IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2011-404-1132
[2015] NZHC 792

UNDER	The Administration Act 1994
IN THE MATTER	of an application for strike out of all proceedings transferred and consolidated in the High Court
BETWEEN	GARRY ALBERT MUIR First Plaintiff
	CLIVE RICHARD BRADBURY Second Plaintiff
	GREGORY ALAN PEEBLES Third Plaintiff
	PETER ARNOLD MAUDE Fourth Plaintiff
	Plaintiffs continued over
AND	COMMISSIONER OF INLAND REVENUE Defendant

Hearing: 9 to 11 February 2015

Counsel: GA Muir for himself
RA Edwards for fifth, ninth and tenth plaintiffs
TGH Smith and SJ Leslie for Commissioner of Inland Revenue

Judgment: 22 April 2015

JUDGMENT OF FAIRE J

This judgment was delivered by me on 22 April 2015 at 11:30 am,
pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Date……

Plaintiffs continued

ACCENT MANAGEMENT LIMITED
Fifth Plaintiff

BEN NEVIS FORESTRY VENTURES LIMITED
Sixth Plaintiff

BRISTOL FORESTRY VENTURE LIMITED
Seventh Plaintiff

HILLVALE HOLDINGS LIMITED
Eighth Plaintiff

LEXINGTON RESOURCES LIMITED
Ninth Plaintiff

REDCLIFFE FORESTRY VENTURE LIMITED
Tenth Plaintiff

WAIKATO RESIDENTIAL PROPERTIES LIMITED
Eleventh Plaintiff

CIV-2011-404-1132

IN THE MATTER of Section 26A Taxation Review Authority

IN THE MATTER of Decision of Taxation Review Authority [2011] NZTRA 2

BETWEEN GARRY ALBERT MUIR
Appellant

AND THE COMMISSIONER OF INLAND REVENUE
Respondent

Contents

Introduction

[1] There are two sets of proceedings which require consideration. They are:

(a) Proceedings issued by Dr Muir and others which are challenges to assessments made by the Commissioner of Inland Revenue for the years 2007 to 2010 pursuant to Part 8A of the Tax Administration Act 1994. In addition, there is Dr Muir's challenge proceeding to the assessment made by the Commissioner of Inland Revenue for the 1997 year; and

(b) Appeals from decisions of Judge PF Barber as the Taxation Review Authority. The first was delivered on 1 February 2011, which struck out the challenges to the Commissioner of Inland Revenue's assessment of Dr Muir for the financial years ending 31 March 1998 to 31 March 2006. The second was delivered on 16 June 2011. That decision refused Dr Muir's application to recall the 1 February 2011 decision.

The applications

[2] The Commissioner applies to strike out the challenge proceedings. The Commissioner relies on three specific grounds, namely, that the challenge proceedings:

(a) Disclose no reasonably arguable cause of action;

(b) Are frivolous, vexatious and (or otherwise) an abuse of process of the court; and

(c) Are, most relevantly, as they relate to assertions regarding limitation, speculative.

[3] The Commissioner submits also that Dr Muir's appeals should be dismissed for the same reasons.

The appeals

[4] Dr Muir's appeal seeks an order that the decision delivered on 1 February 2011 by Judge Barber as the Taxation Review Authority be set aside.

[5] Dr Muir's notice of appeal in respect of the 1 February 2011 decision contains multiple grounds. They can, however, be broken into two parts, namely:

(a) The Authority was wrong to strike out the challenges because it had no application for striking out before it; and

(b) Even if it had, it was not appropriate to strike out the application on what was simply the determination of a preliminary issue of whether the Taxation Review Authority had statutory power to hear Dr Muir's challenge against the assessments of income tax.

[6] Although the decision of Judge Barber delivered on 1 February 2011 purported to deal with Dr Muir's challenge proceeding in respect of the Commissioner's assessment for the 1997 year, counsel confirmed that it did not. Dr Muir sought leave to amend the statement of claim in the challenge proceedings by adding 1997 to paragraph 6 of his statement of claim so that it was clear that that year's assessment was included in the challenges. Mr Smith did not oppose as it was common ground that the 1997 challenges had not been dealt with. I ordered accordingly.

[7] Mr Smith drew attention to the fact that the second appeal, that is, in respect of the 16 June 2011 decision, is an appeal from an interlocutory application in respect of which there is no right of appeal.[1] Dr Muir accepted that position. Accordingly, the appeal in respect of the 16 June 2011 decision is dismissed with costs reserved.

The remaining plaintiffs

[8] In a judgment delivered on 31 October 2013 Toogood J ordered that:[2]

(a) The challenge proceedings which had commenced before the Taxation Review Authority be transferred to the High Court for hearing;

(b) That the challenge proceedings be consolidated;

(c) That the challenge proceedings be consolidated with Dr Muir's two appeals;

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1 *Jiao v Commissioner of Inland Revenue* (2009) 24 NZTC 23,763 (HC).
2 *Commissioner of Inland Revenue v Muir* [2013] NZHC 2881, (2013) 26 NZTC 21-044.

(d) That statements of claim in accordance with the High Court Rules be filed in respect of the challenge proceedings to be followed by statements of defence; and

(e) Other procedural orders and orders as to costs.

[9] The assessments which are the subject of the current proceeding are the remaining cases which were the subject of notices of stay issued by the Commissioner of Inland Revenue. The notices of stay were issued to await determination of 13 test cases. Proceedings seeking orders for stay, judicially reviewing the Commissioner's decision to designate the 13 test cases and to stay the remaining cases were determined by Paterson J in a judgment delivered on 18 November 2013.

[10] At the commencement of the hearing and with the consent the Commissioner of Inland Revenue and non-opposition by Dr Muir, I made an order on the application by Ms Edwards, granting leave to the fifth, ninth and tenth plaintiffs to discontinue their challenge proceedings.

[11] The remaining parties in the challenge proceedings are the first plaintiff, Dr Muir, the fourth plaintiff, Mr Maude, the eighth plaintiff, Hillvale Holdings Ltd, and the eleventh plaintiff, Waikato Residential Properties Ltd. At a conference held on 5 February 2015 before me, Mr Ewen, counsel for Mr Maude, Hillvale Holdings Ltd and Waikato Residential Properties Ltd advised that Mr Maude, Hillvale Holdings Ltd and Waikato Residential Properties Ltd would take no active part in this hearing and would simply adopt the submissions made by Dr Muir.

[12] The second plaintiff, Mr Bradbury, has been adjudicated bankrupt. Mr Peebles, the third plaintiff, who is represented by Mr Judd QC, advised at the conference on 5 February 2015 that he had attempted to file a debtor's application and that it was anticipated that that matter would be brought to conclusion shortly. On that basis Mr Judd advised that Mr Peebles would take no part in the hearing. Out of an abundance of caution, I adjourned this aspect of the application so far as it

affects Mr Peebles to a conference on 13 March 2015. I excused Mr Judd's appearance.

[13] Subsequently, counsel for the Commissioner and counsel for the Official Assignee acting for the bankrupt estate of Mr Peebles advised by memorandum that Mr Peebles was adjudicated bankrupt on 10 February 2015. The memorandum sought the striking out of the statements of claim, with costs reserved. Accordingly, the statements of claim on behalf of Messrs Bradbury and Peebles are struck out and costs are reserved.

[14] The remaining plaintiffs not referred to in [11], [12] and [13] have discontinued.

Background

[15] The challenges relate an investment known as "Trinity Investment" or "Trinity Scheme".[3]

[16] The scheme was considered by the High Court,[4] the Court of Appeal[5] and Supreme Court[6] in relation to the assessments for the 1997 and 1998 years of certain investors in the scheme who had been selected as the participants in the test case.

[17] I adopt the analysis of the facts and contractual terms as recorded by the Supreme Court:

> **Facts and contractual terms**
>
> [14] The nine appellants are investors, or loss attributing qualifying companies (LAQCs) of investors, in a syndicate that has been involved in the development of a Douglas Fir forest project as part of what is known as the Trinity scheme. The forest has been planted in Southland. Douglas Fir has a 50 year rotation and the forest is due to be harvested by 2048.
>
> [15] The contractual arrangements for investment in the forestry project are complex. The scheme, including its contractual aspects, was

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3 *Accent Management Ltd v Commissioner of Inland Revenue* (2005) 22 NZTC 19,027 (HC) at 19,030.
4 *Accent Management Ltd v Commissioner of Inland Revenue* (2005) 22 NZTC 19,027 (HC).
5 *Accent Management Ltd v Commissioner of Inland Revenue* (2007) 23 NZTC 21,323 (CA).
6 *Ben Nevis Forestry Ventures Ltd v Commissioner of Inland Revenue* [2008] NZSC 115.

devised and set up by Dr Garry Muir, who is a tax lawyer. At the relevant time he was the partner of a Mr Bradbury in the law firm Bradbury & Muir, which acted in the establishment and implementation of the scheme. Dr Muir and Mr Bradbury were both also investors. Mr Bradbury and the LAQCs of both Dr Muir and Mr Bradbury are appellants.

[16] The initial steps in the implementation of the Trinity scheme were taken early in 1997 when an agreement was entered into for the purchase of the land on which the forest was to be established. Investors did not at any stage acquire ownership of the land. Rather, title was acquired and retained by three subsidiaries of Trinity Foundation Ltd, a company owned by the Trinity Foundation Charitable Trust. The issues which are the subject of these appeals concern that part of the forest that is situated on land owned by one of the subsidiaries, Trinity Foundation (Services No 3) Ltd, which we will refer to as Trinity 3. It owns Lot 3 of the property known as Redcliffe Station. Lot 3 comprises 538 hectares on part of which the forest was planted.

[17] The investors in the Trinity 3 part of the Trinity scheme all became members of a syndicate through which they made their investments. It is called the Southern Lakes Joint Venture. A company, Southern Lakes Forestry Ltd, was formed to act as the contracting or "documentary" agent of the joint venture. We will refer to that company as Southern Lakes Forestry and to the joint venture as the syndicate. On the syndicate's behalf Southern Lakes Forestry entered into the various contracts, which constituted the scheme.

[18] Trinity 3 and Southern Lakes Forestry entered into an agreement for the grant of an occupation licence to the syndicate and, later, a licence agreement. The two agreements are to be read together along with a subsequent modification agreement entered into by the parties.

[19] The first of these agreements provided for Trinity 3, as owner of the land, to grant a licence to the syndicate to use Lot 3 "for the purpose of carrying on [the syndicate's] forestry business on the property". This agreement required the syndicate to pay a premium for the licence on the expiry of its term. The licence premium is stipulated to be the sum of $2,050,518 multiplied by the number of plantable hectares in the licensed land. Under the second agreement, the licence term commenced on 24 March 1997 and expired on 31 December 2048. Ultimately 484 of the 538 hectares, which were the subject of the agreements between Trinity 3 and the syndicate, were certified as plantable.

[20] The second agreement confirmed the terms of the licence grant. Under it the syndicate had an obligation, at its own expense, to establish, manage and protect a Douglas Fir forest on the licensed land in accordance with sound forestry principles. The modification agreement required the syndicate to enter into a Forestry Planting and Management Agreement with Pine Plan New Zealand Ltd (Pine Plan), which is a forestry management company.

[21] As well, the second agreement requires the syndicate to arrange for the sale of the forest on the basis that cutting and extraction should be completed during the period of four years prior to expiry of the term of the licence in 2048. Purchase monies recovered are to be applied by the land owner towards first GST, secondly costs of the sale, and thirdly payment of promissory notes given by investors covering their obligations to pay an insurance premium, shortly to be discussed, and the licence premium. The balance of the net stumpage proceeds is to be paid to the syndicate on 31 December 2048.

[22] Under the licence agreements the syndicate investors were also obliged to pay Trinity 3, on 21 March 1997, $1,350 per plantable hectare for the establishment of the forest, $1,946 per plantable hectare for an option to purchase the licensed land in 2048, and $1,000 each, irrespective of hectares taken, for a lease option. They were also required to pay a $50 annual licence fee during the term of the licence. These payments are in addition to the obligation to pay the licence premium in 2048.

[23] In this manner, the scheme involving Trinity 3 was structured so that the investors effectively met the initial costs of buying the land and planting the forest and the continuing costs of its future maintenance and management. The syndicate does not at any point during the term of the licence become owner of the land or the trees. It did, however, obtain an option to acquire the land the subject of the licence in 2048 from Trinity 3 for half of its then market value.

[24] The agreements contemplated that the syndicate would have the net proceeds of the sale of harvested trees at the end of the period of 50 years applied to its liability to pay the licence premium. There was, however, on the face of these arrangements a risk that the net proceeds would be insufficient to meet the liability for the premium. One further aspect of the structure of the contractual arrangements is seemingly directed to this potential gap. It is an arrangement for insurance to be taken out by individual syndicate members, through Southern Lakes Forestry, and Trinity 3.

[25] To this end Dr Muir caused CSI Insurance Group (BVI) Ltd to be incorporated in the British Virgin Islands. We will refer to the company as CSI. It is licensed in the British Virgin Islands to conduct business as an insurer. In broad terms, cover under the policy is triggered by an event or events having the effect of preventing the market value of stumpage of Douglas Fir from reaching $2,050,518 per plantable hectare during the period between occurrence of the event and 31 December 2048. The insured are the members of the syndicate and Trinity 3.

[26] For this cover the syndicate was obliged to pay two insurance premiums to CSI. The first was of $1,307 per plantable hectare in 1997. The second is of $32,791 per plantable hectare payable on or before 31 December 2047. Trinity 3 is also obliged to pay an insurance premium of $410,104 per plantable hectare on or before 31 December 2047. That premium is subject to increase up to a maximum of $1,230,311 per plantable hectare, dollar for dollar, to

the extent that the market value of stumpage at 31 December 2047 is less than $2,050,518 per plantable hectare.

[27] Therefore, CSI insured Trinity 3 and the investors up to $2,050,518 per plantable hectare in the event that the net stumpage did not reach this value. However, as a result of the increasing premiums to be paid by Trinity 3 as well as the premiums to be paid by the investors, the maximum CSI would have to pay would be $787,416 per plantable hectare. This would be in the worst case scenario where the net stumpage value was zero. If the net stumpage value reaches $787,416 per plantable hectare, CSI will not have to pay anything at all on the policy. Likewise, cover does not attach if fewer than 300 trees mature, that being an event when cover would, seemingly, be most needed.

[28] Syndicate members provided promissory notes to cover their obligations to pay the licence premium of $2,050,518 per plantable hectare in 2048 and to meet their liability to pay the insurance premium in 2047. Trinity 3 likewise provided a promissory note for its 2047 insurance premium liability. Debentures creating charges over the assets and undertakings of the syndicate and Trinity 3 secured the money payable under the promissory notes. Their overall effect was to give CSI first rights over the forest until its value exceeded the deferred portion of the insurance premium. Trinity 3, and the syndicate, had second ranking priority covering the obligations each had to the other.

[29] Investors took up proportionate shares in the syndicate by reference to a number of plantable hectares. In the 1997 year they claimed the following deductions from assessable income in their tax returns:

(a) $34,098 per plantable hectare for the insurance premiums. This figure was made up of the sum of $1,307 paid in March 1997 and $32,791 to be paid in cash terms in 2047;

(b) A small proportion of the licence premium of $2,050,518 per plantable hectare, payable in 2048. The proportion was claimed as a depreciation allowance. The sum reflected amortisation of that cost over the 50 year period and, in the 1997 tax returns, the fact that the transaction had been entered into only ten days before the end of the financial year.

[30] In the 1998 year the investors claimed in their tax returns the amortised licence premium figure for a full year of about $41,000 per plantable hectare.

[31] None of the expenses claimed related to the costs to the syndicate of planting and tending trees. No issue has arisen concerning the tax treatment of those costs. Putting them aside, in order to qualify for the deductions and allowances claimed, the investors had to spend in cash terms a little under $5,000 per plantable hectare in the 1997 year. In the 1998 year they had to spend only the $50 per plantable hectare licence fee.

[18] The overall result was that the challenges to the Commissioner's assessments were all dismissed. The Trinity Scheme was held to be a tax avoidance arrangement. It is void as against the Commissioner of Inland Revenue for income tax purposes. The taxpayers have adopted an abusive tax position in carrying out their tax arrangements pursuant to the Trinity Scheme and could properly be penalised.

[19] The deductions were claimed by the taxpayers under the depreciation regime and were assessed by the defendant under that regime.

Issues not examined

[20] On the morning following the hearing I called a conference of counsel for the Commissioner and Dr Muir. I invited counsel and Dr Muir to consider the following questions, namely:

(a) Are the amended challenge proceedings subject to r 7.77?

(b) Do they introduce a new cause of action, i.e. a new basis for a claim?

(c) Are they barred by time limits for filing challenges?

[21] A timetable was set for the filing of submissions. The submissions confirm that both the Commissioner and Dr Muir adopt the position that the amended challenge proceedings do not introduce a new cause of action. For that reason, this potential issue, namely whether the amended challenge proceedings are barred by appropriate time limits, will not be examined in this judgment.

Strike out jurisdiction

[22] The Commissioner applies to strike out the challenge proceedings relying on r 15.1 of the High Court Rules which provides:

> **15.1 Dismissing or staying all or part of proceeding**
>
> (1) The court may strike out all or part of a pleading if it—
>
> (a) discloses no reasonably arguable cause of action, defence, or case appropriate to the nature of the pleading; or
>
> (b) is likely to cause prejudice or delay; or
>
> (c) is frivolous or vexatious; or

(d) is otherwise an abuse of the process of the court.

(2) If the court strikes out a statement of claim or a counterclaim under subclause (1), it may by the same or a subsequent order dismiss the proceeding or the counterclaim.

(3) Instead of striking out all or part of a pleading under subclause (1), the court may stay all or part of the proceeding on such conditions as are considered just.

(4) This rule does not affect the court's inherent jurisdiction.

Applicable principles

[23] The court's approach to a strike out application was summarised in *Attorney-General v Prince and Gardner* as follows:[7]

> A striking-out application proceeds on the assumption that the facts pleaded in the statement of claim are true. That is so even although they are not or may not be admitted. It is well settled that before the Court may strike out proceedings the causes of action must be so clearly untenable that they cannot possibly succeed. (*R Lucas & Son (Nelson Mail) Ltd v O'Brien* [1978] 2 NZLR 289 at pp 294-295; *Takaro Properties Ltd (in receivership) v Rowling* [1978] 2 NZLR 314 at pp 316-317); the jurisdiction is one to be exercised sparingly, and only in a clear case where the Court is satisfied it has the requisite material (*Gartside v Sheffield, Young & Ellis* [1983] NZLR 37 at p 45; *Electricity Corporation Ltd v Geotherm Energy Ltd* [1992] 2 NZLR 641); but the fact that applications to strike out raise difficult questions of law, and require extensive argument does not exclude jurisdiction (*Gartside v Sheffield, Young & Ellis*).

[24] The principles referred to above were endorsed in *Couch v Attorney-General.*[8]

[25] The court can have regard to evidence either put forward in opposition or support of the application provided it does not contradict that which is pleaded in the statement of claim: *Attorney-General v McVeagh*.[9]

[26] Where, as is the case is here, the application relies on an alleged abuse of process the position is as summarised by Fisher J in *Russell v Taxation Review Authority* where he said:[10]

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7 *Attorney-General v Prince and Gardner* [1998] 1 NZLR 262 (CA) at 267.
8 *Couch v Attorney-General* [2008] NZSC 45, [2008] 3 NZLR 725.
9 *Attorney-General v McVeagh* [1995] 1 NZLR 558 (CA) at 566..
10 *Russell v Taxation Review Authority* (2000) 19 NZTC 15,924 (HC) at [19] and [20].

The Commissioner's first ground for striking out that pleading is that the matter is res judicata in the strict sense, the subject of issue estoppel and/or an abuse of process having regard to prior litigation. Proceedings can be dismissed in whole or in part as an abuse of the process of the Court where the cause of action pleaded could not succeed because of the existence of an issue estoppel with respect to one or more of the essential elements of the cause of action (see for example *Spiels v Blakeley & Ors* [1986] 2 NZLR 262 (CA); *Joseph Lynch Land Co Ltd v Lynch* [1995] 1 NZLR 37 (CA)) or where the pleaded cause of action represents an attempt to litigate or re-litigate issues which ought properly to have been included in the previous proceedings (*Meates v Taylor* [1992] 2 NZLR 36 (CA); *NZ Social Credit Political League v O'Brien* [1984] 1 NZLR 84 (CA)) or where the pleaded cause of action is statute-barred (*DFC New Zealand Ltd v McKenzie* [1993] 2 NZLR 576,578, 579; *G v GD Searle & Co* [1995] 1 NZLR 341, 346, 347); *Homed Abdul Khali Al Ghandi Co v NZ Dairy Board* (1999) 13 PRNZ 102, at 107.

Of the two possible forms of res judicata the important one here is issue estoppel. The effect of the authorities appears to be as follows:

(a) The public policy principles underlying cause of action estoppel and issue estoppel are that it is in the public interest that there should be an end to litigation, that there is hardship to an individual in being vexed twice for the same cause (*Lockyer v Ferryman* (1877) 2 App Cas 519, 530) and that it is undesirable to create an opportunity for different courts to pronounce differently upon the same issue (*House of Spring Gardens Ltd v Waite* [1991] 1 QB 241, 255 C (CA)).

(b) Issue estoppel will apply where (i) a final decision has been made by a court of competent jurisdiction (ii) deciding the same question (iii) between the same parties or their privies (*Carl Zeiss* supra at 935B per Lord Guest). Each must be considered in turn.

(c) There is a final decision for present purposes where a New Zealand Court of competent jurisdiction has determined the issue as an essential step in the logic of the judgment without which it could not stand (Spencer Bower & Turner: *Res Judicata* 3rd ed (1996) para 182 pp 88-89).

(d) For present purposes a case involves the same parties if the party in the second proceeding has such a mutuality of interest with the party in the first proceeding that estoppel would produce a fair and just result having regard to the underlying purposes of the doctrine (*Shiels v Blakeley* supra at 268 line 40).

(e) For present purposes the second proceeding involves the same question as the first where the issue raised in the second proceedings could with reasonable diligence have been raised in the earlier proceedings: *Henderson v Henderson* (1843) 3 Hare 100 at 114-115, [1843-60] All ER Rep at 381-382; *Arnold v National Westminster Bank plc* [1991] 3 All ER 41 at 47 C-H (HC) ("Every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time" per Wigram VC in *Henderson* supra); *New Zealand Social Credit Political League Inc v O'Brien* supra, 95.

> (f) In special circumstances the Courts may depart from the foregoing principles and decline to recognise an issue estoppel where it would otherwise create a clear injustice, for example where important fresh material has become available which could not with reasonable diligence have been adduced in the earlier proceedings: *Arnold v National Westminster Bank plc* supra at 50E-F; [1991] 2 AC 93, 109; X v Y supra at 213; *Nippon Credit Australia v Girvan Corporation New Zealand Ltd* (1991) 5 PRNZ 44, 60 ("There were in my opinion understandable and acceptable reasons why the Maronis did not embark on a full-scale action raising all three possible challenges when it is a matter of fending off a threatened mortgagee's sale").

[27] Fisher J also had helpful comments to make on the question of mutuality of interest and said:[11]

> … each case needs to be examined to see whether there is any difference between company and shareholders in substance (see, for example, *Matai Industries v Jensen* at first instance [1989] 1 NZLR 525, 552). Section 99 is not limited by the corporate veil (*Miller v C of IR; McDougall v C of IR* (1997) 18 NZTC 13,001). The parties who ultimately stood to gain by the taxation scheme were the original proprietors. They were the guiding hand behind the trading company and they represented the original equity interest in it. They would not have embarked upon the scheme if they had not thought that it would ultimately be for their benefit. At the end of the loop they retained the right to re-purchase the business assets of, or in some cases the shares in, the original trading company. It is artificial to suggest that in substance there was a conflict of interest between the original proprietor/managers on the one hand and the trading companies on the other.

[28] The Commissioner's case is that Dr Muir stood to gain from the Trinity scheme because he was its architect, adviser, and investor; and the guiding hand behind Redcliffe Forestry Venture Ltd as well as an 80 per cent shareholder in the company.

[29] The pleadings and the factual position as placed before the Court need to be analysed as to whether orders in terms of r 15.1 are justified.

The plaintiff's major contention in opposition to strike out and in support of the appeal

[30] Mr Muir submits that the promissory notes issued in 1997 by his LAQC, to which he was the sole director and 80 per cent shareholder, are "financial arrangements" in respect of which deductions should have been calculated and,

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[11] At [31].

presumably, allowed under the accrual rules. He submits that the Commissioner made incorrect tax assessments in so far as his "black letter" analysis of the Trinity Scheme is not based on the accrual rules. In short, Mr Muir submits that the Trinity Scheme required analysis under subpart EH of the Income Tax Act 1994 and not under subpart EG of the Act, which had been the basis for the court's analysis of the Trinity Scheme. Mr Muir submits that the application of subpart EH is mandatory where there is a financial arrangement and that it is unlawful to fail to apply it. He contends that subpart EH requires there to be a calculation of a core acquisition price in order to determine the interest to be spread, and thereby see what is left to depreciate under subpart EH. The result is, he submits, that the assessments against him are all invalid and of no effect.

[31] This point was contested for the first time in the Supreme Court . The Supreme Court declined to accept this argument for a number of reasons, namely:

(a) It was not a matter in respect of which leave had been given. It was noted that the new point was contrary to the stance previously taken by the taxpayers and inconsistent with the claimed deductions;

(b) That taking the particular point was outside what was contemplated by the procedures laid for resolution of tax disputes in the Tax Administration Act 1994.

The defendant's contention in support of strike out and against the appeal

[32] Mr Smith submits that the statements of claim in the strike-out proceedings are tax challenges for assessments arising from the Trinity Scheme in the same related years to those which were determined by the Supreme Court. He submits that whilst they are fresh tax challenges, in the sense that they relate to later or different assessments, they nevertheless arise out of the Trinity Scheme and are identical to the tax challenges already determined by the Supreme Court judgment. The statements of claim, Mr Smith submitted, seek to re-litigate the legal analysis of the Trinity Scheme.

[33] Mr Smith submits that Mr Muir is prevented from raising this issue. The issue is subject to the doctrine of issue estoppel with the result that it is an abuse of process to issue the current proceedings. There has been a final decision as to the legal analysis of the Trinity Scheme by the Supreme Court in *Ben Nevis Forestry Ventures Ltd v Commissioner of Inland Revenue* between the defendant and the parties to that litigation including their privies.[12] Mr Smith submits that there is sufficient mutuality of interest to support the proposition that Mr Muir is a privy. He stood to gain by the Trinity Scheme. He was its architect. He was an investor. He was in effective control of Redcliffe Forestry Venture Ltd. The plaintiffs' statement of claim and, indeed, the plaintiffs' appeal, seeks to rerun the argument rejected in three Supreme Court decisions.[13]

Analysis

[34] Counsel for the Commissioner understandably placed submissions before me designed to show that the position advanced by Dr Muir was not correct. That approach was, no doubt, adopted out of an abundance of caution and having regard to the extensive submissions advanced to me by Dr Muir.

[35] The primary basis for the strike-out application and for dismissal of the appeal is that the issue sought to be raised has been finally determined by the Supreme Court in now three judgments. In short, there has been a final decision as to the appropriate analysis of the Trinity Scheme. There is therefore an issue estoppel because the Supreme Court judgments have determined all matters between the plaintiffs and their privies and the defendant and, in relation to the appeal, the appellant and the respondent.

[36] There is no basis for concluding that Dr Muir was not a privy to the parties in *Ben Nevis Forestry Ventures Ltd v Commissioner of Inland Revenue* and does not have a sufficient mutuality of interest with them. He was the architect of the Trinity Scheme. He was an investor in it. He had control of Redcliffe Forestry Venture Ltd.

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12 *Ben Nevis Forestry Ventures Ltd v Commissioner of Inland Revenue* [2008] NZSC 115, [2009] 2 NZLR 289.

13 *Ben Nevis Forestry Ventures Ltd v Commissioner of Inland Revenue* [2008] NZSC 115; *Commissioner of Inland Revenue v Redcliffe Forestry Venture Ltd* [2012] NZSC 94, [2013] 1 NZLR 804 and *Bradbury & Peebles v Commissioner of Inland Revenue* [2014] NZSC 174.

The result is that the Supreme Court judgment is binding upon him. To allow re-litigation of the issue would be an abuse of process.

[37] The position of the remaining plaintiffs should be briefly referred to. At the time of the initial Trinity proceedings Mr Maude was a 10 per cent shareholder of Redcliffe Forestry Venture Ltd. He stood to gain by the company's participation in the Trinity Scheme.

[38] One must also look at the position of the plaintiffs Hillvale Holdings Ltd and Waikato Residential Properties Ltd. At all material times the sole director of those companies was Christopher Verissimo. He was also the sole director of Accent Management Ltd, a party to the proceedings before the Supreme Court. These plaintiffs also are clearly privies and must therefore be bound by the Supreme Court judgments.

Conclusions

[39] I conclude that the current plaintiffs are estopped from disputing the determinations of the Supreme Court judgments as binding on them as if they were parties to those proceedings. They therefore are estopped from raising arguments concerning the treatment of the Trinity Scheme and appropriate assessments.

[40] This is a clear case of an abuse of process which must not be allowed to continue. It may also be viewed as a collateral attack on the final decisions of the Supreme Court and is equally an abuse of process on that ground.

Orders

[41] For the above reasons, I conclude that the Commissioner is entitled to an order striking out the current proceedings and also an order dismissing the appeal against the 1 February 2011 decision. I also dismiss the appeal against the 16 June 2011 decision.

[42] I order accordingly.

Costs

At the conclusion of the hearing I raised with counsel what should happen in terms of costs. Counsel and Dr Muir were agreed that costs should be reserved so that the parties could attempt to agree and failing agreement memoranda in support, opposition and reply should be filed and served at seven-day intervals. I accordingly reserve costs and order that same be resolved as set out.

JA Faire J

Solicitors: Crown Law, Wellington

To: GA Muir, Auckland