IN THE SUPREME COURT OF NEW ZEALAND SC 79/2015

BARRIE JAMES SKINNER

Appellant

v

THE QUEEN

Respondent

IN THE SUPREME COURT OF NEW ZEALAND SC 126/2015

DAVID INGRAM ROWLEY

Appellant

v

THE QUEEN

Respondent

Hearing:	9 June 2016
Coram:	William Young J Glazebrook J Arnold J O'Regan J McGrath J
Appearances:	R M Lithgow QC and N Levy for the Appellant Skinner R C Laurenson for the Appellant Rowley H W Ebersohn, P D Marshall and M J Ferrier for the Respondent

CRIMINAL APPEAL

MR LITHGOW QC:
If the Court pleases, I appear with Ms Levy for Skinner. Ms Levy will carry the burden of the argument and in discussion with counsel Mr Laurenson – Ms Levy would go first, then Mr Laurenson.

MR LAURENSON:
May it please your Honours. I appear for the appellant, Rowley.

WILLIAM YOUNG J:
Thank you Mr Laurenson.

MR EBERSOHN:
May it please your Honours, Ebersohn, Marshall and Ferrier appearing for the respondent.

WILLIAM YOUNG J:
Thank you Mr Ebersohn. Ms Levy.

MS LEVY:
May it please the Court. The position for the appellant Skinner is that the words in section 109 mean what they say. That was accepted by this Court in declining leave in *Smith v R* [2008] NZSC 110.

WILLIAM YOUNG J:
Is *Smith* actually in the authorities?

MS LEVY:
Yes.

WILLIAM YOUNG J:

So the leave decision?

MS LEVY:

Yes it is. It is –

WILLIAM YOUNG J:

I seem to be missing from my set. I don't seem to have a 13.

MS LEVY:

Is that the appellant's authorities?

WILLIAM YOUNG J:

I've got the authorities of the appellants.

MS LEVY:

Yes. I am sorry, it should be, it is at tab 13 on the electronic version, page 54.

WILLIAM YOUNG J:

I see. Okay. Right well I will pick it up on the electronic version, thank you.

MS LEVY:

It is relatively short. There were a number of points raised and the way the Court on the leave decision –

WILLIAM YOUNG J:

Thank you. I have got a complete set now. Well I think I have. No I have not actually. No it is not in this volume.

GLAZEBROOK J:

This – have a look at 54. That's the Supreme Court.

WILLIAM YOUNG J:

I see. Sorry. I looked at the wrong point. I have it. I did not sit. None of our number today were sitting.

MS LEVY:

No that is correct.

WILLIAM YOUNG J:

And I know the Chief Justice would be I think distressed to see that the Court appeared to decide an issue of substantive law in a leave judgment.

MS LEVY:

With respect –

GLAZEBROOK J:

There is an issue as well as to the status of a leave judgment in terms of it being – because - and it would have to be read with the decision of the Court below which is on quite a different point.

MS LEVY:

I am not suggesting that it is binding in any way on the Court today but it –

GLAZEBROOK J:

Do we have the Court of Appeal, do we have the *Smith* [2008] NZCA 371; (2009) 24 NZTC 23,004 Court of Appeal?

MS LEVY:

Yes you do. That would be in the –

WILLIAM YOUNG J:

It is in the respondent's –

MS LEVY:

– in the respondent's authorities. Number 6 on here.

GLAZEBROOK J:
Six?

MS LEVY:
Yes. Accepting what your Honours say about it, it being a decision on a leave decision. Nonetheless the way that this Court puts it in the leave decision is as simply –

GLAZEBROOK J:
Well that is your submission –

MS LEVY:
– as we say it can be put. Yes, your Honour. The second major point is that applying that approach, section 109 applies to civil and criminal cases, works perfectly well. The Crown have used it in *Smith* and the reason that it works is because the Commissioner of Inland Revenue has the power to call for the form and issue a reassessment when fraud or a failure to declare a particular form of income is alleged as it is here.

WILLIAM YOUNG J:
Ms Levy, can I just ask you to assume a simple case where a tradesman is alleged to have carried out work for cash and not declared it and the Commissioner assesses the tradesman for the income allegedly derived and the tradesman is prosecuted. The tradesman's only defence is that in fact he did not do any work for cash. He does not have a defence that perhaps he did do a few cash jobs and just forgot about it because that is not what he has told the revenue investigator or the police or a solicitor. So he goes along to give evidence and says, "Well I did not do the jobs. There was no cash income." The prosecutor says, "But you cannot say that because the assessment and everything that goes into it is deemed correct. You have got to shut up," what does the Judge do?

MS LEVY:

Well I am assuming for - your Honour kept it very simple. I am assuming it is a prosecution under section 143B(f) so the charge is providing false information in an income tax return.

WILLIAM YOUNG J:

Yes and the Crown says, "We have got an assessment which by implication means that the information you returned was false. It must be treated as correct. You are not going to be allowed to say that it is wrong."

MS LEVY:

Well –

WILLIAM YOUNG J:

Even though your only defence is that it was wrong. Even though - when I say, "only defence," only available practical defence because there is no evidence that would support a defence that it was wrong but I thought it was right.

MS LEVY:

If his defence is that he did not do the work then his defence is that he believed the return –

WILLIAM YOUNG J:

No.

MS LEVY:

– was correct.

WILLIAM YOUNG J:

Well, yes but his – that defence necessarily, his defence is not that he believed he did not do the work. The defence is that he did not do the work. It is very like a case which probably is not on our website, *Morton v R* [2015]

NZSC 129, which we decided last month in relation to section 49 of the Evidence Act.

MS LEVY:

With respect Sir, I would need to see the indictment against this tradesman.

GLAZEBROOK J:

Well what you would say presumably is that he has to challenge that assessment under the normal challenge proceedings.

MS LEVY:

Yes.

GLAZEBROOK J:

So does a criminal proceeding have to wait until he has had the opportunity to do that? That would not be the normal way that you would do things.

MS LEVY:

What he would have to - well, you would expect for the tax reasons that he would file the necessary paperwork to challenge the Commissioner's assessment.

WILLIAM YOUNG J:

Say he has not? Say it is too old. Say they go back more than four years. He is hit by a time bar.

MS LEVY:

So the Commissioner has made the change.

WILLIAM YOUNG J:

He has not objected in time.

MS LEVY:

And then four years later he is prosecuted.

WILLIAM YOUNG J:

Yes he is prosecuted or there is a prosecution over a whole range of years.

MS LEVY:

Well with respect Sir, the indictment still has to refer to him, sorry, just let me get the 143B in front of me. So in your Honour's example he is charged with –

WILLIAM YOUNG J:

Under (c).

MS LEVY:

Under (c), "Providing a false return by declaring nil income."

WILLIAM YOUNG J:

Yes.

MS LEVY:

"Intending to evade the assessment or payment of tax."

WILLIAM YOUNG J:

Yes. He is in a bit of a pickle on your approach to the case.

GLAZEBROOK J:

Well also does your approach mean that the Crown does not actually have to bring in the people who say that there was a cash job done and prove beyond reasonable doubt that there was a cash job done and that he was paid in cash for it? So effectively can get around a criminal standard of burden of proof by saying the assessment under 109 means what it says?

MS LEVY:

No because it is a deeming provision for convenience. In my submission the tradesman in that situation would be entitled to say, "I believed because this is the work that I did that my return was correct."

WILLIAM YOUNG J:

It is a very artificial defence though isn't it when – because the defence he is permitted to advance is not really what his defence is. The defence you say he can advance is he did the work but for some extraordinary reason did not have it in his mind when he filed the return. Where his real defence is, "I did not do the work and I am a most meticulous filer of tax returns." So you make him run a defence that really is not his defence.

GLAZEBROOK J:

Well also what do you say about what the Crown has to prove? Do they have to bring along the people who he did the work for and if so why, if 109 is conclusive?

MS LEVY:

109 is not conclusive that he did work for cash. 109 is conclusive as to the assessment of what tax he is required to pay.

GLAZEBROOK J:

Well that is effectively the Crown's argument, its first argument that it is just a, isn't it? So in fact it has nothing to do with the actual inputs into the return.

MS LEVY:

Well in my submission the tradesman is entitled to say, "I believed my return was correct because I believed I did no cash work for anyone that I haven't declared." And realistically to answer that the Crown has to bring more than a piece of paper signed by the Commissioner saying the tax has been assessed at what was declared plus X. So it comes down to what the Commissioner chooses to provide. In my submission that is, it is almost exactly the same situation as in the *Smith* case where *Smith* said, "Well we did not have to pay any PAYE because we did not have any employees." And the Crown called all the evidence about that. They didn't rely on the section in the absolute way that your Honour has suggested.

WILLIAM YOUNG J:

Have we got the indictment in this case, we haven't got the indictment I think.

MS LEVY:

I did printout one copy of it which I can make available but the offence is, "Knowingly, did knowingly provide a false income tax return for the year with respect to income obtained from entering clients into certain transactions intending to evade the assessment or payment of income tax." So I can have that copied and make that available.

WILLIAM YOUNG J:

If the tax, if the assessment itself is deemed to be correct so that the tax that was due has been correctly returned it might be hard to assert that there was an intention to evade the assessment of tax.

MS LEVY:

Well it's deemed to be correct at the time of the prosecution.

WILLIAM YOUNG J:

Yes, but this is, I guess, in a way your argument, although you really come into conflict with the Crown case a bit higher up in the list of issues but sorry, to go back, the focus was on the non-filing, non-reference to income that had been derived?

MS LEVY:

Yes that's right.

WILLIAM YOUNG J:

And not otherwise particularised, there wasn't a list of particulars of…

MS LEVY:

No, it says, "With respect to income obtained from entering clients into certain transactions." So the evidence about what those transactions were was what was called at trial.

So, just coming back to your Honour's question, I think that the timing point is important. Because of the way – what the Judge could explain to the jury, or explain to him or herself, if it was a Judge Alone trial, is that the way the law works in regard to correctness is that there's a deeming in favour of whoever's standing up when the music stops. And in this case it was Mr Skinner and Mr Rowley, their returns are deemed to be correct because of where they are in the assessment process. More likely it will be the Commissioner that's holding the upper hand when the music stops, when the indictment is filed. But what the jury has to focus on is what the defendant understood the position to be at the time that he or she filed their income tax return, or their assessment. So if they believed at the time that the position that they were taking was correct then they're entitled to be acquitted and it doesn't matter that the way things have panned out, whether it's by an assessment by somebody else or a Taxation Review Authority decision or a High Court decision, it doesn't matter how far along the chain, later, they've been found to be wrong, their focus is on their belief as to their correctness at the time that they filed the return.

And that's why the defendants in *Smith* were entitled to call evidence that they weren't their employees.

GLAZEBROOK J:

But that would make the assessment wrong. That's what I can't understand. Because they would call – just like the tradesman example, he was calling evidence, presumably, to say, "I didn't do a cash job. You say I did a cash job for X, Y, and Z. I'm going to call X, Y, and Z or I'm going to call A, B, and C, to show that X, Y, and Z are mistaken or liars and that it was actually the man down the road who did the cash job not me and it's a mistaken identity," or whatever it was. In *Smith* they were saying, "We didn't have employees." If they were right then the assessments were wrong and they were clearly challenging the assessments and it's left open, at paragraph 19 of the Court of Appeal decision, that if they were saying, "Well, we believed the assessments were actually correct at the time, even though we've now been

shown to be wrong," then that's sufficient as well. But here they were saying we didn't have any employees therefore they're saying the assessments were wrong.

I mean the only thing in *Smith* that was the issue with the assessments was the issue was saying you have to prove the exact amount of PAYE and that wasn't the issue. It was whether there had been some PAYE and for convenience you take the assessment amount. Wasn't it? Because they were saying we didn't have employees and therefore we didn't have to deduct anything so the assessments were wrong. Just like in Justice Young's example the tradesman was saying, "I didn't do any cash jobs."

WILLIAM YOUNG J:
I mean it's not an easy, entirely easy case to read but as I understand it the Judge must have left to the jury the defence that these people weren't our employees. Because if she hadn't I would have thought that it would have loomed rather large in the judgment of the Court of Appeal.

MS LEVY:
Well it appears that she did tell the jury that the assessments before the jury were to be taken as correct.

WILLIAM YOUNG J:
Yes I understand that –

MS LEVY:
Yes.

WILLIAM YOUNG J:
– But this is only challenged under the heading, did the Crown have to prove the particular amount of PAYE that was payable. It's not - if the defence that these weren't our employees had been cut off at the knees I would have expected that to have been at the forefront of the arguments in the Court of Appeal.

MS LEVY:

Well in my submission this discussion really highlights that the operative biting part of section 143B is the intention part at the time that the return is filed.

GLAZEBROOK J:

Well it might be –

MS LEVY:

Except the –

GLAZEBROOK J:

– but the intention, it's not just intention because here they say we filed the correct amount so the defence was actually we didn't have any employees. Therefore we didn't have to deduct anything. So there's nothing to do with their intention because they're just saying as a matter of fact we didn't have to deduct anything.

MS LEVY:

Well no with respect. They're saying we believed it was correct.

GLAZEBROOK J:

They didn't believe it was correct. They say it was correct. We didn't have employees. Not we had employees but we thought we didn't have to deduct X because of Y or...

MS LEVY:

Well the effect of section 109 is that they are not right about that. So their belief becomes the important issue. In my submission.

GLAZEBROOK J:

Well I'd like to see a jury. You have to decide whether they believed they were filing the right thing because actually they didn't have employees. How do you direct a belief?

MS LEVY:

You direct that because of the way the objection process takes a separate course the position at the moment is that, this is in the *Smith* case, the position at the moment is that the returns are false, so you need to go back to what the position was in the minds of the defendants at the time they filed the returns and why they believed them to be correct.

WILLIAM YOUNG J:

Yes, well it goes round in circle. They believed them correct, their position would be they believe that they were correct because they were correct.

MS LEVY:

Except that you don't have to finish the sentence in that way.

WILLIAM YOUNG J:

Well you might have to if the first element in the question is whether the returns were false.

MS LEVY:

Well it's, with respect it's not. You would start with what did the, did the defendants believed at the time of filing that what they were filing was –

GLAZEBROOK J:

Well no 'cos if you're looking at this offence, 143A which they were, "It knowingly applies or permits the application of the amount of a deduction for any purpose other than in payment to the Commissioner." So their defence would be that they didn't apply or permit it in a way other than was allowed because they had no employee, therefore there were no deductions. It wasn't that they didn't knowingly apply it because the defence would be they just didn't.

MS LEVY:

I think your Honour's looking at 143A.

GLAZEBROOK J:

It's 143A(d). I'm just looking at what they were actually charged with in *Smith.*

MS LEVY:

This is in *Smith*.

GLAZEBROOK J:

Which is set out at paragraph 10 of the Court of Appeal decision.

MS LEVY:

143A. Well the difference, the difference in this case, in a 143B case, –

GLAZEBROOK J:

Oh no, I can understand there might be a difference but I'm just discussing what happened in *Smith*. But anyway, it might be more productive to look at what they were actually charged under here.

MS LEVY:

And what they were charged under was 143.

GLAZEBROOK J:

Where do we have that? It is somewhere isn't it.

MS LEVY:

Well you have it summarised in the Judge's decision on the 347.

WILLIAM YOUNG J:

This is at page 206 of the case on appeal.

ARNOLD J:

The Act is in the respondent's bundle anyway.

GLAZEBROOK J:

Yes I was just looking at that.

WILLIAM YOUNG J:

So he said, “It’s common ground that the Crown must prove five elements; the accused provided information to the revenue. Two, the information was false. Three, the accused knew the information was false. Four, the information was in respect of tax law, and five, the accused intended to evade the assessment or payment of tax.” So the very first thing – the second thing is, the first thing is they provide the information. The second thing is was it false and you say that the assessment means that it wasn’t false?

MS LEVY:

That's correct.

WILLIAM YOUNG J:

And where we –

MS LEVY:

I’m sorry your Honour, which page were you reading from? I think the pages may have –

GLAZEBROOK J:

Page 206 of the case on appeal, it’s paragraph 23.

MS LEVY:

Yes thank you.

WILLIAM YOUNG J:

This is a 347 decision.

MS LEVY:

Yes, yes, no I’m in the right place now.

WILLIAM YOUNG J:

It’s just that if it was turned around, where there wasn't assessment, on your argument, the second question would have to be asked in favour of the Crown.

MS LEVY:

Well yes it would, yes.

WILLIAM YOUNG J:

And that would, you would then, and I suppose we probably may have thrashed this point as much as we can but the defendant whose primary defence is not I was mistaken but that I was right is in a bit of a pickle.

MS LEVY:

No, because the decision, the determination that they were wrong has been made after the event by the Commissioner and that just is. They are still entitled to say at the time I filed that return I believed this to be the position.

WILLIAM YOUNG J:

Okay, but you're – but they're not entitled to say that it was the position so they can't explain the basis of their belief.

MS LEVY:

Well in my submission they can. All it means is that the, if the defence is accepted, all it means is that the not guilty comes in at number 3 of the five things to be determined.

GLAZEBROOK J:

But the Crown can, so the Crown doesn’t have to prove the information was false because the assessment does that.

MS LEVY:

Yes. But the Crown does have to prove that at the time that the accused filed their return –

GLAZEBROOK J:

And I suppose you say well if the Crown doesn’t prove the information was false they can't prove the accused knew the information was false?

MS LEVY:

They'd have to give it some context.

GLAZEBROOK J:

It just seems odd, when you've got five things to prove and you only have to prove four of them, but by a backhanded way you have to prove number 3 because otherwise you can't prove it but it's backhanded.

MS LEVY:

Number 2. Well it is but it demonstrates really how, how it's the intention element that, as you might expect, is the focus of an evasion section.

GLAZEBROOK J:

Well I would have thought the main focus is that the tax has been evaded in the first place. It's like saying the main focus of an assault charge is an intent charge. It's actually not. Or a fraud charge is intent. You have to have both elements don't you to have a crime?

MS LEVY:

Well you do but it's not as if the Crown are gaining anything substantial. We know they think it's false, that's why they've brought the charge. It's just one step that – what it really does is save the jury from the very difficult decision, in some cases, of what, if there was a technical tax question, what was the position? They can be told that that's a matter that's being determined and they don't need to trouble themselves with whether they agree with what section 109 deems to be the position. They have to focus on the state of mind of the accused at the time that return was filed. Did the accused know then what the position is said to be now?

WILLIAM YOUNG J:

Well I think we've probably dealt with this as far as we can. So where are you now, section 109?

MS LEVY:
So my submission is that section 109 works perfectly well. The burden on the Commissioner is insignificant making this reassessment. There's no absurdity.

So turning to the question of whether section 109 has unintentionally, reads as if it applies to criminal cases, in my submission it is in a section of the Act called assessments, but the surrounding sections, section 108 and section 110 are both clearly applicable to criminal and civil cases and for the reasons that Mr Laurenson advances in his submissions it's very clear that Parliament knew what it was doing with this section, particularly when the latter words – the earlier words relating to liability of the taxpayer were removed. So I'm just finding where the Act is. It will be in the Crown submissions. I'm sorry, the Crown bundle of documents, page –

WILLIAM YOUNG J:
Well it finishes about 93, 94 I think.

MS LEVY:
Yes, it begins at page 88. So page 88 of the Crown's submissions. Section headed, "Time bar for amendment of Income Act assessment."

McGRATH J:
So where in the Crown submissions sorry?

MS LEVY:
I'm sorry, I'm in the Crown authorities, page 88.

McGRATH J:
That's fine.

MS LEVY:
Crown authorities, tab 1, page 88 to 89.

WILLIAM YOUNG J:

So is it just the ability to amend at any time where fraud is suspected that you rely on in relation to section 108?

MS LEVY:

Yes that's the reference to what's plainly a criminal concept.

GLAZEBROOK J:

Where's that sorry?

MS LEVY:

108(2).

McGRATH J:

That is the exclusion of the time bar from application in a criminal context, yes?

MS LEVY:

Yes, yes.

GLAZEBROOK J:

I was just puzzled why you said they apply to criminal proceedings because that doesn't seem to me to – it might import a criminal concept.

MS LEVY:

Perhaps that's a better way of putting it your Honour.

GLAZEBROOK J:

All right.

MS LEVY:

Yes.

GLAZEBROOK J:

Thank you.

MS LEVY:

The point I'm making is that the writers of the sections were fully alive to criminal activity in relation to tax law at the time of drafting.

GLAZEBROOK J:

I mean that's just been in there since Adam was a boy, that particular concept. That you have a time bar but obviously if you've done something misleading the time bar doesn't apply. I mean I don't see that really helps you particularly. It's just how you would expect a time bar to operate.

MS LEVY:

Well nonetheless the argument for the Crown is that somebody's just made a terrible oversight here in failing to state what's obvious to everybody that this was never meant to apply to a criminal case. So my submission is that a reading of the entire surrounding sections doesn't support that.

WILLIAM YOUNG J:

And section 110 is a form of proof provision.

MS LEVY:

That's right.

WILLIAM YOUNG J:

Which plainly does apply in criminal proceedings.

MS LEVY:

That's right. And it is, again it's got the phrasing, "All Courts and in all proceedings including proceedings before a Taxation Review Authority." So it's the references to what must include criminal Courts in the surrounding section or the following section.

GLAZEBROOK J:

110 just says you don't have to produce the original of documents doesn't it?

MS LEVY:

Well I accept that it's not a huge advance on the way things work but it's in answer to the Crown's submission that people are cherry picking what suits them out of what is an assessments part of the Act. So the submission is that the drafters were alive to the different places that these sorts of things are dealt with. Courts. All Courts. Proceedings. All proceedings. Fraud. Criminal proceedings. So the opportunity to –

ARNOLD J:

I think Justice Kós made the point that he thought section 109 hadn't been amended when the whole self-assessment procedure was introduced. That in an earlier time it was the Commissioner who always made assessments but now the system relies on self-assessment.

MS LEVY:

Yes.

ARNOLD J:

Now that came in, I can't recall but was that some time in the early 2000s? That self-assessment system?

MS LEVY:

I think Mr Laurenson's going to be able to answer that. Mr Lithgow remembers calculating his own PAYE in the late 50s.

WILLIAM YOUNG J:

Late 50s?

MS LEVY:

And I'm not sure whether that's –

GLAZEBROOK J:

I think there was a difference between that. There was a time and I've forgotten exactly when, but there was a time when the Commissioner still made an assessment based on the return and then it was changed so the return became the assessment in itself –

MS LEVY:

Yes.

GLAZEBROOK J:

So it was a more explicit self-assessment. Yes of course you always made your own assessments but they weren't called that, until a particular point. Actually, Mr Marshall was nodding so he might actually have the time.

MS LEVY:

I'm sure we can find that out.

GLAZEBROOK J:

I'm not sure it matters necessarily but there was that change made.

McGRATH J:

I'd be interested to know if this is when the words, "the assessments," I'm sorry, "the return must contain an assessment" came in because that to me is, I'm interested in the distinction if there is one between assessments and quantification.

MS LEVY:

Well in my submission there is no distinction between the return and the quantification. The –

McGRATH J:

And you're saying that on the text of the statute and the definitions are you?

MS LEVY:

Yes.

McGRATH J:

Because if so at some stage, I don't want to, I would like you to just take us through the Act, just show us the text you're relying on. I appreciate there are early cases on this that are relevant but I'd just like to see the text you're relying on first.

MS LEVY:

Yes, well I'm relying on the text that I've set out in my submissions beginning at paragraphs 9 and 10 but I haven't told you when those changes were made.

McGRATH J:

Well, in 10 you say, "Returns filed or assessments for the purposes of the Act," and you cite section 3.

MS LEVY:

Yes.

GLAZEBROOK J:

We have to look at section 92 perhaps. I'm just…

McGRATH J:

Yes, then I think it's section 92. It's a definition of assessment and there are other passages, but, Ms Levy, I just appreciate your showing us the text and where you draw this from because it's quite crucial to your argument on this part of the case.

MS LEVY:

Well, as Justice Glazebrook has just noted it's at section 92, "A taxpayer who is required to furnish a return of income for a tax year must make an assessment." "An assessment under this section is made" –

McGRATH J:

Well, it must make an assessment of the taxpayer's taxable income and income tax liability.

MS LEVY:

Yes.

McGRATH J:

But that passage to me is indicating quantification, and in subsection (2), it's, "An assessment under this section," which may indicate it's not intended to be of particularly broad effect.

MS LEVY:

Yes. In my submission, the place that we need to go for the purposes of this argument is section 3 and the definitions.

McGRATH J:

Yes, of "disputable decision" perhaps.

MS LEVY:

Of "disputable decision" and…

McGRATH J:

Which is an assessment.

MS LEVY:

Yes.

McGRATH J:

And then back to "assessment".

MS LEVY:

Yes.

GLAZEBROOK J:

It might be worth looking at taxable income. I can't remember where that is.

McGRATH J:

May I just ask Ms Levy just to take through her argument because I understood this is what she was saying. "Assessment" means an assessment of tax made under a tax law by a taxpayer –

MS LEVY:

Yes, that's in section 3.

McGRATH J:

– which I think is taking you back to section 92. But, I mean, I don't want to try and put the argument to you.

MS LEVY:

No, no, your Honour is right.

McGRATH J:

But I'd like to just have it elaborated, what you're saying in this part of your submissions.

MS LEVY:

We do go backwards and forwards but in my submission the reason that it's not necessary to focus on exactly the words that get you to the assessment in section 109 is because in section 109, "Every disputable decision and, where relevant, all of its particulars are deemed to be, and are to be taken as being, correct in all respects."

WILLIAM YOUNG J:

So is "particulars" otherwise defined?

MS LEVY:

Not that I can see, Sir.

WILLIAM YOUNG J:
So you say that that includes the assertions as to income that are contained in a return?

MS LEVY:
Yes.

McGRATH J:
You've got to say, don't you, that it includes the information in the return on which the quantification is based to try and put this neutrally?

MS LEVY:
Yes.

McGRATH J:
Now that is reading a deeming provision in quite a broad way, just purely on the literal, looking at it literally, before we get to the cases.

WILLIAM YOUNG J:
What other particulars are there? What particulars can there be in an assessment?

MS LEVY:
You put in the income and the deductions and the rest of it follows mathematically.

WILLIAM YOUNG J:
Yes, so you say the particulars are the steps which lead to the assessment?

MS LEVY:
Yes.

WILLIAM YOUNG J:
I just wonder, is there anything? I mean, I can't think of anything else it can refer to but perhaps there is. I don't know.

MS LEVY:

Well, for the purposes of this case what's important is what that income number is and the income number is something that's put in by the taxpayer.

GLAZEBROOK J:

Particulars might be important, I guess, in terms of resident withholding tax or something of that nature because this is much broader. 109 is much broader than merely income tax, isn't it?

McGRATH J:

Or the calculations but – yes.

MS LEVY:

Yes, it is.

McGRATH J:

So what do you say but in a general application of a tax return with information about income, expenditure and so forth, and the move towards a calculation of the tax only. What do you say particulars are in terms of section 109? How wide does that go? Is it more than just the immediate context of the quantification itself?

MS LEVY:

Well in my submission the main particular is the very first number that gets put in by the taxpayer, so that's the income earned.

McGRATH J:

You're really saying it's everything in the tax return?

MS LEVY:

Well that's because everything follows from that first number and there's really only, for the purposes of this sort of argument, there's really only two possibilities for the particulars in this case; there's the income and the deductions because then every, you know, it's A plus B minus C plus F

times G and it all just happens for you. Now, and all those particulars are affected by your initial inputs A and B.

McGRATH J:
They have to be particulars of the decision don't they, the disputable decision, because it's all of its particulars?

MS LEVY:
Yes but that's where it's important that disputable decision means an assessment.

McGRATH J:
Well go on from that because I haven't yet picked that up, and an assessment means – as you then go to the term "assessment" do you?

MS LEVY:
In section 3, yes, an assessment of tax made under a tax law by a taxpayer or by the Commissioner so that's in the definition section.

McGRATH J:
So that's – an assessment is an assessment of tax, now isn't that a quantification of the tax liability?

WILLIAM YOUNG J:
It's also an assessment of the taxable income isn't it because the assessment has to be an assessment of taxable income.

GLAZEBROOK J:
Taxable income is defined in BC5 of the Income Tax Act as being determined by subtracting tax losses from their net income. Net income is unhelpfully, well, helpfully or unhelpfully defined as, "Whatever's left over after you've had deductions."

McGRATH J:

Ms Levy, I suppose what comes out of both – when I had some familiarity with this, which is a long time concept, long time ago, what an assessment might be. An assessment was a quantification by the revenue and I think in the, maybe in the Crown submissions there's a reference to the *Commissioner of Inland Revenue v Canterbury Frozen Meat Co Ltd* [1994] 2 NZLR 681 (CA) and what Justice Richardson had said, and so forth, that you put in the returns, furnished the information, it was part of a voluntary disclosure process. An element of self-assessment comes in but in the end the Commissioner assesses the tax, and in those days an assessment was a quantification, and I'm just trying to see where, in the statute, that has become a broader concept so that you can then apply, as your argument does, section 109 to it, in the way you do.

MS LEVY:

The broad, well, the definition of assessment in section 3(a), an assessment of tax made under a tax law by a taxpayer begins the broadening process.

McGRATH J:

Why?

MS LEVY:

Well because it's something that can be done by the taxpayer so it doesn't have to hit the revenue desk before there can be an assessment. That can be done by the taxpayer.

McGRATH J:

All right well look if there's any – I think I've probably taken enough of your time with this thank you, unless there's any other statutory provision you want to refer me to.

MS LEVY:

Well no, in my submission there's not supposed to be anything technical or tricky about section 109. It would be bizarre drafting, in my submission, if

there were aspects of the whole tax return process that didn't, that weren't affected by section 109.

McGRATH J:
Section 109, it's really a privative clause, isn't it? It's sole purpose is to channel disputes into the statutory process and not to have collateral challenges?

MS LEVY:
That is one of its purposes. That is probably its primary purpose.

McGRATH J:
So you think the focus would be on challenging the decisions, challenging the assessment, in terms of the quantification, that that would be all you'd need to be concerned with to have the privative clause take effect?

MS LEVY:
For tax purposes, yes. It's for criminal law purposes that this argument is concerned.

McGRATH J:
All right, look that's, that's – thank you, you've – that's given me some help.

MS LEVY:
So I, perhaps to wind that up I say that it demands a broad interpretation to cover what taxpayers put forward because otherwise the tax – if I'm wrong and it doesn't include what the taxpayer puts down as income then the taxpayer would be allowed to judicially review the Commissioner on their treatment of that particular clause, they could attack it wherever they wanted and they'd say, "Oh, no, section 109, no, no, that's just this little narrow area of what we call particulars of disputable decisions. That's just box XY."

McGRATH J:
Anyway, you focus on particulars. Thank you for that.

MS LEVY:

Yes, for bringing everything in, and, as your Honour says, one of the purposes of the section is to prevent side arguments and to keep it all in the one place, and that would be defeated if there was some specialist narrow interpretation.

WILLIAM YOUNG J:

Okay, so to put it in a nutshell, if the Commissioner assesses someone on the basis of a view of that person's assessable income, unless that view of the assessable income is itself part of the assessment then that could be the subject of discrete, satellite, judicial review proceedings?

MS LEVY:

Yes.

GLAZEBROOK J:

Although to what effect it's difficult to see because you still have to pay what's on the assessment.

WILLIAM YOUNG J:

You might then go back to the Commissioner and say, "Look, it's been proved to be wrong." But anyway that's the argument.

MS LEVY:

Well, that's the argument. I mean, the Courts have been so keen to keep the Commissioner of Inland Revenue out of judicial proceedings that it would seem bizarre to favour an interpretation of this clause that allowed litigation outside the channel provided for by the Tax Administration Act.

WILLIAM YOUNG J:

Okay, well, I think perhaps move on.

MS LEVY:

Now the effect of the Crown's submissions is that this section 109 should be read down so that it applies only to civil disputes and not to criminal

proceedings. Your Honour, Justice Glazebrook, referred in the *R v Allan* [2009] NZCA 439, (2009) 24 NZTC 23,815 decision, to the *Green v Bock Laundry Machine Co* (1989) 490 US 504 case and to Reading Down Statutes in general, but there's a further reference to that in an earlier decision of your Honour's in *Agnew v Pardington* [2006] 2 NZLR 520, which I've got copies of. I'm looking at paragraph 43 on page 9 of that decision as to the circumstances in which it is legitimate to "read down" a section, and the three circumstances are referred to. "The first is when a non-literal meaning for a rule that is narrower than some apparent literal meaning was the meaning intended by its authors." Now in my submission that's not this case because the drafters were well aware of criminal proceedings. "The second is when making some modification of the intended meaning of a rule, whether that intended meaning is literal or not, is consistent with respecting the practical judgement or will that its authors intended the rule to implement." Now that, the *Agnew* decision, was obviously a classic example of that but this case is not. There simply isn't external material available supporting the argument that Parliament intended to confine section 109 to civil disputes. And the third circumstance is that, "Reading down can sometimes be justified by doctrines that allow us to limit such uncertainty or deal reasonably with it. This is the third circumstance." Now in my submission none of those circumstances apply to what we have in this case.

GLAZEBROOK J:

What about reading consistently with the Bill of Rights? Really the points that are made at paragraph 55 of *Allan*, which I must say – and actually fundamental criminal procedure.

MS LEVY:

In my submission the real effect of section 109 normally in criminal proceedings, and I'm very conscious that this is not the way you would have expected section 109 to get to this Court, the *Smith* way would have had the arguments perhaps on the right sides, but in my submission the Crown greatly overstate the effects of the interpretation that the present appellants contend for, and that is because the intention element which is so critical to the

evasion offence is what still remains for the defendant. All that is taken away is the right to say to the jury, "Oh, well, don't worry about what I thought. I was right." That's all that's lost.

GLAZEBROOK J:
Well, it's really quite huge, isn't it? You're taking away the ability to say the actus reus wasn't there. That's pretty huge. You're not allowed to say you didn't – that the person wasn't assaulted or wasn't harmed but you say you didn't mean to. You're still allowed to say you didn't mean to.

MS LEVY:
But with respect, as your Honour's just identified, that sort of case arises all the time in the criminal law.

GLAZEBROOK J:
When?

MS LEVY:
Well, plainly if the victim has a bruise there's some explanation required. It's just – it's not unique for there to be a set of circumstances that –

GLAZEBROOK J:
You're still allowed to say the bruise arose not through an assault; the bruise arose through somebody else assaulting them. Here you're saying you're not allowed to say any of that. You're only allowed to say, "I didn't mean to." It's probably going over old ground but –

MS LEVY:
It's probably not a helpful example, but in my submission it's a relatively simple matter to explain to a jury that where the chips lie on the objection process at the moment is that the Commissioner has the benefit of a find, of the law saying that the information is false. So your focus has to be on what this accused thought, what the Crown can prove this accused thought when he or she filed that return. The Commissioner now says it's false and has filed

the assessment so that is the position, but what was the accused thinking at the time of filing?

Now of course none of the concerns that the Crown raised were raised by them in the *Smith* case. They were very content to rely on section 109 as supporting their position in *Smith* so in my submission it's –

GLAZEBROOK J:
Well I think you're probably better saying the *Allan* case because *Smith* was slightly different because they weren't relying on section 109 other than to say we don't need to prove quantum which was what the contention was.

MS LEVY:
Well with respect they were relying on it as applying in a criminal context and –

GLAZEBROOK J:
Yes they were.

MS LEVY:
Yes and we can tell from the judgment of this Court on leave that they maintained that application.

GLAZEBROOK J:
Well they were to the extent that they didn't have to prove quantum, that quantum wasn't relevant to the offence, whether it was $1 or 50,000 wasn't relevant and the Crown is hypocritical on a number of occasions.

WILLIAM YOUNG J:
Well there are other cases where section 109 has been invoked in criminal cases by prosecutors.

MS LEVY:
Yes, that's correct, that's correct so –

GLAZEBROOK J:

But the fact they're hypocritical and wrong in one context doesn't make them wrong – doesn't mean that we should sustain their submissions in another context.

MS LEVY:

Well no, but in my submission it gives a certain flavour to the submissions that they make today, given their failure to make them, or accept them on other occasions. The true strength or their true belief in them has to be questioned given that history, in my submission.

WILLIAM YOUNG J:

So where are we? Is the next case you want to refer to *R v Gill* (1999) 19 NZTC 15,526 (CA)?

MS LEVY:

Yes and –

WILLIAM YOUNG J:

In your bundle of authorities?

MS LEVY:

Yes, yes. I'm not sure that there's any dispute with the submission about *Gill* in the Crown submissions. I don't need to say anymore about that than I've said in the written submissions.

WILLIAM YOUNG J:

Okay, so it's just as to what's false in the –

MS LEVY:

It really goes to the, I suppose it really goes to that part of the Crown submissions in the Court of Appeal and in this case which, trying to suggest that even if section 109 applies it doesn't actually bite on the information provided in this case, on the assessment provided in this case because

they're not actually trying to prove that so in my submission that discussion about the meaning of false is of assistance in that regard because I haven't addressed yet the Crown submission accepted by the Court of Appeal that they weren't claiming that it was false, they weren't – that section 109 wasn't engaged. In my submission that's just not an available argument when the definitions are looked at and when the indictment is looked at and I'll ask the registrar to copy that over the break. The charge is, "Knowingly providing a false income tax return," so that's plainly an assessment, plainly a disputable decision and in my submission the Court of Appeal reasoning cannot be correct. Now unless your Honours have any questions arising from the remainder of my submissions.

WILLIAM YOUNG J:

Thank you Ms Levy. Is there anything you want to add Mr Lithgow?

MR LITHGOW QC:

I just think that the example that Ms Levy I think intended to give for often actus reus can be excluded is the requirement now to the presumption that a previous conviction in some cases subject to judicial discretion –

WILLIAM YOUNG J:

It's not a presumption. It's conclusive. Unless it's excluded.

MR LITHGOW QC:

So that is an, a statutory example –

WILLIAM YOUNG J:

This is – I mean it's a bit unfortunate because our judgment in this *Morton* case isn't on our website but it does grapple with what in a sense is quite a similar issue in relation to section 49.

MR LITHGOW QC:

Well could that be made available to us? Is it - have submissions?

WILLIAM YOUNG J:

Yes. Yes it can.

GLAZEBROOK J:

I could make that available. Its subject to suppression orders.

MR LITHGOW QC:

Going back to the thinking of Lord Cooke in dealing with a broad range of criminal propositions their defence would be that though they cannot argue they're right or wrong but they believed in a set of circumstances which I think Lord Cooke accepted could be mixed fact and law which, which if correct –

GLAZEBROOK J:

Sorry. Were you referring to a particular case? I just missed it.

MR LITHGOW QC:

Well, I think I had the case name in my head. I may be wrong about which case it is.

WILLIAM YOUNG J:

Is this colour of right?

MR LITHGOW QC:

No this is where there is a belief in a set of circumstances which if correct would be a defence, would be a normal standard criminal defence in New Zealand. So you can be completely wrong, for example, age is a bad one because some of those don't are not amenable to that. But you can be completely wrong but if your belief structure was accepted to whichever standard of proof applies, whether the onus on you or not, then that is a defence and the strength with which you assert you are correct, though wrong in law, only goes to the genuineness of the belief. Now I would have thought that's a standard criminal law defence proposition.

WILLIAM YOUNG J:

Why don't we leave this point until you've had a look at *Morton* because it does cover some of these sort of issues in a reasonably similar context.

MS LEVY:

Can it be emailed to us directly?

WILLIAM YOUNG J:

Yes.

GLAZEBROOK J:

It might be worth taking a slightly longer break might it? It's quite long.

WILLIAM YOUNG J:

Yes. It is quite long.

O'REGAN J:

I think we might have to –

WILLIAM YOUNG J:

Rather diverse in the approach that's favoured.

O'REGAN J:

Maybe written submissions later because –

WILLIAM YOUNG J:

You might want to have a look at it now –

O'REGAN J:

– it's too long to just look at over the break.

WILLIAM YOUNG J:

And Mr Laurenson, do you want to make a start now?

MR LAURENSON:

I believe so your Honour. I'll get my stuff together and get to the podium.

GLAZEBROOK J:

I was just saying that we should have realised, we apologise. We should have realised about *Morton* earlier but it didn't occur to us until this morning unfortunately.

MR LAURENSON:

As a first matter your Honours, I'd like to address the matter of the builder, the example given by your Honour Justice Young, the builder who it is alleged against his undertaken cash jobs he files a return which does not disclose them and the prosecution considers that there were cash jobs and brings a prosecution under section 143B(c). Now in my submission that there is a deeming provision in section 109 which can assist the Crown to prove the second element of the offence does not in any way preclude that builder from advancing the defence that he did not do cash jobs and I take you to the elements of the offence that have to be proved under section 143B(1)(c) as set out by his Honour, Justice Kós in his reason for verdict and which are repeated at paragraph 436(23) at page 185 of the case.

GLAZEBROOK J:

Sorry, can you just wait a second? 143, do you say?

MR LAURENSON:

185 of the case and the section is 143. The section is 143. This is of the Tax Administration Act, 143B(c) of the Tax Administration Act. (1)(c) is the charge which my client and my learned friend's client were charged and which is the subject of this appeal. Now Justice Kós identified there were five matters which the Crown must prove.

McGRATH J:

This is at page 185 we're back to now?

MR LAURENSON:

Correct, and it's the subparagraph (23) where His Honour has set out an extract from his earlier decision on the section 347 application which was dismissed in the course of the High Court hearing. He says, "It is common ground that to succeed the Crown must prove five elements: (1) the accused provided information to the Revenue." Now putting that in the context of the builder who has suppressed allegedly cash receipts we have therefore a builder providing a return to the Commissioner which does not disclose those cash receipts or does not disclose cash receipts. Secondly, that information was false. That's the second thing that the Crown has to prove. Now by section 109 it can prove that because it is deemed that the assessment provided is false, but that is as far as that goes.

WILLIAM YOUNG J:

I agree with that.

McGRATH J:

It's no further than that.

WILLIAM YOUNG J:

Perhaps we might take the adjournment in a moment and you may want to just have a very quick look at *Morton* but the problem is that there are cases where the denial of mens rea necessarily is a denial of the actus reus, and in this sort of cash job situation a person who is found to have been doing jobs for cash is going to be in difficulty – is allegedly doing jobs for cash – is going to be in difficulty unless he can deny successfully that the jobs were done for cash.

MR LAURENSON:

Yes, but –

WILLIAM YOUNG J:

And he doesn't want to come along because it's not really his position that he, he's a muddler and he doesn't do proper invoices and he forgets a lot of stuff,

because that's not his defence. Now it might theoretically be available to him but he doesn't want to run it. But, look, it's actually a very similar situation to that in *Morton* and you may just want to have a bit of a look at it and we can perhaps come back to it after the adjournment. We'll take the adjournment now.

COURT ADJOURNS: 11.30 AM
COURT RESUMES: 11.50 AM

MR LAURENSON:
Your Honours, I've had a quick look at the first part of *Morton,* up to the passage where the orders are made of the majority.

As I understand it *Morton* is a case which involves –

WILLIAM YOUNG J:
Can I just say, you may want to – it's quite a dense case and not an easy one. You may want to just leave it until after lunch, or perhaps if you want to make written submissions on it. The primary reason it's put to you is, I guess, a), section 49 has been invoked and it's a case about section 49. Secondly, it does identify how a mens rea defence may become tied up with the actus reus that's alleged.

MR LAURENSON:
But the effect of the decision is to relax what might otherwise be the precluding effect of section 49 in respect of a defence.

WILLIAM YOUNG J:
That's right, yes.

MR LAURENSON:
Okay, well let's start with that principle. Start with that principle. The argument that is being advanced by the Crown in this case is that if the construction of section 109, which the defence is relying on, is applied to other

prosecutions it'll create a prejudice to the defence in the other prosecutions. Now that is the flipside of what is happening here but let's just accept that that is the proposition that the Crown are saying, that the constitutional and rules of principle in respect of the conduct of defence of criminal charges might, in some way, be constrained by a literal construction of section 109. Isn't the point of *Morton* that you, or the Courts, have power to relax that? In any event I don't see that it needs to be relaxed because the remaining elements of the charge that is involved in this case allows the defence of the suppressing builder, of his cash jobs, still to be advanced by reason of the elements that have to be proved under three, element 3, and under element 5 of the section, as set out by Justice Kós and if there does become an issue as to the deeming provision of section 109 constraining a mens rea defence then *Morton* shows that a Court, properly directing a jury, can relax the hardship of that constraint.

GLAZEBROOK J:

What *Morton* – there was a specific ability to do so under section 49 but as I say it's probably not fair to discuss *Morton* at this stage.

WILLIAM YOUNG J:

Yes, it's quite a complex case in that there are three different approaches taken in the judgments which, you know, were perhaps rather uneasily, two of which were perhaps rather uneasily melded together to form a majority but I think just leave the issue in the meantime and perhaps come back to it after lunch if you want to or in written submissions.

MR LAURENSON:

Well I'm not too sure how much we can usefully continue to argue today's appeal if that is to be the position but…

WILLIAM YOUNG J:

Well it's really probably a hare I set running that's become a bit diversionary but there's quite a lot else to be considered, including your reasonably helpful, quite helpful material on the legislative history and so I think, I mean, the

actual point at issue in this case is a relatively narrow one but the legislative history's quite interesting as to it.

MR LAURENSON:

Well the argument that is advanced for both defendants, but in the submission for Mr Rowley, is that up until *Maxwell v Inland Revenue Commissioner* [1959] NZLR 708 (SA & CA) there may have been a good rationalisation of why the predecessors to section 109 did not apply to criminal proceedings, and it is because of the passage in the last, or the last phrase of those sections, that were the forerunners, which contain the words that, "The taxpayer would be assessed accordingly."

WILLIAM YOUNG J:

There are two elements of the legislative history that struck me as interesting and that's one of them. The other arose a little earlier and that's the *Anson v Commissioner of Taxes* [1922] NZLR 330 (SC) and *Macfarlane v Commissioner of Taxes* [1923] NZLR 801 (CA) approach that the conclusive effect of the precursors to section 109 extended not just to the end result of the assessment but the premises upon which it had been arrived at and these are the standard value stock cases.

MR LAURENSON:

Yes.

WILLIAM YOUNG J:

Was that point particularly addressed in them, in detail?

MR LAURENSON:

In –

WILLIAM YOUNG J:

This is *Anson* and *Macfarlane*.

MR LAURENSON:

Yes. Is that point addressed in detail where?

WILLIAM YOUNG J:

In those cases. I mean the argument for the Crown and was to some extent put to Ms Levy when she was giving her submissions is that well it's only the assessment that's correct. That the steps which led to that assessment are not within the deeming provision so that, for instance in this case, the assertions as to taxable income are not deemed to be correct.

MR LAURENSON:

In my submission that issue is resolved by the term, "and any particular thereof" in section 109 and I have to reinforce what my learned friend advanced this morning that to try and read out or read down or neutralise the effect of the word, "particular" as Justice Kós has done and which may have been the thrust of some of the question from the bench this morning, is - simply cannot be done because for an assessment to be made necessarily requires a consideration of return that is income and what is the net position after justifiable allowable deductions and an assessment can be false as much as for any reason by reason of an overstatement of deductions. Income, the income figure may be perfectly, the gross income figure may be perfectly accurate but the return is incorrect because of a over-claim of deductions and therefore you have to have regard to how the sum is calculated, ie, what are the deductions in order to determine whether the assessment is false and therefore a particular of the assessment has to be the amount of deduction and whether or not that is a overstated amount.

WILLIAM YOUNG J:

All right. Well just looking at page 6 of your submissions. You've cited from Anson. And it's really the last four or five sentences that struck me. The Judge says his assessment for the preceding income year was based on a valuation of his sheep as worth £3,776 at the end of that year and his tax income, taxable income was conclusively completed on that basis. He's not now at liberty therefore to dispute that valuation though and that is

presumably a reference to the particulars deeming provision which was in the statute that was in force at the time. I think it's the 1916 Act.

MR LAURENSON:

It is the provision that is set out at paragraph 12.

WILLIAM YOUNG J:

"And every such assessment and all the particulars thereof shall be conclusively deemed and taken to be correct." So I think that that helps on that particular point.

MR LAURENSON:

Well, in those standard value cases what was being concentrated on was the difference between the standard value of the sheep, and you've pointed out that there is a misprint in the submission. "Sheet" has been incorrectly recorded. But there has been a difference between the standard value of the sheep and the now assessed value on the valuation at death or, in the case of *Anson's* case, on the sale, the actual sale of the sheep, but in order to arrive at the taxable liability there still has to be the particulars of other factors that determine income which include what might be the deductions that would be available to the farmer. The standard value and the other value don't live in isolation, in my respectful submission.

WILLIAM YOUNG J:

All right, but it did seem to me that that point was reasonably illuminating in relation to the argument that Ms Levy engaged in. The other point you wanted to deal with briefly was *Maxwell*.

MR LAURENSON:

Well, before I leave *Macfarlane*, *Macfarlane* is in my submission an important decision in the context of this case because there the Court said the Crown is stuck to the deeming provision of then-section 18 as much as the taxpayer is, and although there was a strong minority judgment of Justice Salmond to the contrary effect, in my respectful submission *Macfarlane* is an important case

in this context because it is saying that what applies to the taxpayer equally applies to the Crown here, and we've got in the particular circumstances of this case the Crown attempting to void the deeming position of section 109 in its prosecution of my client and Mr Skinner although I think the word before was used, "hypocritically", there would be no attempt to avoid that deeming position if it suited the Crown in a prosecution.

Now this Court in looking at this issue I submit can take support, strong support, from that decision in *Macfarlane* where the Court held that it applies equally to prosecutor and to defence. So that would be a second matter that I would draw for *Macfarlane*.

WILLIAM YOUNG J:
It's a deeming provision so it states the law and the law applies both to the revenue and to the taxpayer.

MR LAURENSON:
Yes, although I hope that is unqualifiedly accepted.

O'REGAN J:
I don't think the Crown's saying it applies when it benefits them but it doesn't apply when it doesn't. They're saying it doesn't apply at all and you can make the point, well, that's inconsistent with what the Crown has said in other cases but I don't think the Crown is contending for a best point for it on every case. They're accepting that if they win this case they can't then use the benefit of it in future cases.

MR LAURENSON:
Yes, there is a certain irony that being called in aid the constitutional and rules of principle to defeat a deeming provision that is of assistance to the defence in this case. Perhaps it's no more than irony. *Maxwell*.

I should just before I leave *Macfarlane*, your Honours, there are some typographical errors in the print of my submission but there is one omission at

paragraph 22 in discussing *Macfarlane* which I need to correct. Paragraph 22 says, “The majority of the Court of Appeal denied the Commissioner on two grounds. First, that the increase in value was,” and I had printed there, “was derived income”. In fact, the Court of Appeal found that it was not derived income. That word “not” has been omitted.

In respect of *Maxwell*, nowhere there appears in any of the cases it would appear that the second *Maxwell* decision is included. I have copies of that for the Court.

GLAZEBROOK J:
The civil one, you mean?

MR LAURENSON:
Yes, but I have referred to it. My submission is very simple, that *Maxwell* was the leading decision on the section at that time on the application of the deeming provision to criminal cases. You had the strong judgment of Justice McCarthy which was not in any way affected in the Court of Appeal decision in the criminal case and it was followed subsequently in cases such as *Gideon Trading Company Limited v Commissioner of Inland Revenue* [1961] NZLR 440 (SC) and *Kirkpatrick v Commissioner of Inland Revenue* [1962] NZLR 493 (SC) which are mentioned in the submission followed in the High Court, or then Supreme Court, by Justices Barrowclough, in one of the cases, and Hutchison, in the other, and in my respectful submission that as at 1959 going into the early ’60s and beyond, the leading or the understood position of the law was that the deeming provision did not apply to section, or forerunner of – I’m sorry – did not apply to criminal proceedings. However, any issue about that was removed when the qualifying phrase in the earlier sections was removed. It must have been apparent, known and obvious to the legislature that by removing that qualifying last phrase in the section it was removing the very qualification that allowed Justice McCarthy to find that it did not apply to criminal cases.

GLAZEBROOK J:

I was just going to make the point that that assumes that every member of the legislature was aware of the minutiae of a decision that was – what was the date of it?

MR LAURENSON:

1959.

GLAZEBROOK J:

1959. Was anything said in the Parliamentary debates that might indicate that this rather momentous change was occurring by virtue of really getting rid of redundant words because of the definitions that were now in the Act in respect of taxable income and the self-assessment process?

MR LAURENSON:

There has been no – well, certainly my research could not reveal, did not reveal anything of the way of a specific, of this matter being addressed and I think the Crown did look at this in their submissions.

MR EBERSOHN:

Yes, we couldn't find anything. I'll address it further…

MR LAURENSON:

One of the cases referred to by Justice McCarthy was a case called *L Marks, Morrin and Jones Ltd (In Liquidation) v Louis Marks* [1931] NZLR 756 (SC) which was a civil case. Say parties enter into a contract for sale of a property that bills into the calculations of what one owes the other, a GST liability. Would a GST assessment, in relation to one of them, be decisive of that liability and so bind the other? Pretty tough, because the other wouldn't have a right to challenge the GST assessment because say it's in my interests that there's no GST and I file a return that a particular transaction was by way of sale of a going concern, so it's zero rated. Might be a bit tough on the person I've been contracting with to be stuck with the, my assessment, without any right to challenge it under the Tax Administration Act.

There's a large number of, there's a body of authority where the GST liability of one party under a contract is sought to be passed off to the other party. There's a large amount of judicial discussion of that, and as I understand it, having been involved in one case myself some time ago, unless the contract specifically provides for the liability, the GST liability of, say, the vendor to be passed onto the purchaser, each are treated separately under their own tax affairs. Now are you putting, as the example, where the contract provides that the purchaser, say, is to meet any GST liability of the vendor, are you putting that as the proposition?

WILLIAM YOUNG J:
Well there may be plus GST, if any, and the vendor may, the reverse of what I've said, not declare it as a sale of a going concern and then seek to pass on the GST liability, self-inflicted, to the purchaser.

MR LAURENSON:
Well then you would be looking at the terms of the contract.

WILLIAM YOUNG J:
Yes I know that but –

MR LAURENSON:
And if it was a self-inflected liability on the part of the vendor then I would have thought there would be any amount of relief to the purchaser, by reason of bad faith or breach of contract or something…

WILLIAM YOUNG J:
Why wouldn't the assessment just be deemed to be correct?

MR LAURENSON:
Because it has no effect to the present circumstances because the dispute there would be between the purchaser and vendor not between a taxpayer and the Commissioner, section 109 applies and the taxpayer –

WILLIAM YOUNG J:

But this isn't a dispute between the taxpayer and the Commissioner. This is a dispute between a prosecuting agency and the taxpayer.

MR LAURENSON:

And how would that arise?

WILLIAM YOUNG J:

Well I've just given you an example which I've, you know, it may be a bit clunky because I haven't thought it through completely but it just seems to me that there would be a problem if a self-generated assessment by one party to a contract was binding on the other party because of the deeming provision of section 109 with that other party not having any right at all to challenge it because not a taxpayer.

MR LAURENSON:

Yes, I'm not seeing it as applying because section 109 involves any dispute of an assessment between Commissioner and taxpayer.

WILLIAM YOUNG J:

But that's the Crown's argument. I mean say this was a private prosecution for instance, I mean, the prosecutor here isn't – I wouldn't regard the prosecutor here as the Commissioner. Was it a police prosecution or an SFO prosecution?

MR LAURENSON:

Inland Revenue Department I think was it, yes, just an Inland Revenue Department.

WILLIAM YOUNG J:

So the original informant was an IRD person?

MR LAURENSON:

Correct.

McGRATH J:
It became a Crown prosecution.

WILLIAM YOUNG J:
It would have become a Crown, it would have been taken over by the Solicitor-General after committal presumably.

MR LAURENSON:
That's correct, the Crown solicitor in Wellington was instructed on the indictment or took over the indictment or…

McGRATH J:
Well lay the indictment under a statutory pass.

MR LAURENSON:
Absolutely. Automatically became involved because it was laid as an indictable offence.

Your Honour, are not those examples leaving the realm of everyday life, which we are dealing with in this case?

WILLIAM YOUNG J:
Well just looking very quickly on my computer screen at *L Marks, Morrin and Jones Limited v Louis Marks,* which is referred to in *Maxwell*, that does seem to be –

O'REGAN J:
It's in the bundle.

WILLIAM YOUNG J:
Is it actually in the bundle?

MR LAURENSON:
It's number 42 of the appellant's bundle.

WILLIAM YOUNG J:

Oh I see, okay.

MR LAURENSON:

Doesn't that answer the GST?

WILLIAM YOUNG J:

Well it rather suggests that section 109 wouldn't apply in the civil context between the parties, one of whom doesn't have a right of challenge.

GLAZEBROOK J:

But what you'd probably say is well, here, the Commissioner had the ability to change it and the taxpayer had the ability to challenge it so it's not apposite.

WILLIAM YOUNG J:

Not what you say.

GLAZEBROOK J:

But it does suggest that 109 isn't as comprehensive as might have been suggested by its plain wording, assuming that these decisions survive, survive the new wording I mean, sorry.

WILLIAM YOUNG J:

I mean the point which I've been raising, rather awkwardly, is captured at the bottom of page 46 and the top of page 47 of the bundle. "The object of this section, it appears from its concluding words, is to determine the liability of the person who has been assessed for tax. That liability's not in question in this proceeding. In this proceeding the person assessed is seeking to make another person liable in respect of its own assessment. In my opinion section 18 has no application in such a case."

MR LAURENSON:

And it goes on, "It applies only to a case in which the liability of the person assessed is in question in respect of that particular assessment."

WILLIAM YOUNG J:

Now that may draw something from the concluding words of the section of course, which we no longer have, but the Judge there addresses the point that I was making, "If it were otherwise a mistake made by the Commissioner in describing third persons, a notice of assessment would have the effect of altering the rights of the person who had no notice of the assessment and had no opportunity of objecting to it."

MR LAURENSON:

And that's over at page 47.

WILLIAM YOUNG J:

Yes, "And the Commissioner mistaken this case in describing the company as agent for the debenture holder cannot help a company." I just wonder whether, would that case not still be decided the same way despite a change to section 109?

MR LAURENSON:

Well I have to say that throughout I've always read the application of section 109 in the context of a controversy between the Commissioner and a taxpayer and not the involvement of third parties.

WILLIAM YOUNG J:

But it couldn't make a difference here if the informant had been an investigator in the Serious Fraud Office or a detective in the fraud squad.

MR LAURENSON:

Well they're both acting under the aegis of the Crown are they not?

WILLIAM YOUNG J:

Yes but they're not the Commissioner.

MR LAURENSON:

They're not the Commissioner but I perhaps loosely am saying that you must read the Crown and/or Commissioner in the one sense in the application of the prosecution provisions of section 143B and therefore the application of section 109 and I believe the Crown accepts that in their submissions, that they are one and the same for the purposes of this. But the issue here is not whether this extends to third parties. It is what is the effect of the provision on this particular controversy between Messrs Rowley and Skinner and a prosecution where section 109 is sought to be applied by the defendants. Does it need, does it help at all to widen the discussion to the civil position of third parties? I submit it doesn't.

WILLIAM YOUNG J:

The rest of your material pretty much covers ground pretty similar to that address by Ms Levy, doesn't it?

MR LAURENSON:

It does. I was wanting to relate the carpenter example of yours to the decision in *Smith*. However, I sense that the patience of the Court would more be treated if that was incorporated in any response arising from a more considered look at the *Morton* decision. So I won't press that at the moment unless you wanted to hear that.

WILLIAM YOUNG J:

Well, I think deal with it in reply after lunch and if, as is possible, you find *Morton* a bit of a dense read, too dense a read to permit that course to be adopted, we'd be happy to accept written submissions on it.

MR LAURENSON:

Mmm.

WILLIAM YOUNG J:

I mean, the example was simply dropped on Ms Levy this morning so you may want to think about it.

MR LAURENSON:

All right. At one stage in argument this morning your Honour, Justice Glazebrook, asked for the consideration of the matters in paragraph 55 of *Allan* and I simply wish to point to my paragraph 19. I believe it is in my submission. Let me just confirm that.

WILLIAM YOUNG J:

I don't think it is actually –

GLAZEBROOK J:

It – sorry –

MR LAURENSON:

No.

GLAZEBROOK J:

It's paragraph 44, 45. Paragraph 45, page 15.

MR LAURENSON:

That's correct, and that is the –

GLAZEBROOK J:

Was that the paragraph you were thinking of?

MR LAURENSON:

That is the one, 45 through to – at pages 15 and 16. That is the reconciliation to the defendant's, the appellant's position to that section 55 of your Honour and the *Allan* decision.

I believe I don't have anything more usefully to say until we can have a look at *Morton* other than to reiterate that for my client, and I submit it applies equally, I believe it is accepted equally for Mr Skinner, that the section says what it does, the prosecution in this case made an error in not diffusing the effect of the presumption and the Crown, the prosecution is stuck with that. It's as

simple as that. It is not going to create any great problem in the future because I'm sure the Commissioner and the prosecutors will be alert to this issue if they have to. We have had a series of arguments advanced by the Crown as to why it should not apply, as I have said, ironically, all pleading unfair defence, but we're not saying there's anything unfair about this. We say it's to the, not the advantage but it is to the defendant's benefit, this deeming provision, and the prosecution really just has to bear it, get on with it, because the real world will deal with it in a pragmatic way in the future.

Your Honours, unless there's anything else I can assist at this stage I reserve the position until a closer look at *Morton.*

O'REGAN J:
What do you say should happen if your argument is upheld, in terms of the sentence or do you suggest we should just refer that back to the Court of Appeal?

MR LAURENSON:
I don't see it affecting sentence because in the High Court it was not – the convictions on these five charges did not influence the level of sentence at all. That's expressly said by Justice Kós. I don't want that, necessarily, to be a final position but that's how I've always seen it, that it's not going to change the sentence.

WILLIAM YOUNG J:
Okay, thank you Mr Laurenson.

MR LAURENSON:
As your Honours please.

MR EBERSOHN:
Thank you, your Honour. I have copies of the Tax Administration Act penalty provisions which I'm going to be referring to. I'd be grateful if I could hand-up copies of that.

I've prepared written submissions, I wasn't going to hand them up but I can if it would assist the Court because it does reference a lot of the documents which I'll be referring to. I don't mind either way, whatever the preference.

WILLIAM YOUNG J:
Hand them up, I think.

MR EBERSOHN:
In the written presentation what I've done, or the Crown's done, is collapse the two different arguments really into one argument and that's because a lot of the considerations which inform the second argument also impact upon the first in the sense that the way the Courts in the past have read, such as in *Maxwell* and such as in *Allan*, have read section 109 is impacted significantly by the effect which the application of section 109 in criminal proceedings would have, and therefore the primary submission of the Crown is that section 109 applied in criminal proceedings would cut across the established balance between the Crown and the defendant in a manner that Parliament would not have intended, and this is supported by the fact that section 109 has no clear purpose in a criminal context where it clearly performs a clear function in a civil context.

I am going to start at 4 by – in terms of the distinction between the civil and the criminal proceedings and I think it's very helpful to go to the Commissioner, sorry, the respondent's bundle of authorities at tab 1, page 110, which is where you'll find section 149A.

Now 149A is the provision dealing with the onus of proof, the standard of proof and the onus of proof, in both civil and criminal matters, and I'm not taking your Honours to it simply to say that it is there but there are certain aspects of this provision which, one, it illustrates that there is this distinction very clearly in the act between civil and criminal firstly and, secondly, they are components of this test which is simply inconsistent with the application of section 109 in the criminal context. And so simply starting at

subparagraph (2), “The onus of proof in civil proceedings relating to evasion or similar act to which section 141E applies or to obstruction rests with the Commissioner.” Now if you pause there, it’s interesting that for the penalty of evasion or obstruction the onus of proof rests with the taxpayer.

Then you go down and it goes on to say now evasion in this case, sorry, rests with the Commissioner, which is the reverse of what would happen if section 109 applied in the criminal context.

So evasion, referred to there is the penalty of evasion which is found in section 101E and if you look at the hand-up, which is the hand-up I’ve just given on penalties, and you go to page 26 of that, you’ll see the civil penalty for evasion, and then obstruction also refers to the provision which increases the penalties for obstruction and that is found at page 39. If you page through to 39 you’ll see the increased penalty for obstruction.

Now in both cases that is the only obstruction referred to in the Tax Administration Act so it’s the only thing which subsection (2)(a) can be referring to, and so what you’ve got is the scenario where quite clearly Parliament intended that even in the civil context the onus of proof when it comes to evasion or obstruction would rest with the Commissioner.

WILLIAM YOUNG J:
But wouldn’t, in civil proceedings, the penalties, section 109 apply in accordance with its language?

MR EBERSOHN:
Yes, it would.

WILLIAM YOUNG J:
So the assessment would be treated as correct?

MR EBERSOHN:

Yes but what one must understand is that the actus reus in the criminal proceeding will not be, will not match the falsity, if you like, that will be deemed to be correct in a 109 if section 109 applies is not the same thing which will – the onus there will still be on the taxpayer.

WILLIAM YOUNG J:

Yes but, sorry. Say there's an allegation under section 141E that the taxpayer should pay a shortfall penalty –

MR EBERSOHN:

Yes.

WILLIAM YOUNG J:

– because of evasion and taxpayer says, "But look there was not any evasion because I – my assessment was fine. My return was dead correct. That argument would be precluded wouldn't it by section 109?

GLAZEBROOK J:

Well I think isn't argument that if the onus of proof is to prove evasion is on the Crown in Civil proceedings that would go against the Commissioner being able to fulfil that burden by merely making an assessment.

WILLIAM YOUNG J:

Yes. It's just that a Commissioner would have to prove other stuff to establish evasion, would have to have to point to a state of mind.

MR EBERSOHN:

Yes.

WILLIAM YOUNG J:

But it would be possible to construe these sections as applying on the basis that the return which by this stage will have been upheld presumably by the Courts or the TRA –

MR EBERSOHN:

Or the subsequent reassessment of the return, yes.

WILLIAM YOUNG J:

– is correct and the issue then is whether it was intended to - whether there was - that the evasive state of mind's been established? Would you really accept in evasion proceedings that the taxpayer could put in issue the correctness of the assessment?

MR EBERSOHN:

I think, I don't think that, or I would submit that the correctness of assessment of evasion case on the criminal evasion is –

WILLIAM YOUNG J:

No, no. I'm talking about the shortfall for penalty, leave. I'm talking about section 141E so I'm just talking about –

MR EBERSOHN:

Right.

WILLIAM YOUNG J:

– proceedings for a shortfall penalty based on section 141E. Now I would have thought the Commissioner would hold very fast the proposition that the assessment is correct and all that remains in issue is whether an evasive state of mind has been established.

GLAZEBROOK J:

No but I think with the penalties don't they come on at the time of the assessment so the Commissioner will amend the assessment and the burden of proof applies to the objection proceedings?

MR EBERSOHN:

Yes.

GLAZEBROOK J:

So in terms of the objection proceedings the burden's on the Commissioner. I'm not sure that it takes you anywhere to be honest in terms of 109 because doesn't - 149 will apply in objection proceedings won't it –

MR EBERSOHN:

Well –

GLAZEBROOK J:

– because if the Commissioner has put a shortfall penalty on that's related to evasion –

MR EBERSOHN:

Yes.

GLAZEBROOK J:

– the Commissioner has to prove that that is justified, unlike normal objection proceedings where the taxpayer has to prove that the assessment is wrong.

MR EBERSOHN:

Yes. Let me talk to that broadly first in terms of how I think, how the process would work. The Commissioner would assess usually, I mean usual course both the income tax, assuming it's income tax liability and at the same time the shortfall penalties as her Honour said. What would then happen is the taxpayer today, assuming, it could be an objection but that would be – if the years were in early sort of 1990s but most of it would be a challenge proceedings to be brought. In terms of the income tax liability the onus would still be on the taxpayer. In terms of the evasion penalty the onus would be on the Commissioner, so it is possible –

WILLIAM YOUNG J:

Well let's see if we postulate a situation. There's an assessment for tax and shortfall penalty. The case goes to the High Court. The Judge upholds the assessment as to income tax, says that the Commissioner's assessment is

right. Adjourns for further consideration the shortfall penalty. That case then comes on for hearing.

MR EBERSOHN:
That's still a challenge.

WILLIAM YOUNG J:
Yes I know. It's still a challenge. Now, for the purposes of that challenge is the taxpayer entitled to say that your earlier decision was wrong. The assessment's not correct.

MR EBERSOHN:
It's –

WILLIAM YOUNG J:
– I didn't do anything that amounts to evasion because I never defeated tax?

MR EBERSOHN:
I don't know if the taxpayer would put it that way but they certainly could say that you've accepted on a balance of probabilities with me, with myself having the onus. They can do that. The Taxation Review Authority or the High Court could do that and, but if you're looking at it as different test, beyond reasonable doubt, rather as you would have a civil criminal case involving the same set of facts. You could have an acquittal –

WILLIAM YOUNG J:
I understand that.

MR EBERSOHN:
Yes, the same –

WILLIAM YOUNG J:
But would the Judge be prepared to entertain an argument on the second half of the proceedings that the conclusion that the Commissioner's assessment was right is open for challenge because the onus of proof is now on the

Commissioner? I mean, you could say the onus of proof is satisfied because here's an assessment that's deemed to be valid.

MR EBERSOHN:

I've just argued a case on that basis in the Taxation Review Authority. I don't know whether it will be entertained or not but that was the view accepted by both parties that you could have that distinction. I mean, I think that in most cases the onus is not going to make that much difference depending on the extent of the evidence but you could have that distinction.

WILLIAM YOUNG J:

But the standard of proof might make a difference.

MR EBERSOHN:

The standard of proof might make a difference, yes, yes.

WILLIAM YOUNG J:

Okay. Are there any decided cases about that?

MR EBERSOHN:

There are decided cases on evasion. Whether this point – I can't take you to authority standing here right at this moment.

WILLIAM YOUNG J:

Okay.

MR EBERSOHN:

Now the interesting point though is that this –

GLAZEBROOK J:

I'm just thinking because it may not be the taxpayer saying it was right. The taxpayer might be saying, "Prove it's evasion," and I'm not sure that the Commissioner could then say, "But I've assessed it on that."

WILLIAM YOUNG J:

No, but I'm simply saying I would have thought it open to argument for the Commissioner that the assessment establishes the correct tax position. Whether it's evasion is a matter which the Commissioner has to prove but that would normally, on my hypothesis, reflect focus on the state of mind of the taxpayer rather than the correct tax position which on this proposition would be held to have been established by the dismissal of the challenge.

MR EBERSOHN:

Yes. Yes, most, I think a lot of the cases where both the tax and the – is being disputed and the shortfall penalties, the focus probably will be on intent more than on the actus reus because it's a slightly different type of case where somebody's saying, "Look, I really don't owe this tax. Here are the reasons for it," and then you've had a big fight about the fact that they don't owe the tax on – so the focus usually on penalties then does revert to intent in those circumstances. The point simply being made though is that if section 109 applies in the criminal context you have going to have scenarios as set out in the written submissions where effectively the onus is shifted onto the defendant in a criminal context and yet in a civil context for evasion the onus rests with the Commissioner, and that is a rather peculiar result and furthermore if you look down, stating the obvious, it says, "The onus of proof in criminal proceedings relating to any matter or thing rests with the Commissioner." The interesting thing about section 149A is that it was enacted and inserted. It encapsulated the standard position but it was enacted and inserted on 26 July 1996 by section 43 of the Tax Administration Amendment Act (No. 2) of 1996 which was the same provision, sorry, the same amendment which inserted the new version of section 109 which removed the words, "And liability of the person so assessed shall be determined accordingly," that, of course, being the wording which my learned colleague says when that was removed the effect was the *Maxwell* and those cases no longer applied.

ARNOLD J:

So do you say those words were redundant because the position that they record is actually the result of the way the Act works so you don't need them?

MR EBERSOHN:

Works, in any event. The words were redundant, I think, because if you go to page 93 we come across section 109.

GLAZEBROOK J:

93 of your new bundle, is it?

MR EBERSOHN:

No, no, sorry, of the respondent's bundle, and…

GLAZEBROOK J:

It's not in this new one.

MR EBERSOHN:

No, it's not, no. No, the new bundle is simply the penalties and we'll deal with why that's there in due course. But the focus of that provision is clearly on disputing an objection or challenge proceedings or limiting proceedings to dispute an assessment or disputable decision, in other words a challenge to that disputable decision, and if you can't challenge that disputable decision other than through challenge proceedings then the words, "And liability of the person so assessed shall be determined accordingly," really serve, they're superfluous, they really serve no additional purpose. They don't add anything to the section. The interesting thing is though that if this was the intention of Parliament to now apply this for the first time to criminal proceedings you would have expected something. If you go – and we haven't produced it because there's nothing in them, but at the time, this was the same time the disputes resolution was being introduced into the procedures being introduced, there was a lot of discussion documents. There was the very big select committee report dealing with the changes but there's simply no mention of 109 at all. It just doesn't – you know, it's there in the bowl and it's

amended, but there's just no discussion at all as to why it's been amended. You would have expected a change of that significance if it was to have any – if Parliament is trying to do anything other than just neaten up the provision, you would have expected something to have been said in some or other document at that stage.

Now for civil penalties, there's a clear distinction between criminal and civil penalties, which is set out – which is obviously the hand-up which I've provided – and civil penalties are assessed in the same way as income tax is assessed, which, if you go to the hand-up, you'll find that at page 70 – sorry, not the hand-up. In the respondent's bundle of authorities you'll find that at page 74, and there's the provision dealing with the assessment of shortfall penalties which follows on from section 92 which dealt with assessments to income tax. I'm not sure that it takes us anywhere but there was some discussion as to when that was introduced, the self-assessment regime, and that was for the 2003 income year it was introduced.

GLAZEBROOK J:
Sorry, two thousand?

MR EBERSOHN:
Three, income year. Self-assessment. The reason I say it doesn't take us anywhere is because prior to that the Commissioner made the assessment but the effect was much the same as it is today because all that would happen is the taxpayer would file their returns. There would be over the course of a year well in excess of a million returns would come in and you'd have people who would look at these returns very briefly initially and would then just issue assessment in terms of the return which had been filed in most cases. I mean, theoretically they could take it and put it aside and there could be an investigation on that, but what would often happen is that investigators would come around later and have a look at different returns after the assessment has been made and then there would be a disputes process entered into. So a lot of returns in those days were simply based – a lot of assessments were simply based on the returns filed in any event. So I don't think it

changes the dynamics particularly to discuss whether it's a taxpayer or Commissioner assessment in that sense.

But going back to 74, that is the provision which allows the Commissioner to make or amend an assessment for civil penalty in the same way as they would for the ordinary tax. This important point to note is there's, of course, no equivalent for criminal penalties. It's not imposed by an assessment of the Commissioner. The civil penalties are in fact imposed, as your Honour's will know, under the Sentencing Act taking into account the relevant principles that relate to sentencing and the purposes of sentencing. They involve offences, criminal penalties, so where they refer to as criminal penalties if we page through, I think it's to the, if we look at the hand-up, you'll see the heading under page 1, that's the big 1 at the top, of "Penalties. The purpose of this part is to encourage taxpayer compliance," et cetera, and if we turn the page to page 2 you'll see the heading, "Civil penalties," so these are the penalties which are imposed by assessment. If we then go through to, and then page 26, which is the evasion or similar act, which is the civil penalty on that. And then if we page all the way through to 45 you'll see the heading, "Criminal penalties," which is the absolute liability, starting off with the absolute liability of offence. Although they refer to it as criminal penalties they, in essence, the criminal offending and if you turn the page you'll see, at 46, the mileage offences.

WILLIAM YOUNG J:
Why does the standard of proof provision distinguish between criminal penalty provisions and criminal prosecutions?

MR EBERSOHN:
Sorry?

WILLIAM YOUNG J:
The onus of proof provision you took us to earlier address, dealt separately with –

MR EBERSOHN:

It did.

WILLIAM YOUNG J:

Criminal penalty provisions and criminal proceedings.

MR EBERSOHN:

Yes it did, so it's at page 110 of the respondent's bundle of authorities. So the onus of proof in civil proceedings, which is subsection 2 –

WILLIAM YOUNG J:

Yes but why, I don't quite understand, it's maybe something that I'm just missing but why – I'm looking at page 55 of your hand-up, section 149A(3). "The standard of proof in criminal proceedings related to the imposition of penalties is beyond reasonable doubt." Well, I mean, I would have thought that was obvious.

MR EBERSOHN:

I think it is, it is obvious but I think the first point is that there is this clear distinction and quite clearly Parliament intended in the, and this was provision – it is obvious but Parliament, when it put this provision in, was quite clearly giving an indicator that it intended that in criminal proceedings it would rest with the Commissioner and what we do have, and this was the same time that 109 was amended, supposedly to have an effect and undermine *Maxwell*, the decision in *Maxwell*, when quite clearly section 109 in the enactment is, well the provisions in it, is having a contrary effect and is inconsistent with that hypothesis which is being advanced by the appellants.

GLAZEBROOK J:

Can I just be clear that these criminal penalties, they come within criminal proceedings. I don't see a definition of criminal proceedings.

MR EBERSOHN:

Yes.

GLAZEBROOK J:

They usually tell you where they do that but.

MR EBERSOHN:

And the relevant provision that we're dealing with here falls within section 143B, which is the provision we're dealing with in this, before the Court today, is at page 49. And so you can see that they've followed all the ordinary procedures which you would expect in a criminal proceeding, so a person who commits an offence against this Act, and then goes to –

GLAZEBROOK J:

What I'm saying is you've got the standard proof in civil proceedings is the balance of probability apart from evasion so the standard of proof in criminal proceedings, and that'll be anything that's under criminal penalties is it?

MR EBERSOHN:

Yes.

GLAZEBROOK J:

Is there a definition of criminal proceedings or we just infer that from the criminal penalties and civil penalty? I couldn't see one.

MR EBERSOHN:

I don't think there's a definition, I think we infer it. We couldn't refer to anything else within the Act –

GLAZEBROOK J:

No, no, no, I was just checking what the submission was, that was all.

MR EBERSOHN:

Yes.

O'REGAN J:

Isn't it with the Crown rather than with the Commissioner? It's a bit – the Commissioner isn't the prosecutor.

GLAZEBROOK J:

Well it doesn't say that, it just says it's beyond reasonable doubt.

O'REGAN J:

No it says the onus of proof rests with the Commissioner.

MR EBERSOHN:

Your Honour, it is not a thing of beauty in terms of its wording.

O'REGAN J:

I can't see how the Commissioner can have onus of proof when he's not a party to the prosecution but anyway.

MR EBERSOHN:

The – going back to the hand-up though, in terms of the procedures for the criminal offences, they found it, or criminal penalties, they found it at page 56. You'll see there are some provisions which deal with that. So for example –

GLAZEBROOK J:

Oh, it is, it's filed by the Commissioner, the charging document –

MR EBERSOHN:

The charging document's filed by the Commissioner –

GLAZEBROOK J:

– which might be why they say that.

O'REGAN J:

The indictment is the charges owned by the Crown Solicitor aren't they?

MR EBERSOHN:

That's correct. The indictment is, it's – but I think whatever one thinks of the wording of –

GLAZEBROOK J:

It's a submission in a nutshell that if you have a burden and standard of proof and an onus of proof on the Commissioner it would be very odd if that can be met without it being absolutely explicit by merely an administrative act of, well actually even an act of the taxpayer or an act of the Commissioner in making an assessment.

MR EBERSOHN:

That's exactly the submission. It's –

GLAZEBROOK J:

And one would have thought if you put them in at the same time that you would have had something in section 149A to say subject to section 109 –

MR EBERSOHN:

You would have your Honour is the submission.

GLAZEBROOK J:

– or vice versa, possibly but it's odd that you have them both in at the same time and a major element of an onus can be satisfied merely by the Commissioner punching a few numbers into a computer.

MR EBERSOHN:

Yes. That's exactly the submission firstly and the supporting that submission is of course the proposition that if such a fundamental change was in fact intended you would have expected to see something in the select committee report or in some document at that point in time.

GLAZEBROOK J:

Or in the text of the statute –

MR EBERSOHN:

Or in the text of the statute, yes –

GLAZEBROOK J:

– to make it clear that there were limits on section 149A.

MR EBERSOHN:

The - before we move on. If we go to, this will be hand-up. If we charge - if we turn to page 57. My learned friend mentioned that section 108, which is a time bar provision applied both to criminal and to civil. She said that on the basis that if there's a fraud the time bar doesn't apply –

WILLIAM YOUNG J:

I don't think she said it applied. She simply said it showed that the statute was drafted with criminal activity in mind.

MR EBERSOHN:

Doesn't – well certainly in terms of lifting the time bar that would be correct but, be that as it may, I just point out that at page 57, section 150A and section 150B have a separate, effectively time bar for prosecutions under the Act, one being 10 years for the income tax and GST offences and the other being –

GLAZEBROOK J:

Sorry, what page?

MR EBERSOHN:

Page 57 of the –

GLAZEBROOK J:

57. Thank you.

MR EBERSOHN:

– the hand-up. Sorry about the two documents.

GLAZEBROOK J:

No, no, no. It's all right. That's fine.

MR EBERSOHN:

– has a separate, what can be called a time bar effectively for laying of charges –

McGRATH J:

And this legislation again is dated, the legislation we're looking at in the hand-up –

MR EBERSOHN:

Sorry, your Honour. This is the hand-up, yes.

McGRATH J:

When the section 150A and 150B coming in? I'm just trying to relate it to – oh, 1996.

MR EBERSOHN:

Yes it's the same. It seems to be the same –

McGRATH J:

Thank you. Yes, I can see that.

MR EBERSOHN:

Yes. That was a time there had been a report by President Richardson, as he was then, into the tax administration and the dispute procedure was a significant overhaul of the tax procedures and the tax administration had a number of provisions inserted to make things clearer.

GLAZEBROOK J:

So were these new provisions or were there criminal time bars before –

MR EBERSOHN:

I'm not sure if the time bars –

GLAZEBROOK J:

They say inserted don't they so –

MR EBERSOHN:

Yes, yes. I don't' know if it existed elsewhere such as –

GLAZEBROOK J:

Exactly. That's what I was asking you.

MR EBERSOHN:

It might exist –

GLAZEBROOK J:

The Richardson report might be, might tell us that anyway if we…

MR EBERSOHN:

Yes.

McGRATH J:

This is an amendment that really almost immediately have followed the original Acts didn't it? It was –

MR EBERSOHN:

Yes.

McGRATH J:

– in fact really much in contemplation as I recall it at the time of the original Act, but –

MR EBERSOHN:

Yes. The process was started already at the time of the first, yeah, the Tax Administration Act came out. Now, now I simply make the point from the written submissions at about 4.3 that what the clear purpose in the civil context of section 109 is to limit and this is inserted in the written submissions, collateral tax on the assessment. It's other forms of attacking the assessment. Now – and there's significant case law on that and it has a clear purpose of, really of two things. One of administering the tax system efficiently so you've got very strict timelines built in which people have to

adhere to, otherwise they're barred from, they're deemed to accept the position of the other party. And it does so in a way which tries to ensure that people pay their fair share of tax liabilities, so there's a focus on correctness of the assessment. So for example the reassessment provision which is section 113 says the Commissioner can reassess to ensure its correctness. So it's a real emphasis on not having administrative law or limiting administrative law defences and focusing on the correctness of the assessments and it clearly has a role in that context but it's very difficult to see what its role is or what role it would play or way Parliament wanted it to play any role in a criminal context.

WILLIAM YOUNG J:
Just pausing there. That's really para 6 on page 3 of your –

MR EBERSOHN:
Yes.

WILLIAM YOUNG J:
We might take the adjournment now.

COURT ADJOURNS: 1.01 PM
COURT RESUMES: 2.16 PM

WILLIAM YOUNG J:
All right, Mr Ebersohn.

MR EBERSOHN:
Thank you, Sir. Prior to the break I noted on behalf of the Crown that the purpose of section 113 in the civil context, the submission, I'll be fairly brief on the point, is that in a criminal context it doesn't appear to serve any purpose or there doesn't seem to be any function or any role that it would play. My learned friends haven't suggested any real purpose other than the fact that it applies in the criminal context but it's not clear why Parliament would want it to apply in that context. It's clearly directed at section 109 and I see clearly

it's at page 93 of the respondent's bundle of authorities. At challenges to the disputable decision and the process and how those must be brought, it's not –

WILLIAM YOUNG J:
There's some – a lot of these points are fair enough but if you look at 6.2.2 there is a challenge to the correctness of the income figure and the assessment. I mean…

MR EBERSOHN:
There's a –

WILLIAM YOUNG J:
I don't think *Smith* is particularly germane to this issue.

MR EBERSOHN:
The challenge, there isn't a challenge to the correctness of the assessment in that the Court does not need to determine the –

WILLIAM YOUNG J:
Well, it depends on what you treat the assessment as including. If you treat it as including the income returned then there is a challenge by the Crown to the correctness of that figure.

MR EBERSOHN:
If you – in other words, what your Honour is essentially saying is a point you raised with my learned colleagues here and that is that if the particulars of the assessment include the income, the deductions, the like, the reasons for it, then there is at least a challenge to that.

WILLIAM YOUNG J:
There is a challenge to that. I mean, I think that's – I mean, there may be an issue as to whether that's what particulars include but assuming it does then there is a challenge to the assessment.

MR EBERSOHN:

Having looked at *Anson*, *Simunovich Fisheries Ltd v Commissioner of Inland Revenue* [2002] 2 NZLR 516 (CA), *Kirkpatrick* and the cases which my learned friend raises which are all civil cases, I think, certainly the Court has in the past, how the particulars of an assessment include the individual items which make up that assessment as opposed to what's written in the Crown's submissions which is that it's the taxpayer, the period, et cetera, and I think that's fair comment. I think that, well, how that's reconcilable with what the Court of Appeal did in *Skinner* and *Rowley*, in this case, is that in essence the Court of Appeal was essentially saying, look, this is simply focusing, it's not focusing on assessment, all section 109 does, it's only ambit is if somebody is actually challenging what is that end figure, the correct amount, and that includes the components of it but for the purpose of determining what the correct tax liability is.

WILLIAM YOUNG J:

But *Anson* doesn't stand for that. *Anson*, because in *Anson* the basis upon which the earlier figure had been arrived at, the values attributed to the stock were treated as part of the particulars and as therefore deemed to be correct.

MR EBERSOHN:

I agree with that. I agree that that's what *Anson* says. What I'm saying is that the way it's reconcilable with the Court of Appeal and *Skinner* is simply to say that the scope of section 109 – it's essentially what the Crown is saying in this case and that –

WILLIAM YOUNG J:

The simple argument of section 109 doesn't apply to crime?

MR EBERSOHN:

Doesn't apply to crime, yes.

WILLIAM YOUNG J:

Yes. I think that might be –

McGRATH J:

But I'm interested in your argument on the scope of the section, so what's your reply to the presiding Judge's question?

MR EBERSOHN:

I think that the scope of the section – certainly the authorities, *Simunovich* and earlier, suggest, well, not only suggest, do rely on the fact that it does include, the particulars of the assessment does include the elements that make up the end figure such as the income, the deductions, the –

McGRATH J:

This is not, I take it, in the context of section 109 or a privative clause?

MR EBERSOHN:

No, this is simply in the context, I would suggest, well, all of these cases were civil cases and I would suggest it's simply in the civil context and no further than that.

McGRATH J:

Yes.

MR EBERSOHN:

So that's part of the reason why the submissions are drafted differently to the written, oral submissions are different to the written submissions, is this point around *Kirkpatrick* and *Anson* and *Simunovich*. The issue is possibly arguable because of the subsequent case in *Zentrum* where this issue came up as to what is included in the assessment if I recall correctly, but I think the better argument is simply to say it doesn't apply in the criminal context at all, and that it serves no purpose in that context. Now I think it's possibly best to go through to page 108 of the actual –

McGRATH J:

Are you now on your supplementary written submissions or did you hand it up or are you…

MR EBERSOHN:

No, no, there's only one set of written submissions. It's these. I'm around paragraph 6. I say "around" because I'm not sticking religiously to the written submissions which…

WILLIAM YOUNG J:

Sorry, when you say the written submissions you mean what you've handed up?

MR EBERSOHN:

Sorry, the oral submissions.

O'REGAN J:

That are written down.

MR EBERSOHN:

This is a problem with having oral written submissions. The –

GLAZEBROOK J:

Where did you say you were? Sorry, I have got lost.

MR EBERSOHN:

I'm in paragraph 6.

GLAZEBROOK J:

Paragraph 6?

MR EBERSOHN:

Of the oral submissions.

GLAZEBROOK J:

I was getting ahead of yourself.

WILLIAM YOUNG J:

I thought I have moved you on from paragraph 6 a bit actually.

GLAZEBROOK J:

I'd optimistically moved a couple of pages on.

MR EBERSOHN:

I'll move on very shortly, your Honour. Page 108 of the respondent's bundle of authorities is the provision. The point made in fact at paragraph 7 is that if you look at these provisions it's hard to see why Parliament would have wanted section 109, or needed section 109 to apply in the criminal context because, for example, if you take 143B(1)(b), paragraph (b), "Knowingly does not provide information to the Commissioner or other person when required to do so by a tax law," and does so intending to evade tax, just as an example –

WILLIAM YOUNG J:

So there's no assessment required for that but there's no assessment –

MR EBERSOHN:

Yes, no assessment. It's just not, you know – if you go to –

WILLIAM YOUNG J:

Well, there may have been. But there may have been an assessment, but it's just chance?

MR EBERSOHN:

It's just chance really in that case. And if you go to subsection (2) which is a separate offence but with the same sentencing provision, which is subsection (4), but subsection (2) simply says, "A person who evades or attempts to evade the assessment or payment of tax by the person or another person under a tax law contains an offence against this Act." So in this case you simply have to have evaded or attempted to evade tax, evade the assessment or the payment of tax. It doesn't require a false return. In fact, if – you would argue that irrespective of the application of section 109 in this case the appellants could equally have been charged under subsection (2) and it wouldn't apply.

WILLIAM YOUNG J:

No, because if section 109 means what the appellants say it means, their assessments were deemed to be correct, it would not be open to the prosecution to say that they were wrong and therefore the premise of the contention, of any contention that they were setting out to defraud the Revenue would be destroyed.

MR EBERSOHN:

Well, you could say that they were still attempting to evade assessment.

WILLIAM YOUNG J:

No, you couldn't because if their actual return was absolutely correct how could the prosecutor say they were doing anything wrong?

MR EBERSOHN:

You would then fall into the area of *Hayes*, the decision in *R v Hayes* [2008] NZSC 3, [2008] 2 NZLR 321, of this Court where –

WILLIAM YOUNG J:

No, I don't think – I think we are going actually sort of to a tangent here.

MR EBERSOHN:

Well that was the submission, I'm not going to take it further, it was just a passing, it was a passing submission that you would still be able to liable under subsection (2).

Then, of course, we come to what's really the, I think, the primary issue and as pointed out in the submissions and that is, I'm citing from sort of paragraph 8, and that's that the fair trial rights, which are engaged, starting from paragraph 9.

I do note in paragraph 8 that it would be unusual, as Justice Kós said, that a return could be conclusive of itself when the offence is that you filed a false return. It just doesn't make a lot of logic or sense. But I think the really

significant issues in this case is what happens if the Commissioner does assess first and then the taxpayer is left in a situation where possibly, in some circumstances, his fair trial rights would be engaged in the most unhelpful way to a significant degree.

At paragraph 9.1 I set out the disputes procedure in some detail. Really all it is, the only point of it is to note that the various documents which parties must prepare, they're fairly technical, they're fairly complex, notices of adjustment, notices of response, where you set out the facts in law on which you're relying, statements of position, where you set out the propositions of law, facts, evidence that you're relying and which binds the parties to those propositions and issues raised in the statements of position. So it's a fairly complex, fairly extensive process before the taxpayer can even bring a Court proceeding and then of course there's the cost of the Court proceeding. Throughout this process there are fairly strict timelines which apply. So, for example, if you don't respond to a notice of proposed adjustment by issuing a notice of response within two months there's deemed acceptance. That deemed acceptance can, in exceptional circumstances and subject to some very narrowly defined statutory exceptions, is binding then on the person after that.

And so you're then left, and this is from paragraph 9.2, with the situation where you've a process which is reasonably complex, quite costly, where a taxpayer may not have the ability to defend themselves, deeming – and when I say defend themselves, defend themselves in the sense of doing it personally as opposed to with legal representation, finding themselves bound by a set of facts, in terms of the actus reus, which they can no longer challenge or no longer dispute in a criminal prosecution which is subsequently brought. They need not even know, at the time of deemed acceptance of course, that a prosecution won't be commenced at a later date. This is not something which is published on any website where people can look up their names to see if a prosecution is being contemplated, this is just something which on a particular day you happen to be charged.

The first issue which this raises is in terms of legal representation because, and as you know from *R v Condon* [2006] NZSC 62, [2007] 1 NZLR 300, it's a constituent element of a fair trial, right. It doesn't mean, of course, that it's necessarily an unfair trial but it is engaged in a most unhelpful way in the circumstances, particularly given that the civil legal aid provisions are more restrictive than that which apply in the criminal context. The criminal context, the legal aid, the Act itself, Legal Services Act, mirrors, to some extent, the wording of section 24 of New Zealand Bill of Rights Act, in terms of a claim to the interests of justice and if the person does not have sufficient means they will be entitled to receive, or they have the right to receive legal assistance without cost but on the civil side you have these regulated lower thresholds, such as if it's a single applicant it's increased for if you're married or if you've got dependents but for a single applicant it's $22,366 and if you have disposable capital, which is 3500, there's some allowances for things like homes and a home of 80,000, which would be a very cheap home, motor vehicle and household effects, and in fact the 22,000 if you crunch the numbers I suspect is less than the minimum wage. And, of course, this also has a knock-on effect in terms of section 30 of the Sentencing Act, and we can possibly go to that. That's at tab 5.

WILLIAM YOUNG J:

Just as you can't be sentenced to imprisonment if you haven't been offered legal representation.

MR EBERSOHN:

Yes, it's during the period in which you are at risk of conviction so the argument could be made that in the civil side you're not at risk of conviction, but it's still a difficult, it's still unhelpful, it still starts to undermine the way the criminal justice system is supposed to work.

WILLIAM YOUNG J:

I think you are a bit on the periphery of the argument by the time you get to section 30.

MR EBERSOHN:

But it still illustrates, it's simply there to illustrate some of the difficulties. And then turning the page to page 7. I think we've done most of that. But there's certainly, I think the essence of it is there certainly will be cases where liability is, could not, because it's not even a case of, you know, you can bring this yourself because in some cases lay litigants simply will not have the ability to in any sensible way represent themselves in tax disputes. I'm not saying they can't ever do it. It's just that they certainly would not be able to sensibly do it, and that's, of course, why you have the New Zealand Bill of Rights Act 1990 having the provisions where somebody is entitled to legal representation if the interests of justice permit it and they can't afford to pay themselves.

Now this is paragraph 13 of the oral submissions. My learned friends have essentially said, "Look, it doesn't matter because you can rely on the mens rea," and –

WILLIAM YOUNG J:

Well, there's quite a good passage from Mr Justice Hutchison in *Gideon Trading* which you've referred to.

MR LAURENSON:

Yes, and I was –

WILLIAM YOUNG J:

It's sort of rather close on point.

MR LAURENSON:

And I was going to take your Honours to that but I think that that captures the essence of the issue and it can't seriously be suggested that having the actus reus deemed to be satisfied so the Crown doesn't have to prove it has no knock-on impact, and that is at tab 17 and it's at page 341. This is the respondent's bundle of authorities, and at line 25 there's a – refer to, "The question is whether section 18 makes the assessment conclusive

against the defendant when a charge is brought against him under section 149," and then they note section 25 which is basically the provision which says, "The burden of proof shall be on the objector," and if you then go down to approximately line 41 of the assessment, "Either as originally made by the Commissioner or as altered by him under section 27 so as to conform to a determination made on an objection to the original assessment, is conclusive in a prosecution under section 149B, the effect is that the defendant is not permitted to challenge by evidence figures arrived at in a proceeding in which the burden of proof rested on him. In this case, for the years ended 31 March 1947, the appellant returned its income as £769. The assessment of income for that year after the objection proceedings had been heard was £7525. With figures like that, if they were to be accepted as conclusive, it would be quite illusory to say that the onus of proof the defendant wilfully made a false return still rested on the informant; for the difference between the figures is so large that the inference of wilfulness would be what McGregor described as 'a compelling inference'." And that's the essence of the point.

Now although *Gideon* and *Maxwell* and these cases relied on the wording in the old Act which basically says you're liable as you shall be so determined or accordingly determined. What drove that interpretation was the reversal of the onus. That is what concerned the Court and that's why that provision was read in that way and that hasn't changed. That remains an issue today.

And then we note at paragraph 40, or I note at paragraph 40 of the oral submissions that of course it's a reversal of the orthodox position that criminal proceedings are dealt with first. And one should add that that seems to be implicit in the Tax Administration Act that criminal proceedings would be dealt with first before civil proceedings. That can be seen in section 149 which is at tab 1, page 110. And that's a provision which deals with imposition of civil and criminal penalties and says, "Every time a taxpayer breaches a tax obligation the taxpayer may be liable to a civil or on conviction to a criminal penalty or to both." So it's quite clear that for the same offence if you like or same incident there can be both a civil and a criminal penalty.

But then if you go to subsection (4), “The Commissioner may assess and impose civil penalties after taxpayer has been prosecuted for an offence under this Act whether or not the prosecution is successful.” And then if you go down to 5. “If a shortfall penalty other than under section 141E(d) which is not relevant for current purposes has been posed on a taxpayer for the taking an incorrect tax position the Commissioner may not subsequently prosecute the taxpayer under this Act for taking an incorrect tax position.” So in other words, if the Commissioner assesses civil penalties first the Commissioner can’t prosecute. But the Commissioner may impose both penalties, may impose civil penalty but only after the prosecution. So the clear implication of the section is that Parliament intended the orthodox position to apply that criminal proceedings would precede the civil proceedings.

Now there’s no absolutely fixed rule that that has to be the case. As your Honours will be aware in every case it’s a balancing act, a balancing test. But one of the factors taken into account are New Zealand Bill of Rights issues which do arise in the context that a civil proceeding is heard prior to a criminal prosecution, so such issues could be the right to refrain from making a statement or the right not to be compelled to be a witness. This is particularly so in tax disputes because the evidence or, most of the facts in tax disputes are entirely with the personal knowledge of a taxpayer. That is why the onus is in fact on taxpayers if you go back to the Court of Appeal decision in *Buckley & Young v Commissioner of Inland Revenue* [1978] 2 NZLR 485 (CA). That is the rationale for putting in on taxpayers is that information is within their personal knowledge but in a civil context that ordinarily, not in all cases but in most cases means that the person has to take the stand and has to give evidence, the taxpayer has to give evidence. And we see some of these issues which arise in a slightly different context but the same principles in the *Commissioner of Police v Burgess* [2011] 2 NZLR 703 (HC). *Commissioner of Police v Scott James Corless* High Court Auckland CIV-2010-404-5585, 15 December 2011 case. These were cases dealing with the forfeiture of criminal proceeds with - those are civil proceedings and they were stayed so the prosecution could occur first, the Court weighing

these New Zealand Bill of Rights issues, taking them into account in making that decision.

And then, that's the essence of the case for the Crown. We go on on page 8 just to note that the effects would be to breach both elements of natural justice in certain cases and that of course the onus of proof has shifted and that quoting *Woolmington v The Director of Public Prosecutions* [1935] AC 462 (HL) which is of course quoted in *Allan*. Throughout the web of the English criminal law one golden thread is always to be seen, that is the duty of the prosecution to prove the prisoner's guilt. There are, of course, cases such as this Court dealt with in *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1 where that is reversed but that is always reversed by a very clear statutory provision. So in *Hansen* it was to do with, somebody said a deal in terms of illicit drugs and that was in, there was express provision which, I can't remember the exact words but essentially said something along the lines of if you have a certain amount of, a prescribed amount of cannabis or methamphetamines found on you you're deemed to be a dealer unless the contrary is proven but it's expressed. What our – and you would expect Parliament to deal with it in that way not, not by enacting the section like section 149A which is, in fact, inconsistent with a reversal in the onus.

That is the essence of the Crown submissions. If there's any questions I will obviously answer them.

WILLIAM YOUNG J:
Thank you Mr Ebersohn. Replies from whom?

MS LEVY:
Yes, your Honours just first of all, a quick matter arising out of the question that your Honour Justice Young put to Mr Laurenson about parties in a civil context and the impact of section 109. The answer, I missed the beginning of the example but the answer may well be in the *Cockburn v C S Development No 2 Ltd* [2010] NZCA 373, (2010) 24 NZTC 24,431 a decision of your Honour

and Justice O'Regan and Justice Baragwanath, where the argument was that –

WILLIAM YOUNG J:
I think it was the case, the example I was thinking of.

MS LEVY:
Yes, and the decision was that section 109 had no application in the dispute between the parties to the contract.

WILLIAM YOUNG J:
Why? I mean if you're right is that right?

MS LEVY:
It was because the Commissioner was not a party to the proceeding.

WILLIAM YOUNG J:
But according, I mean, in the *Gideon* case the Judge there said well, it doesn't really matter whether an employee of the Inland Revenue Department's the informant or not, the Commissioner isn't a party to a prosecution.

MS LEVY:
Well this case has been run on the basis that the Commissioner effectively is the Crown. That's –

WILLIAM YOUNG J:
But why? I mean it could equally have been run by the Serious Fraud Office or by the Fraud Squad.

MS LEVY:
Well one, I mean one of the, one of the factors that weighed with Justice Kós was the Crown explanation, with no evidence behind it, that the Commissioner's administrative preference was to await the outcome of the criminal proceedings and that was seen as eminently sensible by Justice –

WILLIAM YOUNG J:

Well yes, sorry, but that doesn't mean that this is a dispute between the Commissioner and the appellants. It may be that in a practical sense the enforcement division within the Inland Revenue Department has the carriage of the case, at least up to a certain point, but I don't, I mean, what Justice Hutchison said in *Gideon* did strike me to be correct, that it's not realistic to talk about someone like the Commissioner being a party to a prosecution, it's just happenchance that the informant may be an employee.

Put it another way, you couldn't have a different outcome depending on whether this had started off as a police prosecution or an IRD prosecution.

MS LEVY:

Well in my submission when it relies upon views formed by agents of the Commissioner and that's the evidence then that's a situation where section 109 has to be engaged. And the answer that your Honours gave in the *Cockburn* case was that the proceedings did not involve a challenge to a GST assessment but the legal obligations of the Cockburn Trustees under the agreement for sale and purchase. Nothing in the present proceedings undermines the requirement that challenges to tax assessments be undertaken under Part 8A except in exceptional circumstances. Indeed the Commissioner is not a party to the present proceedings. And of course the Commissioner didn't have a voice in those proceedings. But in proceedings such as this one the Commissioner does have a voice through the Crown.

WILLIAM YOUNG J:

Would it make a difference if it had been a police prosecution or a Serious Fraud Office prosecution?

MS LEVY:

Mr Lithgow has referred me to section 149 which provides that only the Commissioner can issue the information –

WILLIAM YOUNG J:

Yes but –

MS LEVY:

– in a case under this Act.

WILLIAM YOUNG J:

– but what about under the - if there's been a committal wouldn't the general provisions about laying additional charges be available? And in any event the charge might be under the Crimes Act it would be possible to come up with for instance a charge of conspiracy to defraud based on an agreement to file false returns and the informant there could be anyone.

MS LEVY:

Sorry, your Honour, I'm struggling to get my head around that, that scenario –

WILLIAM YOUNG J:

Say the Serious Fraud Office had been brought into it.

MS LEVY:

Yes.

WILLIAM YOUNG J:

And they said well we can't really be bothered going back to the Commissioner to get the Commissioner to lay charges of evasion. We'll just lay a charge of conspiracy to defraud. The conspiracy being a conspiracy to file false tax returns. Exactly the same issue would have arisen. It can't be that it would be decided differently depending on whether it's an SFO prosecution or an IRD prosecution.

MS LEVY:

Well so the issue must be then whether the proceeding does in fact involve a challenge to an assessment –

WILLIAM YOUNG J:

Yes. That's probably right.

MS LEVY:

– and your Honours in the *Cockburn* case said the present proceedings do not involve a challenge to a GST assessment but rather to the legal obligations of the Cockburn trustees under the agreement for sale and purchase.

GLAZEBROOK J:

Well that's slightly odd distinction if it says I'll pay your GST and then you're saying, well your GST isn't what was assessed. You have to be challenging the assessment don't you?

WILLIAM YOUNG J:

I suppose it –

GLAZEBROOK J:

I thought there'd been a recent decision on it.

WILLIAM YOUNG J:

Yes. It sort of – I suppose it might be thought to stand for a more general reluctance to treat section 109 as having an effect outside the area of tax disputes between taxpayer and Commissioner.

MS LEVY:

Well from the point of view of the appellants it's certainly the Commissioner that takes issue with what they put on their assessments, in the present case.

GLAZEBROOK J:

Before you start on the reply can you just confirm that your client's position is the same as Mr Laurenson's position in terms of sentence?

MS LEVY:

Yes I can. Just to touch briefly again on this cash job tradesman. The passage just read out by my learned friend from the *Gideon* decision

about the vast difference between the fresh assessment and the filed assessment giving rise to an inference of intention to evade demonstrates in my submission that it's an evidential problem that is created for the tradesman but not a complete defeat without the ability to speak to it of his defence. Now I say that having become bogged down in the *Morton* decision over the luncheon break and –

WILLIAM YOUNG J:
My apologies.

MS LEVY:
Well, you weren't in it on your own.

WILLIAM YOUNG J:
That's true.

MS LEVY:
But I do accept your Honour's invitation to take some time to file written submissions that deal with any implications of that decision.

WILLIAM YOUNG J:
Okay. I mean, it's only really, at a very high level of generality it's quite similar, but that's at a very high level of generality.

MS LEVY:
Well, certainly similar policy-type issues come into it. Now my learned friend –

GLAZEBROOK J:
See, you're still talking about "defends" rather than the onus of proof being on the Crown to prove these things and the submission that is made by the Crown is that it is, as I think the Court said in *Allan*, very startling to think that the Commissioner, by pressing a few buttons on the computer, can thereby establish that there has been a false return without putting any evidence forward, without doing anything whatsoever in order to substantiate that, so

effectively an administrative act means proof beyond reasonable doubt by the Commissioner and the onus is on the Commissioner to prove the falsity.

MS LEVY:

And I come back to what else the onus is on the Commissioner or the Crown to prove and that is the intent to evade.

GLAZEBROOK J:

But why without saying, "Oh, you don't have to prove the falsity of the return. You can just do that by fiddling on your computer and picking a number, plucking a number out of the air." Why don't they have something in section 149A to say, "But an assessment is conclusive proof of one of the elements of the offence"? Because it's very startling to say that the Commissioner can prove something where she is obliged to prove beyond reasonable doubt just by putting a number into a computer and saying, "Here's an assessment."

MS LEVY:

Well, of course, that does set in train another series of events, but I accept what your Honour's saying but I ask that that be taken into account alongside what I'm about to say, first of all, which is to do with the relationship between section 149A and section 109 and as Mr Ebersohn advised they were enacted – the change to 109 and 149, 149A, were enacted in the same Amendment Act which, in my submission, strengthens the appellants' argument that the drafters of 109 as it is now knew that the plain words that it contained would be taken, or should be taken, to apply to both civil and criminal proceedings, because in the very same Act they insert this lengthy provision setting out the differences between civil and criminal proceedings, the different onuses.

GLAZEBROOK J:

I'm not sure that's new. I mean, they say it's inserted but that's always been the position. It might have been in the Income Tax Act beforehand.

MS LEVY:

Well, be that –

GLAZEBROOK J:

Because a lot of the stuff was moved from the Income Tax Act into the Tax Administration Act because it was a mess.

WILLIAM YOUNG J:

It must have always been the position that the burden of proof was on the prosecution to establish a criminal charge. I mean, it's apparent from *Maxwell* and *Gideon*, for instance, that that's the case.

GLAZEBROOK J:

Yes, it may not have been there absolutely explicitly. It may just have been assumed. But from memory it was there before, but my memory could well be faulty.

MS LEVY:

Well, I mean, you can argue these things till you're blue in the face but the submission is that if you're entitled to look at the way things came in and the order in which they came in then it's relevant that this standard and onus of proof section, referring specifically to criminal proceedings and civil proceedings, came in on the same wave of changes that removed those words from section 109 and that takes you back to the very clear words of section 109, which I've now lost off my screen. All proceedings. So it would seem to be a remarkable oversight if the drafters were not aware that the "all proceedings" in section 109 – sorry, "any proceedings", the, "A Court or any proceedings on any ground whatsoever," did not include both types of the proceedings that they deal with in such detail in 149A.

Now my learned friend says it's hard to see why Parliament would have wanted 109 to apply to criminal proceedings. The answer to that is that it's a section with plain words that can be given a plain meaning and the role of this

Court is to interpret it as it reads and let the chips lie where they fall as a result of that, and if that's –

GLAZEBROOK J:
There is a purpose of interpretation that one has now but I'm not sure that that submission flies.

MS LEVY:
Well, in my submission if the words are plain then it should fly because Parliament can change these things and as this Act and many others are examples of, the Commissioner has ready access to Parliament to change Acts like this when situations like this occur, and I refer your Honours to –

GLAZEBROOK J:
Usually it would suit the Commissioner if it did mean that because the Commissioner would be able to avoid having any possibility of having to prove anything in an evasion case. They could just type some numbers and all that would be remaining would be Mr Laurenson's responsibility, I think, of prosecutors that he refers to as one of the answers at paragraph 44. "It would be expected the Commissioner would be reasonable in the conduct of prosecutions," and one would expect that and I'm not really suggesting that the Commissioner – but the Commissioner has on other occasions certainly tried to turn section 109 to I think probably at that stage his advantage.

MS LEVY:
Your Honour in the *Allan* decision, your Honour, Justice Glazebrook, referred to the United States Supreme Court decision of *Green v Bock Laundry Machine Company* and I won't take you through all the details of that case but it's a case where even with a small, purposive-type adjustment the plain words still gave an absurd result but the Court refused to tinker further than was strictly necessary saying that if the result of their interpretation of the plain words is undesirable then Parliament can change it, and in my submission that is an appropriate approach to take here. This Court shouldn't meddle with clear meaning, in my submission.

My learned friend made much of the lengthy procedure that ensures when a challenge is made to an assessment by the Commissioner or by anyone. Well, the appellants in this case were ready for that. They would have welcomed it and, indeed, they are still ready for it. So it's not in every case the hardship or winning card that the Crown fears it would be for defendants.

In many ways section 109 is simply an example of how tax law works. It's hard for taxpayers. The important thing is that they get a hearing and they can have that on this very issue in the disputes process. If the onus is more difficult for them in criminal processes that's no different than it is in respect of many other legislative presumptions. They do have the ability to challenge and these appellants were prepared to do just that.

Unless I can assist your Honours further those are my submissions.

WILLIAM YOUNG J:
Thank you Ms Levy.

MR LAURENSON:
Yes, may it please your Honours, my reply will be a submission not what I think. The first matter is in respect of the issue that was raised as to how would *Maxwell* have been or not have been, in the contemplation of the legislature, when the present section 109 was enacted.

In my respectful submission the distinction between the provision now and that which previously applied and which *Maxwell* had discussed had to be in the contemplation of the legislature. *Maxwell* is the leading case on the discussion of the application to criminal law. We are having a wholesale reflection of the whole criminal and civil litigation process in a section such as 149 where distinctions are being made between onus of proof on civil proceedings and onus of proof on criminal proceedings and at the same time we have, or thereabouts, a change to section 109. I turn it around and say it

is ridiculous, in my submission, that the distinction earlier drawn in *Maxwell* would not have been in contemplation.

And also something else was going on at that time as well and I take you to my first part of my written submission and you will note that in the 1954 enactment of the forerunner, which is section 27 of the 1954 Income Tax, I'm sorry, I'm referring to paragraph 15 of my submission at page 4, and there I say, "The 1954 Act was replaced by the Income Tax Act 1976, section 27 of which was the equivalent of the earlier 26." Now that section 26 appears in the paragraph before in my submission. And then I set out section 27 which says, "Except in proceedings on objection to an assessment under part 3 of this Act no assessment made by the Commissioner shall be disputed in any Court or in any proceedings (including proceedings before the Taxation Review Authority)." So at that point in 1976 there was considered a need to make clear that proceedings before a Taxation Review Authority came within the reference to any Court or in any proceedings. Now that qualification or amplification, let's put it that way, then is re-enacted in the first exemplification of section 109 in the 1994 Tax Administration Act which is set out at paragraph 16 of my written submission. Again it repeats, "No objection shall be disputed in any Court or in any proceedings including proceedings before a Taxation Review Authority either on the ground that the person so assessed," and et cetera so that amplification is there.

Then we come to and this is set out at paragraph 17 the latest exemplification of section 109 and it is a completely unalloyed definition. It says, "Except in objection proceedings under Part 8 or challenge under Part 8A no disputable decision may be disputed in a Court or in any proceedings on any ground whatsoever." And then (b), "Every disputable decision and where relevant all of its particulars are deemed to be, and are taken to be being, correct in all respects."

Now 19 – I'm sorry, not 1994, but in 2001, I think. I haven't got the date there. Yes, it was replaced in 1996, in fact. Not the 2000s but in 1996 we have the legislature sees no reason to qualify any of the provisions in section 109, as I

have already submitted, a completely unalloyed provision. Now the question was put to my learned friend, Ms Levy, as to, "Well, what is the purposive reason for that?" and I – as an aside, I'm very happy to adopt all of the submissions my learned friend, Ms Levy, did say in reply – but I come back to the question that was put to her, "What is the purposive effect or reason for that unalloyed provision in section 109? In my submission, it is to give the Commissioner of Inland Revenue another tool amongst many in the administration of tax law in New Zealand to streamline litigation, whether it be civil or criminal. It is totally consistent with the overwhelming, I would submit, privileges that the Commissioner of Inland Revenue has under the Act to conduct the business of tax law, entirely consistent with it.

GLAZEBROOK J:
Why bother to say he has to prove a criminal case beyond reasonable doubt then when – or she, as it is at the moment…

MR LAURENSON:
May I have that question again?

GLAZEBROOK J:
Well, why bother in the Act to say that the Commissioner has to prove a case or the Crown has to prove a criminal case beyond reasonable doubt if in fact the Commissioner doesn't have to do anything of the sort in terms of the actus reus?

MR LAURENSON:
Well, it only has the protection or the privilege in respect of the actus reus in one provision of one section of 143B(1) and it gives it that assistance for that.

GLAZEBROOK J:
Well, wouldn't the Commissioner have that for everything where there was assessment involved?

MR LAURENSON:

If it fits within the elements of the charges but I don't necessarily see it always, an assessment always fitting in with the elements of the charges but where it does the Commissioner doesn't have the obligation to prove the surrounding facts once an assessment is made if it fits into an element of a charge, but it's not giving the Commissioner a wholesale deeming provision for all charges but it does fit it in in a charge under section 143B(1)(c).

Over luncheon I did have a look at *Morton*. I am not reading it as a case that is authority nor is it a discussion of a deeming provision or the effect a deeming provision has on an actus reus element of a criminal charge being –

WILLIAM YOUNG J:

Well, I think you might be reading it wrong then actually. On the Crown argument *Morton* was not entitled to dispute the proposition that his co-defendants had raped the complainant. Effectively that was – it's a complicated case because he was a party but in a sense, or in a real sense, that's the actus reus, part of actus reus against him, but they had raped the complainant and he had helped them do so.

MR LAURENSON:

Okay, so he was stuck with that actus reus?

WILLIAM YOUNG J:

Well…

MR LAURENSON:

That's what the Crown was saying.

WILLIAM YOUNG J:

That was what the Crown was arguing.

MR LAURENSON:

Yes.

WILLIAM YOUNG J:

And the concern that particularly Justice O'Regan and I have was that that precluded, or could preclude, a defence that he believed on reasonable grounds that she was consenting, the reasonable grounds being that she did consent. But anyway it's quite a complex case.

MR LAURENSON:

Yes, I appreciate that, but okay, let's just focus on that. If the Crown proposition was that the defence was stuck with the actus reus, the effect of the decision is to relax that, isn't it?

WILLIAM YOUNG J:

It is.

MR LAURENSON:

Right.

WILLIAM YOUNG J:

But partly by reference to section 49(2)(a) –

MR LAURENSON:

Yes, which has –

WILLIAM YOUNG J:

– which doesn't have a counterpart in section 109, and partly by reference to a Bill of Rights approach to what is entailed or was entailed in the case.

MR LAURENSON:

Yes, well, granted those matters, what the decision of the, I'm not sure if it was the majority, it was the majority once enlisted were the coincident passages of Her Honour, the Chief Justice's judgment, the effect of that was that a trial Judge was directed, was it not, or could be able to be – to direct a jury in the most sophisticated and subtle terms finding your way around section 49(1).

WILLIAM YOUNG J:

Well, that's one way of putting it.

MR LAURENSON:

Well, that's how I submit the directions or the orders at the end of the "as if" majority is saying, with the utmost respect, that it is contemplating sophisticated directions to a jury. Now in my respectful submission if we are left in this case with a position where the second ingredient of the five elements of this charge against Messrs Rowley and Skinner is a deeming position but the Crown still has to prove that the defendant knew he had filed false information, and that the Crown has to prove that he did so intending to evade tax, a Judge is required to make no less, sorry, no more sophisticated direction to a jury that it's deemed to be false but you have to understand that deeming against the evidence you will hear as to why the defendant knew it was false and that he intended to evade, you will have to be satisfied beyond reasonable doubt that both those elements are established. With the utmost respect, I don't see that causing any problem to a Judge nor a jury if the evidence then has to be laid as to those matters of mens rea. And, quite frankly, I submit the Crown case in this case has been putting up a series of straw men to knock them over to avoid the plain language of a section which has been overlooked by the prosecution in this case in seeking to prove the charges. We are getting far too sophisticated in our knocking it over when there is a plain meaning to it and which can be dealt with in the pragmatics of first instant trial, whether before a jury or before a Judge alone.

So that really, your Honours, is my submission.

WILLIAM YOUNG J:

Thank you, Mr Laurenson. Do you want to make written submissions on *Morton* or are you perhaps…

MR LAURENSON:

I really don't know that spending some hours of careful reflection will result in a submission any more worthwhile than the one, or less worthwhile than the one that I have just now, but I would reserve that right, your Honour.

WILLIAM YOUNG J:

Okay, well, how long do you think it would take before you can decide whether to make a submission and, if so, put it in? Would it take much more than a week? It depends on your other commitments.

MR LAURENSON:

This is my preliminary indication of whether I'd like to have some more time to make a submission.

WILLIAM YOUNG J:

Well, it's really, and if you do want to make a submission when would it be? Would perhaps 10 working days be okay?

MR LAURENSON:

I'm sure that would be very – what do you think, Ms Levy?

WILLIAM YOUNG J:

Ms Levy, is that fine?

MR LAURENSON:

Can we proceed on that basis, and if we're not going to we will let you know as soon as possible.

WILLIAM YOUNG J:

Thank you, and you may or may not want to respond, Mr Ebersohn.

MR EBERSOHN:

Yes, your Honour. If we are going to respond, if the Crown's going to respond, it should be sufficient after their submissions.

WILLIAM YOUNG J:

All right, well, subject to that we'll reserve our decision.

COURT ADJOURNS: 3.19 PM