

IN THE SUPREME COURT OF NEW ZEALAND

SC 43/2007

BETWEEN BEN NEVIS FORESTRY
VENTURES LIMITED AND ORS

Appellants

AND COMMISSIONER OF INLAND
REVENUE

Respondent

SC 44/2007

BETWEEN ACCENT MANAGEMENT LIMITED
AND ORS

Appellants

AND COMMISSIONER OF INLAND
REVENUE

Respondent

Hearing: 23 - 27 June 2008

Court: Elias CJ, Tipping, McGrath, Anderson and Gault JJ

Counsel: C R Carruthers QC, R B Stewart and G J Harley for Appellants
SC 43/2007.
C T Gudsell QC, M S Hinde and R Southall for Appellants
SC 44/2007
D J White QC, R J Ellis and J H Coleman for Respondent

CIVIL APPEAL

Monday 23 June 2008

10.13am

Carruthers May it please your Honours I appear with Mr Stewart and Mr Harley
for the Ben Nevis Appellants.

Elias CJ Thank you Mr Carruthers, Mr Stewart and Mr Harley.

Gudsell May it please your Honours I appear with Mr Southall and Mrs Hinde for Accent Management Redcliffe and Lexington.

Elias CJ Thank you Mr Gudsell, Mr Southall and Mrs Hinde.

White As your Honours please, I appear with my learned friends Ms Ellis and Mr Coleman for the Respondent in both appeals.

Elias CJ Thank you Mr White. Yes Mr Carruthers. I take it you will go first.

Carruthers Yes I am if your Honour pleases. Your Honours the way in which the argument will be presented is this. We have tried to devise a logical way of covering the issues. I propose to open the appeal by dealing with aspects of the transaction and the evidence, not to take you through it at a great length but certainly to identify where it is and what the significance is to the Ben Nevis appellants. Having opened the appeal in that way, I propose to then deal with the insurance premium issue and with the licence premium issue, as two of the technical matters within the framework of the Income Tax legislation.

Perhaps a little unconventionally, but because it will suit the presentation of the case, my learned friend Mr Stewart will address next on the sham issue, before I will return to deal with the avoidance issue. I appreciate that's a little unusual but it will be of benefit because that is a logical order for the matter to be approached. My learned friend Mr Harley will then address on issues of participation, reconstruction and penalties, which are the ancillary issues that arise on the avoidance question.

What we have done to facilitate presentation, is to prepare a folder which we shall add to as we go through. I'll come to deal with it in a moment but it is material that is designed to aid the argument. I will explain the chart and the diagrams in a moment. But included towards the end of that folder is a note that will just facilitate the oral argument, dealing with those two initial matters on which I propose to address. That is the insurance premium accrual rule spreading and the licence premium issue.

If I can just begin by explaining the integrity of this investment. And invite you to look at the chart that is in the front of the folder. The 50 square kilometres is the area of the Douglas Fir Forest Development. It is superimposed on Wellington to just give you perhaps a homely comparison of how extensive the forest development is. And that's the whole of the forest development. In the case of the Ben Nevis appellants, their planted area is 484 hectares which, in round terms, involves five of the squares in the 50 square kilometre range. So it is about a tenth of the forest development is the Ben Nevis appellants' interest, that is the Trinity3 interest.

What I have then done is put together four diagrams just so that you have for ease of explanation and understanding the actual structures that are involved. In taking first the Trinity Foundation Ltd structure you will see, moving from the bottom, there are the three services companies and we are concerned with the one on the righthand side, Trinity3. Each of the companies are 100% owned by the Trinity Foundation, which in turn is owned by the Trinity Foundation Charitable Trust and the beneficiaries of that Trust are identified at the top of the page, and I will say more about that when I come to just deal with some of the evidentiary matters that I want to deal with in opening the case.

The next diagram I have handed up is the CSI ownership structure and you will see working up the way in which the CSI ownership structure is put together, I don't need to make any greater explanation than appears in the diagram. It is simply so that your Honours can appreciate how each of the participants are identified in the record, in the judgments and in the evidence to which I will refer.

And then the next diagram just deals with the interaction between CSI and Parentis and the brokerage structure. Again, it is simply to identify the names of those involved and how they fit together. On the CSI insurance structure, the last of the documents, I will deal with that by reference to the evidence and I can say this, it is a more complete and more accurate diagram than the trial Judge's diagram. That is not to criticise what he did for his purposes. But this reflects more accurately the way in which the money was to move. And I will put that to one side for a moment because I come to deal with it on the evidence as I go through. I have got a short paper there on Dr Muir's role and I would like to come to that a bit later, and that leads me to the notes for my oral argument on the first two issues with which I shall deal.

I want to move from the diagrams to the documents. I want to identify the documents, the evidence to which I shall refer relates, if I can invite you to go to Volume 15 please. And if you go to page 2965, that is what is described in Mr Bradbury's evidence as the main agreement. And that's the agreement to grant the licence and the options. There was a variation. I don't need to take time with it. My purpose in dealing with it this way is simply to identify the documents that you will see referred to in the narrative that I want to follow through.

Going to page 3111 in the same Volume, that is simply referred to throughout as the JVA agreement. 3137 and following is the proposal for insurance. 3141

Elias CJ Sorry what was the first reference. I missed it.

Carruthers The very first reference your Honour?

Elias CJ No after the beginning of the document, you said you took us to, was it 3105.

Carruthers No, your Honour, I took you first to 2965, the main agreement, then I took you to 3111 which was the JVA agreement.

Elias CJ Yes.

Carruthers I have taken you now to 3137, which is the insurance proposal. And I am going to 3141, which is the insurance policy. At 3151 is the licence agreement and at 3166

McGrath J Just slow down a bit please.

Carruthers I beg your pardon Sir.

McGrath J Yes thank you.

Carruthers Shall I just go back.

McGrath J Just repeat the number that you have mentioned.

Carruthers Yes, I've taken you to the licence agreement which was 3151.

McGrath J Yes.

Carruthers And that concerns the licence premium argument and at 3166 is the promissory note for the licence premium.

McGrath J Is the licence agreement what was executed pursuant to the agreement you mentioned at page 2965?

Carruthers Yes that's right. Yes

McGrath J Thank you.

Carruthers Now just to complete the documents, I've got to take you to one document in Volume 16 please.

Tipping J Should we keep 15 out Mr Carruthers? That will be referred to with some frequency will it?

Carruthers Not it won't be. I think you can put that away. My reason for drawing attention to it, is that they are key documents in the transaction.

Tipping J I just want to try and keep this paper under control.

Carruthers Yes I sympathise very much with that. And my reason for doing it at this stage, as I come to the evidence these are documents that are

referred to. So that may be put to one side. In Volume 16, I want to take you to page 3216 and that is the promissory note for the insurance premium. So that is the suite of documents that are primarily involved in the case.

I want to move there to just identify the evidence that was available and will be relied on in the Ben Nevis appeal. And there are two volumes that your Honours will require to follow through on this. The first is Volume 4 which has the briefs of evidence in it, and the second is Volume 12 which has the notes of evidence and I am referring particularly to the cross-examination so that you have a balanced approach to the various issues that I need to deal with.

I want to begin with Dr Muir's brief in Volume 4 which begins at page 676. Let me say at the outset that I am of course alert to the fact that the Judge made credibility findings against Dr Muir on some of the issues on which he gave evidence. The parts that I want to refer to are really non-controversial in the sense that they explain the background to the transaction and the reasons for it. And if I can take you to page 678 and I propose to just identify issues that arise and move through the brief with a reasonable amount of speed.

Just on the introduction he explains his background and experience. And what is important in the context of the case, largely because of some of the criticisms that have been made by the Courts below, is the origin of the Trinity Foundation and you will see at paragraph 5 it was a charity for children's education run either by the Anglican Church or for its benefit. And the attraction was, at paragraph 7, an investment in Douglas Fir, it was recognised from Dr Muir's background and from the inquiries that he made. In fact, as the evidence shows, his wife was an expert in forestry and had held positions as a director and I will come to that. But what, the choice of Douglas Fir was deliberate based on its fifty year rotation, and the reason is that, as he said, was a better return in the years the value was locked up in the trees than would have been obtained elsewhere. And at paragraph 9 the charity offered two things to investors: the satisfaction of benefaction and the second was certainty of long term cashflows. As he notes, in paragraph 10, this is a different venture from other forestry ventures and it was deliberately chosen in the way he put it together. Now the approach to the investment was a considered one, as you will see from paragraphs 11 and 12, and the investment came with a background of distributions, and you will see from paragraph 14 in the years 1998 to 2003 there is something in the order of a million dollars of distributions from the charity.

Coming to paragraph 16, he sets out his concept of the idea that would attract investors and then in (a) to (e) sets out the practical steps. Structuring the charity, I've dealt with by reference to the diagram so that you can follow that through. In the section "documenting the investment", I am going to skip over that and deal with that through

Mr Bradbury's evidence, he was involved in the preparation of the documents. I think the division is that the idea, the concept, was Dr Muir's, and Mr Bradbury was the person who was responsible for preparing the documentation. That is not to the exclusion of Dr Muir but that was his role and of course Mr Bradbury became an investor.

Dealing with the headings finding suitable land investors, the point about investors is that the project was so large that it needed investors and as he said they paid a fee to get things done. Looking at the position of Trinity, it involved Mr Gillespie who was independent and that's paragraph 32, paragraph 34, the Reverend Withers as a director of TFL as well, and you will see a reference just above paragraph 34 to Mrs Taylor. She was and had been Dr Muir's wife. Now paragraph 36 the charity had substantial assets and Mr Gillespie's role is independent as your Honours may know from some of the roles that he has performed, particularly in relation to insolvency.

Now there is extensive evidence from page 690 through to 713 of the background for the plaintiff in which Dr Muir explains the position or his position. I just pick up some of the issues that he deals with. As to his knowledge of forestry, dealt within that section from paragraph 48 onwards, I just note or emphasise paragraphs 49 and 50. And then coming to 694 paragraph 54, he explains the purchase of the licence and what he says in paragraph 54, "the plaintiff does not have an interest in the land or in the trees but only an interest in the licence and in the net proceeds from the sale of the trees". And it is put this way a little later on, in the paragraph towards the bottom of the page, "To put it another way, the plaintiff is speculating against the price of Douglas Fir in 2048 saying to the landowner I will pay you \$2.05m per hectare in 2048 which is the cost of buying the licence on deferred payment terms, and you will pay me the then value of one hectare of Douglas Fir. But the value will be fixed not by the general market but by this hectare I have planted and have some control over". And the decision, at paragraph 55, the decision for the plaintiff was whether the benefits were likely to exceed the costs and it was carefully considered as he says and concluded that it was not a reckless investment.

On the issue of cost to purchase, it was always recognised, as you will appreciate from the evidence, that this was a case where the Government would legislate against them and once they had done the transaction, and that was precisely what happened.

Elias CJ Sorry what are you referring to there?

Carruthers I was just referring to the, in that section on costs to purchase at paragraph 59 and following, where he is analysing the legislative purpose and I was just interpolating that while that was the statutory regime at the moment, there was a recognition that once this transaction had been done and had come to the attention of the

authorities, the Government would legislate against the deductions that formed the basis of the claims that were made in this case, and that is precisely what happened. So you are looking at a short point.

Elias CJ A short period.

Carruthers A short period, yes.

Elias CJ A short period in which these benefits would be obtained.

Carruthers Yes yes.

McGrath J So Mr Carruthers, just remind me, when the plaintiff is referred to in the singular, that refers to which company?

Carruthers It is referring to, yes that's right, Dr Muir's company is Redcliffe, so it is in this brief referring to Redcliffe.

McGrath J Thank you.

Tipping J It was the LAQC step that was to be the subject of legislative attention as perceived here, was it Mr Carruthers?

Carruthers No I think it was the legislation in relation to forestry investments.

Tipping J Forestry in general, not just the LAQC.

Carruthers No no no. This is where we are critical of the approach that has been adopted because the LAQC regime has long been recognised, has not been tampered with or altered in any way, and it still retains its integrity as a separate legal entity.

Tipping J I couldn't quite understand the reference to quarantining losses attributed to shareholders. That presumably is a LAQC observation is it? It probably doesn't matter so don't detain yourself on it. It's just I couldn't quite follow it, beyond the LAQC dimension.

Carruthers I'll come back to it if I may.

Elias CJ Well is quarantining the right word? It prevented the losses being attributed didn't it?

Carruthers That wasn't very sotto voce. But what the quarantining means is there is a ring-fence around the losses that cannot be attributed until the money comes in. So that is how the LAQC system works.

- Tipping J So they can't be claimed until there is a genuine receipt to offset them against?
- Carruthers That is so. That's right. That is the position now. The next point I want to pick up is at paragraph 68 which is the exposure to risk and the justification for the premium is that it was the landowner that took the risk. From 698 through to 713 there is a discussion about the return on investment and the value of the investment. The issue that really arises in this case is whether there was a business in the *Grieve* sense of carrying on a business with an aim to make a profit. Whether you make a profit or not doesn't detract from the fact that there is a business. So what we say in relation to that return on investment is that Dr Muir may be right, Dr Muir may be wrong, but it doesn't matter because the consideration that is necessary to engage the legislation is whether they were conducting a business and that has never been in issue.
- Gault J Is it relevant what was the nature of the business? Because earlier on, in 54, he said in a sense the plaintiff the buying the proceeds at some future date.
- Carruthers Yes.
- Gault J Now, if the true nature of the business is in buying a return in money, it must necessarily be the same as the true nature of the business being to undertake a forestry investment.
- Carruthers Well but really no matter how you characterise the activity of the company involved, that is the carrying on of the business. If your Honour just pauses with me, that is an issue I come squarely to in dealing with the licence premium issue because that is why I paused when I talked about there not being any issue about whether they were carrying on a business or not, because there was an issue in the Courts below as to whether both parties were carrying on a business in the sense that each had a separate role. But I do come to deal squarely with that.
- Gault J Thank you.
- Tipping J The word "premium" in paragraph 68, is that really forecasting the licence premium issue?
- Carruthers Yes that's right.
- Tipping J It is the same concept isn't it?

Carruthers Yes. Now I can pass over sections through to page 718 where through to 726 Dr Muir deals with the insurance issue. Now some of this evidence was rejected as not credible or untrue and I think I can identify particularly paragraph 164 which, and I will give you the reference to the trial Judge's finding. In the Supreme Court proceedings bundle under tab 3 is the trial Judge's judgment and, at 243 and 244, paragraphs 243 and 244, the evidence is found to be simply not credible. The reason for referring to the section though is that it does set out the narrative as to how the insurance was obtained and I just must face squarely that that finding against Dr Muir on that point as to how he came to know or as to how the position was dealt with in the British Virgin Islands. In the brief at page 733 he deals with the position of the landowner, 180-181 I identify, and then at 735 deals with finding of potential investors. I want to move from that initial brief, I acknowledge there was a brief of evidence in reply from Dr Muir

Elias CJ Sorry because I was looking at the judgment, you were grounding those findings against the brief, which paragraphs are these?

Carruthers Ah at 164 of the brief is the paragraph that was in issue.

Elias CJ Thank you.

Carruthers But what I said your Honour was also that even if you recognised that and take that out as part of the narrative, there is still a useful description of how the insurance was obtained.

Tipping J You will be returning to this no doubt.

Carruthers Yes I do. I was going on to deal or to just recognise that there was a brief of evidence in reply beginning at 738. I don't need to deal with that. I can come now to the cross-examination of Dr Muir and I am now in Volume 12, at page 2322 where his cross-examination begins. Or in fact this is some of his oral additions and the cross-examination begins on the following page. Now much of the cross-examination, in fact the bulk of it, concerns the introduction of documents made available through the Serious Fraud Office which were plainly discoverable by Dr Muir and not discovered and that is a matter where justifiably in my submission there has been criticism. So that is one aspect of the cross-examination and I don't need to go through the documentation in any detail.

The second feature of the cross-examination which I acknowledge is that the Judge treated his explanations for failure as untrue and if I can just give you a reference to the paragraphs in the judgment, they are at [237] and [239] and I don't need to go to that.

- Elias CJ That's the non-disclosure.
- Carruthers That's right. Yes, that's the discovery issue. But what is important is that there is evidence which plainly the Judge did not reject affecting the insurance and the genuineness of it. And I want to just identify passages in the cross-examination that I will invite your Honours to look at it and take into account, on these issues because they become important particularly, well they become important on the deductibility argument but they are important on the sham argument too.
- Elias CJ And are you going to contrast this evidence when you have taken us to it, with the findings made in both Courts? Because I am just trying to get a map of where you are going Mr Carruthers.
- Carruthers Yes I understand. The reason I am doing this and really just giving you signposts on the way through is that yes I do come in the course of argument, and my learned friend Mr Stewart comes in the course of his argument to these topics and to this evidence and deals with the Judge's findings, we both deal with the Judge's findings as well. So your Honour will find that
- Elias CJ But are you taking us to this evidence now because it is different from the findings or because if, to the extent that the findings are in your submission accurate, do we need to start with the evidence?
- Carruthers Well your Honour, the answer to that is yes because what is important and it is perhaps a feature of my learned friend Mr White's submissions, is that, and it is a feature that came through in the judgments in the Court below, is that there is a global reference to Bradbury and Muir as if they are tarred with the same brush, if I can put it that way. And in the same way the LAQCs are both in a sense disregarded so the reason for my taking you to the evidence is to make it very very clear that there were separate roles, that they had different approaches to it, and they in the end were separate entities from their LAQCs in any event. So your Honour, in my submission, it is important that the evidence is identified. As I said, I don't want to be reading long passages because the point that your Honour makes to me is right, if the Judge has made a particular finding, for example on the insurance issue I expect, that I have got findings on the insurance issue in both Courts, so I am not rehearsing the evidence.
- Tipping J Are you seeking to use the evidence to contradict the adverse findings?
- Carruthers Sorry your Honour?

Tipping J Are you seeking to use the evidence to contradict the adverse findings?

Carruthers No no no. I don't have to do that. The purpose, the reason I am doing this is that when it comes to the analysis of the roles of Dr Muir, Mr Bradbury, and I come to Mr Peebles as well, and the roles of the LAQCs, I wanted to be very clearly understood that there are very very separate functions and if that were common ground in the Courts below I wouldn't need to do it. But what has happened in the Courts below is that the separateness among the four bodies I have mentioned, Dr Muir, Mr Bradbury and the two LAQCs, the separateness is actually important to my argument and indeed to the whole of the appellants' argument in various ways.

I want to identify the cross-examination on the insurance issue, beginning at page 2376. And those passages run through to, the passage I am referring to runs through to 2379. The essence of what emerges from that is that Dr Muir is cross-examined as to how the insurance works and what emerges from it is that he believes that it did and asserted so and one can see that from the very last answer on 2379. In looking at the way in which the securities worked, there is a helpful and useful explanation from page 2380 through to the middle of 2383. And just above line 20 where before the Court asks a question.

Elias CJ Sorry what do you say this is useful, you say this is useful for.

Carruthers I said it was a useful explanation as to how the securities worked. How the system worked and how the securities worked, because of one of the findings in the Court of Appeal was that these parties could have just walked away from all of this, that there wasn't anything stopping them from walking away. Now at 2423 through to the bottom, and pages following, but I don't need to take it any further than 2424, is where the sham allegation is put to Dr Muir and denied.

I want to now take you back to Volume 4, to page 770 which is the start of Mr Bradbury's brief and I am going to deal with the evidence of Mr Bradbury and Mr Peebles. There is no finding against either of them so that there is no finding that their evidence wasn't credible. But the Judge doesn't refer to their evidence and it is important from my point of view for the reason that I gave before, that it becomes an important part of our argument to look at the distinction between the positions of Dr Muir and Mr Bradbury. So I am at 772 and he explains his position, his LAQC is Bristol and I quickly just go through some of the preliminary matters that he deals with. He deals with the issue of forestry consultants from whom he obtained information, Groome Poyry is one of those he deals with, at 776 with the purchase of Redcliffe Station. And then at 784, with the financing of that. And then at 785 he starts the narrative about the preparation

of the documents and my submission is that this is material which is helpful to just understand the way in which the transaction emerged. At paragraph 46, which is on page 788, there is a reference to the main agreement as I indicated, that is the document your Honours want to note, is at Volume 15 2965. And then in paragraph 47 he notes the resolution, that is, the understanding, that in entering into the documents the capacity that he has is documentary representative and agent of the joint venture parties, and in (a) and (c) indicating the capacity in which

Tipping J Is there any evidence here that explains why it was necessary to interpose a documentary representative and agent. Does he deal with that? Primarily convenience as I read the

Carruthers Yes that's right. There is no

Tipping J There is no structural or transactional significance in it other than just to having a single body involved.

Carruthers That's right, to have a convenient way of getting the material signed. Yes.

Gault J Who operated this company Mr Carruthers?

Carruthers Which company are you referring to?

Gault J The agency company.

Carruthers Your Honour a man named Mark Taylor, who married Mrs Muir and that is how she is referred to as Mrs Taylor. But that's by way of explanation and not to suggest that there was any other connection than that. So he was the person who conducted that.

Tipping J This agency was described as documentary representative and agent. Was the agency concept further elaborated? Was it circumscribed or was it a general agency or there is just nothing?

Carruthers Your Honour if you would just bear with me for a moment. If I can take you to Volume 15, at the beginning of page 3111, I identified that as the joint venture agreement, it is the Heads of Agreement for the joint venture. And at 3120, the status and appointment of the agent and the authority of the agent is identified.

Tipping J Administrative convenience and management efficiency. So there is a management role?

Carruthers Yes that's right, as I explained in answer to his Honour Justice Gault.

Gault J There is an aspect underlying this that I will need some help with as we go along. I would be grateful if you would just bear it in mind Mr Carruthers and that is questions of attribution of knowledge as between all of these various parties.

Carruthers Yes. Well your Honour, I am sure it won't have escaped you that part of the reason that I am doing the analysis I am is that that's a matter that I want to be very clear on, that I have got the role and position of each of those parties in place but I'm

Gault J Yes it is not just the role and the position with the various parties being related in the various ways. It is maybe a question, I don't know, of whether knowledge is to be attributed between them.

Carruthers Yes I understand that

Gault J Well that is why I asked.

Carruthers Yes and I can think immediately of three parts of the argument to come where that issue does arise. Now the next issue that Mr Bradbury deals with is at page 792, arranging the policy and you will see from the analysis that is made in paragraphs 61 through to 69, he has made his own careful analysis of the insurance for the purpose of looking at his own and Mr Peebles' investment. I just want to go to paragraph 65 as a lead-in to the table under paragraph 68 where what Mr Bradbury says is that after factoring in all the premiums he calculated that CSI's maximum exposure under the policy was \$787,416 per plantable hectare. And that exposure was on the basis that the market value of the net stumpage of the forest was zero and, as he noted, that was improbable. And then he looked at other values to just determine where a break even point was on the insurance. And that takes me to the table under paragraph 68 where in his analysis in leading up to the table is this, this can be, perhaps I will deal with the table in this way. You will see from the table that the first column is the value put on the net stumpage for the purposes of this analysis. And where the value is nil the maximum premium is \$1,230,311. And that then follows through with the exposure for CSI. But when you get down to that table, at 800,000 per plantable hectare as a net stumpage, the payout for CSI is nil. So his analysis is this. As can be seen, CSI will be in profit if net stumpage reaches approximately 800,000 and gives the actual figure per hectare. It will receive its maximum net return when net stumpage reaches approximately 1.2m provided there has not occurred a non-insured event.

And if I can just pause there to take you back to the insurance diagram which I said I would deal with, that analysis by Mr Bradbury explains the box in the top right hand corner of that diagram.

Gault J I'm sorry, which chart are we looking at?

Carruthers We're looking at the CSI Insurance structure. And the way into that Your Honour is the narrative in paragraph 68 and the analysis in the table that follows that.

Tipping J And what's the key point that you're seeking to make out of all this Mr Carruthers?

Carruthers The key point that I'm making out of it is that Mr Bradbury made a careful analysis of the investment before going into and looked at the insurance issue so that he could assess the risk that he was taking in going into the investment.

Gault J Can we just come back to the chart at 795?

Carruthers Yes.

Gault J Obviously I have an inaccurate recollection from just the reading that I did. But the top line, CSI's maximum insurance payout, this is column D, I thought that the maximum exposure that CSI had under the policy was only 1220 rather than the full 2050. Am I wrong?

Carruthers (Counsel confers). Your Honour may I just come back to that. And I apologise for not being able to deal with it immediately. I must say I did think I had that at my fingertips but if I can just come back to it. I know that there is an explanation of that.

Elias CJ Well at the moment there's a dissonance isn't there between your CSI insurance structure at the top right hand box and this table?

Carruthers Yes.

Elias CJ So that'll need to be explained.

Carruthers I will explain it Your Honour too. And I regret it's just some of the complexities that one thinks one's got under control.

Tipping J If the essential point your trying to make at the moment is that Mr Bradbury looked at this carefully and weighed up the risks, that's really comprehended in paragraph 65 isn't it?

Carruthers Yes it is.

Tipping J Rather than looking at this table in the insurance structure.

Carruthers Well, yes that's so. But the.

Tipping J I wanted to know whether there was anything subtle for the moment about the structure or the table that we should be taking into account. My brother Gault's isolated something that will need to be explained. But is there anything more in it for the moment that we need to take into account?

Carruthers No Your Honour no. And I may be just.

Tipping J You see if we're going to come back to this with a precise focus, I'm just wondering what is the advantage of going through it several times.

Carruthers Well it's not a matter of going through it, it's not a matter of going through it several times because the way in which we come back to it really works off having drawn attention to what the evidence is.

Tipping J I see. But for the moment you don't want to anything taken out of all this except that Mr Bradbury looked at it very carefully and weighed up the risks?

Carruthers Well yes although it's important to me that I actually have put an accurate diagram in front of the Court so that.

Tipping J Well leaving that slight awkwardness aside. I just don't want to be missing something Mr Carruthers.

Carruthers No Your Honour's not. But as you will come to appreciate from some of the findings that have been made or just some of the dicta in the particularly in the Court of Appeal, it is really important that the position of Mr Bradbury is given its proper perspective, that this wasn't just something that was thought of as a unconsidered investment where he and Dr Muir cobbled it together themselves and duped a whole lot of investors into it. It's in an entirely different category from some of the other experiences that Your Honours yourselves will have had and certainly that feature in the reports.

Just looking from 799, and this just goes to that question of bringing an independent mind to the investment in the way in which he did. This is illustrated from paragraphs 94 through to 109 and it's at this point where Mr Peebles' involvement is mentioned, both of them

brought an independent mind to the investment and proceeded in that way.

Moving through to an issue that arises under the investment documentation at page 809, I want to come through to the end of that discussion where.

Elias CJ Sorry, is this not volume 15?

Carruthers No I'm sorry Your Honour I'm in volume 4.

Elias CJ Oh yes, thank you.

Carruthers I'm dealing with Mr Bradbury's brief. And I'm dealing at 809 with the investment documentation but taking Your Honours through to 825 where, and I just want to draw attention to this paragraph because it's important, where Mr Bradbury says there is no separate agreement or understanding of any kind between Trinity3 and Southern Lakes Forestry limiting recourse to stumpage proceeds from the forest. If Southern Lakes fails to pay the promissory note licence premium in full on 31 December 2048, then it will be unable to pay a debt then owing with all the legal consequences which will flow from the occurrence of those circumstances at that time. Each joint venture party will be severally liable for its share of the debt. And the transaction documents contain no restriction as to the other businesses and assets which can be owned by the joint venture parties so there's no reason why each could not have a worth beyond its interest in the forest and the CSI insurance policy. I mentioned that there was some alteration to the agreements, that's dealt with at page 827 and following.

And then in relation to Mr Bradbury's position, that analysis begins at 830 with the election that Bristol made. It deals with the role of the Bradbury and Muir law firm. And it deals with the brokerage arrangement involving Parentis and just to give some flavour to some of this, that in this section he explains the role of Parentis, the reason for it. And this is a matter which Mr Bradbury volunteered when interviewed by the Commissioner's representative. He was asked if there was anything more that he wanted to say about the transaction and he asked if they knew of Parentis and recognised its role and went on to explain it. So you have somebody who had been careful in the way in which he dealt with the transaction.

McGrath J I'm at page 830. Is that where I should be?

Carruthers Yes Your Honour and I'm sorry, what I have done is just gone through the headings. 830, 831 deals with one aspect of the role of the law firm Bradbury and Muir and 833 deals with their professional fees

issue. And Your Honour I'm sorry, what I was dealing with was at 834, the brokerage arrangement which affects Parentis and the reason for it. And I drew attention to the disclosure that had been made about it.

Tipping J Before we adjourn Mr Carruthers, just trying to be of some assistance on that point that was raised earlier, looking at this CSI insurance structure chart in the green folder, is the second bullet point in the bottom, the box in the bottom, the essence if you like of what their exposure was, CSI's exposure was?

Carruthers Yes Your Honour that's right. But let me make very sure that I'm right during the course of the adjournment.

Tipping J Oh my brother thought it was a maximum.

Gault J There is a maximum. That's where I'm concerned I may be under a misunderstanding. Mr Harley seems to think I'm right.

Carruthers Yes. Your Honour let me deal with it in the adjournment and I'll make sure that it's clear by the time we come back.

Elias CJ Alright we'll take the adjournment now then.

Court adjourns: 11:30 am

Court resumes: 11:50 am

Carruthers Your Honour I think we were both right. Let me explain it in this way. In the table.

Elias CJ Which one? In the brief?

Carruthers Yes in the table in paragraph 68, that figure for maximum exposure in column D is in fact the correct figure for maximum exposure in terms of the documents and that can be seen by reference to the insurance policy itself that I referred to earlier. But it can also be seen by the table that I gave you on CSI insurance structure, the box at the right hand side and, as His Honour Justice Tipping noted, the summary of the policy underneath. Let me just explain the figure in paragraph 65 where Mr Bradbury refers to a maximum exposure. What he is looking at is what the commercial result of the various calculations would be and if the stumpage gets to \$787,416 per hectare, then the figures sort themselves out so that CSI goes off exposure. But that's only derived from that figure of 2050 in column D. And you'll see what happens under the policy is that apart from the promissory note which is in column C, that's the \$32,791.

Elias CJ Sorry, 32,791 column C.

Carruthers Yes it is, in the introduction.

Elias CJ Oh at the top, sorry yes.

Carruthers Yes. That's the investors' payment. Now in column B, that figure is derived from the policy. And if I can take you to my chart that I handed in this morning, you'll see that the policy provides a minimum of 41,104 per hectare, due 31.12.2047 but that can increase to as much as 1,230,311, which is the figure in B, if there is a certificate approved by CSI, if market value of the net stumpage from lot 3 as at 31 December 2047 as certified is less than that figure, then there's an increase in the premium to take account of the difference as between the minimum and the maximum. Now that certificate is really looking ahead to what actually happens in 2048 when the stumpage is actually determined. So that's the way in which policy works.

Gault J Where's the policy, can we just have a look at that. It's 15 3141 is it?

Carruthers Yes that's right. Does Your Honour need a reference to the premium calculation, to the provision for premium?

Tipping J That would be helpful to me.

Carruthers It's in the proposal, so if you go to 3137 and you'll find that the premium calculation is 3138 and 3139, it's that that has been transposed onto the diagram I handed in this morning.

Tipping J Is the uplift from 410 is to the maximum of 1230?

Carruthers Yes. And that turns on the certificate that's given at the end of 2047.

Elias CJ With the uplift, what's the amount insured?

Carruthers If you.

Elias CJ It depends on the.

Carruthers Yes, well the sum insured will always be that 2.05 million but the exposure of the insurer will be reduced by the increase in value of the stumpage.

Elias CJ To what.

Carruthers Well the exposure can be nil. If stumpage reaches \$787417 per hectare, if that's the value of the stumpage certified, then the payments on due dates sort themselves out. So that the insurer doesn't have an exposure.

Tipping J On a worst case scenario, is the exposure of the insurer the difference between 1.23m and 2.05m?

Carruthers 1.263 in column C because there is the.

Tipping J Sorry I just didn't add that little bit on yes.

Carruthers That's right, yes. That's right. But you're going to get a net exposure on that basis but if you look at it technically in terms of the sum insured, it is in column D. Or the maximum insurance payout.

Tipping J Yeah but the maximum payout, because the two payments for all practical purposes are coincident in time, forgetting the up front payments which are trivial, the difference, it's the difference between 2.05 and 1.26 is it?

Carruthers Well if you were including what Your Honour has rather disparagingly referred to as a trivial amount, yes.

Tipping J Well comparatively trivial.

Carruthers Yes comparative terms.

Elias CJ Is the maximum exposure the \$787416.

Carruthers I'm sorry Your Honour.

Elias CJ Is the maximum exposure \$787416.

Tipping J Yes.

Carruthers No, the maximum, the absolutely maximum is 2050.

Tipping J The maximum loss to the insurer is 787.

Carruthers On the.

Tipping J I.e. difference between payout and monies received.

Carruthers Yes, that's right, between 1263 and 2050, yes.

Elias CJ That's the benefit that the insured gets is it?

Carruthers Yes that's right on the basis of a nil stumpage.

Tipping J Worst case.

Carruthers Worst case, yes.

Tipping J But is there something that comes into CSI from somewhere else in certain events, or am I misleading myself?

Carruthers No, no. I think with respect no, I think Your Honour is.

Gault J And the short answer it seems to me I was incorrect that there is no maximum exposure under the policy less than 2050.

Carruthers Yes they were the terms that I was putting it in to you. And I rather thought Your Honour was coming back to me and saying, well while that might be the maximum insurance figure, one has to look at what the insurer receives in various scenarios. I thought that was where you had got the figure from.

Gault J I don't want to further confuse matters. I had thought from reading the judgments that the maximum insured sum was a sum less than total wipeout.

Carruthers No. I don't think that's so. And Your Honour I'll check the judgments to see if I can deal with that.

Gault J Thank you.

Carruthers Just a concern really in relation to the way that Your Honour Justice Tipping responded on how those payments work. It is significant that you're talking about a calculation of premium and a payment, they're a year apart. There is a year's difference between the calculation and payment of the premium.

Tipping J Well maybe I was a little loose Mr Carruthers, but in practical terms it comes at the end of the period.

Carruthers Yes, yes. And for my part Your Honour that's how I understood it, but there was just a moment's concern that the dislocation hadn't been made clear.

Your Honours there was in Mr Bradbury's brief of evidence in reply that begins at 845, I don't need to take time on that except I do invite

you to look at it and I'll just go through the various topics that he dealt with. 847.

Elias CJ But what are you inviting us to look at it for that's relevant to the issues that we have to look at in this appeal?

Carruthers I'm very determined Your Honour, as you will appreciate, to isolate very carefully the way in which Mr Bradbury went into this investment and the analysis that he made before he went in on the integrity of the investment and part of that exercise is to ensure that the difference in position between Dr Muir and Mr Bradbury is crystal clear.

Elias CJ I see so that that's all you're taking us to this for?

Carruthers That's all I'm doing except you will find as we develop the various parts of our argument that we will draw on the analysis that I have made. But it means that you have been taken through in a comprehensive way to the evidentiary base on which we rely for the way in which we put the case.

There was an issue that arose about the difference between this forestry investment and others. And that was always acknowledged. I drew attention to that in Dr Muir's evidence and the reason why Douglas fir had been chosen and the reason why the 50 year cycle was appropriate.

Then at page 848, under the heading "Pricing of the licence premium" there was an issue that was raised about the appropriateness of the pricing of the licensing premium. Mr Bradbury deals with that. There was a question of stumpage and at paragraph 7 on page 849 this is where the question of the justification for the figure that was taken and the reference to Mrs Taylor because she had had access to Douglas fir log prices and yields for the Central North Island forests in her role as a director of Forestry Corporation. And I just pause there because it's not as if Douglas fir was a new species for forestry development. The Kaiangaroa Forest in Central North Island had a significant Douglas fir content.

Real price increases, 851. And a recognition that timber was a commodity that spiked in price. And then annual licence fees, 853, paragraph 19. Familiar with Crown Forestry Licences for the Central North Island forests that were then owned by the Central North Island Partnership. And the source of his knowledge acting for the receivers of that partnership. And finally at page 855, and looking at the bargain, this is something that he entered into, still four decades to run. Markets go in cycles and fortunes can change dramatically and I intend to stay with this investment.

He was then cross-examined and I'm now in volume 12 and his oral evidence begins at page 2476. And at 2484 this issue is put to him about being able to structure the investment in some other way. Beginning at line 25 on 2484 and the passage runs through to 2485 at line 10. And there is a debate about whether it was possible to structure it in another way. That wasn't something that Mr Bradbury agreed with.

The question of obtaining tax benefits, top of page 2485. You expected to obtain the tax benefits that I took you through a moment ago by entering into this investment didn't you? What we contemplated at the time was that the tax treatment for this investment might be available for two to three years before the Inland Revenue Department persuaded the Government to alter the law. We also contemplated that there was a high risk that any new legislation would have retrospective effect. In fact the first thing that I did when the amending legislation was introduced was to check whether it had retrospective effect so that there was no certainty this tax treatment would continue beyond two to three years and there was no certainty that those two to three years would be available unless and until those steps that you've just referred to were taken.

And then there's a debate about the nature of the investment and I just draw attention to 2486 going onto 2487. And it comes down to this proposition around line 5 where essentially it was being put on the basis that there were other ways of doing this. And at line 6 Mr Bradbury agrees, "Well theoretically that may be possible. But I can tell you now I had no interest in taking a 6.2 percent interest in a forest of two and a half, (that's thousand, hectares as is clear from the evidence a bit later on), two and a half thousand hectares and incurring the expenditure that would have been necessary to achieve that."

Elias CJ Can I just ask you, just so that I know where it's going, how does the fact that it was confidently predicted that the law would be changed, how does that help your clients?

Carruthers Well it really neither helps nor hinders except that they were prepared to enter into this investment on the basis that any immediate relief they got may well be removed, which helps in this way, that it points to the fact that it was the integrity and the attractiveness of the long term investment that was driving their decision and not the fact that they were going to enjoy a tax benefit for any length of time. Indeed, as Mr Bradbury says, it was such a contentious issue that it may well have been the subject of retrospective tax legislation. So I think this is why if one's looking at well why did these people enter into an investment 50 years out. And you'll see in the cross-examination Mr Bradbury's asked, well how old will you be when this matures. And I think the answer was 93. But that's where the distinction between Mr

Bradbury and Bristol the company is lost. Because Bristol the company.

Elias CJ Won't die.

Carruthers Well no, it won't die. I mean it's subject to the same vicissitudes as any other company and we can go through the New Zealand Stock Exchange of companies and start in about a settled time and see what exists now. So I think that's the point Your Honour that I draw from that.

Oh just so that you can pick this up, at 2493, between line 25 and 30, the two and a half thousand hectares is picked up in my learned friend Mr White's question. And I think just in that passage at 2493, 25 through to 2494 is again picking up just the nature of the investment.

Now then Mr Bradbury is cross-examined about the insurance policy. And at 2495 line 15 through to the top of 2496 at line 5 where in fact that issue of the existence of CSI and whether it would be available when the insurance fell due is discussed and debated.

2,500 line 24 the discussion concerning parentis is taken up. And that goes through onto 2501. The bottom of 2501 line 20 to 35 deals with the letter of comfort issue.

If I can just in relation to Parentis and this is just because it falls in separate places, the role of Parentis is again discussed at 2506 between lines 25 and 30.

Tipping J Is it fair to regard CSI Mr Carruthers as a one-off creation whose sole role was to ensure this venture?

Carruthers (Counsel confers). The answer to Your Honour is no. It wasn't a captive insurer, or captive insurance in the conventional sense where as a matter of commercial practice insurance exists for a single venture. But CSI was able to carry on other business.

Tipping J Oh yes, it wasn't disabled.

Carruthers No.

Tipping J But it was brought into being for this business and as far as I read the evidence it didn't undertake any other insurance.

Carruthers Well that's right Your Honour.

Tipping J I mean one can't forecast what it might or might not do in the future.

Carruthers No.

Tipping J But as of the date when the evidence was heard, it was a one-off insurer.

Carruthers Well that's right.

Tipping J As a matter of fact.

Carruthers That's right and I expect that's so of any insurance company that's set up and does its first transaction.

Tipping J Of course.

Carruthers But if Your Honour is drawing something from that, this is no different, I mean this was not a captive insurance situation but it is no different from a captive insurance.

Tipping J But weren't the proprietors of this company involved in this transaction as a whole? Weren't Muir and Bradbury the directors or the shareholders or both?

Carruthers No, no.

Tipping J Were they not.

Carruthers That's really why I gave you these diagrams. Because I can understand why Your Honour might have formed that view.

Tipping J Well I did. So you can put that out of my mind can you?

Carruthers Well I can Your Honour. If you go to the CSI ownership structure diagram which is the second of the diagrams in the folder that I gave you, they're simply not involved.

Tipping J Alright, well I don't want to distract you further at this point Mr Carruthers, thank you.

Carruthers It's important that I deal with it.

Tipping J Well it is important because, and is someone going to come and take us through these arrangements in closer detail later on are they? How

CSI was set up and who set it up and how it was all structured and why all this complex chart is necessary.

Carruthers Well Your Honour.

Tipping J I only ask now because I'm expecting someone to do that. And if you're not going to do it now I'll keep quiet. But if this is the only occasion it's going to arise, it would make a difference to me.

Carruthers No, I think that we can see that the integrity of the insurance arrangement is important. For example when it comes to the sham allegation is an obvious place. It's probably equally important on the Commissioner's analysis on the avoidance issue. But just if I can just deal with that issue of control, and this really highlights why I've dealt with the evidence in this way. If you go to our written submissions, beginning at paragraph 17 on page 6. We submit there, this is.

Tipping J Just pause would you – I want to follow this very carefully for when I get to somewhere near what for me is significant.

Carruthers Well your Honour I apologise.

Tipping J I know what you are doing Mr Carruthers and I respect it but it seemed a convenient opportunity to interpose some analysis of what this transaction was all about.

Carruthers Right, let me just deal with this section.

Tipping J Page, I'm sorry I missed.

Carruthers Page 6 of our written submissions, paragraph 17. This is the Court the Court of Appeal asserted that "for practical purposes" Trinity, TFL and Trinity3 were under "the control" of Dr Muir and Mr Bradbury. No explanation is given of the meaning "for practical purposes" and "control".

Each is a separate legal entity. Under the Act neither Mr Gillespie.

Tipping J Now I was talking about CSI.

Carruthers But please be patient with me your Honour, I am coming down to that, that's in paragraph 19 but what your Honour has quite properly put your finger on is the interaction of these parties.

Tipping J Yes I see where you getting, they talk about similar control.

- Carruthers Yes, so I, sorry – does your Honour mind if I just pursue reading that.
- Tipping J No no, please I am not trying to interfere with your presentation I just wanted to make sure we were coming ultimately to CSI.
- Carruthers Well I mean because your Honours asked me about CSI it's actually brought this whole issue to a head, which is why I have been doing what I have been doing, but each is a separate legal entity. Under the Act neither Mr Gillespie nor Reverend Withers is an “associated person” with either of Dr Muir or Mr Bradbury. These entities were established on Dr Muir’s instructions to B&M, as part of the structure for the project which Dr Muir devised for TFL as the recipient of income generated by it's charitable subsidiaries. And, until it's dissolution, B&M acted as solicitors for TFL and it's subsidiaries. However, there is no evidence that the separateness of the legal entities has not been fully and appropriately respected, with proper accounting and governance under Mr Gillespie’s stewardship (with the Rev Withers, concerning the affairs of TFL). TFL and each of it's charity subsidiaries is subject to the Charitable Trusts Act and the Tax Administration Act and thus accountable to the Attorney-General.

Similar “control” assertions were made concerning CSI and it's owner, the Christian Services Charitable Trust. While these entities were again established at Dr Muir’s request, CSI has it's own British Virgin Islands resident professional directors, it's affairs are licensed and monitored by the BVI Insurance Supervisor and it's financial statements are audited annually. The Christian Services Charitable Trust enjoys legal status under BVI laws which is similar to that of New Zealand charities and ultimately accountable to the BVI Attorney General. I think that’s probably as far as I need go your Honour.

I want to go through to Mr Bradbury’s cross-examination to 2510 at the bottom of the page. This seems to be laying the ground work for putting the allegation of sham to Mr Bradbury about his knowledge of the structure and the intention and then at 2511 between lines 15 and 20 the assertion is put of pretence down to between lines 30 and 35. Although that evidence of Mr Bradbury’s sets out his position it doesn’t feature in the judgments of either court below. No findings against him, but no reference to his independent position. In the same way there is the position of Mr Peebles is Ben Nevis and his brief of evidence is in vol 4 at page 857. It's quite a short brief at 859 it begins, he had a background with Westpac involved in credit assessment of problem loan areas, transferred to Auckland to deal with the fallout from the Crash and then he comes on to deal with the Trinity forestry investment. And Mr Bradbury are described as best friends and have been involved closely professionally and personally since Mr Peebles’ arrival in Auckland. He sets out in this section the various features of the transaction that he considered and then at 864

he sets out his position on what he did to as he described at risk profile of the investment. And there is an analysis through from paragraph 19 on page 864 through to what is paragraph 20 but runs through to 868 of the steps that he took in risk profiling. His cross-examination begins in vol 12 at page 2514 and he is challenged about his expertise in the forestry matters, he points on 2514 between lines 20 and 25 to his experience from a credit prospective and looking at forestry deals and you will appreciate from his brief of evidence that he made his own assessment.

Elias CJ Sorry just to this reference to the due diligence package, is that part of the materials we have? Is there a report, was there? On the investment.

Carruthers Sorry your Honour just where is your Honour referring me to.

Elias CJ Page 2514 around line 35, there is reference to some due diligence package which is where he got his advice from on some of the aspects of.

Tipping J That was the French Burt document I think. Referred to in the evidence-in-chief I think as a French Burt solicitors due diligence exercise or something like that.

Elias CJ It doesn't matter don't take time on it, it's just that if we are getting a road map of the whole show and if it was in evidence I would have wanted to flag it to look at.

Carruthers There is an extensive amount of due diligence material in vol 16 and 17 your Honour and what, if I can just invite you to take up. The most helpful way is if your Honour just takes up vol 1.

Elias CJ It's alright are you saying that there isn't a report that is being referred to here it's just a lot of supporting information.

Carruthers No I think that what those, I can identify those two reports, I think that what at 860 in paragraph 7 Mr Peebles is identifying the due diligence material that he got and there were two reports in there, one Pine Plan and one French Burt and Partners. But I think what I wanted to just alert your Honour to was that there is a significant amount of due diligence material to which reference is made. If your Honour it will help just for a moment to pick up vol 1 and the index and look at the index to vol 16 because in relation to vol 16 you will see on what is roman numeral 14 beginning at no 162 at page 3298. The tabulation of the due diligent material and in relation to various items the witnesses involved are identified, so lets see the advertising brochure, Peebles at paragraph 7c. And you will see that that is referred to and without going through the whole of it, if I can take you

to 173 on the next page you will see that there is a reference to the Pine Plan due diligence report which is referred to by Mr Peebles and.

Tipping J Is there anything in advance from a forestry expert discussing the likely returns from this forest? In advance of their committing themselves to the acquisition.

Carruthers Well the answer to that is yes and Taylor who was in her own right a significant expert in forestry, and Groome Poyry is the other report that comes to mind immediately, so I think the short answer to your Honours question is yes.

Tipping J Well could you in due course give us where we find those. If we are talking here about due diligence.

Carruthers Yes, but your Honour can I just be careful that this is not diverted into an inquiry as to whether this investment would succeed or not.

Tipping J I am not in anyway diverted in that sense Mr Carruthers, from the point of view of the genuineness if there is a sham allegation it would be quite useful to see that sort of material because it might aid you.

Carruthers Yes your Honour that is right and understanding the thrust of your Honours question I shall ensure that that is dealt with. Your Honour may I come back and deal with that.

Tipping J Yes of course.

Carruthers Yes I think I could take time now

Tipping J Well as you go through this overview I am going to go through my own overview with you.

Carruthers I am content with that your Honour, in fact I welcome that because it is such an important, this is such an important plank to where my argument goes. I was moving through the Peebles evidence and looking at the pointers to the way in which he has analysed material and if I can go to 2519 it's actually, the question is split. Just let me read from the bottom of 2518: "As a prudent investor you were concerned you were relying so heavily on two people so closely connected with the investment?" "No Mr Bradbury is a very close friend of mine and I do value his judgment and trust him, secondly it may sound a little arrogant but I have analysed a lot of businesses in my life and I felt capable of assessing what I saw as the key risk to achieving profitability myself". And then at 2520 he is asked about the insurance arrangements and it's put to him in this way: "If you had been told prior to the investment that CSI was a captive insurance

company set up for the forestry investors, would you have as a prudent investor made further inquiries?” “I am not sure the insurance was definitely a risk mitigant as I said in my brief of evidence and I saw it protecting the worth of the forest...” and he goes on and deals with it in that way. I suppose there will be some debate as to whether this was in fact a captive insurance but it doesn’t particularly matter, all that matters is that we had an insurance policy. And then later on at 2520 “wasn’t the reason Mr Peebles that you were not concerned to obtain independent forestry advice about the investment was that it was a very attractive financial structure for you because of the very significant tax benefits for you personally”. Now as I said earlier I think the information that we had and the skills that we had certainly in my judgment that I could make a very good assessment as to whether the business was going to achieve the profitability or not. The question of insurance was pursued at page 2527 lines 25 on to 2528 just at the top of the page, I don’t have to deal with that in any greater deal and then there is just an amusing little interlude, probably one of few in the case, at 2530 where Mr Peebles was being asked about the disposition of the insurance premium. Just at line 29 the question started and then put substantively in this way. “Are you aware that I think it's over 90% of the premium that were in fact paid, that’s the \$1307, I think it is dollars per hectare to CSI went to Parentis, and then back by way of loans to the family trusts. I am now, I wasn’t then, that said it doesn’t really surprise me when my father was an insurance salesman he received the first two years premium on every deal he wrote”. And then at 2531 again attacking the integrity of the transaction, my learned friend asked, this is between lines 10 and 15, “but the premiums payable by Southern Lakes Investors would not be sufficient would they to enable CSI to meet all claims it needed as well as to receive premiums payable by Trinity, that may be so in the case of *Armagedon* but I mean that’s probably so for every insurance company in the world”.

- Tipping J What was mean by “to receive premiums payable by Trinity”?
- Carruthers Well that was my learned friend asked the question.
- Gault J They both paid premiums didn’t they?
- Carruthers Yes that’s right, in that chart they are in two columns, I think that must be what it's referring to.
- Gault J The reference to *Armagedon* must be read with the exclusion in the policy that he has already referred to in his evidence that the policy excludes loss worse than leaving 300 trees standing per hectare. So I don’t know what the estimated value of those 300 was, but sure it takes away a lot of the risk.

- Carruthers Yes. Your Honour I think all I can do is simply note that is so. I want to move from there just to really round off the acknowledgement that I made in relation to Dr Muir's evidence I don't want it thought that I have ignored the elephant in the room so I have started in that way, and in my note which is in the folder I have handed in, I just want to draw together the essence of what I have been taking your Honours through on the facts, and I have noted in that that Dr Muir is the architect of the Trinity Foundation.
- Elias CJ Which document, oh I see, Dr Muir's role, yes just wondering which document it was.
- Tipping J Which elephant I was wondering?
- Carruthers I should ask your Honour whether that's a personal matter (laughs).
- Tipping J Probably the best way for you to answer a rather unfortunately expressed question Mr Carruthers.
- Carruthers Well it's a way of just recognising that there is a significant issue that I plainly need to deal with as I have been quite frank about in trying to isolate those parts of Dr Muir's evidence on which I can rely and which plainly I can't, and there is really nothing in that part that I need be concerned about. But I want to put just the respective positions of Dr Muir and Mr Bradbury and I put it in this way that Dr Muir is the architect of the Trinity Foundation benefaction, his enterprise resulted in the Ben Nevis and Accent Management Joint Ventures investing. Dr Muir is not a party before the Court, however, as the principal he was involved in the Commissioner's inquiries and the events concerning discovery of documents. He gave evidence before Justice Venning who expressed very strong adverse findings of credibility, Dr Muir's behaviour in these discovery matters and in his evidence before the Court are matters relied on heavily by the Commissioner and the Court of Appeal in its reasons as somehow affecting all of the joint ventures generally but with particular attribution to Mr Bradbury and relatedly his LAQC Bristol forestry. While Dr Muir and Mr Bradbury were then and until recently in their law firm partnership together, they had quite different and discrete roles in the organisation of the Trinity Foundation benefaction and the joint venture itself. Mr Bradbury in my submission gave a full and truthful account of his role in his interview with the Inland Revenue, including volunteering the Parentis brokerage arrangements. He had no knowledge of or role in the discovery matters that the Judge was so critical of. Mr Bradbury's evidence before the Court at trial was not criticised and my submission is that there was no basis on which it could be.

Turning now to Mr Bradbury's position. Strong exception is taken by Mr Bradbury to what is a guilt by association smear on him by the Commissioner and the Court of Appeal especially concerning the repeated sham allegation in this Court, which is a matter to be addressed by my learned friend, Mr Stewart, however the entire tax avoidance submission for the Commissioner is infected with this general smear approach against Mr Bradbury, in submission careless of the facts concerning his role. It's not only unfair to him, but in my submission it does amount to improper conduct. And finally in this respect when seeking to separate the interest of the joint ventures who are before the Court, it's worth noting the rather acid remark of the President of the Court of Appeal when referring to Dr Muir and the criticisms made by the trial Judge, ask counsel for the appellants, "well then are you saying that none of this matters". And there are two parts in response to that question. First and directly responding to it the answer is, Yes. It is submitted that none of that conduct has any relevance to or effects in any adverse way any of the JVAs before the Court. As the Court correctly noted, no attempt was made to suggest that those adverse findings and criticisms were not open to Justice Venning. The second response is this, it's appropriate to reflect on why that question was relevant to these appellants in the way it was expressed. It is with respect not the burden of the JVAs to answer a question in those terms as if there is a need for them to express any view about Dr Muir. The case needs to be argued and dealt with on its merits concerning the affairs of the JVAs and what is their dispute with the Commissioner. And while the Court did say that the moral dimension is of little moment, it is very clear from the Courts reasons that it did not carry that discipline through, rather it infects large parts of the Courts reasons and they are criticised for that reason and the submissions before this Court.

McGrath J Mr Carruthers, do I understand you to say it, I am looking at paragraph 4 in particular, that your criticism of the guilt by association smear as you put it, is one confined to the Court of Appeal. It's not a criticism of Justice Venning?

Carruthers No it's not a criticism, ummm oh, I certainly wouldn't put it as smear, no.

McGrath J I am just really wondering how that relates to your reference to Justice Venning in paragraph 6.

Carruthers The adverse findings were the findings made against Dr Muir, not against Mr Bradbury.

McGrath J Right so there is no criticism in this aspect of the case of Justice Vennings analysis and judgment?

- Carruthers Well let me be careful in answering.
- McGrath J No criticism of the smear of guilt by association.
- Carruthers No, but I do submit in relation to his judgment that he does treat the Bradbury and Muir team as being represented entirely by the evidence that he relied on from essentially Dr Muir because as I have submitted there is no reference to Mr Bradbury's analysis or Mr Peebles analysis of the transaction, but I think your Honour, the real thrust of the submission is the way in which the Court of Appeal has dealt with the issue.
- Elias CJ For myself Mr Carruthers, while accepting entirely that it is open to you to make a powerful submission and to indicate a sense of injury on behalf of your client, I think it unfortunate that you make the comment on the remark of the President of the Court of Appeal which strikes me as an entirely appropriate question to ask and also really more importantly the suggestion that the submission being put on behalf of the Commissioner is improper conduct in this Court, that strikes me as an exaggeration which I don't think assists in what is an entirely proper and firm submission.
- Carruthers Your Honour, I understand what you say but as to the propriety of the question in the Court below, I can say as counsel that we had a number of comments and criticisms and dispersions that were made, that in my submission cannot be justified. Now if I have gone too far
- Elias CJ In the end Mr Carruthers you do answer the question, so there can't be an off the wall question, it's an appropriate question to have been posed, however, I simply make the point that I think these comments detract from the force of the submission you make.
- Carruthers As your Honour pleases, in that case I do want to fall back from them but I do invite you to accept that it is very difficult to listen to a very pointed remark that suggests that one's argument is not appropriate and similarly in relation to some of the arguments that are made by the Commissioner, particularly the sham argument when we get to that and look at whether it does actually have a proper factual foundation, then they are serious matters.
- Elias CJ We will look at that in due course.
- Carruthers Your Honour I want to now move to.
- Elias CJ Where are we heading Mr Carruthers, can you just give us an indication of where you want to take this part of the argument.

Carruthers I have now dealt with all of the factual issues that I want to deal with, all of the evidentiary base that I wanted to deal with and I now want to turn to the two topics that I am going to address and I want to address first the issue of the insurance premium and the accrual rules spreading and then I want to follow that with what is essentially a reply to what the Commissioner is saying on the license premium issue. Your Honours those parts may not take me through the whole of the balance of the afternoon and I am concerned that to really achieve the logic of what we are doing that Mr Stewart addresses next and with some concern he wanted to, for reasons that I perhaps don't need to go into, but they do concern a request by his client that he addresses on that issue in the morning. So if we did happen to finish a little early I would invite you to adjourn at that stage so Mr Stewart could begin in the morning.

Elias CJ Will Mr Harley be addressing us following on from you?

Carruthers No I proposed after I have done these two topics I propose that Mr Stewart would address on sham and then I would want to come back and address on avoidance and then Mr Harley would deal with the consequences of avoidance.

Elias CJ Well we would be very reluctant not to use the time that we have available Mr Carruthers, perhaps over the adjournment you can consider with your colleagues how you might use the time, because it may be that some different sequence would be more helpful, if you want Mr Stewart to address in the morning.

Carruthers Your Honour, I will reflect on that, but I wouldn't want you to think that we hadn't carefully looked at the best way of presenting the case in the Court. But I will look at that issue.

Elias CJ I am sure you have and I am sure it's the preferable way to address matters Mr Carruthers, but we are concerned to make sure that everyone gets a fair go, and don't really view with equanimity losing time.

Carruthers I understand that and I certainly appreciate the point that your Honour makes to me about ensuring that everybody has time.

Lunch adjournment

Court resumes: 2:18pm

Carruthers Your Honours may I turn to the first substantive argument that the appellants make and it is in the note that I have for oral argument on that point, under the heading "Ben Nevis Appellants Insurance

Premium Accrual Rules Spreading”. And it is an issue of statutory interpretation and despite the explanation that may just take a little time, in the end it turns on two quite short points concerning the amount involved or the percentage involved. Let me take you through it in this way.

That the general policy of the financial arrangement rules is canvassed in our submissions and I have given you the reference. And just identifying what is at issue concerning the contract of insurance premium note is this. First the legal characteristic within the FA Rules themselves (that is, is it truly a contract of insurance or a “sham” and I note now but only against Redcliffe and Bristol); and the second issue is whether the amount is deducted correctly when incurred (in 1997) or whether it is required to be spread over the 50 year period under the AE Rules.

Without the FA Rules in the Act, unquestionably the amount for what is loss of profits insurance would on ordinary principles be a business expense of the JVAs, deductible as incurred, in 1997, and as the Commissioner purports to accept.

What is at issue here is the treatment of what is generally known as a “wider” or “composite” financial arrangement, which is not a defined term, but which description reflects the broad effect of s EH 2. And I come to deal with EH 2 in a moment. The idea of how a wider financial arrangement is treated under the FA Rules is simple to describe conceptually as it is subject to complex statutory rules.

The term “financial arrangement” is deliberately cast widely in the statutory definition of OB1, and I set that out as well in a moment. And is then confined by exceptions. So, while a “debt instrument” is a financial arrangement, a share in a company and a contract of insurance are not – the latter two are “excepted financial arrangements” (EFA).

The Ben Nevis appellants’ position is that unquestionably there is a wider financial arrangement here, including the insurance. And the Commissioner’s reply correctly states the position, and I summarise it in this way:

- the insurance is, in isolation, an EFA (as the definition prescribes).

And your Honours you will see that I have cross-referenced to the submissions into the High Court judgment as necessary. That follows what we have done in our written submissions and I don’t need to take you to this material. I can summarise the argument quite conveniently by just noting these passages in passing.

And the second proposition is:

- the insurance becomes part of a wider financial arrangement because of the inter-relationship and integration with the other licence premium promissory note (and the Ben Nevis appellants also suggest in paragraph 17 below the accounting for Trinity3 harvest proceeds, and the option).

As the Commissioner goes on to record in his reply correctly, the JVAs' general assertion was that while there was a wider financial arrangement, there was no financial arrangement spreading under the AE Rules required because, viewed overall, the contracting parties had all agreed there was simultaneous satisfaction of the obligations (by delivery of the promissory notes, that is the securities) with the delivery of the licence. Accordingly, as the Commissioner has always accepted from the JVAs own tax returns position when assessed, there is no difference between the agreed acquisition cost and the consideration exchanged. And in the High Court Justice Venning recorded this position correctly, and I do cite from that to illustrate it. "Take the case of an unconditional agreement for sale and purchase of property where possession passes immediately upon the contract being entered into and where the bulk of the purchase price is not payable until settlement, which is to take place two years later. It is likely that the vendor will require extra money to be paid because the purchaser has both the use of the money and the use of the property. The extra amount paid to the vendor is to compensate him or her for being without both the property and the money. It is this compensation which the accrual regime seeks to isolate and bring to tax." And then I emphasise this passage. "Where payment in full takes place at the time of the first transfer of right [in this case by delivery of the promissory notes in satisfaction], there will be no interest element in the sense required and the accrual regime will not isolate one."

My submission is that this approach, of course, reflects exactly what the contracting parties had always intended, so that the FA Regime did not require any recharacterisation of the constituent terms. And that being so, and subject to the Act's specific provisions, it is not surprising that in principle: (a) the FA Regime not being applicable to the Licence, the licence premium amount is subject to orthodox depreciation treatment of such a capital asset (spread over 50 years); and (b) the insurance component is treated as deductible in full when incurred. This approach reflects the general scheme of the Act, outside of the FA Regime.

Now, the Commissioner maintains (and he always has) that: (a) the licence premium is not treated as the acquisition cost of depreciable property – this is the separate argument I come to in the next section.

Tipping J Would you mind just pausing Mr Carruthers. That passage which is cited from Justice Venning, his paragraph [203] I take it, where he says “where payment in full takes place by delivery of the promissory notes”. A promissory note is simply a promise to pay. It is not a payment. Is there something subtle there that I am just not grasping?

Carruthers It will in the end turn on the word “incurred”.

Tipping J So the word “payment” is not strictly accurate. It is the incurring of the obligation.

Carruthers Well that’s, yes that’s right. And there is, we come to a delightful discussion by Lord Hoffmann of juristic and commercial terms in the word “payment” in due time.

Tipping J But

Elias CJ Is that the Judge’s words in square brackets or yours? Sorry

Tipping J Yeah, I thought it was intended to be the Judge’s words.

Elias CJ I assume that it is not. I might be wrong.

Tipping J Oh, I don’t actually think it is [203]. I have just been trying to find it.

Elias CJ No, it’s not.

Carruthers My apologies.

Tipping J Because I noticed this in the judgment and I should have marked it. Maybe I did and I am now trying to find it. There is a further reference to the promissory note in the judgment of Justice Venning at paragraph [130]. That is not the paragraph you are here referring to but I had a similar sort of query as to that paragraph but I am pretty certain I marked, I can’t now.

McGrath J Paragraph [194] is the paragraph I have marked as explaining why it is incurred on the signing of a promissory note.

Tipping J I think I would be with the concept if His Honour had used the word “incurred” but it's the use of the concept of payment that, as I understand, you are highlighting here Mr Carruthers, that I find somewhat elusive.

- Carruthers Well I am highlighting the coincidence of obligation, that is that, and the point being they are unconditional promises to pay, as you say. I mean it is not different from a cheque in that respect. And the only point the Judge is making is the coincidence of it but your Honour I apologise for the error but I am just equally determined to find out where it was.
- Tipping J Well you see the Judge's reasoning leads on to the proposition there will be no interest element.
- Carruthers Yes.
- Tipping J That's the crunch because that pre-supposes that there is coincidence of payment and delivery but here, with a promissory note, you haven't got a payment in the sense of actual delivery of the money.
- Carruthers No but you do have a sense of delivery of the obligation by which payment will be made.
- Tipping J Of course but it doesn't seem, with respect, the reasoning doesn't seem to me to precisely add up where the focus is on payment.
- Carruthers Your Honour I am getting a little collection of things that I need to come back to and I will. I just, for the moment, don't understand how we made that mistake. And your Honour, when I come back to it, I will just deal with the question of that passage in brackets, because that is certainly the approach that we have taken.
- Tipping J What's the passage in brackets I'm sorry?
- Carruthers Oh it's just as the Chief Justice indicated where we have got the word "by delivery of the PNotes in satisfaction".
- Tipping J Oh I see.
- Carruthers And I just need to check exactly what we have done.
- Anderson J You are relying on para [194] aren't you? It may be a mnemonic for you to make a submission to that effect.
- Carruthers I mean your Honour is correct that that is the context in which payment is equated with, the payment by the promissory notes is equated with incurred.
- Anderson J It rather seemed to me that you have incorporated a submission really. You indicated that by the use of the square brackets.

- Carruthers Yes I am losing confidence in what I have actually done your Honour but I know that I thought that I personally had insidiously checked all of these
- Tipping J But least there be no doubt about it, let's take those bracketed words out. There would be then absolutely no problem because the money has passed.
- Elias CJ But it's the square brackets that are the problem which is why I think it is editorialised.
- Tipping J Well I don't think it's sound.
- McGrath J It's a different case isn't it?
- Tipping J Yes a wholly different situation.
- Carruthers Well with respect I don't agree and I think that the way that the reference that Justice Anderson helpfully took me to in [194] puts that position correctly, that is that the expenditure has been incurred as the plaintiffs are definitively committed to the payment of the insurance premium in 2047. Payment is not
- Tipping J I don't, that is not my problem. My problem focuses on the word "payment". The promissory note is not a payment. It is an order for payment. It is a bill drawn on one's self in a sense, like a cheque. Well not quite like a cheque. But the Judge here is deliberately equating a real exchange. It means that there is no interest dimension. That is what he is doing. And to interpolate a promissory note as being the equivalent of that, is where I have the difficulty Mr Carruthers. But come back to it. I don't, it's not an altogether easy point and I noticed this in the judgment itself. So I am wondering whether this is an interpolation. Because the Judge seemed to be treating in one passage of his judgment the promissory note as amounting to payment.
- Carruthers Yes well that is at paragraph [130]. I think that's.
- Tipping J Well that can't be right can it? It may evidence the incurring of an obligation to pay but it can't be surely equated with actual payment. But anyway come back to it Mr Carruthers.
- Carruthers Well I will but I think the approach that His Honour took is actually reflected in paragraph [130] and in [194] and I will find that passage and I will come back to it. And I will revisit that issue that your Honour raises with me too.

Tipping J It may not matter. I just don't know whether it does but I just couldn't let it go by without comment that it didn't look right.

Carruthers No, well your Honour I think it is a fair observation on our argument that it does not matter and it is certainly the position that the Commissioner similarly has taken on that. Now what I have then submitted in paragraph 7, is that the approach that I have been discussing as to the way in which the parties had approached the issue reflects exactly what the contracting parties had always intended. So that the FA Regime did not require any recharacterisation of the constituent items. That being so, and subject to the Act's specific provision, it is not surprising that in principle the FA regime not being applicable to the Licence, that the licence premium amount is subject to the orthodox depreciation treatment of such a capital asset. Oh I'm sorry your Honour I have dealt with that.

Yes I think your Honour Justice Tipping stopped me when I was in

Tipping J I am afraid I did.

Carruthers No no, that's quite alright.

Tipping J But it doesn't do any harm to repeat it because that is your essential argument isn't it, in sum?

Carruthers Well that's right, yes it is. And the, so the licence premium amount is subject to orthodox depreciation treatment and the insurance component is treated as being deductible in full when incurred. And that, this approach reflects the general scheme of the Act outside the FA Regime.

Elias CJ Sorry where are you?

Carruthers I have actually repeated paragraph 7 your Honour. I was really just trying to catch up and I apologise for that. Paragraph 8, I am dealing with the, what has consistently been the Commissioner's position. His position is that the licence premium is not treated as the acquisition cost of depreciable property. And that's the separate argument that I come to. The Commissioner lost in the Court of Appeal and the Commissioner re-argues in this Court. And the, as I have noted, that's the next argument I want to make when I finish this topic.

The insurance premium is nevertheless required to be spread under the AE Rules. That's the Commissioner's argument that that's so. And Justice Venning, in our submission, correctly rejected that argument but the Court of Appeal upheld the Commissioner's appeal

so that the Ben Nevis appellants contend that the Court of Appeal was wrong on the insurance premium amount and I have given the reference to our written submissions and the Commissioner's response. My submission is that the Commissioner's response is unsound.

So the question then is "Was the insurance premium required to be spread over more than one year?" And the JVA's argument is that the premium was deductible in the 1997 income year, either because s EF 1 (and I come to that) was not applicable as the premium was incurred in respect of a financial arrangement and the deduction was not required to be spread under the rules, under the AE Rules, because either it was solely attributable to an excepted financial arrangement that was part of a financial arrangement, or the amount was less than 2% of the core acquisition price of the financial arrangement.

Now, if the premiums are incurred in respect of a financial arrangement, s EF 1 does not apply. It is only if the premium is not incurred in respect of a financial arrangement that s EF 1 has possible application. Now, I then set out EF 1 and I think

Elias CJ Sorry this is, I am just trying to understand these split sentences. Is it, this is all tied up with, the first sentence "if they are incurred in respect of a financial arrangement", that is, on the basis that they are insurance premiums, is that the exception.

Carruthers Yes.

Elias CJ Yes. Yes.

Carruthers So I have set out EF 1 under paragraph 11 and I think I can probably pick up the point about EF 1 by just going to the narrative on the next page. The "spreading" would occur by virtue of paragraph (b). The "unexpired portion" is prescribed in EF 1(5), to reflect the future use of the benefit acquired by the affected payment. And the, that then leads to my consideration of the application of s EH 1. EF 1, being the AE Rules does not apply in relation to any expenditure incurred "*in respect of any financial arrangement*". "Accrual expenditure" is defined by OB 1. It means any amount of expenditure incurred that is allowed as a deduction other than expenditure incurred in respect of any financial arrangement. And then I have set out the definition of "financial arrangement" in paragraph 16 but bear with me and let me come to that.

The position is this, that if the \$34,000 insurance premium was paid in respect of a financial arrangement, then it will be required to be spread, if at all, under EH 1, being the general FA Rule. It is not required to be spread under EH 1, but it is still incurred in respect of a

financial arrangement, the result is that s EF 1 does not apply. The insurance premium can be deducted in the year it is incurred. And then I have referred to the accrual regime guide where the editor, where the authors note “The rationale for defining the above arrangements [including a contract of insurance] as excepted financial arrangements is that each has characteristics similar to equity. In the case of life insurance, partnerships, joint ventures, group investment funds and superannuation, an interest is essentially equivalent to an equity interest. Other forms of insurance and bets are similar to equity in that a holder of an interest partakes of risk and risk-spreading. As expressed by the 1986 consultative committee, such arrangements are unlikely to involve the concept of time value of money.

So then that leads to the question of “Was the premium incurred in respect of a financial arrangement?” And then I have gone to the general rule. The factors are noted in (a) and in (b) the person is an issuer in relation to the financial arrangement, the factors are noted there. And in s EH 1(2) is prescribed how expenditure (in this case) is to be spread, giving a yearly allocation.

That brings me to the definition of “financial arrangement”. And you will see under (a) (ii) that it includes “money in consideration for a promise by any person to provide money to any person at some future time or times, or upon the occurrence or non-occurrence of some future event or events”, and then underneath that “but does not exclude [sic] any excepted financial arrangement that is not part of a financial arrangement. And an “excepted financial arrangement” means “a contract of insurance”.

- Tipping J It is a self-standing contract of insurance. It is not to be spread.
- Carruthers That’s right.
- Tipping J So in order for it to be spread it has to be part of a wider financial arrangement. Or have I got that the wrong way round?
- Carruthers No that is the wrong way round. In this case the contract of insurance is part of a wider financial arrangement and the exception bites because it is the amount that is taken out of play by the definitions.
- Tipping J They have really made it very tricky, haven’t they?
- Carruthers Well yes, and it is something of a cold towel around the head, but it is purely a matter of statutory interpretation and just matching those provisions. Let me go through

Tipping J Well what do you, where did the Court of Appeal, Justice Venning said it didn't have to be spread. The Court of Appeal said it did have to be spread.

Carruthers Yes.

Tipping J Now what was the fulcrum on which they differed. Because that is really what we have to resolve isn't it?

Carruthers Let me just go to, take you forward to paragraph 26 then. No go back to paragraph 25 on page 8. The Judge makes a very good analysis of this. His reasons for accepting the contention against spreading were that the insurance is part of the wider financial arrangement as defined. The insurance premium note is the right to money as defined. And the end result is that the insurance is within the wider financial arrangements. And both those points are common ground with the Commissioner. Now EH 2 applied as a result of that. And, as the section says, the amount (and we have interpolated here the final insurance premium note of \$32,000) in respect of a financial arrangement [here the "wider" financial arrangement, by reference to the definition that I have just read], that is solely attributable to an EFA [that is, the insurance] that is part of the financial arrangement.

So what is being isolated is the amount in terms of the section. And what the Court of Appeal, yes, I will just read from paragraph 26 because this is the analysis. "If the amount that is removed, it is the amount that is removed and not the instrument to which it relates." And the Judge was right to so conclude. And it was this question of modification of the definition of financial arrangement. "Specifically EH 2 does not modify or alter the definition of "wider" financial arrangement by removing from it the relevant excepted financial arrangement – that is not what EH 2 provides." That is, it doesn't remove the document from the wider financial arrangement. What is removed is the amount and so the Court of Appeal said that, said correctly "that the premium is solely attributable to the policy and thus to an EFA. But the Court was wrong to disregard the EH 2 reference to the amount of that EFA that is part of the wider financial arrangement."

And our submission is that the Court is wrong. If the relevant note is part of the wider financial arrangement, as here, it is the amount that is excluded with reference to its singular solely attributable character. So that is where, when I introduced this topic, I indicated perhaps a little delphicly that this really turned on the word "the amount", and that's the difference between the Judge in the Court below and the Court of Appeal, Judge at first instance in the Court of Appeal. The Court of Appeal

Elias CJ So in terms of the fulcrum, it is EH 2.

Carruthers Yes.

Elias CJ Yeah.

Tipping J They differed on the effect of EH 2.

Carruthers That is right. And the difference between them was that the Judge correctly picked up that the statutory provision that was the fulcrum, as your Honours have put it, was the amount and somehow the Court of Appeal reasoned that that provision, that that provision somehow converted the excepted financial arrangement and did not allow for the operation of EH 2. Can I just then go back

Elias CJ And that, similarly, wholly hangs on it being an insurance arrangement.

Carruthers Yes it does. As I said at the start, the whole question of the deductibility depends on it being a contract of insurance. If it is a sham, I mean this is really the choice, it's either a contract of insurance or it's a sham.

Elias CJ Well it might be mislabelled. It still might have effect but not as a contract of insurance.

Carruthers Yes although it is

Elias CJ As a financial arrangement.

Carruthers Um,

Tipping J Well that is theoretically possible but I don't think anyone is suggesting that there is another ingredient potentially in this mix.

Carruthers No please, we have enough.

Tipping J There is enough, it's either insurance - if it is valid it is insurance. If it is not valid it is because it is a sham.

Carruthers Yes. I mean in my submission that has to be so. And

Anderson J What if the parties think it is a contract of insurance and in fact it is wrongly categorised as such, it is something else, and they are honestly mistaken about it?

Carruthers Yes it is the question of what else it can be though that is the issue and I suppose that I am reinforced by the

Anderson J Does it insure something or doesn't it? Does it insure an insurable risk? Theoretically.

Carruthers Yes. I, in my submission, it just doesn't arise in this case by reason of the findings in the Courts below.

Elias CJ Sorry, which findings? To summarise?

Carruthers That it was a contract of insurance.

Tipping J Well I don't think there is any suggestion is there, by anyone, that if it doesn't have the substantive effect of a contract of insurance and is not a sham, it has substantive effect as some other legal beast?

Carruthers No, there's no suggestion of that.

Elias CJ Only talk about logical possibilities here. You have to establish that it is a contract or you have to maintain the view that it is a contract of insurance and that it comes under EH 2.

Carruthers Yes. It is as short an argument as that.

Elias CJ And the error you say that the Court of Appeal made, is in looking at the arrangement or the contract rather than the amount of the expenditure.

Carruthers Yes, the Court of Appeal failed to appreciate that the statutory provision bites on the amount and that

Elias CJ Which here is expenditure.

Carruthers Yes. But the Court, the conclusion of the Court was that EH 2 took the document out of the definition of "wider" financial arrangement.

Elias CJ Can you just refer us to the paragraph in the Court of Appeal judgment that you say does

Carruthers The discussion begins at paragraph [71] where the Court sets out EH 2 and then just concludes at [72] "The Commissioner succeeds on this point. The premium is solely attributable to a contract of insurance and thus to an excepted financial arrangement. Accordingly on the basis that the contract of insurance is part of a financial

arrangement, the premium is nonetheless not attributable to that financial arrangement given EH 2 and thus not excepted from the definition of accrual expenditure.”

I will read the whole of that passage, the whole of that reasoning:

“For the sake of completeness we note that the result is the same even if the contract of insurance is not part of wider financial arrangement (that is, a wider financial arrangement). If this is so, it is not a ‘financial arrangement’ at all, given the definition of ‘financial arrangement’ and accordingly the relevant expenditure would not be excluded from the definition of ‘accrual expenditure’.

In his judgment Venning J made a broadly similar analysis of the statute to the one we have adopted. He took the view that the insurance contract was part of a wider financial transaction and was thus required to consider the impact of s EH 2. But it was at this point that his approach differs significantly from the one we have adopted. Having set out the terms of s EH 2, he said (at [205]) that the insurance premium due in 2047 fell within the definition and was thus not required to be spread under the accrual rules.

With respect to the Judge, he thereby misapplied s EH 2. If s EH 2 applies, the relevant expenditure is not incurred ‘in respect of a financial arrangement’ and accordingly is not excluded from the definition of ‘accrual expenditure’. Instead the relevant expenditure is accrual expenditure and is required to be spread.”

Now, if we go to EH 2, which I have set out under paragraph 22, “The amount of the gross income deemed to be derived or the expenditure deemed to be incurred by a person in respect of a financial arrangement under the qualified accrual rules shall not include the amount of any income, gain or loss, or expenditure. It shall not include the amount of any expenditure that is solely attributable to an excepted financial arrangement that is part of the financial arrangement.” That is, that the money, the amount of the insurance premium which is solely attributable to the insurance policy, which is part of the financial arrangement. So

Tipping J I am not quite following this emphasis on the concept of amount.

Carruthers Well you see what, because what the Court of Appeal has done is said well it is really the contract of insurance that is being taken out of play. What the Court has really said is “shall not include the document by which expenditure is incurred that is solely attributable”. See it has actually taken the contract of insurance out, whereas the section simply requires one to look at the money or the amount.

- Tipping J Weren't the Court of Appeal right that the premium was solely attributable to the excepted financial arrangement. If we just stop there.
- Carruthers Yes that's right.
- Tipping J So far so good. It has recognised in the last few words of the section that that excepted financial arrangement is part of a bigger financial arrangement.
- Carruthers Yes.
- Tipping J But I don't see how your argument, focusing on this concept of an amount, takes you to your intended destination. Because the amount is referred to twice. The amount is in the first line. And the same amount, the same concept, is in the third last line.
- Carruthers Yes but the amount in the third last line is the amount of expenditure that is solely attributable to the insurance policy where the insurance policy is part of the financial arrangement.
- Tipping J Well the first step is the amount of the expenditure deemed to be incurred shall not include the amount of any expenditure solely attributable. That's the end of it isn't it?
- Carruthers No no. But no, your Honour, you are still dealing with the amount of expenditure.
- Tipping J I must say I am unaided by learned counsel, I view this section as being quite straightforward. That you don't take in to the deemed expenditure any amount that is attributable solely to an insurance arrangement. Even although the insurance arrangement is part of a wider financial arrangement. That's the way I would naturally read it. What am I doing wrong Mr Carruthers?
- Gault J It seems to me to be ambiguous, you could read it either way, couldn't you?
- Anderson J If the contract of insurance, which is an excepted financial arrangement, is part of a larger financial arrangement, it doesn't come within the general definition of a financial arrangement. Is that your point?
- Carruthers Yes.

Anderson J And therefore it is not caught by clause (b) of the accrual expenditure definition.

Carruthers That's right.

Anderson J The Court of Appeal has got it back to front.

Carruthers Yes it has and Justice Venning got it right.

Anderson J So it's rather a linguistic maze isn't it?

Carruthers Well it is your Honour. That's a fair comment. But if one works through it step by step, one can see where the legislation was intending to get to.

Anderson J In fact you can convey it really with a flow chart.

Carruthers Yes you may well have provoked me to do just that.

Tipping J It is the apparent simplicity of EH 2 on its face muddied by other factors that I am not bringing to account Mr Carruthers.

Carruthers You carried me forward in the argument, and don't misunderstand that's not a criticism for a moment, but I think

Tipping J You will need for my benefit anyway to go back to where you were, and then just work it through the way you were wishing to. Because I have to say I have read that quite simply but obviously it's not nearly as simple as a simple mind like mine is treating it as. And the Court of Appeal seem to have taken it quite briskly don't they? They have fallen into the same error that I have, obviously, on your submission.

Carruthers Yes that's right which, with respect, is why we are here.

Tipping J Well on this point yes. You have got more problems ahead. If you don't win this point, then you are down anyway aren't you? Or nearly.

Carruthers We have got another leg to this point, yes.

Tipping J You have got another leg. Where do you want to go back to, Mr Carruthers? I am very willing to be shown that I am being simplistic.

Carruthers No I am just, I am going to take you back to where I was and I think I can go back to paragraph 17 on page 5.

Elias CJ Sorry because I am just lost. Just tell me, if you are right and the insurance premium is not treated for accrual purposes under the financial arrangements, what's the provision that is treated under as that? OB...?

Carruthers No OB 1 is the definition.

Elias CJ Oh, that is the definition.

Carruthers It then is, it is either deductible in 1997 or it is spread over, well over the whole 50 years.

Elias CJ Under what provision?

Carruthers Because it is spread over, that's the period, um

Tipping J That's the accrual period.

Carruthers That's the accrual period yeah. Um, but your Honour wanted me to just

Elias CJ Just if you can, at some stage, I need to find the section.

Carruthers It is under DL3, DL1(3) or BB7 and your Honour will see a discussion of those sections in the trial Judge's judgment but you can take it from me that the argument is that it's either deductible in the 1997 or it's spread over 50 years.

Elias CJ But it doesn't come within the financial arrangements?

Carruthers Well that really is the issue.

Elias CJ I realise that. But I am just saying on your argument.

Carruthers Oh I see yes, that's right.

Elias CJ Yes.

Tipping J There is no argument against you, as I understand you, except sham that it is not deductible at all.

Carruthers That's right, yes.

Tipping J So it is either a sham and therefore it is not deductible, or it's deductible in one hit or over 50 years.

Carruthers Yes that's right. That's right. If it's sham it's not a contract of insurance at all. Just for Your Honour the Chief Justice, that discussion of DL1 subs (3), and BB7, begins at paragraph 186 of the High Court judgment.

Elias CJ Thank you. Oh, 171, thank you. What does 'solely' mean in EH2?

Carruthers Well it really means only because, and with respect I don't think there's an issue, the amount, the insurance premium can only be attributable to the contract of insurance. So in that sense it is solely attributable.

Elias CJ Thank you.

Carruthers I'm sorry I think I interrupted you in going on to something. No, I'm going back because I'm determined to take Justice Tipping to the point where.

Tipping J Well I want to hear this because it's the crunch of this issue.

Carruthers Yes well it is. Now let me just deal with the whole of the context because I'm going back to paragraph 17 where the submission is that the insurance premium was clearly incurred in respect of a financial arrangement consisting of lease and these are the constituent parts of the financial arrangement that we say existed. And part of that is the contract of insurance. Now there's no authority on when one arrangement is part of a wider financial arrangement. There is authority in the Court of Appeal on when it's not. And I've cited a passage from the decision of Justice Gault on that point. But then we go on to submit that here through clause 5 of the agreement to grant a licence and the shared securities and the insurance contract, all parties were bound contractually together. There can be no argument over the fact that the \$34,000 was incurred in respect of a financial arrangement, the contract of insurance, which was part of a wider financial arrangement. This is commonplace, for example mortgage replacement insurance which is part and parcel of the lender's terms with the borrower. And having regard to the complete integration of the complex of agreements involved, the total premium and the final insurance premium reflect directly the CSI policy response in the event of a claim upon harvest, being the provision of money at some future time upon the occurrence or non-occurrence of some future event being the harvest value when it arises. And that's a classic wider financial arrangement. And I've referred to the Judge in the High Court. And as the Court of Appeal noted, it was common ground that that's so.

Now I do want to just continue through with this and the question is whether the insurance premium was required to be spread under EH1.

And cash flows including wider financial arrangements are generally required to be spread over the term of the financial arrangement under EH1. And there are limited exceptions to the requirement to spread. And then I've dealt with the two relevant ones, amounts incurred which is solely attributable to an excepted financial arrangement that was part of the financial arrangement. And the second leg of that, the non-contingent cost not exceeding 2 percent of the core acquisition price of the financial arrangement. And we rely on both. Common ground the insurance premium was solely attributable to the insurance.

And then I've gone and dealt with the EH2 provision. And I've said the point of emphasis is on the amount and not upon the classification of the wider financial arrangement and of its constituent elements. In order for the provision to apply, the JVA's contract with CSI needs to be an excepted financial arrangement which means in effect it would need to be a contract of insurance. And I've noted the definition of excepted financial arrangement includes a contract of insurance. Both courts so held. And then that's subject to the sham issue and I've noted that the commissioner maintains the right to assert sham concerning two of the parties only.

And then just going back to the accrual regime guide, and this passage: "Of these categories of excepted financial arrangement, the most important is likely to be the category of insurance contracts. An insurance contract is not defined in the Act. The common law definition should therefore apply. In general an insurance contract will be any contract which provides a benefit on the happening of an uncertain event where the purpose of the benefit is to compensate the insured party for loss or prejudice resulting from the event. This is a relatively wide definition providing scope for taxpayers who want to move outside the ambit of the accrual rules to draft agreements as insurance contracts. If this is done care should be taken to ensure that various statutory requirements related to insurance and life insurance are complied with."

Then I think I will take Your Honours, and because of the issue that Your Honour Justice Tipping has raised, I'll go to the way in which the Judge has reasoned it and then come back to the Court of Appeal analysis. And if I can go to paragraph [203] of the judgment please.

Elias CJ Court of Appeal?

Carruthers No, I'm at the Judge at first instance Your Honour, under tab 3 in the Supreme Court proceedings volume.

Elias CJ Thank you.

- Carruthers And the Judge reasoned it in this way: “The wider financial arrangement in the present case must be one that satisfies Part (a)(ii) of the definition of financial arrangement. Namely an arrangement whereby a person obtains money in consideration for a promise by any person to provide money to any person at some future time or times or upon the occurrence or non-occurrence of some future event or events. The section contemplates that money will be paid now or in return for a promise of payment of another sum of money at a later time. No money has been paid over now. However promissory notes have been issued by the joint venture in respect of the licence premium obligation and the insurance premium obligation. Section OB1 at the relevant time defined money.”
- Elias CJ Why is he looking at the definition of money? It that when EH2 is about expenditure?
- Carruthers Your Honour you'll see at the beginning of the paragraph that I've just read where the Judge says that the wider financial arrangement in the present case must be one that satisfies Part (a)(ii) of the definition of financial arrangement.
- Elias CJ Yes.
- Carruthers And in Part (a)(ii), which is set out in paragraph 16 of my note of oral argument, under (a)(ii) you'll see in that part of the definition an arrangement, and I leave out the parenthesis, whereby a person obtains money in consideration for a promise by any person to provide money to any other person at some future time. So it's simply that's why he's looking at the definition of money in this passage. And it's a separate issue altogether from incurred. It's a question of whether the insurance policy would fall within the definition of financial arrangement under (a)(ii) and that's why he's looking at obtaining money in consideration for a promise to provide money.
- Tipping J The point being that CSI obtained money in return for it's promise within the wider concept of money as per the definition.
- Carruthers Yes. So yes, as you say, on the definition of money, money's worth convertible, whether or not convertible into money, the right to money including the deferral or cancellation of any obligation to pay money, whether in whole or in part. Now the promissory notes meet the definition of a right to money. The end result is that the insurance arrangements with CSI meet the requirements for part of a wider financial arrangement. And then the Judge sets out EH2 and I don't need to repeat that.

The insurance premium due in 2047 falls within this definition. It is not required to be spread under the accrual rules. So you'll see that what the Judge was looking at was squarely at the amount involved.

Tipping J Did the Court of Appeal have it round the wrong way? Did they think they were looking at a situation where if it was solely attributable it was within the accrual rules. Whereas if it was within the solely attributable in EH2 it was actually, by this convoluted process that the Legislature has produced, outside the accrual rules. Is that the difference between us Mr Carruthers, that satisfying EH2 takes you outside the rules rather than brings you inside them?

Carruthers Yes, yes.

Tipping J Is it as simple as that, the Court of Appeal in a sense had it the wrong way round. And I did too.

Carruthers With respect Your Honour, yes.

Elias CJ Justice Anderson didn't.

Carruthers No.

Tipping J So it's really where you end up.

Carruthers Yes.

Tipping J You're in, then you're out, then you're in again sort of thing and it's a question of what actually you're talking about.

Carruthers Yes Your Honour.

Tipping J All I was really saying was that it seemed to me that it clearly fitted EH2. The consequence of that is another matter.

Carruthers Yes, yes.

Tipping J The consequence of that is that you don't have to spread it. That's what Justice Venning seems to be saying.

Carruthers That's right. That's exactly right.

Tipping J And the Court of Appeal seem to be saying it, that the consequence of it fitting EH2 was that you do have to spread it.

Carruthers Yes.

Tipping J And therein lies the difference.

Carruthers Yes.

Tipping J Is it as simple as that.

Carruthers Well with respect, yes.

Anderson J It's not a financial arrangement.

Carruthers No.

Gault J I understood the Court of Appeal focused rather on the definitional aspect rather than the amount.

Carruthers I think I put it before Your Honour that the Court, well with respect I'm agreeing with you and I think I put it on the basis that the logic or the approach adopted by the Court of Appeal was that it focused on the document and that's where this issue comes about about our argument somehow modifies the definition. Whereas if one looks at it purely as an amount, which the Legislature says, then our argument is in my submission right.

And I've submitted that, and I'm at paragraph 28, because just that by going to Justice Venning's judgment and looking at that issue of the Court of Appeal's approach, I've submitted EH2 does not alter the meaning of the definition concerning wider financial arrangements which does include the policy of putting the amount of the insurance premium note as part of the financial arrangement and is excluded from the rules definition of accrual expenditure accordingly, excluding any financial arrangement.

Now the answer to the Commissioner is that EH2 deals only with the amount which is solely attributable and excludes it as an amount. The section does not alter the meaning of wider financial arrangement as defined. The Commissioner and the Court of Appeal ignore the words "that is solely attributable to an excepted financial arrangement", emphasising that as part of the financial arrangement these words are clearly referring to and describing the wider financial arrangement and for the purposes of the exclusion from accruals expenditure of any financial arrangement do not purport to modify that exclusion.

Elias CJ Just so that I understand the legislation, the reference in EH2, the amount of the income deemed to be derived etc, what language does that refer back to.

Anderson J Well you're reading from the next part, the expenditure incurred.

Carruthers Yes the expenditure incurred, yes. We're not concerned with, I mean Your Honour what the provision says is, the gross income deemed to be derived.

Elias CJ From the financial arrangement doesn't include the exempted.

Carruthers Shall not include. So you're just looking at the obverse side.

Elias CJ No I understand that.

Carruthers Yes.

Elias CJ But I'm just trying to get the whole legislative scheme. So in EH2 in the initial words, the amount of the income deemed to be derived or the expenditure deemed to be incurred, what does that relate back to? Is that the financial arrangement, the initial provision in that Part is it?

Carruthers It is. It is the money, the amount that is, I'm sorry.

Elias CJ Is it EH1 subs (2), is that what it's referring back to?

Gault J What are the qualified accruals rules?

Carruthers I'm sorry Your Honour.

Gault J EH2 is referring to expenditure or income which is the subject of the qualified accruals rules.

Carruthers Was Your Honour's question what are they?

Gault J Yes.

Carruthers They are the current rules, the relevant rules and they're described in that way because they replace previous accrual rules. But Your Honour, for present purposes you can simply regard them as being the accrual rules that are within the statutory provisions that I've been dealing with.

McGrath J Mr Carruthers, I'm sorry, have you finished that?

Carruthers May I just answer Her Honour the Chief Justice on the way in which.

Elias CJ Because you've got an Alsatia, on your submission, which is an excepted financial arrangement. But what applies to the rest? Is it just EH2?

Carruthers Can I invite Your Honour to go to our written submissions, not necessarily now, and at paragraph 32 we have tried to capture the whole construct of the rules which may assist Your Honour in putting EH2 into context.

Elias CJ I just want to know which provision attaches. You're taking us to the exception, but is it EH, I'll look at it later, but I just thought you could help me.

Carruthers Well, yes I think.

Elias CJ It's EH1, subs (2).

Carruthers It's EH1, yes Your Honour, yes. And EH1(1) is the calculation and EH1(2) prescribes how the expenditure is to be spread.

Elias CJ Yes.

Carruthers So I'm sorry Your Honour.

Elias CJ No that's fine I just wanted to see a map of it.

Carruthers Yes.

McGrath J Mr Carruthers can you just help me? There's at paragraph 22, when you set out s EH2 you refer to the amount of the gross income. I'd just like to check that the word gross does appear in the text. The 1994 version does not have it. It doesn't have to be done now but I just wanted to make sure I'm dealing with the right section.

Carruthers I'll check that Your Honour. I'll make a point of dealing with all of these matters that have arisen today first thing in the morning if I may.

Tipping J Can I just take you through to be tedious Mr Carruthers, I'm sorry, but this is really quite difficult. I think I've grasped your argument now.

Carruthers Yes.

Tipping J And can I put this to you to see whether I have grasped it. Expenditure must be spread unless it is in respect of a financial arrangement. Step one.

Carruthers Yes.

Tipping J A financial arrangement doesn't include an excepted financial arrangement such as an insurance unless that excepted financial arrangement is part of a wider financial arrangement.

Carruthers Yes.

Tipping J This is, hence it fulfils the definition and is not excepted from a financial arrangement. Hence you don't have to spread it.

Carruthers That's right. Now there is another way of looking at this issue as to whether it needs to be spread or not. The second of the relevant exceptions to spreading I've noted in 21(b). The non-contingent costs not exceeding 2 percent of the core acquisition price of the financial arrangement. And in dealing with that beginning at paragraph 30, I put it in this way, that if the expenditure of \$34,000 insurance premium is not solely attributable to an excepted financial arrangement, so EH2 does not apply, then those sums will prima facie be required to be spread under EH1 since the expense has been incurred in 1997 against a promise to pay money in the future upon a contingency.

Section EH1 requires that amounts representing in effect deemed interest in transactions involving non-simultaneous transfers of value, firstly be recognised and secondly spread over the period any consideration is deferred. So as a general rule, where a person ends up paying more than they receive, they are an issuer of the financial arrangement. The difference in value is interest which they may be entitled to deduct, while the party who receives more than they gave is the holder, and assessable on the difference.

One type of expenditure which is not subject to spreading under EH1 is non-contingent costs not exceeding 2 percent of the core acquisition price of any financial arrangement.

And going again to the guide: "An exception to the ordinary rule that all benefits received or provided under a financial arrangement are included in accrual income/expenditure calculations applies to fees paid or received under a financial arrangement. If the fees are contingent on implementation of the financial arrangement, that is the fee is payable only if the financial arrangement is entered into, such fees are included as benefits received or provided and no distinction is made between such fees and other financial arrangements benefits.

However if the fees are not contingent on implementation of the financial arrangement, that is the fee is payable whether or not the financial arrangement is entered into, then special rules apply. In general non-contingent fees up to 2 percent of the value of the financial arrangement are not subject to the accrual rules but are deductible or assessable as the case may be under ordinary non-accrual income tax rules. In most cases that means such fees are assessable when derived and deductible as incurred under for example DJ1(1). Any non-contingent fees over and above 2 percent of the value of the financial arrangement are included in the accrual benefits in the normal manner.”

And then rather forbiddingly I set out the relevant statutory provisions on this. Up to March 1986 I've set out the way in which EH1 read and, short of reading this, I'm not sure I can be of any greater help than to just identify how I've set it up and invite Your Honours to take time to go through it. So I've set out what EH1 did provide. And then from 1 April '96 to 31 March '97 it was amended to read in the manner I've set out.

And then I've picked up the various definitions that are involved in a consideration of the section. Acquisition price under (c). Core acquisition price under (d). The definition of holder in 1997 and on page 13, hold and issuer.

And where those provisions get to is this. It's not clear whether the JVA is the issuer or holder of the wider financial arrangement here. In relation to the licence premium promissory note it is the issuer since it is the debtor. In terms of the wider financial arrangement, including amounts payable by Trinity 3 to it, it may well also be the holder but the recipient of the greatest amounts of deferred consideration, namely the bank account balance representing the net proceeds of the forests. In either event, the core acquisition price is at least \$2.050m. And \$34,000 is less than 2 percent of the core acquisition price. It's 1.66 percent. The present rules exclude all non-contingent amounts from the spreading requirements under EH48(1).

So the submission is that the premium is not required to be spread under EH1 and it is deductible in full in the 1997 income year. The non-contingent character of the 34,000 is established by reference to clause 5(7) of what I've called the main agreement, the agreement to grant licence and options.

And we've submitted that the Judge's treatment of this clause was wrong for the reasons that we've set out in paragraph 40 of our written submissions. And the Commissioner's reply in this Court does not respond to this alternative contention.

Now Your Honours that completes.

Tipping J Is core acquisition price, and I'm sorry I haven't yet got to grips with the intricacies of this Mr Carruthers, but is that a sort of shorthand for all that you have to pay to acquire whatever it is you are acquiring, so to speak? In other words, is that the combination of all the payments?

Carruthers The answer is yes, subject to the gloss that it's less the cost of money.

Tipping J We'll leave that one aside.

Carruthers Yes.

Tipping J But essentially.

Carruthers Yes, yes.

Tipping J It's all that you have to pay.

Carruthers Yes.

Tipping J Less the cost of the money.

Carruthers Yes.

Tipping J Alright. So you're saying here in 36 that the investors had to pay at least \$2.05m.

Carruthers Yes. And that the.

Tipping J What about the reservation, does that not affect it?

Carruthers No I think I'm right on the core acquisition price.

Tipping J Alright. No doubt Mr White will tell us if he doesn't agree.

Carruthers Oh yes, and that's certainly what I would expect him to be doing. Now those are my submissions on that first argument about the insurance premium and the accrual rules spreading. The next argument I want to make.

McGrath J Mr Carruthers, did the Court of Appeal address this argument?

Carruthers No. Well the answer is undoubtedly no they didn't and I think in fairness with the Court of Appeal I don't think we squarely made the argument.

McGrath J The argument wasn't made in the Court of Appeal but you have resurrected it at paragraphs 36-40.

Carruthers Yes that's right.

Tipping J It was made to Justice Venning obviously, but he didn't buy it.

Carruthers Yes that's right, no.

Elias CJ But he didn't need to did he?

Tipping J He didn't need to because you weren't spreading anyway, but I think he addressed it didn't he? Because you said he was wrong in not going your way on it.

Carruthers Yes. The next argument I want to make concerns the licence premium, do your Honours want me to make a start on that?

Elias CJ Yes I think we would Mr Carruthers, thank you.

Carruthers Again I have given a written, a note for my oral argument and the submission is that the licence premium is properly treated as the cost of depreciable and tangible property for the purposes of s EG 1 and we have noted that the statutory provisions are set out in the Court of Appeal's judgment. The issue is this that Justice Venning disavowed what's called economic equivalence, what he identified as economic equivalence as did Justice Fisher, as the trial Judge in *Wattie* reversed on appeal and that's a case we come to discuss. But this is in fact the approach which Justice Venning had taken adopting the Commissioner's commercial reality submissions and the Court of Appeal in our submission rightly recognise this and we argue that the Commissioner's submissions are incorrect for this reason. So this is an argument where we are supporting the Court of Appeal decision and as a matter of convenient presentation of the case, I am content to make our argument first, but it's essentially a reply point to the Commissioner. So our submissions are these that the Commissioner does not engage with the following propositions. The first is that the licence was a capital asset of the JVAs which provided for their profit making structure indeed for all the reasons given by the Commissioner in his submissions. The licence premium was clearly a capital payment on orthodox principles. The cost of that capital asset was the licence premium. The licence is depreciable intangible property being a right to use land and I have given the reference to the

Court of Appeal judgment referring to the statutory provisions and as such that cost is the cost of the property to the taxpayer within EG 2 concerning the JVAs depreciable property and it couldn't be anything else. Thirdly, while the Commissioner is right that the licence imposed contractual burdens on the JVAs, any such lease or licence will impose a variety of burdens on a tenant licensee. That feature of the licence is irrelevant to how the cost of the asset to the licensee is characterised for depreciation purposes and fourthly, while the Commissioner is also correct that the JVAs expected economic benefits from the cost of the licence premium to share in the fruits of the harvest, that fact does not permit the Court to look through and to re-characterise the true nature of the burden and both *Wattie* and *Regent Oil* are clear about that and the Court of Appeal excepted correctly that approach. So let me just turn to the principles by reference to *Wattie*. Justice Fisher as the trial Judge saw that the \$5 million premium paid by the landlord on the grant of the lease to Coopers & Lybrand as tenant in addition to the agreed monthly rent subsidies and the inevitable effect as he put it providing a further economic subsidy to the firm taking on an onerous lease. In the Court of Appeal Justice Thomas agreed with that approach as commercial reality. The taxpayer itself, the majority of that Court and the Privy Council agreed that was commercial reality, but that it was not relevant to the question before the Court, which was "what did the terms of the contract themselves provide for in terms of acquisition of the relevant asset?". And in *Wattie*, relying principally on *McKenzies* applying both *Regent Oil* and *Tucker*, the answer was that the \$5 million payment was a negative premium, paid by the landlord to the tenant, being the converse of the more usual payment by the tenant to the landlord of key money. And that created an interest in land being a capital asset to the firm. *Wattie* and *Regent Oil* both involve facts where the person who paid the premium also assumed obligations under the lease contracts and also enjoyed the fruits of the rental bargain in *Wattie* or the trade tie in *Regent Oil*. That did not alter the correct or true characterisation of the premium paid to create a capital asset of the tenant *Wattie* or the landlord *Regent Oil*. And the analysis is that the licence is a capital asset of the JVAs. The licence premium was the cost of, and immediately created, a capital asset of the JVAs being the right to use the land owned by Trinity 3. As Lord Wilberforce said in *Regent Oil* "the distinction is between a payment to acquire an assets for future use, a premium paid on the grant of a lease or licence being capital, and the rent paid under a lease or licence which is for current use being revenue". The point is crucial here and in defining the Judge's error at first instance and the correctness of the Court of Appeal's reasoning. Justice Venning approached the question from the prospective of whether the premium should be held to be non-deductible because as the Commissioner correctly continues to submit, commercially it acquired or secured the future right to income from the licence being the net stumpage proceeds, if any. This is however a classic test for whether a payment is capital or revenue. In this case the licence premium is certainly an

affair of capital which goes for the foundation of the cost of depreciable property. That capital nature is not disqualifying, rather it is defining here because the entitlement to a deduction by way of depreciation depends on there being a cost for a capital asset. Depreciation is relevant only to that capital asset classification, as Lord Millet explained in *Peterson*.

Tipping J Is it crucial here, and I don't want you to anticipate a later point, here we are looking at it quite independently of any issues of tax avoidance. We are simply looking at it as to its legal character. And that's crucial for this, and one mustn't mix up the two issues.

Carruthers Yes that's very much the argument I make, because the whole of my tax avoidance case comes down to, what is it, and I think we came to deal with it in *Peterson* as being a threshold question, what is it when you comply with the statutory rules? When you are within the statutory rules, what is it that converts that to... ?

Tipping J Well I don't want to divert you, but it is important here, isn't it, to keep ones mind very firmly on what ball one is addressing.

Carruthers Yes and that of course is the issue when it came to the way in which Justice Fisher looked at *Wattie*, and the way in which Justice Thomas looks at a number of matters that he regards as not having commercial reality, but that was the wrong inquiry and the Judge was on the wrong inquiry. What is being analysed here is: what is an affair of capital? And what is an affair of revenue? And recognising that in a transaction, like a rental transaction or like a trade tie, you can have a payment, which is to capital account, and you can have an obligation, which is to revenue. With respect in the long way round I have agreed with you on that.

Tipping J And this is pretty important for this point is it not?

Carruthers It is essential to this point. Yes.

Gault J So your argument in this paragraph 6 is whether or not you categorise it as acquiring a right to use land or a right to acquire access to the stumpage, it is a capital asset?

Carruthers Yes

Gault J Is that a new way of putting it, from your point of view? If you centre all the judgments fixed peculiarly on the definition of "right to use land"?

Tipping J I rather thought the argument was that it might be wholly uncommercial to pay for a right to use land in these circumstances but it is nevertheless, inter partes, a payment of that ilk. Its validity if you like for the immediate issue doesn't depend on any questions of the Court looking at avoidance. They structured it as a right to use land. Now a label doesn't matter. I am not wanting you not to answer my brother Gault's point but you are really having it both ways aren't you, you are saying it is a right to use land because that's what the parties intended but it's also a capital payment, even if it doesn't come within that?

Carruthers Yes and in answer to Justice Gault I am confident that we put this in this way in the Court of Appeal but I can check that very easily overnight.

Gault J It's just a question.

Carruthers Yes.

Tipping J But your primary point as I understand you Mr Carruthers is it is a right to use land.

Carruthers Yes.

Tipping J But it's something of a fall-back to say if it doesn't fit within that category it's still depreciable. Or are you actually making that separate argument?

Carruthers I wouldn't describe it as a fall-back if you look at the reasons for the payment.

Tipping J But what I want to know as clearly as possible at this stage is are you justifying it on two limbs or only one?

Carruthers The argument is squarely put as the right to use land as depreciable capital.

Tipping J If it's not that for whatever reason and you don't support it on some general or it's a capital asset so it can be depreciated sort of argument.

Carruthers May I give you an answer on that in the morning?

Elias CJ In paragraph 7 you ground it on it being an interest in that.

Carruthers Yes I do. Yes I am just concerned that Justice Tippings raised with me

Elias CJ Another way of putting it.

Tipping J I am not encouraging it, I just wanted clarity.

Carruthers I understand that, I understand that very clearly, but I don't want to say no to you at this stage.

Tipping J I think Mr White might have, subject to what happened in the Court of Appeal, might have something to say if you are trying to support it on a

Carruthers I understand all of that, and I am sure that my answer will be in the morning the same as I have given it now, that I am supporting it as being a right to use land and that gives me the depreciable.

Tipping J Whatever it's state may be under the next stage, it's a right to use land.

Carruthers Yes and I am content to face that with some equanimity at some stage tomorrow your Honour.

Elias CJ Is that necessarily the same thing though as an interest in land, that's the way you put it?

Tipping J No because a licence doesn't necessarily create an interest.

Anderson J Especially when it's non-exclusive.

Tipping J You can cite *Fatac*.

Carruthers Yes.

Elias CJ Yes. You do say that, you do talk about an interest in land there don't you.

Gault J That's under a lease. I think that's the reference there.

Carruthers I am at the top of page 3 and I have submitted that since 1968 New Zealand has by special provision allowed for the amortisation of premia paid to acquire a lease or licence, because such are normal capital assets. Thus where a landlord grants, or sells a valuable leasehold interest, as lessor, to a third party, that person pays what is commonly called "key money" which is in a law a "premium". As the Privy Council observed in *Wattie*, such a payment or receipt is inherently capital. The payer is acquiring an interest in land, as lessor. With it goes the terms of the lease itself. The new owner of the lease/landlord will have purchased the lease, knowing that the existing

tenant has the usual rent and other (for example, maintenance) burdens. The premium has been paid because the new owner regards that leasehold interest as being advantageous because of the underlying value of the rental covenant from the tenant.

In this sense, and as the Commissioner contends interest his case, in “commercial reality” the owner can be said to have paid the premium as the price, in order to secure the rent. The amount of the premium will often be calculated by reference to such expected earnings, and, “of course they have”, (to borrow from Lord Wilberforce in *Regent Oil*, as were the facts in *Wattie*). That “commercial reality” however, is irrelevant in determining what in law the payment was for. Where as here, the JVAs paid the licence premium in order to secure or to obtain a capital asset, it's critical to identify what the cost of that asset was – being the Licence itself. The fact that the Licence had running or associated with it by collateral contract the right to share in any net stumpage is neither here nor there, being no different from the right of an owner to collect the rent. That’s why in *Wattie* the landlord paid Coopers & Lybrand \$5 as a negative premium on the grant of that firm’s lease – it wanted a tenant to pay it rent, as prescribed in the lease itself.

The stumpage proceeds and the right to them arose from the JVAs carrying on their silviculture business on Trinity3’s land pursuant to the Licence. As part of their contractual permission to be on that land, like any “tenant” the JVAs had to obey what are simply contractual rules as set out in the Licence. Most “tenants” have obligations imposed on them when they seek to use another’s land. Neither the nature and extent of the obligations imposed nor the restrictions on use can define whether or not the right conferred is a Licence, as a matter of law, being a capital asset subject to depreciation. And then I go on to a section on why the Judge at first instance was wrong, and he observed that a party is normally entitled to the fruits of their business activities as of right. In that passage the Judge does not recognise that there were two different people carrying on business. One is the landowner, Trinity3, certainly it owns the land and the resulting forest. It is entitled to the premium and annual licence payments. It is also entitled to the benefits of the proceeds of sale of the timber.

The other person is the JVAs. They were using their asset – the Licence – for the purposes of what is their business. The fact that they are only entitled to net stumpage proceeds after the “prior” obligations are satisfied cannot affect the result. Why are these proceeds not considered to be “the fruits of the [JVAs] business activity as of right”? The Judge is not correct with respect to say that “the only business activity” is referable to Trinity3, as if the JVs are not themselves carrying on their own –separate – business, of which he takes no notice. Great emphasis is put by the Judge accepting the

Commissioner's submissions, repeated here on appeal, on the "obligations" of the JVAs, without any explanation as to why "obligations" make any difference as to whether they own a capital asset – the right to use the land by way of the Licence. And then I deal with the Commissioner's submission.

Essentially, for the reasons summarised appropriately by the Court of Appeal the Commissioner's submission is directed at the wrong legal question – for all the reasons he gives, he establishes beyond doubt that the Licence is a capital asset of the JVAs. If that were the correct focus of the question before the Court, on orthodox capital/revenue principles, the payment of the Licence Premium would be a capital (non-deductible) amount. That's common ground.

However, the capital/revenue question is not what ss EG 1 and EG 2 are focused on. The focus is on the "owner" of what the Act defines as being "depreciable property" and the "cost" of acquisition to the owner. By its very nature, "depreciable property" concerns what the Act treats as being capital assets. In this case the Licence is such an asset of the JVAs. The interpretation question posed is not what is the characterisation of the asset (capital, or not) but, rather, being a capital asset defined as being "depreciable property", what was its "cost" (being the approach taken to the original depreciation base, in s EG 2)? "Cost" is not a defined term, but the correct approach is stated by Lord Millett in *Peterson* and I have given the reference.

The Licence Premium is the "cost" of the Licence; it could not be anything else.

While the Commissioner complains in his submission in this Court that his contractual analysis was not addressed by the Court of Appeal, in fact it was, it was stated at paragraph 100 and dismissed at paragraph 101. The Court not only saw no "fatal inconsistency between the imposition of a contractual obligation on the one hand and the grant of licence on the other hand, with a concomitant obligation to pay a premium for the discharge of a contractual obligation" but also rejected that proposition, as being prohibited economic equivalence and in our submission it was right.

There is no such "fatal inconsistency" as both *Regent Oil* and what *Watties* show on their facts. So just drawing that to a conclusion.

EG1 requires that the JVAs claiming the deduction on account of depreciation is the "owner" of depreciable property. It's common ground that by paying the Premium, the JVAs were the "owner" of the Licence. It is also common ground that such an asset was a capital asset of the JVAs. The premium paid on ordinary concepts is an affair of capital. Expressly, "depreciable intangible property" is

“depreciable property”, if within the items listed in Schedule 17, 4 is “the right to use land”.

Justice Venning held that the Licence was not such a “right to use land” repeatedly saying that the “legal effect” was to secure – as the Commissioner contended – the right to the balance of the net stumpage.

Section OB 1’s definition of “depreciable property” associates the ownership of the capital asset of the taxpayer with its “use” in deriving gross income. In this case, it is common ground that the JVAs were in “business” (having the intention to make a profit from the conduct of their venture). It follows that the Licence, being the JVAs capital asset, was committed to the income earning process of the business, and hence was “used” by it in the relevant statutory sense.

So our submission is the Court of Appeal’s conclusion is correct accordingly.

Gault J Mr Carruthers when peeking through the analysis of Justice Venning of the contractual relationship a thought that went through my mind was, how does the position of the JVA differ from that of Pan Pine being contracted to establish and manage the forest?

Carruthers The answer is, your Honour, that that is the method by which the JVAs conducted their business. There must be endless illustrations of companies and organisations that whose business involves an overall superintendence of work that is actually performed by other people.

Gault J The expected contractual payment for doing that work would hardly be described as a capital asset for use of the land. I’m sorry, that’s just a phrase, you can consider it overnight.

Carruthers Yes, thank you your Honour I would like to do that and I will put it on our check list for the morning.

Elias CJ Thank you counsel. We will take the adjournment now.

Court adjourns for the day: 4:13pm.

Tuesday 24 June 2008

Court resumes: 10:06am

Elias CJ I am sorry counsel about the heat in this room. Apparently the technicians are working on it. I thought it was just me yesterday. I almost said something but they are working on it and hopefully it will improve.

Carruthers May it please your Honours, I am picking up, as I said I would do, on the various issues that were raised that we were unable to deal with on the spot yesterday. And I have handed up a series of notes which I will very quickly go through because they deal with the issues.

Your Honours may recall that the first issue was the use of the word “quarantining” in the evidence that I went through from Dr Muir and the tax information bulletin that you have, at the bottom of the index refers to the deferred deduction rule and I have included the discussion of that. It is probably the second paragraph that deals with the issue. It was designed to apply to situations where an investor is not at real risk of having to repay loans. However, a number of criteria are used to target the rule to minimise its impact on everyday commercial transactions. Where the rule applies deductions are deferred, to the extent the loans are outstanding and the investor continues not to be at real risk of having to repay them. It is a little wider than that, and I think I can summarise it in this way, that the first point to be made about it is that it is not retrospective, so it does not apply to this case. What it does is it

Elias CJ Sorry what is it based on, Mr Carruthers? Is this a new section? Section DK1, is that it?

Carruthers It is DK1 and subpart ES.

Elias CJ So when did it come in? This is later than our case.

Carruthers Yes it is. Yes but because it was just used, it is actually quite helpful to just understand the concept and it is this, what is ring-fenced or quarantined are the deductible losses and the concept is to take losses as incurred into a suspense account, which is carried forward against the project until it yields taxable returns. The losses can then be used against the returns. So that is why quarantining or ring-fencing is used. It is just takes those losses forward. Now, in this case as I have said, this wasn't retrospective so it doesn't apply. So we are in the position that if BG1 applies then we lose all the losses forever,

irrespective of how spectacularly successful our project might be in due course. So that's the quarantining issue.

If I can come now to a moment of great embarrassment

Elias CJ You lose the ability to bring them into, to offset them against profit later, is that what you are saying?

Carruthers Yes, for us they are either deductible as part of the rules that we operate under or if BG1 applies we lose them altogether, and that is irrespective of how successful the project is. I just make that submission to draw the contrast between the arrangement that is now, or the provision that is now in force.

Elias CJ Sorry, um, Madam Registrar, the air conditioning is clearly not on at all. So I think, I wonder whether it would be sensible to open the doors, to at least get some draught through? And can you check what is happening, and when we can expect it to come on? Thank you.

Carruthers The next piece of paper is the correction to the quotation and I have got to say it is a moment of huge embarrassment but what happened was quite simple.

Elias CJ Sorry which piece of paper is this?

Carruthers This is Ben Nevis reply on the IP spreading argument, was that a line was left out which didn't draw the distinction between Justice Venning at 203 and an extract from the accruals regime guide and I have attached that. You will see the example in the middle of page 254, which is the example that we quoted and you will see that last sentence in the first paragraph where payment in full takes place and so in the note of argument that I handed up yesterday that addition in square brackets was our addition, equating payment with the notes. And Justice Tipping took me to task about whether that could properly be said to be payment and what I have done is just record the paragraphs that I referred to yesterday in the way in which the High Court Judge dealt with it and, in my submission, correctly dealt with it. He correctly stated the proposition as the simultaneous exchange of consideration, so that there was no spreading required under the EF Rules. He then correctly set out the reasons for that, and we have been to those paragraphs. The amount was incurred and hence deductible in full when the final note was delivered. He then recorded at 201 correctly the legal question concerning the AE Rules as to whether or not the final IP note required spreading or whether it was excluded. And then the famous paragraph 203 correctly stated that the delivery of the IP note was money as defined in OB 1.

And just responding directly to Your Honour Justice Tipping's question on the nature and legal effect of the promissory note, I have just annexed a section from Byles and if I can just go to that. In the third paragraph "Whether a Bill is Taken". "Whether a Bill is taken in complete satisfaction or merely as conditional payment, is a question depending on the facts of each case. The onus lies on the party alleging that the Bill operated as a complete satisfaction of the original debt. The presumption of fact being the other way since it is already stated if a Bill or Note is taken on account of a debt, and nothing is said at the time, the legal effect of the transaction is that the original debt remains but the remedy for it is suspended until maturity of the instrument in the hands of the creditor."

Now in this case the parties agreed that there was complete satisfaction and that is the effect of clauses 3 and 4 of what I have described as the main agreement, and those clauses are in Volume 15 beginning at 2965. I don't need to take you to them but I will give you a reference.

- Tipping J So the cause of action would be on the note not on the original debt?
- Carruthers Yes.
- Tipping J Yeah, that's fine. It was only that conjunction that was troubling me Mr Carruthers.
- Carruthers Yes thank you Sir. And as you were quite right to raise it with me because it is an important issue for us. So I think that deals with that issue.

Now the next topic is next tidying up whether the licence premium is correctly treated as being deductible and while I am not picking on your Honour Justice Tipping, it is another issue that you raised with me on the basis that were we trying to have it both ways. And the position I have recorded is this. As a general conceptual matter the Act provides for depreciation in order to enable the business to recover over time the amount of its capital used in the production process. The statutory depreciation regime provides for at times a rough approximation of the reduction and useful life of the relevant assets and machinery is a common example. Until there was a specific enactment to provide for depreciation, it was established long ago that there was no deduction allowable for wastage of capital value. But in this case there is a capital asset, the licence. The questions in issue are first whether it fits the statutory scheme for depreciation of that type of asset and we say yes for the reasons I argued yesterday. And what is the cost of that asset, and we say it is the amount of the licence premium. There is no attempt to have it both ways. Rather the attempt is to have it one way, namely that there

is depreciable property. If that is correct, the position is that the licence premium is itself to be spread under the relevant depreciation timing rules over 50 years being the term of the licence itself. So it is a capital asset on our argument. It is depreciable property and the depreciation rules required depreciation over 50 years.

The next matter on that same piece of paper is the correct legislation. To Your Honour Justice McGrath, yes gross income is the correct expression. But can I just deal with this because Your Honour's question actually raises an awkward historical feature. At the point that this dispute arises, there is a re-write project on foot, which is a re-ordering of the 1994 Act. And in 1997 and 1998 the Act was again renumbered. And the only way for the Court to be certain that it has the exact language is really to have the, probably the best course is the two CCH editions for 1997 and 1998 side by side. Now having said that, in the Crown's Volumes they have been prepared very carefully to try and ensure that the Court does have that material accurately and I am not criticising the way that that's done.

- Elias CJ Where is that? I hadn't appreciated that
- Carruthers It's in the yellow volume.
- Elias CJ I have just been going off the old bound volumes.
- White There should be three volumes, yellow-covered, for the Crown, the third one being Commissioner's supplementary bundle of authorities which includes the relevant legislative materials.
- Elias CJ Thank you Mr White.
- Carruthers And what my learned friend has done is to try and capture the very point that I am making. If any issue does arise, for our part we are able to provide the two CCH volumes so that the Crown has that exercise. It is simply an offer if the point arises.
- Tipping J Is it a case of just desirable precision or is it a case that is said that there are some material differences from one year to the other?
- Carruthers No it is only desirable precision.
- Elias CJ And it is the numbering is it?
- Carruthers And words which prompted Justice McGrath's question to me, as to whether

Elias CJ So it is a one volume, it is the supplementary bundle of authorities.

Carruthers Yes that is where the Crown has put material together. If you wanted to be absolutely sure that you have complete accuracy then we can provide the actual source material from the CCH guide which is probably as good as you get, recognising that there are official volumes.

McGrath J But you have no issues with the Crown's compilation of the relevant material. If we work off that, we will be right.

Carruthers Your Honour that's right. We have no criticism of that, and in fact we have a compliment of it, but it is just an issue that I think needs, you need to know of.

McGrath J Thank you.

Carruthers Can I come to the final piece of paper which is in response to your Honour Justice Gault on the Pine Plan issue, and I have just prepared a short note which really captures what I was trying to answer to your Honour yesterday without access to the material. And the role of Pine Plan is independent contractor. I didn't take you to that forestry planning and management agreement yesterday as among the key documents. But that's in Volume 16, it is the first document in that page. And under clause 12.2 Pine Plan as the independent contractor was engaged to prepare the forestry land, plant and manage the forest. It obtained its permission to enter the land under clause 11 of the agreement that I have referred to, and that's a permission from the joint venture. It does not come from Trinity3. So Pine Plan is paid to perform its work. It has no interest whatsoever in the harvest proceeds. It has paid nothing and is not required to pay anything to gain entry to the land or to plant the trees. It has no contractual relationship with Trinity3 although it is obliged to send it progress reports. So that leads to the position that Pine Plan does not obtain any relevant depreciable property right and it has no relevant cost in respect of a capital asset. So that issue is preserved squarely for the JVAs.

Now your Honours that leaves three matters that follow from yesterday. The first is the issue of attribution which your Honour Justice Gault raised with me and I did say that that would be dealt with in the course of argument. That is an issue that arises on Mr Harley's, my learned friend Mr Harley's, part of the argument and he will deal with that. There are two other matters. Your Honour Justice Gault raising the issue of the 300 stems, and Justice Anderson raising the desirability of a flowchart. Those two matters are still work in progress, and we will deal with those at an appropriate point in the argument.

Gault J When you are dealing with the 300 stems, I have become even more confused, Mr Carruthers. In the principal agreement there is a frustration clause that seems to avoid the insurance at the very time it is meant to bite. And I need some help.

Carruthers I understand and it was the subject of discussion and I am sure we can resolve that and we shall your Honour. My learned friend Mr Stewart will address on the sham issue if your Honours please.

Stewart Your Honours will have um two pieces of paper. One that is the sham submission and the other one should be Mr Bradbury's role in the documentation which I refer to in the course of the submission.

Elias CJ This submission is as extensive because it follows the direction from the Court that we expect you to address the sham issue. So it is not covered in your initial submissions.

Stewart No your Honour.

Gault J What was the second paper you said we should have Mr Stewart?

Stewart It is three pieces of paper your Honour, which is headed up "Mr Bradbury's role in the documentation".

Gault J I haven't seen that.

Stewart You haven't seen that Sir.

Elias CJ No, it should have been above, handed in today, up on here.

Tipping J You are going to the sham first. We could probably make a copy, get another copy made.

Elias CJ Yes I am sorry the Registrar is out on an errand.

Tipping J Have you got another

Stewart I've got another one here.

Elias CJ There are no holes.

Stewart Mr Harley broke the xerox photocopying machine this morning. He was under a bit of pressure.

Gault J With a hammer. [laughter]

Stewart I think that it happened before we arrived at the chambers, so.

Tipping J You can take out your frustrations Judge.

Stewart Your Honours, by way of introduction, of course it goes without saying that an allegation of sham is a serious matter and should never be made lightly and, having been made of course, the appellants respond to it seriously, involving as it does an issue of dishonesty. The allegations of a sham in this case have changed markedly on each of the three occasions that this matter has been argued before the Courts. And when considering the sham allegation being made in this Court it is instructive to briefly review the emergence of the Commissioner's sham allegation in the form in which it was advanced in the High Court, the Court of Appeal and this Court. The sham allegation was never pleaded in any of the statements of defence filed by the Commissioner, despite the fact that the Commissioner filed a second amended statement of defence as late as 11 August 2004, being just five days before the trial.

Prior to that on 14 July the appellants sought an order that the Commissioner file and serve a more explicit statement of defence so as to provide full particulars of the tax avoidance dimensions of the alleged arrangement pleaded in the statement of defence. And on the 26th of July, Justice Venning ruled that if the Commissioner wished to rely on other factors than those expressly pleaded to support his case, that the arrangements had the purpose or effect of tax avoidance, then the Commissioner was to provide an outline to that effect.

Elias CJ Mr Stewart I haven't looked at the pleadings but I suppose that the Commissioner denied the efficacy of the arrangements. He must have traversed the pleading.

Stewart Yes he said the arrangement avoided tax avoidance and so had the effect, more than incidental effect of tax avoidance. And that really the pleading mirrored the words in the legislation. And what the appellants were pressing for were the particular matters that the Commissioner relied upon. On the 30th of July the Commissioner filed a list of further factors to be relied upon, and factor 5 said the deduction by Southern Lakes Forestry Joint Venture plaintiffs in the 1997 income tax year of the insurance premium of \$32,000 per hectare payable in 50 years time was a pretence and/or artifice and/or outside the range of acceptable practice because the "insurance cover" with CSI was a sham. No similar allegation was made in respect of the initial premium payment of \$1307 per hectare.

At a pre-trial conference on the 4th of August, the appellants sought further detail in relation to the same allegation appearing in factor 5. And on the 6th of August the Crown Law responded, saying the word

“sham” in factor 5 of the further factors is used in its ordinary sense – “a thing that is not what it is purported to be; a pretence”. And the Commissioner’s case would be that no contract of insurance was ever entered into and that there was and is no prospect of any insurance cover being provided. The Commissioner would rely on *Calkin* in support of the proposition that, as there was no contract of insurance, neither the initial premium nor the final premium was a real insurance premium and therefore there was no entitlement to deduct the amount involved. In addition, the Commissioner would claim that in the case involving Dr Muir and Mr Bradbury the insurance arrangements were “a sham” in the narrow legal sense referred to by Lord Justice Diplock in *Snook*.

In opening and closing submissions at the trial, the Commissioner’s case in relation to sham was as follows. He relied on the expert evidence of the insurance witnesses and *Calkin*’s case in making the submission that if the court found there was no insurance, then it would be fictitious to describe the payments made by the appellants as “premiums” so as to entitle them to claim them as valid; and secondly he relied on the traditional *Snook* test of sham in respect of Redcliffe and Bristol.

In the Court of Appeal the Commissioner advanced the sham argument on the following grounds. The insurance documentation did not reflect the true agreement between CSI and the appellants, because CSI was not in fact an “insurer” capable of providing any “insurance”; that the appellants either knew that there was no “insurance” in fact or, if they did not know, they did not care. In the unlikely event that CSI sought to enforce the promissory note in 2047, it was unlikely that they or their LAQCs would pay the final “premiums”. This was a new argument in the Court of Appeal. I note that in my learned friend’s written submissions he refers to the fact that Venning J overlooked the fact that the policies were separate, sorry that this is a new argument completely. Alternatively, in the Court of Appeal, the Commissioner said that the insurance arrangements between CSI, Redcliffe, Bristol and Mr Bradbury were a sham because in terms of the Southern Lakes Joint Venture they were individually and severally liable under the “insurance contract” with CSI for the “insurance premiums” and the common intention required by *Snook* was present in each case. That was a new argument in the Court of Appeal. Although the submissions say that this was overlooked by Justice Venning and he got it wrong, it was not addressed, we faced that argument for the first time in the Court of Appeal.

Now in the High Court Venning J considered the insurance arrangements and held the contractual arrangements prima facie satisfied the requirements for an insurance contract at law, and were deductible under DL 1(3). The sham allegation was dealt with by the

Judge in a little over three pages. The Judge noted that the principal difficulty confronting the Commissioner's sham allegation was the requirement that the parties must have a common intention that the act or documents were not to create the legal rights and obligations which they gave the appearance of creating, reflecting *Snook* and the adopting of Diplock LJ's judgment by the New Zealand Court of Appeal in the cases discussed by Justice Venning.

The Judge recorded that the insurance arrangements in issue were principally the proposal and policy. The Judge noted that the parties to those documents were not only Dr Muir, Mr Bradbury and CSI, but also other investors in the joint venture. In fact there were 12 parties to the insurance arrangements: CSI, the joint venture, the eight joint venture parties, Trinity Foundation (Services No 3) and Trinity Foundation Limited. And I come later to discuss their roles in more detail. The insurance arrangements comprised the documents listed in paragraph 17, and I have given the references to where they are in the case on appeal.

As recorded by the Judge, there was no evidence to suggest, and the Commissioner did not submit, that the other parties were parties to the alleged sham or that those parties shared a common intention that the documents did not create the legal rights and obligations which they purported to. The Judge correctly stated the position when recording that the insurance contract or arrangements cannot be a sham insofar as they relate to Dr Muir and Mr Bradbury but not a sham in relation to the other investors.

Elias CJ What was the interests, sorry, claimed in the caveat. We don't have a copy of that I take it, because you haven't given us a reference.

Stewart The CSI held a debenture security over the land as security for the obligations by Trinity3 and the investors to pay the premiums. Therefore they are the equitable owners of the land at law. And the caveat supported that interest.

Elias CJ Right, thank you.

Stewart That does become important in the analysis of whether the investors ever had an intention to perform their obligations, ie. pay the final premium. Because, of course, CSI were first security holder. They got the first proceeds from the harvest.

As recorded by the Judge there was no evidence to suggest, and the Commissioner did not submit, that the other parties were parties to the alleged sham or that those parties shared a common intention that the documents did not create the legal rights and obligations which they purported to. The Judge correctly stated the position when recording

that the insurance contract or arrangements cannot be a sham insofar as they relate to Mr Bradbury and Dr Muir but not a sham in relation to the others.

The Judge rightly disposed of the sham allegation on this threshold point and did not give any consideration to the question of whether there was in any event any basis for a claim that any party executed documents knowing that they did not reflect the true agreement or not intending the documents to bind the parties according to their terms. This is not surprising given that the Commissioner did not point to, let alone establish, a single instance of a party executing documents knowing that they did not intend to reflect the true agreement between the parties. This includes Redcliffe and Bristol. As detailed below, both gave evidence to the contrary, denying the assertion, but we had no finding of course.

The Judge gave short shrift to the Commissioner's reliance on *Calkin*. His Honour noted that in *Calkin* the taxpayer's payments were made to a confidence trickster and were not deductible on the simple basis that there was in fact no business in respect of which the deductions were made. The business did not exist – except in the taxpayer's mind.

In this case the Judge found: that CSI exists; it was incorporated; it had been issued with a licence to provide insurance; contracts were signed; there is a Douglas Fir forest growing in Southland; some premiums had been paid. The Judge omitted to note that Trinity companies also executed the documentation.

The Court of Appeal rejected the Commissioner's argument that because in law there was no true insurance, the contracts were *per se* shams. The Court rightly focused on the need for common intention – the relevant state of mind of the other parties.

The new argument for the Commissioner in the Court of Appeal that the other taxpayers neither knew nor cared as to their insurance rights and were, accordingly, “tainted by the shamming state of mind that he attributed to Dr Muir and Mr Bradbury” was not permitted to be made for the reasons set out in paragraph [54], and I don't need to take your Honours to that, unless you wish to.

At paragraph [55] the Court disagreed with Justice Venning and said it was prepared to treat the policy as “in effect” creating eight separate insurance arrangements, relevantly one for each of Redcliffe and Bristol. In paragraphs [58] to [63] the Court then gave a series of reasons as to why Dr Muir and Mr Bradbury were nearly involved in a sham.

The Commissioner's criticisms in his submissions in this Court of some aspects of the Court of Appeal reasoning in paragraphs [58] to [63] are, in our submission, well made. The appellants have made further substantive criticisms of most of the reasoning in their primary submission to this Court. For the reasons which follow the Court of Appeal's conclusion, however, that there was no sham was correct.

Now before I come to summarise the Commissioner's argument in this Court, and the appellant's response, I have a section here picking up in my submission the relevant law, which I don't need to take you through but I would like to take you to.

McGrath J Just before you leave what you have just been dealing with Mr Stewart, the basis for, as you put it, treating the policy as in effect a separate policy, was just joint and several liability was it?

Stewart It was the fact that after the policy had been established, the documentary agent, Mr Taylor, wrote to CSI saying that although we hold the shares as bare trustees as tenants in common for the joint venture as a whole, we would like you to recognise that the joint venture parties have separate proportionate interests in the forest, and we would like you to limit your recourse to those parties for premiums, according to their several interest.

McGrath J Yes.

Stewart And that was accepted but there is only the one proposal, one policy, one security and I come in and deal with that at the end of my submission as to why the Court of Appeal got it wrong. We weren't assisted by much by the Court of Appeal's analysis.

McGrath J But that's right, because you have answered my next question. Mr Carruthers took us yesterday morning to one insurance policy which was in effect, I think, in the name of the Southern Lakes. And that is the only policy is it?

Stewart Yes, that's right. If I could just mention at paragraph 30, the decision of the Court of Appeal in *Paintin*. A graphic reminder of what sham is. "The word "sham" has no applicability to transactions which are intended to take effect, and do take effect, between the parties thereto according to their tenor, even though those transactions may have the effect of fraudulently preferring one creditor to others, and notwithstanding that they are deliberately planned with this in view. If such is their effect, there are statutes and rules of law designed to thwart the intentions of those who enter into them; but the fact that the law discountenances such transactions as these does not render them "sham"."

Now, at 31, the decision of the Court of Appeal of Justice Richardson in *Securitibank*, it is important that a systematic and objective approach is undertaken to ascertain the true nature of the transaction. And his Honour sets out some factors to provide guidance in that analysis.

Paragraph 32, I don't need to take us to the well known statement of the Court of Appeal of Lord Justice Diplock in *Snook*.

At paragraph 33, a recent decision, the fact that the act or document is uncommercial, or even artificial, does not mean that it is a sham. A distinction is to be drawn between the situation where the parties make an agreement which is unfavourable to one of them, or artificial, and a situation where they intend some other arrangement to bind them. In the former situation, they intend the agreement to take effect according to its tenor. In the latter, the agreement is not to bind their relationship.

Tipping J Is there any authority on sham that suggests that if a document deliberately miscarries, it is a sham. I am not making any assertions at all. I am just curious. Say, and I am by no means saying this is the case here, say for whatever reason this document actually involves CSI in undertaking no risk, I am not sure that that would be a sham. It would be close or analogous to the fraud cases wouldn't it, where there is no, where there is in effect misleading. But that doesn't mean to say that it's a sham.

Stewart No. If that is what the parties intended

Tipping J Well they wouldn't. I mean, they wouldn't intend an insurer purportedly issuing an insurance policy to actually, in terms of that policy and other documents, not to be on real risk at all. I am not saying that that's my view of these transactions. I am just exploring with you the extent of the concept of sham. It's highly unlikely that the beneficiaries of the insurance would have an intention that the insurance be effectively of no value.

Stewart Absolutely.

Tipping J So there wouldn't be any common intention.

Stewart No.

Tipping J But the document would amount to, in effect, a misfiring. But that's not necessarily the same as sham is it?

Stewart No, the document may not have achieved the intended status. We have the *Euro-national* decision of the Court of Appeal where that point was graphically made, when they were trying to deal with s 62 of the Companies Act by establishing employee unit trusts. And went into terribly complex arrangements which were horribly complex. They didn't achieve the purpose that they were intended to, which Justice Cooke said they nevertheless operated in a way that the parties intended them to, and took effect as such and they could not characterise as sham.

Elias CJ But if you have a statutory exception for insurance contracts and if this doesn't, I asked this question yesterday of Mr Carruthers, if the insurance company, if the, the label can't be determinative, if it isn't an insurance contract, then you don't need to go to sham to say that the exception hasn't been made out, that's just a matter of objective interpretation isn't it.

Stewart Absolutely your Honour. The parties, despite their best efforts and intentions, failed to achieve the status that they accorded to their transaction.

Elias CJ Yes.

Stewart And of course we are not troubled with that issue today.

Elias CJ Why do you say that. Just because it hasn't been argued.

Stewart No. No. I wouldn't be that optimistic. Not with my learned friend Mr White to follow. I would try and be prepared for everything he has got to fire at us. I say that because it is in his s 24 notice he wanted to uphold the judgment on the basis of sham but not on the distinct and separate basis that there was no policy of insurance. Now if I can just take you to that, because if we go to the respondent's submission, if we can just deal with that, because this is an important point your Honour.

Elias CJ Do you want to go to the notice?

Stewart No, if I go to, well it is evident from the submission too.

Tipping J The Chief Justice and I are sort of broadly on the same wavelength on this point. I mean, we have got to be very careful to distinguish a sham allegation from an allegation that in whatever, in the circumstances this was not an insurance, whatever else it was, it wasn't an insurance.

- Stewart That's right. You see, and the position became hopeless for the Commissioner after Justice Venning, who had heard considerable evidence, analysis by experts and submissions, concluded this was a contract of insurance. The Court of Appeal reached the same conclusion. It then becomes a very high hill to climb to submit that these parties didn't intend this to be a contract of insurance, when there are two courts finding that in fact it did.
- Elias CJ But it may not be to do with intention. It just may be to do with whether the statutory exception has been achieved by what the parties did.
- Stewart Well certainly it was run in the lower courts that there was no contract of insurance and the parties knew that. At least in respect of Mr Bradbury and Mr Muir. Now with a finding that it is a contract of insurance it gets very difficult if not impossible to argue, or it becomes irrelevant anyway, they've achieved their status, it was a contract of insurance. It did qualify. And, as the passage I mean to refer to you, in *Paintin*, and also there's another authority which if you just
- Elias CJ Sorry, *Paton*?
- Stewart *Paintin v Nottingham*, I just took you to the judgment of Justice Turner.
- Elias CJ Oh yes.
- Stewart Now if you just scroll forward in the written submission I handed up this morning, page 13 down the bottom of the page. "On the other hand a transaction is no sham merely because it is carried out with a particular purpose or object. If what is done is genuinely done, it does not remain undone merely because there was an ulterior motive in doing it." In other words if the motive was to create a contract of insurance so that the tax treatment was favourable that doesn't make it a sham if that's what the parties intended. They obviously intended in this case to create a contract of insurance. It may be vulnerable on other grounds such as tax avoidance but not on the sham ground.
- Tipping J Well sham means they pretended it to be an insurance full-well knowing that that's not what they were seeking to achieve. That's quite different from intending to create an insurance genuinely and not actually achieving that objective.
- Stewart Well you know, if that was, well.

Tipping J But that's the Chief Justice's point. If they didn't actually achieve the objective then it's not insurance for the purposes of the tax Act.

Stewart No.

Tipping J But you say Mr White's not arguing that.

Stewart No. And I'll show you why. Paragraph 20 of the respondents submissions. Sorry, page 20 Your Honours I beg your pardon. Page 20 paragraph 33. In this Court the Commissioner accepts that there was a contract of insurance for all the investors other than Redcliffe and Bristol and that the premiums are deductible under DL1(3) subject to tax avoidance and the spreading rules. Now you can't have a document being a contract of insurance at law. In other words qualifying as a contract of insurance for some parties and not for others on the pure legal analysis of the document.

And then the Commissioner's further, and I come to this, argument in this Court does not say that the parties never had a contract of insurance. In fact as I come to it, it's very difficult to discern exactly what the allegation is in this Court. But we're not required to traverse the arguments in the High Court and the Court of Appeal as to whether in fact at law there was an effective contract of insurance for the purposes of DL1(3).

Tipping J Well I too would need some considerable help as to how you can sever some of the insured and say that they're not, as to them it's a sham but as to others it's not.

Stewart That may have been the motivation that persuaded the Commissioner to restrict the sham argument now to the narrowest form that it's ever been in before the courts today. And I have difficulty in seeing where the sham exists. And I do take Your Honours to that and if I persuade you on that then no doubt Mr White will bring you back the other way if he can.

In fact it's timely because this brings me to page 12 and the allegation of sham in this Court. The sham allegation in this Court has changed significantly from the allegations advanced in the Court of Appeal. In particular the Commissioner has accepted the decisions of the High Court and the Court of Appeal that the arrangements with CSI did satisfy the requirements for an insurance contract at law. As a consequence the Commissioner makes no allegation of sham against the investors other than Redcliffe, Bristol and Mr Bradbury. The Commissioner also accepts that the appellants other than Redcliffe, Bristol and Bradbury have these deductions and I've just taken you to that passage in the Commissioner's submissions.

As far as Redcliffe, Bristol and Bradbury are concerned, the Commissioner says: the insurance premiums were not deductible under DL1(3) because in those cases the insurance arrangements were sham and the Court of Appeal decision to the contrary was wrong. The submission at paragraph 34 does not say why the insurance arrangements were a sham. The Commissioner argued in the Court of Appeal that the liability of each member of the Southern Lakes Joint Venture was individual and several. The Commissioner submits in this Court that the separate insurance arrangements between CSI, Dr Muir and Mr Bradbury's LAQC could be shams on orthodox *Snook* principles. Again, the Commissioner does not say why the insurance arrangements could be shams on orthodox *Snook* principles. The Commissioner's submission at paragraph 37 refers to the liability of Dr Muir and Mr Bradbury being in reality contingent and not definitively committed. The submission then says that in the circumstances CSI and Dr Muir and Mr Bradbury clearly did have a common intention not to create the legal rights and obligations which the insurance policy gave the impression of creating. This appears to be an allegation that Dr Muir and Mr Bradbury had no intention of making the final insurance payment of \$32,000. That's as close as I can get to identifying what the Commissioner is saying was the sham.

The Commissioner says that the set-up of the insurance and premium arrangements were clearly established, that the intention was to give the appearance of creating an insurance policy in order to enable the payments to be classified as deductible insurance premiums and it was a classic sham. The allegation is difficult to understand given that the Commissioner accepts that the arrangements did establish a contract of insurance at law. And I've taken you to that authority.

- Tipping J What's the year of that – *Miles v Bull*?
- Stewart Did I not put that?
- Tipping J Could you come back to that, and just give us the year reference when you can?
- Stewart Yes I'm very sorry Sir.
- Tipping J Just because it might be worth looking at more widely than just that citation.
- Stewart Yes. What I've captured there sounds correct enough.
- McGrath J Mr Stewart the Court of Appeal did think that there was an element of distinction by which the position of Mr Muir and Mr Bradbury could be distinguished as I recall it. But although they eventually found that

the transactions were not a sham what was the basis on which they were prepared to see an argument that Dr Muir and Mr Bradbury had to face which the other investors would not have.

Stewart It was because each policy, there were eight separate insurance policies.

McGrath J That's right yes.

Stewart And there was Bristol's policy with CSI, there was Redcliffe's policy with CSI and then there were the other six investors.

McGrath J Yes I appreciate that but there must have been another fact just specific to Messrs Muir and Bradbury must there not, which distinguished their position.

Stewart As close as I could get it Your Honour was that they didn't have a settled intention to pay the final premium in 2047.

McGrath J So that's back to your, yes, back to the point you've just made.

Stewart Yes.

Tipping J But wouldn't the point be more relevant as to whether they were legally liable to pay it?

Stewart Well if the, yes.

Tipping J I mean some people could enter into transactions without necessarily intending to discharge their obligations but I never thought that was a sham.

Stewart No, no. Only if they intended to create that documentation with a view to deceiving somebody else as to what the arrangement was as between them I imagine. I mean but even then Sir, if the legal obligation is that you must pay the money in five years' time, if at that point you have no intention of paying it, let's say I have a contract with you Your Honour that I'm going to pay you 50,000 in five years' time but between us we say I'll never call upon you to pay it. But we present that document to somebody saying this is our arrangement.

Tipping J Well that might be fraud on that other person.

Stewart Yes.

Tipping J But as between ourselves, I mean if I know full well that you're not intending and I don't. But here, it's unilateral isn't it. The idea that they didn't intend is unilateral.

Stewart Oh yes.

Tipping J And there's no pretence that the transaction is something which it is not intended to be.

Stewart Not in any

Tipping J The fact that you don't intend to perform your legal obligation, I've never heard that suggested as a sham.

Stewart I haven't found a case on that, no Sir. I mean we lawyers here at the bar are kept busy every day because people enter into transactions which they don't intend to perform or can't perform or circumstances change.

Tipping J Is the key to your present rejoinder to the Commissioner's submission those words that you italicised in your (c) in page 13. The Commissioner's submission "*in reality their liability was contingent and not definitively committed*".

Stewart Well you see that's

Tipping J That's out of their submissions.

Stewart That's out of their submissions. Now the Judge has found in the High Court that it wasn't contingent and they were definitively committed. Now what the Commissioner says in his submission was "in reality they weren't". Although they may be legally by having given the promissory note at law for the purposes of having incurred

Tipping J Well that's avoidance, that's not sham.

Stewart No. I absolutely agree with you Your Honour. I rather think I'm taking up the Court's time unnecessarily on the sham issue.

Tipping J Well, no maybe not. But I'm just trying to explore it with you.

Stewart Yes.

Tipping J It's the liability they're talking about apparently, not the intention.

Stewart Yes. And in my submission it can't be sham but I had to make some attempt to discern what the Commissioner's argument was in this Court. Even as to the intention, that can't get off the ground, Your Honours, because the investors gave CSI a first ranking debenture security over the forests to secure the payment of \$32,000 in 2047. These forests on the lowest evidence presented to the Court by anybody were going to be worth \$475,000 per hectare in 2047. CSI were going to be paid comfortably unless some disaster happened which took the forest out completely. It is inevitable that the investors' obligations to CSI get discharged first ahead of anybody else and they hold the security. They own the forests until they get paid. There is just no room for an argument that they didn't intend to perform their obligations in 2047.

Tipping J Because they could have been made to

Stewart Well they'd have no choice Sir. They appoint a receiver. CSI owns the forest.

Tipping J So the debentures gave a first charge to CSI.

Stewart Absolutely. They get paid ahead of anybody else. So the appellant's case at 38(a) is that they intended to establish a contract of insurance and they did so. I've said (b). There is no evidence that the parties did not intend to be bound by the CSI arrangements. And common intention. Even given the Commissioner's reliance on the contracts being several and separate for each member there is still no evidence of any shared common intention that any party executed the contracts knowing that they did not reflect the true agreement or not intending the documents to bind the parties according to their terms. And I finished up dealing with the Court of Appeal finding on the several liability.

As to the no evidence, as I've said, it's not easy to identify the basis for the Commissioner's sham allegation other than the assertion that Dr Muir and Mr Bradbury have a common intention not to create the legal rights and obligations which the insurance policy gave the appearance of creating. At best as can be judged, this appears to be an allegation that Dr Muir and Mr Bradbury, or more correctly their respective LAQCs, had no intention of making the final insurance payment or were indifferent to it. In this regard the Commissioner described the liability of Dr Muir and Mr Bradbury as in reality contingent and not definitively committed. Venning J held to the contrary and there was no appeal from that finding. In any event, any suggestion that Bristol and Redcliffe did not intend paying the insurance premium is met by the fact that they granted CSI and Trinity a first ranking debenture security over the harvest. Short of doomsday scenarios as Mr Peebles described it, it is practically inconceivable that forest harvest proceeds will not yield 32,000 per

hectare thereby discharging the insurance premium promissory note at that time.

I've referred to the lowest scenario which is appendix B to the Commissioner's submission. One insurance expert called by the Commissioner was Professor Doherty and he said that the security arrangements for payment of the premiums rendered his opinion to the effect that the investors might default on the final premium moot. In these circumstances the evidence shows not only did the investors, including Redcliffe, Bristol and Bradbury, intend to perform their outstanding obligations under the contract but they secured performance of those obligations in a manner that virtually assured performance in 2047.

Mr Bradbury's evidence notes that the beneficial owner of the forest was CSI pending payment of secured monies. It also had a charge over the carbon credits referred to by Mr Bradbury at paragraph 100 of his evidence which have now become valuable again. And finally there was the option to purchase the land at half the market value which also vests in CSI.

Now common intention. Apart from its failure to establish that any investor or other party to the CSI contract did not intend the contract to take effect according to its terms, the Commissioner also failed to establish that any such intention was shared by all parties to the contract. Indeed and somewhat surprisingly the clear requirement to prove that the intention was common to all the parties, the Commissioner did not even attempt to prove common intention.

The Commissioner's case in relation to Dr Muir and Mr Bradbury was that the insurance arrangements were a sham and the narrow legal sense referred to in *Snook*. In this Court the Commissioner for the first time has restricted the sham allegation to Redcliffe, Bristol and Bradbury albeit in the High Court the Commissioner's claim was that the insurance arrangements were also a sham in the narrow sense in respect of Muir and Bradbury.

Now I've referred to the 10 other parties that were parties to the insurance arrangements. The Judge had no difficulty in rejecting the sham allegation on this ground that the Commissioner had failed to address, let alone establish the necessary common intention. It is to be noted that the Crown Law letter dated 6 August, the Commissioner's opening and the Commissioner's closing submissions unambiguously stated that the allegation of sham in the sense referred to in *Snook's* case was limited to Redcliffe and Bristol.

In keeping with this position, that is the narrow focus on Redcliffe and Bristol, the Commissioner made no attempt to establish that any one of the other parties (for example CSI, Trinity, Southern Lakes or Trinity Foundation) shared the common intention which he attributed to Redcliffe and Bristol and their respective principals. That matter was not even hinted at in the course of the cross-examination of the joint venture investors who gave evidence.

No evidence was called by the Commissioner on that issue from Mark Taylor who is the joint venture signatory, Kevin Gillespie who is the Trinity3 signatory or Jane Muir who was also a Redcliffe signatory at the time. This was despite the fact that they were all interviewed by the Commissioner.

Importantly, the Commissioner elected to call no evidence from Mr McCullough, who as the Commissioner of Insurance for the BVI was responsible for renewing CSI's insurance licence after conducting an investigation into its affairs in 2002. This was despite the fact that Mr McCullough had been flown to New Zealand by the Commissioner for the purpose of giving evidence and was available to give evidence. It can be inferred that his evidence would not have been helpful to the Commissioner on this issue.

In addition the Commissioner refused to make Mr McCullough available to counsel for the appellants for the purpose of briefing his evidence with a view to Mr McCullough being called as a witness for the appellants. The Commissioner's position was that if the appellants wished to call Mr McCullough they would have to do so blind.

The other parties to the transaction which is alleged to have been a sham were: Trinity Foundation Limited (that was the security agent holding the securities on behalf of CSI) Trinity and Southern Lakes. Mr Gillespie was the signatory for that entity.

Trinity3, which was the owner of the forest and which contributed the bulk of the payments to CSI. Trinity3 was the secondary insured and loss payee. Mr Gillespie was also the signatory for this entity.

Southern Lakes Forestry Limited, the documentary agent for the joint venture, its signatory was Mark Taylor - also an investor in the forest in his own right. The joint venture parties mandated Southern Lakes Forestry Limited to execute binding documentation on their behalf. The CSI and the other parties.

There are eight documents which relate particularly to arrangements between CSI, Trinity and Southern Lakes. They are the insurance policy, sorry the promissory note, the insurance policy proposal, the

letter of 14 March from CSI to Southern Lakes accepting the proposal, two deeds of debenture, then the letter dated 21 March from Southern Lakes to CSI recording the agency arrangement and the heads of agreement which Mr Carruthers took you to yesterday.

Because the allegation of sham necessarily involves a charge of dishonesty against all parties to these documents, it is critical to identify who executed them. So signatory for Mr Bailey, he signed the letter accepting the insurance binding CSI, the policy itself, and the debentures. Mr Bailey was the former Commissioner of Insurance for BVI and, as such, a senior civil servant appointed by the United Kingdom Government. He was also a consultant on insurance to the US Government. Mr Bailey was the head of AMS Insurance Management Services and as such was statutorily responsible for the management of CSI, as well as being a director of CSI (along with Mr Jackson a chartered accountant).

Mr Mark Taylor, a chartered accountant, signed the promissory note payable to CSI, the debenture given in favour of CSI by Southern Lakes, the insurance proposal and the letter to CSI recording the agency agreement.

Mr Gillespie, a sole director of Trinity3, signed the insurance proposal binding Trinity3 and the debenture in favour of CSI. He also signed both debentures as sole director of Trinity Foundation as agent holding securities on behalf of CSI and Southern Lakes. Mr Gillespie is a long-standing chartered accountant and is currently an officer of the High Court of New Zealand in his role as court appointed-liquidator of Matauri X Corporation.

The only document signed by the joint venture members was the Joint Venture Agreement, pursuant to which all the joint venture members authorised Southern Lakes to sign the transaction documents after taking legal advice.

The Commissioner did not establish any evidential basis to prove that any of the three signatories to the insurance documents acted dishonestly, not intending the documents to take effect according to their tenor. The failure on the part of the Commissioner is significant given that he interviewed two of those signatories – Messrs Gillespie and Taylor. Having made these most serious allegations against parties who are not represented, it was incumbent on the respondent to produce that evidence.

Now, for the sake of completeness, it should be noted that the Commissioner is unable to impute the alleged knowledge and conduct of Dr Muir to the other parties to the transaction. This is the position

even if Dr Muir was the agent of the other parties – which he was not. And the authority to that is *Snook*.

It should be noted that the Commissioner did not allege any agency via Dr Muir, and nor could he have. The Joint Venture Agreement expressly states there is no partnership or fiduciary obligations and that no individual joint venture party has the power to bind the joint venture or any other joint venture party other than as a participant in the special resolution.

Even the Commissioner's reliance on the contracts being several and separate for each investor and the fact that he has now restricted his sham allegation to Redcliffe, Bristol and Mr Bradbury, he must still prove the existence of a shared common intention on the part of CSI, Trinity3, Southern Lakes, Redcliffe and Bristol.

This brings me to my penultimate point, the other point being Mr Bradbury's role. Liability under the joint venture was several and individual. The Commissioner submitted for the first time in the Court of Appeal that the insurance contracts between CSI and Dr Muir and Mr Bradbury were a sham on the basis of *Snook* because the parties shared the same common intention, and liability in respect of the insurance payment obligations under the Southern Lakes joint venture was several and individual. Of course this doesn't arise if you accept the previous submission, that he didn't establish a shared intention by all the participants.

By this submission the Commissioner is submitting that there were eight insurance contracts. He did so despite a finding where Venning J said in the High Court: "The same policy issued to all Southern Lakes investors. Put shortly, the insurance contract or arrangements cannot be a sham insofar as they relate to Dr Muir and Mr Bradbury but not a sham in relation to other investors."

What was yet another new allegation changes nothing because even if there were separate documents (which there are not), the Court of Appeal was wrong to hold otherwise. I will explain that below. The signatories would not change. They would still be Messrs Gillespie for Trinity3, Mr Taylor for the joint venture, and Mr Bailey for CSI. The Commissioner would still need to establish that those parties shared the common intention: there is no such evidence from any of them.

The chronology is important. The contract between Southern Lakes Joint Venture and CSI came into force on 13 March 1997. However it was 21 March 1997 when Southern Lakes Joint Venture wrote to CSI asking for their several liability to be acknowledged. All that CSI effectively was asked to acknowledge was, having been advised that

there were undisclosed principles behind Southern Lakes, and that Southern Lakes was only an agent, that it would waive its right to sue any principal for the full amount of the debt undertaken by the agent, and limit a claim against any principal to its several interest in the joint venture.

The letter signed by Mr Taylor and addressed to CSI is the critical document. It advises that “we hold the rights conferred on us by the Documents as bare trustee for Joint Venture Parties as tenants in common in their respective shares in the Joint Venture”. It is clear this would not be necessary if there were already eight contracts. The letter records that the joint venture parties and their respective shares in the joint venture may change from time to time. It then requests CSI to accept that at any time each joint venture party shall only be severally liable for their respective shares in the joint venture. This is inconsistent with there being different contracts. Further, there is only one promissory note to CSI, two registered debentures, and only one caveat on the title to the licensed land. Only one proposal was signed and one policy issued. As a matter of elementary legal principle, the Court of Appeal’s “in effect” acceptance of eight separate contracts is wrong. The rights and obligations created cannot be “sliced” in such a way, as the letter itself clearly establishes, and it is plain on the face of the documents themselves.

The following points are to be noted:

- Tipping J Just pause. While there was this limitation, in a sense, limitation of the obligations of the joint venturers, there is never any suggestion is there that the policy itself or the cover was to be subdivided, as between the parties behind the agency so to speak?
- Stewart No, it couldn’t have been. I mean if there was a default in payment by one joint venturer, they would enforce a security which was held by
- Tipping J Verbally.
- Stewart Yes. The following points have been noted:
- (a) Venning J was wrong [at 222] when he names the parties to the insurance documents. He omits Trinity3 and the Trinity Foundation.
 - (b) The Commissioner’s argument was based on the agency letter signed by CSI. The Commissioner argued that the letter meant that the parties’ liability under the insurance arrangements and for premiums was several and not joint (which was correct) and that, as a result, the common intention required under *Snook* would therefore involve CSI and the appellants

individually. This conclusion does not follow, in the absence of a clear intention on the part of all parties, including CSI, to have several independent policies. It absolutely ignores the position of Trinity3 and the documentary terms.

- (c) It also ignores the fact that the agency letter states that it is not intended to affect any of CSI's rights and remedies.
- (d) The primary beneficiary of the policy is the Joint Venture members as tenants-in-common and as it is constituted from time to time. Clearly CSI would not be required to split the policy into multiple policies and deal with individual members on the Joint Venture. One look at the proposal and the policy shows that it could never have intended to comprise multiple policies and presumably multiple securities, which would necessarily have to follow from the theory. If any part of the premium was not paid by the JVAs or Trinity3 then CSI would clearly have the right to cancel the cover in its entirety and to enforce the securities in their entirety. One look at the Joint Venture Agreement clause 8, refers to the agent holding the assets of the JVAs as bare trustee as "tenants-in-common". One such asset in the insurance – one asset is the insurance – it is the antithesis of a tenancy in common that one party has the right to deal separately with what is in law an undivided asset. Another example arises from the terms of the policy, limiting liability to \$50,000, for insurance of claims preparation costs. If there were eight policies in contemplation, would the limitation apply eight times? Or be divisible among the eight members, and upon what basis? The policy itself contemplates nothing of the sort.
- (e) And I've said, in the last paragraph, I have said before.

Your Honours that just brings me to this bit, which may be of more relevance than the tax avoidance argument perhaps, but also here I thought it might be helpful just to capture Mr Bradbury's role in these transactions. Now if I can just quickly take you through this. In cross-examination Mr Bradbury said that Trinity was Dr Muir's project, and he was obsessed by it. Mr Bradbury handled the conveyancing of Redcliffe purchase but not of the other Trinity land purchases. And he documented the agreement to grant licence and option for Lot 3 Redcliffe Station and all of its appendices with the exception of Appendix 1, the deed of assumption and transfer, which Dr Muir drafted, and Appendix 4, the insurance policy and proposal, which was the result of discussions between Dr Muir and CSI. Mr Bradbury also documented the next transaction CWF, that's Can West. Mr Muir handled all subsequent transactions. Mr Bradbury had no discussions with anyone from CSI, with the exception of the brief conversations, one of which related to the securities to come

from Trinity3 and SLFL, and the other in the form of legal opinions which CSI required from Bradbury and Muir acting for Trinity3, and Bruce McLean acting for Southern Lakes, as to the enforceability of those securities.

Mr McLean drafted the heads of agreement for Southern Lakes but Mr Bradbury had input on behalf of Bristol. Mr Bradbury had no involvement with and, until the Serious Fraud Office documents turned up, had not seen the bulk of the documents that were generated between Dr Muir and AMS CSI. In particular he had not seen the documents that I have listed there, including the draft business plan, and that evidence is at Volume 12.

Mr Bradbury was familiar with and drafted the Swiss Franc term loan agreement between Parentis and the subsidiaries, and the other downstream parties. And I have listed what those are and taken you to the evidence.

Mr Bradbury's evidence-in-chief is at Volume 4, page 720, where he refers to arranging the CSI policy and the brokerage arrangement. He discusses his involvement in those two matters at those pages in his evidence. Mr Bradbury's cross-examination is at Volume 12, and this cross-examination, in my submission, reflects the extent of Mr Bradbury's knowledge and involvement at various stages. It will also show that he gave his evidence in a candid manner, without any prevarication. The cross-examination in relation to CSI commences at the reference I have given you, and the Parentis cross-examination starts a bit further on.

- Tipping J Was there, presumably the sham allegation was put to Mr Bradbury?
- Stewart Yes and he flatly denied it. He said it was put to him in the sense that the insurance arrangements were a pretence and he denied it. I mean you couldn't take it much further. Yes it was, no it wasn't, yes it was, no it wasn't.
- Tipping J Was it put to him on any basis other than an assertion? Was he cross-examined as to knowledge of certain circumstances or that would lead him to know that this wasn't really what was intended?
- Stewart No, it wasn't put that way.
- Tipping J Where is the cross-examination on the sham? I am not asking you to read it; I would just like to know
- Stewart Page 2510 at line 30, and at 2511 at line 18. There was no criticism of Mr Bradbury as a witness or in the manner in which he gave his

evidence by Venning J. In Mr Bradbury's interview by the Commissioner, he volunteered the Parentis transaction. This was new information for the Commissioner and that is clear from an internal memorandum prepared by an investigator following the interview. Now there's a reference which I wasn't able to pick up before arriving here this morning your Honours, but there is the affidavit of Mr Bradbury dated 16 August 2004 which deals with the production of the Serious Fraud Office documents prior to trial and his knowledge of those documents and that again hasn't been seriously challenged, not challenged at all really, as to his knowledge of these documents, and his involvement with them.

Tipping J You mean his lack of knowledge.

Stewart His lack of knowledge, yes. Absolutely. He knew about them when they arrived but not previously. Now if I have got the flavour across, it is really that we don't have a sham issue that should detain this Court but of course you will want to hear from my learned friend no doubt.

Elias CJ Yes thank you Mr Stewart.

Carruthers Your Honours I have the practical problem, that Mr Stewart referred to, in getting some documents copied and I wondered if we could take the adjournment now?

Elias CJ Yes, we will take the adjournment now.

Court adjourns 11.20 am

Court resumes 11.56 am

Elias CJ Thank you.

Carruthers My apologies your Honours but I can report that the technicians has said he has never seen a problem like it, so

Elias CJ It has allowed our technician to do something

Tipping J One might reciprocate by saying nor have we, but [laughter]

Carruthers Your Honours I have a note and it is quite an extensive note on what is one of the crucial issues in the case and that is how to deal with the situation where a transaction falls, in our submission, squarely within the rules and principles and what is it that carries that transaction

through to offend BG1. And what I have done immediately is to set out the competing contentions and this

Elias CJ Does this really supersede the stuff we read Mr Carruthers?

Carruthers It's, yes you can treat it that way. But it's being done this way so it responds to what the Commissioner has done, and it squarely meets what the Commissioner has done. I hope that I can move through this quickly.

Our contention as to why BG1 cannot apply is this. And these are the propositions. The Ben Nevis appellants are in business in terms of the Act, notwithstanding that in entering into their forestry harvest enterprise they have structured their financing using promissory notes in order to achieve tax timing advantages based on orthodox historical cost tax accounting principles. Second, the Commissioner and the Courts below have accepted correctly that the relevant expenses or costs represented by the final insurance note and the licence premium note, were incurred for the purposes of the deduction provisions of the Act. This is a legal concept within the scheme and purpose of the Act. Such expenses or costs are either truly and genuinely incurred or they are not. In this regard, on the threshold question approach to statutory interpretation, the only disqualifying circumstances for BG1 purposes is whether or not the relevant obligations can be categorised as being a pretence because they can be seen to frustrate the underlying scheme and purpose of the deduction provisions, in this case by reference to the deductibility of an insurance premium, for what is a loss of profits benefit and in respect of the cost of the depreciable capital asset, namely the licence premium.

On the basis of *Challenge*, as applied in *Peterson*, the JVAs have absolute and unconditional obligations in respect of the promissory notes, which is all that is required within the statutory scheme, where specific timing regimes such as the accrual rules are inapplicable. And in respect of both items, for the reasons given by the Privy Council in the decisions of *Auckland Harbour Board* and *Peterson*, given that there is no frustration of the underlying scheme and purpose of those provisions, and that the relevant costs are properly said to be genuinely incurred, it is incompatible with that scheme for BG1 to be held to apply.

Elias CJ Where do I find the text of BG1 sorry? I can't find it in the Commissioner's bundle but I might be looking in the wrong place.

Carruthers Well if your Honour goes to the decision in the High Court, Justice Venning sets it out, and that is probably the most convenient place.

Elias CJ I see it is in the Commissioner's bundle, thank you.

- Carruthers So then, having identified squarely our propositions on why BG1 doesn't apply, I have come to the Commissioner's propositions
- Tipping J Just before you move on Mr Carruthers. BG1 says a tax avoidance arrangement is void against the Commissioner.
- Carruthers Yes.
- Tipping J But doesn't the whole of this case turn on the definition of tax avoidance arrangement under the Act.
- Carruthers Yes.
- Tipping J And are you going to be looking at that in due course.
- Carruthers Well yes because the authorities that I turn to, and the whole of this analysis, is on the basis of what is a tax avoidance arrangement and that raises the question as to whether you actually comply with discrete provisions under the Act. What is it that makes it a tax avoidance arrangement
- Tipping J Yes, you accept that you can technically comply but still be caught.
- Carruthers Yes I do. I mean there are countless
- Tipping J What is your ultimate submission as to how one recognises tax avoidance arrangements against that premise? Do you have it written down somewhere?
- Carruthers Well yes I do. In fact I mean it is really picked up in that summary that I have made. But where you get to is that analysing the scheme and purpose of the Act, that it is, in this case analysing the scheme and purpose arising from these provisions, is the transaction a pretence? And your Honour this is where it becomes very difficult because there are some unhelpful expressions in the cases as to quite what the test is.
- Tipping J Well I understood you to be saying in your paragraph 1, particularly (e), that is not tax avoidance if it does not, pardon the double negative, if it does not frustrate the underlying scheme and purpose of the relevant provisions.
- Carruthers That's right.
- Tipping J Is that your essential submission.

- Carruthers That's the essential submission yes.
- McGrath J Do you accept that we have to apply and derive a meaning for tax avoidance arrangements in s BG1 and that in the end that must govern the situation after its application to the particular provisions for which deductions or depreciation is claimed?
- Carruthers Yes. I accept that there's one of the statutory provisions in the Act in the statutory scheme that must be given effect to according to its terms properly interpreted. Because, as your Honour knows, on a literal interpretation of the section, virtually everything falls, every choice falls within it. So I am sure your Honour
- McGrath J I said that point of course Mr Carruthers but what I supposed I want to do is that when you say that it's a pretence, I just want to make sure that we are focusing here on what the meaning of the words used by Parliament in BG1, tax avoidance arrangement, yes, and that's in the end what we have to ascertain and apply.
- Carruthers That is exactly right and what, where the difficulty arises your Honour is that you actually have to reconcile that with the discrete rules that the taxpayer is entitled to make choices about and comply with.
- Gault J Mr Carruthers, the difficulty I have with your paragraph (c) is that if there is a pretence which frustrates the underlying scheme and purpose of the deduction provisions, that wouldn't come within those deduction provisions.
- Carruthers Well your Honour that is right, which is no more than to say that what you have undertaken is an exercise in statutory interpretation and identified the scheme and purpose of the Act and said "no, that's a pretence". *Miller* is a very good example of a transaction where it was carefully documented as being a sale but the documentation meant that the deductions were always going to come back to the original owners. This is through the Russell companies. So while you could say yes that is a sale, and you could identify what provision Mr Russell was endeavouring to rely on, what was then undertaken was an analysis of that transaction as to whether it was a sale and it was found to be a pretence and therefore it is right that it wasn't within the deduction provision, it was an avoidance transaction.
- Gault J For obvious reasons I accept *Miller* but it seems to me that that is one instance of a situation where then s 99 must be met, but it seems to me too narrow to articulate this in the way you have in your paragraph (c) for the reason I have already indicated. I rather think an arrangement within BG1, tax avoidance arrangement, could constitute use of a combination of factors, each of which meets the individual black letter requirements for deduction but which is set for the purpose of tax

avoidance. That's what I need your assistance on. I think that's too narrow unless you can convince me otherwise.

Carruthers Well that's why we have formulated this as involving a threshold question. For the purpose of the operation of the tax system and the commercial and legal community, what the Court, in my submission, needs to decide is what is it in the transaction that converts it from being compliant to infringing BG1. So what converts it from being, even with constituent parts that your Honour is putting to me, the constituent parts all comply, what is the feature that makes it a tax avoidance arrangement. It can't just be a visceral reaction because the taxpayer is going to have a different visceral reaction from the Commissioner.

Elias CJ Well that's the question being put to you. What's your answer to it?

Carruthers Well my answer is in the way in which I put it at (c), that what, the transaction that is being considered is a pretence.

Tipping J But it doesn't have, if it is a pretence then you are getting very close to sham.

Carruthers No, well

Tipping J I mean I don't understand this word "pretence" in this sort of subsidiary sense. I can understand you want this to be a threshold question because very seldom will you be able to describe it as a pretence.

Carruthers Oh no, well your Honour that's really not a fair analysis of the reason for the argument. It is really trying to get a principled approach.

Tipping J But I am putting to you, like my brother Gault, that if it has to be a pretence before it can even qualify as a possible tax arrangement, tax avoidance arrangement, you have got a very narrow first threshold. It depends what you mean by pretence.

Carruthers Well the way in which it has been analysed is that it becomes a pretence where it does not comply with the scheme and framework of the tax legislation.

Elias CJ Yes, you put pretence in inverted commas, but the test it seems that you are suggesting must be an objective one. Does it frustrate the underlying purpose and scheme of the Act as a whole?

- Tipping J So we are back really to it is not tax avoidance if it does not frustrate the scheme and purpose of the relevant provisions or the Act as a whole. This is where pretence I think is very unhelpful.
- Carruthers Well your Honour I hear what you say and I understand the point that you are making to me. But you will find on the analysis of the cases that that's a word that is so frequently used as part of the, I mean that shouldn't deter you for a moment, I appreciate that
- Tipping J Well it may make me hesitate Mr Carruthers but obviously
- Gault J It may be more readily used in the context of the British system, which doesn't have a specific anti-avoidance provision
- Carruthers Yes but I am not going to be shut down on that line with respect your Honour because, oh I see, I beg your pardon, I see the point you are making to me.
- Elias CJ What's your best case on pretence? I mean are they English cases?
- Carruthers No no no no no. I focus on the New Zealand cases and I draw on the English cases because they actually are very good illustrations of the approach to statutory interpretation which now you can see from those cases is coincidental with ours.
- Elias CJ Mr Carruthers, a pretence or an element of pretence, may be important evidence but is there, you take us to some authority do you which posits this as a test for tax avoidance.
- Carruthers Yes I do your Honour and I think without in any way suggesting that I am avoiding the question, I think it would help if I could develop the argument a little in the text that I have to get to that point. Your Honour let me, what I will do is I will take you to *Auckland Harbour Board*. Which is under tab 7. And
- Tipping J Tab 7 in volume ...?
- Carruthers In volume 1 of my cases. My casebook, in the blue colours. Now that was a case where Auckland Harbour Board was about to be abolished and it transferred assets, Government stock and Local Authority stock, to two trusts and the stock was transferred at nil consideration. And your Honours may remember the fuss that arose on that. They were financial arrangements within the accruals regime and there is an avoidance provision in that regime, in the s 64 regime. Now this was – the advice of the Board was delivered by Lord Hoffmann, and let me take you to paragraph 9 because I am

going to read through from paragraph 9 to paragraph 12 so that you see the way in which this issue has arisen.

At this point it appears to Their Lordships that Mr Jenkin (for the Commissioner) was faced with a logical difficulty. He concedes that, giving s 64F the liberal construction which the Acts Interpretation Act requires, reading it in the context of the general scheme of the accrual regime, in the purposive spirit prescribed by *Challenge* and with the best will in the world, it is not possible to read the section as requiring anything other than the actual consideration to be used as part of the formula for calculating the base price adjustment. If the consideration is nil, that is the figure to be inserted. If this is what s 64F means, Their Lordships find it difficult to understand on what basis it can be said that it was not its intention.

Mr Jenkin's argument was that if one looks at the accrual regime as a whole, it was constructed on the assumption that transfers of financial arrangements would be at market value. So far as the language of s 64F could not be given such a construction, it should be regarded as an aberration in the execution of the legislative design which could be remedied by a determination of the Commissioner under s 64J(1).

Their Lordships will return in due course to consider whether a base price adjustment on the basis of a transfer for a nil consideration is inconsistent with some fundamental principle of the accrual regime. But they should first draw attention to the fact that the Commissioner's argument involves putting s 64J(1) to a very unusual use. The section appears to Their Lordships to contemplate that the circumstances which justify its application will be specific to a particular transaction, arising out of the relationship between the parties and other relevant circumstances. In this respect it is similar to other anti-avoidance provisions such as s 99. Their Lordships do not of course suggest that the two sections necessarily cover the same ground, but what they have in common is that they are, generally speaking, aimed at transactions which in commercial terms fall within the charge to tax but have been, intentionally or otherwise, structured in such a way that on a purely juristic analysis they do not. This is what is meant by defeating the intention and application of the statute. Some of the work such provisions used to do has nowadays been taken over by the more realistic approach to the construction of taxing Acts exemplified by *Ramsay*, although Their Lordships should not be taken as casting any doubt upon the usefulness of such tax avoidance provisions as a long stop for the Revenue.

In the present case, there is no tension between the commercial and juristic character of the transaction. It is, in legal, commercial or any other terms, a transfer of financial arrangements for no consideration. Such a transaction either attracts a deduction or it does not. The Commissioner accepts that it does, but claims the right under s 64J(1)

to be able to amend the law to ensure that it does not. Their Lordships do not think that the section was intended to confer such a power. It would amount to the imposition of tax by administrative discretion instead of by law.

So just coming back to the essence of what is being said,

Elias CJ Well it seems to be, in terms of a test, it seems to be an objective assessment of whether the transactions would fall within the charge to tax on a commercial basis but don't have that effect on a juristic basis. That seems to be the test.

Carruthers Yes but your Honour has to be a little careful with an objective test because the objectivity has to take into account that the taxpayer has tax choices. So this is where objectively one might say well to my mind if I were doing the transaction I would have made a different choice, which would have given the Commissioner, the tax base, a better result. So you have immediately a subjective consideration to make which allows the taxpayer to make the choices between different provisions.

Elias CJ But the choice is built in because that's whether they fall within the charge to tax doesn't it. You might have a range of options available to you and as to selection between them, that's not going to be tax avoidance.

Carruthers Yes, if your Honour uses objective in that sense, I agree.

Elias CJ You don't have to choose the option that's of most benefit to the revenue.

Carruthers No no.

Tipping J But Lord Hoffmann seems to be making the clear distinction here, for where it might lead us, between commercial concepts and juristic concepts. Is that possibly the clue to what Parliament was on about? The fact that you structure it in juristic terms, is not always an immunisation if it, in commercial terms, is within the general intent of the charge to tax, or doesn't qualify or shouldn't qualify for a deduction in commercial terms. Then that overrides the legal structure which has been adopted.

Carruthers Yes and who makes the decision as to whether it is commercial?

Tipping J The Court.

- Carruthers Well your Honour, and on what basis does the Court make that decision?
- Tipping J Well you have just drawn us to this passage and it seems to me that this clear distinction here is between commerciality and legality.
- Carruthers Yes I understand that but one of the issues we face is this comes to Court and a Judge at first instance says well this isn't commercial; I have never seen a transaction like this before; it is outside my experience; I would be astonished if such a transaction was a commercial transaction. Now against that you have the evidence as to what the parties are endeavouring to do, and what their own commercial judgment is. So while it has to be, I am not arguing with you your Honour about the commercial feature of the analysis but what I am signalling is that there has to be a concern as to just how commerciality is judged.
- Tipping J There may be two commercial ways of doing this and one non-commercial way of doing it, yielding a much better taxation outcome. Now surely that one will be caught. The other two, whichever you choose, won't be caught.
- Carruthers And it then becomes a question as to how does the Court approach what is a non-commercial case. I mean these cases are riddled with examples of disagreement between Judges as to what is commercial and what actually is the legal test. Let me just take *Barclays* case that we come to. I mean that was about the Irish Sea pipeline. Now that was heard at first instance by Mr Justice Park, who had a huge background as a tax barrister. And his judgment is absolutely peppered with commentary about what is in effect lack of commerciality. In fact he talks about part of the transaction being the fifth wheel on the cart. And that goes to the Lords, who actually analyse the transaction and say well of course this is what responsible parties have negotiated and intended, and that, on the sort of analysis that your Honour makes, is well – the House of Lords says this is commercial, Justice Park with all his experience says no it's not, which gears us to the problem of how that commerciality is judged.
- Tipping J I accept all that but at the margins there will always be difficult cases. What we have got to do is to give the right signposts.
- Carruthers And your Honour with that I agree entirely, which is part of the reason why this case has got to this Court.
- McGrath J If everybody agrees then Mr Carruthers, where in the transaction there are features which do not appear to be commercial, that may be relevant to the key question which isn't commerciality but whether there is a tax avoidance arrangement.

Carruthers Yes I accept that. Where there is a step in the transaction that has no utility, and

McGrath J Well whether it is a contrived step or a pretence in the context of contrived, that may indicate that it is a tax avoidance arrangement.

Carruthers Yes your Honour.

Elias CJ I must say I wouldn't have thought this was your best case.

Carruthers This transaction.

Elias CJ No no this

Carruthers Oh you had me terribly worried there for a moment your Honour.

Tipping J The same thought was going through my mind. You get your worst case upfront as your best and then move on from there.

Carruthers No no no that's not my worst case.

Tipping J Well where do we go from here.

McGrath J Back to page one I think.

Elias CJ It can't be an antithesis between commercial terms and juristic terms. The commerciality of something may be evidence from which one can infer that there's an arrangement for tax avoidance but it must be juristic and juristic. There's a bigger juristic picture and a smaller juristic picture.

Carruthers Yes I have often wondered whether Lord Hoffman in *Westmoreland* might have regretted the sort of analysis that he has made. Your Honours, let me move through the argument because I want to contrast the propositions that I have put with what we have distilled from the Commissioner's argument, and this is really to synthesise propositions out of the Commissioner's submissions. The quote is really quite deliberate because it is really inviting the Court to formulate the test so that we have somewhere to steer.

But what the Commissioner says is this, that BG1 applies in any given situation where the Commissioner acting objectively forms the view on his own factual supposition that the taxpayer has entered into an arrangement with more than an incidental purpose of avoiding tax. The section will apply to a taxpayer who is affected, that is receives any benefit from another's arrangement having such a purpose. Such

an affected taxpayer does not need to know of the existence of the other person's arrangement or of its offensive characteristics. What is a tax avoidance arrangement is primarily a question of fact to be determined by the Commissioner deciding that the line has been crossed. The Commissioner, in acting objectively in his formulation of the facts as he determines them, is able to state those factual elements of the arrangement based primarily on his view of the documents and any other information he wishes to obtain, without taking into account any taxpayer evidence to the contrary which will be subjective and is therefore irrelevant. If, however, anyone writes a document which purports to record that the taxpayer had such a purpose, that document will be conclusive against the taxpayer or an affected person. BG1 is overarching and will, as a matter of its literal application, deny any taxpayer a tax benefit offered by the Act if the taxpayer enters into the arrangement for the more than incidental purpose of obtaining that benefit. The term "tax benefit" includes any timing advantage obtained by the taxpayer, negotiating the benefits of deferral, the making of cash payments, and in this respect the giving of securities to provide affirmation of payment obligations will be ignored.

A more than incidental purpose of tax avoidance will be inferred in respect of any company with limited liability if the company is regarded by the Commissioner as being insubstantial or single purpose, where that company enters into any arrangement which has a more than incidental purpose of securing a deduction of expenses to the company, without the payment of cash immediately by it. Orthodox tax accounting accrual principles are inapplicable, maximum level penalties will apply to any shareholder such as a company which collects for LAQC treatment and the Commissioner does not have to give any relief to an offending taxpayer by using his reconstruction discretion, if he decides that he does not wish to do so.

And those propositions are two supporting aspects, that is that the Commissioner requires the taxpayer bears the statutory onus of proof without resort to what the Commissioner considers to be evidence of subjective intention, and in this case the Commissioner can withhold from the taxpayers the existence and content of evidence which may be of assistance to them from an overseas-based witness, and I have submitted that that approach is inconsistent with the Commissioner's obligation to uphold the tax system.

So we describe that as unlovely and then go on to really de-construct what the Commissioner says. Where the Commissioner describes this as an overarching contention, it goes to Lord Hoffmann's speech in *Westmoreland* and I think your Honours were given another copy of that, because the copy in our bundle has been through the self-same troublesome photocopier, where he set out what the Crown said was

the principle of statutory construction to income tax generally. But what is that principle.

And what he says is when a Court is asked, first, to apply a statutory provision on which a taxpayer relies, for the sake of establishing some tax advantage, secondly, in circumstances where the transaction said to give rise to the tax advantage is or forms part of some preordained circular self-cancelling transaction, thirdly, which transaction, though accepted as perfectly genuine, that is not impeached as a sham, was undertaken for no commercial purpose other than the obtaining of the tax advantage in question, then unless there is something in the statutory provisions concerned to indicate that this rule should not be applied, there is a rule of construction that the condition laid down in the statute for the obtaining of the tax advantage has not been satisfied. My Lords I am bound to say that this does not look to me like a principle of construction at all. There is ultimately only one principle of construction, namely to ascertain what Parliament meant by using the language of the statute. All other principles of construction can be no more than guides which past judges have put forward, some more helpful or insightful than others, to assist in the task of interpretation. But the Crown's formulation looks like an overriding legal principle superimposed upon the whole of revenue law, without regard to the language or purpose of any particular provision save for the possibility of rebuttal by language which can be brought within the Crown's final parenthesis, as set out above.

This cannot be called a principle of construction except in the sense of some paramount provision subject to which everything else must be read, (and then gives the EC Act). But the courts have no constitutional authority to impose such an overlay upon the tax legislation and, as I hope to demonstrate, they have not attempted to do so.

And he goes to *Norglen* and that was the case where he referred to this approach of the Commissioners being spooky jurisprudence. And that's the sentiment that really he repeats in *Auckland Harbour Board*, describing the Commissioner's approach as being an unconstitutional attempt to impose tax by administrative discretion instead of by law.

And he recognised in *Miller*, and made perfectly clear, that BG1 had to accommodate the taxpayer's course of action which obtained tax benefits if the Act on its true construction offered the taxpayer that choice. And that's a reference to paragraph 10 in *Miller* and referring to *Westmoreland*.

Now my friend submitted that this was slightly confusing but there is nothing confusing about it. Where the difference is in this, that BG1 does not overarch the choice, even if the tax benefit so obtained was for more than an incidental purpose. Rather the observation is simply

and clearly against the Commissioner's contention. And this overarching issue goes to our submission and our approach, that it is one provision in the tax scheme and it has to be looked at in the context of that framework and it has to be given effect to, as I come to in a moment.

So what we are submitting is that the Commissioner is really trying to rewrite history, and I put it in this way, while expressed in terms of the interpretation to BG1, the Commissioner's submission really seeks to overturn Sir Ivor Richardson's legislative scheme and purpose approach to statutory interpretation generally taken as a Judge of the Court of Appeal for 25 years. And the history to this is that His Honour really did disinter s 5J in *Lowe*, taking a purposive approach. He sat as an appellate Judge in that Court which applied that statutory interpretation method, not just in tax cases but over the legislative spectrum generally and consistently over those years and beyond. While the importance of the s 5J mandate originated with the *Lowe* judgment, the general approach was reflected by that Court as a whole. In the face of a plethora of decisions to the contrary concerning BG1, the Commissioner now retreats to what he says is a literal approach without confronting the problems that that causes.

The Commissioner also seeks to demolish 25 years of authority in the Court of Appeal. And I've noted and more since 2003 which was when Sir Ivor retired, as to the approach a Court will take construing the legal effect of agreements by adopting their so-called economic consequences. This approach for the Commissioner denies the orthodoxy of the judge's assertion in 1978 in his companion decisions of *Re Securitibank* and for a unanimous Court of Appeal in *Buckley v Young*, incidentally delivered on the same day without reference to the other, involving many of the authorities relied upon in common, that there is no halfway house between sham and a true character of an agreement. And although this approach was emphatically confirmed by the Privy Council in *Wattie*, the Commissioner presses yet again the halfway house approach when the Court is considering the application of BG1 to the true legal effect of transactions.

And then I've submitted that to confine these observations to Sir Ivor is a disservice to other members of the Court over that period and I've submitted because of his vehement judgments, that only Justice Thomas would determinedly excuse himself from any such association.

And the Court of Appeal has been a consistent adherent to the approach, whether or not Justice Richardson happened to be sitting. The Privy Council was in this respect consistent in supporting the approach for example in *Wattie*. There is no reason in principle why the Court should take a different approach to transactions when considering the possible application of what is simply another

provision of the Income Tax Act. And this is where I make the point about BG1.

The New Zealand Courts have never taken that approach and neither has the Privy Council. The cases cited by the Commissioner offer no support for such a proposition and that proposition is wrong.

And then from that house-on-sand duality, the Commissioner asserts that the Richardson approach to BG1 has always been based on a fallacy, notwithstanding that it was, and these are the contras, that the then Mr Richardson as counsel for the Commissioner, who successfully argued for the Commissioner the early cases of *Elmiger*, *Marks*, *Mangan* and *Wishart*.

Elias CJ I don't come to this with the long history of most of counsel involved in this case and I'm losing the propositions in the history here. And in the personalities. And while you were speaking, because you passed up *Westmoreland*, I was looking at what Lord Nicholls said at paragraphs [4] and [5]. Are you contending for something different from that. I'm just trying to understand Mr Carruthers the propositions that you are contending for here. Lord Nicholls is not talking about a halfway house, he's talking simply about ascertaining the legal nature of the transaction. And whether the loss is a loss within the meaning of the relevant statutory provision. Is that contrary to the position that you're contending for?

Carruthers No, no, because you see Your Honour in paragraph [5], having identified the legal nature, the courts must then relate this to the language of the statute. For instance if the scheme has the apparently magical result of creating a loss without the taxpayer suffering any financial detriment, is this artificial loss a loss within the meaning of the relevant statutory provision. So no, but this is another way of expressing the issue where you look at the scheme and purpose of the legislation. So no I'm not arguing for anything different, but what I am trying to illustrate from history is what the Commissioner is trying to do just flies in the face of a whole history, a whole development of jurisprudence on what was s 108, s 99 and now BG1. And that is by saying, well look it's an overarching provision but it's simply not that. It is one of the weapons in the Commissioner's toolbox in the same way as other statutory provisions simply are. I mean whether the insurance premium is deductible, whether the licence premium is depreciable and he can look at.

Elias CJ But those are aspects of the transaction and the virtue of BG1, or whatever it is, is that one looks at the whole picture. And that's really what Lord Nicholls is talking about in *Westmoreland*.

- Carruthers Well with respect no, there's no whole picture concept. What Lord Nicholls is saying.
- Elias CJ So is your submission then that it's only the sum of the individual parts that one has to look at?
- Carruthers Well yes, because there's nothing else in the transaction but the sum of the individual parts.
- Gault J Mr Carruthers, BG1 itself must have a scheme and purpose. And it talks about arrangement and schemes. It's not talking about the individual components. Doesn't it invite a consideration of a package?
- Carruthers Well it extends to a single transaction. Take the *Miller* transaction. That was found to be an arrangement. So it doesn't necessarily involve anything wider than the actual transaction or transactions you're talking about.
- Gault J Nor is it confined to the individual components which you are focusing on. It is talking about an arrangement of those components.
- Carruthers Yes. Yes.
- Gault J It seems to me that it has a scheme and purpose there of inviting a view of the package separate from the individual components.
- Carruthers May I respond in this way, that BG1, being part of the Tax Act, is a necessary consideration in looking at the scheme and purpose of the Act. And within that scheme and purpose, one has to interpret the provisions on which I am relying and has to interpret s BG1 as to what role it plays and what its metes and bounds are in the context of the statutory scheme that's identified.
- And that, with respect, is consistent with what Lord Nicholls is saying because having identified the legal nature of the transaction, the courts must then relate this to the language of the statute and if there is some magical result, is the artificial loss a loss within the meaning of the relevant statutory provisions. And one wouldn't get to any different position here.
- Elias CJ But including BG1.
- Carruthers Yes. Oh yes I accept that.
- Elias CJ Yes.

- Carruthers Yes, yes. But not so that the starting point or the overarching provision, as my learned friends would have it, it is one of the provisions that needs to be interpreted because one must be very careful that by interpreting BG1 you are not eliminating the legitimate choices of the taxpayer. In the same way as one must examine my argument and say, are you making BG1 a dead letter because my position is certainly no, one must always recognise that BG1 has a role.
- Tipping J I had written down the word or the phrase legitimate choices by coincidence just a moment ago.
- Carruthers Yes.
- Tipping J So picking up on your use of the same phrase, is BG1 to be interpreted literally, save only that one must preserve legitimate choices.
- Carruthers I think regrettably there's more to BG1 than just that. For the purposes of my argument on this transaction.
- Tipping J Because that would put a heavy weight wouldn't it on the word legitimate. Which is a kind of question begging.
- Carruthers Well it is and Your Honour will appreciate in this in much of the analysis that's gone on on this section, there is a lot of question begging in the way in which the decisions are made.
- Tipping J But what would be wrong with an approach which simply said we must give effect to the true meaning as we perceive it of BG1 but making sure that we were not emasculating the commercial community from fair use of tax breaks available to them?
- Carruthers Can I put it round the other way, that you need to make a careful analysis of the tax choices that are available, that is the various provisions that the taxpayer has chosen, and then look at BG1 about the choices. Because I just want to get the balance right, the approach right because understand that the taxpayer devises and enters into the transaction. So the taxpayer is making a choice at that point. And it is that choice and that provision that commands the first analysis. And that then has to be looked at in the framework of the Act which includes BG1. So one would look at the transaction in the way in which, well I hesitate to go back to it, but the way in which Lord Hoffmann did in *Auckland Harbour Board* and said, no this was the transaction, this is what it was about and then asked the question whether there was room for the operation of the avoidance provision under the accrual rules.

- Tipping J So start with the transaction that the parties have chosen, and then test it by BG1, rather than start with BG1 and call on the taxpayer in effect to justify it.
- Carruthers Well that's right. Because when you're talking about question begging, you are begging the question as to whether the starting point is that this was a tax avoidance arrangement, or was this a tax avoidance arrangement instead of looking at what the proper basis.
- Tipping J The trouble is to someone like me without the background in tax that others have, BG1 is couched in extremely wide terms.
- Carruthers Well that is.
- Tipping J Now what do we do to read it down in order to give the appropriate commercial rights if you like for people to order their affairs as they generally choose. I mean it is a very curious piece of drafting to my eye as a novice in this field. Because they're starting almost from the premise that anything you do which lessens your tax is suspect.
- Carruthers That is precisely right. And that has always been the problem with the section. And what you do Your Honour is to follow the jurisprudence that's led by Sir Ivor Richardson and leads through, probably we'll come through to *BNZ Investments* as one of the cases that one needs to look at. Because in that case the judgment of the President, Justice Richardson and the judgment of Justice Blanchard both face that issue squarely as to the approach that one must have to ensure that transactions that should not be caught are not caught.
- McGrath J Mr Carruthers can I just, seeing you've used the phrase which was featured in your earlier written argument, the question being whether there's room for s BG1 to apply.
- Carruthers Yes.
- McGrath J I would just question how helpful that metaphor is because it seems to me to imply that the specific provisions can occupy space if you like, to continue the metaphor, into which the anti-avoidance provision can't go. It seems to me that there must be some scope for the anti-avoidance provision to operate even though, on a proper application of the specific provisions, there is a qualification for the deduction.
- Carruthers We may not be at a difference because what Your Honour is really putting to me is that on analysis of the transaction under the specific provision, there is some aspect of it that raises a question as to whether it does fit within the scheme and purpose. So the moment.

- McGrath J Of the specific provisions.
- Carruthers Yes. The moment you get into a question about a transaction that involves a specific provision, then to use the room and space, you would engage BG1 and it's not a matter of looking at one to exclude the other but you could well get to a point where on the initial analysis of the transaction under the specific provision you decided that yes it fell squarely within the provision and there was nothing about it to raise any question that could suggest that BG1 applied. And I think that was the concept that we were pointing to in our written submissions.
- McGrath J Yes well the last element of that, bringing the last element in, that it's within not only the meaning of those provisions in accordance with purpose and context and the rest of it, but somehow bringing in the spirit as well in that inquiry seems to me to usurp something of the role of s BG1.
- Carruthers Your Honour what my Junior has just drawn attention to was Your Honour's decision in *Dandelion* which was a case about the Raro Runaround on which you may recall we spent some years. And I think Your Honour is right, that we may have put the matter unhelpfully in terms of room for operation because in that case the analysis was made really of the provisions side by side and the decision was reached that the ability to claim the tax credit was still subject to the BG1 analysis. So I think I am driven to say that one would look at the provisions side by side but you will still get to one of probably three positions. One is the way in which I put it to you a moment ago, that the transaction is so squarely within the general provision that there wouldn't be a concern about it, that the transaction requires consideration of BG1 and BG1 may be decided that it doesn't apply, having regard to the features that caused the concern, if I can put it that way. Or alternatively the third one, one might get to the point of saying, well no, the scheme and purpose of the whole of the legislation and the nature of the transaction that was entered into means that it does fall squarely within the object of BG1, the spirit of BG1.
- McGrath J Yes, yes.
- Carruthers So I think, if that is helpful.
- McGrath J Yes, thank you Mr Carruthers.
- Elias CJ Mr Carruthers one of the purposes of course of asking counsel to put their submissions in writing in advance is that we can expedite the hearing a little.

Carruthers Yes.

Elias CJ I'm not sure how my colleagues are placed over lunchtime but I will suggest to them that we might read on and might then be in a position to indicate to you that subject to your emphasising the propositions that you're making to us, the matters of background will have been considered and I would hope at least we could perhaps get onto page 18 and pick it up there, subject to anything you particularly want to draw our attention to.

Carruthers I'd be very happy with that Your Honour and that would suit me.

Elias CJ I am a little concerned about the time. And making sure that all parties have a fair opportunity.

Carruthers Yes.

Lunch adjournment: 1:03pm

Court resumes: 2.21pm

Elias CJ Yes Mr Carruthers we've read carefully to page 18.

Carruthers Thank you. Your Honour asked me a question earlier about whether you needed to read anything more than my note for oral argument in the context of the argument I'm making and I really wanted to emphasise that it is of course supplementary to the written submission that we filed prior to the hearing and this was designed to be a comprehensive reply to the Commissioner's submission which necessarily drew on my other.

Elias CJ Yes I understand that yes.

Carruthers So I wouldn't want it thought that I didn't want you to look.

Elias CJ That it was superseded, no.

Carruthers No, no, not at all.

Elias CJ Thank you.

Carruthers You did invite me just to deal with any matters in the intervening pages.

Elias CJ Yes.

Carruthers And I think it is important for me to just emphasise some of the cases that I want you to look at.

Elias CJ Do you want to take us to them.

Carruthers Yes I do, if I can take you to volume 1 of my casebook. And take you to *Challenge* under tab 5, and take you to *Challenge* in the Privy Council, this is Lord Templeman's speech, I'm sorry Lord Templeman's decision as part of the advice. And I'm at page 561.

And what I want to draw attention to is that really as a novel concept, His Lordship formulates the material distinction between tax mitigation and tax avoidance. Points to the *Duke of Westminster's* case and said that distinction was not considered nor applied. He then, in that paragraph just before line 20, looks at what mitigation is and then looks at the advantage being derived not from an arrangement but from the reduction in income which he accepts, or the expenditure which he incurs. So that the contrast is whether it's derived from a statutory provision or an arrangement. And then he gives this example, and I'll read this very quickly:

“Thus when a taxpayer executes a covenant and makes a payment under the covenant he reduces his income. If the covenant exceeds six years and satisfies certain other conditions the reduction in income reduces the assessable income of the taxpayer. The tax advantage results from the payment under the covenant.

When a taxpayer makes a settlement, he deprives himself of the capital which is a source of income and thereby reduces his income. If the settlement is irrevocable and satisfies certain other conditions the reduction in income reduces the assessable income of the taxpayer. The tax advantage results from the reduction of income.

Where a taxpayer pays a premium on a qualifying insurance policy, he incurs expenditure. The tax statute entitles the taxpayer to reduction of tax liability. The tax advantage results from the expenditure on the premium.

A taxpayer may incur expense on export business or incur capital or other expenditure which by statute entitles the taxpayer to a reduction of his tax liability. The tax advantages result from the expenditure for which Parliament grants specific tax relief.”

And then coming to the bottom of the page and looking at the facts in *Challenge*, “In the present case the taxpayer subsidiaries seek to reduce their assessable income by a loss of \$5.8 million which was sustained by Perth (another company in the transaction) and suffered by Merbank and was not sustained by the taxpayers or suffered by

Challenge. It is true that Challenge expended \$10,000 in purchasing the shares in Perth but this purchase price is not deductible against Challenge's assessable income. Apart from the risk of losing \$10,000, the Challenge Group never risked anything, never lost anything and never spent anything but now claim to deduct a loss of \$5.8 million.

Challenge have practised tax avoidance to which s 99 applies. Challenge have not practised tax mitigation because the Challenge Group never suffered the loss of \$5 million which would entitle them to a reduction in their tax liability of \$2.85 million.”

And then going to the bottom of the page to pick up the principle that His Lordship is applying, the last substantive paragraph on the page:

“Most tax avoidance involves a pretence; see the analysis in *Ramsay*. In the present case Challenge and their taxpayer subsidiaries pretend that they suffered a loss when in truth the loss was sustained by Perth and suffered by Merbank. In New Zealand s 99 would apply to all the cited English cases of income tax avoidance. Section 99 also applies where, as in this case, the taxpayer alleges that he has achieved the magic result of creating a tax loss by purchasing the tax loss of another taxpayer. In order to escape s 99 a transferable loss must be sustained by a member of a group which suffers the loss.”

And then finally on 563 line 9: “Whatever the circumstances or complications, if a taxpayer asserts a reduction in assessable income, or if a taxpayer seeks relief without suffering the expenditure which qualifies for such relief, then tax avoidance is involved and the Commissioner is entitled and bound by s 99 to adjust the assessable income of the taxpayer so as to eliminate the tax advantage sought to be obtained.”

Now whether His Lordship is right or wrong in that analysis, that is an illustration on the way on which His Lordship has analysed it, that is an illustration of the concept of pretence. What I invite and ask Your Honours to do in looking at the way in which that jurisprudence developed, is to read these cases: *Dandelion* which is number 14 and that's in volume 2, and that's assisted by a diagram from the High Court decision, *Miller*, which is case 21 in volume 2 and *Peterson* which is case 23 in volume 2.

And if I could just say a word about that because, and this is really responding to a question Justice McGrath asked of me. And it was that question about room and space Your Honour. And if one looked at *Peterson*, what that involved was a determination by the Commissioner that was published on the way in which expenditure in relation to films was to be treated. And part of it involved the cost of films which applied on both sides of the transaction and part of that

determination concerned the way in which limited recourse loans were to be treated. So what the transaction involved was a compliance with the Commissioner's determination and it was acknowledged by the Commissioner that the costs included both sides and recognised the limited recourse transaction. So what the Privy Council decided correctly was that that transaction fell within the Commissioner's determination and was deductible accordingly. So there was not a space that allowed for BG1 or for s 99 to operate. So I really just invite the reading of those cases because that is where that concept of pretence comes from.

Now, your Honour, if I can just deal with some very short matters that are really involved perhaps

McGrath J Are you saying that in *Peterson* the denotation of space or room was actually employed or are you just saying it is an illustration of it.

Carruthers It is an illustration of where, on proper analysis of the transaction, there was no room for the operation of BG1 because the transaction fell squarely within the deductibility provision, that is the specific deductibility provision as a result of the way in which the Commissioner had determined transactions should be looked at.

McGrath J I can certainly understand that. It wasn't possible for the Commissioner to challenge the truth of the deduction, if you like, for the full amount, the Y figure I think it was called. It wasn't any longer possible because of concessions that have been made in lower Courts.

Carruthers Well no, it was actually always assumed in the lower Courts, and it was certainly always argued in the lower Courts, that it turned on the question what costs was in the proposition to. And it was formally conceded in the Privy Council that that applied to both sides of the transaction. That's the concession that is being spoken of. Because it was raised in argument by one of the Judges who finished up being a Judge in the minority, as to whether costs, as to how costs should be interpreted. And that's why the concession was obtained.

Now just if I can take you to page 8 and just in that first paragraph after the word "secondly", that secondly is in *Challenge*. It's just not altogether clear reading it, and I will just deal with these quickly. Please note in 16 that *Ramsey* is wrongly spelt, it has got 2 "a"s, that is an "a" instead of an "e". In 21 to make that read properly, on the second line, paragraph 21, on the second line, delete the words "itself resulted".

Can I come through to page 12 at paragraph (d). You will see there is a reference to the Australian Part IV A cases, this is looking at part of

the argument in *BNZ Investments*. Now Part IV A is light years away from our BG1 provision. It is a much more draconian provision in quite different terms. And I will just pick that up by reference to *Hart*. If you take up the Commissioner's yellow bundle of additional authorities, volume 1 of 2, and *Hart* is case number 7. And I'm only going to this for the, to identify the provision for you. Go to page 233.

Tipping J I've got one yellow volume. Were any of the other ones that came in earlier yellow?

Carruthers Yes.

Tipping J There's some yellow ones here are there?

Carruthers You will have three yellow volumes.

Elias CJ At the top, see on top of the bottom ones.

Carruthers It is tab 7. It is Commissioner's Bundle of Additional Authorities, volume 1 of 2.

Tipping J I had [inaudible] you know what place I couldn't see it.

Carruthers That's the penalty of a good filing system your Honour. And I'm under tab 7 and I am at page 233. And that provision runs onto 234 and it is all geared around a tax benefit. Now the point of that is that those cases aren't on point. More importantly, there is a similar provision in Hong Kong and I noticed

McGrath J Sorry I just haven't quite worked out why we don't derive assistance from the Australian cases?

Elias CJ I suppose it depends on what the case law means. Whether this provision coincides with the case law.

Carruthers Well I think your Honour will find that this provision goes much further and much more precisely to check tax avoidance than our provision does.

McGrath J There's a lot of specification in it isn't there?

Carruthers It was drafted by the present Chief Justice when he was at the Bar. Chief Justice Gleeson actually drafted this provision and as a result would never advise on it. But more importantly

- Elias CJ Did he sit on it?
- McGrath J He sat on it and gave a judgment on it.
- Carruthers Yes, well he was allowed to by then. But more importantly it is recognised now to have a number of problems with the extent of its application. But I just brought, your Honours
- McGrath J Just the particular specified features are interesting as to what to take into account in deciding whether a matter is a scheme within Part IV A it seemed to me. I mean commerciality isn't one of them as I understand it.
- Carruthers Now that's right.
- McGrath J The fact that there is the specification and we no longer have a provision in the form it was at the time of *Newton* or something of that kind, obviously means we are dealing with a different provision. But I just wondered, everybody seems to race off to the English jurisprudence and find huge assistance in that, where there is no general anti-avoidance rule. But no-one seems to place any great emphasis on what the Australians are doing when they do have one. It just seems to me to be a bit ironic.
- Carruthers Well let me deal with that because the first part of running off to the English jurisdiction is certainly not our approach. The only reason that we get, for our argument, this is a personal matter, for our argument the only reason we go there is that we had the Privy Council jurisdiction and we had the same Law Lords, like Lord Hoffmann's reasoning
- McGrath J And the *Auckland Harbour Board* and that sort of thing.
- Carruthers Yes and all of, so that was the value of the English jurisdiction and I think some care needs to be brought to this concept that they don't have an anti-avoidance provision therefore there is something about their jurisprudence isn't appropriately brought to us because, as I have submitted, what is relevant in those English cases is actually the statutory interpretation and the way in which they interpret scheme and purpose of their Act. Which, as I have submitted already in this note of oral argument, does bring it very much into our approach. And I think the other aspect of that is, when dealing with the Privy Council cases, is that they recognised, I mean *Auckland Harbour Board* recognised, *Westmoreland* recognised, *Peterson* recognised, that there was very much an issue with, I think Lord Hoffman called it a longstop provision. But I have been very careful in this analysis to make sure that it is not regarded as a dead letter on either side.

- McGrath J Well it just all the only comment I would make Mr Carruthers is that they obviously, insofar as the English side of the jurisprudence is concerned, they obviously have found they had to go into purpose of interpretation to bring some form of restriction on the scope of tax avoidance to bear. And they do seem to have visited that approach very much on New Zealand in their decisions in relation to New Zealand law in the Privy Council. They, for example, do not seem to, in recent decisions, have gone back and discussed the development of what you might call the s 108 jurisprudence.
- Carruthers Um, well if your Honour analyses those recent decisions, they use as their jumping off place in many instances *Challenge*, and that really going back to the Court of Appeal decision what was a thorough analysis of the jurisprudence. So you have got to be careful that one doesn't lose sight of the fact that
- McGrath J What you mean tax mitigation.
- Carruthers No I am actually much more concerned with the principled approach that Justice Richardson brought to *Challenge* in the Court of Appeal where he analysed what that jurisprudence was, and that jurisprudence has been referred to by the Privy Council and by the English cases in their analysis.
- McGrath J Probably because they see similarities to their own English approach in it and they like it.
- Carruthers Yeah well, I accept that and the reverse applies. And one of the observations I was going to make your Honour, that of course Lord Cooke was in some of those cases. *McGuckian* is one that we haven't referred to and he was also in *Auckland Harbour Board*. So you are narrowing down the scope to say that there is a separate jurisprudence. But for my part we have only used those for the
- McGrath J Why is it, I can understand what you are saying, that your argument in relation to England, but why is it we derive no assistance at all from the approach the Australians have been taking to their provision?
- Carruthers Well I don't think it is fair that we don't derive anything from them. Certainly some of the analysis that I think we have made draws on some of the Australian material. But the explanation is that I think they have moved away from a comparable tax avoidance provision, I think that is probably the reason why the jurisprudence
- Elias CJ But if our provision is much wider, why is not their more specific development helpful in giving content to such a broad provision?

Carruthers Well part of the reason for that your Honour is, and I will find the reference, but the Chief Justice actually disavowed all the previous jurisprudence on the basis that the

Elias CJ There was a new [inaudible]

Carruthers Yes it had really taken over the

Elias CJ It was a code. Which doesn't really answer the point though about if we have a very wide provision here, often it is quite interesting to see what tools other jurisdictions have employed.

Carruthers Yes well I notice that my learned friend has got that material in his bundle and one assumes that it is there to develop some argument from it. I suppose in the face of that passage from the Chief Justice and the difference in provisions, if we had tried to rely on it we may well have been met with an answer on the other side that the provision is different. And the passage is in *Spotless Services*, in that same volume, under tab 8, the next tab down. And this is the judgment of Chief Justice Brennan and Justices Dawson, Toohey, Gaudron, Gummow and Kirby. And at page 414, just in the first substantive paragraphs "Part IV A is to be construed and applied according to its terms, not under the influence of muffled echoes of old arguments concerning other legislation. In this Court counsel for the taxpayers referred to the repetition by the Privy Council in *Challenge* of the statement in *Duke of Westminster*."

Elias CJ We are having amplified echoes of old arguments it seems to me.

Carruthers Yes the not very subtle distinction is that they have a resounding relevance to the current case. Your Honours, now I think I can go to page 18 and take up the invitation you gave me. But because this is, from here on it really is narrative argument that actually identifies the propositions, I am going to canter through this if I may. Because it is, it does lend itself to simply being read when your Honours come to consider the matter.

I will deal with the topics though. At page 18, paragraph 41, I am looking at the position of charities, and in the Courts almost nothing is said about the charity status and what has the potential to be the extraordinary benefaction that will likely result from the forest. So if we are looking at terms of "usual" or "commercial", you are looking at something that is really unique and different on a scale that is vastly different from all other forestry investments that there have been.

I think I then developed the lack of symmetry argument against the Commissioner, [paragraphs] 42–43. Will it help your Honour if I just

refer to it in this way because I think it is material that can be read for itself.

Elias CJ Well I have already read through it but no doubt other Judges will stop you if you are going too fast.

Carruthers Alright. And then 45 picks up a theme that we have made, that really the Court of Appeal dismissed outright any reliance on the terms of the securities and we have noted that it didn't reflect on whether prices, other contractual terms including the insurance and the securities might not reflect the measure of risks run, for example by Trinity³ and CSI.

And then we have looked at the issue of risk for the JVAs in 46 and then I think I can go to the ledger, because this was "The Emperor Has No Clothes" was an expression that the President used in the Court of Appeal in the course of argument. But what emerges then in the judgment is what is described as "balancing the ledger" and the issue is what is the ledger. The Court's contention is that they were overpaying and the option to buy the land at half the value did not go anywhere near balancing the ledger. And the question is why and how does the Court get to the position that the value of the option doesn't go anywhere. And it is this issue really that prompted my response to Justice Tipping earlier, on the difficulty of expressing a view that this is not commercial or that the commercial judgment is one entirely for the Court. Because this is an illustration of the Court using what can only be self-informed knowledge and, in our submission, inaccurate because, if one looks at paragraph 51 and then looks at the evidence that I took you to yesterday of Mr Bradbury and Mr Peebles, there is an outright denial of the suggestion that the licence premium amount was known to be too high. And that's really the Court's own underlying assumption based on the Commissioner's assertions.

And probably the next paragraph, 53, and that should read "The important point of principle *is* to examine the Court's asserted need to identify "the ledger" and to ensure that it is "balanced"." When one looks at the judgment, there is no reasoning behind those concepts. And this is the position that the Court takes, that the JVA should have bought the land themselves at the original cost price; they should have paid cash upfront to meet their obligations; they should have ensured that they were practically certain of deriving pre-tax profits, and that they did not take tax benefits into account for the real business model.

Now what underpins all of this approach is the notion of what is real. And where the Court itself means that, for tax avoidance analysis purpose, an obligation which is met or satisfied only when it is paid in cash immediately. And if the, well I have just moved to our

submission, that it is what in the *Ben Nevis* submission is called (that should be at the top of page 22) is called the Court's credit-worthiness approach – if cash is not paid at the outset, then it is necessary for taxpayers to show that there is a practical certainty of payment, and to have made themselves personal guarantors of that result.

Now and the contrast with *Peterson* as I have put it, and *CityLink Melbourne* is obvious enough and I will leave it to you to go to those. There was no certainty of cash payment, that is repayment of the loan in *Peterson* or the notes. And so it is important to look at the principle that underlies that approach to the Court of Appeal and it is not at all easy to articulate what it is.

And our submission is that payment in cash immediately/certainty of payment with personal guarantees – really are unsound and they conflict with the historical cost tax accounting principles. And we have drawn the distinction with the company solvency concept, what the Court of Appeal has insisted is really on a certainty of payment that is much higher than the solvency issue.

Then our submission is that the personal guarantees are not relevant and I have made an analysis of that and if I can take you to 63, the Court is saying “Dr Muir/Mr Bradbury ‘do not (and could not sensibly be thought to) have anything like a settled intention that their LAQCs will pay the 2047 insurance premiums as they fall due (or indeed meet the obligations to Trinity3)’. The trial Judge made no such finding. And the evidence given by Bradbury and Pebbles is directly to the contrary.”

So it is where one gets to expressions like the Court's impression, the making of presumptions, introducing a concept of practical defeasance, which is meaningless for the reasons that we identify in paragraph 65.

And the next feature that we deal with is the securities for the satisfaction of the promissory notes, and my learned friend Mr Stewart has canvassed this, as have I. But in paragraph 67 the Court treats the promissory note obligations as being “nothings” – the President's Clayton's Act reference. And then also

Tipping J Just pause for a moment. Was there actually any need to have the promissory notes, if there was a contractual obligation which the promissory notes simply reflected? What was the promissory note dimension adding to the incurring of the liability?

Carruthers It is this, it is the immediate exchange of consideration falling within the money definition that the Judge dealt with.

- Tipping J But a right to money surely can be created by contractual obligation just as much as a promissory note. A promissory note was simply there to back the contractual obligation. Was it a sort of belt and braces exercise?
- Carruthers Well I mean I think that for the transaction it was a piece of paper which said that was the money, that was the payment. And I mean
- Tipping J This is a point that has just puzzled me and I just thought there might be some obvious – that without the promissory note some essential ingredient would be missing.
- Carruthers Yes.
- McGrath J It is the satisfaction of the obligation wasn't it?
- Carruthers Yes it is. And I now see the point. It is an immediate satisfaction of the obligation for the purpose of the accrual rules, that is that by having the promissory note you satisfy the obligation you incur, and you deal with the entitlement under the accrual rules or the avoidance.
- Tipping J So it is a necessary step to get the accrual rules into play is it?
- Carruthers It is a transaction that is designed around the statutory provisions to which the taxpayer is entitled to have recourse and of which the taxpayer is entitled to a benefit, to make sure that the analysis starts at the right point.
- Tipping J Yeah but given all that, but without the promissory note are you saying the accrual rules wouldn't be engaged?
- Gault J Couldn't the contract do exactly the same thing?
- Carruthers Your Honours it is the immediate transfer of the property that has to be achieved to avoid the spreading obligation under the rules. So that and that is achieved by the promissory notes.
- Tipping J What property are we referring to?
- Carruthers Can I invite your Honour just to look at the argument that, the reply that I put in this morning to deal with your Honour's question yesterday. And look at the analysis that is made by the Judge and the point that is raised in the passage from *Byles* that I handed in and point to the promissory notes reflecting the parties' agreement that those promissory notes would be complete satisfaction in terms of the main agreement.

- Tipping J Is that a step which discharges one obligation by creating another?
- Carruthers If your Honour is referring to the obligation to pay ultimately on the promissory note yes.
- Tipping J No I am talking about, I may be making an assumption here Mr Carruthers, which you will be able to correct me about. Before the promissory note was executed, was there an existing obligation of which the promissory note was, as my brother McGrath said, full satisfaction? Because I am just getting a little puzzled here as to exactly what the promissory note was intended to achieve. Because if there was already an obligation by force of the contract to pay this amount of money represented by the promissory note, it is that obligation of which the promissory note was full satisfaction, as *Byles* puts it. But all that does is to simply substitute the same obligation but under another instrument.
- McGrath J Mr Carruthers perhaps I can just say that I thought what you had told us yesterday was that you needed to show that the expenditure had been incurred, and that that needed a definitive commitment, and that the way that was done was to execute the promissory note, because by satisfying the debt you could establish the definitive commitment. That may or may not be helpful.
- Carruthers Yes that's right. As part of the transaction, not substituting one obligation for another.
- Tipping J If it is full satisfaction of obligation 1, as per my brother's approach, then all it is doing is substituting an identical obligation by dint of the promissory note. It is the same amount of money.
- Carruthers It is the method by which the obligation is satisfied and it is an integral part of the arrangements between them, between the parties.
- Tipping J Alright, well I don't wish to trouble you any more about it. I have just raised some concern about this dimension, as to really what was going on.
- Carruthers Well I think
- Tipping J What was the whole purpose of substituting the promissory note for the anterior obligation which the promissory note fully satisfied?
- Carruthers Well you say it was anterior, but they were concurrent in the sense that the terms were being fashioned and the method of payment was being fashioned, so it is not one being substituted for the other. It is the way in which the obligation was satisfied.

- Tipping J But I thought Mr Carruthers you were placing some reliance on the proposition in *Byles* that the promissory note fully satisfies some sort of obligation. I have been diverted perhaps by your reliance on that point in *Byles* and if I am misleading myself I apologise.
- Carruthers No no no. I am much more concerned to sort it out so that we know
- Tipping J I mean there may be nothing in this but it has puzzled me what the promissory notes added to, as my brother Gault said, an ordinary contractual obligation to pay. Wouldn't that be a right to money in terms of the definition of "money"?
- Carruthers The point is that there has to be immediate exchanges of property in order to get the benefit of the rules and that the issue of the promissory note in relation to the insurance premium and the licence is a transfer of property that allows that to take place. The provision in the contrast as to payment is not a mutual satisfaction of the obligation. It is not a transfer of the property.
- Tipping J Is it a transfer of property in the sense of substituting an obligation under one instrument for an obligation under another?
- Carruthers Well it is really of performance of the obligation under one. So I suppose that you do, you do finish up with an obligation to meet the promissory note in due time.
- Tipping J It's the same obligation; it is just being transferred, if you like, so as to bring it within the accrual rules.
- Carruthers Well it's being performed. And the obligation is being performed.
- Tipping J Well this is what is nagging me, that it seems to me that this, subject to your further explanation, is just a means of getting it within the accrual rules which they had to do because they just couldn't just rest on the contract.
- Carruthers It is the method of performance of the contract, in compliance with the rules, that allows them to take the benefit of the rules. Your Honour the trial Judge in those paragraphs that I have taken you to in that note, sets it out admirably and accurately that, in my submission, meets the point that you are concerned about.
- Tipping J Well we will just have to see about that Mr Carruthers.
- Gault J I wonder whether there might be a difference at the other end and I don't know, I am just thinking aloud Mr Carruthers, but if Trinity³ holds the promissory note and also an entitlement apply proceeds

from the sale of the forest to discharge the promissory note, might that have an effect that the proceeds of the sale of the property don't become income in the hands of the JVA which gives them the responsibility for paying a contractual debt.

Carruthers No the answer to you is no, it is income, it is an income credit in the account, that's the way that the transaction is documented. So it wouldn't suffer the difficulty that your Honour sees.

I was dealing at page 24 with the debentures as securities and I just draw attention to paragraph 68. I think my learned friend Mr Stewart covered that sufficiently. This issue of real money, paragraph 70, there is real money and there is a lot of real money applied to different hands. And the investors will have satisfied, that is paid in cash under the securities, the \$32,000 and their licence premium obligation to Trinity3 of \$2.05m.

And then at 72 I have noted "Even if the harvest proceeds are \$787,000", dealing with that issue we discussed yesterday, it is still a lot of real money applied in different hands. And I just want you to make some alterations to this paragraph. "The investors will then still satisfy the insurance premium note of \$32,000 to CSI" [please delete the next words "and the LP Note to Trinity3" – that is actually out of order, so delete that]. And then "Trinity3 will satisfy its obligation to pay CSI the maximum premium. CSI will pay the maximum insurance amount [and I have got "to the investors", that is something of an elision – it's paid to Trinity3 with credit, for the credit of the investors being \$1.263m so that they discharge their licence premium obligation of \$2.05m" and that's in line with, that is determined by that stumpage figure.

I then come to deal with the language used by the Commissioner and this issue of crossing the line. Can I invite you to read and, in my submission, just appreciate what line-drawing actually is. I have given the reference to *BNZ Investments* and at paragraph 42 which is the substantive paragraph that the President, Justice Richardson, formulates what line-drawing is. That is what the metes and bounds of the provision is, and that is picked up by Justice Blanchard at 175. So that is the correct approach to line-drawing, which is not the concept that the Commissioner is trying to fashion it into.

Complexity. I dealt with *Barclays Mercantile* this morning just in passing by reference to the vast experience of Mr Justice Park in this area. *Barclays* is under tab 28 and there is a diagram that actually by reference to the paragraphs in the judgment identifies the *Barclays* transaction, and you will see it is of complexity. And then in paragraph 76 I have just really made the submission I have already made. Other illustrations were given. I have gone through *Barclays*, 78, 79, 80.

Just on this issue of what's usual and what's unusual, there are some quite interesting examples and some quite homely examples that I think I can draw from, some of your Honour's background. If one looks at the insurance industry and what somebody, looking in from the outside might regard as usual or unusual, there is an instance of a snapper fishing competition within a specified period and fishing for tagged fish with prize money of \$100,000. And it is a competition that attracts 3,000 people; a number of other prizes on offer, and it was discovered, just as part of inquiry about this competition, that the prize was actually insured. And the insurance organiser was, it was put to him, that this was a most unusual insurance. And the answer was "well no it's not". And he was asked "well do you make any money out of it", and there was a quizzical look in response. But there you are is an unusual transaction.

I will move your Honour from fishing to golf, where one can insure against a hole in one, and a number of other competitions on the golf field.

Tipping J That's yourself getting one you mean.

Carruthers Yes, that would be the only reason you would want to insure. But in terms of competition there are other insurances.

Tipping J I am not quite sure what point you are making here Mr Carruthers. Is it don't be beguiled by usualness or unusualness?

Carruthers Well it is only valid, there is always this question of judgment and this is why I come back to a carefully designed plan around the life cycle of Douglas fir trees for the benefaction of charities and ask somebody in the street or somebody informed whether that's a usual transaction, whether that's a commercial transaction, and the answer is "well no, it is not a usual transaction; it is a unique transaction". Is it commercial? "Well what commerciality does a charity want to get the benefit of a transaction?" I think I have given, oh I was not going to let your Honour the Chief Justice out without an example there in the South Island.

Tipping J Well the Auckland plumber I thought

Carruthers Oh no. [laughter]

Elias CJ I did know an Auckland builder.

Carruthers No no I wouldn't do that to your Honour, you know very well that. But I mean the substantial prize is, well a substantial stake where a horse wins three different named races at race meetings over a

premium, over a period, and that's another feature of insurance. No I like the Bentley turbo car that was, as your Honours will appreciate, doesn't come cheaply but it was converted as a plumber's van and attracted a lot of attention and a lot of custom. But as well as a lot of criticism. And of course if one is looking at usual and unusual transactions, the mandatory convertible notes in the *BNZI* case, one could look at with some interest as his Honour Justice McGrath and I did for some three years a little while ago.

Incurred, I have dealt with incurred and *Mitsubishi Motors* and I think that's straightforward. At the bottom of 29, page 29, just in that quote the square bracket is just around the letter "t" in case that misleads in any way.

91, there is a lovely problem with the double negative in that second sentence. "An individual shareholder never has such liability" [delete the *no* for me]. And that's an issue where one is looking at the position of LAQCs and the LAQC election and the inconsistency where the Court fails to appreciate the difference between the two LAQCs and Accent.

I think I have raised that question of juristic and commercial terms, towards the end of that paragraph. I have dealt with *Auckland Harbour Board*. And I think the balance of it is simply looking at, paragraph 105 [sic], "truly incurred" is an obligation equalling a deduction. And I have just put together very briefly the conclusion. In paragraph 108 please, it's ironic, it is appropriate to return to why this should be rejected. Sir Ivor Richardson's *Challenge* judgment contains *the answer* [should be inserted] *with* its reasons. And then I have drawn attention to that essay *Countering Tax Avoidance*, which really captures the argument that we have been making and the reason for a principled approach as to what takes this case out of its statutory provisions and out of its specific provisions and into s BG1.

To your Honours Justices Tipping and Gault, I will return to that issue and make sure that I deal with it satisfactorily for you. Those are my submissions.

Elias CJ Yes thank you Mr Carruthers.

Carruthers Mr Harley will address

Elias CJ Yes Mr Harley.

Harley Two housekeeping matters. My friend Mr Stewart would like me to refer to the citation of *Miles v Bull*, which was at the foot of page 13 of the sham submission. The correct citation to the case is [1968] 3 All ER 632 at page 636G.

Anderson J Where was that again please.

Harley At [1968].

Anderson J No, what paragraph? What page?

Harley 636 line G.

Anderson J And what is it meant to be?

Harley We are at the foot of Mr Stewart's sham submission page 13.

Anderson J Yes I have got that.

Harley The reference is [1968] 3 All ER 632 at 636 line G.

Your Honour Justice Tipping, hopefully not to reopen Pandora's box about the accrual rules exchanges, if I could refer you to the Commissioner's reply submission on the accrual rules, please don't look at this now. Just reading

Tipping J The temptation was almost too great.

Harley Please don't. Um page 3, paragraph 8, and your Honour should avert your eyes when it comes to paragraph 9.

Elias CJ You don't support it?

Harley How did your Honour guess?

Gault J What page was that?

Tipping J Page 3 paragraph 8, avert eyes at paragraph 9.

Harley Yes please.

Two other matters by way of confession. The incorrect quotation reference to Justice Venning at [203] is my error and I apologise to the Court and to my friends for that goose-chase. Secondly, and relatedly, your Honours I am the person who had the primary responsibility for preparation of the accrual rules and their drafting. I have always appreciated that my friend, now her Honour Justice Glazebrook, managed to write a textbook about that. And my admiration for that is profound, as it is to you Justice Anderson, for

your immediate grasp of what are such simple rules. To the rest of your Honours

Anderson J I was just taking a punt [laughter]

Harley Please don't your Honour. To the rest of your Honours, it would be kind of you if you did not criticise the draftsman or record this confession. By way of introduction to the participation argument, I do have what was supposed to be a full note of what was I was going to address but it is not in print. I would like to blame Mr Stewart for that in relation to the xerox but even my conscience doesn't permit that. I can hand it in tomorrow, if that is going to be of assistance. But I can speak to the full written submission and my notes and, hopefully your Honour the Chief Justice, keep to time management.

In terms of what is Part 5 of the main submission for the Ben Nevis appellants, the points are, in terms of common ground with the Commissioner, that if it's simply and only by virtue of membership of the joint venture agreement that there is an illegitimate arrangement which constitutes avoidance, this participation submission can't succeed. On that approach it would seem that the joint venture agreement avoidance arrangement simply concerns the use of the promissory notes and the amounts being treated as incurred in 1997 but not satisfied in cash until 2047-2048, outside of the accrual rules. The reference to guarantees or no guarantees, in my submission, is completely irrelevant to that proposition. But on that basis, and if that is what the Court decides that's simply the essence of the arrangement, then all of the Ben Nevis appellants are within it.

And so I move on to a separate part of the factual context and it is on the assumption that the Court does not reach the conclusion that I have just postulated. The second part of it being then that the Court considers that the offensive parts of the arrangement are the existence and content of the CSI business plan and the CSI letter of comfort. And if it is those are the two critical condemning elements, then this submission takes life in terms of who is and who is not a participant in respect of those two aspects.

Accordingly, for this submission to succeed, it is common ground with the Commissioner and acknowledging that he doesn't accept the initial premise, first the Court has to approve the decision of Justice McGechan and of the Court of Appeal majority judgments in *BNZ Investments* and to prefer those reasons as to participation over those of their Lordships in the Privy Council in respect of the *Peterson* decision. I should have said your Honours there is no need for you to take detailed notes, if it helps you, I can hand this in and I can avoid writer's cramp.

Elias CJ Can you, that would be helpful, but are you going to outline for us where you are going, so that we know what to listen for.

Harley Absolutely your Honour and I am hopeful I am going to do better than outline, I am going to finish it.

Elias CJ Alright.

Harley Second, your Honour in respect of

Elias CJ May I just ask, um, are you speaking to Part 5 of your submissions or are you

Harley Yes I am.

Elias CJ You are not, there is no reply element in this.

Harley Not so far.

Elias CJ No. Well do you get to it. I just want to know whether we should be able to follow this from Part 5 of your submissions.

Harley Yes you should be able to.

Elias CJ Do we need to have any more written material then?

Harley Only if you think it is helpful.

McGrath J Just which particular statutory provisions BG1 and

Harley GB1.

McGrath J GB1.

Harley I will get to the statutory language and the language that is pivotal to this, which is GB1 and its interplay with BG1. And the shorthand way

Elias CJ Where do we find them, sorry, under what tab?

McGrath J 13 and 14 of the Commissioner's compilation I think.

Elias CJ Thank you.

Tipping J And is your part of it in the main submissions, we are to look at Part 5, which starts, I am just trying to find where Part 5 starts.

Harley Page 34 at paragraph 91.

Tipping J Thank you. Thank you very much.

Harley And all I have tried to do so far, your Honours, is clear the decks in terms of what's common ground, what's in dispute, and what is the argument in respect of participation. And I have identified the CSI business plan and the letter of comfort and those are the two elements that the Court of Appeal particularly latched onto in respect of all of the appellants.

Tipping J Participation is a shorthand for who is caught by?

Harley Yes it is your Honour.

Tipping J Is it?

Harley Yes it is. And is anchored in the judgment that you joined in *BNZ Investments*. And I will come to that, going to that judgment is a very convenient shorthand way of getting into the analysis and understanding what it's about.

Tipping J But can you not be affected by an arrangement without being a participant in it?

Harley The answer to that question on this submission is no and that is what *BNZ Investments* establish.

Tipping J Well it may have done in the context of that case but it seems to be contrary to the, whatever one of those tax avoidance sections it is.

Harley GB1.

Tipping J BG1.

Harley GB1.

Tipping J GB1 is it. Well you will no doubt be telling us why we have to read that down.

Harley I am going to explain why if you read it carefully it means exactly what it says.

Tipping J It doesn't need to be read down, if you understand it properly.

Harley No, correct, as your Honour did.

Tipping J Well you may be attributing more to me Mr Harley than I deserve.

Harley Your Honour I am happy to take anything I can. In the third element in terms of the argument is then is a matter of evidence that the Court has to be satisfied that both the Courts below were wrong in respect of the treatment of the evidence concerning the CSI business plan and the Trinity CSI letter of comfort in terms of their attribution of those documents to everybody who is a joint venturer. And in relation to the Ben Nevis appellants for the reasons that I will articulate, none of them are privy to or have knowledge of the existence of those documents or the features that the Court of Appeal particularly latched onto. By way of an overview taking into account the broad meaning of the word arrangement in the statutory dictionary, contract, agreement, plan, or understanding. Understanding is the broadest of those words. That formulation in the statutory dictionary was lifted directly from the judgment of the Privy Council in *Newton* and of this being applied generally to the meaning of the word arrangement across a number of different statutes in New Zealand law and elsewhere.

Elias CJ The statutory dictionary, is that OP1.

Harley OP1 and now YA something in the new Act.

Elias CJ We don't need to look at it.

Harley Thank heavens. From the broadest reference understanding it involves the person having knowledge and involvement, the authorising of, the accepting or the carrying out of an arrangement with reference to that taxpayer's affairs, and so the postulation is this and this is not in the written submission but I can hand it in. If I can just go through this carefully. If there is an arrangement between A and B, which has the purpose of avoiding tax for C, by way of for example making a tax free payment or the obtaining of a tax deduction for C, C is obtaining a "tax advantage" from the voided arrangement, and is a person affected by that arrangement where C has knowledge of that arrangement and its purpose and is involved in the authorising, accepting the making of, or the carrying into effect of it. C is a participant and it's within the power of the section. There is in *BNZ Investments* language.

Elias CJ Sorry that proposition is derived from what?

- Harley BNZ Investments. There is in *BNZ Investments* language requisite for mutuality between A, B and C as to the plan or understanding, sufficient to justify the invocation of the section against C.
- Tipping J Though C must be mentally engaged so to speak.
- Harley Yes.
- Tipping J Is that the nub of it?
- Harley Yes.
- Tipping J You can't just wake up one morning and find to your horror that someone has inadvertently given you a tax benefit under something that's voidable?
- Elias CJ Well you're up for penalty interest or whatever.
- Harley Indeed and I am going to give you your Honour some examples that we used in the Court of Appeal and *BNZ Investments* literally on that wakeup scenario. There were three, and in Justice McGechan's High Court judgment it would seem from the way the judgment is written, that his Honour had had a rather horrible experience with the unauthorised use of the family car. And so through the reasons he refers to the.
- Elias CJ Sorry which High Court judgment are you referring to?
- Harley Justice McGechan, in *BNZ Investments*. He refers to the use of the family car, I think perhaps not very wisely by his wife, and the consequences of the use of the vehicle, where he knows that she is using his vehicle, but he does not know what for or, I think from the way it was written, the sticky end that it may have come to. And so he articulates the idea that simple knowledge is not enough to bring the person within the idea of consensus of mutuality as to the tax avoidance arrangement and the consequences. If I could divert at this point from what I am saying.
- McGrath J Can you just give us a page reference for that, or is there a passage you were going to come to. You go on and other counsel.
- Harley There are several paragraphs where he talks about the car, I think I can find them quickly. If I could just address Justice Gault and the problems that he raised about attribution in the question yesterday. There is a number of Australian cases on its form of what was s 260 where taxpayers were before the Australian courts saying (I hope I get the order of this right), you can't assess me for being a tax avoider

within an arrangement, because I personally had no knowledge that that was the arrangement that I had entered into, and I never authorised any tax avoidance and funnily enough the Australian cases are unanimous saying essentially ignorance of the consequence of the law is no defence.

Anderson J It might affect penalties though mightn't it?

Harley Might do, but no it doesn't on their view of it.

Anderson J No but in principle you could say well you can't retain the benefit of the tax advantage through your ignorance but you won't incur a penalty for it because you didn't do anything reprehensible.

Harley I understand the point. The Australian cases respond to the person who makes that kind of plea, that if the legal affect of the arrangement is avoidance this section applies to you, regardless of whether you understood that that was what it was.

Elias CJ But the way you are explaining it, there is nothing odd about that result because that simply is just not appreciating that you are caught, doesn't mean to say the way you are explaining it, that there is ignorance of the circumstances which cause the law to attach.

Harley Common ground your Honour. The second example before the Australian Courts is "my lawyer and accountant were authorised by me to enter into these arrangements, but I did not authorise them to take steps in terms of implementing these arrangements which constituted avoidance". That doesn't work either, the Australian Courts have said these are your agents, everything they do and know is you and you are caught.

Elias CJ Well again, are you saying that that wouldn't apply here?

Harley No I am saying that it's orthodox. The third example arises in the context of two very difficult cases, one called *Hancock* and one called *Rowdell*, which are discussed in passing in *BNZ Investments* where the shareholder arrangements first in *Hancock* and then in *Rowdell* are the mirror image of each other, one's the seller, one's the buyer. The seller is assessed under a tax avoidance arrangement and is held caught. The buyer is held under a tax avoidance arrangement in respect of the same transaction and the High Court of Australia said "no that's not how the section works, there is only one benefit," and the benefit in that case is the seller.

The principal Australian authorities are discussed in the Court of Appeal's judgment in *BNZ Investments* and also by Justice

McGechan. One's called *Gregrhon* and I just can't recall the other two, but Justice McGechan particularly details the essence of those cases in his judgment and respectfully in my view does a masterful job of explaining precisely the effect of them and the Court of Appeal was very happy to adopt that jurisprudence, saying it was perfectly consistent with the idea of understanding in *Newton*.

The critical question then in terms of this submission for the Ben Nevis appellants is to ask the question "what is the arrangement that they entered into"? And on a factual basis the answer to that question is "not CSIs letter of comfort and business plan, so that if they are the condemning elements the argument that's being made for these appellants is not their arrangement". And going back to the point that Justice Anderson has just raised with me, even if that's wrong in terms of participation under s BG1 it is relevant to the question of penalties and the role of the penalties regime applies. With that introduction, then if I can take the car example that Justice McGechan uses as in paragraph 53 of his judgment, which is at tab 3 of the materials. I don't suggest you go there, but I can read it quickly because it very quickly catches the idea. "There is a conceptual difference between arrangements and within that contracts agreements, plans and understandings, and mere passive knowledge at whatever degree it is pitched. I can have an arrangement with a motor vehicle repairer to bring the family car in for servicing. My wife may know of it. But that does not mean that she is a party to the arrangement. It's more likely Parliaments stipulation under s 99 in our BG1 for an arrangement means precisely that. It was not intended to bring in those who merely know without more, even if they gain some benefit".

Tipping J But if it's void as against the people who are parties to it, it doesn't say as against only those parties, does it?

Harley The submission is going to be yes it does. When you understand the exact language that is used in BG1 and GB1 in particular, that's exactly what it says.

Tipping J So in effect the argument is that you read in as against those parties. Even though it says "the starting point is that it was a tax avoidance arrangement it's void, as against the Commissioner". So it doesn't exist. And then when you come to it says "entered into by the person affected by or by another person", so the person affected doesn't have to enter into it. You say although it says that it doesn't really mean that?

Harley I don't have s GB1 directly in front of me your Honour but you will find in GB1 the additional words from or under that arrangement.

Tipping J I am looking at the definition of tax avoidance arrangement.

Harley The quick form into this is *BNZ Investments* in the Court of Appeal. Lets go there at 4

Elias CJ Sorry which provision were you just referring to BG12 was it?

Tipping J No GB, it's very sort of confusing, it just happens to be.

Harley Look this is horrible alpha numeric language and the easy way to deal with GB1 is to talk about the reconstruction power.

Tipping J So it's BG1 on the one hand and GB1 on the other.

Harley Yes.

Tipping J That's just a very strange coincidence presumably?

Harley It is in the 1998 Act onwards, it happens in the 1997 Act because of the renumbering, it was BB9 and I can't remember what the reconstruction was, but lets talk about reconstruction, which is GB1 and the main power which is BG1.

Tipping J But isn't the first step that it's void, what you can then do is a rather different matter isn't it?

Harley Well we will see your Honour that the language is completely intertwined and the reason it is, is that the draft person picked up a passage out of Lord Wilberforce's judgment in *Mangin* and copied it verbatim and stuck it on.

I wouldn't say that that was Sir Ivor Richardson but he certainly had a role in the formulation of the section as it was passed. But there is no question that the language is verbatim from Lord Wilberforce's dissent.

Elias CJ The language of GB1?

Harley A lot of it, yes.

Elias CJ Well which part?

Harley The formulation is would in all likelihood have.

Elias CJ Or might be expected to have or would in all likelihood have.

Harley Yes you will find that in Lord Wilberforce's dissent.

Tipping J So they were going to go with Lord Wilberforce to the extent they were willing?

Harley Yes, well he explained the problems with the section and criticising it as strongly as he did in his dissent and so when the Commissioner lost *Gerards* case and introduced legislation to fix the problem, and I don't mean this critically, the drafts person picked up the master as it were in terms of the critique and adopted precisely the formulation that Lord Wilberforce brought to bear. In that judgment of his in *Mangin* somewhere else he describes the old s 108 as a rusty instrument which breaks in our hands, the idea being that the Commissioner was trying to use it to do something that it simply couldn't do effectively.

Tipping J You were taking us to BNZ, where do we find that in the volume.

Harley Tab 3.

Tipping J Of volume One.

Harley Yes and I am pretty sure that we start at 42.

Tipping J And whereabouts in BNZ are you wanting us to go Mr Harley?

Harley Well it's a bit corny but lets start at six which is the section itself. As it was and in the form that we are talking about it in this case BG1 in the 1998 year you will find some of the words that are in this form are now missing. But,

Elias CJ You better tell us which they are if you are taking us to this.

Harley I can't do it immediately your Honour but I can tell you that it doesn't matter. And it doesn't matter because the statute tells us in the redraft process, no change to law is intended by the reordering and trimming.

Tipping J Is it subs 3 of the old 99.

Harley Yes it is.

Elias CJ Did you say paragraph 6 of the Court of Appeal decision?

Harley Sorry, yes. There is a lot of compression in terms of the statutory formulation in subs (3) but the words that I am asking you to look at closely are the Commissioner's exercising his powers under subs (2)

and then the arrangement that's subject to subs (2) to be adjusted as the Commissioner considers appropriate to counteract any tax advantage obtained by that person and the critical words are "from or under that arrangement".

- Tipping J That doesn't imply you have to be a party to it.
- Harley Your Honour I am going to submit to you that it does and that that is what *BNZ Investments* correctly holds.
- Anderson J What about the whether or not part? Sorry I may be in a different part of the swamp from you.
- Harley I am in subs (3).
- Anderson J Of s 99?
- Harley Subs (3) yes.
- Anderson J Well I was looking at the 99(2) and the last words of
- Harley Yes yes yes yes no I understand. We are in different parts of the swamp. I am only focusing on subs (3) at the moment.
- McGrath J What was it in subs (2) you had mentioned in passing? You mentioned some words; I thought you were asking us also to look at something in subs (2) which I didn't quite note down.
- Harley I am sorry your Honour, what I was talking about was in subs (3), it talks about the arrangement that is voided under subs (2).
- McGrath J Okay. I'm sorry.
- Tipping J What you did say, I think probably inadvertently, was that the Commissioner exercises his powers under subs (2), whereas in actual fact it is a statutory consequence, not a power.
- Harley I agree with that. Yes thank you.
- Tipping J But it doesn't matter.
- Harley No I agree with you though. That is correct. That's how the section works. It applies regardless of the Commissioner.
- Tipping J As I say, I don't think it matters at all for our immediate point.

Harley And so the focus here is on the words “to counteract any tax advantage obtained by that person from or under that arrangement”. And then it goes on “and without limitation. These are the sorts of powers he can exercise in reconstruction”. What does that mean in terms of the scope of the power in subs (2). And the answer to that question is given by the majority

Tipping J The scope of the power in subs (2).

Harley Yes.

Tipping J What do you mean by that?

Harley The scope of the power to void an arrangement. What arrangement are we talking about.

Tipping J But if it is one of these beasts that the statute voids, it’s void. There is no power to avoid it.

Harley Your Honour that’s

Tipping J It’s consequential isn’t it on it being

Harley That which is void under subs (2) is that which is counteracted in terms of the tax advantage. One is the mirror image of the other.

Tipping J Of course. I don’t dispute that. I’m just being a bit pedantic perhaps, as to the way you are expressing this

Elias CJ We have got through to avoidance.

Tipping J It’s void.

Harley Absolutely.

Tipping J Nevermind why or how. Then the question is what does the Commissioner do but he shall adjust.

Harley Yes. To counteract any tax advantage obtained by that person from or under the arrangement. Question “What arrangement are we talking about?”

Anderson J Or is the tax advantage one that is, if there is a tax advantage is it one that is obtained from or under the void arrangement.

Harley Correct. And the majority judgment in *BNZ Investments* goes from paragraph [42] through to [52] to explain why this involves a consensus or mutuality.

Elias CJ Just looking at the statutory language though and before we see what the Court of Appeal did about it. If you have an arrangement that is void, subs (3) adjusts the accessible income of any person affected by the arrangement. It's not

Harley In respect of "their tax advantage".

Tipping J Well there must be some nexus between the arrangement and the tax advantage.

Harley That's correct.

Tipping J You don't have to be a party to the arrangement in order to provide the nexus.

Harley Your Honour I hate the word "party" because it immediately gets into a

Tipping J Well you don't have to be mentally engaged

Harley Yes you do.

Tipping J If you prefer that expression.

Harley I prefer participant.

Tipping J Participant alright. Well let's go with participant. You don't have to be a participant to be affected, if it is designed to give you an advantage.

Harley Your Honour the judgment of the Court is yes you do and the reason for it is as exactly as you put it earlier, if you wake up in the morning with some kind of benefit that you know nothing about and the Commissioner is knocking on the door. And I will give you the

Tipping J That must be a pretty far-fetched example though, because knocking on the

Harley Well I think you'll find it's not very far-fetched at all.

Elias CJ Well it has to be, it's an adjustment in such manner as the Commissioner considers appropriate. The Commissioner can't act unreasonably in this.

Tipping J He surely knocks on the door and says you probably know nothing about this Mr Harley, but I'm awfully sad to have to tell you

Harley And I'll give you time to pay.

Tipping J that Messrs Stewart and Carruthers have done something wonderful for you but actually it's tax avoidance and we are going to have to do a little bit of jiggling with your tax return Mr Harley. We are awfully sorry. But we won't dong you for various other things.

Anderson J But that million dollars tax credit I'm awfully afraid it has got to go back.

Harley This is a nightmare that's worse than my xerox this morning. But there is a lot of difficult elements in various of your Honours' reply, including your Honour the Chief Justice, in terms of the power of the Commissioner under subs (3) and his duty to act reasonably in the administrative law discretionary sense. But I would like you to do is just follow through if you would from [42] through to [52] where the Court comes to the conclusion that this is all about mutuality and that it is necessary for participation to occur for the person to be the subject of the power.

Tipping J But look at the start to paragraph [49]. It's all focused on what is the meaning of an arrangement.

Harley Indeed.

Tipping J Not affected by.

Harley Indeed. And read on your Honour.

Tipping J Right. Well where do you say is the key waking up in the morning point in all this?

Harley In [50]. "That reasoning", that is the reasoning in all the cases including the Commerce Act cases, the magic million case, which I think one of your Honour's, the Commerce Commission cases all dealing with the meaning of arrangement. "In our view that reasoning is applicable to s 99. An arrangement involves a consensus, a meeting of the minds between parties involving an expectation on the part of each that the other will act in a particular way. The descending order of the terms 'contract, agreement, plan or understanding' suggests

there are descending degrees of enforceability, so that a contract is ordinarily but not necessarily legally enforceable, as is perhaps an agreement, while a plan or understanding may often not be legally enforceable. The essential thread is mutuality as to content. The meeting of the minds embodies an expectation as to future conduct. There is consensus as to what is to be done.”

Elias CJ But this is all directed at whether it is to be avoided. If you have got through that gate, and this is a void arrangement, what I thought we were concentrating on, the unwind, the consequences. And I thought you were going to take us to something which indicates that it can only be unwound against somebody engaged.

Harley The person who has the tax advantage is the person who can be unwound.

Elias CJ Yes.

Harley And I'll get there in a moment your Honour.

Elias CJ Alright.

Harley In paragraph [51] the Court sets out the reason for “don't come knocking on the door” to the so-called innocent person and there is the reference to the passage in *Chitty on Contracts*.

Tipping J The justification for construing both concept of arrangement in that way.

Harley Yes.

Tipping J This passage is not directed to the next stage.

Harley Just bear with me your Honour please.

Tipping J Well I will bear with you but you can't portray that paragraph as though it was directed to this issue, can you? There may be some more to come.

Harley Yes and

Elias CJ It's not a thriller you know. We would be quite happy to go to the punchline.

Harley If only it were. The Judge then sets out in [51] the reference to *Chitty* and then goes on “In order to avail the Commissioner, the consensus –

the meeting of minds – necessary to constitute an arrangement under s 99 must encompass explicitly or implicitly the dimension which actually amounts to tax avoidance; albeit the taxpayer does not have to know that such dimension amounts to tax avoidance. Whether there has been a meeting of minds as to what is subsequently done in a particular respect by one party to an arrangement, and whether in answering that question the concept of wilful blindness (discussed by the Judge) may provide guidance, depends on particular facts.”

Now, where the Judge is saying that what amounts to tax avoidance and the dimension, is the mirror image of the advantage. It’s the tax advantage that’s being counteracted. And so, in order to have the section apply to that person, within the arrangement they have to get an illegitimate arrangement, an illegitimate advantage sorry.

Anderson J This is the key isn’t it to the majority’s finding that the downstream people involved would not lose their advantage.

Harley Indeed.

Anderson J And that raises the question whether the majority reasoning can actually be a scrutiny, because it fuses two different sections, subsections, as if they were just one question. And they are not one question; they are two questions. And the next point, just for you to think about overnight, is whether in s 51 there is a confusion between the absolute illegality of an arrangement on the one hand, or, on the other hand, as the statute contemplates merely voidness as against the Commissioner. And if it is merely void against the Commissioner, you don’t lose all your rights under the arrangements. You only lose the tax advantage rights. And I just wonder whether the majority has just fused and confused different concepts in that approach.

Tipping J We might have erred in the first respect but I don’t think we erred in the second.

Anderson J I didn’t realise brother Tipping a party [laughter]

Harley And a participant.

Elias CJ Well is that the best you’ve got, paragraph [52] in this?

Harley No your Honour.

Elias CJ Oh you are going to carry on.

Harley Justice Blanchard thought this was sufficiently important to write a separate concurrence and he sets out to do that from paragraphs [172]

through to [174], referring to the Australian cases that I discussed briefly and, at [175], he comes to the same conclusion for the same reason. He says in respect of the section, and this is the line crossing exercise, there are three separate inquiries. “The first is the extent of the arrangement; the second is whether it has the purpose of avoidance, and the third which arises only if the second is answered affirmatively is an adjustment made to counteract the advantage. The adjustment can be made against both a party to the arrangement and a person affected, who is not necessarily a party. But that can ...”

Elias CJ Sorry what paragraph?

Harley [175].

Elias CJ Thank you.

Harley “But it can be made only where a tax advantage has been obtained “under that arrangement”. The Commissioner therefore cannot make an adjustment as against someone who is not a party merely because that person has received a payment subsequent to the operation of an arrangement but outside the arrangement.” And then he explains

Anderson J They would have to receive a tax advantage.

Harley I beg your pardon Sir.

Anderson J They have to receive a tax advantage.

Harley Yes.

Elias CJ But they have to receive it outside the arrangement.

Harley Because they are not a participant in it.

Elias CJ But if they receive it pursuant to the arrangement, they seem to me on the words of the statute to be caught and I don’t understand Justice Blanchard to be saying anything different.

Harley Well he clearly does your Honour in terms of the so-called innocent person, which is what all this argument is addressing, as was the majority. That is the person who receives as an innocent person a benefit but is not a participant in the arrangement.

Tipping J Well I am not sure that that’s, whatever I may have been thinking at the time Mr Harley, I’m not sure that’s consistent with the statute. And I think you have really got

Elias CJ I don't think I know that it's consistent with Justice Blanchard.

Tipping J No I don't think so either. But let's assume that that's what was being said. Let's assume that. But is that consistent with the plain words of the statute. That you don't have to be a party to be affected.

Harley Well your Honour, there's a number of different responses to that. The answer to the question first is yes it is, if you focus on counteracting the tax advantage and what it means. But, more important, there is a problem with this section in terms of focusing on its literal language. Every judgment in the Privy Council and in the Court of Appeal that deals with this says it doesn't mean what it literally says.

Tipping J Ah that's earlier but you are saying they are all directed to this adjusting issue.

Harley No I am not saying that, in those words in respect of this part. What I am saying is why would you pick one part of a whole section and say we apply that literally but not the main charge.

Tipping J Well you normally apply something according to its words, unless it results in a nonsense. Now it may result in a nonsense if it is construed to take away some ordinary straightforward benefit which you, anyone would say you should have. But that doesn't mean you spill over this sort of creative interpretation into something that won't have such a dire consequence.

Harley Well with respect your Honour, taking a purposive approach to, on the one hand all of the rules that were discussed this morning and the choices they offer, and taking a literal approach to a section that's say, if you get a tax advantage out of this, you're caught. The Court is then saying to itself, we can't read that section, giving it the expansive overarching effect.

Tipping J Well if it's a qualifying tax advantage to be struck down, let's assume you have passed the first step. Whatever that test is, it fulfils it. Is there a gloss on it that you don't strike it down against someone who didn't know what was happening.

Harley Who was not a participant as in an innocent person.

Elias CJ Well but how do you explain, s 99, if you look back at paragraph 6, the last words in subs (2)?

Harley Whether or not a party thereto.

Elias CJ Yes.

Harley Easily. By reference to the cases.

Elias CJ Well it's drawing a distinct, well leave the cases, I really think we should perhaps a clean slate approach might actually help, just be looking at the statutory language to begin with. This section, because it all has to hang together, draws a distinction between those affected by arrangements and those who are parties thereto.

Harley Your Honour, with the greatest of respect

Elias CJ I am not suggesting clean slate this time. But just looking at this, what's the response to it, as a matter of statutory interpretation.

Harley On the literal language of whether or not a party thereto, what does it mean? It means if you are a contracting party or not, it doesn't matter.

Anderson J What's wrong with that?

Harley And that language is introduced into the section, I'm sorry to say, you can't disregard the cases, the Court of Appeal in cases *Wishart Gerard* and *Ashton* questioned whether the section could apply only to parties. And in the Court of Appeal in *Wishart's* case in particular, Justice Turner in particular said it could only apply to a person who was a party. Then we get to the Court of Appeal in *Gerard* who said no that's not right. It can apply to people who have contrived or procured the arrangement. And so the language is taken from the discussion in the cases and literally added onto the section at the time it's amended. And you cannot disregard the cases that provoked the change. That's the whole purpose of it.

Tipping J Well they provoked the change. The question is how far the change was intended to go.

Harley Yes absolutely. And let me give you the three examples that were given in the Court of Appeal to deal with the very issues we are talking about. These will be very familiar to you as soon as you hear the facts. A person in the business employs a gardener.

Elias CJ Just a second, have you finished or are you going to come back to this case? Have you gone through the reasoning that you want to refer us to?

Harley Yes I have.

Elias CJ Yes thanks.

Tipping J We are not going to be furnished with the coruscating criticism. I am not tempting fate Mr Harley I'm sorry. But the gardener, I have a glimmering recollection of the gardener.

Harley I thought you might. At the gardener's insistence the employer agrees to pay the wages in cash. The gardener doesn't declare the wages as being taxable income. While the employer doesn't know anything about this it can be shown from market rates the gardener is working for the employer for what is less than market value, because of the fraud on the revenue. In that sense the employer is obtaining an advantage from the gardener's wrongful conduct. But the employer is not a participant in it in the sense that's used in this case.

Tipping J Is he getting a tax advantage?

Harley Yes.

Tipping J Well he's just got less expenditure.

Harley Yes.

Anderson J That's a tax disadvantage isn't it.

Harley Well he's got more after tax income. He's richer.

Gault J What is the arrangement there?

Harley The employment agreement.

Tipping J Well I would have thought he was a participant, unless he's a very stupid employer.

Harley I am just giving you back your Honour the examples that were given to us by the President and it is pretty obvious what that one

Tipping J Well they were given by the President; they were given by all members of the Court.

Harley I know but they were freely discussed your Honour by all members of the Court, including Justice Thomas. The second example was the person in New Zealand who decides to buy shares in a bank. Unknown to the person who is the investor, the bank is in fact engaged in widespread tax avoidance transactions in New Zealand. The share prices rise in result, and in due course the New Zealand

investor sells out for a capital gain. That person has no idea of the activities of the bank but obtains the economic benefit of the capital gain as a function of the increased profits of the bank. The investor is the innocent person. I don't know where that example came from but it seems rather prescient today in terms of the litigation that is before the Courts.

The third example was the person in business who buys petrol from the local service-station, attracted to the discount in price on offer from the oil company, which is taken from Europa oil.

In each of those three examples Sir Ivor Richardson was firm in terms of certainly the person has an economic benefit but the section doesn't follow the money, which is the expression that was used by Justice Blanchard for the Court in *Miller's* case. It is not a tainted money theory that we are talking about. And the reason we get to that result is precisely for the reasons that are articulated by the majority of the Court of Appeal in the passages that we have gone through.

Elias CJ Is there any other cases that supports this interpretation of s 99 or subs (3) of s 99?

Harley The only, the answer is no. The only case where the taxpayer attempted to make the argument in the Court of Appeal was in *Dandelion Investments* and on its facts it was hopeless and was treated in that way, because of the correspondence that's recorded in your Honour's judgment.

Gault J Do you say that the Privy Council majority in *Peterson* just got it wrong?

Harley Yes, yes I am. And the reason for it is that they do not discuss the legislative history and the case law that we have referred to in this exchange, in terms of how we got to what is a complicated provision that's got these bits added onto it instead of, as Australia did, start again.

Elias CJ Can we go to *Peterson* on this point? Where do we find that?

Harley Volume 23, sorry volume 2, tab 3, tab 23 sorry. And it's right at the beginning of the judgment of Lord Millett.

Elias CJ And is it on the interpretation of subs (3)? Is that what you are

Harley It doesn't mention subs (3).

Elias CJ Oh it doesn't, I'm sorry. I got that wrong.

Harley It is in paragraph, you need to read paragraphs [33] to [35] to get the essence of it. And I should say that this was fully argued before the Board.

Tipping J In the middle of [33] or towards the end, Lord Millett is saying that what has to be shown and (2) is that whether or not the taxpayer was a party he was affected by it. Now did he go on and say later what he understood by affected?

Harley That's a nasty question for this time of day.

Tipping J Yes it is rather. Because I am not sure that he did.

Harley Yes he did.

Tipping J He did?

Harley Yes he did. He explained the result in *BNZ Investments* by introducing the idea that in *BNZ Investments* the taxpayer, *BNZ Investments*, was not caught because it got an economic advantage, not a tax advantage. And then he proceeds to tell us that that is the view that was expressed by Justice Thomas in dissent in the Court of Appeal. And the problem with that is that Justice Thomas wouldn't have a bar of that analysis in the Court of Appeal. He said it was wrong. I think in our main submission we went so far as to say the Privy Council made quite a mess of this.

Elias CJ But this, I'm sorry, this does bear on the interpretation of subs (3). Because Lord Millett is saying that he doesn't, he need not only be a party but he need not be privy to its details either. So the distinction you were drawing between being a party and being somehow a participant, would make no difference.

Harley Your Honour can you show me which paragraph we are talking about here?

Elias CJ Paragraph [34].

Tipping J [34]. That's when they reject this consensus

Harley Yes, yes they do.

Tipping J proposition and they go on to say "and in their view he need not be privy to its details either". So, in other words, he didn't know anything about it.

- Harley Correct. That's what they say. Then they go on
- Tipping J So they are right in part, but wrong, they are wrong in the first part and right in the second part.
- Harley Well then they go on to talk about the *BNZ* case and the economic advantage. And what they don't do is then step back and ask themselves the question "Well why do you need an arrangement at all?"
- Tipping J Well I don't think this authority is any real guide to us, in interpreting our section quite frankly. I think it's all over the place Mr Harley.
- Elias CJ I wouldn't want you to think I think that. Because I am just trying to grasp it but it seems to me to be a determination by our then highest Court, which is wholly against the submission you are making to us.
- Harley Wholly against the submission.
- Elias CJ Yes.
- Harley Yes. I can't escape that. I am having to ask the Court to say this is wrong for the reasons I have given, and that the Court of Appeal in *BNZ Investments* was right, for the reasons that it gave.
- Elias CJ Well the reasons you have given are the case law which preceded it. There is nothing else that you are submitting to us. You are not mounting a statutory interpretation argument except in terms of the antecedent history.
- Harley Oh yes I am and I did. And it is set out in the written submission, in terms of the focus of tax advantage in subs (3) as the mirror image of the void arrangement in subs (2).
- Tipping J My concern Mr Harley is that they seem to me to have merged two discrete steps. The first step "is there an arrangement". The second step is "if there is and it is void as a tax arrangement", then you have got the adjustment step. Now I don't think myself, *prima facie*, they were right in saying an arrangement does not require a consensus. But I do think that they were right that you needn't be privy to the details to take a tax advantage from an arrangement that someone else has made.
- Elias CJ And to enable the Commissioner to seek to adjust
- Anderson J They fused two concepts as the Court of Appeal had done in *BNZ*.

Tipping J Or may be we set the hare running. I don't know. I don't honestly think so but

Harley Your Honour Justice Tipping I was with you until you got to the word "privy" and I would

Tipping J I could imagine you would part company with me at the Privy Mr

Harley I would have put "delete participant" and then I was with you one hundred percent, and if I could just step back again your Honour, if it is not for me to say, as you did, the authority of the Privy Council in this Court but what I would say is that Lord Millett's approach would, on my submission, mean that you do not need an arrangement at all. There's no need to have any arrangement. All you need to do is to find a

Elias CJ But that's the pre-condition. There has to be an arrangement.

Harley To do what?

Elias CJ For the transaction to be void as against the Commissioner. But once it is, then he looks to where the tax advantage was taken. And it may be taken by somebody who is not a party to the arrangement.

Harley Your Honour when you use the word "party", do you mean "participant"?

Elias CJ Well I don't see a difference I must say. Well not a substantial difference anyway.

Harley Well what we are getting to, in the examples that I gave before of the bank shares and the gardener and what have you, is the so-called innocent person.

Tipping J Yeah well that's a worry. But can it not be controlled through the Commissioner's discretion as to what steps he takes pursuant to his duty to adjust. It's one thing to take the advantage off someone; it is quite another to start penalising them. And, as my brother Anderson I think was suggesting earlier, is not the way through this to give very considerable force to the Commissioner's discretion as to how he adjusts and what other steps he does?

Harley Your Honour, treating a person who is innocent in that way strikes me as being a very unusual power to give to a statutory authority.

Tipping J But they have got a benefit, a tax benefit, from something which the Commissioner must regard as void.

Harley And about which, on that extreme, they know absolutely nothing

Anderson J Suppose someone steals your car and sells it to me, and I take it in all innocence. The fact that I am innocent doesn't mean that I can keep your car. I am not liable to be charged for theft. But I have got to give you your car back. And this is why the justification on equitable grounds in paragraph [51] seems to me to be inapt. Why should you keep what you shouldn't have, just because you acquired it innocently.

Harley Because honest people going about their business lawfully should not be deprived of the benefits of their lawful conduct, in other than

Gault J Windfall benefits.

Harley Well windfall benefits in what way?

Gault J In the sense that they shouldn't have got them because they have been acquired through a scheme which the law doesn't tolerate.

Harley But if they have organised their affairs honestly, and have not made any other kind of alternative

Gault J I'm not sure that you couldn't have actual participants who could say we have gone about this honestly and we genuinely believe all we are doing is right but objectively it doesn't stand.

Harley And I have agreed with that

Gault J You have got to hand it back.

Harley And I have agreed with that proposition your Honour.

Gault J Is this much further down the track than that, if it flows from or under the arrangement, and it's not, as Justice Blanchard referred to, under a separate arrangement, I don't see any reason why it should not be capable of adjustment. I don't think honesty comes into it.

Harley Your Honour in *Miller* in the Court of Appeal Justice Blanchard for a full Court expressed precisely the opposite view. It's not a tainted money theory.

- Tipping J It's nothing to do with tainted money. Because I joined in that. I was in *Miller* as I recall it.
- Harley Yes you were.
- Tipping J I don't think it's anything to do with tainted money. It's not a following or a tracing exercise. It is a simple statutory direction that, if you get something of a tax benefit that you shouldn't have, you have got to pay it back or get adjusted. Now that's just one of those facts of life. And you may well have actions against those who have advised you to go into and all sorts of other possibilities. But you just have to pay it back. Not because it is tainted money but because the section says so.
- Harley Well your Honour my submission is that the section should not be read in that way and that the Court of Appeal in *BNZ Investments* was, for the reasons it gave, absolutely right in respect of an innocent person and I should have said, in respect of that case, that it was argued on the basis that the Commissioner accepted that an innocent person was not the subject of the section. And then as the argument developed that kind of morphed.
- Tipping J But wasn't the key point in *BNZ* that there were really two separate transactions; one upstream and one downstream. And therefore it was very important to know with which one, which one if you like had given you the tax advantage. But I don't think any of what you have read out of *BNZ* is directed to this issue. Other than Justice Blanchard saying, be careful because don't roll up different arrangements; it has got to flow from the arrangement which is void.
- Harley Which gets us to where I started, which is what arrangement are we talking about, and I made the point specifically, this argument will not succeed if the arrangement is simply the entry into the joint venture agreement and the payments
- Tipping J That's not the problem. The problem is whether your high level statutory interpretation argument is sound. Not what is happening in this present case for the moment.
- Harley And to respond to your first question your Honour, I was simply making the point that in defining the arrangement the submission that is being made on the facts is we exclude the CSI business plan and the letter of comfort. And if it is those elements that constitute the void arrangement, then these people are not on the facts participants within it.
- Tipping J Yeah they may not be participants but the question is are they affected by it in an advantageous way?

Harley Well I would say they were affected it in a very disadvantageous way which is why we are here.

Tipping J Well

Elias CJ Mr Harley, will you be, how much longer do you think you will require?

Harley On this?

Elias CJ Yes. Well on anything that you are going to address us on. Is this just this?

Harley No, I need to deal also with reconstruction and penalties.

Elias CJ Ah yes, yes. We will take the adjournment now but I am just after an indication of how much longer you expect to be.

Harley Half an hour.

Elias CJ Excellent. Alright we will take the

Harley Can I just give you one other reference, which is to Mr Stewart's note on Mr Bradbury's role, paragraph 11. The paragraph was filed with the affidavit of Mr Bradbury dated 16 August 2004, it deals with the production of the Serious Fraud Office documents prior to trial and his knowledge, that reference is volume 30 at page 187. I'm sorry I should have

Elias CJ No that was probably the housekeeping.

Harley Yes it was.

Anderson J What you are really saying essentially Mr Harley, is that you have to identify the relevant arrangement under which the tax advantage is obtained.

Harley Yes.

Gault J And you are saying that the insurance aspect of this should be excluded from the relevant arrangement, if there is an arrangement to be struck down because of a lack of knowledge?

Harley I hope not.

Gault J Well you are stressing that, if the arrangement involves the insurance aspect, you are not participants and therefore not affected by it. But if it is simply the postponing, taking advantage of the time delay etc, then you and your JVAs necessarily are participants. Is that

Harley I have miscued you in terms of how extreme that is. I am saying in respect of the insurance that if it is the CSI business plan content, which is the document held admissible

Gault J I'm sorry, just the business plan document

Harley Yes.

Gault J I see. I rather thought that was only evidence, that was my

Harley I can't look at it. It's just hopeless to contend that these people are not participants within the insurance arrangement. They have signed it.

Gault J Yes exactly.

Harley No, that isn't what I am saying if at all.

Tipping J If it turns only on the business plan and on the letter of comfort, then you are not in.

Harley That's correct, which is what the Court of Appeal particularly, if I can put it that way, hang us on.

Anderson J It's helpful.

Elias CJ Alright, we will take the adjournment and resume at 10:00 tomorrow.

Court adjourns for the day: 4:38pm.

Wednesday 25 June 2008

Court resumes: 10.02 am

Elias CJ Yes Mr Harley.

Harley Good morning Your Honours. There are two pieces of paper. The first is the summary of participation, which I'll deal with very briefly. The second is the response to the two questions that were left open yesterday which Mr Carruthers will deal with. Those are the

questions that were left by Justice Gault and Justice Tipping in respect of the promissory notes.

I said yesterday that I thought I'd take half an hour to finish this and I'm going to do my best to stick to that. The first part of the participation summary simply sets out the ABC example that I went through yesterday and I don't need to repeat it again. It is simply there for the record as it were in terms of understanding the ABC concept I was giving. And then in paragraph 5 I've just simply referred again to Justice Blanchard, who did mean what he said in paragraph [175] of *BNZ Investments*. And I've also referred to the Judge's comments in the full Court's decision in *Miller* and given the page reference there. And then I just make the observation in reply to Justice Anderson and his observation about the stolen car having to be returned. My submission in reply is that that analogy is not apt in the context of the correct assessment of income tax concerning the affairs of a person who's innocent.

I then get to the real and essential point dealing with Lord Millett's judgment in *Peterson* as to the authority of *BNZ Investments*. That judgment is internally inconsistent in my submission and it incorrectly attributes to Justice Thomas a concept and idea that he actually repudiated very clearly in his own judgment.

As Justice Thomas in that dissent makes clear, there is no economic advantage on his view of the facts of that case outside of the operation of s BG1. And so the Judge in dissent said that it didn't appeal to him that there were two arrangements at all. He held that there was one. But on either view of the facts in that case, the inter-company exempt dividend that was paid on the redeemable preference share investment across the so-called upstream and downstream divide in that case, that is across the so-called two independent arrangements, was a tax advantage, being a tax exempt dividend received by BNZ Investments and where the parent company, BNZ, obtains the interest expense deduction for the cost of its funds.

The entire two arrangements recognition in that case becomes unnecessary and irrelevant on that approach and yet Lord Millett in the judgment in *Peterson* recognised it as being factually and legally correct. He termed the inter-company exempt dividend as an economic advantage and being, on his approach to reasoning, different from the tax advantage within the meaning of the section.

My submission is that it isn't logically possible to take that approach if the affected words are given their own life and meaning independent from the rest of the section taken as a whole, as we've submitted.

And last there's nothing unorthodox or strange about taking that holistic approach to statutory interpretation or indeed to contractual interpretation. It's standard practice to construe a provision in its

entirety using the meaning of one subsection to explain the meaning and operation of another, especially when one provides the remedy for the problem being dealt with in the other.

Reconstruction. This issue arises on our submission if the Court holds that there is a tax avoidance arrangement in this case and I'm now dealing directly with part 6 of the main written submission for the Ben Nevis appellants and that starts at page 39 at paragraph 106. The question being addressed in terms of s GB1, which is the reconstruction power, is what does the Commissioner need to do in exercising his discretion to counteract the tax advantage that's been obtained.

I've set out the text of the section in 107 and it confers on the Commissioner a statutory power by way of discretion as to how he is to go about reconstruction. The Commissioner is to have regard to the amounts of gross income, allowable deductions in the Commissioner's opinion that person would have, might be expected to have, would in all likelihood have had the arrangement not been entered into. And as I've said to you yesterday, that formulation is taken straight out of Lord Wilberforce's dissent in *Mangin*.

I've gone through in 108 and 109 setting out the approach to interpretation. I've referred to Justice McGechan's approach to it in *BNZ Investments* and I've also referred to the derivation of the power in respect of *Mangin*'s dissent and also Lord Wilberforce's speech in a case called *Parker*. And I've set out on page 41 a part of that speech. It's going too far to be able to say to the Court that Lord Wilberforce had *Parker* in mind when he wrote *Mangin* because he doesn't refer to *Parker*'s case in *Mangin* at all. But at the end of the judgment he appends the English statutory legislation that's being discussed in *Mangin* and it is the legislation that's in *Parker*.

In New Zealand the leading case on reconstruction is *Miller* in the Court of Appeal. It's worth briefly going through the facts to understand why the Court held that reconstruction was not required. In that case the profit company, Fiorucci, was sold by the taxpayer shareholders to the loss company for the \$1.5m, the price being left outstanding as a debt. As the profits are earned by Fiorucci, it pays 95% of its net profits by way of the administration charge to the loss company and the idea of that is that the profits are then reduced by a deduction of 95% and the loss company absorbs the fee that's paid. The tax loss company pays to the shareholders as repayment of the principal amount of the debt the amount equal to the administration charge less 50% of the tax benefit. And the remaining 5% of Fiorucci's profits were paid to a related tax loss group member as a consultancy fee to Mr Russell for his good works.

The court upheld a reconstruction with the profits of Fiorucci being treated as having been paid to the taxpayer shareholders in the form of

salaries assessable to them and deductible to Fiorucci. The net effect of that reconstruction is to deny completely the benefit of the purported sale treatment and to disallow the use of all of the losses in the loss company.

In paragraph 112 I observe that the reconstruction needs to be considered in that context. Of course the shareholders are participants in the entire scheme and the shareholders understood the tax loss utilisation within Mr Russell's loss group and that that was how they were to be paid.

In explaining the outcome in the case in 113 I say Fiorucci would have earned income and either retained it and it would have been taxable, or it would have been paid out as salaries and/or dividends. Given the classic double taxation system that was in effect at the time, by which I mean we didn't have imputation, the amounts distributed would have made sense for Fiorucci to pay the shareholders the maximum amount possible by way of the salary which is what the Court said.

In 114 the putative sale is treated as an avoidance arrangement because it didn't have effect in law as the genuine sale of shares in the company, and this is the explanation that Mr Carruthers went through yesterday. And then I set out the passage in the judgment from 301 to 302 in terms of how that approach is justified, disallowing the entire amount in that case.

In the submission I've referred, however, to the approach that was taken by Justice McGechan in *BNZ Investments* and his base case analysis depends on understanding the facts of that case also. If Your Honours would go to I think it's.

Elias CJ You use again the word illegitimate tax advantage benefit. There's no reference to illegitimacy in the quote you've set out from *Miller*, is that right?

Harley Correct.

Elias CJ Yes.

Harley That's my word.

Elias CJ Yes, it's your word.

Harley And I'm using it in the context of accepting the premise that the section applies.

Elias CJ Yes.

Harley And that we have a tax advantage within GB1 that is illegitimate because.

Elias CJ I see, yes.

Harley And therefore we're talking about reconstruction.

Elias CJ Yes.

Harley In tab 3 of the casebook, I think it's *BNZ Investments*. And if you go to page 15,737 of Justice McGechan's judgment, it's about the third page in. The easiest way to understand the Judge's analysis of the outcome in the case is to draw a circle that starts around the BNZ, going down the left hand side through the middle of Capital Markets Ltd, across through Capital Markets Investments Ltd and then around underneath Capital Markets Ltd again and then round the top. So-called upstream transaction, everything below that line is downstream.

The way the maths works in the judgment and in this case is BNZ itself is the person who borrows the money on the market, let's say at \$100 interest, and using the 33% income tax rate at the time, the after tax cost to BNZ is \$67. It receives a dividend from Capital Markets Investments which was \$83.5.

Elias CJ Sorry, where were you, what are you referring to? Are you just telling us this?

Harley Yes and it's all in the judgment. But it's easy to understand the example.

Elias CJ Right.

Harley I'm sorry, the amount was \$86.5, not 83. Where does the \$16.5 split come from? The answer is it's the 33% tax rate. They are sharing the benefit of the tax rate 50-50. And so the Judge comes to this on the basis of the base rate by taking \$67, which is the after tax amount that Capital Markets would have received if it had been a full taxpayer on its earnings. Takes the \$33 benefit that's being received from the deduction, splits the two into 16.5 and adds 16.5 to the \$67 which is in fact 83.5 as I said originally. That's the way it works.

Now what he said in the judgment was the Commissioner's assessment was to assess 100% of the \$100 to the bank. And the Judge said, that is going too far. The base case is that the bank would always have received \$67. And so the illegitimate advantage amount is the 16.5 and that would have been subject to the reconstruction power and tax in the ordinary way.

In the submission that's being made to you this morning on the facts of this case, the Commissioner has given no thought or consideration

to whether or not reconstruction should have been made to eliminate the benefit that he says has been illegitimately attacked. And what he's done is disallowed the entire 100% of the deduction.

Tipping J So if you've got some benefit that's justified and some that's not you reconstruct only to eliminate that which is not?

Harley Correct Your Honour, that's the submission. Now given the complexity of this case on its facts, and what that would have been, the Judge was asked to reserve that for another day. You'll find that at paragraph [324] of the High Court judgment. And in the Court of Appeal.

Elias CJ Sorry, page?

Harley Sorry, paragraph [324].

Elias CJ Thank you.

Tipping J So if we were with you in principle, it would have to go back to the High Court would it to do the necessary exercise?

Harley That is my submission, yes Your Honour, yes. And how that would be done is best set out, I won't take you to this, but it is best set out in my submission in Mr Gudsell's submission for Accent Management. The relevant passage I have marked, it starts at page 32 over to 35, and I'll leave him to address that methodology if and when he gets there. But I adopt what he says.

That then gets us to penalties. There are four points in respect of the penalties submission which starts at Part 7 [p 43] of the main submission. The first is what I've referred to as appeal point (a), whether the Commissioner was correct to have imposed 100% penalties on everyone. In relation to that, the second point is the unacceptability of what the Court below has called the draft business plan and which it fairly attributed from Dr Muir to Dr Muir's LAQC Redcliffe to Mr Bradbury and his LAQC, Bristol and to all the other joint venturers. And as I understand was addressed yesterday from Mr Stewart, there's no evidence to support that Mr Bradbury knew anything about it and certainly any of the joint venture appellants.

The penalties point (b) then I've left 'til last because it's easiest to deal with in the context of all of the other points. The abusiveness in terms of the statutory language is addressed by Justice Venning at [366] through [372] of his judgment in the Court of Appeal wholly upholds it and adopts it.

I've set out the text, the reference sorry to s 141D of the Tax Administration Act which imposes an objective test as to the dominant purpose which is attributed to the appellants. And the

subjective intention of the taxpayers is not relevant to that which is the penalties point (c).

Last in respect of Ben Nevis and Greenmass, as LAQCs, whether the Commissioner has correctly imposed abusive penalties on them as well as on their shareholders which I've referred to as doubling up.

Each of those four points is appealed.

As to the first point, unacceptable interpretation, for the reasons that are set out in paragraph 122, the Parliamentary Select Committee spent quite a considerable time on what the language of the section meant in terms of "about as likely as not to be correct". And its report to the Parliament was that it meant that it didn't have to be correct or even have a 50% chance of success. It would be acceptable if a Court would give the argument serious consideration but not necessarily agree with it and that the word "about" imports important flexibility as a qualifier.

Now in this case, originally it was the Commissioner's position that the Trinity arrangements failed to meet the specific provisions of the Act, that the insurance contracts were shams and he failed in both courts on the sham point. He said that the insurance premium did not qualify for deductibility under BB7 and/or DL1. He failed in both courts on that. But in relation to the spreading argument, he succeeded on appeal in the Court of Appeal but lost in the High Court.

In respect of the licence premium not being within the depreciation regime, the Commissioner succeeded in the High Court but lost in the Court of Appeal on that. And then in the alternative s BG1 applied.

The Commissioner's penalty contention is that the deliberate pursuit of timing advantage is, and in this case it's the illegitimate tax advantage, and it constitutes per se abusive avoidance. For that reason the Court's position is that the position is self-evidently unacceptable, it's too clear for argument it says.

My submission in reply rests primarily on the authority of what was originally *Europa No 2* and which is reinforced by *Peterson*. And the points that are being made in paragraph 126 (a) through (d) are simply these. At the time this transaction was entered into, if the Court would have come to the conclusion that the expenses that are involved in this case had been legally incurred, then on the authority of *Europa No 2* the application of s BG1 would have been said, if that case had been applied properly, to have been binding and determinative against the Commissioner. And so post-*Peterson*, the position in this Court is that the Commissioner has to persuade the Court not to follow *Europa No 2* as well as *Peterson* on the same point. And what's being said in this submission is that the Court may well be persuaded to adopt that

approach, but at the time the transactions were entered into, the taxpayers were on good ground in terms of established authority as to the law in the country and that it could not be abusive in terms of an unacceptable interpretation for them to have applied *Europa Oil* and everything that it contains.

I've also made the point.

Tipping J You've used the expressions abusive and unacceptable almost as a conjoined concept. Is it right, they are two different levels if you like of being wrong.

Harley Yes they are. And abusive gets you to 100%.

Tipping J Is worse.

Harley Yes.

Tipping J Than unacceptable.

Harley Yes.

Tipping J Unacceptable is just it was wrong but you had a sporting show. Abusive is it's wrong and it was hopeless from the start. Is that, very colloquially.

Harley That'd do me Your Honour.

Tipping J That'd do you.

Harley Yes.

McGrath J But isn't abusive more concerned with knowing of the tax avoidance effect?

Harley I'm going to say.

McGrath J I thought they were different concepts rather than concepts of degree.

Harley I'm going to say to Your Honour that that is correct. But that is a submission to be made in respect of the interpretation of the abusiveness provision. The Commissioner's going to tell you that everything I'm saying is heresy. And he's on reasonable ground in the sense that both the Judge and the Court of Appeal thought it was wrong too.

McGrath J Well just in terms of *Europa*, your argument really is that if this Court overturns *Europa*, and the taxpayers had relied on it, that is at the point of being just short of likely as not. Its beyond that point and so

they're protected by the unacceptable tax interpretation provision, is that the essence of it, of at least under that element.

Harley I accept everything Your Honour has just said and would add quickly to it. For this Court to say that a decision of the Privy Council is wrong and will not be followed in this context, would involve overruling a decision that was made in 1976 and so we're talking 30 years later. And where the Parliament has adopted an entirely different regime to deal with the problems that were in *Europa Oil* which was transfer pricing. So it's a very big step for a superior court, in this context, to say, no, not going to follow it. Particularly I would say where the Privy Council, in what is a keenly divided board, by majority affirmed it and did follow it in *Peterson*.

Anderson J Wouldn't your position be that at the time the arrangements were entered into one would be contemplating the likelihood or not of the Privy Council disagreeing.

Harley In 1997?

Anderson J Disagreeing with its previous decision in *Europa*.

Harley Yes, yes.

Tipping J Well the track record of the Privy Council in this field suggests that nothing is certain.

Elias CJ Yes.

Harley I have to say yes to that, given the track record. But at least in *Peterson*.

Tipping J At least you had a foundation, a fairly solid foundation, you're saying.

Harley And where in the course of argument in *Peterson*, within minutes it was obvious that we had a seriously divided board. Lord Millett thought the answer to the case was simple. And he said what it was within 10 minutes. And then a good deal of the so-called argument addressed by counsel in fact was an exchange between Lord Millett and Lord Scott and counsel's role was, it would be unfair to say an irrelevance, but it wasn't the main show.

And so in that context, and I make the point in paragraph (d) referring to this track record, we have a *Mangin*, a divided board with, in my submission, a brilliantly written dissent for its power. And then in *Europa No 1* we have a divided board 3-2. Very powerful dissent written by Lord Donovan who happened to be the majority Judge in *Mangin*. Those decisions were given on the same day by the same boards. *Ashton*, there wasn't a divided board there. Viscount Dilhorne delivered that for the board. *Europa No 2*, a

sharply divided board again, 4-1. This time Lord Wilberforce dissenting. *Challenge*, a divided board, a strongly worded dissent from Lord Oliver. And *Hadlee*, a unanimous board. In *Miller*, a unanimous board. And in *Peterson*, again a sharply divided board.

And so looking at that track record, I think anybody would say that in this area of law it is not easy and for these taxpayers to be said to have entered into an arrangement that was abusive, given the power of authority in *Europa No 2* in their favour, is going too far.

McGrath J What is the relevance of the fact that *Peterson* was only decided after the High Court decision in this case. I see what you're saying in relation to *Europa* obviously has more force than what happened in *Peterson* because there was no way Dr Muir was going to be taking that into account.

Harley That's an uncomfortable question Sir. I'm simply pointing to *Peterson* because it happens that it re-emphasises the authority of *Europa Oil*. And yes, if we'd lost it would have had to say to you, but you shouldn't have particular regard to *Peterson* because it was decided after this arrangement was entered into. And that is the frank position.

Tipping J Just to help me Mr Harley, what is the essence of *Europa No 1* decided, which you say ameliorates your client's position? Just in the simplest possible terms.

Harley You mean *Europa No 2* Sir?

Tipping J Well the one that you say, I'm sorry I may have got that, but whichever of the *Europas* it is that you say underpins and makes it very difficult to say that your clients' stance was abusive.

Harley You mean *Europa No 2* Sir. Very briefly, in *Europa No 1* the Board decided that the expense was not fully deductible under orthodox deductibility principles and it decided therefore the Commissioner's alternative s BG1 case did not need to be addressed.

Tipping J Right.

Harley In *Europa No 2* dealing with different years and what the Board said were different facts, it said deductible in full under the orthodox deductibility provisions expense incurred. Now I turn to the BG1 section which was the Commissioner's application of the avoidance provision. Commissioner you lose. You lose because the expense is truly incurred by the company that's buying the petrol and that's all it got. There is no arrangement which has any tax avoidance purpose within the meaning of the section albeit that the Commissioner's case was dealing with a tax exempt dividend that comes back across the border from the arrangements that we used in that case.

And they did so on the basis that it is incompatible to have the regime that authorises the deduction as being genuinely incurred on the one hand and then the overarching effect of the tax avoidance provision and you've heard all that yesterday.

Tipping J Yes I follow, thank you. In other words, the specific trump the general.

Harley The outcome.

Tipping J Well don't let's get hung up on precise language, but that sort of idea.

Harley Yes I prefer to use the railway line analogy which is we've got BG1 going down one side of the railway line and everything else going down the other.

Tipping J Well I don't want to provoke a revisitation.

Harley I understand.

Tipping J I mean it's broadly, it's in that area of the case.

Harley Yes.

Tipping J Yes.

Elias CJ Wasn't it rather though that the arrangement didn't, there was no arrangement beyond the deductibility.

Harley No Ma'am there clearly was an arrangement that went beyond that.

Elias CJ Beyond.

Harley Yes. Which produces what's called in the case the Pan Eastern benefit, which is the dividend coming back across the border.

Tipping J It was just simply, as I understood you, that although there was an arrangement, it wasn't an arrangement which gave rise to a tax benefit because the benefit you were entitled to it anyway.

Harley That's the essence of what they said was the conclusion.

Elias CJ Yes.

Harley And the way they got there is to look at what was the expenditure incurred for. The answer to that question in *Europa No 2* was, all they got was trading stock. All Europa Oil got was trading stock. And because that was the expense that is deducted, what happened in terms of the sharing of the profit that arose from that expense, which

is the Pan Eastern benefit coming back across the border, they treated as irrelevant.

In *Peterson* it's the same idea and the same principle but the expense in *Peterson* is not for trading stock. It's for a capital asset which is Mr Peterson's interest in the film and Lord Millett said it's the same consequence.

Tipping J Yes thank you, that's most helpful.

Harley In paragraph 132 I have set out what is the common ground with the Commissioner in terms of what he is asking this Court to do, which is to overrule *Europa* and *Peterson*. I don't need to go back through there but, for the reasons which we have just canvassed, my submission is not abusive as the position nor, in my submission, is the taxpayer's stance unacceptable. The penalties point (c) is a short one which is whether or not the Court is having regard to subjective purpose of the taxpayer entering into the arrangement or is taking an objective purpose view of the arrangement itself. Both Courts below held that it was the latter, not the former. My submission is that they are wrong.

The statutory language in 141D(7) is set out at 135 and the next paragraph simply observes that there is common ground here that there's an arrangement. The question is whether the definition requires the objective assessment of dominant purpose of the arrangement itself or whether, as the appellants contend, properly construed it requires an objective assessment of the taxpayer's dominant purpose in entering into that arrangement. The best discussion of the position on very similar statutory language is the Full Federal Court decision in *Starr*. And I won't take your Honours to that case but it is in the bundle.

Essentially, in what is a very carefully reasoned judgment of the Full Court, they come to the conclusion that the standard is subjective and they do that primarily, in my submission, on the basis that this is a penalty and that they expect that Parliament would be looking to visit penalties on people who have, for want of a better expression, a guilty mind. They don't actually use that language but that's essentially where they get to. And that is the submission that's being made here. In that regard, however, I do make the point that these taxpayers obviously did expect to get some tax timing benefits. Lord Millett in *Peterson* says well of course they did. That's common.

Tipping J But you wouldn't be believed if you denied that. I mean, as a witness I mean, would you?

Harley It's hopeless.

Tipping J It's hopeless.

Harley Yes. And so all I am saying in relation to Lord Millett in *Peterson* is the tax benefit often makes all the difference between profit and loss. And often is why people choose to enter into the forms of arrangements and structure them in the way that they do. Nothing wrong with it. There's nothing unacceptable about it. And as the Court of Appeal

McGrath J Without more.

Harley Absolutely your Honour, yes without more. And where in *Peterson* he went looking for without more and on the facts of the case found that there was no more than Mr Peterson had incurred the expense to buy the film and got the benefit.

Tipping J So what is this, and I know you don't adopt this expression Mr Harley, this guilty mind expression, but what subjectively has to be the state of the taxpayer's mind in order to satisfy your subjective approach.

Harley I would ask myself the question, "did these taxpayers have a genuine and honest belief that the arrangements that they had entered into were fully effective against the Commissioner?" "And did they have a proper authoritative basis for that belief?"

Tipping J A genuine and honest belief on reasonable grounds. You can't be given marks just for being stupid.

Harley That's uncommon but to be penalised for being stupid is something that

Tipping J Well you yourself introduced the idea of some foundation for this genuine and honest belief.

Harley Yes.

Tipping J Surely the articulation has to be on reasonable grounds, because there has been a sufficient foundation

Harley The way I put it, I think was, deliberately, by reference to existing authority.

Tipping J Well that would be a reasonable ground.

Harley In my view yes.

Tipping J I'm not trying to sort of define you out of existence Mr Harley.

Harley No no I understand that. I just I have difficulty with generalisations where I can't be certain of the factual context that next comes and

where, on consideration of that context, the answer or the submission may need to be modified or different. In this case, I can say firmly that the proposition I put to you, in terms of being based on authority, is well made.

Tipping J Well yes but we have to articulate something that has generality. We can't just say well in Mr Harley's case he's fine. We have to have a general proposition that people can guide themselves by and if there has to be some uncertainty because you never quite know which way the Court is going to go, that's inherent in an awful lot of law.

Harley Well your Honour I am not a Judge but I have real reservations about Courts making general pronouncements, one size fits all, in circumstances where, in this sort of area, I can't contemplate the kinds of different facts and sometimes the weird things that people do that might strike you initially as being unusual or complex or artificial but, with the benefit of information and education, makes perfectly good sense.

Gault J Can I step back from this philosophical discussion to the problem, are we simply engaged here in an exercise of statutory interpretation of 141D(7)(b)(i) in which you say is ambiguous and you invoke Australian *Starr* case, which presumably is not based on identical statutory provision, but am I correctly understanding where we are going here?

Harley Yes absolutely. And the Australian provision was imported by us and fitted into our Act.

Gault J Is the wording the same?

Harley I can't remember in the sense of saying to you it's identical.

Elias CJ Well it's quite important.

Harley Well I can take you to the language of the section which is

Elias CJ *Starr* will have it won't it.

Harley in *Starr*, which is in casebook, it's tab 36.

Elias CJ I was going to ask you much the same point, which is what words do you read this test into, is it the use of the word "penalty" or is it use of the word "purpose" or what is it in the language of s 141D(7)(b) that you say has to be construed in the way you contend for?

Harley I take as the starting place penalty and in that context I look at the language of 171D(7)(b) and look at the words "viewed objectively, the taxpayer takes, in respect of, or as a consequence, of an arrangement that is entered into [that is what that taxpayer has

actually done] with the dominant purpose of avoiding tax” and ask myself the question whether properly construed that means that it is what is in that person’s mind as to what they did.

- Anderson J So, in other words, we have to read “objectively” as “subjectively”.
- Harley No I think it takes up Justice Tipping’s proposition in terms of what is a reasonable person to think of what this person has actually done, having regard to this being a penalty provision, in much the same way as we do with a lot of law dealing with penalties.
- Anderson J So we are really concerned then with the material in respect of which an objective assessment is to be made.
- Harley Yes.
- Anderson J The scope of it.
- Harley Yes.
- Anderson J Everything except the taxpayer saying my mind is pure, we look at. If it is relevant.
- Harley Yes. The provision that the Court is dealing with in *Starr*’s case.
- Elias CJ Do we have the text of 141D in its entirety?
- Harley Yes we do.
- Elias CJ It is probably in the Commissioner’s bundle, don’t take time now to find it.
- Harley We definitely do, and the Judge has set it out in his judgment as well.
- Gault J Is this the provision at the top of page 4 of the *Starr* judgment?
- Harley I don’t think it is your Honour. I think that’s part of Part IV A. That’s s 177D of Part IV A, which is the tax provision dealing with tax benefits and their voidness. And so the penalty provision operates off the application of the section.
- Gault J entered into or carried out the scheme or any part of it did so for the purpose of enabling the taxpayer to obtain it. Is that the wording that you say we adopted, I am just looking for help here.
- Harley I understand your Honour. That is Part IV A; it is not the penalty provision. The penalty provision operates off Part IV A. And just before that, in paragraph 6, the Court refers to 226L, which is the tax shortfall provision.

- Elias CJ But where, you haven't yet found the penalty provision, is that it?
- Harley I'm just trying to find it.
- Elias CJ Right, that's fine.
- Harley I can't find it but I can find the reference to it which is in paragraph 58 of the judgment, where the Court goes back to 226L(c), where the scheme is assessed as a tax avoidance scheme, and the contract arrangement that the taxpayer has made is the subject of the return. The reference to the scheme they say is that the contracts entered into by *Starr* and *Hopkins* and then they go into the tax avoidance scheme language in subpart IV A, then say in 61 the legislature has made it clear that the purpose referred to in 177D was an attributed purpose. And so the answer to the question of Justice Gault is they are going back to Part IV A itself.
- Elias CJ So then what part of Part IV A are you looking at for the comparison?
- Harley It is, as Justice Gault pointed out correctly, at the top of page 4. It would be concluded that the person who entered into or carried out the scheme did so for etc etc.
- Anderson J It actually starts at the bottom of the previous page, for completeness. 117F(b).
- Tipping J Don't the words "viewed objectively" really resolve the matter for us? We had an interesting debate a few minutes ago Mr Harley, before I had really focused on the language of the section. Isn't the simple question "Viewed objectively, was the dominant purpose of this arrangement the avoidance of tax?"
- Harley Well your Honour my answer to the question is help is obtained by paragraph 2 of the subsection, providing an interpretative context, this is 137 of the written submission, where it says the tax position doesn't relate to an arrangement described in subparagraph (1) with a dominant purpose of avoiding tax. And so my submission is it's the taxpayer that has to have the dominant purpose.
- Elias CJ But that, if you look at the whole, that's why I've turned up the whole of s 141D(7), it's not talking about the taxpayer. It's the first part of it is involving the taking of an unaccepted interpretation of law and then there's the cumulative provision. But none of that is expressed in terms of the taxpayer. It's looking at the position, it's at the tax position.
- Harley Well only a taxpayer can have a tax position Ma'am and only a taxpayer can be the subject of a penalty.

- Elias CJ It's not expressed in terms of a subjective view by a particular taxpayer. It looks objective, both in paragraph (a) and (b). And in (b) it is explicitly said that it's to be viewed objectively.
- Harley And my submission in reply is, when you take into account for example subparagraph (2), which in my submission more clearly is referring to the taxpayer's purpose, there are several indications as to why the pure objective approach is not right. We are talking here of the position the taxpayer takes.
- Anderson J Viewed, not ascertained objectively.
- Tipping J I think paragraph (2) actually is against you. Because it talks of an arrangement with a dominant purpose of avoiding tax. It's the arrangement that demonstrates the dominant purpose, not the mind of the taxpayer.
- Elias CJ Well (2), doesn't subparagraph (2) deal with the non arrangement position?
- Harley Yes.
- Elias CJ Yes. But they are equivalent. They are not different.
- Tipping J But there's an internal reference in (2) to (1). And (1), the description of what's in (1) in (2), is an arrangement with a dominant purpose of avoiding tax, which is a dictionary in a sense as to what's meant by (1).
- Harley I think it helps your Honour and my submission is that subparagraph (2) more clearly points to the taxpayer's purpose.
- Tipping J I hear what you say but I'm not
- Elias CJ Isn't it about the tax position. I mean you have to look at the whole provision. And all of it is about a tax position.
- Harley That the taxpayer takes.
- Elias CJ The subjective, well it just doesn't read subjectively to me I'm afraid. The bad element seems simply to be taking an unacceptable interpretation of a tax law under paragraph (a).
- Harley Well your Honours I can't take this submission any further but what I can say is that the Federal Court of Australia on a very similar provision, comes to the opposite view and in particularly informs itself that it should take that view because it is dealing with a penalty.
- Gault J What we don't have, I've been reading through this *Starr* judgment, we don't have is any means of ascertaining whether the provision they

are referring to there, where they drew the distinction between purpose of an arrangement and purpose of an arrangement being entered into, and that's why paragraph 56 would be your best support I should have thought. It doesn't help us, unless we know that the Australian provision had those words viewed objectively that we have.

Harley I shall find out your Honour.

Gault J I think that would be helpful.

Harley The last part of this submission deals with the doubling up in respect of the LAQCs and the shareholders.

Tipping J Now this does seem a bit rough Mr Harley for speaking in your favour. It does, because the LAQCs are simply vehicles by means of which, as I understand it, the losses are attributed to the shareholders. So to treat them each, if you like, as being liable seems a bit tough. I don't know if it gives you any

Harley I would go further and say plain wrong.

Tipping J Plain wrong, yeah.

Harley And that is my submission. And the reason for it is simply to take what is the LAQC purpose provision, which tells us that an LAQC is to be treated in the same way as if it were a partnership. And of course with a partnership you have what is called a statutory return for the partnership but that doesn't establish anything more than a tax accounting mechanism for each of the individual partners. And so it acts as an attribution, an accountable mechanism, amongst the people.

Tipping J But it's not a separate legal entity partnership. Strictly.

Harley No it isn't.

Tipping J So, if they are asking us to treat it like a partnership, it doesn't really exist, other than for certain very specific purposes.

Harley As an accounting entity it exists and it is what enables each of the shareholders to take on the attributes as if it were a partnership. Now subpart HG tells us that that is the purpose of the LAQC provisions in 149. And the submission can be summarised very simply with reference to the statutory dictionary definition of tax position and taxpayer where of course it contains the standard language of Parliament in relation to those dictionaries, unless the context otherwise requires. And this submission is that in respect of a person who is a shareholder in respect of an LAQC that's the person who's taking the tax position, not the company.

Gault J Is an LAQC assessed for tax?

Harley Yes.

Gault J Does it pay tax?

Harley No.

Gault J Well then where's a tax shortfall if it doesn't pay tax.

Harley On the shareholder.

Gault J Well I understand that. The shareholder is the one I would have thought that is assessed and pays the tax and would have his shortfall, which is then the focus of any question of penalty. I'm in your camp here. I just don't understand why, if you only have an accounting vehicle, which is what I understand the LAQC to be, you have a penalty imposed upon that vehicle.

Harley Your Honour if I add another word, I can only go backwards.

Gault J I wouldn't recommend that.

White I hesitate to interrupt your Honours but to save misunderstanding both Parliament and the Commissioner agree with your Honours' reservations, which is why s 141F(c) has been enacted. The one provision which we have mentioned in our submissions which is retrospective in effect and avoids totally or ameliorates the suggestion of double up of penalties. Your Honours will find the provision in the Commissioner's bundle under tab 17. It was because I was waiting for my learned friend to refer to the provision, I didn't interrupt earlier but there is in fact no issue on it.

Elias CJ The Court of Appeal was wrong?

White Well the effect of the provision, the amending provision, of s 141F(c), which is under tab 17, removes the issue for practical purposes.

Tipping J So they are not going to get hit twice. Well I am relieved to hear that.

Harley Your Honours that it is not my understanding in respect of these taxpayers.

Tipping J Well you had better quit while you are ahead. If Mr White tells us from the Bar that he is not going to do it to you.

Harley Your Honours I just want to be absolutely clear that if my friend is telling me that the Commissioner of Inland Revenue accepts that there is no doubling up against these affected shareholders, I'll accept that.

- Tipping J No he's saying that there shouldn't be any doubling up vis a vis the LAQC. The shareholders were
- Harley I understand that, yes, no I accept that. If that's what he is saying in respect of this case in these years I am happy to accept that but it is not my understanding of the effect of the legislation and it is certainly isn't my client's understanding.
- Tipping J Well we had better ask Mr White hadn't we. We had better ask Mr White to confirm what I understood him to be saying. Whatever the law is Mr White, do you accept that these people are not going to get hit twice, that you are not going to do it against the LAQCs.
- White If your Honours please, I am certainly not in a position to give concessions, whatever the law might be. I'm only concerned with what the law is and it is, as I understand I have stated it correctly, but if my learned friend has a different view I would certainly make appropriate inquiries to make sure, no no, just to make sure your Honours that what I indicated was the law in view of s 141F(c) is correct, which is that it is retrospective. That's what I understand.
- Tipping J Well perhaps you could put your heads together over the adjournment and settle this point.
- White But your Honours this is in our written submissions.
- Tipping J No I am not criticising you Mr White. I just think it would be extraordinary if you were saying he doesn't have to pay it, he's trying to talk himself into paying.
- White Well it would be your Honour and we have raised the matter and one assumed that the appellants would be responding to our submission on that point.
- Tipping J Well do you think you could have a word in the adjournment Mr Harley and get the point. It does seem quite absurd frankly.
- Harley I understand.
- Elias CJ Well it really would be absurd if you want to argue that s 141F(c) doesn't help you.
- Harley Precisely and I'm not. Last, the individual knowledge of the appellants. We have dealt with this in the context of Mr Stewart's submission yesterday and in terms of the 100% penalties. The submission is that in respect of the offensive parts of the arrangement identified by the Court of Appeal, being the CSI business plan and the Trinity, sorry the letter of comfort, in respect of the persons who had no knowledge of that, the 100% penalty level is too high. Those are

the submissions that I was to cover and that leads then Mr Carruthers to deal with the true unanswered questions from yesterday.

Elias CJ Thank you Mr Harley.

Carruthers Your Honours, I don't need to take time apart from just drawing attention to the note, the 300 stems analysis was to explain the significance of that as a result of a question from his Honour Justice Gault. The second part of the note is really to support the answer that I gave to Justice Tipping yesterday, that the promissory notes are not a substitute for the contractual obligation; they are security for it. And there is a commercial and a tax purpose for the promissory notes. The promissory notes secure the question of payment and there can be no argument in the event of default, there can be no argument as to whether the contract is effective, the promissory note can be sued on in its own right. So you have, as that section from *Byles* explains, a valid commercial purpose for the way in which the securities were organised and you have a taxpayer choice as to why the matter was dealt with in that way.

Tipping J I took a note yesterday Mr Carruthers which, on what you have just said, seems to have been wrong. I understood you to say yesterday that the promissory note was necessary in order to affect a transfer of property. Do you remember?

Carruthers Yes I do.

Tipping J Are you able to

Carruthers That's in the context of the application of the rules. That is, you had to establish that there had been an incurring of the expenditure, which is why the promissory note was. So it was a transfer of property by the promissory note.

Tipping J What was the property being transferred?

Carruthers Well it is the consideration in the promissory note. It is probably easier your Honour to look at the answer that I gave in relation to the duality of the contract and the promissory note, that they both subsist and the promissory note is a security for the obligation in the contract. I think your Honour was putting it to me that there was a substitution and I was resisting that there was a substitution, because they are both co-existent. It is probably easier your Honour if it is just pursued in the way in which I have in the note.

Tipping J Well I can understand the concept of a promissory note being some form of security, in the very loose sense, for the payment for the promise, for the fulfilment of the promise to pay. But I was attracted, and I don't want to press on this if you prefer to leave it on the basis that it is read as a security, then that's fine, subject to what Mr White

may say about it. I don't want to press you but I have to tell you at the moment I cannot quite grasp this idea of transfer of property being affected by the promissory note.

Carruthers Well your Honour I think I will leave the exchange there and deal with the matter in reply, if it becomes an issue.

Tipping J When you see what Mr White says about it.

Carruthers Yes.

Tipping J Very well, thank you.

Carruthers May it please your Honour.

Elias CJ Yes Mr Gudsell. I should indicate that we'll hear you on your submissions, even though we understand that the Commissioner objects to the argument being developed. But we'll determine that at the end of the day, rather than to take time about a preliminary skirmish.

Gudsell Thank you your Honour. Your Honour I propose to speak to my submissions. And, other than some general material by way of corrective matters in respect of the references to sections in the submissions, which I will conveniently I think hand up to you or to your Registrar in the break, rather than now, I propose to approach it in this way, to address the accruals regime as I have set out in my submissions. Because the key to that submission is that this is not a case about tax avoidance. I will respond to the Commissioner's submissions with respect, however, to the licence premium deductibility and the sham issue. So far as matters of participation are concerned, I've set out in my submissions the position that Accent has taken, reconstruction and penalties with regard to the Accent submissions, because you have three sets of submissions before you.

Elias CJ Sorry three sets from you.

Gudsell Yes. The first is in respect of Accent; there are separate submissions, synopsis of submissions in respect of Redcliffe Forestry, and Lexington. In respect of Redcliffe and the issue that arises there with regard to penalties, that matter will be dealt with by my learned junior Mrs Hinde.

So that the matter of some discussion yesterday was the, particularly from your Honour Justice Tipping, was in respect of the application of the accruals rules. And if I may, for convenience, refer you to a passage in the case on appeal at volume 24, at page 4975, the passage is in the publication *The New Zealand Accrual Regime: The Practical Guide*". And there's an important starting point in the position that is taken on behalf of Accent Management is set out in that passage.

Because it cuts essentially across a number of the issues that have been advanced in relation to this appeal to date. That the accrual regime can be interpreted as a fundamental shift from the rest of the income tax regime which operates on traditional legal accounting principles. There's a move to a regime where the Act operates more on economic principles within the area in which the accruals rules apply, income and expenditure are measured in terms of systemic gains or losses.

Tipping J Systematic.

Gudsell I'm sorry systematic gains or losses, resulting from benefits received and provided under financial arrangements. In this respect the accrual regime is substance-oriented and has regard to the broad economic consequences to the parties. Whether the arrangement is viewed as a composite financial arrangement or otherwise must be a reflex of the correct economic effect of the arrangement. Further, the approach adopted must give effect to the spirit and intention of the accruals rules in the area in which they operate so as to arrive at a fair result.

In terms of the debate in this matter with regard to economic substance, pre-economic burden, matters of legal and accounting principles traditional to the Income Tax Act, this regime that has been brought into the legislation is a specific anti-avoidance regime. And it has been commented on, as is referred to above, on page 4975 by Justice Gault in the decision cited that there is an interaction or interdependence between the elements of the arrangement which characterise a composite arrangement. And the alternative approach is to isolate the arrangement into its component elements. And the submission on behalf of Accent here, is that in respect of this matter there is a deferred property settlement and further there is a secured debt instrument, both of which give rise to the application of the regime.

If the regime is the starting point, as reflected in that decision, I'll also take you to the *Auckland Harbour Board* decision, then that is the basis upon which the assessments in this matter should have been processed. Not on the basis of an analysis in its scheme and context of the licence premium and insurance premium but Accent submits here that the full consideration that is paid for the purposes of acquiring the agreement to grant licence and options in this case contain both elements of that sum, namely the \$2.05m and the \$34,000 in respect of the component relating to the CSI plan of insurance.

The reason I advance that is because in order for the investors to acquire in this case, they were required by the agreement to pay both the \$2.05m and the insurance component, to secure the licence in this case. So, if you start with the proposition therefore that there is a deferred property settlement here, then the financial or the accruals

regime contained in EH of the Act is applicable. And that as a consequence moves one away from deliberation or consideration of matters associated with determining whether or not EG1 or in this case, in a section you haven't heard much about, but in fact is the key provision relied upon of BB7, in respect of the \$34,000 payment. It moves away from considerations of those provisions and takes you into the accruals regime by way of it being a financial arrangement that meets the definition in OB1 (ii) of the definition of financial arrangement. And OB1 can be found in the High Court judgment at paragraph 199.

Elias CJ Is it also in the Commissioner's bundle. I'm just intending to work off that so that

Gudsell Yes it's in tab 9 of the Commissioner's bundle. Financial arrangement is defined on the third page of tab 9, at the foot of the page.

Gault J Just before you get into this, could you clarify something for me Mr Gudsell please. Um, you are proceeding on the basis that financial arrangements are the subject of an accruals regime are you not?

Gudsell Yes.

Gault J How does that come about given, I'm looking at the judgment at 19057 that you have just referred us to. Accrual expenditure, which I assume is that which is the subject of the accrual regime, expressly excludes financial arrangement. Is there a separate accrual arrangement for financial arrangements.

Gudsell Yes, the accrual expenditure is distinct from financial arrangement and the accruals regime. Accrual expenditure in this case by application of, for example BB7 of the Act, in relation to expenditure incurred for the purposes of obtaining gross income, would be deductible under provision EF1 as accrual expenditure. The regime is an independent regime that defines what comes within it for the purposes of adjusting what might be seen to be advantages obtained by entering into financial arrangements, where you effectively have a deferred property settlement. And what is sought to be adjusted under this regime, and it is a provision that starts with the words in EH 8, notwithstanding, which I will come back to, any other provision in the Act. The calculation of effectively the acquisition price and the interest component in a deferred settlement is provided for by a mechanism within that specific anti-avoidance regime. It ensures that mismatches of both income and expenditure are removed. And essentially the key in this case, so far as the Commissioner and the lower Courts have been concerned, is that serious mismatch. The accruals regime independently of accrual expenditure expressly addressed that.

So what OB1 provides for in the definition and the definition that is relied upon is (ii) of that particular definition. And

Elias CJ Sorry of which definition?

Gudsell Financial arrangement.

Elias CJ Oh yes.

Gudsell And what I have set out in my submissions is that we have a finding in the lower Courts that in their analysis of the premiums paid in this case, described in the lower Courts as insurance and licence premiums, is that the Court, at paragraph [199], sorry [200], of the High Court judgment, provided that the insurance contract was an excepted financial arrangement. And then examined whether that financial arrangement was part of a wider financial arrangement. So that at paragraph [203] of the judgment, the Court finds that the wider financial arrangement in this case must be one that satisfies Part A (ii) of the definition of financial arrangement. And the Court found that that was so, as did the Court of Appeal at paragraph [70] of the Court of Appeal judgment. So armed with those findings of the Court

Elias CJ Sorry what paragraph in the Court of Appeal

Gudsell Paragraph [7] of the Court of Appeal judgment.

Elias CJ So [203] in the High Court and paragraph [70] in the Court of Appeal.

Gudsell In the Court of Appeal the Court, when examining the excepted financial arrangement issue, and what it termed the “wider financial arrangement”, stated at paragraph [70] that however it was common ground before us that Venning J was correct to conclude [at paragraph [204] that this contract of insurance was part of a wider financial arrangement. So if, just setting the scene really for the discussion as to whether or not the Court should back the bus up here, and examine as indeed the remarks of the Court of Appeal in *Peterson* that recorded, because I am encouraging this Court to do just this. Your Honours will be well aware of the remarks made by the Privy Council with respect to the way the Commissioner puts its decision, its case before it, and how it would have had alternative bases for putting that case to the Court. What the Court of Appeal had said in the decision in *Peterson* at paragraphs [33] and [34]

Elias CJ Sorry where do we find that?

Gudsell In the *Peterson* judgment at paragraphs [33] and [34].

Elias CJ Oh yes okay.

McGrath J That’s the Court of Appeal judgment?

Gudsell Correct your Honour.

McGrath J And which is at?

Gudsell I'm just finding the page. It doesn't appear that the Court of Appeal judgment, the Privy Council judgment is in volume 2.

McGrath J I think it's in the respondent's bundle at tab 5.

Gudsell Thank you your Honour. If one goes to paragraphs [33] and [34], perhaps it is better to start with

Elias CJ Sorry I can't find it. It's in the respondent's bundle, volume 1, is it at 5.

Gudsell Yes.

Elias CJ Thank you.

Gudsell And if you go to tab 5, where the Court remarked at paragraph [32], I'm happy, content for your Honours to read that. You've had a lot of material read to you. Through to the end of paragraph [34] and indeed through to the end of paragraph [35]. My submission in response to what the remarks that are made there is that it is as exactly, for the reasons I am advancing in respect of the accruals regime, is happening here. That there were means by which the assessment should have been properly undertaken in accordance with the accruals rules and I will take you to the passage where the assessing officer in the evidence in the High Court says that that was an option, it was a choice that was available to assess under the accruals rule, which I say in terms of the language of the accruals regime in s EH was a requirement, not a choice; that the matter should have been properly dealt with and we ought not and should not have been meshed, as the Court put it there, in a complex (by analysis of BG1) analysis in this case.

Tipping J So the Ben Nevis appellants are striving to kick outside the accruals rules in one respect, and you are saying that you are in them.

Gudsell The key to that your Honour is this. The key difference is that the Ben Nevis appellants have taken you to the agreement and have suggested in clause 4 of the agreement that the promissory notes were a payment in full satisfaction and that removes the accruals regime, because there is no deferment of the property settlement. My submission is to the contrary. My submission is the promissory notes do not reflect that.

Tipping J So it all turns around these promissory notes?

- Gudsell There was no reference in the High Court judgment nor in the Court of Appeal judgment, to my recollection. Certainly not in the High Court, to the modification of a critical clause in the structure of this agreement. That critical clause was 4.3.
- Tipping J So the difference between you is, relates, and I am not asking you to develop it at this stage of course, because you will develop it as you wish, but relates to the effect of the promissory notes.
- Gudsell Correct.
- Tipping J Right thank you.
- Anderson J Do you say you are entitled to amortise the ultimate payment over the 50 years.
- Gudsell No, the accruals regime provides a regime which is set out in the rear of the Commissioner's submissions.
- Anderson J Because, just in a nutshell, what does it allow you to do on your approach?
- Elias CJ What's the effect?
- Gudsell It's a reverse, it's a gradual curve. It starts off with very very low deductions
- Anderson J Yeah I can recall, I recall the graph yes.
- Gudsell Yes and it's at paragraph 27 or 28 of the Commissioner's submissions in response to the Accent submissions. So it's a totally totally different position.
- Anderson J With most of the deductibility coming at the end of the 50 years.
- Gudsell Correct.
- Tipping J Is this really a pre-cursor for your saying it is not tax avoidance?
- Gudsell Correct. If there's a specific anti-avoidance regime, that this falls within as a deferred property settlement, as a financial arrangement, the regime provides a mechanism, determinations, G17 (b) is a mechanism that is provided for in the legislation, there is a provision in GD11 of the Act, to address any non-market considerations or adjust
- Tipping J So the price your clients will pay for it not being tax avoidance is not such a favourable curve or a curve rather than a straight line.

Gudsell Well the serious consideration here your Honour is the concern that the Commissioner has had of these massive upfront deductions that they have quarantined. They have only allowed them for a very brief period. They would not exist. They would exist at considerably lower levels as reflected in the graph, and I can take you to details and there could be a core acquisition price.

Tipping J There wouldn't be such an acute mismatch of time

Gudsell There would be no, it couldn't be described as acute at all.

Tipping J No.

Anderson J So again in practical terms your position is that we will pay our tax, we get very little at the front, but if I am right, you say we avoid the penalties.

Gudsell That would happen.

Anderson J But that's the practical purpose of the position isn't it?

Gudsell It's not the practical purpose of proffering the submission. It's the practical result of the application of the legislation. And I have come to the matter as your Honours appreciate at this level, not at any lower level. The argument is one that I am putting before you as being one that is available to consider this matter and finds favour, not only in the High Court and Court of Appeal judgments, in the department's internal papers between 1999 and 2003, all consistent with that position and indeed more critically when it came to the submissions in the Court of Appeal with respect to the application of BB7 to the licence premium, the Commissioner's counsel themselves said this should have been dealt with under EH accruals.

Gault J So how do you get assistance from the *Peterson* judgment in introducing some difference way it could have been done when that was acknowledged in the passages in this Court of Appeal that you have referred to that that is not open, as I understand the Court of Appeal said "we think it should have been dealt with in this way but it was dealt with in the other way and we must deal with it in the other way" and the Privy Council said "the Commissioner could have done it in another way but he didn't" and you have a section in the Act which says "you can't raise new matters" and you have got a situation where this case right up until now has been contested on a wholly different basis. That seems to me to be a huge obstacle to introduce a wholly new way of approaching a case at a second level of appeal.

Gudsell There were many questions in there your Honour, with respect, and some of them I will address now. Firstly, I am only taking you to *Peterson* to say that we shouldn't get enmeshed in something that is

not there and the reason in *Peterson* that they did get enmeshed in is because the Commissioner made a concession.

Gault J But having got to that point, both Court of Appeal and Privy Council in *Peterson* had to deal with it in that way.

Gudsell Because of the concession the Commissioner made, in my submission here, is there are findings in the lower courts with respect to this matter, that there has been a lack of appreciation of the consequence of the findings that exist and indeed the Commissioner stated in the Court of Appeal submissions, and I will take you to them, that in respect of the financial arrangement that this issue was a finding of fact that was not appealed. So they are themselves saying, there has been a finding by the trial Judge with respect to that, that is a launching pad that is not available in *Peterson* and as a matter of interpretation, statutory interpretation against the facts of a deferred property settlement being found as a fact, it's a launching pad for the Regime to apply and should apply, otherwise this Court would be deciding matters in a legal vacuum away from the, because there are other, this is a test case, there are other taxpayers who are sitting in the wings who don't have the insurance component.

Gault J But we get no assistance from the lower courts and part of the whole structure of the courts is that a case distils as it goes up and final Courts have the benefit of the reasoning in judgments in the lower court. That's why we have these rules, that parties, and particularly in tax cases, because the Act says so, you are stuck with the notice of objection and the reply.

Gudsell Yes there are some issues with regard to rule 29 which I have mentioned in my memorandum as regard to the grounds of appeal that this Court has broadly approved and my submission is that the breadth of those and your Honour, the Chief Justice has mentioned that you would rule on this at the end, but I do make the submission now that the breadth of the grounds that the Court has approved for this purpose, not by way of a case stated or a point of law reserved, are broad enough in my submission, for this to go forward and it is not you.

Tipping J But speaking as one of those, I think, who joined in granting leave, I don't recall Mr Gudsell, and you will no doubt be able to assist, it being indicated that leave was sought for a wholly new basis of approach.

Gudsell No you are quite right Sir, that wasn't put forward at that time.

Tipping J So I don't think with respect you can construe the grounds against that background as letting you in.

Gudsell Well there are many aspects to it and I can.

Tipping J Perhaps we better take the morning adjournment so that we can recover from the first steps if you like, I think I am grasping now what you are endeavouring to do and we have said we will hear it out, but I am beginning to wonder whether we shouldn't have a clearer examination up front as to whether you should be allowed to do this, because it does seem very unconventional. But anyway that's just a passing thought of my own.

Morning adjournment 11:35

Court resumes 11.59.

Elias CJ Mr Gudsell now understanding that you are not seeking to justify the deductions that were made but you are seeking rather to indicate what deductions might have been made, we think we need to hear from counsel for the Commissioner as to whether we can entertain this. In particular we are concerned about the implications for the scheme of the TAA. Mr White are you able to address us on this now.

White If your Honours please the matter is addressed in our very small thin submissions in response to this argument. I should just mention that we understand it is an argument that has indeed shifted yet again from the one that we were responding to in these submissions because, these ones were concerned with a suggestion that the 2004 Act applied retrospectively, but we now understand that Mr Gudsell's argument is indeed raised under the 1994 Act. But just to deal with the specific matter your Honours raised, in paragraph 3 of the small submissions we do make the submission to your Honours that this is a new argument without leave or cross-appeal and that it is wholly new and that's now acknowledged, but the practical matters that are relied on are listed there, first of all of course in 3.1 the taxpayers themselves in their returns claimed the deductions in the way in which in fact did and they claimed the full amount in 1997 of the \$34,000 insurance premium and a small part of the licence premium. And then in 1998 they claimed some \$40,000 per hectare for the licence premium which they amortised back over the 50 year term of the arrangement. And the Commissioner's assessments were made in response to those returns and disallowed those deductions on the grounds that they didn't comply with the black letter law provisions and that they were part of a tax avoidance arrangements. The NOPAS and NORS were exchanged on that basis. It is true and I should acknowledge that there was a brief mention in the NOPA of the possibility of this sort of argument, but it was not pursued and did not form the basis of the Commissioner's subsequent reassessments. The pleadings, that's 3.5, the challenges to the reassessments in the High Court and the Court of Appeal they all proceeded on this basis, and indeed the appeal to the Court of Appeal and to this Court have also proceeded on the basis outlined. So it was not until my learned friend Mr Gudsell filed his submissions that this matter was raised. And on

this particular issue, there is of course the matter of whether the promissory matter of fact or mixed question of fact or law whether the promissory notes are putting aside for the moment any argument about tax avoidance, constituted a deferred payment or removed the deferred payment, and on that of course, that issue as is clear from here, we are in agreement with my learned friend, Mr Carruthers, the Ben Nevis appellants that it was not a deferral so that the accruals rules don't apply anyway. The point I am making on that your Honours is that if it had been suggested otherwise, in the High Court and in the Court of Appeal, or particularly in the High Court, that that matter would have been addressed properly on the basis of evidence and submissions then, rather than being raised at the last minute now, so it's not – there are the issues of statutory interpretation and the more fundamental issue relating to the factual matter to the promissory notes.

Elias CJ Well why is that a factual matter Mr White?

White Well your Honour the question whether the promissory notes were to be separated out from the contract and whether the agreement to pay them meant that they constituted as my learned friend, Mr Carruthers has submitted, an immediate acceptance of the obligation and constituted payment then, and were not a deferral, has always been argued on that basis, it's never been suggested otherwise.

Tipping J Forgive me Mr White, I don't I'm afraid have your short submissions immediately in front of me and forgive me if it's referred to here, there, what is the statutory basis for, because I know there is one for saying you can't expand things as you go along, so to speak, it's all, I know it's quite tight.

White I would have to dig out the relevant provisions of the Tax Administration Act your Honour, but as I understand that under the Act now if you reach the stage of statements of position, abbreviated to SOPs on both sides, then you are stuck with your SOP as it were, statement of position. That stage was not reached here. So that is not in itself .

Elias CJ An impediment.

White As I understand it I would have to check the provisions because as I understand it that's not in itself an impediment.

Tipping J But in tax litigation, and forget my ignorance, I have always understood that you can't just sort of keep changing your ground, it wasn't as open as that was it in the years that we are concerned with, or the time we are concerned with.

White Well as I understand it your Honour and I would have to check the provisions, but the statement of position provisions were in the Act at

the time, but you have to reach that stage and because the challenge proceedings here were issued when they were, the statement of position step was not reached.

Tipping J But surely if you get to the point of formal court proceedings you can't be in any better position than if you had reached a statement of position position. It would seem quite counter.

White I am not wanting to disagree with your Honours approach at all, and certainly as we say here, this argument was never raised on the pleadings which is where you would have expected it to have been raised if it was going to be.

Tipping J This statement of position conceptually comes before the commencement of any formal litigation proceedings does it?

White Yes your Honour.

Tipping J But why wasn't it, was it just not taken in this case as opposed to not being reached.

White It wasn't reached.

Tipping J Wasn't reached.

White I would have to check your Honour.

Tipping J But can you go to the Court without there being statements of position?

White Yes you can. Well you could then. It may be more difficult to do that now.

Tipping J Well one wonders what the point of having pleadings is, if people aren't supposed to keep to them.

White Well in this case there might well have been arguments at the time of the pleadings, if these new arguments had been raised, but here there is no doubt and my learned friend Mr Gudsell has acknowledged, that this argument has been raised for the very first time in their submissions the Accent Management submissions filled in support of this appeal, wasn't even the subject of the leave application as your Honour pointed out.

Tipping J Could it be relevant to penalty or to the quantum of the tax advantage?

White The Commissioner's position on penalties your Honours is that your Honours are going to have to decide the tax avoidance issue in order to determine the penalties issue, one follows the other, and our argument which is in here, in any event, a response is that even if it

were under these accruals rules we would still be arguing tax avoidance. And I know my learned friend Mr Gudsell will argue that his specific anti-avoidance regime, which he has described, cuts out or leaves no room for BG1, the Commissioner doesn't accept that.

Tipping J Let's assume for the moment Mr White that the Court is at the point of deciding it's tax avoidance to some extent, and that Mr Gudsell's client can't raise this new point against that conclusion, could they raise it in relation to reconstruction or penalty and/or penalty?

White We would say no in either case your Honour.

Elias CJ What's the impediment, you have got to ascertain the tax advantage, what's the impediment they are raising it to, is there any statutory bar?

White It would be a matter of looking at the provisions relating to penalties, as far as penalties were concerned, and one would consider it to be somewhat difficult for them, when they didn't take that position at the relevant time, how they could possibly argue that it was relevant to what the purpose of the arrangement was back in 1997. I mean the evidence that we will be relying on of course your Honours is that back in 1997/98 the object or purpose of the arrangement was tax avoidance.

Tipping J But let's assume you are right in that.

White And that's the relevant issue for penalties.

Tipping J Yes, but a quantum of the penalty surely has to be, oh I see, you say that is inevitably linked.

White Exactly, one follows through.

Tipping J But what about the extent of the tax advantage. Say they could have done it Mr Gudsell's new way, and that would have allowed them, I am taking very rough hypothetical figures, a legitimate tax benefit of \$1,000, they have actually got a tax benefit of \$2,000 under the arrangement that's struck down. The tax advantage is \$1,000 not \$2,000 on one view of it.

White Well for that particular year.

Tipping J Yes, but that's surely we are looking at two years. But for each year.

White Yes but in looking at the issue of tax avoidance, of course, you are looking at the whole, the affect of the whole arrangement over the whole 50 year period.

Tipping J Oh yes, but in the year in question, say one's looking at the '97 year hypothetically the whole tax advantage is \$2,000, but if they had done

it a way that was available to them but they didn't use, the tax advantage would be cut back to \$1,000. Now does that have any relevance?

White The difficulty with answering that question your Honour is that if we don't accept that it was a way that was open to them to do it.

Tipping J But that will be, you can resist that when it come – all I am concerned about is, if you like, there are two separate stages there is the whether its avoidance at all, or whether it qualifies at all, stage one and if it doesn't what do you do about it, and what penalties, I am with you provisionally, subject to what Mr Gudsell says about the first stage, they shouldn't be allow to raise it now, but what about stages that relate to the amount of the tax advantage.

White Well if we just deal with reconstruction first, because that was the first one your Honour. They claimed in their tax returns deductions for the full amounts for 97 and 98 and the Commissioner's argument will be that if tax avoidance is found and the arrangement is void, those deductions were properly disallowed in full. So that's the end we say.

Elias CJ They didn't structure it on a different basis.

White No they did not in fact do the curve, they did a straight line.

Elias CJ And indeed Mr Gudsell said, you really need to look at the substance in order to it being a deferred payment, so you would have to reconstruct their scheme to get there.

White Exactly, it's not the scheme, it's not the Trinity scheme that was implemented.

Gault J And I suppose you would say that it hasn't been raised as a point of interest in the context of reconstruction until now either?

White Correct your Honour.

Tipping J Or in the context of penalties.

White Correct your Honour.

McGrath J Mr White, had these proceedings not been brought, do I understand from what you have said that it would have been technically possible, because the SOP stage hasn't been reached for this argument to have been raised under the internal procedure?

White I believe so your Honour, yes – I am always a little hesitant being an expert on all of these internal matters, but I believe so.

- McGrath J And old legislation and things of that kind. But in any event instead of proceeding to that internal procedure they elected to bring the proceedings at the stage they did.
- White Yes. Excuse me I may just need to check up on that. There was just one step I omitted your Honours which is probably in paragraph 3 if one looks at it. Yes, the procedure that is shown in paragraph 3 your Honours is that the, there were the returns, the original assessments based on those returns and then there was the audit and then there was the NOPA and the NOR and then the Commissioner assessed and that happened after that they issued their proceedings and that was before the reassessments occurred before the unfortunately phrased SOPs. There were no SOPs. The reassessment precluded the SOPs. Because of the reassessments step 3.4 there were no statements of position.
- Elias CJ Is this procedure the procedure in the TAA?
- White Yes. And the critical point that my learned juniors reminding me, which is what I have already said, that if these issues were to be raised then step 3.5 with the pleadings was the moment to raise them.
- Tipping J The SOP was in effect overtaken by the proceedings.
- White Exactly your Honour. So it had the equivalent effect, because you are stuck with your pleadings.
- Tipping J Well and surely.
- White I am getting some more help here – and what I have been saying your Honours is reinforced by my new learned junior which is that there is a time period for the challenge proceedings to be filed after the reassessment some 60 days.
- McGrath J So it's the upshot of all that that it was not open given the way the matter was handled in a particular stage 3.4 having been reached, for this to be raised at this issue Mr Gudsell's raised, to be raised in the internal proceedings.
- White We would say that your Honours, yes.
- Elias CJ That time period for the challenge procedures, 60 days, section reference, alright we will find it.
- Gault J Are the SOPs the foundation for the authorities process which is circumvented by the Court proceedings?
- White That is exactly right, yes.

Elias CJ I have alarmed Justice McGrath by referring to the TAA simply because I can't remember what it's – Administration Act but he thought I was referring to the authority, it's worrying him.

White We can find these provisions for him.

Elias CJ Thank you Mr White. Mr Gudsell.

Gudsell Your Honour I have filed a memorandum as you are aware in response to this matter.

Elias CJ I am just not sure that I can find it. Is this the 5 June one?

Gudsell Dated the 6 June, and in that memorandum I set out a response to the points that the Commissioner addressed in what he calls the small submissions. The matters that I have already addressed relate to the broad grounds and I hear what Justice Tipping has to say in response to that particular point. The argument is not new. I am just addressing each of the grounds that the Commissioner intends why it is that this Court ought not to hear something in respect of which there are factual findings in the Courts below.

Tipping J Well that may be so Mr Gudsell but what worries me, putting it quite bluntly, is that if we allow you to do this everybody will come along and say well we can raise a new point anywhere up to the Supreme Court.

Elias CJ It will be a bus.

Gudsell Well, with respect, the submissions that I filed in this matter were filed on the 11th of April. The notice, with respect, to the points that I wish to raise have been well before my friends for some considerable time. This Court is empowered by Rule 29 to address the grounds upon which and extend or whatever those grounds. I set that out in my submissions at paragraph, for the reasons I advanced of it not being new, I set out in paragraph 10 of that memorandum, and fairly put it before the Court in my submission, that it is submitted the Court is empowered under Rule 29, Supreme Court Rules, to amend the approved grounds at any time.

Elias CJ Mr Gudsell I am not so worried about the events through the Court processes. I am concerned about the Tax Administration Act and the time limits it sets up for raising challenges of this sort.

Gudsell There are two responses really your Honour in respect of that. And one is that, having come to the matter at the time I have, and seeing a point of law that is based on fact and is based indeed on the Commissioner's own submissions, despite the issue you raise with respect to pleadings, the Commissioner and this Court I am sure are interested in achieving the correct tax assessment in this case.

- Gault J Well that's a very broad point Mr Gudsell but the difficulty I have with it is that you want us to talk about a different case. Now this is a case about claimed deductions which your client made. You want to argue that those deductions were wrongly made. Whereas, right up until now, your clients' case has been to support the deductions. Now you can't change horses like that. And I would have thought that was made perfectly clear, look at *Peterson*. The Commissioner could have done it in another way. He could have argued it this way. But too late. And that's really been the whole approach to tax litigation, certainly in all the years I have been unfortunately involved.
- Gudsell There are examples that I can take you to where the Commissioner, I can't quickly point to the case at the moment, where the Commissioner has not taken the point in the lower Court, not taken a point in the NOPA process and I will find it for you.
- Elias CJ But it's not
- Gault J But this is not about taking a point. This is about changing the whole basis of the tax case because you claimed the deductions.
- Gudsell Yes. What one authority, if I may place before you, and I cited in the submissions, it may have been considered by one of your Honours in response to that memorandum. There is a case of *New Zealand Flax Investments Limited v Federal Commissioner of Taxation*. I have copies here for you. But the essential point of that particular case, which involved not dissimilar situations to this, Justice McGrath may have considered it, was that there was a deferral of commission and interest but the Court commented, if I could just get
- McGrath J Perhaps you could hand those up so we can see which Court we are dealing with.
- Gudsell Give it to you, so you can refer to it. The passage I was taking you to was at page 198 and 199 of the decision, where there had been issues with regard to deductions, questions of actually incurred, some very similar phrases that we have seen here in this Court. What the Court stated at the foot of page 198 was that "The assessment has proceeded on a wrong basis from first to last. And it is advisable in my judgment to set aside the assessments and remit them to the Commissioner for re-assessment." It carries on "The Commissioner will doubtless give consideration to the suggestion made by this Court. His duty is to see that the taxpayer is assessed according to law and not according to some mistake or want of understanding on the part of the taxpayer. It is also necessary if the taxpayers desires to rely upon such suggestions that it take them clearly and precisely [and I read this expressly, for accuracy] in his notice of objections."

Now what hasn't happened here is the precision and I only put it before the Court, it is my duty to put it before the Court as a case that is relevant, it does refer in the last line that I read to putting the objection precisely. The difficulty that we have faced in this Court now is that, in my submission, there are factual findings in the Court below that take us on a different route to where we are going. And if this Court, as has been invited by my friend for the Commissioner to deal with the matter, and it's been remarked upon yesterday on occasions of giving some signposts to the commercial community, then it should do so with care and respect to the facts that surround the case. And those facts, in my submission, lead to a contrary legislative regime than that which is currently this Court is on track for. Because at paragraph 48 of my friend's submission, substantive submission, the tax avoidance aspect of this case is of considerable significance, not simply because the Commissioner submits that BG1 voids the Trinity scheme for tax purposes, but because it is the first tax avoidance appeal to reach the new Supreme Court. While in itself a notable event, the Commissioner submits that it is particularly so when considered against the background of the difficulties with *Peterson* and other judgments. For these reasons, and this is important, the Commissioner's position in relation to the interpretation of the general anti-avoidance provision and its application to the facts of this case are set out in some detail in the submissions.

Now this Court has the benefit of factual findings from the lower Court. Those factual findings, I am submitting to you, take the case into a different regime so that if we want to pretend they don't then we can continue down the track we are continuing on and I accept the Court's, and particularly Justice Gault's remarks, with regard to the precision of objection. But this is indeed not the first case. The *Foodstuffs* case, *New Zealand Flax* is important, the *Foodstuffs* case is also significant. And to be fair this Court has also dealt with the matter, this particular Court for assistance in ruling on this particular matter in the case of *Paper Reclaim Limited*, which I think, I'm not sure, that Justice McGrath and Justice Tipping, and Justice Blanchard were on the Court. And that raised issues with regard to altering the basis for which the case is presented after judgment had been given. So I bring that to your attention as well.

Elias CJ Sorry what's the submission you are directing

Gudsell I'm just referring you to that. In the *Foodstuffs* case the Court took the view, in the Privy Council, that leave would be granted to the appellants to argue the point that had not been argued below.

Elias CJ But what is being put to you Mr Gudsell is that this isn't another argument. This is a different case. It's, you have acknowledged, you are not seeking to justify the deductions that were made but you are seeking to say that your clients might have claimed different

deductions. Well the facts we are dealing with are the fact of the deduction that was claimed.

Gudsell It is not a matter of choice your Honour, with respect. The position that the Accent Management appellant takes in this case is that, as a result of the factual findings of the Court below, it hasn't the choice, the law takes it into the accruals regime. So it is not a matter of being fancy or jumping around on the issues or looking for an opening. Because the Court expressly addressed this, you see yesterday in the many exchanges that Justice Tipping raised with regard to promissory note, now the promissory note is fundamental to the deferred property settlement issue. If it is fundamental and the Court has found that OB1(ii) applies, as indeed the Commissioner conceded essentially in respect of the licence premium, needs to go down the EH route in the Court of Appeal. Then it is not a new creation. I'm not bringing something to the Court to be smart. I'm bringing it to the Court because of the basis upon which it is below. And remembering critically, not only the passage I read to you from paragraph 48 of my friend's submissions, but there is a specific procedure under I think 138P or Q of the Tax Administration Act, which allows the Commissioner to put the matter forward as a test case. And that's a specific statutory choice. So they come before this Court and say this is a test case. In my submission to you it is far from a test case. It is concerning that it is not. And, more importantly, this deals with the 1997 and 1998 tax years. Do you have, as the SOP stage has not been reached, investors whose cases are stayed for the purpose of this hearing. Sitting in abeyance and saying well we'll just run the EH argument, we'll amend our pleadings, we'll file new pleadings. It doesn't quarantine anything.

Anderson J What's the consequence, put succinctly, of it being in the EH regime, from your client's viewpoint. Where does it take you?

Gudsell Essentially it takes you your Honour where the position is set out in my friend's short submissions at paragraph, in the table, that's where it takes you.

Tipping J Curve rather than a straight line.

Gudsell Yes.

Anderson J But that's not what you do. So what if you could have done it that way.

Gudsell No not a choice.

Anderson J But you didn't.

- Gudsell Not a choice. The assessing officer in this case said in evidence, I can take you to it, that the accruals, he was cross-examined by Mr Stewart,
- Anderson J I understand that but it doesn't get around the fact that you didn't do it. You claimed something different and it's the different thing that you claimed that has been subject of the Commissioner's conduct.
- Gudsell If there is no choice but, as a matter of statute, once you have a factual foundation, then it is not for the investor to be critiqued for something that the Commissioner ought to have done.
- Elias CJ Well isn't the return the foundation in this whole structure.
- Gudsell The return provides for the Commissioner to assess, allow the deductions and re-assess and disallow the deductions. In the re-assessment process, if the law is that there is a deferred property settlement, which all I suggest the internal papers that I have annexed to the submissions are referred to in the case on appeal, then that is precisely what it was and a choice was made and I take you to this at footnote 17 of my submissions, paragraph 47. A choice was made to go down a different route. If you look at paragraph 47 of my submissions the present, it refers to the respondent having ignored the accrual rules and invoked, it uses the general anti-avoidance rule. And the Court of Appeal, the case on appeal at volume 24, page 5088, you will see that that's the
- Tipping J It is a bit rich isn't it to say the respondent has ignored rules which the claimant doesn't invoke.
- Gudsell Well the Commissioner has the ability to reassess on a basis and my friend went through with you the way in which the NOPA/NOR and statement of claim process went. And the Commissioner has been fluid in the way in which it has approached this matter and indeed in the NOPA filed in 2002, the first being in 2000 which relied on tax avoidance only, therefore the deductions must have been allowed. In 2002, and I say as a reaction to *Peterson*, has covered its bases by challenging the deductions and it does so on several bases in its NOPA, licensed land issues and financial arrangement. So it actually puts at the forefront a limited version of the financial arrangement as a basis, a hierarchical basis for disallowing the deductions. So it is addressing it front on. It then changes its tune again in 2004, only about two weeks before the trial commenced, to say it is disallowing the licence premium deduction on the basis that it's the right to proceeds of the stumpage. So it's been a
- Tipping J But everything is focused on the claimed deductions. What you are now trying to do is say we can't defend the claimed deductions but we could have done it a different way, which should somehow or other be recognised. Isn't that it in a nutshell.

- Gudsell Well there are probably two sides to that with respect your Honour. One is it could have been put forward as a deduction under EH and I accept that that is a basis upon which it could have been put forward. It could also have been dealt with by way of reassessment by the Commissioner in accordance with the law and the evidence before the Court that the choice was there. Now is no choice of going from EH to tax avoidance. You need to establish what the deduction is before you move forward. And if the deduction is one under a specific anti-avoidance provision EH, then that is the route it ought to have taken and didn't.
- Elias CJ But it wasn't. It wasn't the deduction that was claimed.
- Gudsell No my point in respect of that was that, in its reassessment process, it said we could make an accruals regime assessment here. That's what they say in evidence and the documentation, in the remark I have referred you to in the case on appeal in volume 24.
- Gault J But you didn't pursue that, you persisted in maintaining the entitlement to the deductions claims. Now having to this point been unsuccessful there you are now seeking to change horses. Now you may have very good reason for that. There may have been an opportunity to seek reassessment, but this isn't the place to do that.
- Gudsell All I'm hopefully responsibly putting before the Court is the fact that there is a legislative regime that the Commissioner recognised was a choice available to it when it did this, when it made the reassessments. It made the reassessments against a time bar. It made the reassessments so that the SOP process didn't take place and it laid its cards down that the deductions in respect of licence premium were challenged and the sham issue was raised in respect of the licence premium. That provoked the statement of claim in it and the statement of defence are mentions of the financial arrangement I think in para.18 of the statement of defence.
- Elias CJ Well if that's important I haven't looked at that. Do you want us to go to it?
- Gudsell Well all I'm really raising too is that we have what's been regarded, for the reasons I've set out, a significant tax avoidance case before you that cover two years of an arrangement only with other taxpayers in the wings, and I'm saying to you we'll be back here next year or the year after with the 1999 and 2000 issues addressing EH. How can, with respect, this Court determine a matter that is tax avoidance in respect of this scheme if there is no insurance component for those who have stayed, *a la* the importance CSI plans and other matters as I think Justice Gault mentioned yesterday, composite parts of an arrangement that you might factor together are not there, are we going to have a different ruling on different years for the same arrangement?

My submission to you is that EH is overwhelming in its statutory thrust and it meets the facts of the lower Court. Now for me not to raise that but to stand before you perhaps in two years time on behalf of other investors making the same argument when this is supposed to be the leading tax avoidance case and notable opportunity for this Court to say something in my submission is not responsible of me not to raise it.

Tipping J I don't think there's any question that you are responsibly raising it, the question is whether we can responsibly hear it.

Gudsell Yes, and I'm saying for the reasons I set out in my memorandum, because of the comfort of the factual findings in the Court below, below of the other matters I've alluded to, that you can and should.

Anderson J The taxpayer carries the burden of demonstrating not only why an assessment is wrong, but by how much it is wrong, and this approach is going down the road as saying well it's wrong by less than the Commissioner said.

Gudsell Well it's not wrong by less, it's wrong to do it the way it is and it's right to do it the other way.

Anderson J Well, you see the whole of the disputes regime depends on response times of two months, and here we are four years after it should have been raised.

Gudsell One could put it another way and that would be given the Commissioner's recognition of choice as clearly put to them in trial that a statutory regime applies, and on disclosure point us to exactly that right through to 2004, that is what it ought to have done in reassessing it had the power.

Anderson J I just think the argument is years too stale quite frankly.

Gudsell I suppose one way of looking at it is I've really flipped the coin already. The flip of the coin is that this Court comes out with a decision of the licence premium and insurance premium and decides whether or not they are allowed and then it may or may not move on to tax avoidance, and it may or may not move on to reconstruction in penalties. And what has it done in terms of setting the factors or the signposts along the way for the commercial community?

Elias CJ Well perhaps we can't be that ambitious Mr Gudsell

Gudsell Well I'm only leading off

Elias CJ We have to deal with the case that comes before us.

Gudsell I agree, but I'm only leading from the remarks that were made in the last two days as I have heard the argument develop, and also leading from what the Commissioner is alluding to in his own submission, so it's not my creation that that is what's been tried to be achieved here, it's what the parties are saying to the Court and indeed what the Court indicated yesterday in discussion. So I think the only other authority, and it's not a track I want to go down Justice Anderson, but it's only responsible that I mention it, and that is the case of *Buckley & Young*, which I think is also in the Commissioner's casebook, and in that case there is mention

Elias CJ Just give us where we find it.

Tipping J Number 2 in volume 1 of 2.

Gudsell Thank you Sir. There's a reference at page at the righthand column around about line 10.

Gault J Which page?

Gudsell 497 Your Honour.

Gault J Thank you.

Gudsell And around line 17 there's a reference to 'the second part of the question involves the application in this case to the rule that an appellate Court will not ordinarily allow a new point to be raised except on a question of law which no evidence could alter'. It's only proper that I put that before you. In this particular case the Court remarked by reference on page 498 through to 499 on the *Lancaster* decision and also *Duggan*. This is an apportionment case and Your Honour Justice Anderson's point at 499, line 8, 'where the Commissioner has refused a deduction must establish the decision is wrong and the extent to which the assessment should be varied. It doesn't require an answer of absolute precision or one that has been calculated by some kind of scientific process. A minimum quantifiable sum is deductible. He will have failed to discharge the onus'. So that I'm not saying because of some discussion and by the Court with my friend about can we do some form of reconstruction or can we acknowledge it in some other way, but my submission to you is as desirable as that might be practical, the reality is that there are two different regimes, and indeed under the accruals regime there is provision to link to a provision called GD11 which allows adjustments to be made by the Commissioner. Because in this case what's happened is the Commissioner, and indeed its own internal workings, have equated the value of the agreement to grant licence at \$136,000 in, that's per acre per hectare, in 1997, and the balance of the sum through the \$2.05 million is interest, and that's where the interest curve comes from in respect of that query whether the 136

would be subject to some adjustment by the Commissioner by its own internal mechanisms.

Tipping J Are you really saying to us it's all or nothing, you're either in for all purposes or not in at all?

Gudsell Correct.

Tipping J Right.

Gudsell You can't juggle with this. It's an accruals regime issue or it's not and

Tipping J Alright, that was the understanding I had from your argument.

Gudsell That's right, and the Auckland Harbour Board case which I'm aware that Justice Gault is very familiar with is in both the Court of Appeal and Privy Council decisions talked about the internal regime and the processes that go on within that internal specific anti-avoidance regime, that really needs to play its part and play its hand before. There's no point in saying well we'll just do some practical workings out – it's not to happen.

Anderson J Could you help me with this Mr Gudsell. You said before the break, if I understood you correctly, the general anti-avoidance regime is excluded if a case comes under the accruals regime

Gudsell Yes.

Anderson J Could you just explain very briefly why you say that.

Gudsell EH8 of the Act in 1994 commences with the words 'notwithstanding any other provision in the Act and for the purposes of calculation and deduction under the accruals regime'. Those were remarks I know that the subject of specific versus general must have been the subject of a comment by President Woodhouse I think in one of the judgments I think in *Challenge*, and the remark made there was with respect to general versus specific, and His Honour made the specific reference in that case to the fact had there been a word like 'notwithstanding' any other provision he would have seen it differently. And the other interesting, which we do have here, and important factor is that the legislature when it came to consider the changes to this part of the regime actually had – I'll try and find the footnote for you if I can – it's at page 16 of my submissions at footnote 19. It's an interesting legislative guide because the accrual rules at page 16, footnote 19 'the accrual rules were effective from 1 April 1985 in the Acts referred to with the introduction of 64B to 64M. Now 64C provided 'to the extent that any provision of this Act, other than s 99 conflicts, that provision shall apply'. And as I point out there that wording did not survive into the Act, so in my

submission had it been the other way it would be called in aid by the Commissioner.

Anderson J What's the sanction then for someone who adopts an abusive tax position within the accrual rules?

Gudsell That's provided for in particular by two mechanisms. There's a sort of non-market value issues and there's also provision under GD11, and the *Auckland Harbour Board* case also dealt with offending against effectively the scheme and purpose of the accruals regime. That's available as a mechanism to set that aside too.

Anderson J What are the penalties?

Gudsell I don't

Anderson J Is there a sort of penalty regime for it?

Gudsell I'm sorry Sir I'll have to come back to that.

Tipping J Well if *Auckland Harbour Board* has in effect sort of written s 99 as it was then back in, if it allows you to strike down something within the letter of the accrual rules but which is not within the spirit and purpose of them.

Gudsell Well in my submission that can be dealt with within the framework of the scheme and purpose of the accrual rules. Now in the same way as deductibility in my submission I join with my friend Mr Carruthers for Ben Nevis in the same way that if you're examining the scheme and purpose, the scheme and purpose of the specific anti-avoidance rules will themselves be the yardstick for whether or not the deduction is statutorily rearranged and this is the significant point Your Honour is that under the accruals regime if the arrangement is to be struck down, there is a mechanism within it to set up the arrangement itself, so to alter or reconstruct the arrangement. So that's a statutory regime that's available there and one can only feed off the remarks made by what's now Justice Glazebrook in the passage I referred you to at the start, that the whole process is to contain and deal with financial arrangements that try to ratchet up at the start the significant benefits for the taxpayer, and they say 'no we have a regime we'll put that back to where it ought to be' as reflected in the graph in my friend's submissions. The other point just as an aside and with respect to and I raise it for completeness that Your Honour Justice Anderson asked issues about penalties. In the 1997 year when we're dealing with a very brief period in 1997 before the end of the 6/7 financial year there's a payment of about \$32,000 in that year, there were no penalties in that year for any. It's only the 1998 year that's relevant.

Anderson J Yes you made that point in your written submissions.

Gudsell Yes I did Sir, thank you. The point that's being made and I think it's one I've made before is that the charge to tax is a statutory assessment and the quantifications made by the Commissioner, and EH8 doesn't provide a choice, and that arises out of the remarks made by the assessing officer, so there is no question of let's go with tax avoidance, which clearly they didn't because they challenged deductions, but if the deductions were to be available they were to be calculated in accordance with EH8 and the way in which that provision was drafted of notwithstanding any other provision in the Act. So unless there are other matters on this preliminary point those are my submissions Your Honours.

Elias CJ Mr White did you have anything in reply?

White I think anything in reply Your Honours would be just as I said before in that just the main point that the case has always been conducted on the basis of the deductions that were made and that that was on the straight line basis and not on the curve basis, and that's a matter of fact, and those were the facts of this case in the High Court and in the Court of Appeal.

Elias CJ Thank you Mr White. Well we will take the lunch adjournment now thank you.

12.55pm Court adjourned

2.17pm Court resumed

Elias CJ Yes Mr Gudsell, for the reasons that we will give in the judgment, we will not admit the new argument and won't hear you on that.

Gudsell As Your Honour pleases.

Elias CJ You've got some additional points to make but you haven't made a general fall-back position. You might want to consider that.

Gudsell The fall-back position is that if the accruals rules or the accruals regime matter – I'll just go to the point Your Honour. At para.52 of my submissions it was set out that 'the appellant supports the Court of Appeal's findings with respect to deductibility'.

Elias CJ Yes, thank you.

Gudsell So it's really from that point you really wanted to hear me on the question of tax avoidance.

Elias CJ If you want to enlarge on

Gudsell On the submission?

Elias CJ Yes.

Gudsell I would like that opportunity.

Elias CJ Yes, yes of course.

Gudsell I'm sort of adjusting the framework of this because as you know from the submissions you've read it's the Accent submission that with all due respect to proceed down this line is essentially to deal with the hypothetical, but having said that the position as found in the Court of Appeal is that the deductions are available under BG1 and as I mentioned briefly before lunch, under BB7 it's not a matter that was addressed yesterday or the day before in any detail. The concentration had been on DL13. DL13 deals with insurance, a contract of insurance, where in fact in the High Court the judgment in this matter the trial Judge

Elias CJ Sorry, what provision are you referring to?

Gudsell Section BB17,

Elias CJ Right.

Gudsell Sorry, s BB7. Two Bs.

Tipping J Is that referred to in the High Court judgment you were saying?

Gudsell It is Your Honour.

Tipping J Yes.

Gudsell I've just misplaced for the moment my

Elias CJ It's 11 in the Commissioner's bundle.

Gudsell BB7 deals with the general provision is expenditure of loss incurred in the production of assessable income, and Your Honour it is in the respondent's folder on the legislation

Elias CJ Yes I have it, it's under tab 11.

Gudsell Thank you.

Tipping J So it's the general deductibility?

Gudsell Yes it is, it is, and it's quite significant as we've been, with respect, thrashing around on insurance related matters. If we look at para.189 of the High Court judgment. Just to sort of get

Elias CJ Sorry, what paragraph?

Gudsell Para.189.

Elias CJ Thank you.

Gudsell So just sort of getting the focus on what the provisions under which the deduction was found to be available. This is highly relevant to another issue I want to come along to in respect of the licence premium. In para.189 there's reference there 'although counsel focused on DL1(3), BB7 precedes it in the Act. It is in more general terms. The premiums fall within the definition of expenditure'. And then it carries on 'it follows that the premiums would be deductible under BB7 primarily, or, if not, in any event under DL1(3)'. So my submission is the relevant provision with respect to the \$34,000 payment that is being made. Now the Court of Appeal addresses that point at paras. 46 and 48 of its decision. I'm just really setting the scene here in respect of the provisions.

Elias CJ Is there anything further you want to draw to our attention on the relationships between BB7 and DL1?

Gudsell Well so far as the relationship is concerned BB7 is, as Justice Tipping said, a general provision so that when the Court went on to address and indeed the Commissioner does extensively in relation to the sham issue – and I just want to make it very clear here. In respect of the appellants' for whom I act, the sham issue does not relate to Accent or Lexington, it only relates to Redcliffe, because the Commissioner has said all but Bristol, Redcliffe and Bradbury. The insurance deduction is claimable, is available, save for the issue of spreading it all at once. So that's its position.

Elias CJ So it's only Redcliffe?

Gudsell Yes.

Elias CJ Yes, that it's an issue.

Gudsell It goes to the sham related point. Now in respect of that point, if I could – DL1(3), the reason that the Court and the Commissioner were considering the application DL1(3) is because of its reference to insurance, and my point is in respect of DL1(3), that it's not the applicable provision under which the deduction is available, so in terms of scheme and purpose-related issues, the consideration falls to BB7, not DL1(3), and DL1(3) drives all of the argument with respect to sham. It's not the applicable provision.

Tipping J So DL1(3) applies only where it's not deductible under BB7, is that right?

Gudsell Correct, correct.

Tipping J So if it is deductible under BB7 you don't get to the other one. DL won't let

Gudsell Correct, and that's what the Court found, so all the arguments about contract and sham and insurance and everything, because of the specific nature of that provision, because the sham issue was raised directly as I submitted driving out of DL1(3).

Elias CJ Sorry, I just want to be sure that I understand in the submission you were directing us to is not contended that the deductions weren't available under BB7?

Gudsell No. So therefore looking at the insurance, sorry, the licence premium deduction, that's been claimed under BG1, but what we have in the High Court is a finding in para.168 of the judgment that the 'licence premium is not deductible under BG1'.

Elias CJ 168?

Gudsell 168 Your Honour. So what we have in the High Court is a situation where the learned High Court Judge has proceeded to move on as you will see in para.262 and 263, say that he has to deal with tax avoidance, and if I could just give you a link if I may. 168 says that the licence premium deduction is not available. 169 then addresses insurance premiums, and it's quite critical that three questions are posed there and they're set out in 169. The Court having found that sham does not exist, and this is deductible under BB7, then it reminds itself of what's an issue at that point, and what's an issue at that point is that the Trinity scheme is said to be a tax avoidance arrangement. Now the problem is that in the Judge's definition of the Trinity scheme – that includes the license and insurance premiums. If the licence premium is not deductible, it's not a factor to be considered in relation to tax avoidance. It simply doesn't exist for the purposes of going forward. The first step is to determine deductibility. The process requires under the Act terms of scheme and purpose of the relevant provision under which the deduction is claimed, is it available or not, and the High Court is determined it is not. So what it is required to do as it says in 262, 'as I have found at prima facie the insurance premiums are deductible, then the deductions for the insurance premium could only be set aside if the Trinity scheme was a tax avoidance arrangement'. But what he's found, and from that point on by taking into account the licence premium issue is all obiter, because he's found that the licence premium deduction is not available. How can it then be part of a scheme if it's not available under BG1, because what he does at paragraph

Tipping J There may be two reasons why it's not deductible. One that it doesn't fit and the other that the whole thing's taxable.

Gudsell Well no it can't go that way Your Honour with respect. It can't be that it's not deductible, but it's also relevant to tax avoidance, but if it's not deductible, it's not deductible – you don't move forward. You're avoiding the tax break that's otherwise available. That's what tax avoidance provision BG1 is all about. If the deduction doesn't go forward the whole thing stops.

Tipping J You mean if it's not deductible at the first step under Black Letter principles you ignore it completely?

Gudsell Well that's what the Court has held that BG1 does not provide a basis for the deduction of the licence premium.

Elias CJ But you've claimed it.

Gudsell Beg your pardon.

Elias CJ But you've claimed it.

Gudsell Yes but in terms of applying, and *Peterson* and other cases say this, you need to set it up. You don't move forward to take into account a tax avoidance arrangement. An arrangement with respect to licence premium that the Commissioner has found is not available – the Court has found.

McGrath J But surely if you have two elements, only one of which is found to not comply with the specific provisions, you can take into account the fact that there is a provision that the agreement was structured in that way with that intention in sorting out whether the other aspect, the insurance premium, and this amounts to a tax avoidance arrangement, or part of a tax avoidance arrangement. I mean it then just becomes part of the context doesn't it?

Gudsell In my submission, no.

Tipping J So you've got to ring-fence it and pretend it never happened?

Gudsell Well if it's not available and indeed I take you to what I would regard really as a cross-roads submission in para.47 of the Commissioner's

Tipping J Well just before you go on are you able to direct us to a case of any utility which says directly that, that once you've got rid of it at the Black Letter stage it's to be ignored for all future purposes.

Gudsell Can I take you para.55 of my submissions.

Tipping J 'If no deduction is allowed there is nothing to avoid' in that respect, but is there some passage in *Peterson* here that you would want to rely on in particular?

Gudsell Over the page 'it's inherent in the section but for its provisions the impugned arrangements would meet all the specific requirements of the income tax legislation'. Well in this case the Court has found they don't. So they don't avail you of a deduction.

Anderson J But a scheme can comprise more than tax relevant direct aspects.

Gudsell The scheme to include as His Honour has done here in para.280 of his judgment, to find that the arrangement is voided by BB9 or BG1, includes, or purports to preclude the deductibility of the insurance premium which he has already found in an earlier finding of fact. Relevant evidence is not available under the Black Letter law at all.

Anderson J There's nothing to disallow under the general anti-avoidance regime, but perhaps of more significance is whether it nevertheless exists as part of the context in evaluating some other challenged deduction.

Gudsell Well my submission is it doesn't, but even if it did it would only be to address the insurance arrangements.

Anderson J Apart from the other element

Gudsell Yes.

Anderson J Yes.

Elias CJ Sorry are we talking about the licence fee here?

Gudsell Firstly we're talking about the licence premium and the High Court made a finding not available.

Elias CJ Yes.

Gudsell Forget about tax avoidance. You don't even get there. You don't even get

Elias CJ Well that I think is what works.

Gudsell That's my submission.

Elias CJ Yes, that's what we're exploring with you, yes. But what did you say about insurance?

Gudsell It's a two-step process that in order for the arrangement to be avoided, the deduction must meet the specific requirements of the legislation, and the Commissioner in para.47 sets this out of his submissions.

- Elias CJ I'm sorry, just looking at that statement for *Peterson* that you rely on, it's but for its provisions. If there was nothing more than a failure to come within the terms of the provision there would not thereby be any tax avoidance, but if it's part of a bigger scheme in which it's integral, why is it not within the tax avoidance provisions?
- Gudsell Well my submission is that this authority provides the basis for saying that you can only have regard to the question of whether it is or isn't deductible if it firstly passes the Black Letter test, and this one doesn't.
- Tipping J But if you've passed the Black Letter test it's prima facie deductible, so you then have to go on and look at the tax avoidance journal.
- Gudsell Correct, correct.
- Tipping J If it doesn't pass the Black Letter test I don't think it's a sequitur at all that has to be ignored for all purposes.
- Gudsell Well it's already void, it's already
- Tipping J You don't have to use general anti-avoidance to strike it down because it's not there anyway.
- Gudsell It's already gone.
- Tipping J But it's a huge leap from that to say that you ignore it for the purpose of looking at some other aspect of whether there is a general scheme, I just think it's a non-sequitur.
- Gudsell Well the point that Justice Anderson raised as well was the question of can you take the broad scheme into account, but what are you determining and utilising BG1 for when you move past into that next phase?
- Tipping J You're asking yourself against the background that you don't need s BG1 for the non-qualifying one whether there is a general tax avoidance scheme, and surely all aspects of the context must be relevant to that.
- Gudsell Well there is a consequence of it being found to be tax avoidance as opposed to it simply not being deductible.
- Gault J While there was no tax advantage in that respect there is nothing to adjust, but just help me where we are going if you will Mr Gudsell, do I take it you accept and adopt the finding of the High Court that this licence premium was not in respect of a right to use land?

- Gudsell I have supported the position that's been advanced by the Ben Nevis appellants in respect of that deductibility but I say when it comes to a consideration of whether there is tax avoidance I am posing, well I am providing a submission that the matter that falls for consideration under the tax avoidance provisions, given that finding can only be the insurance arrangement.
- Gault J The Court of Appeal differed from the trial Judge on the point of whether this was a right to use land as I understand it, and differed as to the application of BG1 to it in that respect. Now as I understand it, the Ben Nevis appellants maintain that it was a licence for the right to use land and you are now seemingly seeking to rely upon the contrary finding of the trial Judge to say that it is to be excluded from consideration of the scheme. Now you can't have it both ways it seems to me and that's why I wanted to see where you were going.
- Gudsell No, I was simply addressing the way in which building up from DL1(3) and BB7 for insurance and looking at what it was that the High Court had found. That's all I was doing in this instance, and applying that to the tax avoidance, because the distinction as Your Honour points out in the Court of Appeal, is that both deductions in the Court of Appeal's view met the Black Letter test, and therefore went forward for the purposes of determining they were avoided as a tax avoidance arrangements those deductions.
- Gault J Well what support is there for your argument in the point you're seeking to make that because the Judge found BG1 did not apply to the licence premium, it can be excluded when you say you support the position of the Ben Nevis appellants, that that's wrong.
- Gudsell Yes. All I was doing with respect was taking through the process of the High Court judgment into the Court of Appeal judgment, just pointing out the basis upon which the judgments proceeded, because it appears
- Tipping J Are you just narrative at the moment? You're not asking for any conclusion? I thought your purpose was to ring-fence this licence premium issue so that we don't take any notice of it when we come to look at the insurance issue.
- Gudsell Well it leads on to the submission that the Commissioner makes in the Court of Appeal and indeed in this Court with respect to the licence premium, so I wanted to develop the argument
- Tipping J Well do you or do you not contend that the licence premium was deductible according to Black Letter?
- Gudsell Yes in BG1, correct, I do.
- Tipping J So you can't run the ring-fence argument?

Gudsell No, not in respect of the Court of Appeal decision.

Tipping J Alright.

Gudsell So what I was going to take you to, and if I may, if we go to para.47 of the Commissioner's submissions in the Supreme Court. If the Court decides that the Commissioner on the issues relating to the deductibility of the licence and insurance premiums as the Court of Appeal did, if they decide against the Commissioner

Elias CJ Sorry, I'm behind. Where are you?

Gudsell Paragraph 47 of the Commissioner's submissions. 'If the Court decides against the Commissioner on the issues relating to deductibility of licence and insurance premiums as the Court of Appeal did, the Commissioner contends that all the appellants are parties to a void tax avoidance arrangement. Even if however the Supreme Court were to decide in favour of the Commissioner in respect to the non-deductibility of the licence premium in the sham argument, it would still be necessary for the Court to determine the tax avoidance issue because the appellants' tax avoidance submissions remain relevant to the deductibility of the insurance premiums by the appellant other than Redcliffe, Bristol and Bradbury, and to the issues of penalties'.

Tipping J So what, with respect?

Gudsell Well.

Tipping J They're not saying "oh well you should blinker yourself". They're demonstrably not saying that. They're just saying that if on a certain hypothesis we'll have to go on to decide that if the licence premiums out as matter of Black Letter we'll still have to look at the insurance, but they're not saying for that purpose you have to put your Nelsonian telescope to one eye only.

Gault J It's counsel that's says that.

Tipping J It's you saying that, that we have to use Admiral Lord Nelson's

Gudsell Just addressing the issue with respect to the licence premium, in the submissions before this Court the Commissioner contends that the licence premium is not deductible under BG1 for the reasons that it is in respect of the proceeds of the stumpage. So in the same way that the High Court had determined that the relevant licence premium deductions was not available, the Commissioner is submitting for its non-availability in this Court as well, so that in terms of a consequence of such a ruling by this Court, what then would the Court be avoiding by utilising BG1 after that point.

Anderson J Is your point

Gudsell I'm sorry Sir if I could just – and as I read it the Court saying the submission had been made is that the tax avoidance provision would go to address the insurance premium only.

Anderson J I was wondering if your point was – I may have it completely wrong or is not – the point you're driving at is if one of the components of the alleged avoidance scheme misses out through Black Letter law, that component shouldn't attract penalties based on avoidance. Is that the point you're trying to make?

Gudsell Well it's simply not having BG1 applied to it. It's not available.

Anderson J But with what consequence?

Gudsell That is a consequence.

Anderson J But that would be the only consequence unless you're suggesting that it then has to be ignored in relation to the evaluation of some other component.

Gudsell Well the Commissioner is suggesting in that submission that the only relevance of the tax avoidance aspect or argument is in relation to the question of whether the insurance arrangement is void or not.

McGrath J I understand.

Gudsell And if it is void as a consequence of BG1, there are the consequences with reconstruction penalties issues, but the same would not apply in respect of the licence premium component because it's already gone. So in terms of coming back to Your Honour Justice Tipping's point about ring-fencing, in both respects, if the Court were to determine as the High Court did that the deduction is not available for the licence premium, then the consequences that are said to flow would not be as a result of BG1 because

Tipping J In that respect.

Gudsell In that respect. That's a significant respect.

Tipping J Yes, well quite.

Gudsell A huge respect because all you're doing then by this Court examining this issue on the basis that the Commissioner is right is to say that the insurance premium which is \$34,000 is tax avoidance, nothing more.

Tipping J Yes but are you or are you not saying that when deciding that issue of tax avoidance you can't take into account the facet of the overall arrangements that comprise the licence premium dimension.

Gudsell The scope of consideration is that you're avoiding a payment or a deduction that would otherwise have been available.

Tipping J But is it or is it not relevant to whether there was a tax avoidance arrangement in relation to the insurance dimension?

Gudsell Sorry in relation to the insurance dimension. No, my submission is it is required to be considered within the bounds of the insurance arrangement.

Gault J Would it not be important to draw the distinction between the arrangement and any reconstruction. You can have aspects of an arrangement which are perfectly unobjectionable but form part of an overall arrangement, but when you come to the reconstruction, you only look at where there is a tax advantage flowing from the arrangement. That seems to me to be

Gudsell So in this instance if that were to follow the reconstruction would be in the insurance component of the arrangement

Gault J Yes.

Tipping J Because there's no tax advantage from the one that fails at the Black Letter stage.

Gudsell Correct, correct.

Tipping J Yes.

Gudsell And no penalties arising from that at all.

Tipping J Well that may not necessarily follow.

Gudsell Well technically.

Elias CJ Well isn't it only the avoidance, or the need for avoidance that it is evaded by not coming within BG1, there are still questions of penalty surely that could be addressed.

Gudsell If you do not need to avoid the licence premium deduction by use of BG1 then the consideration

Elias CJ Is it BG1, I thought it was EG1?

Gudsell No. Then the licence premium arrangement is available as a deduction under s EG1.

Elias CJ Yes.

Tipping J That's the awful EG/BG problem.

Elias CJ Yes, yes.

Gudsell And then GB. If that licence premium deduction is voided because it doesn't meet the scheme and purpose of EG1; is avoided at an early stage without utilisation of BG1, then there is a significant difference in position when it comes to penalties.

Tipping J So you're better off having it struck down for Black Letter reasons than for tax avoidance reasons.

Gudsell Look I'm not saying it is. I'm pointing out the difficulties

Tipping J But are you saying that you can get away more lightly if it fails at the first hurdle than if it crosses the first and fails at the second?

Gudsell Well I'm trying to put before you the position if the Court were to determine as has been set out in here that it is not available under EG1, and what the Commissioner says in respect of that particular point is that it would be for the proceeds for the stumpage, and if it's for the proceeds of the stumpage, in the Court of Appeal the Commissioner recognised, and this sadly comes back to our financial arrangement issue, that if the \$2.05 million is deductible as had been put in the Court below on a proceeds issue, BB7 applying expenditure, the Commissioner responded as follows. Further in any event EF1 which allowed a straight line spreading would not apply because the contract under which the payment will arise is a financial arrangement and therefore excluded from the definition of accrual expenditure which is a prerequisite to EF1.

McGrath J What paragraph are you reading from?

Gudsell I'm reading from the submissions made in the Court of Appeal by the respondent. The Judge held that this payment was part of a financial arrangement and that's the passage I took you to earlier, this is why the complications, paras.203 and 204, the appellants did not appeal this finding. Now this is the most important part. This is the proceeds of sale issue. As a payment under a financial arrangement, any deduction would need to be spread under EH, and to identify the deductible component to be spread annually and the method of spreading, expert evidence would need to have been adduced for this purpose - no such evidence was adduced. So that if this Court were to find that the licence premium deduction is not available because it's for the proceeds of the stumpage, then the submission is that would be dealt with under the accruals rules in the accruals regime because it's a financial arrangement and the Court below found that, so I am

simply addressing what it is that the Commissioner contends against the argument that Ben Nevis and Accent have put forward; that is the deduction under EG1. If it's not then the Commissioner's position is that it's a financial arrangement and the Court below found it to be that payment, and therefore it needs to be spread under EH, the accruals regime. So if that's the case, and I say it is, then you do not get to address tax avoidance because it moves off to the accruals regime. Your Honours I wonder if I could hand up to try and add a little bit of ease we have endeavoured to add some flowcharts. I have discussed these with my friend, and

Gault J Just before you move on could I seek your assistance Mr Gudsell, going back to the point you raise about the insurance premium, you say it's deductible not under the DL1(3) which expressly provides for insurance policies, but under BB7 which is the general deduction provision, if it's not an insurance policy, isn't it a financial arrangement? So which prevails then, the accrual rules or BP7?

Gudsell The deductibility with respect to the insurance component, which is what I was dealing with before lunch, really puts the full consideration under the agreement into the accruals rules which has somewhat hamstrung my argument.

Gault J I understood you to be arguing for a deduction of the full sum, in a lump sum in the first year under BB7.

Gudsell Correct.

Gault J If it's a financial arrangement is that correct, if it's not an insurance policy?

Gudsell The EH8 requires and provides that the accrual rules prevail in respect of that notwithstanding any other provision.

Gault J Then aren't you better to rely on DL1(3) and the express reference to the insurance deduction which does give you the full sum in the first year? You're not supporting that?

Gudsell I'm not taking that position.

Elias CJ Why not?

Gault J That's not helping me very much.

Gudsell And the point I've been assisted with is that in terms of the statutory framework or structure, it's not a matter of choice, it's a matter of BB7 applying and DL1(3) not, that's what the law says.

Gault J Yes, but that was not quite my point. I understood that part of your argument, but it seemed to me the reason you would go for BB7, you

said that was the appropriate provision and that DL1(3) was not the appropriate one, although DL1(3) refers expressly to insurance, and that would seem to be a much clearer way than to rely on BB7 which then if it's not insurance, it would seem to be a financial arrangement and that would cloud the application of BB7 because of the accrual rules. I don't know much about this but I'm just trying to find out where you're going.

Gudsell Well it relates to the spreading arrangement either all at once or spread over a term.

Gault J But what are you asking. You want it all at once because that's what you claimed in your return.

Gudsell That's what's been claimed but the difficulty with the argument that I'm advancing now is that it was prefaced on the application of the accruals rules, the accruals regime, that this Court has determined

Gault J Well we've ruled on that so what we now must try and get from you is what is your position, what are you contending for in relation to these various payments?

Gudsell The position in respect of the insurance premium is that the Court is correct to determine it under BB7, and in respect of the licence premium that's available under EG1.

Gault J Thank you.

Gudsell What I just handed to the Court, and had discussed with my friend Mr White, is what I had hoped would be helpful and is called a decision-tree for the licence premium deduction issue, and just to guide the Court through the process with respect to the way in which the licence premium may be considered by the Court, and you will see that the boxes to the right are really not in the picture anymore with respect to accruals, and the reason that you see in the legend on the bottom right corner, the consequence is not appreciated and the next step not taken. Well leaving aside the aspects on the right the process here with respect to the way in which the Court would work through a decision is put forward as hopefully something of assistance with respect to its application, and I have evidenced the position with regard to the Commissioner's view that the deduction is not available under EG1 by saying that that would necessarily require in his earlier submissions for that to be dealt with under the accruals rules.

Tipping J For it to apply under EG1 it has to be a right to use land is it?

Gudsell Yes.

Tipping J And if it isn't a right to use land, it's not deductible under EG1, and is it seen to be deductible anywhere else?

Gudsell No.

Tipping J No, so the fulcrum here is whether it's the right to use land.

Gudsell Yes. And why I've put the box to the right and paid for the right to proceeds is the way in which the Commissioner put its case in the lower Court, and the High Court dealt with that argument and found against EG1.

Tipping J Are you going to add anything to what the Ben Nevis people have said about it being a right to use land?

Gudsell No Sir.

Tipping J You're not.

Gudsell No.

Tipping J So you simply adopt Ben Nevis in that respect?

Gudsell Yes.

Tipping J Thank you.

Gudsell I have put forward, as you will see in the submissions before the Court, at para.60 and following, in respect of the question of construction, and have in the main addressed issues relating to interpretation. I won't go through them all or read them all. The Court's asked me to speak to them, that they've been considered, and in respect of the methods of interpretation as you will see in para.65 and following reference to remarks that my friend Mr Carruthers took the Court through yesterday in relation to the *MacNiven v Westmoreland* case in matters of interpretation associated with the word 'cost'.

Tipping J Is cost here used in the sense of real cost or cost incurred?

Gudsell The

Tipping J You understand what I mean by that distinction? In other words do you use 'cost' in the sense of actually exchanging value, or just becoming liable?

Gudsell The position is set out in para.69 and reliance upon the English authorities

Tipping J Well that 69 I don't think really answers my question. It could be either there. Cost of acquiring the capital asset could be either the actual exchange of value involved or the liability incurred.

Gudsell The following paragraphs however Sir do address the issue.

Tipping J And what is the outcome for which those paragraphs reach? Well what is the sense of which

Gudsell In terms of the *Peterson* direction ostensibly paid

Tipping J Sorry?

Gudsell Ostensibly paid.

Tipping J Ostensibly paid.

Gudsell Correct.

Tipping J What does that mean?

Gudsell What is said in para.62, it sets out the position

Tipping J Well I have to confess that when reading these I had a big question mark alongside that paragraph Mr Gudsell and you'll need to interpret it for me.

Gudsell Let me take you to para.64 with respect to the definition cost and to para.101 of the Court of Appeal judgment.

Tipping J But this 101 is dealing with Black Letter issues. I thought we were now dealing with general avoidance issues.

Gudsell I'm sorry Sir I've obviously got cross-purposes with you.

Tipping J I thought we were now onto within your submissions the question of general avoidance. If I'm wrong it's my error, because your (c) which introduces 60 – question of construction application of general anti-avoidance.

Gudsell Yes.

Tipping J What I really want to know is what is the significance of the word 'cost' and its meaning in the general anti-avoidance regime?

Gudsell With respect to the interpretation of it in the context of the section within which it's found, the submission is advanced in reliance upon the relevant authorities to determine that it does not require supplementary, like genuinely incurred or truly incurred, so it is a real cost - an obligation that has been incurred.

Elias CJ I was going to say is that what you're saying in para.62?

Gudsell Yes it is Your Honour.

Gault J What is the argument you're seeking to meet here? Are you seeking to meet an argument that the amount claimed in respect of the licence premium in some way was not a true cost? Is that the argument you are seeking to meet? I'm not sure why you are dealing with this.

Gudsell No, no, as I've said it's the Accent submission supports the interpretation approach that's been advanced by Ben Nevis with respect to the deductibility of the licence premium under EG1.

Gault J Yes.

Gudsell So I'm simply referring you to the fact that this is addressed in the submissions that I have advanced referring to the same authorities essentially as those referred to by Ben Nevis.

Gault J And you are simply advocating that that claimed deduction was a claimable part of the cost of a capital asset?

Gudsell Correct.

Gault J Right, thank you.

Gudsell If I could come back to the charts that have been placed before you, and if I go to chart, or what's called slide 2(a), you will see the course of the way in which the matter was dealt with in the High Court, and given the earlier ruling I just proffer that as a position with respect to the way in which its decision proceeded. Having determined that EG1 was not available it however proceeded on to determine and avoid the licence premium and insurance premium deductions. The way in which the Court of Appeal approached the matter is set out in slide 2(b). To give an illustration of the way in which the Court proceeded it determined albeit supporting in para.70 as I mentioned before lunch with respect to the wider financial arrangement issue, but determined that if there was a claim for the right to use land, and proceeded further down the track that is shown there.

Tipping J Is there any explanation in the evidence, and this may be a naive question, as to why the amount of the licence premium and the amount of the third insurance premium are the same to the last dollar?

Gudsell The amount of the licence premium?

Tipping J Well \$2,050,518 is the figure in the top box in the licence premium analysis, and then when you get to the decision tree for insurance premium, you have that very same figure as the starting figure for what follows.

Gudsell Yes.

Tipping J Is there any explanation as to how that apparent coincidence came about for two rather different conceptual beasts?

Gudsell Yes I'm sorry Sir, I wasn't appreciating that you're on slide 3.

Tipping J Yes I'm sorry, I just had a sneak look forward.

Gudsell The licence premium is still at the head of the page for that amount. The insurance for the component for that of \$34,098 is the so-called insurance premium, and that runs down the left side of the column. They're not the same figures at all. So if you look to the top left box that's the

Tipping J Yes I see that, that's why I talked about it as being the deferred insurance premium.

Gudsell No, no it is just the figure

Tipping J Well why is the \$2 million figure there then?

Gudsell Well it's just showing the full picture in the insurance how it relates because it comes back in under the accruals rules if that argument had proceeded.

Gault J It's just that the sum insured is the same amount as the licence premium because they want to be assured that they will receive at least that amount so they can pay the licence premium.

Gudsell Sure.

Tipping J But that's the sum insured?

Gudsell Yes, and the premium if you like, the insurance premium, is on the lefthand side.

Tipping J So I can ignore everything that goes down from the \$2,050 and the insurance premium tree. That's not really immediately relevant to what we're talking about.

Gudsell It's designed to address the way in which you would look at the insurance premium component, and the insurance premium component that's paid by the investors is the \$34,098.

Tipping J So as my brother Gault said, the \$2 million is simply the amount that they're insuring is the licence premium in effect.

Gudsell Correct.

Tipping J Yes okay, thank you.

Elias CJ What is the analysis of the course followed in the Courts? What use do you make of it?

Gudsell Well all I was addressing really was the way in which the matter had proceeded over the last two days, and the suggestion that there would be some assistance if we were able to be seen, and I think Justice Anderson or one of Your Honours suggested some form of flow-chart process to address the way in which the matters proceeded. If it's not considered to be helpful, or indeed if it's considered to be unhelpful

Elias CJ No, no, it may well be very helpful although it's quite difficult to absorb. My question was rather 'are you making a submission on it or is it explanation by way of background'?

Gudsell These matter are explanation by way of background.

Elias CJ Yes, yes, thank you.

Gudsell Yes.

Tipping J Personally I would be most helped by you Mr Gudsell if anything you can add to Mr Carruthers' general submission – the ones he made last – about why this isn't taxable, leaving aside all these intricacies of flow-charts and other such issues.

Gudsell Well essentially for the very same reasons that he did in respect

Tipping J So you've got nothing substantive to add to his submissions as to why this isn't tax avoidance?

Gudsell Well

Tipping J I don't mean that pejoratively, I just want to know, because if you have another take on it I'd be very interested to hear it.

Gudsell Well the other take on it is not an available take if you like so that

Tipping J Now that you've been precluded from taking it?

Gudsell I'm sorry.

Tipping J I thought you had said, and I'm sorry if I misheard you, that in spite of that you still had some points you wanted to make in support of Mr Carruthers.

Gudsell No I don't recall saying that Your Honour, but I will reflect on that and see whether there is anything else to take.

Tipping J No, no, I'm not wanting to invite you to do it if that's not what your purpose is, but that's how I had understood it, but it's probably me Mr Gudsell, I'm sorry.

Anderson J What I had in mind Mr Gudsell with the flow-chart is one that would explain this mystery of how excepted financial arrangements come and go and exist right left and entrance and all the rest of it.

Gudsell I'm sorry Your Honour

Anderson J The insurance in these provisions in EGH I think it is or financial arrangements, and excepted financial arrangements if it's your insurance policies – one minute they're in, next minute they're out and next minute they're in, and that's the mystery of it I can't resolve, and that's what I had in mind in terms of a flow-chart that showed the statutory analysis of how that was

Counsel talking to each other

Gudsell You may have heard that.

Anderson J No I didn't.

Gudsell It's still a work in progress.

Anderson J I'm not surprised.

Tipping J Well I'm sure Mr White will produce a limpid version that we'll be able to focus on. Does that bring you to reconstruction?

Gudsell No, the difficulty if I may Your Honour, the difficulty which that presents from the argument in respect of the application of the law to the tax avoidance issue is as you will have seen in the submissions that have been advanced for Accent, the position is that it takes the view that the deductions available here with respect to the licence premium, and indeed the insurance component are by law not those available under EG1 and BB7, or EG1 in respect of the licence premium. So that's the position it's taken and it was the position I was setting out earlier. Now if the deductions, and I did set this out in my submissions, if the deductions are available under the accruals regime and not under EG1, then the question arises therefore in the same way of the ring-fencing argument we discussed before, is whether they move forward for consideration under the anti-avoidance rule, and the position that Accent takes, and has taken, in its submissions is in respect of question 1 of the questions that are before the Court, and I set this out in response considering that question 1 is whether the appellant's satisfied the statutory requirements relied on to found both the claims for deductions and the timing of claims in terms of any requirements that they are spread over a period, and the difficulty with the way that this afternoon's

session has gone is that principally Accent has said, and I think one of Your Honours mentioned it before lunch, that they're not available under EG1, they are under a different regime. There are some deductions less but they don't meet the requirements of EG1 as claimed. So if they don't meet them as claimed for that legal reason

Elias CJ I'm Sorry I took a note I thought that you did support the contention that they were deductible under EG1 as a fall-back argument.

Gudsell Correct. The first argument that is made and is completed at para.52 of my submissions is however evidence of the submission that I made before lunch, and that is why I say and have suggested that I'm rather ham-strung in a sense that I'm saying that the law provides that the deductions would not be available under EG1, there would be a regime under which deductions were available, but it's under EH.

Gault J Well they are not those deductions that were claimed and which are the subject of this litigation.

Gudsell No they're not, and that's where I needed to adjust the position I've taken because it's simply the evidence of the situation that Accent says the deductions are not available under EG1 as its formative position because of the accruals regime. If they're not available under that position, query then whether the BG1 anti-avoidance rule have any part to play.

Gault J It's just not an argument open to you with respect.

Gudsell I'm just completing the position in respect of the way that I was required to respond to the tax avoidance issue.

Elias CJ I think we understand that Mr Gudsell and that our ruling that you can't develop the matter in this way means that a lot of what's in here is overtaken, but as I understand it your fall-back position, although not the submission that you think is the correct legal position, is that you support the Ben Nevis appellants in saying that EG1 applies.

Gudsell Correct.

Elias CJ The other route being precluded by our ruling.

Gudsell Correct. And to complete in respect of the insurance component that that is available under BB7, that would then give rise on the basis of the charts etc to the Court's consideration of the application of BG1 – both deductions being available. What I'd prefer to do Your Honour is to just review whether there are other matters I have to say on the tax avoidance issue, and any other matters, so if I may I would like to break at this point to make good use of time.

Elias CJ And come back in after Mrs Hinde. Is that what you are proposing?

Gudsell Yes, just to review precisely where matters can proceed to from here on these issues.

Elias CJ Would it help you if we took a short adjournment at some stage?

Gudsell That may be more preferable, yes.

Elias CJ Now.

Gudsell Now would be fine.

Elias CJ Would it? Alright we'll take an afternoon adjournment.

Court Adjourned: 3:29pm

Court Resumed: 3:49pm

Gudsell Thank you Your Honour. There are really just a few matters that I would like to complete in respect of the tax avoidance issue and they really surround the submissions made with the review of relevant authorities that I had started to address earlier from para.73 of my submissions forward in respect of the way in which the term 'cost' for the purposes of not meeting the Black Letter, but in terms of meeting BG1, and the question of whether or not additional words can be read in as had been done in the Court of Appeal of pre-tax economic burden and the like, and in my submission when you look at the cases on page 24, from para.83 forward in relation to the *Citylink Melbourne* case and the *Canadian Trustco* case and others, that those authorities as set out in para.86 of my submissions, that the term 'cost' as it appears in EG2, does not incorporate a concept of 'pre-tax economic burden' by which the application or otherwise of the GAAR is to be determine. Those authorities address in particular the *Canadian Trustco* case, and I've set out the quote in respect of that at para.85. I appreciate that Your Honours have considered those submissions. They are advanced in support of the view that the Court should take in interpreting this word so far as considering the application of BG1. As I mention at para.93, there is no statutory basis for the Court of Appeal to incorporate into the term cost as it appears in EG2, any requirement that there be certainty of payment, that is a test of creditworthiness.

Elias CJ Sorry, just on this *Trustco* case.

Gudsell Yes.

Elias CJ Aren't they indicating that it's concurrence that is required?

Gudsell I hadn't

Elias CJ Well I might be misreading it, but they're saying you don't look at economic risk.

Gudsell Yes, you don't

Elias CJ They say that cost is a well understood legal concept.

Gudsell Yes.

Elias CJ What else is there?

Gudsell Well what these authorities are supporting however is when even in their situation where they do have general anti-avoidance rule, that the object of the provisions in their Act does not permit them to re-write or interpret to mean an amount economically at risk, so that they are limiting it to its legal context in the provision in which it is found, as indeed the general thrust of the other words of payment and charges on income etc are considered in the previous authorities that I've set out. It is clear as I've set out in para.87 that the proposition that the cost is to be interpreted to mean 'cost' having a business purpose is not supportable either. Business features as they say of the tax system such as depreciation clearly allow for the deliberative pursuit of tax advantage. So that the submission that is being put forward in respect of the way in which the Court ought to go about interpreting it for the purposes of the application or otherwise of BG1 should in my submission have in mind the general line of authority that is cited in those paragraphs. The position with respect to the insurance premium I've set out at page 29, page 102, and para.103, given the former argument is not able to be put, that it be treated as a revenue outgoing to secure revenue receipts, but as I was discussing with Justice Gault earlier, the position with respect to the insurance premiums is set out in the body of that part of the submission. So far as the question of reconstruction is concerned, that is set out at para.108 of the submissions and essentially the respondent has the power to adjust under GB1. I have submitted it's not for the taxpayer to demonstrate how it should be done. The question is what tax position fulfils the purpose of EG1 and EG2 while recognising the commercial reality that Trinity will be out of its money and its land for 50 years. Licencing land for forestry is commercial which suggests that the Act does not require some other investment structure to be adopted. Rather the inquiry should be what would be a commercial rate for licencing the land for 50 years, and what would be a commercial rate of interest for non-payment of the premium for that period. The respondent has not yet exercised his powers under GB1, so these issues will have to wait in their practical application until he does. But there is a statutory duty which is set out there, and in para.111, even where the GAAR avoids or ignores the facts of the arrangement necessary to support that figure being the cost of the land, it does not follow that the Act requires that no cost is to be recognised. Section GB1 permits the respondent, notwithstanding the

GAAR, to nonetheless recognise part of the cost, and only ignore sufficient of it to counteract the tax advantage obtained. The respondent is not permitted by s GB1 in the circumstances to create a new commercial arrangement different from that which the parties entered into. He's only allowed to make an adjustment to the cost as provided for the actual arrangement. Because much depends on why the cost has been recognised. If for example it was because the cost was excessive then clearly only the excessive part would be disallowed, and while the respondent has the power to consider in appropriate cases what might have happened if there had been no arrangement, in a depreciation case involving a perceived excessive cost the purpose of EG1 and EG2 cannot be given effect to by disallowing the total costs rather than the excessive amount on the basis that without the transaction being entered into no cost would arise. Now this was a point that Your Honours had raised earlier in respect of the alternative argument as to whether there was some way a form of reconstruction to recognise that. I had at that time, and must maintain the position, that it's not a matter of 'a foot in both camps' in that regard. So it's a matter of ignoring the accrual regime, albeit that it has some attractions.

Elias CJ Is that right that for these purposes the accrual regime would be ignored?

Gudsell Well my submission is that it's either available because the facts and the law apply to it or it's not. In terms of a practical approach as to what might have been said to have been the value of the interest in 1997, and any component to it at some later point between the then and 20048. It would be a very attractive thing to say well let's just overlay what would have arisen under the accruals rules. I'm not sure that that has any legal tightness to it at all, albeit of its attraction.

McGrath J Mr Gudsell under s GB1 does language expressing a power to adjust - in other words expressing permissively?

Gudsell Yes.

McGrath J I presume that you have an authority that says there is in fact a duty to adjust in a way that recognises deductions that could properly have been claimed to you or something, because I really got the impression that the Court of Appeal saw the section as a permissive one. Is that right? What I'm really wanting to know is the basis on which permissive language becomes the duty. I can see why that might be, but I'm just really wanting some authority that confirms it's the case.

Gudsell Yes, I don't have that to hand presently. I will however see whether that is available. But the position with respect

McGrath J Well someone else might be able to get it before Friday.

Gudsell

Sure, yes. And I've concluded in respect of the matter at page 34 onwards – the taxpayer challenges the notion that the Act requires it to prove by reference to probable alternative costs of production that his outgoings are reasonable in order to claim a deduction. There's an obligation to prove reasonableness of deduction it submits that when the respondent does perform his duty under GB1, he should treat the transaction as if a lowest price clause would have been stipulated for and treat any sum he considers excessive for the licence premium as interest on the unpaid licence at the rate he considers commercial based on evidence of market rates. And I point out there that the reference to the extract from the notes of evidence regarding the officer, admitting they'd given no consideration to giving a deduction for a lesser amount than the claimed deductions. Your Honours that really completes what I have to say in respect of the tax avoidance issue. Can I just say however that there are some aspects that were taken into account by the lower Courts associated with the investment in this case and expected an immediate cash-flows, and there are also some issues with regard to the use that has been made of losses arising from this venture by the Accent Group. It's part of the submissions advanced by the respondent and I have been discussing with my friend Mr White the position where it's set out in Appendix A of the respondents' submissions, particularly in relation to the Accent Group, and the loss is reflected there from the Trinity deductions. There is an issue to that matter as representing the true position, and I just reserve, if I may, to come back to the Court on issues associated with commerciality. There are matters of the use of losses by the Trinity Group which in my submission don't reflect the position that has been set out in that appendix and I am currently discussing with Mr White the way in which that can be conveyed to the Court from Accent's position. There are other issues that have been canvassed in the submissions for the Commissioner, as indeed they were in the lower Courts, with regard to the lack of commerciality of this venture, and I really wish to see how that matter develops in the course of submissions over the next day to determine whether or not this Court should receive the benefit of further benefit of further material associated with commercial aspects, and I refer in particular to benefits that these investors would get from the sale of the thinning as they are called; from the sale of pine; and from the general economic benefits associated with carbon credits that had been subject to discussion in the lower Court, that go directly to issues concerning the commerciality of the venture. Because you will have seen in slides 5 and 6 – as Your Honour Justice Tipping was taking a peek through to 3, I'm sure Your Honour took a peek through to 6 - I hope he did - that there is a calculation of expected returns and these are highly relevant to whether or not given the finding that these investors were in business, that there were numerous other deductions besides these two that we're dealing with directly here that have been allowed under this arrangement or Trinity scheme, and I wish to develop the argument. It wouldn't take long,

but just depended upon how Mr White approaches it through his submissions.

Elias CJ I'm not sure that you can reserve your position in that way. I think the fact of the matter is if you've got nothing further to give us at this stage but you feel later that there is more material, or more argument you wish to address to us, you will have to make an application to us which we will consider at that stage in context.

Gudsell Thank you. I'll call on Mrs Hinde to address Your Honours.

Hinde Your Honours there's two more pieces I wish to put before the Court. In the casebook the Income Tax Return for Redcliffe Forestry Venture Limited, which is the appellant I represent, was cut off at the bottom, so there's a relevant box that's missing, so if I could give you some copies of that with the missing box. And there is also

Elias CJ Where is this meant to be?

Hinde It's

Elias CJ It's in substitution for something in the bundle is it?

Hinde Yes it's volume 18; it's referred to in para.6 of the synopsis of the submissions. It's the 1998 Income Tax year and it should be at 3927 – that's the beginning of the Income Tax

Elias CJ Thank you.

Hinde And it's just that the very last line was cut off.

Elias CJ Yes.

Hinde There's also a slide which is slide 18, which I'm just going to speak to Your Honours. I don't have written submissions. Just correcting an error in para.5 of the synopsis in that first line there, the case on appeal number is 183917, that's the 1997 Income Tax Return of Redcliffe. That's just an error that otherwise might confuse.

Elias CJ Thank you.

Hinde Redcliffe abides this Court's decision except for two issues. The first issue is confirmation of the original assessments made for the 1997 and the 1998 years, and the second matter is penalties that arise for the 1998 year as you will have seen. In 1997 there was no penalties regime. So those are the two things

Elias CJ Sorry, confirmation of the assessments

- Hinde Confirmation of the original assessments, because what happened was that the Redcliffe Income Tax Returns for 1997 and 1998 as put in showed nil tax to pay. The Commissioner reassessed and it was still nil tax to pay. The way in which the Commissioner got to the nil tax – his reasoning was different, but the result was the same, and the essence of the submission for Redcliffe’s tax assessment is exactly that the Commissioner’s duty is to quantify the tax which the Income Tax Act itself has charged.
- Tipping J Was there a difference as to loss to carry forward or something like that? What’s the practical ramification?
- Hinde The practical ramification Your Honour is that if the original assessments as made were confirmed, which is what Redcliffe says should have been done by the Hearing Authority, which was the High Court, then there would have been cost ramifications and also no penalties because there was no change to the tax position, so it has a very practical effect for them, but essentially there was no change.
- Tipping J Well you said there was no tax to pay and he said there was no tax to pay
- Hinde Correct, so
- Tipping J What was the big argument then? It’s not a naive question.
- Hinde No Your Honour it’s not at all naive. It puzzled Redcliffe because the thing was that what they had put in was correct. It should have been confirmed. The Commissioner has to quantify the tax that is payable by a taxpayer. That is his function. The Income Tax Act automatically charges the tax; the Commissioner’s duty is to quantify it - he has to find it. In those days when the taxpayer put it in, the Commissioner assessed, not like self-assessment now, and that was correct, but then he later reassessed the same amount. Now that enabled him to apply penalties. It also meant that in the High Court the taxpayer lost on its challenge.
- Tipping J Well how could he apply penalties if he still was of the view that you weren’t in default paying tax?
- Hinde He did.
- Gault J The Return claimed the deductions
- Hinde No Your Honour this
- Gault J It also in the accounts accompanying returns showed a right back of setting those.

Hinde No Your Honour this is where we part company with what the Commissioner says is happening with the Income Tax Return that is put in by an LAQC, and if you look at slide 18 – this is the most effective way of going through this argument

Gault J Is this just the double-catch point again?

Hinde Sorry Your Honour?

Gault J Is this the double tax point again, the fact that there have been assessments and penalties against both the LAQCs and the shareholder, and I think we've reached the point where it's agreed that that's not right and that the LAQC should not have been the subject of the penalties. Is this that point again, or is it a separate point?

Hinde It concerns double penalties, but the way you get to double penalties is by following the course of the legislation for LAQCs. If you look at that first box on what's been called a decision tree at the top there, that top box and the box off to the left is encapsulating the submissions that we have adopted in Ben Nevis's submission. I just refer to those submissions at para.15 of our synopsis, which is the doubling-up point, that's what that is about, and essentially the argument there is that the LAQC is there. It is a company; it has a legal entity, but for tax purposes it becomes equivalent to a partnership which has no legal entity and all the consequences of partnerships putting in tax returns, the partners could claim the results of the partnership activities because they are the one who are the real people. If the partnership never filed the tax return that would not prevent them from claiming.

Tipping J What is the practical disadvantage that you are complaining about where it's hurting?

Hinde Well the penalties and the costs Your Honour.

Tipping J The penalties – is that what my brother Gault's point effectively that you object to the LAQC getting the penalty as well as the shareholders?

Hinde Two points. The first point there is the point about the assessments should have been upheld. The Commissioner should not have reassessed.

Tipping J But look Mrs Hinde I just want you to forget about the intricacies of tax law for a moment and tell me what your client is objecting to – the practical effect of what has happened.

Hinde The practical effect of what has happened is that Redcliffe has acquired penalties which under the Act it is not exposed to.

Tipping J Right. So it's penalties that you're objecting to and you're saying that there was no basis in law

Hinde And the assessment. That is a distinct and prior question.

Tipping J But the assessment still has you paying no tax?

Hinde Correct, but if the original assessment had been confirmed by the Hearing Authority then we never would have got the penalties.

Tipping J So it all comes back to the penalties in the end, never mind how you get there?

Hinde At the end.

Elias CJ And costs.

Tipping J And costs

Hinde Well yes that's the prior part, no that's the prior part in the challenge proceedings.

Tipping J But aren't you in the same case as the arrangement that was reached between Mr White and Mr Harley this morning?

Hinde Your Honour that I have yet to understand. Certainly I'm here on the basis that Redcliffe has been visited with penalties.

Tipping J Well have you discussed this with Mr White as to whether he's agreed to the position of Mr Harley's clients, the same shouldn't apply logically to your client.

Hinde No Your Honour I haven't got anything from him yet.

Tipping J Well have you discussed it with him?

Hinde No Your Honour I haven't discussed it with him. I was leaving it to find out what senior counsel would get and I'm afraid I haven't discussed it with him.

Tipping J But from the sound of it, it's now accepted that there shouldn't be penalties on the LAQCs. Now that

Hinde Well if that's the situation, that certainly short-circuits part of this argument – the penalties part of it, but I still put the assessment

Tipping J Well would it be better to defer this until tomorrow to see if – I've inferred that Mr Harley and Mr White are *ad idem* because we

haven't heard anymore about it, so it sounds a pretty sporting bet that you and Mr White will be *ad idem* Mr Harley's shaking his head.

Hinde The body language doesn't look very good to me Your Honour. I certainly wouldn't abandon my

Tipping J Oh I'm not asking you to abandon it for a moment, I just thought a chat might help resolve it, but

Gault J At present the wind is with you.

Tipping J Yes, very strongly with you, and it just doesn't seem right that the LAQC should cop the penalty as well as the shareholders. What other problem have you got – costs?

Hinde Yes that flows from the Commissioner reassessing and coming out with the identical result as the taxpayer Redcliffe had put in. It was just not necessary and the Hearing Authority should have confirmed the assessment, the original assessments. That would then have meant that Redcliffe succeeded in its challenge in the Hearing Authority and would not have been visited with any costs.

Anderson J Couldn't you have accepted the assessment? Was it possible to say yes we accept the reassessment – nil by my route and nil by your route – we're happy.

Hinde No Your Honour because the reassessment replaced the assessment and that's what we've challenged.

Anderson J Why didn't you just accept it? There's nothing to pay, why not just say fine.

Hinde Penalties Your Honour, and costs.

Anderson J What penalties would there have been on accepting the reassessment?

Hinde We apparently have penalties.

Tipping J This should have been sorted out long ago. I mean really this Court shouldn't be troubled by a point like this, and I'm not criticising you or your client, it's just an exasperation that we should have this sort of distraction. Would you be content to stand it over until tomorrow morning and see if you can reach accommodation and if you can't then we'll have to deal with it.

Hinde Yes Your Honour that would be very acceptable.

Tipping J Well I'm not speaking for the Court, but from my point of view that would seem very sensible.

Gault J On the question of costs I suppose what we would need some assistance with is if any what were the additional costs over and above the shareholders' costs, because one would have thought that the interests of Redcliffe and the shareholder were very close throughout the proceedings.

Hinde Your Honour it's my understanding that the shareholders presently have their own challenges before the Court which have been stayed pending the outcome of this which is the test case, so their position is totally distinct from Redcliffe itself.

Gault J It can't be that distinct when one is just the tax conduit for the other.

Hinde It is distinct Your Honour. I just want to point out that if Redcliffe had been a partnership there would have been no penalties. I can find nowhere where the Commissioner has applied

Gault J Well I don't have any difficulty with that part of it, it's just that when it comes you say when your second complaint is that you have incurred costs and I wonder why there are separate costs when the same issues as to deductibility and avoidance and so on are directly invoked against the shareholder.

Hinde The shareholders Your Honour are not party to this action.

Gault J Well that may be so but I might be helped if you can outline for me why it is you should have the separate costs and the quantum.

Hinde Well the costs Your Honour were against Redcliffe Forestry Limited. That is the only entity before this Court.

Anderson J You don't mean the costs that the company's incurred, but the costs that it's had to pay?

Hinde I'm talking about the costs which were awarded against it in the Court Your Honour. That's the only sort of costs I'm talking about. I'm sorry if you thought

Tipping J Oh it's only the party costs?

Hinde Yes Your Honour. The order of costs which is quite

Gault J The order of costs which is a global figure against all appellants wasn't it as I understand it? Perhaps we can have it all clarified tomorrow.

Hinde Your Honour if it's not clear tomorrow do I have leave just to complete going through that slide because it is important to your understanding of the submission?

Tipping J I'm only just hoping and crossing my fingers that you'll sort it out because if you don't well then obviously you're still afloat in all respects.

Hinde Thank you Your Honour if that's the view of the Court.

Elias CJ Yes.

Hinde If Your Honours please.

Elias CJ Mr White it may not be necessary for Mrs Hinde to address us until after your submissions. She may deal with the matter in reply given the fact that you have got her submissions.

White We'll wait and see what happens.

Elias CJ Alright, alright. Did you wish to say something Mr White?

White I was going to just invite Your Honours to look at s 141(F)(c) which is the provision which I referred to before and it relates to

Elias CJ Yes.

White It's in the Commissioner's supplementary bundle under tab 17, and I'm raising it because His Honour Justice Tipping I didn't want him to leave today thinking that it was the LAQC that didn't have to pay penalties necessarily, and if I can just take Your Honours through the provision

Tipping J No I didn't really think that Mr White, I just thought this sounded like an incredible storm in a teacup that ought to be sorted out.

White But I just wanted to make it clear because it may be that my learned friend Mr Harley and I can agree at least on the meaning of the provision.

Anderson J I missed what tab it was Mr White.

White 17, and it's s 141(F)(c), which is headed 'Loss Attributing Qualifying Companies reduction of shortfall penalties' and subs 1. 'The section applies if as a consequence of the attribution of a net loss for an income year by an LAQC to a shareholder in the company and the subsequent disallowance of one or more deductions, shortfall penalties are imposed on the company and the shareholder'. And then under subs 2 'written notice requesting application of section, if an LAQC to which this section applies pays in full, the amount of the shortfall penalty referred to in subs 1, and the shareholder gives a written notice to the Commissioner requesting the application of this section, a shortfall penalty imposed on the shareholder must be reduced by the lesser of' and then this formula which I won't go

through. And I just wanted to make two points Your Honours. If Your Honours turn over the page right at the very top you will have a little summary of the history that this section was inserted in 2003, but as noted it's effective from 1 April 1998 with application to shortfall penalties imposed on and after 1 April 1998, and that was the first year for shortfall penalties and of course does relate to the penalties in this case which relate to the 1998 year, and the second point to make Your Honours of course is that my friend Mr Harley asked whether the appellants in this case were able to avoid the double penalties and that I would give an assurance and that was the position. The answer is I'm not going to give any such sort of assurance but if they consider this provision applies to them then the steps for them to take are set out in s 141(F)(c)2, which first of all of course requires the LAQC to pay penalties and his response to that I'm sure will be well they'll wait for the outcome of Your Honours' decision.

Tipping J Yes, actually it's the other way around too.

White That was the point I felt I needed to draw to Your Honours' attention.

Tipping J Yes.

Elias CJ Mr Carruthers, there was a point that Justice Gault was going to ask you about, just a loose thread we have about the insurance facts.

Gault J Thank you for your note this morning about the relationship between the number of trees and the insurance and the frustration. I was just wanting to be sure I understood the position correctly because I found that reading the provisions confused me every time, but as I now understand it the business proposition was in effect to try reach a point where there were at least 300 mature trees at the appropriate date, and the insurance exclusion suggests that there is no cover in the event that there is an effecting event resulting in fewer than 300 trees and that's I think what your note said this morning. But it seems then that the investors incurring the \$2.05 million obligation presumably would have been looking to the insurance for some assurance that they would get a return that enabled them to meet their obligation for the licence premium, but it seemed to me that the exclusion was such that when they really needed the insurance there was no cover, i.e. if it's less than 300 trees. Then it seems that the response to that is oh that's alright because the whole thing is frustrated if there are fewer than 300 trees. But the position seems to me that therefore the deductions are being enjoyed through the whole period until such times as the frustration occurred and there's no corresponding benefit to the investors, or saving for the investors who've enjoyed the tax advantage, and that seemed to me to suggest that the structure was really just to get the deductions because the insurance didn't really help when it really would have been needed.

- Carruthers Well Your I'll check this, but I think I'm correct in saying the frustration event doesn't bring the agreement to an end. There can be an election to continue with that and I'll check that because
- Gault J Well yes definitely they can seek to go on but the insurance policy is null and void under the frustration.
- Carruthers Yes but Your Honour you can see from the analysis of what the business case was for the expected number of stems, you can see that there's been an obvious commercial decision, but you can finish up with about half of the trees a frustration event occurring and as I've noted in the very last sentence, it really reflects a business judgement that they were confident that the venture would succeed even if losses of the magnitude were suffered without any insurance policy support, and I think that if one looked at the prospect of a non-insured event destroying to a greater extent than less than 300 stems per hectare, that was regarded as unlikely. I think it can be no more than a business case in the same way as one makes decisions in one's own experiences to what is and what isn't insured and to what level having regard on what the likely risks are. And Your Honour I'd certainly resist the conclusion that the policy and the deductions were taken for the reason that Your Honour articulated.
- Gault J Well it's a fair assumption by me that the availability of insurance would have been put forward as some sort of reassurance to investors as to the situation they would be in when their promissory note fell due.
- Carruthers Undoubtedly so but I would be confident if wasn't misrepresented on the basis that
- Gault J I haven't suggested that Mr Carruthers.
- Carruthers Well no, undoubtedly it would have been an assurance for the investors to know that the risk to the extent that I've identified was insured.
- Gault J Well I think that's as far as I can take it. Thank you for that.
- Elias CJ Well we'll take the adjournment. Mr White did you want to say something?
- White No thank you Ma'am.
- Elias CJ We'll take the adjournment now and resume tomorrow at 10am.
- Court adjourns for the day: 4:35pm.

Thursday 26 June 2008

Court resumes: 10:05am

Gudsell Yes may it please Your Honours, I have spoken with my friend Mr White and there's just a few matters if I may address the Court on. The first is in respect of a matter Justice McGrath raised yesterday concerning the reconstruction issue.

McGrath J Yes.

Gudsell In volume 1 of the casebook for the appellants at tab 5, the decisions in respect of the *Challenge Corporation* matter and in the Privy Council decision, under the reference from Lord Templeman at page 563, the righthand side there runs really from about 5 through to line 14, on page 563 on the righthand side

McGrath J In title and bound is it?

Gudsell Correct.

McGrath J Yes, in fact I think Mr Carruthers and I see that, and I think Mr Carruthers may have referred to that

Gudsell It's also mentioned Your Honour in the *BNZ Investments* case at tab 3 just for completeness the High Court decision there at para.197 and the decision of Justice McGechan.

McGrath J Thank you, that seems pretty clear.

Gudsell There are just three other matters very briefly. If I may there's a brief memorandum here in respect of the promissory note issue. I provided copies to my friends, and if I just may take the Court very briefly through this, that's just a reflection overnight in respect of a consequence of the Court's ruling yesterday, and the Court ruled yesterday that it would not allow the appellants to advance the argument that sub-party H prohibits the respondents raising the assessments under any provision of the Act other than sub-party H, where a financial arrangement exists in respect of the amounts claimed as deductions. The Court advised that it would give its reasons for this ruling at the time of giving judgment in the substantive appeal. Counsel apprehends that the Court may be under a misapprehension that the application of the accruals rules is limited to the situation where there has not been a payment in full at the time the transaction is entered into. As pointed out in the written submissions that I filed on this matter, payment in full will prevent there being a deferred property settlement, but the issue of the promissory note in full and final settlement does not avoid the application of the rules. The promissory note itself is a financial arrangement as set out there and the interdiction in EH against raising

assessments other than under the accruals rules still applies. And pursuant to that part E of the definition, the Court acquisition price to the respondent is still required to determine the acquisition cost of the promissory note the value in 1997 to Accent of being relieved of the obligation under the contract to pay \$2 million in 2048 and spread the difference on the yield to maturity basis accordingly. And I simply provide that to you as a duty in the sense that both the Commissioner and in his submissions, and indeed my friend's for Ben Nevis, contend for that position and the former argument not being raised that's a consequential issue arising in respect of that point, so I simply bring that to the Court's attention. The third and brief matter is in respect of the Redcliffe LAQC issue that was raised yesterday by my learned junior Mrs Hinde. There has been discussion overnight. The position that's been taken is that Mr White will address the Court on that issue and rather than take the Court's time up now going through that slide 18. The final matter is in respect of the submission. As I indicated last night, there was some discussion about relating to the use of deductions, and I just bring this point to the Court's attention. In para.1 of my friend's submissions, Mr White, he states that in most cases investors, including the appellants took a sufficient number of hectares to ensure that the annual deductions claimed exceeded their annual tax liability, and he refers to appendix A. Now in appendix A of the submissions there is reference to Accent Group and the losses, and for Accent Group I object to that position being reflected in that way. I had discussed with my friend that Accent is an exception to the position. To date it has utilised 40% of the losses available to 31 March 2004 being the date of the introduction sub-part ES which were the Quarantine Provisions, and that is in respect of losses used by the Group, so it has not, as I apprehend the submissions suggests, utilised those losses in the way suggested. And those are my submissions on the matters outstanding, thank you.

Elias CJ Thank you. Yes Mr White.

White If Your Honours please I propose to address the Court through the principal submissions for the Commissioner in the green volume that was filed.

Elias CJ Thank you.

White Together with a slim further green bundle which should be in front of Your Honours on the bench. Justice Tipping it's right in the middle of the papers in front of you on the top, on the ledge above you. Green.

Tipping J Oh is it that sort of green, yes.

White And I'll take Your Honours to the slim green folder as appropriate. I'm starting on page 3, para.6, and of course I don't propose to read the submissions which Your Honours have had the opportunity of

doing so in advance, but in this paragraph we set out sequentially the submissions for the Commissioner on this appeal and with one exception as to sequence, this is the sequence in which I will address Your Honours on various issues. The very first point to bear in mind is that the underlying issue is whether the Commissioner's amended assessments in each case were correct in terms of s 138(P) of the Tax Administration Act. The Commissioner issued those assessments for a number of different reasons. In particular disallowing the deductions for the insurance premiums and the licence premiums and the extra reason of tax avoidance. The High Court as Your Honours know agreed with the Commissioner's reasons in respect on the non-deductibility of the licence premium. Disagreed in respect of the insurance and agreed on tax avoidance, and the Court of Appeal agreed with the Commissioner only on the tax avoidance issue. Those decisions mean in effect of course that the Commissioner's assessments for the different reasons were held to be correct, and that is the principal issue here, namely whether those decisions of the two Courts were correct in upholding the correctness of the Commissioner's assessments. The next matter relates to the factual background, and under that head there are four matters Your Honours in respect of which I will address you in a moment. They relate to the issues of due diligence, a matter that Your Honour the Chief Justice raised I think on Monday with my learned friend Mr Carruthers, and there are some aspects of that that I wish to address. Then there's the issue of the position of Mr Bradbury, vis a vis Dr Muir, and then there is a small issue relating to carbon credits, and the fourth issue is the question I think raised by Justice Tipping to my learned friend Mr Carruthers as to whether CSI was able to or did do any other business, and I wish to address that. So having done that I'll then turn to the third matter which is the deductibility or not of the licence premiums and I will address Your Honours relatively briefly on that issue by reference to the relevant statutory provisions in the contractual documents, and then I'll move to deal with the issue of sham in respect of Mr Bradbury and Dr Muir LAQCs and CSI. I'm proposing to do that your Honours in a little detail, because of course it does overlap with the tax avoidance issue, and on the factual matters I should say at the outside I don't think I will be wasting the Court's time by addressing the facts relating to sham because they will also be relevant to tax avoidance. And then the issue of spreading is the one on which my learned junior, Mr Coleman will address the Court, and he will do that after I have completed the further submissions which will relate then to tax avoidance; the parties issue; reconstruction, and penalties. So with that outline of the matters that I'm proposing to address Your Honours on, I turn to the first of the factual background matters which is the issue of due diligence, and I'm raising this Your Honours to ensure that Your Honours are not left with an impression that the investors, the taxpayers in this case, conducted due diligence of the sort that that phrase normally captures in a commercial context, particularly in relation to the value of the forest the licence premium and the insurance aspects. Now Your Honours will recall that my

learned friend Mr Carruthers gave you an overview of some of these issues by reference to the brief of evidence of Mr Bradbury and he took you to that brief – I’m going to try and avoid repeating what he’s done by simply summarising the issue. It’s in the case on appeal at volume 4 at page 849 and the particular paragraph is para.7, under the heading 1996 stumpage, and in that paragraph Mr Bradbury stated at about line 5

Tipping J 847?

White 849, para.7 Your Honour, yes.

Tipping J Thank you.

White He said ‘I relied on Dr Muir’s stumpage assessment of \$240,000 per hectare which I understood had been confirmed by Jane Taylor. I assumed that Jane Taylor was well placed to do this because I understood that she had had access to Douglas fir log prices and yields for the CNI forests in her role as a director of Forestry Corporation of New Zealand’. Then he also touched on these issues later in his brief at page 78 – oh I’m sorry it must be earlier in his brief going backwards. At page 786, para.41. And he’s referring there to a letter which is set out in part in February 1997 – the 18th February, and he sets out in para.1 an extract from a letter that Mrs Taylor had written as he then says ‘who had then taken on the role of Chief Executive Officer of the Trinity Foundation, wrote to Mark Taylor at Southern Lakes Forestry, summarising the proposed structure of the investment’. And then he sets out an extract from that letter and you will see that it refers to some assumptions in the middle of the paragraph as to the increase in Douglas Fir, 2% per annum over 50 years, and inflation 2.3% from a base figure of \$120,000’. And then over the page in para.42 Mr Bradbury said he hadn’t seen that letter until late 2001 and he had some doubts about the figures and he concluded in that paragraph ‘whilst I do recollect some changes being made to the amount proposed to be paid by Southern Lakes Forestry by licence premium, I am certain that the amount involved was always in excess of \$2 million per plantable hectare. Certainly in every draft of the main agreement which I prepared the licence premium amount always exceeded \$2 million per plantable hectare’. Now with those references Your Honours, can I take you to two matters. First of all volume 17 at page 3547, and this is a letter dated the 29th February 1997. It’s not the one that Mr Bradbury was referring to in the second extract I took Your Honours, but this is a later letter dated the 29th February 1997, to the Directors of the Trinity Foundation c/- Bradbury & Muir, Trinity Douglas Fir Proposal, Redcliffe Station. And this is a letter about the calculation of the licence premium

Tipping J Yet again I’m sorry Mr White, volume 17

White Page 3547.

Tipping J Oh, 3547.

White And this is a letter dated the 29th February 1997 from Forestry Equities to the Directors of the Trinity Foundation Limited, c/- Bradbury & Muir, and the figures that I need to draw to your attention Your Honours appear on page 3549, and Your Honours will see a little box under the big one called parameters in it, and the first is area 1 hectare, and then underneath that is inflation rate of 7% per annum; a real price increase of 3% per annum; and a clearfell value of \$343,880 (1997 dollars). And those were the figures Your Honours which were used to calculate the \$2 million licence premium. Now Your Honours might like to just keep that open while I take you now, having given you the background to the cross-examination of Mr Bradbury in volume 12, at page 2490. I'd like to start in fact Your Honours on the previous page 2489, and at the top of that page, starting at line 3, 'in any event as indicated in para.88 of your report, you relied I think on the Groome Poyry figure of \$243,000 per hectare as the most likely scenario. I did' - this was Mr Bradbury, 'but in doing that I was relying principally on Dr Muir's research in conjunction with his wife and his finding or conclusion that an appropriate stumpage would be \$240,000 per hectare. Are you aware that Dr Muir has given evidence that he did not believe that the figure of \$243,880 would apply to Redcliffe in 1997? No. Does that surprise you? What I do know is that he believed that the figure of \$240,000 was an appropriate figure for Redcliffe to the extent that the other figure with a question mark is relevant? Yes I guess to some extent I am surprised at that conclusion. Just so we're clear as to timing is your evidence that back in 1997 prior to the investment your understanding was that Dr Muir considered the figure of \$240,243 was appropriated applied to Redcliffe then?' Answer - 'my understanding at the time was Dr Muir's conclusion was that a stumpage of \$240,000 per hectare was appropriate to Redcliffe. Now you mentioned a moment ago both Dr Muir and his then wife Jane Muir, in places of your brief you refer to her by her current name Jane Taylor, but that's one and the same person? That's correct'. Turn to that reference and the volume and page there is the High Court reference and if Your Honours like to note to the case on appeal is 17, 3547, which I have taken Your Honours to a moment ago. That's the Forestry Equities letter. 'This is the Forestry Equities report dated 29th February 1997 isn't it? Yes. Did you see that at the time - by that I mean back in February/March 97 before Bristol made its investment? As I say in statement I saw drafts of that letter and at some stage I would have seen the final form of the letter. And when we note in that that from the schedule, the first one at 911, Mrs Muir used the Groome Poyry figure didn't she for her schedule. That's correct. She also uses figures of 3% log price growth and 7% inflation. Do you know where those figures came from? I'm not sure where the 4% log price growth came from but the 7% inflation rate

appears to have come from the research that Dr Muir did in 1996. To the best of your knowledge was any forestry consultant or expert retained to advise on the log price growth figure at that time? No, at that stage reliance had been placed as I understand it, primarily on the research undertaken by Dr Muir and also on information that had been known to Jane Taylor. Just keeping that letter you remember we looked a moment ago at her letter of 18th February 1997 which you referred to in paras.41 and 43'. Now for some reason Your Honours that letter doesn't seem to have got itself from the High Court record into the Court of Appeal and to the record for this Court, but the relevant extracts are in the paragraphs of Mr Bradbury's brief that I took you to a moment ago. So the paragraph references there to 41 and 43 are right. 'Your evidence is that the letter of 18th February 1997', and Your Honours will see that was written before the Forestry Equities report, 'is written by Mrs Taylor or Mrs Muir – is that right? That's what I say in my brief, yes. And her position at that time I think you said in para.41 was Chief Executive Officer of the Trinity Foundation, is that right? That was the title that she had taken at that stage, yes. And that letter of 18th February 1997, she's writing in that capacity to Southern Lakes Forestry Ltd, is that right? That's my understanding from reading the letter'. And then looking at the other one, 'and that one at 909 is Forestry Equities, and you've been told and I think confirmed that was Mrs Muir Taylor wearing a different hat, is that right?' And I just pause there Your Honours, raising that question because it doesn't look as though it's actually signed by Mrs Muir Taylor, but the evidence was that she was Forestry Equities, there's no dispute about that. 'That letter from Forestry Equities is addressed to the directors of the Trinity Foundation isn't it? It is. Are you able to comment Mr Bradbury on how Mrs Muir could on the one hand be Chief Executive Officer of the Trinity Foundation and on the other hand as Forestry Equities be giving advice on this investment to the Trinity Foundation? Jane Muir took many roles in this investment. You don't see any problem with that? Well actually I did at the time, but. You weren't listened to? It was one area in which Dr Muir's enthusiasm probably got the better of him. I take it that you would accept that it would be rather difficult for her to give any independent advice with these roles that she had you would agree? I didn't see this letter from Forestry Equities as being independent advice to the investors. It was simply an illustrative analysis done for the purposes of the Trinity Foundation. And of course just looking at the figures in the letter which I think you've actually set out more conveniently in your brief, she's there talking about the calculation of the agreed percentage of the net stumpage to the landowner? That's right. And the figures she uses there, this is in the first letter Your Honours, '2% real increase inflation of 2.3% and a base figure of \$120,000, that's right isn't it? They are the figures in the letter. And you point out that produces, this is para.42 of your brief, that produces a licence, well a premium of \$1 million, that's what I calculated. I think you actually say under \$1 million. Yes that's the way I calculated it. So just so I've got this clear, at this stage in February

Mrs Muir, as Chief Executive of the Trinity Foundation – the landowner – is writing to Southern Lakes Forestry Limited, Mr Taylor, suggesting a premium of under a million. Is that right?’ And then he replies ‘I don’t think she’s actually suggesting that. I think there’s a very simple explanation for this letter. What she addresses in the letter is what she I would say believes she is addressing in the letter is the calculation of the \$2 million amount, what that formula in the letter to Mark Taylor is saying is that if you use a stumpage rate of \$120,000 a hectare if you use a real increase in Douglas Fir of 2% and an inflation rate of 2.3%, this will arrive at the \$2.05 million price that Trinity is asking for. And I believe that this is a conclusion that I came to on Friday having been told that the department had discovered the basis on which the \$2.05 million had been calculated. I believe that what has happened here is that the 2% real price growth is actually the 3% used in the department’s formula multiplied by .67, i.e. 2/3rds of being 2% and the 2.3% inflation figure is the department’s 3.5% multiplied by .67’. The .67 Your Honours is the tax. ‘And what I assume was Mrs Taylor as the author hasn’t realised that you simply cannot do that and use these figures to arrive at that sum, but I think that is the simple explanation of what is happening in this letter. Now in contrast to that the Forestry Equities’ letter is focusing not on the \$2 million payable to Trinity, but on the profit which the investors will arrive at using an inflation rate and a real price growth rate based on historical trends. Mr Bradbury your hypothesis as to Mrs Muir’s calculations in her letter of 18th February is conjecture isn’t it? Totally. Is Mrs Taylor or Mrs Muir-Taylor as she now is being called, to give evidence to assist? No she’s not’.

Gault J Mr White, at the top of the last page from which you were reading, there’s the reference to the profit that the investors will arrive at using the inflation rate and real growth rate. Does that suggest that the \$2.05 was seen as the likely proceeds of the forestry to the investors?

White That’s a difficult question to answer Your Honour because it assumes that they saw or were concerned with what the figure in 50 years time was going to be, and subjectively that’s what they said, but the reality is and I’m just about to take Your Honours to the findings of the Court, they didn’t call Mrs Taylor, nor did they call any evidence to substantiate those figures in the Forestry Equities reports.

Gault J Yes right, thank you.

White And the

Elias CJ What about the real price growth rate based on historic trends?

White Yes, my next step was to take Your Honours to the judgments

Tipping J Can we put these books away for the moment Mr White or should we keep them?

White No, they can go away. And if we start with Justice Venning in the High Court at para.39 – ‘the first information regarding the commerciality of the investment in the Trinity scheme was contained in a number of documents that were referred to as the due diligence documents. The individual plaintiffs gave evidence as to the documents that were available to them at the time they made the decision to invest in Trinity. Dr Muir and Mr Bradbury had the most information, given their role in the establishment of the Trinity scheme. The most significant information that dealt with the expected return in year 50 was largely contained in the following documents, although not all investors saw all the documents. A Pine Plan due diligence report on Redcliffe Station dated 13th February 1997 and associated material. A feasibility study prepared by Pine Plan in December 1996 in support of an application for a certificate of compliance. A letter from Forest Equities Limited to the directors of Trinity Foundation Limited dated 29th February 1997’ – and that’s the letter that I have taken Your Honours to, and if Your Honours wanted to note again that the case on appeal reference there is 17, 3547. ‘The author of that letter was Dr Muir’s wife at the time. Mrs Muir is a forestry consultant. The letter purported to compare the Trinity scheme with an independent establishment of a Douglas Fir plantation. In the Forest Equities’ letter Mrs Muir calculated the net present value on a range of returns, all on a pre-tax basis, and she concluded “the Trinity Foundation investment proposal represents a commercially viable alternative to investors compared to an independent investment on the best available land of a similar size. Our conclusion is based on standard forestry valuation techniques incorporating the assumptions outlined in the report. During the course of the hearing significant evidence was called to test the validity of that conclusion. While unable to agree on the commerciality of the forestry venture, the plaintiffs and the Commissioner were able to agree that whether the forest would be commercially viable or not was dependent on three principal factors. The initial figure taken for stumpage in 1997; the figure for log price growth over 50 years; and the average annual inflation rate over 50 years. The parties called an abundance of evidence on these issues”. ‘Stumpage. The starting point for estimating the predicted return is to fix the stumpage value at the outset in 1997. In the December 1996 document Pine Plan calculated stumpage at \$135,704 per hectare on a 50% production thin basis. Mrs Muir set out her assumptions on the relevant variables in a schedule to the Forest Equities’ letter of 29 February.

Elias CJ Is that taking out 50% of the planted trees?

White As I understand, yes.

Elias CJ Yes.

White 'She took a stumpage value \$243,880, a real price growth of 3% per annum and an inflation rate of 7% per annum. Mrs Muir relied upon an extract from an earlier Groome Poyry report into the viability of a Douglas Fir investment for the stumpage figure of \$243,000. The Groome Poyry report was prepared in July 1995, two years prior to the relevant investment, and was directed as a South Canterbury property'. And then he summarises in paras.45, 46 and 47 the expert evidence and it's 48 that I wish to draw Your Honours' attention to. 'The figures for the 1997 stumpage values ranged from \$90,000 approximately to \$243,000 first referred to in the 1995 Groome Poyry report and adopted by Mrs Muir. However, the plaintiffs did not attempt to support the figure of \$243,880 for stumpage in these proceedings. The plaintiffs submitted the appropriate figure was \$185,000 based on Mr Belton's evidence'. Now if Your Honours then turn to para.67, after moving on to deal with other aspects of the expert evidence he concludes 'what is clear from the evidence

Elias CJ Sorry, where did you go to?

White 67 Your Honour. This is in the High Court judgment.

Elias CJ Yes, thank you.

White And I'm assuming that it's not necessary for me to read all the intervening paragraphs to Your Honours but emphasising 67. 'What is clear from the evidence is that the figure in the Forest Equities' letter taken from the 1995 Groome Poyry report of \$243,000 for stumpage cannot be sustained. The plaintiffs do not seek to support it. The plaintiffs have not called evidence to support it either from Mr Muir or from the author of the 1995 Groome Poyry report'. And then Your Honours go to para.85 now dealing with the log price growth figure. Having summarised the evidence on that he concluded 'as noted the figure of 3% supported by the plaintiffs was referred to by Mrs Muir in the Forest Equities' report of February 1997. Mrs Muir was not called to give evidence for the plaintiffs to explain or support her use of the figure of 3% real price growth'.

Tipping J 3% here I presume means 3% compounding in the sense if based on

White Yes Your Honour. So that's log price growth and then we come to inflation, and Your Honours para.96. 'On any view the 7% figure, I'm sorry

Elias CJ So the figure that the Judge accepted was about 1

White 1

Elias CJ 1% wasn't it.

White Yes. 96. 'On any view the 7%' – this is inflation – 'figure fixed in the Forest Equities report, which again the plaintiff did not seek to support is outside the range. It is not able to be supported on the evidence before me'. And then if Your Honours turn to para.309 where he brings all this together, or refers to evidence from Mr Frankham called for the Commissioner. 'On Mr Frankham's evidence the tax advantages, if they were to apply over the 50 years of the Trinity scheme are substantial'.

Tipping J Is this the tax advantages derived from the excess of the figures that were used against those that were reasonable?

White No Your Honour, these are the deductions that were claimed.

Tipping J Oh I see, this isn't directly linked to the previous discussion?

White No.

Tipping J No.

White No, it's another reference by the Judge to the fact that the plaintiffs didn't seek to support any of those figures in support of the point.

Tipping J I see, sorry, I just misunderstood.

White Yes Your Honour I should have made that clear. I've jumped a long way ahead of the judgment and the point is Your Honour that here he is dealing now with the

Tipping J Tax advantages from the deductions.

White Yes, yes.

Tipping J Yes.

White 'On Mr Frankham's evidence the tax advantages, if they were to apply over the 50 years of the Trinity scheme are substantial. Even over three years, which is the period the plaintiffs suggest they expected to obtain the benefit of the amortised licence premium, the tax advantages are still extremely significant', and this is 'applying the most favourable figures from the plaintiffs' point of view to the potential returns, by taking the stumpage value, log price growth and inflation figures from the Forestry Equities Report, which the plaintiffs did not seek to support during the course of the hearing,' which is the point I wanted to make, 'Mr Frankham calculates that the tax benefit still comprises 60% of the present value of the gross revenues the licensee would receive, and over 77% of the net present value of the licensee's cash flows over a three-year period'. Now the first point of drawing that paragraph to Your Honours' attention was to note that yet again the fact that the investors did not seek to support

those figures was recognised as significant by the Judge. But even if you used them it didn't in fact make any difference to the comparison that he was conducting between the tax benefits over the whole period or even over the three-year period. And just because so much of this case, bits of it relate to other parts of it. If I could just indicate in this context looking ahead to tax avoidance Your Honours and the difference between the 50 years and the three years. If the test is as we submit objective for tax avoidance, then when you're looking at the arrangement, the arrangement was a 50-year arrangement, so one looks at it over the 50-year period. It's only if Your Honours felt that the subjective views of some of the taxpayers who suggested that they thought they wouldn't get away with for much more than three years was relevant that you would look at that. I wanted to draw those matters to Your Honours' attention in the context of the Forestry Equities report and the claimed due diligence that was conducted prior to the taxpayers entering into the investments in relation to the value of the forest and the material that they had and they said they relied on. That is a considerable elaboration Your Honours. In fact in para.16.2 of our written outline of submissions, and the next aspect of the due diligence that I wish to take Your Honours to was the question or the impressions that Your Honours may have been left that there was due diligence in respect of the insurance. Now this is addressed in our outline at para.21.5, and the way I'd like to deal with this Your Honours is as follows. That as far as Dr Muir and Mr Bradbury are concerned, their due diligence in respect of the insurance will be covered when I deal with their knowledge in the context of sham/tax avoidance. As far as the other investors are concerned, there's a very brief summary of their position in 21.5, but if I might invite Your Honours where there's a slightly more longer summary of the cross-examinations of the other investors. In our submissions there's a schedule or appendix C, and this is an extract from the Commissioner's cross-appeal submissions in the Court of Appeal on sham, and it contains a detailed chronological summary of the establishment of CSI by Dr Muir and Mr Bradbury, and I wouldn't of course propose to read through the whole summary and I would invite Your Honours to do that, but it's that summary which is then further summarised by the Court of Appeal and I'll come to that in a moment. But if Your Honours would go please to para.102

Elias CJ Your submissions?

White Of this appendix Your Honour.

Elias CJ Sorry.

White Which starts on page 46, and I just need to explain the context. In the Court of Appeal the Commissioner did submit that the sham extended to the other taxpayers, and that was on the basis that they simply didn't care and that the doctrine of sham should be extended. The Court of Appeal decided that it was not open to the Commissioner to

run that argument in the Court of Appeal because it should have been properly pleaded and run in the High Court, and we accepted that and have not pursued the position of the taxpayers, other than Dr Muir and Mr Bradbury in respect of sham. I do need to explain as I will in a number of contexts that because of the very late discovery of documents by the appellants, what were colloquially called the BVI documents obtained by the New Zealand Serious Fraud Office just on the eve on trial, a lot of the material that was relevant to sham was not known to the Commissioner until that stage in respect of the other taxpayers. But in this paragraph 102 – now that’s the context in which it was given – but the taxpayers all were cross-examined as to their knowledge and what they did back in February/March 1997 in respect of sham, and when passing over Dr Muir and Mr Bradbury, we come at para.102.3 to Mr Verissimo of Accent Management. He was Dr Muir’s close friend and his company, Sierra Developments Ltd, was a trustee of Dr Muir’s family trust. The beneficiary of the “introduction fees” paid by CSI to Parentis and advanced to the trust. That’s a matter I’ll come to in a moment. And then we dealt with his age and no personal guarantee. It’s the next bit though. He did not concern himself with the insurance aspect of the investment. He discussed it with no-one, and he did not know the name of the insurance company. Now if Your Honours’ wish I can take Your Honours to the cross-examination, but that is a summary of it and it’s not being challenged. That is the position. Mr Verissimo was not concerned about the insurance. He didn’t talk to anybody about it, and he didn’t even know the name of the insurance company. Mr Peebles, whose LAQC is Ben Nevis Forestry Ventures Limited was Mr Bradbury’s close friend, and then dealing with his age and personal guarantee, and then Mr Peebles did not see insurance as a key issue. Under cross-examination he suggested that the insurance had been checked out by Bruce Maclean, a solicitor acting for some of the Trinity investors, and he was satisfied with that. But when the document showing the inquiries made by Mr Maclean were put to Mr Peebles, he accepted that the information obtained by Mr Maclean from Minet Archer Limited, International Insurance Brokers and Risk Managers, indicated that no-one had heard of CSI and that it appeared to be a captive insurance company set up for the forestry investors. Mr Peebles then admitted that he had not heard of CSI before going into the investment and that he was not sure whether he would have made further inquiries if he had been told that it was a captive insurance company set up for the forestry investors. Mr Algie of Greenmass, and a trustee of the Laird Estate, gave his age and no other assets and no personal guarantee. Under cross-examination, Mr Algie suggested that a report had been obtained from Mr Maclean stating that CSI was “a large recognised reputable insurance company” and he was happy with that. But when the document showing the inquiries made by Mr Maclean were put to Mr Algie, he admitted that he had never seen the Minet Archer report relating to CSI and that he had only seen AMS material. He also acknowledged that he did not understand what captive insurance meant and that if he

had known that CSI's only business was with Trinity he would have sought further clarification. He was not aware that over 90% of the initial premiums paid to CSI had been paid out again as introduction fees and ultimately loaned to family trusts associated with Dr Muir and Mr Bradbury, that there was a letter of comfort issued by the Trinity Foundation to CSI or that CSI had virtually no assets. If he'd been aware of these matters he would have sought further clarification. The inference can be drawn Your Honours, and indeed underpins the judgments below of course, that these investors were not concerned with the viability or otherwise of CSI. All they were concerned about in February/March 1997 was getting the deduction for the insurance premiums. And the reason why it was so important to them to get those deductions in that period for the first year is of course because the \$2 million licence premium amortised back over the 50 years is some \$40,000 per hectare per annum, but of course for the first year because the contracts were only entered into in February/March 1997 you'd only get a 12th of that, so in order to get the decent amount of the deduction they sought they created the insurance.

Tipping J At the moment you're just concentrating on the extent or lack of it of due diligence?

White I am, yes. Just to ensure that Your Honours weren't left under any impression that anything like normal commercial due diligence in respect of these matters was conducted by these parties. The next matter in the factual background Your Honours I just want to address very briefly is the perhaps understandable but nonetheless very belated attempt by counsel representing Mr Bradbury to distance or disassociate himself, that's Mr Bradbury, from Dr Muir. In the High Court and at the time of the trial they were of course still in partnership, represented by the same solicitors and counsel, and there was then no suggestions of this distancing or this association. There was a considerable amount of evidence adduced relating to what the firm Bradbury & Muir had done - a lot of it signed by Dr Muir - but never suggested by Mr Bradbury that he wasn't authorised in any way to do that. This issue was not raised at the trial so there has never been any opportunity for the Commissioner to test the appropriateness or otherwise of this belated attempt at distancing, and as I will indicate when I come to the submissions on sham, there are findings by both the High Court and the Court of Appeal in relation to the role of Mr Bradbury in this matter. The third matter that I wanted to touch on very briefly Your Honours is the question of carbon credits which it is referred to very briefly in the Ben Nevis submissions and it's answered in our submissions on page 13 at para.21.3 where we submit that there was no admissible evidence before the Courts below as to carbon credits having an estimated value of \$6,000 per hectare. We say that the statement in Mr Bradbury's brief of evidence to that effect was a reference to a statement by Dr Muir and was ruled inadmissible,

and an attempt by the appellants to adduce further evidence on this point in the Court of Appeal was unsuccessful.

Elias CJ Sorry, which paragraph are you referring to?

White Page 13, para.21.3 of our submissions.

Elias CJ Thank you.

White Does Your Honour have that?

Elias CJ Yes thank you.

White That paragraph has been since the filing of the submissions the subject of correspondence between Crown Law and my learned friend Mr Harley for the Ben Nevis appellants, and as they do not seem to have pursued that matter but I noted that my learned friend Mr Gudsell raised this as one of the matters that he wanted to know what the Commissioner's position was yesterday, and I can take Your Honours to it very quickly. If Your Honours take the green slim bundle that I provided this morning and go to tab 1, and if I can just take Your Honours really quickly through this letter of explanation because it does take a moment to do that. And I should just say at the outset that there were a number of

Elias CJ Is it really necessary for us to go through this? Your position is that there was no evidence about carbon credits so we can just ignore the topic of carbon credits, is that right?

White Absolutely Your Honour, and can I take Your Honours to page 3, para.4 of the letter and the reasons are there, very simple. (1) Lay evidence as to carbon credits was consistently ruled inadmissible by Justice Venning. None of the experts used them. No expert was cross-examined. Justice Venning didn't do it and in the Court of Appeal, and this is the point I did want to make Your Honour Chief Justice, is that in the Court of Appeal before the hearing the appellants tried to adduce further evidence on this very point, and we have a judgment of the Court of Appeal refusing them leave to do so.

Tipping J How on earth do they seek to take advantage of it now?

White Well that's the Commissioner's position Your Honour and one assumes that the Ben Nevis appellants have resiled from their attempt to do so. It's in their written submissions. They are trying to rely on this evidence and we are taking issue with that, and my learned friend Mr Gudsell wants to know what the Commissioner's position is, well that's what it is.

Tipping J Well he should be in no doubt now Mr White.

White And the final of the four matters that I had indicated that I wished to deal with on the factual side at this stage was the question whether CSI could do other business. A matter I think raised by Justice Tipping of my learned friend Mr Carruthers, and again if I may take Your Honours to our submissions, appendix C, and this time to para.93. It may be better to start at 92. I was going to take Your Honours to 92 when I came to sham but if it will save time I will do it now. And this is a summary of all the evidence and the references given in the schedule. 'The evidence as finally adduced at the trial', and this was based very largely on these documents that were obtained at the last minute, 'that by 31st March 1997 CSI was incorporated and registered by AMS in the British Virgin Islands, a well-known tax haven, on the direct instructions of Bradbury & Muir who determined or approved the name of the company, its shareholder (Christian Services Charitable Trust), its directors (Messrs Mitchell and Jackson), its assets, the scope of its activities, including the terms of its business plan and the policies it issued, and the disbursement of its initial premium income. A captive, single-purpose paper company without substance. It had no other business, no office, and no employees. It was indeed one of 10,000 similar companies run by AMS in the BVI. That's what AMS does - it's a nothing. After the payment of fees and the so-called introduction fees to Parentis, CSI was effectively without assets other than the US\$200,000 deposit required by the BVI Government, and controlled in all relevant respects by Bradbury & Muir.

Tipping J Its business plan would have a significant bearing one assumes on what the purpose of its establishment was.

White Yes exactly Your Honour, yes. And what happened at the end was irrelevant - that's what the business plan said, immaterial.

Gault J Just out of curiosity Mr White the \$200,000 that was required to be deposited, was that the same sum that subsequently was invested in the failed investment?

White In Evergreen? I think not Your Honour.

Gault J It was a different sum?

White I'll have to check that

Gault J Well yes, it would be surprising if it was a required deposit.

White Yes, and then went off to Evergreen.

Gault J But then it is said subsequently that this company had an asset value of about \$16,000 – well what happened to this \$200,000.

White I'll check Your Honour.

Tipping J Presumably it had to be deposited with the Government scheme.

White Yes.

Gault J In which case it had assets of \$200,000 and \$16,000.

White I'll check that Sir.

Gault J Thank you.

White Evidence as to events after 31st March 1997 reinforced the evidence that CSI was not an insurer. And this is the point Justice Tipping that we wanted to draw to Your Honour's attention about business. 'Opportunities for CSI to do other business which would have given CSI quite more substance and made it look more like a non-captive insurer were rejected by Bradbury & Muir when referred to them by CSI/AMS in September 1997'. In fact some other solicitors, if one looks at the documents, but I won't need to take you to them, wrote off to AMS saying they'd heard about it and could they get in with CSI. CSI of course wasn't prepared to do anything without consulting

Tipping J So it was being treated as some form of intellectual property?

White Yes, well they of course immediately contacted Bradbury & Muir and Bradbury & Muir were at pains to stress that the CSI structure was highly confidential, and no suggestion should be given that it was a captive, though of course it wasn't prepared to do any other business, so one would have thought that's exactly what it was, nor should any reference be made to it for what has been done in relation to it.

Tipping J Was that in a letter written by Bradbury & Muir?

White Yes Sir.

Tipping J Who did they write that letter to – the other solicitors?

White No, no, they didn't deal with the other solicitors.

Tipping J Oh, but

White I'll take Your Honours to it. It's in volume 26

Tipping J 5386, is that right?

White That's the one, yes. 'In terms of what suggestions you may make to Mr Sydenham, that is a matter entirely between yourself and him. We must stress, however, that the CSI structure is highly confidential and no suggestion should be given that it was a "captive", nor should any reference be made to it or what has been done in relation to it. In

other words, Mr Sydenham should not gain the impression that any suggestions you make are the result of any precedent set by CSI. That Company has its own Insurance Licence which you are the director of and which has offices in your building. Enquiries beyond that should be regarded as covered by confidentiality'. And then I will take Your Honours now to volume 12 because Dr Muir was cross-examined about this. Volume 12 at page 2391.

Elias CJ Sorry, what page?

White I think it starts at 2391 Your Honour.

Elias CJ Thank you.

White At about line 22 Dr Muir said 'yes what happened was as it we found out was that one of the service providers that we had obtained advice from had been careful and I don't want to cast aspersions, but apparently had attempted to duplicate the Trinity structure for one of their own clients using the same type of documentation that we had used in this transaction. We were somewhat alarmed by this when we found out they had approached CSI because we didn't want a poorly advised and potentially unworkable transaction for whatever reason, to in anyway impact on what we considered to be the integrity of our transaction. CSI spoke to us or wrote to us – I'm not sure which – saying they had this approach from these other people and did we have any views on it. Now we did have views and those views as I've just expressed are we didn't want any transaction which wasn't properly structured to in any way impact on the integrity of our transaction. This letter to CSI as it points out says firstly to CSI that whether or not they proceed with it is of course entirely a matter between themselves and the proposer – i.e. we have no control over CSI or what decision they make, however we were concerned that the confidentiality of the structure was being abused by the people in New Zealand who had confidentiality obligations which is the point I make there, and I suggest to them that if they go ahead and write the business which as I say was a matter entirely in their power that we didn't want them to say that our transaction or that they were writing captive insurance because that would be misleading, and I go on to say that we don't want them disclosing to any third part any of the matters between ourselves and CSI which is why I say that I would not want them to gain the impression they were making suggestions which result from our policies, and ask them to respect the confidentiality. If CSI were truly independent of you Dr Muir they wouldn't be troubling you with this approach in seeking your input on this matter would they? Well no that's not how I see it at all. CSI were aware that this project ultimately will result in a very large Christian benefaction and they throughout have consulted me from time to time on these matters because they know that is what I'm trying to achieve and I don't find it unusual at all in the context of that background that they would come to me and say look is those going to

have any effect on the benefaction or what you're trying to achieve, that doesn't suggest to me in any way that they're not being independent and indeed I recall that very thing there. It's a matter entirely between themselves and the person proposing it. If CSI were a proper insurance company Dr Muir how could another policy with somebody else in relation to radiata pine possibly impact on the integrity of your transaction? Well there are two bits to that answer. The first is that they are a proper insurance company, and there are a lot of insurance companies which are truly captive which are a lot closer to the policy holders than this insurance company which is not a captive, and you will be aware that I believe it's in the evidence that captive insurance is one of the major businesses of insurance companies in this and other jurisdictions, so I don't think you're correct to assume just because there's a what do you call is not proper because they consult I think that assumption I think you'll find the true captives, which this one isn't, is a lot of consultation, but to answer the second part of the question the difficulties that we had in which we were trying to convey to the insurance company were that if they had a proposal put to them and it was not a proposal and it resulted from some structure which was not properly thought out and which was subsequently attacked by the IRD, that there was always a possibility that CSI's integrity would be called into question, and that's not something that we particularly want to happen, but at the end of the day as I record it's up to them what they did. And if Christian benefaction was such an important feature why are you so concerned that the CSI structure should be confidential? No, what my concern is that I mean there's no problem with CSI being kept confidential because CSI is recorded on the policy documents, so it's not the confidentiality of CSI which is important, and there is no way that CSI would be telling anybody about their ownership because I don't think the insurance side of the people would have even known of it. Our concern and what was motivating this letter is that the parties to the, not the parties to but the advisers to the Trinity investment were subject to confidentiality and we were concerned that they were breaching that confidentiality. What do you mean when you referred to the CSI structure in the last paragraph of that letter? Well what I meant was that it was confidential is the nature and terms of the arrangement the policy between the parties how it works, what it covers, because if you pick that up further on I say in other words the person I don't want to name them in Court should not. In other words our concern is that the insurance company keep our business confidential'. And then over the page in another letter 'and is Mr Bailey reassuring you in the second paragraph that the promoters of this other proposal have no reason to suppose that your existing insurance is anything but a commercial transaction with trees that have a better trace record? That's correct. And was he giving you that assurance because of course there was a real doubt as to whether there was any proper existing insurance. No I don't think that is what he's saying at all. I think what he's saying is giving no reason to suppose it was anything other than what it was. And isn't he

recommending that it would be worth considering the proposal that these others were putting up? That's right because the advantage was it would give more substance to CSI and make it look more like a non-captive insurer. That's what he says, yes. And he was saying that wasn't he Dr Muir because CSI obviously lacked substance didn't it? No, I don't think that's correct at all. What he's saying was that he was going to broaden the base etc', and on it goes. And I could go on for a very long time reading the exchanges with Dr Muir, but the answers are convoluted in the extreme and we can rely now of course on the findings of the Judge in the High Court and in the Court of Appeal. And as I say at the end of 93.1, 'Dr Muir's explanations were unconvincing. He ultimately accepted that CSI/AMS appeared to have acted in a way which was in accordance with his view. And then we refer to the audited financial statements for CSI for the period ended 28 February 98 – premium income. And that's of course being the total premiums receivable in 2047. Commissions, which all went off to Parentis. The investment of US\$275,000 in Evergreen which was subsequently lost. The repayment of the share capital by way of dividend and cash in hand. The audited statements for CSI for subsequent years showed that its financial position worsened with the loss of the investment, and its only external asset consisting of cash in hand. That might be the answer to Your Honour Justice Gault's question of the use of the word 'external'.

Tipping J External, yes.

Gault J Yes.

White 'Mr Frankham, an independent investigating accountant called by the Commissioner, concluded after reviewing these financial statements, that without further injections of capital CSI could not continue as a going concern until the end of the licence period. Mr Arpel, an expert called by the Commissioner, considered that CSI's financial position was not one usually associated with professional insurers. A total of US\$3.589 million was paid as commissions or introduction fees by CSI to Parentis from the initial premiums received from Trinity investors in March 1997 and subsequently. There were other trounces and other initial premiums paid as well. And this amount constituted 90% of the initial premiums. As the learned Judge held this amount was then lent back to the family trusts of Dr Muir and Mr Bradbury. The loans are unlikely ever to be called up because the lenders are controlled by Bradbury & Muir and they are not repayable now anyway until 2047. And Bradbury & Muir gave instructions as to the disbursement of the funds the subject of the loans'.

Tipping J Where does one find the business plan that's referred to in 92.1 Mr White, because that would be a significant document as I said before in relation to what the whole purpose of this outfit was and how they were going to go forward so to speak? Come back to it if

it's more convenient, but it just seemed to me to be relevant to what we're presently talking about.

White Yes, well it's referred to in our summary not surprisingly, when I put my finger on it.

Tipping J Isn't it a document about which there was some argument as to admissibility that it was ruled in admissible?

White Yes it was. Was ruled?

Tipping J Was ruled admissible.

White J Yes it was. Can I do two things? First of all take Your Honour to our submissions,

Tipping J Yes.

White Para.18, on page 11, and I'm there dealing with the conclusion of both Courts below, which is referred to in para.17 that the evidence overwhelmingly established that the predominant purpose was to obtain the tax benefits rather than to make a profit from the forest. And we submit, well we don't submit, we just state 'the conclusion was reinforced in both Courts by a statement in the CSI business plan that the real benefits of the deal are tax concessions that can be obtained now by the investors and the foundation. One of the conditions required to gain the tax relief is that the insurance must be in place. The actual outcome of the deal in 50 years time is not considered material.

Tipping J Who prepared that?

White Well, the evidence established that that was Dr Muir.

Tipping J Dr Muir?

White Yes, I'm going to be submitting in the sham context that Your Honours may have been left with the impression that CSI is a real insurance company somewhere. It's a bit of paper in an office in the British Virgin Islands with two persons who are called directors. They are cyphers – mere cyphers – for Dr Muir and Mr Bradbury. That's what happens in the BVI. And of course with sham and tax avoidance Your Honours can go behind all the bits of paper and deal with the substance of it – the reality. There's no insurance company, there's no insurance I'll be submitting.

Tipping J But I still would like to see the whole of the document Mr White.

White Yes Your Honour. Can I just finish off

Tipping J If now is a convenient time?

White Yes I'm doing that. I wanted to finish para.19 because that deals with the admissibility. 'The relevance and significance of this statement was supported by the fact that it was contained in a document which together with a number of other relevant documents had not originally been discovered by the appellants but was disclosed to the Commissioner as relevant when received by counsel for the appellants from the Serious Fraud Office immediately prior to the trial. Although the admissibility of the statement was challenged in the High Court and on appeal, both Courts held that the statement was able to be produced by Dr Muir, the principal architect of the Trinity scheme, and was admissible in relation to all parties to the arrangement. The reference is given. Bearing in mind that the decision of Justice Venning on the issue of the admissibility of the statement was based in large part on an adverse finding of credibility against Dr Muir which has been upheld by the Court of Appeal, this Court is also invited to uphold this finding and reject the Ben Nevis appellants' unsubstantiated submission of inadmissibility', and they haven't advanced that orally.

Tipping J Well I don't see how it could be inadmissible. I mean it's a central document to what was going on here.

White Of course. I agree Your Honour, or we agree Your Honour. Here it is. If Your Honours go to volume 25.

Elias CJ You'll need to take us though won't you also to its production by Dr Muir – what he said about it?

White Well I certainly will if Your Honour wishes, though like anything that I take Your Honours to, the cross-examination of Dr Muir may take some time.

Elias CJ Oh alright. I suppose you do have

White I should say the cross-examination of Dr Muir took four days and it was based on the documents that had been obtained from the British Virgin Islands which we hadn't seen before, and he produced them all, and he gave

Tipping J Well they were put to him presumably and he had to acknowledge and thereby was able to produce them.

White Yes, but he balked at this one.

Tipping J Well I'm sorry, what page do we find this?

White At 5242, and we had an argument, and we had an argument about admissibility which the Commissioner succeeded on. But Your Honour Chief Justice I can certainly get the references for you.

Elias CJ Yes the reference will be fine thank you.

White It's just at the moment we've got findings from both Courts that it's admissible and relevant

Elias CJ Yes I understand that

White And of course if the test is

Elias CJ It's not the admissibility - I was interested in his explanation for it.

White Certainly, we'll find that. Anyway the document is at 5242

Tipping J That's followed by a Deed. Wait a minute we've got some page mis-numbering, I'm sorry. My first document under the cover sheet 5242 is that this deed made and the day is blank between Citco and Parentis.

White I mean 5242?

Tipping J Yes, of volume 25?

Gault J It seems to have page 5343 in there instead of 5242.

Tipping J Yes, so it's alright following that I think. But the first page is the business plan and is the wrong document.

White Well regrettably Your Honours I have a different version.

Gault J Well it's only one page.

Tipping J It's only one page.

Gault J You can get us 5243 after the break, that will fix it.

White Yes Your Honour, so you're missing, but that's the critical page.

Elias CJ But hang on the next page appears to follow on as part of the deed doesn't it. Oh no, it doesn't.

Tipping J We just need true 5242.

McGrath J 5240, is that an earlier draft of the same document?

White Yes, and it's that which caused the trouble for Dr Muir because it was a typed version of a hand-written version, but if Your Honours

McGrath J Oh I see.

White Are interested in this I'll have to get the references for them and this might be

Gault J I remember reading – just to briefly summarise – he was sent the draft. He made comment upon it and amendment to it but did not amend that particular part and therefore it was attributed to him in that way.

White Yes, yes, that's right Your Honour in summary.

Tipping J Well it's the adjournment now anyway, so if you wouldn't mind getting 5243

White But Sir Your Honours have 5242?

Tipping J Yes 5242 I've got. What I've got as 5243 is 5343 so we need copies of 5243.

White Yes, and Your Honours do have 5244?

Tipping J Yes.

White And 5?

Tipping J And 5.

White So it's just the one page. We'll fix that.

Tipping J Just the one page, but the key page.

White Is that convenient?

Elias CJ Yes, we'll take the adjournment.

Court Adjourned: 11:30am
Court Resumed: 11:50am

Elias CJ Thank you.

White Your Honours should have page 5243 on the ledge in front of you.

Tipping J Thank you. I just wanted it to be complete. I don't need you, unless you wish, to go through it Mr White.

White No, what I wanted to do was to answer Her Honour The Chief Justice's question and to say if Your Honours have that volume 25 opened at 5237, and also volume 12 opened at 2350, and then I can save an awful lot of time Your Honours because Chief Justice the matters that you were asking me about are actually all set out conveniently with all the references. If you take our main submissions as well. I am sorry there are three things to have, but if you have our main submissions, again appendix of appendix 3, para.41, this is our compilation of the documents and the cross-examination on this very issue Chief Justice. Page 20, para.41 of appendix C. Does Your Honour have that?

Elias CJ Yes.

White Yes, and it starts 'also on 31 January 1997 Bradbury & Muir wrote to AMS (Messrs Bailey and Jackson) in response to their letter of 29 January 1997'. And that is the letter at volume 25, 5237, which should be in front of you in that volume – volume 25. And unless Your Honours wish me to go into any more detail I just propose to go through this paragraph, drawing this to your attention so that Your Honours then have it. But I'll keep going at 41. 'The latter letter', that's the AMS letter of 29 January 1997, 'was not discovered or produced in evidence', and there's a reference to the cross-examination on that point. 'It is apparent however from Bradbury & Muir's response of 31 January 1987', which Your Honours have, 'that they were addressing a business plan for CSI which had been sent to them with the AMS letter of 29 January 1997', and the cross-examination reference is given. 'It is also apparent that the CSI business plan which AMS had drafted and sent to Bradbury & Muir for comment was a document based on the information in Dr Muir's hand-written note prepared prior to 9 January 1997 and the fax based on that note sent to Mr Jackson of AMS', and there's the cross-examination references to that. And if you wanted to go to those documents you will find them earlier in this chronological sequence. This is a whole chronological sequence of what happened in that very busy time – January, February, March 1997. 'While Dr Muir acknowledged under cross-examination that when he wrote the Bradbury & Muir letter of 31 January 1997, he had a copy of a draft CSI business plan in his possession, or at least portions of it' (and the references are given), 'and that the information in the draft business plan had come from him. He was not prepared to produce the document himself. The Learned Judge had little difficulty in ruling that this draft business plan was admissible' etc. Now if Your Honour The Chief Justice wanted me to take you further on that?

Elias CJ No, no more thank you.

White No. So those were the only factual matters that I wished to address beyond what is in the written submissions Your Honours, which I take

it I don't need to go through in any more detail the factual background.

McGrath J Mr White in relation of your appendix C, and obviously we might read a bit before and a bit after the passages you have taken us to, but it's a long document and are you suggesting that we need to go through the whole of the document to get the passages you've highlighted in context or can we focus on what's immediately before and after?

White We would prefer Your Honours regrettably if you were to read it. It does tell the story of

McGrath J That's alright, that's fine.

White Yes, yes, but I wasn't proposing to do that during the hearing and I will be referring to other parts of it in due course. So I now turn to the issue of the non-deductibility of the licence premiums which is at page 15 of our submissions, starting at para.24 and on this we have prepared a very short two and a half page note, which is under tab 2 of our slim green volume, really in response to my learned friends – Mr Carruthers particularly – submissions on this point, and I can go through this relatively briefly, but I do wish to divert in a moment to the legislation and to the contractual documents, but if I can just note that the Commissioner's position is in 2.1. Obviously this submission is without prejudice as it were to tax avoidance but that goes without saying. So the first point is that 'we agree that the licence was a capital asset, but that is not the issue because not all capital assets are depreciable property', and we'll come to the definitions. 'Here the issue is whether the licence (a capital asset) constituted a right to use land in terms of schedule 17 so that it was within the definition of depreciable property and so that the premium was the cost of that asset and therefore deductible by the appellants'. And the statutory provisions are referred to in our para.25, but if I could invite Your Honours to go please to the Commissioner's supplementary bundle of authorities, starting at tab 4, and under s EG1 'a taxpayer is allowed a deduction in an outcome year for an amount on account of depreciation for any depreciable property'. And then one turns to tab 5 for the relevant definitions, and if we start with *Depreciable property* – just below, half-way down the page. 'Depreciable property in relation to any taxpayer means any property of that taxpayer which might reasonably be expected in normal circumstances to decline in value while used or available for use by persons in deriving gross income, or in carrying on a business for the purpose of deriving gross income; but does not include' - and these are some of the exclusions for capital assets – 'trading stock; land; financial arrangements; intangible property'. But then as is the want of this legislation, having got something in and then taking it out; it brings it back in again, other than depreciable intangible property. So you have to with your wet towel firmly in place realise that you

might be back in if you are within depreciable intangible property. So you then go to the definition of depreciable intangible property, and that means intangible property of a type listed in Schedule 17, and if you turn over to tab 16 we'll find schedule 17, and item 4

Tipping J Just go quite slowly here please Mr White. This is pretty crucial, so without wanting to slow you down unreasonably I think it's vital that I at least keep us with you.

White Where did I get ahead of Your Honour?

Tipping J You were just going a little fast. One's sort of digesting these things as one goes through, so it's now to tab 16.

Elias CJ 16.

White 6.

Tipping J I thought you said 16.

White I apologise. Everyone here is telling me I did say 16 and I meant 6.

Tipping J That was why I was wanting a little bit of help.

White Everyone's helping you Your Honour except me on that one.

Tipping J Tab 6, right.

White And that's Schedule 17 and that lists the items of depreciable intangible property in respect which going back through the definitions in respect of which are payment and in respect of which you are entitled to pay depreciation

Elias CJ And these are examples?

White No, no

Elias CJ Of a type.

White No, sorry Your Honour. You need to go back to tab 5. I did go too quickly. Perhaps I go back to tab 5 and just recapitulate. The definition of depreciable property has a general description in A as to what is meant by depreciable property.

Elias CJ Yes.

White And then in B it has some exclusions – trading stock; land; financial arrangements; intangible property. But under Roman 4

Elias CJ I understand that and you go back into depreciable and tangible property which takes you to 17, but my question was the things listed in 17 are examples

White No, no Your Honour

Elias CJ No.

White Because the definition of depreciable intangible property says ‘means intangible property of a type listed in Schedule 17.

Elias CJ Well isn’t it of a type listed?

McGrath J If it’s not an example it has to fit within the category of a type listed.

White It does, yes, yes.

McGrath J It’s not an example it’s a description.

Elias CJ Oh I see, it’s not a controlling thing.

White Yes, and I have gone too quickly

Elias CJ I see, yes I see, yes thank you.

White Because Justice Tipping’s absolutely right, I ought to read the rest of the definition of depreciable intangible property too. Which Schedule describes – it also helps to answer Your Honour the Chief Justice’s question.

Elias CJ Yes.

White Intangible property that has a finite use for life that can be estimated with a reasonable degree of certainty on the date of its creation or acquisition, and (b) if made depreciable a low risk of being used in tax avoidance schemes.

Anderson J What’s the point of that parenthetical addition? Why is it necessary if the types are actually listed in Schedule 17? Does it mean that they have to come within that type and have additional qualities in terms of the parenthesis?

White One assumes Your Honour that the draftsman thought that each of the items in the list met that description.

Tipping J It’s the rationale.

White Yes, but

McGrath J It’s the context of which you read the words of Schedule 17.

Tipping J It doesn't mean they can't be used in tax avoidance schemes.

White No, no.

Tipping J There may be a low risk, but clearly it's envisaged they might be.

White Yes, yes Your Honour.

Anderson J Suppose you had a right to use land which if made depreciable involved a high risk of being used for tax avoidance schemes?

White You mean such as here Your Honour?

Anderson J Yes. Does it come within the definition or does it not?

White Well.

Anderson J That's why I find the parenthesis rather unusual. Does it mean when it says which Schedule provides it, mean in effect provided that, so that it has to come within the types and the schedule and have these other qualities?

White I'd like to reflect on that a little more

Tipping J Well with respect it's a quality that each of these listed beasts has.

Anderson J So what's the point of saying

White That's the way I answered it originally.

Gault J Well with respect that can't be right. When you have a look at some of these things, the right to copyright in software, how does that automatically have a finite useful life? It must be a qualification and not a description.

Tipping J Doesn't copyright have a finite life?

White 50 years – a similar period.

Anderson J My point is what's the point in saying that, if you've got the types listed?

White Yes.

Anderson J Unless it's meant to be an additional test - not only must it come within the type but it must also have these other qualities.

White We've certainly just moved straight to Schedule 17 as I did rather quickly and Your Honours are asking questions of importance which I'd like to reflect on.

Elias CJ Yes I would have thought that you would want to adopt what is being put to you.

White I have a recollection that we

Tipping J Well without wanting

Elias CJ It's very old drafting.

Tipping J Mr White without wanting to muddy the water, the way I read it, and this may not be right, is that it was a descriptor rather than a qualifier.

White Yes well that's the issue Your Honour, yes

Tipping J Yes.

White Yes, and I'd like to just reflect on what the Commissioner's position is or should be on that because it's not a matter that we've addressed in the submissions.

Anderson J But it's fairly crucial to the matters we have to consider.

Elias CJ Well there's no point in putting an explanation in if all of those come within the definition which is really why I wondered whether it's the definition that's not controlling and Schedule 17 is just examples, but however, apparently not.

White Well I'm not saying

Elias CJ No, no, I understand that.

White The focus has certainly always been on whether what is here is on the use of the word 'right' to use land.

Tipping J If it was a qualifier would it be general or would it be the particular instance? And then you'd have to decide the level of the risk of it being used, and decide what low risk means. It would be a very very difficult exercise.

McGrath J It would create a lot of uncertainty that the Commissioner may not want.

White Yes, well that's why I want to check what the Commissioner's position is on that.

Elias CJ And maybe it's a control over what can properly be added to the Schedule.

Gault J I have a feeling that I've looked at this before, and maybe in relation to the right to use a trademark which will not necessarily have a finite life.

White I think Your Honour is probably right and this is one of those cases where a large number of issues of which I think this may have been one at an earlier stage, but in the process of distillation it hasn't come this far, but now it's coming back again, so I just

Elias CJ Well we really don't want to open things up again if they'd been distilled Mr White.

White No, but can I just check what the distillation was Chief Justice

Elias CJ Yes.

White And certainly at the moment the focus of my learned friend's and the Commissioner has been on whether the issues, whether the licence, the capital assets, constituted a right to use land, but Your Honours are quite rightly saying that the meaning of that expression in this context may be significantly influenced by those words and I'll need to check that. But I think I can keep going on because

Elias CJ Before you're addressing the lower point really, yes.

White Yes, yes, and that in our short note in response in para.2.3 is that when in answer to the issues which were identified in 2.2, 'is that when the contractual documents are construed on the assumption that the parties intended to achieve a result which made commercial sense, the licence imposed obligations (not rights) in respect of the land and that the premium was paid for the right to receive the balance if any of the net stumpage proceeds', and we refer to the submissions there. And 'we agree with Justice Tipping that on this aspect of the case the contractual documents should be construed in accordance with normal principles and not on the basis of economic substance' or any form of substance which of course is the position in relation to tax avoidance or sham. But just interpolating there we say 'but normal principles of contractual interpretation require the Court to approach this on the basis that the parties intended to achieve a result that makes commercial sense', and there is a distinction between on the one hand commercial sense, which is accepted as the appropriate approach to interpreting contractual documents and economic substance on the other hand, and we're not trying to run the two together, we're separating them out, and in our written submissions we set out in para.26, an extract from the judgment of the Court of Appeal in *Renouf* where Justice Blanchard in the context of a tax case said 'the true meaning and effect of a transaction which is not alleged to be a

sham, the Court examines and construes that transaction in the same way as it would do if the parties to it were in dispute about its meaning and effect. The Court assumes that the parties were intent on achieving a result which makes commercial sense'. That's where those words come from, and we have a footnote 18, which unfortunately appears on page 17 to a decision of the House of Lords and also to the judgment of this Court in *Gibbons Holdings* where Your Honours The Chief Justice and Justice Tipping say similar sorts of things about interpreting contracts to make commercial sense. And that's what we submit should be done here, and with that in mind we now would refer Your Honours to the relevant contractual documents. My learned friend Mr Carruthers gave you references to these but if I could just take you to volume 15, and the references are all in our submissions now at para.27 and our para.27 contains the summary of them all and then we summarise the summary in what Justice Venning decided. But if I can take you to volume 15, page 2977, and this document starts at 2965. This is the agreement to grant licence and options and at 2977 under the heading *Grant of Licence in clause 3 - 3.1* reads '*Grant of Licence – In consideration for the purchaser's promise in clause 4 to pay the licence premium, the vendor agrees to grant the purchaser a licence to use the property for the purpose carrying on the purchaser's forestry business on the property for a term and on the conditions set out in the licence agreement*'. I should note 3.2 in passing – '*Non-exclusive Possession – the purchaser acknowledges that the licence agreement will not confer on it any interest in land (whether by way of lease, easement or otherwise), nor will it entitle the purchaser to a legal right of exclusive possession of the property*'. And then at '*Subject to an Agentment Contract*', and over on the next page under 4, '*Licence Premium and Payment – 4.1 – Agreement to Pay Licence Premium – In consideration for the vendor agreeing in clause 3 to grant the purchaser a licence to use the property on the terms described therein, the purchaser agrees to pay the licence premium to the vendor on the final expiry date*', which Your Honours will find defined on page 2971 as meaning 31 December 2048, and in 4.2 there is a provision as to the calculation of the licence premium and there is the \$2 million figure at (a). And then we then go over to clause 8 on page 2981, and under clause 8 reads '*Douglas Fir Supply and Planting Agreement. The vendor, Trinity, is to act as Southern Lake's Forestry's agent, and on or before the initial closing date, the vendor shall, as agent for the purchaser, enter into the Douglas Fir Supply and Planting Agreement and deliver a copy thereof to the purchaser. The vendor shall through the instrumentality of the Forestry Manager and the Douglas Fir Supply and Planting Agreement, and at the vendor's cost (subject however to the purchaser having complied with it's obligation to pay the agency fees amount), procure the purchase of the seedlings, the planing and a certificate*'. And I need to draw Your Honours' attention to the definition of "Forestry Manager" which Your Honours will find also on page 2971, and "Forestry Manager" means Pine Plan New Zealand Limited at Dunedin. So what that in our submission a very important

clause 8 provides is that Trinity acts as Southern Lakes' agent and Trinity as the agent, enters into the Douglas Fir supply and planting agreement with Pine Plan and ensures that Pine Plan procures the planting of the forest. And then in clause 9, 'the Forestry Management Agreement, the purchaser, Southern Lakes, is to comply with the Forestry Management Agreement and on or before the initial closing date, the purchaser shall enter into and execute the Forestry Management Agreement and deliver a copy thereof to the vendor, and the purchaser covenants to the vendor that the purchaser will duly and punctually comply' etc with that. And over the page significantly 'the purchaser further agrees to not vary, waive, terminate, surrender or otherwise prejudice any of its rights under the Forestry Management Agreement'. So what all that means is that Trinity is making sure that Pine Plan is going to plant the forest, and it's doing that in its capacity as agent for Southern Lakes. And then if Your Honours next turn to page

- Gudsell I wonder if before my friend proceeds, and I very reluctantly do this, but my record in respect of the Management Agreement is the clauses my friend's been reading from have all been amended by subsequent clauses in the case, and in respect of clause 9 to which he has just read, and placed reliance on at page 3109 is a reference not used. So I just bring those to the attention of the Court.
- Elias CJ Thank you.
- White The changes that were made Your Honours are referred to in our submissions.
- Tipping J Do they affect the thrust of what you're
- White Not the thrust of it Your Honour. At page 3154, which is the document that starts at 3151, is the licence agreement.
- Tipping J You're moving off the first agreement are you?
- White Yes Sir, and now I'm moving to the
- Tipping J But is the effect of the first agreement that the purchaser strictly speaking doesn't need a right to occupy the land because someone else is going to do it all for him?
- White That's exactly right, yes Your Honour. The arrangement was that Pine Plan would be doing it all.
- Tipping J Yes. I just wanted to make sure I understood what the punch-line was.
- White Yes.

McGrath J But as the purchaser's agent.

White As the purchaser's agent, yes.

McGrath J Yes.

White 3151 is the Licence Agreement, and perhaps if I can just refer to the relevant definitions on the way through - this is at 3152. 'The Annual Licence fee - there was an Annual Licence fee - means an amount equal to \$50 multiplied by the number of plantable hectares, so there was an annual licence fee. Then over on 3153, 'the Licence Commencement Date means 24th March 1997. The Licence Expiry Date means 31st December 2048, and the Licence Term means the term commencing on the licence commencement date and expiring', so there is the period of the licence. And at 3154 (2) '*Grant of Licence*, the land owner hereby grants to the licensee (for the consideration disclosed in the original agreement) a licence to use the land for the purpose of carrying on the licensee's business on the land during the licence term - I've taken Your Honours to the definition - and the licensee accepts that grant. The licensee acknowledges that while the grant entitles the licensee to possession of the land, the grant does not confer on the licensee a legal right of exclusive possession (as that expression is discussed in para.5.008 et seq. of *Hinde, McMorland and Sim* Land Law 1978, or any estate or interest in the land (whether by way of lease, easement or otherwise). The land owner further grants to the licensee the authority to act as agent of the land owner to take all lawful steps to exclude trespassers from the land. The rights conferred on the licensee under this licence are subject to the rights conferred on the Grazier under the Agistment Contract. Notwithstanding that the land owner will (subject to clause 20) have property in the trees in the forest by virtue of its ownership - I'll slow down - Notwithstanding that the land owner will (subject to clause 20), have property in the trees' - and it's important to remember that the trees remained the property of Trinity - 'by virtue of its ownership of the land, the licensee shall have all rights to sell, lease or otherwise dispose of Biomass rights/pollution credits in respect of the forest'. '*Licence Fees* - the licensee shall pay the annual licence fee of \$50 in arrears on each anniversary of the licence commencement date'. And then two pages over we have now in clause 12, and I suspect this is the point that my learned friend Mr Gudsell was anticipating I would come to. In 12 '*Establishment and Maintenance of Forest*. The licensee will at its own expense in all matters, establish, manage and protect a Douglas Fir forest on the land in accordance with sound forestry principles, and generally act in such a manner as will produce a high yield mature Douglas Fir forest, having an average of 300 stems per hectare on each of the plantable hectares by the licence expiry date. In particular, but without limiting the generality, the licensee shall ensure that the forest which it establishes on the land is protected from fire', etc. And then over the page under 17 '*Use of land*. The licensee must not, without prior written consent

of the land owner, use all or any part of the land except for the purposes of establishing and maintaining thereon a Douglas Fir forest and generally carrying out its forestry business on the land. The licensee shall be at liberty to construct, etc, and 18 '*Other restrictions on use*', and then over the page at 21, '*Entitlement to stumpage proceeds*'. During the tender period the licensee will arrange the sale of the standing trees and naturally fallen timber and such sale shall be conducted by way of public tender', and then the proceeds are disbursed as set out in this clause by the land owner as follows. 'First' in payment of GST; secondly, all costs; thirdly, in payment of the insurer of the promissory note; fourthly, in payment to the land owner of the promissory note; and fifthly, in payment of the balance of the licensee'. So that's where they get the proceeds of the net stumpage, if any. And 22 is important. '*Original Agreement*'. The licensee shall duly and punctually comply with and observe all the obligations and provisions to be complied with or observed by it under the original agreement as though this licence and the original agreement were one document'.

Tipping J Are you contending Mr White that this licence was so personal to the licensee that it couldn't use agents to conduct its business and go on the land, as if they were it?

White No Your Honour, what we contend is what Justice Venning found and summarised in para.28 of our submissions, which is that the arrangements imposed contractual obligations on the licensee to establish, manage and harvest the forest, which they had to do through Pine Plan, while Trinity retained ownership, that they had access to the land for that purpose, and that purpose is to discharge the contractual obligations, and that entitled them, well the licence entitled them to receive the net

Tipping J You mean they didn't need a licence because they already had the obligation?

White Precisely.

Tipping J Is that the point?

White That's exactly the point. It's not a right, they had an obligation. What the licence conferred was an obligation to plant, look after and harvest the forest.

Tipping J So looking at this from ordinary contractual interpretation principles

White Yes.

Tipping J Your argument is that as there was no commercial purpose in giving them a right because they already had the obligation, then what do we

- do to the purported giving of the right - simply treat it as not being there?
- White Well it was ancillary, or it was an entitlement
- Tipping J Well somehow or other you've got to get rid of haven't you, something that prima facie gives a right to occupy land, even though they may have already have been obliged to do it?
- White Well when Your Honour puts it like that of course, it doesn't make sense does it? The principal point is that they were under an obligation, not a right, to use the land for the forest. They had to do it. It was a contractual obligation.
- Elias CJ But does that exclude there being a correlative right?
- White They were entitled to use the land. They had to. It's like any contractor. Take a contractor
- Elias CJ But they've got an implied licence
- White Yes, well that's
- Elias CJ So what's so wrong with making it explicit?
- White Nothing, but you wouldn't pay \$2 million for it.
- Elias CJ Well maybe not
- Gault Isn't the point not so much whether they had a licence, because one would have thought plainly they did, isn't the question what under the contract was the payment for?
- White Yes, yes, exactly Your Honour.
- Elias CJ Which is a different point
- White You were
- Elias CJ Than the one you seem to be making.
- White No Your Honour, because you have to recognise first that the principal obligations under the contract were not the licence just to go on to the land and do whatever you wanted to. The principal obligation under the contract was to establish the forest.
- Tipping J I could understand an argument that this was colourable from the tax avoidance point of view, but to say that this wasn't in contractual terms 'a right to occupy land' – leave aside for the moment what's a proper payment for that – because that doesn't come into it, does it, at

- the stage of whether it's a right to occupy land. It may be colourable but
- White Well it depends what the payment was for Your Honour. You see they have already agreed to pay an annual licence fee
- McGrath J The payment was for the grant of the licence wasn't it?
- White The \$2 million dollars?
- McGrath J Yes, wasn't that for the grant of the licence?
- Tipping J Sort of key money in advance, or I think that's how the other side put it.
- White Well that's how they see it, yes.
- Anderson J It's not analogous to key money, because key money gives you a right to do something
- White Yes.
- Anderson J To enjoy, but with here the entry onto the land was so indivisibly implied from the obligation, that the additional documentation could have done nothing more than define the scope of the necessarily implied performance.
- White That's exactly right Your Honour, that's the point.
- Anderson J I mean one can't say come and paint my house but you've got to buy a separate licence from me to fulfil your obligation to come onto my land.
- White Yes that's exactly right. That's our argument.
- Elias CJ But that's the payment point and that's perhaps very potent in terms of avoidance, but why are you not within the Schedule – Schedule 17?
- White Because the Court has to be satisfied that the payment is in respect of the right to use the land. That payment, that is \$2 million dollars per hectare payable in 2048, is for the right to use the land, and we say no, there's an
- Elias CJ I'd like to go back to the statutory provision, sorry, as you say this, because the penny is only just dropping.
- White Yes certainly, it's at tab 6 Your Honour. 5 and 6.

Tipping J There's a difference between what comes within the definition of depreciable intangible property and whether a payment was in respect of that property. I think that's

Elias CJ Yes, yes.

Gault J That seems to me that that's not the argument whether or not there was a licence to use land. The argument is whether that which is said to have been paid was for that licence, for that right. That seems to me to be the key issue.

Tipping J What's the head depreciation section? You were taking us through it before Mr White?

White Yes, tab 4

Tipping J Tab 4 is the head depreciation?

White Yes it's always a chicken and egg situation Your Honours which end to start, but EG1 under tab 4.

Tipping J On account of the depreciation for any depreciable property, yes. But you can only depreciate something on account of its true worth, and if the payment was for something else in substance, then the right has a nil value as a right and therefore is maybe depreciable but you won't actually get anywhere. That I think is what it was a payment for must lead you to. If it's a right it has a nil value, because nothing was actually paid for that right. Is that another way of putting it?

White That's a more felicitous way perhaps of putting

Elias CJ I had understood your argument to be relating to whether it was a right in respect of land, but your argument is really that there's no deduction on account of depreciation for depreciable property.

White Yes Your Honour that's the argument. Perhaps we haven't put it as clearly as it ought to have been put but

Elias CJ No I'm sorry I'm getting confused. Confusing myself I think.

White It has to be

Tipping J I think with respect Mr White you've slid slightly. I think your primary point was that this wasn't a right to occupy land at all. Faced with the proposition that in contractual terms it looks like one, you're saying well the payment didn't relate to it.

White Well we have always focused on the payment, and our 2.2 says that, so that the premium was the cost of that asset. We have always said that.

Tipping J Yes well maybe the analysis is now coming sharper as we go along. Perhaps that's a fairer way of putting it.

White I acknowledge that Your Honour.

McGrath J Isn't it against you Mr White at page 2978 that the agreement is expressed to be in consideration for the vendor agreeing to grant the purchaser a licence to use the property.

White I'm sorry Your Honour, I had put the book away.

McGrath J Yes.

White Read in isolation, yes Your Honour, but when adopts a commercial sense approach to the contractual documents, no.

Tipping J There's no sham arguments attaching to this aspect of the case is there?

White No Your Honour.

Tipping J No.

Elias CJ Well it sounds very much like you're saying you interpret contractual documents with a weather eye out for sham.

White No, no

Elias CJ Well if you're saying that commercial sense requires us to go as far as saying there was no commercial purpose, therefore interpret it in a different way

Tipping J What the parties have actually subscribed to is not the truth on this argument.

White It's like the labelling argument. Mislabelling is not a sham. If your document is a lease and not a licence, or neither, *Fatac* makes it clear that what you've called it is wrong, and

Tipping J You're not bound or no party is bound literally by what they've called it

White Yes, yes, you see they

Tipping J But here you're saying that the payment was for something other than the right in terms granted.

White Yes. When you read the whole document and the later one, and you realise in fact what all this does is impose the obligation. What this

so-called licence is, is really a contract requiring Southern Lakes to arrange through Pine Plan for the planting, caring and harvesting of the forest for Trinity.

Tipping J I could understand an argument that in substance because of that point this is not a right to use land at all, and therefore it's mislabelled. Is that another part of your argument?

White Yes it is, yes.

Tipping J That in substance because all this was going to be done by Pine Plan, and Pine Plan was the person that was going to go in and do the actual donkey work and use the land in that sense, this is just a dressed up right, where in substance it can only logically and commercially be for the end product.

White Yes, exactly.

Tipping J Yes.

McGrath J But you are really saying in 4 'truly understood the agreement is not what it seems to be'.

White Yes we are and Your Honour Justice McGrath has picked up the point that I wanted to acknowledge that the way Your Honour is putting it to me is moving possibly away from – it is a continuum is there when you're interpreting a contract you can apply commercial sense, but at some point you either merge into sham or in this case we would say in substance tax avoidance, and where having succeeded before Justice Venning on this point, because all these points that we are raising are highly relevant to tax avoidance and if we win on tax avoidance we don't need to do this

Tipping J But sequentially though one has to go through it doesn't one?

White Yes, exactly.

Tipping J Well you can't just sort of leap to tax avoidance?

White No that's exactly right Your Honour and we don't want to leap there without recognising that there is as Justice Venning found a real argument in favour of the Commissioner on this point, and that's

McGrath J I think we understand the argument, yes.

White Yes, yes.

Tipping J Yes, I fully understand the argument, it's just quite an interesting tricky point.

White Yes, it is, exactly. We've recorded our position in relation to Justice Gault's question on Pine Plan, and *Wattie*. We actually say *Wattie* wasn't really dealing with this issue at all and that there are some dicta in *Wattie* that help us, but I think Your Honours don't require me to pursue that particular argument anymore. So I now turn for a similar reason because it's a pre-cursor to tax avoidance to sham, and there's also a short argument on sham under tab 3 of our slim volume. And I want to be realistic on this matter, particularly in view of my understanding of His Honour Justice Tipping's questions or perhaps the lack of questioning of my friend Mr Stewart on this.

Tipping J It is always rather ominous if your opponents not.

White But I want to explain why we are pursuing it and why it's not a waste of time if I can put it colloquially. And the first point of course is that the Court of Appeal decided against us on this by a narrow margin, so the Court of Appeal didn't see it as totally against us. Secondly, of course the background, as I've said before, is equally relevant to tax avoidance. The difference between sham and tax avoidance of course is that sham does require us to establish the common intention which must be subjective and we accept that, and of course with that difficulty we submit doesn't arise in tax avoidance where the test is objective. And we are only looking at the two LAQCs – Bristol, which is Mr Bradbury's one and Redcliffe, Dr Muir's one. So we have distinguished between those two – Bradbury & Muir partners – on the one hand and the other investors on the other hand, and whereas for the others it will be a matter of deciding in the tax avoidance context what the objective purpose of the arrangement was in relation to the whole thing, including the insurance. We didn't want to get to the position where in drawing attention to the evidence relating to tax avoidance and insurance, it appears as we will submit that Dr Muir and Mr Bradbury had much greater knowledge and actually do meet the subjective test. And the final reason for doing it is that the approach of the Courts to questions of sham and tax avoidance, putting aside for one moment the difference of subjective or objective is similar. I'm not saying it's the same but it's similar. And I wanted to start with a reference to the judgment of the Court of Appeal in *Buckley & Young* which Your Honours will find in our bundle of additional authorities, volume 1 at tab 2. And this is a judgment of the Court of Appeal comprising Justices Woodhouse, Richardson and Somers and the judgment of the Court was delivered by Justice Richardson, and we would submit this is a very helpful indication of the different approaches of the Court to these issues as providing a framework for where I'm going to go. And at page 489 at line 30 His Honour says 'the first step in deciding the character of the payments and benefits is to determine the true nature of the legal arrangements pursuant to which the payments were made and the benefits provided'. And then he deals with that case. 'Extensive evidence was called on those matters' – line 40 – 'but it is well established that the true nature of a transaction must be ascertained by

reference to the legal arrangements actually entered into and carried out'. And reference is there made to the *Duke of Westminster*. And then over the page at page 490 at about line 5 His Honour continued. 'While the nomenclature used by the parties is not decisive, it is the legal rights and duties created by the transaction into which the parties entered and as ascertained by ordinary legal principles, taking into account surrounding circumstances, that must be determined. Thus while it is legitimate to take into account surrounding circumstances and to refuse to be blinded by terms employed in documents, the documents themselves may be brushed aside only if, and to the extent that they are shams, in the sense of not being bone fide in inception or of not having been acted upon, and are only used in whole or in part as a cloak to conceal a different transaction, or if required by a provision such as s 99 of the Income Tax Act 1976.

Tipping J That's quite a cryptic, with respect, definition of sham isn't it Mr White?

White Yes Your Honour. I'm using it here just to provide the framework, but moving away from what we were looking at before, the contractual interpretation that you do do more than that.

Tipping J Right.

White And the point that we'll come back to though is the very important final words that Justice Richardson in passages of this sort which appear in a whole line of cases, always put sham and tax avoidance together as being exceptions to the position that's adopted in relation to the ordinary interpretation of the documents. And then over on the next page 491, line 4 – 'analysis of the documentation may not determine the true character of payments made. Indeed the contract may be silent or equivocal as to the quality which ought to be attributed to the payment in question. In that situation evidence of surrounding circumstances may be of particular significance in determining what the contractual expenditure is calculated to effect from a practical and business point of view', and then he refers to the well-known case of *Hallstroms*. 'And in other cases the essential genuineness of the documentation of the arrangements may be challenged. The Court must then determine whether the substance of the transaction as reflected in the documentation is the true legal arrangement between the parties, or whether the documentation is used as a cloak intended by them to conceal, in whole or in part, the true arrangement. In that situation the Court may take into account all evidence which bears on that question and is not limited to consideration of evidence admissible in the ordinary course of construction of documents. Finally, in some cases the parties may have departed from the documents in which event questions of a new agreement or estoppel or sham may arise'.

Elias CJ Or sham in operation.

White I'm sorry Your Honour, or sham in operation.

Elias CJ That's interesting, yes.

White Yes.

Tipping J That's when you do something different rather than constructed to mislead.

White Yes, yes. There are a number of cases subsequent to that one to which reference will be made later where His Honour says very much the same thing. The Court has said the different approaches that should be adopted to contractual interpretation - on the one hand sham, avoidance on the other.

Tipping J At the risk of being thought to be jumping a bit ahead Mr White, on this sham point, is it the Commissioner's stance that there really was no true risk covered?

White Yes it is.

Tipping J Right.

White There was no insurance.

Tipping J Well I don't want to say any more than I thought that's where you were going but you'll need to demonstrate how that comes about.

White I will, yes. Looking then at our notes again and in 2.1 – there are no concurrent findings of fact as to the absence of sham. In the separate insurance premium payment arrangements between Bristol in CSI and Redcliffe in CSI, and that's because Justice Venning did not consider these arrangements separately and I know Justice Tipping before you tell me I will need to address that issue, and the Court of Appeal held that he was wrong on that point but they also held by a narrow margin that there was no sham. And our submission is that the separate insurance arrangements between CSI on the one hand and Redcliffe and Bristol were shams. First of all because as the Court of Appeal correctly held in our submission, 'the policy in effect created separate insurance arrangements for each member'. And again if I can take Your Honours to Appendix C in our main submissions, para.106, because this was the material on which the Court of Appeal agreed with the Commissioner, and in para.106 on page 49 of Appendix C. And we submitted to the Court of Appeal that 'each member of the Joint Venture had an individual insurance contract with CSI and was individually liable to CSI for the insurance premium because in terms of the relevant contractual documents, the liability of each member of the Joint Venture was individual and several. And we in point 1 deal with the position of the LAQCs. Separate ones in point 2 – 'the eight

LAQCs, including Dr Muir's and Mr Bradbury's, were the parties to the Joint Venture Heads of Agreement', and that document we give the reference to. In the next point – the important one – 'Southern Lakes Forestry was agent for the Joint Venture parties. It was appointed as documentary representative and agent to enter into each of the Trinity documents'. And fourthly under that agency agreement, 'the liability of each joint venture party was several and not joint. The Management Committee and agent were required to ensure that this was to be expressly acknowledged by each third party dealing with the Joint Venture', and 'the insurance documentation was between CSI and Southern Lakes as primary insured with Trinity Foundation as secondary insured and no question as to the tax implications for the secondary insured arose because it did not pay any premiums'. So we then submitted in 107, 'consequently, in the cases involving Dr Muir's and Mr Bradbury's LAQCs, the primary parties to the insurance arrangements were their LAQCs and CSI, and the knowledge and intentions of Dr Muir and Mr Bradbury should have been imputed to their LAQCs on the basis of well established authority. And at 108, 'the evidence relating to the knowledge and intentions of Dr Muir, Mr Bradbury and CSI has already been established'.

Tipping J The difficulty I have with this Mr White is that it seems to me on a natural reading of the insurance document that the management company was the insurer in effect as trustee for the Joint Ventures individually underneath, and the joint and several governs the relationship between the Joint Venturers and their management company, not the relationship between them and the insurer. Now that's just put to you for rejoinder if you can.

White Well our answer to that Your Honour is really as is set out here, is that they were agent rather than trustee.

Tipping J Well they were agent but they held the cover, and that is the body with whom the insurer would deal if there was a loss, and they would then have to deal with the proceeds in accordance with the arrangements which were underneath them.

White But the only liability would be from the LAQCs, not the

Tipping J But I'm addressing solely this idea of six or eight or however many that is, separate insurance contracts which frankly I can't grasp from this set up.

White Well we have two responses. I understand Your Honour's point, and if Your Honour takes that point, we don't succeed on this argument for that reason, I accept that. But the Court of Appeal agreed with us that in effect there were separate contracts and we are dealing here with sham, and the difficulty Your Honour is that one has to put aside the form of the contractual arrangements here as in tax avoidance.

Tipping J But I can't see why the presence of one contract or several is the fulcrum between sham or no sham.

White Because in substance because the Southern Lakes Forestry was acting as a bare agent, that's all it was in substance, the contracts in effect were between CSI and each of the LAQCs separately.

Tipping J But why is that a step which leads to sham?

White Well it's the first step

Tipping J Yes.

White So that you then need to look as we submit at them separately, which enables us – as we have to get over that first step – so that we can invite the Court to look at the particular insurance arrangements between CSI and Bristol and Redcliffe.

Tipping J This is in order to get this separate treatment of sham in relation to some of the beneficiaries if you like of the policy and not others?

White Correct Your Honour. And we would submit that when you come to sham why not?

Tipping J Yes, I understand better the force of the point.

White Yes. So I'm on the first bullet point of 2.2 and I've just referred to the paragraphs in our submissions. There was a subsequent confirmatory letter which we referred to. That was referred to by Mr Stewart and I don't need to go there. And the next bullet point is the answer I've just given to Your Honour Justice Tipping. And then the next one is that as per *Snook* we submit the common subjective intentions of CSI and these LAQCs – just these ones – was to give the Commissioner the appearance of

Elias CJ Sorry, where are you now?

White I'm sorry, I'm in the slim green

Elias CJ Yes.

White Para.2.2

Elias CJ Yes, I'm sorry, yes thank you, I had something over the top of it.

White And I'm on the bottom bullet point which is dealing with *Snook*.

Elias CJ Yes.

White And I've just simply taken the language from *Snook* and applied it here, so that we say 'as per *Snook* the common subjective intentions of CSI and these LAQCs was to give the Commissioner, who's a third party, that's Lord Justice Diplock's words, the appearance of creating insurance rights and obligations when there were none'. And could I add in under that point a further one is that a contra patent which was the other case relied on by my learned friend Mr Stewart. Here the transactions were not intended to take effect and did not take effect between CSI and Bradbury and Muir.

Tipping J I would have thought they were intended to take effect but was that effect illusory?

White No they were not intended to take effect for this insurance, they were intended to give the impression that that's what had been done so that they could get the deductions.

Tipping J Or would it equally be a sham if they were intended to take effect between the parties but the parties knew that the effect was illusory and therefore misled the Commissioner in that sense?

White Well we'd have that too.

Elias CJ On this argument

White Yes Your Honour.

Elias CJ Is tax avoidance does it always entail sham?

White No.

Elias CJ When documents are used.

White No Your Honour.

Tipping J They would be if Mr Carruthers' submission of pretence were accepted.

Elias CJ Yes.

White Yes, yes. No we don't know. I am now going to move on over the page to looking at CSI's intentions which I'm happy to start on, but

Elias CJ No, we'll take the lunch adjournment now thank you Mr White.

Court Adjourned: 12:59pm
Court Resumed: 2:20pm

- Elias CJ Thank you. Yes Mr White.
- White If Your Honours please I was just turning to the top of page 2 of tab 3 of the small bundle for the Commissioner. Turning to deal with the evidence relating to the intentions of CSI, and we submit that the evidence established and the Courts below both held – and we give the references – that CSI and its Directors were effectively under the control of Dr Muir. So there were concurrent findings of fact to that effect, and that evidence if Your Honours needed it is summarised in the Commissioner’s main submissions, Appendix C, and by the Court of Appeal. So the consequence of that is that the parties therefore shared the same intentions. The views of the Directors of CSI, Messrs Mitchell and Jackson, according to the Ben Nevis CSI Ownership structure chart – although I note that Mr Stewart suggested that Mr Bailey was a Director, but it matters little because their views were irrelevant. They were mere cyphers and did what Dr Muir instructed. I note in passing Your Honours, because I’ve just referred to the Ben Nevis CSI ownership structure, that we’ve included at tab 6 our version of that structure with various additions in red. I’m not proposing to go through that in any way Your Honours but one of the difficulties with the Court being provided with charts of various sorts at this stage is that they’re not necessarily accepted by the Commissioner as being complete. The next point in our summary is that it was
- Elias CJ I’m sorry, are you talking about some of the charts that have been handed up during the course of argument here?
- White Well this one was you’ve been given a CSI ownership structure chart and in the Commissioner’s submission that was incomplete and we endeavoured to provide further material to the Court on that one.
- Elias CJ Oh yes I see, thank you.
- White In 2.4 we submit ‘it was established that the common intention of these parties was to give the appearance of creating insurance rights and obligations when there were none’, and I’ve already taken Your Honours to Appendix C in red, paras.92 and 93 this morning, and I obviously won’t read those again, but just continuing on noting that in para.94 there is summarised the lengths to which Bradbury & Muir went to avoid disclosing to the Commissioner and the Court the true nature of CSI. First of all concerned to keep the arrangements confidential. Incriminating documents were sent out of the jurisdiction A finding from Justice Venning on that. They were sent out. They weren’t produced during the Inland Revenue’s investigation, notwithstanding formal requests under s 17. Point 4 – ‘Dr Muir did not provide adequate responses as to the nature of CSI during his interview. The documents weren’t referred to or adequately referred to in the lists of documents Dr Muir and Mr Bradbury on behalf of their LAQCs, and a number of matters were

not referred to in their original briefs of evidence'. And these matters had to be covered in later evidence. But even after that Dr Muir was reluctant to acknowledge their significance and references are made to the evidence, and at the top of page 41, to an affidavit in opposition to the Commissioner's application for further and better discovery. And the Judge unfortunately held his evidence to be untrue. And we submit that the evidence establishing that CSI was not an insurer was overwhelming and meant that CSI was created as a device solely for the purpose of enabling Southern Lake Investors to have a policy and to pay or agree to pay premiums which could be claimed as deductions for tax purposes. And the sham nature was further compounded by the fact that CSI provided no insurance cover. And in para.96 we submitted 'the essential requirement for insurance is the transfer of risk', and I don't need to go through the statements there on that. Professor Doherty, an expert witness, called by the Commissioner gave unchallenged expert evidence to similar effect in paragraphs set out. In 98, 'the necessity for risk transfer was also confirmed by Mr Arpel', another expert for the Commissioner, and we've set out his evidence and note that he wasn't cross-examined on that point. 'The evidence adduced at the trial established however that there was no transfer of risk between Trinity and Southern Lakes on the one hand and CSI on the other. The absence of any transfer of risk meant that there was in fact no insurance', and we refer to the evidence. No transfer was intended by AMS and Dr Muir, and Mr Mitchell wrote to Dr Muir stating that there is no real risk in the whole thing. The letter of comfort from Trinity Foundation, the beneficial owner of the Trinity Foundation to CSI was intended to ensure that there was no transfer of risk to CSI', and we quote what the letter said. 'The provision of the letter of comfort was Dr Muir's idea. According to Dr Muir in his letter to the Insurance Supervisor of the BVI, the letter of comfort was intended to ensure that the latter company, CSI, will be able to meet its commitments as they fall due. But he acknowledged in cross-examination that his letter of 17th February 1997 accurately recorded the position and that the letter of comfort was intended to create legally binding obligations on the part of Trinity Foundation Charitable Trust, but he also suggested that the letter was ineffective and a nothing because there would never be a call under it. He considered that both of his view were correct, and that letters of comfort are often given to enable the person who holds them to be assured that the Directors will act in accordance with their legal obligation, and I suppose to that extent it does ensure a level of comfort to CSI. The Judge was not impressed. Mr Bradbury gave similarly conflicting evidence when he agreed that CSI was entitled to expect the Trinity Foundation Charitable Trust to act in accordance with the letter of comfort, but also described the letter as being a valueless piece of paper, because the trustees had no power to give the guarantee'. And we submitted that 'notwithstanding their views there is little doubt that its existence confirmed the absence of any intention on the part of Trinity and CSI to transfer any risk to CSI. And that was reinforced by the fact that the ultimate beneficiaries of both the

Trinity Foundation Charitable Trust and the Christian Services Trust were the same so that it was also unlikely that any obligation would be enforced in 2047. And Mr Arpel considered that the letter of comfort indicated an intention on the part of the parties not to transfer any risk. At no time was CSI in a financial position to accept or meet any risk because it had insufficient assets. If the stumpage in 50 years time is between \$787,000 and \$2.05, the amount of any claim to be met would be covered by the so-called further premiums payable by Trinity and Southern Lakes. If the stumpage in 50 years time is below that, Dr Muir's evidence was that Trinity would default and no premium would be paid with the result that CSI would be under no obligation to pay out. If the stumpage is below \$787, and, contrary to Dr Muir's evidence, Trinity were to pay its premium, CSI would only be able to meet the shortfall – it's the difference between the \$787,000 and the actual stumpage – if the letter of comfort from the Trinity Foundation Charitable Trust is enforceable. And there's law on that which suggested it might be, but if it is enforceable there was in fact no transfer of risk.

Tipping J A letter of comfort which expressly on its terms says that it's intended to have legal effect is really not a letter of comfort in any sense, it's a guarantee isn't it?

White Yes well one would have thought so.

Tipping J Yes.

White But both Dr Muir and Mr Bradbury thought it was a nothing or valueless.

Tipping J It's either a guarantee or an underwriting agreement or something like that.

White So that's what we say in 99.6 Your Honour, but alternatively if they were right and it's a nothing, a valueless piece of paper, in other words it's a sham, because that's what they were saying it was themselves, and therefore unenforceable, and Trinity were to sue CSI under the policy, CSI would pay out up to the premiums received and it would then default, and again there would be no transfer of risk – just the same money changing hands. And then we set out the evidence of Professor Doherty, confirming that, and then *the intentions of the parties*, and on this paragraph 101, related to all of them and in that sense of course we aren't pursuing it against the others, but as far as Dr Muir and Mr Bradbury and their LAQCs are concerned, this is 101.2 'they and their creation, CSI, clearly had a common intention to create a sham. As parties they were individually and severally liable and contrary to the decision their common intention was sufficient for a sham in relation to their insurance arrangements in accordance with *Snook*.

Elias CJ Mr White you've taken us through most of the rest of this

White Yes I have, yes.

Elias CJ Do you need to

White No, I've just been trying to be careful to give Your Honours the bits that I hadn't taken Your Honours through, and I think the rest I've covered.

Elias CJ Yes, thank you.

White So that was 2.4. 2.5, 'there's no dispute of course that there were in existence documents called "insurance policies", which on their face met the legal definition of insurance as Justice Venning found – there's no argument about that. But as Justice Venning recognised absent sham' – those are his words in para.185 'the existence of such documents did not determine the issue of sham which under *Snook* depended on the common subjective intentions of the parties. While the insurance documents exist, the Ben Nevis suggestions that they were in full effect was countered', and I'm now taking Your Honours effectively to that evidence and also note that we have findings from the Court of Appeal that 'neither Mr Bradbury nor Dr Muir had a definitive commitment to pay their premiums in 2007 either'. The first bullet point Your Honours in 2.5, there's a typographical error at the end of the last line. It should be 'para.39 and Appendix C', not 'and Appendix C'. In 2.6 we move on to respond to some points in the memorandum of Ben Nevis filed. This was before my learned friend Mr Stewart's submissions, and I think I've probably covered this, that 'there is no dispute that CSI was a party to the insurance

Elias CJ This is a reference to the hand-up material is it?

White No, no, it's a memorandum that was filed Your Honour Chief Justice on the 29th May

Elias CJ Oh yes.

White When they raised the point that we couldn't raise sham because it wasn't in a cross-appeal, yes, so I'm just touching on those points. I think I can pass over the first one because I've covered that one completely. I did want to just very briefly deal with the matter in 2.7. It's true, the Commissioner did elect not to call Mr McCullough, who was the retired BVI Supervisor to give evidence at the trial. We submit 'no inference adverse to the Commissioner should be drawn from this election as none of the conditions for drawing an adverse inference is present here'. There's a decision of the Court of Appeal in *Ithaca (Custodians)* judgment delivered by Her Honour Justice Glazebrook, and we've given Your Honours the references. Three conditions, none of which we say are met here. First, 'there was no

expectation that Mr McCullough would be called by the Commissioner rather than by the plaintiffs. Secondly, there was no basis for concluding that his evidence would elucidate a particular matter; and thirdly, his absence was not unexplained. On the contrary, he was not called because his evidence was unnecessary. First, there was already more than enough evidence before the Court to establish the background to CSI and its precarious financial position. And this evidence emerged largely from the last minute production of relevant documents on discovery by Bradbury and Muir, and the cross-examination of Dr Muir during the trial. And secondly, the BVI documents produced at the last minute included documents relating to the BVI Insurance Supervisor and his concerns', and we've given you all the references. 'In view of the production of these documents, Mr McCullough's evidence was unnecessary, and anyway he was concerned about his BVI secrecy obligations'.

Gault J How last minute was the production of these documents?

White Ten days – two weeks, Your Honour.

Gault J Before the trial?

White Yes.

Gault J Thank you.

White I can be more precise. It was something like that. What happened Your Honour was that the Serious Fraud Office got them from the British Virgin Islands, and they were then referred to my learned friend Mr Stewart QC, who I understand that there were some 3,000 documents I think. He referred them to his clients who went through them and then it was appreciated that they needed to be discovered and they were then, without any list or anything, provided to the Commissioner.

Gault J Thank You.

White Yes, and there's a further point. 'Once the plaintiffs decided not to call their insurance witness (Mr Twaddle), who had provided a brief of evidence, the Commissioner decided it was unnecessary to call either Mr Faire, who had also provided a brief, or Mr McCullough, who had not. There was already ample evidence for the Commissioner as to the absence of a real insurer or any insurance from Professor Doherty and Messrs Arpel and Maguire, and Justice Venning covers that. And indeed the plaintiffs did not even require Mr Maguire to travel from London to New Zealand to read his brief or to be cross-examined. His evidence was taken without challenge'. The point very very briefly Your Honours is that as often happens at a trial the evidence relating to insurance was comprehensive from the

Commissioner's point of view, and as I say there, two witnesses in the end – one for the appellants now and one for the Commissioner. Mr Twaddle and Mr Faire weren't even called and Mr Maguire didn't come over, and there was in our submission overwhelming evidence for the Commissioner on this point, some of which wasn't even challenged. Finally 'Mr Bradbury's personal involvement and knowledge of the CSI insurance arrangements, including the precarious financial position of CSI, was the subject of concurrent findings in the Courts below', and we've set out there the paragraphs in the judgments of Justice Venning and the Court of Appeal which relate to Mr Bradbury. I don't propose to take Your Honours to them, but they are all there. 'These findings were amply supported by the evidence which established that Mr Bradbury was aware of the CSI arrangements and involved in negotiating the securities with CSI'. He was interviewed by the IRD under s 19, and there's the reference to the documents there. Reference to his brief of evidence where he's involved, and also to the cross-examination and 'his involvement and knowledge progressed during the cross-examination from very little – very little after the first two transactions; a reasonable amount about the structure; familiarity with most of it, to knowledge of the third evolution of the introduction fee structure – what Parentis was going to do at about that time, and to knowledge about the tax havens used for the companies involved in the Parentis transaction. Through the Parentis transaction, his family trust received a loan of a significant proportion of the initial insurance premiums' – and the references to the judgments on that is set out. 'Mr Bradbury's evidence relating to the Parentis transaction was contained in his s 19 interview – his brief of evidence, and the cross-examination. He was personally involved in various aspects of the Parentis transaction. Northern Nominees gave a Power of Attorney to him. Northern Nominees indemnity was signed by him under the Power of Attorney. He corresponded on behalf of Bradbury and Muir' – the references are given. 'He wrote to Mr Peebles of Westpac about the calculation of the balance of the Parentis loan', and the references are given. 'In February/March 1997 his LAQC, Bristol, agreed to pay CSI the \$32,791 per hectare insurance premium in 2047 and claimed a deduction because of the number of hectares the company took, of over \$1 million dollars in respect of the premium for the 1997 income tax year'. And that's referred to in the cross-examination and summarised in the Commissioner's submissions in Appendix A. And of course as Appendix A shows Your Honours, all of the appellants similarly claimed significant deductions for that year in respect of the insurance premiums. And in the case of Mr Bradbury, the inference can be drawn one might have thought that he knew what was going on. Next 'he had no settled intention – definitive commitment – to pay that per hectare premium in 2047', and we've got Court of Appeal paragraphs, evidence summarised and a finding in the cross-examination. 'The inference can be drawn that Mr Bradbury was well aware of his partnership's involvement in the creation of CSI at that time', and the references are given. And there are findings in the Courts below and

in our submission Your Honours it's not sufficient for Mr Bradbury to point to denials when we have findings against him. Finally on this 'the Commissioner is not asserting a one-way sham. The Commissioner is asserting that there was a classic sham because there was a common intention between those particular parties there was no real insurance and no settled intention to pay the premiums in 2047'. And just for completeness, because there are a couple of points raised by Accent Management that in their memorandum we just note here that first of all the sham will exist regardless of whether the deduction is under DL1(3) or BB7. If it's a sham it's a sham for both purposes. And secondly of course under the contractual arrangements there was the agreement to pay. There's no dispute about that but again if the sham is there it will exist regardless of the contractual provision. So those are the Commissioner's submissions on sham Your Honours. On page 23 is set out the summary of our submissions on spreading, which my junior, Mr Coleman will present when I have completed the rest of these. So I now turn over to page 24 come to tax avoidance. I certainly don't need to read Your Honours para.47, because my learned friend Mr Gudsell has already read it on our behalf to you. But perhaps I could make the point at the outset here Your Honours that the suggestion by, or on behalf of Accent Management, I think in response to Your Honour Justice Anderson, that non-compliance with one or more of the Black Letter provisions means that there is no tax avoidance is clearly misconceived. In a case such as this that would mean that the incompetent tax-avoider would avoid penalties by failing to comply with the Black Letter law provisions, and one only needs to put it like that to see how erroneous it is. The Commissioner's position on tax avoidance is summarised in para.49, and in essence that is that

Elias CJ I'm sorry, can I just interrupt you? Is anyone else feeling hot in here? Madam Registrar can you see if something can be done, thank you?

White I was just in para.49 picking up what the Commissioner's primary submission is, and that is that as Your Honours will have noted from the Court of Appeal judgment, they felt that they could not do what we're inviting you to do because of previous authority – particularly at Privy Council – and that they left open for argument, presumably here, that the approach adopted by the President Justice Woodhouse in *Challenge*, which we say is the right one that should be followed and we've summarised that in para.49. The starting point will be the section, and I'm just trying to get there as quickly as possible – but we've set out in 49 the essential points which is first of all 'the general anti-avoidance provision is over-arching' – that is 49.1. 'Whether it will do in any particular case depends on whether the impugned arrangement had a more than merely incidental tax avoidance purpose or effect. That's to be determined objectively on the facts of the case'. One might add there Your Honours, and in light of the surrounding circumstances or factual matrix, whatever expression one wishes to use, and looking at the substance, and then

‘in the event that a more than merely incidental tax avoidance purpose or effect is found to exist, then you may move into reconstruction, and that the existence of a specific provision does not override or render nugatory the general one’. And we’ll come to the decision in *Peterson* in a moment, and we’ll respond to the approach of the appellants, which I’ll refer to as well. We note in passing in para.55 what’s been noted elsewhere which of course is that there’s no anti-avoidance provision in England which does have a very significant effect on the judgments of that jurisdiction, and I’ll come to that in a moment. Whereas of course in Australia, Canada, and Hong Kong there are provisions, and I’ll come to the comparative law later. But I really want to start with the statutory provisions, which are set out on our page 29, at para.57. And because so much is made of the scheme and purpose of the legislation and specific provisions, it is, we submit, relevant to note that these matters are actually addressed in the legislation and while for Parliament to say that the main purposes of the Act is to impose tax on income, may not take things very far, that is what they have said. It is to impose tax on income. And then they have principles of interpretation, and then the way the Act is organised, and under part (b), there are core provisions, and amongst the core provisions are the avoidance provisions. And then there are purposes to part B, which is set out on page 30 of our submissions. And I now come

Elias CJ Sorry, you say the core provisions? Oh they’re in part B, yes I see. We don’t have the index do we, in the materials that we’ve got?

White The index?

Elias CJ To the Act?

White No I don’t think so Your Honour.

Elias CJ No, that’s alright.

White You do have the provisions in the materials, but as they are conveniently all on one page, on page 31 of our submissions, it’s a fortunate coincidence.

Elias CJ Yes.

White So under ‘s.BG1 *Avoidance – Arrangement void* – a tax avoidance arrangement is void as against the Commissioner for income tax purposes. *Enforcement* – the Commissioner, in accordance with part G (avoidance and non-market transactions), may counteract a tax advantage obtained by a person from or under a tax avoidance arrangement’. Just pausing there Your Honours, without going any further right at the moment, but one might consider the words answer quite a lot of the questions that have been raised, ‘may and by a person from or under’. We then have to turn to OB1 for the three

critical definitions. 'Tax avoidance arrangement means an arrangement, whether entered into by the person affected by the arrangement or by another person'. And again some of those words might assist in answering the questions. 'That directly or indirectly (a) has tax avoidance as its purpose or effect'. So it's the purpose or effect of the arrangement. Or (b) 'has tax avoidance as one of its purposes or effects, whether or not any other purpose or effect is referable to ordinary business or family dealings, if the purpose or effect is not merely incidental'.

- Tipping J That's where the merely incidental comes from isn't it?
- White It is, yes, and that
- Tipping J And is the reference to ordinary business or family dealings also useful as a kind of comparator?
- White Yes, and 'not merely incidental' was added – it comes from Justice Woodhouse in *Elmiger* by the subsequent amendment, that's where it comes from.
- Tipping J Yes, I appreciate the merely incidental aspect, but what I'm also interested to know is whether the reference here in the statute to ordinary business or family dealings, has got some part to play in working out whether the arrangement in question is tax avoidance.
- White Well certainly it's an element, it's there in the statute Your Honour and whether any other purpose or effect is referable to ordinary business or family dealings, doesn't resolve the matter if the purpose, the tax avoidance one, is not merely incidental.
- Tipping J Yes I appreciate all that, but if one came to the view that the purpose or effect overall had no reference to ordinary business or family dealings, would that be a strong indicator of tax avoidance?
- White Yes, certainly Your Honour, yes. I'm sorry I didn't
- Tipping J I may have been a little elusive the first time around, but that is the essential point I'm looking at, because this is a phrase that derives from *Newton* doesn't it?
- White Yes it does. Well I think it was in the section before.
- Tipping J Was it?
- White Yes.
- Tipping J Right. Well wherever it came from I would have thought at least subject to further argument it was a key indicator of what the

legislature was looking at as being alright as opposed to what's not alright.

White Yes, certainly Your Honour, yes, it must be right. And the concept of 'ordinary' is there in the section. That's the point isn't it that Your Honour is raising?

Tipping J Yes.

White Yes. So that's tax avoidance arrangement. 'Arrangement means an agreement, contract, plan, or understanding, whether enforceable or unenforceable, including all steps and transactions by which it is carried into effect'. It's obviously a broad definition. It is not limited to a particular contract or a particular transaction, or a particular component part. It is an arrangement, the whole thing, and it means an agreement, contract, plan, or understanding, and obviously a combination of those. It doesn't even have to be enforceable and it includes all the steps and transactions by which it is carried into effect. And tax avoidance – well perhaps I'll stay with arrangement for just one moment more. And looking at what's in the arrangement, that must include the circumstances surrounding the agreement, contract, plan, or understanding – all the steps

Elias CJ It may be another answer to the suggestion that if you claim a deduction that complies with one provision, you're somehow out of the tax avoidance regime altogether.

White Well I think there are quite a number of answers to that proposition Your Honour.

Elias CJ Yes, yes.

White I mean there is that one, but I've always had great difficulty in understanding how compliance with the Black Letter law provision – the sort of threshold argument

Elias CJ Yes.

White Can possibly get off the ground, because if it were right, every time you'd just come along and say we've complied, goodbye. Because you must have complied with the scheme and purpose of that particular provision to have got the deduction, or to have complied.

Tipping J Well if you hadn't complied you'd get knocked out before you get to avoidance.

White Yes, yes, and in which case you don't need – in other words the anti-avoidance provision has no room.

- McGrath J Nevertheless you will be coming to deal with what Lord Hoffmann's done with the New Zealand legislation in that respect at some stage no doubt.
- Tipping J The long stop.
- McGrath J It does seem to me that Mr Carruthers was making this point yesterday. that I'm not sure it's really quite so much Justice Richardson in *Challenge* as the English Judges in the Privy Council.
- White And is Your Honour referring, well there's the long stop point and also the difference between juristic and commercial, the distinction that he's drawn.
- McGrath J Well I think it comes through the English cases and perhaps Lord Millett in the minority speeches in *Peterson*, it comes through the idea that it's the scheme and purpose of the Black Letter provision that is the key factor, and somehow the application to the BG1s and associated provisions is written down. There is no room for matters I was discussing with Mr Carruthers yesterday.
- White Certainly we will be coming
- McGrath J And I think when he suggested that Lord Hoffmann subscribes to that, I think there was a point there that has to be addressed.
- White Whether it's Lord Hoffmann or Lord Millett in *Peterson*, we will certainly be addressing that. No question about that, but I don't want to leave that point because I think the principal answer is the one that I've just been giving to the Chief Justice which is there is no room. How can there be? If compliance with the Black Letter law, and by that I mean the scheme and purpose of a specific provision
- McGrath J Yes.
- White If you're going to have the scheme and purpose, whatever that might mean, then that must apply to your entitlement to the deduction in the first place, so you must comply not only with the strict wording of the section – that's not going to be enough – you've got to comply in accordance with ordinary principles of statutory interpretation with the wording, the context, and the purpose of the Black Letter
- McGrath J As the interpretation provision now directs us?
- White Exactly.
- McGrath J Yes.

- White So every time you've complied, there is no room at all for BG1 on their argument, and if you don't comply with the specific provision, you don't need BG1 either because it won't be deductible.
- McGrath J Yes I understand that, and I think that when I suggest it I had difficulty with the 'no room' concept. I probably had something of the similar point in mind.
- White Yes.
- McGrath J But if you're going to address what Lord Millett and Lord Hoffmann have done, that's fine, because I haven't quite grasped myself what they, or arguably Justice Richardson in *Challenge* and outside writings perhaps have said in this regard, and that's something I think we have to come to grips with, particularly if we're to give consideration to your submission that we should go back to Justice Woodhouse in *Challenge* for the rule.
- White Yes, yes. Well we endeavour to address that point in the written submissions and I will certainly be elaborating on it Your Honour, but at the end of the day it may be that it is just simply what I have just said that if you read the statutory provisions and think about the scheme and purpose of the whole Act and the role of BG1, the answer is the English Law Lords are wrong.
- Tipping J Well what you're really saying I suspect Mr White is that it's a logical impossibility.
- White Well yes exactly. I don't understand it myself, and the submission is how can it possibly work, doesn't work when you think about it. I think that was flowing out of the definition of 'arrangement', and if we now look at the definition of tax avoidance, it's interesting that it in contrast to the other two starts 'includes directly or indirectly altering the incidence of any income tax; directly or indirectly relieving a person from liability to pay income tax or from a potential or prospective liability to future income tax; directly or indirectly avoiding, postponing, or reducing any liability to income tax or any potential or prospective liability to future income tax'. And those are very broad definitions, all of them. And as I said before, but I just very briefly summarise. Our position is that BG1 is the over-arching core provision; it's not subject to any other provisions, and it wouldn't make sense if it was; and the appellants are wrong.
- Gault J I have a bit of difficulty with the use of term 'over-arching'
- White Right, yes.
- Gault J If that is to suggest that it is in some way superior I don't see a justification for it, but if it is simply to suggest that it has to be read in

light of the other provisions of the Act but given some effect, I understand that.

White Yes, whether it's a stage or a description further Your Honour is this that compliance with another provision does not preclude the operation of BG1.

Gault J Well in other words they must be read together.

White Yes.

Gault J In some way.

White But merely because you have got yourself within some black letter provision does not mean that

Gault J Yes well I understand that.

White So the next point is that the identification of the arrangement is crucial, not just its component parts

Elias CJ Where are you now?

White I'm not Your Honour, I'm just

Elias CJ Oh, yes, you're there.

White I'm not reading, I'm now sort of summarising our position in relation to the statutory provisions. Identification of the arrangement is crucial. Not just its component parts. One has to look at the surrounding circumstances, and the substance of what is involved. The identification of the purpose or effect of the arrangement is then crucial. And neither of those matters have been addressed by the appellants.

Tipping J I don't want anything very long on purpose or effect Mr White, but it's always struck me that if your purpose is to effect, oh sorry that's too cute, but if your purpose is to bring about tax avoidance, but you don't create that effect, the Commissioner won't be interested, so really the concentration would be on effect wouldn't it, or does purpose have some supplementary role to play that's useful?

White I think it's *Newton*, and the cases have said what's the difference? When you see what the effect is, that must have been the purpose objectively.

Tipping J But if you have a purpose which is not fulfilled, then it won't matter will it?

White If there's no tax avoidance, no we wouldn't be here.

Tipping J No, so really it comes down to effect.

White Yes.

Tipping J Because there's a lot of talk in the cases focusing on purpose, and some of the discussions I've read seem to leave out the concept of effect, but I for myself subject to further argument, would see the effect as being the key concept rather than purpose. Because if you have a mis-firing purpose, it's not going to worry anyone.

White No. Well I think something much to effect is said in either *Newton* or the subsequent Privy Council decision, *Ashton*, I think it was, where it said very much what Your Honour's just said, which is that the effect

Tipping J Objectively if you're looking at effect

White Once you've worked out that there was a tax avoidance effect, that was the purpose, it must be.

Tipping J Yes.

White Yes.

Tipping J Well it doesn't matter what the purpose was, if that was the effect.

White That's right, and which of course is why it's all objective and why the effect of the arrangement supports that. And that's why of course, once that analysis is done, very large parts of the appellants' submissions trying to bring in their subjective intentions or purposes, simply disappear as irrelevant to this analysis.

Tipping J Is there by the way any definition of tax advantage?

White No Your Honour.

Tipping J No. There is a quasi-definition in the reconstruction provisions, but there is no express definition.

White Not in this context.

Tipping J No.

White And so just dealing then with the next one, which is the reconstruction

Elias CJ I suppose the tax avoidance definition provides something of an indication that if you alter to your benefit you've had a tax benefit.

Tipping J I think tax advantage is quite simple. All I wanted was a factual assurance that there wasn't a specific definition.

White No, no there's not.

Tipping J So you just give it its ordinary natural meaning?

White Yes, but I do agree with the Chief Justice that looking at the inclusive definition of tax avoidance, that just gives you a bit of an idea

Elias CJ Well that gets you postponement and things like that, so it's important, yes.

White Yes, it does – postponement and future. So then turning over to GB1. Where an arrangement is void in accordance with s BG1, the amounts of gross income allowable, sorry, I'll start again.

McGrath J That's not in your text of your submission is it?

White Yes it is, on the next page, page 32.

McGrath J Yes, sorry.

Tipping J That's GB?

White This is GB1, page 32. 'Where an arrangement is void in accordance with s BG1, the amounts of gross income, allowable deductions, and available net losses included in calculating the taxable income of any person affected by that arrangement, may be adjusted by the Commissioner in the manner the Commissioner thinks appropriate, so as to counteract any tax advantage obtained by that person from or under that arrangement' – there are those words again – 'and without limiting the generality of this subsection, the Commissioner may again have regard to such amounts of gross income, allowable deductions, and available net losses as, in the Commissioner's opinion, that person would have, or might be expected to have, or would in all likelihood have had if that arrangement had not been made or entered into, or (b) such amount of gross income and allowable deductions as, in the Commissioner's opinion, that person would have had if that person had been allowed the benefit of all amounts' etc. And I'll be coming to reconstruction later, but just to answer Justice McGrath's question that provision contains a power, says May, not a duty and

McGrath J And what do you say to the cases that Mr Gudsell pointed to?

White In s 99(3) the word was 'shall', it's now 'may'. But even then those cases said that the Commissioner was expected I think to adjust. We're not arguing that he's not expected to adjust. In our case here, we submit in our submissions, and I'll be expanding on this as far as reconstruction that we don't need to go into this section at all because once the Trinity scheme is void the deductions go.

Tipping J But would you accept the general proposition that this may be one of those cases where there's a duty to exercise the power?

White No Your Honour.

Tipping J You wouldn't?

White In this case?

Tipping J No, no.

White Oh in some cases

Tipping J In some cases there may be a duty to exercise the power if it would be unfair not to.

White Oh I'm sorry I misunderstood.

Tipping J I didn't mean in this case, I just mean generally. You can't just say it says 'may' and he can just make up his mind willy nilly.

White No, I certainly accept in administrative law terms that there may be circumstances when the Commissioner is under an obligation. For instance if the taxpayer asks and provides evidence in support, and just so Your Honours have been interested in this reconstruction issue, our position is one here in this case if the assessments are upheld as being correct and tax avoidance is the basis for that, then the deductions have gone because the arrangement was void as against the Commissioner. And you don't need to go any further than that. This section doesn't bite as it were because it's unnecessary. That might have been different if in challenging the assessments, the taxpayers had said you are wrong Mr Commissioner, and you ought to have done this. Justice Anderson recognised earlier in the week, and there's authority which I will come to that the onus is on the taxpayer. If the taxpayer wants the Commissioner to do something different to the assessment, he has to show the assessment is wrong and if so by how much. It's not for the Commissioner to go off and say well did you think of this, that, or the other thing. I mean that would be completely impractical, and that didn't happen here. The taxpayers do that.

Tipping J So if the taxpayer wants a reconstruction more favourable if you like

White Yes.

Tipping J To the taxpayer, than the Commissioner appears to be doing at the moment, it's for the taxpayer to put up the basis for that?

White Yes, exactly Your Honour.

McGrath J That's when the 'may' might become 'shall'.

White Exactly Your Honour, yes. That's not this case, and this is why the onus is so important, and the framing of the onus. It's all in *Buckley & Young*. Justice Richardson's set it all out very carefully, but why don't I take Your Honours to it now seeing that we've raised it. It's in the Commissioner's bundle, tab 2. I've already read part of *Buckley & Young*, but if I can invite Your Honours to look at the Commissioner's bundle no. 1, tab 2, judgment of the Court of Appeal in *Buckley & Young*, and if Your Honours turn to page 498, line 16. 'The more difficult class of case is where each advantage is intangible and does not lend itself to measurement

McGrath J Sorry Mr White did you say volume 2?

White No, 1, sorry Your Honour it's tab 2.

McGrath J Right, and page?

White It's the yellow covered Commissioner's bundle, volume 1, tab 2, page 498.

McGrath J Thank you.

White And I was at line 16. 'The more difficult class of case is where each advantage is intangible and does not lend itself to measurement against any conventional yardstick. It then becomes a matter of deciding whether there is any and if so sufficient evidence to justify a conclusion that some particular part of the total expenditure is actually attributable to a deductible item, or at the least that a minimum fractional share of the total expenditure can be recognised as so attributable. If there is insufficient evidence to arrive at a conclusion, any answer must be mere speculation and the taxpayer will have failed, to discharge the onus of proof upon him', and he then gives the previous provision, and I'll be giving Your Honours what's in the submissions the current provision under the Tax Administration Act. Where the assessment is made in terms of s 19 he is liable to pay the tax assessed by the Commissioner "save in so far as he establishes on objection that the assessment is excessive". It was held in *Commissioner of Taxes v McCoard* that the effect of that onus is to require the taxpayer to show not only that the assessment is wrong but also by how much it is wrong. This burden applies equally to an amended assessment as it does to the original assessment. It follows that in apportionment cases the taxpayer has the burden of establishing the extent to which the amount claimed to be deductible satisfies s 111. As It was put by Justice Moller in *Lancaster*, the onus of proof on the taxpayer in objection proceedings requires that the final question must always be "on all the evidence, has the taxpayer discharged the onus of demonstrating that the Commissioner's

assessment was wrong, and if so why it was wrong, and how far it was wrong”? The reason for this statutory onus is obvious enough. The Commissioner could not sensibly be expected to bear the onus of proof of matters which originate with the taxpayer and which usually are peculiarly within his knowledge and power. Thus, there is sound, if not compelling evidence to support his calculation of his assessable income. If he fails or is unable to provide sufficient evidence to discharge that onus, his objection to the Commissioner’s assessment will fail’. Then Your Honours, just returning to our submissions, page 32, and again on the basis that Your Honours have read them, I’ll just highlight a few points as I go through. Having set out the current provisions we then go backwards in time to give Your Honours the legislative history leading to those, and they are all set out. We’ve referred in some detail to the judgment of the Privy Council in *Newton*. That’s in para.64, I’ve already summarised what was said there, and although that was an appeal from Australia, it was subsequently said it applied equally of course to New Zealand in *Ashton* which is referred to in the footnotes. We refer then to the predication test in para.65. In 66 we refer to some judicial criticism of the breadth of what was previously s 108 and *Gerard’s* case, or *Mangin and Gerard*, in what President McCarthy said in *Gerard*. And then we refer also to *Elmiger* and the passage from Justice Woodhouse in that case, where he, as we note in para.68, applied the approach of *Newton*. And then we come to *the 1974 amendment*, which as we submit that Parliament indeed had been listening to the judicial criticisms and amended the section and we’ve set that out at the top of page 37, and that’s where ‘not being a merely incidental purpose’ was put in, and also the express power to reconstruct was added, and we note from Hansard and the reference to the Minister of Justice and Attorney General that indeed it was intended to legislate to implement the approach of Justice Woodhouse in *Elmiger*. And we then move on to *subsequent case law* which is set out there. We note in passing in para.78 a reference to a case called *Tayles*, where Justice Cooke, as he then was, talked about the size of the tax savings which he described as not spectacular, but still being important, and we note in that footnote on that page reference to the Chief Justice Sir Thomas Eichelbaum in *Hadlee*, where he also felt in that case the size of the tax benefits were relevant. Indeed I think he said that it would have been naive for the Commissioner or anyone else to have thought otherwise, and we submit that’s relevant here. We then come to *Challenge*, and we have set out at quite some considerable length the different approaches of first Justice Barker, and then the President, Justice Woodhouse, who dissented in the Court of Appeal, but his decision was ultimately vindicated by the privy Council on a 4 to 1 majority, and I would like to just highlight on page 42, para.85 what Justice Woodhouse said, because in a way it does encapsulate what we say is the appropriate approach to the interpretation of the provision. ‘Clearly enough para (b) 1992, is designed to catch an arrangement whenever it has a tax avoidance purpose (or effect), even if it has another and real purpose which is not tax avoidance. But the

bracketed words enable a “merely incidental” tax avoidance purpose to be disregarded. So the meaning of that qualifying phrase is all important. Does it have the rather exiguous meaning and effect of excusing only “the casual” or the minor, or the inconsequential tax avoidance purposes? If so many ordinary dealings would probably be caught by s 99 because inevitably the associated tax purpose could seem stronger than that. And the problem would be magnified if as well the assessment had to include estimates of the taxpayer’s motives. However, I do not think the phrase “merely incidental” does have such a limited effect, and in accordance with *Newton*, I am satisfied as well that the issue as to whether or not a tax saving purpose or effect is merely incidental to another purpose is something to be decided not subjectively in terms of motive but objectively by reference to the arrangement itself. As a matter of construction I think the phrase “merely incidental purpose or effect” in the context of s 99 points to something which is necessarily linked and without contrivance to some other purpose or effect so that it can be regarded as a natural concomitant. Many taxpayers when considering a course of action are likely to appreciate and welcome an opportunity provided by the Act for achieving some tax benefit as an aspect of it. But this should not bring the transaction or transactions almost automatically within the avoidance provisions of s 99. By itself conscious recognition and acceptance that a commercial transaction will be accompanied by a degree of tax relief is not the issue. Already I have mentioned the example put forward in this case of goods manufactured in New Zealand and sold overseas in the knowledge that surrounding costs were likely to be assisted by a tax saving which would not be applicable in the case of internal sales. But it could hardly be said in such a case that the trading had been pursued to gain the tax advantage as an end in itself. Conventional exporters do not trade to save tax but to achieve profits. To put the point in another way, among the cost factors to be taken into account, one of them, to a greater or lesser extent, would sensibly and properly be the tax factor. So regarded, the tax saving purpose intended as a support to the operation could in the ordinary course no more be labelled an end in itself than the purpose of avoiding or minimising any other cost likely to affect the operation. In other words in the usual case the associated tax purpose ought not to be and in my opinion would not be regarded as more than a “merely incidental purpose”. In the end, like so much else in the law, the breadth of the qualifying phrase in s 99(2)(b), and so the ambit of the section itself will be discovered as a matter of fact and degree on a case by case basis’. And we note Your Honours in the next paragraph that indeed the suggestion that at the end of the day quite often it is all going to be essentially a question of fact. Applying those provisions to the facts of a particular case is not a new matter at all and we’ve provided – I won’t take Your Honours to it – in Appendix D, an extensive list of prior tax avoidance cases where that point is in fact made by distinguished Judges of the Courts – particularly the Court of Appeal, and indeed I will make this point, we note that at the end of that Schedule in Appendix D, by reference to

both *Peterson and BNZ Investments*, and this is on page 4 of our Schedule D, para.1.19 and 1.20, and *Peterson* – that’s a point that I’ll return to when I discuss *Peterson* in more detail Your Honours. I think Your Honours have already recognised this in fact, that at the end of the day there, the Privy Council was very much focused on how they saw the facts of the case and the so-called concessions by the Commissioner, and similarly in *BNZI*, where the Court made it clear that the – I’m sorry that’s on page 3 at para.1.14, where the then President said that ‘Justice McGechan had the advantage as trial Judge of assessing the witnesses and their evidence. Having carefully considered the evidence and counsel’s submissions, we are satisfied that there was ample evidence to support the Judge’s material findings of fact and we cannot possibly say that he was wrong in the factual conclusions’. And in the next paragraph again he went back to the facts, and of course in *BNZI* that related to factual findings about the nature and scope of the particular arrangements in that case.

Tipping J I’ve always thought Mr White that this is true, but you’ve always got to know what you’re looking for as a matter of law. It’s all very well to throw up your hands and say it all depends on the facts of individual cases, but surely you’ve got to have a clear articulation of what you’re looking for.

White I don’t disagree Your Honour.

Tipping J And what you’re effectively inviting us to do as I understand you are is building on what Mr Justice Woodhouse has said, the natural concomitant of an ordinary business or family dealing, if it’s a natural concomitant that you get a tax advantage, or tax benefit, that’s not avoidance.

White If it’s merely incidental?

Tipping J Yes, that’s how he has interpreted this very important concept of merely incidental.

White Exactly.

Tipping J But there must presumably be a reverse consequence of that, that if it is not a natural concomitant, or if it is not an ordinary business or family dealing, it will be avoidance.

White Yes, that’s right, rightly so - that’s what the section says.

Tipping J Or seems to say.

White Yes, or does say.

Tipping J Well this merely incidental of course is in that subsection which talks about one or more purposes – well when there’s more than one

purpose, so it's a little tangential but it seems but it seems to me to be a very clear indication of what Parliament saw as the fulcrum.

White Yes, we agree

Tipping J To use that word again.

White Yes, we agree, and I'm reminded by Your Honour putting it to me in that way that as always in the various cases, when it comes to going back to the statute it is best to stick with the words of the statute and certainly to be assisted by what the Courts have said about those meanings, but in the end it is the language of the statute that is paramount. But having done that there do need to be findings of fact made as to what the arrangement was

Tipping J Of course.

White And how you apply it to them.

Tipping J But you can't just – no I won't go through it.

White No, I'm not disagreeing with that.

Tipping J No.

White And then just continuing on in 87, and in terms of what the crucial factors are indicators the President said when construing s 99 and the qualifying implications of the reference to incidental purpose, I think the questions which arise need to be framed in terms of the degree of economic reality associated with a given transaction in contrast to artificiality or contrivance or what may be described as the extent to which it appears to involve exploitation of the statute while in direct pursuit of tax benefits. To put the matter in another way, there is all the difference in the world, I think, between the prudent attention on the one hand that can always be given sensibly and quite properly to the tax implications likely to arise from a course of action when deciding whether or not to pursue it and its pursuit on the other hand simply to achieve a manufactured tax advantage. Considerations which would enable an answer as to which side of the line to put a tax purpose in the case of grouped company incomes, as in the present case, would seem to include an assessment as to whether details of the balancing exercise as disclosed by the group accounts could fairly be accepted as a record of real and relevant achievements of what in practical terms was the real and relevant group'. And that's how those concepts of artificiality and pretence came in, and again in our Appendix E, we've included other cases along those lines. And then we note that the President rejected the submission that s 99 had no application because there had been compliance with other requirements of the Act, and we've set out in 89 his statutory interpretation approach which, unless Your Honours wish me to read

it out, take it as read. And then we highlight the consequences in para.90, which I think is what I've been submitting. And then we turn to the *judgment of Justice Richardson and the origins of the "scheme and purpose approach"*, and we've set those passages out there on page 46, and we note in passing in para.92 that His Honour had noted that the scheme and objectives of the income tax legislation are not ascertainable, and we would not disagree with the idea that it's somewhat fallacious to assume a coherent scheme in revenue legislation, and we've set out again his statements there. And then we comment on those in para.94, and I'm just moving on Your Honours, and unless Your Honours wish me to read these paragraphs out I assume that we've – oh in para.94 we note that there is nothing in the wording of 99 or the scheme and purpose to support the proposition that it's not the function of 99 to defeat provisions. There's nothing in the plain wording of 99 to suggest it applies to override some provisions and not others, and Black Letter provisions are not stated to be subject to 99. The purpose of interpretation of 99 inevitably leads to the conclusion that it can, where its pre-requisites are met, potentially override the others, and it should be interpreted widely in accordance with the judgments and Parliament's legislation. And we lead right through then to para.98, which is the point that I've made already to Your Honours that in line 4 or 5

McGrath J Just before you go past, that 94.1, where you're expressing doubt about, or criticism of Justice Richardson's proposition. He says it's not the function of s 99 to defeat other provisions of the Act or to achieve a result that is inconsistent with them. What do you think he was meaning by that? Does he really mean it's not to render them a dead letter? Is it harkening back to that notion, or is he saying something more subtle than that?

White I'm sorry Your Honour, I didn't ask my learned friend Mr Harley, who probably would have told you precisely what His Honour Justice Richardson meant, because he would have asked him, but the best I can do Your Honour is to say that when he says 'it's not the function of 99 to defeat other provisions of the Act or to achieve a result that is inconsistent with them'. We have difficulties in understanding what he does mean, but if he means by defeat, does he mean that having complied with another provision, you can still have a tax avoidance arrangement? But that doesn't defeat the other provision in the sense that you did comply with it first.

Tipping J I thought he was probably meaning that if you use a specific provision for a purpose that Parliament must undoubtedly have contemplated, you won't be charged with avoidance, because you won't be defeating it.

White But where does that get you Your Honour, because take this case, and we are now assuming

- Tipping J But if it's a normal natural use of the provision, but if it's a contrived and artificial use of the provision – I'm not saying this is the whole answer, but on its terms it must have been something like that he was meaning mustn't it?
- White One assumes so, yes, but it is difficult to reconcile because you get into this position that where we are at the moment as far as tax avoidance is concerned, Your Honours will have assumed or decided that the deductions were properly claimed under these specific provisions – not just technically, but properly, and yet if they were part of a tax avoidance arrangement, they will be void. So, I was asking does he mean that in that situation they will be void because of the application of BG1 99, but they will have still complied with the specific provisions, but it doesn't sit very comfortably because the finding of tax avoidance under BG1 – it may not have defeated the provisions of the Act, but it will certainly have defeated the deduction, or the ability to claim the deduction under the other provision.
- Elias CJ Well it's the finding though of tax avoidance that mustn't be so readily reached that it defeats the other provisions.
- White Yes, but how does that work? See the appellants say Your Honour – I mean this is the difference – the appellants say we have complied with BG1 for the licence premium. You've now held that we are entitled to our deduction, Black Letter, and we're entitled to our insurance premium deduction under DL1 or BB7, so we've complied.
- Elias CJ But you're entitled to look at the bigger arrangement.
- White Yes, exactly, that's what we say. So once you look at the bigger arrangement, and you decided that it is within BG1 – see their argument is threshold. They actually say once you've complied properly with the deductions you don't even go. They call it a threshold argument. Anyway, let's assume you disregard it, don't agree with them on that, and you then look at the whole arrangement and you decide yes it is a tax avoidance arrangement – the facts of this case meet the requirements of BG1, then notwithstanding the fact that they'll have already got the deductions, those deductions will be disallowed – the arrangements void and the deductions disallowed. Now,
- McGrath J And I
- White I'm sorry
- McGrath J And I was going to say I suppose the real problem it seems to me is reconciling what he says there, what he says earlier, and you've set this out at page 46. This is a clear view that s 99 is not subordinate to the other provisions.

White That's right, yes.

McGrath J It can't be because it would be a Dead Letter.

White Yes, that's right.

McGrath J But it almost seems as though he's setting up that sort of notion of the unstoppable force against the moveable object as it were.

White Well, and he talks about an uneasy compromise

McGrath J Anyway your resolution of that is really to say it's wrong was it?

White Well one hesitates to be pushed into that position with anything that Justice Richardson says but it is difficult to reconcile that here and I'm trying my best to think of some way of interpreting that sentence in 94.1, other than to say that it's wrong, but if I'm forced to say it's wrong, I will.

Tipping J It's a remark that has to be construed purposively rather than literally Mr White.

White Well if that's the way of saving it Your Honour, yes.

McGrath J Because it is linked earlier and the context is it's where this expression was first coined, whether there is room in the statutory scheme for the application of s 99, that's part of it too, but it is difficult to understand the ideas he's expressing, and I'm not sure that the Privy Council later has

White Helped.

McGrath J Got the clearest of ideas as to what he's saying when they endorsed them.

White That's true Your Honour, which is why we're here.

McGrath J Thank you.

White Yes, well I'm obliged Your Honour, that took us backwards in page sequence, but I'm very happy to go through other matters in 48 and 49. And indeed on 49 perhaps we've picked this up when we refer to the paradox, which is what we've been talking about in para.97. We then come to the

McGrath J I suppose at page 49 it is important to remember about *Challenge* that it was a case in which you had a specific anti-avoidance provision, and you can understand the argument 'there's not room for the general anti-avoidance provision' – the argument being it was the ground

covered by the specific one which was the view that Justice Richardson had, and Justice Cooke.

White Yes, I was going to say that was the specific ground on which Justice Cooke was part of the majority – that particular point. He decided that because there was a specific anti-avoidance provision in the context of the company grouping that covered the ground.

McGrath J And that context may be important. When we look at it all the other cases tend not to have those provisions.

White And moving on, yes. And of course it is all set out here. There are, we would submit, good statutory interpretation grounds for not going down that route which Justice Woodhouse puts forward, and it's on that the Privy Council upheld the President on that particular issue too.

Tipping J Well it may have coloured Justice Richardson's more general approach perhaps. I think that's what's been suggested.

White It may explain it.

McGrath J No room approach, yes.

White We don't agree with that of course

Tipping J No, no, but if you have to come back to that it's got that colour in it.

White Yes, yes, exactly right. We then turn to the Privy Council in *Challenge*, and on that issue of course the Privy Council upheld the dissenting judgment of the President, and then it introduced this concept of drawing a line between tax mitigation and tax avoidance, which has subsequently been described I think as helpful only as describing a consequence, rather than as a means for drawing a distinction, and we haven't really taken much issue with that.

McGrath J You're not suggesting the Privy Council upheld the reasoning of the President though are you as opposed to the result?

White We are on that statutory interpretation issue in

McGrath J General as against specific.

White Yes.

McGrath J Yes, but not on the more detailed reasoning and applying s 99 is your argument that we should adopt, yes.

White Certainly on the result, but no, they have got this concept of tax mitigation and tax avoidance which is not President Woodhouse's

approach, and we've set all that out but I'm happy again to go through it in detail, but perhaps just picking up the Privy Council on page 51, at para.101, 'the Privy Council, like the President, rejected the argument that s 99 did not apply where the conditions specified in s 191 were satisfied. And Lord Templeman said s 99 would be useless if a mechanical and meticulous compliance with some other section were sufficient to oust it. And they also expressly agreed with the President that the existence of a specific anti-avoidance provision did not exclude the operation of s 99'. That's the point I've just been making in response to Justice McGrath. In para.102 there and over on our page 52, they've set out the statutory interpretation arguments which support the judgment of the President. And we then move on to subsequent decisions referring to Lord Hoffmann in *Miller* and to the Court of Appeal's decision delivered by Your Honour Justice McGrath in *Dandelion*, and also referring to *Miller* again in para.106, and perhaps noting in particular in para.107 where in the Court of Appeal in *Miller*, Justice Blanchard said 'it has often been observed that s 99 lacks any express indicator of hierarchy as between it and other sections of the Act. We note however, what was said by the majority of the Judicial Committee' – and that's the paragraph we've already referred to earlier in our submissions. And he continues 'the armoury given by s 191 to the Commissioner has since been strengthened – in fact, even before that case came to Court – but there is no reason to believe that the position concerning s 99 has altered. A company may not have the benefit of a deduction where the Commissioner relies on that provision, but if it is otherwise appropriate, he may choose to reconstruct a tax-avoidance arrangement within the limits of s 99'. And we note over the page in relation to *BNZI*, the factual nature of the inquiry there, and I've already given Your Honours the references to that. We then come to mention *Auckland Harbour Board*. We note first of all that involved a specific anti-avoidance provision, s 64J(1) in relation to the accruals rules, and that provision was expressed to apply where the Commissioner was satisfied that the parties were dealing with each other in relation to the issue or transfer of a financial arrangement in a manner that has the effect of defeating the intent and application. So that provision on its face by its words does require a frustration/scheme and purpose analysis and that is similar to s 76 of the GST Act prior to its amendment in 2000. And there's clearly a difference between that and the general anti-avoidance provision in the Income Tax Act. And Your Honours aren't going to escape having to decide the meaning of s 76 of the GST Act because that will be the issue in the forthcoming *Glenharrow* appeal in two weeks time. But I just mention that in passing. And we continue on commenting on *Auckland Harbour Board* in para.112. We say that it does illustrate the differences or the difficulties in the scheme and purpose approach even when limited to single, discrete regimes. Now there are two matters that are addressed in our supplementary bundle that I wanted to just pass through quickly, well (1) pass through quickly, and then come to *Peterson*. Under tab 4 we've got a note headed

Commissioner's Note on the Duke of Westminster "form over substance", and in a way this is an introduction to what's happened in England on this issue of form and substance and tax avoidance in England in the absence of a general anti-avoidance provision, and the difficulties that the Courts there have got into and how the position has developed, and how it must be said with the greatest of respect the Law Lords may have been influenced by that background when they've come to consider New Zealand cases. Your Honours will note that I've set out just for convenience, what in fact Lord Tomlin did say in the *Duke of Westminster* about substance not being right and one should have regard to the legal position. We note in passing that Lord Atkin dissented, and also of course there was no general anti-avoidance position. But in England the Law Lords have had to grapple with the apparent breadth of the *Duke of Westminster*, and we note in passing what Lord Justice Templeman, as he then was, said in *Ramsay*. I'm not going to read it out but it is quite amusing if Your Honours want to read about the play and the *Duke of Westminster*. And then that's followed by the House of Lords where Lord Wilberforce in *Ramsay* really began to indicate that the *Duke of Westminster* needed to be narrowed, and he says in line 4 to 5 'this is a cardinal principle but it must not be overstated or over-extended', and that case was about that. We note in passing at the bottom of that page that Lord Millett in a Hong Kong decision cited that with approval, and then in *Furniss v Dawson*, Lord Roskill had some very strong language about the need to inter the ghosts of the *Duke of Westminster* – about two thirds of the way down he says '1936, a bare half century ago, cannot be described as part of the Middle Ages, but the ghost of the *Duke of Westminster* and of his transaction be it noted a single and not a composite transaction with his gardener and with other members of his staff has haunted the administration of this branch of the law for too long'. So he deals with that there, and then the next case is *Ensign Tankers* – I'll come back to this in the context of *Peterson*, but again Lord Templeman had various things to say about the *Duke of Westminster*. And then we come to *McGuckian* and Lord Steyn – with whom Lords Lloyd and Cooke of Thorndon agreed – has some helpful, in the English context, statements about the influence of the narrow *Duke of Westminster* doctrine of tax law remaining remarkably resistant to the new non-formalist methods of interpretation, and noting that tax law was by large left behind as some island of literal interpretation. And then he picks up with what Lord Wilberforce had said in *Ramsay*. And then we come to Lord Hoffmann in *MacNiven*, and also under the heading of the *Duke of Westminster's* case and the difference between that and *Ramsay*, said in 39 that he had to suggest that he had some difficulty with reconciling the decisions and talked about the legal position and substance, but at the end of that paragraph he said 'on the other hand, if the legal position is that tax is imposed by reference to a commercial concept, then to have regard to the business substance of the matter is not to ignore the legal position but to give effect to it'. A distinction that has not always been accepted subsequently. Australia,

under its provision, has simply said that the *Duke of Westminster* has no significance at all, and in New Zealand we have similar expressions by Justice Woodhouse in *Elmiger*; Lord Templeman and the Privy Council in *Challenge*, and a reference to the same point by Your Honour Justice Tipping in *A Taxpayer*. And then we come here to the main difference of course which is we do have our tax avoidance provision and the need to look at the substance, and we've covered this in our main submissions, but I've set out in one place these authorities. I won't take Your Honours to them because the essence of what they all say – particularly all the references to Justice Richardson in *Securitibank*, *Buckley & Young*, *Mills v Dowdall*, and *Finnigan* are much of what I read out this morning from *Buckley & Young*. With that background, then one looks over the tab to *Peterson*, and our first submission, which repeats what's in our submissions, is that the decision should be distinguished from here as the Court of Appeal did on the facts. And 'whether a particular arrangement constitutes a tax avoidance arrangement void as against the Commissioner is essentially a question of fact'. In *Peterson* the Privy Council majority held that 'the investors in the two films paid the \$X, which was the actual cash, plus the \$Y, the non-recourse loans, as consideration for the acquisition of the films. The investors therefore incurred the expenditure and suffered the economic consequences which Parliament intended. Having incurred the capital expenditure, the investors were entitled to the depreciation allowances under the legislation, and the general anti-avoidance provision did not apply. And the majority made it clear that if the Commissioner had not conceded that the \$Y had not been paid or exclusively incurred as part of the consideration for the making of the films, but had established that it had been paid for another purpose and that the investors had not suffered the economic burden Parliament intended, then the result might well have been different. And in *Trinity* the Commissioner has made no concessions

- Tipping J Is there a rogue 'not' in there Mr White?
- White Yes, I think when I read it out that time I think there might be but I think
- Tipping J I think the second 'not' is not right is it?
- White What they were saying is that the Commissioner had conceded that the \$Y had been paid and exclusively incurred and that the investors had suffered the economic burden. If they hadn't done that it would have been different.
- Tipping J If they had not conceded that the \$Y had been paid or exclusively incurred as part of the consideration, than the second 'not' should come out.

White Yes, that's right, I'm obliged Your Honour. And the important point of course is that there have been 'no such similar concessions in Trinity and in Trinity it was established that neither the licence premium nor the insurance premiums were truly paid or incurred and were in fact part of an arrangement which clearly had tax avoidance as its predominant purpose or effect. And in our submission therefore, 'the relevant concurrent findings of fact on those issues in Trinity enable the decision of the majority in *Peterson* to be distinguished'. I should, perhaps before going on to the alternative however turn to *Peterson* because Justice McGrath I think was interested to know what the Commissioner's is, and it's in the appellants' bundle – the blue one – volume 2, tab 23, and I expect that Your Honour was focusing on para.43 where the majority after referring to what the Commissioner never succeeded in doing, and at line 35 or so 'the fact that the Production Company made a profit of \$Y at the expense of the investors did not mean that they did not suffer the economic cost of paying it', and then referring to the judgment of the Privy Council in *Europa*. But that in the end, that's what they decided and it's a little difficult to see what more one could draw from *Peterson* in supporting the appellants because it's so fact specific.

Tipping J Well is not the real ultimate key to *Peterson* that whether by concession or by finding, the cash payments and the non-recourse loans did really impact on the payee, or the payer, or the supplier of them?

White Your Honour I think you said you got to that position by fact or by concession.

Tipping J Yes.

White Yes, that was

Tipping J In other words there was a true

White That was the finding that was made which was completely the opposite to what the Court of Appeal had found in fact, or had said was the position.

Tipping J Well I don't know, it's all very

White Obscure, yes.

McGrath J I suppose the passage in *Peterson* that I think I was more concerned with is – one of them is at para.65

White In the minority?

McGrath J Yes, because it is the minority that looks at this issue more comprehensively as I think they said yesterday, but

White Yes, the curious thing about the minority Your Honour, well

McGrath J So you see that it's really from line 45 that I'm concerned with that the answer suggesting that the approach recommended by Justice Richardson in *Challenge* is followed, so that's an endorsement.

Tipping J What page?

McGrath J This is page 452, para.65 of *Peterson*. The answer to the question depends on whether the depreciation claim is within the purpose of the statutory depreciation regime, so this is getting back to the English approach again isn't it?

White Yes it is, yes. Our submission Your Honour is that you know we certainly prefer the outcome of the minority but in our written submissions we have questioned their reliance on going backwards to Justice Richardson's decision in *Challenge*.

McGrath J Yes, if correctly understood it.

White Yes, we've questioned that. I think that's in, if I can give Your Honour the reference. Yes, we deal with the minority in our written submissions at page 61, para.118.

McGrath J Just while we're on the subject I might just have a look at that.

Tipping J Were they saying that it doesn't matter what use the money was actually put to, what was central was the purpose for which the money was paid?

White The minority?

Tipping J Yes, and in particular if it appears that the proceeds of the loan would have not in fact been used to meet the cost of production, the question will be whether the claim to depreciate the amount of the loan falls within that purpose. No, no, it's not the same purpose is it?

White No.

Tipping J No, it's not.

Gault J I got the impression that the majority are focused on the black letter provision and the minority are focused on the avoidance provision.

White Yes I think that's right Your Honour. Perhaps I should continue with my note, because some of these points are picked up and at the second page of the note having submitted that it should be distinguished,

that's the majority decision, our alternative is that the majority should not be followed. And we do submit that the majority actually got off on the wrong foot, because they suggest that the onus was on the Commissioner to establish tax avoidance, and if Your Honours have still got the judgment out, I take you to para.33, under discussion, they start by saying 'Their Lordships consider that the Commissioner is entitled at his option to identify', and then significantly at about line 6, 'the Commissioner must then show that the arrangement which has been identified has the purpose or effect of avoiding tax', and then at line 25, 'if he can satisfy these conditions' and then in para.42, line 24, 'if the Commissioner had shown', para.43, line 30, 'this however the Commissioner never succeeded in doing', and then in 47 right through to 53, under the heading *Could the Commissioner have challenged the nature of the consideration for the payment*, starting at 47, 'Their Lordships wish to make it plain that they have reached their conclusion on the facts agreed or found by the TRA, the way in which the Commissioner has put his case from time to time, and the allegations and concessions which he has made. They should not be understood as deciding that, had the necessary allegations been made and the necessary facts found, he might not have successfully challenged the investors' case that the obligation to make a payment of \$X + \$Y, which they incurred, was exclusively incurred as the consideration for the acquisition of the film'. And then 48, 'the starting point would be for the Commissioner to obtain a finding of the TRA'. And then in 49, line 12, 'the Commissioner could plausibly invite the TRA to infer, but he never did so, and the TRA made no such finding'. And right down to 53, 'the Commissioner has never put any such case forward' etc. And with the greatest of respect it does appear that they've started off on the wrong foot and that infects that decision. The next point we make in 2.2 is that 'the majority also erred in law in not appreciating that the relevant arrangements included all the steps taken in respect of the non-recourse loans and were not limited solely to the payment of the \$X and the \$Y'. And that is another critically important point we would submit because it shows that there wasn't a focus as we've submitted on the language of the provision, whereas the minority, under the heading *Conclusions* on page 458, para.87 ask the question, 'in relation to each of these films, was there an arrangement made or entered into for s 99(2) purposes? It seems to us clear that there was. The steps taken in order to induce investors to invest money in the production of the films fit very easily within the definition of arrangement. The plan included in each case the following features; (1), representations were made to investors about the expected cost of production and marketing that deliberately inflated the expected cost; (2), it was intended that the amount of the inflation would be met by a non-recourse loan; (3), it was intended that the sum advanced by means of the non-recourse loan would not be applied in meeting any of the costs of production or marketing, but would, after the lapse of no more than a few days, be returned back to the lender

Elias CJ Sorry, which paragraph are you referring to?

White I'm sorry Your Honour, para.87 of the minority, on page 458.

Elias CJ Yes thank you

White And they opposed what we would submit is the right question, 'what was the arrangement', and they're now setting out what they say was in it - an issue not addressed by the majority. And we've got now the money going back to the lender; (4), false or misleading documents were to be created in order to conceal the fact that the money had not been used in meeting any of the costs of production or marketing and in order to serve the pretence that the money had been so used; and (5), the purpose of the plan was to allow the investors to claim tax deductions equal to the face value of the non-recourse loan. The plan was carried into effect. It seems to us clear that this plan was an arrangement as defined. The force of that seems to be irresistible. '88: The next question is whether the purpose or effect of this plan or arrangement was tax avoidance, and they concluded that it was. So our first point of error on the part of the majority was by not looking at the arrangements properly, and the width of that definition. The second point is not focusing on the substance of the arrangements which showed that it was never intended that the non-recourse loans would in fact be used for meeting any costs related to the films. And again that's all set out in the minority judgment, and we've given Your Honours the reference to that there.

Tipping J So Lord Millett is no stranger to what non-recourse loans for films so it appears?

White Well that's the next point.

Tipping J Sorry I was just glancing ahead.

White Yes. It is curious to know just why His Lordship back in para.14 on page 439, under the heading *Non-recourse financing*, has a whole section about non-recourse loans, and he describes in para.14 'a further inducement to invest in the films was the prospect of funding the investment in part with money borrowed under a non-recourse loan agreement. A non-recourse loan is a loan made' etc. And then he says 'non-recourse loans are common in the mining and extraction industries. Arrangements of this kind may be entirely commercial, but they are also undeniably attractive to those devising tax-avoidance schemes'. And then he goes on to deal with them in that sense. But this question of non-recourse loans had previously been considered by both His Lordship when he was Justice Millett in *Ensign Tankers*, and perhaps if I could ask Your Honours to look at the Commissioner's supplementary bundle of authorities – it's the one with the statutory provisions in at tab 18, and although the

name of the case is *Ensign Tankers (Leasing)* and one would have thought it was a shipping case, it's in fact about non-recourse loans in the film industry. And the relevant passages about this issue start in the speech of Lord Templeman on page 282, down just below little letter (h), where His Lordship said 'In the course of his judgment in the present case Mr Justice Millett said in purely financial terms, Victory Partnership was in effect a sleeping partner with a minority interest' etc. 'This statement is not wholly accurate', and the answer was explained by that, and then over on the next page at little letter (c) His Lordship said 'unfortunately the Judge continued in legal terms for it was making its contribution by way of loan. But a loan creditor would normally expect to be repaid' etc. And then Templeman continues 'this analysis ignores the fact by reason of the non-recourse provision of the loan agreement, the loan was not repayable by Victory Partnership or anyone else. A creditor who receives a participation in profits in addition to repayment of his loan is of course a creditor. But a creditor who receives a participation in profits instead of repayment of his loan is not a creditor. The language of the document in the latter case does not accurately describe the true legal effect of the transaction which is a capital investment by the creditor in return for a participation in profits. In a later passage Mr Justice Millett said 'the non-recourse nature of the borrowing and use of a limited partnership (either of which would have been sufficient without the other) provided a desirable protection for participants but were not necessary to the securing of the tax advantages sought to be obtained. But the non-recourse nature of the borrowing ensured the LPI paid the whole cost of the film and conversely that Victory Partnership would not be liable'. And then lest one is left with the impression that this is only Lord Templeman again, but having noted that the other Law Lords agree with him, if I could ask Your Honours to turn over to 296, and we have now Lord Goff, 296 at little (d) 'I am prepared with some hesitation to accept that the composite transaction which I have just described should not be called a sham in the narrow sense' – and he explains why – and then at little (f) 'when I embark on this process, I find it impossible to characterise the money paid by LPI into the bank account to the credit of Victory as in any meaningful sense, a loan. It was not in my opinion money lent to Victory Partnership to finance the production of the film. It was money paid by LPI into the bank account opened in Victory Partnership's name to enable Victory Partnership to indulge in a tax avoidance scheme, and for no other purpose. I derive this conclusion from a number of conclusions in the composite transaction'. And over on the next page at little (f). Having described all of that, 'in short this is indeed a case in which, as though by magic, the appearance is given that the taxpayer company has incurred capital expenditure, but the truth is otherwise. The structure created to achieving the conjuring trick is as usual in such case, both complex and artificial. Here the trick consists of, first, the prearranged self-cancelling transactions. Now we accept of course Your Honours that there are factual matters in these cases but that

may provide some interesting background to the approach adopted in *Peterson*. Do Your Honours wish me to

- Elias CJ Well I was just about to ask you Mr White, you're to cover spreading and penalties
- White Reconstruction and parties as well.
- Elias CJ And reconstruction and parties?
- White Yes.
- Elias CJ Well what sort of timeframe do you think we're looking at for completion of the Commissioner's case?
- White Well depending on the questions from Your Honours I would have thought mid morning, the morning adjournment, or perhaps just a bit longer. It depends very much on, I mean we've certainly well and truly broken the back of the Commissioner's case today.
- Elias CJ Yes, I wonder whether we should start early tomorrow. Would it be convenient to start at 9.30am tomorrow? I'm not sure that we will require an early start but it may be safer.
- White As far as the Commissioner's concerned we will fit in with Your Honours.
- Elias CJ Yes. Mr Carruthers is there a difficulty?
- Carruthers Well there is a difficulty Your Honour. We're expected to put a reply together on this material that the Commissioner is dealing with and really every half-hour is actually quite important. If the Commissioner expects to finish by the morning adjournment, and we have an opportunity to put a reply together in a sensible way, it won't take us very long to reply, so I mean I think that the time that's been allocated to the case will be sufficient for the case to finish.
- Gault J You've substantially replied to a lot of it in the way in which the submissions were presented.
- Carruthers Your Honour, that's so, but I certainly know from the notes that I've taken on some aspects that there are matters that require comment and correction. But I'm really in Your Honours' hands. That's the only issue.
- Elias CJ I'm sorry Mr Carruthers, I'm trying to understand. You say that you think we're on track to be able to complete in time
- Carruthers Yes.

Elias CJ But are you indicating that you would prefer a 10am start?

Carruthers I'm sorry Your Honour if I didn't make it clear, yes I am, I would prefer a 10am start.

Elias CJ Alright, if you're confident that we can complete we'll start at 10am. We'll sit to 5pm now anyway if that suits counsel.

White Yes, certainly.

Tipping J Mr White, just to give you the biggest notice of this as possible, I've had a little bit of trouble as you may have picked up with the promissory notes and where they all fit in and how important they are, or unimportant, and why they were necessary and so on. Is it any part of the Commissioner's case to focus on that dimension, because if it's not I shall simply put the matter right out of my mind.

White It wasn't specifically but I can confirm in the morning that that's the position Your Honour.

Tipping J Alright.

White I mean our position is that they're obviously relevant in the context of black letter, but we're talking about tax avoidance here. If Your Honours find the tax avoidance arrangement then they go.

Tipping J Well I just wondered whether they might be relevant to the tax avoidance stage of the proceeding, but if you say no, well it's not for me to wonder about it anymore.

White Well can I have the opportunity just of confirming the Commissioner's position on that?

Tipping J Yes, thank you.

Anderson J Does that mean that we might get into the delphic mysteries of excepted financial transactions?

White I can assure Your Honour that I'm doing my best to avoid going anywhere near any of that, but to the extent that might be relevant to spreading, my learned junior, Mr Coleman, I'm sure will be able to answer any questions on that.

Anderson J Thank you.

Tipping J All I want to know is whether it's relevant to tax avoidance.

White Yes, I understand Your Honour, and I'll come back to Your Honour specifically on that, as I will I should indicate Your Honours, also on the question of the interpretation of that interesting provision in the depreciation provisions and the decision of the Court of Appeal and indeed the Privy Council in a case called *Simkin Trust* which Justices Gault and McGrath sat on.

Gault J I thought I had a vague memory.

White But I'll come back to that tomorrow. So I'm dealing then with the final points in our extra submission relating to *Peterson*, and I've dealt with 2.2 and I'm on to the third bullet point 'approaching the application of s 99 on the basis that the legal form of the investment was relevant and not recognising that the investors did not in real terms incur the \$Y payment or suffer the economic burden; and not applying the general anti-avoidance provision when they were satisfied that the arrangements had the purpose or effect of reducing the investors' liability to tax, which they actually found'. And we submit in 2.3 all of 'these points constitute sufficient grounds for this Court not to follow the Privy Council majority', and we address this issue as we feel presumably that if Your Honours get to that position we'd need to persuade you of this course, and as to the grounds on which this Court may decide not to follow a Privy Council decision, we would make reference to the High Court of Australia in *Barnes v Barnes*, and that judgment is in our bundle, and to the judgment of Justices Gummow and Hayne and also Justice Kirby, and also to Peter Hogg's text as to the position in Canada. In applying the points that have been recognised in Australia and Canada for not following an earlier decision of the Privy Council, we submit that 'here Your Honours are concerned with the proper interpretation and application of the New Zealand general anti-avoidance provisions, and if Your Honours are satisfied that the Privy Council majority erred on issues of statutory interpretation such as onus of proof, the meaning of a arrangement tax avoidance and tax avoidance arrangement then that should not prevent Your Honours from declaring the true meaning. And we also have here of course the very strong division of opinion between the majority and the minority which would also support a decision not to follow the majority, especially where the minority did not appear to impose an erroneous onus on the Commissioner but correctly identified the scope of the arrangements and the true nature or substance of the non-recourse loans. And finally it could not sensibly be suggested that people have been ordering their affairs in reliance on the Privy Council majority decision, especially as it was fact specific, based on the recorded Commissioner's concessions, qualified by the acceptance that a different outcome might have been

reached if the Commissioner had argued it differently, and was subsequently distinguished by the Court of Appeal in *Trinity*'. And indeed Your Honours, those last points are probably also sufficient to submit that really it is a decision of very narrow input because of the way it was argued and the factual findings that were made. And I've now I think covered in our green folder part the approach to *Peterson*, which is also referred to in our written submissions between pages 57 and 62. And we then come to *General anti-avoidance provisions in comparative jurisdictions* – and we refer to this in two places. First very briefly here in paras 122 and 123, and then in rather more detail in Schedule F, Appendix F to our submissions. And because in broad terms we do submit that particularly the approach in Australia does provide assistance for the Court, and insights into the interpretation and application of the general anti-avoidance provision, it is appropriate to look at the position across the Tasman, and also I'll touch on the position in Canada, and very briefly Hong Kong.

Tipping J Are the statutory provisions in those countries sufficiently similar to make their jurisprudence helpful?

White In Australia - yes, there are differences we acknowledge. I am going to submit that the Australian provision for reasons which I will just come to in a moment, namely that it was enacted in that form to reintroduce *Newton*

Tipping J Alright, well perhaps I should let you come to it, but I rather thought the utility of this might be fairly limited.

White We're in the position Your Honours that the appellants draw comfort from the Supreme Court of Canada, which also has a general anti-avoidance provision, and the Commissioner suggests that there's more assistance from Australia rather than Canada. I don't want to take too much time but I do wish to explain briefly why the positions of the parties are different. The Australian provision is set out in our Appendix F, at para.2, and it is different because it talks about 'having a dominant purpose and having regard in (b) to the manner in which the scheme was entered into; the form and substance of the scheme; the time; result'; and a whole list of matters. But it then says 'it would be concluded that the person, or one of the persons did so for the purpose of enabling the relevant taxpayer to obtain a tax benefit in connection with the scheme'. And there are differences, but the essence of it is the same, or very similar to New Zealand.

McGrath J How much are those difference significant? I mean just looking at them they seem to me to be the sort of factors that might be applied just as a matter of common sense in looking at an anti-avoidance provision.

White Exactly Your Honour, that's exactly our position, they are common sense, and we would say they are the sorts of things that have already

been decided in New Zealand and should be applied. But the question is why did Australia have to put them in, and the answer to that is that the Australian provision under the High Court of Australia before these amendments had become - I think we use the emasculated - under the guidance of the former Chief Justice, Sir Garfield Barwick, and Australia changed the law, and the easiest way to explain that is to invite you to look at the Commissioner's bundle - it's the decision of the *Federal Commissioner of Taxation* in *Hart*, the Commissioner's bundle, volume 1, tab 7, and this was a unanimous decision, but at page 254, in the judgment of Justice Callinan, he has set out the explanatory memorandum to the 1981 Amendment to the Australian legislation, which explains why those provisions were added, and if I could read it, because it does make it fall into place. This is on page 254 of Justice Callinan. 'The proposed new Part 4A, which this Bill will insert into the principal Act, is designed to overcome limitations on the scope of s 260 as exposed by judicial decisions, and provide with paramount force in the Income Tax Law, an effective general measure against those tax avoidance arrangements that, inexact though the words be in legal terms, are blatant, artificial or contrived. In other words the new provisions are designed to apply where, on an objective view of the particular arrangement and its surrounding circumstances, it would be concluded that the arrangement was entered into for the sole or dominant purpose of obtaining a tax deduction or having an amount left out of assessable income. That test for application of the new provisions is intended to have the effect that arrangements of a normal business or family kind, including those of a tax planning nature, will be beyond the scope of Part 4A. In this respect, Part 4A may be seen as effectuating in general anti-avoidance provisions of the Income Tax law, a position akin to that which appears to emerge from the decision of the Privy Council in *Newton v Federal Commissioner of Taxation*. The essence of the views expressed in that case was that a tax avoidance situation covered by s 260 exists only if it can be predicated from looking at an arrangement that it was implemented in that particular way so as to avoid tax. In coming to a conclusion about the application of Part 4A in particular situations, it will be necessary to examine all relevant external evidence of the purposes for which a person entered into an arrangement and carried it out in the way it was carried out. The manner in which the scheme was entered into, its form and substance, timing aspects, its practical results, including changes in the financial positions of the taxpayer and connected persons and the nature of those connections, e.g. business, family, are all to be considered. It will be necessary if Part 4A is to apply, that a taxpayer has obtained a tax benefit. A tax benefit will have been obtained by a taxpayer in connection with a scheme if, after applying the other provisions of the principal Act to the taxpayer, either an amount is not included in assessable income of the taxpayer that might reasonably be expected to have been included if the scheme had not been entered into, or a deduction is allowable to the taxpayer the whole or a part of which might reasonably be

expected not to have been allowable if the scheme had not been entered into', and it continues.

Elias CJ What page was that, because I didn't get it, sorry,

White I'm sorry Your Honour.

Elias CJ Just tell me the page and I'll read it later.

White 254.

Elias CJ Thanks.

Tipping J It's interesting that here too the contract between what is deemed not acceptable and what is acceptable seems to be based on normal business or family dealings.

White Yes, yes, because there are some insights

Elias CJ Is that a specific provision though?

Tipping J No, it's not carried forward in those terms into the legislation, but it's one of the indicators isn't it?

White Yes it is, and of course the point I was trying to make by taking Your Honours to that is that because of the limitations on the scope of s 260, as exposed by judicial decisions in Australia, Parliament of Australia decided that it needed to bring it back to *Newton*, and we would submit of course that's been the position in New Zealand throughout. So with that background in mind, we submit that the Australian decisions are not at all unhelpful and we refer to the first of those – *Spotless* – in our Schedule F, paras.4 to 8, and that judgment is in our bundle at Volume 1, tab 8, but the relevant paragraphs are set out there in our Schedule.

Tipping J Is that still the leading decision in Australia from the High Court on this subject

White No, there are two Your Honours – *Spotless* and then *Hart*.

Tipping J Two, and one to come.

White Yes there's another one to come. And *Hart*, which is also referred to in our submissions at para.131, and I need to make a correction to page 66, para.131. I'll make the correction to the text first. If Your Honours wouldn't mind adding in para.131 on page 66 of our submissions, in line 4, 'in the latter case Chief Justice Gleeson and, it was a combined judgment of the Chief Justice and Justice McHugh, and the page reference should be 227', and that judgment in *Hart* quotes from the judgment in *Spotless*, part of the way through. And

because there is the passage that we've left out of the quote there, can I ask Your Honours please to look at the reported judgment, which is in our bundle of authorities, volume 1, at tab 7. It's immediately before *Spotless*, because of alphabetical considerations.

Elias CJ I had thought you were referring to *Hart* before. Which was the case you were referring to before. Sorry I got into a mess here.

White Yes, I was referring before Your Honour to *Spotless*

Elias CJ Right, thank you.

White And I now

Elias CJ Now you're with *Hart*?

White Yes.

Elias CJ Thank you.

White Yes, and I'm starting at the top of page 227. 'As Justice Hely correctly observed in the Full Court, the fact that a particular commercial transaction is chosen from a number of possible alternative courses of action because of its tax benefits associated with its adoption does not of itself mean that there must be an affirmative answer to the question posed by s 177D. Taxation is part of the cost of doing business, and business transactions are normally influenced by cost considerations. Furthermore, even if a particular form of transaction carries a tax benefit, it does not follow that obtaining the tax benefit is the dominant purpose of the taxpayer in entering into the transaction. A taxpayer wishing to obtain the right to occupy premises for the purpose of carrying on a business enterprise might decide to lease real estate rather than to buy it. Depending upon a variety of circumstances, the potential deductibility of the rent may be an important factor in the decision. Yet, if there were nothing more to it than that, it would ordinarily be impossible to conclude, having regard to the factors listed in s 177D, that the dominant purpose of the lessee in leasing the land was to obtain a tax benefit. The dominant purpose would be to gain the right to occupy the premises, not to obtain a tax deduction for the rent, even if the availability of the tax deduction meant that leasing the premises was more cost-effective than buying them. Even so, a transaction may take such a form that there is a particular scheme in respect of which a conclusion of the kind described in s 177D is required, even though the particular scheme also advances a wider commercial objective. In *Federal Commissioner of Taxation v Spotless Services*, Chief Justice Brennan and Justices Dawson, Toohey, Gaudron, Gummow and Kirby, after noting that revenue law considerations influence the form of most business transactions, and that the presence of a fiscal objective does not mean that a person entered into or carried out a scheme for the

dominant purpose of obtaining a tax benefit, said “much turns upon the identification, among various purposes, of that which is dominant. In its ordinary meaning, dominant indicates that purpose which was the ruling, prevailing, or most influential purpose. In the present case, if the taxpayers took steps which maximised their after-tax return and they did so in a manner indicating the presence of the dominant purpose to obtain a tax benefit, then the criteria which were to be met before the Commissioner might make determinations under s 177F were satisfied”. And then over the page, because this was dealing with a specific factual matter, and there’s a helpful reference at 228 between 18 and 19. That paragraph that starts ‘let it be assumed that in the present case even if the wealth optimiser structure had not been available, the respondents would have borrowed money to buy their new home, and also borrowed money in order to retain their former home as an income-earning investment. The wealth optimiser structure depended entirely for its efficacy upon tax benefits generated by arrangements between the respondents and the lender that had no explanation other than their fiscal consequences. What optimised the respondents’ wealth was the tax benefit earlier described, not the deductibility of interest as such, but the deductibility of additional interest on loan account 2 contrived by the particular form of the borrowing transaction’.

- Tipping J Of course in New Zealand we don’t have a dominant purpose do we?
- White No, no we don’t, and that’s the point
- Tipping J So that makes these authorities sort of a fortiori if you like.
- White Yes, exactly. But that one I was drawing to Your Honours’ attention because of the argument about choice, and it’s quite an interesting example that they’d given.
- Tipping J Yes, yes it is.
- White Now turning to Canada. The Canadian position is set out in our Appendix F at page 3, and we’ve set out the statutory provision which is their general anti-avoidance provision which has a number of features which distinguish it significantly from the New Zealand provision – perhaps the most significant being the one down the foot of page three, subs 4, where it says that ‘for greater certainty, subs 2 – the General Anti-avoidance Provision – does not apply to a transaction where it may reasonably be considered that the transaction would not result directly or indirectly in a misuse of the provisions of this Act or an abuse having regard to the provisions of this Act, other than this section read as a whole’. And Your Honours don’t need to work out what that means - that’s for the Supreme Court of Canada, which they have done in two cases, and they reached opposite views. That’s *Canada Trustco* and *Mathew*, which are referred to over the page, and we’ve noted that that’s an additional requirement in our

paragraph 11. We've referred to the two Australian decisions there in para.12, and the next point I really wish to make is over the next page on page 5, where former Professor Hogg in his textbook has opined in relation to *Canada Trustco* its analysis was disappointing, and they've said there 'a textual, contextual and purposive interpretation of the concept of cost was effectively reduced to a mere textual interpretation. The Court did not shed much light on how to establish the legislative purpose of the CCA provisions; it simply declared that the purpose emerges clearly from the scheme of the CCA provisions within the Act as a whole'. And indeed those Canadian provisions have led Professor Judith Freedman, the Professor of Tax at Oxford University, 'to suggest that the Canadian approach to tax avoidance has now converged with the English approach, despite the existence of an anti-avoidance provision'. And one could go for some time on Canada, but I just wanted to give you an overview, but there's just one further matter to mention in relation to Canada Your Honours, and that is that the issue of tax avoidance in Canada is back before the Supreme Court of Canada in a case heard there on the 23rd April this year, in a case called *Lipson*, and we have included in our bundle, volume 2, at tab 24, the decision of the Federal Court of Appeal upholding the Commissioner's position and dealing with those issues there, but it doesn't seem to be much point in taking it any further except to let Your Honours know that I'm sure the Canadians would be interested in what the Supreme Court does there in *Lipson* in due course. And finally on this comparative law side Your Honours there's the position in Hong Kong, and in our supplementary bundle of authorities we have included. Sorry, in our volume 2 at tabs 21 and 22, two decisions of the Hong Kong final appellate Court – the leading judgments in both cases being delivered by Lord Hoffmann, and in the second one, which is *Tai Hing Cotton Mill* under tab 22, he compares the position of the Hong Kong statutory provision which is very similar to the Australian one, and the position

Tipping J It's a famous name in the law from Hong Kong.

White Yes it is, yes, it contributed to other jurisprudence. In para.15 he notes that 'such general rules have been introduced in Canada, Australia and New Zealand', and then in para.16 'the rules are all expressed in different language but some have a certain family resemblance. In particular both the old Australian and the New Zealand rules operated by providing that a transaction should be absolutely void'. And then he refers to *Europa Oil – Europa No.2*, and then compares the position under the Hong Kong provision with the provision under the New Zealand Act. But of course he's dealing with the old New Zealand provisions as they stood prior to the 1974 amendment, and doesn't seem to have appreciated that things have moved on since then.

Tipping J So you're not recommending this as compulsory reading Mr White?

White

No, I wasn't Your Honour, no, I was just doing that for completeness. And we now come to page 67 and the *Application of the words of s BGI* to the facts of this case. And it is noted that as a preliminary point that of course none of this has really been addressed by the appellants because their threshold argument means that they say you don't go to BG1 at all. So we are now addressing Your Honours on the basis that their threshold argument has been not accepted and that you're now going to apply s BG1 to the facts as found in both Courts below, and against which there's been no appeal. And we simply note in para.133.2 'a close and careful examination of the facts of the case based on all the relevant evidence relating to the Trinity scheme, which was adduced at the trial, confirms the concurrent findings of fact of the Courts below that objectively determined, tax avoidance was more than incidental and rather was the dominant purpose of the arrangement'. And we have concurrent findings of fact to that effect in this case which have not been challenged. And 'the evidence clearly established that in the Trinity scheme tax avoidance was an end in itself' as the CSI business plan indicated the outcome in 2048 was simply immaterial. As both Courts below found, the Trinity scheme was replete with artificial and contrived features designed to complicate and obscure the real purpose of the scheme which was to obtain the immediate benefit of the spectacular benefits regardless of the success or otherwise of the forest' Justice Venning found that the uncertainty of the profitability of the scheme was in stark contrast to the certainty and extent of the deductions. The expert evidence established the overwhelming value of the tax advantages; the various payments under the scheme were circular in nature. The assumption of a liability bore no resemblance to the commercial value of the land and was inferior to an ordinary forestry venture. The insurance arrangements were highly unusual. The admission in the CSI business plan was relevant, and the unusual structure of the investment was designed to achieve this mismatch of deductibility and obligation', and in 'the Court of Appeal it was found that the taxpayers did not suffer the pre-tax economic burden; the admission was relevant. There was an absence of commercial sense in the forestry and insurance arrangements; and the absence of any obligation to meet liabilities meant that the arrangement was technically correct but contrived and an artifice with tax induced features outside the range of acceptable practice, and therefore well and truly across the line'. Any 'attempt by the appellants to challenge these concurrent findings required the statutory words of the general anti-avoidance provision to be ignored, and they should be rejected, first of all because there's 'no threshold scheme and purpose'; secondly 'the test for determining whether an arrangement has a tax avoidance purpose or effect is objective not subjective, and all the subjective expectations of the appellants claimed in respect of their business are simply irrelevant. The Courts below were required to examine the scheme objectively and were bound to conclude on that basis that its dominant purpose was tax avoidance'.

- Tipping J That it's more than incidental purpose was. I think we've got to be careful not to slip into this, because dominant becomes relevant later doesn't it?
- White Your Honour we have findings of dominant purpose here. They didn't need to.
- Tipping J Yes, but any exposition of it has to be careful to not
- White Well the law is clearly merely incidental, but we're dealing here now with the facts and what we're saying is they were bound to conclude on the facts here.
- Tipping J Yes, I understand what you are saying, yes.
- White 'In considering whether there was a tax avoidance arrangement, the Court may examine the broad substance of the transactions and their overall economic consequences. The strict legal obligations' – and I am now addressing Your Honour Justice Tipping's point – 'the strict legal obligations under the promissory notes had to be assessed in light of the real uncertainty as to whether the obligations would be met in 50 years time and compared with the fact that the appellants did not suffer the pre-tax economic burden of the deductions in 1977 and 1988'.
- Tipping J Well I was, if I may say so, I was also curious about this proposition that we seemed to shift as the argument developed that the promissory notes achieved a transfer of property and then it was suggested that they were simply to provide security, additional security, for the payment, but it seemed to me that there was something in there that made them necessary in order to bring them within a regime that would not otherwise have applied, and that is what attracted my attention. Now if that is so, that must surely be at least of some suggestion that they were put there as a contrivance, though not being strictly necessary. I'm not saying that's my view, but that's what has excited my curiosity Mr White.
- White Yes, I understand Your Honour, and perhaps rather than right now, but I could come back to that in the morning specifically.
- Tipping J Yes.
- White We go on then Your Honours to deal on the basis that that's not the approach the Court adopts to the alternative approach of the Court of Appeal, because they felt they couldn't go down that route, and we deal here on page 70 with arguments that indeed even if you were to look at the scheme and purpose of the deduction provisions, they are being frustrated by this scheme. I'm not sure whether I particularly need to go through all of these arguments Your Honours at this stage, but we have set them all out there in detail should Your Honours get

to that part of the case, or that alternative. And the next matter Your Honours is to turn to the question of the parties to the tax avoidance arrangement, but

Elias CJ Would that be a convenient time to take the adjournment?

White It would.

Elias CJ Right, we'll take the evening adjournment and resume at 10am tomorrow.

White As Your Honours please.

Court adjourns for the day: 4:56pm.

Friday 27 June 2008

Court resumes: 10:04am

White If Your Honours please before resuming with the main submissions and the issue of parties, there were just a few preliminary points that I wish to touch on that had been raised in the course of submissions yesterday. The first of those is the definition of depreciable and tangible property which Your Honours will recall is in the Commissioner's bundle of authorities under tab 5, and the intriguing language of that provision where it says that '*depreciable intangible property* means intangible property of a type listed in Schedule 17, which Schedule describes intangible property that has a finite useful life' etc, and (b) 'if made depreciable, a low risk of being used in tax avoidance schemes'. And in front of Your Honours you should have the decision of the Court of Appeal as Justice Gault correctly recalled, called '*Trustees of the Simkin Trust v The Commissioner of Inland Revenue*, which concerned the meaning of item 7 in Schedule 17, the right to use a trademark where the owner of the trademark had granted a licence of it to somebody else, and was claiming that they still had a right to use it, and in the Court of Appeal, the meaning of the provision was addressed in para.18 on page 320 'where for the Court which comprised the President Justice Gault, and Justices Blanchard and McGrath, the President said 'Schedule 17 lists the items which according to the definition constitute depreciable intangible property. According to the definition the Schedule describes intangible property that has a finite use for life that can be estimated with a reasonable degree of certainty on the date of its creation or acquisition. Each of the items in the Schedule is to be interpreted in the light of that description'. And the Court then dealt with that in more detail in the context of that particular case, and then in para.22 the Court continued, 'the argument that a licensee cannot be the owner of the right of use which is an inherent aspect of the bundle of rights constituting ownership of trademark is best met by considering the

right to use land while undoubtedly the owner of the land, the reversion has a right of use subject to the lease is a matter of legal analysis of the concept of ownership. That does not mean that it is wrong or a misuse of language to describe a lessee as the owner of the lease. The lease constitutes a right of use. A finite duration that can in normal circumstances be expected to decline in value while used'. And at the end of 23, 'that right to use is quite different in tangible property for the right of ownership of the intellectual property right'. And that decision was appealed to the Privy Council, and Your Honours will next have the decision of the Privy Council in that case and on page 19003 on the righthand column in the judgment of the Privy Council delivered by Lord Scott after setting out the definition of depreciable and tangible property it reads 'this is an unusual definition and Their Lordships are not clear what purpose is intended to be served by the words that follow Schedule 17. Are they merely explanatory of the reasons for the selection of the particular types of intangible property that are listed in Schedule 17, or are they criteria that an item of intangible property of a type listed in Schedule 17 must possess in order to qualify for depreciation? These questions do not however need to be answered if the intangible property in question does not fall within one or other of the listed types'. So the Privy Council kicked for touch.

Elias CJ Well they've asked the question.

White Yes they asked the question.

Elias CJ So we may have to answer.

White Well, I'll come back to that in a moment

Elias CJ Yes.

White If I can just complete the story, because it is a story with an end. The next piece of paper Your Honours is the Income Tax Act 2004, where Parliament indeed has moved to clarify the matter and you will see in what is now s EE53(1) meaning – 'it means the property listed in Schedule 17 and underneath that subs 2 'for property to be listed in Schedule 17 the criteria are as follows: (a), it must be intangible, and (b), it must have a finite useful life that can be estimated with a reasonable degree of certainty on the date of its acquisition', and you will notice immediately that the reference to low risk of being a tax avoidance scheme has been removed, and then it says in subs 3 'property that is listed in Schedule 17 is depreciable intangible property, even if the criteria are not met'. And that's repeated also for completion.

Elias CJ So what does that mean? It's an instruction to those adding to the Schedule - that's all really.

White That's all it is yes, telling Parliament what they're supposed to do next time, whatever. It would be an interesting issue to debate in constitutional terms another time.

Elias CJ Well is there a mechanism for adding to the Schedule?

McGrath J Yes.

White No, I've asked that Your Honours and the answer appears no.

Elias CJ So in the new Act it is a definition and the criteria are irrelevant for our purposes?

White Yes, yes, and that's repeated

Tipping J Once it's in, it's in. If it answers to the description, it's in.

White That's right, yes, exactly. And that's the reason in effect why, well one would agree with what the Court of Appeal said in the Simkin case. As a result of distillation if it does come back I'm sure those authorities were referred to in one of the lower Courts – probably in the High Court, but we've always focused solely on the issues whether on the facts of this case, this so-called licence constitutes the right to use land.

Elias CJ Yes.

White That was the first matter Your Honours. The second two matters relate to the licence agreement, and they're very short points – just really a matter of giving Your Honours references. My learned friend Mr Gudsell QC intervened when I was going through the documents yesterday to remind me and Your Honours that the first agreement had been modified subsequently. I think I said in reply that that had been covered in our written submissions, which is correct, and I simply wish to give Your Honours the reference in our written submissions to where we deal with the issue of modification. It's at para.27.9, and I don't need to take Your Honours to that because that's covered fully there.

Elias CJ Thank you.

White The other matter arises from questions of my learned friend's I think by Justice Gault about insurance and frustration events, and in view of the submissions that we have made, it hasn't loomed large in our part of the case, but just for completeness I would just ask Your Honours to note that the original agreement to grant the licence and options which is in volume 15 contains a clause 15.1(b)

Elias CJ What page is it? I just want to take the reference.

- White Which provides or grants the right to Southern Lakes to have an option to require Trinity to assume all of Southern Lakes obligations and liabilities if any, under the and the other transaction documents other than the purchaser's premium payment obligations, which is defined, following the occurrence of a frustration event, and this purchaser's premium payment obligations is an expression defined on page 2973 of volume 15, to mean the purchaser's obligation to pay the purchaser's share of the insurance premium or any part of it and includes the purchaser's obligations under the promissory note. What that means is that if there's a frustration event and if the liability assumption option was exercised, then everything goes except the obligation to pay the insurance premium.
- Tipping J Is 'the vendor grants the purchaser an option to require' just big words for 'the purchaser may require'?
- White Yes, it is an option given to the purchaser. There are a number of options of which that is one.
- Tipping J There's nothing significant in the convoluted way in which it's framed.
- White No, it is perhaps an example of the convoluted wording of these documents Your Honour. But I'm simply drawing that for completeness. We don't take that any further. The next matter Your Honours is just to make sure that an answer that I gave yesterday about sequence of events in legislative history in relation to amendments to what was s 108, now s BG1, and *Newton*. I just wanted to make sure, and it relates to Your Honour Justice Tipping's questions focusing on ordinary business or family dealing, and I just wanted to make sure that I had explained correctly the sequence of events that were involved, and if Your Honours just simply note that s 108 before its amendment is set out in our submissions at page 33 at para.63, and at that point there was no reference to ordinary business or family dealing. The judgment of the Privy Council in *Newton* was delivered in 1958, and the passage from Lord Denning's judgment which is in para.65 of our submissions on page 34 includes the reference, well said 'if you cannot so predicate, but have to acknowledge that the transactions are capable of explanation by reference to ordinary business or family dealing, without necessarily being labelled as a means to avoid tax', so that's where that came in through *Newton*, and I understand
- Tipping J That's helpful because I think you said earlier that that phrase predated.
- White Yes that's why I wanted to correct that Your Honour.
- Tipping J And I was a bit puzzled by that so thank you.

White The written submissions are right and I think my answer was wrong. And what I wanted to add though was I understand or expect that what happened was that the taxpaying community, or those who could, aimed at ordinary business or family dealing from *Newton*. So that led then of course to the 1974 amendment which is set out on page 37 of our submissions in para.72 on page 37 of our submissions, and that's where the reference to ordinary business or family dealings was inserted. So to that extent *Newton* was modified by the subsequent amendment, and I just wanted to clarify that point. Your Honour Justice McGrath asked yesterday whether we would be addressing Lord Hoffmann, and the point raised by my learned friend, Mr Carruthers. As I understand it, that was his reference to the *Auckland Harbour Board* case where Lord Hoffmann - and I simply wanted to say that I did intend to answer that. I think I did answer it yesterday. It's covered in our written submissions, paras 109 to 112, and the point to emphasise of course is that that case was concerned with s 64J, which is quite distinct in some significant respects from BG1.

McGrath J You didn't have anything in particular to comment on the characterisation of such tax avoidance provisions as s 99. I'm looking at Lord Hoffmann, at paragraph [inaudible] of *Auckland Harbour Board* as a long stop.

White Well I think I've answered that yesterday Your Honour - we don't view it in that way. Then Justice Tipping's interest in promissory notes and why they were introduced. Just before the close yesterday, I had indicated that in page 70 and 71 we had set out a number of respects in which if scheme and purpose was a factor, it had been frustrated, and if I could just note that in para.138.5 on page 71, we do make a submission, and if Your Honours will just note that this relates to the licence premium, not to be confused by the insurance premium, which is the one that's subject to the spreading argument, but we made the submission there that 'the scheme of the Act, with respect to the accrual rules would also be frustrated because the scheme of those provisions is that where there is a deferment of the payment of consideration the accrual rules of the Act are intended to apply to provide a fair and reasonable spreading of the expenditure and recognition of the income. That fair and reasonable spreading is generally to use the yield to maturity method to spread the recognition of income and the allocation of expenses over the terms of the deferral. The yield to maturity method would provide deductions as generally described in the chart in our very short submissions - that's the curved one, rather'

Elias CJ Yes.

White And it's the next sentence I emphasise. 'The Trinity scheme avoids this consequence by resort to the promissory note, which means that the consideration payable in 2048 - the licence premium - can be said

in juristic terms to have been paid already. That avoids the application of the accruals rules and enables the straight line spreading under the depreciation rules even though the consideration is not in any real sense payable until 2048’.

Tipping J Thank you, that’s exactly what I was looking for.

White Yes.

Tipping J Because it struck me that there was an argument at least that the promissory note was a device in order to accelerate the payment in real terms, although not in legal terms, so as to get out of the accrual rules.

White Exactly right, and that’s what we’ve covered there. And the final matter could only be classified as de minimis, but having invited Your Honours to read the whole of Appendix C, I just do need to explain that there is a slight error in the copying on the very first page. Missing from the bottom of the first page of Appendix C is the number 20, yes it is number 20, and the first two lines of what should be para.20, and I don’t need to ask Your Honours to write them down because we have included in our bundle which we’ve been looking at with the legislation, right at the very end, under tab 24, which I imagine Your Honours haven’t even noticed, is a corrigenda and at the very end of that, right at the very end of that bundle, the very last page are the words that are missing from the bottom of Appendix C, and I just wanted to make sure that Your Honours weren’t misled by not being able to find those. And my friends are drawing to my attention that the other error that is not even picked up there is that if Your Honours wouldn’t mind, in Appendix C, where it says 17, para.17, for reasons that totally escape me, that in fact should be 18 and 18 should be 19 and at the bottom of page 20, and the first two lines at 20 are the ones at the back of the corrigenda, and hopefully then it all runs on clearly. And with those matters Your Honours I now pick up our written submissions on page 72 and deal first with the issue of *parties*, which in our submission can be dealt with very briefly indeed as we set out in para.140. The first point is that there was no dispute at the trial that the appellants were all investors, either themselves, the LAQCs, or the companies, or through their LAQCs, and we have a finding from Justice Venning on that, and I’ve set out then the distinction that Justice Venning correctly found between the facts of this case and *BNZI*, and as he said there ‘there was a completely separate series of transactions downstream that the plaintiff taxpayer was not involved in. The plaintiffs in the present case knew the nature of the composite arrangement they agreed to enter. They knew that had joined up as signatories to the obligations under the agreement to grant licence, in particular the obligation to pay the licence and insurance premiums’. I mean after all they deducted them. ‘The finding of fact was not challenged in the Court

of Appeal, and the Court of Appeal', not surprisingly, simply accepted that that was the position.

Gault J I understood that the only argument in this area was in the event that it was held that the avoidance arrangement was centred on the business plan in which case that was the defect of aspect and some of those others were not participants. But that's the only argument I thought that you had to meet there.

White In the way Your Honour puts it like that it's so artificial that it

Gault J Yes I understand.

White Our response is that's a totally artificial way of viewing, it's not the arrangement. It's not the arrangement that the Commissioner's suggested or has been found in either Court – it's much wider than simply the business plan.

Gault J On the subject of the arrangement I've been thinking about it a bit and can I outline the reasoning or the thought processes I was going through so that you and indeed Mr Carruthers might have an opportunity to disabuse me. It looked to me as if it was better rather than to focus on all the detail that we have been focusing on, rather to look at the plan that was formulated of the arrangement that was identified and the subject of all the documentation, and in the material you referred to us yesterday, it appears that there was a prior estimate of the likely returns in 2048 from the forest of \$2.05 million per hectare and that was Mrs Muir's advice as an expert that that was the best estimate then of the likely return. Well that sum of \$2.05 million being the expected return, was then set as the premium for the use of the land, and the insurance arrangement protected only that value. Now the plan involved the revenue or return from the forest being applied to pay that premium, so it seems that the premium was set to consume the whole of the anticipated income from the forest on Mrs Muir's advice. Therefore the only benefit to the investors was from the tax deductions, by constructing the right to use the land as a depreciable asset, and deducting the premium in the first year albeit though it wasn't to be paid for 50 years. So on that reasoning there was no pursuit of profit at all in the plan, so it wasn't a business. So we're not interested in whether there was a deduction for business purposes. The only business it seems to me was to secure the deductions for that sum which was fixed by reference to the expected returns. Now that seems to me to be the end of the matter.

White I don't think the Commissioner would disagree with that analysis except Your Honour that the investors would say that the \$2.05 million which I took Your Honours to yesterday, they hoped to achieve more than that and they did certainly did call evidence to it.

Gault J No, they have hoped to but the plan was that that was the expected return.

White Yes, I'm trying to understand what they are likely to say. Well Yes Honour we agree. In essence cutting through it all that's what it was.

Gault J And in the process of doing that, although this step may not be necessary, they were really converting what was going to be income in the last year to capital

White To deduct it, yes.

Gault J To depreciate it.

White Yes, that's right.

Anderson J It rather seemed to me Mr White that it's like writing a thriller where you decide that X kills the person whose body is in the library and then you write the book backwards from that. Not you, I mean 'one'.

White One, yes. Well I think Your Honours that that does cut through it accurately, and the wording in the CSI business plan basically says as much.

Gault J Well that is simply evidence

White Yes

Gault J But one is required to look at this objectively and rather than look at personal expectations and likely outcome other than that, surely one looks at the plan as it was formulated, and I will be interested to know why one doesn't approach it that way.

White Yes, exactly Your Honour. That of course means there's not much more to be said, certainly on the question of parties at all. We do note that, well I can't imagine Your Honours are going to resolve any apparent differences between *BNZI* and *Peterson* on that issue, but if you were we have recorded that on this issue we support the decision of the Privy Council in *Peterson*, but really it's not a matter that needs to be resolved. The Commissioner's position is you do not need to be a party to the arrangement to be affected by it, and to lose any tax advantage obtained from it.

Tipping J Are you saying the Commissioner prefers the *Peterson* approach that there's no need for mutuality in an arrangement?

White The Commissioner's position is you do not need to be a party to the arrangement

Tipping J That's a different point, yes.

- White Yes, that's the point, yes.
- Elias CJ Your preferred position is the statutory interpretation but as a fallback you say *Peterson's* to be preferred to the minority position?
- White But Your Honours are not required to make that decision here. *Reconstruction* Your Honours, I've really covered that already when I dealt with s GB1, but just very briefly we note that if assessments are upheld on the basis that there was a tax avoidance arrangement, then the deductions go as both the Courts below held, and we invite this Court to do likewise, and one simply doesn't get to the power to adjust under GB1, because once the arrangement's found to be void, the deductions were illegitimate and there was nothing to adjust, the powers of discretionary power which the Commissioner may exercise when necessary to do so, when it is necessary all the tax advantages which would otherwise be enjoyed, it's not necessary to do so here. There's no statutory obligation on the Commissioner to exercise the power in every case. In particular there's no obligation on the Commissioner to second guess the tax avoiding taxpayer and substitute in place of the avoidance arrangement some alternative tax advantageous arrangement which might have been entered into but was not. And against that analysis it's unnecessary in our submission to consider the reconstruction issues which might arise in the case involving income rather than deductions, such as those addressed in *BNZI* by Justice McGechan, and alternatively we rely on the approach of the Court of Appeal in *Buckley & Young*, which was that it's for the taxpayers if they wanted some alternative to have put forward evidence to that effect.
- McGrath J It is an alternative position isn't it, that's the *Buckley* position, where what you're saying is that the Commissioner has a discretion in these things, but in the events that he's fallen to exercise it, if the taxpayer hasn't put up enough information for the Commissioner to make the necessary judgment, then the case must fail on the onus of proof. Now that's a separate in *Buckley*
- White Yes it's a separate point.
- McGrath J And quite independent, and your main argument really is that you do have a discretion in the particular circumstances of this case as to whether you do anything, and the Commissioner was satisfied with the position with the deductions going because the arrangement was void?
- White Correct Your Honour, yes.
- Elias CJ I just wonder whether you can stop short, because if they have a discretion, it's still got to be exercised reasonably in the context of the

- Act as a whole. I think you may be pressed to the onus position. I don't think it's a total answer to simply say there's a discretion.
- White Well in this case it's our para.143.3 'there is no statutory obligation to exercise the discretionary power in every case'.
- Tipping J Nothing has triggered the discretion I think is the best way of putting it
- Elias CJ Yes that might be
- White Yes exactly Your Honour.
- Elias CJ Yes.
- Gault J Isn't the position depending upon how you construed the arrangement that any reconstruction is to get to a position as if the arrangement hadn't been entered into, so it's not a question of re-jigging the arrangement.
- White Exactly, that's exactly right Your Honour.
- Elias CJ Yes.
- White Your Honours have both put it more fallaciously than we have, but that's exactly the point. And it's certainly not for the Commissioner to go out and say they should have done it some other way.
- Tipping J Yes, and then they might have got some benefit which was allowable to them, but there's been no suggestion of that.
- White No. The arrangement in fact, right at the end of 146, just for completeness we have given you some references to Dr Muir's evidence, was that it was take it or leave it. That's the arrangement. There's no alternative put forward.
- Tipping J He took the high ground?
- White Yes. Moving then to *shortfall penalties*, and noting as the heading does that we are only talking about the 1998 year, because that was the year they were introduced, it may be helpful if I take Your Honours to the statutory provisions first and also the further ones in our small bundle. But in the Commissioner's legislative bundle, the sections are set out under tabs 16 and 17. That's *unacceptable interpretation* at 141B, and *abusive tax position* in 141D, and if Your Honours also have open in our slim green folder handed out yesterday, right at the very back under tab 9, the relevant definitions and they're important when I come to respond to the argument Mrs Hinde advanced for Redcliffe. But I could start with the definitions, and on the first page of the definitions, shortfall penalty is defined as

meaning a penalty imposed under any of ss 141A to K, for taking an incorrect position or for doing or failing to do anything specified or described in those sections, and then

- Tipping J But incorrect includes both unacceptable and abusive does it?
- White Well I think it just means taking a wrong tax position because it must include that, yes Your Honour.
- Tipping J Well it's just that this is such a slippery field Mr White, that one needs to be very precise and clear about these things.
- White Yes, but the expression 'tax position' is defined.
- Tipping J Right, but an incorrect one
- Elias CJ Is not correct.
- Tipping J But it obviously must include unacceptable and abusive.
- White Yes, yes. Under ss 141A to K, they are all the incorrect things that can be done which constitutes shortfall penalties.
- Tipping J Yes, thank you.
- Elias CJ Sorry, is that 141?
- White A, right through, yes.
- Elias CJ Yes.
- White But if I can take you then to – this legislation never ceases to amaze, but I'm told there's another definition that says 'correct tax position means the correct tax position established under one or more tax laws'.
- Tipping J Well that's very comforting.
- White It's very helpful isn't it? Well we'd be very surprised if it was anything else. Tax position, over the page, tax position means a position or approach with regard to tax possible under one or more tax laws, including, without limitation, a whole list, and if I could just note G, the incurring of an amount of expenditure or loss, or the allowing or disallowing as a deduction of an amount of expenditure or loss. H, the availability of net losses, or the offsetting or use of net losses, and I, the attaching of a credit of tax or the receipt or lack of entitlement to receive a credit of tax. And that's a very broad definition provision and of course those paragraphs G, H, and I, extend to cover LAQCs and the persons under them. And that's confirmed by the next definition to refer to over the page which is *tax*

shortfall. Tax shortfall for a return period means the difference between the tax effect of a taxpayer's tax position for the return period and the correct tax position for that period, when the taxpayer's tax position results in too little tax paid or payable by the taxpayer or another person, or overstates a tax benefit, credit, or advantage of any type or description whatever by, or benefiting, as the case may be, the taxpayer or any other person. And when we come to Redcliffe Your Honours will see that the LAQC Redcliffe, the ultimate benefits were obtained because of the attribution to Dr Muir, but I'll be able to show you the actual documents showing how that works. But those definitions are highly relevant in that context. Now with that in mind, going back to 141B, *unacceptable interpretation*, under the definition in subs 1, for the purposes of this part, an unacceptable interpretation of a tax law is in relation to a tax position taken by a taxpayer – so we've had a look at tax position – an interpretation that involves the interpretation or application of that tax law, so that must include the application of the provision to the circumstances of your case and fails to meet the standard of being viewed objectively about as likely as not to be correct.

Elias CJ Does that mean that if it's a reasonable interpretation it's not an unacceptable interpretation?

White Well the words 'about as likely as not to be correct'

Elias CJ It's cumulative isn't it?

White Yes, yes.

McGrath J It's got to be close to a 50/50 chance of being right.

White That's a colloquial way of putting it, yes.

Tipping J It's not quite the balance of probability.

White No.

Elias CJ I think we should keep off that path.

White Yes, it's not just the interpretation either, or the application, and that may turn to be important here. It involves the interpretation or application. Our main submission Your Honours is that in view of the concurrent findings of fact, and if Your Honours decide that there's tax avoidance here and that the dominant purpose was to obtain the deductions, then the tests of both unacceptable interpretation and abuse of tax position are met. Our argument is summarised in para.148, but I'll move over because it's all dealt with in more detail under the heading starting on page 76 – *an unacceptable tax* – and our first point there is that it has to be viewed objectively as the language of 141B says and our submission is that in this case the test was

undoubtedly met in the present case. The Ben Nevis submissions suggest that the test, they suggest, is whether there is an area of law

Elias CJ Sorry, I'm just wondering how you call in A the concurrent findings of fact, because 141B doesn't really seem to turn on – do you mean the facts as to the application and interpretation?

White Yes Your Honour.

Elias CJ Oh, sorry.

White I'm guilty of elision.

Elias CJ No, well I'm guilty of lag.

White But Your Honours that's what we do mean. My learned friend suggested that the test is whether it's an area of law ripe for strong disagreement, or whether there is a contention that merits serious and careful review, and we submit that the standard is considerably higher than that and that the decisions which I don't think my learned friends took you to on that point – I'll be coming back to *Star* later on abuse of tax position, don't help the appellants, and that here in any event the test is met. And as I understand it their principal argument is that *Europa Oil No. 2* and *Peterson* – even although *Peterson* was effectively decided after the taxpayers took their positions in this case – provide justification for their interpretation, but our short response to that of course is that those cases can be distinguished on their facts first of all, and the Privy Council in both cases found that the costs had been truly or genuinely incurred and were deductible, and we have contrary findings in *Trinity*. And in the context of *Trinity* the interpretation and application was unacceptable, viewed objectively, and didn't meet the standard. And so we say it's not a question of Your Honours having to decide to overrule *Europa* in order to impose the penalties - that's not the question, it's the question here of whether on the facts of *Trinity*, the interpretation and application viewed objectively were about as likely as not to be correct.

McGrath J When you say there are findings in this case in the Courts below that the costs had not been truly incurred, is that in relation to the specific provisions? What are those provisions?

White No, that's in the context of tax avoidance. The Court of Appeal I think said that the appellants were not definitively committed to meet the amounts payable in 50 years time. And that's the distinction between *Europa* and as it happens *Peterson*, where the Courts decided that the amounts were deductible because they did meet the test.

Elias CJ I'm still a little bothered about your emphasis on these being findings of facts, because they really depend on application of law. They're

inferences of law aren't they? They're not primary fact. I may be sort of missing which facts you're relying on for this submission.

White Well if I can just go back to the section Your Honour. It says 'involves the interpretation or application of that tax law'.

Elias CJ Yes.

White And that must be to the arrangement, the tax avoidance arrangement that Your Honours find in this case

Elias CJ Yes.

White And say for instance the arrangement as succinctly described by Justice Gault earlier, that is the finding, then viewed objectively one could not decide that the interpretation or application of BG1 adopted by the taxpayers here was about as likely as not to be correct because it's such

Tipping J It's not a close run thing?

White Exactly, that's exactly right.

Tipping J And the point of factual difference between this case and *Europa* in particular is really in relation to the 50-year time span and the remoteness of that?

White Yes.

Tipping J That's the basis on which you invite us to distinguish what Lord Diplock I think was saying in that case.

White Yes, well that's perhaps the most stark difference, but the factual differences of the two cases are very significant in the way the arrangement here was structured. And we also make the point that the matter of law which is in our submissions of course that after *Europa No.2*, the amendments were introduced to make it clear that the general anti-avoidance provision did apply to deductions cases, because that was one of the difficulties that the Privy Council faced in *Europa*. And to the extent we note in para.150.3 'the appellants' rely on subjective intentions', well we just simply submit they are irrelevant. But we note at the top of page 78 that of course the statement in the CSI business plan is still relevant in the objective context. In other words if that's viewed as a subjective statement, it's in effect of subjective statement against interest, which may assist in determination of the objective purpose. In other words a taxpayer who says my purpose is not tax avoidance, it doesn't help particularly, but a taxpayer who says my purpose is tax avoidance, can assist in objectively determining the purpose.

McGrath J Even though it's a subjective judgment?

White It can be evidence relevant to assisting the objective determination surely. It's rather like a rather extreme example that's been used in other Courts in tax avoidance litigation with the person holding the knife, plunging it into the victim, saying I have no intention of killing you. Well, on the other hand if he plunges it and said I am intending to kill you, the subjective statement of intention – the latter one – establishes the

McGrath J Evidence in the law of murder is not confined to objectivity Mr White.

White No I know, but the point is it's rather a stark way of putting it.

McGrath J There's a lot of conversion goes on in these matters, but I'm just having a little difficulty in the conversion of the subjective view of Dr Muir if as I understand it was eventually sheeted home to him how that that subjective view becomes an objective consideration?

White Well, I'm talking about the statement in the CSI business plan.

McGrath J Yes.

White Now the evidence

McGrath J Which was attributed to something that he was the drafter of it eventually, yes.

White That's right. Now that statement is in a company document for CSI which was part of the arrangement.

McGrath J Yes.

White And our submission is that that shows when one's looking at or determining the objective purpose of the arrangement – it's a piece of evidence, strongly in support of the view that what was of concern here – the purpose here was to get the tax deductions and that what happens in 50 years time is immaterial.

Tipping J Isn't it a facet of the general law of evidence that a self-serving statement is not likely to be as reliable as one against interest? And to say that you can't take it into account in an objective view would rather emasculate sort of what you might call any sort of common-sense approach to a problem like this.

White That's exactly what I just said a moment ago Your Honour. The subjective statements against interest may assist in determination of the objective purpose.

Tipping J The objective purpose.

White Yes, that's the submission. That's exactly right. Turning then from unacceptable interpretation to abusive tax position, and again I don't want to tarry too long on this Your Honours because you had a full discussion with my learned friend, Mr Harley, on whether the test was objective or subjective, and the Commissioner of course does submit that it is objective, and we submit – that's in paras 151 and 152 – 152.1 – I think we've really just summarised the arguments that Your Honours were identifying with Mr Harley. He did rely though on the decision of the Federal Court of Australia in *Starr*, which is referred to in our para.152.2, and Your Honours enquired of him whether the legislative provisions were the same, and we have provided those provisions to you now in our slim green bundle under tab 8, and they are quite extensive, but they are framed differently to New Zealand. They have a whole part 7 – *penalty tax* – and it's got an interpretation section at 222A, and then over on page 14, starting with 226G, there is a range of provisions which has a whole lot of different situations – shortfall caused by lack of reasonable care; recklessness, and Your Honours will notice there are different percentages in each case. The first one is 25%; 50%. Intentional disregard of the law, 75% - unarguable position taken in 226K, 25%, and then 226L, which I think is the one that might have been relied upon in *Starr*, where unarguable position taken about scheme – it could be 25% or 50%. Now Your Honours we simply just wanted to make the point that the provisions are quite different from ours, and don't have the reference objectively viewed in our s 141D. And we also submit as an alternative on abuse of position, that even if the test were subjective, it would be met here for the reasons we've given.

McGrath J Sorry, what was the section again for the objective – s 102 was it?

Elias CJ 141.

White Sorry, the Australian one Your Honour?

McGrath J No the New Zealand ones you've referred to.

White Oh, 141D.

McGrath J Thank you.

White 7B where it's viewed objectively.

McGrath J Yes.

White Now coming then to the question of doubling-up, I've already taken Your Honours to s 141FC which is under our tab 17. I do need to emphasise

Elias CJ Sorry, what section was that?

White 141FC under tab 17. This is the provision which I mentioned in the course of my learned friend's arguments earlier in the week, provides a mechanism for a person who has been attributed with penalties under an LAQC, to seek relief. We submit of course that that rather reinforces the need, or confirms that both the High Court and the Court of Appeal were right to uphold the Commissioner's assessments in respect of penalties for both the LAQC and the shareholder. And we invite Your Honours to do the same

Elias CJ Because there's a procedure to be followed.

White Exactly, yes, that's exactly right.

Elias CJ Yes.

Tipping J Doubling up okay subject to the procedure prescribed for relief?

White Precisely Your Honour.

McGrath J It confirms the correctness. Is that a submission of interpretation in respect of later legislation?

White That's always a difficult one to run because of what the Privy Council said in a case called *Databank*, but it clearly does, and the reality is that it's retrospective so to that extent it meets the test in *Databank*, and the answer is yes, it does confirm that Parliament intended there to be the doubling-up but it's provided a mechanism for relief. And my recollection is that's what Lord Hoffman said in *Databank*.

Elias CJ Well maybe that's the answer. I was going to say it doesn't necessarily follow, because after all if the procedure was not properly followed by the Commissioner there would be a remedy there, it's rather that that process has to be followed. It's not to say that doubling-up is okay, it's simply that there is a procedure to adjust.

White Precisely Your Honour, yes.

Elias CJ Yes.

Tipping J Well subs 1 of 141FC is premised on the basis that they will be doubling up.

White Exactly Your Honour, that's right, so if Your Honours come with the Commissioner through penalties, we don't want you to accept the appellants' submission that there should only be penalties for just the LAQC or the taxpayer.

- Tipping J Well they can hardly claim the benefit of the relief without acknowledging the premise on which the relief is granted.
- White Precisely Your Honour. And that brings me finally to the argument relating to Redcliffe, which is touched on in our written submissions at paras 156 through to 157, but I can do this, or I'd like to do this Your Honours, keep in mind the definitions of tax position and shortfall penalty, and tax shortfall, and if Your Honours take volumes to hand 18 and 8. At volume 18, at page 3927, Your Honours will find the Commissioner's notice of assessment for Redcliffe for the year ended 31 March 1998, which is the second year the subject of these proceedings, and the first year of penalties, and while I could take you as well to returns, this document is the convenient one to look at because it has two columns. First of all *as returned* and secondly, *as amended*. And *as returned* of course is the tax position that the Redcliffe LAQC took, and we submit that what was returned constituted the tax shortfall, because they have returned – Redcliffe's returned a total gross loss of \$1.208 million dollars and that is the Redcliffe share for that year of the amortised licence premium of \$40,000 per hectare
- Anderson J I'm just wondering if I've got the right page.
- White 3927.
- Anderson J Oh 3927, yes.
- White Would you like me Your Honour to go through it?
- Anderson J No, no, I found that I had 3727 for some reason.
- White It's the Redcliffe notice of assessment for the year ended 31st March 1998. Redcliffe of course is a taxpayer and made a return as a LAQC, and its tax position was to claim the loss, the deductions of \$1.2 million dollars being Redcliffe's share of the amortised licence premium – the \$2.05 million dollars – which is \$40,000 per hectare, and Redcliffe had enough hectares to claim \$1.2 million. Now just still going down the return, that amount was then attributed – that's the LAQC loss attribution amount – and that goes in fact to, as I'll show you in a minute Your Honours, to Dr Muir substantially, and also to the other shareholders of the company, Ms Taylor and a Mr Maude. And then as a result of that loss there was of course on the face of the return, no taxable income, and that's the zeros. There was some tax credits and some residual income tax, and then you'll see the assessment for shortfall penalty; abusive tax position, \$391,746, and that's 33% of the \$1.2 million shortfall tax.
- Tipping J Why are there zeros against taxable income loss?
- White Because there wasn't any.

Tipping J Wasn't there a taxable loss as returned, and also as amended, or am I misleading myself Mr White?

White No, because the money had been attributed to Dr Muir etc.

Tipping J Oh I see, that's the result of the attribution? Thank you that was the missing step.

White And if Your Honours could keep that page open but also now look at volume 8, at page 1669, this is an extract from the brief of evidence of Ms Lloyd, who was the Department's investigator and who gave a very full brief, setting out all of these various steps in relation to all of the taxpayers, but these are the paragraphs relevant to Redcliffe, and on page 1669, starting at para.80, the evidence was that 'on 14th April 1997 Redcliffe registered with the Department as a Loss Attributing Qualifying Company. To become an LAQC, all shareholders must execute the required form allowing them to receive the company's annual net loss into their personal tax returns each year', which is explaining Your Honour Justice Tipping's point that was raised. 'As a result of Redcliffe's LAQC status, its loss for each income year was attributed to its shareholders' personal income tax returns in proportion to their percentage shareholding'. And she then deals with 1997, and you'll see that Dr Muir received a loss of \$897,869 as his part of the attribution, and for the 1998 year, the loss, that's the \$1.2 million that we've been looking at on the previous volume, was attributed to Dr Muir \$966,705 – Ms Taylor and Mr Maude'. And then if for completeness Your Honours just note that in the Commissioner's main submissions, tab A, you will see how this affected Dr Muir's, the principal shareholder and controlling Director of Redcliffe's, personal tax position at the top line for the two years, and Your Honours will see that in 1997 he had an income from his partnership with the figure shown in the second column there. He then was able to take advantage of his LAQC Trinity deduction for the 1997 year – that figure of \$897,869 in Ms Lloyd's evidence – which gave him losses to carry forward, and meant of course that he paid no tax that year. And the next year his partnership income is the figure shown, and the loss attribution from Redcliffe of \$966,705 is shown, and again he had greater losses to carry forward, and if Your Honours go through those lines you will see that's how it works. And the same of course for the other appellants is also shown in that appendix, and below that appendix Your Honours are all the references to the evidence substantiating the information.

McGrath J In respect of Dr Muir it's footnote 1 really is it?

White Yes, I'm sorry I've turned the page. Yes his personal position and all the references are all referred in footnote 1, and Redcliffe's tax returns are all referred to in footnotes 2, 3 and 4.

McGrath J Thank you.

White So, with all of that explanation it's clear that Redcliffe took a tax position. There was a tax shortfall, if the Commissioner's case is accepted. The assessment is correct as amended, and that is the second column on page 3927, and the shortfall penalties are payable.

Tipping J The figure fixed – I've put my volume away – but it was about \$300,000 odd, is that fixed as a matter of discretion, or is it a matter of mathematics?

White Mathematics.

Tipping J Mathematics. But we don't need to go into that?

White No.

Tipping J No.

White And unless there are any other matters I can assist Your Honours on, those are the submissions for the Commissioner, apart from my learned friend, Mr Coleman addressing Your Honours briefly on spreading.

Elias CJ Yes thank you Mr White. Yes Mr Coleman.

Coleman Thank you Your Honour. The Commissioner's spreading argument is at page 23 of his big volume with the submissions in it. This submission just deals with the spreading of the insurance premium. The important thing to understand is that the taxpayers claimed the full amount of the \$32,000 per hectare premium in 1997 and one of the grounds on which the Commissioner disallowed that was to say it should be spread 1/50th each year under s EF1 of the Act.

Tipping J Under EF

Coleman EF1, yes. What can get very confusing is that s EF1 deals with what's called accrual expenditure, but it's quite a distinct thing from the accrual rules under Part EH, but because they sound so similar, one can often slip from one into the other.

Tipping J And could you just show us where we find EF1 in your legislation?

Coleman Yes Sir, if you go to the Commissioner's volume that has the legislation in it, it's under tab 7, and

Tipping J So accrual expenditure is an independent concept in its own right?

Coleman Yes it is Sir.

Tipping J But linking in presumably with the accrual rules?

Coleman It only links in a negative sense Sir in that there is an exception that stops EF1 applying to a particular item of expenditure if the accrual rules apply to that particular item of expenditure. So there's that negative linking, but not a positive one. And what EF1 does is to spread the item of accrual expenditure on a straight line basis, so you get the same amount each year as a deduction, and its purpose was to stop people say buying five years worth of say fertiliser if you are a farmer and deducting it all in year 1, where it really relates to five years – you'd get 1/5th each year. So the issue is whether s EF1 applies to what is called accrual expenditure, and that's the defined term, and its definition is set out under tab 9 of the Commissioner's legislation, but it's also quite helpfully set out in the Court of Appeal's judgment at para.68. Slightly more helpful in the sense that they've only reproduced the sort of pertinent part of the definition. So accrual expenditure in relation to any person means any amount of expenditure by the person that is allowed as the deduction under this Act and of course an insurance premium is allowed as a deduction under the Act under s BB7, other than expenditure incurred, and there's several exceptions, one of which is in respect of any financial arrangement. So the taxpayers wish to avoid the application of s EF1 by saying that exception B to the definition of accrual expenditure applies, and the Commissioner's response to that is that exception B does not in fact apply because of s EH2 of the Act, which is a section under the accrual rules part of the Act, and what that section does, and it's conveniently set out at para.71 of the Court of Appeal's judgment

Elias CJ Well I haven't gone to the Court of Appeal one, so can you just tell me where I find it? I'm just looking at the sections.

Coleman It's para.68 through to 71.

Elias CJ Oh, the section in the Act. Sorry I'm just

Tipping J Is it in here, is it in this volume?

Coleman It is, yes, and Your Honour if you want to

Elias CJ I'd just rather follow it through

Tipping J It's on 26251 of the righthand top corner of the legislative tab 8.

Elias CJ Thank you.

Coleman Yes Your Honour, and in fact it's the one over the page, because we're dealing here with the 1997 year and so it's EH2 as it applied to that year as set out at page 26252, and it says 'the amount

Tipping J Oh is that under the history section?

Coleman Yes that's right Sir. And it reads 'the amount of the income deems to be derived'

Elias CJ Sorry, we're looking at EH?

Coleman 2.

Elias CJ 2, 'because it's common ground that there is a wider financial arrangement here, but the important thing is that s EH2 specifically deals with expenditure that solely attributed to an excepted financial arrangement', and again it's accepted that insurance is an excepted financial arrangement, so the only issue is what is the effect of s EH2, and s EH2 says 'the amount of the income deemed to be derived, or the expenditure deemed to be incurred by a person in respect of a financial arrangement under the qualified accruals rules shall not include the amount of any income, gain or loss, or expenditure that is solely attributed to an excepted financial arrangement that is part financial arrangement. What we have here that the insurance premium is solely attributable to the excepted financial arrangement, i.e., the insurance, which is part of a wider financial arrangement, but what EH2 does is to say that that amount is not included.

Tipping J So I was right the first time?

Coleman Yes. So we're now back into EF1 sort of

McGrath J If an excepted financial arrangement was the insurance, what's the financial arrangement part of it?

Coleman It's the whole of the scheme.

McGrath J So it's not just the insurance, it's the whole of the Trinity scheme?

Coleman Yes Sir.

McGrath J Thank you.

Coleman And the Commissioner's case is just simply that the Court of Appeal was right to conclude that the effect of s EH2 applying was to mean that exception B to the definition of accrual expenditure is no longer engaged, which means the amount of the premium is properly dealt with as accrual expenditure under S EF1, and it's as simple as that.

Tipping J So I have just written a chart and I just want to make sure that I've got it right according to your submission. It's an insurance premium, so it's in to start with – in the accrual rules. If it's a financial arrangement, it's out, but it comes back in again through EH2.

Coleman It comes back in to

Tipping J The accrual rule, to the spreading rule- the requirement to spread.

Coleman Yes to the accrual expenditure EF1.

Tipping J The requirement to spread.

Coleman Yes Sir, under EF1.

Tipping J So it's into start with then it goes out and then it comes back in again?

Coleman Yes, that's exactly the submission Sir.

Elias CJ So it's only a stand-alone insurance

Coleman Stand-alone insurance is an excepted

Elias CJ Deduction

Coleman I beg your pardon Your Honour.

Elias CJ That is excepted?

Coleman An insurance policy is an excepted financial arrangement

Elias CJ Yes.

Coleman But you can have an excepted financial arrangement being part of a bigger thing that is called a financial arrangement.

Elias CJ Yes I understand that and on your submission then it comes back into EF1?

Coleman Yes Your Honour exactly, yes.

Elias CJ So the only insurance arrangement that would be excepted is one that is not part of a bigger financial arrangement? Is that right?

Coleman I think it's the other way round. Because it's an excepted financial arrangement, it can be part of a bigger thing called a financial arrangement just by virtue of the definition of financial arrangement, but the Act's being very careful to say we don't want you to do anything with an amount that's solely attributable to an excepted financial arrangement. We want you to take it out of the accrual rules which is what's happening here. It's been taken out and been dealt with by EF1. And the final point Your Honours is that my learned friends will hand up an analysis, step 1, 2, 3, 4, of s EH2, and I just wanted to note that there's no disagreement with the steps. The disagreements with the consequence of EH2 applying, that's the

difference between us, and I thought if I mentioned that now that would save me popping back up later.

Tipping J So they say that EH2, even if fulfilled, it doesn't bring it back in again to the spreading regime.

Coleman Exactly, that's their argument.

Tipping J And you say it does?

Coleman Exactly Sir. And I don't have any further submissions.

Elias CJ Thank you very much Mr Coleman. Well Mr Gudsell, do you want to be heard in reply?

Gudsell Yes, I call on Mrs Hinde just to respond if I may to the matter that my friend Mr White QC has addressed the Court on, and then I will reply.

Elias CJ Well it's very unusual. We usually only hear one counsel in reply, but it's a complex case but that's alright.

Gudsell Well the matter was deferred as I understood the arrangement to hear from Mr White

Elias CJ Oh yes you're absolutely right Mr Gudsell, thank you.

Gudsell I use deferred very carefully.

Elias CJ Yes, yes, thank you. Yes Mrs Hinde?

Hinde Your Honours to understand my response to Mr White I need to take you through the actual tax return which he did not. He took you straight to the assessment. It's only when you look at that tax return that you can actually understand what the submissions are for Redcliffe, and that was the loose copy that was handed up on Wednesday, because the bottom of the page was sliced off and it's actually and important the bit that was sliced off.

Tipping J Volume 18, 3927 I've got written on the top of my loose. Does that assist anyone?

Hinde It's the Redcliffe return, volume 18, 3917, but it's actually a photocopy one and it won't have the printed numbers on it. Has that got a handwritten number on it?

Tipping J So that's what you handed up?

Hinde Yes.

Tipping J And then you said that was a little bit incomplete and that we needed to go somewhere else to get this as I recall?

Hinde Well if that's got printed number 3917 that would be from the volume which is the incomplete one. The one I handed up is a fresh copy of the assessment.

Anderson J Like this, that that's 3917 in the book.

Tipping J I wrote it on it.

Elias CJ Yes, I wrote it on.

Hinde Now that's the Redcliffe Forestry Venture Limited income tax return for 1998. Over the page, go to the second page, and you'll see the numbers down the left-hand side, the questions for the taxpayer to complete, and that says 'income from a partnership, estate or trust.

Elias CJ Which number?

Hinde 15.

Elias CJ Yes thank you.

Hinde And over on the far right side you will see at box 15B that has been completed, a bracketed amount of \$1,208,382 – the brackets of course indicating a loss. Going down then to question 22, further down the page, and the question asked is 'is the company a loss attributing qualifying company', and the answer is ticked yes, and what the instruction is, is print the total amount allocated to shareholders in box 22B, and that same figure appears \$1,208,382, so the two figures, box 15B and box 22B, are the same figures. Then you go to question 23, the next one down, and the instruction there basically is to add the figures in box 15B and 22B. Now the brackets have appeared in error twice. They should have only been put around once, but that result of that addition of boxes 15B and 22B is at 23, and you will see it's totally blank. They haven't put nil - it's just blank.

Elias CJ Sorry, which number now are we looking at?

Hinde You're still looking at question 23, and then right across on the right-hand side there's a 23 with a black background and next to it it says 'total income/(net loss), and that is the figure for Redcliffe.

Elias CJ Mine's blank.

Hinde Correct, mine's blank too.

Elias CJ Oh I see Mrs Hinde thank you. When you said that is the figure I thought you meant that there was a figure there but there isn't.

Hinde No there's not a figure there, but that absence of a figure Your Honour is the total income/net loss for Redcliffe for 1998.

Tipping J Well it should have had the \$1.2 million figure in it shouldn't it?

Hinde No Your Honour

Tipping J If the instruction had been followed.

Hinde No Your Honour, because what 23 is doing is adding 15B and 22B.

Tipping J But it doesn't say 22B

Hinde Yes Your Honour it is very badly printed but it says add boxes

Tipping J Oh I see, and deduct box, so you actually would have a loss of \$2.4 million.

Anderson J The brackets on 22B are wrongly there,

Hinde Correct Your Honour.

Anderson J And the idea is that you would add the loss in 15 to the positive figure shall we say in 22 and it should have led to a total figure of nil in 23 – there being a blank I think is equivalent to nil, as they're certainly not asserting an amount

Tipping J We might want to take the adjournment before we have to do this incredible

Hinde But Your Honour Justice Anderson has perfectly encapsulated what the boxes are supposed to be saying.

Tipping J Well maybe what they're supposed to be saying, but I'm still grappling with what they appear to say. I mean it says add boxes in 12, 13, 14, 15, 17, 18 and 20B, so of those you've only got 15B, so so far you're up to a minus \$1.2 million.

Hinde A loss, yes.

Tipping J A loss.

Hinde Yes.

Tipping J And then you deduct boxes 21B with nil, so it's still \$1.2 million loss, and 22B, so you're at \$2.4 million loss.

Hinde No Your Honour, what's happened is that the brackets have been put in there in error

Tipping J Put in where?

Hinde In 22B. It's a self-cancelling exercise.

Anderson J It's plain that it's an error because you're meant to put in the amount that you want to attribute. You want to attribute an amount that will have a positive effect really.

Gault J That's affirmed by the nil in box 25.

Elias CJ Yes.

McGrath J I thought you were deducting a loss. I would have thought the brackets would have been there but they had to be deducted so that that produced the nil.

Hinde Yes that's right.

McGrath J That made the acquittal.

Hinde That bracket was an error which

McGrath J Was an error, okay.

Hinde It was an error, yes. Do you want me to continue now with this?

Elias CJ Do you want to complete this or is it going to take some time?

Hinde I just want to finish this part of it but I think then

Tipping J Oh I see, the penny has dropped.

Hinde Once you've got that part. So at the foot of that page, which is 3918, box 27, that was the box that was chopped off in the case on appeal. It was totally chopped off and you will see there it says taxable income or net loss to carry forward and that is nil.

Anderson J It's all been attributed to the shareholders.

Hinde Correct, yes, so there's nothing there. There's no taxable income and there's no net loss to carry forward. Read it with a comma after taxable income. There's no taxable income to pay tax on and there's no net loss to carry forward. There's nil.

Tipping J Because what came in went out.

Hinde Correct, because of the attribution.

Gault J Isn't there a tax position by asserting the loss in box 15? Isn't that taking a tax position?

Hinde Could I just finish going through the mechanics of the form, but I'm coming to the answer to that Your Honour, because the tax position is critical. If you go over to page 3, and right at the top there it says nil, box 28A, and that's been copied direct from box 27, so there's nothing changed there, and then the total tax payable which is the next box, which is 28B, second box down, that has been left blank, and that describes total tax payable, so there's no tax to pay. Then go over to page 5 and that's the page that shows how in box 40, the amounts have been attributed. So there are three amounts there which comes back to that total of \$1,208,382 million. It's not actually a total on that page but that's where it went to those three shareholders. Now Your Honours perhaps we might

Elias CJ Shall we take the adjournment and then you're going to tell us so what.

Hinde Yes, correct, yes.

Elias CJ Yes, that's good, thank you.

Court Adjourned: 11:40am

Court Resumed: 11:58am

Elias CJ Yes Mrs Hinde.

Hinde Now, if you can go to volume 18, page 3927, which is the notice of assessment that my learned friend Mr White just took you through earlier,

Elias CJ Sorry, page?

Hinde Page 3927, it's volume 18. Now that's a copy of the assessment which was issued on the 28th March 2003 for Redcliffe, and you will see as you've already been taken through it, half-way down 'taxable income/loss' – it's zero for the return; it's zero for the amended – the two columns. So there's no difference between what Redcliffe returned as its loss and what the Commissioner has reassessed. It's nil in both cases. The next line, 'the tax on the taxable income' – there's no difference – nil and nil. Tax Credits, that's no change either, and no change to the residual income tax. Now the only change is the shortfall penalty of \$391,746.78. Section 92(1) of the Tax Administration Act required the Commissioner to determine taxable income; income tax liability, and tax payable, and there is no change. Those are the only three items that he had to file

Elias CJ Sorry, do we need to look at 92(1) to follow this?

Hinde No Your Honour, it has been covered earlier. I don't want to waste your time with that and it's also referred to in the written submission for Redcliffe.

Tipping J Well there is a change to taxable income in the sense that there's a major change to the loss. Surely income must be deemed to include loss for this purpose.

Hinde Your Honour if you look at that line it says taxable income/and then in brackets the word loss, and Redcliffe has recorded it as zero, zero, and the Commissioner has recorded it as zero, zero, and the tax

Tipping J Oh I see what you mean. I was looking at the total gross income loss but you say that can't for this purpose.

Hinde The total gross income loss, where was that Your Honour?

Tipping J At the top line.

McGrath J This is not an assessment so much though is it as a, at least not an assessment of taxable income, it's just a statement determining shortfall penalty?

Hinde What's happened is that that has replaced the assessment because you can't have two assessments living together. You just can't have two assessments living together, and this of course was the point that the Hearing Authority was being asked by the challenger, which was Redcliffe, to confirm their original tax return position, and the assessment that the Commissioner made was that there was no tax to pay, and then this comes along and there's a penalty to pay but nothing that was in the income tax return has changed.

McGrath J Is your answer Mrs Hinde then that yes this is an assessment of the income, it's not just merely a statement fixing the short-term penalty?

Hinde No, it's a

McGrath J Well I think you're saying it's a reassessment of income.

Hinde Yes, you can't have two assessments living together. This one replaces the earlier

McGrath J I'm not disputing that, but so what you're saying is this was a reassessment of income?

Hinde Yes, and it's because there has been no change to the critical things that had to be assessed by the Commissioner under s 92(1)

Tipping J Well it wasn't a reassessment of income in substance. It's got a heading notice of assessment, but it didn't reassess income or loss or tax on taxable income as a matter of fact. It did neither of those. As you've pointed out there was no change, so in substance surely this is a document that purports to apply the shortfall penalty.

Hinde Well Your Honour to reach that position it means that the original assessment should have been confirmed.

Tipping J Well technically perhaps, but are you saying your clients were misled or something?

Hinde No.

Tipping J Are you saying there's some very technical reason why they haven't quite got their language correct or something?

Hinde No, they got their language correct. It's just that the assessment that was originally made, and is still agreed with by the Commissioner, that assessment should have been confirmed, and their challenge should have succeeded.

Elias CJ But I think we may need to look at s 92. Is that key to what you're saying here that they didn't have the competence to do other than reassess tax payable?

Hinde Well the Commissioner's result is identical for the three items that he can reassess.

Elias CJ Well that's what I'm asking you about

Hinde So what he's gone beyond

Elias CJ Sorry, that submission is based on the wording of s 92(1) is it?

Hinde Yes.

Elias CJ Well I'll need to look at 92(1), I'm sorry

Hinde 92(1) did change between the 1997 year and the 1998 year and so we're dealing specifically with the 1998 year, and the three items that the Commissioner had to determine was taxable income, any income tax liability on that income, and the tax payable, mathematical calculations of tax payable, and those are the three.

Gault J Under what statutory authority then does he assess penalty?

Hinde That's in the Tax Administration Act and that's under the penalties part of that Act.

Tipping J 141 etc. The ones that Mr White was taking us through.

Hinde Yes, part 9.

Tipping J So are you saying that technically he shouldn't call this a notice of assessment, he should call it a notice of in possession of shortfall penalty, is that the argument?

Hinde Well, the thing is that he can only springboard off into these penalties if the company has made an incorrect return, and the Commissioner, on the face of this document, has agreed with what the taxpayer returned.

Tipping J It hasn't.

Elias CJ But it springboards off the tax position taken.

Tipping J It may result in the same position on the ground but it's a very materially different assessment because he disallows about \$1.2 million of losses.

Hinde No, the return did not claim losses of \$1.2 million, and that was why I was taking you there to show you that there was nil, that the return says nil.

Tipping J But surely if you claim something it's under 15, you claim a loss from somewhere.

Hinde Go down to – this is on page 3918 – it's box 23, and that is the net loss, and box 23 is blank. It should have had a nil or a zero or something written there, but box 23 is the result of taking box 15B

Tipping J Look I understand all that. I'm perfectly

Elias CJ Formalism based on form.

Hinde No Your Honour this is what the Act requires.

Tipping J Well I think you're trying to take advantage of the fact that he hasn't purported to impose a shortfall penalty in the precise way perhaps that the law would require, but in substance that's what he's doing. He's not changing the assessment, he's imposing a shortfall penalty isn't he?

Hinde No Your Honour he's misrepresenting what the company actually returned, because where in that top line of the reassessment, it says total gross income loss, and in the column is as returned that is not what the company returned. What the

- Tipping J Can't he focus on 15 and say that was an abuse of tax position to put that \$1.2 million dollar loss in that box?
- Hinde No Your Honour, because what the company was required to do under the legislation was to say 15, what income received, or loss, and that has been correctly recorded in box 15B
- Elias CJ Well that's the net loss. Oh sorry 23 is the net loss.
- Hinde No I was just at 15B.
- Elias CJ Sorry.
- Hinde Then you go down to 22 and it says LAQC, and it instructs the taxpayer to print the total amount that's been allocated to shareholders, which is the identical amount, so it's all gone and this particular
- Tipping J But if you took this view Mrs Hinde you would completely emasculate the whole point of the LAQC regime. They've got this loss into the hands of the shareholders on the hypothesis we're working which they shouldn't have, and this LAQC was donkey deep in that arrangement.
- Hinde Your Honour, it would be impossible for any taxpayer to make a tax return because obviously the Commissioner has always got the tax avoidance provisions available. For anything whatsoever, there's nothing a taxpayer can do except correctly record in the tax return the figures that have been calculated and then attributed under the Act – under HG1 and HG16 – it's recording what has happened, and the whole scheme of the LAQCs is that this happens. You treat the LAQC like a partnership so that it's almost as though it wasn't a legal entity at all, it just passes through - so it comes in and it goes out and you end up at 23 with no income and no net loss to return, because it is just passing through to the shareholders. It is correct.
- Elias CJ Sorry, can you take me to s 92? Do we have it here? We might not. I've got the statute anyway.
- Hinde Your Honour we don't seem to be having very much success with finding 92.
- Elias CJ Because what you really need to convince us is that the statement in para.15 is not a tax position.
- Anderson J Or even that the whole return is not when it's defined as such.
- Elias CJ Yes.

- Anderson J And you seem to be proceeding I wonder Mrs Hinde on the basis that the tax position is the bottom line, and it's not. Tax position is comprehensively defined in the Tax Administration Act very broadly. One of the definitions is the provision of a tax return, and if you file an unacceptable tax return, you've taken an unacceptable tax position – simple as that.
- Hinde Well just treating the tax return as the tax position, which is the normal way of getting to a tax position, the tax position is correct until
- Anderson J No, the tax is not the bottom line, it's the whole return can be a position, and if an element of that return is unacceptable, you've got an unacceptable tax position. It's not just the net amount.
- Hinde Well the thing is that under s 92 the Commissioner is having to find those three items and he hasn't disagreed.
- Anderson J But that's not the point. The point is whether you've taken an unacceptable tax position.
- Hinde That's not coming from the tax return figures though, that's coming from somewhere else.
- Anderson J Yes it is, it's not coming from the figures, it's coming from the fact that you are attributing when you're not entitled to attribute.
- Hinde That's a separate issue Your Honour because the thing is the LAQC does not do the attributing. If the LAQC never filed a return, the attribution would act automatically under the provisions of the LAQC. HG1, HG16 passes those amounts through to the shareholders automatically, and this is determined prior to the commencement of the tax year when the elections have to be made by the shareholders
- Anderson J I just wonder whether the point might be resolved by just considering the definition of tax position in s 3 of the Tax Administration Act? As simple as that.
- Hinde Right. Just explaining how that then feeds into the argument that we have made in the written submission and – Your Honours I'll just draw to your attention, my learned friend has directed me to s 94A which is assessment of shortfall penalties. I'm not in a position at the moment to address you on that though but I just draw your attention to it. I just want
- Gault J So it's an assessment is it under 94A?
- Elias CJ Can we just have that confirmed if you're not in a position to address us on it Mr White?

White Certainly Your Honours, yes, and I can help you with both of the provisions that have been mentioned and we can certainly provide Your Honours with copies if that would help. 92(1) reads 'a taxpayer who's required to furnish a return of income for a tax year must make an assessment of the taxpayer's taxable income, and income tax liability, and if applicable for the tax year the net loss terminal tax or refund due. That's the provision my learned friend's relying on. She's correctly mentioned at my request s 94A, assessment of shortfall penalties under subs 1. 'The Commissioner may make or amend an assessment of a civil penalty in the same way as the Commissioner may make or amend an assessment of the tax in respect of which the penalty is imposed. The Commissioner to assess shortfall penalties separately. The Commissioner must assess a shortfall penalty in the same way as the tax to which it relates but separately from the tax', and there are a whole lot of sub-provisions that deal with that.

Elias CJ Thank you.

Hinde The distinction Your Honour is that the figure that the Commissioner has put in this document 3927 is that the company actually returned a gross loss of \$1.2 million, and that is disputed. It did not return that figure at all.

Elias CJ Well didn't it?

Tipping J Wasn't that the extent of the tax position that has been disallowed? The thing that went wrong on the hypothesis we are addressing this was that this return was wrong to the tune of that amount, and presumably there's some arithmetical relationship between that amount and the shortfall.

Hinde Your Honour what you're attacking is what appears in box 15, which is the loss

Tipping J Well we're back to where we were. I think have you've got anything else you can say about this Mrs Hinde?

Hinde I just wanted to say Your Honour how that argument feeds into that slide 18 that you were given. I just want to relate that to the argument and I think it will clarify things where the argument goes if you've still got that slide 18. It was a decision tree for Redcliffe, and just going down to the third line on the right there there's a box that says 'what determines the attribution of losses'. Now what I just said earlier, if you go to the lefthand box it's a centre box LAQC election, it's HG16, and I've already said that if the company never files those losses still feed through just as it would with a partnership, the losses automatically go through to the shareholders, and those are the two consequences, so if it didn't file a return it wouldn't affect the shareholders, having taken the statutory attribution. It's the statute

that does the attributing and whatever the company puts in its return it doesn't actually give the shareholder that position because it's the elections that the shareholder makes prior to the commencement of the income year that sets the process for attribution to occur. They have to be in the Commissioner's hands prior to the income year commencing, and so the company's return is just really figures just to check on what has happened, but the shareholders could go ahead and actually take those attributed losses because that's what the statute says now if you see attributions as automatic under HG16. Now going back on the righthand side there, if that argument fails and if the tax return itself is what causes the attribution, if that is the trigger for attribution, then you'd come to the position of having to look at the tax shortfall definition as to whether there's a difference between the tax filing position and the correct position.

Anderson J Your return said we lost \$1.208 million.

Hinde No Your Honour it didn't say that. What it said was it was recording the fact that under the statute that amount had been attributed and gone but it left

Anderson J But what does clause 15 say. 'Did the company receive income from a partnership, estate or trust'.

Hinde Correct.

Anderson J It says \$1.208 million.

Hinde Correct.

Anderson J And the Commissioner says no, that's wrong, it was \$21,000.

Hinde If you go down to box 23 though Your Honour, there it requires the company to state its total income/net loss, and the company has got a blank there because there is no figure to put in that box because 15B and 22B cancel out. It's all gone.

Elias CJ Mrs Hinde I really wonder whether we should spend any more time on slide 18 because the key point is your question 'is there a tax difference between the tax filing position and the correct position of the LAQC', and you're trying to submit that there is no position. If you don't succeed in that submission then there's nothing more to be said is there?

Hinde No I'm saying if you say it's the tax return, and it's coming down there, it's the tax return that's relevant instead of it being attributed already, and the question is, is there a tax difference between the two positions

Elias CJ Yes, yes, and you say no.

- Hinde There's none, now if you go down where the box says no, that is actually the argument in para.14C of the written submission. It might just be helpful to write it there because it's in reverse order to what's in the submission.
- Elias CJ Yes.
- Hinde So that's 14C argument. Going down from that box it rather cryptically says there's no penalty and the then consequence is not relevant. That's where the Court of Appeal had identified that there was no difference in the true position. The Court of Appeal held that. There was truly no difference in what the company had filed and its true position. But then the Court of Appeal went on to the second part of that definition which requires you to look at the downstream effect on other people including the shareholders who have got these losses – the attributed losses, and that was where the Court of Appeal said that well clearly the words that were in italics I think in the judgment, those are the things that cause them to say there were double penalties. Now Your Honours my submission is the critical word in that definition of tax shortfall is the word 'when'. You go down and it says the position as filed, a, b, the correct position, and you find yes, tick, there's no difference. Now if there is no difference you are not required then to go on and consider the consequences of that tax difference – that effect. You've stopped at the word 'when' because there's no trigger.
- Elias CJ Yes, if you're right in that submission it follows that you finish up with the box that says no penalty.
- Hinde Yes, now if you don't accept that submission, if you go over to the right where as the Court held in the Court of Appeal, it said, well no it didn't, it said no there wasn't a tax difference but then it went straight on to the second half after when to see what happened to the shareholders. Now then you've got to look at what they looked at to see if there was too little tax being paid by shareholders. Now that takes you down to the position well was there or was there not, and if there wasn't there's no penalty, that's easy, but if there was do we know that yet, and this is my argument which is in para.14B, so if you write that on the box, have the shareholders paid too little tax, that's my 14B and you then split. Well we don't know yet because those shareholders have got challenges stayed on that very point, so nobody knows and they're entitled to fight that in the way prescribed under the Act for challengers. Now if you say yes, they have got those benefits, then you get to the final point which is my para.14A, which is reflecting the position that the Commissioner took that they would only apply penalties if that resulted from the avoidance provisions.
- Tipping J If your point that there's a timing mismatch between the assessment here and the position of the shareholders, and that it all should wait

until we see what happens to the shareholders? That's what you seem to be saying.

Hinde Well if you follow the section you do have to determine what is the shareholders' position but the trouble is that they're entitled to argue that in another place.

Tipping J But if we say this is an abusive or an unacceptable tax position for upholding that view for this LAQC, the shareholders aren't going to be in a very healthy state are they, the Supreme Court having said that? So is your point that we should not say that until the shareholders themselves have had an opportunity to get themselves out of their present predicament?

Hinde Well Your Honour

Elias CJ Is this why Mr Muir's not a party to this litigation?

Hinde Well I only represent Redcliffe Your Honour.

Tipping J He's the controlling shareholder of Redcliffe.

Hinde I'm afraid I can't speak for anybody but Redcliffe.

White Perhaps I can just help on that Your Honours?

Elias CJ Yes.

White Test cases were selected and I could take some time explaining why but Dr Muir's personal position was not one of the test cases, unlike Mr Bradbury.

Tipping J Yes, but is it part of an agreement that they will be bound by the result of the

White Those cases are stayed pending the outcome of this appeal. There's no agreement, no.

Tipping J No agreement.

White No, but some of the other taxpayers of course have settled. Well I believe one of the other shareholders may well have settled.

Tipping J But are we doing justice to the shareholders here if we were to say that this was no good and the shortfall penalty was valid? Wouldn't that immediately and unequivocally bind them to that same conclusion without them being heard? I think this is what Mrs Hinde may be, I don't know, driving at.

White Well I don't think it's ever been raised in those terms before. What Your Honours ask is the only shortfall penalty that is before the Court is the one imposed on Redcliffe, and it's the assessment for Redcliffe that's being challenged, and if Your Honours uphold the assessment for Redcliffe, including the shortfall penalties for Redcliffe, that's as far as Your Honours need to go.

Elias CJ Yes.

Tipping J Yes I know it's as far as we need to go, but it would pretty well foreclose the point wouldn't it for the shareholders?

White Well unless there's some other argument that he's got, it may well do but of course it is a test case from that point of view as far as the scheme is concerned. But his remedy then

Tipping J It's the only part of what Mrs Hinde has been saying that strikes any resonance in my mind that we're in effect going to unequivocally affect someone who's not technically before the Court, but I can't say I'm very sympathetic to that view, because he should have applied to be joined or something.

White Yes he could have, and of course he was before the Court in the sense that he gave all the evidence for his own LAQC. He is the LAQC in that sense Your Honour.

Elias CJ And in any event if Mrs Hinde doesn't succeed on the principal argument she's advancing to us, there's no question of considering the position of the shareholders in any event.

White No, no, that's right Your Honour.

Elias CJ Yes.

White And the relief is still there. I mean if the LAQC pays the penalty, and if he has a penalty, he then can proceed under

Tipping J I think the argument seems to be that after hearing from Dr Muir there won't be any penalty, but it's a bit late for that I would have thought.

Hinde Your Honour, to get double penalties you're looking at the company and you're looking at the shareholders quite distinctly. The company is saying why it should not have got these penalties at all.

Tipping J Are you trying in any way to tell us that we shouldn't engage on this because the shareholders are not strictly parties to the present proceedings, yes or no?

Hinde I'm saying that what the Act requires you to do is to follow through.

Tipping J No look, is it part of your argument that we should not do something that we might otherwise have been minded to do because the shareholders personally are not before the Court in this proceeding? Is that any part of your argument?

Hinde What is not before the Court is the factual finding about whether or not those shareholders have paid too little.

Anderson J It doesn't matter. If you look at the definition of 'tax shortfall' which is what the penalty's attached to, not the bottom line on the tax return, but a tax shortfall, that can be a situation that results in too little tax paid by the taxpayer or another person.

Hinde Yes.

Anderson J Now, the tax position that was taken says here is a loss that's been thistled out as to its amount; here is an attribution to other people we know that these other people have claimed that attribution, and there must therefore be a corresponding alteration to their tax position.

Hinde But it doesn't affect Redcliffe because

Anderson J Well it does because it took the tax position.

Hinde No, if that loss is removed, it is not available to be attributed under the Act.

Elias CJ Mrs Hinde I think we do understand your argument. Is there anything in addition that you want to add to it?

Hinde No Your Honour, that's my argument.

Elias CJ Yes, thank you Mrs Hinde. Yes Mr Gudsell.

Gudsell Yes may it please Your Honours. I have some brief further notes for you to put amongst the bundles that you've already got handed up to you.

Anderson J Much of the forest has gone on paper in this case Mr Gudsell.

Gudsell Yes you don't have to look very far do you Sir.

Tipping J Two trees per hectare.

Gudsell The Douglas Fir of good quality. In respect of the deductibility of the licence premium, the respondents' submission, para.32, its main submissions is that licence premium was to be paid in 2048 for the right to share in the proceeds of the forest, and not for the right to use the land in the face of the contractual obligation to do so. Now Accent's position is if the licence premium was payable for the right

to share in the proceeds, it will constitute as I mentioned the other day, a financial arrangement, as indeed the respondent had submitted in the Court of Appeal. As a consequence of the licence, premium must be spread as required by EH1. Now this is simply a legislative trawl. It's in no respect on my part of being disrespectful to the Court with respect to the ruling which of course I

Tipping J No, I understand that Mr Gudsell, but that doesn't at all mean that the thing as returned was correct. It actually acknowledges that it wasn't.

Gudsell If the position of this Court is that contrary to the submission for Accent, that the deduction is not available under EG1 for the right to use land, then the Commissioner is saying to this Court, the position is that it's paid for the right to proceeds. What I'm saying to the Court is there is a consequence of arriving at that position and the consequence of arriving at the position legislatively is the one that I'm setting out.

Tipping J But the Commissioner was right not to accept the return then.

Gudsell The Commissioner was right if this is the position that is reached, the Commissioner would be in a position in respect of an assessment where the position that he has arrived at gives rise to a deduction under another route.

Gault J That's not for us to decide is it.

Tipping J No, that's not in front of us.

Gault J Are we not directed at other routes or what might have been done in a different situation? We are considering the claim that was made.

Gudsell Yes, I accept that

Tipping J And one appellant is saying to us that it was wrong.

Gudsell Yes.

Tipping J Well that's a very bizarre

Gudsell No sorry Sir, I missed that.

Tipping J One appellant is saying to us well actually we accept that the Commissioner was entitled.

Gudsell No that's not the position I'm taking Sir at all. I am responding to the respondents' submission in pointing out

Tipping J Is this a fallback? Are you saying that it was for the right to use land, but even if it wasn't and it was for the Commissioner's purpose, it would have been deductible but on a wholly different basis?

Gudsell That's what the Commissioner's position has taken. All I'm advising the Court is of the consequence of where the respondents' submission takes you to.

Gault J Well it takes us to disallowing the deduction. It doesn't take us to reassessing the income or loss on another basis.

Gudsell If you reach that point? And the question of whether

Gault J I suspect it's far too late for the Commissioner now to reassess on a timing point of view.

Gudsell There will be a timing point.

Gault J Well what we're dealing with is a claim deduction.

Gudsell Yes, and all I'm telling you is the consequence. All I'm doing is responding to the position that's an available deduction.

Gault J Well I understand that but my response to you then is so what?

Gudsell Right, so what if the Court finds that in respect of the licence premium that it's not deductible then that in my submission is full-stop with respect to tax avoidance. If, before you get to the GAAR or the GAP, whatever term is used, you have to establish that the deduction, or part of at least, of that figure is allowed under A or any provision of the Act otherwise there is nothing to avoid. Tax avoidance requires a tax actually be avoided or postponed, therefore the purpose without effect is nothing, nor can it be corrected. Having a purpose of altering tax is sufficient to have the required effect – a point that Your Honour Justice Tipping was addressing yesterday. Because every deduction has a purpose of altering the incidents of tax. The Act often encourages economic choices by providing tax incentives to adopt certain structures. Depreciation is an example because it allows a capital deduction otherwise excluded by the Act.

Tipping J So if it falls at the first fence it can't be avoided?

Gudsell Correct.

Tipping J It's as simple as that in your submission?

Gudsell Correct. And I just take you as I mentioned in my submissions the other day, cross-reference to para.47 of the Commissioner's submissions, and it wasn't read out yesterday because I had read it out, and I'll read it out again. 'If the Supreme Court decides against

the Commissioner on the issues relating to the deductibility of the licence premium and insurance premiums, as the Court of Appeal did, the Commissioner contends that all the appellants are parties to avoid tax avoidance arrangement'. So the premise that one commences with is that the deductions are as the Court of Appeal found them, that is available, they have effect, there is a tax effect achieved, it is a deduction that is available. So the Commissioner puts that at its forefront. 'Even if however the Supreme Court were to decide in favour of the Commissioner in respect of the non-deductibility of the licence premium and the sham argument as it will still be necessary for the Court to determine the tax avoidance issue because the appellants' tax avoidance submissions remain relevant to the deductibility of the insurance premiums for the appellants other than Redcliffe, Bristol and Mr Bradbury, and to the issue of penalties'. So it's put its position very clearly there. If you find in their favour with respect to non-deductibility the point just discussing with Your Honour Justice Tipping on the licence premium and for what are regarded as the sham arrangements, then tax avoidance issues are over.

- Elias CJ Well what about penalties?
- Gudsell Penalties is another issue which independently both in all the Courts, and indeed I'm not sure in this Court, in all
- Elias CJ I'm just referring to the weight you're putting on the way it's expressed in the Commissioner's submissions, because it expressly says that it's relevant to penalty.
- Gudsell And the Commissioner has taken a very clear position throughout this proceeding, both in the evidence in the High Court and in the lower Courts, that it took an abusive tax position, penalties position, where there was a tax avoidance position taken by the appellants. If there was not they haven't addressed that. They have taken singularly only in that instance, so if you do not find tax avoidance, penalties issues have not in my submission, been addressed in the absence of that finding.
- Anderson J Yes so they'd then come under the not abusive but the unacceptable provision.
- Gudsell Well the question for determination really.
- Anderson J Well ordinarily one would expect that.
- Gudsell Or not in terms of an interpretation that the appellants may have taken that is reasonable.
- Anderson J Yes, I see that point.

Gudsell Yes. So critically there needs to be some lines drawn in my submission in respect of the position that the Court reaches at every stage. Depreciation is an example because it allows a capital deduction otherwise excluded by the Act.

Tipping J So it's better for your client that it fall at the first fence than clear the first fence and fall at the second?

Gudsell No Sir, I'm pointing out with respect not a matter of preference but a matter of consequence, so I have made submissions in support of Ben Nevis that the deductions are available, so I'm not

Tipping J Yes but the consequence of your submission is what I've just stated isn't it, if you be right then it's better to fall at the first hurdle than the second, because the second is never available if the first is not crossed.

Gudsell I understood Your Honour to be suggesting to me that there was a preference on my part as to where I would fall

Tipping J No, no, it's nothing to do with you Mr Gudsell, I'm just saying is that a consequence of the submission being accepted?

Gudsell That is a consequence Sir, it's not a preference, it's a consequence, because the appellants for whom I act have presented in support of Ben Nevis that the position is that the scheme and purpose of the Act with respect to the deductibility has been met.

Tipping J Right, thank you.

Gudsell If a deduction is allowed under s EG1 the meaning of cost will have already been resolved when determining the issue of deductibility and the remarks of the *Auckland Harbour Board* that have been proceeded with, and the often referred to reference to the long-stop for the Commissioner. The scheme and purpose of the Act to where an obligation to pay an arms length party is incurred, to provisionally allow the deduction but required to be later written back if the deduction is not paid. In cases where the deduction claimed is not within the scheme and purpose of the Act despite literal compliance with the Act, the GAAR provides the statutory basis for adjusting income, however this is not such a case. It's not an independent hurdle that has to be jumped without reference to the provision under which the deduction is claimed. The Commissioner quotes a number of factors which he says indicate the presence of tax avoidance, but which do not apply to Accent. These include the aged shareholders in Accent. Accent was owned 50% by a company owned by trusts of eight years, and 50% by a trust company, and the fact that investors were single purpose companies which Accent was not. The Commissioner in addition relies on the licence being unusual. Accent not being in existence in 2048, and that no personal guarantees were

given by the shareholders. None of these matters in my submission are compelling reasons to find that there is tax avoidance. Those circumstances are common to many investments. The Commissioner also submits that deductions were inflated contrary to the accrual rules, and the licence premium was structured to sideline the accruals rules. The Commissioner has accepted that he could have assessed under the accruals rules but chose not to do so, hence those allegations are irrelevant. They are only addressed because they are in part of a submissions despite the references there. The respondent is not concerned with time-lag, just quantum. The inflation of the amount paid for the right to use the land for forestry has as perceived by the Commissioner formed the basis of almost all of his objections to allow deductions. It is not the 50-year time lag between expenditure and income which is done so because if that were the case all deductions claimed up front would have been denied. And that's a point in respect of the way in which this matter has been examined because there are a significant number of deductions associated with this forestry venture by management plan, thinnings from Douglas Fir, and the Pine, and other matters that the Commissioner said they are deductible at the end of the day – well, as the matter proceeds. Despite the Commissioner's belief as to price inflation, the legislation he sponsored in 2003 to confront the Trinity position did not allow him to reduce the \$2 million but merely to quarantine deductions against future income where payment is deferred in excess of two years. I just want to take a position if I may – I'll deal with the deductibility of the \$34,000. This is deductible under BB7, as both Courts have found below, s BB7 applying deal 13 on its own terms cannot. If BB7 applies then EF1 applies and the premium is spread over 50 years. Now can I just take up a point that my learned friend Mr Coleman raised this morning, and it was a response to Your Honour's Justice McGrath about if we have an excepted financial arrangement here, I understood your question to him Sir had been, 'what is the financial arrangement is part of', and it's quite a critical aspect that I'm sure that you will consider further and that is that the Court has found the financial arrangement that it is part of, and that can be found at para.203 of the High Court judgment, and so rather than just being as I understood my friend to say, just part of the Trinity scheme, and Justice Venning has described the scheme as being the licence premium and insurance premium, His Honour Justice Venning describes it as one that satisfies part A(2) of the *definition of financial arrangement*, and it crosses over with issues and I am obviously not to go there, but it crosses over with the references to the definition too which had earlier been contended satisfied the criteria of the deferred property settlement – but I simply leave that matter before the Court as I did the promissory note issue of being a financial arrangement – but that's the finding Your Honour that you were looking for. If BB7 applies then EF1 applies and the premium is spread over 50 years. Tax avoidance in claiming the \$34,000. The \$34,000 is 1.6% of the total consideration paid for the licence. It was truly incidental. It would have been non-commercial

for Accent to forego the \$4.8 million dollars per hectare proceeds as Justice Venning has held and has been put before you as one of the slides, in slide 6 of the material that's been placed before the Court, where you had the lowest expert, lowest on Justice Venning's calculations of the expected reasonable returns for the forest through to \$4.876.726 million, and that's slide 6 that was handed up. Accent was indifferent to what the money was paid or used for, for that indifference was not indicia of tax avoidance it is evidence of an incidental relationship to the larger commercial deal, and it is somewhat akin if I may use the analogy of securing a rental arrangement for a vehicle and being told that in order to meet secure the rental agreement you need to take out crash insurance of whatever the sum might be. Who the insurer might be is not a consequence. If you want the car, you pay the rental plus the insurance component. I want to say something before reconstruction in respect of the position that I've advanced in response to Justice Tipping, and in respect of the actual position with regard to tax avoidance, and it drives off the back of a remark that my learned friend Mr White QC made yesterday, where he talked about the – I'll get this accurate if I may. My notes record in respect of the opening of the tax avoidance issue of the failure to comply with the black letter would mean taxpayers escape penalties. Now we've just discussed that that probably is not so, but there's certainly abuse of tax penalties. So the reference was an incompetent tax adviser would get away with it. Now I just want to briefly retrace the position in respect of this matter, because I submit it is important when one considers whether in fact when I remarked that 1.6% of the total consideration for this component in 1997 has been relied upon so heavily to bring this whole scheme tumbling down. The CSI plan; the letter of comfort; BVI investment; BVI insurance, are critical features of that. That is only applicable in 1997. The 1997 returns were filed with the insurance for the \$34,000 component. The 1998 returns were not. There are separate returns; there are separate proceedings. There is no claim for insurance in respect of 1998. The position is in that time that the returns were filed for those respective years. There were no self-assessments in that time - the original assessments were issued by the Commissioner. In those original assessments the deductions were allowed. NOPAs were issued and the reliance that the Commissioner placed in the original NOPA in 2000, Accents is not in the case on appeal but you do have others, was tax avoidance. So the Commissioner had taken a position in respect of this matter – *ALA Peterson* for example, that it hung its hat on tax avoidance. In 2002 the Commissioner changed his position, and in the hierarchy of deductions that he sought to challenge, not just tax avoidance, but if you like covering the bases – not put crudely in any sense at all, but covering the bases, the deductions are not allowed, but if the deductions are allowed then tax avoidance, because under the former approach, if tax avoidance had not been established then the deductions stand. So that's the way the Commissioner had approached it. Reassessments were issued because of time bar and the challenges, the separate challenges for each

particular year followed. Now my point in relation to this exercise is that what's happened, and I was mentioning this in my submissions the other day, is that when it came to the High Court proceedings, the High Court Judge said EG1 is not allowed. A formal finding at para.168 as I recall. He then had to go on and consider the insurance premium. What he's done is said if I'm wrong on disallowing the licence premium deduction, then I'll go on to consider the big picture of tax avoidance, and found that it applied to the whole arrangement. But his former finding, as I was just discussing earlier, is that the licence premium is not deductible. It has no tax effect. The facts forming the basis for it are not there to be avoided.

Elias CJ Well this is the same argument that your principal argument that if they fail on the deduction, then you can't get into tax avoidance.

Gudsell Well there's a development on that because it's responding to the suggestion that some form of incompetent tax advisors can get away with a process of avoiding the heavy hammer of tax avoidance. The tax avoidance choice is by the Commissioner in assessing and NOPAing the assessments on the basis

Elias CJ Well you said that his NOPA – which I hadn't appreciated – was on the basis of tax avoidance.

Gudsell Initially, and then changed, to say no, we're now attacking the deductions and tax avoidance. Now if the deductions in the stepped process that is required by law – the deductions are not available – you don't move forward. If the deductions are available as the Court of Appeal had held, you do move forward. But my point in respect of this issue is this, that what has happened here in the appellants' for whom I act, is that there has been a rigorous scheme and purpose examination I submit under the wrong provision, under DL13, which has survived, that deduction has survived for Accent. It hasn't survived for Redcliffe, and what occurs at the end of this process is that that deduction then moves forward and the features of it critically form an evidential basis for tax avoidance.

Tipping J It's the ring-fence point.

Gudsell It's important Your Honour in my submission.

Tipping J No, no, I'm not knocking it, I'm just saying it's the ring-fence point isn't it that we discussed under that label?

Gudsell Yes it is.

Tipping J You can't use the evidence.

Gudsell Well because it's got no effect, you're not avoiding the facts that form the basis for that deduction.

Tipping J Well just so long as I'm following you, yes it's the ring-fence argument.

Gudsell So what happens is you go forward under my submission, a rigorous scheme and purpose examination of the \$34,000 component, and you then utilise that same position that has survived for Accent, utilised that in the sense of the tail wagging the dog to say that critically the evidential basis for that critically brings down this whole scheme. A minor component of it; an incidental component of it; a component that was not in existence in 1998 – one of the years you have before you – and is not in existence in the subsequent years, so the evidence associated with it is simply not present. Now I'm not sure whether the Commissioner is asserting that if the Court finds that the licence premium and the insurance premium are not deductible for the shammers, that the Court should go forward and examine the whole transaction for tax avoidance - paragraph 47 cautions against that. So you would only go forward to examine tax avoidance in respect of the insurance component; for the non-shammers, and in that year, 1997, there are no penalties. I want to move to reconstruction and just point out that in respect of the reconstruction point Your Honour was taken to GB1 and with respect to my friend it appears that GB1 was amended and with application from 1997/98, and subsequent income years, not 96/97, in which the insurance component is relevant, and that in that financial year in which the 97 matter that you're concerned with, GB1 on my analysis of the legislation requires that where the arrangement is void in accordance with BB9, the assessable income of any person affected by that arrangement shall be adjusted in accordance with the challenge and the BNZ investment matter I referred Your Honour Justice McGrath to yesterday. So that is a reflection of the legislation and reconstruction with respect to that year. And my submission in respect of that, if the respondent considers that Accent paid too much, he has a power to reconstruct under GB1, which in 1997 year provided that he shall do so. In the 1998 year it provides that he may do so, and I refer to the submissions, and he is bound to reconstruct the 1997 year. He should act consistently; treating matters alike and exercise the same power in 1998. If Your Honours would like me to, I'll move through the Redcliffe issues that Your Honours discussed, or alternatively bearing in mind the time, I'm probably about another five or ten minutes.

Elias CJ I was just going to suggest that we could read this over the adjournment and then you could stress any point you want to and that might expedite matters.

Gudsell Thank you.

Carruthers Your Honours can I just indicate that I've handed up a written outline of what I want to say in reply and it will not take me very long to reply at all. I'm going to ask Your Honours to follow the unusual

course of allowing Mr Stewart to reply briefly on the issue of sham, because you'll appreciate we have done in discrete parts of the argument and I am told by him initially that it was 15 minutes and then 20 minutes, but whatever it is it's short and I give those indications because

Elias CJ Sweet.

Carruthers We're as always within Your Honour.

Tipping J Is it all within this one document?

Carruthers No it's not. He's actually got

Elias CJ Another bit of paper.

Carruthers Well it is

Elias CJ Being photocopied. Yes, let's pass it in. I'm not saying that we will read it all over lunch, but at least we can have the opportunity to do that. Thank you all, we'll take the lunch adjournment now.

Court Adjourned: 1:00pm

Court Resumed: 2:20pm

Elias CJ Thank you. Yes Mr Gudsell, we have had the opportunity to read your submissions.

Gudsell I'm in fact content Your Honour unless there are matters arising from them, for those to be taken as read thank you.

Elias CJ No, thank you, that's helpful. Thank you Mr Gudsell.

Gudsell The only other matter that, I hesitate to do this, but there's another page in front of you albeit that it relates to the substantive submissions upon which you have ruled for the purposes of accuracy the references are made there to the relevant provisions in the relevant paragraphs.

Elias CJ Thank you. So this ties back into your substantive submissions. Yes, thank you Mr Gudsell.

Anderson J It's a sort of road map.

Gudsell Yes it is because of the issue that the Commissioner raised in the memorandum about EZ and EH

Anderson J Very helpful, thank you.

Gudsell Thank you Sir.

Elias CJ Yes Mr Carruthers.

Carruthers Your Honours I want to speak to the note that I've made. There are some matters that I want to go to deal with quite quickly, but I'm looking for a speedy departure. Can I start with the table that's just behind the backing sheet and this is prompted by Your Honour Justice Anderson's comment about the way in which these provisions fit together. The reliance is on EH2 – that is the Ben Nevis appellants' reliance is on EH2. The question that arises is that there is a financial arrangement by virtue of the definition, so the question is, is there a wider financial arrangement in order to see the way in which the sections bite. The answer is yes, that's common ground. This is the 4-part table that my learned friend Mr Coleman was referring to. What are the components of that wider financial arrangement? Five elements are identified and that's common ground. In respect of that wider financial arrangement, is there any component that is an EFA? Yes, it's the contract of insurance. That's common ground. Under EH2 what is the amount of the expenditure incurred in respect of the wider financial arrangement that is not to be included. It is the amount of any expenditure that is solely attributable to the EFA, which is the insurance premium, and I've given a note as to why one doesn't get back into EF1 and the Commissioner's analysis. Just moving through my documents. I've made some comments on the structure diagram. I don't need to dwell on that. Discovery of Documents – could I draw this to your attention that there's evidence among the materials that Mr Keating, who was an IRD person, did a review and plainly had access to the documents obtained by the SFO prior to their being released to the appellants, to Mr Stewart. And that's unremarkable because of the protocols between the SFO and IRD. It would be more remarkable if they hadn't seen them. On the due diligence materials I'm going to come and look at that calculation and deal with the analysis that His Honour Justice Gault made this morning, but just looking at the due diligence materials, and this was a submission when I opened the appeal to answer Your Honour Justice Tipping, who in my interpretation of what he was saying would have expected there have to be some analysis by way of due diligence by the Ben Nevis appellants, and I think I took you through the evidence of Mr Bradbury and Mr Peebles showing what they did. The Commissioner was rather scornful of what was done, but that was his analysis. If one looks at what the factual position is, it's set out, and it's recognised just on the way in which the case developed that the figure that Mrs Taylor took of \$243,000 per hectare could not be justified on the additional work that had been done, and I've referred to Mr Belton's evidence, who suggested that the stumpage could be as high as \$272,500. The appellants adopted in their analysis about half on the basis of the evidence. The Judge found that was too high, and in para.7, and this is why I went through that evidence on the first day,

the Bradbury/Peebles used the best case/worst case scenario, and the best case was the extract from the Groome Poyry report, and the worst case was based on an actual experience that I've identified there. And part of the difficulty in all of this is the issue of commercial confidentiality surrounding the transactions over Douglas Fir. I then set out the materials and the references to those materials in the evidence, so far from the Commissioner's submission being correct that this was a once-over lightly and there wasn't any serious due diligence of the kind one might expect in a commercial transaction, the contrary is in fact true. And as I've submitted in para.9, it's not a claim of perfect information, but it is a thorough going look before they were making any investment, as one might have expected. Let me come to this licence premium calculation, and I'll deal with the facts before I answer His Honour Justice Gault. Can I just take you to volume 17, and the letter that was the subject of discussion is 3547, but I want to go to the table at 3549, and just explain what that table involves. This is Mrs Taylor's analysis and you could just go to the last line. On the parameters that I'll come to in a moment, the production revenue is put at nearly \$31.5 million. With the cost deducted one gets to a figure of nearly \$29.5 million. Now that is on the basis of the parameters taking it per hectare. 7% for inflation; 3% for real price increase; 243,880 Clearfell value. So that is per analysis of the project, and that plainly wasn't the basis on which the premium was fixed, because if one goes now to volume 27 at 5628

Elias CJ 5?

Carruthers 5628.

Elias CJ Thank you.

Carruthers Now this is the calculation that gives you the licence premium – that's the figure of \$2,050,518 – oh the providence of this document is that it's a working paper for the Commissioner and it was used in the cross-examination of Dr Muir, who agreed with the approach.

Elias CJ Have you got the reference to that?

Carruthers Yes I have.

Elias CJ Yes.

Carruthers Will Your Honour just let me come to it please.

Elias CJ I just want to note it.

Carruthers The stumpage figure taken is \$125,000 – not Mrs Taylor's figure of \$243,000. Inflation is taken at 3.5%, not 7%. The growth is the same, 3%; and then the number of years is 50. And that comes you'll

see at a figure of \$3,060 million odd and it is multiplied by .67, and that then is rounded to the nearest dollar. Now that figure, and you can get this from the index. If Your Honours go to the index, you will see that there's a reference at 459 in the index and it gives you the reference to Mr Muir's evidence, and I'll take you to that.

Tipping J Is this how the Commissioner justified the, or by 'justified' I mean rationalised the licence premium figure, not how the people concerned when they were planning this exercise did so?

Carruthers No, you can only get to it in this way Your Honour. This is the way that it was got to and that's what Dr Muir says in his evidence. And I'll give you a reference to volume at page 2428 and you will see by line 5 it refers to exhibit 15173, and that is the exhibit that has been discussed in the preceding pages, and I think I can go to the top of page 2426 to identify that. There's one issue that arises that I should draw attention to. On page 24 between lines 30 and 35. The origin of that .67% figure in issue it was on Dr Muir's evidence a 2/3rds deduction in factoring the figures down, and you'll appreciate that the \$125,000 is a facted down figure from even the allowance that was made for Bolton at \$185,000, and the inflation figure is facted down by a half and the real growth stays the same, and this on Dr Muir's evidence was put as an arbitrary 2/3rds factor – that is the .67%. Now he was cross-examined on the bases that it was tax related and he said at the bottom of the page 'no it's not tax being deducted from what', and then it was put it to the inverse of tax, it also happens to be just slightly more than 2/3rds. It's a discount figure, but if you take the tax rate away from 100 you get .67, yes. Now there is a finding against me on that and that's at para.315 of the High Court judgment, and I accept that I'm caught with that, but I just wanted to explain

Gault J Is that it wasn't believed that it was not a tax deduction?

Carruthers No, that's right.

Gault J Yes.

Carruthers The Judge found it was tax related. Now what I want to turn to now is just to answer Your Honour Justice Gault, because you will appreciate from the analysis that appears on 5628, and contrasting that with Mrs Taylor's figures that I took you to at 3549, you actually have a significant business entered into for profit over and above the licence premium figure, and so Your Honour my submission is that your analysis starts really on a wrong premise, and really if one looks at it, the profit on Mrs Taylor's analysis – that is the cash flow before net pre-tax cash flow, is something over \$29 million, and once one starts with that proposition that that was the business for profit, then my submission is that with respect to you, your analysis falls away

Gault J Well I just don't understand that. 5628, as I now understand you to say, is a calculation which Mr Muir accepted

Carruthers Yes.

Gault J To the fixing of the licence premium.

Carruthers That's right.

Gault J And that is headed formula for projecting future value, and the net figure is precisely the figure that was fixed for the licence premium; that is with reference to the future value. If that's the future value of the forest, where is the business of seeking to profit from the forest?

Carruthers Well it is variously put, but the \$29 million that Mrs Taylor calculates – see in her calculation the \$2 million

Gault J I'm not talking about Mrs Taylor now, I'm talking about the new page you've referred us to you, which you accepted as I understood, was Mr Muir's explanation of how the licence fee was arrived at.

Carruthers How the licence premium was arrived at?

Gault J Yes.

Carruthers Yes, yes but Your Honour

Gault J Yes, and that relates or equates with what is described as projected future value.

Carruthers It is the projected future value though of a figure of \$125,000 which is the negotiation for the price. It's not the value the forest is going to yield on maturity. The forest is going to yield hugely more on maturity, and that's

Anderson J Yes, but there's more than one hectare to the forest.

Carruthers No, we're even talking about it on a per hectare basis Your Honour.

Anderson J Well can you help me with this then. In this page 3549

Carruthers Yes.

Anderson J The second column from the right – annual – it's the per hectare is it?

Carruthers Yes it is

Anderson J And what does the next column relate to?

Carruthers The parameters are set out in the table

- Anderson J I understand that, I'm just trying to work out what it relates to. I rather wondered whether annual referred to per hectare, and the extreme righthand column referred to the whole of the joint venture interest that's party. Would that be right?
- Carruthers Well the extreme lefthand column is the total
- Anderson J Extreme righthand.
- Carruthers The extreme lefthand column is the production revenue projected and the other columns are the costs, and the net pre-tax profit figure is in the righthand column, and that's on a per hectare basis.
- Anderson J So is it \$29 million per hectare.
- Carruthers Yes, as against an outlay of \$2 million per hectare for the licence premium, which is why we submit that these people were seriously in business. And in fairness, the most comfortable way into it is one of Mr Gudsell's slides to show how everything, or to show what the scope of the dispute was, and it's slide 6 of his, where he sets out the reasonable returns - the lowest through to the highest - that's expert and Judge figures. But Your Honour, as I submitted when I opened the appeal, it is enough for us to establish that the investors were in business to make profit in the *Grieve* sense without going into the debate about how much profit they were going to make.
- Tipping J Mr Carruthers, just something that's always puzzled me, and this may be just an amazing coincidence - the figure on a per hectare basis at 3549, in the second column from the right, is \$2,050,518 million, which happens to be precisely the same figure as that on 5628. Now is that just a complete coincidence?
- Carruthers Well no Your Honour, that is the cost of the licence premium that has been taken into account in Mrs Taylor's calculation. You've got \$31 million of projected revenue; you've got costs which include the \$2 million; and you get back to the \$29 million figure.
- Tipping J So is that the only cost that they've brought in here?
- Carruthers Well no Your Honour, there's a column of investment costs that's in there at \$32,000 - that's how you get the arithmetic.
- Tipping J This table on a per hectare basis suggests that your total revenue from the forest per hectare is \$31,493 million. Am I right so far?
- Carruthers That's right, yes.
- Tipping J And then you've got costs of \$2 million per hectare

Carruthers \$2,082,000 million or \$83,000

Tipping J Yes, adding the \$32,000 yes.

Carruthers Yes.

Tipping J So you end up with a profit before tax per hectare

Carruthers That's right, a cash flow

Tipping J A cash flow. So this annual simply relates to the licence premium cost, but the table that ends with \$2,050,518 million at the bottom

Carruthers Yes.

Tipping J Represents solely that cost pertaining to the licence premium, annualised?

Carruthers Yes. Now coming to the Commissioner's argument, and I think this is really a matter of reading through. The Commissioner now agrees it's a capital asset. Not all capital assets are depreciable property, and we've never argued that. We say it is a right to use land on the face of the document, and the premium is a relevant cost. I've dealt with the question of labels, and just drawn attention to the fact that if you analyse it, it's a question of what is it that entitles the joint venture to use the land, and it is the licence. One can talk about ways in which this might have been done and implied licences to perform obligations. In fact one might have expected if I had argued in the absence of the licence that there was an implied licence, why this wasn't better documented on the basis that it was a complicated arrangement. What we have done here, whether the form of licence is necessary or not, that's how the parties chose to organise their affairs, and Trinity wasn't going to let the joint venturers onto its land to plant until it was agreed that they would pay the licence premium. There's nothing mis-labelled, and with respect to Your Honours the Chief Justice and Justices Gault and McGrath, it is the question what was the payment for? And we've drawn on Regent Oil as really a helpful analysis, and that was applied in *Wattie*. The terms of the licence itself state unambiguously exactly what it was for by explicit reference to the legal characteristics of the licence. I've submitted the *Renouf* case as irrelevant for that reason, and then I've drawn attention to the Commissioner's tab, and I'll just identify that so that it's quite clear, but on page 2, under the third bullet point. This is not the ordinary case where a lease or a licence might obtain a premium. Well curiously that is the ordinary case

McGrath J Sorry, where are you at Mr Carruthers? Tab 2 is it?

Carruthers I'm at para.21 of my note in reply

McGrath J Yes.

Carruthers And I'm at tab 2 of the Commissioner in his slim green volume,

McGrath J Yes, thank you.

Carruthers And I'm on page 2 of that, and I'm at the third bullet point where he says 'this is not the ordinary case', and we've done just the careful analysis of *Regent Oil* to show exactly that. And it's interesting to look at the analysis in *Regent*. I'm at para.22 'clear that the premium paid by *Regent* to the garage owner, including any subsequent top up, was capital and non-deductible to *Regent*. They described the trade tie in the lease/sub lease form as being devised to achieve that capital benefit to the garage owner as this machinery, and if the asset acquired does not fit within the statute's specific rules for depreciation, there is no allowance. Lord Reid expressly referred to obligations which affect the trader's ability to conduct the business'. Now while I'm dealing with this in view of Your Honour Justice Tipping's comment to me about not understanding the promissory note argument. Your Honour lets assume in my righthand right now I

Tipping J Sorry, this is an interpolation

Carruthers Yes, it's an interpolation, but it goes directly to

Tipping J I just want to take a note if it's an interpolation.

Carruthers Yes. Just assume I have a promissory note in my right hand, and in Your Honour's right hand you have a licence, or an insurance contract, and I give you mine and you give me yours, and that is all I mean by a transfer of property, because in line with the illustration that came from the accruals guide, that is the mutuality of transfer of obligations. Now in my note that I handed in, I also added, because it seemed a matter of some concern to Your Honour is quite what the status of the promissory note was, that of course it was a security because it avoided any argument about the contract itself. It was something that one would have historically issued a bill writ for and now one would obtain summary judgment on it without the ability to be defeated by any contractual issue that might arise. And if Your Honour looks at those promissory notes, they are of course completely negotiable. On the face of it there would be nothing to stop either of the holders of the promissory notes from negotiating them by having them discounted to their present value. And for Your Honour to describe it as a device, is really in my submission, to misunderstand what taxpayers may do. The issue is, was that a genuine document with economic consequences. The fact that the parties choose to document it in that way, or to use that form of record or security, is not to the point, and Your Honour I'd resist the question of device unless you are saying device is simply a method or a means without any sort of pejorative overtone. Now let me come to the tax

avoidance contention, and what I've submitted here is that I've noted that the Commissioner's reply doesn't deal with the analysis that we made of what his contention was, so I hold to that, but what's more important is that it mis-states the contention by repeating the assertion that the threshold question approach to the underlying scheme and purpose of the statutory provisions, whether they have in the relevant sense been frustrated, and whether the transactions under review are properly described as pretences, and Your Honour Justice Tipping, that is not a synonym for sham. The case law clearly establishes that and I really invite you to look closely at *Challenge*, because it makes that point

Tipping J I'm coming in for a bit of stick here Mr Carruthers in a form of advocacy that may not possibly be all that persuasive to the recipient. But would you like to just say where I've got all this wrong without any.

Carruthers Yes I'll do that Your Honour, because you're teasing me a little by referring to Your Honour's own judgment in *BNZ Investments*.

Tipping J Yes, well that may be a fair rhetorical. (laughter).

Carruthers Take volume 1 of our casebook, under tab 3.

Tipping J I'm not sure that if I was endeavouring to say that a pretence is simply a synonym for a sham

Carruthers Well Your Honour did say that to me.

Tipping J Well if I said that I don't think that can be taken entirely literally.

Carruthers No, well I'm content with that, but there's another dimension to it that

Tipping J Alright, well let's have the other dimension.

Carruthers Yes, I'm happy to do that.

Tipping J Pretence can be unilateral, whereas a sham clearly in one sense has to – so let's move on from that equation. If there's another dimension I'd be pleased to hear it.

Carruthers Yes, well there is and it's the way in which

Elias CJ Are we going to *BNZ*?

Carruthers Yes we are.

Elias CJ We are, that's alright, no, no, it's just I had pulled it out with great danger.

Tipping J I think for my benefit Chief Justice.

Carruthers Yes, and no it's for the benefit of Justice Gault also, who tackled me on the pretence issue too.

Gault J Did I?

Carruthers Oh I think when I was doing the analysis of the Ben Nevis contention, you questioned me about whether pretence as one of my propositions was an appropriate analysis of the test.

Gault J I certainly questioned your paragraph C.

Carruthers Yes, yes, that's right, yes. Let me begin in para.39, and I'll be quite quick. I just want to read the last sentence and I want to read 40 and 41, because this captures what we have been saying.

Tipping J Just pause. You'd better make sure I'm absolutely there Mr Carruthers. What paragraph was that?

Carruthers Paragraph 39 Your Honour and it's the last sentence. 'By contrast with specific anti-avoidance provisions which are directed to particular defined situations, the legislature through s 99 has raised a general anti-avoidance yardstick by which the line between legitimate tax planing and improper tax avoidance is to be drawn. Line drawing and the setting of limits recognise the reality that commerce is legitimately carried out through range of activities and in a variety of way; that tax is an important and proper factor in business decision making and family property planning. That something more than the existence of a tax benefit in one hypothetical situation compared with a other is required to justify attributing a greater tax liability, that what should reasonably be struck at are artifices and other arrangements which have tax induced features outside the range of acceptable practice. As Lord Templeman put it in *Challenge* at p 562, most tax avoidance involves a pretence, and that certainty and predictability are important but not absolute values. The function of s 99 is to protect the liability for income tax established under other provisions of the legislation. The fundamental difficulty lies in the balancing of different and conflicting objectives. Clearly the legislature could not have intended that s 99 should override all other provisions of the Act so as to deprive the taxpaying community of structural choices, economic incentives, exemptions and allowances provided by the Act itself. Equally the general anti-avoidance provision cannot be subordinated to all the specific provisions of the tax legislation. It too is specific in the sense of being specifically directed against tax avoidance, and it is inherent in the section that but for its provisions the impugned arrangements would meet all the specific requirements of the income tax legislation. The general anti-avoidance section thus represents an uneasy compromise in the tax legislation'. Now that I

do invite Your Honours to reflect on together with *Challenge, Miller and Dandelion*, as cases that support that proposition.

Tipping J All that is extremely valid and I think I might have been party to writing some of that, but in the end a judgment has to be made doesn't it? To use Noel Templeman's very slippery word, whether it is acceptable or not.

Carruthers But this is why despite the Commissioner's resistance, we have always argued in these cases, at least with the recent ones I seem to have been involved in, that there has to be a threshold. There has to be something that says look this transaction complies with those specific provisions that the judgment talks about. It's necessary to accommodate in any analysis BG1 as part of that analysis, but the hard question is what is that standard or yardstick that you apply when you have a compliant transaction, what is the yardstick you apply to look at BG1?

Tipping J Your two yardsticks if I may interpose in the wish to help are pretence and frustration of the purposes of the specific provisions?

Carruthers Yes, but I think it's important to just look at the cases to see what pretence means in that context, but I've used that word because that's a word that's used in the cases and I accept immediately that it may not be the best word, and I can see difficulties with it, but that's probably as good as I can do.

McGrath J Mr Carruthers you're attempting to sort of answer the hard question. Would you accept that you've gone further than Justice Richardson himself felt able to, and it seems to me that what Justice Richardson has done, has discussed the purposes if you like of the general anti-avoidance provision on the one hand and the specific provisions on the other, and ending up with the comment that there is an uneasy compromise he accepts that he hasn't managed to come up with any form of yardstick himself

Carruthers Yes.

McGrath J He's rather come up with a tension, and when you come to your threshold approach which seems to me, and I may be wrong in that, to be drawing on the more recent English authority, as articulated in New Zealand cases decided by the Privy Council, that you're going further than Justice Richardson said and I accept you're not going further than Lord Hoffmann said. I don't think that's so but I think that you may be going further than what Justice Richardson said.

Carruthers Well Your Honour will see from the note that I've handed in that I've really tried to draw on New Zealand authority. Now admittedly *Miller* went to the Privy Council, but I think one can see the thread through the New Zealand part of the case. But Your Honour in

fairness to me and looking at what Justice Richardson said, he does in para.40, say that ‘what should reasonably be struck at are artifices and other arrangements which have tax induced features outside the range of acceptable practice, and recognises that most of them involve a pretence’. So that’s where that comes from, and Your Honour is right, and the reason for the approach that we have adopted is to try and accommodate that case, or accommodate this case, where we say we comply with the specific provisions. There’s nothing in our arrangements, nothing in our contractual arrangements that can be criticised in a way that says that it’s an artifice or it’s beyond acceptable behaviour, because each of the stages is a conventional commercial arrangement, and having got to that point, then we need to deal with what happens to s 99, and if I can just perhaps leave you to read forward, but I want to take you to para.31, and just again look at *BNZI*, and I’ve used that room to move expression, and I’ve referred there to the standard group equity investments in *BNZI*’s and said no room to move. The reason for that is that the relevant interest expense was incurred within the statutory scheme and there being no pretence which does not mean that there is a tax benefit obtained even if that is deliberate, and the transaction if structured to achieve that effect. It’s incompatible for BG1 to override that choice because it is itself prescribed by and within the Act scheme, and that’s what *Challenge* said. I’m sorry the paragraph I wanted to draw attention to was 28, and that really captures the essence of what I’m trying to achieve on that reconciliation. Where the taxpayer does establish full legal compliance, the next step is for the Court to consider the true legal effect of the transactions as a whole. This is not to disregard their true legal effect, or to apply an in-substance analysis, as the Commissioner submits, but to consider whether properly understood, the specific provisions of the Act have been frustrated by what the Court challenge based language describes as being a pretence. That is being whether the taxpayer has truly suffered the actual financial consequences of the relevant transactions, and I think that’s probably as close to a definition of a pretence as I can get.

Tipping J But the frustration must be through a pretence?

Carruthers Yes it must be, yes.

Tipping J And I think has to be the consequence of the submission.

Carruthers Your Honour if you could think of a better word I’d be perfectly happy to see it.

Tipping J No, no, I’m not trying to be semantic, but just conceptually the one has to come from the other.

Carruthers Yes, that’s right.

Tipping J Yes. Of course the problem with this and I'm not wanting to prolong the agony Mr Carruthers

Carruthers Oh no I'm enjoying it Your Honour, that's the worry.

Tipping J That all depends on what you mean by frustration.

Carruthers Yes.

Tipping J That puts it all on frustration. When do you frustrate the purpose of a particular provision?

Carruthers Well can I invite Your Honour to just carefully analyse in due course the facts of *Challenge, Miller and Dandelion*, because they in my submission provide the clue to, or they provide a clue to answering Your Honour's question.

Tipping J Thank you.

Carruthers Now can I just make a submission about *Peterson*, because you've been asked to sideline that, but you've been asked to sideline it on a basis that actually doesn't exist in the case? What has to be recognised in *Peterson*, is that that was a case based on the Commissioner's ruling. He had made a determination that's recorded in the majority's judgment as to how expenditure on films was going to be dealt with, and despite the almost righteous indignation of my good and learned friend about non-recourse loans, the determination actually provided in its ruling the way in which non or limited recourse loans were to be dealt with and they were to be deductible over a two-year period. One of the issues that arose in the case was the meaning of costs, and whether that meant the costs of the, well the vendor and the purchaser if I can put it that way just for convenience, and as Lord Millett, he wasn't altogether sure that counsel needed to be too concerned in the event that that issue had been argued on the same basis right through the New Zealand-based Courts, and it was really being looked at a little more closely in the Privy Council, which is why there was then agreement between the Commissioner's counsel and the appellants' counsel that the effect of the ruling and the way in which the transaction went, meant that the costs had been incurred. Now there was also a debate about whether the facts were correct, and had been correctly stated and I would take issue with the minority's analysis of the facts. But where the majority got to was that once you got to the point that these were costs within the ruling, and that they were applied for the purpose that the ruling envisaged, then they were incurred, and once you get to that position then you have to say well what is the room for s BG1 now, and as Lord Millett said, well that's really the end of the argument and there's nothing wrong with the way in which the taxpayer had applied the Commissioner's ruling. So in my submission it is a good illustration of a case where for that no room principle and you get to that by saying well there is nothing in

the nature of pretence or artifice or unacceptable commercial behaviour, that leads you into s 99. Now I think I can leave Your Honours to read through the rest of my note. Unless there are matters that arise in it that Your Honours want to ask me about.

Elias CJ No, that you Mr Carruthers.

Carruthers Can I just correct one thing? I think I was being a little expansive on the promissory notes, and I'm told that I made a submission that suggested that the promissory note for the licence premium was negotiable. It's not. I intended to refer to the insurance note as being in conventional form and being negotiable.

Tipping J Did they differ in that respect?

Carruthers I think the answer to that is yes they did, but not in a way that

Tipping J Not in a material way.

Carruthers Not in a material way and not in a relevant way to the argument. May it please Your Honours.

Elias CJ Thank you. Mr Stewart you might want to take us to anything that's important to other arguments, but we don't think we need to hear from you on sham.

Stewart No, I'm happy about that and there's nothing else I wish to detain Your Honours with this afternoon. I have put in a full note in reply on the basis that we might have been pushed for time, but it's there and when you come to consider the sham argument, you will no doubt have a look at it and I'm happy to leave it on that basis.

Elias CJ Yes. Yes thank you Mr Stewart. Well thank you very much counsel for your assistance. We'll reserve our decision on this matter.

Court Adjourned: 3:14pm