IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2009-404-002250

UNDER	the Judicature Amendment Act 1972 and Part 30 of the High Court Rules 2008
BETWEEN	JAMES COLIN RAEA Applicant
AND	THE ATTORNEY-GENERAL First Respondent
	THE DISTRICT COURT AT AUCKLAND Second Respondent

Hearing: 1 October 2009

Appearances: M Pitch for the Applicant
F Sinclair and P F C Massyn for the Respondents

Judgment: 9 October 2009

JUDGMENT OF DUFFY J

This judgment was delivered by Justice Duffy
on 9 October 2009 at 3.00 pm, pursuant to
r 11.5 of the High Court Rules

Registrar/Deputy Registrar
Date:

Counsel: M Pitch P O Box 105725 Auckland City Auckland 1143 for the Applicant

Solicitors: Crown Law P O Box 2858 Wellington 6140 for the First and Second Respondents

Copies To: Jesse and Associates P O Box 105725 Auckland 1143
Inland Revenue Department (Legal and Technical Services Auckland North Service Centre) P O Box 33150 Takapuna North Shore City 0740

[1] After a defended hearing in the District Court at Auckland, the plaintiff, James Raea, was convicted of 18 charges of failing to discharge statutory obligations under the Goods and Services Tax Act 1985 and the Tax Administration Act 1994. Mr Raea then sought to have the charges re-heard on the ground that he had not been advised, before entering a plea to the charges, of his right to elect trial by jury on those charges. The District Court refused the application for a re-hearing. Mr Raea now applies to judicially review that refusal.

[2] Mr Raea had also pleaded guilty to 81 other such charges. He then sought to withdraw his guilty pleas on the ground he had a defence to those charges. The District Court refused him leave to change his plea on those charges. When he filed the judicial review proceedings, he challenged the refusal to permit him to withdraw his guilty pleas. He now accepts that there is no basis for this part of the judicial review claim, hence it is no longer pursued. This means that the sole focus of attention is on the District Court's refusal to grant him a re-hearing of the 18 defended charges.

[3] The Commissioner of Inland Revenue, who was the prosecuting body in the District Court, opposes the application.

Relevant legislation

[4] Under s 75(1) of the Summary Proceedings Act 1957, a District Court Judge has a general discretion to grant a re-hearing either of the whole matter or only the sentence or order. On a re-hearing of the whole matter, if the offence entitles a defendant to elect trial by jury, under s 75(5) a defendant is entitled to exercise the right to elect trial by jury.

[5] Under s 66(1) of the Summary Proceedings Act, any person charged with an offence that is punishable by imprisonment for a term exceeding three months is entitled, before the charge is gone into but not afterwards, to elect to be tried by a jury. The section goes on to provide that before the defendant is called upon to make his election, the substance of the charge he is facing shall be stated to him. Section 66(2) sets out the formula for informing a defendant of his or her right to

elect trial by jury. Subsection 2 provides that the court shall, before the charge is gone into, inform the defendant of the right conferred on him or her by subs 1 in the following way:

> This case is one where you have a choice of being tried here in this court or being tried by a judge and jury. Do you wish to be tried by a jury or by this Court?

Subsection 2 is subject to s 66(a)(1), which is not relevant for present purposes, and subs 7, which is relevant. Subsection 7 permits any barrister or solicitor who appears for the defendant to inform the court on the defendant's behalf that the defendant does not elect to be tried by a jury. No specific formula is set out in the Act for how the court should receive this information from a barrister or solicitor under subs 7.

The District Court decision

[6] In this case, the choice of election was conveyed to the court by Garth O'Brien, the lawyer who was then acting for Mr Raea. Given the number of charges Mr Raea faced (around 124 in total), it is understandable that the entry of pleas was not done in a way which would require Mr Raea to plead to each specific charge. What in fact occurred was the preparation of a schedule, which was provided to the court, setting out the criminal record numbers of each information and the plea that would be entered to the charge therein. The handwritten schedule ran to six pages. Before the pleas were entered in this way, nothing in writing was obtained from Mr Raea to acknowledge that he had been properly informed of his right to elect trial by jury. The manner in which the pleas were entered meant that there was not the same certainty that Mr Raea had understood and exercised the right of election s 66 gave to him as would result from the procedure in s 66(2) being followed. Whilst the practicality of the system that was adopted can be understood, the failure to combine it with a written acknowledgement from Mr Raea that he had been properly informed of his right to elect trial by jury has created the opportunity for bringing this judicial review proceeding. Whether or not Mr Raea has been properly informed of his right to elect trial by jury has now had to be determined by the District Court, following a hearing with contested evidence. Where there is a departure from the procedure set out in s 66(2), the wisdom of ensuring a

defendant's understanding of and exercise of his or her right to elect trial by jury is carefully recorded should not be overlooked.

[7] Mr Raea swore an affidavit in which he said he had not been advised of his right to elect trial by jury on the 18 defended charges. Mr O'Brien swore an affidavit in which he said that he had advised Mr Raea of his right to elect trial by jury, prior to the entry of the not guilty pleas. Both Mr Raea and Mr O'Brien were cross-examined on their affidavit evidence during the District Court hearing.

[8] The decision of the District Court sets out the conflict in the contested evidence, refers to Mr O'Brien's account of the advice given to Mr Raea, and the reasons for it, and concludes by accepting Mr O'Brien's evidence. Mr Raea's evidence denying the receipt of this advice was rejected.

[9] In his evidence, Mr O'Brien described a meeting he had with Mr Raea before pleas were entered to the charges. At that meeting, Mr O'Brien had prepared a handwritten schedule of the charges, identifying each of them by the criminal record number. Beside each charge he had noted whether the plea to it would be guilty or not guilty. Beside some of the charges noted as for a not guilty plea, he had also noted the letter "J". Mr O'Brien said this stood for jurisdiction. Those marked as "J" were the charges with a right to elect trial by jury. The decision was made that Mr Raea would plead guilty to the group of charges that were not imprisonable, and not guilty to those that were. In both his affidavit and under cross-examination, Mr O'Brien said that he had advised Mr Raea of the right to elect trial by jury on the 18 charges to be defended. Mr O'Brien explained that he had discussed with Mr Raea the potential for confusion if there were to be a jury trial, given the number of charges and amount of material likely to be produced in evidence, and hence it was decided by Mr Raea to have a Judge alone trial regarding those charges.

[10] The evidence of Mr O'Brien persuaded the Judge that the requisite advice on the right to elect trial by jury had been given. There was the handwritten schedule of charges with the notation relating to jurisdiction, to confirm the evidence Mr O'Brien had given in court. Against this background, the Judge concluded that "it was not credible to assert" that the handwritten notations were made without

reference to Mr Raea, and with no explanation given to him at the time about what they meant. The conclusions the Judge reached on the evidence meant that there was no factual basis to support the grant of a re-hearing under s 75. Hence, the application was refused.

The issues

[11] Mr Raea now contends that the decision of the District Court amounts to an error of law on the grounds the decision was:

i) Unreasonable;

ii) Took into account irrelevant considerations;

iii) Failed to take account of relevant considerations;

iv) Was based on a mistake of facts;

v) Failed to give sufficient weight to certain facts; and

vi) Frustrated Mr Raea's legitimate expectations.

[12] Ordinarily, the Judge's preference for Mr O'Brien's evidence over that of Mr Raea would be the end of the matter. Once Mr O'Brien's evidence was accepted, there was no factual basis to support the grant of a re-hearing. It would be difficult to imagine how, in this circumstance, any administrative law complaint could be made about the Judge's decision.

[13] However, in the course of the judicial review hearing, it became clear that the grounds of review were directed at how the Judge had decided whose evidence he would believe. A Judge's finding of credibility is not usually amenable to judicial review. Nonetheless, I can see that where a decision under s 75 hinges on credibility findings which determine the facts to be relied upon for making the s 75 decision, an aberrant decision on credibility will then become part of the decision-making

process, which then taints the decision made under s 75. I propose, therefore, to consider the credibility findings in the light of the judicial review grounds.

Unreasonableness

[14] Mr Raea argues that the refusal of a re-hearing was unreasonable because:

a) The Judge made a leap in reasoning when concluding that Mr Raea was advised of his right to elect trial by jury on the 18 defended charges, but not on others, for which it turns out there was a similar right; and

b) The Judge failed to recognise that had Mr Raea been advised of the right to elect trial by jury on the 18 defended charges, he would also have enquired about whether other charges also carried this election.

[15] This argument is based on a process of reasoning which takes account of the fact that, in relation to a group of 15 charges to which a guilty plea was entered, Mr O'Brien misapprehended the penalty for those charges and, therefore, failed to realise they carried the right to elect trial by jury. It was common ground at the District Court hearing that Mr O'Brien made a mistake of this nature in relation to those 15 charges as he thought they did not have an election right when in fact they did. For this reason, the Judge permitted the guilty pleas entered to those charges to be withdrawn. Mr Raea argues that it is illogical for the Judge to have concluded that Mr Raea was advised of his right to elect trial by jury on the 18 defended charges, when the Judge accepted no such advice was given for the group of 15 charges.

[16] The fallacy in this argument is that it assumes that the mistake Mr O'Brien made about the election right for the group of 15 charges proves he was mistaken about the availability of the election right for the remaining charges. Hence, he could not have advised him on the election right in relation to them. If the only available evidence was evidence showing Mr O'Brien was mistaken about the election right on some charges, it could be thought that he may have been mistaken

about the other charges as well. But in this case, there is his evidence that he did give advice on the election right and there is the handwritten schedule of charges with the notation "J" referring to jurisdiction. Furthermore, the 15 charges, for which the mistake was made, were laid under a different offence provision of the relevant tax legislation than were the 18 defended charges. If the 18 defended charges were laid under the same provision as the 15 charges about which Mr O'Brien was mistaken, there would be something to support the inference that a mistake about the election right relating to one set of charges would mean the second set were similarly affected. But in this case, the 18 defended charges were laid under a separate and different provision of the Act. The election right turns on the charge's maximum penalty. The fact that Mr O'Brien was mistaken about the maximum penalty for a set of charges laid under one statutory provision does not necessarily mean he would be mistaken about the maximum penalty for other charges laid under a different statutory provision. The Judge obviously concluded that the mistake about the election right associated with the set of 15 charges was a discrete mistake which had no carry over effect to the defended 18 charges.

[17] The next limb of Mr Raea's argument is that if he had been advised of the right to elect trial by jury on some charges, he would have queried whether the right was available for other charges. This, in turn, would have brought to light the mistake Mr O'Brien had made over the 15 charges. But this assumes that any query made by Mr Raea would have caused Mr O'Brien to recognise the mistake with regard to the 15 charges. The problem was that the offence, which gave rise to those charges, was contained in a subsection that was surrounded by other provisions for offences that did not carry a maximum sentence of imprisonment. For some reason, Mr O'Brien failed to recognise that different penalties were provided for in the different subsections. So long as he was under this misapprehension, any number of queries from Mr Raea about election rights would not have corrected Mr O'Brien's mistaken understanding of the subsection. It would still have been possible for Mr O'Brien to give correct advice on the election rights for the 18 defended charges, while still failing to apprehend that the charges for the 15 other offences also carried an election right.

[18] On the evidence before the Judge, I consider it was open to him to form the view that Mr O'Brien's evidence was credible and Mr Raea's was not. The Judge's decision cannot be categorised as a decision no reasonable decision-maker would make. Where more than one view of the evidence is reasonably available, the Court on review will not intervene unless the decision-maker has departed from the statutory path, or the decision was reached unfairly; neither of which are alleged to have occurred here, nor could they be: see *Fowler & Roderique v Attorney-General* [1987] 2 NZLR 56 at 71:

> No doubt the Court will interfere where a decision reached is, upon the available material, one which no reasonable Minister could reach. In cases in which, at best from the point of view of an applicant for review, two views are reasonably open the Court will not interfere (see eg *Secretary of State for Education and Science v Tameside Borough Council* [1977] AC 10 14 per Lord Diplock at pp 1064-1065) unless the statutory path along which the decision-maker must tread has not been followed or unless the decision has been reached unfairly.

Relevant/irrelevant considerations

[19] The ground of review based on taking into account irrelevant considerations does not relate to the exercise of the discretionary power under s 75 to grant a re-hearing. There is no suggestion that the Judge took into account irrelevant considerations in relation to s 75. The type of irrelevant considerations to which Mr Raea referred were matters that related to the Judge's decision to prefer Mr O'Brien's evidence over that of Mr Raea's. I have already set out the reasons why I consider that the Judge's decision on whose evidence he would accept is not unreasonable. There is nothing to which Mr Raea has pointed to show the Judge was materially influenced by an irrelevant consideration such that it caused him to reach an unreasonable decision as to whose evidence he would prefer.

[20] Mr Raea argues that the Judge's reliance on the explanation he was given for the choice of a Judge alone trial is an irrelevant consideration. Mr O'Brien said that he had informed Mr Raea of his right to elect trial by jury, but the decision was to elect a summary trial by Judge alone, as it was thought that would be a better way of dealing with the matter. It seems to me that Mr O'Brien's advice to Mr Raea on the best forum for having the defended charges dealt with would necessarily include

some discussion of the pros and cons of a jury trial. By taking into account Mr O'Brien's explanation with regard to how best to avoid confusion during the trial, the Judge was treating this as a piece of circumstantial evidence to support the direct evidence of Mr O'Brien on the advice he gave to Mr Raea about the election right.

[21] It is also said the Judge took into account an irrelevant consideration by concluding that the majority of the schedule of pleas was prepared in Mr Raea's presence and so he must have been advised of his election. Mr O'Brien's evidence was that the handwritten schedule of offences, with pleas noted beside it, was prepared by him predominantly in Mr Raea's presence, having discussed the overall strategy. I cannot see why the Judge cannot take into account the preparation of a schedule that was partly prepared in Mr Raea's presence, and infer from that it was likely that, as part of the discussion, there was reference to the right to elect trial by jury. This is not a case where the evidence showed the advice on how to plead related to each specific charge. Once a decision was made that the better course of action to avoid confusion at the hearing was a Judge alone trial, that choice would have applied for all the defended charges. Therefore, it was unnecessary to complete the schedule, in respect of every charge, in Mr Raea's presence.

[22] There is nothing Mr Raea has brought to my attention that could suggest the Judge's decision on the evidence he preferred, and the refusal to grant a re-hearing, was influenced by an irrelevant consideration. This ground of review fails.

[23] I now turn to the ground of failure to take account of relevant considerations. Like the irrelevant considerations' argument, this argument is also not directed at the exercise of the discretionary power granted by s 75, but rather attacks the way in which the Judge has decided to prefer the evidence of Mr O'Brien over that of Mr Raea. It is said that the Judge failed to take into account that Mr Raea did not understand what was occurring and that he had a right to elect a jury trial. The difficulty with this argument is that this evidence was brought to the Judge's attention, he took account of it, but did not believe it. He has instead preferred Mr O'Brien's evidence. This is, therefore, something of a bootstrap's argument. It is said the Judge failed to take into account that Mr Raea did not appreciate his

rights. That too cannot be sustained, in view of the Judge's finding that he did not accept Mr Raea's evidence on this topic. It is said that Mr O'Brien's assertions as to the advice given were equivocal. How they were equivocal is not made clear. It is said the Court failed to take into account Mr Raea's evidence that had he been advised of his right to elect trial, then he would have opted to do so. Mr Raea's argument overlooks what has happened. The evidence he points to has not been taken into account, because the Judge did not believe it. This was a view the Judge was entitled to take. Consequently, the ground of review alleging failure to take into account relevant considerations fails.

Mistake of fact

[24] The argument under this ground is again about the Judge's alleged failure to prefer the facts as presented to him by Mr Raea. The argument fails to take into account that this ground of review is only available when the fact is an established one and not where there are differing views of the facts. This is made clear by the Court of Appeal in *New Zealand Fishing Industry Association Inc v Minister of Agriculture and Fisheries* [1988] 1 NZLR 544 at 552:

> Of course Mr Parker for the respondents is clearly right in his submissions, based on Scarman LJ's observations in *Secretary of State for Education and Science v Tameside Borough Council* [1977] AC 1014, 1030, that to jeopardise validity on the ground of mistake of fact the fact must be an established one or an established and recognised opinion; and that it cannot be said to be a mistake to adopt one of two differing points of view of the facts, each of which may reasonably be held.

[25] I have already found that the Judge's view of Mr O'Brien's evidence was one that the Judge could reasonably adopt. At its strongest, Mr Raea's case could only be that the account of events given by him and by Mr O'Brien constitutes differing versions of the facts. For the ground of mistake of fact to be established in judicial review, the facts need to be clearly proven. Where there are differing views on the facts, a mistake of fact ground of review cannot be sustained. Here, the Judge simply did not accept Mr Raea's view of the facts. In such circumstances, it is not open to Mr Raea now to assert that the Judge's decision is flawed for mistake of fact. This ground of review fails.

Weight

[26] Mr Raea argues that the Judge failed to give sufficient weight to certain facts. It is submitted that little or no weight was accorded to the evidence adduced by Mr Raea. The Judge decided that he preferred the account of Mr O'Brien. In any credibility contest where one witness' evidence is accepted and the other's is not, it necessarily follows that little or no weight will be attached to the evidence of the witness who is disbelieved. Furthermore, in general, the weight to be attached to the matters to be taken into account is for the decision-maker. Only when the insufficiency of weight makes the decision an unreasonable one will the decision be set aside on that ground: see *Isaac v Minister of Consumer Affairs* [1990] 2 NZLR 606 at 635. I have already found the decision to rely on Mr O'Brien's evidence in preference to that of Mr Raea, for the purpose of determining the re-hearing application, does not meet the test of unreasonableness. Accordingly, the insufficiency of weight ground of review fails.

Legitimate expectation

[27] Mr Raea argues that he had a legitimate expectation that he would have been fully informed and advised of his rights with respect to all of the charges. He says this did not occur. He also says that, because it is accepted that he was not advised fully of his rights with respect to the group of 15 charges, it necessarily follows that his legitimate expectations have been frustrated with respect to all charges. This submission turns on the assumption that the failure to inform Mr Raea of his rights in relation to the 15 charges is proof that he was not advised of his rights in respect of the remainder of the charges. For the reasons given earlier in this judgment, I do not consider that this inference can be drawn.

[28] Once again, the ground of review fails on the evidence. The difficulty Mr Raea faces is that the Judge found he had been informed of the right to elect trial by jury. This occurrence satisfies the legitimate expectation. In such circumstances, the ground of review based on legitimate expectation is unsustainable.

Costs

[29] This seems to me to be a case where the Commissioner is entitled to an award of costs. I consider an award of costs at category 2B of the schedule to the High Court Rules would be appropriate, as well as disbursements, including the travel costs of the Commissioner's counsel. If the parties want to be heard further on the matter of costs, they have 15 days to file memoranda on that topic. Otherwise, the costs award will be to the Commissioner in accordance with category 2B.

Result

[30] Mr Raea has failed to make out any basis for the judicial review of the District Court's refusal to grant a re-hearing of the 18 defended charges. The convictions on those charges entered after the defended hearing must stand.

[31] The Commissioner is entitled to an award of costs.

Duffy J