IN THE SUPREME COURT OF NEW ZEALAND

SC 8/2012
[2012] NZSC 94

BETWEEN	COMMISSIONER OF INLAND REVENUE Appellant
AND	REDCLIFFE FORESTRY VENTURE LTD First Respondent
AND	GARRY ALBERT MUIR Second Respondent
AND	ACCENT MANAGEMENT LTD Third Respondent
AND	LEXINGTON RESOURCES LTD Fourth Respondent
AND	BRISTOL FORESTRY VENTURE LTD Fifth Respondent
AND	BEN NEVIS FORESTRY VENTURES LTD Sixth Respondent
AND	CLIVE RICHARD BRADBURY Seventh Respondent
AND	GREGORY ALAN PEEBLES Eighth Respondent

Hearing:	19 June 2012
Court:	Elias CJ, Tipping, McGrath, William Young and Gault JJ
Counsel:	B W Brown QC, T G H Smith and J D Kerr for Appellant C G Gudsell QC for First and Second Respondents M S Hinde for Third and Fourth Respondents R B Stewart QC and N S Gedye for Fifth, Sixth, Seventh and Eighth Respondents
Judgment:	9 November 2012

JUDGMENT OF THE COURT

A The appeal is allowed and the judgment of the High Court dismissing Redcliffe's proceeding is restored.

B The respondents are jointly and severally liable to pay costs of $15,000 to the appellant together with reasonable disbursements to be fixed if necessary by the Registrar.

C The order for costs and disbursements made by the Court of Appeal is reversed. Any outstanding questions concerning costs and disbursements in the High Court should be determined by that Court.

REASONS

(Given by McGrath J)

Introduction

[1] This appeal raises a question concerning when a party to litigation, against whom judgment has been given and whose appeal rights are exhausted, may apply to have the judgment set aside. The general rule is that, once a court having jurisdiction to hear and determine a proceeding has entered its final judgment, that judgment is binding on the parties unless it is set aside on appeal. There are, however, certain identified exceptions. Under one of them a final judgment may be challenged in separate proceedings which claim that the judgment was procured by fraud. The present case involves a new proceeding challenging an earlier final judgment which is said by the respondents to fall into that category. Their claim differs, however, from the line of decided cases involving fraudulent procurement of a judgment, which alleged concealment of evidence, usually through perjury. In this case the respondents rather allege that the defendant, the Commissioner of Inland Revenue, fraudulently concealed from the Court in the earlier proceedings the existence of a legislative provision. The claim is that the Commissioner knew that the provision applied to the case, and thereby procured an erroneous legal result.

The ultimate issue in this Court is whether the respondents, in their new proceeding, have raised an arguable exception to the rules concerning the finality of judgments which should be allowed to go to trial.

Procedural background

[2] On 19 December 2008 this Court delivered judgment in an appeal by nine investors and loss-attributing qualifying companies (the Trinity investors), who had claimed tax deductions as a result of their participation in a forestry development project known as the Trinity scheme.[1] The Court's judgment, in favour of the Commissioner of Inland Revenue, concluded that the Trinity scheme was a tax avoidance arrangement. Assessments by the Commissioner, disallowing the claimed deductions and imposing penalties on the investors for taking an abusive tax position, were upheld by this Court. Earlier High Court[2] and Court of Appeal[3] judgments had reached the same conclusions (but taking different views on the analysis of the scheme under specific tax provisions).

[3] Four days after this Court's judgment, Accent Management Ltd and six other Trinity investors (including Redcliffe Forestry Investment Ltd) brought a representative proceeding seeking judicial review of the assessments upheld by the Supreme Court. An application by the Commissioner to the High Court to strike out this proceeding was granted by Keane J on 12 March 2010.[4] An appeal against that judgment was later abandoned. Other challenges to the tax treatment of the Trinity scheme have also been brought since this Court's judgment, but it is only necessary for our purposes to refer to the proceeding next mentioned, which is the subject of the present appeal.

[4] On 15 September 2009, Redcliffe and six other Trinity investors, along with Dr Muir, a director of Redcliffe who had devised and set up the Trinity scheme, brought a new proceeding against the Commissioner. These plaintiffs, to whom we

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1 *Ben Nevis Forestry Ventures Ltd v Commissioner of Inland Revenue* [2008] NZSC 115, [2009] 2 NZLR 289.

2 *Accent Management Ltd v Commissioner of Inland Revenue* (2005) 22 NZTC 19,027 (HC).

3 *Accent Management Ltd v Commissioner of Inland Revenue* [2007] NZCA 231, (2007) 23 NZTC 21,323.

4 *Accent Management Ltd v Commissioner of Inland Revenue* (2010) 24 NZTC 24,126 (HC).

refer as "Redcliffe", sought orders setting aside the judgment of the High Court, delivered by Venning J in 2004, in the Trinity scheme litigation[5] on the ground that the Commissioner had obtained that judgment by knowingly presenting a "false case" in the High Court. Redcliffe pleaded that the Commissioner had deliberately refrained from putting material facts and law, applicable to the treatment of the scheme by the Inland Revenue Department, before the High Court, so as to secure a judgment that departmental officers knew would not have been available if there had been full and frank disclosure of the legal position. Redcliffe's specific contention is that the Commissioner knowingly and wrongly applied a depreciation allowance to expenditure incurred by the Trinity investors under subpart EG of the Income Tax Act 2004 when subpart EH8(l) required that the expenditure be calculated under its provisions.

[5] Redcliffe accepts that, in general, following completion of available appeals the decision of a court is final and a trial court is functus officio. Relying, however, on the exception to that principle which allows such a judgment to be attacked on the ground of fraud, Redcliffe contends that the Commissioner is not able to rely on the finality of the Supreme Court's judgment concerning the tax treatment of the Trinity scheme.

[6] The Commissioner responded to Redcliffe's proceeding by filing an objection to the jurisdiction of the High Court under r 5.49 of the High Court Rules and applying for orders dismissing Redcliffe's proceeding on the ground that the High Court judgment Redcliffe seeks to set aside is final and cannot be reopened. The Commissioner also filed a memorandum which accepted that the Supreme Court had jurisdiction to vary the High Court's 2004 judgment and said the Commissioner would not object on jurisdictional grounds to any application to this Court by Redcliffe to recall its own judgment.

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5 *Accent Management Ltd v Commissioner of Inland Revenue*, above n 2.

High Court judgment

[7] The Commissioner's application was heard by Venning J, who dismissed Redcliffe's proceeding.[6] The Judge referred to the related principles of finality in litigation and that a trial court is functus officio once the proceeding has been subject to the decisions of appellate courts. These principles were not an absolute bar to Redcliffe bringing a fresh proceeding in the High Court and a finding that an otherwise final first instance judgment had been obtained by fraud was a limited exception to the finality principle. The Judge accepted that such a claim should be brought in the High Court, particularly where the allegation was likely to require the resolution of disputed facts. He also pointed out that stringent requirements in the pleading of the alleged fraud had to be met before such a challenge to finality would be entertained.

[8] Venning J held that only fraud in a strict legal sense would suffice to bring a proceeding within the fraud exception; the judgment had to be obtained by conscious and deliberate dishonesty.[7] The Judge's conclusion on Redcliffe's pleading in the statement of claim was:

> [43] While a false case involving false evidence, the suppression of material evidence or the creation of false documents will be fraud, none of that is pleaded in the present case. The gravamen of the plaintiffs' pleading is that the Commissioner had a duty to refer to the existence, effect and likely application of subpart EH of the Income Tax Act 1994 (the ITA) but did not do so. It is said the Commissioner knowingly assessed the plaintiffs under the wrong statutory provision. The plaintiffs say that … the Commissioner knew that subpart EH rather than subpart EG was applicable and by failing to disclose that to the plaintiffs or the Court at any stage, the Commissioner presented a false case to this Court. But if the Commissioner was wrong to assess under subpart EG when subpart EH applied then he was wrong at law. That is not fraud.

[9] It followed that the allegations of fraud that appear in Redcliffe's statement of claim were not of a kind that came within the exception to the principle of finality of judgments that had been subject to a completed appellate process.

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6 *Redcliffe Forestry Venture Ltd v Commissioner of Inland Revenue* [2011] 1 NZLR 336 (HC). Judgment was delivered on 26 February 2010.

7 Applying the judgment of the House of Lords in *The Ampthill Peerage* [1977] AC 547 (HL) at 571 and 591: see [27]–[30].

[10] Venning J also held that he had no jurisdiction to declare that his 2004 judgment was a nullity. The assessment had effect unless and until declared a nullity by a competent court, which could only be done in challenge proceedings under the Tax Administration Act 1994. The nullity argument had not, however, been raised in the challenge proceedings that were the subject of the 2004 judgment. It followed that the Court had no jurisdiction to consider Redcliffe's substantive proceeding to set aside the 2004 judgment of the High Court. The Commissioner's objection to jurisdiction under r 5.49 was upheld and Redcliffe's proceeding was dismissed.

Court of Appeal judgment

[11] Redcliffe appealed.[8] In the Court of Appeal the procedural issue of whether the Commissioner was entitled to object to the High Court's jurisdiction under r 5.49 came to the forefront. Redcliffe's submission was that r 5.49 was confined to cases where there were issues of territorial jurisdiction or exclusion of jurisdiction by statute. Redcliffe argued that the Commissioner should have brought its objection based on the finality of the earlier judgment by applying to strike out Redcliffe's proceeding under r 15.[9] As a result of the procedure followed, Redcliffe had been denied an opportunity to amend its pleading, and to meet any strike out application with affidavit evidence of the alleged fraud.[10] The Court of Appeal accepted these arguments. It summarised the circumstances in which the objection to jurisdiction procedure under r 5.49 is available as follows:[11]

> (a) The procedure for filing an appearance and objecting to the High Court's jurisdiction will generally only be suitable where a party claims that:
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> (i) it is not subject to the jurisdiction of the New Zealand courts;
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> (ii) the case can, by law, only be determined by a different New Zealand court or authority; or

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8 *Redcliffe Forestry Venture Ltd v Commissioner of Inland Revenue* [2011] NZCA 638, [2012] 2 NZLR 823.

9 At [24].

10 At [25]–[26].

11 At [52] (footnotes omitted).

(iii) the High Court's jurisdiction is precluded by the operation of a contractual term or because statutory requirements have not been complied with.

(b) If none of those situations arises and the application or proceeding is of a kind that the High Court can hear, it must have jurisdiction.

(c) The procedure under r 5.49 is only concerned with the Court's jurisdiction to hear and determine the application or proceeding. Rule 5.49 is not concerned with the Court's jurisdiction to grant relief in a proceeding within its jurisdiction. Thus, in an application under r 5.49, the Court's focus must be on the allegations made in the statement of claim and any affidavit evidence put forward to support or contradict them.

[12] The Court later summarised its view of the different roles of rr 5.49 and 15:[12]

> … under r 5.49 the Court's concern is the effect on its jurisdiction of the territorial considerations, or of statutory or contractual provisions excluding the Court's jurisdiction to entertain the case at all. But under r 15.1, the focus is on the tenability of the claim made or cause(s) of action pleaded: is it reasonably arguable and/or is it an abuse of the Court's process? While the Court has jurisdiction over the matter generally, it will strike out the claim if proper grounds for striking out are established.
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> …
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> As is clear from the [above] summary of principles … r 5.49 is restricted to protests to jurisdiction in the strict sense. This was not such a case. Rather, the "protest to jurisdiction" by the CIR was in reality a challenge to jurisdiction in a broader sense, namely, that the High Court was functus officio and lacked jurisdiction to grant the remedy sought because the 2004 judgment had been appealed to the Supreme Court. The CIR's argument was the High Court had no "jurisdiction" because jurisdiction now lay with the Supreme Court on an application by the appellants to recall the judgment of the Supreme Court.
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> A challenge of that type fell to be determined on an application to strike out under r 15.1. In dealing with it as a protest to jurisdiction, the High Court fell into error by confusing its power to grant relief (by setting aside the 2004 judgment) with its jurisdiction to hear and determine the setting aside proceeding. We are satisfied that the way in which the CIR presented and argued the application in the High Court demonstrates that the application was, in substance, an application to strike out. As such it ought to have been dealt with under r 15.1.

[13] The Court allowed the appeal, quashed the High Court's order dismissing the Redcliffe proceeding and remitted it to the High Court. The Commissioner could then apply under r 15 to strike out Redcliffe's proceeding.

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[12] At [57]–[59] (footnotes omitted).

Grounds of appeal

[14] The Commissioner applied for leave to appeal against the judgment of the Court of Appeal. Leave was granted on two matters:[13]

(i) whether the Commissioner's challenge to the claim was appropriately brought under r 5.49; and

(ii) whether the judgment of the High Court should in any event have been upheld.

The objection to jurisdiction rule (r 5.49)

[15] Rule 5.49, so far as is presently relevant, provides:

> **5.49 Appearance and objection to jurisdiction**
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> (1) A defendant who objects to the jurisdiction of the court to hear and determine the proceeding may, within the time allowed for filing a statement of defence and instead of so doing, file and serve an appearance stating the defendant's objection and the grounds for it.
>
> (2) The filing and serving of an appearance does not operate as a submission to the jurisdiction of the court.
>
> (3) A defendant who has filed an appearance may apply to the court to dismiss the proceeding on the ground that the court has no jurisdiction to hear and determine it.
>
> (4) The court hearing an application under subclause (3) must,—
>
> (a) if it is satisfied that it has no jurisdiction to hear and determine the proceeding, dismiss the proceeding; but
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> (b) if it is satisfied that it has jurisdiction to hear and determine the proceeding, dismiss the application and set aside the appearance.
>
> (5) At any time after an appearance has been filed, the plaintiff may apply to the court by interlocutory application to set aside the appearance.
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> (6) The court hearing that application must,—
>
> (a) if it is satisfied that it has jurisdiction to hear and determine the proceeding, set aside the appearance; but

[13] *Commissioner for Inland Revenue v Redcliffe Forestry Venture Ltd* [2012] NZSC 10.

(b) if it is satisfied that it has no jurisdiction to hear and determine the proceeding, dismiss both the application and the proceeding.

(7) To the extent that an application under this rule relates to service of process effected outside New Zealand under rule 6.27 or 6.28, it must be determined under rule 6.29.

(8) The court, in exercising its powers under this rule, may do so on any terms and conditions the court thinks just and, in particular, on setting aside the appearance it may extend the time within which the defendant may file and serve a statement of defence and may give any directions that appear necessary regarding any further steps in the proceeding in all respects as though the application were an application for directions under rule 7.9.

…

[16] Rule 5.49 is the successor to r 131, which was introduced to the High Court Rules in 1986 under the heading "Appearance under protest to jurisdiction".[14] A protest in this context is a formal statement contending that the Court has no power to entertain the claim. Rule 5.49 is headed "Appearance and objection to jurisdiction" which is to the same effect. Nor is there any material difference in meaning in the text of the successive provisions. Each provides for a defendant who objects to the jurisdiction of the court to hear and determine the proceeding to file and serve an appearance, stating the objection and grounds for it, instead of filing a statement of defence. The defendant may then apply to the court to dismiss the proceeding on the ground that the court has no jurisdiction to hear and determine it.

[17] In this Court Mr Brown QC, for the Commissioner, submitted that the challenge to Redcliffe's proceeding was correctly brought under the appearance and objection to jurisdiction provisions of r 5.49. This was so whether, under the terminology of the Court of Appeal, jurisdiction in r 5.49(1) was given a "wide" or "narrow" meaning. Mr Stewart QC, for several respondents, with support from counsel for others, supported the Court of Appeal's narrow approach and also submitted that the use of the r 5.49 procedure by the Commissioner had deprived the respondents of the opportunity to produce probative evidence of fraud and fully argue their case in repleaded form.

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[14] *McGechan on Procedure* states that the origin of the rule is the "broadly comparable" English Order 12, r 8, now Part 11 of the Civil Procedure Rules 1988 (UK): see Andrew Beck and others *McGechan on Procedure* (looseleaf ed, Brookers, updated to 19 December 2003) at [HR131.02].

The Court of Appeal's definition of jurisdiction

[18] It is convenient first to consider a submission by Mr Brown that, even if this Court upholds that aspect of the Court of Appeal's judgment, which confined the scope of objections to jurisdiction covered by r 5.49 to those concerning jurisdiction in its "strict" sense, the Commissioner was entitled to bring the objection in this case under that rule. This was because the Court of Appeal recognised that r 5.49 did cover the situation where only one court was competent to hear the case. In Mr Brown's submission, the Supreme Court, as the final tribunal to hear the case, was the only Court able to deal with the matter as Redcliffe's complaint, properly understood, was of an error of law to be corrected on appeal, rather than an instance of fraud.

[19] In the present case the Court of Appeal, in formulating its test for when r 5.49 can be invoked, placed considerable reliance on the reasoning in one of its earlier judgments. In *Doug Hood Ltd v Gold and Resource Developments (NZ) Ltd*,[15] the appellant applied under r 131 seeking to have dismissed, for lack of jurisdiction, an application brought by the respondent under the Arbitration Act 1996 for leave to appeal against an interim award. The appellant contended that the parties, in their arbitration agreement, had implicitly excluded from application the provision in the Second Schedule to the Act, which authorised the High Court to grant leave to appeal on a question of law arising out of the award. The Court accordingly had no jurisdiction to deal with the respondent's application for leave to appeal. It did not have power to determine whether the Second Schedule *could* apply in the circumstances of the case because any award given in the course of the arbitration had by agreement been shielded from scrutiny by the courts. This was even though the effect of the contractual provision was a question of law.

[20] In *Doug Hood Ltd* the Court rejected that argument, holding that the High Court had been given jurisdiction by Parliament to determine if leave to appeal should be granted under the Act.[16] It would have been surprising if the Court had held otherwise. It is well-established, indeed axiomatic, that the High Court has

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15 *Doug Hood Ltd v Gold and Resource Developments (NZ) Ltd* (1999) 13 PRNZ 362 (CA).
16 At [15].

jurisdiction or power to decide if it has jurisdiction over any matter because that Court is always able to decide if it has a power to act. As Salmond J once said:[17]

> The [High] Court is a superior Court of general jurisdiction, bound, indeed, like all other Courts, to observe the appointed limits of its jurisdiction, but possessed of authority to determine judicially and authoritatively what those limits are.

[21] The Court in *Doug Hood Ltd* added that, in exercising its power to determine the application for leave, the High Court would consider whether it had jurisdiction to grant the application, which would depend on whether or not the provision in the Act authorising an appeal with leave had been excluded by the parties or whether it applied. The appellant was essentially arguing, according to its own construction of the terms of the agreement, that such an appeal had been excluded. It was in this context that the Court of Appeal encapsulated the flaw in the appellant's argument as being that:[18]

> The argument for the appellant confuses the jurisdiction of the Court to grant relief with its jurisdiction to entertain and decide a claim for relief.

[22] This observation was apt to address the argument put before the Court in *Doug Hood Ltd*. In the present case, however, it has been treated by the Court of Appeal as a statement of principle concerning the application of r 5.49. The Court of Appeal concluded that, in dealing with the Commissioner's application as an objection to jurisdiction under r 5.49, Venning J had fallen into the error of confusing the High Court's power to grant relief by setting aside the 2004 judgment, with its jurisdiction to hear and determine the setting aside proceeding.[19] We disagree with that analysis. In *Doug Hood Ltd*, the appellant had argued that the High Court had no jurisdiction to determine whether it had power to entertain the application for leave to appeal. That is not the argument advanced by the Commissioner in the present case. The Commissioner accepts that the High Court has the threshold power to determine the limits of its jurisdiction in relation to Redcliffe's proceeding and seeks that it do so. What the Commissioner contends is that the High Court is no longer competent to deal substantively with the Redcliffe

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17 *New Zealand Waterside Workers' Federation Industrial Association of Workers v Frazer* [1924] NZLR 689 (HC) at 707. Applied in *Gazley v Lord Cooke of Thorndon* [1999] 2 NZLR 668 (CA) at 680 and 684–685.

18 At [15].

19 At [59].

claim because the 2004 judgment has been confirmed on appeal. As the Court of Appeal itself recognised:[20]

> The CIR's argument was the High Court had no "jurisdiction" because jurisdiction now lay with the Supreme Court on an application by the appellants to recall the judgment of the Supreme Court.

That contention goes to the Court's power to hear and decide Redcliffe's proceeding rather than merely to whether the Court can grant the relief it seeks.

[23] Because it erroneously saw the present case as being on all fours with *Doug Hood Ltd*, the Court of Appeal did not come to address this argument. Had it done so, it would almost certainly have recognised that the Commissioner's objection to the High Court's jurisdiction falls within one of the categories of cases to which, on the test which the Court of Appeal had itself formulated, r 5.49 applied.[21] The Commissioner asserts that Redcliffe's challenge to the High Court's 2004 judgment cannot be determined by the High Court; it can only be determined by the Supreme Court. That is because Redcliffe is challenging the correctness *in law* of that Court's judgment. The Commissioner's application is accordingly directed to the competence of the High Court to decide the dispute, which was held in *Doug Hood Ltd* to be a proper function of r 5.49.

[24] Applying r 5.49 in this way in the present context enables the Court to avoid the kind of circularity that was identified in *Re St Nazaire Company*.[22] In referring to an application to rehear a case which had been the subject of appeal, Jessell MR said: [23]

> … it is a petition presented to a Judge of the High Court to rehear a decision of the Appeal Court, I should have thought that the mere statement of that would be sufficient to shew that the Judge below had no jurisdiction. It would be a wonderful result indeed if the *Judicature Act* empowered a Judge of an inferior Court to rehear a decision of the Appeal Court which perhaps had reversed his decision. Upon that theory, how long is the thing to go on? If the Judge below has this power, he may exercise it by reversing the decision of the Appeal Court where the Appeal had reversed his decision.

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20 At [58].
21 See category (a)(ii) of the Court of Appeal's test set out in [11] above.
22 Shortly after an appellate process was created by the Judicature Acts (UK).
23 In *Re St Nazaire Company* (1879) 12 ChD 88 (CA) at 96–97 (emphasis in judgment).

In any event the Court of Appeal took too restricted an approach to the meaning of "jurisdiction" under r 5.49

[25] We also conclude that the Court of Appeal's view of the scope of what can be addressed in an objection to "jurisdiction" under r 5.49 is too restricted. The Court has held that r 5.49 can be invoked in only three situations:[24] first, when the matter is extraterritorial; secondly, when by law the case can only be determined by a different New Zealand court or authority; and thirdly, where the operation of a contractual term or failure to comply with statutory requirements precludes the High Court having jurisdiction. The third of these categories is obviously directed primarily at arbitration. Although each of these situations is clearly covered by r 5.49, it is not easy to read the rule as limited to them as it expresses an unqualified right to challenge a court's jurisdiction to hear and determine a proceeding. The better approach is to give r 5.49 its ordinary meaning. In that respect, the Court of Appeal's limitation on the application of the rule appears to cut across Diplock LJ's classic expression of the meaning of jurisdiction set out in *Garthwaite v Garthwaite*:[25]

> In its narrow and strict sense, the "jurisdiction" of a validly constituted court connotes the limits which are imposed upon its power to hear and determine issues between persons seeking to avail themselves of its process by reference (1) to the subject-matter of the issue or (2) to the persons between whom the issue is joined or (3) to the kind of relief sought, or to any combination of these factors.

[26] Also material to the meaning of jurisdiction in the context of r 5.49 are the remarks of Lord Scott in *Tehrani v Secretary of State for the Home Department*:[26]

> When issues are raised as to whether or not a court of law has jurisdiction to deal with a particular matter brought before it, it is necessary to be clear about what is meant by "jurisdiction". In its strict sense the "jurisdiction" of a court refers to the matters that the court is competent to deal with. Courts created by statute are competent to deal with matters that the statute creating them empowered them to deal with. The jurisdiction of these courts may be expressly or impliedly limited by the statute creating them or by rules of court made under statutory authority. Courts whose jurisdiction is not

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24 *Redcliffe Forestry Venture Ltd v Commissioner of Inland Revenue*, above n 8, at [52].

25 *Garthwaite v Garthwaite* [1964] P 356 (CA) at 387. This definition has been adopted for the term "jurisdiction" in Peter Spiller *Butterworths New Zealand Law Dictionary* (7th ed, LexisNexis NZ Ltd, Wellington, 2011) at 163.

26 *Tehrani v Secretary of State for the Home Department* [2006] UKHL 47, [2007] 1 AC 521 at [66].

> statutory but inherent, too, may have jurisdictional limits imposed on them by rules of court. But whether or not a court has jurisdictional limits (in the strict sense) there are often rules of practice, some produced by long-standing judicial authority, which place limits on the sort of cases that it would be proper for the court to deal with or on the relief that it would be proper for the court to grant.

[27] The principal instance of a reason established by judicial authority for why a court should not exercise jurisdiction which, strictly it possesses, is the doctrine of forum non conveniens.[27]

Finality in litigation and the fraud exception – general considerations

[28] The principle of finality in litigation gives rise to a rule of law that makes conclusive final determinations reached in the judicial process:[28]

> Unless a judgment of a Court is set aside on further appeal or otherwise set aside or amended according to law, it is conclusive as to the legal consequences it decides.

The rule reflects both the public interest in there being an end to litigation and the private interest of parties to court processes in not being subjected by their opponents to vexatious relitigation.[29] The rule recognises, however, that a policy of absolute finality is unsafe. It accommodates exceptional situations by allowing final determinations to be revisited but within prescribed limits. For example, where there is no abuse of process involved,[30] an application for recall of the judgment of a court can be made on grounds, which include "where counsel have failed to direct the Court's attention to a legislative provision or authoritative decision of plain relevance".[31] Limitations on the exceptions ensure that they do not subsume the general rule of finality and conclusiveness of judgments. The need for this was

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27 At [67].

28 *R v Smith* [2003] 3 NZLR 617 (CA) at [46] per Elias CJ.

29 *Shiels v Blakeley* [1986] 2 NZLR 262 (CA) at 266; and *Lockyer v Ferryman* (1877) 2 AC 519 (HL) at 530.

30 Instances of which are discussed in *New Zealand Social Credit Political League Inc v O'Brien* [1984] 1 NZLR 84 (CA) at 89; *Henderson v Henderson* (1843) 3 Hare 100 at 115, 67 ER 313 at 319 per Wigram V-C; and *Housing Corporation of New Zealand v Maori Trustee (No 2)* [1988] 2 NZLR 708 (CA) at 719.

31 *Horowhenua County v Nash (No 2)* [1968] NZLR 632 (HC) at 633.

recognised by Lord Wilberforce in the leading case on the availability of the particular exception which Redcliffe relies on in this case:[32]

> For a policy of closure to be compatible with justice, it must be attended with safeguards: so the law allows appeals: so the law, exceptionally, allows appeals out of time: so the law still more exceptionally allows judgments to be attacked on the ground of fraud: so limitation periods may, exceptionally, be extended. But these are exceptions to a general rule of high public importance, and as all the cases show, they are reserved for rare and limited cases, where the facts justifying them can be strictly proved.

[29] In cases brought under the fraud exception, only fraud in the strict legal sense will suffice: equitable fraud or lack of frankness does not qualify. In Lord Wilberforce's words:[33]

> There must be conscious and deliberate dishonesty, and the declaration must be obtained by it.

And as Lord Simon said in *The Ampthill Peerage*, citing a passage in the leading text on res judicata:[34]

> Where the allegation, or the evidence, of the suggested fraud is inconclusive, or wanting in precision, or such as to give rise to no more than surmise, suspicion, or conjecture, the affirmative answer fails, and the estoppel is not displaced.

[30] In New Zealand, the Court of Appeal has confirmed that claims based on suspicion are not allowed and has said that the fraud alleged must go to the heart of the judgment.[35] To ensure these requirements are all met in any fresh proceeding challenging the finality of a judgment on this ground, the law sets strict requirements as to pleading in a case brought under the fraud exception.

[31] It is also established that the appropriate procedural course, where a party against whom a judgment has been entered, alleges that it has been obtained by

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32 *The Ampthill Peerage*, above n 7, at 569.
33 At 571.
34 At 591, citing Sir Alexander Turner's edition of George Spencer-Bower and Alexander Turner *The Doctrine of Res Judicata* (Butterworths, London, 1969) at [373].
35 *Shannon v Shannon* (2005) 17 PRNZ 517 (CA) at [123].

fraud, is to commence a separate proceeding seeking to have the judgment set aside.[36] This is because cases invoking the fraud exception allege there has been dishonesty, usually involving perjury, in the evidence given at trial which has deceived the trial court into making erroneous determinations of fact. It is because the challenge is directed at the integrity of the determinations of fact in the litigation that the party alleging fraud brings a fresh proceeding in the trial court, even where the impugned judgment has already been subject of appeal. In such a case the plaintiff does not seek a review of the legal principles that were applied, being rather concerned with the consequence of their application to tainted evidence.[37]

[32] The rationale for allowing a fraud exception to finality is that it is right that a party who can show that his or her ability to mount an effective case was compromised by the fraudulent conduct of the other party, should not be bound by a judgment which was thereby obtained.

[33] While this rationale exceptionally warrants permitting an unsuccessful litigant to bring a proceeding seeking to reopen a judgment in concluded litigation on the ground it was procured by fraud, it also provides for pre-trial scrutiny of such claims to protect against abuse of that process. So where a defendant in a proceeding involving the fraud exception applies to strike it out, the plaintiff is required to discharge the onus of showing it has a case with an evidential foundation amounting to a prima facie case of fraud. The plaintiff's claim of fraud must be one that is fully and precisely pleaded and particularised and of sufficient apparent cogency that it should go to trial.[38] Where the claim alleging fraud is based on allegations concerning facts discovered since the judgment concluding the litigation, it must be shown they were not discoverable with reasonable diligence at the time of the previous proceeding. The same requirements of freshness, materiality and cogency that are imposed for admissibility of new evidence on appeal must be met. Evidence that was available at the time of trial, and could reasonably then have been

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36 *Sulco Ltd v ES Redit and Co Ltd* [1959] NZLR 45 (CA) at 71 per Hutchison J; and *Jonesco v Beard* [1930] AC 298 (HL) at 300–301.

37 *Kuwait Airways Corporation v Iraqi Airways Co (No 2)* [2001] 1 WLR 429 (HL) at [18]–[22].

38 *Shannon v Shannon* [2002] 3 NZLR 567 (HC) at [51] per Potter J; *Birch v Birch* [1902] P 130 (CA) at 130; and *Boswell v Coaks (No 2)* (1894) 86 LT 365 (HL).

adduced, will only be considered in special circumstances.[39] As well, if the defendant applies to dismiss the proceeding on the ground that the threshold for a claim under the fraud exception is not met, the plaintiff must also respond by promptly submitting probative affidavit evidence which verifies the critical pleaded facts relied on in the proceeding. It has the onus of establishing that the new evidence is such as to justify a new trial.[40]

[34] Sometimes a defendant's objection to the High Court's power or authority to try a claim will be directed to whether the plaintiff has pleaded a cause of action that is capable of displacing the finality and conclusiveness of an earlier judgment. In such a case the objection is to the Court's jurisdiction and may properly be brought under r 5.49. In other cases, the objection is rather concerned with questions of adequacy and cogency of a pleading which are more appropriately addressed in r 15.1. There is clearly an overlap between the two rules. It will often be convenient to apply under both. Despite Ms Hinde's submission to the contrary, we see nothing in either rule that prevents this.

Redcliffe's case of fraud

[35] We turn to consider whether Redcliffe has raised a tenable case involving the fraud exception.

[36] The legal premise of the statement of claim is that in calculating certain expenditure incurred by participants in the Trinity scheme, the Commissioner was required to apply subpart EH of the Income Tax Act, rather than the depreciation allowance provisions of subpart EG, which were applied by the Commissioner in making the relevant assessments.

[37] Advice that subpart EH should be applied to this effect was given to the Inland Revenue Department officials by Donald McKay, a tax consultant, prior to the issue of notices of proposed adjustments on which the assessments in issue in the

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39 As discussed in *Shannon v Shannon* (CA), above n 35, at [124] and [125].

40 *Shannon v Shannon*, above n 35, at [108]–[110] per Glazebrook J citing *Boswell v Coaks (No 2)*, above n 38, at 366 per Lord Selborne and *Birch v Birch*, above n 38, at 136–137 per Vaughan Williams LJ; and at 138–139 per Cozens-Hardy LJ.

Ben Nevis proceedings were based. We are informed first that the fact that such advice was given was unknown to the plaintiffs in those proceedings, until after judgment was given in the Court of Appeal in *Ben Nevis*.[41] Secondly, the plaintiffs did not see a copy of the document containing Mr McKay's advice until after the Supreme Court judgment was delivered.

[38] Redcliffe alleges that the Commissioner had a statutory duty[42] to refer, in notices of proposed adjustment, to the "existence, application and effect" of subpart EH8, but deliberately, and as part of a litigation strategy, did not do so. Redcliffe contends that had these mandatory obligations been met by the Commissioner, the assessments made would not have been confirmed in the subsequent court proceedings challenging them. Redcliffe's overall claim is that the Commissioner has suppressed the true legal position, presented a false case to the High Court, and thereby procured a judgment, based partly on the wrong provisions of the Income Tax Act. It seeks to have that judgment set aside.

[39] When asked whether there was any authority for the proposition that an error of law could be the subject of the fraud exception, Mr Stewart cited *Meek v Fleming*.[43] That case referred to a situation in which counsel for a party had concealed facts resulting in the Judge and jury being misled as to the credibility of the defendant police officer. The dictum of Denning LJ in another case was cited:[44]

> This raises an important question of professional duty. I do not doubt that, if a favourable decision has been obtained by any improper conduct of the successful party, this Court will always be ready to grant a new trial.

Neither of those cases, however, is of assistance on the essential proposition that Mr Stewart sought to draw from them. We are satisfied, for reasons we can give shortly, that the fraud exception to the finality of judgments does not apply to legal errors allegedly made in the reasons for judgment, even if a party's conduct is said to contribute to the making of the alleged error.

[40] Redcliffe's allegation of fraud rests on two propositions:

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41 *Accent Management Ltd v Commissioner of Inland Revenue*, above n 3.
42 Under s 89F of the Tax Administration Act 1994.
43 *Meek v Fleming* [1961] 2 QB 366 (CA).
44 At 379 citing *Tombling v Universal Bulb Co Ltd* [1951] 2 TLR 289 (CA) at 297 per Denning LJ.

(a) The true legal position was that the case was governed by subpart EH8; and

(b) This was dishonestly concealed from the Court by the Commissioner.

Put in this way, it is clear that Redcliffe, in proposition (a), is directly challenging the conclusions of this Court on matters of law which it was competent to address. This is not a case which rests on an allegation of fraud involving perjury or dishonest suppression of evidence bearing on findings of fact which were the primary responsibility of the High Court as the trial court.

[41] As we have said, the High Court is best placed to determine any subsequent issue of whether the evidence on which a final judgment in the case was based is tainted by fraud, so that the judgment must be set aside and a new trial ordered. That is not, however, the position where the error allegedly induced by fraud is one of law. It is well-established that the High Court has no power to recall or set aside judgments on questions of law which have been the subject of appellate decision.[45] As Mr Brown submitted for the Commissioner, echoing the words of Jessel MR already cited, were the position otherwise, the High Court would be able to overturn the decision of a court on appeal from its judgment on the content of the law.[46]

[42] There is another relevant and important consideration. As we have noted, where the fraud exception to finality is properly invoked, the party challenging the judgment will be able to show that his or her ability to mount an effective case was compromised by the fraudulent conduct of the other party. It is this consideration which provides the rationale for not insisting on finality. But this rationale is not applicable in the present context. The subpart was there to be seen in the legislation and was thus inherently incapable of concealment. For this reason alone, Redcliffe cannot credibly claim that the litigation strategy attributed to the Commissioner compromised its ability to mount an argument as to the subpart's applicability. The force of these considerations is enhanced when the facts are examined. The potential applicability of the subpart was signalled in the Notice of Proposed Adjustment; so it

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45 *Hikuwai v Sanford Ltd* (1996) 9 PRNZ 587 (HC) at 591 per Thorp J.

46 See [24] above.

was not concealed. And counsel for Redcliffe at the High Court trial were well aware of this potential applicability as the cross-examination of Ms Lloyd shows.

Nullity

[43] Redcliffe argued in its written submissions that the nullity of a judgment is a further exception to the principle of finality and conclusiveness. It pleaded that, as a consequence of the Commissioner's failure to discharge his obligations concerning the application of subpart EH8(1) of the Income Tax Act, the assessments were unauthorised by Parliament and incapable of confirmation by the High Court in its 2004 judgment. During oral submissions, Mr Stewart accepted that, if the taxpayers failed on their fraud claim, there was a jurisdictional impediment to the High Court dealing with the nullity issue. Only the Supreme Court could do so on an application for recall of its 2008 *Ben Nevis* decision. Mr Gudsell QC and Ms Hinde for the first, second, third and fourth respondents, adopted the written submissions of Mr Stewart which had argued that nullity was an exception to the principle of finality. Venning J rejected Redcliffe's contention of nullity, on the merits, concluding that s 138P of the Tax Administration Act gave the High Court jurisdiction to decide the question of validity in the challenge proceedings.[47]

[44] The nullity contention rests on two propositions:

(a) The true legal position was that the case was governed by subpart EH; and

(b) The failure to apply it deprived the High Court of jurisdiction to confirm the assessment.

Proposition (a) is of course the proposition that underpinned the allegation of fraud. It is subject to the same objection as we have identified in that context,[48] namely it is challenging conclusions of this Court, on a matter of law, which it was competent to

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47 *Redcliffe*, above n 6, at [63].
48 See [40] above.

address. For the reasons previously given,[49] the High Court has no power to recall or set aside its judgment on the questions of law which have been the subject of appellate decision.

Conclusion

[45] In this appeal Redcliffe's error in commencing a fresh proceeding in the High Court on the correctness of the legal conclusions of the Supreme Court is one that goes to the High Court's jurisdiction because what Redcliffe alleges does not constitute a case capable of leading the High Court to set aside the 2004 judgment. The High Court accordingly lacks jurisdiction to determine whether the Supreme Court's legal conclusions in *Ben Nevis* were wrong and for this reason Redcliffe's proceeding must be dismissed.

[46] It follows that the Commissioner's objection to the High Court's jurisdiction under r 5.49 was soundly based and should have been upheld. The appeal is allowed and the judgment of the High Court reinstated. Redcliffe's proceeding is dismissed. Redcliffe must pay costs in this Court and in the Court of Appeal.

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[49] By Jessell MR in *Re St Nazaire* set out at [24] above.