IN THE COURT OF APPEAL OF NEW ZEALAND

CA276/2015
[2015] NZCA 591

BETWEEN	GARRY ALBERT MUIR First Appellant
AND	PETER ARNOLD MAUDE Second Appellant
AND	COMMISSIONER OF INLAND REVENUE Respondent

Hearing: 23 September 2015

Court: Harrison, Dobson and Gilbert JJ

Counsel: First Appellant in person
No appearance for Second Appellant
T G H Smith and S J Leslie for Respondent

Judgment: 8 December 2015 at 11 am

JUDGMENT OF THE COURT

A The appeal is dismissed.

B The appellants are ordered jointly to pay the Commissioner indemnity costs on one appeal together with usual disbursements.

REASONS OF THE COURT

(Given by Harrison J)

Introduction

[1] The first appellant, Garry Muir, is a lawyer practising in Auckland. He specialises in taxation advice. He is the architect of what is now known as the Trinity scheme, involving some 300 individual investors and related entities including Mr Muir and the second appellant, Peter Maude. Its details have been recounted and summarised in numerous decisions of the High Court, the Supreme Court and this Court.

[2] Keane J's summary of the Trinity scheme, in his judgment in not dissimilar litigation in *Accent Management Ltd v The Commissioner of Inland Revenue* (*Accent 2010*), is particularly apt for our purposes:[1]

> [6] In 1996 Accent [the appellant and one of the investors] became a party to a joint venture, set up in that year under the Trinity scheme to grow a plantation of Douglas Firs over a 50 year span on a 538 hectare property in Southland licensed for the purpose from Trinity Foundation Services (No 3) Limited. The joint venture agreement is one of three elements primary to the tax consequences of the scheme. The two others are the licence … and an insurance policy.
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> [7] Under the 50 year licence granted to the joint venturers by Trinity 3 they became liable to pay a licence premium of $2,050,518 per plantable hectare in 2048; a liability they answered immediately in 1997 by promissory note secured by debenture. On that basis Accent, and its co-venturers, claimed the right to a deduction for depreciation of the asset they said they had purchased, the right to use the land during the period of the licence, amortised on a straight line basis across its life. Accent's claim for part of the 1997 year was $409,371. In 1998 it claimed $4,716,589.
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> [8] The policy of insurance to which the Trinity scheme required Accent and other venturers to subscribe was to meet the risk that in 2048 the trees for harvest might prove to have less value than the premium liability that then crystallised ($2,050,518 per plantable hectare). The policy was issued by Trinity 3's nominated insurer CSI Insurance Group (BVI) Limited, incorporated for the purpose in the British Virgin Islands. Accent became liable under the policy to pay two premiums, the first in 1997, $1,307 per hectare, the second, $329,791 per hectare, in 2047. Here too Accent and its co-venturers answered the latter liability by a promissory note secured by debenture. On that basis Accent claimed in 1997 a deduction for the entire expense, $3,989,466.

[3] The Commissioner disallowed the investors' claims for deductions for these expenses. In upholding the Commissioner's assessments for the 1997 and 1998

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[1] *Accent Management Ltd v The Commissioner of Inland Revenue* (2010) 24 NZTC 24,126 (HC).

years in *Accent Management 2005*, Venning J found that the scheme was void against the Commissioner under s BG 1 of the Income Tax Act 1994 (the ITA) because its purpose was to avoid liability to income tax.[2] Appeals to this Court[3] by Accent Management (*Accent Management 2007*) and to the Supreme Court[4] by Ben Nevis (*Ben Nevis*) failed. As this Court found in *Accent Management 2007*,[5] the scheme's purpose was not to conduct a forestry business for profit, but to generate spectacular tax benefits.

[4] The investors in Trinity claimed deductions in the 1997 and 1998 tax years under sub-pt EG (the depreciation provision) of the ITA which was the specific statutory provision in issue in *Ben Nevis*. Messrs Muir and Maude now assert that *Ben Nevis* does not bar them from claiming deductions instead under the accruals rules in sub-pt EH (the financial arrangements provisions) of the ITA for those tax years and following years. We note that since *Ben Nevis* was decided in December 2008 Mr Muir and others have attempted frequently but without success to revisit or re-litigate its finding of tax avoidance.

[5] Messrs Muir and Maude applied to the High Court to judicially review the Commissioner's refusal, upheld by the Taxation Review Authority (the TRA), to allow deductions under sub-pt EH. The Commissioner successfully applied to strike out the applications as unarguable in law.[6] In Faire J's judgment an estoppel applied against Messrs Muir and Maude because the issue – their ability to rely on sub-pt EH – had been finally determined by three successive Supreme Court judgments starting with *Ben Nevis*. He found that Messrs Muir and Maude and their privies on the one hand and the Commissioner on the other were parties to each judgment.

[6] Messrs Muir and Maude appeal on two related grounds. First, they say, they were arguably not privies to the *Ben Nevis* judgment for the 1997 and 1998 years; Second or alternatively, they say, they could arguably pursue claims for deductions

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2 *Accent Management Ltd v Commissioner of Inland Revenue* (2005) 22 NZTC 19,027 (HC) [*Accent Management* (2005)].

3 *Accent Management Ltd v Commissioner of Inland Revenue* (2007) 23 NZTC 21,323 (CA) [*Accent Management* (2007)].

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

5 *Accent Management* (2007), above n 3, at [141].

6 *Muir v Commissioner of Inland Revenue* [2015] NZHC 792, (2015) 27 NZTC 22-004.

from 1999 onwards by relying on sub-pt EH. We shall address each ground separately.

[7] Mr Maude was not represented in this Court but he filed a brief synopsis to the effect that he adopted Mr Muir's arguments. For these purposes, we shall refer to Mr Muir alone, effectively as representing the interests of both appellants.

[8] There is no dispute about the principles to be applied on the Commissioner's application to strike out the proceeding and it is unnecessary to rehearse them again. In the High Court, the onus was on the Commissioner to show that the causes of action upon which Messrs Muir and Maude rely are unarguable in law.

Background

[9] Faire J was required to determine applications to strike out two sets of proceedings. One was a set of challenges by Messrs Muir and Maude to the Commissioner's assessments for the 2007 to 2010 tax years pursuant to pt 8A of the Tax Administration Act 1994 (TAA); and to the Commissioner's assessment for the 1997 year. The other set comprised two separate appeals by the same parties against TRA decisions striking out their challenges to the Commissioner's assessments for the 1998 to 2006 years. The same issues were common to both proceedings, as they have been for much of the litigation following *Ben Nevis*.

[10] While his pleading is obtuse, the essence of Mr Muir's amended statement of claim appears to be that the Commissioner's assessments for the years 1997 onwards are unlawful; and they should be replaced by allowing deductions which he now claims in terms of the accrual rules. In support he advances these grounds:

(a) All Courts have incorrectly analysed the Trinity scheme in terms of sub-pt EG whereas sub-pt EH applied.

(b) As Trinity constitutes a financial arrangement under sub-pt EH, a calculation of the core acquisition price was required to determine the interest to be spread with the balance left to depreciate under sub-pt EG.

(c) The application of sub-pt EH is mandatory and, because it is a special regime standing apart from and having superior operation to the balance of the ITA, the Commissioner's alleged failure to undertake assessments on this basis renders them invalid and ineffective.

[11] The Commissioner applied to strike out Mr Muir's proceedings on a number of grounds which were amplified by Mr Smith in argument. Among other things the Commissioner alleges that Mr Muir cannot tenably argue he is entitled to the deductions originally claimed under sub-pt EG and now claimed under sub-pt EH because:

(a) *Ben Nevis* has finally determined the appropriate legal analysis of the Trinity scheme in terms of sub-pt EG.

(b) Even if elements of the scheme could or should have been analysed in terms of sub-pt EH, the Supreme Court found that the scheme as a whole was a tax avoidance arrangement void against the Commissioner and therefore the deductions are not allowable on any basis and the Commissioner's assessments are correct.

(c) Given the final determination of the appropriate legal analysis of the scheme in *Ben Nevis*, attempts to raise new arguments in this regard which could have been dealt with earlier are an abuse of process.

(d) Mr Muir's proceedings are also collateral attacks on judgments given in previous litigation between him as a represented party or privy and the Commissioner where the same or near identical issues and arguments have been determined by the Courts. All matters pleaded are subject to an issue estoppel.

Ben Nevis

[12] It is necessary for us to summarise the relevant reasoning and conclusion in *Ben Nevis*, as it is of central importance to Mr Muir's appeal.

[13] At an early stage the judgment provides explanatory context to the investors' claims for deductions for the 1997/1998 tax years as follows:

> [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.
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> [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:
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> (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; and
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> (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.
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> [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.
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> [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.

[14] The Supreme Court then summarised more particularly the legal nature of the investors' claims, saying this about the licence premium and its deductibility:

> [40] Venning J held that, under the applicable legislation, the syndicate was not able to deduct as an expense in the 1998 year the amortised portion of the licence premium of $2,050,518 per plantable hectare. The Court of Appeal decided to the contrary, holding that the licence premium was deductible under the relevant specific provision, but subject to avoidance issues.

[41] The basis on which the deduction was claimed was that the licence premium was a payment for a capital asset for which depreciation could be claimed under the tax legislation. Section EG 1 of the Income Tax Act allows a taxpayer a deduction in an income year on account of depreciation for any "depreciable property" owned by the taxpayer during that year. Section OB 1 defines "depreciable property" as meaning property of the taxpayer which may reasonably be expected to decline in value while being used in deriving gross income or in carrying on a business for that purpose. The definition, however, excludes "intangible property" unless it falls within the defined category of "depreciable intangible property".

[42] The licence premium meets the requirements for deduction as long as the licence it relates to is "depreciable intangible property". That term is defined to mean "intangible property of a type listed in Schedule 17" of the 1994 Act. That schedule covers certain intangible property that, in broad terms, is described in the legislation, first, as having a finite useful life that can be estimated with reasonable certainty on its creation or acquisition, and secondly, which is at low risk of being used in tax avoidance schemes if made depreciable. One type of property specified in Schedule 17 is "[t]he right to use land". Accordingly, the deductibility of the licence premium turns on whether it was to be paid for "the right to use land". That phrase is not governed by, but must be interpreted in light of, the statutory description of "intangible property" of a type listed in Schedule 17.

[43] Reading the definitions in this way, and putting aside at this stage the question of tax avoidance, which must be considered separately, we are satisfied that the effect of the legislative provisions is that the licence premium payable by the syndicate is depreciable property and deductible if, on the proper meaning of the words, the payment is for the "right to use land". The words of description in Schedule 17 do not add any gloss to that meaning. …

[54] The ultimate question on this aspect of the appeals is whether, under the agreements, the licence premium is paid for the right to use land in terms of the specific provision. The transaction has been set up on the basis that the syndicate assumes obligations to establish and maintain a forest on the land which remains in the ownership of Trinity 3. The syndicate receives the net proceeds when the forest is harvested but the payment of the premium is not linked to this benefit under the terms of the contracts. The licence provides the syndicate with the necessary access to Trinity 3's land to perform its forestry obligations, for which it incurs the licence premium as a cost. To treat the agreement as linking the premium payment to the right to share in profits or the options would be to allow overall economic consequences to dictate the character of the payment. That character is plain on the terms of the documents. That the access is to enable the syndicate to perform obligations to the land-owner does not in any sense contradict the contractual terms. Nor does it make the legal construct something other than what on its face it is – a right of the taxpayer to go onto land to conduct an aspect of its business. In these circumstances the character of the payment, which the parties called a licence premium, is a "right to use land" within the terms of the specific provision. It follows that, subject to the issue of avoidance, the payment is deductible as depreciation on depreciable property.

(Footnotes omitted.)

[15] The Court said this about the insurance premiums and their deductibility:

> [55] It will be recalled that the syndicate members were contractually obliged to pay CSI an initial premium of $1,307 per plantable hectare in 1997, and a second premium of $32,791 per plantable hectare on or before 31 December 2047. At the time s DL 1(3) of the Income Tax Act provided that a person carrying on a forestry business in New Zealand could deduct, for the purpose of calculating assessable income, expenditure "by way of … insurance premiums … or other like expenses".
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> …
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> [63] The expression "excepted financial arrangement", as defined, included a contract of insurance. Hence a contract of insurance was an excepted financial arrangement. The effect of the crucial words is, however, that a contract of insurance is not included within the definition of financial arrangement when it is entered into in isolation of any wider financial arrangement. But it is common ground that the contract of insurance in the present case was entered into as part of a wider financial arrangement. That being so, the present insurance contract is not excluded by the crucial words from the definition of financial arrangement. It is a financial arrangement for the purposes of s OB 1. It is therefore outside the reach of the definition of accrual expenditure and the spreading rules do not apply to it.
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> [64] In summary, insurance contracts are within the principal definition of financial arrangement. They are then taken out of that definition because they are excepted financial arrangements. But they are brought back in again if they are, as here, part of a wider financial arrangement. The end result is that the insurance contracts in this case were within the definition of financial arrangement and therefore excluded from the definition of accrual expenditure. Hence the premium did not have to be spread.

(Footnote omitted.)

[16] Finally, in concluding that the Trinity scheme was a tax avoidance scheme void against the Commissioner, the Court found:

> [156] The appellants all entered into an arrangement which gave rise to expenditure by them on a licence premium and an insurance premium through the mechanism of promissory notes. They all claimed deductions based on this expenditure in their tax returns for the 1997 and 1998 tax years. In each case the expenditure satisfied the ordinary meaning of the specific provisions relied on to claim the deductions. The appellants were, however, also required by the general anti-avoidance provision to show that the specific provisions they relied on had been used in a manner which was within Parliament's purpose and contemplation when it enacted them. Having regard to the various features of the arrangement we have discussed, our conclusion is that the appellants' use of the specific provisions was not within Parliament's purpose and contemplation when it authorised deductions of the kinds in question. The appellants altered the incidence of income tax by means of a tax avoidance arrangement which the Commissioner correctly treated as void against him.

Decision

1997/1998 tax years

[17] Mr Muir's first ground of appeal challenges Faire J's conclusion that an issue estoppel arose because Messrs Muir and Maude were privies to *Ben Nevis* and two later Supreme Court judgments[7] as they had a sufficient mutuality of interest with the parties to the various proceedings – Mr Muir was the architect of Trinity and an investor in and controller of Redcliffe.

[18] In Mr Muir's submission an issue estoppel can only arise if the parties, the facts and the issue in both proceedings are identical. In particular, he says:

(a) The test is whether the result would have been the same if he had been joined personally in *Ben Nevis*. His present challenges to the assessments under sub-pt EH were not part of the challenges in *Ben Nevis* and could not have been decided as part of Redcliffe's separate challenge. Also, the statutory right to pursue different deductions and different challenges applies not only to new years, but to each taxpayer.

(b) If his challenges had been heard at the same time as *Ben Nevis*, Mr Muir would have been free to argue for the sub-pt EH deductions before the TRA even though other taxpayers did not. The real error in the High Court's approach was to equate the timing of proceedings with privity, which cannot apply to rights that the alleged principal cannot exercise.

(c) It is irrelevant that he was the architect of the Trinity scheme, and he is not to be identified in law with Redcliffe. He was no more than an investor in the loss-attributing qualifying companies (LAQCs) which in turn invested in a 6.2 per cent interest in the joint venture. There is no evidence that as one of the two directors he had control of

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[7] *Ben Nevis*, above n 4; *Commissioner of Inland Revenue v Redcliffe Forestry Venture Ltd* [2012] NZSC 94, [2013] 1 NZLR 804 [*Redcliffe*]; and *Bradbury v Commissioner of Inland Revenue* [2014] NZSC 174, (2014) 26 NZTC 21-112 [*Bradbury*].

Redcliffe when the investment was made. While he was an 80 per cent shareholder, Mr Maude was a 10 per cent shareholder. An issue estoppel could not arise unless a shareholder has 100 per cent ownership and is the sole director.

[19] We reject Mr Muir's submission on two closely related grounds. First, it is not disputed that, where a New Zealand Court having competent jurisdiction over the parties to and subject matter of the litigation has pronounced a final judicial decision, any party or its privy is estopped from disputing the decision on its merits in subsequent litigation. As a matter of public policy there should be an end to litigation and an opposing party should not be put to the cost and inconvenience of litigating the same issue twice.[8]

[20] Privity in this context does not require a complete identity or coincidence of legal interests between parties. The Commissioner need not establish Mr Muir's 100 per cent ownership of Redcliffe. The law allows for a more flexible standard, consistent with its power to determine whether issuing a fresh proceeding would produce an unfair or unjust result.[9] The prerequisite is proof of a derivative interest founded upon a contract or some other sufficient connection between Redcliffe and Messrs Muir and Maude, such that a mutuality of interest exists. The question is whether those two individuals had the same kind of interest as Redcliffe in *Ben Nevis* or its subject matter.

[21] There were nine named parties to the *Ben Nevis* appeal, either individual investors in the scheme or their LAQCs. Messrs Muir and Maude were both investors.[10] Mr Muir owned 80 per cent of Redcliffe's shares; Mr Maude owned 10 per cent. Redcliffe Forestry Venture Ltd as their LAQC was a party to the appeal. Mr Muir acknowledges, as this Court noted in *Accent Management 2007*,[11] that the losses associated with Redcliffe's investment were transferred by s HG 16 of the ITA to its shareholders including Messrs Muir and Maude. Redcliffe had no interest independent of its shareholders in pursuing the *Ben Nevis* litigation. All the

8 *Shiels v Blakeley* [1986] 2 NZLR 262 (CA) at 266–268.
9 See generally *Attorney-General v Spencer* [2015] NZCA 143, [2015] 3 NZLR 449 at [21]–[22].
10 *Ben Nevis*, above n 4, at [15].
11 *Accent Management* (2007), above n 3, at [14].

taxpayers including Messrs Muir and Maude were members of the investing syndicate (Southern Lakes Joint Venture). Its purpose was to take a licence and participate in the development and eventual harvesting of the forests. The mutuality of interest between Redcliffe and its shareholders could not be more compelling.

[22] Mr Muir was asked during argument whether his design of the Trinity scheme included promoting to investors the prospect of claiming deductions under sub-pt EG. His response was that "it may have been". From the reviews of the scheme in the numerous judgments, it is a safe inference that Mr Muir encouraged investors by projecting the extent of deductions their participation could generate under sub-pt EG. In our judgment it would be disingenuous for such a designer to distance himself from the corporate conduit he used to participate in the scheme, for the purposes of attempting to run at a later date a different construction of the arrangements once he appreciated that the Courts were satisfied the scheme was implemented for the purpose of avoiding liability to tax.

[23] Second, Mr Muir now accepts that *Ben Nevis* was a final decision of a Court of competent jurisdiction. *Ben Nevis* upheld the Commissioner's disallowance of the taxpayers' claimed deductions under sub-pt EG. Mr Muir says, correctly, that it did not make a final ruling on the sub-pt EH claim. However, the issue raised in this proceeding, the right to claim a deduction under sub-pt EH, could with reasonable diligence have also been raised in the *Ben Nevis* proceeding.[12] As the Supreme Court observed in *Ben Nevis*:

> [149] Mr Gudsell QC, on behalf of Accent Management Ltd, endeavoured to persuade us to entertain a new point raised for the first time in this Court. After hearing submissions from him and Mr White, the Court ruled that the new point could not be taken nor could any subsidiary point, based on acceptance of the primary one. We indicated that our reasons would be given later. These reasons now follow.
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> [150] In summary, Accent Management wished to argue that the agreement to grant the licence and options was an agreement for sale and purchase of property and fell within para (b) of the definition of financial arrangement in s EZ 45 of the Income Tax Act 2004. The agreement was said to constitute a deferred property settlement because payment was not made in full at the time when the first right in the specified property was transferred. This represented an attempt to have deduction and spreading

[12] *Arnold v National Westminster Bank plc* [1991] 3 All ER 41 (HL) at 46–47.

> issues determined in accordance with Subpart EZ of the 2004 Act, or Subpart EH of the 1994 Act as it then was.
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> [151] We declined to accept this line of argument as it had not been raised at any earlier stage of the proceeding. It cannot be said that the grounds upon which leave was granted to appeal to this Court contemplated or authorised the argument. Hence the first basis of our declining to consider it was the simple one that leave had not been granted to raise the point and it would not be appropriate to give leave at the hearing in the face of the Commissioner's understandable opposition. The more is this so because the proposed new point was contradictory of the stance previously taken by Accent Management and inconsistent with the claimed deductions, the Commissioner's objections to which are being challenged in these proceedings.
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> …
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> [155] It is not necessary for present purposes to go into the jurisprudence in this area in any greater detail. It is sufficient to reiterate that in the present case the taxpayer sought to introduce an entirely separate and distinct basis for assessing the tax payable and sought to do so for the very first time on second appeal. It would be quite contrary to the scheme and purpose of Part 4A to allow this to be done. If we had been willing to entertain a wholly new point in the circumstances of this case, it would be difficult to refuse a similar request at any earlier stage of the disputes process. To accede to the present request would undermine the whole point of the relevant statutory provisions.
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> (Footnotes omitted.)

[24] Mr Muir asserts without giving any detail that Redcliffe could not have claimed a deduction under sub-pt EH in its 1997 and 1998 returns. But it is significant that after *Ben Nevis* was delivered Redcliffe attempted to challenge the Commissioner's assessment, alleging that the Commissioner acted fraudulently in failing to apply sub-pt EH rather than sub-pt EG.[13] In *Redcliffe* the Supreme Court upheld the High Court's dismissal of the company's challenge on the ground that, by asserting that the true legal position was that the deduction claims were governed by sub-pt EH, it was directly contesting *Ben Nevis*' conclusions on matters of law which the Court was competent to address.[14]

[25] Furthermore, in *Redcliffe* the Supreme Court noted:

> [42] There is another relevant and important consideration. As we have noted, where the fraud exception to finality is properly invoked, the party challenging the judgment will be able to show that his or her ability to mount

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[13] *Redcliffe*, above n 7, at [36].
[14] *Redcliffe*, above n 7, at [40] and [44].

> an effective case was compromised by the fraudulent conduct of the other party. It is this consideration which provides the rationale for not insisting on finality. But this rationale is not applicable in the present context. *The subpart was there to be seen in the legislation and was thus inherently incapable of concealment. For this reason alone, Redcliffe cannot credibly claim that the litigation strategy attributed to the Commissioner compromised its ability to mount an argument as to the subpart's applicability.* The force of these considerations is enhanced when the facts are examined. The potential applicability of the subpart was signalled in the Notice of Proposed Adjustment; so it was not concealed. And counsel for Redcliffe at the High Court trial were well aware of this potential applicability as the cross-examination of Ms Lloyd shows.
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> (Emphasis added.)

[26] In *Accent 2010* Keane J found that Accent could have raised the sub-pt EH claim when it originally challenged the Commissioner's assessments for 1997 and 1998. Its belated attempt to take that legal path and change its position was a reaction to its failure in *Ben Nevis*. The same is true for all other taxpayers including Redcliffe. This Court has since confirmed its approval of Keane J's conclusion, as we do.[15]

[27] We are satisfied that *Ben Nevis* creates an issue estoppel against Messrs Muir and Maude's attempts to reopen the Commissioner's assessments of Redcliffe's liability for the 1997 and 1998 years. It was always open to Redcliffe to claim a sub-pt EH deduction when submitting its original income tax returns in 1997 and 1998. It is also an abuse of process to attempt to re-litigate issues which could have been determined in a previous proceeding.[16] Despite Mr Muir's protestations to the contrary, this proceeding is no more than another collateral attack on *Ben Nevis*, continuing what has become an extended pattern or course of conduct.[17] His first ground of appeal must fail.

1999 onwards

[28] Mr Muir's second or alternative ground of appeal is that for the taxation years from 1999 onwards he and Mr Maude can arguably pursue sub-pt EH deductions. Deductions claimed under this provision proceed on a different factual foundation

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15 *Accent Management Ltd v Attorney-General* [2014] NZCA 351, (2014) 26 NZTC 21-087 (CA) at [15] and [16].

16 *New Zealand Social Credit Political League Inc v O'Brien* [1984] 1 NZLR 84 (CA) at 95.

17 *Bradbury*, above n 7, at [17].

from the deductions incurred in the 1997 and 1998 years. No issue estoppel can apply from 1999 onwards because that was the first time he had then pursued sub-pt EH deductions before the TRA in exercising a unique statutory power of assessment. Resolution of the sub-pt EH issue before the TRA could not have been the subject of earlier proceedings.

[29] As Faire J did not determine this issue, we must do so afresh on the basis that, if Mr Muir's argument is correct, the proceeding should not have been struck out.

[30] We have previously described Mr Muir's pleadings as obtuse. They are confused and confusing but, as best as we are able to discern, he alleges the existence of a financial arrangement in terms of the accrual rules under sub-pt EH. In essence that was because:

(a) The joint venture's agreement to pay Trinity the sum of $2,050,518 per plantable hectare in 2048 is a deferred property settlement or otherwise an agreement to provide money's worth in 1997 against a promise to pay money's worth in 2048.

(b) The core acquisition price under the relevant financial arrangement is $136,633 per plantable hectare, entitling the taxpayer to spread the difference between this figure and the deferred liability of $2,050,518 on a yield to maturity basis and to deduct fees and deemed interest against liability to income tax.

(c) The core acquisition price of $136,633 per plantable hectare was fixed by reference to Venning J's finding in *Accent Management 2005*[18] that the appropriate 1997 stumpage value was in the range of $135,000 per plantable hectare, factoring in allowances for negative real growth (1 per cent) and inflation (2.5 per cent).

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18 *Accent Management* (2005), above n 2, at [73].

(d) A base price adjustment had to be calculated when the investment matured in the 2010 tax year, rendering it unnecessary to value the forests. However, in order to determine the sub-pt EH claims, the Court will only have to take into account (i) the amounts promised to be paid in the February 1997 agreements; (ii) the amounts actually paid at that time; and (iii) any amounts actually paid afterwards, but excluding the promissory notes which attracted condemnation in *Ben Nevis*.[19]

[31] Mr Muir seeks to distinguish what he calls "the statutory facts" under which sub-pt EH deductions may be claimed from what he says are the very different facts in *Ben Nevis*. These differences, recited verbatim, are as follows:

> (a) All disputed deductions, being $2 million p/ha, were *incurred* under EG [and DL 1(3)] in 1997, not as interest but as the purchase price of a right to use land (98.4% of the sum) and insurance for market failure. Unlike EH incurrence had to be proved by proving a legal obligation to pay, regardless of whether any economic effect resulted;
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> (b) No disputed deductions were *incurred* in 1998;
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> (c) Deductions were largely based on *accrual* not cash (paid) accounting because little money had changed hands at the time of the hearing;
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> (d) The Court did not know what income the forests would produce in 1998 and had to value them by estimated 2048 yield. That value was found to be between $285,000 p/ha and $5.015 million p/ha;
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> (e) Had the $2 million p/ha incurred in 1997 not been subsequently voided under BG 1, which required it first being allowed, it would have been spread either under EG 8 (for the depreciation element) or under EF 1 (for insurance).

(Footnotes omitted.)

[32] Mr Muir's argument falls at two related hurdles. First, our recital of his argument discloses its flaw. The facts of the transaction considered in *Ben Nevis* were identical to those upon which Mr Muir seeks to rely. What he calls different facts are no more than arguments based on the same facts, designed to support a different result from *Ben Nevis* for taxation purposes. His use of the phrase "statutory facts" is telling. For example, deductions claimed for interest under the

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19 *Ben Nevis*, above n 4, at [130], [147] and [148].

spreading regime allowed by the accrual rules, as opposed to deductions claimed more immediately as depreciation on depreciable property[20] (the purchase price of the right to use the land and for insurance cover for market failure), are related to the incidence of liability to income tax said to arise from a different statutory treatment. But they do not alter the core facts of the Trinity scheme to be ascertained from the contractual instruments and surrounding circumstances.

[33] Second, the syndicate's liability to pay a licence premium to Trinity of $2,050,518 per plantable hectare in 2048 is the foundation for claiming the existence of a deferred property agreement, and thus a financial arrangement under sub-pt EH. *Ben Nevis* confirmed there was no apparent commercial reason for the syndicate to pay this figure to use the land when it had already funded the purchase.[21] There was also no evidence that the amount was fixed on an assessment of value of the land or its use.[22] Instead, it was based upon some figures used by Mr Muir without an apparent empirical basis, applying a present day value of $125,000 per plantable hectare, an inflation rate of 3.5 per cent and a real price growth of 3 per cent, projected across 50 years (the same type of calculation as is now advanced to fix the core acquisition price). A multiplier of 0.67 was applied to the resulting figure, which was then rounded out to the nearest dollar value.[23]

[34] All three Courts inferred that the figure of $2,050,518 was simply calculated as the after tax amount which the mature forest was expected to yield, rather than according to its true value,[24] which raised in *Ben Nevis*:[25]

> … a serious question over whether [the investors] had a true business purpose, as distinct from a tax saving purpose, in entering into the arrangement with regard to the licence premium. The clarity of the tax advantages was in marked contrast to the obscurity of the prospect of any ultimate commercial profit.

[35] As *Ben Nevis* also observed:

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20 *Ben Nevis*, above n 4, at [54].
21 *Ben Nevis*, above n 4, at [122].
22 At [124].
23 At [125].
24 At [125].
25 At [122].

> [126] If the expected after-tax returns to the investors only equalled the amount of licence premium to be paid out of the proceeds (and would not meet the insurance premiums similarly payable), the perceived benefits to the investors would be only the tax deductions to be enjoyed.

[36] The Supreme Court went further in *Ben Nevis*, finding that the 50 year timing mismatch between investors incurring the liability to pay the licence premium of $2,050,518 per plantable hectare and the date of due payment could only be justified for tax avoidance purposes.[26] The Court concluded:

> [130] The timing mismatch is not justified by the fact that harvesting would have taken place 50 years after planting of the trees. The giving of the promissory note had no necessary business connection with that period. It introduces a distortion which is inconsistent with the purpose of the provisions for depreciation-based deductions. It puts a different stamp on the nature of the obligation to pay the licence premium so that, as a matter of commercial reality, its discharge is dependent on the proceeds of the stumpage. There are so many contingencies around events that may occur prior to 2047 that the obligation to pay the licence premium lacks real force. The effect of the arrangement (if permitted) would be to provide a tax concession in circumstances where the commitment to make the payment is dependent on stumpage proceeds and otherwise is illusory. The result of this use of the specific provision is to take the arrangement, insofar as it depends on the licence premium promissory note, outside of the scope of the provision allowing for a deduction for depreciable property and to make what the investors entered into a tax avoidance arrangement.

[37] This statement was made in the context of the taxpayers' sub-pt EG claim for depreciation-based deductions. In some cases where the Commissioner resorts to the general anti-avoidance provision to disallow deductions claimed under one taxing provision, her analysis might not be transposable to assert a tax avoidance purpose if the taxpayer sought to claim a deduction under different provisions. As a matter of sequence, the Commissioner must first accept that the deduction claimed is technically available to the taxpayer in the given circumstances. Resort to the anti-avoidance provision arises where, as the Supreme Court put it in *Ben Nevis*, "… the [taxpayer's] use of the specific provisions was not within Parliament's purpose and contemplation when it authorised deductions of the kinds in question".[27]

[38] Mr Muir's argument was that the Commissioner could not resort to a defence that the scheme amounted to tax avoidance until she had undertaken the analysis of

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26 At [127]–[129].

27 At [156], quoted at [16] above.

the taxpayer's entitlement to claim the deduction under sub-pt EH, including quantifying the extent of the tax benefit such a deduction would produce, and measuring that against the overall effect of the scheme.

[39] While there may be cases where that sequence must be followed before the general anti-avoidance provision could lawfully be invoked, we are satisfied that the features of the Trinity scheme which make it a tax avoidance arrangement when deductions are claimed under sub-pt EG must inevitably also apply if the scheme or steps in or elements of it were used to seek a different deduction under sub-pt EH. That is because Mr Muir's argument depends upon adopting the same contractual instrument – the agreement to pay the licence premium – which the Supreme Court found lacked commercial force and was part of an illusory arrangement with tax avoidance as its purpose or effect. An arrangement is defined by s OB 1 as meaning:

> Any contract, agreement, plan or understanding (whether enforceable or unenforceable), *including all steps and transactions by which it is carried into effect*.
>
> (Emphasis added.)

[40] The essential steps in or elements of the Trinity scheme cannot be severed to suit Mr Muir's new purposes. The investors' agreement to pay the licence fee was central to the arrangement as defined by s OB 1. Its cornerstone was the obligation to pay $2,050,518 per plantable hectare in 2048, setting the benchmark against which investors could claim deductions whether for depreciation allowances, as was originally the case, or for interest, as is now the case. Similarly, the promissory notes, which affirmed the illusory nature of the obligations assumed under the Trinity scheme, cannot be ignored.

[41] Moreover, when addressing an analogous argument in *Ben Nevis* about whether taxpayers were entitled to spread liability to pay an initial and closing premium on the insurance contract,[28] the Court observed:

> [58] The spreading issue turns on whether the second premium was "accrual expenditure" within the meaning and purposes of s EF 147 in the light of s EH 2. Accrual expenditure is defined in s OB 1. If the insurance premium comes within the s OB 1 definition, the premium could not be

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28 At [55] and [56].

> deducted in full in 1997. Rather, it had to be spread, with 2 per cent being deductible in each of the 50 years during which the policy ran. Spreading would, of course, heavily reduce the deductible amount in year one from 100 per cent of the premium to 2 per cent, and hence substantially reduce the amount individual investors could deduct in that year against their other income, either directly or through their LAQCs.
>
> …
>
> [68] It is unnecessary to go into the competing arguments in any greater detail *as the whole spreading issue in this case is rendered moot by the conclusion, to which we come later, that the insurance contracts were part of a tax avoidance arrangement.* Hence the insurance premiums were, for that reason, not deductible on any basis.
>
> (Emphasis added.)

[42] Again, this reasoning answers Mr Muir's argument. Even if Mr Muir were able to bring a sub-pt EH claim within the lawful purview of the specific statutory provisions, the result of the challenge would be a foregone conclusion. Based on the *Ben Nevis* finding, a Court would necessarily conclude that the agreement to pay the licence premium was an essential step in a tax avoidance arrangement. Mr Muir would be unable to recreate or sever off facts or components of the Trinity scheme to suit his new purpose. He would always face the absolute bar of a finding that the agreement to pay a licence premium had no commercial purpose. It could only be justified as part of a wider scheme to avoid tax. He would inevitably fail.

[43] In our judgment it would be an abuse of the Court's process to allow Mr Muir to continue his claim. It would commit judicial resources for no purpose and bring the administration of justice into disrepute. It would also be unfair to require the Commissioner to expend further costs in defending a position on taxation liability which has been unequivocally and authoritatively answered in the Commissioner's favour.

[44] This claim must fail.

Result

[45] The appeal is dismissed.

[46] We agree with the Commissioner that the appeal was hopeless from the outset. As Mr Smith noted, Messrs Muir and Maude had no basis for arguing that the *Ben Nevis* decision on the tax consequences of the Trinity scheme did not apply to them or that they could have claimed accruals deductions. The proceeding is also a collateral attack on the Supreme Court's decision, and brought for an improper purpose. The circumstances justify an award of indemnity costs in the Commissioner's favour.[29]

[47] Messrs Muir and Maude are ordered jointly to pay the Commissioner indemnity costs on one appeal together with usual disbursements.

Solicitors:
Crown Law Office, Wellington for Respondent

29 *Bradbury v Commissioner of Inland Revenue* [2015] NZSC 80, [2015] 1 NZLR 739 at [17] and [18].