IN THE SUPREME COURT OF NEW ZEALAND SC 63/2010

[2011] NZSC Trans 22

BETWEEN **TANNADYCE INVESTMENTS LIMITED**

Appellant

AND **COMMISSIONER OF INLAND REVENUE**

Respondent

Hearing:	25 August 2011
Court:	Elias CJ Blanchard J Tipping J McGrath J Gault J
Appearances:	A J Forbes QC and A J F Wilding for the Appellant K L Clark QC and P H Courtney for the Respondent

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CIVIL APPEAL

MR FORBES QC:

If Your Honours please, I appear with my friend Mr Wilding for the appellant.

ELIAS CJ:

Thank you Mr Forbes, Mr Wilding.

MS CLARK QC:

May it please Your Honours, I appear with Ms Courtney for the respondent, the Commissioner.

ELIAS CJ:

Thank you Ms Clark, Ms Courtney. Yes Mr Forbes.

MR FORBES QC:

If Your Honour pleases. Your Honour, I have what I've described as my hearing submissions, reduced to writing. If nothing else, it may assist the Court in not having to take quite so many notes, if indeed –

ELIAS CJ:

How long are they Mr Forbes?

MR FORBES QC:

Well they – I have to admit, a total of 17 pages Your Honour.

ELIAS CJ:

Oh, Mr Forbes.

BLANCHARD J:

No.

MR FORBES QC:

Right.

ELIAS CJ:

We don't mind hearing notes that outline the submissions, but that's a recasting of the written submissions. Are you going to be able to address us on the basis of the written submissions we have, without that?

MR FORBES QC:

Well, these are on the basis of the written submissions but I'll address it from these notes myself Your Honour. I just – I accept it ended up, so to speak, longer than I had expected but I hadn't anticipated it was going – apart from –

ELIAS CJ:

Is it new material Mr Forbes?

MR FORBES QC:

It's, I, I say it's not new material, no Your Honour. It raises some issues about the potential in this case for the present pleading, if it's deficient in the way that the Court of Appeal suggested, to be amended but it's only a strike–out situation and there are

a couple of new matters, the Official Information Act and Bill of Rights issues raised but they're not intended to be matters that need to be argued as such in front of this Court, just to signal –

ELIAS CJ:

Well then, why don't you develop your oral argument and if we're getting lost we may have to revisit things.

MR FORBES QC:

As Your Honour pleases. If Your Honours please, it's submitted that this appeal gives rise to an important question, whether conduct of a public official, such as the Commissioner and his delegated Inland Revenue Department officers, who allegedly make at their lowest, knowingly incorrect, or at their highest, dishonest statements, to a taxpayer on a number of occasions over several years, prior to making a tax assessment, can amount to conscious maladministration which is amenable to judicial review, when those statements are alleged to be material to the ability of the taxpayer to exercise its rights under the statutory disputes and challenge procedure.

As Justice French held in the High Court, at [55] of her judgment, if the allegation could be proven then it would amount to conscious maladministration. The Court of Appeal's decision is that judicial review is not available when the official who actually made the assessment, and in this case there was a material loss determination as well, as part of that assessment, was not involved in the antecedent alleged conduct which is impugned and I should emphasise that point Your Honour, that that's disputed in this case on the appellant's position in any event, that is that the –

ELIAS CJ:

Sorry, when the officer is not involved?

MR FORBES QC:

Yes, it is alleged that the officer can be alleged to have been involved and would be if the pleading can be specifically, if the pleading is able to be amended.

McGRATH J:

But you go on, don't you, to say that the assessment can be tainted by prior independent conduct?

MR FORBES QC:

Yes, that's the gist of the case and that the responsibility, at the end of the day, is that of the Commissioner and it's his knowledge, through his various offices that's relevant, not the particular officer who carried out the assessment.

TIPPING J:

This argument seems to presuppose that conscious maladministration is some form of fulcrum, or open sesame if you like, to judicial review. Where does that come from Mr Forbes, it comes a bit from Australia and from the Court of Appeal, does it?

MR FORBES QC:

It certainly comes from the Court of Appeal. I don't think the phrase had been used in New Zealand jurisprudence in this area until *Australian Commissioner of Taxation v Futuris Incorporation Ltd* (2008) 247 ALR 605 (HCA) came onto the scene Sir.

TIPPING J:

Well for myself, I wouldn't want it to be thought that I necessarily accept that as a test.

ELIAS CJ:

And I too and indeed, although it may be that the issue is with *Westpac*, I have some question about the applicability of the Australian approach to judicial review which is peculiar.

MR FORBES QC:

Well I'm certainly going to submit Your Honours, that *Westpac Banking Corporation v Commissioner of Inland Revenue* [2009] 2 NZLR 99 (CA) is too restrictive and indeed, in this case, the Court of Appeal went further and made it even more restrictive.

I have to say however, that I had interpreted this Court's judgment on the refusal of leave in *Westpac* as effectively endorsing the Court of Appeal's decision in *Westpac* on the basis, I think the words were that the Court, that's the Court of Appeal, applied conventional principles but I –

ELIAS CJ:

Well it was a leave judgment.

MR FORBES QC:

Yes.

ELIAS CJ:

I think it could not preclude argument that the principles applied –

MR FORBES QC:

What I have –

ELIAS CJ:

– need tinkering with.

MR FORBES QC:

I have approached it on two bases, that the approach of the Court of Appeal at a higher level was wrong anyway. It's the Commissioner's responsibility, not the individual officer's but even if it is the individual officer, in this case she can be open to attack in the same way – or challenge might be a better word, as having been involved in – taking Justice Tipping's point, whatever conscious maladministration really may mean. Does that just meaning knowingly?

ELIAS CJ:

Does that mean though that you'd have to amend the pleadings for that?

MR FORBES QC:

Well I don't know that I have to really, for the second level. I take issue with the Court of Appeal that my generic description of the Commissioner and the IRD officers involved wasn't sufficient but if I have to name a name, Ms Christine Stella, I can certainly do that and I'll explain why in these submissions because she was actively involved in the antecedent process herself.

ELIAS CJ:

Sorry, just without wanting to get into the facts, where does the idea that individual officers have to be involved – where does the idea that it isn't just the Commissioner come from?

MR FORBES QC:

It comes directly, in my submission only and directly from the *Westpac* judgment of the Court of Appeal. There is nothing in *Futuris* to suggest this. What the context – and again I was to address on this, the context of the judgment of the learned President Justice Young, is that the Court wasn't prepared to agree to a party, a taxpayer trawling through the internal process documents of the department to find some inconsistency and then latch onto that for judicial review but the case here of course is quite different. It's alleged that there are seriously misleading statements made by the Commissioner on no less than – and his officer, on no less than five occasions, denying that they had any of the taxpayer's, my client's documents, or if they did, they had been returned and denying that they, a claim, well in that case they must have been lost, denying that they'd been lost.

Now that's, in my view, it – would be very surprising that that sort of impugned conduct leading up to an assessment should nevertheless be beyond the reach of judicial review and I add to that and I accept that this is not specifically pleaded but I rely on the ability to amend, that there were at least six requests under the Official Information Act, or which should have been treated as requests under the Official Information Act. Tannadyce, through Mr David Henderson, refers to that Act a couple of times but other times he just asked for all the documents you have relating to Tannadyce, all the financial records. They are declined for quite specious reasons. I mean incredibly, Ms Stella herself declined one, relying on – or two in fact – relying on the secrecy provisions of the Tax Administration Act. Now, how could that be a ground to be advanced against the taxpayer itself? And Ms Stella, and I'm anticipating again, well down the track, Ms Stella, in May 2004, she issues default assessments and, at the same time, says that the time for – just let me check that date, Your Honour, I think it may be, sorry, 24th of March 2005 – she says the date for filing your returns and filing a NOPA and thereby instituting the challenge, disputes and challenge procedure, will expire on the 26th of July, it's a two-month response period.

On the 8th of June she advises that she will – and I'm taking these dates directly out of the agreed chronology, it's –

ELIAS CJ:

I'm sorry, before you just launch into the facts, what ground of review is this directed at? Is it a ground of oppression, breach of natural justice, what are you tying it to?

MR FORBES QC:

Well, it's a ground that the process was unlawful and, if conscious maladministration means knowingly wrong conduct, then I'm endeavouring, assuming that the Court of Appeal may be right on that, to say that Ms Stella fits into that description anyway. Because it wasn't a case – and I put this to the Court of Appeal – that if the approach that the Court was suggesting, in particular Justice O'Regan, was correct, officers of the department could do whatever they liked and then, just before the assessment's made, hand the file over to someone who was, quote, "squeaky clean", and allow that person to make the assessment. Well, that didn't seem to me to be tenable, with respect.

ELIAS CJ:

I'm sorry, just again trying to get a handle on what it is you're arguing.

MR FORBES QC:

Well, I'm trying to –

ELIAS CJ:

When you say, "The process was unlawful," did you mean that it didn't comply with the statutory procedural requirements –

MR FORBES QC:

Yes.

ELIAS CJ:

– or are you invoking wider principles of oppression or breach of natural justice? What's the gravamen of the complaint?

MR FORBES QC:

Well, several areas, Your Honour. First of all the Tax Administration Act itself, where section 6 requires the Commissioner and his officers to act fairly, impartially and in accordance with the law.

ELIAS CJ:

So, is this a complaint of unfairness in the –

MR FORBES QC:

Yes, yes, breach of natural justice – you didn't give me the documents that you held that I needed to invoke my rights to challenge the assessments that you'd made. This is not a case where the Commissioner says, I'm sorry your house has been burgled or you've lost the documents, I can't do anything about that, you'll have to do the best you can. Here the argument is – and we don't know yet for sure, but the argument is that the documents held by the Commissioner would have been or could very well have been material to the ability to file returns, to prepare a NOPA, which is very prescriptive as to its context, including having to supply the relevant documents, and thereby instigate the disputes and challenge process. And I'm also relying – that's why I was referring to it, Your Honour – that the Official Information Act is an important enactment in this context, and the Inland Revenue Acts are not beyond its purview at all, this is a department required to comply with it.

And I was about to say, Ms Stella says on the 8th of June, "I will respond to your Official Information Act request," which Mr Henderson had made the month before, "within the time frames of the Official Information Act," and then she later advises in June that she was extending the time for compliance by two days. Now, that two days took Tannadyce outside the two-month response period, because her decision declining yet again the Official Information Act request on the 28th of July was two days after the time limit set for filing returns and filing a notice of proposed adjustment by Tannadyce. So, even if the Court of Appeal is correct in saying that the officer involved has to be, it has to be their conscious maladministration that is relevant, I would maintain at that lower level that Ms Stella is certainly in that category in terms of an arguable case, and –

TIPPING J:

If the case were brought within the regimen of the procedures laid down in the legislation for challenge, I mean, or disputing or whatever it is, could these points be raised in the course of that process?

MR FORBES QC:

As I understand, any point can be raised, and that raises an issue, when is a judicial review ever going to be available?

TIPPING J:

Well, that's the underpinning of my question, Mr Forbes.

MR FORBES QC:

Yes. But the difficulty with that, Your Honour, is how does the – assuming that the plea, as I submit, it has to be heard here on the basis of the usual principles, and even if greater scrutiny is given to judicial review strike–outs on the evidence than in other cases perhaps, how does the taxpayer invoke that procedure in any meaningful way, and why should the taxpayer be obliged to invoke that procedure on other than a basis of its own choosing which is lawful and proper? I don't want to adopt the asset accretion method, because I consider that I can be more accurate and more beneficial to my position and I –

TIPPING J:

But when your client got the default assessment, why could he not have challenged that, using these points, in aid of the challenge?

MR FORBES QC:

But how – section –

TIPPING J:

Maybe he couldn't have, Mr Forbes, and maybe that's the answer, but…

MR FORBES QC:

Well, section 89(2), Your Honour, provides that a taxpayer cannot challenge an assessment, or what is described as "a disputable decision" unless the taxpayer has first filed returns for the assessment period involved.

TIPPING J:

So is that the real answer, that in this case the so-called maladministration prevented your client –

MR FORBES QC:

Exactly, exactly. And, as well, Your Honour, because it was the Commissioner's assessment, the procedure is it was for the taxpayer to file a notice of proposed adjustment, and section 89F is quite prescriptive as to what the NOPA must include, which is full details of the legal and factual basis of the proposed adjustment, and

89F as well, Your Honour, I think it's subsection (e), it specifically says to supply copies of the documents that the taxpayer considers are material.

TIPPING J:

So that's the essence of it, that's why you couldn't go down the statutory route, and that's why you need judicial review, is that the –

MR FORBES QC:

That's right, and –

TIPPING J:

– essence of the argument?

MR FORBES QC:

And if I can put it to Your Honours, Justice O'Regan in the Court of Appeal at one point turned to my friend and said, "but hasn't Mr Forbes got a point, that the taxpayer, well, his client, couldn't invoke the procedure because he didn't have the means of doing so" –

TIPPING J:

As a result of the, quotes, "maladministration".

MR FORBES QC:

Yes, maladministration. And it's a point that's not referred to in the judgment, and I thought, I derived some comfort from that that perhaps my case was at last making some progress, but it's not referred to. And, indeed, one of the points I intended to address Your Honours on was the Court doesn't suggest how was the taxpayer, my client, to invoke the procedure? And the only answers can be – and it's not referred to in the judgment – is that in correspondence from the Revenue there are a, there is a suggestion from one of the officers, not Ms Stella, this is earlier – you could adopt the asset accretion method, and I think that is referred to with her default assessments. In other words, do the best you can by looking at the opening and closing asset position of the company and, presumably, apportioning it each year or, alternatively, what's the gross return that the company's made over the five years in accordance with the global returns you've made and just apportion it to each year. But why should a client, my, the taxpayer have to do that, when the means for an accurate and potentially more beneficial return could well be in the Commissioner's

documents. But we don't know, the Commissioner's never explained what are the nature of these documents, would they have been material to a return?

TIPPING J:

Well, have you not yet got the documents?

MR FORBES QC:

Well, there's been a wrangle, so to speak, over Official Information Act, because the last request, in 2008, which is when the balloon really went up in this case, where there was an acknowledgement that the Commissioner, or the department, held 200 Eastlight files, made the position of the previous five statements by the Commissioner personally, Mr Holland in 1998 and then successively by other officers, and they're all in the chronology, denying that they had any documents, was clearly, to use a neutral word, incorrect, indisputably incorrect. We've had no explanation as to how that came about, no explanation as to whether the Commissioner, before those letters were written or his officers, made any investigation to ensure the accuracy of the reply and it's ironic, Your Honour, that when the request is made in, I think it's April 2004, yet again there are six requests by Tannadyce over the years, and this is the one that's complied with. The gist of the response is, this is going to be an enormous task. We've got so many files. We're going to have to sort through it. The first tranche will be so many, I think 100 hours, provided free. Thereafter, you'll have to pay and the, notice the count for the second tranche was $60,000 and that's not the complete record, to which one response was, well, I'll take my chance getting discovery in the proceeding because I don't think I should have to face that sort of a burden.

ELIAS CJ:

Mr Forbes, it may be because in neither judgment or in the three judgments, perhaps Christiansen J goes more into the facts, but there's not a huge emphasis on the facts beyond indications that the facts were canvassed at great lengths by the parties at the hearing. But what I'm left in doubt about is surely it's incumbent on your client to identify how he would have been assisted by documents in the possession of the Commissioner and I don't get any sense that that was actually done. It seems very vague this assertion that there are documents that would somehow help me, but it's not, it's not very specific. Is there anything that you can –

MR FORBES QC:

Yes, indeed. In his second affidavit, it's in volume 2, Your Honour, at page 180, volume 2 of the case. I'm sorry, I haven't quite got the right one, yet. That is at the right one, sorry, Your Honour.

ELIAS CJ:

But you might want to take us to the affidavit, but can you just tell us what the gravamen of the complaint is in relation to the documents?

MR FORBES QC:

Well, I was going to reply to my friend who suggested in his submissions that nowhere does Mr Henderson say how, when or what documents were allegedly uplifted. Well, we know that the Commissioner's got 200 files even if some of them are duplicates and may not necessarily relate to Tannadyce, and what my submission was to be, Your Honour, is that there certainly is evidence as to whom and how documents were delivered or uplifted by the Revenue and it's Mr Henderson's affidavit of the 18th of August 2008 and I refer to paragraphs 4, 5, 6 and 7 –

ELIAS CJ:

Sorry, where is that?

MR FORBES QC:

So it will be in the second – 181 it is, Your Honour. Yes, what he says is in paragraph 4, there's a letter from Mr Lewer of the department on the 11th of December 1998 in which it lists documents claimed to have been supplied by Tannadyce and six categories of documents claimed to have been transferred back so at that point, the Commissioner is acknowledging that, at least then, they did have some documents and then the next paragraph in the same letter, "It's reasonable to conclude that the Department has returned all originals to you," and then he says at paragraph 6 at 182 of volume 2 of the case, in paragraph 10 and exhibit A2 of my previous affidavit which is a letter from him to the Revenue in December 1998, this refers to an affidavit as to documents delivered by Ms K Cook to the Inland Revenue, in fact, it was his personal assistant at the time, to the Revenue in early to mid-May 1995. This letter also says that further records were delivered in March 1996. I have endeavoured to locate a copy of this affidavit but have been unsuccessful in doing so.

There were also Tannadyce records obtained by the Revenue in the course of audits and investigations relating to the matter referred to in my previous affidavit, which extended over five years, that is the audit extended over five years. Now, the inference from that and it's my submission quite a reasonable one is I can't really tell you what they took and I don't now remember –

ELIAS CJ:

Well, what does he say he needs?

MR FORBES QC:

Well, he's going to need, isn't he –

ELIAS CJ:

Has he said that?

MR FORBES QC:

He's going to need all normal business records you'd need for a tax return. I mean he's going to need invoices. He hasn't got those. Justice Chambers in the Court of Appeal suggested he could get documents from his bank, but that's not going to be enough to do tax returns and, with respect, why should he have to do that?

ELIAS CJ:

Where's this statement that all his business records have gone? I mean, is that accepted?

MR FORBES QC:

Well, there are repeated requests for –

ELIAS CJ:

I know there are requests from him to the Commissioner to supply him with documents earlier supplied to the Commissioner, but is there any unequivocal statement from him that he hasn't got any business records, or he hasn't got the business records he needs?

MR FORBES QC:

Well, I'm sure there is. I didn't think –

ELIAS CJ:

It may not be controversial, it's just –

MR FORBES QC:

He clearly had, Your Honour, enough to prepare the global return that was filed in August 1999, which was for the five years, but not individual returns and there was an affidavit from a Mr Roberts who he got a chartered accountant in Christchurch to assist him, who said that –

TIPPING J:

But Mr Forbes, presumably he pleads that he doesn't have enough or the records which are unavailable to him are necessary for the purpose of individual returns. I mean it would be pretty odd if he didn't plead that.

MR FORBES QC:

Yes, he does plead that.

TIPPING J:

Yes.

MR FORBES QC:

And he pleads, he will now plead and specifically I didn't have enough to do, to fulfil the requirements of section 89(2) as to what's required for – 89F as to what's required for a NOPA which is even more prescriptive so – and Justice French in the High Court made it clear that it may well transpire that Tannadyce will find that the documents that the Commissioner has wouldn't have made any material difference to its ability, in which case, a further strike–out may well be justified, but at that stage, Her Honour, in my view, absolutely correctly took the view, I can't say that at this stage and we should have discovery and find out what the documents are. If they are material then there is a real issue, in my view, certainly. She actually goes as far as saying, in my view, if that could be proven that would be conscious maladministration but let's wait and see.

GAULT J:

My recollection is that he was given access to documents and given an opportunity to inspect. Has that led him to identify the records that he needs?

MR FORBES QC:

There was a reference, Your Honour, in the Court of Appeal's judgment to, at one stage, Ms Stella saying that you had access to the documents in Christchurch, but I can't find any other evidence of that at all. In fact, I had –

GAULT J:

Well, are you saying it's just a misstatement?

MR FORBES QC:

Well, she says that he maintains throughout I haven't got the documents and I –

GAULT J:

No, he hasn't got them but she says he was given access to them but was some issue about cost of copies and that sort of thing.

MR FORBES QC:

Well, I can't follow that, Your Honour, because I was involved myself at one point in suggesting that the documents be transferred to Christchurch and let's not have all these discs and whatever back then, we couldn't find it or Mr Henderson couldn't open it. Let us go through them. Have someone present if you wish and we'll tell you what we want copies of. Now, the clear implication – that was refused. Now, the clear implication to that is the documents aren't in Christchurch so there may have been some documents in Christchurch, but it's never been suggested other than that reference in the Court of Appeal judgment and my friend may find it, but I can't find where it's derived from that, that's the account of the narrative of the matter, where that is established in any way and it hasn't been part of the Commissioner's case that you've already had the chance to look at them, so what are you on about, otherwise that would –

TIPPING J:

Well, all these sort of issues would be the sort of issues that would be examined at trial.

MR FORBES QC:

Yes, and, Your Honour, you would expect that would be the first reaction to the further Official Information Act, why are you asking again, you've already had a chance to see them but there's been no suggestion of that in any of the responses.

It's either been a denial or, yes, we have got them and it's going to take us several months to put the documents together, and collate and sort them. Why that's necessary is not clear either.

BLANCHARD J:

What was the nature of Tannadyce's business?

MR FORBES QC:

It was an investment company, a property investment company primarily, Your Honour. It actually had, I think, some commercial, commercial retail shopping investment here in Wellington, which involved the BNZ as a lender, because I know that because the last transaction it was involved in gave rise to a GST liability of some $30,000 and that was part of the statutory demand that's part of this proceeding and Tannadyce paid that because it wasn't disputable.

BLANCHARD J:

It presumably was keeping accounts as it went along and they would presumably be prepared by a chartered accountant.

MR FORBES QC:

It's evident that the accounts, as at 1998, hadn't been kept from 1993 because they weren't available and that's why – it's not as though Mr Henderson didn't do anything on behalf of Tannadyce, he got such advice as you could get and Mr Roberts' affidavit is that I prepared a journal and I had a trial balance prepared, but otherwise I wasn't able to prepare accounts on the information I had available and, of course, that came from what Mr Henderson could give him. I could do nothing other than do it on a global basis.

TIPPING J:

Did the Inland Revenue have possession of these documents as a result of audits or inquiries?

MR FORBES QC:

Yes and he says, and it's never been disputed that there were audits that were conducted over a period of five years and in the –

TIPPING J:

And what happens normally? When the audit's over, does the taxman not give the documents back?

MR FORBES QC:

Well, that's an issue because the Court of Appeal raised that and my friend, Ms Courtney, was candid enough to acknowledge to the Court of Appeal that the current practice of the Inland Revenue is to provide a list of the documents and, I infer, if you want them we'll give you copies at the time, but that wasn't the practice then. So he's saying they came in, did an audit, took documents away, they asked for more documents so we gave them to them and I didn't keep a list either and he can't say, and it isn't part of the case and it wasn't at any stage in the lower Courts, that we know there are documents there that are material. What he's saying is, I haven't got any other business records and I think it is more than likely that the Revenue have got them, and they are asking me to file returns and to file a NOPA, but at the same time, preventing me from the ability to do so. It's quite simple. Just let me have the documents, copies or full access to them. Instead of that, he has, it's the sixth request on the correspondence in the chronology that results 10 years after the Commissioner first wrote denying that the department had any documents, that it's acknowledged that there are, in fact, 200 Eastlight files.

The original letters say "relating to Tannadyce", there are then some affidavits filed in the strike–out, in the proceeding involving, setting aside the statutory demand, saying that, well, that's not quite correct because quite a lot of the documents are duplicates or don't relate to Tannadyce, and some relate to Mr Henderson himself. Well, I'm sure he'll give his consent for those to be made available as well. I said to the Court of Appeal, Your Honour, well, it may only be 150 relevant files. There might be 50 files that are effectively duplicates or extraneous documents. It's still a considerable quantity.

TIPPING J:

Is the stand–off largely over costs, the costs –

MR FORBES QC:

Under the Official Information Act?

TIPPING J:

Well, just generally, Mr Forbes, it does seem a little odd and I may be missing the point altogether but, why your client hasn't been given access to these documents, I mean, he's claimed apparently that in some respects he was, but you say, no, that's never happened?

MR FORBES QC:

No, well, I, there's nothing in the evidence except that reference in the Court of Appeal and my friend may remember some other evidence of it. I can't recall anything in the affidavit to suggest that he's had any access or exercised any access earlier and what the nature of those documents were, and I do know that a request that the documents be, because I was involved in drafting the requests, that all the documents simply be transferred to Christchurch and we can inspect them at the Inland Revenue Department's offices there in Cashel Street and that was, I was told later that was declined. I'm only acting on instructions as to what the response was, but the, a disc was supplied and my instructions were that Mr Henderson couldn't open it and they couldn't agree on finding a means of facilitating that technical problem and then one file, hardcopy file was supplied. Justice O'Regan wanted to know what did that disclose and I rang my client during the adjournment in the Court of Appeal hearing and he acknowledged that the first file didn't have anything relevant. So I said, "well, that's one down out of 200 Your Honour". That doesn't really take matters very far at all. And at no stage has the Commissioner in this proceeding, or at any stage, in two hearings in the High Court and both appeals heard in the Court of Appeal, has the Commissioner explained how did it come about that on five occasions there was the denial that the Commissioner, or the department had any documents and then in 2008 in two letters it acknowledged that there's 200 files. No explanation about that at all. No indication of what the nature of the documents are. No assertion, well it wouldn't have mattered, we've been through them, they wouldn't have assisted you anyway.

ELIAS CJ:

All right. I think we understand that. Where are you intending to take the argument?

MR FORBES QC:

Well can I just – so reliance was placed on the fact that it's the Commissioner's responsibility, and I refer to section 6A(2), he's got the care and management responsibility and can delegate any functions under section 6 of the, 6A(2) of the Tax Administration Act. I have already referred to the requirements before you can

issue a NOPA and file returns being required before you can invoke the disputes and challenge procedure, that's under section 89(2) – or 89 it is. 89A has got prescriptive provisions about what the disputes procedure is about Your Honour, which is concerned with improving the accuracy of them and encouraging open and full communication to taxpayers of the basis for disputable decisions. And that's part of the statutory context.

Official Information Act I have referred to. An extension of time for compliance has got to be reasonable in the circumstances and what Ms Stella did, when she extended the time, it will be alleged, was not reasonable. I refer Your Honour to the fact that in *Futuris* there is nothing to suggest that it has to be the actual officer, and indeed, in *Futuris* the High Court of Australia make reference to the process of assessment and the process of making the assessment, not suggesting that the antecedent process is in any way irrelevant to what they've coined as the phrase "conscious maladministration".

It can't be the case that that could be avoided by just giving it to an officer who hasn't previously been involved and then the whole process is immune from review. That would, in my respectful submission, emasculate the important remedy of judicial review, notwithstanding that I accept that the courts are reluctant to see judicial review being invoked in tax cases except in cases that can be as a consequence described as exceptional. I don't submit that that should be an initial threshold. It should be, the circumstances should be looked at and then when a decision is made they are exceptional and they justify judicial review. Conscious maladministration may be one category. Another category may be where it can be said that the assessment is not truly a proper or genuine assessment. It's capricious, it's arbitrary and –

TIPPING J:

What would you say to a test that had the – you, on your argument, would be all right on this test, because you can't go through the statutory procedures, according to your argument, or you can't effectively go through them. But if something can be addressed under the statutory procedures, at least prima facie, shouldn't it have to be – that's not necessarily a view I'm expressing, I'm just putting it for your submission.

MR FORBES QC:

Well that would mean that even the Court of Appeal in *Westpac* was too generous because you could address conscious maladministration presumably. I've got the means to invoke the disputes procedure but I want to tell the hearing authority that I consider the officers acted in a way that's reprehensible.

TIPPING J:

But if it was reprehensible but not material, then it wouldn't get you anywhere, would it?

MR FORBES QC:

No it wouldn't, if it's not material, no.

TIPPING J:

It's got to be materially reprehensible and it's hard to see how that's going to bite on the actual merits of the – the focus will always be, ultimately won't it, on the merits of the actual or default assessment?

MR FORBES QC:

Yes, but in other words, it may be enough simply to show that it's wrong. How it came to be wrong doesn't matter.

TIPPING J:

Well, precisely.

MR FORBES QC:

But I'm not in that category, so to speak or my client –

TIPPING J:

No, I appreciate that.

MR FORBES QC:

I can't –

TIPPING J:

You say you can't even open the door to the statutory challenge procedures, because of this, what you've explained.

MR FORBES QC:

And another ground that would no doubt be available, but early authority in New Zealand certainly indicated that this was amenable to judicial review, is where the Commissioner makes an assessment without taking into account information and facts that were known or should have reasonably been known to him. Now, that derived, of course, from the *Commissioner of Inland Revenue v Canterbury Frozen Meat Co Ltd* [1994] 2 NZLR 681 (CA) case, Justice Richardson in particular, and confirmed again –

ELIAS CJ:

Well, all the grounds of judicial review must be available. There's nothing special about tax except that it is a very extensive statutory regime, so there's no jurisdictional impediment to seeking judicial review. It is likely that the court would sequence matters or case manage it so that the merits, if they could be grappled with, would proceed first but there's no jurisdictional bar.

MR FORBES QC:

No, and it may well be, Your Honour, that the first question that a court's going to say is tell this Court, please, why you can't pursue this argument under the statutory disputes and challenge procedure.

ELIAS CJ:

Yes because judicial review is discretionary and –

MR FORBES QC:

And we don't want to –

ELIAS CJ:

And that is one of the main bases on which the discretion is exercised.

MR FORBES QC:

Yes and we don't –

TIPPING J:

It must be Parliament's intention, I would have thought, that those procedures be followed if they can lead to a just result. If they can't be followed, for some reason, to do justice then that's another matter.

MR FORBES QC:

Well, that would have the consequence, Your Honour, that Justice Richardson in *Canterbury Frozen Meat* and *New Zealand Wool Board v Commissioner of Inland Revenue* [1997] 2 NZLR 6 (CA) and even the Court of Appeal in *Westpac* may have put it too wide, the answer simply is if you can challenge it in that procedure, adopt it, but if you can't and you've got a good case for why you can't, then the situation may well be different.

MCGRATH J:

What it does, I suppose Mr Forbes, is it does move the focus, doesn't it, from one that's exclusively on the way the department internally handled the particular matter leading up to the assessment to one that can take that into account the extent that it's relevant, but also focuses on what is the true amount of tax that's owing by the taxpayer if any. What's the correct amount for which he should be assessed and if that can be addressed in conjunction with the statutory, the defects in the process, it seems to me that you're having one hearing that's far more likely to get the matter through effectively, because it's not just going to focus on the segment of internal IRD procedures.

MR FORBES QC:

Well, it just won't focus on process.

MCGRATH J:

What the legislation seems to be aimed at is focussing on everything that's germane to correctly assessing the tax due, including matters of process irregularity to the extent that they are ultimately relevant to that and brings the judicial review considerations within that wider context of determination.

MR FORBES QC:

You would have to, you would argue that the impugned conduct was material to producing an incorrect assessment, otherwise as Justice Tipping says, well, it's very unfortunate that it's actually, at the end of the day from a legal point of view, irrelevant but we're not here on that category. So that would mean, as I tried to say before, Your Honours, that even Justice Richardson put it too wide in saying that if you don't, if the Commissioner doesn't avail himself of information that was available that would give rise to an assessment that's amenable to judicial review, the answer

would be not if you could have challenged that in the disputes procedure. That's the correct way to do it not in front of the court –

ELIAS CJ:

Although, as part of the discretion, it's open to the court to say that even though eventually it would come out in the wash in a statutory procedure, there is an error here that deserves a pre-emptory correction so that you don't have to waste time going through the full hearing and that's, again, perfectly conventional.

MR FORBES QC:

It was so arbitrary and capricious and without any –

ELIAS CJ:

Or you're not taking into account some –

MR FORBES QC:

Obvious –

ELIAS CJ:

Or relevant consideration.

TIPPING J:

You've clearly misdirected yourself in law.

ELIAS CJ:

Yes.

MR FORBES QC:

Yes, yes.

McGRATH J:

I suppose the problem with the conventional approach though is that we have special restrictions on the time within which assessments can be made by the Commissioner, don't we? We have time bars after a certain period since the formal, the sort of computer–triggered assessment that's first made.

MR FORBES QC:

Yes.

McGRATH J:

And the problem is that if one adheres too closely to the idea that judicial review should come first and be addressed, you can actually end up without ever being able to get to correctness because time bars come into play and that's what the Court of Appeal's referring to when it talks about incentives for gaming.

MR FORBES QC:

Well –

ELIAS CJ:

That's an element of the discretion, if you're into that.

McGRATH J:

Well maybe, but it is – it's also a problem in trying to work out how Parliament intended that the statutory procedures work.

MR FORBES QC:

I don't, though, Your Honour see why – I mean there are cases where both have been run together in tandem. Now there are ways of case managing. One of them is to run them together. Have them case managed by the same Judge if it's in the High Court, or shift it into the High Court from the Taxation Review Authority. So –

McGRATH J:

But if invalidity can be, as I understood you to accept it could, be part of your challenge proceeding, could be part of the statement of claim, does the separate judicial review proceeding being run together with the challenge proceedings, offer any particular advantages?

MR FORBES QC:

No except, as the Chief Justice indicated, it may be such a case that it's appropriate for the Court to signal its disapproval of, we don't expect to see this sort of action occur again. But –

TIPPING J:

Can't you say that in the dispute?

MR FORBES QC:

Yes you can and it may well end up there anyway so to speak.

ELIAS CJ:

But an example would be bias where there is a reason why you wouldn't proceed and it can be quickly corrected on judicial review. It may well be able to be corrected on appeal within the statutory processes but everyone's going to waste a lot of time. So one can't be too rigid about –

MR FORBES QC:

I think that maybe Justice Richardson in one of the earlier cases said that normally the judicial review remedy would be expected to be available only where it's clear or the matter could be resolved relatively quickly. It's not a case for getting involved in extensive, long, you know, evidential issues in oral evidence and cross-examination and the like. So as Your Honour says it may be just part of the discretion and filing judicial review in circumstances that are at least inappropriate, that's not an abuse. It can be visited by "well you're going to do this, you're going to be visited with costs at a much higher level, because it wasn't the correct procedure. There was no foundation for taking the step as against exercising your rights under the statutory procedures".

But the Court of Appeal just didn't answer the question, how was Tannadyce to do that? The answer is, the letters are all, we require you to provide the necessary returns and here's how you do a NOPA.

TIPPING J:

But how did the Court of Appeal deal, or are you saying they didn't really grapple with your key point –

MR FORBES QC:

No.

TIPPING J:

– namely that you couldn't even open the door –

MR FORBES QC:

No.

TIPPING J:

– to the statutory –

MR FORBES QC:

No. They said that the, they wouldn't want their judgment to be interpreted, the Court said, as indicating that the improprieties of revenue officers should remain, not be immune from judicial review at all but the correct procedure for that is within the statutory procedures but how do you get there in a case like this?

TIPPING J:

Well that's your crunch point.

MR FORBES QC:

That's my crunch point Your Honour.

TIPPING J:

If it's correct then it would seem to be a – you would otherwise, if you didn't have judicial review, you'd have no remedy.

MR FORBES QC:

And the only other matter that I wanted to emphasise, and I know it's almost trite to this Court, is that this is strike out. I mean this, as Your Honour graphically pointed, I remember the decision in *Marshall Futures Ltd v Marshall* [1992] 1 NZLR 316 (HC) it sounds like a discussion between me and my mechanic about my car at times, is it a complete write-off or is it capable of repair. So again the Court of Appeal doesn't address that. Well, they just simply say that the evidence and the pleadings indicate that there's no allegation that the officer involved did not make other than a genuine assessment and that's the end of it.

BLANCHARD J:

But your real point, I think, is that you say that you had no means of complying with section 89F and in particular 89F(3)?

MR FORBES QC:

Yes, that's it, as well as not having sufficient information to supply, provide meaningful returns, Your Honour, and that should be on a basis that is admittedly lawful but it is open to me to choose which way I want to do my returns and not have some extraneous method of returns such as assets accretion or an arbitration apportionment between the various shares foisted on me when the very means by which I could do accurate and more beneficial to me returns lies in the documents that you're withholding.

TIPPING J:

Is it both 89F and 89D(2)?

MR FORBES QC:

Yes, Your Honour.

TIPPING J:

Working together?

MR FORBES QC:

Yes, working together and it's further supported by section 89, it's the section, Your Honour, that refers to –

TIPPING J:

89AB(4). Is that the two month –

MR FORBES QC:

Section 89A which is what's the purpose of the disputes part of the disputes and challenge process and it's to encourage open communication between the parties as to disputable decisions. Well, how are you doing that when you're not supplying documents that are or very well may be material? This taxpayer was, in effect, with respect, being treated differently to other taxpayers. So no capable of amendment, no discovery to date. There's a formal application for discovery while Tannadyce has been opposed by the Commissioner, fixture was allocated and then adjourned in light of the appeals that were then pending in the Court of Appeal, although Justice Osborne did express some indication that he'd want to know why or how discovery could be opposed, but that would be for the next hearing which hasn't eventuated of course. So we just don't know and it may well be that Justice French, I acknowledge, may be correct when she said if it turns out that nothing that the Commissioner holds

would have made any difference, well, you've taken your gamble and it's wrong, but if it's material then the situation's quite different.

MCGRATH J:

What are the limitations on amending your NOPA?

MR FORBES QC:

I understand, Your Honour, that I think it's not so much amending the NOPA. It's that the statement of position under section, I think it's 138G is you're not allowed to go beyond the facts, law and ground stated in each party's, neither party that includes the Commissioner, go beyond the ground stated in the statement of position which is the next part of the process of the disputes and challenge procedure except that the hearing authority or the court can, for special reasons, grant leave on the basis that the additional material sought to be relied on wasn't reasonably available at the time, the statement of position.

MCGRATH J:

Section 138 was in the back of my mind but that comes at the next stage?

MR FORBES QC:

Yes, and that's another factor because if you haven't got the documents to advance your case for a NOPA or return, you certainly aren't going to have your documents to comply with the mandatory requirements of section 138, because your hands are tied.

BLANCHARD J:

Well, the case is really never going to get to section 138. You either I think succeed on the earlier sections or you don't.

MR FORBES QC:

Yes, that's right. I mean a pragmatic taxpayer may say, well, I'll file something in order to protect my rights, but that doesn't seem to be appropriate at all and in another context that could invite a prosecution for filing a false return which has no foundation. Doing the best you can is not something that the Act contemplates. It contemplates that you will file proper returns that reflect your own genuine assessment of what your tax liability is.

TIPPING J:

So when 89D(2) talks about you can't do a NOPA unless you've furnished a return, that must mean a genuine attempt at estimating or assessing your tax, presumably?

MR FORBES QC:

I accept that the Commissioner no doubt has the ability to exercise some discretion in cases such as, I'm sorry, my records have been burgled, or there's been a fire, or I've somehow rather managed to mislay them, then it may be a case, well, the best you can do is the best you can do, but why should Tannadyce have had to do that when it persistently claims that the documents that I need, you've got and it's ironic that the early continued attempts to get the documents, the continued refusal, the whole thing is a complete bulk farce in 2008 when there's a response saying yes we've got 200 files.

TIPPING J:

Well it may be arguably that in these particular circumstances the onus is on the Commissioner to show that the documents are not material.

MR FORBES QC:

He's said nothing in evidence about that at all. Nothing at all.

TIPPING J:

Because he who has possession is in a much better position to state what's material than he who is not in possession.

MR FORBES QC:

And it raises the question, why wasn't right at the outset, the documents are here, you can come up and go through them. It's hard to see why there needed to be hundreds of hours spent on collating them and so forth, it really is difficult to understand. The only reason could be that there might be some matters in there that relate to completely unrelated taxpayers, which means they shouldn't have been there in the first place. So it just – the restrictions imposed by the Court of Appeal both in *Westpac* and the current case seem, with respect, to largely emasculate the remedy of judicial review unless you can show, even before discovery, that the officer whose assessment is in issue, genuinely didn't make an assessment contemplated by the Act and how would you ever derive that evidence. But if you can, and once you invoke the disputes procedure, the hearing authority or of course the Court have

got the power to make discovery and you can get whatever documents you think might assist in building up such a case.

TIPPING J:

But we don't actually need to go any further, unless we choose in this case, for them to say well of course you must be able to bring judicial review if you can't open the door to the disputes proceeding.

MR FORBES QC:

If the documents you need or very well could be in the possession of the department and for whatever reason it's declining to make them available. If Your Honour pleases.

ELIAS CJ:

Thank you Mr Forbes. Ms Clark?

MS CLARK QC:

Your Honours, if I may I would like to do two things. I would just like to briefly set the context from the perspective of the Commissioner, because my friend has comprehensively argued the context for Tannadyce and I would like to do that and then I would like to respond to the very specific complaint by Tannadyce relating to the inability to participate in the statutory disputes process by reason of the Official Information Act requests, and I would respond to that point by making several in response.

As to the context, Your Honours, I will speak to my submissions and summarise them in two and a half pages which I can hand up. I have a two and a half page overview but if you –

ELIAS CJ:

I think perhaps we'd better be equitable in this. If you can address us on it.

MS CLARK QC:

Absolutely Your Honours. The first essential point is that Tannadyce fails to plead qualifying grounds for judicial review of assessments and its judicial review proceeding constitutes a collateral attack on valid assessments of income tax and it is helpful to see the history to the litigation and to the relationship in three phases.

The first stage is this. For over a decade Tannadyce has been in dispute with the department about documents which Tannadyce asserts that it needed in order to be able to file returns. It insisted that it needed them. But Mr Henderson, during those 10 years, and I'm referring here to this second affidavit in the bundle, volume 2 at 183, Mr Henderson thought it likely, for 10 years, that Inland Revenue held financial information about Tannadyce but assumed it had been lost or mislaid. That really is the first phase. The second arrives in March 2008 when the Commissioner issued a statutory demand. Tannadyce's response to that statutory demand was to apply for the first time, notwithstanding 10 years of grievance, to set aside the statutory demand on the basis of an intimated judicial review proceeding, but it still was not filed. That is in the affidavit which sets out Tannadyce's claims, the first affidavit in volume 2 at page 140.

The proceedings were eventually filed in the context of the statutory demand proceeding but only after an unless order had been made. Only after court direction on the application of the Commissioner. So the point that I'm making here Your Honours is that notwithstanding these asserted grievances, notwithstanding the mechanisms that Mr Henderson and Tannadyce had available to them over the period of a decade, including judicial review, pre-assessment, notwithstanding –

ELIAS CJ:

What was the incentive pre-assessment?

MS CLARK QC:

The incentive pre-assessment, Your Honour, was –

ELIAS CJ:

Or what was the need I should say.

MS CLARK QC:

The need would have been to have the Commissioner ordered to disclose, if there were any, relevant documents. Mr Henderson threatened, and this is recorded in the Associate Judge's judgment, judicial review proceedings in 2003, that's in a letter in the record. In 2006 he suggested in his correspondence to Ms Stella that, can we not agree on judicial review proceedings or perhaps mediation to resolve this. So as far back as, well at least at 2003, Mr Henderson appreciated, he said he had instructed barristers to take proceedings, nothing happened. The purpose, to come

back to Your Honour's question, would have been to get the documents that he claimed the department held and that he needed. It's a very easy assertion to make.

TIPPING J:

But the claim was struck out as an abuse not on account of delay.

MS CLARK QC:

That is right Your Honour and as I'm stepping through these phases, the end objective will be to demonstrate that the proceeding is an abuse of process, a two-fold abuse of process. One, because of the collateral attack that it constitutes but two, because this is a pleadings argument. It fails on any analysis to meet the threshold for a pleading of dishonesty against the Commissioner and the department. It is completely unparticularised. Not only is the allegation of misconduct and dishonesty, it's not particularised, but the most specific statement we have from Tannadyce about the documents that are lost to it, is at paragraph, I think, 4 of the statement of claim, which I will just refer to because that's the essential assertion. Paragraph 6 Your Honour of the second amended statement of claim is at volume 1, page 92 and it says, "In May 1995, March 1996 and on other occasions, including during the course of audits, the IRD over approximately five years – " I'm sorry the plaintiff – "document records and information relating to the plaintiff were delivered to the department's Christchurch office. All were obtained."

Now, if I could just make three observations about that pleading. The documents in May 1995 on Mr Henderson's own evidence, that's the affidavit of Ms Cooke, were not returned because they were photocopies not originals and that evidence is at 3A, 205, it's a letter from Mr Lewer at paragraph 10. There is a schedule of documents in the record of documents and documents returned, which was provided to Mr Henderson and with which he did not take issue. That schedule does not record –

TIPPING J:

Are you challenging the factual accuracy of this pleading, Ms Clark –

MS CLARK QC:

I'm challenging –

TIPPING J:

I'm sorry, I'm for myself, I'm a bit lost.

MS CLARK QC:

I'm challenging, Your Honour, what I'm suggesting, Your Honour, is that we have the benefit of a full record because of the way in which this litigation has, arrives into the Supreme Court and the pleading has no tenable factual underpinning.

BLANCHARD J:

Where is that schedule of documents?

MS CLARK QC:

The schedule, Your Honour, is in volume 3A. It is a –

ELIAS CJ:

What is the schedule?

MS CLARK QC:

It is a letter to Mr Henderson on behalf of Tannadyce at, on 11 December 1998, writing with respect to outstanding returns which, Your Honours, at the time were 67. There were 67 outstanding returns. That is at volume 3A, 202, a schedule attached to a letter from Mr Holland, the Commissioner and the 67 outstanding returns were income tax, GST, PAYE, a range of returns, not filed and yet in respect of which missing documents could not be raised as the reason, but coming back to the schedule, Your Honours, it's at page 204 of volume 3A.

ELIAS CJ:

Sorry, did that last remark, that doesn't go anywhere for present purposes, it's by way of background, is it?

MS CLARK QC:

It does, Your Honour, it goes to the bona fides of the proceeding.

ELIAS CJ:

Well, we're looking at a strike out application and we're looking at, effectively, a question of jurisdiction, I would have thought so I'm not sure that we can really get into, but perhaps you will indicate why we can look at these matters.

TIPPING J:

Well, the first head of abuse was collateral attack. Well, it doesn't relate to that and the second head was pleadings do not allege dishonestly in a sufficiently particularised manner and I don't know that this relates to that either. Is there some other head that –

MS CLARK QC:

I'm responding –

TIPPING J:

Are you saying there's an overall head that this is not a bona fide claim?

MS CLARK QC:

The third phase, Your Honour, is that, yes, Your Honour, essentially.

TIPPING J:

So we add a third head of abuse, not a bona fide claim?

MS CLARK QC:

It's inherently implausible. This is a claim effectively of institutional dishonesty spanning 10 years against an organisation, a serious contention of dishonesty and lack of truthfulness, but and it is required to be properly particularised –

TIPPING J:

Well, is it ultimately necessary for them to prove dishonesty? What if they can prove that the documents that were withheld were quite innocently withheld, but it was nevertheless necessary for them to have those documents to comply with their statutory obligations? I mean, they're not putting it all on dishonesty, I didn't understand. That may be part of this conscious maladministration, but Mr Forbes's essential point, I understood was, never mind how it came about, your client was keeping the documents from his client and he couldn't without them do his job.

MS CLARK QC:

Well, Your Honour, in response I ask the hypothetical question, what is to stop, what is to prevent any taxpayer making that assertion? If there is no plausible –

TIPPING J:

Well it's clear that the assertion is sound here.

MS CLARK QC:

Why?

TIPPING J:

You were keeping the documents.

MS CLARK QC:

But Your Honour that is not supported, with respect, by the evidence. It's simply not. What –

TIPPING J:

Whether it be innocent or otherwise, you had documents which he says are material. Now they may be, they may not be.

MS CLARK QC:

Mr – I'm just going to check with my friend before I refer to a matter if I may Your Honours. Your Honour what – I apologise for that interruption. The claim of abuse of process arises, does not arise until a single event in August 1998 and that single event was, in the words of Associate Judge Christiansen, seized upon by Mr Henderson and from this single event he makes his claim of consciously withholding documents within the department –

ELIAS CJ:

Is this the 200 Eastlights?

MS CLARK QC:

This is the 200 Eastlights which has been explained in an affidavit by Mr Cassidy which was not challenged in the statutory demand proceeding. The 200 Eastlights has, because of the repetition of the fact over time, it seems to have gained a stature and a meaning. We know little about its content. What we do know is, and my friend does not resist this, is that in a good faith and conscientious and laborious response to the Official Information Act, which was sweeping in its terms. The Official Information Act asked for every document, email –

ELIAS CJ:

Ms Clark, I really can't understand where we're getting to with this case.

MS CLARK QC:

But this is their case Your Honour. Their case is the 200 documents.

ELIAS CJ:

Look, you might be entirely correct about this being highly implausible but what we're concerned with is a strike out application on judicial review proceedings. Is it necessary for us to hear why you say that in the end if these judicial review proceedings were heard they'd be shortly disposed of?

MS CLARK QC:

It's necessary, Your Honour, to respond to the argument that is being developed today which creates, which relies on the 200 folders. If that is the argument that is being presented then it's not just necessary but permissible. It will not be the case that a plaintiff can make allegations that are contrary to the facts that are properly before the court and that is the Court of Appeal decision, His Honour Justice Hardie Boys in the *Attorney-General v McVeagh* [1995] 1 NZLR 558 (CA), that where you have a pleading, and this is really my point Your Honour, that the pleading is, does not withstand scrutiny in light of the material –

TIPPING J:

This is the contrary to indisputable fact doctrine that was –

MS CLARK QC:

Yes it is, it is Your Honour.

TIPPING J:

As far as in *McVeagh*.

MS CLARK QC:

And there's two in – yes, I'm sorry.

TIPPING J:

I see. So you say this claim is contrary to indisputable facts?

MS CLARK QC:

Yes I do Your Honour. What are those indisputable facts? The first is the nature and tenor of the communications over the 10 years concerning the missing documents.

ELIAS CJ:

But why should that be relevant? If the allegation is that there are documents that the taxpayer needs that the Commissioner has, why is the correspondence relating to disclosure going to help us?

MS CLARK QC:

It's necessary to look at the pleading and what foundation there is for that pleading in light of the test which is that judicial review is unavailable to challenge an assessment properly made unless there are exceptional grounds and so, necessarily, Tannadyce has raised the bar from, this is its third pleading, the statement of claim –

ELIAS CJ:

Well, it's been pushed into that –

MS CLARK QC:

It has, Your Honour.

ELIAS CJ:

By the adoption of the Australian test.

MS CLARK QC:

I don't believe I refer to *Futuris* in our submissions and I think it's not necessary to refer to *Futuris* Your Honour. There is a pedigree of case law in New Zealand which really articulates the principle which is not contentious that where you have a statutory appeals mechanism that can provide the remedy that a plaintiff would be entitled to on an allegation properly pleaded of misconduct and unlawfulness. That is the preferred course.

ELIAS CJ:

Well, of course, but normally, well, until recently, that seems to have been the conclusion on judicial review application in exercise of the discretion. What we have here is a strike out which really suggests that there is some jurisdictional impediment not a – I mean, you would have to go, surely, so far as to say that the discretion

could only be exercised to decline judicial review before we could say that the strike out was appropriate on those sort of grounds, that there was an available procedure, otherwise you have to say that there's a jurisdictional bar and I'm not sure that you can, you're really arguing for that or that you can argue that –

MS CLARK QC:

That's correct, Your Honour, I'm not arguing –

ELIAS CJ:

So you're really putting everything on the fact that judicial review isn't appropriate as a matter of discretion where there is a more convenient statutory procedure to be followed.

MS CLARK QC:

I'm really putting it on a different basis, Your Honour, which is that judicial review must be reconcilable with sections 109 and 114 of the Tax Administration Act because they have to be given meaning and they help serve the purpose of the statutory disputes procedure which is set out in section 89A. Your Honours will know it well, but just to recap, the purpose of that procedure is to improve the accuracy of assessment and it's to reduce the likelihood of disputes. It's to ensure that all information that should be available can be available. It's to promote early identification of issues leading to the making of an assessment and it's to prompt the efficient and inexpensive resolution, so whereas my friend has suggested that why should Tannadyce be beholden to an expensive statutory regime, in fact, Tannadyce had, at least, five opportunities to invoke that disputes process and resisted just as it resisted filing returns. The opportunities arose, Your Honour, during all that period of correspondence about documents, which –

TIPPING J:

The essential argument against you is that they couldn't effectively comply with 89F and 89D, because they didn't have the material. That's the sole but core part of the argument against you. Now, if you can answer that, you'll be making progress in my view.

MS CLARK QC:

The taxpayer had available to it any reasonable means. It wasn't bound to the assets accretion method which Inland Revenue proposed. Inland Revenue said, "We

will accept returns provided on the best information available to you and on any reasonable basis" and the form that came back had, that's in the bundle, had only one –

TIPPING J:

Could we be referred in due course to the correspondence which supports that?

MS CLARK QC:

I can take you to the returns, Your Honour.

TIPPING J:

No, no, the letter that said we will accept it on any –

MS CLARK QC:

Yes Sir, and it's in the affidavit of Mr Lewer at, that would be a quick way to access the correspondence Your Honour. I'll just - Mr Lewer's affidavit is in volume 2, starting at page 153. I want to find that specific advice Your Honour. At page 158 of volume 2, Mr Lewer is referring to a letter he wrote on the 1st of April 1999 where he dealt with Mr Henderson's reluctance to use the asset accretion basis and Mr Lewer said, "Your resistance seems to be based on your claim that unspecific records were lost or destroyed. As you know we don't accept that."

ELIAS CJ:

Sorry, what paragraph is this?

MS CLARK QC:

The letter started on page 157 and I'm now at page 158. At the top the quote from the letter, para 16, "I was not, however, content to merely leave things on that basis." Mr Lewer is just rehearsing the history of the matter again to Mr Henderson. "Accordingly I suggested the asset accretion method could be used to prepare the returns. I have also said I will accept returns prepared on any other reasonable basis. I assume you have some reasonable basis for the claim of losses of $2 million and would therefore expect that basis to have formed the starting point in preparing Tannadyce's returns," and a copy of that letter is in volume 3 at page 233.

And so what this affidavit and more particularly the contemporaneous correspondence reveals is Mr Lewer's attempts, I would describe them as

conscientious attempts over a number of years, to facilitate Tannadyce in the provision of returns with no formal requirement around their provision, other than that they should provide sufficient information to enable the Commissioner to calculate assessable taxable income and the quantum of liability. And that information was not provided and notwithstanding that Mr – I do need to just refute another plank in Tannadyce's case while I'm at this affidavit – Tannadyce has complained that the department did not criticise the global nature of the returns for some time. That is explained at paragraph 27 of Mr Lewer's affidavit, page 159. He said, "Taxpayers cannot file global returns. However, in the spirit of the agreement," I'm at paragraph 27 –

ELIAS CJ:

So what's the agreement, is that the one –

MS CLARK QC:

That was with the Ombudsman Your Honour.

ELIAS CJ:

Yes.

MS CLARK QC:

"I decided to consider the information contained within the return and the supporting documentation," and then what followed was a series of questions which to this day have not been – were simply not responded to, to enable an assessment to be made.

Now what ought to have happened is that at this stage it would be apparent to Tannadyce that a default assessment is on the cards and the Part 4A disputes procedure could have been utilised to great effect at this stage to resolve the contention of missing documents. To confine the disputes and to enable early identification of the issues between the parties, but it was not. It could have been also invoked –

ELIAS CJ:

Sorry, this is a complaint that some formal step such as an application for judicial review should have been made at this stage?

MS CLARK QC:

Not should have, Your Honour, but if the grievance was generally, it could have been. It was available as was –

ELIAS CJ:

So this is –

MS CLARK QC:

– recourse to the Ombudsman. The Ombudsman could have gone into the department and asked to see all of the documentation and conducted an investigation and resolved the issue of documents, because that was – so long as a taxpayer asserts missing documents, an impasse is created and it's, it is able to be resolved –

TIPPING J:

Are you arguing, Ms Clark, that not only could they have satisfied the requirements of those two sections I mentioned a little moment ago, but they were, in effect, given every assistance to do so, is that the argument, every opportunity?

MS CLARK QC:

I do, Your Honour – every opportunity, I do, Your Honour, yes and every facility. Even the desire not to reject the global nature of the returns, but rather to scrutinise the information, to go back to the taxpayer, to ask for further information. A default assessment could have been issued many years earlier.

TIPPING J:

And this is all so clear cut that we, the claim should be struck out in limine.

MS CLARK QC:

Well, it's clear cut in respect of any situation, it doesn't have to be.

TIPPING J:

Well, it might not be a matter of assessment as to whether, on proper full inquiry as to whether the situation was such that they were able, effectively, to file a return or issue a NOPA.

MS CLARK QC:

Your Honour, the whole point of the statutory disputes and challenge process is to deal with either contested assessments or inadequate returns. It is not necessary that the taxpayer have available to it every single document that they assert. They can make a best endeavours assessment of their taxable income and on that point, the claim of lost documents without looking at the evidence must be exaggerated because paragraph 6 of the statement of claim suggests that '93, '90, whatever the years were, '95, '96, '97 documents were taken and the chart indicates the table that there were at most 10 boxes, how can these 200 folders be remotely relevant to events after the time when on Tannadyce's own case was the end point when the Commissioner took documents? That was 1997, at the very last time. What relevance can these other documents possibly have? Tannadyce doesn't complain about documents after that time.

MCGRATH J:

Ms Clark, the affidavits you've been taking us to most recently were all filed in the proceedings to set aside the statutory demand, weren't they?

MS CLARK QC:

They were, Your Honour, but for the purpose of, for the purpose of supporting the ground in the statutory demand, which was judicial review. If Your Honour recalls –

MCGRATH J:

What I was going to ask you was whether on these contested matters the Associate Judge made any findings or has addressed the matter?

MS CLARK QC:

He did, Your Honour.

MCGRATH J:

Will you be taking us to whatever, any passages in that judgment?

MS CLARK QC:

Is Your Honour interested on findings on particular issues, such as, the 200 folders?

MCGRATH J:

Well, just in particular on the questions that might be said to be contested by the department and the affidavits you've been taking us to. Were the findings relevant to those issues?

MS CLARK QC:

The documentation from the department has never been contested by Tannadyce other than in this broad respect. The department has said we have no documents, we've returned them, not the department but a series of officials have made that assertion and Tannadyce resists that. That's the only contention that arises on the documents.

MCGRATH J:

But my question is related to whether there are any relevant findings in the judgment of Judge Christiansen?

MS CLARK QC:

I consider that the finding that's most relevant, Your Honour, is his, having assessed the evidence, his finding at, I'll find the paragraph over the adjournment, that the claims of deliberate withholding of documents, particularly based on the 200 Eastlights are "nonsensical", because they fail, the allegations fail or they are maintained in the face of an affidavit by Mr Cassidy who explains – this case of conscious maladministration is based on one word in that letter. Mr Cassidy explains the ambiguity in that letter and his affidavit was not challenged, the Associate Judge having looked through, dealt with in great detail.

BLANCHARD J:

Are you going to take us to that affidavit?

MS CLARK QC:

Yes, Your Honour, I can.

BLANCHARD J:

After the adjournment.

COURT ADJOURNS: 11.31 AM
COURT RESUMES: 11.59 AM

MS CLARK QC:

Your Honours, before going to the Associate Judge's judgment and Mr Cassidy's affidavit I'll just refer Your Honours to three pieces of correspondence that led to Mr Cassidy making the affidavit. The first is at volume 3B, page 453, it would be in – it's well towards the end of volume 3B.

ELIAS CJ:

453?

MS CLARK QC:

453 Your Honour. At page 453 there is Mr Henderson's Official Information Act request of April 2008, three paragraphs down, starting with, "Accordingly Mr Henderson asks to provide every document you have of any nature whatsoever including emails, diary notes, letters, worksheets, invoices, credit notes and anything else that in any way relates to anything between Tannadyce Investments and the Department and/or has come into possession of the Department."

So that was the request and the first response is over several pages at page 476, it's almost one month later, 14 May, and it really is to the effect that there's been a decision made to grant the request. "You'll be aware," Mr Cassidy says to Mr Henderson, "that the Department has a large volume of information. It will take a significant amount of time. At this stage the Department estimates it will take three months to provide the information to you." And then there is a cost, costs advice and – "But the Department," I'm reading five lines from the bottom of the page –

ELIAS CJ:

Sorry, what page are you at?

MS CLARK QC:

I'm sorry Your Honour, 476 of 3B.

ELIAS CJ:

Thank you.

MS CLARK QC:

It's a grant of the request. Five lines from the bottom of the page, "The Department is prepared to commit the first 100 hours to your request free of charge and will

advise you of progress before proceeding further and you can make a complaint to the Ombudsman."

And then over the page is the problematic letter – not over the page, at 488 a further letter from Mr Cassidy advising of the progress that had been made in particular at the third paragraph, "The Department has now collated all possible information that may relate to Tannadyce. It holds a very large volume of information relating to Tannadyce. The Department has gathered approximately 200 Eastlight folders of documents relating to Tannadyce." And those are the words, "relating to Tannadyce" that became problematic.

Just at that point Your Honour I can refer to the Court of Appeal's observations that this is taking place at a time, this request, when there's been select committee inquiry into Inland Revenue, which was really brought about by the joint efforts of Mr Hyde and Mr Henderson. It was also at the time that there was the book and the movie. Mr Henderson was related to many other companies and so as Mr Cassidy explained in his affidavit, which I will now take you to, there was much information relating to – as much information relating to Mr Henderson, really, which needed to be weeded out because that was not what the Official Information Act request sought.

Now if I can just –

TIPPING J:

You mean the relating to TIL should have said relating to TIL and Mr Henderson, is that what you're saying? Is that why those words became controversial? I was just not –

MS CLARK QC:

No Your Honour, that's not why they became controversial, the request was confined to Tannadyce and the department was simply construing that request in its terms and therefore collating and sorting out all information that didn't come within the terms of that request, and there would have been a large amount. Now what – the response to this letter was an affidavit from Mr Henderson which was his second affidavit filed in the statutory demand proceeding, which Your Honours will recall had as one of its grounds the judicial review proceedings, and that is at volume 2, and I'm looking at page 183. Mr Cassidy's letter was on 7 August, this affidavit was sworn 18 August and at page 183 it addresses Mr Cassidy's letter at paragraph 2, "I consider the letter

from Inland Revenue dated 7 August reinforces the absolute necessity for Tannadyce to have full discovery of documents."

If I can just interrupt myself there, Your Honour, as I was referring Your Honours, to Mr Cassidy's previous letter of May, granting the request, I noted that Mr Cassidy to Mr Henderson, "You will be aware that the Department holds a vast amount of documentation." That did not prompt Mr Henderson to react negatively. That clearly was no surprise to him but this 7 August letter has, because of these words and I'll come back to Justice Tipping's question –

TIPPING J:

I don't want to divert you, Ms Clark, I was really just being a bit curious but I mean, frankly, I'm trying to keep my mind above the detail of all this.

MS CLARK QC:

Well, I understand that, Your Honour, but of course this is Tannadyce's case for maintaining the judicial review and to come right up to the two broad propositions, well, sorry, I'll just finish this exercise, and over the page at 189, is Mr Cassidy's affidavit in reply at page 190 specifically at para 5, paragraph 5.2, "The 200 folders contain information relating not only to TIL and to that request, but also to Mr Henderson personally or to other companies associated," there's a number of documents and so at paragraph 6, the purpose of his affidavit, "The third sentence of the third paragraph of my letter should have made it clear that the 200 Eastlight folders contained documents of potential relevance," so that had Mr Cassidy's letter said, "The Department has gathered 200 folders of potential relevance," rather than "relating to," there would be no case for, no basis for Tannadyce's present proceeding which is founded on this letter.

ELIAS CJ:

Well, I must say the significance of that passes me by.

MS CLARK QC:

Well, Your Honour, it's founded on the letter because the –

ELIAS CJ:

No, no, I'm not disagreeing that it's potential relevance. What else could it have been taken to mean?

TIPPING J:

Relating to could mean – doesn't warrant relevance.

MS CLARK QC:

The point I'm trying to make, Your Honour, is that where there is a pleading which is, the incontrovertible fact is that there has been a sworn clarification of any ambiguity in that letter and Mr Cassidy was not cross-examined on that as he might have been, so the evidence is that the 200 documents do not contain –

ELIAS CJ:

Where was he cross-examined on it?

MS CLARK QC:

He might have been in the statutory demand –

ELIAS CJ:

In that process, yes I'm sorry, yes of course.

MS CLARK QC:

Yes, Your Honour, so his evidence stands and this presumably –

TIPPING J:

Was there an agreement to treat the evidence in the statutory demand proceedings as evidence in these proceedings, presumably?

MS CLARK QC:

Yes, there was Your Honour.

ELIAS CJ:

But no, sorry, was there any evidence referred to in these proceedings, because this is strike out?

MS CLARK QC:

Yes, Your Honour, Justice French had available to her all of the information that was available to the Associate Judge, but quite properly she dealt with the evidence as

she records in her judgment on the basis of familiar strike out principles an assumption that the pleadings should be ...

TIPPING J:

But was it made plain to her that there was a, that part of the strike out was an allegation that the discretion could never on uncontradicted facts be exercised in favour – that doesn't seem to me to come through very clearly.

MS CLARK QC:

Well, certainly the submission was made – the Judge was invited to engage with the evidence for the purpose of this exact exercise but did not do so. In other words to establish, to look at the pleadings, which is completely permissible on a strike out, and see whether there is a properly pleaded case that is not capable of amendment and that does not raise a tenable cause of action in law.

BLANCHARD J:

I maybe being a bit slow Ms Clark but I'm not quite following the argument about the 200 files. Let us assume for the moment that Mr Cassidy's correction is correct, and I really don't doubt that it is, what's being alleged against the department is that Mr Henderson tried to get hold of documents. And the exact quantity of the documents doesn't really matter, and that he was not able to get those documents, and that because of the absence of the documents he wasn't able to comply with section 89F and section 89D. The fact that some of the 200 files might not have been relevant seems to me not to make a complete case for implausibility.

MS CLARK QC:

I would agree with Your Honour and that is not the only basis upon which I advance the implausibility submission. Taking the pleadings by themselves, almost with no other documentation, they are fundamentally defective. But when also viewed against the permissible, the record that finds its way permissibly into this Court, they have the additional defect of being pleaded, contrary to the evidence, and it was the evidence that enabled – and I'm just now going to, I've taken a long time to respond to Justice McGrath's enquiry about what the Associate Judge said, and I can just refer very quickly to his paragraph 1771 that –

BLANCHARD J:

Sorry, whose paragraph?

MS CLARK QC:

The Associate Judge. Just on that Your Honour –

ELIAS CJ:

What page is it in volume –

MS CLARK QC:

It's in the Commissioner's bundle at tab 4 and the reason that I'm referring to this copy of the judgment, not what's in the case on appeal, is because that one is incomplete. This is the full reported judgment at tab 4 of the Commissioner's bundle. At page 152 of the bundle. At paragraph 71, which is on the left hand side, left hand column, bottom of the page, this is the Associate Judge's assessment of the allegations around the 200 folders. To paragraph 72, "the submission of deliberate withholding", because that is the pleading, the submission and the case against the Commissioner, is "nonsensical". "No reasonable inference of sinister intent can be extrapolated from [the letter]. Any ambiguity has been adequately explained." The importance of that finding, Your Honours, is that –

ELIAS CJ:

Sorry, I'm not familiar enough with the process. These findings are made on, what? On –

MS CLARK QC:

On the basis of the very documentation, which is in the record today, which on that Mr Henderson –

ELIAS CJ:

The Associate Judge presumably didn't hear evidence. Is this all done on the basis of what?

MS CLARK QC:

It's simply his assessment of the documentary record.

ELIAS CJ:

I see.

MS CLARK QC:

And of course the sworn evidence which was not challenged. Mr Cassidy might have been cross-examined on that affidavit. The importance of –

ELIAS CJ:

What, before the Associate Judge?

MS CLARK QC:

Yes Your Honour in a statutory – in an application to set aside the statutory demand that would have been orthodox. Not necessarily frequent but not uncommon.

TIPPING J:

But my understanding now, Ms Clark, is that a plaintiff says he can get home without the concept of deliberate.

MS CLARK QC:

I'm sorry Your Honour, I didn't hear your whole question.

TIPPING J:

I'm sorry. I don't understand it to be now essential to the plaintiff's case that the withholding, if such it can be called, is deliberate. He simply says that without these documents he couldn't – I'm not expressing a view on the merits of his case, I'm just saying well he says, like my brother Blanchard put it to you, without these documents he couldn't reasonably comply with those sections therefore he couldn't go down that route. Now isn't that where the argument really needs to focus?

MS CLARK QC:

That is an assertion without substance Your Honour. To say I could not participate in the process is simply an assertion without substance. Any taxpayer can file the most perfunctory return, the most inadequate return, the most incorrect return and the response from the Commissioner, as it could have been from the taxpayer in the face of an assessment, will be to issue a NOPA and Mr Henderson was sent NOPA documents and returned them – today Mr Tannadyce's case is we were prevented from engaging in that process. Back then the evidence shows, again, a letter from Mr Tannadyce, returning the NOPA documents – I'm sorry, from Mr Henderson, saying we reject completely the default assessments and I'm returning today, by post, the documents you've sent me. That was –

TIPPING J:

Are you in effect saying he could have filed any old return and any old NOPA and that would have let him into the statutory proceeding?

MS CLARK QC:

Absolutely Your Honour. Yes, that's the whole point of that – the whole point of the pre-challenge process.

TIPPING J:

And it didn't really matter whether it was a genuine estimate or anything, it could just be anything?

MS CLARK QC:

Just – well, if any taxpayer files information which is inadequate, which is simply what that might have been, inadequate, doesn't provide –

TIPPING J:

Makes a bit of a nonsense of the procedure, doesn't it?

ELIAS CJ:

It seems –

MS CLARK QC:

But his complaint is that he couldn't participate in it. He could have participated in it and the issue of documents could have been resolved in that procedure.

BLANCHARD J:

Well section 89F puts some obligations on the person who is filing the NOPA, he couldn't just ignore those and their obligations of identifying the adjustments proposed. Well I suppose you would say he could make the adjustments in accordance with the any old return that you reckon he can put in. But it then says you've got to, "Provide a statement of the facts and the law in sufficient detail to inform the Commissioner of the grounds," and I'll skip over the next one, "Include copies of the documents of which the disputant is aware at the time that the notice is issued." Now he's saying I don't have the documents can he really comply with section 89F?

MS CLARK QC:

I'm going to regret those words "any old return".

TIPPING J:

They're mine Ms Clark, I have to 'fess up, but you did tend to borrow them.

MS CLARK QC:

You're on the record Your Honour. Yes, Your Honour, they are the statutory requirements and indeed Mr Henderson, having said, having rejected the NOPA process, did send a letter on another occasion saying, "Accept this as my NOPA without regard to any of this." So my point is that, I'm not suggesting that –

TIPPING J:

But didn't your client then reply, "That's not good enough," or something like that?

MS CLARK QC:

It did Your Honour.

TIPPING J:

Well that makes your life a bit more difficult doesn't it?

MS CLARK QC:

But there was a process then that ought to have been – the statutory process that was available to that response. The point that we, the point that is inescapable is that it was available to Tannadyce to file returns on any reasonable basis. It had a basis for its claimed losses of $1.5 million. Where did that basis come from? It was asked for that basis. It had no trouble providing that information to the Commissioner and the Commissioner was simply requesting the basis of that claimed loss and a return. The dispute –

BLANCHARD J:

You mean it was able to figure out its loss as it said it had incurred, but wasn't able to explain how it arrived at the figure that it was putting up?

MS CLARK QC:

Well, it didn't explain, Your Honour, no. I don't know whether it was able to, but it did not.

BLANCHARD J:

So you're saying how did it come to that figure if it wasn't able to give an explanation?

MS CLARK QC:

I think what I'm really saying, Your Honour, is that if it was able to come to that figure for the claimed loss, then one might expect that it could be equally able to arrive at a self, at a –

BLANCHARD J:

At an explanation?

MS CLARK QC:

An income figure.

BLANCHARD J:

Yes, I think we're saying the same thing. You're saying it more elegantly than me.

MS CLARK QC:

Your Honour, just on that, Mr Henderson also had an affidavit put in by a chartered accountant –

TIPPING J:

Sorry, just before you go on from that, did he just give a good round figure for his loss or was his figure more specific?

BLANCHARD J:

Can we have a look at that?

MS CLARK QC:

Yes, Your Honours, it's in the return that was eventually filed, the so called global return, that's at volume 3A, starting at 254 –

TIPPING J:

My numbers are unintelligible, could you please say what the document looks –

MS CLARK QC:

They are –

TIPPING J:

Is this the income tax return and IR4 94?

MS CLARK QC:

Yes.

BLANCHARD J:

So he comes up with a figure of $1,539,753?

MS CLARK QC:

Yes, which is –

ELIAS CJ:

Any old return.

MS CLARK QC:

Any old claimed loss.

TIPPING J:

It's not quite think of a number, you might think. It was, sort of looks a bit precise.

MS CLARK QC:

It's reasonably precise and, of course, well, yes, there are supporting attachments, purportedly supporting attachments. They run to page –

TIPPING J:

This is the global one?

MS CLARK QC:

This is the global return, Your Honour, for years '93 to '98.

ELIAS CJ:

Which the Commissioner says is not appropriate?

MS CLARK QC:

The Commissioner did not say that at the outset. The Commissioner said it doesn't provide the information that it – it's not the fact of them being global, it's the fact they don't provide the information that's needed to assess the income.

ELIAS CJ:

Did they later say that it was not appropriate?

MS CLARK QC:

A long time later.

ELIAS CJ:

I see.

MS CLARK QC:

Yes, Your Honour.

ELIAS CJ:

Well, is it appropriate, no, in your submission?

MS CLARK QC:

It may have been, it may have been had it provided the information that was needed.

BLANCHARD J:

He had the records on his Stutz Bearcat.

TIPPING J:

On his what?

BLANCHARD J:

Stutz Bearcat at page 266.

MS CLARK QC:

And at page 267, there is the letter going back acknowledging the returns, not rejecting them but saying, we've got a whole range of questions about some of the

management fees, the rents, the other income and the correspondence about that went on for some considerable time. The – Tannadyce was assessed. It was issued with nil default assessments for income tax but its complaint is that this claimed loss was rejected and therefore it lost the benefit in successive income tax years of this claimed loss. It maintains that loss and wishes to maintain the benefit of it, presumably on the basis that it was real, presumably there was sufficient information available to it to make that assessment and my point about this has been one could expect the same response for income tax returns.

TIPPING J:

Is there a reconciliation between the figure in 18B, in the box 18B, and the documents attached?

MS CLARK QC:

I have looked at that and I, I understand not Your Honour, which accounts for the letter at 267 at the end of those accounts asking for information so that the material can be understood.

TIPPING J:

So the compass of the dispute, forgetting all the subtleties, is whether there is a loss to be carried forward of this 1.5 million figure?

MS CLARK QC:

I think that would be fair Your Honour, yes.

TIPPING J:

Yes. Well there is an inference from the precision of that figure that might be capable of being drawn. How powerful it is, of course, is another matter.

MS CLARK QC:

If I can just make a final observation about the evidence. Mr Henderson in his first affidavit filed in support of the statutory demand, based on judicial review, said, and this is at volume 2, page 33, that he's put in the documents, not all of those that are relevant but, and I quote, "Some of the more significant ones." And my submission about that is that one might have expected to see more in a judicial review proceeding against the Commissioner where Mr Henderson was making his best case.

ELIAS CJ:

Sorry it can't be page 33 I don't think.

MS CLARK QC:

I'm sorry Your Honour, it's at 133, and his particular evidence on the documents being the more significant ones is at paragraph 6 on 135. While I'm on that page Your Honour, at page 135, Mr Henderson deposes that Inland Revenue had obtained possession of documents around 1997. That is another example of this, of an inconsistency between his own evidence and Tannadyce's pleading at paragraph 6. In a case like this the pleadings are not allowed to be that undisciplined and that unfocused.

ELIAS CJ:

What do you mean a case like this? Is it the allegation that you're –

MS CLARK QC:

Against the Commissioner Your Honour, yes, against the department. Against generic officials, that was the expression of the Court of Appeal. Everybody is tainted by this.

ELIAS CJ:

Because it's bad faith that's –

MS CLARK QC:

Absolutely Your Honour.

ELIAS CJ:

– being alleged. Yes.

MS CLARK QC:

And although the material facts are pleaded with some ambiguity and inconsistency, the allegation, the ground of review, is not. It does use the words "untruthful" and "misleading" but without them being sourced to any particular office or time, much less identifying the documents that Tannadyce insisted it needed but which were consciously withheld.

BLANCHARD J:

So you're saying there's not particularisation of the bad faith?

MS CLARK QC:

That's a substantial plank in my case Your Honour. That – in a sense this is a pleadings issue rather than the test, the threshold test for judicial review in the context of an assessment because that's always going to be difficult to formulate.

ELIAS CJ:

Was that a basis of strike out, I know it's not, I think, or maybe I've misunderstood, it doesn't seem to be within the terms of – I'm just trying to work out what it's directed at, this submission. When you say it's a major plank of your case, that it isn't properly – that it isn't pleaded with significant specificity.

MS CLARK QC:

Yes and that is a separate abuse of process when it's an allegation of dishonesty and I rely on –

ELIAS CJ:

But – I'm sorry, yes, perhaps you should take us to your strike out application.

TIPPING J:

But the normal rule there is you're given one chance to particularise. You don't strike out peremptorily normally on lack of particularity, even in cases of bad faith –

MS CLARK QC:

Yes Your Honour –

TIPPING J:

– or fraud.

MS CLARK QC:

Yes.

TIPPING J:

It's bad pleading.

MS CLARK QC:

I would agree with Your Honour but this is the third pleading. This is the third pleading on the – it is – it's not – I commend to Your Honours the observation that the Court of Appeal in *Tannadyce* made, which is that there, on the evidence, on the available evidence, and bearing in mind that Mr Henderson has selected the most significant material, and the most relevant, to support his judicial review case, there is no basis for the pleading.

TIPPING J:

Does he confine himself to bad faith or is he including an argument. Whether it be bad faith or not, I didn't have the necessary material, you had it.

MS CLARK QC:

Well Your Honour, that's, if that was a ground of review, a stand alone ground of judicial review, which it may be, it was available to Tannadyce to institute those proceedings at some point during those 10 – prior to the assessment –

TIPPING J:

But it may be a very powerful reason to exercise the discretion against relief but it's not claimed as a ground to strike out for abuse, the delay, is it?

MS CLARK QC:

No Your Honour, it absolutely is not. It is a, it goes to discretion and I – from memory I believe that's what the strike out claim said – I'm sorry, the application, that was a ground of the application –

ELIAS CJ:

Well the application doesn't identify the lack of particularity in –

MS CLARK QC:

Well of course Your Honour when I – the proceedings have been complex. The application would have been – I'll just turn to that, I haven't got the date of it because there was a statement of claim on the 1st of August then one on December 1998 and then one in April 1999. I'll just –

TIPPING J:

What page is your application for strike out to be found?

ELIAS CJ:

65.

ELIAS CJ:

I see that you did actually claim delay –

MS CLARK QC:

Yes.

ELIAS CJ:

– as a ground. But as, put quite properly –

MS CLARK QC:

But as a –

ELIAS CJ:

– in relation to the discretion.

MS CLARK QC:

Yes Your Honour. Coming back to Your Honour Justice Tipping's point about Tannadyce's case being simply that it couldn't participate in the disputes process, that is not a ground of review in its pleading. That is one of the consequences.

TIPPING J:

But it's capable of amendment to say that more specifically or more –

MS CLARK QC:

But its ground –

TIPPING J:

– accurate.

MS CLARK QC:

– of review Your Honour is dishonesty. That's its ground of review.

TIPPING J:

Well it may have put its case too high or higher than it needs.

MS CLARK QC:

But it had to.

TIPPING J:

Well I don't know.

MS CLARK QC:

On the basis of the test as it presently stands.

TIPPING J:

Well if, surely you'd, if you, through some alleged default of the Commissioner, you can't go down the statutory route. It can't be right that you can't bring judicial review. The privative provisions couldn't possibly be construed to have that effect, could they? Because otherwise you'd have no remedy.

MS CLARK QC:

The Court of Appeal decision in *Dandelion Investments Ltd v Commissioner of Inland Revenue* [2003] 1 NZLR 600 (CA) is very helpful on precisely this point Your Honour. I understand Your Honour's concerns about emasculating judicial review, which is obviously an important and powerful, provides powerful remedies. And what we're really discussing is two competing interests. The two competing public interests. The one in the ability of a plaintiff to have available to it a remedy and the potential to enquire into unlawfulness and misconduct. But the competing interest in the context, the very narrow context that we have here, it's not all tax cases, it's the limited context of an assessment which attracts sections 109 and 114 and in that context only is judicial review limited to circumstances where the assessment is not one protected by those provisions.

But prior to the assessment and even in the face of an assessment judicial review may be available for example, Your Honours, on these grounds. An assessment is not allowed to be conditional. If it is, it is not a proper assessment and judicial review will be available to enquire into the processes and the status of the assessment to see whether it is provisional. And that is reconcilable with section 109 because section 109 does not protect non-assessments from scrutiny.

TIPPING J:

Is there any proposition that you wish to advance as to when 109 and 114 do not protect against judicial review other than sort of individual ad hoc examples?

MS CLARK QC:

My proposition is this Your Honour. That the expression "conscious maladministration" has been unhelpful in the formulation of the test and I would adopt the test in *Westpac*, particularly at paragraph 59, which is, which builds on established principles. This is not new. *Futuris* doesn't matter. *Futuris* just has the appellation conscious maladministration which taxpayers have come to understand if they chant they get home. If they assert conscious, plead conscious maladministration, then they've reached the threshold for judicial review.

ELIAS CJ:

Well where does it come from?

MS CLARK QC:

It –

ELIAS CJ:

As a threshold I'm talking about.

MS CLARK QC:

Well I think *Futuris* is difficult for a number of reasons Your Honour not the least of which is the –

ELIAS CJ:

You wouldn't be unhappy then if we don't recognise conscious maladministration as a threshold?

MS CLARK QC:

Not at all Your Honour. It's an example of what we'll make, as the Court of Appeal put it in *Westpac*, the threshold really for judicial review is when you are faced with an assessment which is not a proper assessment. You – there's this small area that's immune from judicial review.

TIPPING J:

But that all depends on what you mean by "proper".

MS CLARK QC:

If it's not, if it doesn't come within the – if it doesn't have the characteristics of honesty, genuine attempt, considering the right information and if the taxpayer is going to plead those causes of action, there must be, they must also plead material facts otherwise sections 109 and 114 and the whole scheme of the Act is subverted by taxpayers –

ELIAS CJ:

Can you – sorry.

MS CLARK QC:

– simply issuing the sorts of judicial review proceedings that we're familiar with.

ELIAS CJ:

You've spoken of a threshold. Can you just tell me what you say the threshold is? Is there a statement of it that you're happy with?

MS CLARK QC:

The statement I – that the Commissioner is comfortable with, although we looked to have it expanded in Tannadyce and it wasn't attractive to the Bench, but that we are comfortable with is at paragraph 59 of the *Westpac* Court of Appeal decision.

TIPPING J:

I thought you didn't like the exceptional cases because of the proposition that exceptional is the result, should be the result rather than the test?

MS CLARK QC:

No Your Honour, what I didn't like was conscious maladministration and Westpac – this bears careful reading because what the *Westpac* test really based on established principles was that when you're dealing with an assessment, and that's all we're talking about here, not all taxpayer related matters, judicial review is available where what purports to be an assessment is not.

ELIAS CJ:

Well – sorry.

MS CLARK QC:

And associated with this, associated with this we accept that it is available in exceptional cases and thus may be available in conscious maladministration. But conscious maladministration is an example of an exceptional case. It must be exceptional Your Honour. Incorporated into my statement of threshold would be the –

ELIAS CJ:

It depends, of course, what you mean by "maladministration" I suppose. But if it is defective or a substantially defective process one wonders why it has to be conscious. Where does that come from?

MS CLARK QC:

It no doubt comes from a recognition of the importance of the integrity of the tax system and certainty. Certainty around assessments and the need to avoid gaining diversionary tactical litigation. So the threshold – and so –

ELIAS CJ:

Well I understand that argument but what I'm really, I suppose, trying to find out – you said that this is, and indeed the Court of Appeal says that these are established principles, and you mentioned that you don't rely on *Futuris* as much as New Zealand authorities and –

MS CLARK QC:

Yes, yes Your Honour.

ELIAS CJ:

– I wondered if you were going to take us to those New Zealand authorities?

MS CLARK QC:

Yes, I certainly will. It's a reference to authorities, and they're not just New Zealand, but the Privy Council case, *Miller v Commissioner of Inland Revenue* [2001] 3 NZLR 316 (PC), which I think was from Hong Kong, no that was *Harley*, but that line of cases –

TIPPING J:

Miller is a very New Zealand authority.

MS CLARK QC:

It wasn't Privy Council –

ELIAS CJ:

Yes it was.

MS CLARK QC:

– I'm sorry Your Honours.

ELIAS CJ:

No, it was, it was a New Zealand Privy Council appeal.

MS CLARK QC:

Yes it was, yes. Those, that is where the expression "exceptional" came in but certainly not conscious –

ELIAS CJ:

No, exceptional circumstances, which is – oh maybe that's all that's meant by exceptional cases.

MS CLARK QC:

Another example of an exceptional circumstance, avoiding the whole conscious maladministration, or avoiding any allegations of misconduct on the part of either party, would be where, as occurred in the case of *North City Motors* Your Honour, where a taxpayer had been – a company, a corporate taxpayer had been assessed without knowing it was – I understand it was almost like a joint venture arrangement –

ELIAS CJ:

So a breach of natural justice.

MS CLARK QC:

Couldn't, didn't know about the assessment. Couldn't obviously begin to invoke the statutory process. That was an exceptional circumstance.

McGRATH J:

Which case was that?

MS CLARK QC:

North City Motors, it's referred to in my written submissions Your Honour, I'll just give the citation. Sorry Your Honours, it's referred to at –

McGRATH J:

That's enough, *North City Motors*.

MS CLARK QC:

It's called *Great North Motor Company (in liq) v Commissioner of Inland Revenue* [1998] TRNZ 90 (HC).

McGRATH J:

Thank you. Can I just ask about conscious administration, the maladministration, that idea of bad faith. The Court of Appeal in *Westpac* really confined that to the person actually making the assessment, I think. This is something we discussed with Mr Forbes this morning. What's your position on that?

MS CLARK QC:

It's necessary to have it directly associated with the assessment process because the – to acknowledge or to reconcile the judicial review with sections 109 and 114, because if it's not related directly to the issuing of the assessment, the pleading, then what we will have is what we had pre the Tax Administration Act reforms with judicial review being the norm rather than the statutory appeals process with the necessary timeframes that has within it.

ELIAS CJ:

Was that – did that answer your question?

McGRATH J:

I can see it's a lot –

MS CLARK QC:

It's a little opaque.

McGRATH J:

There's a lot more cases where it might be open to allege against Inland Revenue investigatory officers maladministration than it would be against those who are making determinations under the statutory process. Is that –

MS CLARK QC:

Yes Your Honour.

McGRATH J:

– the essence of the point?

MS CLARK QC:

Yes.

McGRATH J:

So it's a floodgates type argument really.

MS CLARK QC:

Yes, yes. And if the Commissioner is not contending for such a narrow proposition which requires the naming, the specific naming of officers, but at least a pleading which does more than this statement of claim which maybe has times, dates, places and even the office where these officials worked from, but there's nothing like that in the statement of claim.

ELIAS CJ:

It's going to be a very narrow opportunity for judicial review which maybe what's intended if conscious maladministration has to be shown because, as you really are indicating, it's going to be quite impracticable to identify whose consciousness really is material, perhaps.

MS CLARK QC:

That's why I've never advanced the term "conscious maladministration" as being helpful. I think really –

ELIAS CJ:

I'm sorry. I thought you were, you were saying that paragraph 59 you accept.

MS CLARK QC:

I'm not wedded to the nomenclature Your Honour. I see conscious maladministration in terms of behaviour. It's the behaviour that's important and the behaviour is – it needs to be, I think, an analogy with misfeasance is most useful because that is what is being – if this indeed, if this had been a statement of claim issued without an assessment in the mix, without challenging an assessment, this is, the remedy is revealing. It's not just documents, the remedy is not – the plaintiff does not seek documents. The plaintiff seeks to have the assessments set aside and that is revealing as to the intent of its proceeding.

TIPPING J:

Ms Clark can I please put something to you? It seems to me that in order to escape 109 which talks about disputable decisions and 114 which talks about assessments, the juridical basis for that has to be that where something purports to be an assessment, but is not in law an assessment at all, because then the reach of the section can be treated as not going so far. Do we need to build on that as the fundamental premise? I find slightly awkward the idea, as the Court of Appeal put it in *Westpac*, associated with this, we accept, shouldn't that be the headline criteria and then the courts work out examples and some may be obvious, some less obvious, of when a purported assessment is not in law an assessment at all, because I can't see any basis of moving outside those two sections unless you can say of it that in law this isn't an assessment at all. And it may be, and I just don't know, but it may be that maladministration, and I deliberately don't use the word conscious, is an example of something that is not in law an assessment if that's what's led to it.

MS CLARK QC:

It must be the case that the court could not construe section 109 as protecting the outcome of maladministration and that is why it's necessary to be able to have – to construe section 109, although as the Court of Appeal in *Westpac* said, it hasn't been construed consistently over time, I would go further and say not only has it not been construed consistently, it has been almost overlooked, but it can't be overlooked, and so when Your Honour talks about the – or raises the juridical basis for a judicial review in the face of section 109, it must come down to demonstrating on the pleadings, at least raising –

TIPPING J:

Well never mind the pleadings. I'm talking more generally.

MS CLARK QC:

All right. More generally.

TIPPING J:

More generally because we've got to have the aiming point before we come down to this case.

MS CLARK QC:

The aiming point, Your Honour, is that it must be a disputable decision, or assessment in this case –

TIPPING J:

But one that measures up to being such –

MS CLARK QC:

Yes Your Honour –

TIPPING J:

– in law?

MS CLARK QC:

Yes Your Honour. Yes.

TIPPING J:

Because I can't see –

McGRATH J:

Just –

TIPPING J:

Sorry. I would have some difficulty myself, and I'm open to persuasion, how it would be proper to go behind those sections except on that basis. Now what amounts – what would qualify as vitiating a purported assessment in law as an assessment is another matter all together.

MS CLARK QC:

That's exactly so Your Honour.

McGRATH J:

If the term "conscious maladministration" retains its conscious qualification, is it really more than bad faith? Assessment made in bad faith?

MS CLARK QC:

It's no more than that but it's not less – it can be no less than that to avoid section 109. It can't just be –

McGRATH J:

If it's made honestly albeit mistakenly –

MS CLARK QC:

It can't be that Your Honour.

McGRATH J:

– it can't be qualified.

MS CLARK QC:

Because that can be –

ELIAS CJ:

What about an arbitrary decision, a decision that is properly characterised as arbitrary or one that is oppressive or not for proper purposes. Those grounds of review must be available.

MS CLARK QC:

Yes Your Honour and because – and the reason that they're available in this context is because they, in a sense, nullify the quality of the assessment. They – the assessment must be a genuine –

ELIAS CJ:

Well it's not an assessment according to law.

MS CLARK QC:

It's not an assessment according to law.

TIPPING J:

You see this is where I think the *Westpac* test might need some consideration because they leave out the vital ingredient is not an assessment in law. Now that may be implicit but it's not stated.

MS CLARK QC:

Yes I'm just looking to turn to *Canterbury Frozen Meat* which dealt with – it's a good example Your Honour, where on a judicial review application the plaintiff sought to enquire into the processes leading to the assessment, one might say just as has happened here, but for the purpose of demonstrating the assessment was not one in law, and it was found not to be, because it was conditional, it was tentative, and that is not an assessment in law. But it was, certainly the Court did not retreat or have any difficulty with enquiring into that process because it was properly pleaded or raised on the pleadings. It can't just be asserted.

TIPPING J:

Well your argument I suppose here is that the - Mr Henderson's supposed difficulties are not such as to vitiate the assessment in law. I'm not expressing a view –

MS CLARK QC:

That's the essence –

TIPPING J:

– I'm just saying that must be the essence of your argument.

MS CLARK QC:

That is the essence of the argument on that point.

TIPPING J:

There are two assessments here, aren't there? There's the default ones and the – well it doesn't matter for present purposes.

MS CLARK QC:

There were actually three Your Honour.

TIPPING J:

Three, no, no it doesn't matter.

MS CLARK QC:

And in direct response to Your Honour's enquiry about arbitrariness, I am looking at *Canterbury Frozen Meat* at page 690 where it is said, "A second ground on which a decision affecting tax liability may be challenged is that the Commissioner did not follow a proper process in arriving at that decision. In making an assessment the Commissioner is required to exercise judgment. He or she is not entitled to act arbitrarily or in disregard of the law or facts known to the Commissioner. ... There must be a genuine attempt to ascertain the taxable income of a taxpayer even if carried out cursorily or perfunctorily," and I would add also that the correctness and accuracy of an assessment is not a value in that process.

TIPPING J:

Another example might be an assessment vitiated by bias or something like that. I mean we don't have to multiply –

MS CLARK QC:

Yes.

TIPPING J:

– examples but it's something that's so fundamental that it undermines the whole legal integrity of the process and the answer.

MS CLARK QC:

Yes and many arrive on the face of the statute themselves. There can't be an amended assessment beyond a certain time. It's time barred and so on. So there remains ample scope for not only – well, I'm sorry, I'll start again. There is ample scope for remedial relief and there remains good scope for judicial review in the tax context. And by ample scope for remedial relief I am referring to the de novo jurisdiction of either the High Court or the Taxation Review Authority in a challenge proceeding.

Just coming back to *Dandelion* Your Honours, importantly –

ELIAS CJ:

Where do we find *Dandelion*?

MS CLARK QC:

Dandelion is at tab 6 and at paragraph 50, these reflect the arguments of the taxpayer which are similar to Tannadyce's. That there's been a serious impediment as a result of departmental conduct inhibiting full benefit of the statutory appeals process. But importantly at paragraph 61, "Like the High Court Judge, we do not excuse the department's conduct but hold that it did not affect the scope of the ultimate hearing which determined the objection. In these circumstances…" I'm sorry that's a point relevant to section 6, which is also pleaded. At 62, "the authority's hearing was directed to revising incorrect assessments its curative effect on irregular departmental procedures was recognised by Salmon J in the earlier case … The powers concerned were also adequate to enable the authority to deal with any conduct by the parties abusive of its hearing processes."

For example if the Commissioner resisted providing documents my submission is that the challenge procedure can deal with that.

ELIAS CJ:

That was an appeal from, what, from the statutory procedures was it?

MS CLARK QC:

It was a judicial review. Yes it was originally Your Honour, yes, and the taxpayer succeeded largely and it was an appeal from that.

McGRATH J:

The taxpayer succeeded before the TRA?

MS CLARK QC:

Yes.

McGRATH J:

Is that right?

MS CLARK QC:

Yes Your Honour.

McGRATH J:

And then there was a decision of the High Court, appeal to the High Court and then onto the Court of Appeal?

MS CLARK QC:

Yes Your Honour and the importance of my referring to *Dandelion* – I'm sorry to have taken that time - Your Honours were –

ELIAS CJ:

Yes, I was going to ask you when it would be convenient to take the adjournment. Do you want to finish what you're saying?

MS CLARK QC:

It's really at paragraph 90 of *Dandelion*. The observation that – it needs to be right through, read right through Your Honours, to paragraph 94. It's a whole section on the de novo process. I'm sorry, the de novo jurisdiction. And the essential point is that because of the de novo jurisdiction all defects in the process in the department are cured but there's no need to conduct a broad based judicial review type analysis. One doesn't need to crawl through the defects in the proceeding, just bring your information, your evidence, and your complaint and we'll start again and it will be corrected. That was –

McGRATH J:

But that was before the authority wasn't it?

MS CLARK QC:

Yes it was Your Honour.

McGRATH J:

And it reflected the limits of the authority as a tribunal to deal with judicial review?

MS CLARK QC:

The limits but also the scope can be taken from *Dandelion*.

COURT ADJOURNS: 1.04 PM

COURT RESUMES: 2.14 PM

MS CLARK QC:

Your Honours, subject to any questions that you may have I would propose to finish with a submission about what Tannadyce should and could have done to engage in the statutory challenge process and challenge the default assessments. The process that Tannadyce should have followed to challenge the assessments was to apply under section 138B(3) to challenge the assessments. What that requires –

TIPPING J:

One three?

MS CLARK QC:

138B(3).

BLANCHARD J:

Have we got that?

MS CLARK QC:

Yes Your Honour, it will be in the Commissioner's bundle at tab 3. The Court of Appeal and the Supreme Court considered this provision and ruled that where default assessments are challenged, it is necessary to not only issue a NOPA under section 89D but also to furnish returns of income. In respect of those two requirements Tannadyce have already furnished what it considered to be a satisfactory return on 15 July when it furnished the global returns. So that was one of the requirements satisfied, one of the statutory pre-requisites. As to the – I'm sorry, that was the letter of 15 July which Mr Henderson said, "Please accept this as my NOPA." So the NOPA was provided and so were the global returns.

TIPPING J:

The letter of 15?

MS CLARK QC:

15 July 2004 at page 312 of 3A.

TIPPING J:

So you say that in fact they had satisfied so they can hardly be heard to say they hadn't?

MS CLARK QC:

Exactly.

TIPPING J:

Or couldn't.

MS CLARK QC:

If there was an issue – if the Commissioner objected it would be for the High Court or TRA to resolve the issue. Having commenced that process then, the challenge proceedings, Tannadyce would have had available to it all of the information gathering powers of the hearing authorities to obtain documents and order discovery. And just on that point if I can just read from the head-note of the TRA case which just simply reflects, but in a nicely stated way, a very orthodox principle. "The powers of the authority – " I'm sorry, this is *Case F70* (1983) 6 NZTC 59,907 and these principles are summarised in the head-note. "The powers of the authority on the hearing of an objection under the Income Tax Act are the same as the powers of the High Court on the hearing of a case stated. The authority may require the discovery of documents, the productions of documents for examination, and order the particulars of those documents be furnished to the taxpayer by the Commissioner. In this case an order for discovery is not appropriate. There is no evidence of any discoverable documents or papers in the possession of the Commissioner that are crucial to the taxpayer's case, that are prejudicial to the taxpayer, or which, as a matter of fair play or justice, should be revealed to the taxpayer at this stage." The point is the principle Your Honours not the result in that case.

As to the scope, and I just make a final submission as to the scope –

BLANCHARD J:

Well are you going to give us reference to the section numbers of the powers of the TRA?

MS CLARK QC:

To order discovery?

BLANCHARD J:

Yes.

MS CLARK QC:

The powers are – yes Your Honour. The powers are sourced, and it's not just the TRA, of course, it's any of the hearing authorities. But it has the powers of a commission of inquiry and can order discovery under the District Court Rules. That is section 15 of the Taxation Review Authorities Act. Of course the High Court, the second source for the jurisdiction is the High Court, of course, can order discovery under the High Court Rules including in a challenge proceeding. The third authority is the Court of Appeal decision in *Cates* that the High Court has a discretionary jurisdiction to make an order for discovery against the Commissioner.

BLANCHARD J:

Have we got a reference to that?

MS CLARK QC:

Yes, Your Honour, *Cates v Commissioner of Inland Revenue* (1982) 5 NZTC 61,237 (CA).

TIPPING J:

Is the essence of your point shorn of the detail that Tannadyce cannot now be heard to say that it was unable to satisfy the pre-conditions to going down the statutory route because they had, in fact, satisfied them?

MS CLARK QC:

They could have asserted that they had satisfied them. They had –

BLANCHARD J:

They had done everything except issue proceedings?

MS CLARK QC:

Yes and a final useful principle I take from *Golden Bay Cement Co Ltd v Commissioner of Inland Revenue* [1996] 2 NZLR 655 (CA), which I don't need to take Your Honours to, but it is at tab 12 of the Commissioner's bundle, of the appellant's bundle and the Court was specifically considering whether under the predecessor to the challenge proceedings, the process could deal with validity arguments and it concluded that it could, but the important point from that excellent decision is this in reliance, it's taken from *Harley Developments*, these are from paragraphs 60 to 63 of *Golden Bay Cement* and the point, the quote from *Harley* is –

ELIAS CJ:

Are there paragraphs?

MS CLARK QC:

Sixty, Your Honour, to 63.

MCGRATH J:

Which tab are you in, your authorities was it?

MS CLARK QC:

It's the appellant's bundle, Your Honour, at tab 12.

BLANCHARD J:

There are no paragraph numbers. *Harley* is mentioned at the top of page 672 and there's a quote from it.

MS CLARK QC:

Thank you Your Honour, that's exactly what I'm looking at and in the middle of that quote, "The right of objection ... validity of notice apart [is] unqualified and does not purport to restrict in any way the circumstances in which a taxpayer may be aggrieved by an assessment," which ties to the more recent articulation of the scope of jurisdiction which I referred Your Honours to in *Dandelion* at paragraphs 90 to 93.

TIPPING J:

Is the point that you're making actually at about line 14, still within the quote, that "if he considers that, for some reason or other which necessarily includes questions of vires it should not have been made at all, he annuls".

MS CLARK QC:

That is another point but a good one, Your Honour, and I had simply been concerned at this point in my submission to focus on the ability to get documents, but that is a – yes that is an important point, the annulment rather than the concentration on the accuracy of the assessment by producing or varying.

TIPPING J:

Because that would, at least on its face, cover situations where the, whatever it was, was not in law what it purported to be. We're using the word vires in perhaps a more expansive sense than – I'm not saying that this would oust judicial review but I'm just saying that it might allow you to deal with that same point within judicial review – within the statutory process.

MS CLARK QC:

Yes, exactly so Your Honour. It's a parallel and – it's a parallel process to judicial review which can deliver both the remedies and the procedural advantages of discovery, for example.

I have looked through my written submissions Your Honours and I don't think there's anything further that I need to bring to your attention or emphasise following our exchange this morning. Unless you have any questions, they are my submissions.

ELIAS CJ:

Thank you Ms Clark. Yes Mr Forbes?

MR FORBES QC:

Thank you Your Honour. A number of points Your Honour but they are all relatively short. I feel I need to say again, certainly for myself, I hadn't understood the approved ground as giving the potential to open up whether *Westpac* was wrongly decided in the Court of Appeal that in effect that this leave judgment in that case had approved the principles but I'm happy for it to be opened up but I also need to say that my junior hadn't necessarily seen that restriction as applicable and so the written submissions do encompass a wider view and indeed suggest the *Westpac* test is too restrictive.

The second point Your Honour is that Justice Tipping suggested that the point being made by my friend was that Tannadyce's difficulties were not sufficient to vitiate the assessment in law. It, that – invited her to indicate that that was what she was suggesting and her response, yes it was, but surely Your Honours if causing an inability on the part of the taxpayer, assuming that it is causative, of being able to comply with section 89D and the provisions of 89F is not sufficient, it's hard to see what would be in order to vitiate an assessment because your rights are not able to be exercised at all.

Taking that point section 138B refers to the situations in which a disputant may file challenge proceedings and section 138B(2) a disputant is entitled to challenge an assessment by commencing proceedings in a hearing authority if the assessment was the subject of an adjustment proposed by the disputant which the Commissioner has rejected by written notice within the applicable response period. Now, that's the situation here because Tannadyce had to issue a NOPA and then the next step would have been presumably the Commissioner rejecting it and the whole basis, at least on my understanding, of Parts 4A and 8A is that Part 4A precedes – the disputes procedure precedes the challenge procedures and the intention of the disputes procedures is to try and avoid the necessity for challenge procedures.

You can't launch straight into challenge procedures and the letter from Ms Stella absolutely confirms that because her letter with the default assessments, Your Honours, is at volume 3A, page 281. This is the lengthy letter enclosing the default assessment, setting out the background and what she says at 284 under the heading, "Basis for Assessments", "the document provided with your letter of the 18th of August", that's the letter accompanying the global returns, "has been carefully considered. Unfortunately the document and information does not meet the legislative requirements and the information of an annual return for each income year." Next paragraph, "There is a further defect in that Tannadyce has provided only one return purporting to cover all six years rather than filing individual returns." Paragraph 16, "For the above reasons the Commissioner does not consider that Tannadyce has met its statutory obligation to file annual tax returns."

And accordingly default assessments have been issued for the 1993, '90 years and a resultant notice of lost determination. Ms Stella then goes on at the next page, 285, under the heading, "Process for Disputing Assessment" to tell Mr Henderson on behalf of Tannadyce, what – if you should – to dispute and challenge in court the enclosed notices of assessment you must, must take the following steps. File separate income tax returns for the years in question, and she encloses the necessary forms. Issue a notice of proposed adjustment, and it must be in the prescribed form, and she then sets out the requirements of section 89, including that you must outline the facts and the legal issues arising. I haven't got that she made – on my copy that she would have also said presumably provide any documents material to the position as you assert it.

Now there is no suggestion there at all that you can go straight to – if this is what my friend was saying, that you can go straight to section 138G and file a challenge proceedings. So that wasn't an alternative open to Tannadyce and in any event the same problem would arise. I don't have the documents to meaningfully and effectively engage that process and you are preventing me, or I allege you are preventing me, from doing so.

TIPPING J:

Mr Forbes, can I ask you at this stage, it may be slightly out of sequence, is your client's claim necessarily based on bad faith?

MR FORBES QC:

No, no, that's another point I'm about to come to Your Honour.

TIPPING J:

No, you'll come to it, sorry, well come to it when you will.

MR FORBES QC:

That's not correct either Your Honour but I just wanted to make this point because it was my junior that contributed to the submissions as to the wider perspective of judicial review and in effect taking issue with the restrictions imposed by *Westpac*, which was effectively that an assessment has to be an assessment which is proper in accordance with the law, I think that's what was clearly intended. Or alternatively there has been conscious maladministration thereby giving rise to exceptional circumstances. That section 109, the protective or probative provision refers to no disputable decision being challenged in any court. Now the decision has got to be capable of being disputable. It's not – otherwise, within the purview of the section, if it's not a proper decision, and certainly not one which can't – if it can't be disputed, and I submit in accordance with 89D and 89F, so that's another example where judicial review may be available.

McGRATH J:

"Disputable decision" is defined isn't it?

MR FORBES QC:

Yes but I think it lists the type of decisions –

McGRATH J:

Well assessment is I think the first one.

MR FORBES QC:

An assessment is one, absolutely. But that, I have to acknowledge, doesn't gainsay the point made by Justice Tipping that nevertheless it could still be the subject of the disputes procedure provided you can meaningfully engage it. In other words, my first ground of disputing it is that what I'm asked to dispute wasn't, in fact, a legal decision or a proper decision in terms of the Act and my position on the test applicable would be the combination of Justice Tipping and the Chief Justice, if it's capable of being – capable of being challenged under the disputes procedure, that's the way you've got to go but overall there's a – well there is an overarching right to apply – to seek judicial review and the court's discretion, if that relatively pre-emptory course is suitable for particularly egregious or other type of conduct, that warrants the court's intervention under the jurisdiction to grant judicial review. But in most cases, if not the vast majority of cases, the dispute that you want to raise can be raised under the disputes and challenge procedure, which of course is quite lengthy and cumbersome as the disputes procedure. NOPA, response, statements of position, there's an informal procedure of reference to the adjudication unit in Wellington in most cases, so there's a semi-independent assessment of the matter, and then you file your proceedings. Now –

TIPPING J:

For a procedure that's supposed to achieve prompt and sort of succinct resolution it does seem fairly elaborate.

MR FORBES QC:

Well it's ironic that judicial review may be a quicker process. Anyway, my next point is this. Ms Stella herself was involved, and so were other officers, in refusing requests for information, official information under the Act. It's necessarily inherent in that, that the department has got documents because it's meaningless to refuse to provide documents that you haven't got and –

ELIAS CJ:

Well they may be difficult to retrieve.

MR FORBES QC:

Yes but, well I still stay by my first point, we have got documents but we're not going to give them to you for whatever reason, and I've already submitted that the reasons were specious. What Ms Stella said in her letter of the 27th of July – sorry I'll just – on the 28th of July, it's at 317 Your Honours I'm sorry. Volume 3, 317, section A of volume 3. This is the request made on the 31st of May by Mr Henderson, and just on that regard that document, Your Honour, is at – I'll just take you back to that. That document is at 298 and on the 31st of May Mr Henderson on behalf of Tannadyce writes to the department and the request for –

ELIAS CJ:

Sorry is it 398?

MR FORBES QC:

Sorry, 298 is the letter and it's 302 – sorry, sorry, 304, paragraph C he says, "A way forward," and C is, "you provide immediately all the documents you have in your possession relating to Tannadyce's financial affairs affecting the period 1993 to 1998." Now I submit that's a perfectly reasonable request because she criticised a later one which certainly was wider but there's a specific request. All documents you have relating to Tannadyce's financial affairs. And the reply is at 317. The next letter in reply from, and I mentioned this briefly earlier, is at 310 and this was from Ms Stella to Mr Henderson. "Please be advised that an extension of time for the information request contained," and she refers to the letter of the 31st of May, "is made pursuant to section 15A and the extension will be for 20 working days to the 28th of July." And then on the 28th of July, which is at 317, volume 3, 317, she then replies declining the request, and bear in mind Your Honours, this is two days after the 26th of July time limit imposed in her earlier letter of the 28th of May, that you must respond by the 26th of July, she said it's declined and she relies on the ground – I mean I said before, and I repeat incredibly, that disclosure would prejudice the proper operation of section 81 of the Tax Administration Act and thereby the maintenance of law, section 81 of the secrecy provisions of the Act, and doesn't fall within any of the exceptions and this is because the information is not readily available and is considered – nor is it considered reasonable and practicable to provide the information. So that's the extent of the assistance that Ms Stella was prepared to give to Tannadyce to assist in fulfilling its – or giving it the opportunity to invoke the statutory disputes procedure which was a blanket no after, after the time had expired in any event and I mentioned before that it's implicit in a refusal to grant documents that there are documents so that obviously registers with Mr Henderson no doubt that

why aren't you giving them to me, and the further question can be asked in this Court is why has the Revenue got documents about Tannadyce at all unless they are relevant to Tannadyce's tax affairs? That's a natural assumption. You've got documents, you won't give them to me but I assume that they must relate to the company's tax affairs or otherwise why have you got them? Why would you have completely extraneous documents unrelated to tax affairs? So, again, that only engenders concern as to why you're holding back. You want me to take these steps but you won't assist me and the simple way of doing it is to give me the documents that I want and then demonstrate whether or not, that would then demonstrate whether or not it would assist me in fulfilling the obligations I have if I want to invoke the statutory disputes procedure.

There are two affidavits and my friend has referred to them, of Mr Cassidy and Ms Ryan, filed in the setting aside proceeding in the High Court, they're at 2191 and 2193 and they qualify the letter that Mr Cassidy had written in August 2008 where he said he had 200 files or the department did to say that they were potentially relevant and there are some duplicates and not all the documents, some of the documents don't relate to Tannadyce or many of them don't, but there's no suggestion there that they are not relevant documents, just that the, all that does as Justice Tipping indicated reduces the number that might be an issue. So that didn't sign off that we don't have any documents and it was hard to understand how the Associate Judge could come to the view that the claim that the department has deliberately withheld documents is "nonsensical", there was a perfectly firm foundation especially after there'd been a letter written saying we hold 200 files.

My next point is I cannot see, with respect, that there can be anything in the argument that it was open and I know Justice Tipping was putting it up to test the position with my friend that any old return will do. That can't possibly be right, with respect. You can't say, well, if I don't put something in, I'm going to be caught by the statutory provisions that I've got to respond within two months and thereafter I've got no way, I have no way of challenging. That couldn't be right. I don't have the documents but you have, but in the meantime I've got to just put in some piece of paper which I know is not correct and certainly isn't what I want to return which is a proper return, an accurate return and one that I claim will be beneficial.

The return that Mr Henderson did put in, the global return, contained quite a bit of information but there is an affidavit from Mr Roberts and I know there was an

objection taken, I really don't remember now what the grounds were, but it's in the case, it's at volume 1, page 177 and he was the accountant that Mr Henderson got to assist Tannadyce to file global return and he says at six, "That the only financial information Mr Henderson said he had was the balance sheet of the company as at 31 March 1992, together with a profit and loss account and the shareholders current account." This is at 177.

TIPPING J:

What page again, Mr Forbes, I'm sorry?

MR FORBES QC:

Volume 2, Your Honour, page 177.

ELIAS CJ:

Sorry, what are you taking us to this one for?

MR FORBES QC:

This is an affidavit of Peter Roberts who was the accountant that put together the supplementary material that went in with those global returns, generated off a computer obviously.

TIPPING J:

What do you say, that the precision of the figure claimed for a loss?

MR FORBES QC:

Well, it's actually there, Your Honour.

TIPPING J:

Is it?

MR FORBES QC:

Yes, it is, yes.

TIPPING J:

What at this volume 2, 177?

MR FORBES QC:

No, it's in the exhibit which will be at three, volume 3, page 260.

ELIAS CJ:

Volume 3, 260 – was this the exhibit though to his affidavit?

MR FORBES QC:

Yes and he exhibits the return that was put in for Tannadyce because in effect he prepared it. And he says in his affidavit, I prepared – I created journal entries, prepared a general ledger and a trial balance and the first exhibit that went in with the return at page 260 is the trial balance and you'll see that there's the figure about halfway down Your Honour Justice Tipping of 1.539 million. And then he goes on to –

TIPPING J:

The net revenue was a loss was it?

MR FORBES QC:

The net revenue is a loss.

TIPPING J:

Yes. It doesn't have a minus or brackets.

MR FORBES QC:

No, it should have.

TIPPING J:

It should have.

MR FORBES QC:

His total gross revenue was a negative and there were expenses of 162,000 to come off as well. He then – he's got a general ledger and he goes on in his affidavit to say, "My recollection is that I was advised by Mr Henderson that Tannadyce had not traded since 1992 and annual accounts for the period 1993 to 1998 had not been prepared. The financial records that I prepared necessarily had to be on a global basis. It would have been unrealistic to prepare annual accounts on the basis that the information given should be given to me. I consider I had no alternative but to file the return on a global basis for the period 1993 to 1998." And he then finally goes

on to say that it took him quite a while to find the source documents. They were actually stored in a – elsewhere and he had to find them after he was requested to do so. They are the source documents. So –

BLANCHARD J:

Tannadyce have not traded subsequent to 1992.

MR FORBES QC:

No but I think –

BLANCHARD J:

I wouldn't think the accounts would be very complicated for the subsequent period then?

MR FORBES QC:

Well the – I accept that Mr Roberts doesn't say what else he would have needed to do annual returns but it reads in that otherwise he was deliberately assisting in not doing annual returns but will do global returns. Well why do that if you're trying to claim a loss of 1.5 million? I just don't know what it was that would, else would have been required.

BLANCHARD J:

Not very much I would have thought.

TIPPING J:

If it wasn't trading there'd be nothing to set the loss against.

MR FORBES QC:

Well –

BLANCHARD J:

You'd just be carrying forward the loss, wouldn't you?

MR FORBES QC:

Well there's bad debts, depreciations, salaries, so something's occurring in that period for 1993.

BLANCHARD J:

Salaries, when it wasn't trading?

MR FORBES QC:

Well I don't know how that figure derives Your Honour. The actual figure that the Commissioner assessed was a loss of something like 260,000 and that's where the problem arose because the higher figure wasn't able to be carried forward into later years. I haven't, I have to say I haven't gone into more than the face value of the documents returned but he does say I couldn't do it on other than a global basis. And I don't think it's, with respect, to be inferred that he's deliberately avoiding doing annual returns when it might have been feasible. It would follow from that, if he had no other information that the requirements to file a NOPA couldn't have been fulfilled either.

My next point is that the immediate response with the letter of the 13th of September, after the returns were filed, which is at 3, 267, relatively immediate, which is Mr Lewer's letter of the 13th of September which figured quite prominently in this proceeding, or has done, because it requests a range of further information. But the letter commences, "The returns together with the accounts supplied by you have given arise to a number of queries." There's nothing in that saying that these are not valid returns and likewise his letter of the 15th of May 2000, which is at 270. He says in the third paragraph, Mr Lewer again, "Accordingly I advise the Revenue will not be acting on the returns belatedly provided by Tannadyce, covering the period 1993 to 1998, until the information requested that is in the previous letter has been provided." Again, not suggesting that the returns were invalid or were not acceptable, and finally, on the 13th of March 2003 at 274 it's again a letter from, this time it's from Christine Stella. That's the one I referred to before, sorry, 13th of, no, that's not the correct one at all, sorry, 275. This is Christine Stella, it's the document at –

ELIAS CJ:

On page 275?

MR FORBES QC:

Yes, 13th of March 2003, the document itself is at 271, Your Honour, but the page I want to refer you to is at 275 where Ms Stella says –

TIPPING J:

This isn't Ms Stella, this is a Martin Scott?

MR FORBES QC:

Sorry, have I got the wrong author? Yes, you're right, it's Martin Scott. "In any event" – you're quite right, Your Honour, I'm sorry, it's not Ms Stella. It's at 275 is the relevant part of this letter of the 13th of March 2003, Mr Scott saying, "In any event, the returns to which the department's inquiry –

ELIAS CJ:

Sorry, where – up the top, is it?

MR FORBES QC:

Yes, it's the third paragraph, "... were prepared after the claimed losses. These returns were presumably prepared on the basis of some records held or assumptions made regarding the course of Tannadyce's business over the relevant periods." Now, the department's interests in those records or assumptions, again, no suggestion that the returns are not acceptable but we want more information and then the next paragraph, "Your failure to provide the information requested leaves the Department in the position where it will consider the returns on the basis of the information contained in them and any other information available to the Inland Revenue," and it's not until May 2005 which is what, another two years or so later, a bit over two years, that the position completely changes and the returns are not in an acceptable form. In effect saying they're invalid, are not acceptable and we now issue default assessments and, please, we'll tell you what you have to do to invoke the disputes procedure.

BLANCHARD J:

When did Mr Henderson write his letter saying, "Treat the," I hope I'm not misquoting, "Treat the global return as a NOPA" or "Treat this letter as a NOPA?"

TIPPING J:

The 15th of July 2004, 3A, 312.

MR FORBES QC:

Thank you.

TIPPING J:

Well, that's the note I have. It may not be the right one – the very last paragraph.

MR FORBES QC:

This document, the previous return files stand as our NOPA. The – what's the gravamen of all this, Your Honours, is that there's a reference to the Chief Ombudsmen who in June 2009 thinks that he's reached an accord between the parties and that's at 249, and what it said was it's a summary of the relevant factual situation, IRD says that Tannadyce must file income tax returns for the financial years 1993, 1998. Tannadyce says that the Revenue has lost some documents sent to the IRD by Tannadyce and necessary for it to prepare such returns. The Revenue denies it has lost any of the documents and claims it has forwarded all of the documents which it held to Tannadyce. The Revenue has offered Tannadyce the opportunity to prepare tax returns on an asset accretion basis. Tannadyce does not accept this opportunity and it would seriously prejudice Tannadyce, and on the 1st of April, the Revenue also offered to accept returns prepared on any reasonable basis.

Then the next document which is at 250 is a record or a letter by Sir Brian Elwood, the Chief Ombudsman. My understanding is that it's been agreed as follows, "You will file within one month annual income tax returns for Tannadyce for the financial years '93, '98. You'll be supported by such reasonably prepared sets of accounts on the basis of the information available to you" –

BLANCHARD J:

And did he do that?

MR FORBES QC:

He filed those global returns within a month, Sir. No, no, it wasn't, it was in August so he's late, but I don't think that point's been taken at any stage except the reference to the word "belatedly" filed. "The Revenue would inform you within one month of the income tax returns and supporting accounts of any areas of concern or issue assessments." Now, the Revenue did notify that there were concerns in that letter of Mr Lewer's of the 13th of September and on the foregoing basis, the Revenue would not institute any prosecution proceedings. So you can understand, in my submission, Mr Henderson taking the view, "I've tried to do what I could on the information that was reasonably available to me and it's clear that the Revenue knows that I can't do it because I don't have the documents," thinking at that stage that they had been lost. Of course, at this point, unaware that there's a substantial

number of documents which the Revenue, in fact, has but that haven't been disclosed and, indeed, are not disclosed for quite a few years, in fact, nine years.

The strike out application of the Commissioner did not, in fact, rely on any lack of particularisation in the pleading and the second amended statement of claim, coming to Justice Tipping's point, does not rely solely on maladministration or bad faith or any such similar pejorative allegation. Volume 1 at page 104, the critical pleadings at paragraph 40 which is, well, the first pleading that's relevant is that the defendant, including the IRD offices, this is at page 102 of volume 1, had been guilty of conscious maladministration and deliberately misleading conduct, and had abused the statutory powers in terms of the relevant sections, in particular, section 6(1) and 6(2) of the Tax Administration Act 1994, particular to them provided, one of which is by having knowledge that the plaintiff, through David Henderson, had made requests for the plaintiff's documents which the IRD held including requests under the Official Information Act, all of which have been refused and then the second alternative is that, well, the second ground is that the assessments and notices of loss determination, paragraph 41, were not truly proper assessments and notices but relying on the same particulars.

Then at 42, "The matters which the plaintiff complains of could not whether as at mid-2004 or since have been properly and fairly determined under the statutory disputes procedures, Part 4A or the statutory challenge procedures, Part 8A. Now, I accept it doesn't specifically refer to 89D or 89F but they are part of 4A, of course, and then it relies on the fact that the plaintiff has sought full discovery in this proceeding.

Then my friend I think sought to make something of the issue of, well, relief would be denied anyway on the grounds of delay. With respect, I think it's not open and, indeed, a bit rich for the Commissioner to be referring to delay by Tannadyce. There were 10 years between the first denial of the Commissioner, Mr Holland, when he wrote a letter in 1998 denying that the department held any documents up until the acknowledgement in 2008 that there were 200 Eastlight files, even if some of them aren't relevant or necessarily relate to Tannadyce, so that time span is a considerable one and there's four years between the default assessments made in May 2004 and the statutory demand issued by the Commissioner in 2008. That's, in fact, I think in March 2008 and it's the statutory demand and there's no pretence about it that galvanised Tannadyce into action, it immediately applied to set it aside.

It no doubt was content to let sleeping dogs lie, even if Mr Henderson had referred earlier to taking steps to seek judicial review.

Those are the points in reply unless there's any other matters?

ELIAS CJ:

No, thank you, Mr Forbes. Thank you counsel. We will reserve our decision.

COURT ADJOURNS: 3.00 PM