguable error in the extension decision; he regarded Ms Hoeberechts' arguments as to both the interpretation of the relevant statutory provisions and the relevance of the long line of appellate cases on which the Judge had relied as untenable.[17] He accepted that the asserted error was of significant importance both to Ms Hoeberechts and to others who had received backdated payments from the ACC and been taxed at a higher rate than would have been the case had the ACC paid on time.[18] However, the Judge had no doubt that the Commissioner's treatment of the payment was in accordance with the Income Tax Act 2007 and that any change to the position would require intervention by Parliament. He therefore declined to grant leave for Ms Hoeberechts to appeal the extension decision.[19]

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13 Issued by the Chief High Court Judge on 28 February 2021.
14 Leave decision, above n 4, at [20].
15 At [19].
16 *Ngai Te Hapu Inc v Bay of Plenty Regional Council* [2018] NZCA 291 at [17]; *Tomar v Tomar* [2021] NZCA 419 at [7]; and *Finewood Upholstery Ltd v Vaughan* [2017] NZHC 1679 at [9] and [14].
17 Leave decision, above n 4, at [40]–[47].
18 At [48].
19 At [49].

The correct jurisdictional pathway

[11] Section 56(1) of the SCA provides a right of appeal from any "judgment, decree, or order of the High Court". However, where the order or decision is made on an interlocutory application, the right to appeal is constrained by s 56(3) and (5), which provide:

> (3) No appeal, except an appeal under subsection (4), lies from any order or decision of the High Court made on an interlocutory application in respect of any civil proceeding unless leave to appeal to the Court of Appeal is given by the High Court on application made within 20 working days after the date of that order or decision or within any further time that the High Court may allow.
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> …
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> (5) If the High Court refuses leave to appeal under subsection (3), the Court of Appeal may grant that leave on application made to the Court of Appeal within 20 working days after the date of the refusal of leave by the High Court.

[12] Section 4(1) of the SCA defines an "interlocutory application" as follows:

> **interlocutory application**—
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> (a) means any application to the High Court in any civil proceedings or criminal proceedings, or intended civil proceedings or intended criminal proceedings for—
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> (i) an order or a direction relating to a matter of procedure; or
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> (ii) in the case of civil proceedings, for some relief ancillary to that claimed in a pleading; and
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> (b) includes an application to review an order made, or a direction given, on any application to which paragraph (a) applies

[13] Rule 20.4(4) of the High Court Rules requires an application to the High Court for an extension of time to bring an appeal to that Court to be made by an interlocutory application. However, "interlocutory application" is only defined in the High Court Rules as "an application made in accordance with rule 7.19 or 7.41", both of which are concerned only with the manner in which the application is made, rather that its substantive nature.[20] For present purposes, it is the definition in s 4(1) of the SCA that is relevant. For the reasons we come to next, an application that is, in

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[20] Rule 1.3(1).

form, made in accordance with the requirements for an interlocutory application in the High Court Rules may nevertheless not be an interlocutory application in substance within the meaning of the SCA.

[14] The leave decision was decided on the basis that the extension decision was made on an interlocutory application and any appeal was therefore subject to s 56(3). However, as we discuss next, this was not correct. The application to extend time was not, in substance, an interlocutory application and s 56(3) was not engaged. Instead, Ms Hoeberechts had an appeal as of right against the extension decision.

[15] This Court has concluded previously, albeit in different contexts, that an application for an extension of time to appeal is not to be treated as an interlocutory application. In *Simes v Tennant*, decided under s 66 of the Judicature Act 1908, it was said that:[21]

> … the application for extension of time to bring the appeal was a step which had to be taken as a precursor to bringing the appeal, rather than an interlocutory step in the course of the hearing of it. We think that this means that the application for extension of time is an independent application to the High Court which is separate from the appeal itself (should an extension of time be granted and the appeal be brought). It is not an interlocutory step in the course of the hearing of the appeal because there is no appeal at the time the application is considered by the Court.

[16] The statutory context in which *Simes* was decided was different because the right to appeal under s 66 of the Judicature Act did not distinguish between interlocutory and substantive decisions. Instead, there was a right to appeal "any judgment, decree, or order" of the High Court. A line of cases decided by this Court under s 66 of the Judicature Act distinguished between interlocutory decisions that had some substantive effect on rights and liabilities and those that did not. Only the former were regarded as ordinarily appealable as of right.[22] In *Siemer v Heron*, the Supreme Court made it clear that this approach was not correct — the words "judgment, decree, or order" meant what they said and s 66 conferred a right of appeal

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21 *Simes v Tennant* (2005) 17 PRNZ 684 (CA) at [46].

22 See for example *Murphy v Murphy* [1989] 1 NZLR 204 (CA); *Association of Dispensing Opticians of New Zealand Inc v Opticians Board* [2000] 1 NZLR 158 (CA); and *Attorney-General v Howard* [2010] NZCA 58, [2011] 1 NZLR 58.

against interlocutory decisions of all kinds made in the High Court unless the Judicature Act itself or a rule or order pursuant to that Act created a restriction.[23]

[17] *Simes* was noted in *Siemer v Heron* as part of that line of cases.[24] However, the rationale in *Simes* did not rest on the distinction between interlocutory decisions that affected a substantive right and those that did not. Rather, it was that a decision determining an application for extension of time to appeal — whether granting or refusing — was simply the precursor to the bringing of an appeal and not properly characterised as an interlocutory decision at all.[25]

[18] *Simes* was applied without comment in *TFD v JDN*, though given that the appellant appeared in person and there was no appearance for the respondent, it may be that the matter was not fully considered.[26]

[19] The ongoing relevance of *Simes* was, however, specifically considered in *Ochibulu v Immigration and Protection Tribunal* and, while not treated as materially helpful in that case, its rationale was viewed as supportive of the approach taken.[27] The case concerned an application for an extension of time to apply for judicial review of a decision by the Minister of Immigration to reactivate Mr Ochibulu's liability for deportation.[28] Under s 247(1) of the Immigration Act 2009 Mr Ochibulu had a right to bring judicial review proceedings in respect of the decision within 28 days of being notified of it, unless the High Court allowed further time. Mr Ochibulu was refused an extension of time to bring the proceedings.[29] He appealed. The Minister applied for a stay of the appeal on the ground that the High Court decision was made in relation to an interlocutory application and Mr Ochibulu required leave under s 56(3) of the SCA to bring the appeal.

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23 *Siemer v Heron* [2011] NZSC 133, [2012] 1 NZLR 309 at [31].
24 At [26].
25 *Simes v Tennant*, above n 21, at [4] and [46].
26 *TFD v JDN* [2022] NZCA 503 at [2] and [23].
27 *Ochibulu v Immigration and Protection Tribunal* [2021] NZCA 269 [*Ochibulu* (CA)] at [32]–[33].
28 Mr Ochibulu had also sought leave to bring judicial review proceedings in respect of a decision by the Immigration and Protection Tribunal to dismiss his appeal against deportation liability on humanitarian grounds. That aspect of the decision is not relevant to the present issue.
29 *Ochibulu v Immigration and Protection Tribunal* [2020] NZHC 792.

[20] This Court considered that an application for extension of time to bring judicial review proceedings under s 247(1) of the Immigration Act was best characterised as an originating application rather than an interlocutory application, given that no other proceedings were on foot and, depending on the outcome of the application, no other proceedings might ever be on foot.[30] The most appropriate procedural mechanism for applying for an extension of time under s 247(1) would generally be to file an originating application.[31] However, while a decision by the High Court dismissing an originating application so brought would be an order to which s 56(1) of the SCA applied, it did not follow that s 56(3) applied. Such an application did not fall within either limb of the definition of "interlocutory application" in s 4(1) so that a decision dismissing the application was not a decision made on an interlocutory application and leave was not required under s 56(3).[32]

[21] As we have noted, the High Court Rules require an application for extension of time to appeal to be brought as an interlocutory application, which distinguishes the procedural basis for the application in *Ochibulu* from the present case. However, the Court also considered the position would be the same if the proposed judicial review proceedings had simply been filed outside the permitted period, together with an interlocutory application for an extension of time.[33] The proposed judicial review proceedings could not be characterised as "intended civil proceedings" given that, depending on the outcome of the application, there may never be substantive judicial review proceedings.[34] The Court noted that, although *Simes* was not on all fours with Mr Ochibulu's case, it nevertheless supported the approach being taken because it also had treated an application for an extension of time as an independent application separate from the proposed appeal.[35]

[22] We, likewise, find support in the *Simes* approach, notwithstanding the different context. An application for an extension of time to bring an appeal that would otherwise be brought as of right is not an application brought "in any civil

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30 *Ochibulu* (CA), above n 27, at [23].
31 High Court Rules, pt 19.
32 *Ochibulu* (CA), above n 27, at [24]–[30].
33 At [29].
34 At [30].
35 At [32].

proceedings" because none exist. Nor is it brought in "intended civil proceedings" because if the application is declined, no proceedings will commence. Nor is it an application that seeks an order or direction relating to a matter of procedure nor for relief ancillary to that claimed in a pleading. An application for an extension of time to bring an appeal is, in fact, the antithesis of an interlocutory application.

[23] Accordingly, Ms Hoeberechts has a right of appeal against the extension decision and does not need to seek leave from this Court to bring her appeal. However. through no fault of Ms Hoeberechts, the time for filing an appeal against the extension decision has long since elapsed.[36] Ms Hoeberechts will need to file an interlocutory application for an extension of time under r 29A of the Court of Appeal (Civil) Rules 2005. That application will be determined by reference to the principles in *Almond v Read*.[37] The ultimate question will be what the interests of justice require in the particular circumstances of this case.[38] The key considerations will be the length of the delay and the reasons for it. However, an extension of time may also be declined where the proposed appeal is clearly hopeless and the lack of merit readily apparent.[39]

[24] Given the views expressed by the High Court Judge and in the Commissioner's submissions, it seems likely that an application for an extension will be opposed on the ground that the proposed appeal is clearly hopeless. This is a high threshold.[40] However, we note that Ms Hoeberechts is faced with the High Court decision in *Hollis v Commissioner of Inland Revenue*, which specifically addresses the position of back-dated payments by the ACC,[41] and her argument against the effect of *Hollis* seems to be premised on the Inland Revenue's Interpretation Statement IS 16/06, which deals specifically with income received for professional services.[42]

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36 Court of Appeal (Civil) Rules 2005, r 29(1AA)(b) and (1)(a). The deadline for filing an appeal against the extension decision was 29 September 2022.

37 *Almond v Read* [2017] NZSC 80, [2017] 1 NZLR 801.

38 At [38].

39 At [39(c)].

40 *Wislang v Attorney-General* [2022] NZCA 341 at [12].

41 *Hollis v Commissioner of Inland Revenue* (2010) 24 NZTC 23,967.

42 Inland Revenue *Income Tax – Timing – When is Income from Professional Services Derived?* (Interpretation Statement 16/06, December 2016).

Result

[25] Ms Hoeberechts' application for leave to appeal the leave decision was misconceived and must be declined. However, the issue of jurisdiction was one that the Commissioner did not identify either. In the circumstances we make no order for costs.

Solicitors:
Crown Law Office, Wellington for Respondent