IN THE COURT OF APPEAL OF NEW ZEALAND

CA65/2008
[2008] NZCA 141

BETWEEN	THE COMMISSIONER OF INLAND REVENUE Appellant
AND	BNZ INVESTMENTS LIMITED First Respondent
AND	BNZ INTERNATIONAL LIMITED Second Respondent
AND	BNZI SECURITIES NO. 1 LIMITED Third Respondent
AND	BNZI SECURITIES NO. 2 LIMITED Fourth Respondent

Hearing:	17 April 2008
Court:	Chambers, Robertson and Ellen France JJ
Counsel:	D J White QC and R J Ellis for Appellant A R Galbraith QC and A S Butler for Respondents
Judgment:	3 June 2008 at 12.30pm

JUDGMENT OF THE COURT

A The appeal is allowed.

B Orders for further discovery are quashed.

C With respect to costs in this Court, the respondents are jointly to pay $6,000 to the appellant, together with usual disbursements.

D **If costs in the High Court remain reserved, then, if the parties cannot agree them, the High Court should now fix them in light of this judgment.**

E **If costs in the High Court were fixed in favour of the respondents, that costs order is quashed and, in the absence of agreement, the High Court should now reconsider the issue of costs in light of this judgment.**

REASONS OF THE COURT

(Given by Robertson J)

Introduction

[1] This is an appeal by the Commissioner for Inland Revenue ("the Commissioner") against three discovery orders made by Miller J: *BNZ Investments Limited & Ors v Commissioner of Inland Revenue (No 5)* (2008) 23 NZTC 21,821. They were made in substantial litigation between the respondents and the Commissioner, the basis of which is a series of transactions entered into by the respondents which the Commissioner claims had the purpose or effect of tax avoidance. In making that claim, the Commissioner in part relies on other banks' transactions that are similar to those of these respondents, and claims that such similarity indicates that the transactions were "template" in nature.

[2] The application in the High Court was in respect of three categories of documents. The nature of the documents sought is such that the relevance of the second category is contingent upon the relevance of the first.

[3] The documents in the first category are binding rulings made by the Commissioner in favour of other taxpayers in respect of transactions that are said to be materially analogous to those transactions at issue in these proceedings. Specifically, those documents are rulings made in respect of Westpac and National Bank. We will refer to these documents as the "Westpac and National rulings." We

understand that seven rulings were given in respect of Westpac First Data and one ruling in the case of National Karapiro.

[4] The documents in the second category are those relating to the Commissioner's consideration and analysis in respect of the Westpac and National rulings. We will refer to these documents as the "Westpac and National preliminary documents". These documents can be relevant if, and only if, the Westpac and National rulings themselves are relevant. During the hearing, Mr Galbraith QC refined the scope of this category, limiting it to the "final issues papers" issued by the Revenue prior to the issuance of the Westpac and National rulings. We were told that there was one final issues paper for each of the Westpac and National rulings.

[5] The documents in the third category relate exclusively to the respondent's own transactions, entered into with related entities, in a matter called "AIG-2". We will refer to these documents as the "AIG-2 documents". BNZ seeks documents which indicate the Commissioner's consideration and reasoning in respect of the application made for a binding ruling on that transaction.

[6] The Commissioner appeals on the basis that none of the material sought could be relevant in the substantive proceeding.

The rulings in the High Court

[7] In the High Court the four respondents (referred to collectively as "BNZ") sought orders that the Commissioner provide discovery of the above-noted sets of documents on the basis that these documents would assist to impugn the basis of the Commissioner's decisions regarding the critical structured finance transactions. The Commissioner resisted such discovery on grounds of irrelevance.

[8] Miller J ruled that:

(a) The Westpac and National rulings were discoverable because they were relevant to BNZ's defence to the Commissioner's claim that the transactions had the purpose or effect of tax avoidance in part because

they were mass-produced by intermediaries and marketed to various banks (High Court judgment at [33]). He held that it did not matter that the Commissioner was not a party to the transactions sought to be discovered. An admission by the Commissioner regarding allegedly substantially similar transactions was relevant because it was the quality of the transactions that was in dispute, and the Commissioner was a party to the present litigation. The weight properly attached to such transactions was a separate question, but could not rule out threshold admissibility;

(b) The Westpac and National preliminary documents were discoverable because discovery "should extend to documents which the Commissioner took into account when making rulings on what he now characterises as template transactions" (at [38]). Miller J found that such documents were discoverable because they might impact upon the weight that a court would attach to the Commissioner's rulings "as an admission by, or opinion of, the Commissioner about the purpose and effect of such transactions."

(c) The AIG-2 documents, were discoverable pursuant to the logic used to analyse the relevance of the Westpac and National rulings and the Westpac and National preliminary documents.

[9] The effect of Miller J's ruling was that the Commissioner was obliged to discover documents that were "substantially similar" to BNZ's impugned financial arrangements.

The appellant's submissions

[10] Mr White QC for the Commissioner argued that none of the documents on which Miller J ordered discovery met the relevance tests, because none could affect the Court's determination under s 138P of the Tax Administration Act 1994 ("TAA").

[11] He submitted that, since the Court's role under s 138P of the TAA was one of rehearing rather than a traditional appeal, the Court would determine the challenges to the Commissioner's assessments on the evidence. The Commissioner's reasons for his decision were not under scrutiny, and documents relating to them were not therefore discoverable.

[12] Against Miller J's finding that the rulings in respect of other banks' transactions might be "admissions" under the Evidence Act 2006, Mr White submitted that there was no scope for other bank rulings to be used comparatively in these proceedings, as prior inconsistent statements, since any ruling was confined to the parties in respect of which it was made. No "consistency" is required of the Commissioner across rulings, and there is therefore no room to argue that one ruling is improperly inconsistent with another.

[13] Mr White also adverted to what might be called a conservative, 'necessity-based' approach to discovery, whereby there should be a cautious approach to determinations of relevance at the discovery stage of proceedings.

The response

[14] BNZ contended that the Commissioner's approach was unduly narrow and that to the extent that the Commissioner premises his claim that BNZ's transactions are "template" on alleged similarities between BNZ's and other banks' transactional mechanisms, BNZ should have access to the material on which that inference is based, so that it can answer the case against it.

[15] BNZ emphasised in its submissions that the existence of prior favourable rulings in respect of other banks' transactions was conduct-influencing and that those rulings, in light of allegations of contrivance now made against BNZ, could reveal inconsistency in the Commissioner's approach.

[16] Mr Galbraith submitted further that the rulings issued by the Commissioner might be utilised to clarify ambiguity in, and to facilitate understanding of the

scheme and purpose of, the relevant legislation: *L R McLean and Co v CIR* (1994) 16 NZTC 11,211 at 11,214.

Discussion

[17] It is not difficult to appreciate the BNZ's frustration that from its perspective the Commissioner wants to have it both ways. Mr Galbraith accepted that normally the tax consequences of any transaction would be determined on the basis of the documentation and steps specifically relating to that transaction. However, as it was noted by this Court previously (*BNZ Investments Ltd v C of IR* (2007) 23 NZTC 21,589), the approach of the Commissioner in this case is different:

> [3] The Commissioner, however, prefers to conduct the litigation on a broader basis. While he does not seek to consolidate proceedings involving different banks, he is unenthusiastic about the prospect of any further segmentation of the cases. More importantly for present purposes, in relation to each bank, the Commissioner wishes to be able to rely on documents associated with similar transactions entered into by other banks. We will refer to such documents as "other bank documents". …

[18] We noted a central factor in this litigation is the characterisation of transactions as "template" and said at [44]-[45]:

> The Commissioner's case is that the repo deals were executed on a template (this notwithstanding some variation between the transactions). Indeed the Commissioner maintains that they are examples of "mass-marketed tax technology" and thus replicable by the banks depending on their "tax capacity" and what they regarded as an acceptable amount of tax to pay. We recognise that there may be some hyperbole in the Commissioner's use of the phrase "mass-marketed" as the marketing of repo deal technology (assuming it occurred) must have been confined to the limited number of banks operating in New Zealand. On the other hand the strike rate would appear to have been high as all the main trading banks entered into such transactions.
>
> If a taxpayer picks up and implements what is independently established to be an off the peg tax scheme, that may be relevant under the *Newton* test. This seems to us to render potentially relevant the other bank and other transaction documents. For instance, if transaction A is looked at in isolation and only by reference to the documents generated in relation to it, it may not be apparent that it is the implementation of an off the peg tax scheme and thus that the purpose of the underlying structure (for the purposes of the *Newton* test) was to manage the bank's tax capacity. But these features of the arrangement may become established if other transaction documents associated with the same bank are examined. The same may also apply in the case of other bank documents. In this regard it is

> important to recognise that some of the counter-parties dealt with more than one bank and that some of the individuals involved worked on a number of transactions (sometimes for different counter-parties).

[19] As against this background, BNZ argued that the relevance of, and reasons for, similarities between transactions will be an issue at trial, but that those similarities arise only because, at an earlier stage, BNZ had received some favourable rulings from which it had inferred the legitimacy of particular transactions.

[20] In respect of similarities with other banks' transactions, BNZ said it will not be in a position to properly engage with that argument if it does not have all available information.

[21] We emphasise that, logically, the relevance or irrelevance of the Westpac and National rulings is determinative of the relevance of the Westpac and National preliminary documents. We therefore begin with a discussion of the Westpac and National rulings, as our conclusions on those documents will in large part dispose of this appeal.

Westpac and National rulings

[22] Mr White argued principally that the invocation by BNZ of the Westpac and National rulings to defend its own transactions would lead to quasi-judicial review, which is improper. BNZ may wish to use the Westpac and National rulings to draw comparisons of how the Commissioner has viewed other banks' transactions, with the implication that, once taken, his view should be consistent across taxpayers. But, Mr White argued, the Commissioner's rulings have no precedential component, and the Commissioner is obliged to observe consistency only within, and not across, transactions.

[23] Mr White further contended, in this vein, that the Westpac and National rulings could not constitute an "admission" under the Evidence Act.

[24] While Mr Galbraith accepts that a ruling is legally binding only in respect of the particular arrangement to which it is expressed to apply, he submits that the rulings and associated information sought are relevant to:

(a) demonstrating that there is, or may be, commercial justification for any similarity in structure of the various transactions;

(b) testing the consistency of the Commissioner's assertions of artificiality, contrivance and lack of commerciality in respect of the various transactions; and

(c) the validity of the Commissioner's selective reliance on aspects of other banks' transactions.

[25] With respect to whether the Westpac and National rulings might be "admissions" in terms of s 4(1) of the Evidence Act, Mr Galbraith suggested that, since the rulings sought might be interpreted against the Commissioner's interests, they may fall within the statutory definition and be admissible on that basis.

[26] In the course of the hearing, Mr White stated that the Commissioner would not be calling witnesses from inside the Inland Revenue Department to give evidence on issues of "commerciality", "range of acceptable practice", "artificiality" or "contrivance". This amounts to a commitment on the part of the Commissioner that no person from the Revenue who made the rulings at issue will be called by the Commissioner as a witness. The use of the Westpac and National rulings as prior statements that might inform BNZ's cross-examination of such witnesses is thereby precluded.

[27] Mr Galbraith suggested, in response to this commitment by the Commissioner, that the scope of the Commissioner's discovery obligations was not properly limited by his contingent litigation strategy which may, in any event, shift.

[28] Notwithstanding Mr Galbraith's arguments, on balance we are persuaded that Mr White is correct in what may be described as the necessity approach to discovery.

The character of the applicable tax regime means that the High Court is going to have to make its own independent and objective determination of whether there was tax evasion in any of the transactions. As Miller J noted at [38]:

> It is the purpose or effect of the Bank's transactions, and not the Commissioner's reasoning, that is the subject of the litigation.

[29] The rulings sought here could not constitute "admissions" in terms of the Evidence Act. Any ruling is evidence of the Commissioner's view of the particular transaction in respect of which it is issued. Under s 91EA of the TAA, the Commissioner is bound by his application of the law to a transaction within the confines of that particular ruling, but not across rulings; pan-ruling uniformity is not required.

[30] It is correct, as Mr White submitted, that the Commissioner cannot be estopped in his application of the law with respect to one transaction by his previous application of the law to another transaction. That is inherent in the framework of the TAA, and emphasised by the principle that the Commissioner cannot alter, limit or circumscribe his auditing discretion by his conduct in issuing particular rulings: *Brierley Investments Ltd v Bouzaid* [1993] 3 NZLR 655 (CA).

[31] The Commissioner's view on earlier, unrelated transactions, let alone his reasons for the conclusions he reached in any particular matter, do not inform or assist in determining the purpose or effect of BNZ's transactions. This is not judicial review, nor an appeal. The analysis of BNZ's transactions begins afresh in the High Court, and an independent assessment is undertaken.

[32] We are satisfied that discovery is properly limited at this stage by the Commissioner's concession that he will not call witnesses from inside the Revenue to give evidence on commerciality, acceptable practice, artificiality and contrivance. Rule 300 of the High Court Rules mandates a conservative approach to discovery orders. The Court must be satisfied, before it makes an order, that the order is necessary at the time it is made.

[33] The Court should have regard to clear undertakings and concessions made by counsel. As a matter of policy, in order to be true to the legislative guidelines, discovery should be as confined as possible in the circumstances of the case. The touchstone of relevance should be fashioned or tailored to reflect those matters which will actually be in issue before the Court.

[34] Should the Commissioner's position shift, and particularly if he decides to call witnesses from inside the Revenue, then the "nature and circumstances" of the proceedings may warrant some discovery order of the kind sought by BNZ. But that is not the case at this juncture.

[35] Mr Galbraith further argued that the other banks' rulings may be utilised to clarify ambiguity in tax legislation; Miller J found that they could (at [36]). Mr White submitted that, even in the case of ambiguity, the scheme and purpose of legislation is properly a question of law. He contended that there is a limited scope for the use of extrinsic aids in statutory interpretation and that rulings by the Commissioner are not within that scope. Mr White cited authority in support of his contention that Revenue policy statements were not determinative of the law.

[36] We accept that Revenue policies cannot determine the law. But, particular applications or interpretations of the law could be relevant to the resolution of ambiguities in esoteric and inherently complex legislation.

[37] Richardson J in *L R McLean* was emphatic that Revenue rulings could neither alter statutory meaning nor be relied upon to circumvent clear statutory language. But, he noted that rulings might be a useful aid where there is ambiguity in legislation since rulings reflect the "considered view of those entrusted with and experienced in the administration of the legislation" (at 11,214).

[38] It is necessary to distinguish between general rulings and private rulings in considering the approach of Richardson J. There is no principled objection to the use of public rulings as interpretative aids. In addition to their public character, as long as public rulings are in effect, "the Commissioner must apply the taxation law … in accordance with [them]" (s 91BD). It may also be legitimate, in litigation

involving a particular taxpayer, to refer to other rulings issued in respect of that taxpayer. It cannot, however, be legitimate to use other taxpayer rulings for the same purpose. Section 81 of the TAA mandates the secrecy of all matters relating to the Inland Revenue Acts, with an exception for the use of such material where that use is "reasonably necessary for the performance of the Commissioner's statutory functions": *Westpac Banking Corporation Limited v Commissioner of Inland Revenue* [2008] NZSC 24 at [69].

[39] It cannot be said that, in the circumstances before us, the Westpac and National rulings come within the "necessity" disclosure exception in s 81(1) of the TAA. Disclosure of the rulings is "necessary" for neither the Commissioner's case, nor for that of BNZ. From the Commissioner's point of view, what is of relevance is the alleged template nature of the transactions at issue, and that makes other banks' actual transactions of relevance, but not the rulings. From BNZ's point of view, the rulings are relevant only if the Commissioner calls witness evidence on them, which he has undertaken not to do.

Westpac and National preliminary documents

[40] During the hearing, Mr Galbraith clarified his submission that, in respect of the second category of documents, the Westpac and National preliminary documents, BNZ would seek discovery only of the Commissioner's "final issues papers". These are documents that are prepared and circulated within the Revenue before a ruling is given. As the name suggests, they highlight issues identified by the Commissioner in respect of a particular transaction.

[41] To the extent that the Westpac and National rulings are not, as the situation between the parties currently stands, relevant, the documents that preceded and led to them cannot be relevant either. The Westpac and National final issues papers are therefore not discoverable at this stage of the proceedings.

AIG-2 documents

[42] With respect to the AIG-2 transaction, the documents lodged to the Commissioner, and the Commissioner's ruling on the transaction, are in the hands of BNZ.

[43] What matters, in terms of this litigation, is the substance of the rulings, not the manner in which the Commissioner arrived at them. BNZ asserts reliance on certain of the Commissioner's rulings, and those rulings have been discovered. But BNZ's reliance argument is not contingent upon the merit of the rulings, nor the reasoning behind them. It is contingent only upon the rulings themselves.

[44] The quality, cogency or logic of the Commissioner's reasoning in respect of AIG-2 is irrelevant to the ultimate substance of the ruling and the reliance that BNZ may have placed on it. The additional AIG-2 documents sought by BNZ are therefore not relevant, and not discoverable.

Conclusion

[45] The documents BNZ submitted to the Commissioner in support of its application for the AIG-2 ruling and the Commissioner's ruling in respect thereof are already in BNZ's possession. We are not satisfied that the other documents sought under this heading could be of relevance. They will not be of any material assistance to the issues which the Court has to determine.

[46] In respect of the Westpac and National rulings, we accept that the documents filed by other banks, and the eventual rulings on them, as a matter of law and definition, affect only the transactions involved and are not germane to the reassessment of BNZ's transactions in the circumstances of this particular litigation.

[47] The Westpac and National preliminary documents are necessarily not discoverable on the basis of the reasoning which we have applied to the Westpac and National rulings and the AIG-2 documents.

[48] We are unable to accept Miller J's assessment when he concluded at [38]:

> I accept that discovery should extend to documents which the Commissioner took into account when making rulings on what he now characterises as template transactions. Such documents are relevant because they may affect the weight that the Court may attach to the rulings as an admission by, or opinion of, the Commissioner about the purpose and effect of such transactions.

[49] As we have held above, the Commissioner's assessments of the transactions are not a factor in the litigation and therefore no issue can arise as to the weight to be given to his opinions.

Result

[50] Accordingly the Commissioner's appeal must succeed. The orders for further discovery are quashed.

[51] The respondents are jointly to pay costs of $6,000 to the appellant, together with usual disbursements. Miller J reserved costs in the High Court. If those costs remain reserved, then the High Court should now fix them in light of this judgment. If subsequently costs were fixed in BNZ's favour, then we quash that costs order and, if necessary, direct the High Court to reconsider that issue in light of this judgment. Of course, we expect the parties will be able to agree costs in the High Court without having to trouble Miller J on the point.

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