

CASE SUMMARY

Taxpayer successfully appeals from strike out of taxpayer's challenge in the TRA.

Decision date: 29 September 2023

CSUM 03/23

CASE

Kaur v TRA and CIR [2023] NZHC 2748

LEGISLATIVE REFERENCES

Taxation Review Authority Act 1994

Senior Courts Act 2016

LEGAL TERMS

Strike out application

Summary

The TRA struck out Ms Kaur's challenge due to her failure to comply with unless orders made by consent ([2022] NZTRA 4). The taxpayer both appealed the TRA's decision and sought judicial review.

The High Court accepted there was a right of appeal from the interlocutory decision as it ended Ms Kaur's challenge.

The High Court allowed the appeal against the strike out of Ms Kaur's proceeding. The High Court dismissed the judicial review as redundant. The effect of this is that her proceedings is revived before the TRA.

Impact

This decision differs from the outcome in two earlier decisions that interlocutory decisions of the TRA were not amenable to appeal (*MJ Wetherill* (2004) 21 NZTC 18,924 and *Jiao* (2009)

24 NZTC 23,763). These cases were distinguished on the basis that they did not end the challenges by the taxpayers whereas the strike out here would effectively end the challenge for Ms Kaur. The High Court also relied on s 56(4) of the Senior Courts Act 2016 (SCA) to support the conclusion that an interlocutory to strike out proceedings was able to be appealed.

Facts

Ms Kaur commenced proceedings in the TRA to challenge assessments made by the CIR. Due to Ms Kaur's failure to meet timetabling requirements, the parties agreed that the TRA should issue "unless orders", which the TRA did with the consent of the parties. If either party failed to meet the timetable in the unless order, their pleadings would be struck out.

Ms Kaur failed to file her briefs of evidence with the TRA (although she did serve them on the CIR) and failed to file and serve an index of documents for an agreed common bundle. The TRA struck out her challenge on 19 October 2022 ([2022] NZTRA 3). Because the strike out order had been sealed by the TRA, the TRA considered it was unable to revisit the order made (decision dated 9 Nov 2022 [2022] NZTRA 4).

Ms Kaur lodged an appeal against the decision of the TRA. She subsequently also commenced a judicial review of the TRA's decision in case there was no right of appeal against the TRA's decision.

Issues

1. Could the decision to strike out Ms Kaur's proceeding be appealed?
2. If it could, should the High Court allow the appeal?
3. If it could not be appealed, could Ms Kaur judicially review the decision?

Decision

1. Could the decision to strike out Ms Kaur's proceeding be appealed?

McQueen J noted that where a proceeding is struck out by the High Court then, under s 56(4) of the SCA, that strike out could be appealed (at [39] of the judgment). This provision was enacted to address situations where an interlocutory order has the effect of resolving proceedings before the High Court and allows such interlocutory orders to be appealed.

McQueen J found the reasoning for the introduction of s 56(4) of the SCA "compelling" and considered the 'real issue' was whether the particular circumstances of the TRA justified a different approach.

Her Honour concluded:

[46] A strike out application is properly regarded as an interlocutory matter. It does not relate (particularly in these circumstances) to the merits of a particular dispute. Nevertheless, the reality is that if a proceeding is struck out it is finally determined. That is equally true in proceedings before the TRA as in proceedings before the High Court. While I accept the Commissioner's submission that context is important, and that 'endless interlocutory skirmishes' should be avoided, I am not convinced that the taxation context requires a different approach to the long-standing and well-established view of the effect of strike out decisions as held by the senior courts.

[47] I consider that the striking out of a challenge by the TRA amounts to a substantive determination of that challenge and therefore comes within the appeal rights contained in s 26A....

She distinguished both *Jiao* and *MJ Wetherill* on the basis that neither case 'in form and substance' substantively determined the challenge but were of a procedural nature (at [48]).

2. *If it could, should the High Court allow the appeal?*

Having decided the strike out order could be appealed, McQueen J turned to decide whether the appeal should be allowed.

Her Honour started by referring to the leading case on non-compliance with unless orders: *SM v LFDB* [2014] NZCA 326; [2014] NZLR 494.

She then identified two unusual factors in Ms Kaur's case:

- The fact that the sealed order by the TRA also made the TRA *functus officio* - meaning the TRA could not deal with any application for relief from the order made. McQueen J dealt with this quickly, accepting the TRA lacked any ability to recall a sealed order (at [69] to [70]).
- Mr Lukey's (Ms Kaur's counsel) mistaken belief that he had complied with the unless order, which McQueen J went into in more detail.

Her Honour noted the key aspect of the appeal was the impact of counsel error as it was accepted Ms Kaur had no personal responsibility for the non-compliance (at [72]). After discussing some cases about counsel error leading to non-compliance with an unless order, her Honour noted that "Ms Kaur's non-compliance can properly be laid at the feet of Mr Lukey." (at [82]). However, she did not think his behaviour could be described as showing "perverse and obstinate resistance of authority" or "contumacious conduct". Rather it was an unfortunate error (at [83]) and, while his explanation of not preparing the index for the

agreed bundle was “quite inadequate”, the delay caused by this was not serious given there had been no hearing date set by the TRA (at [84]).

McQueen J concluded:

[87] Ultimately, I consider that in the circumstances, the interests of justice require, by a fine margin, that Mr Lukey’s failures are not visited upon Ms Kaur, and that it is appropriate to allow her appeal against her claim being struck out. Although Mr Lukey’s failures were serious, he had attempted to comply with part of the unless orders, and the common bundle index was a matter that could have been resolved without delaying the progression of the claim to a hearing. I consider that Ms Kaur should not be prevented from challenging the Commissioner’s assessment of her tax liability as a result.

3. *If it could not be appealed, could Ms Kaur judicially review the decision?*

Given her conclusions on the availability of, and decision on, the appeal, her Honour did not consider it necessary to consider the application for judicial review (at [90]).

Appeal Period

The Commissioner has 20 working days to file an appeal.

About this document

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