

IN THE SUPREME COURT OF NEW ZEALAND

SC 43/2007

BETWEEN BEN NEVIS FORESTRY VENTURES
 LIMITED AND ORS
 Appellants

AND COMMISSIONER OF INLAND REVENUE
 Respondent

SC 44/2007

BETWEEN ACCENT MANAGEMENT LIMITED AND
 ORS
 Appellants

AND COMMISSIONER OF INLAND REVENUE
 Respondent

Court: Chief Justice, Tipping and McGrath JJ

Counsel: R B Stewart QC and G J Harley for Appellants in SC 43/2007
 C T Gudsell QC for Appellants in SC 44/2007
 D J White QC and J H Coleman for Respondent

Hearing: 8 February 2008

APPLICATION FOR AN ADJOURNMENT

10.00 AM

Elias CJ Your application Mr Stewart.

Stewart Yes, good morning Your Honours. I appear with Mr Harley for what we've referred in the memorandum filed for the Ben Nevis appellant.

Elias CJ Yes, thank you. Mr Gudsell.

Gudsell Yes I appear in support on behalf of Accent Management and others.

Elias CJ Yes thank you.

White And I appear with my learned friend Miss Ellis for the Commissioner, the respondent.

Elias CJ Thank you Mr White, Miss Ellis.

Stewart Your Honours could I indicate the position of Mr Carruthers who could have attended if we had the conference at 9 o'clock by video at one stage, but he's in a trial at Auckland that started at 9 o'clock this morning and expected to go to after 5 o'clock, so as indicated in my memoranda, he unavoidably cannot be present this morning.

Elias CJ Yes, yes I had in fact meant to suggest that perhaps we could have started at 9 but if it wouldn't have assisted perhaps it was just as well I didn't introduce that complication. Yes well Mr Stewart, you want to enlarge on your application?

Stewart I don't know there's much more that I can say Your Honour except that the position of myself and Mr Harley is that we start a five-day trial in the Auckland High Court on Monday. The following week I have a two-day trial in the Auckland High Court. Then further fixtures throughout February, sorry, later in March, I come free in April, but I simply cannot appear in the week of 5 March and that was a matter which I disclosed to the Court when seeking the vacation of the initial fixture for 8 February in which fixture had been allocated without a single reference to myself, and the position of Mr Carruthers as mentioned in the memoranda is that he simply doesn't have the time to prepare with Mr Harley in refining and getting the submission short and crisp and accurate. With respect to the June position, I have a month-long arbitration in June but I have made arrangements to be free of that arbitration because I've had sufficient time almost five months so that I can take a fixture in the month of June should this hearing for the 5 March be vacated. Mr Carruthers can take a fixture in the week of the 9 June. It's difficult for him to do the 16th or the 23rd of June for reasons mentioned in the memorandum filed and Mr Harley is available in the month of June also.

Elias CJ Mr Carruthers' problem after the 9th June is a fixture in the week of 16 June is it, I can't remember?

Stewart Yes he has two Court of Appeal fixtures

Elias CJ Two Court of Appeal fixtures

Stewart In the week of the 16th June and what he describes as an important commercial appointment in the week of the 23rd of June. Now I take it that must be for more than one day.

Elias CJ Well he doesn't say which is one of the frustrating things about the memorandum Mr Stewart.

Stewart Yes, and I'm sorry Your Honour I can't assist you further on that and I should have got further particulars.

Elias CJ It's a shame that Mr Carruthers isn't appearing because the fixtures in the week of 16 June which he says are going to impair his ability to prepare for a fixture in the week of 23 June, one would have thought that the preparation would be well completed.

Stewart Yes, yes I sympathise with that Your Honour and indeed it would be well and truly completed and refined and ready for submission in discussion or argument with the Bench.

Elias CJ Alright, the aspect that bothers me about the adjournment application quite candidly is the fact that no application for adjournment was made until the 17th of January, because the reasons that you put forward Mr Stewart seem to me to be matters that were well-known at the time the fixture was granted.

Stewart Yes that was notified to my office on the 17th of December Your Honour

Elias CJ Yes.

Stewart And it didn't come to my attention until the 18th of December, but I was committed with a fixture right up to the very last day of the year and didn't have the opportunity to discuss the matter with the other counsel, Mr Harley and Mr Carruthers, and I came back from my vacation early on the 15th of January specifically to deal with this. It occurred to me that perhaps not much if anything could have been done anyway on the day before Christmas in relation to this matter even if I was able to take instructions, confer with other counsel and get my memoranda in.

McGrath J Well Judges would have been available Mr Stewart up until the Court vacation started and it really seems to me that on the appearance of the thing your application appears to have been timed to arrive at a time when

you would have known Judges would not be available because the vacation would be continuing for some at that time.

Stewart I can assure Your Honour no such consideration or motive crossed my mind. The end of the year was a terrible flurry as I'm sure you will recall from your days in practice that it gets like that right before Christmas.

Elias CJ Mr Stewart I hadn't picked up from the memoranda that you filed that you were engaged in a Court case until the end of the year. That ran till when?

Stewart 20th December Your Honour. I was free on the Friday, on the 21st, and I didn't go to the office on the 24th.

Elias CJ Yes.

Stewart Yes.

Tipping J Can I just asked for clarification Mr Stewart that the date in June that's subject to the argument of the Crown and subject to the fate of this application that seems to be satisfactory to everybody is the week commencing what the 9th June is it?

Stewart Yes, yes that's correct Your Honour.

Tipping J That's the one that if the adjournment application succeeds you would seek it to be adjourned to, is that the position?

Stewart Yes Your Honour.

Tipping J Thank you.

Elias CJ That's all the appellants?

Tipping J All the appellants, yes.

Elias CJ Yes.

McGrath J Am I right Mr Stewart in understanding that while you were always going to have a problem if the fixture were allocated for the 3rd you had indicated you'd be perfectly comfortable with any fixture in March as long as it was from the 10th?

Stewart No, I said I could be free after the 10th of March I free up but not necessarily take a fixture because I am terribly pressed on other commitments. I've had one of the busiest starts to the year with the financial companies collapsing - that's an area that I practice in. As an

indication I was working till 3 o'clock this morning to get a submission finished for the Securities Commission.

McGrath J The point I'm making Mr Stewart is that as far as the Registrar was concerned, and I'm thinking really of preparation, you were always as far as he was concerned in December going to be able to accept a fixture from the 10th of March and that rather implies that at least at that stage you had no problem that you foresaw then in terms of being able to prepare for a fixture like the 10th of March, whereas by the 17th of January you're really unilaterally stating to the Court that you just can't do it and you won't do it.

Stewart I'm sorry is that in my memorandum is it that I was available after the 10th of March? It wasn't

McGrath J It's just that I've read all the material, it's an impression I picked up. I can probably find reference to it in the memorandum. I'm looking at an email, no I'm not.

Elias CJ I think you might be looking at the email of 12 December.

McGrath J Yes I am actually, yes.

Elias CJ Where you advise the Registrar Mr Stewart that you had unfortunately a five-day fixture in the High Court commencing on 3 March, 'however I can advise that I then have a gap through to 20 April, thereafter I am free from 23 April to 30 June when I start a 10-day trial.

McGrath J That is what

Stewart Yes, yes that's right and that remains the position and I must say given the advice that I had a fixture starting 5 March, sorry 3 March, which was allocated as long ago as last April, the fixture was allocated on the basis that most counsel were available, I was rather nonplussed by that advice thinking well the fixture's going ahead whether I'm available or not and that's because I had clearly signalled that 3 March could not be done by me.

Elias CJ Well the position under the Rules Mr Stewart is that the Registrar makes the fixture. He consults with counsel, as of course he did, but then the fixture, I'm sorry I'm not sure which way to look at you, but then the fixture is made by him, and as I indicated to you earlier the part that bothers me about this application is the lack of indication of any attempt to meet the fixture made by the Registrar but rather simply a reassertion of the difficulties that you had in December which had been communicated to the registrar. In other words I would have thought that there would be

some indication from you that you had tried to unload one or other of these briefs in order to try to meet the fixture after all you had really at that stage you had two and a half months notice of.

Stewart Yes Your Honour if that was possible I would have done, just as I have unloaded provisionally my month-long June arbitration with five months notice, I could not get release by my clients for the other matters, that's understandable. They're long-running, they're complex, they're five-day trials and it's just not acceptable to those and I've taken the view that I'm committed to the fixture that I accepted on their behalf and can't without getting their consent another counsel replace them. If I could Your Honour I would have. I did try.

Elias CJ Yes well that's the response to the other fixture perhaps and it may be that you have to elect between them. I'm thinking Mr Stewart of here on out, what the Court is to do, what the Registrar is to do when he's trying to co-ordinate counsel and co-ordinate the Court, because as you know this is a case where we're going to have to sit an acting Judge, so it does make it quite difficult to do that and I think certainly there will be cases where it will just not be possible to accommodate or counsel and that's really what the Rules envisage.

Stewart I appreciate that Your Honour and this is an extremely significant case for my appellants. It may have life-altering consequences for a number of people. It deserves all the attention and time it can reasonably get and for those reasons it's my submission that in the interest of justice and the perception of justice being done that the matter be adjourned even though notwithstanding the matters Your Honour has averted to. I certainly can't be here on the 3rd of March and there are real preparation issues for Mr Harley and Mr Carruthers. How that will impact on the fixture if they make the decision that notwithstanding the shortness of time and the lack of preparation they will nevertheless appear to do their best or I don't know, you'll have to hear from them whether they will decline to take that fixture and to appear on the basis it's not responsible for them to attempt to represent a litigants, or litigants, in a very very important matter where they haven't been able to give the matter the time that they consider needs for them to adequately discharge their obligation to the client and to the Court.

Elias CJ Well that isn't a submission that's been made to us and of course it could have been made to us. It's not one of the grounds on which the adjournment is sought so I'm not sure really what we can do with that Mr Stewart. It's not something that Mr Carruthers has put forward. Anyway

McGrath J Mr Stewart my concern is that while I can understand that from the point of view of your client the matter's reached a crisis position, it is really

because nothing has been done as at the 8th February since the 17th January, and that's the position the Court's faced with, that you have just simply elected because having appraised your other commitments you've decided you don't have enough time to do it properly and so no preparation has been done with a view to meeting the timetable of the Court.

Stewart No, no that's not the case Sir, with all counsel for the Ben Nevis appellants there simply was not time even as at December to do the preparation unless they gave up their family arrangements and their holiday time during January and came back and spent the month of January working on it.

McGrath J The point though is that's for whatever reason, and you've explained your circumstances, that was not communicated to the Court in December and really an ultimatum was given to the Court on the 17th of January when you lodged your memorandum, knowing that the Judges would not be there at that stage but the Court was still in session back in December.

Stewart Well Sir I don't know when the Supreme Court was in session and what the last day the Supreme Court was open for business. I wouldn't have thought it was open for business on Friday the 21st December and indeed I would be surprised if it was open for business on the 20th December. I just don't know, but Your Honour I said before and I would ask you to accept my assurance, there was no game playing in this. I certainly did not entertain for a moment the matters that you've just put to me Sir. This is the second time I've said that and you can either accept it or not but that is the position. I give you my assurance on that.

Tipping J Mr Stewart can I just turn the focus of this into a slightly different area? Regardless of the circumstances of this particular case, I'd just like some help from senior counsel, because it's a long time since I've been in practice. Is there any sort of convention or custom in relation to returning briefs when conflicting fixtures arise? You've talked about loyalty to the client, and I fully totally take that onboard but inevitably there are going to be clashes of fixtures at the senior bar, if not elsewhere. Is there any sort of general understanding upon which briefs are accepted when you get into this sort of clash situation with instructing solicitors or just generally amongst the senior profession?

Stewart I'm not aware of any convention Sir, but neither in my 30 years in practice have I been aware of a case where a barrister has returned a brief against the wishes of the client that initially engaged and I would have thought that would give rise to very significant difficulties if counsel was to do that.

Tipping J Yes thank you.

Stewart It's an interesting point Sir, one that I will follow up as a matter of interest, but this is an unusual situation; one which also I have not been confronted with before. It's very difficult; the clients are very anxious about it, and it's most unfortunate and we just hope we can find a way through that can accommodate everybody and so that nobody feels that they've had a short straw or not been given a fair go in this matter.

Elias CJ Alright, thank you. Is there anything more you want to add Mr Stewart?

Stewart No thank you Your Honours.

Elias CJ Thank you. Mr Gudsell do you want to be heard in support of your memorandum?

Gudsell No I have nothing to add to my memorandum thank you Your Honour.

Elias CJ Thank you. Mr White. Yes I'm sorry to treat you unequally because you're having to stand, but in fact this is the first time we've been in a lowered bench so we are grateful to you because you're testing it for us.

White As Your Honours please. The Commissioner's position which will be apparent from the two memoranda filed on his behalf is that he opposes the adjournment of the current March fixture and also I am instructed opposes the suggestion that if an adjournment were granted that the fixture should be the 9th of June. In elaboration of that Your Honours these appeals relate to Income Tax challenged proceedings issued by the appellants in 2002 and relate back to the 1997 Income Tax year.

Tipping J It might be thought that three months isn't going to make a huge difference in light of that scope Mr White.

White Well the Commissioner's position is that in the public interest they should be heard as soon as practicable and the reasons for that are set out in the Commissioner's memoranda. The appeals that is in Your Honours' decision affect not only the appellants but also some 170 other investors of the Trinity scheme whose cases are stayed

Elias CJ How many is there?

White Well when we filed the opposition to the grant of the application for leave Your Honour I think the figure was 173

Elias CJ Yes.

White I'm instructed that there may have been some more settlements since then but I perhaps shouldn't go any further than put it like that Your Honours, but there's still a very substantial number.

Elias CJ Right.

White And the Court's decision on the law of tax avoidance is likely to have an impact on other cases that are referred to in our memoranda, particularly the structured finance cases involving the Trading Banks which Your Honours are familiar with from the hearing last year, and there are very substantial amounts of money at stake. As far as the structured finance cases are concerned, it is hoped or anticipated that the first of those may come to trial towards the end of this year with a timetable hopefully commencing in April, that is of course somewhat subject to Your Honours' determination of the appeal that was heard in December, but that is a factor from the Commissioner's point of view. The Commissioner's position as far as fixtures is concerned and has been throughout, the Commissioner has simply accepted whatever fixture has been allocated by this Court. He's already done so twice, and indeed while the Commissioner's preference is to retain counsel who have appeared for him throughout this litigation, if the Court were so-minded to allocate a date that did not suit those current counsel the Commissioner would feel obliged to accept the fixture and to retain alternative counsel.

Elias CJ The positions are not of course entirely parallel as Mr Stewart rightly points out. The impact upon the individuals on one outcome would be devastating, so one can understand the dependence on counsel who's had the conduct of the case throughout.

White Yes but they haven't Your Honour, that's their difficulty. That argument simply doesn't stand because Mr Gudsell is new for the Supreme Court. Mr Carruthers and Dr Harley appeared in the Court of Appeal and not at the trial. Mr Stewart appeared with Mr Galbraith for the appellants in the High Court for the trial in a much, I hope he doesn't mind my using the word 'diminished' or 'lesser' role in the Court of Appeal, and as I understand it Mr Carruthers will be presenting the arguments for the appellants in this Court principally and I can't imagine that Your Honours would welcome hearing from both of them on similar material. So in fact the party that would be disadvantaged if a date were chosen that didn't suit senior counsel for the Commissioner, is the Commissioner, and Your Honours it's perhaps not for me to say this, but Your Honours might have some benefit in having current senior counsel for the Commissioner having been involved throughout this appeal and having a familiarity with this case which may in fact prove of some assistance to you. It's somewhat difficult for me to advance that submission Your Honour but it is what I am instructed to say.

Tipping J Mr White I just would like some help from you on the question of bearing in mind that in this sort of very major litigation counsel are likely to be engaged who are pretty busy in relation to all sorts of other things. What's a sort of reasonable notice of a fixture of this size? I would have thought anything less than three months was getting pretty tough.

White Well yes Your Honour and

Tipping J Speaking as a former litigator I suppose I'm

White Well it depends Your Honour but that's what the appellants have effectively had here.

Tipping J Yes

Elias CJ Although with the intervention of the vacation.

White Well I'm going to come to that aspect of it in a moment Your Honours. The next point I did want to just touch on very briefly was what is the proper approach to the grant of an adjournment and I'm happy to say that Your Honour Justice Tipping in another jurisdiction has in our submission very helpfully summarised the position in a case called *O'Malley and Southern Lakes Helicopters*, which probably doesn't spring to mind.

Tipping J I remember it

White You remember it well

Tipping J I remember it vividly Mr White.

White Well Your Honour in that case said that the essential question which the Court always has to consider when asked for an adjournment is whether or not that is necessary in order to do justice between the parties. One must not overlook that not only is it necessary to do justice to the party who is seeking the adjournment but also justice to the party who wished to retain the benefit of the fixture. It is essentially a balancing exercise. So when one applies those factors here we note that the appellants have already had one fixture adjourned at their request. This isn't the first request, it's the second, and that was

Tipping J But I have to say with the greatest of respect speaking purely for myself, I thought the first fixture was very preemptory.

White Well again all I can say for the Commissioner Your Honour is that we accepted it.

Tipping J Fine, yes good on you, but that's not the end of the matter.

White No, and we didn't oppose the adjournment on that occasion, the application Your Honour might recall.

Elias CJ It may be that really in retrospect one of the problems was that the Court should have convened a conference and adjourned only to a date set that was fixed.

White Well that may be Your Honour

Elias CJ Yes.

White With the wisdom of hindsight, but as far as the Commissioner was concerned, and it's the next point that's important, we were advised of the March fixture on the 17th of December by email from the Registrar. All counsel were, so on the 17th of December last year we were notified that the new fixture had been allocated to start on Monday the 3rd of March, and the email actually stated 'being a period of time when the majority of counsel are available'. So that was the notice that we had and it was confirmed I think the next day by a formal notice from the Court confirming that fixture, and just as the Court was not advised of any difficulty for the appellants with that date, neither might I add was the Commissioner or his representatives, so we proceeded on the basis from the 17th of December that the 3rd of March fixture had been accepted by the appellants and their counsel and no suggestion was given to us by them at any time that there were any difficulties for them with this fixture, as a result of which counsel for the Commissioner did what you would have expected, namely, we did prepare during the summer period for this appeal, which is why we remain in a position to proceed in March, and the position as I understand it is that if a party having sought an adjournment, obtained it and got a new fixture then discovers or knows as here that the new fixture is apparently still for some reasons inconvenient, they're under an obligation not to wait for a month but to notify the Court and the other side immediately, expeditiously, and these appellants quite obviously failed to do so. The fact that Mr Stewart may have had a trial for the last few days before Christmas is neither here nor there. No doubt he could have got to a fax or a telephone and he could certainly have spoken to Dr Harley or Mr Carruthers or Mr Gudsell, and it is almost beyond belief that none of them was able to communicate with this Court or with counsel for the Commissioner until the 17th of January this year. And with the greatest respect to my learned friend, the suggestion that no game playing was involved is not accepted. Why I ask were we not notified if they had a real problem at the time. They did not. This Court's formal directions require

Elias CJ It's not of course one thing or the other, it may be conduct for which counsel can be criticised but it's not necessarily game playing Mr White.

White No but perhaps taken with some of the other suggestions that have been made, for instance choosing the 9th of June, knowing that that date is the most inconvenient for current senior counsel for the Commissioner and a suggestion of a timetable

Elias CJ It has crossed my mind, yes.

White Yes I thought it might have Your Honour

Elias CJ Yes.

White And suggesting that their submissions be provided on the 1st of May being the other most inconvenient date for senior counsel. When all those matters are taken together Your Honour with the greatest of respect, the only description that can be given to it is game playing.

Tipping J I thought the 1st of May was an advancement of the time that you would ordinarily expect to get the submissions.

White Yes it was Your Honour but we sought the 11th of April.

Tipping J So they didn't feel able to meet that?

White No Your Honour.

Tipping J Well if we directed that, that would help would it, assuming?

White Assuming a number of other matters Your Honour.

Tipping J Well assuming, yes I'm wholly on a hypothesis.

White Certainly that would be a great help.

Tipping J That would be better.

White That would be better. But I just wanted to touch on this point Your Honours that there are timetable directions in place requiring not only the Ben Nevis appellants but also the Accent Management appellants, the two different appeals in two different categories, to file their submissions by the 1st of February. None of them did. None of them sought a stay. No one made an application under Rule 36. They're all in breach. That's the way one apparently deals with directions from this Court. There has been no application for an adjournment by Accent Management and the other

appellants in that appeal. Why are their submissions not filed? It's suggested that they haven't had the opportunity to get together and discuss the division of the argument. With the greatest of respect Your Honours counsel for the appellants have had since the 9th of October last year when this Court granted them leave to appeal and is it seriously being suggested that these counsel couldn't get together over the five months that has elapsed since then to discuss the division of the argument? There were just a couple of other points in my learned friend Mr Stewart's latest memorandum that I need to touch on and that is the suggestion that some of the arguments that they're proposing to advance involve different circumstances for different appellants. That, as I understand it, is drawing a distinction between Dr Muir and Mr Bradbury, who were the two closely involved with the design of the Trinity scheme, and the other appellants. Their answer would have at least be able to be understood if indeed the division between the appellants was Mr Bradbury and Dr Muir on the one hand and the others on the other, but it may be helpful if I just explained who's who in the two appeals. On the one hand Ben Nevis Forestry Ventures, which is the first named appellant in the appeal in respect of which the adjournment is sought, was the LAQC of a Mr Peebles, a close friend of Mr Bradbury, and Bristol Forestry Ventures Limited was Mr Bradbury's LAQC, and Mr Bradbury of course is Mr Bradbury and Greenmass was the LAQC of two other persons. So that's one group and the other group, Accent Management and Lexington Resources are investment companies associated with Mr Verissimo, a close friend of Dr Muir, and Redcliffe Forestry Ventures is Dr Muir's LAQC, and so in fact the division between the appellants is essentially on the one hand Dr Muir and his friend Mr Verissimo and on the other hand Mr Bradbury and his friend Mr Peebles and the other company Greenmass.

Tipping J But when you say Mr White, I just want to clear this out of my mind, when you say there isn't an application for adjournment in the other case I had understood naively perhaps that there were applications in both, they sort of marched, sank or swum together so to speak

Elias CJ The memorandum supporting the application made by the Ben Nevis appellants..

Tipping J You are taking the point that there's no formal application.

White Well there certainly hasn't been an application. Mr Gudsell has simply supported the application without making one by Ben Nevis.

Tipping J But you haven't been misled I take it. You must have understood that both of them were sought to be adjourned. I can't see any reason

White Well certainly since receipt of Mr Gudsell's memorandum. We understood that he was going along with the Ben Nevis one but before that it wasn't a question of being misled or not, we simply didn't know what his position was. Indeed I half thought he might well have put his submissions in by the 1st of February in accordance with the Court's direction.

Tipping J But so far as the more recent times, everybody's been working on the premise that both cases are sought to be adjourned. There's no suggestion otherwise is there? I mean it would be ridiculous

White Well one doesn't

Tipping J To sever them surely.

White Certainly it would be difficult to understand why that would happen but then I don't understand the division between the two groups of appellants

Tipping J No I understand

White Which is the reason that I'm making the point I just am in response to their suggestion that there is some special division between the groups of appellants which is going to assist the division of the argument and I do so

Elias CJ Does there have to be a formal division in order for the individual positions of the different appellants to be differentiated in the argument because there are different legal considerations aren't there, or there may be?

White No there not Your Honour and that of course is one of the arguments that the appellants wish to raise.

Tipping J Well the grounds that have been approved are identical in each case aren't they.

White Yes, yes.

Tipping J So that's all that needs to be said. If they want to subdivide a ground well

White We suggested, I'm entirely in agreement with Your Honours. It's entirely over to the appellants what way they present their appeals. It's not for us to indicate that, it's for them. I do apprehend that you wouldn't hear from all them on the same point so that one anticipates that they are likely to wish to divide up their arguments that's all, and all we've submitted is if that's what they wish to do they've had ample opportunity to do so. I mean one of their grounds for their adjournment is that they haven't had a

chance even to get together to divide up the argument and I'm simply responding to say yes they have and it shouldn't be too difficult, and in para.4 of my learned friend Mr Stewart's affidavit he's suggesting that it's not correct that it will be easy for them to do so and I'm simply saying well it's for them to decide.

Elias CJ No, no, memorandum.

Tipping J I'm sorry I just caught the word 'affidavit' and I thought I was missing something.

White Memorandum, yes. So that then leaves the final point that I should touch on and that is the suggestion that the fixture should be on the 9th of June, which apparently suits the appellants' counsel. It does not suit current senior counsel for the Commissioner and as Your Honours just said if it's going to be three months more well what's three weeks more which is what the attitude that we took and that the week of the 23rd of June, which I understand it does suit all the appellants and the Commissioner and that the only person who apparently suit is my learned friend Mr Carruthers, who has what is described as 'an important commercial appointment' and unfortunately no one can indicate what that is, how long it is and so Your Honours are faced perhaps regrettably with the choice if you are going to grant the adjournment of inconveniencing senior counsel for the Commissioner by making it the 9th of June and forcing the Commissioner to consider alternative senior counsel or choosing the 23rd of June which suits everybody except Mr Carruthers important commercial appointment, and that is a matter for Your Honours to determine.

Tipping J Are we able to understand the weight of the difficulty that you face Mr White without wanting to pry into something

White Well it relates particularly as I've said in the memorandum Your Honours to the anticipated first structured finance trial which is likely to be a very significant case in hopefully October/November this year which a timetable hopefully to be fixed next week which would involve on last discussions the Bank providing its briefs in April, thereby enabling counsel to discuss with overseas expert witnesses in May and not returning to New Zealand until very late in May, hence the difficulties in early June, and the other matters referred to in our memo.

Tipping J Yes, thank you.

White Our final matter Your Honours is that I should just note that we have sought a direction under Rule 36(6) that the Commissioner not be limited to the 30 pages of submissions for the two reasons referred to there. First of all there are two lots of appellants and they've each got 30 pages each

and also one anticipates that Your Honours may be assisted by full submissions from the Commissioner in this case.

Tipping J Have you got 30 pages in each appeal Mr White?

White I beg your pardon.

Tipping J Have you got 30 pages in each appeal? Would 60 be enough?

White It may not be Your Honours. I don't know how many they are going to provide us. Oh you mean for every single one of them?

Tipping J No, no, no.

Elias CJ How many pages do you want Mr White?

White 60. The reason why I am being cautious Your Honours is that

Elias CJ Yes, it's difficult

Tipping J Well you can apply again if 60 is not enough.

White Yes. Unless there are any matters I can assist Your Honours with.

McGrath J Mr White you haven't referred to the Glenharrow mixture and I just am uncertain as to the status of that, except that I understand that if this matter were adjourned presumably there is an underlying fixture in the same period. I may have got that wrong but you don't want it to take place, the hearing of Glenharrow to take place before the Trinity cases, so could you just help me a bit with that.

White Yes I'm obliged Your Honour. First of all there is no fixture in Glenharrow yet.

McGrath J There is no fixture?

Harley Yes there is.

White Well the Commissioner of Inland Revenue hasn't been notified of any fixture in the Glenharrow case.

McGrath J Mr Harley is senior counsel I think in that case.

Harley Yes I am Your Honour. It's the same date as this fixture.

McGrath J The 3rd of March?

Harley 6th and 7th.

McGrath J 6th and 7th of March. As far as you're concerned there's a fixture then.

Harley Except that I think it's not possible to be doing two at once.

Tipping J Can I add to the confusion by saying that being in doubt myself I expressly asked the Registrar yesterday or the day before or whenever but recently and he said that Glenharrow was standing in the wings waiting for daylight to emerge, if I can mix my metaphors, on this present debate.

White Well Your Honour that's exactly as I understood the position from the same source.

Elias CJ So does that mean that if an adjournment is granted Glenharrow will get 6th and 7th March?

White No Your Honour not without some argument, because the Commissioner's position, which I understood was perhaps a preliminary view of the Court was that the Trinity case needs to be heard first because it covers the field whereas Glenharrow's a much narrower issue.

Tipping J I'm not sure that that either is the view of the Court or necessarily should be the view of the Court Mr White. I can understand in the most general of senses but is there any major reason other than the thought that it's better to take the bigger bite before the smaller so to speak to inhibit Glenharrow going ahead. You're ready. There's no suggestion that Glenharrow isn't ready.

White Well there is Your Honour.

Tipping J Oh there is?

White Absolutely. I'm unaware of any fixture in Glenharrow; I'm unaware of any timetable in Glenharrow.

Tipping J But you are senior counsel

White I am now senior counsel for the Commissioner in Glenharrow.

Tipping J And who are leading for the appellants in Glenharrow?

White Mr Harley will have to tell you that. I think it's Mr Harley now.

Harley It is Your Honour and there is a timetable and there is a fixture for the 6th and 7th of March. I've got the notice.

McGrath J And you're not wanting to move that fixture I take it Mr Harley, is that the position?

Harley No I don't.

McGrath J If you're given an adjournment in wearing your other hat, you're quite happy to put your Glenharrow hat on on the 6th and 7th of March?

Harley And my instructions are to get going on it Your Honour. If it's helpful Your Honour I can also respond very

Tipping J I'm not sure that Mr White has finished. You were just asked to confirm your position on that one point. I'm not sure whether Mr White is finished

White I am in considerable difficulties Your Honour as far as that's concerned as my junior confirms that the Commissioner of the Crown has no notice of a fixture in Glenharrow and certainly no notice of any timetable and while we would be prepared for Trinity in March we would not be prepared for Glenharrow in March and that's the position.

Tipping J I don't think that the Registrar on the face of this has given a fixture and a formal timetable to one party but not the other.

White According to my learned friend

Elias CJ It may be sensible for us to ascertain that position Mr White because we may be tilting at windmills here if notice hasn't been given to you.

White Yes, yes, and if that were the case we might be banded here again Your Honours with an application by the Commissioner.

Elias CJ Yes, well I'd like to avoid that so if we can – I wonder whether Madam Registrar you can ask Mr Thatcher if he could let us have the notice in the Glenharrow case thank you.

White I was responding to Justice McGrath on the Glenharrow matters which beyond that unless there's any other matters I have completed what I wish to say.

Elias CJ Yes, thank you. Mr Harley did you want to

Harley Just a point of information Your Honour and spartan because I've had almost no opportunity to get detail from Mr Carruthers about the meetings he's referred to in the week of the 23rd of June. My understanding is that it relates to a Public Company board meeting to be followed by an annual general meeting of that company and it's in the context of a capital raiser. I have no idea what the company is. I don't know where the meeting is and I'm not sure that all those details are absolutely correct.

Elias CJ So you're talking about one day?

Harley I think it's longer than a day Your Honour.

Elias CJ Oh it can't be longer than a day.

Harley Oh yes it could.

Tipping J Well it may be one of those matters Mr Harley where counsel simply have to decide which is the higher responsibility.

Harley And Your Honour I'd be shot for responding to you in any way on that point.

Tipping J I didn't expect you to.

Elias CJ Alright, who's instructing solicitor in this file?

Harley William Wood for the appellant, so obviously the Crown Law Office

Elias CJ Well apparently we can't find out the position at the moment in terms of the Glenharrow matter so we'll leave that for now. Mr Stewart do you wish to be heard in reply?

Stewart Only on one matter Your Honours. I'm not a sensitive person but I do submit that it's to be regretted that Mr White is unable to accept my assurance to the Court that there was no game playing or strategic manoeuvring. Those antics have never been resorted to by me on any occasion ever in matters of the Court. Nevertheless Your Honours I accept the criticism that has been indicated from the bench and accept that it would have been preferable and desirable to make strenuous efforts to have communicated the position earlier even if I was unable to get in touch with Mr Carruthers and Mr Harley. I can say that I was a little nonplussed by the 17th December advice as to the fixture for two reasons – one, I'd indicated that 5 March couldn't happen for me and the communication was that having considered that that date was suitable to most counsel, therefore that would be the fixture. I was uncertain whether I could do anything about that. Presuming that this had been a direction from the

bench and that there was no appeal, you couldn't go any further, that was the end of the matter and that caused me some hesitation. Nevertheless I do submit this arising out of that delay and the issues that have been exchanged this morning and that is that it would be regrettable if the appellants were prejudiced by that omission on the part of myself in communicating earlier, and not only the appellant but the approximately 170 other taxpayers affected by the outcome of this litigation and if at all possible that is a matter which I would invite the Court, notwithstanding the criticism of myself which I fully accept. The only other matter that I've just touched on is that it's not just the nine appellants, there's 170 other people anxiously awaiting the outcome of this test case and I would submit that that has a bearing on how this application ought to be determined given the importance and impact that the end decision will have on those people also. Thank you Your Honours I have nothing further to say.

Elias CJ Thank you Mr Stewart. We'll take a short adjournment and then indicate how we will proceed with this.

11.02am Court Adjourned

11.10am Court Resumed

Elias CJ Yes for the reasons which we will give in writing later, we will adjourn the fixture. It will be adjourned to the 23rd of June. We substitute the following timetable that the appellants' submissions are to be filed and served by 11 April. The respondents will have till the 15th of May to put in their submissions. The respondents may exceed the page limit. We'd like to hear you if you have any application to make on costs Mr White.

Stewart Your Honour, sorry, before we get to that the appellants will need to give consideration as to their limit on their submissions also. It's not something that we have addressed because that's something we could deal by memorandum to the Court.

Elias CJ Yes, deal with that by way of memorandum. Bear in mind Mr Stewart that the longer the submissions are the less impact they may have. But with senior counsel involved I don't think it's necessary to be too rigid about these things. In fact Mr Stewart we're content to leave it on the basis that if counsel feel the need to exceed the limit they may.

Stewart Thank you Your Honour.

White Yes on that point Your Honours I note that my learned friend in the last paragraph of his latest memorandum said that they didn't anticipate their

written submissions would exceed a total of 60 pages, so they actually did touch on that.

Elias CJ Yes.

White Your Honours I know there is no right to raise any matters, it's just that that date of the 15th of May is likely to be when senior counsel is not in the country, which is the reason why

Elias CJ Well you could always file them before then Mr White.

White Yes alright.

Tipping J I thought we were doing you a favour Mr White.

White Well the first part is Your Honour, yes. I tried. Now costs Your Honours, I have no instructions on that. I suggest they be reserved for the moment unless Your Honours wish to address it.

Elias CJ Well do you seek costs Mr White?

White Yes, I'm instructed to seek costs.

Elias CJ Alright, so do you want to file a memorandum relating to costs and Mr Stewart we'd expect you to respond promptly to that because we'd like to deal with costs in our written reasons.

Stewart J Yes Your Honour.

McGrath J I don't think we're expecting any detailed submissions on this matter

Elias CJ No, no.

McGrath J But if counsel wish to make submissions then we'll reconsider.

Stewart Maybe counsel can resolve it without troubling the Court.

White Well I was wondering about that Your Honours because I'm obliged His Honour Justice McGrath's indication because there isn't a lot that one would wish really to say.

Elias CJ No.

Tipping J I thought you'd be able to say it now Mr White frankly, I mean

White Well I've said it.

Tipping J Yes exactly.

Elias CJ Well is your position you leave the question of the amount to the Court?

White Yes, subject only if my learned friend Mr Stewart and I wish to come up with an agreed figure that might help you.

Elias CJ Well if you hurry up and put in a memorandum to the effect that we needn't be troubled with costs that would be fine.

White Are you happy with that process Mr Stewart?

Stewart Yes I'm prepared to offer \$3,000 now.

Elias CJ If Mr White accepts that or some modification a memorandum can be filed otherwise we'll treat costs as being a matter that counsel don't wish to address us on and we will deal with it in our written reasons.

Stewart As Your Honour pleases.

Elias CJ Thank you, thank you counsel.

Harley Your Honours?

Elias CJ Yes Mr Harley.

Harley Your Honours before you retire

Elias CJ Yes. Glenharrow.

Harley There's Glenharrow

Elias CJ Well we'll make enquiries about that Mr Harley and it may be that we'll need to convene a telephone conference to try and sort it out.

Harley At the risk of pressing you Your Honour there is a timetable which requires the filing of written submissions if not today on Monday.

Elias CJ Well presumably you are going to comply with that timetable Mr Harley.

Harley I can, but what's the point if there's going to be an application for an adjournment of that fixture

Elias CJ Well they have to be filed at some stage anyway Mr Harley but we will make enquiries and if it's necessary to convene a telephone conference we will do that.

Harley Very well Your Honour.

McGrath J I think we can take it Mr Harley doesn't have to do it today. We can give him some

Elias CJ Comfort.

Tipping J I was just about to raise a similar point as to the exact status of the present timetable but perhaps it could be suspended pending clarification at an early date. Would that be

Harley I'm happy to be

Elias CJ If there's no fixture, there's no timetable because the timetable simply hangs off the fixture date under the rules, isn't that the position?

Harley I don't know what the rules say Your Honour but I know about

Elias CJ I think they should be modified.

Harley I know what the fixture date is and it is the 6th and 7th of March.

Elias CJ Yes alright well that we will investigate, thank you. Thank you counsel.

Harley As Your Honours please.

11.16am Court Adjourned