IN THE COURT OF APPEAL OF NEW ZEALAND

CA185/04

BETWEEN	GARRY ALBERT MUIR, ACCENT MANAGEMENT LTD, BEN NEVIS FORESTRY VENTURES LTD, BRISTOL FORESTRY VENTURES LTD, CLIVE RICHARD BRADBURY, GREENMASS LTD, GREGORY ALAN PEEBLES, ESTATE OF THE LATE KENNETH JOHN LAIRD, LEXINGTON RESOURCES LTD AND REDCLIFFE FORESTRY VENTURES LTD Appellants
AND	COMMISSIONER OF INLAND REVENUE Respondent

Hearing: 4 October 2004

Coram: McGrath J
Hammond J
William Young J

Appearances: J G Miles QC for Appellants
J H Coleman for Respondent

Judgment: 14 October 2004

JUDGMENT OF THE COURT DELIVERED BY WILLIAM YOUNG J

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Introduction

[1] This is an appeal against judgments delivered by Venning J on 30 July and 23 August this year in which he discharged confidentiality orders in favour of the present appellants in connection with taxation litigation involving what is known as the Trinity scheme.

[2] The appellants are Garry Albert Muir, Accent Management Ltd, Ben Nevis Forestry Ventures Ltd, Bristol Forestry Ventures Ltd, Clive Richard Bradbury, Greenmass Ltd, Gregory Alan Peebles, the Estate of the late Kenneth John Laird, Lexington Resources Ltd and Redcliffe Forestry Ventures Ltd. All, with the exception of Dr Muir, are plaintiffs in the Trinity litigation. Dr Muir is closely associated with Redcliffe Forestry Ventures Ltd which is one of the plaintiffs.

Background

[3] The case in the High Court concerns tax returns filed for the 1997 and 1998 tax years.

[4] Some 23 taxpayers who were involved in the Trinity scheme lodged returns for the 1997 tax year. Those returns were challenged by the Commissioner and this resulted in a dispute which in turn led to the filing of proceedings in the Taxation Review Authority by the 23 taxpayers concerned.

[5] In a judgment delivered on 25 November 2002 (now reported as *Commissioner of Inland Revenue v A Taxpayer* (2003) 21 NZTC 18,001), O'Regan J transferred these proceedings to the High Court for hearing. He made confidentiality orders in favour of the taxpayers. There was some dispute before us as to the exact terms of those orders but we do not see this as material in the present context.

[6] A very significant number of taxpayers involved in the Trinity scheme lodged returns for the 1998 tax year. The Commissioner proposed adjustments to those

returns and this resulted in five challenges being filed in the High Court and many more in the Taxation Review Authority.

[7] The Commissioner designated seven of the 1997 cases and six of the 1998 cases as "test cases" pursuant to s 138Q of the Tax Administration Act 1994. Cases so designated are required to be heard in the High Court. Challenges to the Commissioner's test case designations were heard and dismissed by Paterson J, see *B v Commissioner of Inland Revenue* [2004] 2 NZLR 86. There was a subsequent appeal but this was compromised with further test cases being designated.

[8] Confidentiality orders were made by Paterson J in relation to the proceedings designated as test cases.

[9] All remaining cases (ie those relating to the 1998 year which were not transferred from the Taxation Review Authority and those in the High Court which were not designated as test cases) are stayed pursuant to s 138R of the Tax Administration Act.

[10] The hearing of the substantive proceedings commenced in the High Court on 16 August. In anticipation of that hearing, there was a hearing before Venning J on 30 July in which the status of the existing confidentiality orders was examined. At the conclusion of the hearing on 30 July, Venning J delivered, orally, the first of the two judgments which is under appeal.

The first judgment of Venning J

[11] At the 30 July hearing, the arguments on behalf of the taxpayers appear to have primarily been focused on the contention that special rules should apply to tax cases and general considerations of fairness to the taxpayers involved in the test cases as other taxpayers, who are presumably identically placed but whose proceedings have been stayed, retain the benefits of anonymity.

[12] In his 30 July judgment Venning J noted:

> [5] …The essential principle is one of open justice. It dictates that there should be no restriction on the publication of information about a case, including the parties' names, except in very special circumstances …

Having referred to the arguments advanced on behalf of the taxpayers, the Judge went on:

> [15] I have considered the authorities referred to by counsel. There does seem to have been a change in the practice adopted by the Court in relation to the publication of taxpayers' names in tax cases over recent years. It is apparent from the authorities cited that previously it was perhaps more common for taxpayers to have their names suppressed and the proceedings in this Court were themselves sometimes held in camera … That approach seems to have been affected by the general move towards more open reporting of cases …
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> …
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> [18] Of all the cases cited by counsel, the one that has most in common with the present from a procedural point of view at least is the case of *CIR v Erris Promotions Ltd & Ors* (2002) 20 NZTC 17,977. In that case the substantive proceedings concerned over 400 investors. The dispute between the investors and the Commissioner related to the tax treatment of deductions. The Commissioner took the view that deductions were not claimable, that the arrangements were shams and that the anti avoidance provisions of the Income Tax Act applied, including penalty provisions. The taxpayers issued proceedings in the TRA. The Commissioner applied to transfer the cases from the TRA to the High Court and designated certain cases as test cases. In the High Court Hammond J declined the Commissioner's request. The Court of Appeal found that the test case designation was valid. The cases were thus to be heard in the High Court. In the circumstances it was not strictly necessary to formally deal with the appeal against Hammond J's decision to refuse transfer. But in the course of its discussion on that point the Court of Appeal noted, on the issue of transfer generally, and the impact of a transfer on confidentiality:
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> > [27] The above factors point strongly to the transfer of the cases to the High Court … and in our view clearly outweigh the taxpayers' reasons for choosing the TRA as the preferred forum. This is particularly so as the Commissioner has agreed to pay the hearing fees in the High Court and has agreed that costs will lie where they fall. He has also agreed to cooperate in seeking confidentiality orders in the High Court, although whether they are granted or not will be for the High Court to determine.
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> (emphasis added)
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> [19] The Court of Appeal in *Erris* thus recognised that even though the cases were transferred from the TRA confidentiality was not assured.
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> [20] When the *Erris* case was returned to the High Court Ronald Young J declined the application for confidentiality before him, particularly the

application that the hearing be in camera. As both Mr Stewart and Mr Green for the plaintiffs have emphasised the *Erris* case is distinguishable on its facts as that the taxpayers' names were out in the open in the initial High Court and Court of Appeal decisions so the issue of retaining confidentiality about their names was not strictly relevant.

[21] While the authorities are of assistance, at the end of the day the Court must apply the general principles to the particular facts of the case before it and in the exercise of its discretion on those particular facts and in light of the principles.

[22] The factors that favour preserving the confidentiality of the taxpayers' identity until determination of the proceedings are:

- The taxpayers issued their challenge in the TRA, where they are entitled to confidentiality and they have effectively been brought to this Court by the Commissioner;

- The particular taxpayers before this Court are here as plaintiffs in test cases and are only a sample of a much greater number. The other taxpayers will, because their proceedings remain in the TRA, retain the benefit of confidentiality;

- Disclosure of the taxpayers' identity may affect their ability to earn income or affect their business particularly, perhaps, in the case of professional taxpayers. The difficulty for the Court on that issue is there is no evidence before it directly on the point to support Mr Stewart's general submissions to that effect.

[23] The factors against maintaining the confidentiality and that support the Commissioner's request to review confidentiality orders are:

- An established principle of open justice in this Court … .

- While the taxpayers have been brought to this Court by the Commissioner, the provisions of the Tax Administration Act that provide for test cases and the transfer of proceedings to this Court do not repeat the provisions relating to confidentiality or in camera hearings that are applicable to the TRA. Parliament must be taken to have considered whether in the circumstances of transfer or designation as test cases the confidentiality that prevails in the TRA ought to be maintained in this Court and to have decided not to provide for that.

- While these taxpayers have to a degree been singled out as test cases, that is not a unique or unusual situation. I did not, understand counsel for the taxpayers to submit that in every test case, confidentiality ought to apply.

- Provision could be made for confidentiality of taxpayers' personal financial information insofar as it is irrelevant and unrelated to the matters in issue.

[24] I have some sympathy for the position the taxpayers find themselves in, their cases having been selected as appropriate test cases because of the features of their cases. I also understand their reluctance to be identified as

> taxpayers in what has been described as the country's biggest tax avoidance file.
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> [25] However, after:
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> - weighing the considerations referred to above
> - particularly noting that the legislature has not given automatic protection from publication to taxpayers who find themselves in this Court by the route that these taxpayers have followed (or been led); and
> - noting that details of taxpayers' personal financial position unrelated to the particular proceedings can be protected by appropriate orders,
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> my view is that the considerations in favour of the taxpayers' submissions are not sufficient to outweigh the general principle of open justice. I consider the confidentiality orders should be reviewed as sought by the Commissioner.

[13] The Judge, however, thought it right to give the taxpayers the opportunity to put before the Court information as to personal circumstances which might warrant the continuation, on an individualised basis, of the existing confidentiality orders.

The second judgment of Venning J

[14] The second judgment of Venning J was delivered on 23 August 2004.

[15] By this stage a significant number of the taxpayers who had been in dispute with the Commissioner of Inland Revenue had indicated an intention to settle the dispute. We understand that all test cases other than those involving the appellants have now been settled. The present appellants, however, who were not inclined to settle the proceedings, sought to preserve the confidentiality orders in relation to themselves and affidavits on behalf of some of them were filed. The appellants complained to Venning J that the Commissioner was apparently willing to agree not to challenge confidentiality orders in relation to taxpayers who settled but was maintaining an open justice stance in relation to those taxpayers who were insisting on going to trial.

[16] In his second judgment, Venning J again referred to the principle of open justice which he said applied to proceedings in the High Court generally and tax cases in particular. He took the view that the possibility of publicity was merely

one of a number of factors which might, in any given situation, be taken into account by a litigant contemplating settlement of a dispute.

[17] He then went on to consider particular circumstances of the parties who had not settled their cases but who sought to maintain confidentiality.

[18] He noted particularly that Mr Bradbury and Dr Muir, who are solicitors practising in partnership and would appear to have been the architects of the Trinity scheme, are subject to the allegation that they entered into transactions which were shams. These allegations are not made against the other appellants. As to this the Judge said:

> [28] I do not accept the submission that the media will not be able to distinguish between those who set up or established the arrangements in issue, the authors of it, from the investors. The concern is overstated. As Mr Coleman submitted it is possible to make a distinction between the promoter of the arrangement and those who invested in it. The media, particularly the business media who are likely to be more directly interested in the case, are well able to make that distinction. It is not a difficult distinction to draw. …

He also noted:

> [32] Further, it could be said that members of the business community who may deal with Messrs Bradbury and Muir are entitled to know of the nature of the allegations made against them. They can then make informed decisions about their relationship with the firm.

[19] Another of the parties, Mr Peebles, had alleged that publicity relating to his involvement in the scheme would prejudice his position with his employer. The Judge noted that this assertion was not supported by direct evidence from his employer.

[20] The Judge concluded by saying:

> [37] In summary, the taxpayers were given the opportunity to lead evidence to satisfy the Court there were circumstances in relation to their personal position that meant suppression orders were necessary. While the evidence led by Messrs Bradbury, Muir and Peebles sets out their expectations and belief that their personal position will be affected the evidence is not such as to counterbalance the principle of open justice. Some degree of distress, embarrassment and adverse personal and financial circumstances might be expected to follow publication of names. Against

> that there is a legitimate public interest in an arrangement that has the potential effect of the magnitude that this arrangement could have on the tax base, both in relation to the details of the arrangement, its creators and those who chose to continue to support their investment in it.

[21] The upshot was that existing orders as to confidentiality were continued in relation to the taxpayers who had settled their disputes but discharged in relation to the present appellants. This was subject to a number of exceptions, particularly as to "details of the taxpayers and associated entities' personal financial circumstances".

Overview of the appeal

[22] The starting point for the appeal is that the Judge was exercising a discretion and the scope for successful challenge to his decision is therefore narrow, see *May v May* (1982) 1 NZFLR 165. In light of this, we propose to address the appeal primarily by reference to what we regard as the primary heads of argument advanced by Mr Miles QC for the appellants, namely his contentions that:

(a) The Judge was wrong to take the view that tax cases are subject to ordinary principles of open justice; and

(b) The appellants have been subject to unacceptable unfairness.

Was the Judge wrong to take the view that tax cases are subject to ordinary principles of open justice?

[23] The argument that there should be a special rule for tax cases is based largely on the contention that, as the tax system operates on the basis that confidentiality of taxpayer affairs is fundamental, principles of open justice should be applied in an attenuated way in tax cases. There was also an associated argument that those principles should be applied less rigorously in civil cases than in criminal cases.

[24] Proceedings before Taxation Review Authorities are conducted in private (see s 16 of the Taxation Review Authorities Act 1994). Decisions of Taxation Review Authorities which are published must be in a form which does not

contain the names of the disputant or objector, see reg 36 of the Taxation Review Authorities Regulations 1998. So if the present proceedings had remained before the Taxation Review Authority, the appellants' anonymity would have been assured (subject of course to the possibility of later appeals to the High Court or judicial review proceedings). Of course, the relevant provisions of the Act and Regulations which apply to Taxation Review Authorities have no direct application to proceedings which are commenced in, or transferred to, the High Court but they have in the past been seen as supporting the view that tax litigation in the High Court should be subject to confidentiality orders, see *Auckland Medical Aid Trust v Commissioner of Inland Revenue* (1979) 4 NZTC 61,404 at 61,405-61-406.

[25] Also of contextual significance is s 81 of the Tax Administration Act 1994. This provides for secrecy in relation to taxpayer information but with exceptions which extend to disclosures required for the purpose of carrying into effect the Inland Revenue Acts. The purpose and reach of the precursor to this section (s 13 of the Inland Revenue Department Act 1974) were considered at length in the decisions of this Court in *Knight v Commissioner of Inland Revenue* [1991] 2 NZLR 30 and *Fay, Richwhite & Co Ltd v Davison* [1995] 1 NZLR 517. In the first of those cases, at 39, Richardson J noted:

> Without an army of inspectors a tax system inevitably depends very substantially on the willingness of taxpayers to provide proper and timely tax information to the Revenue. As Lord Wilberforce observed in *R v Inland Revenue Commissioners, ex parte National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617, 633, the total confidentiality of assessments and of negotiations between individuals and the Revenue is a vital element in the working of the system. It rests on the assurance provided by stringent official secrecy provisions that the tax affairs of taxpayers are solely the concern of the Revenue and the taxpayers and will not be used to embarrass or prejudice them.

It is clear from these two judgments that once the "carrying into effect" exception is engaged (as it plainly is here), s 81 is spent. Further, s 81 is directed only to officials associated with the Inland Revenue Department and does not, itself, prevent taxpayers being required in litigation to disclose their own tax affairs. So s 81 does not, at least directly, assist the appellants. On the other hand, the *Fay Richwhite* case particularly shows that general considerations of taxpayer confidentiality may be relevant (although not controlling) factors in determining whether to permit

publication of evidence disclosing taxpayer information. And, of course, the Courts do not permit litigants to use judicial processes obtain access to tax information associated with other taxpayers.

[26] Mr Miles also sought to invoke the general obligations imposed by s 6 of the Tax Administration Act on those who administer the tax system. These obligations do not apply to the Courts and we see them as being of limited relevance to the approach the Courts should take in relation to confidentiality.

[27] That last comment leads on to the principle of open justice.

[28] This principle has been discussed in many recent cases, most recently in the judgment of this Court in *Re Victim X* [2003] 3 NZLR 220. Reference can also be made to the earlier decision in *Lewis v Wilson & Horton Ltd* [2000] 3 NZLR 546.

[29] Those cases were concerned with criminal prosecutions. The situations which are said to warrant confidentiality in the context of criminal proceedings are likely to differ from those in which confidentiality is sought in civil cases. Obviously each case must be addressed on its merits. But that said, we see the open justice principle as equally applicable to civil cases. By reason of the coercive powers available to the Courts, such cases necessarily involve the exercise of state authority. In this respect, we differ from the contrary view expressed (albeit in very tentative terms) in Burrows *Media Law in New Zealand* (4th ed, 1999) at 230. We add that at least in relation to criminal cases there is a legislative basis for the exercise of the power to orders suppressing publication of what happens in Court. In civil cases, the exercise of such a power depends on the common law.

[30] Open justice considerations are reinforced by s 14 of the New Zealand Bill of Rights Act which provides:

> **14 Freedom of expression**
>
> Everyone has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form.

[31] So where does that leave the present case?

[32] We accept (at least for the purposes of this case) that there is jurisdiction to make confidentiality orders despite the absence of a statutory power to do so. In this respect we are content to follow *Taylor v Attorney General* [1975] 2 NZLR 675 despite its rejection by the Privy Council in *Independent Publishing Co Ltd v Attorney General of Trinidad & Tobago* [2004] UKPC 26.

[33] The Courts have often made confidentiality orders in tax litigation and sometimes with little or no discussion of the underlying basis. Mr Miles gave us a number of examples: *S v Commissioner of Inland Revenue* (1990) 12 NZTC 7,011, (HC) and on appeal (1991) 13 NZTC 8,253 (CA); *Z v Commissioner of Inland Revenue* (1991) 13 NZTC 8,103, and *P v Commissioner of Inland Revenue* (1997) 18 NZTC 13,487 and (1998) 18 NZTC 13,647.

[34] We acknowledge that the secrecy provisions relating to proceedings before Taxation Review Authorities have been influential in this regard (as indicated by the *Auckland Medical Aid Trust* case) and this is particularly so where applications for review are brought in relation to Taxation Review Authority decisions, see for instance, *Commissioner of Inland Revenue v Taxation Review Authority* (2003) 21 NZTC 18,235.

[35] Moreover there will be cases in which confidentiality arguments associated with particular tax information will be strong and will require careful consideration, as occurred in the *Fay Richwhite* case.

[36] On the other hand, there are a number of considerations that point the other way:

(a) Parliament has left issues of confidentiality in High Court tax litigation to be determined by the High Court. In that context, it might be thought unsurprising if the High Court dealt with issues of confidentiality in terms of general principles associated with considerations of open justice.

(b) The drift of the cases is increasingly towards open justice and against confidentiality. For instance, in the *Erris Promotions* litigation, an attempt

by the plaintiffs to have the trial before Ronald Young J conducted under what was described as "TRA trial conditions" was flatly rejected, see *Erris Promotions Ltd v Commissioner of Inland Revenue* HC WN CIV 2002-485-895, Wellington Registry 7 July 2003. More importantly perhaps, open justice considerations were referred to by this Court in *Wattie v Commissioner of Inland Revenue* (1997) 18 NZTC 13,297 at 13,299 in terms which strongly suggest that they apply with their usual force in tax cases.

(c) In this context it is perhaps important to note that tax cases in the High Court are now dealt with in the same way as ordinary litigation cf *Auckland Gas Co Ltd v Commissioner of Inland Revenue* [1999] 2 NZLR 409.

(d) It is not appropriate to reason by way of analogy from the Taxation Review Authority secrecy provisions. Whether those provisions are anomalous may be open to question. Taxation Review Authorities are independent judicial bodies – courts in all but name. But there is a sense in which the legislation proceeds on the basis that they form something of an informal disputes resolution adjunct of the Inland Revenue Department. For instance, s 12 proceeds on the assumption (which may or may not be currently correct) that the staff of the Taxation Review Authorities are Inland Revenue employees. We think that the absence of a jurisdiction to award costs and the secrecy provisions are, to some extent, associated with this type of thinking and neither are fairly capable of extrapolation in the context of High Court proceedings.

(e) Given the scale of the Trinity scheme, it might be thought that the level of legitimate public interest in the litigation is far higher than is usually the case with civil or criminal litigation.

[37] Tax litigation is likely to involve evidence as to tax returns and other communications from the taxpayer to the Commissioner which might fairly be regarded as confidential and in respect of which there is likely to be no legitimate public interest. In respect of such information, factors which are either personal to the taxpayer or referable to maintaining the integrity of the tax system may favour

the making of confidentiality orders. So there is a sense (perhaps rather literal) in which it is accurate to talk of some attenuation of open justice principles in tax cases in the same way as there is necessarily some attenuation of the same principles in other classes of litigation, for instance where trade secrets are involved.

[38] Acknowledgement that tax cases (along with many other categories of case) may throw up genuine issues of confidentiality should not be allowed to obscure the reality that those issues nonetheless fall to be determined in accordance with open justice principles. To be more specific we see no scope for arguments along the lines that:

(a) All tax disputes heard in the High Court ought presumptively to be subject to confidentiality.

(b) That a case concerns tax is in itself and without more an appropriate basis for making confidentiality orders.

[39] Our approach does not mean that taxpayer information cannot be properly treated as confidential. Indeed Venning J considered that confidentiality was appropriate in relation to the personal financial circumstances of the appellants. Nor does our approach render irrelevant systemic considerations associated with the importance of taxpayer secrecy to the administration of the tax system as a whole. But, as we have just noted, we see such arguments as requiring assessment in the context of open justice principles. Accordingly we agree with the Judge's conclusion that tax cases are subject to ordinary principles of open justice.

Have the appellants been subject to unacceptable unfairness?

[40] This aspect of the case has caused us concern although not entirely in the respects urged on us by Mr Miles.

[41] His strongest point was that the taxpayers who are involved in the test cases are subject to High Court publicity rules whereas other taxpayers, whose behaviour has been identical, retain the benefit of anonymity in the Taxation Review Authority

proceedings which have merely been stayed. We understand why the present appellants see this as unfair.

[42] Mr Miles was also critical of the negotiating stance the Commissioner has taken. As to this, we confess to some unease that the prospect of unpleasant publicity may have been utilised as a negotiating technique in settlement discussions in terms of the Commissioner being prepared to concede confidentiality in relation to taxpayers who settle but to dispute it in relation to those who persisted with the litigation.

[43] In saying this, we accept that the Commissioner is not required to act as a champion of open justice. Nor are we particularly sympathetic to the appellants. Major litigation is for neither the faint hearted nor the thin-skinned. The risk of publicity is often enough a significant factor in settlement decisions. Those who contemplate taking what might later be regarded as aggressive tax positions must accept the possibility that later associated disputes may attract publicity. Nor are we criticising the Judge. He could fairly be expected to deal only with the issues which are placed before him by the parties and has not been invited by anyone (as far as we can tell) to reconsider confidentiality in relation to the parties who have settled.

[44] Confidentiality orders primarily impact on people who are not parties to the litigation and who, at least in the ordinary run of cases, are not heard before they are made. So Judges should be astute, in the wider public interest, to ensure that confidentiality orders which are proposed by the parties to a case are not merely rubber-stamped, cf the *Victim Z* case at para [9]. Our real concern relates to the possibility that the parties who have settled may have been able to achieve confidentiality (at least so far) without any real analysis of the merits.

[45] This concern (real enough though it is) is not a controlling consideration in the present case. As is apparent, we are of the view that there is a legitimate public interest in full reporting of the present litigation in the High Court. On that basis, the fact that other litigants may have been fortunate to secure anonymity either through procedural accident (in terms of which disputes were not designated as test cases) or

strategic settlement is obviously not decisive. Two (or more) wrongs do not make a right.

The result

[46] The appeal is dismissed. The appellants (on a joint and several basis) are ordered to pay costs to the Commissioner of $6,000 together with disbursements (including reasonable travelling and accommodation expenses of counsel, if any) to be agreed by the parties and, in default of agreement, fixed by the Registrar.

Solicitors:
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