

Statutory Interpretation and Tax Avoidance

By Justice Susan Glazebrook¹

My Topic

When I was asked to talk to you today about the judicial approach to the interpretation of tax avoidance provisions I decided that I would tackle the topic from the broader perspective of statutory interpretation generally – well it seemed like a good idea at the time.

I had three thoughts in mind. The first was to compare the approach of the courts in tax avoidance cases with the approach to the interpretation of other open-textured provisions. The second was to trace how the interpretation of tax avoidance provisions had evolved as statutory interpretation itself had evolved. Here I was thinking of the journey in New Zealand from literal to purposive interpretation. The third was to examine how the courts have dealt with any apparent conflicts between specific sections of taxation legislation and the anti-avoidance provisions.

Statutory Provisions

I will deal with the second point first. When I started off at law school and had my first forays into statutory interpretation, close textual analysis was the order of the day. Dictionaries were often resorted to and there were detailed rules of construction, usually based on linguistic rules. There were also a number of presumptions to be applied, such as the strict interpretation of penal and taxation statutes. Students dutifully learnt all these rules

¹ Judge of the New Zealand Supreme Court. Paper prepared for the “Tax Avoidance in the 21st Century” conference held at the University of Melbourne, 17 May 2013. Thanks to my clerk, Claire Brighton, for her assistance with this paper. The paper does not represent the views of the Supreme Court.

and presumptions and applied as many as they could possibly massage to seem relevant when answering the questions in the exams at the end of the course.²

The old interpretation legislation in New Zealand³ did in fact have a provision, section 5(j), requiring statutes to be interpreted in a purposive manner. That section provided that statutes were to be given such fair, large and liberal interpretation as would best ensure the attainment of the object of the legislation. But lip service only was given to this provision and it was seldom even mentioned in judgments.⁴ As I have said, text was key.

In 1999 a new Interpretation Act was passed, clearly setting out the purposive approach to statutory interpretation. Section 5(1) of that Act provides that the meaning of a statute must be ascertained from its text and in light of its purpose. Words are still vital but purpose pervades the interpretation of those words. The purposive approach to statutory interpretation had in any event been the predominant approach for some ten years before the new Act was passed.⁵

I started on my analysis of tax avoidance cases expecting to be able to make learned observations about the evolution of statutory interpretation only to find that a purposive approach had found favour, at least in relation to tax avoidance jurisprudence, in the early cases in the Court of Appeal and long before the purposive approach had taken general hold in New Zealand. Of course, when I thought about it, I realised that it is not surprising that courts did not take a totally literal approach to the interpretation of tax avoidance provisions. As Justice Fullagar said in 1957, if you took a literal approach to the anti-avoidance provision then at issue, it would result in its application to cases that it is hardly conceivable the legislature had in mind.⁶

Early avoidance cases

² For some examples of the rules and presumptions, see J F Burrows, *Statute Law in New Zealand* (2nd ed, Butterworths, Wellington, 1999) at 128.

³ The Acts Interpretation Act 1924.

⁴ DAS Ward “Trends in the Interpretation of Statutes” (1956–1958) 2 VUWLR 155 at 160 and 168–171.

⁵ Burrows, above n 2, at 121-129.

⁶ *Federal Commissioner of Taxation v Newton* [1957] HCA 99, (1956) 96 CLR 577 at 646.

I turn now to three early tax avoidance cases, all decided by the same three judges.⁷ The relevant anti-avoidance provision for those cases was section 108 of the Land and Income Tax Act 1954. An earlier version of the provision in the Land and Income Assessment Act 1908 had been longer and more comprehensive and accorded with the Australian legislation at the time, Australia having based its provision on the New Zealand one. Relevantly for the cases I am about to discuss, in 1916 the legislature had removed two limbs from the New Zealand anti-avoidance provision.⁸

The two limbs remaining related to altering the incidence of income tax and relieving a person from liability to pay income tax. One of the limbs removed from the New Zealand provision in 1916 included “defeating, evading or avoiding any duty or liability imposed on any person.”

Leasing Equipmen

In the first case, *Elmiger’s case*, an earth moving partnership had sold a number of pieces of machinery to a family trust which then hired them out to the partnership.⁹ The hire charges were deducted as an expense of the business. All three Judges in that case proceeded on traditional grounds with a textual analysis of the provisions but it is worth analysing their reasoning briefly as it provides a background to the next case I discuss where two of the Judges took a more purposive approach.

In *Elmiger* the starting point for North P was the equivalent Australian provision and the caselaw relating to it.¹⁰ Had he been construing the Australian provision, North P would have held the arrangement to constitute tax avoidance. He said in a rather colourful manner that

⁷ There were two earlier cases, one decided under the 1916 provision, *Charles v Lyson* [1922] NZLR 902 (CA), and one decided under the 1923 re-enactment of that provision *Timaru Herald Company, Limited v Commissioner of Taxes* [1938] NZLR 978 (SC). The 1916 provision was re-enacted as s 170 of the Land and Income Tax Act 1923.

⁸ For a discussion of these amendments see North P’s judgment in both *Marx v Commissioner of Inland Revenue*; *Carlson v Commissioner of Inland Revenue* [1970] NZLR 182 (CA) at 188–189 and *Elmiger v Commissioner of Inland Revenue* [1967] NZLR 161 (CA) at 176.

⁹ *Elmiger v Commissioner of Inland Revenue*, above n 8.

¹⁰ See *Newton v Commissioner of Taxation of the Commonwealth of Australia* [1958] AC 450 (PC); *Hancock v Federal Commissioner* (1959-61) 108 CLR 258; and *Peate v Federal Commissioner* (1962-64) 111 CLR 443.

the “facts speak not in a whisper but in a loud and clear voice”. He pointed out that there was no change in the practical operation of the partnership business and the same plant and equipment were used throughout. A deduction from partnership income was made for the hire charges and that amount credited to the partners’ wives and children but the appellants retained the use of substantially all the income involved in the transaction. Further, at the end of the stipulated period, the remaining capital of the trust reverted to the appellants.¹¹

North J then turned to the issue of whether, under the truncated New Zealand statute, the arrangement constituted tax avoidance – in particular whether the partners were relieved of their liability to pay income tax (as noted above, unlike the Australian provision, the New Zealand provision at the time did not include reference to avoiding income tax).¹² The construction urged on the Court was that a taxpayer could only be relieved from liability in relation to income that had been assessed. North P was not prepared to adopt a construction that would in his view stultify the section.¹³ He did in fact undertake a textual analysis, however, including resorting to the dictionary, and concluded that the term “relief” was capable of shades of meaning that could include future income. It sufficed if the arrangement was designed to relieve the taxpayer from income tax in respect of income derived by the taxpayer.¹⁴

Turner J came to a similar conclusion on the text. He left open, however, whether a transaction could be caught by virtue of the anti-avoidance provision if its effect is merely that the taxpayer contrives to derive less income than he would have derived without it. That was not the case here as the appellants continued to derive the same amount of income as before. There was merely a deduction for the hireage of the equipment.¹⁵

¹¹ At 179.

¹² At 182.

¹³ There is a presumption of interpretation that allows a court to depart from the ordinary meaning of the text to avoid an interpretation that would lead to absurdity: Francis Bennion *Bennion on Statutory Interpretation* (5th ed, LexisNexis, London, 2008) at 969–971.

¹⁴ At 182.

¹⁵ At 184–185.

Unlike North P, McCarthy J did not find the Australian cases of much assistance.¹⁶ Just looking at the arrangements in question, he considered that what had happened was an obvious and deliberate attempt by the taxpayers to rid themselves of the payment of tax, the liability for which would, absent the transaction, have fallen clearly and inevitably on them. In his view, there had been concerted action with the aim of reducing the tax payable by the appellants. He saw no reason why this could not be classified as an attempt by the taxpayers to relieve themselves of the liability to pay the full amount of income tax due.¹⁷ Like Turner J, McCarthy J left open the question of what would happen if income earning assets had been transferred so that the income earned could be said not to come into the hands of the party who had transferred the assets.¹⁸

Transfer of income producing assets

The question of the transfer of income producing assets arose in the next cases of *Marx* and *Carlson*.¹⁹ This was a joint judgment given in two appeals relating to almost identical family trust arrangements. Under the arrangements the farms owned and operated by the appellants were leased to family trusts, with the appellant employed in one case to manage the farms and in the other case as a sharemilker. While the appellants were paid at a market rate for their services, the arrangement resulted in a substantial reduction of the appellants' income. There was no real change in the practical operation of the farms and the trustees had effectively no input into the farming ventures carried out. In both cases the arrangements were held to be void under the relevant tax avoidance provision. Turner J, however, dissented in these cases.

North P again started with the Australian position and had no doubt that, had the Australian provision been at issue, then the arrangements would have constituted tax avoidance.²⁰ While the Australian cases relied on the inclusion of a prohibition of avoiding tax, which as I have already said was not then included in the New Zealand provision having been deleted in 1916, North P saw no reason why the term “relieve” (which was still in the New Zealand statute)

¹⁶ At 188.

¹⁷ At 189.

¹⁸ At 190.

¹⁹ *Marx v Commissioner of Inland Revenue*, above n 8.

²⁰ At 192.

could not have similar operation. He would not be drawn into terminological subtleties, and equally did not spend a great deal of time considering alternative interpretations once it was clear that what he considered the intended meaning could be supported by the words of the provision.²¹

While his view to a degree involved the same sort of textual analysis conducted in *Elmiger*, this textual analysis was informed and preceded by a consideration of the object of the avoidance provisions. North P quotes with approval an observation of Fullagar J in the case of *Newton*²² that the plain object of the equivalent Australian provision is to defeat “tax avoidance” which had been defined in a recent article as meaning “the art of dodging tax without actually breaking the law.”²³

McCarthy J similarly focused on what must have been intended by the legislation in 1916 and declined to be taken in by the nuances of the words contained in the section. He recognised that the highly sophisticated arguments that had been addressed to the Court had no doubt been encouraged by the difficulties of setting limits to language which, if given full rein, could invalidate large numbers of family and commercial dealings which lawyers have long considered normal and proper.²⁴

In McCarthy J’s view, the discussion regarding the different nuances of the language in the provision had clouded the real purpose of the section and obstructed the way in which it must be regarded. In his view, every transaction that had resulted in someone else paying income tax which, but for the transaction, would have fallen on the taxpayer, came within the section.²⁵

He accepted that this could include many innocuous family and business dealings. This difficulty had in his view been taken care of by the secondary question set out by the Privy

²¹ At 194–195.

²² *Federal Commissioner of Taxation v Newton*, above n 6, at 646. Decision aff’d in *Newton v Commissioner of Taxation of the Commonwealth of Australia* [1958] AC 450 (PC).

²³ At 188.

²⁴ At 213.

²⁵ At 218.

Council in *Newton's* case.²⁶ This required a court to look at the way the transaction was effected and consider if it can be predicated that it was undertaken to escape tax.²⁷ This second part of the test in his view gave life and reasonableness to the section and obviated any need for involved considerations based on individual words in the section.²⁸

McCarthy J noted the historical context of the removal of the two limbs in 1916. He considered it highly unlikely that the legislature, in removing the two limbs of the section, had intended to restrict the section's effect, given that the amendment had occurred in the course of a "most expensive war". Taking account of s 5(j) of the Acts Interpretation Act (remember that was the section requiring a purposive interpretation of statutes) he considered it much more likely that the legislature had regarded the first two limbs of the section as adequate to deal with all situations and had eliminated the third and fourth as redundant. He was bolstered in that view by noting that Sir John Salmond had been Solicitor-General at the time and he was always one who disliked the superfluous.²⁹

While both North P and McCarthy J took what can be seen as a purposive approach to the interpretation of the provision, McCarthy J's approach I think reflects a more modern version of the purposive approach; one which is more comparable to the approach taken by the courts in later years (apart from his, probably quite correct but nevertheless a bit odd, speculation about the motives of Sir John Salmond).

The third Judge in the case, Turner J, took an approach to interpretation which was much more traditional than that of either of his colleagues. This is reflected in his dissenting opinion in *Marx*. Turner J said that he had no doubt that the arrangements would have constituted tax avoidance had the section included the word "avoid", like the Australian one did. The issue was whether the words that remained in the New Zealand provision were

²⁶ *Newton v Commissioner of Taxation of the Commonwealth of Australia*, above n 22.

²⁷ *Newton v Commissioner of Taxation of the Commonwealth of Australia*, above n 22, at 8. The report of McCarthy J's judgment says 'predicted' but the word used by the Privy Council was 'predicated'.

²⁸ At 218.

²⁹ At 219.

sufficient to catch arrangements of the kind at issue in the cases before the court.³⁰ He concluded that they were not. His analysis was grounded solidly in the text of the provision.³¹

Unlike North P and McCarthy J, Turner J considered the purpose of the 1916 changes after he had reached his conclusions regarding the meaning of the provision. Having concluded that the two limbs of the New Zealand test were not capable of applying to the situations before the Court, he concluded that the Legislature must have (for whatever reason) deliberately intended to limit the provision when it deleted the additional limbs and in doing so removed the application of the anti-avoidance provisions to arrangements that resulted in a taxpayer failing to derive income which, but for the arrangement, he or she might have derived.³² Turner J's view of the purpose for the change was therefore derived from his interpretation of the anti-avoidance provision at issue, rather than contributing to it.

Turner J was also influenced by the presumption about the narrow and strict interpretation of taxation statutes.³³ He said that moral precepts, admirable as they are as a guide to private conduct, have no place in the determination of liability to pay income tax. There is no requirement to pay a proper share of the burden of tax unless the statute requires that.³⁴ He quoted the choice principle in the *Duke of Westminster* case³⁵ and said that the words of a statute must be clear and unambiguous before they will be interpreted as limiting that principle.³⁶ In determining whether the statutory provision does or does not clearly forbid the avoidance of tax, one cannot begin by assuming that the avoidance of tax is wrong or unfair as that would be arguing in a circle.³⁷

³⁰ At 198.

³¹ At 199–208.

³² At 208.

³³ At 209.

³⁴ At 209.

³⁵ *Inland Revenue Commissioner v. Duke of Westminster* [1936] AC.1 (HL).

³⁶ At 209.

³⁷ At 210.

Tax avoidance in the Privy Council

Roughly five years after *Elmiger*, the Privy Council was called upon in *Mangin v Commissioner of Inland Revenue*³⁸ to decide a case with somewhat similar facts to those in *Marx*. Instead of the whole farm, however, the arrangement in *Mangin* involved merely part of the farm, a so-called paddock trust. This involved leasing land to a trust to grow wheat. Because of crop rotation, the land leased each year to the trust differed. The taxpayer sowed, harvested and sold the wheat as an employee of the trustees, who paid him for his labour and expenses. The remainder of the income was allocated under a separate trust deed to his wife and children.

In holding that the arrangement was void as tax avoidance, the Court of Appeal had adopted the reasoning set out in *Marx*,³⁹ with Turner J dissenting again.⁴⁰ That decision was upheld by majority in the Privy Council, with Lord Wilberforce dissenting.⁴¹

The reason that I mention this decision is that, although the majority decision upheld the finding of the Court of Appeal that the arrangement constituted tax avoidance, its interpretation approach was nevertheless purportedly grounded in the words used in the provision. The majority decision, delivered by Lord Donovan, stressed that interpretation should be based on the terms of the provision and it did not embrace the purpose centred approach seen in North P and McCarthy J's earlier judgments. At the start of his judgment, Lord Donovan set out a number of rules of interpretation. These were:⁴²

- (a) The words of a provision are to be given their ordinary meaning and moral precepts are not applicable to the interpretation of taxation statutes.
- (b) Since the language used is the primary consideration, there is no room for reading in or implying words, or searching for intendment or applying a presumption as to tax – there is no equity about a tax.

³⁸ *Mangin v Commissioner of Inland Revenue* [1971] NZLR 591 (PC).

³⁹ *Marx*, above n 8.

⁴⁰ *Commissioner of Inland Revenue v Mangin* [1970] NZLR 222 (CA).

⁴¹ *Mangin v Commissioner of Inland Revenue*, above n 38.

⁴² *Mangin v Commissioner of Inland Revenue*, above n 38, at 594.

- (c) It may, however, be presumed that neither injustice nor absurdity was intended by the legislature such that, if a literal interpretation produced such a result and an alternative interpretation was available, that latter interpretation may be adopted.
- (d) The history of an enactment and the reasons which led to its being passed may be used as an aid to its construction.

Having set out those rules, however, the majority did not really undertake a close textual analysis and indeed indicated difficulties in the text with their preferred interpretation. They skated over these difficulties by saying that the appellant in this case did derive the income as he sold the crop and received the proceeds, albeit with an obligation to account to the trustees.⁴³

This reasoning was stringently criticised by Lord Wilberforce, given that the appellant received the income as agent only and therefore did not derive it.⁴⁴ He said that, while he was prepared to believe that there is some degree of overlapping between the four limbs in the Australian provision, it would require a degree of credence, in fact almost interpretative astigmatism, to conclude that the two remaining New Zealand limbs covered effectively the whole of the territory occupied by the Australian section.⁴⁵

Lord Wilberforce did not consider the cutting of the two limbs from the New Zealand provision had been adequately explained but it was perhaps because they were thought tautologous. But, he said, like the Venus of Milo, aesthetic improvement by loss of members may be paid for by a loss of potency.⁴⁶ That was effectively what had occurred here. He did not consider that the process of judicial interpretation, however liberal or commonsense the process may be claimed to be, could bring the current transactions under the wording of the remaining two limbs of the provision.⁴⁷

⁴³ At 597.

⁴⁴ At 604.

⁴⁵ At 601.

⁴⁶ At 601. Lord Wilberforce made a number of criticisms of the drafting of the then anti-avoidance provision at 601–602. These criticisms were referred to in *Ben Nevis Forestry Ventures Ltd v Commissioner of Inland Revenue* [2008] NZSC 115, [2009] 2 NZLR 289 at [78].

⁴⁷ At 603–604.

Comment

So what we have in these early cases is, on the one hand, a desire to bring within the anti-avoidance provision arrangements which are perceived as outside the limits of what should be allowable – where possible using the techniques of traditional statutory interpretation by textual analysis (or perhaps in the case of the majority in the Privy Council in *Mangin* purporting to) but, where this is not possible, applying a purposive approach to interpretation.

On the other hand, there is the recognition that some limits have to be placed on the anti-avoidance provision as a literal interpretation would catch ordinary innocuous family and commercial arrangements.

Amended avoidance provision

Following the three cases discussed, s 108 was amended in 1974.⁴⁸ These changes brought the provision largely in line with its Australian equivalent. Included in the changes was clarification that an arrangement could amount to tax avoidance whether or not other purposes or effects of the arrangement were referable to ordinary business or family dealings. This, the Supreme Court would later state in *Ben Nevis*, dispensed with the predication test set out by Lord Denning in *Newton*.⁴⁹

I note, however, that the predication test was not concerned so much with whether a transaction fell within the scope of family or business dealings, but rather with the manner in which the transactions were carried out.⁵⁰ The Court in *Marx* and *Carlson*, for example, had held that the arrangements involved were avoidance using the *Newton* test, despite the fact that they concerned family dealings.⁵¹ That said, I have never found the predication test very easy to understand or apply.

⁴⁸ By s 9 of the Land and Income Tax Amendment (No 2) Act 1974.

⁴⁹ *Ben Nevis Forestry Ventures Ltd v Commissioner of Inland Revenue*, above n 46, per the majority at [81].

⁵⁰ Denning J stated, for example that the anti-avoidance principle is “not concerned with their desire to avoid tax, but only with the means which they employ to do it”: *Newton*, above n 22, at 8.

⁵¹ *Elmiger v Commissioner of Inland Revenue*, above n 8. See also the discussion of the predication test by Richardson J in the Court of Appeal decision in *Challenge Corporation Ltd v Commissioner of Inland Revenue* [1986] 2 NZLR 513 (report includes decisions of High Court at 513, Court of Appeal at 530 and Privy Council at 556) at 551–552.

I agree with Richardson J's view, expressed in the Court of Appeal in *Challenge*, that the way that the High Court of Australia expressed the test in *WP Keighery Pty Ltd v Federal Commissioner of Taxation*⁵² is preferable to the *Newton* test. In *Keighery* the majority stated that the general anti-avoidance "section intends only to protect the [specific] provisions of the Act from frustration, and not to deny to taxpayers any right of choice between alternatives which the Act itself lays open to them."⁵³

Open-textured provisions in other contexts

Having been a bit stymied in my first idea of showing the evolution from text to purpose, this brings me to my other ideas when I suggested the topic for this paper – the interpretation of open-textured provisions in other contexts and a comparison to the approach taken in taxation cases. It seems to me that my third question of how the courts have dealt with possible conflict between specific provisions of legislation and general provisions is related to this topic and I propose to deal with them together, drawing on selected (some might say selective) caselaw examples.

In terms of open-textured provisions in other contexts, I have taken three case examples: one decided by the Court of Appeal in 1987 and two decided recently by the Supreme Court. The first two cases involved s 9 of the State-Owned Enterprises Act 1978 or a similarly worded provision. The third involved a single provision that was capable of wide interpretation.

Principles of the Treaty of Waitangi

Section 9 provides that nothing in the State-Owned Enterprises Act is to permit the Crown to act in a manner which is inconsistent with the principles of the Treaty of Waitangi.⁵⁴ Some further background. State-owned enterprises (SOEs) were to be set up to take what were

⁵² *WP Keighery Pty Ltd v Federal Commissioner of Taxation* (1957) 100 CLR 66 per Dixon CJ, Kitto and Taylor JJ.

⁵³ See *Challenge Corporation Ltd v Commissioner of Inland Revenue* (CA), above n 51, at 550–551. The idea of the anti-avoidance provision's role being to ensure that specific provisions are not frustrated has some similarities to the Parliamentary contemplation test used by the Supreme Court, as discussed below.

⁵⁴ A treaty entered into in 1840 between the British Crown and Māori Rangatira.(Chiefs).

commercial enterprises out of government departments and put them in separate companies which, while state-owned, would be run on commercial lines. This would involve transferring assets to those new enterprises.

The Maori Council brought the case because of a concern that transferring assets to these new enterprises would compromise the Crown's ability to provide redress for Treaty of Waitangi claims (and a process had been set up for dealing with claims for breaches of the Treaty). I mention that another section of the Act, s 27, had set out certain safeguards for land transferred to state enterprises in respect of claims already lodged but did not provide for claims lodged after the SOE Act came into effect.

The Court of Appeal, in the *Maori Council* case,⁵⁵ relying on s 9 of the Act, held that assets could not be transferred to the new enterprises until a scheme of safeguards was put in place giving reasonable assurance that lands or waters would not be transferred in such a way as to prejudice Maori claims.⁵⁶ The parties then negotiated suitable safeguards and these were later enshrined in the legislation.

A submission that there should be a narrow meaning accorded to s 9 was rejected and the Court also rejected the submission that s 27 should be seen as an exclusive code for the protection of Maori claims to land. The Court held that s 9 was a provision expressing a broad constitutional principle and had to be interpreted accordingly.⁵⁷

I now turn to the recent Supreme Court case, *New Zealand Maori Council v Attorney-General*.⁵⁸ Some more background. The current government in New Zealand was elected on a platform of partial privatisation of some of the state-owned enterprises. This required those companies to be taken out of the State-Owned Enterprises regime and transferred to a mixed-ownership model regime. The legislation setting up those new entities contained a provision protecting Treaty rights similar to s 9 of the State-Owned Enterprises Act.

⁵⁵ *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 (CA).

⁵⁶ At 666.

⁵⁷ At 658–661 per Cooke P; 678–680 per Richardson J; 694–696 per Somers J; 702–703 per Casey J; and 710 and 716–717 per Bisson J.

⁵⁸ *New Zealand Maori Council v Attorney-General* [2013] NZSC 6, [2013] 3 NZLR 31.

The case that came before the Supreme Court was brought by Maori interests claiming that the proposed transfer to the mixed-ownership model was inconsistent with the Treaty in that it would compromise the ability of government to address Treaty claims in relation to water. The transfer to the mixed-ownership model regime and any subsequent sale could therefore not take place until the ability to provide redress for Maori water rights was secured.⁵⁹

The Crown's argument was that the s 9 equivalent provision did not apply to the sale of shares. This is because the power to sell shares was not derived from the legislation. In its submission, the s 9 equivalent only applied to powers conferred explicitly in the legislation.⁶⁰

The Supreme Court firmly rejected that contention. It said that the Court of Appeal's approach in the SOE case had established s 9 as stating a fundamental principle guiding the interpretation of issues involving the relationship of Maori with the Crown and that this interpretation must form the basis for all New Zealand courts when interpreting subsequent legislation which contained similar clauses. This meant that technical arguments that attempted to confine the operation of any s 9 lookalike could not be accepted.⁶¹

Now I am not suggesting that the anti-avoidance provisions in taxation legislation are fundamental or constitutional in the sense that s 9 of the SOE Act is. However, the anti-avoidance provisions are general ones and they are intended to operate generally through the legislation. Thus, their relationship with the specific provisions of the Act is often in play. Where that is the case, a purposive interpretation of the general provision and the related specific provisions is necessary, as occurred in the Treaty cases I have just discussed.

Navigable rivers

The second recent Supreme Court case provides an interesting comparison because, rather than having to reconcile a general provision with a specific one, the Court had to interpret a potentially wide general term contained in relevant legislation. The case, *Paki v Attorney-*

⁵⁹ At [47].

⁶⁰ At [48]–[50].

⁶¹ At [51]–[59].

General,⁶² concerned the interpretation of “navigable” in s 14 of the Coal-mines Act Amendment Act 1903 which provided that the beds of navigable rivers “shall remain and shall be deemed to have always been vested in the Crown”.

The appellants were representatives of descendants of owners of five blocks of land along the left bank of the Waikato River at Pouakani, which had been transferred to Crown ownership from Maori ownership between 1887 and 1899. The appellants sought a declaration that Crown ownership of the river bed to the middle of the river adjacent to the Pouakani lands was subject to a constructive trust in favour of the Pouakani Maori owners.

The Attorney-General contended that the river was navigable and that therefore it became the property of the Crown by s 14 of the Coal-mines Act Amendment Act 1903. The appellants claimed that the river was not navigable. As this would, if correct, have determined the appeal, the question of navigability was set down for hearing separately.

A majority of the Court⁶³ held that the river was not navigable for the purposes of s 14. In their view, the Court of Appeal below, which had held that s 14 applied, had erred in not approaching the question of navigability on the basis of the sections of the river in question. The Court of Appeal had instead taken a “whole river” approach to determining whether the Waikato River adjoining the Pouakani lands was navigable for the purposes of s 14.⁶⁴

The majority in the Supreme Court considered that a number of factors supported a segregated river approach. For example, the reference in the s 14(2) definition of navigable to “sufficient width and depth” could not, the majority stated, “sensibly be assessed except at particular points” of the river.⁶⁵

The concept of navigation, as used in s 14, was, the majority considered, concerned with connections for transport and trade.⁶⁶ Use that is slight, intermittent and restricted would not

⁶² *Paki v Attorney-General* [2012] NZSC 50, [2012] 3 NZLR 277.

⁶³ Elias CJ, Blanchard and Tipping JJ. McGrath J agreed with the majority conclusion but gave separate supplementary reasons. William Young J dissented.

⁶⁴ *Paki v Attorney-General* [2009] NZCA 584, [2011] 1 NZLR 125 at [73] per Harrison J.

⁶⁵ Per the majority at [57], see also [35]. See also McGrath J’s comments at [103].

⁶⁶ Per the majority at [66]-[68].

cause a river to be navigable within the meaning of s 14 of the Coal-mines Act Amendment Act 1903 and its successors. The section of the river in question was therefore, on the evidence, not navigable.⁶⁷

Comments

Courts faced with a conflict or potential conflict between specific provisions and a general provision will carry out a purposive interpretation of both provisions in the wider context of the Act in order to reconcile them. In the SOE case s 9 was seen as having wide, indeed constitutional, significance. This interpretation carried through to the lookalike provision in another Act.

In *Paki* the Court was not faced with the potential conflict between two separate provisions. The Court was, however, faced with the interpretation of a wide ranging provision and its application to the particular facts. A purposive interpretation of that provision led to the identification of limitations that dictated the outcome of the case.

The technique of interpretation (ie purposive) was the same in all three cases but they show that the proper interpretation of a general provision will depend very much on the statutory context.

Loss offsets and tax avoidance

In tax avoidance cases, the task of the courts can be seen primarily as the reconciliation of the general and the specific. In this context, I discuss the *Challenge Corporation* case.⁶⁸ This is because I retain a perverse fondness (always a rather lone voice on this) for Lord Templeman's tax mitigation approach, although, as I note later, it may have had an unacknowledged comeback.

⁶⁷ At [78]–[89]. A decision on the remainder of the appeal is currently reserved.

⁶⁸ *Challenge Corporation Ltd v Commissioner of Inland Revenue*, above n 51.

Challenge centred on the relationship between the group loss offset provision (s 191) and the then anti-avoidance provision (s 99). Briefly, *Challenge* concerned the purchase of a loss making company by Challenge Corporation near the end of the financial year. Challenge attempted to offset the loss of the newly acquired loss making company against the profits of other subsidiaries in the Challenge group. The group loss offset provision contained a specific anti-avoidance provision in s 191(1). This required the Commissioner to disregard any transfers that, in his opinion, were of a temporary nature and which had the purpose or effect of relieving the company or any other company from liability to pay income tax.

The issue therefore was whether the general anti avoidance provision, s 99, could apply to a loss transfer arrangement made under s 191, or whether such an arrangement could only be addressed under the specific anti-avoidance provision in the group loss offset provisions themselves, s 191(1).

In the Court of Appeal, Cooke J would have been prepared to apply s 99 to the arrangement were it not for the specific anti-avoidance provision in s 191. He said that the transactions were so artificial that one could very readily characterise them as tax avoidance.⁶⁹ However, he was not prepared to read s 191 as containing a qualification that it was subject to the provisions of s 99, the general anti-avoidance provision. He said that, where a particular section conferring tax concessions or rights has its own anti-avoidance provision, the preferable inference is that the special provision is exhaustive in its own field. Within that field a taxpayer is entitled to assume that he or she has a right to order his or her affairs to take advantage of the benefits conferred by the section, subject to not falling foul of the terms of the specific anti-avoidance provision.⁷⁰

Similarly, Richardson J considered that the legislature could not have intended that s 99 should override all other provisions of the Act so as to deprive the taxpaying community of structural choices, economic incentives, exemptions and allowances provided for by the legislation.⁷¹ Equally, however, s 99 could not be subordinate to all the specific provisions of the legislation. It is inherent in the section that, but for its provisions, the impugned

⁶⁹ At 540.

⁷⁰ At 543.

⁷¹ At 548.

arrangements would meet all the specific requirements of the income tax legislation. The relationship between the specific and the general must rely on the twin pillars which apply to the interpretation of statutes: the scheme of the legislation and the relevant objectives of the legislation.⁷²

Looked at in this way, Richardson J concluded that Parliament must have contemplated that permanent changes of shareholding allowed the use of the group loss offset provisions and were not subject to s 99.⁷³ This was because s 191 reflected a particular tax concept and established tax norms by which the statutory liability to income tax in the specific area of its application was to be determined. In other words, Richardson J considered that the very purpose of s 191 was to allow a tax advantage in the context of a group of companies offsetting their losses. To treat such transactions as tax avoidance under s 99 would in his view defeat the purpose of the section.

In his dissenting judgment, Woodhouse P stated that s 99 was intended to have general application and therefore applied irrespective of s 191(1).⁷⁴ He considered that s 99 was a central pillar of the income tax legislation designed to catch arrangements having tax avoidance as their main purpose. Where tax avoidance was a “merely incidental purpose” of the arrangement, s 99(2)(b) provided that it would not be caught by s 99. In this way s 99 was reconciled with the specific provisions of the legislation like s 191: as long as tax avoidance was a “merely incidental” purpose to a taxpayer’s primary purpose then the arrangement would not be caught. This required that the tax avoidance purpose be necessarily linked, without contrivance, as a natural concomitant of the other purpose.⁷⁵

Comments on the Court of Appeal’s approach in Challenge

Each of the judges in the Court of Appeal in *Challenge* took a purposive approach to interpretation. However, the provision that they elected to focus on arguably reflected their view as to which of the two provisions ought to take priority. Cooke and Richardson JJ

⁷² At 549.

⁷³ At 555.

⁷⁴ At 540.

⁷⁵ At 533–534. This reasoning was mentioned in *Ben Nevis*, above n 46, at [84]–[85].

focused more on the purpose behind the specific rules, while Woodhouse P in his dissent focused more on the purpose behind the general provision.⁷⁶ While all three Judges considered the purpose and scheme of the alternate provision (s 99 in Cooke P and Richardson J's judgments and s 191 in Woodhouse J's judgment), they approached their interpretation of that alternate provision with their earlier conclusion in mind.

The Privy Council decision

The Privy Council allowed the Commissioner's appeal by majority (Lord Oliver dissenting). The majority of the Board considered that there could be overlap between the general provisions of s 99 and the particular provisions of s 191. It agreed with Woodhouse P in his dissent that it would have been quite extraordinary for the draftsman to prevent a tax advantage because the shareholding was of a temporary nature and yet consciously decide that Parliament would (by implication only) give its blessing to a manufactured and barely tangible association of the kind under review.⁷⁷ Most tax avoidance arrangements involved the exploitations of exceptions and exemptions found in the Act. Section 99 would be useless if mechanical and meticulous compliance with some other section of the Act were sufficient to oust its application.⁷⁸

The majority rejected the notion that their interpretation would lead to ordinary and innocuous transactions being caught by the anti-avoidance provisions. They articulated a distinction between tax mitigation and tax avoidance.⁷⁹ Mitigation occurs where a taxpayer reduces his or her income or incurs expenditure in circumstances which reduces his or her assessable income or gives an entitlement to a reduction in tax liability. In the current case the loss was not sustained by any of the members of the Challenge group.⁸⁰

⁷⁶ At 754.

⁷⁷ At 559–560.

⁷⁸ At 559.

⁷⁹ At 561.

⁸⁰ At 562.

General Comments

Interestingly, both the majority in the Privy Council and the majority in the Court of Appeal viewed their conclusions as avoiding an interpretation that would deprive a provision of its purpose: for example Richardson J in the Court of Appeal warned against defeating the benefits found in s 191,⁸¹ while the Privy Council warned of defeating the utility of s 99.⁸²

The Privy Council also interpreted the purpose of s 191 differently from the Court of Appeal majority. It viewed the purpose of s 191 as being the sharing of losses between groups of companies. This purpose did not extend to the acquisition of losses of other groups of companies to be shared in circumstances where the relevant group did not suffer such losses themselves.

The Court of Appeal majority focused on the loss sharing purpose, irrespective of how the group acquired the loss. The scope of s 99 was read so that it did not operate on arrangements that complied with the specific regime permitted by s 191.

The Privy Council's interpretation arguably gave both ss 191 and 99 full effect. Constructing the transaction to meet the terms of s 191 but in a way that flouted its purpose (as construed by the Privy Council) triggered the application of s 99 to strike down the arrangement.⁸³

The Supreme Court and tax avoidance

What was at issue in *Challenge* was the same concern that arose in the early cases – how to give the general anti-avoidance provision appropriate effect, while at the same time not having it apply too broadly. These concerns still apply today. A discussion of the approach to tax avoidance is therefore not complete without a discussion of the position of the Supreme Court⁸⁴ on this issue.⁸⁵

⁸¹ At 555.

⁸² At 559.

⁸³ See *Ben Nevis*, above n 46, at [91]–[94].

⁸⁴ The Supreme Court was established in 2003 by the Supreme Court Act 2003 to replace the Privy Council as New Zealand's final appellate court. It began operating in January 2004, with the first hearings taking place from July 2004.

Forests

The first case I will discuss is that of *Ben Nevis* (called *Accent Management* in the Court of Appeal).⁸⁶ The case concerned a forestry venture.

In summary, the investors in the scheme were required to pay a premium and an annual licence fee of \$50 for the use of land for forestry purposes.⁸⁷ Other fees were paid for the establishment, maintenance and harvesting of the forest. The licence premium was set at some \$2m per hectare and was payable 50 years after the entry into the arrangement, at a time the trees were supposed to have been harvested and the proceeds from the forestry sale could be applied to the payment of the premium.⁸⁸ The taxpayers “paid” the premium upfront by way of a promissory note to be redeemed in 50 years. The taxpayers then purported to write off the premium over the 50 year term of the licence. This was to be offset against their other income, thus providing (if legitimate) a considerable tax benefit.

There were also insurance arrangements with a company established in a tax haven by one of the promoters of the scheme. Under this agreement, the taxpayers agreed to pay a substantial premium. In return, the insurance company agreed to insure the taxpayers against the risk that the monies derived from the sale of the timber would be insufficient to cover the licence premium payable by the taxpayers. The insurance company did not appear to have any assets and had not reinsured the risk. The insurance premium was due in 2047 but, as with the licence fee, the taxpayers purported to discharge the liability immediately in 1997 by issuing a promissory note redeemable in 50 years.⁸⁹ They then claimed an immediate deduction for the full amount of the premium.

⁸⁵ While there is no reason to think that the Supreme Court would depart from the principles espoused in the tax avoidance cases it has decided so recently, the possibility that it may do so or that it may modify them to some degree cannot be discounted. I stress also that what is set out here is my interpretation of the cases and there is no guarantee that this interpretation would be the interpretation accepted by the Supreme Court (or even by me) in any future cases.

⁸⁶ *Ben Nevis*, above n 46.

⁸⁷ There was also an option fee allowing the investors to buy the land for half its market value in 50 years time. The option fee was about three times the current market value of the land.

⁸⁸ No profit over and above the amount needed to cover the licence premium was projected.

⁸⁹ There was also a small insurance premium payable upfront which was paid by the insurance company to an entity associated with the promoters as an “introduction” commission and, from there, was lent to the promoters’ family trusts.

On appeal, the Court of Appeal⁹⁰ had held that the arrangements were void under the relevant anti-avoidance, s BG1 Income Tax Act 2004.⁹¹ This conclusion was upheld unanimously by the Supreme Court.

In addressing the potential conflict between the anti-avoidance rule and the specific provisions permitting the deductions claimed, the Court of Appeal and the Supreme Court both adopted a form of what I would term the dual purposive approach, whereby a purposive interpretation is applied to the specific taxation provisions and the general anti-avoidance rule. This approach acts to alleviate the tension between the general and the specific provisions.

The two Courts differed however in their articulation of the appropriate approach. The Court of Appeal, rather than interpreting the anti-avoidance and specific provisions separately, stated that the specific provisions and their scheme and purpose, should be interpreted with the anti-avoidance rules (and their purpose) in mind. Picking up on the oft used terminology, the Court noted that this came down to an exercise in “line drawing”.⁹²

In the Supreme Court, the appeal was dismissed but a different approach was taken to the exercise of reconciliation. The majority considered that Parliament's overall purpose was best served by construing specific tax provisions and the general anti-avoidance provision so as to give appropriate effect to each. They are supposed to work in tandem, with neither having overriding effect.⁹³ The majority said that the function of a general anti-avoidance provision is to prevent uses of the specific provisions which fall outside their intended scope in the overall scheme of the legislation.⁹⁴

The majority said that there must be a distinct two-stage inquiry.⁹⁵ At the first stage of the inquiry, the specific provisions are applied to the legal substance of the components of the

⁹⁰ *Accent Management Ltd v Commissioner of Inland Revenue* [2007] NZCA 230, (2007) 23 NZTC 21,323.

⁹¹ A broadly similar provision to s 99.

⁹² *Accent Management*, above n 90, at [125]–[126].

⁹³ *Ben Nevis*, above n 46, at [103].

⁹⁴ At [106].

⁹⁵ The majority's test was actually a three stage test, the third stage being consideration of tax avoidance is merely an incidental effect of the arrangement. In light of the majority's comment on the unlikely practical utility of the third stage, it is convenient to refer to it as the two stage test: see *Ben Nevis*, above n 46, at

arrangement. The taxpayer has to satisfy the court that the use made of the specific provisions is within their intended scope. If that is shown, the second stage assesses whether the use of the specific provision has altered the incidence of income tax in a way which could not have been within the contemplation and purpose of Parliament.⁹⁶ At the second stage, the economic substance of the arrangement is what is at issue.

The majority noted that the general anti-avoidance provision does not confine the Court as to the matters that may be taken into account at this second stage. The manner in which the arrangement is carried out may be an important consideration. So too is any artifice involved. The economic and commercial effects of the documents and transactions are also likely to be significant.⁹⁷

As I alluded to earlier, the distinction between tax mitigation and tax avoidance, as set out in Lord Templeman's judgment in *Challenge*, may have had a comeback in the majority judgment in *Ben Nevis*. Lord Templeman's distinction fell out of vogue following *Challenge*. In *Miller v Commissioner of Inland Revenue*,⁹⁸ for example, the Privy Council endorsed comments made by Baragwanath J in the High Court below where he described the distinction as "conclusory and unhelpful".⁹⁹

The majority in *Ben Nevis* endorsed that comment.¹⁰⁰ But, in setting out some of the factors that would be relevant to the second stage of the enquiry (whether the arrangement was within Parliament's contemplation of how the specific provision would be used), the majority said that, where an arrangement does not affect a taxpayer's financial situation, this may be a factor telling towards a finding of avoidance. In my view, this has similarities to Lord Templeman's statement that tax mitigation can be distinguished from tax avoidance on the

[114]. Compare Woodhouse P's approach in *Challenge* to the "merely incidental" issue discussed above: see *Challenge* (CA), above n 51, at 533–534.

⁹⁶ At [107].

⁹⁷ At [108]–[109].

⁹⁸ *Miller v Commission of Inland Revenue* [2001] 3 NZLR 316 (PC) per the majority at [9].

⁹⁹ *Miller v Commissioner of Inland Revenue* (1997) 18 NZTC 13,001 (HC) at 13,031.

¹⁰⁰ At [94]. This comment was made by the Privy Council in *Miller v Commissioner of Inland Revenue*, above n 98, at [9] endorsing Baragwanath J's comments in the High Court below: *Miller v Commissioner of Inland Revenue* (1997) 18 NZTC 13,001 (HC) at 13,031.

basis that, in cases of the latter, taxpayers reduce their liability to tax without involving themselves in the loss or expenditure which entitles them to that reduction.¹⁰¹

Turning back to *Ben Nevis*, the minority agreed with the conclusion of the majority but differed on one aspect. In the minority's view, recourse to the general anti-avoidance provision is not necessary if the use of the intended provision falls outside the intended scope of the provision. This accords with ordinary principles of statutory construction and avoids unnecessary expansiveness in interpreting the anti-avoidance provisions.¹⁰²

The minority considered that the purposive interpretation of tax provisions, including both specific provisions and the anti-avoidance provisions, may, depending on the context, require consideration of legal or business or economic substance.¹⁰³ There is no general rule. Facts must be found realistically as tax operates in the real world and not that of make believe.¹⁰⁴ In this case, the minority considered it doubtful that the arrangements fell within the relevant specific statutory provisions properly construed but agreed they clearly constituted tax avoidance.¹⁰⁵

The view of the minority that the arrangements might contravene the specific provisions of the Act properly construed has been seen as radical and even as moving wholesale to an economic substance analysis. It can certainly be read in this way (albeit depending on whether the specific provisions properly construed call for an economic as against legal substance interpretation). However, it must be remembered that the facts of the case were extreme and therefore the conclusion that the arrangements potentially did not come within the specific provisions properly construed is not as radical as it may seem.¹⁰⁶

Surgeons and salaries

¹⁰¹ *Challenge Corporation Ltd v Commissioner of Inland Revenue* (PC), above n 51, per Lord Templeman for the majority at 560–561.

¹⁰² At [2] and [7].

¹⁰³ At [4]–[5].

¹⁰⁴ At [4]–[5].

¹⁰⁵ At [6] and [8].

¹⁰⁶ See for example the view, expressed in Michael Littlewood “Tax Avoidance, the Rule of Law and the New Zealand Supreme Court” [2011] *New Zealand Law Review* at 57-58, that the Commissioner should not have conceded that the arrangement met the specific provisions of the Act.

Following the *Ben Nevis* decision, the Court of Appeal released its decision in *Commissioner of Inland Revenue v Penny*.¹⁰⁷ In *Penny* the taxpayers were surgeons who had established companies with their family trusts as shareholders. The doctors were employed by their companies at low annual salaries, allowing them to pay a lower tax rate and enabling greater profits to be received by the shareholder trusts. The Court of Appeal by majority held the arrangements to be tax avoidance. The Supreme Court agreed unanimously.¹⁰⁸

The Supreme Court held that each of the transactions within the arrangement clearly complied with the specific provisions of the Act. As such, transferring a business to a company owned by a family trust is lawful and unremarkable and could not constitute tax avoidance in itself. It was a choice the taxpayers were entitled to make. Further, there is nothing in the specific provisions of the Act which require salaries to be set at any particular level.¹⁰⁹

It was therefore possible for the Court to go directly to the second stage of the *Ben Nevis* test. The Supreme Court's judgment focused predominantly on the manner in which tax avoidance might be exhibited, rather than a close interpretation of s BG1. This is understandable considering its comprehensive setting out of the approach to avoidance in *Ben Nevis*. The Court did, however, highlight the need to consider the arrangement as a whole at the second stage. A particular step within an arrangement, such as salary setting, may be a regular occurrence. But, when viewed in light of its effect within the wider context of the arrangement as a whole, it may be clear that its purpose was tax avoidance.¹¹⁰ The Court's application to the facts supported the ability to take business practice and economic realities into account when ascertaining the purpose or effect of the salary setting arrangements.¹¹¹

The Court identified in the taxpayers' arrangements elements of artificiality,¹¹² circularity,¹¹³ non-market transactions,¹¹⁴ and a (lack of) effect on the taxpayers' financial position.¹¹⁵ The

¹⁰⁷ *Commissioner of Inland Revenue v Penny* [2010] NZCA 231, [2010] 3 NZLR 360.

¹⁰⁸ *Penny v Commissioner of Inland Revenue* [2011] NZSC 95, [2012] 1 NZLR 433.

¹⁰⁹ At [33].

¹¹⁰ At [34].

¹¹¹ At [35]–[36].

¹¹² At [33], [46].

¹¹³ At [19] (referencing [70] of the High Court judgment).

¹¹⁴ At [49].

payment of artificially low salaries, set with no regard to any market benchmarks or to the business requirements of the company, combined with the fact that the taxpayers retained control over and use of the income of the practices, meant that the arrangements fell within the anti-avoidance provision.¹¹⁶

Economic substance and the Supreme Court

The Supreme Court's reliance on the economic substance of a transaction in both *Ben Nevis* and *Penny* has been seen as a major departure from the past.¹¹⁷

Earlier cases have operated on the basis that expenses incurred are a matter of commercial judgment for the taxpayer. In the Australian case of *Cecil Bros*, the Court had held that an arrangement whereby the taxpayer, Cecil Bros, had paid higher than market prices for stock purchased from a company owned by parties related to Cecil Bros, was not tax avoidance. The High Court of Australia held that "it is not for the Court or the commissioner to say how much a taxpayer ought to spend in obtaining his income".¹¹⁸

The approach in *Cecil Bros* was adopted for New Zealand by the Privy Council in the two *Europa*¹¹⁹ cases, even though this arguably departed from the earlier cases discussed above, such as *Elmiger*, *Marx* and *Mangin*. The Privy Council in *Europa (No 2)* by implication explained those earlier cases on the basis that the taxpayers in those cases had attempted to alter the incidence of income tax on an existing income stream. It was said that the anti-

¹¹⁵ At [47].

¹¹⁶ At [16] and [34]–[35].

¹¹⁷ Craig Elliffe and Jess Cameron "The Test for Tax Avoidance in New Zealand: A Judicial Sea Change" (2010) 16 NZBLQ 440, at 451. See also *Glenharrow Holdings v Commissioner of Inland Revenue* [2009] 2 NZLR 359 (SC).

¹¹⁸ *Cecil Bros Pty Ltd v Federal Commissioner of Taxation* (1964) 111 CLR 430 at 434.

¹¹⁹ *Commissioner of Inland Revenue v Europa Oil (NZ) Ltd* [1971] AC 760, at 772; [1971] NZLR 641 (PC) at 649. This was the first of two *Europa* cases. It was decided in favour of the Commissioner (on the basis that the expenditure at issue was not incurred exclusively for the purchase of trading stock). *Cecil Bros* was endorsed in the context of the application of the specific deductibility provision. The second *Europa* case (on the basis of a restructured arrangement) was decided in favour of the taxpayer. In that case, *Cecil Bros* was endorsed by the majority in the Privy Council and applied also to the anti-avoidance context: *Europa Oil (NZ) Ltd v Commissioner of Inland Revenue (No 2)* [1976] 1 NZLR 546 (PC) at 552-3, and 556.

avoidance provision does not apply to new sources of income. Nor does it restrict the right of the taxpayer to arrange his or her affairs to reduce liability to taxation.¹²⁰

In *Europa (No 2)*, the Privy Council clearly took a legal, rather than economic, substance approach to the avoidance provision. The majority¹²¹ expressly rejected the notion that the courts were entitled to look behind the legal character of a transaction and take into account economic benefits derived, even in an avoidance context.¹²²

The relevant general anti-avoidance rule applicable at the time of the *Europa* cases was s 108 of the Land and Income Tax Act 1954. As we have seen, in the first case under the new avoidance provision, s 99, the majority of the Privy Council in *Challenge* did consider the economic substance of the arrangement to be relevant in an anti-avoidance context.¹²³ However, even under s 99 and, despite *Challenge*, the approach of the courts in a number of later avoidance cases was similar to that in the *Europa* cases, with a concentration on legal substance: see for example the approach of the majority of the Privy Council in *Peterson v Commissioner of Inland Revenue*.¹²⁴

So what is new?

I do not see the approach of the Supreme Court to tax avoidance as radically different from that of many of the earlier cases. The factors identified by the majority as assisting in the second stage Parliamentary contemplation enquiry have been relied on by courts for years. Artificiality, for example, has long been a hallmark of tax avoidance for the courts.¹²⁵

The Supreme Court's approach in *Ben Nevis* did, however, serve to clear up some aspects of tax avoidance jurisprudence that had become muddled in recent years. For example, its

¹²⁰ *Europa Oil (NZ) Ltd v Commissioner of Inland Revenue (No 2)*, above n 119, at 556-7.

¹²¹ Lord Diplock, Viscount Dilhorne, Lord Edmund-Davies and Sir Garfield Barwick. Lord Wilberforce dissented. He considered that the Court was entitled to look behind claimed expenditure to the true nature of the transactions in the context of the specific deductibility provisions: see at 559.

¹²² At 557 per Lord Diplock.

¹²³ See also the comments of Richardson J in *Mills v Dowdall* [1983] NZLR 154 (CA) at 159-160.

¹²⁴ *Peterson v Commissioner of Inland Revenue* [2006] 3 NZLR 433 (PC) at [42]-[43].

¹²⁵ I note that, in *Glenharrow*, above n 117 at [49], the Supreme Court did not rule out the possibility that artificiality may, in some cases, fall within the contemplation of Parliament.

acceptance of the relevance of the economic substance of a transaction to determining whether the arrangement constitutes tax avoidance can, as discussed above, be seen as a break, at least with the recent past.

The Supreme Court's approach also heralds a change in emphasis. The majority in *Ben Nevis* took a wider view of the purpose of the specific provision at the second stage of its enquiry than had been the case in some of the earlier cases. For example, in *Europa (No 2)*, the majority said that its finding that the expenditure was deductible under the specific provisions of the Act was incompatible with the contracts being held to be avoidance. The Commissioner had to point to some other aspect of the contracts to succeed.¹²⁶

The wider view of purpose taken by the Supreme Court in the second stage of its analysis arguably results in a greater role for the anti-avoidance provision. While the Supreme Court's approach is reminiscent of that taken by the Privy Council in *Challenge*, it suggests even more of a role for the general provision and, importantly, firmly rejects a suggestion made in one case that the general anti-avoidance rule is simply a long-stop provision.¹²⁷

Another associated change of emphasis is the Supreme Court's view of the avoidance provision as working in tandem with specific provisions. This view allows effect to be given to both provisions, rather than requiring one to be read down to accommodate the other. Similar comments have, however, been made to this effect in earlier cases.¹²⁸ So this change also should not be overstated.

To tie it all together

In summary, the courts' role, whenever they are required to interpret broad general provisions, is to interpret these provisions in a manner that gives them (and any related specific provisions)

¹²⁶ At 556.

¹²⁷ At suggested in *Commissioner of Inland Revenue v Auckland Harbour Board* [2001] 3 NZLR 289 (PC) at [11] per Lord Hoffmann.

¹²⁸ For example in the Privy Council in *Challenge*, where the majority of the Board rejected the view that the inclusion of the specific provision ousted the application of s 99 and emphasised the Court's role in identifying the line between tax mitigation and avoidance: *Challenge Corporation Ltd v Commissioner of Inland Revenue* (PC), above n 51, at 559–561. See also the comments of Richardson J in the Court of Appeal decision in that case: above n 51, at 549 and in *Mills v Dowdall*, above n 123, at 159–160.

proper effect in light of the scheme and purpose of the Act as a whole. A purposive interpretation is required of both any specific provisions at issue and of the general provision. Reconciliation between the general and the specific is achieved by this means.

The same approach was applied by the Supreme Court to the cases related to water and to the question of the navigability of the river as in the tax avoidance cases. The exercise in tax avoidance cases, as in all other cases involving legislation, is one of statutory interpretation. The difficulty remains in predicting how the principles will apply to the facts of any particular tax avoidance case and especially to those that might be seen as lying at the margins. Watch this space.