IN THE SUPREME COURT OF NEW ZEALAND

SC 66/2007

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

SC 67/2007

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

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

Hearing: 11 and 12 December 2007

Counsel: J A Farmer QC, R B Lange and R A Green for Appellant (SC 66/2007)
B W F Brown QC and R J Ellis for First Respondent (SC 66/2007)
AR Galbraith QC and A Butleer for the Second Respondents (SC 66/2007)
L McKay L Turner and S J Katz for Appellants (SC 67/2007)
D J White QC and R J Ellis for Respondent (SC 67/2007)
R G Simpson and G C Williams for Intervenor – ASB Bank Ltd

CIVIL APPEAL

10.05am

Farmer — If Your Honours please I appear with my learned friends Mr Green and Mr Lange for Westpac.

Elias CJ — Thank you Mr Farmer, Mr Green and Mr Lange.

Brown — May it please Your Honours I appear with Miss Ellis for the Commissioner of Inland Revenue.

Elias CJ — Thank you Mr Brown, Miss Ellis.

McKay — May it please Your Honours my name is McKay and I appear with my learned friends Miss Katz and Mr Turner for the ANZ appellants.

Elias CJ — Thank you Mr McKay, Miss Katz and Mr Turner.

Galbraith — If the Court pleases I appear with Andrew Butler for the second respondents BNZ in the Westpac appeal.

Elias CJ — Thank you Mr Galbraith, Mr Butler.

Simpson — May it please Your Honours my name is Simpson, and I appear with Mr Williams for ASB the intervenor.

Elias CJ — Thank you Mr Simpson, Mr Williams.

White — If you Honour please I appear with my friend Miss Ellis for the Commissioner in the ANZ National appeal.

Elias CJ — Thank you Mr White, Miss Ellis. Well there are two interlocutory applications to be dealt with before we get on to this interlocutory appeal. Mr Simpson, do you wish to enlarge upon your notice of application?

Simpson — Yes I do. Your Honours I have filed a memorandum of 6 December and there's just a couple of brief points I wish to add. As I note in para.3 there were two objectives in filing a Hodge affidavit. The first was to demonstrate that the matters raised in this appeal have broader implications beyond the Bank structured finance transactions and the second is to give the Court some indication of the potential volume of documentation at issue. In para.3(b) I make reference to the s.89(n)3 application brought under the Tax Administration Act against ASB by the Commissioner and where the Commissioner is seeking to halt the

disputes process under that Act by drawing a comparison between the ASB transaction and a similar transaction undertaken by the ANZ. In paras.25 and 26 of Ms Hodge's affidavit she refers to a similar application currently being entertained by the Commissioner in entirely different proceedings involving transactions concerning optional convertible notes, so already we have an example where the Commissioner is looking to make an assault on taxpayer secrecy in a different context. The only other matter I wanted to touch on was in the final page of my memorandum I refer to the House of Lords decision in *Air Canada v The Secretary of State for Trade.* Now in that case Their Lordships held that a Court should only inspect documents that are the subject of a claim for public interest immunity where it has definite grounds for expecting to find material that is of real importance to an issue that arises in the proceeding, and that's Lord Fraser at page 436, para.(d), and where it's satisfied that disclosure of the documents in the proceeding is necessary to enable the proceeding to be fairly decided. Now this is raised in opposition to the Commissioner's application for leave to tender the Clark affidavit which exhibits as exhibit (e), a bundle of ASB documents that the Commissioner would like to use in the BNZ proceeding. Now in the *Air Canada* case Lord Fraser noted that there's no

Elias CJ Do we have that, I haven't in fact read it?

Simpson It's in volume 1 of the Westpac bundle and it's at tab 6.

Elias CJ Yes.

Simpson And at page 436, para.(d) there are the words that refer to the first requirement 'should inspect the documents only where it has definite grounds for inspecting to find material of real relevance in the party's second disclosure. And then on the previous page at 435, line (e), Lord Fraser noted that he did not think it would be possible to state a test in a form which could be applied in all cases, and that is certainly the case. The reason I need to talk a little bit further about the *Air Canada* case is that in *Fletcher Timber v The Attorney General*, and I'm sorry Your Honours I don't have a copy of that but it's [1984] 1 NZLR 290. The Court of Appeal in that case comments on the difference between the discovery rules applicable to the UK and our discovery rules. So in New Zealand we have just a simple relevance; in the UK there is an additional test that the documents will only be discovered if they are necessary for fairly disposing of the proceeding or avoiding costs, and for that reason in *Fletcher Timber*, the Court said that while due weight had to be given to *Air Canada* there were differences in the discovery rules which meant that we wouldn't always apply the test applied in that case in deciding whether or not to inspect documents. But the submission I want to make here is that the circumstances of this appeal, it's my submission that *Air Canada* is the appropriate test that should be applied and my reasons are these. First, s.81 of the Tax Administration Act, and the judgment of the full

Court of Appeal in *Squibb* has already held that other taxpayer documents are subject to a public interest immunity claim and should not be disclosed to other taxpayers. So prima facie we already have a public interest immunity

Tipping J Are you resisting Mr White in advance of Mr White at the moment?

Simpson I suppose I am Your Honour.

Elias CJ It might be useful though to hear that.

Tipping J No, I'm not objecting, I just want to understand what

Elias CJ I had understood that that's what you were doing.

Simpson Yes sorry, my memorandum addressed both my application and Mr White's application.

Tipping J Right, I'm sorry I just missed that you'd slid into that.

Simpson Sorry Your Honour. So here we have a situation where the other Bank documents already have recognised protection by the Court of Appeal under s.81, and so in those circumstances the Commissioner should in my submission face some hurdle before the Court engages in a process of inspecting the other Bank documents that he wishes to use in the BNZ proceeding, and in the absence of any other test it seems to me that the *Air India* case, sorry the *Air Canada* case provides a suitable threshold test for the Commissioner to meet before the Court embarks on a process of inspecting the documents. That's really all I wanted to add to my synopsis.

Elias CJ Thank you Mr Simpson. Mr White I think it would be convenient to hear from you now and then if anyone wants to add anything further we'll hear them.

White If Your Honours please I have taken the opportunity of putting the Commissioner's position on these preliminary matters in written form to save Your Honours, and I can hand up some short notes on that. If Your Honours please the preliminary interlocutory matters actually relate to three separate categories of documents which I've set out on the first page. The first is the ANZ National's sample documents which were in evidence before Justice Wild in the High Court and also in the case on appeal before the Court of Appeal, and His Honour Justice Tipping's minute ruled that they should be excluded at this stage from the ANZ National's case on appeal but that a supplementary volume should be prepared by the Commissioner containing those documents and that has been done. So that's the first category. The second category Your Honours is the ASB sample documents, the one's that my learned friend Mr Simpson was referring to in the second part of his submissions. They are exhibited

to the affidavit of Miss Clark and are subject to the application by the Commissioner which is opposed by ASB.

Elias CJ And they're said to be equivalent to the documents which have not yet been received by the Court

White Precisely.

Elias CJ In the other proceedings, yes.

White Precisely, precisely Your Honour. And the third category relate to the affidavit of Miss Hodge which is the subject of the application by ASB in its capacity as intervenor, which is opposed by the Commissioner which my learned friend Mr Simpson addressed first, and with Your Honours' leave I propose to deal with the three categories in the order in which I have recorded them in the note. As to the ANZ National sample documents there is, as the Commissioner now understands it, no question of any issue of relevance before Your Honours in relation to those documents. There's no appeal against the judgment of Court of Appeal that those documents are potentially relevant. So we then submit that there's therefore also no question that if Your Honours decide that it is necessary to consider the application of s.70 of the Evidence Act, which is in the Commissioner's bundle of authorities, that is because the case is not answered by the application of s.81 of the Tax Administration Act, and s.70 is applicable, and then it is necessary to weigh the competing public interest factors under s.70, then it would be necessary for the Court to be able to inspect the documents. The question of inspection is addressed in the Commissioner's substantive submissions relating to the public interest immunity issue at paras.8 to 9 where reference is made to the approach to the question of a claim contents immunity in New Zealand, now we would submit governed by s.70 of the Evidence Act and reference made to the Joseph text where the authorities are conveniently summarised in relation to inspection for that purpose, and in those submissions we also refer to the very recent decision of the *House of Lords v Sommerville*. I'll come back to those points Your Honours just in a moment in the context of responding to my learned friend Mr Simpson's submissions, but the point simply is that if Your Honours reach the position of having to consider the application of s.70 of the Evidence Act which requires a balancing or a weighing of competing public interest factors, then in our submission it would be necessary for the Court to be able to inspect the documents themselves, the subject of that provision.

Tipping J Has that exercise been done below?

White Effectively by both Courts Your Honours in that they had the documents before them and had the opportunity to look at them and all decided, well both Courts decided that they were potentially relevant and that s.81 did apply and that there was no public interest

immunity to prevent them from being discovered and produced for inspection.

Elias CJ But was s.70 argued

White No, no.

Elias CJ No.

White No, s.70 wasn't. It may have been referred to in passing in the Court of Appeal but that exercise wasn't done in the context of s.70, that's correct Your Honour.

Tipping J No.

White But we would say it as a first position that effectively a similar exercise was required at common law balancing the competing public interest factors. So that

Tipping J But that's a document-by-document exercise is it, or is it agreed that it's all or nothing so to speak?

White Under s.70 Your Honour or

Tipping J Yes, or at common law.

White Well the *Sommerville* case where the issue arose, obviously at common law without the equivalent of s.70, it was said to be on a document-by-document basis, yes.

McGrath J So do I understand that the documents were then referred to in arguments on the public interest immunity side of the argument but just were not addressed by the Court of Appeal because it decided the matter under s.81?

White If Your Honour pleases, they were referred principally in the context of the issue of relevance in the High Court and in the Court of Appeal because the issue of relevance was still at large in those Courts, and it was on that basis that I took Justice Wild in the *ANZ Judicial Review* case and the Court of Appeal in the *ANZ* appeal through the documents and summarised them.

Blanchard J Well that's as I understood it that they were there almost entirely in relation to relevance. You're going to have to satisfy us that it's actually necessary for us to get into the detail of documents.

White Well

Blanchard J I rather doubt that it is.

White If this Court decides for instance that the whole matter is answered by s.81, and it's not necessary to go further, then I agree with Your Honour, it won't be necessary to look at the documents. The next stage of course is that Your Honours might decide that the question of any public interest immunity has to be determined under the Evidence Act and for the reasons that the Commissioner has advanced in his submissions that section 70 doesn't apply, and then again you won't need to do the weighing exercise. It's only if, and this is the point I was making in para.1.2 of the note, it's only if Your Honours decide that s.81 does not answer the matter completely – in other words it's not an exclusive code on the issue of the production of these documents by the Commissioner – and then Your Honours decide that s.70 does apply, because we argue it doesn't

Elias CJ Why would we entertain an argument on s.70 at this stage?

White Well Your Honours really should be putting that question to my learned friends because they are seeking to argue that the Commissioner is not able to produce for inspection the documents – discover and produce for inspection these documents in their present form because s.81 prevents that and public interest immunity prevents that, so they are arguments for my learned friends to satisfy Your Honours that s.81 prevents their disclosure and

Elias CJ But we're not ruling on the admissibility of evidence at this stage, except insofar if evidence is not admissible that may bear on whether it's discoverable. A s.70 inquiry seems to be downstream Mr White.

White Well it's raised by my learned friends for the ANZ National Bank

Elias CJ Yes.

White And their submissions that I feel in some difficulty as it were Your Honour in responding in advance to Your Honour's questioning them as to their reliance on s.70. It's raised in their submissions at the start.

Elias CJ But you too are relying on it for the purpose of this argument?

White No, our first position Your Honour is that s.70 doesn't apply at all. As a matter of law these documents aren't matters of State

Elias CJ Yes, State, yes.

White Covered by that provision, and that certainly is questionable.

Tipping J Doesn't all this suggest that the preferable course is your second suggestion under 1.3?

White Well exactly Your Honour.

Tipping J Well let's just wait and see.

White Yes, exactly Your Honour. Those are the two options, yes, which is why I have included that.

Tipping J Well with respect isn't the wait and see one by far the most convincing?

White Unless Your Honours are prepared to receive them now then that's the Commissioner's alternative proposition – wait and see.

Tipping J Well why would we want to receive it now if there is on your view a reasonable case for us not having to look at it at all?

White Well only because Your Honours the documents were before both the High Court and the Court of Appeal and the Commissioner simply took the position that they ought to be before this Court as well and the submissions in relation to public interest immunity refer to them.

Tipping J Alright, thank you.

White In relation to the second category which are the ASB sample documents, the Commissioner invites the Court to take the same approach and therefore the deferring may be accepted as the appropriate course, but there is just one aspect of my learned friend Mr Simpson's submissions in relation to the *Air Canada* case that I do wish to take Your Honours very briefly through. As he has correctly drawn to Your Honours' attention the decision of the Court of Appeal in the *Fletcher Timber* case distinguished the *Air Canada* case on the basis of the different rules, the High Court rules here compared to the rules in the United Kingdom relating to discovery, and with respect to my learned friend we would submit that the *Fletcher Timber* case covers the position in relation to inspection of documents for the purposes of determining the public interest immunity issue in New Zealand.

Tipping J At the time *Fletcher Timber* was decided wasn't the position that all documents had to be discovered if they were relevant, but whether you got to inspect them, there was an overlay there of necessity? Isn't that what the Court of Appeal held in a later case or referred to at least in a later case called *M v L*? I may be astray here Mr White, but I thought that discovery and inspection are different steps if you like and what applies to discovery doesn't per se apply to inspection.

White Yes. Your Honour the *Air Canada* case was dealing with the test for whether the Court should inspect documents for public interest immunity purposes and in England it had been held that the onus was on the person trying to say that there was no public interest immunity, whereas in New Zealand the onus is around the other way, or rather the English onus has not been accepted and that was the point that I

wanted to make in response to my learned friend Mr Simpson who was suggesting that the Court ought to be applying the *Air Canada* test.

Tipping J Yes right, I see thank you.

White And Your Honours should perhaps note that in England itself in the very recent decision of the *House of Lords* in the *Sommerville* case, which is in the Commissioner's bundle of documents at para.9, all of Their Lordships held in the headnote number 5 that the issue whether the withholding of material was justified by the public interest immunity certificates was for the Lord Ordinary to determine and that she could not properly have performed that task without examining the documents herself and they should be produced for inspection by the Court, and in the reference that I've given in the speech of Lord Roger at page 2780, he in fact addresses precisely the issue of whether the *Air Canada* test is as suggested by my learned friend and in para.155 of that decision, just above letter 'h' Lord Roger said that in holding that she, that's the Lord Ordinary, should not look at them. Both the Lord Ordinary and the Inner House appear to have attached undue weight to an isolated remark of Lord Fraser of Tulleybelton and *Air Canada* and not enough weight to a passage in his earlier speech in *Science Research Council v Nasse* **.** There he indicated that where the holder of documents objected to producing them on the ground of confidentiality, it would be the duty of the Judge to read them and decide whether disclosure of the contents was necessary for the fair disposal of the case, and the point I'm simply making Your Honours is that in New Zealand now the onus is clearly on the party seeking to avoid production or here the party seeking to maintain a public interest to immunity to establish it and that's all I need to say at this point in relation to that aspect of the second category of documents which Your Honours could therefore decide to receive or defer until deciding whether it's necessary to weigh the competing interests under s.70. Turning then to the third category

Elias CJ Sorry, that's the same position as in relation to the first?

White Yes.

Elias CJ Yes.

White I went a little further Your Honour because I felt it necessary to assist the Court by responding to my learned friend in relation to *Air Canada*.

Elias CJ Yes, yes, thank you.

White Turning then to the third category which is the affidavit of Miss Hodge. This is a separate category. Miss Hodge does not produce any documents the subject of the issues on appeal, instead she seeks to

give evidence on issue raised in ASB, which is the intervenor, in its supplementary submissions. In due course the Commissioner will submit that ASB's supplementary submissions are outside the scope of the questions approved by the Court in its decision of the 18 October, granting the applicant's leave to appeal and ASB leave to intervene. At this stage the Court does not suggest that you should determine that issue. We invite the Court to defer making any decision in respect of ASB's application to adduce the affidavit of Miss Hodge until it is decided whether to receive oral submissions from ASB as intervenor in terms of para.C of your leave decision and that would be after Your Honours have heard from the appellants, Westpac and ANZ National. In para.C of Your Honours' decision of the 18 October you granted leave to ASB Bank and said that the intervenor's written submissions must be filed and served by the date in which the submissions are due from the appellants and the Court will determine at the hearing whether the intervenor will be given the opportunity of making any oral submissions, and the Commissioner respectfully submits that Your Honours will be in a better position to do that after you have heard from Westpac and ANZ National. You'll then be in a better position to decide first whether you should hear from ASB at all and that would be after consideration of further submissions for the Commissioner that the ASB submissions are outside the scope of the appeal and after hearing from ASB and the Commissioner, whether the affidavit of Miss Hodge should be adduced and then if so whether the Commissioner should have the opportunity to file an affidavit in reply correcting Miss Hodge.

Elias CJ I'm sorry, I'm not sure what you're referring to when you refer to the supplementary submissions. What is the date of those? I'm not sure that I have them.

White The ASB submissions Your Honour are dated the 13 November 2007.

Elias CJ Yes, I have these.

White And in para.2 ASB states that it adopts the submissions of both Banks. That's Westpac and ANZ National, and this synopsis is therefore confined to supplementary submissions.

Elias CJ Oh I see, you're referring to the 13 November submissions.

White I am, I am Your Honour

Elias CJ Yes, thank you.

White Which ASB itself describes as supplementary and the Commissioner's position is Your Honours that again to avoid having to get into the detail of evidence, new evidence, at this point it would be much preferable for Your Honours with respect to hear from my learned friends – Mr Farmer for Westpac and Mr McKay for ANZ

National – because after that Your Honours will be in a better position as to whether you need to receive the supplementary submissions from ASB at all, and the Commissioner would wish to be heard on that. Unless there are any other matters Your Honours those are the submissions for the Commissioner at this point.

Elias CJ Yes, thank you Mr White. Mr Simpson do you want to be heard in reply?

Simpson No Your Honours.

Elias CJ No, thank you. Does any other counsel wish to be heard on these applications?

McKay If I might briefly Your Honours just respond to a couple of my friend Mr White's observations with reference to his category 1 of his preliminary issues, and that is the ANZ National sample documents. In view of I think the intimation from Your Honours that a final decision on the question of whether the ANZ sample bundle will be received before the Court, I needn't develop ANZ's position in any detail but I would make two comments if I might, just simply in response to his comments. First of all in picking up a point I think that His Honour Justice Blanchard referred to. Those documents were before the High Court and the Court of Appeal entirely on the question of the relevance aspect of the judicial review and subsequent appeal and not the confidentiality and secrecy

Blanchard J The same could be said of the Hodge affidavit frankly.

McKay That's not

Blanchard J It seems to be dealing with relevance.

McKay Yes, well that's for my friend Mr Simpson Sir, but certainly there's no doubt that the documents that comprise the ANZ sample bundle were relevance and exclusive relevance documents, not secrecy or confidentiality, and the second very short point Your Honours if I might is that my friend's bullet point where he talks about the option of deferring a decision until satisfied it's necessary to weight the competing public interests factors under s.70, it is ANZ's submission, as it confirmed by its written submission to this effect, that as a matter of form of s.70 of The Evidence Act 2006 is now the procedure by which public interest immunity issues do come before Your Honours, but it is also ANZ National submission that particularly in light of the judgment of the Court in *Squibb* that the weighing exercise with reference to taxpayer affairs and taxpayer identity in terms of the disclosure of that by the Commissioner to third parties, that's already

been done. It's been done by the Court in *Squibb*; it's been done in accordance with the principle of *Knight*, and in those circumstances there is no question of inspection or the need to inspect documents. All that matters is that those documents fall within the immunity, the immunity being an immunity from the disclosure of identity and affairs. Now I will of course elaborate upon that submission Your Honours in terms of the development of the main submission but I thought I would seek to make those two points.

Elias CJ Yes thank you Mr McKay.

McKay Thank you.

Elias CJ Yes Mr Farmer.

Farmer Just very briefly, first of all to confirm our understanding that the documents were put before the High Court and the Court of Appeal solely on the question of relevance, but then to add to that the fact that from Westpac's point of view what developed in both Courts was an unsatisfactory procedure in this way that in the High Court Westpac was excluded altogether from the hearing of the ANZ's case which may have been fair enough in relation to the issue of relevance but we were also excluded in relation to arguments from both ANZ, but more particularly from the Commissioner, on the question of confidentiality, so that what happened was that we had a hearing before his Honour Justice Wild that we were present at, where confidentiality was issued both by ourselves and by the Commissioner. The same Judge then heard continued argument on precisely the same issue of confidentiality again hearing from the Commissioner, albeit through different counsel, in our absence, and then in the Court of Appeal a somewhat similar procedure but modified was followed and in that case what happened was that we were permitted to be present during the argument on confidentiality so that we heard ANZ; we heard the Commissioner in response to ANZ; and the Commissioner of course in response to our own arguments, but we were then excluded from the Court while a supplementary argument took place about confidentiality and relevance in relation to the Westpac document, so we were somewhat heartened I must say when this Court in giving leave also ruled that both appeals should be heard together as in our respectful submission they should be because after all it's precisely the same issue, and it is an issue of principle as the leave term state, so for that reason we would be opposed, dismayed, really if documents from one or other or both of the Banks were then put before the Court and it put us in a position where we might again be excluded from hearing what the Commissioner says on the confidentiality issue.

Elias CJ Yes thank you. Yes Mr Simpson.

Simpson Your Honours I know I said

Elias CJ Sorry, any other counsel before Mr Simpson in response? No, thank you. Mr Simpson.

Simpson It was just in response to the comment made by Your Honour Justice Blanchard that the Hodge affidavit could also be criticised for dealing with issues of relevance, and I just wanted to make clear exactly where the thrust of ASB supplementary submissions are headed. In all of the public interest immunity cases the Courts have been satisfied at a threshold level that the documents are relevant, because if they're not relevant, they're not discoverable and the issue doesn't arise, so we only get into these issues if the relevance test has been satisfied. But once we passed that the Court then has to undertake a balancing exercise as you know and on the one hand there's the public interest in maintaining taxpayer secrecy, on the other, the administration of justice, and I hope this isn't unfair but my sense is that ANZ and Westpac have primarily directed their submissions at the first issue, taxpayer secrecy, and what ASB has focused its submissions on is the issue of the due administration of justice. In other words if these documents are to come in and be used by the Commissioner in the BNZ proceeding, what value will they have at a trial? So this isn't an issue of relevance, this is an issue of necessity. If the documents don't come in will there be a lacking of the adjured administration of justice? How will the Commissioner be prejudiced, and in that respect I have focused in my submissions on what legitimate findings could the trial Judge in the BNZ case make in relation to other Bank documents, and that's why I focused on issues of natural justice.

Tipping J Are you saying in effect we acknowledge they're relevant but it is not necessary to have them in?

Simpson That's right and that is the case with all public interest immunity cases, always relevance must be satisfied because if they're not relevant there can be no case for their production.

Tipping J No I'm not inviting you to regurgitate it, I just wanted to make sure I understood your point.

Simpson Yes, so my issue is more about the necessity of these documents for due administration of justice, and that's why the Hodge affidavit is concerned with issues such as the number of documents at issue and the broader implications and other litigation to show that we're not looking at a unique set of circumstances and that's why I refer to the OCN transactions where we're seeing the same issues come up in other contexts.

Anderson J Well ultimately the crucial matter is whether the documents are admissible, and it seems to me that the Banks are trying to pre-empt the issues of admissibility by attacking discovery to pre-empt a strike procedure. Now if the documents are discovered you don't have to

look at them. Ignore them. Take your risk at trial. But if they are immune from discovery they are going to be resisted in terms of admissibility, which we can't decide upon.

Simpson But the issue there is it's the BNZ that will decide whether they want to look at the ASB documents, and it's the ASB that's protesting. In fact the BNZ's not here today.

Anderson J But that's a confidentiality argument. That's not a necessity argument.

Simpson But in *Squibb* the Court of Appeal, Justice Richardson, held that to counsel only disclosure's no good and in the lower Courts in these appeals, the Courts have held that redaction will render the documents useless, so we are in a situation where other Banks will look at ASB documents – we won't have any say in that process – and the Courts have already held that redaction is not going to be a useful exercise.

Elias CJ Thank You Mr Simpson. We'll adjourn and consider what we'll do at this stage thank you.

10.42am Court Adjourned
10.49am Court Resumed

Elias CJ Thank you. Yes the questions posed in the leave judgment are ones expressed as matters of principle and our expectation has been that they would be able to be dealt with on that basis and that it will be unnecessary to consider the documents. We will defer ruling on the applications until we've heard the argument further but would hope that it won't be necessary to get beyond the matters of principle we thought we were to be hearing today. Well what order? Mr Farmer will you two go first?

Farmer Yes I would.

Elias CJ Yes.

Farmer I've done an outline of the oral submissions that we would seek to present and which obviously take account of the written submissions that have been filed on behalf of the Commissioner in both cases, so I'll hand those around if I could. So if the Court pleases what I wanted to start with was the issue of policy, that is to say the policy which underlines the secrecy obligation that's contained in the statute and the policy which underlies the exception to that secrecy obligation which is also contained in the statute and which we would say is also contained in the principles of the public interest immunity that have been recognised and applied by the Courts for a very long time now, and we thought it would be useful to collect together initially from the

leading cases and from the Court of Appeal judgment in the present case and also from the Commissioner's submissions, the statements of policy that each side seems to see as being particularly relevant or applicable and just to show the contrast that exists between the different ways in which the policy is expressed. I will then go back later and address in more detail and by reference to the facts the leading cases that are referred to but as I say what I've tried to do initially is to extract those statements of policy in order to show what seems to be a fundamentally different approach and a different that is taken on policy by the Banks on the one hand and by the Commissioner and by the Court of Appeal on the other. So one starts with Lord Wilberforce in the *Small Businesses* case which of course is referred to as a leading precedent in virtually all the decisions that have followed including the leading New Zealand Court of Appeal decisions such as *Squibb* and *Knight*, and the particular dictum, the statement of policy that Lord Wilberforce, the way that he puts it is the total confidentiality of assessments and of negotiations between individuals and the revenue is a vital element in the working of the system, so that's what we are concerned about immediately – the working of the system – or as it's put in our statute now the integrity of the system. Viscount Simon in *Gamini Bus Company* in the Privy Council, decision given in 1952, and referred to at some length by Justice Richardson in *Squibb*, His Lordship's statement there of policy was this 'It is of the highest importance that the affairs of an individual and identifiable income tax payer should not be disclosed to anyone outside. Their Lordships would strongly deprecate the production or use of such a document if it did in effect disclose information about other identified or identifiable taxpayers'. And if I could just pause there, immediately you see the emphasis on identity of taxpayers as being the critical prohibition as it were that the policy is addressing. And then to Justice Richardson in *Knight*, which preceded of course the *Squibb* case. His Honour '..without an army of inspectors a tax system inevitably depends very substantially on the willingness of taxpayers to provide proper and timely tax information to the revenue'. So if I can just pause there, that's the voluntary compliance to make the system work without an army of inspectors. And then His Honour continues '..as Lord Wilberforce said in *Small Businesses* the total confidentiality of assessments and of negotiations between individuals of a revenue is a vital element in the working of the system. It rests on the assurance provided by the stringent Official Secrecy Provisions that the tax affairs of taxpayers are solely the concern of the revenue and the taxpayers and will not be used to embarrass or prejudice them. That fundamental premise underlies the Secrecy Provisions of the Income Tax Legislation in New Zealand as in other countries and is reflected in the very limited disclosure provisions contained in standard double tax treaties'. And then the same Judge in *Squibb* '..would it ever, would it ever he says be necessary for the purposes of carrying into effect the Inland Revenue Acts to compel disclosure of the identity of other taxpayers'. So if I can pause there, His Honour there is addressing specifically the

exception to the secrecy obligation that the Commissioner invokes to justify what he's seeking to do here. So His Honour asked the question '..will it ever be necessary to compel disclosure of identity', so again the focus is on identity of taxpayers. 'To do so he said would inevitably undermine the integrity of the tax system which the stringent official secrecy provisions are designed to support. To compel disclosure of the identity of other taxpayers would be inimical to the carrying into effect of the Inland Revenue Act'. So again if I can pause and just emphasise the point because this is the very heart of this argument that what is being addressed here by His Honour in *Squibb* is the exception that the Commissioner relies on – the carrying into effect of the Inland Revenue Acts – and His Honour is saying whatever else you might disclose, and I'll come back to that point, you cannot disclose identity of other taxpayers because if you do so you will inevitably undermine the integrity of the system.

McGrath J Mr Farmer you've not thought it helpful to read the first sentence of that paragraph, but I wonder whether it might not be an important part of the context in understanding this passage.

Farmer I think I'd do that later Your Honour.

McGrath J I'd just like to register that what is said is that against a claim by the Commissioner that he or she had regard to comparative industry data, which was of course the *Squibb* circumstances, and I just wondered whether the emphasis on the words that follow in Justice Richardson's judgment are very much speaking in that particular context are they not?

Farmer Yes and it is if I may say so jumping ahead, but I'll deal with the point now because

McGrath J Well you may say that's not part of the principle but I just wonder whether the statement isn't qualified by reference to that context.

Farmer Well I think our submission would be that it doesn't but what that statement that Your Honour has referred to does do usefully is that it indicates what His Honour and what the Court in *Squibb* held was permissible which was for the Commissioner to make use of relevant information – in that case comparative industry data when he made his assessment – that was permissible, but what was not permissible was disclosure of the identity of the other taxpayers, so *Squibb* in a way is a very useful case because it actually effects a sensible compromise to those who would say secrecy is sacrosanct; everything is secret; no part of any document can ever be disclosed or made use of by the Commissioner on the one hand and on the other hand those who would say that, indeed our Court of Appeal would say that if the Commissioner requires all the documents and every part of those documents without redaction in order to obtain optimum utility for the purpose of winning the case, then he should be permitted to do so, and

what the Court of Appeal did in *Squibb* of course was to say well the Commissioner shouldn't be stopped from making use of the knowledge and the information that he obtains as a result of obtaining other taxpayers' returns in his result of his obtaining information from other taxpayers on whom he might have served section 70 notices or the like. That's fine, he should be able to do that, but he's got to do so in a way that doesn't breach what I call the sacrosanct requirement that taxpayer identity is not disclosed, and so what he's

Blanchard J But why then did Justice Richardson a little later say 'different and difficult questions may arise if the Commissioner decides to adduce further details of industry profitability which identify other taxpayers but were not called on in this case to express any views as the conduct of the hearing itself?' That seems to suggest that the prohibition on identity is not seen by Justice Richardson as an absolute.

Farmer Well that's probably the most difficult part of his judgment, and it's difficult because he raises the issue but makes no attempt to resolve it.

Blanchard J But why would he raise it and just leave it hanging if he wasn't

Farmer Well we don't know Your Honour of course what was argued at the hearing and it may well be that what was argued at the hearing, and of course by reference to the *Gamini Bus* case that he also considered at length, it's clear that in *Gamini Bus* what actually happened was that the Commissioner having put forward in that case comparative date that there was then an attempt by the taxpayer to press for the underlying primary documentation that supported that, and so that issue arose as it were at trial and had to be dealt with and the Privy Council said we're not going to allow identification of taxpayers, so there is an issue as to what happens at discovery, and the issue, let me put it this way, the issue probably is one that at trial becomes an admissibility issue, because if at trial the Commissioner puts forward what is in effect secondary evidence in the form of comparative data that is based on material that is primary material, but in accordance with the requirement of secrecy does not identify the particular primary documents because to do so would be to identify the taxpayers, or if he puts forward the primary material but redacts it so that the taxpayer identity is preserved, then it may well be that the opposing party is entitled to say I am entitled under the rules of evidence to have the primary material and if you don't lead it then I have an objection as to admissibility and I think that's the practical issue that arises at trial, and I would submit that that's what His Honour was probably thinking of. What the answer to it is will be for a future Court to decide. Our submission will be that the answer to it is that taxpayer identity remains sacrosanct and if the Commissioner can't in fact prove his case other than by referring to taxpayer identity of other taxpayers, then he can't prove his case.

Anderson J With the question of what's necessary in any particular case, I mean s.81 enables the disclosure of information when it's necessary to do so generally speaking

Farmer Yes.

Anderson J And in the case such as *Squibb* the relevant evidence could have been presented as the Court found in a secondary sort of way, in a statistical way rather than

Farmer Yes.

Anderson J In this case here

Farmer Well well assuming of course that when that happened, and this is my point I made a moment ago, assuming that when that happened it was done in a way that did accord with the rules of evidence and of course one of the problems about putting forward analyses that are based on documents or other material that's not before the Court is that if the other party wants to test the analysis he may need to have recourse to that

Anderson J And then it may become necessary for the Commissioner to disclose.

Farmer Well that depends on the view that you take of public interest immunity and of the exception to s.81, because Justice Richardson asks the question would it ever be necessary and he says no because the public interest immunity

Elias CJ Does he say that, no it would never be necessary?

Tipping J He asks the question rhetorically in that form and then appears to answer it in slightly different ways.

Farmer Well he says to do so would inevitably undermine the integrity of the tax system.

Anderson J But it may be an undermining that is authorised by s.81.

Farmer Well I think my learned friend Mr McKay put it to you this morning that what *Squibb* has actually done is it has looked at the two competing public interests. On the one hand you have the secrecy obligation, which is at its strongest in relation to the identity of taxpayers, which as I say allows in fact the Commissioner to use other taxpayer material providing taxpayer identify isn't disclosed. So you have that strong public interest. On the other hand you have the public interest in the due administration of justice that the Court should be able to receive from a party relevant information to the case. The Commissioner in this present case takes it as far as to say and the Court of Appeal rarely goes along with this view, that if the

Commissioner wishes in support of his case to put relevant material into evidence he should be able to do so. That the Court should not be deprived of relevant evidence and our submissions of course say well that's not an absolute principle, even in the administration of justice, that is not an absolute position that exists now under our general law, because for example privileged documents

Elias CJ Well there really are no absolutes are there?

Farmer No, no.

Elias CJ I mean even in terms of the first principle that you place so much weight on, Justice Richardson grounds that principle, or derives that principle from the stringent Official Secrecy Provisions, so he's grounding it on s.13, now s.81. I'm surprised you don't start with the terms of the section.

Farmer As far as I do or I don't?

Elias CJ You don't start with the terms of the section

Farmer Well

Elias CJ Because these statements of principle are all made in context and Justice Richardson is making it clear that he derives the principle, not in some absolute a priori sense but because that is what the statute provides for.

Farmer Of course Your Honour

Elias CJ And really what Justice Anderson is putting to you is we're in the area of talking about necessity for the purposes of the tax legislation.

Farmer Yes and of course one starts with the words to the section. What I was seeking to address from the outset is the policy, very important policy considerations that underlie that section maintaining the integrity of why do we have a secrecy obligation in s.81 to maintain the integrity of the tax system; why do we have voluntary compliance – because of the importance of making the tax system effective. Will voluntary compliance work if the secrecy obligation is breached – no it won't. Those are the sorts of very important policy considerations that with respect I would have thought this Court was most interested in.

Elias CJ But do you need to labour them?

Farmer Oh I'm sorry if I

Elias CJ Who would not accept them?

Farmer Well you see

Elias CJ The question is whether s.81(3) with the exception applies in this case.

Farmer Exactly, exactly, that is the exception, and that's why I stressed when I read as I did from Justice Richardson that those statements of policy that he makes about the integrity of the tax system and so forth, maintaining it, and how it will be harmed if taxpayer identity is disclosed, he's not when he says that, he is not talking about the primary prohibition in s.81(1) of Taxpayer Secrecy, he is talking about the exception. Is it necessary for the purposes of the Act to disclose taxpayer identity, he's saying no it's not.

Elias CJ Well it's not if you're only using the information for comparative purposes as in *Squibb*.

Farmer Well of course *Squibb* was a case where in fact the, and you'll find it earlier in the judgment, the actual statute – it was a transfer pricing case – so the statute in effect raised the issue as to whether a taxpayer's returns in this country where it was involved in also carrying on business in other countries, whether the profitability of the company as returned might in fact be much lower than comparable companies carrying on similar business in this country, so in effect directed attention to that very issue, but although it doesn't arise under the statute here, that is precisely in a way what the Commissioner is trying to do in the present case. He's trying to make a comparison between transactions entered into by one Bank, with transactions entered into by other Banks, in order to draw a conclusion that, well we don't know quite what his conclusion is, because he hasn't pleaded in any way precisely how he says other Banks transactions are relevant, but he is seeking to make a comparison and that's our point, that that's why *Squibb* immediately becomes relevant because by all means assuming pleading, assuming relevance, which we are for the purpose of this hearing, we're not otherwise, by all means let the Commissioner make whatever use he wants to make of these other Banks documents, but require him, and it's what was done in *Squibb*, require him as a matter of balancing these competing public interests, to protect above all taxpayer identity, and if at the end of the day he says well if I do that the documents aren't much use to me, or they aren't as much use to me as they would be if I could disclose the other Bank's identity, well then that is an issue he has to live with because in that situation in our submission the policy in the Act must prevail.

Tipping J So really you're saying that identity must be protected at all costs?

Farmer Yes.

Elias CJ Even though the statute could well have provided that - must never disclose the identity of the taxpayer in any information disclosed?

Farmer Well that's why I suppose I've gone to look at the policy behind the statute which has been laid down in the Courts of, not only this country, but of England and even Australia.

McGrath J Is it fair to say Mr Farmer that where Justice Richardson ends up with all of this is that he concludes that it is possible in this case to allow the substance of the evidence the Commissioner wishes to call the comparative data to be admitted, while still anonymising, if that's a word, the

Farmer Still anonymising, yes.

McGrath J Yes, the source of it, the taxpayer identification element, and when you can do that, public interest immunity should restrain the Commissioner – not s.13 or not s.81, but public interest immunity should restrain the Commissioner only to using the evidence to the extent that does not interfere with identification of taxpayers. I mean that's all I drew out of his **..**

Farmer Yes, and perhaps if I could make two points. While it's true that we've placed enormous emphasis on taxpayer identity as being what I've called sacrosanct, sacrosanct particularly we would say in a case such as this where you have a dispute between the Commissioner and a taxpayer and where the Commissioner is seeking to use material from other taxpayers. That is a different kind of case altogether from a case such as *Fay, Richwhite* which the Court of Appeal relied very, very heavily on and where the issue was whether or not the IRD, together with the SFO, had acted corruptly by deliberately suppressing corporate taxpayers conduct committed in the Cook Islands. So in that case if one's looking again as one always has to look at it from the point of view of the integrity, maintaining the integrity of the tax system, there could be nothing that would undermine the integrity of the tax system more than corruption by the IRD itself, and so for that reason it's perfectly obvious why in weighing the competing public interests that exist in that case you would come to a different result from what you would come to here.

Tipping J Could I just have confirmation, are you putting it as high as the policy is to protect the identity of taxpayers in all events or at all costs, or do you admit at any possibility that identity may be necessarily disclosed?

Farmer Well I'm saying Your Honour that in a case such as *Squibb*, and we say there is no material difference between *Squibb* and the present case. There are little differences obviously, but materially the two cases are the same. In a case such as *Squibb*, the Court of Appeal has ruled that taxpayer identity is of such importance that its disclosure

Tipping J But never mind what has been ruled before Mr Farmer, are you inviting us to rule that taxpayer identity must be preserved at all costs or do you allow in principle of the possibility that it may be necessary to disclose identity?

Farmer Well I have to, I have to accept of course to take The Learned Chief Justice's point to me that there is no specific provision in the statute that says that taxpayer identity can never be disclosed. Of course I accept that. So then one gets back to the general words that are used in the section necessary for the purposes of the

Tipping J Yes, and do you accept that in some circumstances it may be necessary to disclose?

Farmer Well I've just given

Tipping J You do?

Farmer You the *Fay, Richwhite* example, I've just given you that example, but the important difference between that case and the present case is the entirely different way in which the public interest

Tipping J Is it then simply a matter of weighting, with a huge weight admittedly going into the non-disclosure scale, but the possibility that an even bigger weight might go into the other scale.

Farmer Not on a case of facts such as these, for all the reasons that are set out in *Squibb*.

Tipping J No I'm sorry, I'm at a much higher level of obstruction than you are at the moment Mr Farmer. I'm looking as to the correct way to interpret the word 'necessary' in the context of identity of taxpayers. It is the principle, but it's a huge weight in favour of non-disclosure of identity, but there may be circumstances – this is your argument – where that weight is overtaken.

Farmer I think I've already agreed to that because as I say in a case such as *Fay, Richwhite*, that will be so.

Tipping J I don't want to appear to be pressing but you keep on going into the facts of this case. I'm wanting to get your

Farmer That's because if we're doing a weighting exercise, if we're doing that, then the facts are critical.

Tipping J Oh yes of course, once you get to the weighting exercise the facts are critical.

Farmer Because the public interest, which are essentially the same at the end of the day, will apply quite differently.

Tipping J But it is a weighting exercise ultimately?

Farmer It is a weighting or a balancing exercise ultimately, but it is possible to say that in a case where such as *Squibb* and the present case, it is possible to say that it is very difficult to imagine a case where the public interest in maintaining taxpayer secrecy not only for the benefit of the taxpayer but much more importantly than that, for the benefit of the system. It's very difficult to imagine a case where that will not be the governing interest that will apply. And that's why Justice Richardson used such strong language as he did. Inevitably, the word 'inevitably', and I accept of course it's in a particular context, but the context we would say is the same

McGrath J Mr Farmer I'd just like to clarify this. Am I right in saying that when Justice Richardson said that disclosure of the relevant information would not be barred by s.13, and I'm at page 9160 if you have the report

Farmer Yes, whereabouts on 9160 Sir?

McGrath J Top of the righthand column. 'Disclosure of the relevant information will not be barred by s.13' – then he goes on to talk about public interest immunity fair trial considerations, is it fair to say that as far as Justice Richardson was concerned s.81 did not capture the situation, but some restraints could be imposed – I think that's how he put it – by applying public interest immunity principles.

Farmer Well, I mean that raises a question that clearly troubled the Court of Appeal, it probably troubles anyone

McGrath J I'd just be interested to know what your position is first so please elaborate but is that the way you read it or do you read it somewhat differently?

Farmer No, well it raises the question as to whether public interest immunity is a doctrine that exists entirely outside s.81 or whether it's implicit within s.81, and what in particular The Learned President Sir Robert Cooke said in *Knight*

McGrath J Yes, his position's different, yes.

Farmer Well I'm not so sure whether it is different but it's clear that he sees public interest immunity as being as it were embraced within the statutory concepts that contain s.81, and we would be happy with that analysis. We would be equally happy

McGrath J I appreciate that Justice Cooke saw it as implicitly in the statute.

Farmer And he's not the only one, he's not the only one

McGrath J No, but as far as Justice Richardson and *Squibb* is concerned, isn't it the case that he thought that there could only be restraint here applying public interest immunity, that s.81 just did not bar the admission of the evidence?

Farmer Well if we could just go back a little bit earlier in that passage

McGrath J Yes.

Farmer At the bottom of the first column. What he's addressing there is a distinction between information which should be able to be disclosed and it's relevant, that's the comparative material and so on, that's on the one hand, and information which is the identity of taxpayers on the other. So having said that if I now read it. 'The practical difficulty he said is to separate out information identifying the other taxpayer, separate that out, leaving as disclosable relevant information as to its business operations which is useful for comparative purposes'. So there's the very issue that he's addressing. Then he goes on to say the passage Your Honour referred me to 'disclosure of that relevant information' – now he's talking there about again the comparative material – 'would not be barred by s.13', and if I can pause again, that's because that doesn't contain within it taxpayer identity. Then he says 'but the balancing of public interest immunity and fair trail considerations were in my view justified two restraints on the production of that material. The first is that disclosure does not require production in its existing form of the original law or abstracted data without any adjustment or re-organisation designed to protect the identification of the taxpayer concerned' and then he refers to redaction as being the useful process. So he sort of takes it around in a circle and says well we've got to separate these two things out

McGrath J Yes.

Farmer And I'm quite happy for the Commissioner to put forward this material. It's disposable, it's relevant, but not in a way that discloses the taxpayer identity.

McGrath J Is it fair to say that once he's saying that he's right into applying public interest immunity principles, he's left s.81?

Farmer Well with respect that depends entirely on whether you take Justice Cooke, Sir Robin Cooke's view, or whether

McGrath J Yes, we'll I've said that I certainly accept that Justice Cooke's **..**

Farmer Or whether you say this is a separate exercise that you'd somehow do a s.81 analysis and then you do a public interest immunity analysis following your having done that.

McGrath J Yes.

Tipping J If you do a separate analysis you've come to the view that it's necessary but public interest immunity can trump that?

Farmer Yes, yes.

Tipping J That's the logical corollary isn't it?

Farmer Yes it is, and I must say in our written submissions we've said look we don't mind which way you go on this, you can see it to the same result. We've said that at the very beginning of our submissions.

Anderson J If one interprets necessary is reasonably necessary then this implies a consideration of all the policy values of the Tax Acts, including the Privacy learnings.

Farmer Yes, and the integrity of the system

Anderson J So just by adopting that technique one avoids s.17 but brings this balancing concept into play.

Elias CJ Avoids?

Tipping J Avoids section

Farmer 13 do you mean?

Anderson J No it avoids the public interest immunity argument, the separate one.

McGrath J S.70.

Elias CJ 70.

Farmer 70.

Anderson J Of the Evidence Act I mean.

Farmer Yes, well we see s.70 of the Evidence Act as being a bit of a red herring frankly. I know there's going to be submissions

Blanchard J Well it would be if it's all done within s.81.

Farmer Yes it is.

Blanchard J But Mr Farmer could we come back to that paragraph that you were reading from because it does seem to me that there's a passage later in it which reinforces the fact that Justice Richardson was really concerned with the idea that one taxpayer would be able to force the Commissioner to reveal the identity of another taxpayer. He wasn't

really addressing the issue that we've got here where it's the Commissioner who says to give effect to the Acts I need to be able to put in this material from the files of the other Bank. Can I direct your attention to the passage that starts when he deals with the second of the restraints and I may be misreading this but he says the second is that the non-disclosure of identity in the excision or exclusion of otherwise discernable information to the minimum extent required

Elias CJ Sorry, where are you?

Blanchard J Two thirds of the way down that paragraph.

McGrath J Page 9160, right hand column.

Elias CJ Oh yes, yes.

Blanchard J To the extent required to prevent identification of the taxpayer is justifiable, and that word 'justifiable' clearly is I thought saying the Commissioner would be justified in making the excision, and would be justified for the policy reason that you identified at the beginning of the preceding paragraph, where incidentally the rhetorical question has the word 'compel' in it, and that's clearly directed to a taxpayer compelling the Commissioner.

Farmer Yes, yes it is but of course the way he, if I may read on from where Your Honour finished he does then of course invoke the policy 'upholding the immunity against disclosure of that material is no more than is necessary in the public interest to recognise

Blanchard J The high value

Farmer The high value

Blanchard J That's a balancing suggestion.

Farmer But with respect part of the Commissioner's case here is that if the Commissioner is not allowed to do what he wants to do then he will be disadvantaged as compared with ordinary litigants, but what is good for the goose has got to be good for the gander

Blanchard J Not necessarily.

Farmer Because if in fact, I mean it can't be the case with respect that whether or not the integrity of the tax system is undermined depends on who is leading the evidence.

Blanchard J Well I would think it would be a lot more undermined if one taxpayer could get at another taxpayer's file, than it would be if the Commissioner in the exercise of a power to do so says well it really is necessary in this case.

Farmer But the result is the same. Either way if the identity is disclosed the damage is done. The result is the same.

Blanchard J Well I hear what you say.

Farmer Well that's not a very good comment. I've heard that before with respect.

Tipping J He'd rather you didn't hear it.

McGrath J I think Justice Hardie Boys was making a similar point in *Fay, Richwhite* to the point that Justice Blanchard has just been making.

Farmer Yes, my point about *Fay, Richwhite* is of course that that is such a different case and where the public interests considerations apply so differently that it's, in fact what has happened in the Court of Appeal's judgment in this case is that – oh I was going to make this point later, but I may as well make it now – is that the Court of Appeal faced with *Squibb* referred to Sir Robin Cooke's statement in *Fay, Richwhite* that what was said in *Squibb* had to be viewed secundum subdue materium, in other words be viewed in the context of the facts of *Squibb* which were His Honour said quite different from the facts of *Fay, Richwhite*, and therefore a different result then followed because of as I say the way the different public interests considerations are applied. Having said that the Court of Appeal in effect then chose to come to a similar result to that which had been arrived at in *Fay, Richwhite*, in effect disregarding the strong precedent that *Squibb* represented. So there was no real attempt made to say that *Squibb* was rightly decided, wrongly decided, or perhaps there was this narrow distinction that made a difference. Rather it was just that reference to as I say Sir Robin Cooke's statement and then the Court doing what it chose to do in the judgment. Now that's

Elias CJ Is this is a convenient time to take the adjournment?

Farmer Yes it is.

Elias CJ Thank you.

11.30am Court Adjourned
11.47am Court Resumed

Elias CJ Thank you. Yes Mr Farmer.

Farmer I think what we've done this morning is cover a great deal of the material that was in our written outline, but could I just continue by taking up two points that arose? One of them was from Your Honour

the Learned Chief Justice as to the fact that s.81 doesn't as it were contain within the general words of the exception, any reference to protection of taxpayer identity as such in the context of enforcement or carrying out the purposes of the Act. That of course is correct. However what is perhaps relevant is the fact that after *Squibb*, therefore after section, what was then s.13, there was a new provision put into the tax legislation and you'll find that on page 4 of the notes, namely s.6 and 6(a) of the Tax Administration Act. Now the background briefly to those new provisions was the, as we've referred to towards the foot of footnote 4 and it's in our written submissions as well, was the Organisational Review Committee that was set up under the Chairmanship of Sir Ivor Richardson and that Committee reported with recommendations which were accepted and in particular the relevant recommendation here was the enactment of s.6 and 6(a). and indeed the Committee under Sir Ivor Richardson Chairmanship drafted these provisions and annexed them to their report and they were simply then enacted, and what is important in them as we've set out in the extracts from s.6 on this page is the specific continuing references – three of them I think – to confidentiality of taxpayers' affairs, and taxpayer perceptions of the integrity of the tax system. So there it is set out as if you like a legislative reinforcement of the importance of taxpayer secrecy and specifically in relation as I say to the integrity of the system, and you'll find in s.6(a) under the Care and Management Provisions, also a reference to the importance of promoting compliance, especially voluntary compliance, by all taxpayers. So our submission would be that that is an important post –*Squibb* development that we would submit strengthens the position that we take. It's interesting that, and I won't take you to it because you'll recall it, but in the Court of Appeal, the Court accepted the Commissioner's submissions that there had quote 'been a sea-change' in the way in which tax litigation, or in relation to the conduct of tax litigation, since *Squibb.*

Elias CJ What do you think they meant by that - rich and strange?

Farmer Pardon.

Elias CJ Well that's the quote isn't it? I never know why people use that unless they're meaning to go the whole way with Shakespeare, but however.

Farmer Well the only sea-changes I've ever experienced have been very unpleasant.

Elias CJ But it seems to be used in entirely the wrong sense. People seem to use it to mean a sort of an imperceptible change, whereas

Tipping J No, it's a whopper.

Blanchard J It's a big

Elias CJ Oh it's a big one.

Farmer It is a big one, that's right, it's going to Hobart and suddenly confronting a 10 meter wave that you didn't have when you left Sydney.

Blanchard J But nothing of the sort has happened this morning.

Farmer No, but this provision is actually oddly enough relied on by the Court of Appeal in accepting the Commissioner's submissions as one of the important elements of a sea change. We submit to the contrary that all the emphasis strengthens the position that we've taken. Strengthens therefore the importance of the *Squibb* reasoning. So I did want to draw your attention to that. The second point, which is the one raised by Your Honour Justice Blanchard, is the fact that in *Squibb* it was the taxpayer who was seeking further information that might lead to the disclosure of taxpayer identity, whereas in the present case it's the Commissioner who's seeking to discover material that does disclose taxpayer identity, and whether that as a result of that difference, whether that changes the way in which the public interest immunity considerations apply. Now interestingly if I could take you to the Court of Appeal's judgment, because I think there is a paragraph there that in a sense bears on all that and which would undoubtedly, I mean the actual result in the Court of Appeal's judgment in this case is that yes indeed the Commissioner is in a different, and we would say if that's right, favoured position. So para.71 of the judgment is what I wanted to refer to which is the paragraph that sets out the conclusions as to the s.81 arguments.

McGrath J Just what page is it in in your case – there's so many?

Farmer Oh I'm sorry. Volume 1, page 172. I'm referring to a different version that I have. So in para.71, I'll just read first of all from the middle of the paragraph where there's a sentence about eight or nine lines down which says 'we accept that it would be simplistic to treat the issue as depending upon whether it is the Commissioner who is seeking or resisting disclosure, albeit that this would be consistent with the outcomes of *Squibb* and *Fay, Richwhite*'. But what the Court of Appeal then did, and I take you back earlier up in the paragraph, was to approach it in this way. They, in the third sentence, well the second sentence, 'the Commissioner sees the other Bank's documents as relevant and wishes to use them for the purposes of the BNZ litigation'. The word 'purpose' in s.81(1) either refers to, or at least must include, the purpose of the Commissioner.

Elias CJ That's very strange isn't it? I mean it must be just proper purposes being referred to there. Yes I had a question mark beside that.

Farmer And then it continues 'to the extent that purpose refers to his subjective purpose, the use of the other Bank and other transaction documents in that litigation is within the letter of 81(1) of the Act', and then there's the sentence I read, and then it continues 'but if the stance of the Commissioner cannot sensibly regarded as controlling, it is nonetheless a relevant consideration and we see this as consistent with s.6 and 6(a) which repose in the Commissioner the care and management of the tax system, including preservation of confidentiality'. So one can ponder that for a moment but I will pass on. 'There is no reason to suppose that the Commissioner is acting irrationally or inappropriately in taking the view that the disclosure in question is for the required purpose'. Well one doesn't actually know the answer to that question but I'll carry on again. 'Indeed on our appreciation of the case as a whole, we think it clear that the disclosure proposed is genuinely within s.81(1) as being for the purpose of carrying into effect the relevant statutes' and we see nothing in *Squibb*. *Knight and Squibb* etc is as contradicted. So

Elias CJ It's a very strange paragraph.

Farmer But that's the heart of the judgment.

Elias CJ Yes, yes.

Farmer It's the heart of the judgment.

Tipping J Well there's no reference to necessary.

Farmer Well

Elias CJ And genuine.

Farmer Well necessary of course is used in 81(3), not in 81(1)

Tipping J I know, but

Farmer But everyone agrees that it can be implied in both. I think that's probably the common ground. I mean what we say about that paragraph is that

Tipping J But there's a prohibition subject to the exception, so the case effectively must turn on the exception mustn't it?

Farmer Yes, yes, yes it does.

Tipping J So it's not really 81(1) that's the crucial point, it's 81(3)

Farmer Well

Tipping J Albeit that you have to see it as a composite whole.

Farmer I think the two could be read together, yes that's right, and I mean 81(3) as I understand it was a specific later enactment. I mean it was probably 13 then rather than 81, but it was a later specific enactment to deal with some problem about what was meant by, well there was some problem but I've just forgotten, but my learned friend Mr Green knows it backwards, but it's all intended to be consistent with 81(1). So what we really end up with is a sort of a, we end up with these things. We end up with a different rule for the Commissioner from the rule that applies to the taxpayer, and we end up with the position

Elias CJ Sorry, what do you mean that the

Farmer The taxpayer can't seek

Elias CJ Can't seek the information?

Farmer To put identity of other taxpayers into evidence, or require them to be disclosed on discovery. He can't do that, but the Commissioner can. We end up in a situation where

Elias CJ Well is that because the taxpayer isn't seeking to have access to the material for the purposes of the tax legislation?

Farmer Well presumably he is because he's wanting to have the Court come to a just result and it may well be that it won't be a just result if on the taxpayer's view of it, if the Commissioner puts in to evidence what might be regarded as incomplete material and then invites the Court to make findings on the basis of it. That's why the taxpayer would be saying 'well it's not only in my interest but it's in the interests of the whole system, including the administration of justice, that the Court should come to a determination where both parties are on some sort of level playing field to use that expression.

Tipping J But if it was relevant and the taxpayer could show that it was necessary, surely the Commissioner would have to disclose because he'd have the ordinary obligation and not be subject to the prohibition.

Farmer Well that doesn't seem to be what the Court of Appeal at least thought because over at para.83, and I'll read that to you. 'The difficulty exemplified by *Squibb* the Court said

Elias CJ Sorry what paragraph?

Farmer 83.

Elias CJ Thank you.

Farmer ‘The difficulty exemplified by *Squibb* arose out of the elasticity implicit in what is within the purpose of carrying into effect the Inland Revenue Act. It would be easy for a taxpayer to argue along the lines that the relevant purpose necessarily includes tax litigation which the Commissioner is pursuing or defending that litigants, including the Commissioner, must discover all relevant material and thus disclosure of third party taxpayer information can be required o the Commissioner if that information is relevant to the case. The Courts have simply not accepted this syllogism and in doing so have invoked the concept of public interest immunity’, and if I can pause there, against the taxpayer is what is implicit in that. ‘It is fair to say however that it is not entirely easy to apply public interest immunity principles alongside s.81’, so

Tipping J Well this is the product of this sort of overlay in getting it overly complicated. Why doesn’t one just read the words of the section and apply them?

Farmer Well that’s what I’m

Tipping J I know, I am not departing, on this point anyway, I’m sympathising with you.

Farmer Thank you Your Honour.

McGrath J I think the point though Mr Farmer is that the Court should sort of restate the rule in *Squibb* to say that public interest immunity is addressed, is exhausted if you like by s.81, and in particular 81(3), so that public interest immunity has no application at all and all is to be decided in terms of what’s necessary, just so that there’s no understanding. That’s one possibility that the way the Court would resolve this particular problem.

Farmer Well it could, I mean it could do it as a matter of in other words a pure statutory construction of 81, but read in the context of those sections 6 and 6(a) that we refer to and the Act as a whole.

McGrath J Of course, but that’s the way I think the Canadian’s have gone it would seem from the cases and

Farmer That’s fine so long as the section is read then, I mean the section has its, these provisions clearly have their origins in or they’re based on the policy that I’ve enumerated which in turn can be traced back to many many statements of principle that are contained in the cases as to the value and the importance of taxpayer secrecy in terms of

McGrath J But the cases do not go so far as I read them as applying to inhibit the Commissioner in relation to bringing home the tax liability of a particular taxpayer.

Farmer Well the Commissioner as we say somewhere else here, the Commissioner is not completely untrammeled. He can't for example get access to legally professionally privileged documents between the taxpayer and his lawyers, so the notion that the Commissioner somehow can do what he likes all in the interests of the due administration of justice with respect, is simply not fair.

McGrath J Well all I just want to do is to make sure that you're aware that I think as I understand the nature of the questioning from the bench in saying why can't s.81 do all of the work rather than public interest immunity. The idea behind that is something at least the Canadians seem to have pursued if I read their cases and materials correctly.

Farmer Yes, yes. Well the Canadian cases sort of in a sense go both ways. I mean they require an analysis that is not only complex but at the end of the day possibly not terribly helpful in terms of the way the Canadian case law and Canadian legislation has developed over time. We've referred to the Canadian cases and dealt with them in our written submissions and certainly you can read one or two of those cases in isolation and say yes that seems to be allowing, or giving far less weight to taxpayer secrecy as a value, but on the other hand you can read one or two of the others more recent ones where a different approach is discernable. Sorry Your Honour.

Tipping J No what I was going to suggest Mr Farmer was that quite without prejudice to the weight you give to taxpayer secrecy, I would have thought it was much more logical and avoids disharmony, or lack of syllogism or whatever it was the Court of Appeal said. If you simply deal with this all within the Act, what's expressed and implied in the Act, rather than having some sort of rather amorphous awkward overlay of public interest immunity. You get to the same result. The weights are the same but the analysis is much more straightforward.

Farmer Yes that may be and I'm always happy to take any sort of alternative kind of arguments to get me to the same result and in that respect, but my point I suppose is don't just look at s.81.

Tipping J No, no.

Farmer Look at s.6

Tipping J That's why I said within the Act, rather than within s.81.

Farmer Yes, yes.

Tipping J If the Act doesn't do the trick I don't know what more public interest immunity adds.

Farmer Well perhaps that takes you back to the kind of Sir Robin Cooke approach which is to say that one can find the spirit of public interest

immunity within the Act, and perhaps that's a third way of putting it, and I'm happy with that.

McGrath J The problem with the Cooke approach is it's an absolute approach.

Farmer It's what, sorry?

McGrath J It is an absolute approach as I understand Sir Robin Cooke's approach harking back to Lord Wilberforce. It's a class immunity approach.

Farmer Well with respect I'm not sure that's right because otherwise how could one explain his judgment in *Fay, Richwhite* where he did allow disclosure because the issue was a totally different one, so I'm not sure with respect

McGrath J But as you said he decided that really on the basis of the particular circumstances and the fact that there was legislation for the Commission of Enquiries Act that was being

Farmer But if it was a class immunity then he couldn't have done what he did in *Fay, Richwhite*.

Tipping J I think your best point on that is that His Honour's statement 9150 in *Squibb*, middle of the lefthand column 'as to public interest immunity the Commissioner claims this although not contending that it is absolute', but I'm not sure whether His Honour went further than the submission.

Farmer I'm sorry, it's

Tipping J 9150, lefthand column, about just over half-way down. 'As to public interest immunity' etc.

Farmer Yes, I mean interestingly it's worth actually just having a brief look at what the Commissioner did say in that case, because you'll

Elias CJ Sorry which

Farmer In *Squibb*.

Elias CJ Oh *Squibb.*

Farmer Because you'll find it actually, and we've put into the bundle of authorities the judgment of first instance, which was the judgment of Chief Justice Eichelbaum, and you'll find that in volume 1, tab 18, and in particular, and perhaps this indicates really a sort of different position that the Commissioner was taking then that he's taken over the years really from what he's taking now. So at 8177, page 8177

Elias CJ Sorry what tab was it again?

Farmer It's tab 18 in volume 1. And what is set out at 8177 is the affidavit that the Commissioner filed on discovery in *Squibb* and you'll see it at the bottom of the first column 'privilege was claimed in the following terms. The documents contained confidential information about other taxpayers. Privilege is claimed both on the grounds of public interest immunity and also pursuant to the provisions of s.13 of the Act', so there's the problem Your Honour Justice McGrath raised with me that there is the Commissioner at least on that occasion, relying on public interest immunity as a separate head as it were and I won't take that any further. And then there's a further affidavit the Commissioner filed and which he set out in A to D the various kinds of material that the Commissioner had in his files and C was documents identifying specific taxpayers providing confidential information, and the next paragraph says 'the Commissioner deposed it was imperative that such information should not be disclosed as to do so would be highly prejudicial to the other taxpayers given the probable commercial sensitivity of the information and the inference that could be drawn about the taxation affairs of such taxpayers'. He added that 'in relation to information supplied by other taxpayers on request to the Department, disclosure could lead to a reluctance on the part of these and other taxpayers to supply such information in the future'. So that's the voluntary compliance point.

McGrath J I suppose I was really thinking of the Sir Robin Cooke precedents observations in *Knight* at page 35 when he said 'accept that public interest would debar him from disclosing confidential information about other taxpayers' and he goes on to cite Lord Wilberforce.

Farmer I'm sorry, I missed the page.

McGrath J Page 35, *Knight*.

Farmer Yes, line 10 or thereabouts?

McGrath J Yes line 10 and the word 'debar' appears at line 18. 'I accept that public interest would debar him from disclosing confidential information about other taxpayers'.

Farmer Certainly Your Honour's correct

McGrath J At that stage anyway he was pretty absolute.

Farmer But whether that, yes

Tipping J Well those were back in the days when it used to be called Crown privilege and that's why the word 'privilege' is creeping in and it was deemed to be class as opposed to contents based, so it's a wholly different scenario now.

Farmer Well, yes one of the things I quite enjoyed preparing this case, possibly the only thing, was reading back through the days of *Duncan v Cammel, Laird* and *Conway v Rimmer* and *Robinson v The State of South Australia* and all those sort of cases.

Anderson J *Corbett v The Social Security Commission.*

Farmer Yes, *Corbett* indeed, and the comment was made I think by Lord Reid in *Conway v Rimmer* that he rather deplored the passing of the use of the term 'Crown privilege' for this new term 'public interest immunity', and could I commend to Your Honours the *Air Canada* case that my learned friend referred to this morning. The Court of Appeal judgment is in the report and there's an absolutely wonderful judgment by Lord Denning which he talks about the Three Musketeers who held the forces against the State over a period until they were rolled.

Anderson J Especially when it was Bluebell.

Elias CJ It sounds more like Horatio.

Farmer What I was just going to point out to Your Honour Justice McGrath was that I think you'll find in *Knight* that Justice Richardson actually takes an approach that is not different from that taken by The Learned President on that point.

McGrath J That's page 42 is it?

Farmer No, no, sorry, I've got it the wrong way around. In *Squibb* The Learned President agrees with Justice Richardson in effect, so whether that means that he saw *Squibb* in the same sort of light I'm not sure. Probably not. It means that maybe in *Squibb* he'd modified what you would call an absolute approach.

Tipping J I see as long ago as 1983 Lord Denning's reported as saying 'in recent years Heathrow has become very severely congested.

Farmer If he went there today he'd get a shock. So if I can perhaps move on fairly quickly because I don't know that I need to do much else. I think the issues are clear. On page 7 of our notes we've referred to a case that I think my learned friend Mr White mentioned this morning, which is *Sommerville,* which is a very recent House of Lords case, where these issues arose, but not in the context of taxpayers, they arose in the context of reports about prisoners' conditions, but the whole issue of public interest immunity was addressed, and what is interesting in that case was that there was evidence led on behalf of the Crown of other prisoners' conditions – this having been a complaint by one prisoner in the form of a Court proceeding – and that evidence of other prisoners was led, a considerable number of them, but in every case redaction, the technique of redaction was used

to protect their identity and there was an argument. What the case was really about was the extent of redaction but it was common ground that protection of identity should be preserved. I've dealt with the point about the complaint that the Commissioner should be able to lead all relevant evidence. In page 13 onwards I've dealt with that point I think, the sea-change point. Page 15, public interest immunity, I think that's all been with respect thrashed around this morning in a way that I can't add anything further from what's been said already. There is a section at the bottom of page 17 which is headed 'disclosing un-redacted documents but restrictive disclosure to counsel', and it's in the Court of Appeal judgment, there is a suggestion that really the Banks by refusing to agree to documents being given to counsel for some purposes were creating an unnecessary problem, but certainly Justice Richardson in *Squibb*, and again very strong passages from *Sommerville* in the House of Lords to the concept of trying to deal with these problems by making the documents available to counsel and then restricting further publication by counsel and a fundamental basis of that is that what on earth are counsel supposed to do with these documents? How can you get instructions on them, and speaking personally if I may from the bar, that is a very real issue that it's no use getting the documents if you can't actually do very much with them?

Blanchard J You couldn't even warn your client that there was a time bomb in there.

Farmer No, no. And then finally on page 18 there's a section which deals with the question of first of all the Commissioner's s.17 powers, and of course what you have here and in terms of whether the Commissioner is disadvantaged by having to maintain the secrecy obligation in terms of taxpayer identity in particular, the Commissioner's starts with a pretty good advantage over a taxpayer litigant because of course he will have been able to use his s.17 powers to get material from all sorts of sources and that material is exclusive to him and there may well then be issues, and there is a case that's in the casebook of *Vonelight Nominees v CIR* which deals with the issues about whether the Commissioner can continue to use his s.17 powers after litigation has been commenced and all the rest of it. I don't think we need to go down that track, but one of the points that is made in the Court of Appeal's judgment is that 'oh well why couldn't the Commissioner use non-party discovery also and issue a subpoena duces tecum to have material produced from other taxpayers, particularly if he knows already through having used his s.17 powers, he knows that other taxpayers have got material that he would like to use in the litigation, he can just seek non-party discovery or he can as I say issue a subpoena duces tecum, so why put him to all the bother of having to do that, why not just let him discover the material if he's got it under his s.17 powers anyway? And I think there are a number of answers to that, one of which is well the High Court rule should not be allowed to be used to

circumvent a statutory obligation, assuming he is under it, and if he were to do so he has of course, particularly with non-party discovery, he has to establish to the Court's satisfaction that it's necessary to have that discovery before an order will be made, so he has a threshold to cross anyway, but if he were to build on his s.17 material to then go out and issue subpoenas all over the place to circumvent what would otherwise be a secrecy obligation, then there would be an obvious abuse of process argument.

McGrath J Mr Farmer surely the Commissioner could argue it was necessary to issue those subpoenas if the statutory mechanism could not avail him in the conduct of litigation because if we were to accept your argument

Farmer Well if you accepted our argument then it wouldn't be the statutory mechanism that was deficient, it would be the substantive statutory prohibition that bit on him and therefore for him to resort to another mechanism to get around that substantive obligation we would say would be an abuse of process.

McGrath J To say it's an abusive process because you don't avail yourself of one opportunity to compel production of the documents from the taxpayer, but instead stay outside the tax legislation if you like. Use the High Court rules and get the documents straight from the third party, then I really don't see the force of abuse of process. The Commissioner would presumably be doing it to stay away from the tax secrecy zone.

Farmer Well I think the two situations we've got to address. One is where he never uses his s.17 powers, and that may be what you've just put to me, and in that case though to get non-party discovery, sorry yes non-party discovery where he doesn't know, has no idea at all what these other banks have got, he's got to make his case to the Court as to why he needs the documents and that's not an easy thing to do because of course the costs of general discovery on a non-party are immense and even though they

McGrath J Well it could be an application for particular discovery I suppose.

Farmer Well yes, but then he's got to identify with some specificity and just what it is he's after, and that's where perhaps a subpoena duces tecum might be the route he might want to go down, but if he did then the same issue is going to arise, albeit in a different context. So all I'm saying is that we don't accept the rather bald statement by the Court of Appeal that he can do these other things anyway so why not let him do it at s.81.

McGrath J Well it just seemed to me to be a point that needs answering and I hear what you say.

Farmer That's the second time what I've said has been heard, but that's alright. Well those are our submissions if the Court pleases.

Elias CJ Yes thank you Mr Farmer. Are you to go next Mr McKay?

McKay I think that's the case Your Honour.

Elias CJ Yes thank you.

McKay Your Honours I haven't prepared a written opening, only because I didn't have a great deal of idea where I'd be in terms of the issues of interest to Your Honours following my friend Mr Farmer's submissions. What I would like to do though if I might, I have eight propositions that seem to ANZ National needs to lie at or very near the heart of the issues raised by the appeal and with appropriate modifications as far as I can to accommodate the concerns Your Honours have indicated. I would like to address those on behalf of ANZ National. Both of them relate to s.81 and to issues that Your Honours have raised, the first of them I can approach by reminding the Court of I think Justice Tipping's characterisation, or at least a possible characterisation put forward by His Honour as to that awkward question that the Court of Appeal saw as being raised with reference to the relationship between s.81 and public interest immunity, and Justice Tipping's characterisation, or possible characterisation of description of the relationship was that well is it possible to look at it in these terms and I hope I'm paraphrasing Your Honour correctly, that for a variety of reasons, the policy of reasons that were articulated by my friend by reference to the cases, taxpayer confidentiality is of a high degree of significance in terms of tax administration. For the privacy considerations that the case is referred to, as an aid to voluntary compliance with the legislation, but again some of the authorities relied on including *Knight* and *Squibb* as bases for the significance of that taxpayer confidentiality notions. Justice Tipping then asked well that's the first base proposition, we're then asking in terms of s.81 what are the circumstances in which the Commissioner might be excused of his obligations with reference to secrecy and confidentiality and I think Your Honour suggested that well don't go there in terms of public interest immunity necessarily but simply say after making due allowance for the high degree of significance to be attached to taxpayer confidentiality, reinforced in 1994 by the terms of s.6 and s.6(a). Let us say that it therefore requires, or to allow, if I say rare or exceptional, I'm not saying that those were Your Honour's terms, but it requires a case of some real distinction or distinguishing or significance to step outside the ordinary confidentiality approach. Well if somewhere in all of that Sir is the type of possible approach to the interpretation of s.81 and the relationship with public interest immunity that Your Honour was suggesting, then from ANZ National standpoint, that is a perfectly satisfactory way of approaching both the interpretation of the section and its integration with any more or different public interest notions

that may float around the edges of it. Because it does preserve the two critical elements that all of the cases notwithstanding the differences and expression that they've employed, they've actually urged. The first of them is that the base obligation is that of the confidentiality of documents, but the second proposition supported by the obvious terms of s.81 and supported insofar as it may be relevant after this case by public interest immunity, is that there are some rare, exceptional situations where that confidentiality obligation is to be relieved. In ANZ National's view that is essentially what Justice Richardson was doing in those, again it's all rather awkward, the awkward descriptions in the *Squibb* decision to which Your Honours and my friend Mr Farmer have addressed, and if I just might take you back to them to give you at least ANZ National's slant on them. Of course Westpac's the common bundle. The *Squibb* decision is at tab 14 and the propositions in question are primarily at least on page 9160, and Your Honours this may be as eclectic perhaps as any other interpretation of what Mr Justice Richardson is actually meaning, but I will try and just summarise if I can how we see the various components of his judgment, starting with that paragraph beginning against a claim by the Commissioner of the lefthand side of page 9160. Clearly that paragraph beginning against a claim by the Commissioner contains a statement of two important principles. In the first of them, which is the first half of that paragraph against a claim, it does seem to at least in my respectful, that Justice Richardson is talking about in the language of what is now s.81. In my submission it's not inadvertent that he's referencing to necessary for the purposes of carrying into effect the Inland Revenue Act when he talks about compelling disclosure of comparative interest-free data. So that's a s.81 observation and it is obviously an observation that stresses the significance of the confidentiality obligations, because although expressed in rhetorical terms, it is nevertheless a statement of strength and emphasis as to the importance of the secrecy and confidentiality provisions. The second principle is one we can quickly pass over because I think in common ground with my friend Mr Farmer and the House of Lords, the notion of allowing disclosure to advisers is obviously as it should be, unacceptable. Then we pick up the next paragraph. 'The practical difficulty to separate out information identifying the other taxpayer, leaving as disclosable relevant information as to its business operation used for comparative purposes', and clearly Justice Richardson at that point is saying let's go through this information that the Commissioner has in his files. It's obviously useful information. It names the other taxpayers. It shows the details of their business affairs. It shows for example the amounts of expenditure that may have been incurred on various forms of marketing or other costs, and it shows profit ratios, and Justice Richardson's already expressed, and there's no dispute on this appeal that of course the Commissioner should and will have regard to that when he's performing his background, including ultimately his assessment functions. So Justice Richardson is saying the problem he has when he comes therefore in a discovery context is to take that

material that of course is identifying other taxpayers, but then in a discovery context to put it in a form that preserves secrecy and confidentiality yet nevertheless is useful for comparative purposes, and when he then says disclosure of that relevant information then as one of Your Honours indicated I think in terms of the discussion with my friend Mr Farmer, disclosure of that relevant information is the abstracted information. It's the information that is hopefully useful for comparative purposes but does not name or identify or identify the affairs of a particular taxpayer. So he's saying at that point s.13, or as we would say s.81 now, will not bar the release of those details relating to non-party taxpayers.

Tipping J There's a logical problem here.

Elias CJ Were you saying will not prevent barring those details?

McKay I possibly did but if I said it I didn't mean that.

Elias CJ Yes, yes, sorry.

McKay It won't be barred by s.13 or s.81 is what I should have said if I didn't Your Honour.

Elias CJ Aren't you also going on to say and it doesn't preclude the doctoring of the information to protect confidentiality?

McKay No, I've obviously confused you I'm sorry.

Elias CJ I'm sorry.

McKay No, the relevant information that Justice Richardson says is not barred by s.13. It has already been doctored. It's already been worked on to exclude the confidentiality will be separate material.

Tipping J Well that's where I say there's a logical difficulty here because if you've already doctored it, you don't have to doctor it again.

Elias CJ Yes.

McGrath J I think literally what you say has force Mr McKay, but then why is there any need for the restraint designed to protect the identification of the taxpayer's concerns when we get to the PII dyshr?

McKay Yes he then does go on to say that there are two constraints. One of them of course you don't do anymore than you have to and secondly you don't identify the original abstracted data without adjustment or organisation.

McGrath J Well putting aside the second one, why is there a need for the first restraint if you've already as you put it, if what he's referring to is

information that has been made anonymous in relation to particular taxpayers?

McKay My friend Mr Farmer referred to it as closing out the circle and I think with absolute respect to Justice Richardson that's probably about the best that one can do with it because in my respectful submission there isn't any doubt that when the s.13 hurdle is crossed in terms of his reasoning which is at the top of the page, he has already abstracted the taxpayer identity and affairs from that information, so in a sense his constraint is that of a double check. The other approach to it Sir, and these are all in the sense personal views because one does not know and one is making the best of a rather at this point dense judgment, you know, I don't mean dense in any disrespectful sense

McGrath J I don't have no quarrel with that.

McKay I think in my view that Justice Richardson has then moved to public interest immunity.

Tipping J But he's doing under public interest immunity what he's already done in order to get through s.13.

McKay He is repeating an exercise in the first of his propositions, that is a public interest immunity exercise as an overlay upon a s.13 hurdle that has already been met. Yes that's the best in my submission that one can make of it Sir.

Tipping J Well it doesn't leave much work for public interest immunity to do does it on that premise?

McKay No, but it leaves one area to operate Sir and that is in the next paragraph I think Justice Richardson clearly is talking about public interest immunity when he talks about his different and difficult questions may arise and Your Honours will have already addressed that paragraph in discussion with my friend Mr Farmer. You will recall that what Justice Richardson is doing in that paragraph is saying okay, snapshot of the positions we are once the discovery exercise is completed. We have some abstracted data. The data doesn't include the name or reveal the affairs of any particular taxpayer. What it does do for example is have profit ratios and the Commissioner is producing this table to say well the profit ratios by reference to certain expenditure classes were in my grouping, my anonymous grouping, 25%, and now as a matter of fact in the taxpayer before me the profit ratios are very materially lower than that and I say therefore that there has been suppression of income or there has been transfer pricing, of the transfer that the price of which the goods have been acquired have been far too high because the profit ratio is not nearly high enough by reference to the comparatives. Justice Richardson then contemplates the situation and this is very very close to *Squibb* itself as Your Honours will know, where the taxpayer says no, that may be an

inference that you draw by looking at that abstract data relative to my own profit ratios, but I'm saying that the practice, the accounting convention for example on which those other taxpayers would have calculated various expenditure items, or would have calculated their profit ratio, they would have been based on the following for example, general accepted accounting principles. For example marketing expenditure or insurance on the inward goods or something or anything would under those standards have been dealt with as in the following way, and that has a clear impact on the reasons why they seem to have a very high profit ratio. They would have been excluded from that. They would have been put in some reserve. But says the taxpayers or the taxpayer's advisers, it's different here. It's different with my taxpayer. I don't follow those particular accounting standards. My means of calculating my profits is not those that others would have followed and the inevitable result of that is that I bring those costs into the calculation of my profits and that's why my profits are lower and does exactly as the words of Justice Richardson says, he might well do at the hearing, and the Commissioner

Tipping J Well all that's very conventional Mr McKay

McKay I beg your pardon?

Tipping J All that's entirely conventional but you're not bound if you like by the average. But what I find more problematical is the idea that it should have perhaps been in another paragraph where he says different and difficult. Up to there it's very easy. Then when he says different and difficult, as my brother Blanchard mentioned very early this morning, isn't he then saying well if it's the Commissioner that's wanting to adduce this material then you've got different and difficult issues, not within the previous rubric.

McKay Yes, I was just coming to that section Sir in terms of my very long-winded absence of

Tipping J Well I find it illuminating but not really directed to the essential point.

McKay The essential point is that we now have a different and difficult question, because we have the Commissioner having produced the abstracted data in accordance with the s.81 obligations. We have the taxpayer responding in the manner that Justice Richardson says is open for him to do so and we are now faced with a different and difficult question, because the Commissioner is sitting there sort of boiling on the basis that the Commissioner knows from the Commissioner's information that he has kept redacted, or secret, or confidential, he knows that that's not how those taxpayers in fact accounted for those additional expenditures. So he's presented his abstracted stuff, the taxpayer has given him a very plausible explanation based upon expert accounting evidence as to why they're not really comparable at all because the accounting treatment for the

taxpayer's different than the norm. The Commissioner's got the real data – that's what he used to make the abstraction – and the Commissioner knows that the accounting principles that have been adopted by those taxpayers have in fact been entirely consistent with the

Anderson J How does the tax expert give evidence or advice that the accounting principles are different when the expert hasn't had any access to the other people's accounting principles?

McKay I'm sorry, I don't want to complicate myself on my own example Sir but I imagine there has to be a situation somewhat like this, and this is also square. Where the accounting expert is able to say these are generally accepted accounting principles. This is how we can assume that these multi-national, or subsidiaries of multi-national drug companies would have created their financial account. I can tell you that's the norm. My taxpayer's different and of course as long as he can demonstrate his taxpayer is different from the norm, he at least in some sense is shifting some form of, if not an onus back to the Commissioner, he's at least putting forward an explanation that may be more or less cogent in the circumstances as to why the comparative data at an abstracted level is not the king-hit that the Commissioner actually regards it as being, and not the king-hit the Commissioner knows it actually is when he looks at the data because these taxpayers on the hypothetical have in fact, if he could only get the actual documents names and affairs in, have in fact done exactly what the taxpayer in issue has done.

Tipping J Is this a rebuttal sort of concept?

McKay Yes.

Tipping J But is that it the nub of your submission that the Judge was referring to a circumstance to rebut what had gone on in the previous part of the paragraph?

McKay That may well be so Sir but I was going to put it in a slightly different context than that. I was going to say the difficult and different questions, harping back to my attempt to try and rationalise this whole section in terms of where s.81 starts and ends and where public interest immunity commences, that my submission was that as a matter at least of likelihood Justice Richardson is talking about a role for public interest immunity post-section 81 on the basis that difficult and different questions of the character that he's addressing do arise at least with an element of frequency

Blanchard J But wouldn't you just return to s.81? You wouldn't drift off to public interest immunity. All it is to simplify it is the Commissioner wanting to use the un-redacted material to contradict something that the taxpayer has put in.

Tipping J And it would then be necessary.

Blanchard J And you'd go to s.81 and say well how does it work out? Test it against s.81.

McKay Yes, Your Honour I'm not saying that that's not a view of the law that might have been possible at the time which these judgments, particularly in *Knight* and *Squibb* were given. I'm certainly of course not saying Your Honours that that's not a view of the law that is not open to you, but I'm saying that on the basis of the propositions and the legal authorities that this case has necessarily been argued on in the High Court and the Court of Appeal, that simply isn't the approach that the Courts have adopted. There has been a very clear distinction

Blanchard J Yes, but we're not bound by that.

McKay No Sir and I'm not suggesting otherwise but I am saying

McGrath J And you're not taking exception to us adopting a sort of s.81 does it all approach as I understand your first proposition.

McKay No not at all. I'll come to that Your Honour soon but like my friend Mr Farmer I think it would be critical if Your Honours were to, and please don't take me wrong, but if you were to rewrite the law in that respect, it would be critical.

Elias CJ In what respect, sorry?

McKay Sorry, if you were to rewrite the law Your Honour by saying look this public interest immunity is something of an overhang, a public interest immunity working in some form of conjunction with 81(1) and 81(3) is simply just intellectual befuddlement and it does lead to problems of the character, even Justice Richardson has experienced in my respectful submission in the *Squibb* judgment. If you were to take that course and look at this purely as a matter of interpretation then it would be important as my friend Mr Farmer suggests that obviously the interpretation you give and the concept particularly of necessary is one that is of course fully informed by reference to s.6 and to s.6(a) – that is fully informed also by the background but at the extent to which Your Honours will be tolerant for me taking you through it, but the background of this whole tie-in between voluntary compliance and to the secrecy obligations, but fully informed in that way, yes there's no problems from ANZ National standpoint in seeing this as a matter of interpretation, but there is a lot of gloss and gilding of the word 'necessary' that I think Your Honours would be obliged to put forward in your judgment.

Anderson J I think s.6 is a very useful indication of the elements to be considered in relation to necessity, and s.81 doesn't simply say for the purposes of gathering tax

McKay No Sir.

Anderson J It's for the purposes of the statutes and s.6 is a very useful indication if it's underlying themes.

McKay Well on that basis Your Honour must, I'm sorry Sir, I was going to say you must overrule the Court of Appeal because their interpretation of s.81 is one that does see the function as being to collect that's why

Anderson J Well that's why you've come here, you've come here for us to do that.

McKay Indeed, we've come here to protest Sir at this uneven, very much one-sided interpretation where the Commissioner is conferred a power by the Court of Appeal to pick and choose and discover when it suits his purposes and the poor old taxpayer sits back and like the taxpayer in *Squibb*, is faced with information that is clearly relevant – the highest order of relevance - no doubt about that in the *Squibb* case, and the Court accepted that information as relevant and said no you don't get your hands on it.

Tipping J What would be wrong Mr McKay in construing the word 'necessary' as having this connotation 'necessary in the light of the importance of confidentiality?' I mean there are various ways one can rewake that proposition, but isn't that really what this is all about, that you only overrule confidentiality if it's really important or necessary to do so?

McKay Yes it's consistent but I say yes to that Sir given that my attempt to summarise the form of argument, possibly like you were putting forward before, said you start with confidentiality and it takes something rare and quite exceptional to break out but

Tipping J Well I'm not sure about rare and quite exceptional but that's a nice little gloss on my language, but no doubt that's the way your client would wish it viewed, but this general approach so that people don't overlook the importance of confidentiality, so if they're tied together but the ultimate decision presumably for a trial Judge will be appropos of a set of documents or an individual document identifying a taxpayer other than the one in issue. He has to be satisfied and it truly is necessary but bearing very much in mind the importance of confidentiality.

McKay Sir I suppose I'm simply anxious that the importance of confidentiality is not put in some subordinated

Tipping J It's not parenthetical, it's an integral part. It's why the necessary test is there.

McKay That's right Sir, I was simply about to make the point that of course what s.81 is, is a prohibition. We've already got the statutory prohibition and what we're talking about there now how limited are the circumstances because no one is doubting that they're limited until the Court of Appeal in their para.71, but we've got the prohibition. There is a basis for the Commissioner being relieved of that prohibition. If we simply define the basis on which the Commissioner was to be relieved of the prohibition as simply a reference to confidentiality, that with respect Sir is not an add-on, because that's the whole context of s.81 to start with. I would respectfully suggest that if Your Honours were to adopt this approach you simply have to do more than that and you have to gloss and gild and embroider your analysis of the exception to the confidentiality and obligation

Tipping J Would we also have to read into the tale piece of ss. 1 where it says 'except for the purpose of' carrying into effect, except where it is necessary in that same sense for the purpose of carrying into effect, because that test 'except for the purpose of' seems a distinctly lower threshold than the concept of necessity.

McKay Well as interpreted by the Court of Appeal in their para.71 it's now virtually a nothing of a test, it's certainly nothing

Tipping J Well never mind that Mr McKay, but appropos of what you're inviting us to do, would you be inviting a sort of read back in of the necessity concept into the exception to ss.1, because at the moment they don't seem to have precise parallel. They're dissonant in a sense.

McKay In a sense that's right Sir, and it's another one of the awkwardness' of analysis of s.81, but the Courts as my friend Mr Farmer intimated, have proceeded at least to this point on the assumption that although the word 'necessary' is there in s.81(3) and not in s.81(1), nevertheless you read in the word necessary to ss.1 and that's certainly the approach that the Court of Appeal took in this case, and it's also the approach, and I'll just make sure I'm not mixing up *Squibb* and *Knight*, it's also the approach that the then President I'm sorry, President Cooke took in *Knight's* case when he talked about them in terms of quote his words 'much the same wording'. Although it may be another one of the historical illogicalities or whatever with reference to s.81, the word necessary has effectively been read in as a matter of practice into ss.1, so again I'm sorry to be awkward, but no Sir, I don't think it would be sufficient if part of an exposition of s.81 as a whole was simply to do the task of necessary in 1. It's effectively already there. I think the judgment would rather have to give guidance informed by a number of considerations including 6 and 6(a) and the emphatic support of the significance of the confidentiality

application in the past cases in terms of encouraging lower Courts to actually be reading or building in those matters into a s.81 analysis.

Tipping J Is there anything, sorry, is there anything to be had Mr McKay, and I have to acknowledge by relative lack of experience in this area, is there anything to be had by the fact that ss.1, the exception, seems to be addressed to voluntary disclosure, and ss.3 seems to be directed to involuntary disclosure as witness the word 'required' to produce? Now this may be a total heresy but it's something I would want to have some

Elias CJ Well I was wanting to raise that too and also wanting to flag that I will need more assistance with the scheme of the legislation because while very much attracted at one stage to the view that s.81 covers the whole field here and that it's not necessary to grope for an additional step whether invoking public interest immunity or as I think might well be argued, a separate principle from the legislation of confidentiality. Listening to Mr Farmer, who I know was supportive of that to a certain extent, I've been left in a lot more doubt about the scheme of the whole legislation and this question of use of information by the Commissioner in the context of the Act as opposed to ss.3 which is about whether an officer may be required to produce material, and wonder whether there is a difference or whether require covers both use and be compelled to use.

McKay I'm just trying

Elias CJ Are there other provisions in the Act to do with use of information?

McKay There are two and I won't fully answer Your Honour's question, but there are two I think certainly statutory elements or features of the surrounding matrixes as it were to s.81 which Your Honour might find at least of some, perhaps limited assistance, but at least it's inching towards the broader statutory context. Having said that I've lost my casebook Your Honour but I think

Tipping J Is it other provisions in the Tax Administration Act that you're going to

McKay One set of them, yes. One of them is part of the context of s.81 itself and I'll take you to those first if I might Your Honours. At tab 1, which is the legislation tab of the Westpac casebook, Your Honours will see starts out with extracts from the Tax Administration Act and Your Honours I'm not going to take you here because this is out of the sequence and not directly responsive to Her Honour The Chief Justice's question, but Your Honours will see that their s.6 and 6(a), you will see that item (c) or para.(c) of s.6(2)(c), 6(2)(e) relate to confidentiality matters and since I have taken you there and we're passing, let's look at 6(a) if we might Your Honours. 6(a)3(b), which is an element of the Commissioner's duty to have regard to the

importance of promoting compliance, especially voluntary compliance by taxpayers with the Inland Revenue Acts, and again if I just

Elias CJ That is tied into collecting taxes of course?

McKay Oh indeed.

Elias CJ Section 6(a)3, rather than use of information.

McKay Of course it is Your Honour of course. It indicates on its face though that collecting taxes per se is not the only value, rather the whole burden of s.6(a) is to collect over time the highest net revenue practicable within the law. In other words it's as much an efficiency consideration as any other. Your Honour moving over to s.17, just setting part again of the statutory framework, my friend Mr Farmer referred to s.17 and that of course if the Commissioner's primary information gathering power in terms of the Tax Administration Act and you will see that half a dozen lines down there the powers it confers are also reference to consider as necessary or relevant and that's the breadth of course of the s.17 power that my friend Mr Farmer was referring to when he considered the possibility of an abuse of process for material that's already been obtained under s.17, but the Commissioner knows it exists because he's got it under that provision that in the event he was precluded by s.81 from using it, to have regard to alternative or secondary means. But that's s.17. Two pages further over we come to s.81. Officers to maintain secrecy, and as Your Honours have intimated and as I've suggested to you it is structured in the form of an obligation on the part of the Commissioner and his officers to maintain secrecy in all matters that come to the officers' knowledge and its prohibition on disclosure of all communication of those matters except for the purpose of carrying into effect the Acts referred to, the Inland Revenue Acts. The immediate element of the context of s.81 that I think in response to Your Honour The Chief Justice's question to me, you may find helpful is with reference to s.81(4). As a matter of history and this is very much a broad overview Your Honours, but as a matter of history, s.13 and indeed the forerunners to the old s.13 were primarily confined to what is now s.81(1). In the course of a legislative change that my friend Mr Farmer referred to, s.81(3) was introduced as effectively as a non-comparability provision, but Your Honours will see that it is prefaced without limiting the generality of ss. 1, so it clearly isn't in itself offering out any form of exception to the primary provision. But if Your Honours then look at 81(4), also as a matter of history it became one imagines with certain elements at least of the growth of various elements of the welfare state and an extension of state responsibility, and extension through both the welfare and related systems of the need to obtain information with reference to taxpayers on the basis that certain benefits as Your Honours know better than most, are means or otherwise financially tested, and of

course there was benefit fraud or other abuses of the social welfare or the tax system, pressures came to divulge information held by the Commissioner of Inland Revenue for tax purposes to other state agencies for the purposes of various testing and proofing and the like. They are I might add exactly the same pressures as those experienced in the United States, and I'll talk briefly about the United States experience with your leave after lunch. But as the list that began initially and is now expansively within s.81(4), came by way of authority for the Commissioner, to effectively permit or conduct activity that would otherwise bring a breach of 81(1), because he was divulging information that came to him in his official capacity, as that pressure grew the need for statutory authority for the various forms of divulgence or communication was also perceived by Parliament. So the practice has grown up but on each occasion there is seen to be a need to communicate further information to another Government department, then that is specifically contemplated and sanctioned by this growing list of statutory exclusions to 81(1). It's a very long-winded way of making the point, the main point of taking you there Your Honours. If Your Honours think back to that para.71 of the Court of Appeal's judgment, and the Court of Appeal's interpretation if necessary, or the concept of carrying into effect the Inland Revenue Acts, the Court of Appeal's approached confers a power or discretion upon the Commissioner to determine when it is necessary or to determine what is by way of discovery, carrying onto effect the Acts. Now Your Honours if that was in fact as a matter of ordinary or even remotely permissible statutory interpretation one would surely have expected to find something in the language of s.81(1) which was the basis for a discretionary or power related interpretation, because to a certainty Your Honour you can find it in 81(4), because most of the provisions here do involve

Elias CJ But these are disclosures to other agencies. I was really inquiring about the use that the Commissioner can make for the purposes of the legislation. Is there any other provision or should we be looking at the functions of the Commissioner for that?

McKay I'm sorry if I misinterpreted Your Honour's question. These are certainly overwhelmingly related to other departments of state and

Elias CJ Yes.

Blanchard J They're not things that would be done for the purpose of carrying into effect the Acts.

McKay No.

Blanchard J So they need to be listed. They have no significance other than that.

McKay Other than in this respect Sir, in my respectful submission they do have a significance of showing that when Parliament intends the

Commissioner to have power apart from his statutory secrecy obligations as a matter of power or discretion, they say so.

Blanchard J I don't think they show that at all. They're simply examples of the Commissioner being authorised to make disclosures, which are not for the purpose of carrying into the effect, the Acts.

McKay Yes, so they're put in terms Sir when may he make disclosure, when the Commissioner considers it desirable. When the Commissioner considers it's not undesirable, or when the Commissioner considers it desirable for the purposes of any investigation and the like. That's the language of discretion, or that's the language of power. My point perhaps is a narrower one than Your Honour The Chief Justice had in mind, but my point is that language is completely absent from s.81(1) yet the Court of Appeal has read in in it's power or discretion para.71, has read in that type of language, that type of power into s.81(1) itself.

Anderson J What we have here is a focus on s.81, ss.3 because an order has been made

McKay In discovery, yes.

Anderson J So that's why it applies, but the more difficult question is what if there is no order and the Commissioner wants to introduce information relating to another taxpayer

McKay Yes.

Anderson J Where is the authority for that, and I think that's the most difficult aspect of the case.

McKay ANZ National's focus understandably I hope Sir is that independently of the Commissioner's authority, is that there is a prohibition on him doing so. So because the prohibition applies he has no authority.

Anderson J I understand that because here there is an order for discovery which has to be complied with, but there is unlikely to be an order for introduction into evidence for example

McKay He complies with, I'm sorry Sir.

Anderson J That will be a decision by the Commissioner and the question then will be is there a public interest immunity or statutory prohibition for introducing that into evidence, because s.81, ss.3 will not be applicable at all.

McKay The only obligation Sir that's ever been put in issue at least in the High Court and the Court of Appeal is the Commissioner's contention at least that he was under an obligation to comply with obviously the High Court rule with reference to discovery. Well that's easy, he

complies with the discovery obligation by putting the third party documents, or documents that would reveal the identity and affairs of the taxpayer in the confidential part of his discovery list, so he's complied with that. The debate then has obviously moved on because the Commissioner effectively is no longer contending that that obligation means he's got no discretion to disclose. He's now saying with thanks to the Court of Appeal that 'I do have a power, there is a subjective element in the interpretation of s.81. At least in part it's my purpose; it's what I want to do; the view I take as to whether these documents should be disclosed. So on one hand the Court of Appeal has said to the Commissioner our interpretation of s.81 at least puts an element of your subjective purpose as a component of the term 'necessary'. Don't act in an inappropriate manner otherwise you'll be stepping outside your power.

Anderson J So the focus now must be on s.81(1) with reference to 'except for the purpose' of carrying into effect the Acts.

McKay Yes it's a long-winded way of saying yes Sir, the obligation I think has been discharged in terms of the High Court rules. The question now is effectively one of the interpretation of 81(1) with whatever help, if any, public interest immunity as a *Richardsonian* follow-on as it were, might be or not be. I'm sorry Ma'am I've taken you well beyond

Elias CJ No thank you, that's helpful. We'll take the adjournment and resume at 2.15pm.

1.06pm Court Adjourned
2.21pm Court Resumed

Elias CJ Thank you. Yes Mr McKay.

McKay Thank you Your Honour. Your Honour I have a very slim supplementary bundle of authorities that I should have of course handed up at the commencement of my submissions to you. I wonder if I might do so now. There's only one authority that I would propose to take Your Honours to shortly.

Elias CJ Yes, thank you.

McKay Your Honour The Chief Justice you asked me before the luncheon adjournment whether there was anything in the statute that regulated or restricted the use of the information that the Commissioner might obtain pursuant to s.17 or his other powers, I gave you a very long-winded answer that didn't go anywhere addressing your response. The answer if I might just say so in one word is no.

Elias CJ I was really asking for what use he could make and whether there was anything in the statute that described that. No.

McKay No, and if I elaborate on that

Elias CJ Yes, thank you.

McKay I'll just take up more of the Court's time.

Elias CJ Yes thank you, yes that's fine.

McKay I was considering over the luncheon adjournment a question that obviously is regarded by the Court of being significant and obviously from ANZ National's standpoint is also significant, and reverting to it very briefly if I might, and that is the question of how much weight in any possible re-definition or reappraisal of the approach to considering secrecy and confidentiality matters, how much weight would be given or should be given to the confidentiality concern that underlies the prohibition in s.81. Briefly if I might I would just propose to summarise a broad range of considerations that suggest that that weight is in fact a great deal and that when I was bold enough to suggest to Justice Tipping that it would be in fact any new test, should be reformulated in terms of a rare or exceptional circumstances where the confidentiality obligation in terms of s.81 would be overcome. It is in my submission possibly the case that those descriptions are in fact fair if one does weigh up the range of matters that suggest the significance of the confidentiality imperative. And just listing them briefly if I might, one starts out with s.81 itself, which is of course as I stressed to Your Honours before the luncheon adjournment is itself in terms of an obligation to preserve confidentiality. There is secondly the consideration that two of the six elements that are singled out in s.6 as being props upon which the integrity of the tax system rests are obligations relating to confidentiality owed by the Commissioner to taxpayers and are the rights of taxpayers to confidentiality, vis a vis, the Commissioner himself. Thirdly we have the authority of Justice Richardson, supported by a full Court in *Squibb* who, if I might respectfully say so, talks in Justice Richardson's usage at least, is a high degree of emphasis in terms of the importance of confidentiality, particularly in his phrase 'could it ever be necessary for a taxpayer to seek access and to obtain access to other taxpayers' information'. Fourthly we can move if the Court is interested in doing so to the United Kingdom, because there albeit in the context of public interest immunity rather than the statutory equivalent to s.81, the United Kingdom Courts have on a number of occasions stressed the significance of the public interest immunity as they see it that attaches to taxpayer confidentiality, and have talked in terms of in their phrase 'the strong grounds being required' in order for that confidentiality not to be complied with or observed by the Commissioner, and just briefly to demonstrate the point if I might Your Honours, can I take you quickly

to the case of *Lonrho*, the English Court of Appeal decision which is set out in tab 25 of the appellant's authorities – *Lonrho v Fayed*. The case concerned arose from an issue relating to whether on discovery *Monroe PLC* was entitled to obtain access to tax returns and other tax information of the *Fayed's* relating to the financing of a particular acquisition by the defendant. The contention put forward by the *Fayeds* was two-fold. It said the tax returns and other correspondence with the Department of Inland Revenue relating to that tax position, that those documents would have been subject to public interest immunity in the hands of the Inland Revenue and because they were subject to public interest immunity in the Revenue's hands, a form of public interest immunity then extended to the documents in the taxpayers' hands and accordingly even though the taxpayers had the documents in their possession they were effectively privileged from discovery obligations on the basis of a public interest immunity, and the Court through Sir Thomas Bingham on page 788 of the report on the lefthand side expressed two principles. The first at the top of the page relating to

Elias CJ Just wait a moment while we turn to that please.

McKay I'm sorry, it's page 788.

Elias CJ Yes.

McKay So do you have it? I'm sorry. In the first full paragraph on the lefthand side at page 788 in the paragraph beginning 'in my judgment', and this is where the Court is addressing the issue of whether public interest immunity attaches to documents in the Revenue's hands. 'In my judgment Mr Sumption's argument on the first issue is correct. I think that a claim made by the Revenue to withhold documents relating to a taxpayers' tax affairs from production without his consent is properly to be regarded as a claim for public interest immunity. What matters more than the label is the practice and in this instance the practice seems to be very clear for the reasons which Lord Reid gave and that's in *Conway v Rimmer* relating effectively to privacy. The Courts will give very great weight to preserving the confidentiality of such documents in the hands of the Revenue. They will override that confidentiality only if according to several principles the applicant shows very strong grounds for concluding that on the facts of the particular case, the public interest and the administration of justice outweighs the public interest in preserving the confidentiality of the documents.

Anderson J Is there an equivalent of s.81?

McKay No.

Anderson J Well I don't see how that helps us very much.

McKay It helps us Sir because the same considerations that underlie the United Kingdom approach to public interest immunity with reference to documents in the Revenue's hands, on the line of thought that at least has been discussed by some of Your Honours, those considerations would converge with what we would regard as s.81 considerations. My point is simply that if the public interest factors that are being identified by the Court of Appeal here place very strong emphasis upon confidentiality and require proof of very strong grounds before it's going to be in any sense over-risen, then in my submission that would inform Your Honour's view of when it is necessary for the purposes of the Act to breach the confidentiality or permit the breach of a confidentiality requirement in some greater, if I might call it that, or wider a more encompassing s.81 interpretation.

McGrath J This is a case of civil action between two citizens in which one was trying to get via the Revenue, tax documents of the other?

McKay No, they were trying to get the documents directly from the other, the *Lonrho* people

McGrath J But they failed, that didn't work out though did it?

McKay There line of reasoning though Sir, no, it was only ever a contest between the *Fayeds* and *Lonrho*, but the line of argument went well it's true that the documents, says the *Fayeds*, it's true that the documents are in our possession. It's true that they might ordinarily be relevant, as they probably were be discoverable

McGrath J Yes.

McKay But a public interest immunity attaches to those documents because in the Revenue's hands there's a public interest immunity and if we were to reveal them or to discover those documents then that would be in breach of the public interest immunity, and the Court of Appeal on the second point said no way, they said none of the theories that require a public interest immunity to documents in the Revenue's hands would permit or require the extension of that to the taxpayers own documents in their hands, and it's from that Your Honours that the references that Your Honours might well have seen in the submissions primarily to the *Fay, Richwhite* judgment when Justice Hardie Boys and Justice McKay in this case both refer to the fact that there is no confidentiality possessed by a taxpayer in their own tax affairs. *Lonrho's* second proposition is directly relevant to that, because *Lonrho* stands for precisely that proposition, vis a vis, a taxpayer and either another taxpayer or a third party, not the Commissioner, or a Commission of Inquiry, a taxpayer cannot claim confidentiality with reference to those documents in terms of complying with obligations to discover. It's only if the Revenue's possession of them and the secrecy and confidentiality obligations that are attached to the Revenue's possession of those documents could on some basis be

extended that the taxpayer can put forward their claim. They put it forward and they failed in the *Lonrho* case. But what *Lonrho* does support is the base proposition that in ANZ's submission at least that very strong grounds are indeed required in order to overcome the confidentiality obligation.

McGrath J Mr McKay, the more I hear these cases I just wonder if context is everything, but can I ask you this, is there any case where the principle of confidentiality has been upheld where taxpayers defending a claim for tax against the revenue and it's resisting the release of third party information that it holds?

McKay I'm not aware of one Sir.

McGrath J Because that's our case isn't it?

McKay No our case is *Squibb* Sir.

McGrath J No your case, you're endeavouring to, I mean I'd be concerned in this case with resisting - your concerned with resisting passing over third party information in defending a tax proceeding.

McKay Yes on the basis of the confidentiality of those documents.

McGrath J That it seems to me is a different context from really everything, including *Squibb.*

McKay Yes Sir, a direct answer to your question, I'm aware of no case exactly that has the elements that Your Honour's describing.

McGrath J So I'm just really wondering about all these pronouncements about how strong the principle is don't really help us decide whether it's strong in the particular context we have to address the application of the principle.

McKay Well Sir I think that the *Gamini* case comes reasonably close. Might I take you there? In the nature of things perhaps it's fair to say Sir we probably would not be here at least if there was an authoritative decision that interpreted our own or a foreign equivalent to s.81 in precisely our situation, so all of the analogies are extracted aren't they to a certain extent. But *Gamini* perhaps comes closest Sir if I might take you there because it is

McGrath J Well that's very close to *Squibb* isn't it?

McKay It's perhaps closer to us Sir in the sense that a lot of the directions, or a number of the significant directions on the part of the Privy Council in that case clearly had their eye on the Commissioners within Ceylon and were addressing their conduct in making a form of discovery of a document called R14 in that case. It certainly is on my list of matters

that I think should be taken into account to show how strong the confidentiality claim is, so it's appropriate to take you there if I might.

Blanchard J Just before we go there

McKay Yes.

Blanchard J Did I misunderstand you, I thought you said that in England there was no equivalent of s.81.

McKay That's my belief Sir I'm sorry if there is

Blanchard J Well looking at *Lonrho*

McKay Yes.

Blanchard J At page 786 there's a reference to the Taxes Management Act 1970 s.6 in schedule 1 which seems to be the secrecy provision and I noticed Lord Justice Leggett at page 792 at line B talks about the confidentiality is itself exacted by statue.

McKay Yes. Sir, I'm sorry, my understanding of the United Kingdom provisions, and these are found in my belief in every broadly Commonwealth jurisdiction dissenting from the United Kingdom Tax Principles at least. That's the Oath of Secrecy provision Sir, but it's not a provision like s.81(1) that governs or permits in certain circumstances the disclosure of documents in the Commissioner's hands in accordance with the criteria and similar to that used in our provision.

Blanchard J Well with reference to on page 786 'make a solemn declaration they won't disclose information etc, save for specified purposes which include compliance with legal requirements'. What are those?

McKay I don't know Sir. My understanding would be that they do not include a requirement in terms of necessity for the purpose of the carrying out of the Income Tax Acts, but the oath of secrecy certainly, the basic confidentiality obligation, yes.

Blanchard J Alright, thank you.

McKay No thank you Sir. May I move on to briefly since I'm aware of the passage of time

Elias CJ It's a funny sort of disclosure here isn't it? My mind is sort of running on that

McKay Yes.

Elias CJ They're not really disclosing it, they're using this information

McKay Yes.

Elias CJ And it's only coming out into a more public forum because of the judicial review proceedings?

McKay No Ma'am, it's coming out Ma'am, it's coming out in a more public forum because in defence of the challenge brought by ANZ National to the assessments that the Commissioner has issued, the Commissioner is seeking to discover in those challenge proceedings

Elias CJ Yes in the challenge proceedings, sorry.

McKay I'm sorry, yes I didn't mean to be pedantic, no I'm sorry. Yes that is the context in which the Commissioner seeks to use the other Bank documents against ANZ

Elias CJ I just really wonder whether that is disclosure.

McKay I suppose it only has that focus Your Honour because these issues are arising effectively at the discovery stage of the case management. The term is also being employed I imagine because of course *Squibb* itself was a discovery case explicitly and the rules laid down by *Squibb* were particularly referenced by Justice Hardie Boys in *Fay, Richwhite* to being in a discovery context, and I suppose that's just simply a lame description of why it is that there is an emphasis on the discovery and inspection of these documents. That's the stage we're at Your Honour.

Elias CJ Thank you.

McKay *Gamini*, which I will take you to very briefly, is at tab 20 of volume 1. I suggested to Justice McGrath that this was a case where to at least to a substantial extent the focus of the Privy Council's and the lower Courts inquiry was on the conduct of the Commissioner rather than on the wants of the taxpayer. It's easy to gain the impression I think that the Privy Council wasn't all that hopelessly impressed with the behaviour of any of the participants in the litigation. The actual taxpayer was a Bus Company, who the local Commissioners were certain had suppressed profits. The other Bus Companies, the comparatives in respect of which were used to get the taxpayer facing a certain burden in terms of its very low profitability is relative to everybody else's. They'd all been suppressing profits too, so what the Commissioner did with the other companies in order to form the comparatives was reassess them, say the other five in the area, reassess them and use the reassessed comparatives to say to the one remaining taxpayer we think by reference to those reassessed comparatives you have suppressed income. Now it doesn't say much as the Privy Council observed for the conduct of the Bus Companies, nor were they particularly impressed with the conduct of the local

Commissioners and there clearly was a concern that this was a guilt by association case that the reason why the relevant information that's the subject of a dispute that I'll hone in on a minute, was actually before the Courts, was in fact tainting. It was to say by reference to others who have understated their income; you must have as well. And the Privy Council understandably had very strong language about guilt by association of that character. But it also made some particular comments of relevance to us. All the issues in this appeal are by reference to the obligations that it saw as attaching to the local Commissioners of Inland Revenue, and these observations are on page 579 of the report, and I just note before I turn to them Your Honours if I might, the quotation at the top of the righthand column of the page sets out the terms of the local Income Tax Ordinance and Your Honours will see that at least in so far as the obligation elements of the provision, it is very very similar, in fact materially identical to s.81 itself save that it does not have the carve out except for the carrying into effect of the Inland Revenue Department Acts, but the core obligation is very much the same. And you'll see, if Your Honours just go down to the next section of that paragraph, a reference to a document like R14. R14 was a document that the Commissioners, the Celanese Commissioners developed that show the comparatives that I described. It abstracted the data relating to things like profit margins and the like and then it sought to compare and draw negative inferences from that data relative to this particular taxpayer's profits as returned, and the question before the Privy Council, and it had a number of manifestations to it, but the essential question was whether or not in acting in that way the local Commissioners had breached the obligations of confidence that were owed by them in terms of s.41 of the Income Tax Ordinance. The relevant principle for the purpose of the current appeal Your Honours is a principle that's expressed by Their Lordships at two-thirds of the way down the page when after summarising the effect of R14, and pointing out that it didn't in fact make disclosure of the affairs of any persons because it was abstracted, Their Lordships observed Their Lordships would strongly deprecate the production, and I emphasise the word 'production' if I might, the production or use of such a document if it did in fact disclose information about other identified or identifiable taxpayers, and that is an intimation that at least in terms of the spotlight that was in this focused on the Commissioner himself or themselves, the Privy Council at least saw the obligation of confidence and confidentially imposed by s.4(1) certainly as directly applicable to the Commissioners as relating to their production of a document and to that extent in response to Justice McGrath's query, it does at least come a little closer to the facts of this case. It is pressure being put on the Commissioners, that's the spotlight on them, because they want to make use of this R14 and the question before the privy Council 'well what other criteria or conditions pursuant to which they can make use of such a document. I must stress they were ultimately held not to be in breach, notwithstanding that the Privy Council was clearly worried about a number of elements of that document and why

it was produced and the like, but they were not in breach by using it because it did not identify particular taxpayers but a very very clear admission from the Privy Council that they would deprecate the production or use of such a document if it did disclose information which identified taxpayers.

Tipping J How does one reconcile that with the 'except in the performance of his duties'? I mean it's a very sort of absolute statement but I find it very hard to understand this Mr McKay I'm afraid. You're going to have to help me there. Surely they can't be deprecating it if it's in the course of performance of his duties, because that's what the statute expressly allows.

McKay Justice Richardson, using a similar phrase in *Squibb* that I'll come back and paraphrase in a moment

McGrath J But that exception's not in the statute that the Privy Council was looking at

Blanchard J Yes it is.

McKay No, that's correct.

McGrath J That's correct, so the strong deprecation is in the context of a s.81 without s.81(3)?

McKay I think my friend Mr Farmer is telling me it's there.

Blanchard J It's right at the top of the page, 'except in the performance of his duties'.

McKay 'Except in the performance of his duties'.

McGrath J Oh I see, sorry, it is, thank you. I can see that case gives you some mileage Mr McKay.

McKay And if I might just in response to Justice Tipping's question, the Privy Council is clearly saying, and I think they would put it forward probably as a matter of statutory interpretation though that doesn't matter, but it cannot be in the performance of the duty to actually make disclosure of this character.

Tipping J Well that doesn't make sense because the whole thing is you must keep confidence except in the performance of your duties.

McKay But the performance of the duty obviously has its bounds Sir and the Privy Council is saying that one of those bounds is that you are not performing your duty in circumstances where you make disclosure of confidential information.

Tipping J Well I'll just have to signal that I find this very curious.

McKay Well Sir I can live with the term 'curious' because it's exactly the position that Justice Richardson puts us in in *Squibb* when he asks rhetorically can it ever be necessary, right, and the answer he's giving is it's a rhetorical question, the answer is no, and he's building that in as an overlay. It can never be necessary for the carrying into effects of the Act to disclose confidential information. I'm sorry that's as far as I can take it Sir. These are overrides which have been built in either as a matter of interpretation or as a matter of sometimes more explicit public interest immunity, but my point Sir is, and I'm not surprised I've lost you Sir, but my point is that these are all factors that go to the question of how strong confidentiality in any reformatted approach that supersedes how strong must confidentiality be.

Blanchard J Well if you go back to *Squibb*, when Justice Richardson deals with the passage that you've just been relying on in *Gamini*

McKay Yes.

Blanchard J At the bottom of page 9158

McKay I'm sorry Sir can I catch up Sir, sorry, thank you. At the bottom of page?

Blanchard J 9158. He says the important point for present purposes is the acceptance of the proposition that only the total figure supporting the ratio need have been given. It was not necessary to supply further details of the accounts of the various taxpayers necessary.

McKay Yes.

Tipping J Well if it was reasonably necessary in this *Gamini* case, I don't see how they could have deprecated it. If it wasn't reasonably necessary, fair enough.

Blanchard J But that's what Justice Richardson seemed to be saying.

McKay I'm sorry Sir, I'm nodding at the question only because it's one of those matters where it seems to be an element of common ground, certainly amongst counsel and perhaps from Your Honours' comments amongst the Court, that there is a somewhat confusing – the Court of Appeal said it was awkward – and mixture of interpretation issues and public interest immunity issues, and I daresay it's possible Your Honours to say that we can build in to the interpretation of the word 'necessary' or we can have a stand-alone public interest immunity criteria or considerations exactly the same considerations.

Elias CJ All confidentiality considerations.

McKay Or confidentiality ones.

Elias CJ But then there might be a question of when you make the assessment and a question I have is well why is this not a disclosure if it's properly made under s.81 leaving the question of confidentiality and how to deal with it for the High Court Judge to assess in relation to particular documents?

McKay I suppose that the facts of what these particular disputes might demonstrate why there has to be pragmatically, has to be a rule at the discovery stage that provides a means to determiner in a broadly principled manner the extent of discovery obligations and where examination of documents on a case-by-case basis for confidentiality simply can't get there, and the reason for that is that although the numbers seems to vary, each of the Trading Banks has made discovery, I beg your pardon, let's go to a prior point, each of the Trading Banks in response to s.17 requests has made available to the Commissioner under that provision at the very least tens and tens of thousands of documents. Now discovery coming at a later stage when the Commissioner is discovering the documents in his possession and the Banks are discovering the documents in theirs, the numbers appear to get even larger than that. But when one then says well the Commissioner from amongst all of these tens of thousands of documents that he has obtained under s.17 from the variety of Trading Banks, wishes to discover and say the proceedings against the Bank of New Zealand, a range of documents from ANZ National and from Westpac and from other Banks, it's important to have a rule to determine the extent to which confidentiality to that vast number of documents attaches, and it's not the case in my respectful submission that that can be regarded as being a trial issue because a Court is not going to be in a position in my respectful submission to grapple with potentially that number of documents in the context of a trial.

Anderson J The number is nothing.

McKay The benefit of *Squibb*. I'm sorry Sir?

Anderson J The number is quite a different issue from the question of confidentiality. Confidentiality might effect one document but your original complaint was that there was so many documents it was an abuse of process and oppressive.

McKay I won't resile from the proposition that every one of the documents that have been made available under s.17 and which the Commissioner seeks to discover is a confidential document. That's what s.81 says. That's what s.6 says. They are confidential Sir. They're not confidential I suspect in the sense that Her Honour The Chief Justice is intimating. I think Your Honour has in mind a

particular document with a particular issue of commercial sensitivity of the character I understand that would at least ordinarily come before the Court in a trial context, but the confidentiality obligations here are far broader than that. They do attach to a far wider range of documents; they relate as my friend stressed this morning essentially to the taxpayer's identity and I would add in reliance on Lord Wilberforce and affairs, and there is no requirement in order to fall within what at least traditionally has been the *Squibb* protection or traditionally the public interest immunity protection. There's no requirement that they be commercially exquisitely highly confidential and sensitive. In fact my friend's submission explicitly disavows any reference or any requirement, or at least any claim, that any one of the Westpac documents is commercially sensitive in that sense and the debate certainly amongst His Honour Justice Wild in the Court of Appeal has taken place on a far broader basis

Elias CJ They're confidential, no they're confidential on the basis of confidence contained in the legislation.

McKay Yes, and with respect Your Honour, and I'm not sure you're disagreeing, but it's respectful all the same, where *Squibb* is s.81 or whether *Squibb* is *Squibb* reincarnated in terms of public interest immunity, or whether the public interest immunity drops completely aside and it becomes purely a matter of interpretation, *Squibb* at least is a workable rule. *Squibb* says that in the context of discovery here is the proposition. The proposition that the Commissioner may not disclose or may not discover documents that reveal third party identity and affairs, and that is workable, whereas in my respectful submission anything that didn't at the discovery point operate to provide a principle basis for determining the broad rights and obligations of the parties to the documents in question suffers from potential demerits that a busy High Court Judge is not going to be able to work it other than in those terms. But it's more important that it work than whether it's expressed in terms of the interpretation of s.81 or s.81 coupled with some overlay of public interest immunity. The time is marching Your Honours and I know that I should be more sensitive to that. There are two further matters that I will very briefly refer to you without taking you to them in this pantheon as it were of factors that suggest the significance that should be attached to confidentiality and the importance in any reformatted principle that confidentiality played the paramount role. Those two factors are first of all, and one of them relates to the material in the supplementary bundle that I've given you. It is an extract from a report prepared by what was an officer termed the Information Authority under the Official Information Act. That's at tab 4. I'm sorry I will not be taking you to it. At tab 4 is a report of the Information Authority. The Information Authority was a statutory officer appointed in the earlier days of the Official Information Act. The Information Authority was asked to consider 92 separate pieces of legislation in which some various forms of protections were given to commercially sensitive material that had

been obtained by one or other department under statutory authority, and in particular the Information Authority was asked to determine, or to advise, on whether or not what currently stands as s.9(2)(ba) of the Official Information Act, should be modified or in certain cases reversed or whatever. 9(2)(ba), I won't take you to it but I'll give Your Honours the reference, it's tab 2 of the Commissioner's bundle. Figures and despatches in this appeal Your Honours on the basis that it is the source as ANZ National see it of the matters of state basis for the Evidence Acts former public interest immunity provision. Now I know you badly don't want to go there and I don't want to take you. I'm not brave enough for that, but 9(2)(ba) is the provision that was in terms of the Information Authority the provision upon which he was asked to report, and in the course of his report the Information Authority asked a number of questions of relevance to why should it be that commercial information that's' been made available to a Government department should nevertheless be protected from disclosure in circumstances where that information is generally, at least in the 92 cases in question, generally provided under threat of criminal sanction, and the question that the authority address is well if there is a criminal sanction; if you've got to give the information, then why should the information be protected and in particular if you've got to give it, is it likely that disclosure would prejudice the supply of the information, or information from the same source, or information in the public interest that should be continued to be supplied, and I'll just leave you with the proposition that if the Information Authority said yes, we must protect that information and we should do so by a modification into what is now 9(2)(ba) of the Official Information Act, and we must do it on the basis that that information is the subject of voluntary disclosure. We must do it because the compliance with the statutory request will be greater; they will be more timely; there will be more co-operation; there will be less fuss, less dispute, less contentions as to jurisdiction, in circumstances where it's known to be protected, and in the course of the Authority's report, which I'll simply leave you with, the Authority makes a number of observations that support the significance in its thinking and therefore in Parliament's thinking in terms of modifying subsection (ba) to its present form of the significance of preserving confidentiality obligations. The last of the matters

McGrath J Were you going to refer us to any particular paragraphs without going to them?

McKay I'm sorry my friend Mr Turner is telling me page 6. If you just note page 6 there is analysis of

McGrath J That will do

McKay Of three various theories Sir on which that information might be provided and a quotation from the House of Lords as to why it's all important.

McGrath J Thank you.

McKay The last and although not least but briefest is the extract that's contained in volume 2, I beg your pardon it's volume 3 of tab 50 of the joint appellants' authorities. Again if I can do as I've just done which is not strictly take you there but give you a reference to the tab; give you a particular reference to a page number and just introduce it for 30 seconds. It's a report to the Congress by the Department of Treasury on the scope and use of taxpayer confidentiality and disclosure provisions. It talks about the various reasons why confidentiality is important; it talks on page 34 of confidentiality promoting compliance, which is the heading on that page, and I'll leave you with a reference to para.34; and it also then contains subsequently to that an analysis of why certain United States Federal decisions which permitted the disclosure of taxpayers' specific information in other taxpayers proceedings are wrong. 'Wrong both as a matter of interpretation says the report and certainly wrong as a matter of policy'. So Your Honours it's through miscellany of considerations, many of them judicial, many of them New Zealand, some of them the United States, some of them the United Kingdom, but all of which press the significance of confidentiality that in my respectful submission mean that in any attempt to converge current authorities into purely a s.81(1) interpretation exercise, it would be of critical significance that Your Honours bear in mind the paramouncy of those confidentiality concerns, and yes I do repeat it, I'm old enough to do so, that it would be exceptional and rare for any exclusions to that to occur that necessary should be interpreted in a similar manner with the inevitable consequence in the present case that the Commissioner would be held to be in breach of his obligations. Your Honour there were a number of further points made by my friend Mr Farmer relating to public interest immunity to the balancing exercise if he ever came to that, but for its part ANZ National is privileged to rest by identifying with Mr Farmer's submissions on that matter.

Elias CJ Thank you Mr McKay.

McKay Thank you Your Honours.

Elias CJ Mr Galbraith does BNZ wish to be heard?

Galbraith I wasn't very successful in the Courts below and I think it's better I don't say anything thank you.

Elias CJ Yes thank you.

Laughter

Elias CJ You're here for some purposes however.

Galbraith Exactly Your Honour.

McKay That applies to all his cases.

Elias CJ Well then Mr Simpson we don't normally hear intervenors and we'll hear from you because of the importance of the matter to your client, but we would like you to confine your submissions and wouldn't expect you to take more than about 15 minutes.

Simpson I'll do my best.

Brown May it please Your Honours

Elias CJ Do you want to go now Mr Brown?

Brown Well we did want to be heard on the question of the argument which I believe my learned friend makes which is in my submission outside the scope of the approved question. It's the supplementary point that my friend Mr White was making this morning, because if you do go and hear my friend on these other issues which I say relate to relevance, admissibility and capability of redaction, that takes you immediately into the documents, so I don't want to press myself on the Court but I wonder if it might be appropriate to hear me on whether my learned friend should be able to make any submission that goes beyond the approved question, because that is what I believe is a supplementary submission.

Blanchard J Well the answer to that is clearly that he cannot.

Tipping J We'll stop him.

Brown Thank you, well

Elias CJ So we don't need to hear you at the moment. Yes Mr Simpson, you've heard us.

Simpson I just want to hand up a brief memorandum. I'll come to the memorandum in a minute. I wanted to start with the question raised by the Court this morning about whether public interest immunity should represent an overlay on s.81 or whether s.81 should do all the work and that public interest immunity would be excluded. The concerns that ASB have are threefold. First the word 'necessary' and what is meant by it in ss.3. If public interest immunity doctrine is to be excluded then a Court will require the word 'necessary' to do a great deal of work, and the question then is asked well what does 'necessary' mean. Is it necessary as that term is used in the discovery rules which is quite a low threshold test? Is it reasonably necessary as I think Justice Tipping referred to, or necessary having regard to the requirements of s.6? Will there be balancing as there is under public

interest immunity between on the one hand taxpayer secrecy and on the other the due administration of justice, and how will the balancing be carried out? Is the Court the ultimate arbitrator of this balancing exercise as it currently is since *Conway v Rimmer* in public interest immunity, and if not then how is a taxpayer to challenge a Commissioner's decision about necessity? Is it to be by way of judicial review, and does that mean that we have to show that the Commissioner has made some error or law or acted unreasonably in the *Wednesbury* sense? So they have quite broad-reaching implications compared with what public interest immunity offers which is a situation where the Court decides where the balance lies if there's a dispute. The second concern arises from the debate this morning as to whether there is a difference between voluntary disclosure by the Commission under s.81(1) and compulsion under ss.3 such that although the necessity qualification will apply where a third party is seeking to compel the Commission to provide information, are we going to have a more liberal regime where the Commission is volunteering it, and that different test or lack of symmetry creates a fairness issue which in my submission undermines the integrity of the tax base, which of course is relevant under s.6. Under public interest immunity the Court decides that issue and where the Commissioner volunteers information for disclosure, or whatever the Commission's views are, they are given due weight by a Court but at the end of the day the Court makes the decision as to whether public interest immunity applies; how the balance should be struck and what safeguards should be put in place to protect the secret information. The third concern I have, and I put this to the Court for its consideration, is that *Squibb* and the cases, the UK cases that my learned friends Mr Farmer and Mr McKay have referred to, have represented the established state of a law for now some decades, and during that period the Tax Administration Act has been the subject of legislative review on the basis that those cases correctly represented the state of the law. So my question is this – should the Court or Parliament now undertake a change in the law by overruling *Squidd*, should there be consultation and legislative drafting with precision and protections that any erosion of taxpayer secrecy has far-reaching implications and there is very limited evidence before the Court as to what those implications might be, so in my submission it's for Parliament to overrule *Squidd* not the Court, of course the Court having jurisdiction to do so. Now turning then to the memorandum I've handed out. What I've endeavoured to do in this memorandum is to encapsulate in a brief way as I can principles that I've taken from a review of the cases that I think are relevant. This is not an easy exercise in that there are no absolute rules and that there is no universal set of criteria applicable to each case, but I submit that this represents a sensible encapsulation of the principles that should apply in the context of this litigation.

Tipping J Is there anything sort of materially different here from what we've heard from Mr Farmer and Mr McKay or are you just simply

endorsing it? I don't mean this in any pejorative sense, I just want to listen to it with that in mind.

Simpson Yes there are some additional principles that come out of this that I don't think we have heard from today.

Tipping J Well could you identify them discretely as you go so that we know what's new and what's old?

Simpson Yes I will. Then in relation to one there is the full Court of Appeal in *Squibb.* I think that point's made clear. The *Gamini* and *IRC* case, that taxpayer secrecy is pre-eminent, and that the balance has been struck. The only new point there is the *Makanjuola* case where the Court suggested that where a balancing has already been undertaken as it has been in *Squibb*, then a re-balancing should only be undertaken if there are additional factors which need to be taken into account, and I've given you the page number at 620. A second point – taxpayer secrecy is not a privilege capable of waiver by the Commission having regard to the requirements of s.81, then to the recognition in *Squibb* that the affairs of taxpayers must be kept confidential. It's my submission that a Commissioner has a duty to raise public interest immunity and the prohibition erased in s.81. Now in other contexts doubts have been expressed as to whether there truly is a duty, but the difference here is that we have a section, more often than not public interest immunity arises under the common law without a separate statutory prohibition of disclosure that maintains secrecy, so in this instance my submission is that there is a duty on the Commissioner to raise immunity in the first instance and if he wants to make disclosure then he should put that to the Court for consideration. And the existence of that duty was acknowledged by the Commissioner in the *Avowal* case that I've made reference to which is in the bundle, it's in the first bundle of authorities of the appellants.

Anderson J What is the public interest other than confidentiality?

Simpson There's the public interest in the due administration of justice and there's the public interest in the Commissioner being able to use all of the information he receives when undertaking his duties under the Act.

Anderson J What's the public interest that tells against disclosure?

Simpson The other two - due administration of justice and the use of documents

Anderson J No, the public interest that deters disclosure is the benefits of confidentiality.

Simpson Yes.

Anderson J But that's inherently an Act itself. It's all set out in s.6, so why do you need another layer on top of that?

Simpson Because the language of s.81 does not expressly provide for a balancing of those interests and it doesn't have 50 years of case law that establishes these sorts of principles that guide a Court when undertaking the balancing exercise.

Anderson J Sometimes case law is overtaken by legislative reform or codification. The fact that it's old doesn't necessarily make it vintage, not in a pejority sense.

Simpson Yes but that's the point I'm making Sir is that we have very high authorities and most of these cases are House of Lords and Privy Council judgments and they've stood the test of time and what I say is that should this Court be looking to effect a law change without the benefit of consultation over the consequences of the dilution of taxpayer secrecy. You have virtually no evidence of the implications of that and how it will undermine the integrity of the system, and in my submission that job is more efficiently and more accurately carried out with the due process that follows legislative reform, where there is consultation with taxpayers and advisers and so on. Now three – the onus is on the party seeking to protect a document from disclosure to demonstrate that it is subject to public interest immunity. However once a claim for immunity is manifestly made out on solid grounds, it is necessary for those who seek to overcome it to demonstrate the existence of a countervailing or counteracting interest, calling for disclosure of particular documents. When this is demonstrated, but only then, the Court must proceed to the balancing process to determine whether the public interest in favour of confidentiality should prevail. It is ultimately for the Court to undertake the balancing exercise rather than the discretionary decision of the Crown. Five, I've cut it off. Then going to six, when balancing the public interests the Court will need to know whether the documents in question are of much or little weight in the litigation; whether there absence will result in a complete or partial denial of justice to one of the other parties or perhaps both and what is the importance of the particular litigation to the parties and the public. All of these are matters which should be considered if the Court is to decide where the public interest lies. The Court should give very great weight to preserving confidentiality of documents in the hands of a Revenue and will override it only if the applicant can demonstrate manifestly strong grounds for concluding that the public interest in the administration of justice outweighs the public interest in preserving confidentiality. In other words the scales must fall decisively in favour of disclosure if it is to be permitted. Now I note in C that documents of merely vestigial importance are not the proper subject matter of an order for disclosure, and although a number of cases refer to the narrowing of the scope of public interest immunity attaching to

state documents due to the growing trend for open Government, such developments have no application to taxpayer affairs which include confidential information regarding the affairs of private citizens, which has gained even greater protection through the enactment of the Privacy Act. When balancing public interest, the Court will need to decide whether to inspect the documents. I think since we've had a discussion that I'm happy to take that as read if Your Honours are prepared to do so, and then move to 8, public interest immunity is not lost merely because the documents are relevant for discovery purposes under the rules. If a document is not relevant, and as I noted early this morning, then public interest doesn't arise. The taxpayer himself may be required to discover the documents and that's the point that Mr McKay was making. There has already been partial disclosure. That doesn't result in a loss of public interest for the remaining documents and information, or that the documents relate to past events or transactions as it's suggested here that these transactions are non-going and therefore public interest immunity shouldn't prevail, and that was rejected in the *Burma Oil* case. And the last one of course is if public interest favours the production then it shouldn't be greater than is necessary for the purpose of a proceeding. Now the next point I wanted to address was the issue of necessity. The Court is clearly troubled by what could be perceived by the Court as an attempt by the Banks to muzzle the Commissioner, to hold back relevant evidence. Can I say in relation of that though that this is litigation involving a challenge to the tax assessments of the Commissioner and it's unlikely that the affairs of taxpayer X will be material to the assessment of taxpayer Y under a separate transaction, and indeed in para.31 of the *Chan* affidavit which was sworn by the Commissioner in opposition to these challenges, Mr Chan acknowledged and perhaps

Elias CJ Well we haven't read that.

Tipping J No, it's not before us is it?

Simpson This is in tab

Tipping J Was this in front of the Court of Appeal?

Simpson It is, it is, it's in volume 1 of the case on appeal, the Westpac case

Elias CJ We haven't on the basis that was discussed at the beginning of the hearing that we hope that this matter may be disposed of without need to get into the evidence on points of principle.

Anderson J It was put in to defend the applications in the High Court wasn't it?

Simpson Yes it was.

Tipping J But in the end whether it is sufficiently necessary Mr Simpson, and I don't want to add yet another layer of adjectival adornment, it surely

will have to be for the trial Judge, guided by such principled statements as this Court makes. We're not here to determine that ultimate issue are we?

Simpson With respect Your Honour I don't think that's practicable. These are complexed transactions and complexed litigation. The trials are set down for six and eight weeks and when BNZ comes to trial they are required to grapple on the fly with attempts by the Commissioner to introduce evidence about other taxpayers' transactions. It will inevitably, well the Bank would have two choices.

Elias CJ Well they're not appealing.

Simpson Sorry?

Elias CJ They haven't appealed.

Simpson Well if we ignore BNZ then the next Bank.

Anderson J I'm just a bit unclear about what's happened on the ground here in terms of the documentation and it may be that Mr White and Mr Brown will be able to help more in this respect, but has the Commissioner actually made an affidavit of documents?

Simpson They have made affidavits that merely refer to the other Bank documents as a class, they're not specific

Anderson J So we don't even have compliance with the order for discovery yet?

Simpson No.

Anderson J And where was it decided that the documents in issue are all incapable of redaction in a meaningful way?

Simpson My understanding, and you'll appreciate ASB's playing catch-up here, but my understanding is that that's the Commissioner's submission.

Anderson J Because it would seem to me as a generalisation one would get an affidavit of documents that would point out that there may be special measures needed for the inspection of certain of them for particular reasons, and that then there would be an attempt to redact and then the question of admissibility would arise in the course of trial, but at least with the character of the documents known to the other parties.

Simpson But the difficulty Sir is we are potentially looking at a universal set of in excess of 100,000 documents and when these applications began, the Commission talked about tens of thousands of documents

Anderson J Why don't you just wait and see what pops up?

Simpson Well it's no good facing that at trial.

Anderson J No, I don't mean at trial. Wait until you get your affidavit of documents and then see what can be done about redacting a sufficiently representative sample of them to meet the Commissioner's claimed purposes. Everything just seems to be premature and unduly abstract at present.

Simpson Well if I could just take Your Honour to the difficulty as I see it to be. We have a universal set of 100,000. The Commission started off by saying we'd get tens of thousands and then ten folders and now we're told that it will be for BNZ something of the order of 200 documents. That's the Commission's sample of documents. The Banks can't be bound by the Commissioner's selection. He may well choose these 200, but how is the BNZ to respond to documents produced in relation to ASB, ANZ and Westpac documents without – the BNZ will have two choices, either to completely ignore the evidence and say it's not relevant or it will have to try and grapple with them either on the fly at trial or beforehand, and how can it be fair from a natural justice perspective for the Commissioner to decide out of the 100,000, these 200 documents are all I want to put in? There'll be no context. They'll be no doubt the worst documents from the taxpayers' perspective; the best, the most favourable from the Commissioner's perspective. That cannot be a fair process, so if there is to be discovery of any documents regarding these transactions then it must be all-in, all-out. It cannot be

Blanchard J Well that's particular to this case but we're being asked to make a decision at a fairly high level which will apply in future cases, many of which will not be of this kind of complexity. We can't be too influenced by the problems in the particular case.

Simpson Well in my submission Sir and the Hodge affidavit isn't in there, but it does address a different sort of transaction where the same issue is arising in relation to a s.89(n)(3) application to terminate the disputes process where again the Commissioner wants to do what he's currently doing to ASB, which is applying to stop our disputes process before we get to a statement of position by comparing our transaction with a said to be substantially identical ANZ transaction, and to disclose to the ASB details of the ANZ transaction and to the ANZ details of the ASB transaction and do a compare, and that's going to be done in support of this application and we're seeing the Commissioner looking to do the same thing in an entirely different context. So this litigation is not unique.

Blanchard J I wasn't suggesting that it was, but it doesn't sound to me as though the case you've just described is anywhere near the complexity of this case.

Simpson It's substantially similar. It's another form of so-called structured finance transaction where the Commissioner wants to use one taxpayer's documents in relation to their transaction in proceedings against another taxpayer. Now in my submission those documents just cannot be material for the issues that I raise in the second section of my submission, which is not relevance but necessity. How can it be that a trial Judge could make findings about documents produced in the BNZ proceeding, about transactions to which the BNZ's not a party; the ASB, Westpac or ANZ are a party, but they're not parties to the proceedings. They have no standing. A Court simply could not make any finding. That would be adverse to those Banks in the BNZ proceeding. Nor could it make findings against the BNZ because it hasn't called evidence in rebuttal and I've relied on the *Etharca v Perry Corporation* decision where the Courts have said you know in some cases it's just not fair to put the onus on the other party to produce evidence in rebuttal. Why should the BNZ be required to rebut the Commissioner's evidence about other Bank transactions? Why should it face findings? The Court cannot even assume that the other Banks will co-operate with the BNZ in making witnesses available to it. And in that regard I'm concerned that in the Court of Appeal in paras.54 to 58, the Court of Appeal appears to have laid blame at the door of the Banks for not sorting something out with the Commissioner and in my submission while the Court can expect counsel to act responsively and reasonably, if they are unable to reach agreement, the Court can simply not walk away from the issue, the Court must resolve it in a fair way and in that regard there is no proper balancing exercise undertaken by the Court of Appeal as is required under public interest immunity and under s.81. The closest we get to it is in para.92 of the judgment where almost reluctantly the Court of Appeal says if contrary to what we've just expressed a balancing exercise is required then these factors work in favour of the Commissioner. Well these aren't the right factors with respect. The first one is whether or not the documents are commercially sensitive, but that's not about preserving the integrity of the tax base, so there's no addressing the taxpayer secrecy public interest factor there, and the other one was about how commercial litigation is now conducted, which again there's an issue about confidentiality of trial but it's not about the issue of disclosing one taxpayer's documents to another. The other point to make in that regard is that in para.59 of the judgment it's noteworthy that the Court of Appeal says that they don't wish to exaggerate the significance of the other Bank documents in the role they will play at trial. We suspect at a trial such documents will not assume anything like decisive significance, instead they are likely to provide what in the end will be agreed context and otherwise perhaps help fill in gaps or in respect of particular documents, be used to cross-examine documents who are parties to them. That however is not to say that their relevance will necessarily be slight. Given the amount of money involved in litigation we do not see the costs associated with the discovery and production as to disproportionately to their likely relevance. Now can I just address the issue of cross-

examination, because clearly if a witness gave evidence that was in conflict

Elias CJ What's the submission directed at, sorry?

Simpson This is relevant to the balancing of the two public interests of

Elias CJ Yes.

Simpson And the Court would of course be concerned with a situation where if a witness said something that was in conflict with what that same witness had said in a document, of a Bank document, that the Commissioner might somehow be deprived of the use of that document to impeach that witness and in my submission if that in the unlikely in this litigation if that arose then that would result in a reconsideration of how the balance should be struck and if possible the Court could allow the document in with redaction, but if that wasn't possible then on that occasion what is likely to be a very isolated occasion, a document may need to come in on an un-redacted basis and the balance would tip the other way, so

Elias CJ Isn't that really saying that all of this is, well it's speculative at the moment and that it's premature, that these are decisions that will have to be made in context and we're not at that stage yet? On your submission you better have preliminary rulings made followed by reconsideration when you get closer to the trial and you can see how important the evidence is.

Simpson What I'm seeking now is a ruling dealing with the 100,000 or whatever sample the Commission wants to take of those and effectively to get a ruling that would preclude the Commissioner from leading evidence about other Banks' transactions that discloses their identity, and that can only be done in advance of trial for the reasons I've outlined earlier if the Banks are to face at their own trial evidence led by the Commissioner in relation to other Bank transactions they must have warning and they must have an opportunity to prepare.

Blanchard J But it can't be done in this Court.

Simpson In my submission it has to be done in this Court as it was done in *Squibb* and as it was done with all of them.

Blanchard J So are we going to be given several hundred documents and have a big argument about each one of those?

Simpson No, I don't believe it will be necessary for you to inspect the documents.

Blanchard J Well if it is you run the risk that we might see something in there we don't like much.

Simpson Yes.

Blanchard J And that would be unfortunate given that we are the ultimate Court of Appeal.

Simpson That is a risk we'd have to take but

Anderson J It's very easy for this Court to undertake associate changes of work on that scale.

Simpson In my submission I'm critical of the fact that the Court of Appeal never pinned down what findings the Commissioner would like the trial Judge to make using the other Bank documents and in my submission when you look at the potential findings that could be made the Court should at this stage be able to ascertain that the heavy weight that when in the taxpayers' secrecy will not be unbalanced by what ever those potential findings might be. They cannot be materially enough when the Commissioner has assessed these transactions on an individual isolated basis. As the Court of Appeal said, these documents will only be contextual if as Your Honour Justice Tipping suggested that the weight in favour of secrecy is heavy then can contextual documents that were not the basis of the assessment under challenge, could they seriously tip the balance the other way?

Blanchard J Well we just don't know because we don't know what the context is.

Elias CJ And the Court of Appeal didn't have the context either because this is at a very early stage.

Tipping J At the very least one can presumably say that the Commissioner whether rightly or wrongly must think that these other documents are going to help him to support the view that this was tax avoidance.

Simpson Well I don't believe

Tipping J I mean if he doesn't think that will we may as well all go away to do other things. I mean obviously he must have that view. How good a view it is it's very hard to say at the moment.

Simpson Well in my submission it needs to be tested and it needs to be tested at an early stage so that if the Banks are facing evidence of other Bank transactions they can grapple with it.

Tipping J Well he wouldn't be seeking to put this stuff in either on whatever basis he does, big, large or small, if he weren't of the view that it was helping his case. It's admitted to be relevant so presumably it does

have the capacity to help the Commissioner's case. Now I don't think we can go behind that. For present purposes our task is to give guidance to those who are going to have to make the ultimate decision as to how they approach it, and whether it's public interest plus the statute; the statute plus public interest; just public interest; just the statute, or whatever it might turn out to be. And how much weight you put on confidentiality against other things, it's all that that we're here for not to start getting into the interstices of this particular case.

Simpson Well in my submission the Court of Appeal in *Squibb* and the other cases, having already established that taxpayer documents should not other than in exceptional circumstances be disclosed to other taxpayers

Tipping J Well unless you are arguing for an absolute rule, which you're not, I don't see how we can rule in your favour at the moment.

Simpson Well my submission was this that in those circumstances the Commissioner should bear the onus of satisfying the Court that an exception should be made and the scales tip in the other direction.

Tipping J Yes well he no doubt will if that's what we say. He will have to carry that onus in front of the trial Judge or someone else. I appreciate the logistical problems but won't they arise unless the rule is absolute? Unless the rule is absolute there has to be some weighing of the competing interests.

Simpson I cannot submit that the rule is absolute.

Tipping J No, well in that case however you analyse it surely these logistical issues, which I'm not insensitive to, I hear what you say about that, but how can we get into that now?

Simpson In this respect how is this case different from any other.

Anderson J You've moved too soon.

Simpson Well no with respect the BNZ proceeding was set down for trial and we would be in trial in March if it wasn't for this appeal.

Tipping J Well you're here because you don't like or you want to support those who don't like what the Court of Appeal has said, and you want that pegged back much more in favour of confidentiality – that's why you're here.

Simpson I would at least want the Commissioner to bear the onus of satisfying the Court that this is a case that justifies an exception, and in my submission the Commissioner has not put up a proper basis on which the Court can decide to tip the scales away from *Squibb* and allow an exception to taxpayer secrecy. I mean whatever we think of *Squibb*,

whether it will ultimately withstand the test of time, it does represent the current state of the law, and it reflects a statutory provision where taxpayer secrecy may be not absolutely sacrosanct, but it has a very high priority and it's the Commissioner for the first time that I'm aware is actually volunteering to breach that secrecy and disclose it and in my submission it should be the onus. There is no perfect solution.

Elias CJ But Mr Simpson as far as the appeal today is concerned, you're submitting to us that we should hold the line in *Squibb*. That's the point

Simpson Hold the line with *Squibb* or at least put the onus on the taxpayer to allow an exception

Elias CJ On the Commissioner?

Simpson Sorry, the Commissioner, to allow an exception.

Tipping J Well that's what your argument is and that's what Mr Fowler's argument is and Mr McKay's argument is.

Blanchard J If the test involves whether it is necessary for the Commissioner to have these documents then the onus would be on the Commissioner.

Tipping J He has to get out of the exception, sorry he has to get within the exception. His principal obligations is to be confidential, so whether it be under that first one or that second one, he has to show I would have thought. I will hear what they say but I think they'd be in heavy weather to go against that.

Simpson Yes but we're now at the stage where the Commissioner is about to serve lists of documents

Elias CJ I don't think this argument really is properly directed to us Mr Simpson. I think you really need to concentrate on the questions upon which leave was given and develop your argument against those. I think you have in fact fully developed it.

Tipping J Can you say any more on the principle of the thing that you really want a very heavy weight to go into the confidentiality scale and they've got the onus of pushing that scale downwards. Whether they will manage it in this case is another matter but on the principle of the thing can you say any more?

Simpson No.

Tipping J Right.

Simpson Can I just finish by developing this one. If we are at the point where discovery is to be provided of these documents, then in my submission this is the appropriate time for us to grapple with it. I mean it either has to be now or at trial.

Elias CJ Well we're not going to grapple with it Mr Simpson. We are not going to examine the documents.

Tipping J You're taking an awful lot on yourself as intervenor you know on the terms of which you were given leave to intervene.

Simpson Yes. Alright I think that's it.

Elias CJ You make the point that there are huge practical issues and somebody is going to have to do the balancing.

Simpson One of the frustrations of this series of applications is that certainly the Court of Appeal I understand was quite unsympathetic with those logistical difficulties, but as trial counsel they will be quite significant and I don't know where the most convenient or best place to resolve them is, but I have grave reservations about the Court's ability to do so on the eve of trial.

Anderson J Well that's not an issue that's engaged by the grounds on which leave was given in this Court.

Blanchard J And it may be that if there are all these problems and it needs some time to resolve them, trial will simply have to be deferred.

Tipping J And that may have to be the product of what the Commissioner wants to do.

Simpson Well that may well be the case but it's a pity. We've come this far and obviously Your Honours have still to make your mind up, but the feedback I'm sensing is that we could well come out of this with no ruling about whether these documents are ultimately to be disclosed or not, and very shortly we'll receive lists of document and will not be sure whether ultimately there is a need to inspect them and whether they'll be able to be used at trial. I'm not advocating any sort of a trawl through 100,000 documents, I really think it's a situation where the Commissioner needs to persuade Your Honours that there are legitimate findings that can be made using these documents that will be material to the outcome of the case such that the balance will tip the other way and that's what I think that a Commissioner cannot do.

Elias CJ Thank you Mr Simpson.

Simpson Thank you.

Elias CJ Mr Brown are you going next?

Brown Yes. May it please Your Honours it's for reasons more than mere convenience that my learned friend Mr White and I have divided the argument. We're against different Banks but I'm going to deal with s.81 and he will deal with public interest immunity. I appreciate that perhaps in the eyes of the beholder there's an overlap to a degree and either of us will have to deal with that to the extent that arises. But my submission is that s.81 is a code. That the issues that are before this Court are dealt with squarely within the s.81 context and my learned friend's argument is as it were in the alternative to that in the event that this Court did not accept that and that there is plurality or parallelism with a public interest immunity application. May I just before we start indicate a couple of things about the litigation because while I don't seek to engage with anything that my learned friend Mr Simpson said from the point that he left his piece of paper and moved onto new pieces, there were statements made about trials and discovery that I think you should be aware of the Commissioner's position. The BNZ trial which was in the hands of Mr Dobson QC for which myself and Mr White had entrained was for the 3 of March and the fixture has been vacated I think for multiple reasons, but certainly because of the fact that this matter was coming to this Court, so the urgency issue that is associated with my learned friend Mr Simpson's comments was, but is not now. The ANZ trial was also set down for August of 2008 in Wellington. As I understand it that trial has been vacated as a trial against the ANZ but the dates have been kept available in the event that the way this litigation is evolving that it is able to be used in one or other of the cases. The litigation against Westpac in which I am involved is seated in Auckland and that's a different issue. On discovery the Commissioner did give discovery in a careful way in the list of documents, not betraying the alleged privilege or however you describe the s.81 obligation and in a way which I believe my learned friend Mr Farmer would acknowledge, he agreed was the appropriate way to do it. It was fairly spare. It indicated the types of documents but didn't disclose or communicate - communicate being a critical word as that's the word that's used in the sections. And since then there's been a difficult process where the Commissioner, and I seek not to be pejorative in how I put this, but the Commissioner has sought to engage with counsel for the Banks in terms of looking at the documents, but for reasons that they might explain, they don't want to engage with the documents in terms of receiving on a counsel-only basis or dealing with a segment. But we can say for the Commissioner that the numbers of documents that it is now proposed to seek to deploy at trial in relation to the BNZ is roughly in the order of 350 to 400 documents.

Elias CJ But I suppose the point that's made is that the Banks don't have to accept the Commissioner's selection of 350 documents. They may wish to see all the documents

Brown Yes.

Elias CJ Yes.

Brown Yes, well I would say this that yes a party is entitled to have inspection of relevant discovery documents or other things being equal and that the spectre of all these other documents can be raised, but as Justice Anderson said it's a matter for them whether they choose to inspect them and whether they would think that there is sort of gold in the documents that the Commissioner is relying upon, but the Commissioner will be relying upon the documents that he says are important for the case that he brings alleging tax avoidance against the various Banks. Now if they want to engage in exercise they can, and with respect the statements that are made about the enormity of the exercise and the like are in my submission overstated when one considers the scale of litigation, and fairly the amount of tax that is involved. This is very substantial litigation. There have been plenty of cases in the Construction Industry and even Intellectual Property cases where you would have documents of that order, and there's a disciplined way of going about them. If they wish to inspect them they can do it. If they don't wish to look at any documents as Your Honour Justice Anderson said, they can do it, but the spectre that there is this enormity that is going to affect the way in which the litigation is conducted, the spectre of oppression that there is something unfair about this in my submission is really wholly overstated, and the scale of documents as we say that the Commissioner wishes to deploy to which the exception and the necessary test, if the necessary test is relevant and we're dealing with a s.81(3) as opposed to s.81(1), that's the volume of documents that the Commissioner wishes to communicate or disclose, so that is the field of engagement.

Tipping J If you choose to disclose or to deploy only those you could hardly argue I take it that it wasn't necessary for them to have at least access to all the others. You can't be self-selecting I wouldn't have thought.

Brown No, I accept that but again it comes back to the purpose for which a document would be being used. I mean if you can't as it were prove a negative with a negative. Say you have a situation, and this is a case where these are alleged tax avoidance arrangements, so the litigation is against the Commissioner for challenge to his decision. He is defending it. The Banks are saying these are legitimate transactions, they don't cross the tax avoidance line and then say something like the guaranteed procurement fee is a commercial piece of work. The Commissioner says no it's not. Look how it's referred to in X or Y or Z document. Well the fact that it is not referred to in that way in 250,000 of the documents doesn't prove anything. You can't disprove a negative if you see my point, so it depends

Tipping J I see your point but you can't stop them from having a look surely.

Brown No, no, I don't seek to. They're the ones who are saying oh my goodness we don't want to have a look, please save us from that fate.

Anderson J In terms of ordinary case management the Commissioner could apply to the Court for directions relating to production for inspection

Brown Yes.

Anderson J And could say we propose to produce these which we conscientiously say are the ones relevant to the case for such and such a reason. There are all these other documents that we've adverted to but we take the view that they are impressed with confidentiality and are not sufficiently relevant or significant to justify breaching that confidence.

Brown Yes, and in that case what would be the dreadful crime in counsel only looking to see. I mean the comments are made in the *Sommerville* case and the like and Justice Eichelbaum was overruled in *Squibb* about the proposal, but it depends what you're looking at them for. My learned friend made a sort of plea from the bar that I accord with and the idea that you would ever be actually working with documents on a basis that you couldn't discuss them with your clients or that you wouldn't be able to disclose that there's a bomb. But for the purposes of checking that there's nothing in there that could possibly be helpful to you, that's a different sort of exercise, or it could be done as is being proposed in some arbitration litigation by an independent barrister, saving the Associate Judges from those sort of problems. But that's entirely a practical exercise and it doesn't involve the Courts. I mean in the *Port Nelson* litigation the Court of Appeal said we don't deal with all of these documents. Counsel for starters have got to have a look at them and sort something out, and likewise, and again not in an attempt to be pejorative, it's not in my nature, but I say that the Commissioner has sought to be constructive. Annexed to Justice Wild's decision there is the Commissioner's proposal setting out an appendix as to some of the Bibles being in a form that would be ala *Squibb.* This is not a *Squibb* case, contrary to how my learned friend Mr McKay likes to betray it, but in terms of the Bible documents there was a proposal there that the Banks could look at their material and say yes this is alright. The Commissioner proposed the idea of a bundle of each of the documents that could be looked at by counsel - that was rejected. Now none of these things have to be taken up but my learned friend Mr Simpson makes a too generous plea on the part of counsel for the Banks when he says to you no we've been criticised by the Court of Appeal. I think it's fair to say that there was an element of frustration on the part of Justice Wild and the Court of Appeal in the stance that the Banks have taken. They're entitled to do it but it doesn't move us forward and it's no good saying oh my goodness we're on the eve of trial, this is a terrible situation, when no one's co-operating with anyone to get us where we should be and it's not the job of the Supreme Court to be assuming

Elias CJ Speaking of moving this forward, have you got to the end of your preparatory remarks then?

Brown Yes, shall I move to s.81? I think that would be a good start.

Elias CJ That would be a very good start.

Brown S.81, and it's set out under tab 1 of the first volume of the appellant's bundles of authorities, and may I say it I simply don't tend to recant my submissions. I want however to take you to parts of some of the cases that are relevant to how I say s.1 should be viewed. In the essence of my submission that this is a code there are cases in other jurisdictions dealing with essentially similar provisions that take that approach, and particularly the Canadian cases, and secondly I would say that by reference to the very careful that it is, albeit that is one that is grown over time, and uses a multitude of formulae of words in relation to disclosure or communications, is one that lends itself to being analysed as something that would be thought to be a code. It might be helpful if I just summarise Chief Justice what I would and what I presume the Banks would say on this issue, may I do that? My summary, s.81 certainly contains a prohibition on disclosure in very broad terms. Secondly it's subject to a number of exceptions or gateways as the Privy Council terminology in the *Mount Murray* case and one such exception which is of more general nature than a number of the others is the disclosure for the purposes of carrying into effect the Inland Revenue Acts. Now I'm deliberately using the s.81(1) wording there. I'll come on to look at the inter-relationship between 81(3) and 81(1). I say this is not a narrow exception and it will include in my submission giving discovery inspection in litigation in which the Commissioner is a party, and where the exception is engaged the Commissioner will be required to provide inspection, and these are important words, to the extent that that is required for the purposes of carrying into effect the purposes of the Act. And I say to the extent because perhaps there's a danger we overlook Justice Richardson's observation a the bottom of page 9159 in *Squibb*, 'only where and to the extent that it is necessary'. That extent will vary from case to case. In some instances, in fact in many instances, disclosure will be able to be made with details and sections of documents redacted. That was both *Gamini* and *Squibb*, and that was the position of the Commissioner. He was resisting going further. But in those circumstances where that can't be done then it will permit disclosure of identity or affairs of the taxpayers. That's the default issue. The Banks' position appears to be this. They do not contend as I understand it that this is a case where the prohibition applies as it were to the exclusion of the exception if I can put it that way. And indeed Westpac's submissions for example, para.43, say we don't seek to exclude everything. We could look at this and look at this, but the Banks argue that where the exception is engaged, even then there was or at least until today there was this sacrosanct protection that was absolute. That has been refined today, but up until

today it's been absolute. And they must say that in respect of a document which the Commissioner would regard himself as being required to disclose, but for example even in conjunction with other available information, would enable the say identity of the taxpayer to be deduced, deciphered, or whatever, then the document simply may not be disclosed. It default back. As they say in para.81 of their submissions, if it loses utility through redaction, then it simply may not be used, and that is the real area of engagement in my submission that this case raises and the consequence of such a rule would side-line any document which could potentiate the identity of another Bank and that has a very substantial benefit for the Banks in this litigation because to the extent there's a community of interest there. Each Bank identified it in the exchange with Mr Simpson that the end result is that any single piece of litigation, no document, that it could be determined identified a Bank, could be used. And it's very important we don't think this is communication to the world at large. The group of people of entities to whom the Commissioner seeks to communicate the material are the group of people who are the subject of the assessments on the basis of tax avoidance arrangements. They don't want to see the documents relating to each other. It's when I say circular, I don't mean circular in terms of

Tipping J It's not so much they don't want to see the documents relating to the others, they don't want the other to see the documents relating to themselves.

Brown Well they don't want to be visited with the consequences of any of them, that's the point, yes. So my learned friend saying Mr Simpson comes here and says

Elias CJ But really is this relevant to what we're called on to consider the matter of interesting speculation of some colour, but is it relevant to what we're looking at?

Brown It will be critical in my submission if you move to a position of saying well I'm somehow going to assess the exception by let's take the word 'necessity' for example, by a test like that and yes the Commissioner would identify this as relevant and important to use for the purposes of giving effect to the legislation, of collecting the revenue etc, but if this document even if redacted might with something else or something else be possible of disclosing the identity of the taxpayer, then it comes back out of the mix and that must be a product, that conclusion must be a product of what is already in the public domain, which is already in the public domain in my submission as I say at the end of the submissions, by the very proceedings that each of the Banks have filed in the Court with the details of the transactions, so

Tipping J Well they're not arguing anymore for an absolute.

Brown No, that's right, and therefore we come back to 81 in the round. 81 then, if I can take it. First of all I was going to address the English context which I refer to in para.8 and will hand up the extract from the English legislation that Justice Blanchard was inquiring about. It is as my learned friend said a provision that requires a declaration to be signed by various people, different declarations for different persons within the Department in England that says that they will not disclose unless for the purposes of giving effect to their functions. So it's roughly the equivalent of 2.81(2). It sits there; it brings the same outcome but doesn't have a provision that has the what you might call the base provision that gives effect to it and we will hand that up. Then in para.11 – oh first of all if I could just mention *Mount Murray*. The legislation in New Zealand is by no means unique in fact it tends to follow if I might call it a template in the sense that the legislation around the world seems to have a fairly broad exclusion, oh prohibition, with a number of exceptions set out and *Mount Murray* is an example of that which is in the volume 2 of the appellant's bundle at tab 29 and you will see in the headnote the various gateways that may be gone through to release information. An important theme of my submission is in para.11, that is that the section is in the nature of the code and in that regard we place emphasis on the discussion in the *Glover* case, that is in our volume of authorities at tab 7, if I might just take you to that decision for a moment. It's in the context of the Canadian legislation. It was a case where if you look at the headnote, it failed in the sense that what was sort to be done here was someone was seeking to get an order requiring the Canadian Revenue to provide the particulars of an address of the respondent. It was one of those ulterior type situations, but the relevant discussion on page 163 you will find set out s.241 of the Canadian legislation which is very similar to ours in a sense that the primary section starts off by saying 'except as authorised by the section' and then ss.3 makes it clear that ss.1 and 2 don't apply in respect of criminal proceedings or in respect of proceedings relating to the administration or enforcement of the Act, and over at page 165, delivering the judgment of the Ontario Court of Appeal, Chief Justice McKinnon expressed the view there was a comprehensive code designed to protect the confidentiality of all information given to the Minister for the purposes of the Income Tax Act, and then about two-thirds or three quarters of the way down the page in a new paragraph he talks about s.241(3) referring to the subsections not applying to criminal proceedings or to the proceedings in relation to the administration enforcement of the Act. And in my submission if one then moves to look at the structure of s.81, one is really driven to

McGrath J Just before you leave *Glover*, am I right in saying no question of public interest immunity arises in *Glover* and it's been the same ever since.

Brown That's right, that's right. Now I have the difficulty, I'm sure you're all reasonably familiar with 81, although perhaps if I make some comments about its general structure – and what time do we finish?

Elias CJ Yes, I wonder whether you can give some indication of how long you'll think you're likely to need tomorrow. We would normally adjourn now but I think we'll go on for a little longer, but whether we sit till 5pm rather depends on the progress you think we're making.

Brown I hope to be no more than half an hour.

Elias CJ In total?

Brown No, no for me.

Elias CJ Yes, yes, for you, yes. We'll carry on then Mr Brown.

Brown Thank you Your Honour. I'm basically going to touch on aspects of my submissions and I'm not going to take you right through them. I would draw attention then to the structure of 81 and I would focus on particular provisions. I mean 81(1) brought us a very very broad provision compared with on a world scale because in the first light it talks about all matters relating to matters that come to the officer's knowledge, and then it says 'shall not communicate such matters'. Now I don't want to take time by delaying this point but I did focus on the word 'communicate' because certainly I would consider that 81(3) was a provision that related to *Squibb* and *Knight*, but I'm certainly by no means sure that it applies in a case like this, unless one was simply saying that the fact a party was making discovery and the discovery is at least technically as a result of an order of a Court or maybe these days perhaps just a timetable, was a compulsion that was such that it would be regarded as an 81(3) section and I'll come to that. Perhaps in terms of 81(3) I might draw attention to the discussion of an essentially similar provision, and this is at para.25 of my submissions. It's the decision of the Chief Justice Dixon and the appeal from him in C*anadian Pacific* which is at para.25 of my submissions referred to there. This is para.24 and 25 which refer to the antecedent of s.81(3) and the section was discussed by Chief Justice Dixon in the *Canadian Pacific* case which is in our bundle at tab 5, and if I could just take you to that. The relevant part of the discussion is at page 7 of the report, the judgment of Justice McTiernan and others that upheld this, or dismissed the appeal, starts at page 10, but the observations by the Chief Justice are in the third paragraph on page 7 and in my submission provision of that kind is a very familiar provision in New Zealand. It tends to be, and I was just looking as I came at the decision in for example *Dubress and McCully*, it tends to be in the context of a more global section that has the proceedings privileged heading, has the immunity from suit provision and then a provision essentially similar to this one, and that structure of provision appears in many statutes throughout our statute

book in relation to a whole variety of entities. Now that certainly would bite on an attempt to subpoena a representative of the Commissioner, but I would say to you I think there's a good argument for saying that s.81(1) is really the section that the Court has engaged with at this time. It may be that there's not a material difference but the words 'necessary' don't appear in s.81(1). That is not the reason I express any preference to be there, but other Courts have said well there's perhaps not a material difference between them. I'm not sure that one could be entirely confident with that because when you go through the wording in s.81(4) you find a whole variety of formulae of tests for the disclosure, and perhaps I could just ask you to look at that for a moment under tab 1

Tipping J Just before you do Mr Brown would it not be sensible or reasonable to construe ss.1 as if it read 'except as may be necessary for the purpose of carrying to effect". Are you or are you not wanting to make a distinction?

Brown I would prefer to put it this way. I am not convinced that the fact that different words were used in 81(3) was not a deliberate act of the legislature, especially as s.81(3) commences by saying that it is without limiting the generality of ss.1, so I'm not convinced that is the case, but every time that I have tried to formulate the test or apply the test in s.81(1) to a postulated situation I find myself introducing the word 'necessary', and I say necessary to the extent that, you see if the Commissioner has decided in a given case that he's going to be within the exception, I can see the argument. He would have decided these are relevant and they are necessary or I am required, or I need to refer to them because they relate to my obligation to give effect to the statutes

Tipping J Well one is voluntary, the other is required, now is there anything the Commissioner wants to make? I'm just a little unclear at the moment Mr Brown as to exactly what you're asking on behalf of the Commissioner?

Brown Well up until, and I have to say in the Courts below we had run this as a s.81(3) case and it's probably unhelpful to be expressing anything in the nature of ambiguity to the Supreme Court, but I simply say I'm unconvinced that 81(1) and 81(3) are intended to be entirely the same in their scope. 81(3) is as Chief Justice Dixon said, dealing with a compulsion situation. 81(1) was sitting there long before 81(3) came along and is reflected of course in common law going back a long time, and the reason I grapple however with the problem of the word necessary is that there can be nothing gratuitous, nothing a share matter of choice in the Commissioner electing to communicate a document under 81(1) because it has to be for the purpose of giving effect to the statutes, but whether introducing 'necessary' as the word there I have to say I'm not convinced that that is necessarily appropriate and no Court, the Courts have tended to say well we look

at these and I think the President in *Knight* or *Squibb* said, 'I'm not sure if there's a difference but we'll just treat

Elias CJ It would have to objectively ascertained wouldn't it? It would have to be for the purpose. It's not with the intention of or a subjective purpose, it's

Brown No, but it will be the Commissioner

Elias CJ So there wouldn't be lawful authority if it wasn't necessary, not in the high sense of necessary but sufficiently connected with the purpose of the legislation?

Brown Oh absolutely and in my submissions I refer to I think the way in which Justice Hardie Boys put it in *Fay, Richwhite*, about bascially an intra vires act, although the exception itself is very broad. That's also recognised by Chief Justice Dixon in the previous page of *Canadian Pacific*. It is certainly not a narrow exception, it relates to all of the performance of the duties of the Commissioner and that is why I am wary of the word 'necessary' because that

Anderson J It may have a situation where one distinguishes between something that's necessary and something that's desirable.

Brown Yes.

Anderson J It might be desirable having regard to the integrity of the tax system to communicate

Brown Yes.

Anderson J Without being necessary for the

Brown Or essential

Anderson J Yes.

Brown Or not undesirable, and I mention those because all those words are used indifferent formulae in s.81(4). All those permeations, and indeed the Chief Justice made the point to Mr Farmer this morning that if the legislation, or if Parliament had intended that there was to be this sacrosanct protection which I know is no longer contended for, but it could have put those words in s.81(1) and certainly it could because it has put those words in a part of s.81(4) and if you go to 81(4)(j), and this is the provision dealing with the communication information of a general nature to a person authorised by the Minister, but there's the very wording, the information which does not reveal the identity of a taxpayer. Now it can't be said that it's oversight that it's not in another provision, and then to take the top of the next page, provided such communication shall be limited to such information as

is necessary. There's another formula of carefully titrating the degree of communication or the circumstances in which it is made relevant to the circumstances, and I come back to s.81(1), that's the starting provision. It is a provision that is dealing with, not by compulsion, but putting into effect the purposes of the legislation

Tipping J Well I think I'm going to note you as saying don't read in necessary Mr Brown.

Brown Well I

Anderson J Necessarily.

Brown I think that's a good idea, yes, and likewise Sir with respect as much as one is attracted to it as an attractive phrase but likewise I wouldn't be happy with the words 'necessary in light of importance of confidentiality' because that of course brings back in the very prohibition that the section started with. I say, let's be clear, I say there are not going to be many cases I believe where it's going to be likely that there's going to have to be disclosure of identity. I would have thought that redaction would deal with many cases, if indeed it was necessary to go to that level, but this case before you brings us to that point and the short issue is which way does the issue default.

Elias CJ Do you take that even further. I'm just intrigued by that argument that you can't bring back confidence in deciding whether it's necessary under s.81(3), because that would be to bring back in what you started with and what the exception was carved out of. Does that mean you don't agree with the way Justice Richardson brought public interest immunity back in?

Brown For my purposes you see I am arguing s.81 is solitary.

Elias CJ Yes, but on that basis there is no further inquiry at all in relation to confidentiality?

Brown One would say this that the, and you asked me the question I mean who decides an objective test, the Commissioner in dealing with the object of carrying into effect the legislation, has a number of perhaps I might call them competing considerations. They are those issues that are set out in s.6(2), although importantly s.6(1) is a best endeavours provision - there's nothing absolute about s.6, and he will weigh those in any given case. I mean if I could postulate an example that maybe the litigation might be so relevant or so trivial that it's possible he might feel it would be useful to have this information disclosed but he wouldn't in this case. It might be a proportionality issue. But I am suggesting that the Commissioner will have weighed, as he would have to, a number of matters in deciding what it is that is going to be required and to what extent he needs to deploy it for the purpose of

discharging his statutory function. So I see it as coming in there Your Honour, I just wouldn't see it as

Elias CJ But you see it coming in

Brown When the Commissioner makes the decision.

Elias CJ When he makes the decision to disclose. Then you are inviting us to part from pretty settled authority.

Brown I don't believe I am. I believe the Commissioner in any given case would have to decide objectively if you wish whether the case is one that is intra vires that the exception is engaged. A number of factors dealing with the integrity of the tax system will be in his mind as he deals with that. Confidentiality will no doubt be one. The point I was simply making was that Justice Tipping had proposed a formula of words I think to Mr McKay that had necessary and with the confidentiality there as an orange flashing light that would come in again, and I found that

Tipping J I think Mr McKay would prefer it to be red.

Brown Yes definitely red, definitely red, but sorry I was dealing with it as an aside, but as soon as you introduce other words, and it was interesting in *McCulley and Dubress*, and I know that this is not a strictly immunity provision, but the Court, Justices Goddard and Doogue, set out in terms of approaching the immunity provision, a discussion by Justice Kirby in approaching these sections and talking about the Court may narrow the operation of an immunity provision. They adopt a jealous and strict approach to its meaning. They require it be read in context, but its overriding duty is to ascertain the meaning and apply that meaning to the facts of the particular case. If it's clear or sufficiently clear a Court has no authority to deny effect to the provision because it considers the policy is misguided and will result in unfair application etc. Now if there are cases, and Your Honour referred to sort of accepted authority that go beyond what the section provides then they are wrong, but in my submission that submission doesn't need to be made in relation to *Squibb* because *Squibb* was dealing with a particular set of circumstances. The disclosure of the sanitised schedule which was the same as *Gamini* in effect, and nothing that Justice Richardson said in my submission in those various columns supports the general proposition that my learned friends contend for because in each case that critical passage is introduced by the words that Justice McGrath mentioned and likewise the analysis of the Judge then goes through and the critical central column has the qualifications that Justice Blanchard referred to. So *Squibb* is there. I think in the Court of Appeal

Elias CJ But it's a two-step process isn't it in *Squibb?*

Brown Yes.

Elias CJ And I'm understanding you to say that there's really only one because the second step has been subsumed in the first.

Brown It has in effect been subsumed in the first, but certainly my argument, and Mr White's is the alternative, but my argument is that s.81 is the beginning and the end. The alpha and the omega.

Tipping J If it is subsumed then there must be some balancing inherent in the word 'necessary' or in the exercise somewhere, because otherwise you're eliding something that's unlike into something

Brown Well I think that takes place when the Commissioner is at the point of – take a piece of litigation, because it's generally regarded that a discovery litigation as being within the authority of *Knight*. The Commissioner is only free of the prohibition if the material relied upon is relevant and is shall we say necessary for the pursuit or giving effect of the provisions or his obligations, his statutory functions as the UK provision's drafted and to that extent can't make any gratuitous – it doesn't open the door and then the Commissioner can refer to it, it's a focused communication.

Tipping J Let's just take an example. Is it necessary if it enhances chances by 10% as against 70% if you follow my

Brown Yes I do.

Tipping J I mean there has to be some element of assessment or judgement in there which ultimately I would have thought was for the Court.

Brown Well yes I would agree. I'm not saying that it's not free from review in any way and in fact the ANZ

Tipping J It looks like a *Wednesbury* sort of situation is it? You're not contending for that that once he's made his decision it can only be impugned on sort of irrationality grounds?

Brown Well the Court of Appeal has wording to that effect, although, but though in fairness to the Court of Appeal it comes back to the point that Justice Anderson had raised that this whole matter has been sought to be brought to a head too early. It's really about an admissibility issue not a discovery one and that's because the founding application was an application here to restrain over-discovery. So the approach that the Court of Appeal took which is perhaps my learned friends finds it easy to criticise sort of in the abstract, but in terms of the bundle of applications that came before the Court, I don't know if it's necessarily susceptible to the criticism that is made. *Wednesbury*, I would accept it would have to be objectively appropriate to be used.

Tipping J But is it not a substitution of the Court's view for that of the Commissioner rather than a review function of the availability to the Commissioner of that view? That's the crunch.

Brown Yes.

Elias CJ It's not a discretionary decision. They either fall within s.81(1) or they don't.

Brown Yes, I accept that and it's interesting I think some of the provisions in other jurisdictions have a procedure – I know the Canadian ones do where you refer it to a Court in the same way I think as in the Takeover's Panel litigation there's a process for referring documents to a District Court, that sort of thing.

McGrath J Mr Brown if the Commissioner is not using his best endeavours to protect the integrity of the tax system under s.6, can he be acting for the purpose of carrying into effect the Acts?

Brown What was the last part?

McGrath J Can he be acting for the purpose of carrying into effect the Inland Revenue Acts if he's not acting within s.6 by using his best endeavours to protect the tax system? What I suppose I'm really asking you is whether those elements of s.6 that comprise, or are part of what the integrity of the tax system imposes is part and parcel of what is necessary to do for the purpose of carrying into effect the Inland Revenue Acts.

Brown I agree with this caveat if it is one that in the Court below in dealing with s.6 and 6(a) I submitted that 6 and 6(a) have to be read together and that one does not as it were take precedence over the other, and it has to be read also Your Honour with 6(a)(2) and 6(a)(3) as opposed to focusing simply on one provision as my learned friend this morning looked at 6(a)(3)(b).

McGrath J Yes, well that care and management and things might give some flexibility but the point that I'm really getting at is that if the rights of taxpayers to have individual affairs kept confidential is a part of the integrity of the tax system, surely its Act giving respect to that must be part of acting for the purposes of carrying into effect the Inland Revenue Acts.

Brown I agree, I agree. Where I would recoil, and it's not something that Your Honour is putting to me, but my learned friends might, would be that they had some special priority and I would draw your attention to my submissions at para.20 where I set out the passage from Justice Randerson in *Reynolds* case that points out again the fact that the integrity of the system is likely to be affected by the Commissioner in

acting in a way where taxpayers feel that they are having to carry an unfair burden, so as long as it's understood that when I'm agreeing with best endeavours, I'm agreeing the best endeavour is to the integrity of the system which I accept includes those certain matters in 6(2).

McGrath J What you've just mentioned was presumably decided under factor A, what taxpayers' perceptions of integrity are.

Brown Exactly.

McGrath J Yet I'm not saying that that's not an important aspect of this but it does seem to me that taxpayer confidentiality has to be part of it too and therefore you're right into it in s.81(3).

Brown Yes I agree. I couldn't disagree with that.

Tipping J But would 8(6)(2)(c) not be construed as meaning to have their individual affairs kept confidential in terms of this Act? In other words there's not an absolute there.

Brown No.

Tipping J In other words it's to make sure that you keep in mind, very strongly in mind, but I couldn't read that as cutting down the scope of the exceptions to 81.

Brown No I couldn't either.

Elias CJ Well particularly as it's the responsibilities of those administering the law to maintain the confidence and those responsibilities I suppose are identified from the legislation.

Brown Yes, and when you come to 6(a)(3), the obligation is to collect, that's spelled out as the duty to collect, over time the highest net revenue practicable within the law and then having regard to those factors. They are factors to have regard to. They don't determine either. It's quite a complex series of obligations that the Commissioner has, but I mean how the case has been run until this day, and I know I don't need to thrash it was that one trumped the lot, and that's simply not the case. Now what I think you're discussing with me now is well how does one visit, or how is this accountable?

Tipping J Well we've now moved from a trumping situation to a heavy weight situation.

Brown Yes.

Tipping J And it's a question I suppose is it in the end of how much weight you give to the confidentiality factor in the light of countervailing factors?

Brown And it will in every case be fact-specific. I mean it may be that I mean in the most serious of cases – let's take the *Fay, Richwhite* type situation which I know is extreme, but you would say it would perhaps not take a lot to off-see the countervailing weight in that situation, whereas it might be different in a tax avoidance itself. These cases involve tax avoidance and allegations of sham and I would say that they are at the serious end of the scale as opposed to just the Commissioner resisting a challenge to the assessment on the basis that there were these errors or that error or some fact had been improperly weighed, then the weights in the different sides may depend Upon the environment of the piece of litigation that is before the Court. That's why that's ultimately necessary or whatever at one test one imports or reads in there is ultimately of course for the trial Judge and that's why it may appear petulant but my learned friend's submissions to you, Mr Simpson, were all talking about explicitly in the written parts admissibility and at trial, whereas the questions that were opposed before us are discoverability. That's the approved questions here, and the Commissioner has to discover, has to have these processes and some of the questions that you are perhaps understandably addressing are beyond the point at which we are at this stage of the litigation.

Tipping J But he has to discover doesn't he everything that's relevant, therefore he has to discover all this material?

Brown Including a list, yes.

Tipping J Including the privileged list or what used to be part 2 though heaven knows what it is now, and it's from then on that you start getting into the filtration system to do with inspection, to do with admissibility, etc.

Brown That's right, that's right.

Anderson J It seems to me at this stage Mr Brown that clearly if information is communicated or disclosed it has to be justified, that disclosure has to be justified.

Brown Yes.

Anderson J And under s.81(3) the justification is necessity for the specified purposes, because in 81(1) the justification is the carrying into effect of the Commissioner's responsibilities

Brown Yes.

Anderson J And the Commissioner's responsibilities are much broader than the justification identified in s.81(3) which is why necessary is not

included in ss.1 but it is there for ss.3. They envisage different justifications - one broader than the other.

Brown Yes well it's an argument I'm attracted to. I'd like to

Anderson J The fact that I articulate something doesn't necessarily mean I'm persuaded of it but it's there for discussion.

Brown Well I certainly focused on the compulsion angle and the situation that that is something where the Commissioner has already decided that it's just not something that he would be promoting. I think that 81(1) is almost addressing a situation where it has sort of stepped back or beyond that but I don't think I can take that much further, at least not without having a closer read over it, hopefully overnight. Now I've dealt with s.6. I don't think I need to spend more time on *Squibb* and *Gamini*, although my learned friend will I think, Mr White, will deal with that but I would simply say on that that the Privy Council in *Gamini* in my submission were addressing a situation where document R14 was not regarded as being within the section. It wasn't in play. The Privy Council then make a reasonably general statement in my submission about they would deprecate X or Y or Z but they are certainly not turning their minds to the section applying 'and whether then the exception that introduces the section is engaged' and in my submission it is a fairly long call to rely upon that dictum as supporting the broad proposition that's been advanced today. Secondly, in terms of *Squibb* I would summarise my position by saying that I agree with and support Justice Wild's analysis which is in our bundle – I won't take you there – but in our bundle at tab 4 and it's through a passage from paras.147 and 149 to 155, and the ANZ submission at 4.2 makes this submission. It says it is impossible to reconcile that with *Squibb* and it actually says that *Squibb* would not have been decided the way it was under that approach, and I don't accept that proposition.

Tipping J Quite a lot was said in *Squibb*, and I mean no disrespect in saying this, that was really not necessary for it's actual disposition because this was simply comparative data wasn't it

Brown Yes.

Tipping J But didn't identify anybody.

Brown That's right, it didn't identify anybody, and the Commissioner was saying I don't need to go any further, so it was, and I hesitate to say speculation, but the would have been necessary was postulating the situation at trial, where Mr Simpson wants to go of course in terms of asking questions, but it was not in the context of the type of situation we're talking here and I respectfully submit that is what Sir Robin Cooke meant when he referred to the secundum subdue materium description of *Squibb*. Lastly then if I could just say, the real issue in

this case is something that I address in my submissions at paras.50 onwards – it's the question of if you were going to adopt a different scenario then how are you going to deal with the particular circumstances. In our leave application we refer to the judgment that came before this Court on a judgment of the Family Court that was redacted, but unsuccessfully so because the Court could work out reading the judgment what the issues were. And that happens not infrequently you know. One studies something as Justice Blanchard studied the timetable in *Opua Ferries* and before you know where you are you've found you know something.

Blanchard J Well I think it was Justice Tipping who actually was the one who was clever in the Ferries to be fair.

Brown Yes.

Blanchard J He's good at ferry timetables.

Brown Well perhaps it's a question whether one resorts to sort of practical considerations here, but the Court of Appeal made the statement and we accept it and I don't believe it's challenged by anyone other than Mr Simpson that, and this is at para.90

Elias CJ Of what?

Brown Of the Court of Appeal's decision. The Court of Appeal had made the point that there was a difference between Mr Farmer and Mr McKay. Mr McKay was arguing for an absolute rule and Mr Farmer was arguing for a rule that redacted everything out so that there was no practical difference, and the Court of Appeal at para.90 said 'redaction of the other Bank documents', this is descending to our case 'to take out all taxpayer identifiers would destroy the utility of the documents for the purposes for which the Commissioner wishes to use them'.

Elias CJ What is the purpose, it doesn't come through I must say in the material we have, what is the purpose?

Brown Of using the documents?

Elias CJ Yes in which the Commissioner wishes to use them.

Brown You're inviting me to

Elias CJ There's nothing much in the case.

Brown No and nor would you expect it to be because this is not an appeal about relevance. Relevance is conceded by the Banks for this case, but if you wish it I would be

Elias CJ No, no, I'm not inviting you to do that but isn't there some short indication of how it's proposed to use this?

Brown Yes, and indeed the Court of Appeal are quite helpful, and they did look at the documents, contrary to what was being said earlier and in paras.45 to 52 they, let me just see, oh it's at 58, no just one second, sorry. The discussion, this is in the Court of Appeal judgment, because these are the very paragraphs that my learned friend Mr Simpson was focusing on – para.44 through to para.51 of the judgment as to ways in which the documents could be used. I mean it's not for me to go into the documents and refer to the specifics on them but there's a whole variety of ways in which the Commissioner might want to refer to a document about what a counterparty refers to or the way in which it is presented to another Bank by reason of what another Bank has done, in for example on resisting the proposition that this is a commercially driven transaction as opposed to one that is just for soaking up additional tax capacity.

Anderson J But it may be that in the context of trial the Judge would say I don't think that that is sufficiently significant to justify disclosure of personal information.

Brown Yes, on issue one?

Anderson J Yes.

Brown Or it might be that a document is an issue two. It depends upon the purpose and the use in which it is put.

Tipping J And at the highest level of generality you want to use these documents to assist you in showing that individual Banks were engaging in tax avoidance.

Brown Yes, and in particular in relation for example to the guaranteed procurement fee, a fee that is paid to the subsidiary of a parent, to secure the parent to guarantee the repayment of a sum and where it is said that the figure for that fee is set at market rates when the prevailing market is in my submission only those who are party to the transactions that that is not a commercial transaction at all, that it is a device that is part of a formulae of sharing tax benefits which is the basis for the transactions in the first place, all by the same entitities. Some sponsored by the same counterparties; some with the same person albeit moving between entity and entity, and that is where that material – you could certainly never discountenance it as being relevant, and the Court of Appeal saw enough to accept that they could see how, and if you look at the bottom of page, the sort of much maligned para.71, they say 'in our appreciation of the case as a whole we think it clear that the disclosure proposed is genuinely within s.81(1) as being "for the purpose of carrying into effect" the relevant statutes'. And bearing in mind, this is a Commissioner cast in his

usual role of resisting a challenge to assessments on the basis that the transactions cross the line of what is acceptable conduct and tax avoidance. Now having said that

Tipping J Well the act of, no I won't, I won't Mr Brown, I've thought better of it.

Brown Well can I say I make no apology for not having gone into those because we have been looking at the approved questions with a very clear eye of discovery, prohibition, absolute redaction, if we were moving to the evidence and the documents themselves then one I believe would make a very cogent case that would satisfy you but that's not where you've asked us to be and nor am I submitting that we should on s.81. On PII, if you get to that as you will with my learned friend's submissions, it may be a different question. I'll just check the last couple of paragraphs of my submissions. I was making the point, and I would just close on this, that we were making the point about documents being in the public domain and the like. It is a very difficult question and without being pejorative it invites gaming. If a document, say take the situation, I have a document that I consider is relevant would be necessary I should disclose, I could try and redact some parts of it, I do, and then the redaction fails because the party referred to has actually put material in the public domain. That must impact upon the capability of the redaction to serve its purpose, and as soon as you move into that difficult area of entertaining the Bank's submissions that what you can't redact you lose, then you take it out of the control of the Commissioner to be able to formulate a position on a document on the basis of the document alone. It's actually in the hands of others as to how much information is percolated into the public domain to enable a redaction or reciphering or anything else to be undermined, and that of course plays with respect into the Bank's hands because their submission to you is anything that even redacted has that effect then it can't be used in utile, which is where the utility description comes from. Your Honours I've gone further than the time I said I would have. I believe I've addressed the essence of my submissions but unless you have any questions I will withdraw.

Elias CJ No thank you Mr Brown. Alright we'll take the evening adjournment now and see you at 10am tomorrow.

4.44pm Court Adjourned

Day 2 - Wednesday 12 December 2007

10.05am

Elias CJ Mr White.

White If Your Honours please, we've taken the opportunity overnight of preparing a very short summary of the Commissioner's position in light of the submissions yesterday and if I could arrange for that to be handed up to Your Honours. The first point we make Your Honours is that as the appellants and intervenor have now accepted that there's no absolute prohibition on the Commissioner from discovering other Bank documents which are relevant to the tax avoidance issues in the BNZ challenge proceedings either by virtue of s.81 or public interest immunity. The Court may answer the first approved question in the leave judgment in the negative and that really is the end of the matter we submit because no further question arises for the determination of this Court at this stage for the reasons which follow. First, there is no dispute that the other Bank documents are relevant to the tax avoidance issues in the BNZ proceedings. Secondly, the exception to the prohibition in s.81(1) recognises that the Commissioner may use such documents for the purpose of carrying into effect the Inland Revenue Legislation, ie, in this case. And I emphasise that in this case for the purpose of defending his tax assessments which are under challenge in the BNZ proceedings and in accordance with his duty, and I emphasise that word in s.6(a)3. The third reason is that the Court of Appeal

Elias CJ Mr White I'm not sure that, I certainly haven't seen them, they may be here, that we have the foundational proceeding documents. Are they in the bundles that we have?

White You mean the pleadings?

Elias CJ Yes.

White Yes, in the ANZ case there are judicial review proceedings Your Honour which I will actually be taking you to in the course of this very short summary.

Elias CJ Yes, it's just that you've only mentioned the BNZ proceedings, but there are proceedings in respect of all of the Acts are there?

White No, well yes there are Your Honour, but this case arises out of discovery by the Commissioner

Elias CJ Yes, yes, in those proceedings.

White In those proceedings.

Elias CJ Yes, thank you.

White The third point Your Honours is that the Court of Appeal, after inspecting the sample ANZ National documents, held that the Commissioner had acted for that purpose in the context, and again I emphasise that, of the BNZ tax avoidance case, and Your Honours were taken to the paragraphs, or a number of them in the judgment of the Court of Appeal yesterday and I don't propose to go back there again except just to note that I have referred to a few more paragraphs, 40 to 53 in relation to the Court of Appeal's appreciation of the relevant documents and their relevance to the tax avoidance issues, and in para.71, which starts with a reference to that summary and also finishes on that note. And I note that yesterday in the course of argument His Honour Justice McGrath referred or suggested that the context was all and the Commissioner would accept that, that it does depend on the context. That decision of the Court of Appeal based on an inspection of the relevant sample documents should not now be reviewed without consideration of the relevant arrangement documents, and they are summarised at a somewhat high level in the Commissioner's public interests immunity submissions, and I have given the references to that high level summary. There are attached to the Commissioner's public interest immunity submissions also two confidential schedules which I assume Your Honours have not read because of course they refer to the documents that Your Honours have decided not to receive, and I don't at this point need to go any further than simply to make the point. I think Your Honour the Chief Justice said that you didn't want to get into that area, but I'm simply making the point that the Court of Appeal in deciding that in the context of the BNZ tax avoidance case, these documents were going to be used by the Commissioner for the purpose within the exception of 81(1) cannot now be challenged here or reviewed here unless Your Honours are prepared to do what the Court of Appeal did, which was to look at the documents themselves. The fourth point is that no question of the application of any class, or contents, public interest immunity arises as a matter of law to prevent the application of the exception in s.81(1). There is no public interest immunity, class, or contents in the face of s.81(1). We could put class to one side because as I understand it the appellants concede that there's no class immunity here, so the only question could be whether there was a contents one, and our submissions is that if the exception is engaged as found by the Court of Appeal, the statutory secrecy obligation, which we don't under-emphasise the importance of, but the important statutory secrecy obligation goes, and no immunity could be claimed to trump the engagement of the exception. This was really I think Justice Tipping's point yesterday about the awkwardness of trying to bring back in public interest immunity criteria or factors in deciding how the exception applied. The prohibition, the secrecy prohibition, and I emphasise the word 'secrecy' because that's what the heading and the marginal note and the section refer to, is there in the Act, but if the exception is engaged then the secrecy obligation goes, and we continue decisions which have sought to grapple with a public interest immunity gloss in the face of the statutory provision have inevitably

run into difficulties. Judges have perhaps been guilty of what Professor Burrows described in His Lord Cooke Memorial Lecture last week as the 'old friend syndrome'. In other words trying to use something the old friend of public interest immunity in a context where it is no longer appropriate; trying to apply an immunity which is absolute in the face of a statutory provision which is not, and we say that this conclusion is reinforced by the fact that any public interest immunity must now be found in the context of s.70 of the Evidence Act 2006, and I apologise for that error, which codifies the law and which has no application here, and we have expanded on that latter point in our public interest immunity submissions and I have given the references to the parts of the submissions that do that. I can take Your Honours to them if you wish but in essence there are provisions in the Evidence Act which make it clear that where there is another provision such as s.81 of the Tax Administration Act, that will prevail and you don't go to s.70 at all. The second point is that if you do go to s.70 we have advanced submissions that the other Bank documents do not concern a matter of state so to come within that provision at all. And it is only if Your Honours were to reject all of these submissions and to decide that there was some part to be played by public interest immunity still that you would then need to look at s.70, recognise that under s.70 the balance is in favour of disclosure unless there are countervailing public interest factors against disclosure, so the onus is clearly on the party seeking to stop disclosure and unless you went there and looked at that, those weighing of factors won't actually arise, and as the Chief Justice indicated yesterday, you didn't want to get into that exercise because that would have to be done in relation to looking at all the documents themselves. But our submission is you don't actually get that far at all as a matter of law. The next reason for submitting that no further question arises is that on the engagement of exception to s.81(1), that does not prevent the BNZ trial Court from dealing with any question of confidentiality in relation to any particular documents in the usual way under the High Court rules and if necessary on a document-by-document basis, and we've given the reference to the relevant rules for the Court of Appeal authority in the *Port Nelson* case which my learned friend Mr Brown also referred to yesterday here. The question of confidentiality I'd emphasise is a separate and later question. Once the secrecy obligation under s.81(1) has gone because the exception is engaged, that does not mean that questions of confidentiality have gone out the window. They are still able to be raised in the normal way in tax litigation as in any other litigation, and we point out that that is what happened in *Accent Management Limited*, the Trinity case, a tax avoidance trial where several test cases relating to different taxpayers were heard together and confidentiality orders were made in respect of the tax returns and assessments of individual taxpayers, but not in respect of the Trinity arrangement documents or perhaps most significantly in respect of the names of the taxpayers, and that latter decision of Justice Venning's not to as it were suppress the names of the taxpayers was challenged, the Court

of Appeal upheld Justice Venning's decision and this Court refused leave to appeal against that decision, and we submit that it is in this context, that is in the later confidentiality issue context, that s.6 best endeavours confidentiality concerns may be addressed. The next reason for submitting that there's no further determinations of this Court required is that the engagement of the exception to s.81(1) does not prevent the BNZ trial Court from determining any questions of admissibility. Annexed engagement of the exception does not prevent BNZ from seeking further discovery from the Commissioner or non-party discovery from the other Banks if BNZ considers that there any further relevant other Bank documents which should be discovered in its proceeding, and when the tests of relevance and necessity for such further discovery are borne in mind, however concerns about mammoth document dumps can be expected to be far-fetched. It's not a question of simply saying that all 100,000 or whatever number ANZ has discovered could possibly be relevant to the issues in the BNZ tax avoidance proceedings. I can go further

Elias CJ You might need to go further on that Mr White.

White Well I was going to say Your Honour that that would require me to refer in some ways to the nature of the documents, the sample documents, to highlight why they are relevant, and perhaps I can just do it in a high level way, well by way of a hypothetical example. Let us say that in amongst the ANZ documents produced to the Commissioner in the course of his audit of the structured finance cases, there were emails from counter-parties to the transactions between the ANZ, or with the ANZ, which referred to earlier structured finance transactions between the same counter-parties and the BNZ describing the formulaic nature of the various component parts of the structure – the arrangement. How the guaranteed procurement fee was calculated in the BNZ transaction and for instance talking about the division of the tax benefits. In other words the people in the counter-parties and the promoters to these schemes talk about earlier transactions in their communications with later Banks. So that's the nature of the documents which the Commissioner wishes to use at the BNZ trial and which is now accepted as being relevant.

Anderson J The issues of excessive discovery or abuse of process are not engaged by the grounds in this appeal.

White Precisely.

Anderson J Which are quite narrow.

White Precisely. And that perhaps leads rather neatly Your Honours to the third proposition on page 3 which is that the ANZ National in its judicial review proceedings has not made out any of the grounds on which it sought to review the Commissioner's decision under s.81. I

think it's important to recognise that at least as far as ANZ National is concerned, this case is here because it did issue judicial review proceedings challenging the Commissioner's decision to discover its documents in the BNZ proceedings, and I would ask Your Honours please to refer to the ANZ National case on appeal. I think there was only one volume involved, and at page 1 you'll find the statement of claim. I'm focusing on page 4 where having set out the factual background under the heading *Judicial Review* the Bank pleads 2.2 'the Commissioner has asserted that such disclosure is necessary for the purpose of carrying into effect the Inland Revenue Acts pursuant to s.81(3) and by his conduct he's exercised the statutory power of decision and in reaching his decision the Commissioner has erred in law' and then particulars are given. The first one is that in deciding that the documents were relevant. So that was the first ground of challenge and that's gone. And then in B and C, in deciding that it was necessary. Now those pleadings of course arise in the context of s.81(3), and I must acknowledge that when Your Honours look at the statement of defence, the Commissioner pleaded that it was necessary under s.81(3), but as Your Honours know as happens, the case has moved on and the Commissioner now relies on s.81(1) and the exception there. The alternative pleading in 2.5 was that the Commissioner failed to take into account or give proper weight to the following relevant considerations and there appear the public interest considerations that would be relevant to the public immunity issue, and for the reasons I've already advanced we submit that they are not

Tipping J Give proper weight to is a bit unconventional

White Yes certainly Your Honour in a case seeking to review the Commissioner's decision in quotation marks we would say obligation to make discovery and we argued before Justice Wild that it would certainly be odd for the Commissioner's discovery decision which we said wasn't really a decision at all, to be reviewable, because if the Courts are going to start reviewing parties compliance with discovery obligations, that certainly would be

Tipping J Well my point was rather it has either failed to take into account or come to an irrational conclusion. Proper weight is not a ground for, but never mind that's just a distraction Mr White I suppose.

White Yes, yes, well the submission that we're making Yours Honours is that those were the grounds that they advanced in the judicial review aspect and Justice Wild held in the High Court that the decision to comply by the Commissioner with his High Court discovery obligations was not the exercise of a reviewable statutory power of decision and we would add that if it were then none of the substantive grounds were made out. And the penultimate point we make Your Honours is that if the Court were to go further

Elias CJ Are you going to deal with the Declaratory Judgments Act claim?

White I wasn't going to deal with it separately Your Honour

Elias CJ Well that seems rather more the area that we've been debating in this Court.

White Well our first response Your Honour was that it was not possible to make those declarations of course without resolving the factual issues that arise and require you to look at the documents.

Elias CJ Yes, yes but that's a response, whereas I had rather thought that you were indicating that the judicial review proceedings based on this having been a decision amenable to judicial review were a bit forlorn. The question of interpretation however is a live one

White Yes.

Elias CJ I must say I'm minding to be with you on whether there was a statutory, or whether there was a decision as opposed to an obligation that's an issue here.

Tipping J Is it perhaps part of your skipping over declarity judgments Mr White that the plea here in 3.2 is a right of complete secrecy?

White Yes.

Tipping J Which is no longer

Elias CJ Well that's long gone.

White Yes, exactly Your Honour, and I can certainly go through 3.2 and 3.3 but we have effectively answered that by the earlier points that we made, that it is the acknowledgement of no absolute prohibition that undermines what's sought there and well I don't think I can say anymore than that Your Honours.

Elias CJ No.

White The penultimate point is Your Honours in point 4 in my note, that if the Court were to go further in considering the scope for review proceedings challenging another decision of the Commissioner in relation to the engagement of the exception, the wide scope of the exception, which is referred to in my learned friend Mr Brown's submission, should be recognised in order to discourage collateral proceedings such as these. And the final point which we include to assist the Court because of the wish of the Court to be aware of anything that might help with the interpretation of s.81 is that we'd invite the Court to recognise that the sanction for contravention of the secrecy obligation under s.81 is a criminal offence contained in s.143(c) of the Tax Administration Act which requires a defendant

knowingly to act in contravention of the provisions, and that would require mens rea presumably.

Tipping J But that doesn't lead to the proposition does it, that there could not be civil relief?

White No I wasn't saying that Your Honour, but if you're going to be looking at the obligations imposed on the staff of the department, then it's important to recognise in interpreting the provision that it is also the bases

Tipping J It does give rise to?

White Yes.

Elias CJ And I didn't understand para.71 as being directed at the criminal

White Not directly Your Honour, which is

Elias CJ So what is the point that you're making in the last sentence.

White I'm simply saying that it's reflective of that. In other words the decision that the exception is engaged in order to avoid the contravention must involve we would submit as the Court of Appeal recognised, some subject development, because otherwise you would be creating potentially

Elias CJ Well the proposition in para.71 is much wider than that.

White Yes I'm just endeavouring to assist this Court by indicating that the

Blanchard J Would you be creating a tension? I wouldn't have thought so. You could have an objective test of whether the Commissioner had acted; properly and that would sit quite comfortably with the prosecution test that it would have to be shown that it was a knowing departure.

White Well they merge I think probably Your Honour.

Blanchard J Well it might mean that in many instances you would have to show really almost bad faith – somebody in the Commissioner's staff realising that there was not going to be compliance; it was not necessary if that's the test, but ploughing ahead anyway. It's not very likely to arise.

White No, no Your Honour.

Tipping J You're not arguing here that this test for civil intervention is subjective are you?

White When Your Honour says civil intervention, is Your Honour meaning in judicial

Tipping J Well anything

Elias CJ The legal obligation.

White Well the provision, and I don't want to venture really into areas that my learned friend Mr Brown has already addressed Your Honours or in relation to

Blanchard J Well I thought he accepted it was objective.

White Right, well I'll leave it at that. I was simply concerned that Your Honours should be aware that there is a provision, 143(c), making it a criminal offence and I don't think that's been mentioned.

Elias CJ They may act unlawfully, but may not be criminally responsible however Mr White.

White Unless there are any other matters I can assist Your Honours with, those are the submissions I wish to make.

Elias CJ Thank you Mr White. Now I think perhaps Mr McKay and then Mr Farmer. Is that the order that suits?

McKay I might Your Honour deal with a small number of reply points to my friend Mr White since those are freshest in the Court's mind at this point. Your Honours Mr White first referred to the questions on which leave to appeal has been granted by this Court and indicated that the first of the questions set out in B has effectively been answered by the nature of ANZ National and Westpac submissions in no longer contending for an absolute prohibition. Speaking at least from ANZ National standpoint, ANZ National has not contended, at least in its submissions before the High Court and the Court of Appeal, for any absolute prohibition on the disclosure of third party information. It's always been accepted, taking as ANZ National does, the *Squibb* decision as the map in a sense through s.81 in public interest immunity, that there are a class of questions which Justice Richardson describes as different and difficult where a form of disclosure of third party information may indeed be required. Its proposition rather, and this is in terms of effectively the alternative or the second method of formulation of the question on which leave was granted in B that the Commissioner has an obligation at the discovery stage and the inspection stage in litigation to ensure that third party taxpayer information is not discovered to a different taxpayer, that always with the qualification and the recognition, that different and difficult questions may arise at trial with reference to individual documents of the character that I attempted to describe to Your

Honours yesterday in terms of that accounting evidence situation or example that I asked you to consider.

Tipping J Why do you make this distinction between the discovery production stage and the trial stage?

McKay Because that's the distinction Sir that is explicit in the case of *Squibb*, and it's also the ground for, a primary ground, for distinguishing *Squibb* put forward by two members at least of the Court of Appeal in the *Fay, Richwhite* case.

Tipping J I can't see the logic of having a different conceptual approach at one stage as against the other.

McKay The logic in my respectful submission, and it's picking up a point I attempted to make to Your Honours yesterday, is that as a pragmatic rule, or a pragmatic approach that fairly balances first of all the significance of the secrecy of taxpayer information against the disclosure of that information in the interest of justice, it's a good rule, it's a workable rule. It says there's a prohibition on the Commissioner discovering third party information to other taxpayers, but it does acknowledge, and that fairly represents in the ANZ National's submissions the weight that is given both by the Act and by the authorities and by those various overseas and external sources to which I referred Your Honours yesterday, to confidentiality concerns.

Tipping J Are you saying in effect that it is absolute at the discovery inspection stage but ceases to be absolute at the trial stage?

McKay Yes, that's exactly what *Squibb* says. *Squibb's* difficult and different questions relate to the trial stage, not the discovery and inspection stage and it's at that basis that the Court of Appeal in *Fay, Richwhite* distinguished the *Fay, Richwhite* situation from the *Squibb* case. *Squibb's* a discovery case. Here, inter alia, there is a far broader context. We're not concerned with discovery and different public interests apply.

Tipping J I have to confess speaking for myself, I didn't appreciate that distinction when you were addressing us in your substantive submissions. I thought your concession was across the board.

McKay No, the concession, well all the concessions that ANZ National had made had been derived from what it regards as I said Your Honour to be basically the road map in terms of the balancing of the respective interest, which is the *Squibb* decision.

Tipping J Could you take us to where in *Squibb* we see this distinction?

McKay Yes, volume 1

Tipping J Other than the fact that it may have been at that stage in *Squibb* that they were dealing with.

McKay What would probably be a more appropriate reference then Sir is to the *Fay, Richwhite* decision where that's put forward as the explicit basis for distinguishing S*quibb*, and I'll ask my friend Mr Turner if they've got the reference in *Fay, Richwhite* in the judgment, and I think it's more than him, but in the judgment of Justice Hardie Boys, a ground I think, but certainly the primary ground for distinguishing *Squibb* from *Ray, Richwhite* is the fact that *Squibb* is a discovery case. Page 528, and the tab reference Your Honours is tab 19 of volume 1. And the line number Mr Turner?

Turner 37.

McKay 37, thank you.

Tipping J Page again please?

McKay 528 Sir.

Tipping J Thank you.

McKay It's also, and I've asked my friend if he might be able to locate it while everyone was looking at the *Fay, Richwhite* decision, but it is also explicit in the *Squibb* case itself that when Justice Richardson is describing his interpretation, or what turned out to be of course the Court's interpretation of s.81, that the observations to the competing interests and to the balancing and to the prohibition on disclosure of third party information is put forward specifically by reference to the discovery stage of litigation. Page 9160, that's tab 14, page 9160. My friend Mr Turner is referring to the righthand column of page 9160, to the paragraph 'a taxpayer who was faced with a claim and to Justice Richardson's description of different and difficult questions may arise at trial'.

McGrath J Can you pinpoint whereabouts on page 528 of *Fay Richwhite* we should be looking.

McKay Yes, to a paragraph beginning, 'I do not accept that the *Squibb* decision leads to such a result'. And several lines down in that paragraph of Justice Hardie Boys.

McGrath J Thank you.

Elias CJ In *Squibb* in this passage that you rely on of Justice Richardson's, he refers to some note earlier when referring to the *Mobil Oil* decision.

McKay Yes.

Elias CJ Can you identify what he said there and how that

McKay I could give you a summary. Frankly Your Honour it's beyond me to understand exactly what Justice Richardson's reference to the *Mobil Oil* case is doing at that point.

Elias CJ It doesn't sound much of a road map then.

McKay I beg your pardon?

Elias CJ It doesn't sound much of a road map then.

McKay Not in that particular respect, no. My friend Mr Farmer's submissions have detailed commentary upon the *Mobil Oil* case.

Elias CJ Yes, yes.

McKay It's a funny decision Your Honour. A lower level Tribunal bearing some affinities but far from complete with the Taxation Review Authority asked a number of question which it characterised as being questions of law for the opinion of the Federal Courts. These basically concerned procedural issues and amongst the procedural issues was the question of whether or not it was possible in circumstances broadly approximating *Squibb*, in circumstances where the Commissioner, or the Federal Commissioner in Australia, wished to make use of data relating to the financial affairs of another taxpayer in order to establish as a case against the different taxpayer, so broadly comparative style of material. And a number of questions were raised by the Tribunal for the opinion of the Court as to the procedures it should follow. I mean among those questions were those of confidentiality, like is it possible that we could receive the evidence about the other taxpayer without that other taxpayer being present. Is it possible that we could receive it to the exclusion of a taxpayer who's own affairs were in issue.

Elias CJ I'm sorry, what I really wanted you to do is just to point me to where there is a discussion of *Mobil Oil*

McKay I'm sorry, I misunderstood Your Honour's question.

Elias CJ Oh I see I've found it, 91156, thank you.

McKay So reverting to my point which is a simple one in response to Mr White, it is certainly not in this Court, not before the Court of Appeal the proposition of ANZ National, that a prohibition is absolute. Part of what

Tipping J But it is absolute at this stage.

McKay It's absolute at the discovery stage, yes.

Tipping J Yes, well let's just be very – you see this is where all this potential for misunderstanding arises. You're not putting it very precisely when you say it's not your contention that it's absolute. It is your contention that it's absolute at the stage we're at.

McKay At this stage, yes to discovery, but beyond that, no Sir.

Anderson J Well if it's absolute at this stage there's no subsequent stage to consider. That's it.

McKay No, not in terms of the Richardson view of the world Sir, that's the difficult and different may arise.

Blanchard J I'm not surprised they're difficult if that's the view.

Tipping J I mean this is quite dissonant from ordinary judicial process. You're supposed to have on the table stuff you're going to use at trial. I mean it seems counter-intuitive this Mr McKay, at the very least, and that's a polite way of putting it.

McKay Well I'm not embarrassed to stand with Justice Richardson if that's the impact of it Sir, if it says that notions of confidentiality and secrecy are essential underpinning of the tax legislation

Tipping J Yes well we know all that, but you're trying to now make a distinction between this stage and the trial stage and I'm trying to understand the logic of that and how it fits with ordinary forensic processes.

McKay The logic of it in the ANZ National view of the world is in the example that I put to Your Honours yesterday of a situation where third party information cannot be disclosed by the Commissioner to a different taxpayer at the discovery stage, and subsequently the taxpayer, and it's the accounting example that I discussed I think at some length with Justice McGrath. Subsequently the taxpayer brings evidence to demonstrate that the Commissioner

Tipping J Oh the rebuttal point?

McKay Yes, the abstracted comparables of the Commissioner as put forward, that those are of no direct relevance the taxpayer says because of X and Y. The Commissioner knows that X and Y are wrong and he knows it because he's got information relating to a third party that demonstrates that X and Y are wrong.

Elias CJ Well that's what Justice Richardson is dealing with isn't it?

McKay Yes it is, it's exactly that case Your Honour.

Elias CJ That's what he's considering. But that's a mile away from this sort of case where the Commissioner is saying that this is evidence supportive of his case, not which he may grasp for to rebut something that the taxpayer puts forward

McKay It's evidence that, I'm sorry.

Elias CJ Surely he has to disclose it at the discovery stage if that's so.

McKay Not in my respectful submission Your Honour. I don't see any difference between the Commissioner's position in that respect and the position of the taxpayer in *Squibb* itself. In *Squibb* one will recall that there was relevant information, in fact in my submission, far more relevant information than anything that's in contention here. The taxpayer said I must have that information on account of fair trial considerations. That information is the basis of the assessment that I have to prove is wrong. I therefore must have knowledge, I must have information relating to the identity and the affairs of the taxpayers whose comparables provide the basis of the assessment. Chief Justice Eichelbaum said yes, you must have it in the interest of fair trial considerations. The Court of Appeal said no, it's confidential information. In my respectful submission the Commissioner is on occasions going to be in the same position. The Commissioner may on occasion seek for his own strategic reasons to disclose the information. If *Squibb* couldn't get it because of confidentiality, then the Commissioner should not be able to disclose it for exactly those same reasons Your Honour. Moving on again and a series of brief points with reference to my friend Mr White's submission and with reference to the matter raised at para.2.4, and the question of s.70 of the Evidence Act 2006, I just simply make a very short point with reference to that issue Your Honours. The Commissioner submits that there are no matters of state in evidence in the present case. The detailed written submissions of ANZ National do cover that point and again at some level of detail themselves. The reason why the third party information that the Commissioner seeks to disclose in this case does relate to a matter of state is provided by the language of s.9(2)(ba) of the Official Information Act 1982, on the basis that it is information, the disclosure of which would be likely to prejudice the supply of further information, or information from the same source and it's in the public interest that it should continue to be supplied, and the elaboration of that submission is set out in detail in the written submission Your Honours. And finally and briefly with the question raised by Mr White in para.3 of his written synopsis handed to you this morning. The issue of the jurisdiction under the Judicature Amendment Act and the Declaratory Judgments Act was an issue that was debated before Justice Wild. It was a matter that was included in the written submissions in the Court of Appeal, but the Court of Appeal had no interest in it. It was not a matter that was included in the written submissions before this Court simply on the basis that the

approved grounds for the appeals did not include it. Nor I might point out did my friend's initial detailed written submissions. Your Honours if I might there are an equally small number of points that I make with reference to my friend Mr Brown's submissions on the perhaps more important issue of s.81 itself. If I might move to those briefly Your Honours? My friend Mr Brown said in his written submission, then he repeated it in his oral submission yesterday that the appellants appeared to accept that the carry into effect exception to s.81 applied, and that accordingly what ANZ National and presumably Westpac were arguing was for a rule that had no basis, or a restriction that had no basis in the words of s.81(1) or 81(3). I think his phrase in his written submission is that whatever this restriction is it arises subsequent to the application or engagement of the exception but the critical point is that the exception is accepted to be applicable. Your Honours that is not ANZ National's submission. ANZ National's view is that the restrictions on the disclosure of third party information in terms of s.81 itself arise from the language of the provision. They arise because it is not necessary in terms of 81(3) to disclose third party information at the discovery stage, or they arise because the disclosure of that information is not carrying into effect the Inland Revenue Acts, and again although I sense a measure of Your Honours' impatience in me doing so, can I take you just back to *Squibb* which is the ANZ National reference point for the fact that those restrictions inhere within the provision itself, and are not subsequently engaged, the basis of that proposition from *Squibb* is again on page 9160, and again on the lefthand side of the page and it's a phrase to which I took you yesterday, or a paragraph to which I took you yesterday, 60% of the way down the lefthand side 'against a claim by the Commissioner that he or she had regard to comparative industry data in making the assessment would have ever been necessary for the purposes of carrying into effect the Inland Revenue Acts to compel disclosure of the identify of other taxpayers. To do so would inevitably undermine the integrity of the tax system which the stringent official secrecy provisions are designed to support. To compel disclosure of the identity of other taxpayers would be inimical to the carrying into effect of the Inland Revenue Acts. And ANZ National's proposition is no more than this Your Honours that if an act or an activity or in the form of a proposed disclosure is inimical to the carrying into effects of the Acts, and if it would undermine the integrity of the tax system, it cannot be necessary and it cannot be the carrying into effect of the Acts.

Tipping J Well that is simply to say that it will never be necessary, it will never be for the purpose.

McKay At the discovery stage, and in very very limited circumstances following discovery.

Anderson It's certainly limited, because if the Commissioner tried to introduce a document which hadn't been discovered, one can imagine what the outcry would be.

McKay Yes, yes, and that's appropriate in ANZ National's view of the world Sir, and the *Squibb* view of the world.

Anderson J Well what's the logical justification saying although it can't be produced at that point, it can be produced in rebuttal?

McKay Because there may be circumstances according to Justice Richardson where the line of argument and the evidence that's taken by the taxpayer in the actual proceedings themselves, raise a direct and significant question as to whether or not the Commission is to then or to back-point reliance upon abstracted or redacted information

Anderson J But it's still someone else's information that will be disclosed.

McKay Yes, yes.

Anderson J Why should someone else's confidence be breached because of a particular other litigant's conduct in the trial? Why does it make it necessary then? I can't see the logic of it.

McKay I'm sorry Sir, I was going to say that's an absolute proposition with which I got an element of private sympathy, but in terms of the *Squibb* proposition

Anderson J Yes but we're not bound by *Squibb*.

McKay No.

Anderson J It has dissuasive authority but we're not bound by it. That's why I asked the question in terms of logic, not in terms of precedent.

McKay The logic of the position Sir is that the Act, completely leaving aside *Squibb*, that the Act itself starting on its face in terms of the prohibition in s.81, supported by s.6, supported by well-established propositions in both New Zealand and the United Kingdom and elsewhere, all of which established the significance of confidentiality and secrecy of taxpayer information in terms first of all of voluntary compliance with tax obligations; secondly in terms of privacy, that they indicate that the confidentiality of information is a paramount interest. That that interest is sufficiently substantial not to be outweighed other than in rare and exceptional circumstances. Now the question of when a rare and exceptional circumstance arises, as Your Honours know infinitely better than I, is most often characterised in by way of debate and example, by way of where a document exists of a confidential character which establishes conclusively the innocence of a person charged with an offence,

which is the very example that's taken in the *Makanjuola* report of a situation where if information to that effect subsequently arises then notwithstanding the initial immunity that attaches to that document, other interests arise in the events that they transpire that overrides it. The logic of the position is that if we apply that to taxpayer information we start out with the prohibition which gives full effect. At the discovery stage it's not able for the Commissioner just to put these documents for inspection. There are certain events that may lead to a reassessment in the case of a particular document because of development at trial. Very rare and exceptional circumstances, but the logic of the position is in my submission that as long as those cases are regarded as rare and exceptional then there is that capacity at least for the Courts to make a reassessment as to where the balancing lies for a particular document, giving a particular issue at trial. Your Honours that's the first of my reply points with reference to Mr Brown. The second of them are again with reference to Mr Brown's s.81 submission. It relates to the question of Mr Brown's defence, or rather I think the lack of it of the Court of Appeal's approach to s.81. Your Honours will recall because you have been taken to the relevant paragraph on at least two occasions, that the essence of the Court of Appeal's decision on s.81 lay in para.71 of its judgment, and it was at that reference that the Court of Appeal interpreted the s.81 criterion necessary for carrying out the Acts or carrying the Acts into effect as conferring a form of power on the Commissioner to be exercised in terms of his subjective view or partly at least in terms of his subjective view of what was necessary, and subject only to review in the case of irrationality or obvious inappropriateness. Your Honours made, and I put in neutrally, some comment upon that paragraph, and upon the Court of Appeal's reasoning. It's significant, and this is my reply point, it's significant that Mr Brown, my friend Mr Brown, didn't in any substantive sense defend the reasoning of the Court of Appeal in that paragraph. His only comments in discussion

Tipping J It's not the reasoning of the Court of Appeal you're faced with, it's the reasoning of Mr Brown in his argument that you're faced with.

McKay The substance I think though of the reply point I'm attempting to make is that the Court of Appeal's conversion of what is on any ordinary approach to statutory interpretation, the objective test that is laid down in both elements of s.81, which is the objective prohibition and then the objectively determined question of whether it's necessary to depart from that for the purposes of giving effect to the Act. But those interpretations, or that approach to the interpretation of those provisions are the antithesis of the approach that's contained within the Court of Appeal submission, yet Mr Brown in reliance implicitly, upon the Court of Appeal's submissions develops

Blanchard J The Court of Appeal doesn't make submissions.

McKay I'm sorry I must have mis-spoke. I should have said, and I obviously didn't that Mr Brown's submission based upon the Court of Appeal's reasoning builds upon the power or discretionary element of that para.71 to develop his primary position with reference to s.81 itself which is

Tipping J Well Mr Brown says it's a code and it means what it says.

McKay Well

Tipping J He'll forgive me for paraphrasing him in quite such clipped terms, but it's that you've got to grapple with. He hasn't adopted or any way attempted to invoke para.71.

McKay Nevertheless it is in my very respectful submission, it is a fair point for ANZ National to make in its appeal from the Court of Appeal decision that the critical paragraph upon which the Court of Appeal's interpretation of s.81 rests is wrong and is not being defended in any meaningful way by the Commissioner before you. As to my friend's proposition that s.81 is a code, on the basis of ANZ National review of every New Zealand authority interpreting s.81 there is no support at all for that proposition and that's evidence not only from *Squibb* and *Knight* and the other cases to which Your Honours have been taken, and both of which of course public interest immunity considerations as some form of overlay upon s.81 are present and particularly in the judgments of Sir Robin Cooke, who obviously sees the work being done by public interest immunity, not by s.81 itself, but in addition to the cases to which Your Honours have been taken as far as ANZ National is aware, the first New Zealand decision on s.81 in the history of the provision, the 1958 decision in *Crown v St Morat* which is in the supplementary bundle that I handed to Your Honours' yesterday, a decision of Justice F B Adams, and as I say on the first occasion at least of which I'm aware where the forerunners of s.81 were interpreted, the Judge himself in that decision invokes public interest immunity as a basis for dealing with confidentiality matters, and I simply leave Your Honours with the reference to tab 1 of the supplementary bundle to page 1148, which is the second page into the extract to the paragraph beginning section 12, a short distance down that page and to the language of His Honour 'it may be that if s.12 stood alone it would not have sufficed to exclude the power of the Court to compel production of documents in appropriate circumstances provided always that there was no infringement of a common law rule protecting from disclosure any documents or other matters, the disclosure of which will be concrete to the public interest, and that

Anderson J Well it might be external public interest immunity consideration. If it's not arising out of the inherent value of confidentiality in the Tax statutes, there might be some defence aspects, an invoice, but if this is being cited as authority for a secondary test based on the same value,

then the authority is weakened by the fact that its an extemporary judgment at first instance on a new bit of legislation and it would be the first time that that's ever been revisited by later Courts.

McKay Yes and those later Courts I suppose Sir, including *Knight* and *Squibb*, although not explicitly adopting the case itself, nevertheless adopted that same principle and the public interest immunity that was adopted as some form of companion piece or overlay to s.81 was of course the public interest immunity arising out of taxpayer documents and the prohibition of disclosure of the third parties. I'm simply using the case for a slightly more general reason than that Sir. There has always been a non-code approach to s.81. It has always marched in tandem, perhaps somewhat unhappily so, but always marched in tandem with public interest immunity.

Tipping J But Mr McKay, I'm afraid I must just detain you for a moment longer on this.

McKay Yes.

Tipping J Public interest immunity once established is absolute.

McKay I'm sorry Sir, no not in accordance with the submissions and the authorities to which I referred you yesterday Sir.

Tipping J Well I have to say that I find that quite difficult. Surely if it's in the public interest that a document not be produced, it's absolute. There may be internal arguments as to whether or not that is so, but once you've reached the point of public interest immunity applying, there is no discretion. Now I find that an awkward bedfellow with s.81 and I think this is the point Mr White made very succinctly in one of his points where he talked about it being absolute, and I understood him in that sense. There may be issues arising before you get to the point of it applying

McKay Yes.

Tipping J But once it applies it applies. Now with great respect to those who've dabbled in this field of public interest immunity, I have real difficulty with it. It seems to me that you've got a section which gives a prohibition subject to it being lifted in certain circumstances.

McKay Yes, yes.

Tipping J Now how can you re-impose it under public interest immunity?

McKay Your Honour reference is made at para.3.58 of ANZ National's written submission to the decision of Lord Woolfe in the *Wylie* case that is discussed in some detail in the written submission and the quotation that's taken from Lord Woolfe's speech in the *Wylie*

decision involves a direct negation of the proposition that once imposed this form of public immunity at least is anything like an absolute. It goes to the point made by Lord Justice Bingham in both the *Makanjula* and the *Al Fayed* decisions. The public interest immunity comes in so many forms

Tipping J Yes.

McKay That the various considerations that get taken into account obviously differs from class to class of that immunity. They have varying connections with matters of statutory interpretation. Sometimes supported by statutes, some as an override on it, that the various policy considerations obviously vary from class to class. He also makes the point that some of them can be waived and some of them can't, and the point being made by him in that judgment, well by Justice Bingham, as Lord Woolfe in the *Wylie* case, is that there are some of them that can be once imposed do not have an absolute character but can sometimes later be shifted or the immunity removed, and again the classic example on the basis of certainly a non-expert appreciation of these matters Sir is the case where a document initially subject to public interest immunity on some appropriate basis, loses that immunity because it is necessary to establish and because it does conclusively establish the innocence of a person charged with a crime. There may be many and good reasons why an immunity is imposed on that document in the first instance but because of subsequent events which combine with the importance of the document itself to the actual administration of justice in a particular case, that immunity is manifestly lost. There's nothing absolute about this public interest immunity and there's nothing inconsistent in my respectful submission with the approach in *Squibb* in suggesting it might be removed.

Tipping J You've probably got a point about the capacity for it to be overridden by the necessity for justice but once you've done your weighing exercise under s.81 why do you do the same exercise if you like under public interest immunity as parche my brother's point the immunity might derive from something quite different, but if it's the same why do you do the same exercise twice and why would you come to a different answer the second time around?

McKay Again Sir, and I know you're finding it unnecessary, but I have to take refuge again in the *Squibb* case there. For the want of better road maps it hasn't been bad for them. It's the only one we've had for the last 15 years Sir and it does seem to suggest

Tipping J Well if all you can say is it's said in *Squibb*, therefore keep saying it, that's fine but I just wanted to give you an opportunity to justify it at a higher level.

McKay At a higher level if Your Honours were inclined to tidy up the law and to say that it's an unnecessary dichotomy that the relationship between s.81 and public interest immunity of this particular class is something of an unsatisfactory one, that Your Honours believe that s.81 can do the work itself and that through the interpretation of the concept of necessary or the concept of carrying into effect the Inland Revenue Act, that Your Honours feel able to build in as an interpretation exercise sufficient recognition of, and protections of the confidentiality notions that are presently given effect through both s.81 interpretation and public interest immunity, then I have absolutely no difficulty with that proposition Sir but I would echo if I might the points that I made yesterday in my substantive submissions. It is critical that whatever analysis that this Court was to adopt by way of what would become a single rather than a double protection, that would pay appropriate weight to the significance of confidentiality.

Tipping J Yes I fully understood that point. It's the reality of the analysis

McKay Yes as long as the goal pays appropriate regard to confidentiality in its significance in terms of the legislation, the route by which one gets there Your Honour is although of intellectual and other importance is not critical in terms of outcomes.

Elias CJ What about the route by which Mr White got there that you deal with s.81 and then at trial you raise issues about confidentiality?

McKay If Mr White's interpretation of s.81 was justified as a matter either of the previous authorities, or being an interpretation that gave rise to appropriate recognition of confidentiality then it would be more satisfactory if it is, but Mr White's interpretation of s.81, although it varies because selectively he and his learned friend Mr Brown occasionally make reference back to their former theory of s.81 must be engaged, or the exception must be engaged because there's an obligation to discover, and then when it suits them apparently they will use the power rationale or the discretion rationale in terms of the Court of Appeal's para.71. But the essence of their theory seems to be certainly it was their High Court theory that s.81 is immediately engaged in terms of its exception at the point at which the Commissioner has a discovery obligation that because the discharge of the discovery obligation is carrying into effect the Acts then without more the only question becomes one of relevance and if it's relevance then it will be discovered. Now that interpretation of s.81 is obviously resisted by ANZ National because it ignores, and I won't say it ignores *Squibb*, though manifestly it does, but what it does ignore is the need for a further filter or a further consideration to be taken into account if Your Honours are inclined as a matter of interpretation of s.81 which builds in or gives recognition to considerations of confidentiality and secrecy. That's the missing gap in my friend's analysis of the provision. It doesn't allow for those

factors to come in at that point, yet in ANZ National submission they must.

Anderson J Many of the issues in this type of case are more practical in terms of principle. The Commissioner has obligations under s.6 and 6(a) and one must assume that the Commissioner will attempt those obligations, and I would have thought that a procedure where a Commissioner discretely discovered as appears to have happened here and then sought directions from the Court as to how inspection could be completed preserving confidentiality as far as possible, would sensibly meet everybody's objections, so it's a mechanical process really more than anything else, just as trial issues of confidentiality would be addressed at that point and assessed in terms of the state of the case at that point and the degree of relevance and significance, so it's a progressive method of compliance with some obligations and observing confidentiality within that context.

McKay Yes, and ANZ National's view Sir of the proper sequencing and the proper balancing at various stages is of course that at the stage at discovery and inspection the Commissioner can't do as he seeks to do and which he asserts the law permits him to do which is to discover these other Bank documents, this confidential information of third parties to, as it happens in this case, to the competitors.

Anderson J Well it then may be a question then of whether it's reasonably necessary for the performance of the Commissioner's obligations which are manifold under the Act.

McKay Or it may be Sir, it just may be that *Squibb* got it right and said you can't do it at that point.

Anderson J Well that's what we've been here for two days arguing about isn't it.

McKay Yes, and that of course is ANZ National's submission. Subject to any questions or comments by Your Honours

McGrath J Mr McKay something that's just troubling me a bit and it really goes back to what Mr Simpson was saying in opening which is a little different to your approach to the s.81 question, but it seems to me that the public interest immunity issue is probably stronger, the need for it if you like, the argument for it, is probably stronger in the s.81(3) context where a taxpayer in litigation with the Commissioner may be cut out from getting a fair trial and this I suspect was really what was concerning the former Chief Justice in his decision at first instance. Would you accept that was the case? In other words is the need for public interest immunity control greater because of that factor in the ss.3 context than it would be in the ss.1 context?

McKay In one point alone in this case I agree with my friend Mr Brown that I can't intellectually find a logical basis Your Honour for any real

distinction between the operation of public interest immunity in terms of those two provisions. Like him, I found myself in exactly the dilemma that every time one tries to articulate in terms of s.81(1) a view as to the applicational meaning of the carrying into effect phrase, I found myself constantly slipping into the phrase of necessary or some qualifier that's similar to necessary.

McGrath J But what about if Mr Brown is perhaps for the first time in the history of the legislation taking a rather shy attitude to accepting that there is an implication if necessary in ss.1?

McKay It's for the reason described in my own thought process Sir that I find that when I look at the Court of Appeal's decision in this case, and when I look at the approach of the Court of Appeal in *Knight* in effectively assimilating the two and in reading in the term necessary as if it was present in any event in s.81(1), that I found that rightly or wrongly that internal thought process is at least getting some judicial support, so I do not know Sir what the answer is.

McGrath J But your position is there's no logical basis for distinction between the subsections in relation to whether there's a public interest immunity overlay?

McKay That is ANZ National's position Sir.

McGrath J Yes, thank you.

Elias CJ Thank you Mr McKay.

McKay Thank you Your Honour.

Elias CJ Yes Mr Farmer.

Farmer Perhaps just starting if Your Honours please with the suggestion made by Your Honour Justice Anderson that really this is a case management issue that progressively as we go through the processes of discovery and inspection and then move on to trial, there could be a proper management of the situation so that issues of confidentiality are addressed at each stage and when the exception in the Act is applied, that is to say for the purpose of giving effect to the Act, that can be assessed in a proper context. With respect there's much to be said for that view. It's worth making the point right at the outset though in any consideration of this question that what we're looking at here is not a situation where it is said that the documents cannot be discovered at all. Now that's not the position, the position is that it is accepted they can be discovered all that is sought at least by Westpac is that taxpayer identity be redacted to be preserved at every stage of the process, and I won't take Your Honours through it, but it is actually just worth giving you the reference to the history of how this matter has unfolded and you'll find it most conveniently set out in

three places. Volume 2 of the case on appeal at tab 21 there is a letter dated the 23 November 2005 by my instructing solicitors, Simpson Grierson, to Crown Law which sets out the early history of the matter and protests at the fact that the Commissioner has in fact unilaterally sought to provide taxpayer identity information as to other taxpayer identity to the various Banks without any attempt being made to observe the requirements laid down in *Squibb* then at least thought to be the settled position of the law. So when you look at it, and you can look at it now or not as you please, but the letter does begin by setting out on the first page in para.4 the initial disclosure, or what's called a generic description I think by my learned friend by the Commissioner in his affidavit of documents. The Commissioner also identifies as relevant and claims confidentiality for documents that have been provided to him by other financial institutions. So not even other Banks, other financial institutions which could of course cover a very large number of different entities on a confidential basis that pertained to transactions of a substantially similar sought to those at issue in these proceedings etc. And then the letter goes on to record

Elias CJ Do we have the affidavit by the way?

Farmer This is not an affidavit.

Elias CJ No, do we have that affidavit? Was that in the bundle?

Farmer Yes.

Elias CJ Yes, that's alright.

Farmer Yes you do and I'm going to refer to one affidavit. The letter then goes on to record the subsequent history of that where what unfolded was initially as the inspection process was begun by Westpac, what then unfolded was the realisation that under that relatively innocent generic description there were then said to be discovered first of all 60 Eastlite files for the Bank of New Zealand alone and then later a similar large number of files for the ANZ and also then further documents for the ASB, and the names of those institutions was disclosed unilaterally by the Commissioner's counsel and that was objected to at the time as being contrary to the secrecy requirements and the matter then as it were developed from there and that led on to such things as the *Chan* affidavit, which you've heard a little of and I don't think I don't need to go into. You'll find that incidentally in volume 1 of the case on appeal, tab 16, and annexed to that affidavit but not I think contained in the case where documents included

Elias CJ Sorry Mr Farmer I'm just a little lost as to what submissions are these references in support of?

Farmer Sorry?

Elias CJ What submissions are these references in support of?

Farmer This is, I'm just trying to show you how

Elias CJ That case management of these issues doesn't work is that the point?

Farmer No, no, I'm saying it could have worked

Elias CJ Oh it could have worked.

Farmer But it certainly hasn't because of the way in which the Commissioner chose to handle the matter.

Elias CJ Alright, thank you.

Farmer The *Chan* affidavit, you'll find that, and I'm not going to take you to it now, in volume 1 of the case, tab 16. It contains or annexed to it were Westpac documents among others which are not in the case. That led to an application to the Court. The matter was dealt with by Justice McKenzie. I don't need to go into the detail of that but I do want to make this point that from the very beginning there was a protest by the Banks to the disclosure of identity, not disclosure so much of the documents, although relevance of course

Blanchard J I'm sorry Mr Farmer I just don't see how this relates to the questions that we're called upon to decide. It may be very interesting

Elias CJ Mr Farmer is responding to a suggestion put from the bench I think. It isn't in reply to submissions made and I will need to ask counsel for the Commissioner if there's any factual matter they want to take issue with Mr Farmer, so is it really necessary?

Farmer Well I am actually going to make the point also in reply to my learned friend Mr Brown that there has been a lack of co-operation by the Banks and in particular by counsel for the Banks in the handling of this matter that this is a response to that as well and I do make that point and I'm almost finished so if you'll bear with me.

Elias CJ Alright.

Farmer The other reference I wanted to give you is

McGrath J Mr Farmer can I just ask is it just really the first page or do you really want us to take all of the letter of Simpson Grierson into account?

Farmer Yes, the whole letter is relevant.

McGrath J The whole letter.

Farmer And then volume 1, tab 10 is an application and in fact was made by the Bank of New Zealand to the Court on page 120 in order to sought in fact an order that the names and other identifying features of persons other than the plaintiffs etc be removed or redacted from all documents listed in the affidavit of documents that had been filed in that case etc. So the issue has been on the table from an early point and in particular from the point where it became clear that the Commissioner was not only seeking to discover documents from other Banks which might or might not be relevant, but was seeking to put the identity of those other Banks squarely into the mix. Now if I could move from there perhaps to the central point in the case which Your Honours have spent time with my learned friend Mr McKay this morning. We are quite happy as it were for the Court if it sees this as a more appropriate analysis to deal with this matter under s.81, and I repeat I think what I said yesterday, s.81 properly interpreted in the context of the Act as a whole, and in particular by reference to s.6 confidentiality obligations and s.6(a), voluntary compliance goals. Our submission is the one that you've heard already that one starts with the secrecy obligation, one then turns to the exception and the exception whether one looks at the exception under s.81(1) or under 81(3), and our submission there's no real substantive difference between the two. We certainly would support the view that's been in effect expressed in earlier dicta that one can properly read the word 'necessary' into s.81(1), but even if one doesn't do that, then in our submission the exception is still stated to be one that applies only where it is established that there is a purpose, a proper purpose, of carrying into effect the Acts, and that in our submission necessarily requires the Court to consider whether disclosure of taxpayer identity is for the purpose of carrying into effect the Acts, and that leads you straight into of course the passage that my learned friend Mr McKay and I keep going back to in this case, which is the passage on 9160 His Honour Justice Richardson's judgment, the lefthand column, where he asks that question. He does have the word 'necessary' there but in my submission you could take it out and it would have the same input, would it ever be necessary for the purposes of carrying into effect the Acts to compel disclosure of identity, and the answer to do so inevitably undermines the integrity of the tax system. So if you then perhaps ask the question I think Your Honour Justice Tipping pressed on my friend this morning, well are you arguing for an absolute prohibition? I think where we started yesterday, where I started yesterday whereas the answer to that would have been yes, and then always one's endeavouring to be helpful and to try and compromise to any problem, where I ended up was alright I'm happy to go along with the notion that there is at least implicitly here some form of balancing exercise

Tipping J So you say absolute but you were bullied into agreeing that it wasn't?

Farmer No, no, what I would say is this that one cannot read those words in Justice Richardson's judgment set in the context of a case which is a

tax avoidance, so let's make that point plain, if I can deal with that very quickly. My learned friend Mr Brown said well this is a tax avoidance we're dealing with here, so to it was in the *Squibb* case. So in the context of a tax avoidance case, litigation between the Commissioner and a taxpayer. That's what we're dealing with, in that context, not Commissions of inquiry, none of that. Taxpayer, Commissioner, litigation, tax avoidance. In the context of that case at the discovery stage, and I'm going to deal with the trial thing in a moment. Justice Richardson's judgment can only be read as concluding, leading to a conclusion that yes the prohibition of taxpayer identity as opposed to the rest of the documents, it is absolute.

McGrath J But another part of the context was that the Commissioner was trying to hold back for reasons he thought related to his duty, information of relevance in the proceedings. I mean that's another part of the context isn't it?

Farmer Yes, I was going to then go on to explore two possible exceptions, if they are exceptions, or two possible variations or different factual contexts in which the issue might have been considered and one of them, the first one is, is there a difference in the present case and I think one of Your Honours, it may have been Your Honour Justice McGrath, raised with me yesterday the fact that in that case, the *Squibb* case, it was the Commissioner who was seeking to withhold the point you've just made, withhold disclosure of the taxpayer who was pressing for disclosure of taxpayer identity so that the taxpayer could properly test the comparative analyses that the Commissioner had provided where there was anonymity. In the present case of course it's the Commissioner, it's not the taxpayer seeking disclosure of taxpayer identity, it is the Commissioner who is seeking to put forward or to disclose taxpayer identity to further the case that he wants to run. So is that a relevant difference, is that a difference which might lead to a different weighing of the public interests – so that's the question, and I think our submission would be that it doesn't make any difference because in both cases, in both cases, what we're concerned with is a case in Court where the issue before the Court is is the Commissioner's assessment a correct one, correct in law? If it is then it ought to be upheld. It's in the interest of justice that it would be upheld. More importantly it's in the interests of maintaining the integrity of the tax system that it's upheld, but equally, the other side of the coin, if his assessment is wrong then it's equally important to maintain the integrity of the tax system that it set aside, and so either way the public interests considerations in terms of administration of justice are the same and the public interest considerations in terms of maintaining the integrity of the tax system are the same. So we would say, our submission would be that there's no relevant difference and in a sense the rule can be still seen at the discovery stage – we're still looking at an absolute one. Now one then moves on to the trial

Tipping J So you ally yourself with this two-stage approach of Mr McKay, Mr Farmer, absoluted up until trial?

Farmer Well I wouldn't put it that way.

Elias CJ Absolute in respect of identity.

Farmer Pardon?

Elias CJ Absolute in respect of identity.

Farmer Yes of identity, that's right, and I don't like this notion of two-stage approaches unless one adopts Justice Anderson's view which I'm happy to do that this is a managed process where at different stages of the process and one gets to trial, at different stages of the process a particular document may emerge from the pack. It's never previously before been given any particular consideration and I'll give an example for that where in terms of what's happening at the trial the issue of administration of justice, or the interests of the administration of justice may become more focused and therefore it may be necessary to review the position. Now Your Honour

Elias CJ You mean you may be more confident at that stage?

Farmer Well let me give the example

Elias CJ Well would it actually be convenient to take the adjournment at this stage?

Farmer I was going to suggest that. I'll keep the Court in suspense.

Elias CJ Thank you.

11.35am Court Adjourned
11.50am Court Resumed

Elias CJ Yes Mr Farmer.

Farmer So I think where we got to was we dealt with the matter at the discovery stage and where *Squibb*, which is what *Squibb* is primarily addressing, and it's interesting actually if I could just give you this reference in the Court of Appeal's judgment in the present case, para.65. It said 'there is no doubt that *Squibb* suggests that third party taxpayer information is strictly confidential and the Commissioner cannot be compelled to disclose such information in a way which discloses the identity of the taxpayer, albeit that Justice Richardson did not seek to determine what might happen at the hearing, that is

what evidence might be led. And that really provides quite a neat entrée into

Elias CJ Sorry, what was the paragraph?

Farmer Para.65 of the Court of Appeal's judgment in the present case, so the Court of Appeal in the present case accepted that *Squibb* stands for the proposition that taxpayer information is strictly confidential, the Commissioner cannot be compelled to disclose such information in a way which discloses identity of taxpayers, so taxpayer identity, and it's a point that has to be continually kept in mind with respect that what we're talking about here is not the documents as a whole, we're talking about redacting the documents so that the identity is preserved.

Elias CJ Mr Farmer what order then would you seek if you're successful from the Court?

Farmer I think I'd need to go back to the original relief that was sought in the High Court, looking at para.94 of the Court of Appeal judgment which is I think, yes is dealing with the BNZ case in which Westpac intervened. The Court of Appeal concluded that it hadn't been shown that discovery was an abuse of process that neither s.81 or public interest immunity precluded discovery of production of other Bank documents, and in our notice of application for leave to appeal to this Court which is dated the 14 September 2007, page 8, s.C, para.5, I'll read it to you 'on appeal Westpac

Elias CJ Sorry, we've got that I think in front of us

Farmer Yes I don't know whether it's in the case

Blanchard J Yes it is, it is Mr Farmer. I think that answers the question.

Elias CJ What page?

Blanchard J Page 8, and ANZ's got a similar statement of relief.

Farmer So that the order is directed only to the maintenance of the identity and affairs

Elias CJ Sorry, it's not page 8 of the case. Can I just find it?

Blanchard J Yes it is.

McGrath J It is, of the Westpac case.

Elias CJ Oh I'm looking at ANZ's, yes thank you.

Blanchard J The ANZ relief is on page 4.

Elias CJ Thank you.

Farmer So para.65 then of the Court of Appeal's judgment acknowledges that *Squibb* is directed in its holding to the discovery stage and is, although the word 'absolute' is not used, it clearly

Elias CJ I'm sorry but I had thought and I'm looking at the ANZ claim – are you going on to address it further?

Farmer The ANZ?

Elias CJ Yes.

Farmer I wasn't. The ANZ of course there proceeding was different in substance because they brought the challenge by way of judicial review, whereas we simply after we'd been served, directed to be served with the BNZ's application relating to discovery in its case, we were directed to be served and we intervened pursuant to that service, so I have to say I'm not even familiar with what

Elias CJ Alright, sorry, tell me again what page of the Westpac?

Blanchard J Page 8.

Elias CJ Yes I see thank you.

Blanchard J It's very similar.

Farmer So in effect we're seeking redaction of identity.

Tipping J Yes.

Farmer So my first proposition is that the Court of Appeal in the present case certainly accepted that *Squibb*, the effect of the ruling in *Squibb* right or wrong was that at the discovery stage the Commissioner could not be compelled to disclose the taxpayer identity and documents discovered by him, but then left open the question raised by Justice Richardson as to what might happen at the hearing where evidence of course would be led, and I wanted to give two examples of what might happen at hearing in order to indicate that in relation to a particular document or documents, perhaps as opposed to the whole bunch of documents that had been discovered, there could be a need for the Court to review, reconsider, consider again in a different context what should happen and so if I give you two examples. Take first the *Squibb* case as an example. What the Commissioner had done in that case as the Court is aware is that he had produced or discovered comparative industry data which he had put together, an analysis that he had put together based on primary documents that he had obtained from individual taxpayers in the industry. Those primary documents were not however disclosed and the comparative

material that was put forward did not disclose the identity of the taxpayer's material upon which the analysis was based. Now at trial of course what would happen inevitably would be that the Commissioner would seek to put into evidence, produce into evidence, his comparative analysis. It's not too difficult to see that a taxpayer's counsel might then seek to challenge the admissibility of that material on the grounds that it was secondary evidence only and was not based on disclosed primary evidence from which the analysis had been drawn, and that's an objection that would have some legs to it for sure. I wouldn't presume to say what the ruling might be but it would be a very powerful admissibility objection. If the objection were upheld then the Commissioner would be in the difficult position that he could not make his case that he sought to make based on comparative material unless he put into evidence the primary taxpayer material from which the analysis had been drawn, and so that might well lead him to do as Justice Richardson poses here to seek to lead what His Honour called further details of industry profitability which did identify other taxpayers. In other words the primary documents from those other taxpayers' returns, and the Court would then be faced with perhaps a rather different question, or certainly a different context from which it would be faced at the discovery stage because at that point that admissibility objection having been taken and upheld, the issue of administration of justice might take a different weighting, or have a different weighting, have a heavier weighting, vis a vis, the integrity of the tax system interest, than it would have at the discovery stage, and so that could, and I'm not presuming to say it would, but I'm saying it could and that's all Justice Richardson is saying, he's saying that well there's a difficult issue that would have to be addressed at that point. Justice Richardson doesn't tell s what his answer would be and I'm with respect not seeking to submit what the answer is either. It may be that at that point the Court would say well we still think integrity of the tax system wins. It is absolute in that sense or it may say well we are in a rare and exceptional situation now in a different context from what we're in at the discovery stage and so perhaps a different outcome may be with some conditions laid down as to how this is to be done in Court to try and minimise the damage to the tax system that would inevitably result. And by way of as it were a second example not in this area but this sort of question does arise. This sort of situation I should say does arise from time to time for example in relation to privileged documents, whether the privilege be one attaching to legal professional privilege; where the documents are listed in what used to be part 2, goodness knows what it is now, part 2 of the – I can't keep up with the rules.

Tipping J I'm pleased to hear that Mr Farmer.

Farmer So let's just call it part 2. What used to be listed in part 2 of the affidavit of documents and at trial because of some evidence that may be led it may emerge that an application is made at that point for the document, the privileged document to produce, and that may be

because there's been some evidence led that constitutes a waiver of the privilege or it may be because some evidence has been led which indicates that the privilege objection was wrongly taken. The same can be said of without prejudice, communication's a privilege attaching to those at the discovery stage what happens at trial, evidence might be led, developments might occur at trial which indicate the matter has to be looked at again, so the privilege claim as it were may be absolute in the sense at the time it's made, but because of later developments at trial, the matter might have to as I say be looked at again. So that's how we would with respect put the matter and that's how we would try and balance the kind of what might appear to be competing positions that on the one hand we're saying yes it's absolute at the discovery stage and on the other hand we're saying there is this rare or exceptional situation that Justice Richardson himself identified, but which relates to a later stage of the process, namely the trial stage. The only other point Your Honours that I did want to just briefly mention was my learned friend Mr White's submission this morning, para.2.3 of his notes where he pointed out that the Court of Appeal did inspect sampled ANZ National documents and on the basis of that inspection in effect ruled that the Commissioner had acted within the exception, the statutory exception, that is to say had acted for the purpose of giving effect to the Act, in that case, and my learned friend went on to say well because they did it then this Court if it's not prepared to look at the documents, and we would submit that it shouldn't, should now as it were interfere with the decision or the view that the Court of Appeal took that these particular documents were within the purpose of giving effect to the Act. Of course in our submission if the Court of Appeal applied the wrong legal test in para.71, my learned friend Mr Brown referred to the much maligned para.71, if it did apply the wrong legal test, and we submit it did, well then that rather taints the review of the documents and any finding that it made about the documents in terms of whether in the un-redacted form in which they were, disclosure would be for the purpose of giving effect to the Act. And so just finally, public interest immunity, and I've tried to avoid using the words at all but in our written submissions we did say, and I think I said this yesterday, that whether one looks at this as a matter purely of construction of s.81 which has as it were the secrecy obligation and the integrity of the tax system fairly in it anyway as a matter of construction, whether one approaches the matter entirely that way, in other words whether one accepts my learned friend Mr Brown's code argument, one does accept it, or whether one says that there is a part for classic concept of public interest immunity to play here in an analysis in the way that Justice Cooke and Justice Richardson felt it should play in those earlier cases, one gets to the same result and so in our submission it's a matter entirely for the Court how the matter is approached but we would say the result should be the same. Those are our submissions thank you.

Elias CJ Thank you.

McGrath J This is not for Mr Farmer but Mr Farmer, if he's finished, did helpfully steer us to his preferred order and if Mr McKay then later the Commissioner's counsel might show us where in the papers their preferred order is.

Elias CJ I had assumed that the Commissioner simply seeks dismissal of the appeal, is that right Mr White?

White Yes, yes Your Honour.

Elias CJ Mr McKay?

Blanchard J Mr McKay's one's in there.

McKay With some help from my friends I had perhaps rather lazily Your Honours had thought that in terms of the question of the leave to appeal and the questions that were sanctioned by the Court would provide the basis of an order in favour if the Court was so inclined with reference to ANZ and the order would I think be a modification of para.B or item B of the leave to appeal grounds and although the opening words may be superfluous, that it could read that by virtue of s.81 of the Tax Administration Act 1994

Elias CJ Sorry, is this at page 126 of the case is it?

McKay I think in ANZ's case it's page 131.

Tipping J You're just saying adopt the words of the leave ground in an appropriate way?

McKay And the appropriate way would obviously go consistently with my comments in reply earlier this morning would pick out effectively what is the second alternative. In other words one would obviously acknowledge redaction as a possibility but would say that they cannot be disclosed pursuant to s.81 in a form that did not protect the secrecy and confidentiality of non-party taxpayers. I'm sorry if that's a bit all over the place Sir but that's certainly the burden of it.

McGrath J No, that's a good enough road map thanks.

McKay Thank you Sir.

Elias CJ Alright thank you counsel for your assistance. We'll take time to consider our decision on this matter but we ought to have some message to counsel as to when they might expect a judgment.

12.09pm Court adjourned