IN THE SUPREME COURT OF NEW ZEALAND

SC 43/2007
[2008] NZSC 6

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:	8 February 2008
Court:	Elias CJ, Tipping and McGrath JJ
Counsel:	R B Stewart QC (by video link) and G J Harley for Appellants in SC43/2007 C T Gudsell QC for Appellants (by video link) in SC44/2007 D J White QC and R J Ellis for Respondent
Judgment:	19 February 2008

JUDGMENT OF THE COURT ON ADJOURNMENT APPLICATION

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[1] The fixture for 3 March for the hearing of the appeals is vacated and the hearing is adjourned to 23 June.

[2] The appellants' submissions are to be filed and served by 11 April and the respondent's submissions are to be filed and served by 15 May.

[3] Counsel may exceed the page limit prescribed by the Rules, if they think it necessary.

[4] The appellants in SC 43/2007 are to pay to the respondent costs on the application in the sum of $3,000.

REASONS

[1] The application by the Ben Nevis appellants for adjournment of their appeal, set down for hearing on 3 March 2008, was heard by us on 8 February. At the hearing, the application was opposed by the Commissioner but supported by the Accent Management appellants. At the conclusion of argument we announced that the application was granted and the fixture adjourned to 23 June, for reasons to be given in writing later. We made the further directions as to time-tabling and submissions on the substantive appeal, formally recorded above. We now give our reasons for granting the adjournment.

[2] The proceedings which give rise to the appeal have been acknowledged to be in the nature of a test case. They concern the liability for tax of investors in a forestry scheme. The taxpayers who bring the present appeal were found in the lower Courts not to be entitled to claim substantial tax deductions as investors in Trinity Foundation (Services No 3) Ltd for the 1997 tax year. The liability of investors in two other companies set up under the same scheme is still to be determined but will clearly be affected by the consideration of principle in the present appeal. Some 170 taxpayers are affected. Assessments of tax and penalties amounting to some $300 million is at stake in respect of the Trinity cases. The court proceedings challenging the assessments in respect of investments made through Trinity Foundation (Services No 3) Ltd have been underway since 2002. The taxpayers were granted leave to appeal to this Court on 9 October 2007. In addition to the implications for those involved with the Trinity schemes, the case is said to raise issues which are relevant to other litigation about similar structured finance arrangements, including another appeal to this Court and a substantial trial due to begin in the High Court later in the year. It is clearly desirable that the appeal be

heard as soon as is practicable. After leave to appeal was granted on 9 October, the Registrar of the Court attempted to set a fixture for hearing the appeal.

[3] Under Rule 32 of the Supreme Court Rules the Registrar is obliged to consult with counsel before allocating a fixture but the agreement of counsel is not required by the Rule. Although the Registrar should try wherever he reasonably can to accommodate the preferences of each counsel, it may not be possible to do so and also meet the interests of other parties and the public interest in the orderly despatch of the work of the Court. Where there are a number of different parties, separately represented, finding a fixture that suits all may be impossible without unacceptable delay. That difficulty should not have arisen in relation to the present case, where there are two appeals only and a common respondent. The Registrar apparently felt he should consult separately with each of the three counsel retained in respect of the Ben Nevis appellants, Mr Carruthers QC, Mr Stewart QC, and Mr Harley. Each of them had other fixtures which did not coincide and which made it difficult for the Registrar to find a five-day fixture which suited all during the months of February and March.

[4] After proposing a number of weeks in February and March on which the Court could hear the appeal, and after canvassing the views of counsel during November, the Registrar allocated a fixture for 12 February, a date he had ascertained was suitable for senior counsel for all parties. The notice elicited a prompt response from Mr Stewart that he and Mr Harley were engaged in a five day trial in Auckland that week. An application for adjournment made on 12 December was granted unopposed on 17 December.

[5] In a notice to the parties dated 17 December advising them of the adjournment, the Registrar fixed the hearing of the appeal for the week of 3 March. He had ascertained that this date was suitable for Mr Carruthers for Ben Nevis and Mr Gudsell QC for Accent. At the time the fixture was notified, however, the Registrar knew from separate advice he had received from Mr Stewart that the date clashed with a further hearing in which he was counsel in the High Court at Auckland. The fixture was made by the Registrar on the basis, referred to in his

notice to the parties, that it was a date on which "the majority" of counsel were available.

[6] It was not until 17 January that Mr Stewart filed an application for further adjournment. Nor had he earlier notified counsel for the Commissioner or the Court that such application was contemplated. Without notice that an adjournment would be sought, counsel for the Commissioner proceeded over the summer period with preparation for the hearing on 3 March. They were in a position to proceed with the fixture. In the meantime, it seems that counsel for the appellants took no steps to prepare for the hearing. Both failed to file their submissions on 1 February, as required by the Rules.

[7] The principal reason advanced by counsel for the Ben Nevis parties in a memorandum in support of their application for adjournment of the fixture was Mr Stewart's conflicting fixture in the High Court on 3 March. In addition, it was said that counsel for the Ben Nevis parties had been unable to confer about preparation for the hearing or division of argument among themselves because of: the summer vacation; other fixtures to which Mr Stewart was committed in December, February and March (including the February fixture which had occasioned the first adjournment and which also involved Mr Harley); and Mr Carruthers's involvement in a settlement of High Court proceedings. The principal ground put forward in support of the adjournment application was substantially a reassertion of the fact of the March fixture, a circumstance the Registrar had clearly considered could not be accommodated if a timely fixture was to be set. No indication was given in the memorandum that there had been any attempt to meet the fixture notified on 17 December. At the hearing of the adjournment application Mr Stewart explained that he considered his obligations to his clients precluded his withdrawing from the cases which clashed with the appeal. No doubt the imminence of the Christmas vacation added to the pressure.

[8] There is no adequate explanation of why prompt application for adjournment was not made following receipt of the notice of fixture on 17 December. Although Mr Stewart was engaged in another hearing until 20 December, it is hard to accept that he or other counsel for the Ben Nevis parties could not have made immediate

application. It is harder still to accept that informal advice could not have been immediately given of intention to apply for an adjournment both to the Court and to counsel for the Commissioner. Indeed, at the hearing Mr Stewart accepted criticism of the failure to take these steps.

[9] The overall effect is that the Court has been presented with something of a fait accompli. It does not question counsel's claim that the appeal is not ready to proceed and cannot be properly prepared in the time between now and 3 March. The appellants, in a case of the highest importance to them, would clearly be prejudiced. Moreover, the case raises matters of substantial public importance on which the Court is entitled to expect submissions which are well-prepared from counsel who are on top of their arguments. Since counsel say they cannot be ready, we considered that in this case it was in the interests of justice for the fixture to be vacated.

[10] There are a number of unsatisfactory aspects about the course of events. The adjournment in the present case is ultimately necessary not because the Ben Nevis parties could not be adequately represented in the absence of Mr Stewart by counsel already engaged, but because on the date we heard the application all counsel for the Ben Nevis parties were insufficiently prepared. Once leave had been granted, the parties and their counsel had no reason to defer preparation for hearing until they were notified of a fixture date. It is hard to understand why, in a case of such major importance for the parties and when counsel have already had to address the scope of the appeal in the leave hearing, preparation for the substantive appeal is not further advanced. All parties have been aware that the Registrar has been endeavouring to set down the appeal since leave was granted, more than four months ago. It is unsatisfactory, too, that the Registrar seems to have been expected to consult about the fixture separately with all counsel who have the joint conduct of one appeal. Nor can counsel expect that the preferences of all counsel in the matter of a fixture must be accommodated. It would, however, be unreasonable to impose a fixture without notice adequate to allow counsel and the parties to adjust other commitments, including by relinquishing briefs. In most cases three months notice should be more than sufficient. If counsel cannot meet a fixture allocated on this basis, it will usually be necessary for other counsel to be instructed.

[11] Although the adequacy of the notice in this case has to be considered in the context of the complexity of the litigation and the intervention of the long vacation, those circumstances themselves made it incumbent on counsel to make prompt application for adjournment. Counsel for the Ben Nevis parties took it upon themselves to defer preparation for the hearing despite the notice of the fixture. That unilateral decision made it inevitable in this case that an adjournment would have to be acceded to, in the interests of justice.

[12] It was not disputed at the hearing that costs should be paid to the respondent on the application. The parties are in agreement that $3000 is appropriate and we make that order, as invited.

Solicitors:
Wynyard Wood, Auckland for Appellants in SC43/2007
Wynyard Wood, Auckland for Appellants in SC44/2007
Crown Law Office, Wellington for Respondent