IN THE SUPREME COURT OF NEW ZEALAND

SC 66/2007
[2008] NZSC 24

BETWEEN	WESTPAC BANKING CORPORATION LIMITED Appellant
AND	COMMISSIONER OF INLAND REVENUE First Respondent
AND	BNZ INVESTMENTS LIMITED, BNZ INTERNATIONAL LIMITED, BNZI SECURITIES NO. 1 LIMITED, BNZI SECURITIES NO. 2 LIMITED, BANK OF NEW ZEALAND AND BNZ CORPORATION LIMITED Second Respondents
AND	ANZ NATIONAL BANK LIMITED, UDC FINANCE LIMITED AND TUI ENDEAVOUR LIMITED Third Respondents

SC 67/2007

AND BETWEEN	ANZ NATIONAL BANK LIMITED, UDC FINANCE LIMITED AND TUI ENDEAVOUR LIMITED Appellants
AND	THE COMMISSIONER OF INLAND REVENUE Respondent

Hearing: 11 and 12 December 2007

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

Counsel: J A Farmer QC, R A Green and R B Lange for Appellant in SC 66/2007
B W F Brown QC and R J Ellis for First Respondent in SC 66/2007
A R Galbraith QC and A S Butler for Second Respondents in SC 66/2007
L McKay, S J Katz and L Turner for Appellants in SC 67/2007 and Third Respondents in SC 66/2007
D J White QC and R J Ellis for Respondent in SC 67/2007
R G Simpson and G C Williams for Intervenor - ASB Bank Limited

Judgment: 14 April 2008

JUDGMENT OF THE COURT

The appeals are dismissed with costs to the Commissioner of Inland Revenue of $25,000 together with reasonable disbursements, to be fixed if necessary by the Registrar, and to be borne as to 40% each by Westpac and ANZ National and as to 20% by ASB Bank.

REASONS

(Given by McGrath J)

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Introduction

[1] Following investigation of a number of structured financing arrangements entered into by major banks trading in New Zealand, the Commissioner of Inland Revenue issued amended income tax assessments asserting that the arrangements concerned involved tax avoidance. He has since also contended that some of the transactions have elements of sham. The present appeals are a preliminary stage in litigation by banks who are challenging the amended assessments. In form, the issue before this Court concerns the restrictions that tax secrecy legislation imposes on what material may be discovered by the Commissioner in the litigation. The ultimate issue before the Court, however, concerns the extent to which tax secrecy laws restrict the Commissioner, in defending proceedings brought by one bank, from using information held by the Inland Revenue Department that relates to the business affairs of other banks. It is accepted in this Court that the documents of the other banks are relevant to the issues in the first bank's litigation.

Background

[2] In 1998 and 1999 subsidiaries of the Bank of New Zealand (BNZ) entered into three transactions involving structured financing arrangements with overseas counter-parties. The transactions concerned are of a type colloquially referred to in the finance industry as "repo deals".

[3] For the purposes of this appeal it is sufficient to refer to the scheme of BNZ's repo deal transactions in broad indicative terms. A subsidiary of BNZ would acquire an equity interest in the overseas counter-party on terms that included an obligation for the counter-party to repurchase that interest at the end of, usually, a five year transaction period. A feature of the transactions was that the parent of the overseas counter-party would guarantee the repurchase, by its subsidiary, for a fee. The Bank's subsidiary would pay the fee to the overseas counter-party to procure that guarantee from its parent.

[4] The return to the Bank's subsidiary from this funding arrangement was to come from distributions it would derive, through its equity interest, from the overseas counter-party. The amount actually received would take into account an interest rate swap arrangement between the parties included in the transaction, the guarantee fee expense, and the borrowing costs of the Bank subsidiary.

[5] In its treatment of the transaction for tax purposes, the BNZ group would deduct the cost of borrowing, the guarantee fee expense and the net cost incurred in the interest rate swap. It would treat the distributions it received as tax exempt income, either as distributions received from an overseas owned company, or under foreign tax credit provisions.

[6] Late in 2000 the Commissioner commenced an investigation of BNZ's tax affairs which included the three repo deals. The Commissioner came to the conclusion that, by entering into the transactions, BNZ had become involved in tax avoidance arrangements which were covered by the anti-avoidance provision in s BG 1 of the Income Tax Act 1994. This led the Commissioner to make amended assessments which variously denied deductions for guarantee arrangement fees, set aside swap arrangement payments and treated distributions received by BNZ's subsidiary as gross income. Subsequently the Commissioner has also contended that some of the guarantee fee arrangements were shams.

BNZ proceedings and discovery

[7] In 2004 and 2005 subsidiaries of BNZ brought two proceedings in the High Court against the Commissioner challenging three amended assessments (the BNZ proceedings). The main basis for the challenges is that none of the transactions is a tax avoidance arrangement in terms of s BG 1. BNZ also contends that the assessments are based on inconsistent characterisations of the transactions and that the guarantee fees BNZ paid were deductible. It seeks orders cancelling or alternatively varying or reducing the amended assessments. We have been informed that there is also other current litigation between the Commissioner and six other banks (the other banks) which relates to repo deals in which they have been involved. The other banks include all major trading banks in New Zealand.

[8] In responding to orders for discovery in the BNZ proceedings the Commissioner provided a list of documents, which included documents in relation to what the Commissioner says are transactions entered into by the other banks of "a substantially similar sort" to those in issue in the BNZ proceedings. The Commissioner has obtained copies of these documents in the course of departmental investigations. Many have been provided by the other banks, following the use of the Commissioner's powers to compel production under s 17 of the Tax Administration Act 1994 or pursuant to agreements which avoided the need to invoke these provisions. Documents of counter-parties have been received from overseas authorities (who have similar powers) under mutual cooperation arrangements. In the affidavit of documents filed on behalf of the Commissioner, he claimed confidentiality for the documents of the other banks, but made plain that they were being discovered in the litigation.

[9] BNZ then applied to the High Court for orders that the documents relating to the other banks' transactions should not be discovered in the litigation. The grounds BNZ advanced were the lack of relevance of the documents to issues to be determined in the BNZ proceedings, the oppressively large number of documents disclosed, and the confidentiality of the documents under s 81 of the Tax Administration Act because they concerned other persons' tax affairs. BNZ also applied for orders that the other banks be heard on its application, and that all names and other identifying features of persons appearing in the discovered documents be removed from any which the Court decided were properly discovered and produced by the Commissioner.

[10] Two of the other banks, Westpac Banking Corporation Ltd (Westpac) and ANZ National Bank Ltd (ANZ National), then became involved. Westpac obtained leave to intervene in the BNZ proceedings and make submissions to the High Court in support of BNZ's applications. Its submissions covered the confidentiality and relevance of the documents involving Westpac transactions and the oppressiveness of the volume of documents discovered. ANZ National preferred to bring its own proceedings in the High Court, in which it sought judicial review of the Commissioner's actions and declaratory relief in relation to discovery of documents which concerned transactions entered into by members of its group. The two matters

were heard consecutively and were the subject of separate judgments delivered by Wild J in the High Court.[1]

The High Court and Court of Appeal judgments

[11] Wild J rejected all grounds for challenge. He said that it was for the Commissioner to decide which documents were relevant to the litigation and to discover them. The Court would not intervene on a complaint of over-discovery unless he was plainly wrong. The Judge held that the Commissioner was not plainly wrong to treat the documents of other banks as relevant, nor in taking the view that it was a necessary part of his defence to put other banks' documents before the Court at the hearing of the BNZ proceedings. Any resulting expansion of the discovery and inspection process would not be disproportionate to the stakes involved. The Judge did, however, caution the parties to limit themselves to what was relevant. In his judgment on ANZ National's proceeding, he also found there was no basis for judicial review of the Commissioner's actions during litigation. He also refused ANZ National's application for a declaration under the Declaratory Judgments Act 1908.

[12] Both High Court judgments discussed s 81 of the Tax Administration Act, which directs officers of the Department to maintain secrecy in administering the Inland Revenue Acts, and the leading judgments of the Court of Appeal on that section's scope and meaning. The Judge held that in defending the BNZ proceedings the Commissioner was carrying into effect the Inland Revenue Acts so that producing documents without editing was not prevented by s 81(1). While the Commissioner was bound to disclose confidential material in the litigation to the minimum extent necessary, that did not require complete protection of taxpayer identities and confidentiality. Public interest immunity principles did not alter the position under the Act.

[13] BNZ, Westpac and ANZ National all appealed to the Court of Appeal.[2]

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1 *BNZ Investments Ltd and Ors v Commissioner of Inland Revenue* (2007) 23 NZTC 21045 and *ANZ National Bank Ltd and Ors v Commissioner of Inland Revenue* (2007) 23 NZTC 21032.

2 *BNZ Investments Ltd v Commissioner of Inland Revenue* [2008] 1 NZLR 598.

[14] The Court of Appeal agreed with the High Court that the test for the Court to intervene on an application to curtail excessive discovery had to take into account both the Commissioner's right to choose how to run the Revenue's case in the proceedings and the very early stage in proceedings in which such applications would usually be made. The Court of Appeal preferred to apply a more stringent test, of abuse of process, instead of the plainly wrong test applied by the High Court, while noting the limited differences between the two.

[15] In applying the abuse of process test the Court of Appeal first considered the three banks' argument that other bank documents were irrelevant to the BNZ's challenge to the amended assessments. The Court recognised that, while the inquiry was into whether these documents were properly discovered, the purpose of the Commissioner was to set the scene for their admission in evidence.

[16] While refraining from formally deciding whether any of the documents would be admissible at trial, the Court said it was far from satisfied that other bank documents were irrelevant. The Commissioner's case was that the BNZ's repo deals had no commercial purpose other than the exploitation of tax legislation. The transactions had been structured so that the economic benefits were split between banks and counter-parties. The Commissioner also said that a transaction template had been used by all banks involved and that the "off the peg" nature of the scheme was relevant to questions of avoidance, purpose and effect and whether the schemes were contrived and artificial, crossing the line to be tax avoidance arrangements. It might not be possible to identify such features if the relevant wider commercial context was not before the Court. The Court of Appeal concluded that the documents were likely to be material to whether the anti-avoidance provision of the Income Tax Act was engaged and to the sham issues in the proceedings.

[17] The Court then addressed the oppression argument which was linked to concerns over the number of documents that might be involved and the risk that the Commissioner might disclose an unrepresentative selection. The Court saw the risk as being more apparent than real. The cost of discovery was not likely to be disproportionate and it was likely that the documents would be useful and have some relevance, probably without being decisive. There is no challenge to the judgment of

the Court of Appeal in this Court on these matters. Nor is there any challenge on the Court's findings concerning relevance.

[18] The Court of Appeal then turned to the duty of departmental officers to maintain secrecy under s 81 of the Tax Administration Act. The Court saw it as established that, when conducting any litigation, the Commissioner was within the exception to the statutory duty to maintain secrecy under s 81(1) which permitted communication of taxpayer-related information for the purpose of carrying into effect the Inland Revenue Acts.[3] It also noted that the Court had previously decided that the Commissioner could not be required, under compulsion of Court orders, to discover information concerning third party taxpayers in a manner that would identify them.[4] Public interest immunity principles could be applied in appropriate circumstances to ensure disclosure did not infringe that limit.

[19] The Court of Appeal discussed what it saw as varying degrees of confidentiality of taxpayer information held by the Commissioner, depending on whether the information had been provided as part of returns of income or under powers to compel production under s 17 of the Act. The Court saw as difficult the application of public interest immunity principles alongside s 81 which itself had addressed governing considerations and said that the immunity could not interfere with the operation of s 81. But, even if it did apply, the balancing exercise favoured use by the Commissioner of other Bank documents in an unedited form. Redaction of them to remove identification of parties to repo deals would destroy their utility.

[20] For these reasons the Court of Appeal rejected the arguments that discovery involved an abuse of process, or was contrary to s 81 or precluded by relevant principles of public interest immunity. The result would enable the Commissioner to rely on other transaction documents in all BNZ litigation.

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3 As decided in *Knight v Commissioner of Inland Revenue* [1991] 2 NZLR 30 (CA).

4 *Commissioner of Inland Revenue v E R Squibb & Sons (NZ) Ltd* (1992) 14 NZTC 9146 (CA).

Issues on appeal

[21] Westpac and ANZ National applied for leave to appeal to this Court against the Court of Appeal's judgment. BNZ did not. While represented by counsel at the hearing in this Court, BNZ has taken no active part. Leave to appeal was given to Westpac and ANZ National on the question whether s 81 or public interest immunity prohibited the Commissioner from discovering documents relating to non-party taxpayers and the nature and extent of any such prohibition. Leave to intervene was granted to ASB Bank Ltd, one of the other banks in litigation with the Commissioner, which also made submissions in this Court.

[22] While they presented independent submissions and emphasised different aspects, the issues raised in the appeals by Westpac and ANZ National centre around two common themes. The first concerns the meaning of s 81 in relation to what is permitted disclosure during discovery by the Commissioner of documents pertaining to repo deal transactions in which banks other than BNZ were involved. The extent to which identification of taxpayers other than BNZ is permitted in litigation by s 81 is a key question. The second aspect is the effect of principles of public interest immunity which the appellants contend apply in the present circumstances in addition to the statutory provision. The appellants argue that the necessary balance of public interest and fair trial considerations at least requires redaction of details in documents which are discovered or produced in evidence and alteration of any material that would identify another taxpayer.

[23] These submissions were supported by reference to statutory provisions and discussion in the decided cases concerning the need to maintain "total confidentiality" of taxpayers' affairs to preserve the integrity of the tax system. The appellants reject any suggestion that different levels of confidentiality may apply according to whether the information in issue was received as part of a taxpayer's return of income or was provided in response to a requisition under s 17.

Statutory provisions

[24] Section 81 of the Tax Administration Act appears in Part 4 under the heading "Secrecy". Section 81(1) imposes a duty on officers of the Inland Revenue Department to maintain and aid in maintaining secrecy. This applies to all matters relating to certain statutes including the Inland Revenue Acts which are administered by the Department. Section 81(3) reinforces tax secrecy by providing that information held by the Department is privileged from disclosure. The duty and privilege are subject to stipulated exceptions which are expressed similarly, but not identically, in the two subsections. Section 81(4) permits disclosures of information in defined circumstances for the purposes of certain government related activities. It is common ground, however, that no specific provision in s 81(4) covers the use of material protected by the s 81(1) duty in court proceedings to which the Commissioner is a party. Accordingly the provisions of s 81 relevant to this appeal are as follows:

> **81 Officers to maintain secrecy**
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> (1) Every officer of the Department —
>
> (a) Shall maintain and aid in maintaining the secrecy of all matters relating to —
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> (i) the Inland Revenue Acts, including all Acts (whether repealed or not) at any time administered by or in the Department; and
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> …
>
> which come to the officer's knowledge, and shall not, either while the officer is or after the officer ceases to be an officer of the Department, communicate any such matters to any person except for the purpose of carrying into effect the Acts referred to in subparagraphs (i), (ii), and (iia) or any other enactment imposing taxes or duties payable to the Crown, or of carrying into effect the powers, duties, and functions of the Commissioner under the New Zealand Superannuation Act 1974;
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> …
>
> (3) **[Disclosure by officer before Court or tribunal]** Without limiting the generality of subsection (1), no officer of the Department shall be required to produce in any Court or tribunal any book or document or to divulge or communicate to any Court or tribunal any

matter or thing coming under the officer's notice in the performance of the officer's duties as an officer of the Department, except when it is necessary to do so for the purposes of —

(a) Carrying into effect —

(i) The Inland Revenue Acts, including all Acts, whether repealed or not, at any time administered by the Department;

[25] The other provisions in the Tax Administration Act bearing on secrecy appear in Part 2 headed "Commissioner and Department":

6 Responsibility on Ministers and officials to protect integrity of tax system

(1) Every Minister and every officer of any government agency having responsibilities under this Act or any other Act in relation to the collection of taxes and other functions under the Inland Revenue Acts are at all times to use their best endeavours to protect the integrity of the tax system.

(2) Without limiting its meaning, the integrity of the tax system includes —

(a) Taxpayer perceptions of that integrity; and

(b) The rights of taxpayers to have their liability determined fairly, impartially, and according to law; and

(c) The rights of taxpayers to have their individual affairs kept confidential and treated with no greater or lesser favour than the tax affairs of other taxpayers; and

(d) The responsibilities of taxpayers to comply with the law; and

(e) The responsibilities of those administering the law to maintain the confidentiality of the affairs of taxpayers; and

(f) The responsibilities of those administering the law to do so fairly, impartially, and according to law.

6A Commissioner of Inland Revenue

(1) The person appointed as chief executive of the Department under the State Sector Act 1988 is designated the Commissioner of Inland Revenue.

(2) The Commissioner is charged with the care and management of the taxes covered by the Inland Revenue Acts and with such other functions as may be conferred on the Commissioner.

(3) In collecting the taxes committed to the Commissioner's charge, and notwithstanding anything in the Inland Revenue Acts, it is the duty of

the Commissioner to collect over time the highest net revenue that is practicable within the law having regard to —

(a) The resources available to the Commissioner; and

(b) The importance of promoting compliance, especially voluntary compliance, by all taxpayers with the Inland Revenue Acts; and

(c) The compliance costs incurred by taxpayers.

[26] It is also necessary to consider s 17(1) in Part 3 of the Tax Administration Act concerning information to be furnished on the request of the Commissioner:

> 17 **Information to be furnished on request of Commissioner**
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> (1) Every person (including any officer employed in or in connection with any Department of the Government or by any public authority, and any other public officer) shall, when required by the Commissioner, furnish in writing any information and produce for inspection any books and documents which the Commissioner considers necessary or relevant for any purpose relating to the administration or enforcement of any of the Inland Revenue Acts or for any purpose relating to the administration or enforcement of any matter arising from or connected with any other function lawfully conferred on the Commissioner.

Legislative history

[27] New Zealand legislation has contained provisions requiring officials to maintain the secrecy of matters relating to the administration of revenue legislation since 1879.[5] The format adopted in the Land and Income Assessment Act 1891 has been followed in subsequent tax legislation and is now reflected in s 81(1) of the 1994 Act. This duty of secrecy imposed on departmental officers is subject to very generally expressed words of exception: "except for the purpose of carrying into effect the Acts".

[28] The provision conferring privilege from production now contained in s 81(3), was introduced in 1952,[6] again in a form that is substantially the same as at present.

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5 They were first enacted in s 8 of the Property Assessment Act 1879.

6 Section 12(2) Inland Revenue Department Act 1952.

[29] It seems that prior to the introduction of the privilege provision, departmental officers would claim a common law privilege if they were required to attend court to produce taxpayer related information, or to answer questions on such matters. The decision to give legislative force to the exemption from compulsory disclosure under court rules was taken, according to the Minister introducing the legislation, simply because it was "thought well to write the provisions into the law".[7] The introduction of what is now s 81(3) accordingly addressed apparent uncertainty as to the extent of protection given to departmental information in court proceedings. It makes plain that matters coming to the notice of the department are the subject of an evidential privilege as a class of documents.

[30] Since 1952 further specific exceptions to the duty of secrecy in s 81(1) have been added to the legislation, usually in tightly framed terms. One instance permits, within limits, communication of information to overseas governments where taxing provisions in the Act are conditional on reciprocal laws or concessions, or reciprocal arrangements with that country.[8]

[31] The long title of the Tax Administration Act states that it is:

> An Act to reorganise and consolidate the law relating to the Inland Revenue Department and the administration of income tax matters.

Consistently the Act states that its purpose is re-enactment of administrative provisions in the previous legislation in a reorganised form. Reorganisation of provisions and changes of style and language are not intended to affect the interpretation of its provisions.[9] In light of these directions, where, as in s 81, the legislature has retained the original wording, all other things being neutral, the presumption will be that no change to the law was intended by the enactment.[10]

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7 Hon Mr Charles Bowden MP, (2 October 1952) 298 NZPD 1750. The Inland Revenue Department Bill explanatory note states that it "is a new provision, making it clear that any such confidential information is privileged from production in court, except for the purpose of carrying the Inland Revenue Acts into effect."

8 Section 81(4)(k).

9 Section 2(1) and (2).

10 The former provision was s 13 Inland Revenue Department Act 1974.

[32] There are, however, important new provisions in the Tax Administration Act which form part of the context against which s 81 must now be read. Section 6 was replaced and s 6A inserted shortly after the Act came into effect.[11] These changes were proposed by an organisational review of the Department chaired by Sir Ivor Richardson. The purpose of s 6 is to incorporate protection of the integrity of the tax system in terms that clearly define what is sought to be protected.[12] The Committee had earlier observed in its report that tax integrity included the interaction between the total tax community and individual taxpayers.[13] Section 6 addresses taxpayers' expectations in terms of the confidentiality with which they expect their affairs to be accorded.

[33] The most important aspect of s 6 as part of the altered legislative context is that the right of taxpayers to have their affairs treated as confidential becomes a fundamental principle in tax law, recognising that protection of the integrity of the tax system encompasses those rights. Despite the consolidatory nature of the legislation, and the lack of changes to s 81 itself, that section must now be interpreted in that context.

[34] The other significant amendment, proposed by the Organisational Review Committee, recognises that the role of the Commissioner, who operates with limited resources, is one of care and management of the functions of the office. Section 6A(2) was inserted as the core legislative provision in this respect and provides:

> (2) The Commissioner is charged with the care and management of the taxes covered by the Inland Revenue Acts and with such other functions as may be conferred on the Commissioner.

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11 Section 4 Tax Administration Amendment Act 1995.

12 Organisational Review Committee, *Organisational Review of the Inland Revenue Department* (1994) para [9.6.4].

13 Para [9.4.1].

The *Knight* and *Squibb* decisions

[35] A large part of the argument in this Court was directed to what the Court of Appeal has previously decided concerning the meaning of s 81, and the application of public interest immunity, in separate decisions in 1990 and 1992.[14]

[36] In *Knight v Commissioner of Inland Revenue*,[15] the Commissioner was defendant in an action for damages arising out of alleged unlawful bugging by departmental officers of a conversation between the plaintiff and a third person. Discovery of the reports of a departmental inquiry into the incident was sought and resisted by the Commissioner on the ground of the statutory requirement to maintain the secrecy of tax related information. No claim was made for public interest immunity in the Court of Appeal. In the leading judgment, Richardson J held that the Commissioner was discharging statutory functions in conducting all litigation in which he was a party. As discovery was a necessary element of litigation, it was part of carrying the Acts into effect and covered by the exception to s 13(3) of the 1974 Act. It followed that s 13(3) did not bar production. Richardson J did, however, add that "questions of relevance and public interest immunity fall for determination in the ordinary way".[16] This foreshadowed that in future cases, where it could properly be claimed, public interest immunity might also control the extent of disclosure of taxpayer information, as well as the terms of s 81.

[37] Cooke P in his separate judgment agreed with Richardson J's conclusion and reasons but added this observation, which has been prominent in the arguments for the appellants:[17]

> I accept that the public interest would debar him from disclosing confidential information about other taxpayers; as Lord Wilberforce said in *R v Inland Revenue Commissioners, ex parte National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617, 633 "The total confidentiality of assessments and of negotiations between individuals and the revenue is a vital element in the working of the system". But no question of violation of that principle arises here.

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14 At that time the applicable tax secrecy provision was s 13 of the Inland Revenue Department Act 1974 which was in all relevant respects identical to s 81 of the 1994 Act.

15 [1991] 2 NZLR 30.

16 At p 42. Somers J agreed with Richardson J. Casey and Hardie Boys JJ expressed agreement with Richardson J and Cooke P.

17 At p 35.

[38] This passage suggests that Cooke P had in mind that public interest immunity would apply on an absolute basis to the whole class of other taxpayer related information held by the Department. The case did not, however, call for application of the principle.

[39] In *Commissioner of Inland Revenue v E R Squibb & Sons (NZ) Ltd*,[18] the Commissioner resisted disclosure of information held by the Department relating to taxpayers other than Squibb. In the course of an investigation into possible transfer pricing, information had been obtained by the Department from its own files, from requisitions and from Australian tax authorities under provisions in double tax agreements. Following investigation of its liability Squibb was reassessed. *Squibb* brought judicial review proceedings challenging the validity of the reassessments. One of Squibb's contentions was that the reassessments were the result of improper inquiry into and analysis of the relative profitability of other taxpayers in a similar line of business to Squibb.

[40] The Commissioner claimed privilege in relation to information held concerning other taxpayers, including material described as "gross profit margins for competitor companies" and "industry comparisons".[19] The claim for privilege was rejected in the High Court and the Commissioner appealed.

[41] In the Court of Appeal, Richardson J again delivered the leading judgment. He identified the underlying policy considerations raised by the case. The public interest called for the use by the revenue authorities of information concerning third party taxpayers' affairs as an independent source of objective material in verifying the correctness of a particular taxpayer's affairs. There was also a public interest in ensuring that the Department preserved the secrecy of taxpayers' affairs. But the Commissioner was not entitled to disregard confidential information because of a concern that a litigant taxpayer might seek access to it.

[42] He then summarised the statutory provision concerning secrecy:[20]

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18 (1992) 14 NZTC 9146.
19 At p 9157.
20 At pp 9159 – 9160.

> Section 13(1) imposes absolute secrecy obligations on all Departmental officers. Section 13(4) carefully defines and limits the outside bodies to which information may be disclosed and sec 13(3) reinforces the general obligation under sec 13(1) by excusing officers from obligations to disclose documents or information in court proceedings where, but for the statute, disclosure might be compelled.
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> In terms of sec 13(3) it is only where and to the extent that it is necessary for the purpose of carrying into effect the Inland Revenue Acts that disclosure of taxpayer information may be made to a Court or Tribunal.

[43] Richardson J decided the fact that the Department had used records of other taxpayers' affairs to derive industry profit ratios and profit data did not make it "necessary" for the abstracted or original data to be produced in the *Squibb* litigation. By use of schedules expressing the secret information in ratios or proportions, in a way which avoided taxpayer identification, the underlying requirements of s 13 would be met while providing reasonable detail. He added that to compel disclosure of a taxpayer's identity whenever the Commissioner had regard to comparative industry data would inevitably undermine the integrity of the tax system, which the stringent secrecy provisions were designed to support, and would be inimical to carrying the Inland Revenue Acts into effect.[21] His implicit conclusion was that under s 13(3) material that might identify the other taxpayers concerned was privileged from production.[22]

[44] Relevant information concerning business operations of another taxpayer, from which identifying information had been separated out, would not, however, be barred by s 13. But the balancing of public interest immunity and fair trial considerations justified further restraints on disclosure, covering information which, while not actually identifying other taxpayers to whom it related, could lead to that outcome. There need be no disclosure of raw or abstracted data in existing form, without adjustments to protect taxpayers against identification. Also, there could be excisions or exclusions from documents to the minimum extent required to prevent identification of other taxpayers. This outcome of the public interest immunity balancing exercise was no more than was necessary in the public interest

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21 At p 9160.
22 At p 9160.

to recognise the high value attaching to maintaining and securing secrecy of taxpayers' affairs.[23]

[45] Accordingly Richardson J, in what was on this point the majority judgment, upheld the Commissioner's claim that information relating to other taxpayers' affairs, disclosure of which could lead to the identification of other taxpayers, should not be ordered.[24]

[46] In his separate judgment in *Squibb*, strongly relied on by the appellants, Cooke P said:[25]

> As to the affairs of other taxpayers, I would apply as a principle of public policy implicit in the income tax legislation the statement of Lord *Wilberforce* in *IRC v National Federation of Self-Employed* [1982] AC 617 at p 632: "Such assessments and all information regarding taxpayers' affairs are strictly confidential".

[47] *Squibb* was a case where the Commissioner was resisting disclosure of comparative industry information used as the basis for an assessment, to a taxpayer who was no doubt looking for indications of differences between comparators' businesses and its own. Richardson J applied both the s 13(3) privilege and public interest immunity to control the extent of material to be discovered. The result was that certain information of a general nature had to be provided to the litigant taxpayer, but not any which tended to disclose the identity of the comparator taxpayers involved.

[48] Public interest immunity principles were applied on a contents rather than a class of information basis. While Cooke P reiterated his view that Lord Wilberforce's dictum stated a principle implicit in the legislation, he also concurred with the finding of Richardson J permitting certain revelations of other taxpayers' affairs, with information which could lead to identification being removed. There is nothing in Lord Wilberforce's judgment,[26] which indicates that his remarks about

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23 At p 9160.

24 In separate judgments Gault, Casey and Hardie Boys JJ agreed with Richardson J on the question of confidentiality of other taxpayers' affairs. Cooke P expressed general agreement but made the additional observations mentioned below.

25 At p 9149.

26 In *Inland Revenue Commissioners v National Federation of Self-Employed and Small Businesses* [1982] 1 AC 617.

confidentiality of taxpayers' affairs were intended to support application of public interest immunity principles at all. The context was concerned with whether any other party could have a right to inspect a person's tax information. It did not involve possible use of such information in court proceedings.

[49] For the avoidance of doubt, we should also make clear that we see no basis in Richardson J's judgment for the appellant's contention that s 81 prohibits the Commissioner, for his own revenue collecting purposes, from discovering documents relating to non-party taxpayers, or using them in litigation, in a manner which discloses their identity.

[50] Insofar as it turned on the statute, *Squibb* was solely concerned with the privilege provision under s 13(3). The reasoning in the leading judgment was very much concerned with the extent of disclosure to the taxpayer of relevant comparative information concerning affairs of other taxpayers which the Commissioner had no intention of using in the litigation. Indeed, Richardson J said that different considerations might arise if the *Commissioner* decided to adduce further details of industry profitability that identified taxpayers. In light of this remark, it is unsurprising that in *Fay, Richwhite & Co Ltd v Davison*,[27] Cooke P said that the judgments had to be read as confined to the subject matter.[28] The issues raised by tax secrecy and the public interests at stake will differ in different situations and this must affect how the legislative provisions are applied in any particular context.

Applying s 81 in this case

[51] Section 81 contains the principal statutory direction concerning the secrecy of tax matters. In ascertaining its meaning it is convenient to start with the changes bearing on the confidentiality of taxpayers' affairs made to the Tax Administration Act in 1995. Section 6A introduced a new provision of tax administration which stipulates the core function of the Commissioner as being the care and management

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27 [1995] 1 NZLR 517.
28 At p 523.

of the taxes covered by the Inland Revenue Acts. In the collection of taxes the Commissioner's duty is to collect the highest net revenue practicable within the law, having regard to the resources available, the importance of promoting taxpayer compliance and the compliance costs to taxpayers. The Commissioner's duty to have regard to the importance of voluntary compliance, in collecting the highest net revenue practicable, is closely linked to the importance of public perceptions of the integrity of the system.[29]

[52] Linked with s 6A is s 6. It imposed a new overarching duty on Ministers and departmental officials "at all times to use their best endeavours to protect the integrity of the tax system".[30] One aspect of that integrity is maintaining confidentiality in the affairs of taxpayers.[31] This reflects Richardson J's observation in *Squibb* that the "stringent official secrecy provisions" were designed to support the integrity of the tax system.[32] Of course, the confidentiality of tax affairs is only part of tax system integrity under s 6. It also includes, unsurprisingly, the responsibility of taxpayers to comply with the law.[33] This reflects the importance to tax system integrity of the Commissioner's duty to identify those persons who are not returning all taxable income and who are failing to pay tax that is due. The central position of ss 6 and 6A in the legislative scheme provides contextual support for an interpretation of the Tax Administration Act that requires the Commissioner to have regard to the importance of both values. The ultimate issue in this case turns on how the statute provides for them to be reconciled. That requires consideration of s 81.

[53] Section 81(1) lays down a rule that restricts use by officials of taxpayers' information held by the Inland Revenue Department, when discharging the Commissioner's functions of care and management of taxes. The obligation of secrecy under s 81(1) attaches to that material as a class. It is secret whether it has come into the department through voluntary disclosure in a taxpayer's return of

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29 Under s 6(2)(a) such perceptions themselves are part of the integrity of the system.
30 Section 6(1).
31 Section 6(2)(c).
32 At p 9160.
33 Section 6(2)(d).

income, in response to a requirement that it be furnished under s 17, or because it has been located by the Department in some other way during the course of investigations to verify the correctness of any taxpayer's return. The obligation of secrecy is reinforced by a penal provision which makes contravention of the s 81 secrecy obligation an offence.[34]

[54] Section 81(1) also provides, by way of exception to the secrecy rule, for the Commissioner to make use of information concerning taxpayers' affairs "for the purpose of carrying into effect the [Inland Revenue] Acts". It is well established by *Knight* and *Squibb* that conduct by the Commissioner of any litigation in the exercise of his functions, powers and duties is an activity within that purpose. This broad approach to the content of the exception has been applied both to s 81(1) and to the similarly expressed exception in s 81(3).

[55] Section 81(3) creates a privilege from being required to produce, which attaches to any material relating to the affairs of taxpayers coming to the notice of officers of the Inland Revenue Department in the performance of their duties. The privilege protects that material from requirements of compulsory disclosure in court proceedings. As indicated, the legislative history confirms that the statutory privilege was introduced in 1952 to clarify the basis and extent of that protection of the position of the Commissioner. Its purpose is to reinforce tax secrecy obligations under s 81.

[56] The statutory privilege does not apply when production is "necessary" for the purposes of the Act. Section 81(3) in this way addresses the competing considerations of protecting tax secrecy and permitting use of secret material in court for the purposes of, in this case, carrying the Inland Revenue Acts into effect. The two public interests are reconciled by inquiring into whether production or disclosure in court, with or without editing, is *necessary* for the purpose of the relevant statutes. Where that is the case the privilege does not apply and the ordinary rules of court do. There are other more specific exceptions to the application of secrecy obligations set

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[34] Under s 143C of the Tax Administration Act. Sanctions for breach may include imprisonment for up to 6 months, a fine not exceeding $15,000 or both.

out in s 81(4), but none bear on the situation where the Commissioner is involved in litigation.

[57] It follows that the exception in s 81(1) governs the position where the Commissioner chooses to use secret tax material to support his case in litigation. He may do so provided he is acting within the exception. Section 81(3) applies when, in acting in accordance with the Department's secrecy obligations, he claims the statutory privilege to resist production. Section 81(3) is not itself a restraint on voluntary use of secret material by the Commissioner. That restraint is provided for by s 81(1) when the exception in that provision does not apply.

[58] That is important in the present case. The Commissioner is responding to an order for discovery and in doing so has listed documents relating to transactions involving the other banks, on the basis, which for present purposes is accepted, that they are relevant in the litigation. The Commissioner has also signalled that some of these documents will be produced as part of his case. In all respects he is justified in so acting only to the extent that s 81(1) authorises him to do so. But if it does, he has no duty under his s 81(1) obligations to claim the privilege under s 81(3). Although, during the hearing in this Court, the issue on appeal was expressed in terms of a prohibition against discovery of documents in a manner that identifies third parties, the question does not directly concern privilege under s 81(3) but rather whether in responding to discovery requirements, and otherwise using documents that are secret, the Commissioner is acting in a way authorised by s 81(1).

[59] In considering the extent to which the *Squibb* judgments assist in deciding that question, it is necessary to clarify one aspect of Richardson J's summary of what is now s 81(1).[35] In saying that it imposed "absolute secrecy obligations" on all departmental officers, Richardson J must have been referring to the all-encompassing nature of the obligation in relation to what is held by the Department. He cannot have been addressing the significance of the exception to the duty to maintain secrecy. The exception in s 81(1) obviously permits the Commissioner to

[35] As set out in para [42] above.

make use of other taxpayers' information in the course of his duties. The relevant passage in Richardson J's judgment in *Squibb* does not appear to contemplate s 81(1) being used in this way but the case was of course decided under s 13(3) and not s 13(1) of the 1974 Act. In the present case, however, it is the meaning of s 81(1), and the words expressing the exception in particular, which are critical.

[60] The argument of Mr Brown QC for the Commissioner is that s 81 provides an exhaustive prescription of secrecy requirements in relation to use of taxpayer material. The Commissioner says that the exception to s 81(1) permits disclosure that is part of any action taken for the purpose of collection of taxes. Once the exception is engaged there is no restriction on discovery and any need to protect confidentiality must be addressed on a particular document basis. The Commissioner submits that s 81(1) does not limit use of the material through the "necessary" standard as is provided for in the exception to privilege in s 81(3).

[61] On the other hand, in its decisions under s 13 of the 1974 Act, when the Court of Appeal has focused on both subsections it has consistently indicated that, because of the similarity in the wording of s 81(1) and (3), the two subsections have the same meaning. In *Knight*, for example, Richardson J said:[36]

> In *each* case the subsection understandably recognises that the carrying into effect of [the Acts] will in some circumstances require disclosure of material by the officer concerned... (Emphasis added)

[62] Similarly Cooke P said that the two exceptions are "in much the same wording".[37] The Court of Appeal in the present case took the same view.[38] In effect the approach generally taken has been to read s 81(1) as if the word "necessary" was included in the same way as it is in s 81(3).

[63] The argument of Mr Farmer QC for Westpac is that in relation to the use of information concerning the affairs of other taxpayers, the obligation of secrecy must be given full effect by allowing use of such material by the Commissioner only in a

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36 At p 40.
37 At p 32.
38 At para [60].

manner that does not lead to the identification of taxpayers other than those who are parties to the particular litigation. The argument is largely based on a reading of Richardson J's judgment in *Squibb*, which we have already made plain we do not accept. Nor do we accept that it is possible to read the words in s 81(1) that express the exception from the secrecy obligation in such a narrow way. The appellants' approach is not supported by s 6. To require redaction or editing in a manner that would make a relevant document useless would at times frustrate the Commissioner's performance of his duty to identify instances where persons are not correctly returning their taxable income. An important element of the purpose of the exception is to allow use by the Inland Revenue Department of information concerning the affairs of third parties as an independent, and at times valuable, source of objective material in checking the correctness of a different taxpayer's returns. A prohibition on use of the same material by the Commissioner in court, when in litigation over the exercise of his functions, in a manner that discloses the identity of parties, is completely inconsistent with that purpose.

[64] In support of Westpac's position, Mr McKay, on behalf of ANZ National, also relied on a dictum in the Privy Council case of *Gamini Bus Co Ltd v Commissioner of Income Tax, Colombo*.[39] In that case Viscount Simon said that:

> Their Lordships would strongly deprecate the production or use of such a document if it did in effect disclose information about other identified or identifiable taxpayers…

[65] *Gamini* is authority for the proposition that the Commissioner may use other taxpayers' information to establish ratios and trends, for the purpose of comparison without disclosing primary confidential material. Mr McKay argued that the case supports the further proposition that any disclosure which identifies another taxpayer cannot be within the exception in s 81(1) because such disclosure is not within the performance of the Commissioner's duties. The circumstances of the present case are, however, different to those of *Gamini*. Here the disclosure of the primary information is reasonably necessary for the performance of the Commissioner's functions. As well, it is simply not possible to read the words expressing the s 81(1) exception in the way that Mr McKay proposes.

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[39] [1952] 1 AC 571.

[66] The features of tax system integrity under s 6A support a meaning of s 81(1)[40] which ensures that all the elements of that concept are respected by the Commissioner when using secret material in the course of carrying into effect the Act. That in turn supports the suggestion that the Commissioner must meet a threshold standard related to tax secrecy obligations when using the material for his statutory purposes.

[67] The other important context that clarifies the meaning of s 81(1) is that of the remainder of the section. Section 81(3) expressly incorporates a standard as part of the exception to the privilege against production of secret material in court proceedings. It must be necessary to produce such material for the purpose of carrying into effect the Acts. Section 81(4) provides for exceptions in other specific circumstances with varying standards incorporated, including necessity and desirability. We do not, however, accept that this indicates there was no intention to include a particular standard within s 81(1).

[68] The standard in s 81(3) is a significant part of the context in interpreting s 81(1). If s 81(1) did not incorporate a closely related standard as part of the exception, there would be a mismatch between the two provisions which would mean that the Commissioner had scope to use a wider class of confidential information by choice, when conducting litigation, than the court could compel him to produce. This would be surprising and unlikely to have been intended by Parliament. Mr Simpson for ASB Bank, an intervenor, raised the possibility that it may have been contemplated that such a lack of symmetry would be addressed on public interest immunity principles, but we see little force in that argument. The better view is that Parliament's purpose in s 81 was to cover the entire ground in stating the basis on which the conflicting public interests were to be reconciled.

[69] We are satisfied that these considerations of context and purpose indicate that the permitted use exception in s 81(1) is a qualified one. Disclosure is not permitted unless, and to the extent that, it is reasonably necessary for the performance of the Commissioner's statutory functions. This approach to interpretation reflects the

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[40] See paras [51] and [52] above.

underlying policy considerations referred to by Richardson J in *Squibb*.[41] In particular it recognises that information concerning third party taxpayers' affairs is a valuable resource in verifying correctness of returns and that it would be inimical to the integrity of the tax system if the Commissioner were restricted from using it where that use is reasonably necessary in order for him to exercise his functions effectively. Tax secrecy is also an important value which should be accommodated unless the Commissioner's case would be prejudiced.

[70] So read, s 81(1) sets a straightforward legal standard which the Commissioner must apply. His judgment of when it is reasonably necessary for him to use documents identifying taxpayers, in the context of litigation, is always entitled to respect but may of course be reviewed prior to or during a trial for non-compliance with the Act. Independently the court will take such steps as it considers appropriate to protect taxpayer confidentiality in the way the material is deployed in the course of the proceedings. When a party challenges the lawfulness of such a decision, the court may in cases of doubt invite submissions from third parties affected. Separate proceedings will rarely, if ever, be appropriate.

Public interest immunity

[71] On this basis, s 81 of the Act itself addresses comprehensively the conflicting principles of taxpayer secrecy and the interests of justice. It sets the basis upon which they are reconciled. This involves confining use of taxpayer material in a manner which discloses identity of other taxpayers to situations where that is reasonably necessary. Techniques of editing and redaction as applied in *Squibb* should be pursued where that does not impair the utility of the material concerned. As Mr White QC argued for the Commissioner, there is no need or basis for the court to revert to the common law principle of public interest immunity, or to its statutory expression in s 70 of the Evidence Act 2006, to clarify how that tension between the public interests is resolved. The balance has been set by the 1994 statute. We have already indicated that we do not accept that what Lord Wilberforce said in the *National Federation of Self-Employed and Small Businesses* case supports

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41 See para [41] above.

application of public interest immunity principles in this context. Indeed to do so would be contrary to the rule that resort is not to be had to the common law when the statute covers the ground.[42]

Conclusion

[72] The Court of Appeal has found that the documents in issue are arguably part of the wider commercial context in which the transactions of the BNZ are to be considered in these proceedings. It is clear that if the identity of the other banks involved in those transactions is not before the High Court, the documents will have no utility as evidence. In those circumstances it is reasonably necessary that the identity of the other banks concerned should be before the Court. For the reasons given, s 81 does not preclude that, nor does the common law. That is not, of course, to say that the position of others associated with the transactions makes disclosure of their identities reasonably necessary. If any issue arises in that regard, it should be decided by the trial Judge. As well, the High Court can be asked to address questions of protecting general commercial confidentiality by reference to particular documents.

[73] The appeals are dismissed. The Commissioner is entitled to costs of $25,000 and disbursements, as determined if necessary by the Registrar. These costs and disbursements are to be borne as to 40 percent each by Westpac and ANZ National and as to 20 percent by ASB Bank.

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[42] The situation is akin to that where a legislative scheme is introduced which covers ground occupied by a pre-existing prerogative power, as to which see *Attorney-General v de Keysers Royal Hotel Ltd* [1920] 1 AC 508.

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