

IN THE MATTER of a Criminal Appeal

BETWEEN **BRENT JOHN GILCHRIST**

Appellant

AND **THE QUEEN**

Respondent

Hearing 7 December 2006

Coram Elias CJ
Blanchard J
Tipping J
McGrath J
Anderson J

Counsel B J Gilchrist appearing in person
K B F Hastie and R J Ellis for Respondent
C T Gudsell, Amicus Curiae

CRIMINAL APPEAL

10.02 am

Elias CJ Thank you. Mr Gilchrist you're appearing in person. Sorry we'll just take the appearances.

Hastie Miss Hastie with Miss Ellis for the respondent.

Elias CJ Thank you Miss Hastie, Miss Ellis.

Gudsell May it please Your Honours, I appear as Amicus.

Elias CJ Thank you Mr Gudsell. Right, well Mr Gilchrist, do you want to develop your submissions orally? We have of course read them so it's really just matters of emphasis and perhaps response to some of the other submissions that have been put in that you might prefer to concentrate on, but whatever.

Gilchrist Yes thank you Your Honour. I did want to emphasise some of the major points of the written submissions and with your approval discuss some of the Crown's submissions at this point and indeed the Amicus's submissions. If you would allow me to do that now

Elias CJ Yes that would be useful and if you'd stand at the lectern that would be helpful for us.

Gilchrist Thank you. Your Honours I believe that this case has national, if not, international significance. I believe that this case could create tax history in New Zealand certainly, if not Australasia, or indeed the OECD. And I say that because I believe this is the first case of a matter where the charge is somebody is a tax evader where they have dutifully and correctly filed their tax returns that they have not at any stage understated income, overstated expenditure or acted in a fraudulent manner in calculating tax due. Now I say it could created history because despite my exhaustive review I could not find one case, not one case, where the same issue has been debated and of course I would have expected the Crown to find that case if there was one and you will see from the Crown's submissions right from the District Court level through to their submissions today that they do not identify one case where the issue of evasion has been debated in the context of a taxpayer that has with the Department's approval filed a correct tax return. I believe that's the fundamental issue that we need to look at a bit further today. I believe that the Crown has incorrectly interpreted a recent change to tax law which in my view does nothing more than amalgamate two specific parts of tax law into one Act without any intention whatsoever to change the application of those two different parts of tax law, save for increasing penalty levels and introducing a new regime of shortfall penalties for tax shortfalls. My view is that where the Crown went wrong here is that they indeed have, and just as they say they should have looked at the plain language of the words of the section they we're debating which is found at tab 20 in my casebook and said the words 'evade assessment or payment', 'you didn't pay' and 'payments generally' a fairly understandable proposition, although I know there was a case here two weeks ago where the argument was that it was not quite so straightforward but we're not debating payment. There is no question that I did not pay the GST liability assessed. The Crown then went on and looked at case law on evasion and turned to, found a decision which in a nutshell says that underhand dealings can amount to evasion. The Crown

says that by frustrating the collection of this tax duly payable through a legal means, a lawful means, which the Crown accepted as lawful, you have doubt in an underhand manner with your liability to pay tax and therefore will trawl their cases and will find one back in the 1900s, not a New Zealand case, which defines evasion is underhand dealing and there we have it. You haven't paid. Underhand is enough to be evasion so you must be a tax evader. I am saying that's a too simplistic approach and that indeed if you look at the history of tax law and work it through, it in my view becomes abundantly clear that they have been wrongly focussing on payment and should be focussing on the precedence of evasion all of which, and I emphasise all of which are cases about taxpayers that have not filed the correct liability. They have in the case of *Simms*. He has in a strange way a relatively similar thing. He assigned all his assets to his children before his death, the Crown said as an intention to invade the duty. In *Taylor* it was about a ship's Captain deliberating failing to declare he had the paint onboard the boat and therefore the Crown without themselves finding it had no way of knowing that they should be assessing, collecting this duty.

Elias CJ Mr Gilchrist, not wanting to interrupt you in that, but isn't the real issue the statutory language. I mean you might be entirely right about the old cases but don't we have to start with the statutory text?

Gilchrist Yes Your Honour we do and I agree we do and I say the appropriate text is 'evades assessment or payment of tax' so it's

Tipping J No it's not evading it's intending to evade.

Gilchrist Yes. Yes, correct Sir, it doesn't matter that if in the end you don't achieve that evasion, it's the intent, but if we leave aside intent for a moment, intent to evade, you've still got to find statutory meaning to the word 'evade'.

Elias CJ Well don't you have to start with what the gravamen of the offence is and I had thought it was knowingly not providing information with the intent of evading payment of tax.

Gilchrist Yes, yes Your Honour, yes it is, and the principal part of my submissions is when you get to the words 'evade' and we could even remove the assessment for the case of this discussion, 'evade payment', that phrase, that definition, that terminology is if you look at the entire precedent base of tax law referring to evasion as everybody used to know it which is failing to declare income or assets, paint on a ship

- Tipping J But you can't take out the assessment from it because it provides the contrast for payment. It's something other than assessment. Payment is something other than assessment.
- Gilchrist Indeed it is Sir, indeed it is and in my submissions you will see that I've explained in my view why you must have payment there because the vast majority of duties and taxes around the world rely on self-assessment. It relied on the Captain of the boat disclosing his paint. There is no assessment process for him. It is that disclosure by means of filing the payment for the assets he has that creates the payment.
- Anderson J No one's suggesting that you were intending to evade assessment and the section refers to assessment or payment so you have to focus on payment and in this case if you'd supplied the information as required, the Commissioner would have issued a 157 notice against the creditors and the proposition is that you delayed deliberately providing the information so you could pre-empt the 157 process thereby evading payment by means of that process if that was the case.
- Gilchrist Yes Sir, that's the allegation Sir, yes and indeed the finding of the lower Courts. But where my submissions are that the lower Courts got it wrong was jumping through the evasion word without giving its proper consideration
- Anderson J Deliberately pre-empting a method of payment that was available to the Commissioner in an underhand way, that was the proposition?
- Gilchrist Yes indeed Sir and in my submission there's a raft of laws within the Tax Act to stop and to frustrate that activity. There is actually a specific law *HK11* which deals absolutely on point with people, with a company and the taxpayer in this case was in fact a company – Corporate Trustee – deliberately taking assets out of that taxpayer to avoid recovery. There's particular provisions. There's provisions where you are liable for an offence of frustrating the Commissioner in collecting. There are provisions which allow the Commissioner to have Court orders to enforce requisitions if you don't volunteer the information. There is indeed an entire part of the Act where even the Amicus has separated it out where you've got assessment parts of the Act and collection parts of the Act and we always have up until recently, we've had them in two different Acts and what I attempted to do in my submission is to show if you take those two separate Acts and cast the clock back before 1997 there is just simply no way that the Commissioner could have laid this charge because it didn't exist if it was a s.17 requisition under the Inland Revenue Act here. There was penalties of course for failing to provide the information but they were as what I've described tier 1 penalties, the lowest level of penalties in the two Acts.

Tipping J Are you trying to make an argument that there is some material difference between the concept of payment and the concept of collection?

Gilchrist Yes Sir, I'm saying in the context of a phrase that has the word 'evasion' of assessment or payment that if you look at the history that meaning is abundantly clear.

Tipping J What is the difference in the context between payment, in this context, between payment and collection other than a grammatical?

Gilchrist Because Sir in context if you look at the division context in every case and indeed I'll argue even in the current law, it is surrounded by actions that by that very clear division are failing to disclose information, fraudulently over-stating deductions – in other words not filing a tax return properly with the intent to evade assessment or payment.

Blanchard J Are any of those cases based on the words 'evasion of payment' and do any of the statutes involved also have the word 'assessment' in there?

Gilchrist Yes Sir, I've researched it right back to 1916 where we had the *Land and Income Tax Act 1916*, the words there were exactly as they are now assessment or payment. I've looked at some

McGrath J Sorry, except for?

Gilchrist No Sir exactly as they are now. Evade, assessment or payment.

Blanchard J Have you got that in your materials?

Gilchrist Sir I've only referred back to 1955 I think in my materials but just for the purposes of my own thinking of this I went back one further.

Blanchard J Well do you have a copy of that that you can make available to us?

Gilchrist I certainly can, I certainly can make that available in the break Sir.

Elias CJ Would your contention really require us to read 'intending to evade the assessment or payment of tax' as 'intending to evade the assessment and payment of tax'? Are you saying that payment follows on from assessment, that it's coupled with assessment?

Gilchrist Your Honour I'm saying that the phrase of the two words it must be there because even as early as the 1900s, if you look at the *Simms* case there was no assessment, it was self assessment, so if you just had the words 'evade assessment' as I've put in my submissions, if putting it back to GST law,

you could simply self-assess, which is writing it down on the tax return form, put it in your bottom draw and never tell the Commissioner about it.

McGrath J But surely the word 'assessment' is referring to the assessment by the Commissioner or an officer of the Department, rather than to the process that's generally described as self-assessment which is just really a duty to disclose on the part of the taxpayer. I mean doesn't assessment mean the Commissioner's assessment?

Gilchrist No Sir I wouldn't agree with that because the entire tax base in New Zealand and indeed for overseas countries has for many many years, especially in duty areas, required self-assessment. The offence was then not disclosing what you've self-assessed to the Commissioner

McGrath J I appreciate that the Commissioner doesn't have a huge army of people who can go out and pick up records and put them together and work out what the tax is and the system really depends on taxpayers disclosing matters and actually putting forward their own assessment in a sort of loose use of the term of what's required. But what I'm suggesting to you is that when we speak of evading the assessment or payment of tax the word 'assessment' is actually referring to the act of assessment that the Inland Revenue Act provides for, namely the process initially computerised and subsequently perhaps looked at more closely but nevertheless the official process. It can't possibly refer, can it, to the process whereby a taxpayer sorts out and presents to the Revenue what he or she thinks is the amount liable.

Gilchrist Yes Sir, what I'm saying is that if the law adjusts that assessment it would be too weak because you could with the onus on the Commissioner to prove otherwise say I wasn't scared of assessment, I wasn't scared of somehow the Department finding out about that asset or that income in assessing me, I didn't disclose it because I was scared I was evading payment. That was my mens rea. I was not disclosing to evade payment.

McGrath J Well the word 'assessment' as your submissions recognise is in there because to cover situations where there's an evasion, because in a simple case the taxpayer hasn't put forward enough information for the correct assessment to be made but it looks because of the disjunctive or just on the face of the section as we look at it, it looks as though Parliament has had another aspect in mind and that is basically the collection aspect and it is concerned criminalised behaviour that evades a taxpayer from actually paying the tax in that situation. If you accept that assessment actually means the official act of assessment payment then means collecting the amount recorded in the official act of assessment.

- Gilchrist I could perhaps accept that if it was assessment and payment but my submissions are since that phrase has been there since the 1900s it is there because without the word 'payment' it would render that offence
- McGrath J I think for my part if this language goes back that far and you had a case in which it appeared that the taxpayer wasn't evading or wasn't endeavouring to mislead the Commissioner as to the amount of tax payable, but that amount of tax having being assessed, was trying to mislead the Commissioner if it's to collect payment. I mean if you had a case of that kind that would be very helpful.
- Gilchrist Unfortunately Sir as I said there is no such case. I cannot find one and the Crown doesn't seem to be able to find one. I am the first case to debate that issue of
- McGrath J If this is the first time the circumstances have arisen in a case then we're not going to be assisted by anything prior on different circumstances.
- Gilchrist I agreed Sir but then you look at the interpretative issues and what did Parliament intend perhaps and does
- McGrath J Well absolutely but we've got to start with the language that Parliament used and we have to ascertain what it means.
- Blanchard J Mr Gilchrist I suggest to you that if your argument was correct you wouldn't need 'or payment'. I can't accept for a moment that the self-assessment process is complete when you put your figures down on a piece of paper and shove it in a draw. That argument with respect is nonsense. Self-assessment must at the very least involve the process of forwarding the figures to the Commissioner.
- Gilchrist Yes Sir.
- Blanchard J So you don't need the words 'or payment' on your argument?
- Gilchrist Sir if you look at *Simms* for example, the Act there I think from memory only has the word 'payment' and that case was 'did he evade payment of the duty by his actions'. But the actions were doing things to reduce the returnable payment on estate duties
- Blanchard J But that just happened to be what occurred in that case. This point hasn't arisen before and possibly hasn't arisen because is the first time that both words have come in in this particular context.
- Gilchrist Sir why I chose those words in the context of tax enforcement have been around since the 1900s. It's been there for as long as I can go back, the

words 'assessment or payment' collectively but when you look at where they're applied, you just look at case law precedence for example and look where those words are applied, in every case unless the Crown can show me otherwise, in every case it's a case about under-declaration or fraudulent

Blanchard J Yes but that would have more force if there'd been a case of this kind and the Court had found in favour of the person charged. The fact that it hasn't arisen before in a case doesn't have that much weight.

Gilchrist No Sir but it does question in my mind why has it not arisen, why in all this time has it not arisen? Has there not been one other party that has entered into some lawful but perhaps underhanded

Blanchard J But perhaps because for most of the time as you've pointed out there have been two streams which were brought together first of all in 1994 at which point there may have been no change but then they looked at the question of penalties and they amended the legislation, so you'd expect new cases to arise.

Gilchrist Sir I agree and I would hasten to add that it's probably the Crown's best chance here to say that the law has changed so the history may be irrelevant but then if you look, if we're allowed to look at what actually changed and what the politicians and commentators said about what's intending to happen in this change, again that is enlightening. We even have the

Elias CJ Before you get into that can I just to clear it away, if we are simply looking at the language of the provision, do you accept that on its face the offence is committed if somebody knowingly does not provide information with intention to evade payment, just as a matter of language?

Gilchrist I absolutely do accept that, I absolutely do.

Elias CJ So your argument is that that natural meaning is in fact not one the Court should adopt because it's contrary to the statutory history? Is that your argument?

Gilchrist Yes Your Honour, I suppose what I'm saying is that if you take that phrase the focus has got to be on the word 'evasion' or 'evade' because we must understand what that action is.

Elias CJ And you say that is a technical term which is inevitably coupled with assessment? Is that the argument?

Gilchrist Your Honour most people would offer a definition of 'evasion'. The dictionaries offer a definition of 'evasion' or the case law offers definitions of 'evasion'. But even the dictionary definitions refer firstly to under declaration of your tax liability, not events to attempt to frustrate the collection of a liability that

Elias CJ But the charge wasn't evasion or tax evasion. The charge was specifically not providing information with intention to evade payment of tax, that's the nub of the charge.

Gilchrist That's correct Your Honour, so what is 'evasion' because obviously we have to determine that the Act was evasion to

Tipping J I'd like you to answer the Chief Justice's question a little bit more specifically. She asked you 'is your argument whether the concept of evasion is inevitably in law coupled only with assessment and I think you virtually have to accept that in order to make any progress with this proposition that it can't be evasion if it's to do with payment.

Gilchrist Yes Sir I think I can answer that by saying I'm saying the word evasion if you look at any interpretation in case law, even dictionary definitions, pings itself, puts itself to the action of under declaration of your tax liability

Tipping J What you owe. There are two concepts. I'm not a tax lawyer but there seem to me to be two concepts here – one, what you owe assessment and two, getting it out of the taxpayer, payment, collection, call it what you like. But why can't you evade at the second stage, at the getting it out of the taxpayer stage?

Gilchrist If you look at precedence and definitions it says that that is the not the word you use in that context.

Tipping J Well that's the sense in which Parliament must be using.

Blanchard J Where does it say that?

Gilchrist By the mere fact that every precedent on definition of

Blanchard J That's not saying that it's not the case.

Gilchrist Correct Sir.

Blanchard J It's just dealing with a different situation

Gilchrist Yes.

- Blanchard J I have real difficulty in seeing what function the words ‘or payment’ were to have. On your argument assessment would always be enough and if one rejects as I would be minded to do, the idea that there could be an assessment without the Commissioner having been told about it, then the words ‘or payment’ wouldn’t have any function on your argument or on the rest of your argument.
- Gilchrist Sir yes, but you’d have to have those words ‘payment’ ‘or payment’ there otherwise the argument could be I wasn’t worried about evading assessment. Assessment didn’t frighten, my whole intention was to evade the payment by under-declaring
- Blanchard J Which you would do by not making the assessment.
- Elias CJ That’s why I asked at the beginning whether your argument requires us to read the ‘or’ as an ‘and’ as a consequential assessment and therefore payment, but it all hangs off ‘assessment’ on your argument. Because as soon as you have the disjunctive ‘or’ we immediately hone in on the fact that there are two different concepts there.
- Gilchrist I understand Your Honour and I suppose it gives some weight that it’s a phrase we’re talking about here that has some distinct meaning. If it’s been around for so long in tax law it must have a meaning to be read almost collectively and then we’ve got to look at the precedence to interpret what that evade, assessment or payment phrase means.
- Elias CJ Well not necessarily, because we operate under an Interpretation Act which tells us that the meaning of an enactment is to be obtained from its text in the light of its purpose but we start with the text.
- Gilchrist Yes Your Honour you certainly do and then if that brings any question marks up of course you then search back if there is indeed any question marks.
- Tipping J But can you create an ambiguity that’s not there by referring to the background and saying oh hey presto in the light of the background there’s an ambiguity?
- Gilchrist Yes Your Honour. I don’t think any of us are arguing the word ‘payment’ or what it means or that definition, it’s tagging it with the word ‘evasion’ that is in my submission something that needs to be looked at behind the actual words. But even if you focus on the word ‘evasion’
- Tipping J Can you not evade payment as a singular concept, evading payment? Can you not do that in tax law?

Gilchrist Yes I believe you can Sir, I believe

Tipping J Well what's the problem then?

Gilchrist How do you evade payment? What is evasion?

Anderson J Well just because most tax evaders try and evade by falsifying their returns, doesn't mean to say that you can't be a tax evader by providing true returns and then in an underhand way making sure that the returns have no effect because payment won't be made on them.

Gilchrist Yes I suppose that goes to the point Sir of any effect and if that action is lawful can it be evasion if you've declared your proper position and taken some lawful means to frustrate the collection of that self-assessed or Commissioner-assessed liability.

McGrath J Mr Gilchrist I'm having, I think I'm having difficulty reading because you keep coming back to evasion and cases which interpret that word rather than what it is that is evaded and what the Act does is criminalise the evasion of payment, now if we just for a moment accept that you have some submissions on the word 'evasion' but we'd come back to the fact of what it is that's evaded, can you just in your own words tell me how you would characterise payment as different from assessments in terms of what Parliament's getting at because you've acknowledged that the word 'or' is to be read as a disjunctive?

Gilchrist Yes Sir I have. The phrase 'assessment' or 'payment' has it's absolute common interpretation in tax law really. The two go hand in hand but not necessarily will there be an assessment process that you can evade payment just as equally as you can evade assessment by falsifying

McGrath J What I'm asking you is what is that is different about payment that caused Parliament to put it in after a disjunctive word. What is it on your argument that is different in payment than in assessment?

Gilchrist The fact that without that word there would be no force to that legislation. There would be absolutely no force at all to that legislation because you could say 'I wasn't evading assessment, I wasn't concerned with evading assessment, I was focussed totally on evading payment'. And of course they should have the same result. But we're talking about evading. What is evasion, what is evasion. I know Your Honour said we could go on to that but the phrase as a whole I think if you read it with history in mind sure we must start at the words but if we're allowed to sneak back and look at a little bit of the history to me it becomes quite clear that that terminology was always in Acts involving the assessment part of tax law.

- McGrath J But doesn't that just reflect the fact that the phrase historically because of the word 'or' has had two concepts and the cases have focused on the first assessment and we've got to focus on the word 'payment' because that's the basis on which the charge has been laid and the only complaint made against your behaviour
- Gilchrist Yes indeed Sir and as I opened it seems to be the first case ever that's had to reflect on it in this context of a taxpayer that's correctly filed but hasn't paid.
- McGrath J I'm still at a loss in knowing what you would say was the reason for having over all of these years the concept of payment disjunctively from the concept of assessment.
- Gilchrist Ah Sir because they're totally different activities and in a lot of cases there is actually no assessment process. Possibly the best example of that is tax deductions by employers. There is actually no assessment process. It requires them to take the deduction off the employee, it's held in trust immediately for the Crown and then they pay that across to the Commissioner. There is no assessment and indeed if you look at a lot of the evasion cases they're just on that point where the employer has taken that and pocketed it.
- McGrath J But I understand that that process involves payment of taxpayers tax by the employer but it doesn't help me in my mind as to what the difference is on your argument between payment and assessment.
- Gilchrist Yes well Sir I suppose without that word 'payment' that employer wouldn't have any evasion liability because there's no assessment process but he's still got this obligation, this liability to pay and it's only that action of payment that allows the Commissioner to know that he's entitled to receive that. If that word 'payment' wasn't there he wouldn't have committed an offence because there's no assessment process.
- McGrath J Right, I understand that. Now that's an example you've chosen as to employer's liability to pay. What's different about your liability to pay the GST assessed against you? What's different from the example in relation to the employer's obligation you've given?
- Gilchrist Because I wasn't guilty of deliberately not telling the Commissioner about an amount of income or GST that was due. The Commissioner relies of course upon people telling them because they haven't as you said earlier, they haven't got the resources to do otherwise and so the weight of the criminal liabilities of penalties is on people that deliberately frustrate that obligation to disclose to the Commissioner. Once the Commissioner

knows about a liability he has more power than any other Crown authority to collect that liability.

Blanchard J The result of your activity though was the same as if there hadn't been an assessment in terms of money.

Gilchrist I accept that Sir

Blanchard J So why shouldn't the penalty be the same? Why shouldn't we read it as Parliament having intended to extend the net of the penalty to cases of evading payment simplicitor?

Gilchrist That's a good question Your Honour but Parliament's intent seems quite clear if you step back before 1997 and if you do accept my submissions that before then there could be no such offence as this because of the separation. Assessment or payment was always there but it could never be a collection evasion because that law didn't exist. Post-1997 when we had a review of the Tax Administration Act they simplified if you like the wording and the wording used to be 'evade the tax known to be chargeable' and is precedent where the word 'chargeable' says that it hasn't been levied because they didn't know about it, but you're evading it, you knew it was chargeable. When they brought the new Act, sorry, revised the Act they actually just said 'evade assessment or payment of tax'. So the question should be asked 'was that an intention to create this offence of evading collection', was that their intention? And that's where I think if you look at the history and indeed all the commentaries from the Minister about the Bill and what it's intended, there was absolutely no discussion about an intention of that regard and we find actual discussion saying that we have serious reservations it says, this was in my submission at page 14, they had serious reservations about how the Commissioner might interpret this new law. So they said 'given these serious reservations we provide an overview of our consideration of the Bill and the reasons for amendments, and it's a guide to the intended interpretation of the legislation primarily for the Courts'.

Blanchard J And what does that say which gives us guidance?

Gilchrist To me it gives an onus on the Courts to then read the submissions of the Parliament, to see in fact what they did intend

Blanchard J Sorry, to read what?

Gilchrist It gives an onus on the Courts to actually look at their comments, look at what

Blanchard J Well can you take us to comments which are made by the Parliamentary Committee which help us on this?

Gilchrist Sir, one of the commentaries, and this is indeed the report from the Finance and Expenditure Committee at appendix 23 in my casebook. You'll see it's very lengthy. It's 30 pages and of course to be expected on a Bill that was hundreds of pages, there is absolutely no sentence on this exact point that we the Parliamentarians do not intend to extend the application of the evasion laws in our taxes.

Blanchard J It doesn't say that?

Gilchrist No, there's nothing absolute on point there. What it does do though if you look at it in context, it to me becomes quite clear what they were doing, and if you look at how the report is even set out, it is in two distinct parts. One is bringing in tougher penalties known as the shortfall penalty regime for avoidance, for evasion. Another is beefing up the Commissioner's ability to elicit information from people because of the Commissioner's frustration that under the old law s.17 requests had a tier-one penalty attached to them, and indeed the Parliament says 'yes we will beef up your ability to get information out of people'. 'We will in fact create an ability for the Commissioner to obtain a Court order to do that'.

McGrath J What pages in particular are you referring to in appendix 23?

Gilchrist Okay Sir, most of the first part is to do with the shortfall penalty regime. Now this is getting into technical tax law but the Crown can dispute it if they wish but I can say to you the shortfall penalty regime cannot apply by definition to assessed amounts that have now been collected. The definition of shortfall is your position you took in filing your return and calculating your liability

McGrath J I was more interested in finding out whether there were particular passages that supported your contentions in relation to there being a general policy of facilitating, of helping the Commissioner's frustration in relation to payment.

Gilchrist Yes Sir, so the first bit deals all with the shortfall penalty regime which I say cannot apply in my case. Cannot by legal interpretation. There was no

McGrath J So you don't rely on that?

Gilchrist No, but importantly in all that it goes up in stages. It talks about lack of reasonable care. It goes right through to evasion but all under that tax shortfall part of the Act.

Blanchard J Well where does it deal with evasion?

Gilchrist Sir I'll find it for you. It will be quite some way through so I ought to go back. Of course in here there are other iterations of this entire commentaries on the Bill. Sorry, this commentary was the last report which is generally dealing with amendments that the Select Committee required or wanted for the Bill. It goes through just in general and they wanted to beef up the shortfall penalty matter

Blanchard J But it's not dealing with offences is it?

Gilchrist The entire changes to the Tax Administration Act were beefing up the, the entire focus of this Bill was to beef up the Commissioner's powers of assessment and collection but quite critically they're dealt with separately.

Blanchard J But where in this material is there anything which will help us on the question on the question of offences?

Gilchrist Sir this comes from a discussion document and if you want the most detailed discussion of what the Parliament was requiring it goes to the discussion document dated 1994 which I've attached as appendix 17, but in my written submissions I've gone through what I think are the important parts of that at page 10 and if I can quote you a couple to lead us to the discussion on evasion. I'm reading from my page 10 and it talks about, this is the Right Hon. Bill Birch I think discussion, 'Many of the proposed changes recognise that in a self-assessment environment, individual taxpayers must take responsibility for accurately determining the amount of tax to pay. They must apply the law and present the facts of the situation fully and honestly. They're clearly talking about filing the correct tax return and then it goes on, quoted at 39 under the heading 'Evasion', 'the top end of the scale of non-compliance is a wilful or knowing breach of an obligation. Tax evasion involves a deliberate attempt by a taxpayer to cheat the revenue'.

Blanchard J Well that statement in itself would cover your case.

Gilchrist Sir it depends on your definition of cheating the revenue I guess.

Blanchard J Well the result's the same, whether it's failing to file an assessment properly or frustrating the collection of the tax which is being assessed. The revenue is cheated in the amount.

Gilchrist It is short of that amount Sir, yes. The *Challenge* case dealt with avoidance, the taxpayer paid I think it's \$10,000 to cheat the revenue of a few million dollars, and indeed I think the *Challenge* decision talks about

in terms of that word cheat. It wanted to hold the revenue back for millions of dollars but that was avoidance. The Minister goes on to say 'typical indicators of evasion include a pattern of substantial omission of gross income and a consistent pattern of substantial overstatement of deductions'.

Anderson J It's one way of evading but in this case it's perfectly clear that at the time you failed to comply with the notice tax was due and payable. It's also clear that if you'd complied with the notice that the tax payment would have been extracted by means of the s.157. It's perfectly clear that you didn't want that to happen because you wanted the money to finance this other litigation. You didn't want to pay it so to make sure that a s.157 notice would not effectively issue and extract payment you declined to answer the notice, and that's been found to have been an underhand process, and it seems to fit perfectly clearly within the ambit of the section and I have great difficulty in understanding your argument to the effect that it doesn't.

Gilchrist That is if one is to accept that evasion can by its definition be attached to an action post to complete and full declaration.

Anderson J The intent to evade payment, not an intent to evade assessment but an intent to evade payment.

Gilchrist Yes I understand Your Honour's point. I might cheekily add that I wouldn't accept some of the points that you say are perfectly clear in terms of intention. That's indeed what the District Court determined.

Anderson J Well that's what we have to go by.

Gilchrist Yes Sir I understand that.

Blanchard J Is there anything else in these materials that helps on the subject on the subject of the offences and what Parliament was intending?

Gilchrist Yes Your Honour well in context it goes on and then talks about s.17 and what the Crown's intentions are in terms of s.17 and I'm reading from page 11 of my submissions. I've highlighted the part I'm now talking to. It talks about s.16 allowing full access to books and documents. Section 17 allows information to be requested. The sanction for not complying with a request under sections 16 and 17 is prosecution which on conviction may lead to small monetary fines. And then they're saying prosecution for not supplying information is not always effective. The Commissioner will be given new power to apply to the Courts for an order that the taxpayer present the information. Taxpayers who do not comply will be in contempt of Court and if you stop there and think what alternatives the

Commissioner had after the event he of course could apply for a Court order and of course I would have been in contempt not to comply. He could have used *HK11* to ignore the assignment and say 'even though it's lawful I can call it back'. He can impose insolvency laws to say that that action is immediately recoverable and of course the question always does this if it's available to him.

Blanchard J Had the legislation been drafted at this point?

Gilchrist No Your Honour this was the discussion document, I can't recall whether at the time they had draft law but that would have been unusual Sir, usually the draft law is created from the discussion document.

McGrath J It's over the page when evasion's picked up though isn't it and isn't it clear that they regard offences that would relate to being considered tax fraud to be of a different kind to what's been discussed back at the top of page 11?

Gilchrist Well Sir yes they talk about evasion in terms of fraud. Government intends to bring tax penalties into line with other recently enacted penalties for fraud offences and indeed submissions made on my behalf in the lower Courts was you have to have a fraudulent intent for it to be evasion and

McGrath J But certainly that was the essence of the case and perhaps that aspect of it the Court of Appeal covered rather thoroughly but the point I'm trying to make to you is that we're not helped in particular by the discussion of new powers in relation to presenting information if the case is actually about tax fraud. It's really got to be seen under the heading of evasion we should be looking at. Which you cover helpfully at page 12.

Gilchrist Yes Your Honour and they give an example of evasion where a taxpayer in a cash sale issue under-declares cash sales. They do talk about penalties for failure to disclose information and they talk about standardising the penalties, but I suppose my point is nowhere in that document and of course in subsequent documents is there any hint even that the Politicians want the Commissioner to be able to put an evasion charge on a situation where the tax has been properly disclosed and indeed at the start of the Bill the thing it talks about is that it's a fundamental requirement that people tell the Commissioner about what they owe because if they don't do that the Commissioner hasn't got the resources but he has got huge resources and in fact more resources than any other Crown entity once he knows about something to illicit that money. In my case he chose not to use any of them for reasons only the Commissioner knows.

Blanchard J Well now this material that you've been taking us to you say you think preceded the development of a draft which became a Bill. Was this new section 143(b) in the Bill in this form when it went into Parliament?

Gilchrist Yes Your Honour it was.

Blanchard J And was there anything in the explanatory note which shed any light on 143(b)?

Gilchrist Sir only that they were standardising in their terms of penalties

Blanchard J Do we have that explanatory note somewhere?

Gilchrist In summary on page 12 of my submission there's a reference to it at 7.11. It's perhaps interesting to look at the two together talking about the proposed penalty for evasion and then after that there's a heading 'Failure to furnish or disclose information'.

Blanchard J But this is not the explanatory note.

Gilchrist Sorry Sir this is extracts from the discussion document.

Blanchard J Yes but the discussion document is not an explanatory note.

Gilchrist No Your Honour I haven't the explanatory note in my casebook.

Blanchard J Have you looked at it?

Gilchrist Yes I have Your Honour. It substantially follows the discussion in the discussion document.

Blanchard J Well usually it has a section-by-section commentary. Not always in great detail but I take it from what you're saying that there was nothing in relation to 143(b)?

Gilchrist Not in particular points Your Honour. It's just in general terms that this is the section to standardise penalties because of course they were bringing them together, well had already brought them together and then beefing them up, but I suppose my point is if before this, and in my submissions I say that it's clear that before this change there could not have been this charge laid because it didn't exist, my submissions are if that charge is to be created by this new law then we'd some indication in this that that was their intention given that overriding statement that they were concerned about the Commissioner misusing this new law and indeed I submit that's exactly what he's done.

Tipping J Your argument seems to me to depend very substantially on the proposition that this was an offence which didn't hither to exist. Is that right?

Gilchrist Yes Your Honour, prior to this Act Your Honour, yes.

Tipping J And you're asking us to read down what seems to me to be fairly clear language on that account and on the account of the history generally.

Gilchrist Yes Honour.

Tipping J Now is the reason this offence didn't hither to exist according to you set out at para.44 of your, amongst other places, at 44 of your written submissions on page 13 where you compare it with the previous reference to assessment or payment of any sum which is or may become chargeable. Is that the key reference?

Gilchrist That is one of them Sir because it talks

Tipping J But why didn't the offence of intending to evade payment hitherto exist, because it seems to be there with the intent to evade the assessment or payment of any sum which is or may become chargeable?

Gilchrist Yes Sir, I'm probably relying on the case law talking about those words is or may become chargeable

Tipping J Well if it is chargeable then presumably assessment stage has passed and the

Gilchrist No Your Honour I think it's saying that it hasn't been assessed because it's chargeable but you haven't told the Commissioner about it so he hasn't been able to assess it or charge it.

Tipping J Oh I see. Well I don't necessarily accept that so I just thought I'd signal that this premise, this is a new offence. I need some persuasion of that.

Gilchrist Sir may be I could persuade you if you read on in that same paragraph and we talk about what happens if you're deemed to have evaded the payment, the assessment of payment of a sum which may become chargeable, you are then liable for additional tax called penal tax, not exceeding the amount treble deficient tax

McGrath J That's what this provision's about isn't it, penal tax as opposed to a criminal offence?

Gilchrist Yes Sir before this in the old days it was penal tax and criminal prosecution under the Crimes Act if the Commissioner so wished.

McGrath J Can you tell us what the statutory provision is you are referring to here? I think you've footnoted it to appendix 7. Is it s.420 of the 1976 Act?

Gilchrist Yes Income Tax Act, sorry I'll just take a moment. Yes it's on appendix 7 of the casebook Sir, yes s.420.

McGrath J 420, yes, thank you.

Gilchrist And you'll see the words deficient tax there, now that's defined and there's substantial quotes in case law going right back as to what is deficient tax. Even the Commissioner says this. It's the different between the tax payable assessed by the Department and the amount originally returned by the taxpayer.

Tipping J It's the shortfall in other words, using that word loosely.

Gilchrist Yes Your Honour and you can see by that you could not have any deficient tax if you've declared your position. There's no shortfall, there's deficiency, there's just no ability to interpret the definition 'deficient tax' or now 'tax shortfall' into the position where you've actually disclosed, so it's clear that in the past there was no such thing as evasion of an amount in New Zealand Tax Law, of an amount that was properly disclosed. The question is by this recent change did that all change? Bearing in mind they used exactly the same words that had been there since the 1900s, my submission is nothing changed. Sure they beefed up the penalty for failing to disclose, so failing to supply information they gave Court orders etc, they beefed up the penalties for evasion, but at all times

Tipping J So this is the key point is it that before the legislation we're concerned with there was no such thing as evasion of an amount properly disclosed?

Gilchrist Yes Your Honour

Tipping J So you couldn't evade the payment of that amount properly disclosed do you say?

Gilchrist Absolutely Sir in terms of the New Zealand Tax Law because otherwise it rendered the law a nonsense because there was no penalty for it. Penal tax could not be imposed on you for doing it and that makes the law a nonsense if it might have been an offence but there was absolutely no penalty.

McGrath J This is the consequences of evasion in this provision though isn't it Mr Gilchrist, the consequences in terms that the revenue may impose administratively penal tax on you? What is the provision under this Act which was the equivalent of that under which you have been charged, s.143(b)..11.00.55 ?? what was the equivalent statutory provision that talks about assessment or payment?

Gilchrist Yes Sir

McGrath J Evading assessment or payment.

Gilchrist It doesn't Sir, it was in the Inland Revenue Department Act.

McGrath J What's the section?

Gilchrist Section 17 Sir which is at

McGrath J But isn't that the information requesting section?

Gilchrist Yes Sir, but it also used to then provide the offence, so that Act itself provided the offence for not providing the information. Nowhere in there of course is anything to do with evasion.

McGrath J So but the second and more serious offence just didn't exist is that what you're saying?

Gilchrist No Sir there was certainly an evasion provision. I tried to roam that decision at page 1 of my casebook

McGrath J Oh thank you, it's helpful to refer to that, yes.

Gilchrist And if you look I did it in two stages. You really only have to go back one because stage 1 and 2 are the same so I'm focused on pre-April 97 and what I'm saying is the offence of not providing information was the Inland Revenue Act or later on Tax Administration Act and non-compliance of it was dealt with under that Act of those provisions, tier 1 penalty.

McGrath J Sorry, is this page 2 of what you're referring to now?

Gilchrist Yes appendix 1 Sir of the casebook.

McGrath J Oh appendix 1, sorry, thank you.

Gilchrist And the issue of evasion was dealt with totally separately and there were certainly provisions but the provision, the definition of evasion in the Act talked directly about not filing returns, wilfully misleading the

Commissioner, deliberately filing false returns. It was all about returns and actions before assessment, that's quite clear, that the Commissioner if he laid this charge before 1997 could not tag the evasion part to it, could not, it wasn't there, so the basis of my submission's and I'm sorry they were lengthy was to try and prove that point by just good legal interpretation and I'm satisfied and happy to take submissions on where I might be wrong that

Tipping J The fact that it wasn't there before, why does that mean that we don't, when it appears plainly to be here now, that we shouldn't construe it in that way? They've obviously moved on to use a current buzzword.

Gilchrist Sir I challenge that it's changed at all given the same word are there, they've just put them into a catch all section. They've actually just picked up the same law using identical words, put it into one section and now you've got to read through, there's a s.17, failure to furnish, and immediately in the same section you can get down to as the Crown has evasion issue. But those two issues were dealt with separately in the past. Yes they have brought them together but they've brought them together using exactly the same language, coupled with

Blanchard J Well they've dropped out the reference to 'chargeable'.

Gilchrist Yes they have Your Honour and this is part of the simplification I guess because it's evade tax.

Tipping J Well they've removed from any contention this subtle business about chargeable. We're no longer concerned with that and that must have been deliberate.

Gilchrist Yes one would think if there was any deliberate intention to change existing law you would find some passing reference to it in the entire submissions, instead we see the Crown, sorry the Parliament concerned that in fact that the Commissioner might misconstrue this law and that where we're watching it closely

Tipping J Well why shouldn't it be an offence to evade payment? I mean what's so terrible about that? I mean it seems to me to be common sense. You either evade it at the assessment stage or you evade it at the payment stage.

Gilchrist I suppose Sir we have the risk then

Tipping J I'm talking about policy now. Why should one read it down from a policy point of view?

Gilchrist I understand your point Sir, but the problem we have then is we perhaps have created an offence of lawful evasion, taking lawful acts which might even

Blanchard J There's still got to be the knowingly not providing information.

Gilchrist Absolutely Your Honour.

Blanchard J Sot it's unlawful?

Gilchrist Sorry, the

Blanchard J The evasion is brought about by the unlawful failure to provide the information.

Gilchrist Yes Your Honour

Blanchard J So it's not a lawful evasion.

Gilchrist Yes Your Honour the two parts to the failure to provide information which is unlawful at any level

Blanchard J Yes well you've got to go through that part to get to the issue we're debating.

Gilchrist Yes Sir but there must be obviously evidence of an intent or an act of evasion in that to get to a charge there must be an act of intent to evade or evade in itself.

Blanchard J Yes but it's not lawful.

Gilchrist The activity that is challenged to be the event of evasion the Crown says can be lawful

Blanchard J How?

Gilchrist Because the assignment of the debtors the Crown accepts was a lawful act.

Tipping J But per se that is lawful but the purpose behind doing it is unlawful.

Gilchrist So the Crown would submit. The evasion if you look at

Blanchard J There would have been no point in flicking the assets into the other entity and then saying to the Commission 'ooh look what I've just done'.

Gilchrist But Sir if you did that that would be no offence. You wouldn't have committed an offence.

Blanchard J Exactly, that's my point.

Gilchrist By disclosing what you had done. So the offence seems to be not disclosing what you have done

Blanchard J Exactly, it is unlawful in toto because of the failure to disclose.

Gilchrist Yes Your Honour

Blanchard J It's all very well to have lawful steps but if there's an unlawful ingredient what has happened is not lawful.

Gilchrist That's a good point Sir and I have accepted and I remind myself that I have accepted the offence of not providing information is an offence. I've accepted that.

Blanchard J But you were talking about lawful evasion.

Gilchrist Then I've moved on to say what is the act of evasion so there's knowing and not providing information as part 1 of the charge; with the intention of evading assessment or payment is the next part. There's still got to be an act, it's not the actual not providing information that is evasion, it's doing something else. If I just had not provided the information and did nothing I would be

Blanchard J It is the act of not providing the information which is the evasion.

Gilchrist But Your Honours I just did not provide the information and did nothing else, I did not assign the creditors, I submit that could not be evasion.

Blanchard J Well it might be.

Gilchrist Evasion of assessment of payment. The Commissioner seems to accept that it wouldn't be evasion because there's been no active evasion. There has been an act of failing to comply with the notice

Tipping J The actus reus is the omission with the knowing omission not to provide the information.

Gilchrist Yes Your Honour.

Tipping J The mens reus is the intent to evade payment.

Gilchrist Yes Your Honour.

Tipping J That's the way I would look at it. You're saying I think that you cannot as the law should be interpreted intend to evade payment, because once you've properly assessed, that's the end of it. I think that's the long and the short of your case isn't it?

Gilchrist Yes that may be an apt summary because the evasion is about the act of declaring what you are liable to pay.

Tipping J The evasion is making it impossible in the context for the Commissioner to collect the tax as assessed.

Gilchrist Yes well I would challenge

Tipping J We would have to work on certain factual hypotheses here, but that is the intention behind not giving the information and I can't myself see any reason why we shouldn't simply construe it as written, because there's no clear indication that they have, other than passing observations that they weren't changing the law which

Blanchard J Well that's at the earlier stage.

Tipping J It may or may not be of any moment. We've got to interpret them to apply the law as we find it.

Blanchard J This law reform process went through two stages. One was not intended to change the law but simply set it out in a more convenient form. They then went through a separate exercise as I understand it of looking at the whole question of penalties and defences and what have you, and they amended the consolidated statute.

Gilchrist That is exactly

Blanchard J Well there's no suggestion that I'm aware of that at that second stage they weren't changing the law.

Gilchrist Well I suggest there is no evidence of any intention whatsoever to change the law in this respect.

Blanchard J Overall they were making amendments to the law in that second stage.

Gilchrist Yes Your Honour they were

Blanchard J So the question is were they in this instance?

Gilchrist That is correct Your Honour, were they in this instance, particularly given that they used the same words that were previously there.

Blanchard J Well I would suggest that the pointers are pretty neutral on this and one is forced back on the language itself.

Gilchrist Yes Your Honour.

Blanchard J Which is unambiguous.

Gilchrist Sir well that's one argument it's unambiguous, but one of the main concerns that I had with the Commissioner's approach to interpretation was in fact their application of case law which was all about evasion of a non-declaration and Judge Mackintosh's immediate response to my submissions that challenge cannot be considered, the *Privy Council New Zealand Tax Case* law cannot be considered because that dealt with the matter of assessment, so let's move on and consider the Crown's submissions, the Crown's case law, both of which, all of which relate to matters of assessment, whereas *Challenge* is New Zealand's leading, and still is, New Zealand's leading case on what is avoidance and what is evasion.

Tipping J Mr Gilchrist can I just ask you this because really we're tending to go around in circles I think? As a person not versed in tax rule but as a person having some background in experience of reading statutes, I would have to say that just reading this you're argument is hopeless. Now does it become hopeful because of the background factors that you say should bear on this interpretation? In other words we have to read it down because of these background factors. Is that basically the argument?

Gilchrist Yes I suppose Sir the argument is is there any doubt, is there reasonable doubt that the word 'evasion' does not apply here because of the weight, the entire weight of precedence that suggest that the word 'evasion' relates to the cheating the revenue by failing to declare your position.

Blanchard J But there is no precedent that I'm aware of which actually deals with this point.

Gilchrist Your Honour we submitted the challenge did in passing at least have a definition of what was evasion and

Blanchard J Well perhaps you should take us to that.

Gilchrist Yes just in a nutshell it's on page 28 of the case on appeal, so it was referred to in the District Court and the Court of Appeal.

Blanchard J Well we've got the report here.

Tipping J Well we've got the report here.

Blanchard J Well we've got it at tab 27

Gilchrist Of the, yes Sir.

McGrath J We've got the report I think at tab 5 of the Crown's authorities.

Gilchrist Yes, the credible part at 561. 'Evasion occurs when the Commissioner is not informed of

Blanchard J Sorry

Tipping J Paragraph?

Gilchrist I'm sorry 5

McGrath J 561 of the report.

Blanchard J Well the copy of the report that I've got here is

Gilchrist Yes so now the critical part is evasion occurs

McGrath J 561, at what line?

Gilchrist I'm sorry Your Honour, I've just got the reference 561, it's in my case on appeal book I'm looking at.

McGrath J Okay, that's alright, go on.

Gilchrist But I can find it

Blanchard J It's line 5.

Gilchrist Thank you. 'Evasion occurs when the Commissioner is not informed of all the facts relevant to an assessment of tax, innocent if

Blanchard J That's not a definition.

Tipping J That's just a contextual observation.

Gilchrist Indeed Your Honour and perhaps in my informal way I should be using the word 'context' in all of my submissions.

Blanchard J The law Lord is not saying evasion occurs only when the Commissioner is not informed etc, he's just saying that when the Commissioner is not informed evasion occurs.

Gilchrist Yes indeed and that fraudulent evasion may lead to criminal prosecutions as well as reassessment.

Blanchard J So this isn't really very helpful.

Gilchrist Well Sir the District Court didn't give a chance for it to be considered because she distinguished

Tipping J Well I think if the learned Judge had considered she would have found it was wholly unhelpful or ought to have done.

Gilchrist Yes Sir, her reasons was that that was a case relating to assessment of tax.

Blanchard J Well she's right. That's the context in which that comment was made and it's not intended to be a definition of what is and what is not evasion in other circumstances.

Gilchrist Yes Your but then she preferred the Crown's precedence, *Simms Taylor Wilson*, which all dealt with exactly that, a matter of assessment of fraudulent or wilful under-declaration.

McGrath J That was more concerned with what the concept of evasion was wasn't it

Gilchrist Yes Your Honour.

McGrath J It didn't focus on the assessment payment distinction?

Gilchrist No Your Honour and indeed none of them do but my point is because all of the case law is about cases of under-declaration or over-statement of expenditure of that nature

Tipping J Well it must be possible under this section that we are dealing with to evade payment mustn't it?

Gilchrist Absolutely Your Honour.

Tipping J Beyond a shadow of a scintilla of doubt.

Gilchrist Otherwise it renders that word meaningless. I accept that.

Tipping J Are you saying that the Courts below have misdirected themselves to what evasion means in conjunction with payment?

Gilchrist Yes I am Your Honour.

Tipping J Well you're now saying it. I didn't understand you really were saying it. I thought you were just saying that the history of all this was the magic bullet.

Blanchard J You're saying that an evasion of payment can only be in relation to a sum that's been assessed?

Gilchrist No Your Honour evasion is related only to the act of falsifying, under-declaring, not presenting the correct position to the Commissioner to then elicit from you that tax.

Anderson J Hiding assets after assessment so they'll never be taken in payment?

Gilchrist No Your Honour I would say that different parts of law, including criminal law, come into play if you do that, but not tax evasion law.

Anderson J Why not, you're evading payment if you hide assets so the Commissioner can't take them in payment of assessed tax.

Gilchrist Yes Your Honour if it was as broad as that the Commissioner wouldn't need any other prosecution ability for acts post-assessment.

Anderson J People commit offences for which they could be charged under any number of acts, or any number of sections.

Gilchrist Yes.

Anderson J It's a matter of prosecutorial election as to what statutory provision is invoked.

Gilchrist I understand Your Honour but you would have thought if the words evade assessment or payment of tax having been around for so long that there would be at least one case of the Commissioner testing that theory.

Tipping J Well there is now.

Gilchrist Yes Sir I accept that, I accept that, hence my initial statement that this could create history.

Anderson J I think that we understood you earlier Mr Gilchrist but as I recall, perhaps incorrectly, you suggested that s.134(b) was in the form in 1994 as it is now. Was that your submission or did I get it wrong?

Gilchrist Sir I'll go back to the road map which is more helpful.

Anderson J Because I'm looking at the original iteration of the 1994 Act and there was no s.134(b).

Tipping J 43.

Anderson J 3(b).

Blanchard J I thought it had been accepted that 143(b) came in in, was it 1997, as a result of the reconsideration of penalties and offences and what have you.

Gilchrist Yes Your Honour but its predecessor was s.199 of the Tax Administration Act.

Blanchard J Have we got that?

Gilchrist It's here I think. If I take a moment I'll find it for you.

Anderson J It's in s.200. 'If any question required to furnish in writing any information or to produce any books or documents', under s.220

Gilchrist Yes you're dead right Your Honour and that is the offence of not providing information and of course my submissions are there's no linkage with that section to evasion at that stage

Anderson J That's right, that's true and there was really a penalty akin to the absolute liability penalty now.

Gilchrist Yes Your Honour.

Anderson J So obviously the legislation

McGrath J Where is this provision, the 200, is that in Mr Gilchrist's folio?

Anderson J No I've just got the Act.

McGrath J The Act, oh perhaps I should ask Mr Gilchrist if he's got it handy.

Gilchrist Yes I

McGrath J Or his submissions.

Anderson J Anyway the point I'm leading to Mr Gilchrist is that obviously two years after the discussion paper the legislature thought we need to introduce a new offence. One that is not merely failure to provide information but

failure to provide information with the intent to evade payment or assessment.

Gilchrist Yes Your Honour those words were there before this change.

Anderson J The words 'evade payment or assessment', yes but not in this context.

Gilchrist In exactly this context Your Honour. Those words were there

Blanchard J Where?

Gilchrist 'Evade assessment or payment

Blanchard J But where?

Gilchrist In the provisions that dealt with evasion and my point is those provisions by their statutory place and purpose and interpretation deal with under-declaration and it couldn't be otherwise because

Blanchard J Well they did in that context but not now.

Gilchrist That is the Crown's submission that actually only inadvertently there's admission that it is there now and they haven't actually analysed why it's there and how it's there now but they're saying it is, look at the plain words, payment, evasion, it's there together therefore it must be one.

Anderson J But could you give us an example, a hypothetical example, of any evasion of payment?

Gilchrist Yes I think the best example is that the employer who fraudulently takes deductions off an employee in the guise that he's liable to pay this to the Commissioner and there's plenty of precedents on it, and simply pockets it.

Anderson J Well that's theft.

Gilchrist Yes it probably is Sir. It's certainly evasion of payment.

Anderson J Yes but it's theft. Can you give us an example of something that's not theft but is an evasion of payment?

Gilchrist No Your Honour I'd struggle.

Anderson J Hiding assets so they can't be taken in payment perhap?

Gilchrist I'd struggle Your Honour if I had to interpret in terms of legal precedence, I'd struggle if I had to present an example in terms of a dictionary definition of evasion.

Anderson J I suppose it's because there is some novelty in a case where there has been an honest assessment.

Tipping J Can I suggest an example assigning debt so as to make it impossible for the Commissioner to collect.

Gilchrist Sir with respect I wouldn't accept that as an example and particularly if the Crown accepted that that Act in itself was lawful.

Anderson J It's the intent that accompanies it.

Gilchrist Yes Your Honour

Anderson J Driving your car is lawful. Driving your car with an intention to drive it into someone isn't.

Gilchrist Yes Your Honour, and it's whether they're driving the car into somebody is an act of attempted manslaughter, murder, or is it something. In this case is it evasion or something else. We have to determine what that word means before somebody can be convicted of that act.

Anderson J Well generally speaking it involves intentional conduct of an underhanded and dishonest nature. It must have those characteristics anyway mustn't it?

Gilchrist In terms of precedential interpretation, yes Your Honour, but even if they're underhanded if you look at where the underhand came from in *Simms* it was underhand because of the fact that the intention was to not have to disclose assets.

Anderson J Yes well that's an assessment situation but in a payment situation it will have the same general characteristics of being underhand and being wilful.

Gilchrist Yes it's a matter of whether that amounts to evasion Your Honour.

Anderson J Yes well the wilfulness must relate to an intention not to pay.

Gilchrist I suppose an example to assist me if you like is if instead of assigning you gifted all of your assets to a charity and then the Commissioner up and said I've got your assessment, we all agree that I owe that but I've gifted all my assets to a charity.

Anderson J What if you ran the charity yourself?

Gilchrist It's starting to get into tax avoidance I suggest Your Honour, but that act would certainly put the, on the face

Blanchard J Well the act might or might not be perfectly lawful. I don't know whether there is any other offence that might have been committed but it wouldn't have been this one because you wouldn't have knowingly failed to provide information since on your hypothetical you rang the Commissioner and said look what I've done.

Gilchrist After the event, may be the Commissioner did ask you for a list of all your assets because you owe us tax, so you then go about gifting them to charity

Blanchard J Well the act of gifting them to charity might not be an offence at all. I don't know. It's not this offence.

Gilchrist But one would seem to say that their logically similar if the intent is to not allow the Commissioner to collect that tax, does it make any difference that a charity

Blanchard J Here we're dealing with concealment from the Commissioner. That's what the offence is about.

Gilchrist Failure to disclose information, yes. Information being a list of creditors

Anderson J And shifting, and shifting assets at the same time.

Gilchrist As evidence of an intent to evade Your Honour, yes, that's the allegation that that is evidence of an intention to evade.

Anderson J And if you had answered the information the Commissioner would have said well this is funny, something funny is going on here, it's got no creditors. I'll issue another request and say show us what's happened to all the debts due to the company in the past month, and then you would have said oh I've assigned them and the next notice would say to whom have you assigned them?

Gilchrist Yes Your Honour, and one was

Anderson J What was the consideration? Nothing, gave away \$23 or \$33,000 for nothing.

Gilchrist Yes Sir and that should be challengeable, that should be challengeable as preferring another person to

Anderson J To another company that you also ran.

Gilchrist Yes, and indeed there is a section *HK11* of the Income Tax Act that deals exactly on that point that says if you do that the Commissioner can unwind it. It's exactly on that point.

Anderson J If he knows about it but he wouldn't know about it unless his information requests were complied with.

Gilchrist Yes and in terms of avoidance where generally that provision is applied, that he doesn't know about it until after the event.

Anderson J Avoidance is a re-arranging your tax affairs so they don't incur tax. Evasion is arranging your affairs so that tax is incurred or ought to be incurred but it's concealed. Similarly with payment. I mean mere non-answering or mere non-payment doesn't have the moral connotations of evasion and mere non-compliance with a notice is penalised but at a lower level. Non-compliance with this extra intent envisages aggravated failure in reality.

Gilchrist Yes I understand Your Honour's point.

Elias CJ Is that a convenient time to take the adjournment Mr Gilchrist? We'll take an adjournment for 15 minutes, thank you.

11.29am Court Adjourned
11.47am Court Resumed

Elias CJ Yes, thank you Mr Gilchrist.

Gilchrist Thank you Your Honour. I'm not sure perhaps where I should head now but you might recall at the start I wanted to touch on these submissions of both the respondent and the Amicus. Just a couple of points that I think come out of that and I'm happy to do that now if you're in agreement with that, thank you. Dealing first with the submissions of the respondent as written and following the pages, just a couple of comments starting at para.5 on page 3. The Crown says at s.143(b), this is the section that the prosecution was under, was not a conceptionally new provision. I agree with that, I agree and I hope my submissions have made that quite plain. It's certainly not new, in fact there's nothing new since 1916 in terms of the words 'used', but of course I think I've labelled the point also that there are no precedents to support the use of this old provision in the way the Crown has. Then if Your Honours could turn to page 5 at para.17, perhaps a small point Your Honours but the Crown alleges that by the

assignment it became impossible for the ID to collect the undisputed tax, and I simply can't let that pass without comment.

Blanchard J I thought you'd already dealt with that point.

Gilchrist Yes I'm

Blanchard J Did you correct it because somebody on the bench who

Tipping J I was bold enough to put it that high and I was duly

Gilchrist Yes Your Honour and I possibly used the words 'liquidation provisions' as one means that they could have recovered.

Anderson J Sorry what was that Mr Gilchrist?

Gilchrist I would have added that the simple liquidation law would be one means by where they could have recovered, notwithstanding the other tax law, and then on the second to final page, sorry last paragraph, para.43 and indeed the closing statement 'such an interpretation would have the effect of rendering the clear words and intention of s.143(b) be inoperative. Hopefully I've made the point clear enough that I certainly disagree with that. The word 'payment' must be there, it must be there because of examples I've already given about if it's not there it allows extension evasion simply by not making the payment that you required such as tax deductions you've taken off an employee. The legislatures have known that since at least 1916. There's nothing new about having to have that there. It certainly doesn't render it inoperative. It has to be there and it's never been my submission that it would be inoperative. Turning to the submissions of Amicus, just a couple of brief points on that if I may. At page 6 at para.15, the point made is 'it's not necessary for the Court to consider recovery of tax issues or whether the tax was correctly assessed by the taxpayer in the first instance. The question posed involves consideration of the link between the taxpayer knowingly failing to provide the information requested and whether he committed the act intending to evade tax'. My point there I guess I've laboured it already, the evasion is all about taxpayers not correctly assessing and that clearly goes to what evasion actually is. At point 18, talking about interpretation and if the words are slightly ambiguous or obscure that you have to look behind them and my argument is, my point is I suppose, that my submission is that the history seems to indicate that they may well be a little bit obscure because of the wealth of precedence

Blanchard J They're not obscure on their face, that's the problem, you can't create an ambiguity. I think this is a point Justice Tipping made earlier, you can't create an ambiguity which isn't there on the face of the statute by going

off to some other material and saying in light of this material there's an ambiguity. There has to be an ambiguity there before you even look at that material. Or an absurdity.

Gilchrist Yes Your Honour. I'm not arguing absurdity here, I'm arguing that the term 'evasion' with the words 'assessment of payment' must be somewhat obscure because of the wealth of precedents intending illicit what that term means. At para.29 and 30 I accept the point the Amicus is making there that the quote he has made in para.29 ends with the words 'GST law'. In fact that's wrong in my part, it should have read tax law and that then renders para.30 more, makes it more sense. The point I was making on the paragraph that the Amicus has quoted is that at the time when this law that we're considering there in those paragraphs, there could not be evasion by way of non-compliance with a s.17 notice. And lastly, sorry second to last at page 12 the Amicus makes a point of the two parts, the distinct parts of this new act, the amendments I should say that we've been focussing on to the existing Act. There's a whole part on penalties, shortfalls etc, criminal offences for evasion and there's a whole separate part on recoveries and it's that separate part in recoveries that I suggest is where the Commissioner should have been focussing. And Your Honours at page 15, para.44 the Amicus is making the point of the second bullet point under 44 'my first argument appears to envisage a situation where the self-assessment was complied with but payments were not complied with and it's difficult to draw a distinction between that hypothetical situation and the appellants situation for evasion of payment. I suppose the distinction I was trying to make is in terms of activities and actions that somebody does to under-declare and not disclose as opposed to activities that they undertake once that disclosure has been made and agreed with and whether that subsequent activity can in fact by definition be evasion. That's the only points I had on those two submissions and at risked of being accused of labouring existing points made I'm happy to end my submissions at this point unless there's any questions from Your Honours.

Elias CJ No thank you Mr Gilchrist. Right Miss Hastie, you've heard the exchanges and perhaps with that indication you can focus on the matters that are clearly of most interest to the bench.

Hastie Thank you Ma'am. In very simple terms s.143(b) of the Tax Administration Act criminalises the offence of evading the payment of tax. The section in its terms is very clear, there is no ambiguity, nor is there any absurdity in it. The offence is not simply committed by failing to pay properly assessed tax, nor is it committed by simply failing to comply with a request for information pursuant to s.17. The offence of intention to evade payment of tax is committed. There's the two-step process to it.

Elias CJ Well I wonder whether it's really accurately referred to as an offence of intending to evade payment of tax. I had thought that you were relying on the non-provision of information with that intention.

Hastie Yes, I'm sorry Ma'am, it's a failure to provide information when requested pursuant to s.17 and the purpose of that was with intent to evade the payment of tax. I'm sorry Ma'am. And that's clearly what the section provides for. A person commits an offence if they knowingly do not provide information and there's no dispute that in this case the appellant knowingly did not provide information and does so, ie, the purpose intending to evade the assessment or payment of tax. Clearly it's disjunctive to read the section down as the appellant would wish this Court to do, essentially means that you cannot cheat the revenue if you don't pay, in the circumstances that the District Court Judge at first instance and the Court of Appeal found to be underhand conduct. Because what we have here is a history going back some two years to 2002 between the Department and the appellant in an attempt to obtain the tax that was owing. The notice was issued two years or so after the initial attempts had obviously failed and within three days of receiving that notice, the appellant then assigns the debts of the trust for no consideration to another entity, thereby frustrating the Commissioner's ability to use the 157 path, and that's really what this case in a nutshell is all about. The statute is plain in its terms. The Court of Appeal on a principled approach considered what is meant by evasion and the appellant's conduct was found to be underhand dealing. There's no need to look at the parliamentary reports because with respect they don't throw any light on the matter when the section is so clear and unambiguous. Now that was very brief Your Honour. I'm not sure whether I can in fact pursue the submissions any further.

Elias CJ Well we've read the submissions and we understand what you're indicating there.

McGrath J Miss Hastie perhaps you can help me with this. I know what your position is in relation to the prior history but nevertheless am I right in saying there was no directly equivalent prior provision in the 1994 Act?

Hastie No there wasn't Sir, the best that we have is s.420.

McGrath J But s.420, that's the Penal Tax Provision?

Hastie It is yes.

McGrath J The only offence provision then was s.200 was it?

Hastie Yes Sir as I understand it, yes, there is no equivalent offence of 143(b) prior to its enactment.

McGrath J Now we have been referred to various sources that might throw some light on the legislature's purpose in introducing 143(b). None of them seem to be particularly close in time or in circumstance. Are you able to add anything in relation to that aspect that there has been various reports consideration by Select Committee, or is it a bit of a gap?

Hastie I suspect there is a bit of a gap. If I might just have a moment Sir I have actually done some research on that. Sir I can do no better really than the appellant essentially. I can refer you to the first reading of the Bill at volume 550 of Hansards

McGrath J 550 Hansard.

Hastie At page 9339

Anderson J Does that relate to the 94 Bill or the 96 Bill?

Hastie Yes that was the first reading of the Bill that preceded the 1996 amendment and the Honourable Wyatt Creech states that the Bill provides a comprehensive structure of civil and criminal penalties that replaces the ad hoc structure of penalties that have built up over time. At the top end of the scale of serious non-compliances, wilful or knowing breach of an obligation under a tax law, this is tax evasion and that's essentially the definition from *Taylor*. The second reading is at volume 556 at page 13549 where it is stated that the proposed changes would ensure greater fairness through consistent application of penalties for non-compliance and clear and more effective penalties will provide greater incentive for taxpayers to calculate their tax liability accurately, to file their tax returns on time and to pay their tax on time. There's nothing else that I have Sir that could assist you on that point.

Blanchard J Was 143(b) described or discussed in an explanatory note?

Hastie I'm not sure Sir but if I may just have a moment, Miss Ellis might know. It's not a point that has been looked at but if this Court wishes me to do so I can make the relevant inquiries.

Blanchard J It may help.

Hastie Yes but there is of course Sir s.139 of the Act which sets out the purposes of part 9 which is the penalties provision and it's stated there that the purposes are to encourage taxpayers to comply voluntarily with their tax obligations and to co-operate, to ensure that penalties for breaching of tax

obligations are imposed impartially and consistently and to sanction non-compliance with tax obligations effectively and at a level that is proportionate to the seriousness of the breach.

Anderson J It seems this new provision gave an option to charge at a less serious level than under the Crimes Act.

Hastie Yes, and that's recognised in the test really if I could put it that way, as one of underhand dealing as opposed to the dishonesty element that we look at for fraudulent intent under the Crimes Act.

McGrath J One other point Miss Hastie. Looking at s.143(b)(1)(v) and the words 'required to do so by a tax law' I suppose it might be said that Mr Gilchrist was required to provide information pursuant to a tax law rather than by a tax law in the sense that the command came from a departmental officer rather than the law itself. Should we be reading by his meaning pursuant? What's your submission on that?

Hastie Well it came by a departmental officer pursuant to s.17 which is the relevant tax law.

Blanchard J The Commissioner presumably has no power whatever to require information except via tax law. I mean if the Commissioner suddenly decides to ask me for information which he's not entitled to ask for under the Tax Act,

Hastie You're not entitled to provide it. It's an obligation on you to provide it, yes.

Elias CJ Is tax law defined?

Blanchard J Yes.

McGrath J I think Mr Gilchrist did refer to one or two incidents in the law that did actually directly require disclosure in particular situations.

Hastie Yes tax law is defined as meaning a provision of the Inland Revenue Acts or an Act that an Inland Revenue Act replaces; an order in Council; or a regulation made under another tax law; a non-disputable decision

Blanchard J Inland Revenue Acts are defined as well aren't they?

Elias CJ Sorry what was that, a non-disputable? This Act is so awful to find your way around.

Hastie Decision.

Elias CJ A non-disputable decision, ie, not an assessment. I'm told it means all sorts of decisions that aren't assessments.

Tipping J Your grasp of the matter is commendable Ms Hastie.

Hastie It also goes on to mean an obligation to provide a tax return or a tax form also includes a provision in the Accident Rehabilitation Compensation Insurance Act or any relevant regulation.

Tipping J It's quite clear Miss Hastie isn't it that para.(f) which is the key one in 143(b)(1), although I think one can discern it's general thrust with some clarity, it does have certain awkwardness in it in that it says intending to evade the assessment by any other person under a tax law. There's some degree of if you like, cobbling together some rather awkward concepts here. I can understand intending to evade the payment by any other person, but then that frankly seems to me to support the disjunctive nature of it, but it's not a model if you like of easy draft when you try and relate the idea of assessment.

Elias CJ Well it's broad isn't it, that's the thing and presumably it's also drafted to make humans responsible where the other person is a corporation or something like that.

Hastie I suspect it is, yes Ma'am.

Tipping J I think for my purposes it is not deliberately to pan the drafting but just to point out that I think the disjunctive nature of it is reinforced if you like by what I see as a degree of awkwardness.

Hastie Sir I don't think I'd describe any of the other sections in the statute other than awkward. The tax legislation is quite horrendous to work your way around.

Elias CJ But just picking up on Justice McGrath's point to you about when required to do so by tax law, that which I hadn't really focused on, the argument presumably here for the Crown is that Mr Gilchrist was required to provide that information under s.17.

Hastie Yes Ma'am.

Elias CJ And it didn't matter that what triggered the requirements under s.17 was some official writing to him. It didn't have to be a, yes, yes alright, that's alright.

Hastie Yes Ma'am.

McGrath J I think that there is some elaborating words in s.143(a) also that will help clarify.

Elias CJ I hadn't looked at that.

Tipping J Well we've got by in some places, under in other places, so there's nothing much to gained from the order. Consistency and context are different too in certain places.

Hastie There is a requirement under s.15(b)

Elias CJ Sorry Miss Hastie, what

Hastie I'm sorry there is an obligation under s.15(b) on the taxpayer to comply with obligations and to disclose

Elias CJ 15(b) of which Act please?

Hastie The Tax Administration Act Ma'am.

Elias CJ Oh I see it's another insert.

Hastie It sets out the taxpayers' tax obligations and there's a number of them there including disclosing to the Commissioner in a timely and useful way and this is subsection (e) all information, including books and records that the tax law would require the taxpayer to disclose.

Tipping J The scheme is reasonably plain isn't it? 143(a) implies knowledge, but knowledge only. 143(b) implies intent to evade or analogue malice if you like so you're sort of stepping up if you like in gravity?

Hastie Yes exactly, exactly and I think as His Honour Justice Anderson has said, really it's that intermediate stage or it's just prior below two the imposition of the Crimes Act offending, but obviously higher than simply the imposition of penal tax. Can I assist any members of the Court further?

Elias CJ No thank you Miss Hastie. Mr Gudsell there may be some points of emphasis you want to draw our attention to or matters of comment but we've been greatly assisted by your written submissions and really only need to hear you on anything additional.

Gudsell Thank you Your Honour. There were some matters raised by Justice Blanchard and also by Justice McGrath that may helpfully be able to be pointed out. The comment was made by Your Honour Justice Blanchard regarding explanatory notes and yes there are explanatory notes in respect

of s.143. The explanatory note Mr Gilchrist provided some material from a document that was pages 1 to 308 and I'll just take that from the tab that he gave to give you some useful assistance.

Elias CJ What tab, sorry?

Gudsell I'll just find that Your Honour.

Anderson J 18 I think.

Gudsell 18, thank you Sir. It's actually the archived bills, it's the Taxpayer Compliance Penalties and Disputes Resolution Bill of 1995 and it's a document that actually is referenced to pages 1 to 308 in the top righthand corner.

Blanchard J Sorry, which tab are we looking at?

Gudsell I'm just trying to find the tab I'm sorry Your Honour. The explanatory note in any event Your Honour dealt with s.143 and remarked the new penalty and interest regime which generally comes into effect from 1 April 1997 and includes the following elements. It then expressly refers to the criminal offences and their penalties are standardised across the Inland Revenue Acts, then refers new sections 143 to 145 and at page 161 of that document which I can provide to the Court, it states the new sections 143 to 152 insert the new criminal penalty rules, sections 143 to 143(b) are the general offence provisions which cover absolute offences s.143, knowledge offences s.143(a) and evasion or similar offences s.143(b). And then it extended on to deal with the other provisions but that's by way of the explanatory note.

Tipping J So it doesn't really tell us anything helpful to this.

Gudsell But there was an explanatory note and it was just stating the obvious in essence. The other matter that was asked about was the history – Justice McGrath asked a number of questions about that. I mention in the written submissions that Mr Gilchrist's submissions themselves cover the point of the discussion document and my response to that in the written submissions was that the references in para.37, page 9 through to page 12 do not provide a complete reference to either the discussion document or the matters that were mentioned and I just take you by way of example to that document and it's under tab 17 I think, and what Mr Gilchrist had referred to there he proceeded to summarise for the Court various passages starting at para.1.4 which is the second page in on tab 17. For the Court's attention there is para.1.7 which is not referred to in Mr Gilchrist's submissions. That in my submission is a significant comment by way of the original discussion document. It's important that sanctions for non-

compliance reflect the current environment. Proposed compliance and penalties regimes were both fairer to taxpayers and more effective in ensuring taxpayer compliance with taxation law. Now that's not mentioned on page 10, so for completeness in my submission this matter needs to be examined in a little more detail. The next reference is at para.39 of Mr Gilchrist's submissions start at para.5.31 and appropriately in respect of evasion the preliminary matters however at paras. 5.1 through to 5.3 are also of significance in my submission to the Court with regard to taxpayer standards as it is this taxpayer who the Court has found in the lower Court and in the Court of Appeal did not comply with the required standards, so those are matters of detail with regard to discussion. Most, without going through a number of them, the other one that is relevant is at para.7.15 of that same document and what Mr Gilchrist had included was up to 7.12. What is also relevant in my submission is the following passages under the appropriate Act for prosecution, and that's 7.15 to 7.18. Now they were not referred to in the submission and in my submission they are relevant to the Court's consideration of how this legislation evolved. Particularly the reference in 7.17, if sanctions of imprisonment for tax offences were provided for under the Inland Revenue Acts, in many cases it would not be necessary to take proceedings under the Crimes Act. The Commissioner's right to prosecute for criminal offences against the Inland Revenue Acts will be extended by virtue of the term imprisonment proposed for evasion. So that's in my submission very relevant to the history issues that the Court has been taken through today. The only other matters I alert Your Honours to are at tab 18 and 19 of the material Mr Gilchrist has placed before you. You have the front page of a document and no further pages. There are relevant passages in those further pages for the Court's assistance post hearing that may be of assistance to you. The one at tab 18 is only a 25-page document. It is a discussion document published in September 1995 when The Hon. Mr Creech was speaking to this in the House and it addresses at page 3 'criminal offences of a similar nature and gravity across the Revenue Acts will be consolidated into generic provisions in the Tax Administration Act. The monetary penalties for criminal offences will generally be increased so they are a more effective deterrent. Monetary penalties of up to \$50,000 will apply to most offences, a maximum jail term of five years will be introduced for evasion and related offences'. But at page 15 of that document there is an express detail with regard to s.143 to 148 of the Tax Administration Act. That material is not currently before you and may be of assistance to you. It breaks down and explains the creation of the generic criminal offences to replace the many specific criminal offences in particular Acts. That gives a more appropriate flavour to the nature of the way this legislation in my submission developed. The following page is also significant at tab 19 of the material that is before you. You have the front page of that document. It is a 82 page document in April 1995, but most significantly addresses issues relating to the way in which the legislature has developed

as the Court indeed has developed in discussions with Mr Gilchrist today and at page 20 and 21 deals expressly with criminal penalties and proposals. At 21 is very significant Your Honours in my submission of that document and that addresses the reform and it really deals with a number of issues that have been raised in discussion today with regard to the difference between penal tax and criminal offending. The reform is dealt with at page 21 at para.10.3 after setting out the categories or standardised broad categories of offending and states 'there are a number of problems with the current range of criminal penalties in the Inland Revenue Acts. Some duplicate one another and others treat breaches of similar magnitude inconsistently. Some contain ineffective and inconsistent penalties and are confusing and do not reflect the severity of the offence. Some of these problems will be addressed by the introduction of the new Civil Penalties and others by replacing the current criminal provisions with a simple self-contained regime. The main features of that are then set out. The aggregation of consolidated offences. Removal of offences. A number of criminal offences will become redundant because of the introduction of alternative civil sanctions and increased penalties, the penalties for some offences will be increased so the Act is more of an effective deterrent'. So what I'm submitting to the Court is that rather than the discussion documents and material placed before you being indicative of a history that assists in an interpretation along the lines that Mr Gilchrist has advanced, it does in my submission exactly the opposite, and the detailed examination of that material if it is thought necessary given the clear words, support the clear words. The matter that's occupied some time with the Court is to cross-reference the various sections from the Inland Revenue Act 1974 to the Tax Administration Act to the amendments in 1996 and I apprehend that a document or schedule that I have prepared may be of assistance to the Court if I may pass that up to the Court. It's really reading across the page. So if that is of assistance to the Court.

Elias CJ Yes that's very helpful thank you.

Gudsell I omitted to just mention that there was a speech by The Hon. Wyatt Creech on the 28th September 1995 on the introduction of this Bill where he did expressly refer to the range of criminal penalties. The Hon. Minister said 'there are a number of problems with the current range of criminal penalties in the Inland Revenue Department Act. Some duplicate one another; others treat breaches of similar magnitude differently. Some do not reflect the severity of the offence. The penalties for some offences will be increased so the Act is a more effective deterrent. A maximum term of imprisonment of five years is proposed for evasion; for other offences a maximum monetary fine of \$50,000 is proposed'. So that deals with the criminal and then they move on to the penal issues. The only other matter of relevance just in terms of criminality, just to indicate the

legislature's thoroughness with this matter is that s.12 of the Summary Proceedings Act provides, I'm sorry, the Crimes Act, provides that this particular offence under s.143(b) although indictable is triable summarily, so that the Court has captured the criminality and the way in which the Court may, the informant may approach charges with respect to offending against 143(b).

McGrath J Sorry, what was the section in the Summary Proceedings Act again?

Gudsell It's s.12.

McGrath J Thank you.

Gudsell Summary jurisdiction

McGrath J Of the Crimes Act?

Gudsell Yes it is the Crimes Act I'm sorry Sir, the Crimes Act.

McGrath J Thanks.

Gudsell And one of the matters Your Honour Justice McGrath posed with regard to this matter concerning s.420, and Your Honour was taken to that tab in relation to a penal tax issue, may be seen when one looks at s.143(b) of criminalising what was previously solely a penal issue. When you look at s.143(b)(2) you will see that someone can be charged with evading or attempting to evade, so that is a clear message from the legislature in my submission to encapture some of what were solely penal related matters into the criminal forum.

Tipping J Just for the record Mr Gudsell it appears that this was tried in indictably but by Judge alone.

Gudsell Yes.

Tipping J Is that correct?

Gudsell That's an option.

Tipping J Yes, but that's what actually happened in this case?

Gudsell That's what actually happened, yes. I'm not sure there's anything else that I can helpfully refer to Your Honours.

Elias CJ Thank you very much Mr Gudsell, we've been greatly assisted by your submissions, thank you.

Gudsell Thank you.

Elias CJ Mr Gilchrist would you like to respond? Are there any matters you would like to raise with us in response.

Gilchrist No not particularly Your Honour. Just in one closing comment picking up a point that has been brought out by the old submissions of the Crown and the Amicus and that is quite clear that 143(b) is a difficult section to interpret and if I've got it right it seems that all parties are accepting of my main thrust of my submissions that this to be right it must be new law. It must be new law to link evasion with post-assessment issues. If it is new law I say that there is an onus on the Court to consider the background to that new law and attempt to find out the real purpose of it rather than just looking at the words on their face because if we do that it is most certainly new law and we are creating history, but I submit that was never intended by Parliament and that the wealth background to the creation of that new law is sufficient evidence of that, or at least, the very least providing reasonable doubt as to the meaning of the so-called new law. That's my submissions Your Honours.

Elias CJ Thank you Mr Gilchrist. Well thank you Mr Gilchrist and counsel for your assistance in this matter. We'll take time to consider our decision.

Hastie If the Court pleases.

12.36pm Court Adjourned