IN THE SUPREME COURT OF NEW ZEALAND

SC 63/2010
[2011] NZSC 158

BETWEEN	TANNADYCE INVESTMENTS LIMITED Appellant
AND	COMMISSIONER OF INLAND REVENUE Respondent

Hearing: 25 August 2011

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

Counsel: A J Forbes QC and A J F Wilding for Appellant
K L Clark QC and P H Courtney for Respondent

Judgment: 20 December 2011

JUDGMENT OF THE COURT

A The appeal is dismissed.

B The appellant is to pay the respondent costs in the sum of $15,000 plus disbursements to be fixed if necessary by the Registrar.

REASONS

Para No

ELIAS CJ AND McGRATH J

(Given by McGrath J)

Introduction

[1] Tannadyce Investments Ltd appeals against a judgment of the Court of Appeal[1] striking out, as an abuse of process, a proceeding seeking judicial review of assessments of its liability to income tax made by the Commissioner of Inland Revenue.

[2] Under the Tax Administration Act 1994, taxpayers may challenge tax assessments in accordance with a prescribed disputes and challenge procedure. Its focus is on ascertaining the correct liability for tax and substituting an assessment for that sum where it differs from what the Commissioner determined. The 1994 Act also includes provisions that seek to shield assessments, and other decisions made under tax law, from challenge by means other than those provided by the statute. Legislation that is enacted to restrict access by a citizen to judicial review of governmental decision-making often gives rise to questions of a constitutional kind concerning the true scope and meaning of the exclusionary provisions. The present appeal is an instance. The appellant has brought its challenge in a judicial review proceeding and has not invoked the statutory regime for challenging tax assessments.

The constitutional dimension

[3] Our constitutional arrangements recognise that the Parliament of New Zealand is the supreme law maker and has "full power to make laws".[2] The courts of higher jurisdiction, however, have constitutional responsibility for upholding the values which constitute the rule of law. A central aspect of that role is to ensure that when public officials exercise the powers conferred on them by

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1 *Tannadyce Investments Ltd v Commissioner of Inland Revenue* [2010] NZCA 233, (2010) 24 NZTC 24,341.

2 Constitution Act 1986, s 15(1).

Parliament, they act within them. Judicial review is the common law means by which the courts hold such officials to account.[3] It provides the public with assurance that public officials are acting within the law in exercising their powers, and are accountable if they depart from doing so. Statutes limiting recourse to judicial review to challenge statutory decisions accordingly raise issues of constitutional concern. This concern is reflected in the presumption of the courts, when interpreting such legislation, that it was not Parliament's purpose to allow decision-makers power conclusively to determine any question of law.[4] Furthermore, in the present context, tax legislation will not readily be read as enabling imposition of a liability for tax without also allowing the opportunity of access to a judicial process to show that, in law, the tax should not have been imposed or imposed in the amount assessed.

[4] Legislation which does not on its terms prohibit judicial review, but restricts its availability, can nevertheless interfere with full supervision by the courts of the conformity of activities of government with the rule of law. The courts are reluctant to read legislation in a manner that impairs their ability to hold public officials to account in this way.

[5] These constitutional concerns over access to justice and accountability are also served by the general statutory principle in relation to judicial review that the existence of a right of appeal does not exclude the courts' jurisdiction in judicial review proceedings in relation to the same subject matter.[5]

[6] The courts nevertheless recognise that statutory challenge and appellate processes can provide a better means of judicial supervision of government decision-making than judicial review. In the context of rights of appeal and their effect on claims of breach of rights to natural justice, as an Australian leading text on judicial review argues:[6]

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3 Recognised in s 4 of the Judicature Amendment Act 1972.

4 *Bulk Gas Users Group v Attorney-General* [1983] NZLR 129 (CA) at 133.

5 Judicature Amendment Act 1972, s 4(1).

6 Mark Aronson, Bruce Dyer and Matthew Groves *Judicial Review of Administrative Action* (4th ed, Lawbook Company, Pyrmont, 2009) at 496.

> If there is an appeal on the merits by way of *de novo* hearing, to a person who is unlikely to be influenced by what occurred at first instance, the appeal may be able to provide all that procedural fairness requires. If so, it is a far superior remedy for breach of natural justice than judicial review, since it will not only redress the initial unfairness more effectively and quickly than judicial review can, but also, replace the initial decision with a fresh decision on the merits. This provides a strong justification for courts allowing such appeals to cure defects and requiring those complaining of breach of natural justice to exercise their rights of appeal instead of seeking judicial review. (citations omitted)

[7] At times, however, litigants, including taxpayers, contend that the statutory process is not adequate or effective in the circumstances which give rise to their challenge, and seek to pursue judicial review instead or ahead of a statutory challenge to an assessment. This is such a case.

The 1976 Act

[8] The Inland Revenue Department Act 1974 provided that the Commissioner of Inland Revenue was charged with administration of the Inland Revenue Acts, which included the Income Tax Act 1976.[7] That Act imposed liability for income tax. The Commissioner quantified that liability by annual assessments of the amount on which tax was payable by each taxpayer, and the amount of that tax.[8]

[9] The 1976 Act contained two particular provisions in Part 2, which were protective of tax assessments. Section 26 protected their validity:

> **26 Validity of assessments not affected by failure to comply with Act—**
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> The validity of an assessment shall not be affected by reason that any of the provisions of this Act have not been complied with.

Section 27 deemed an assessment to be correct except where challenged in statutory objection proceedings:

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7 Inland Revenue Department Act 1974, s 4.

8 Income Tax Act 1976, s 19.

> **27 Assessments deemed correct except in proceedings on objection—**
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> Except in proceedings on objection to an assessment under Part III of this Act, no assessment made by the Commissioner shall be disputed in any Court or in any proceedings (including proceedings before a Taxation Review Authority) either on the ground that the person so assessed is not a taxpayer or on any other ground; and, except as aforesaid, every such assessment and all the particulars thereof shall be conclusively deemed and taken to be correct, and the liability of the person so assessed shall be determined accordingly.

[10] Part 3 of the 1976 Act provided a regime for taxpayers to object to assessments of tax. Any person who had been assessed for income tax could object to an assessment.[9] The objections were considered by the Commissioner and, if not allowed, they were heard and determined by the Taxation Review Authority or High Court. Where the objection was heard by the Court, its procedure was the same as if it were hearing a civil action in which the taxpayer was plaintiff and the Commissioner defendant. The legislation gave the Court power to cancel or vary any assessment, and to make any assessment which the Commissioner could have made or to direct the Commissioner to make such an assessment.[10] In other words, the Court stood in the shoes of the Commissioner and determined the objection on the merits. It was able to substitute what it considered to be the correct decision. The provisions where the Authority determined the objection were similar.[11] There were rights of appeal from their decisions in each case.

[11] In a series of judgments, the meaning of the provisions limiting the availability of judicial review under the 1976 Act, in favour of the statutory objection and appeal process, came under close examination from the Court of Appeal. In *Commissioner of Inland Revenue v Canterbury Frozen Meat Co Ltd*,[12] the Court of Appeal, in applying ss 26 and 27, drew a distinction between challenging the correctness of an assessment of tax and challenging the process of the Commissioner in making it, along with the character of the resulting assessment decision. The exclusionary provisions applied to the former and precluded judicial review, but on

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9 Income Tax Act 1976, s 30(1).

10 Income Tax Act 1976, s 33(11).

11 See s 32(1) of the 1976 Act.

12 *Commissioner of Inland Revenue v Canterbury Frozen Meat Co Ltd* [1994] 2 NZLR 681 (CA).

their true meaning they did not apply to the latter. The Court held that the legitimacy of the process, and whether or not the character of the decision was in the nature of an assessment as envisaged by the legislation, could be attacked in judicial review proceedings on administrative law grounds provided that there was a sufficient evidential foundation.[13] The Court also held that whether the particular "assessment" decision under challenge was so tentative and provisional that it was not an assessment for the purposes of the Act could be addressed in judicial review. The Court accordingly refused to strike out the judicial review proceedings brought against the Commissioner by the taxpayer.

[12] Subsequently, in *Golden Bay Cement Co Ltd v Commissioner of Inland Revenue*,[14] the Court of Appeal held that the Court's powers, on hearing an objection, to "confirm or cancel or vary"[15] the assessment covered every situation in which an assessment was challenged. It followed that challenges to the *validity* of an assessment of tax, as well as to its correctness, could be determined under the statutory procedure.[16] Importantly, the Court added that it would only be in exceptional cases, typically involving an abuse of power, that the Court would entertain an application by a taxpayer who had chosen not to appeal under the statutory procedure for judicial review of a decision.[17] The Court of Appeal has also recognised that in objection proceedings the Taxation Review Authority's examination of the correctness of an assessment in objection proceedings could correct defects in the Commissioner's process in making an assessment.[18]

[13] The position where a taxpayer brought separate objection and judicial review proceedings, which raised the same issues concerning validity, was addressed by the Court in *New Zealand Wool Board v Commissioner of Inland Revenue*.[19] A majority of the Court, in a judgment delivered by Richardson P, said that ordinarily the

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13 At 688.

14 *Golden Bay Cement Co Ltd v Commissioner of Inland Revenue* [1996] 2 NZLR 665 (CA).

15 Under s 33(11)(a) of the 1976 Act.

16 At 671–672, applying *Harley Development Inc v Commissioner of Inland Revenue* [1996] 1 WLR 727 (PC).

17 At 672.

18 *Dandelion Investments Ltd v Commissioner of Inland Revenue* [2003] 1 NZLR 600 (CA) at [50]–[64].

19 *New Zealand Wool Board v Commissioner of Inland Revenue* (1997) 18 NZTC 13,113 (CA).

interests of justice would require that the proceedings be consolidated, and only in exceptional cases should a judicial review challenge to validity be heard separately and ahead of the statutory proceedings:[20]

> That may be appropriate, for example, where because of its tentative or provisional character a decision is arguably not an "assessment" for the purposes of the Act (*Commissioner of Inland Revenue v Canterbury Frozen Meat Co Ltd* [1994] 2 NZLR 681 (CA)) or where crucial natural justice issues impinge on the validity of the process and can conveniently be considered separately; or more generally where the taxpayer would be unduly prejudiced by consolidated proceedings. No doubt there may be others.

[14] To similar effect, in *Miller v Commissioner of Inland Revenue*,[21] the Privy Council said that despite the broad language of the exclusionary section, judicial review was not precluded if proper grounds were made out relating to the legitimacy of the process adopted by the Commissioner and the validity of the outcome. As well, in some circumstances the making of an assessment, whether correct or not, might be an abuse of power.[22] The Privy Council also said that:[23]

> It will only be in exceptional cases that judicial review should be granted where the challenges can be addressed in the statutory objection procedure. Such exceptional circumstances may arise most typically where there is abuse of power: *Harley Developments Inc v Commissioner of Inland Revenue* at 736. But they have also been held to arise where the error of law claimed is fatal to the exercise of statutory power and where it would be wasteful to require recourse to the objection procedure: *Golden Bay Cement Co Ltd v Commissioner of Inland Revenue* at 671.

[15] This line of authority is consistent with the approach taken to challenges to administrative decisions in areas other than taxation. New Zealand courts are generally reluctant to entertain judicial review where there is a right of appeal against a statutory decision both on questions of law and where the remedy of appeal provides a more appropriate process.[24] The court may, for instance, refuse to grant relief in the exercise of its discretion where the merits of a decision can be better

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20 At 13,116 per Richardson P, Gault, McKay and Keith JJ.

21 *Miller v Commissioner of Inland Revenue* [2001] 3 NZLR 316 (PC).

22 At [14].

23 At [18] per Lord Hoffmann.

24 *Bulk Gas Users Group v Attorney-General* [1983] NZLR 129 (CA) at 136; *Fraser v Robertson* [1991] 3 NZLR 257 (CA) at 260.

recognised under a statutory appellate process,[25] which adequately protects the appellant's interests.[26] Much depends on the context and whether the statutory process provides the more convenient and effective method for seeking redress in the particular case.

[16] Under accident compensation legislation, a person who has a right to apply for a statutory review, or to appeal, has no other remedy in relation to the matter in any court or tribunal. The process provides for appeal to the District Court, and then to the High Court with leave. The Court of Appeal has held that if a challenge to a decision for error of law is amenable to resolution by the statutory process, the restrictive presumption of interpretation does not apply.[27] If, however, a challenge is not amenable to the statutory procedure, other remedies available through the High Court are not excluded by the legislation.

[17] Reflecting that general approach in relation to income tax assessments, the courts recognised that under the 1976 Act there were cases where justice would be better served by allowing judicial review challenges to proceed, and the passages cited from the judgments of the Court of Appeal and the Privy Council[28] provide a helpful explanation of the type of cases in which exceptional circumstances were seen as arising under the 1976 Act.

The 1994 Act: legislative history

[18] The relevant provisions in the Income Tax Act 1976 were succeeded by those in the Tax Administration Act 1994.[29] In 1995, new provisions concerning tax administration were inserted stipulating that the core function of the Commissioner of Inland Revenue was the care and management of taxes covered by the Inland

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25 *Fraser v State Services Commission* [1984] 1 NZLR 116 (CA) at 123 per Cooke J.

26 *Auckland Acclimatisation Society Inc v Sutton Holdings Ltd* [1985] 2 NZLR 94 (CA) at 103 per Cooke J.

27 *Ramsay v Wellington District Court* [2006] NZAR 136 (CA) at [31]; *Dean v Chief Executive of the Accident Compensation Corporation* [2007] NZCA 462, [2008] NZAR 318 at [6].

28 At [13] and [14] above.

29 The original forms of ss 109 and 114 of the 1994 Act respectively replicated ss 27 and 26 of the 1976 Act.

Revenue Acts.[30] Quantification, assessment and collection of tax due remain the essential characteristics of the Commissioner's role. The 1995 amendment also imposes on every Minister and official having responsibilities under tax legislation an overarching duty "at all times to use their best endeavours to protect the integrity of the tax system".[31] We return to these provisions later in this judgment.

[19] In 1996, the 1994 Act was amended to provide a new process for addressing disputes between the Commissioner and taxpayers prior to the Commissioner making an assessment. The amending legislation[32] also provided for challenges to such assessments by taxpayers bringing proceedings before hearing authorities – either the High Court or Taxation Review Authority. Under the new disputes process the Commissioner may issue one or more notices of proposed adjustments in respect of a tax return or existing assessment which identify the issues arising between the Commissioner and the taxpayer.[33] A taxpayer is also able to issue such a notice to the Commissioner if the Commissioner has issued an assessment or determination without first issuing a notice of proposed adjustment.[34] The taxpayer is able to reject such proposed adjustments within two months in a notice of response, which outlines the reasons for rejection.[35] This closely prescribed process requires disclosure by each party of the issues and their position on them.[36] It culminates in the Commissioner making an assessment of tax.[37] If a dispute is not resolved during this process, the matter will generally be referred to the Inland Revenue Department's Adjudication Unit to consider the correct application of the law. This is an administrative process not covered by legislation and its operation does not preclude the Commissioner from making an amendment to an assessment. The 1996 Act also provided for challenges to such assessments by taxpayers bringing proceedings in the High Court or Taxation Review Authority. While the disputant taxpayer decides

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30 Section 6A of the 1994 Act, as amended by s 4 of the Tax Administration Amendment Act 1995 (discussed in *BNZ Investments Ltd v Commissioner of Inland Revenue* [2008] NZSC 24, [2008] 2 NZLR 709 at [51]).

31 Section 6(1) of the 1994 Act as amended by s 4 of the Tax Administration Amendment Act 1995.

32 Tax Administration Amendment Act (No 2) 1996.

33 Tax Administration Act 1994, ss 89B and 89F.

34 Tax Administration Act 1994, s 89D(1).

35 Tax Administration Act 1994, s 89AB(2) and 89G(1) and (2).

36 Tax Administration Act 1994, s 89M.

37 Tax Administration Act 1994, s 113.

in which forum to bring the challenge, there is provision for the High Court to transfer the proceeding to the other hearing authority.[38]

[20] The 1995 and 1996 changes followed a report on the tax administration system by an Organisational Review Committee chaired by Sir Ivor Richardson.[39] It identified as a key issue in improving the system that tax disputes needed to be resolved more quickly and in a less cumbersome manner.[40] Current procedures were seen as unsatisfactory, and the likelihood of future willing compliance with the system by taxpayers was seen as dependent on their belief that disputes would be handled fairly and quickly.[41] The Committee recommended that the process for addressing tax disputes be revised to include a structured pre-assessment phase aimed at ensuring assessments were correctly based. The process would include an internal adjudication function to provide a specific and strong "focus on the correct and impartial application of tax law to the affairs of individual taxpayers".[42] When undertaken, this would be the final step in quantification of the taxpayer's liability and would enable litigation, which would be initiated following the resulting assessment, to be more effective. This recommendation was the basis for development of the procedures in Parts 4A and 8A of the 1994 Act enacted in 1996. They concern the disputes procedure and internal challenges to assessments. The adjudication process is not established by legislation. The Committee also said it was crucial, in the interests of a fair tax system, that tax litigation be dealt with promptly and be subject to rigorous judicial timetabling.[43] The Committee did not review the functioning of the hearing authorities due to time constraints and the privative provisions were also not addressed.

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38 Tax Administration Act 1994, s 138N(1)(b).

39 Organisational Review Committee *Organisational Review of the Inland Revenue Department: report to the Minister of Revenue (and on tax policy, also to the Minister of Finance)* (Organisational Review Committee, 1994).

40 At 2.

41 At 4.

42 At 56.

43 Appendix E at 44.

The 1994 Act: restrictions on challenges

[21] The 1996 legislation also introduced redrafted exclusionary provisions in place of those originally appearing in the 1994 Act. They appear in Part 6 which deals with assessments. Sections 109 and 114 provide:

> **109 Disputable decisions deemed correct except in proceedings**
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> Except in objection proceedings under Part 8 or a challenge under Part 8A,—
>
> (a) no disputable decision may be disputed in a court or in any proceedings on any ground whatsoever; and
>
> (b) every disputable decision and, where relevant, all of its particulars are deemed to be, and are to be taken as being, correct in all respects.
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> **114 Validity of assessments**
>
> An assessment made by the Commissioner is not invalidated—
>
> (a) through a failure to comply with a provision of this Act or another Inland Revenue Act; or
>
> (b) because the assessment is made wholly or partially in compliance with—
>
> (i) a direction or recommendation made by an authorised officer on matters relating to the assessment:
>
> (ii) a current policy or practice approved by the Commissioner that is applicable to matters relating to the assessment.

[22] Section 109 of the 1994 Act is the successor of s 27 of the 1976 Act. It protected assessments. In its original form, s 109 was expressed in the same terms as s 27. That provision was repealed and substituted by the present provision in 1996. In that form it protects "disputable decisions", a term which is defined to mean assessments and certain other decisions.[44] Accordingly, in relation to assessments there is no material change between s 27 of the 1976 Act and its current form in s 109.

[23] Section 114 is the successor of s 26 of the 1976 Act. It was originally expressed in the same terms in the 1994 Act. Section 114 was replaced in 2004 by

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[44] See s 3.

the present provision.[45] It has some elaboration of the scope of protected assessments but in substance there is no significant change.

[24] It follows that Parliament has not altered the meaning of the critical provisions in the amending legislation which has been applied in the cases we have discussed.

[25] In determining challenges, the hearing authorities have these powers under the 1996 Act:

> **138P Powers of hearing authority**
>
> (1) On hearing a challenge, a hearing authority may—
>
> (a) confirm or cancel or vary an assessment, or reduce the amount of an assessment, or increase the amount of an assessment to the extent to which the Commissioner was able to make an assessment of an increased amount at the time the Commissioner made the assessment to which the challenge relates; or
>
> (b) make an assessment which the Commissioner was able to make at the time the Commissioner made the assessment to which the challenge relates, or direct the Commissioner to make such an assessment.

These broad powers generally reflect those that were available to the Taxation Review Authority and the High Court under the Income Tax Act 1976.[46] They contemplate a right of hearing de novo on the merits with the hearing authority determining the correct tax liability and making assessment accordingly.[47]

The 1994 Act: judicial interpretation

[26] Section 109, as amended in 1996, was considered by the Court of Appeal in *Commissioner of Inland Revenue v Ti Toki Cabarets (1989) Ltd*.[48] The Court rejected the taxpayer's submission that the authorities that applied the predecessors

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45 See Taxation (Venture Capital and Miscellaneous Provisions) Act 2004, s 119.

46 Under ss 32(1)(a) and 33(11) of the 1976 Act.

47 *Dandelion Investments Ltd v Commissioner of Inland Revenue* (1996) 17 NZTC 12,689 (HC) at 12,693–12,694.

48 *Commissioner of Inland Revenue v Ti Toki Cabarets (1989) Ltd* [2001] 1 NZLR 147 (CA).

of s 109 permitted review proceedings to challenge the procedure leading to an assessment as opposed to the outcome, the assessment itself.[49]

> That is not the distinction contemplated in the authorities. Where the judgments distinguish between the correctness of the assessment and the legitimacy of the process employed ... they were merely reiterating that judicial review cannot frustrate the honest discharge by the Commissioner of his statutory duty to assess, yet can be invoked to address procedural error, defects resulting in ultra vires, unlawfulness and such matters as bad faith, abuse of power and errors of law going to the legitimacy of the process rather than to the correctness of the decision. Certainly they do not contemplate that the correctness of every assessment can be challenged in review proceedings on the ground that it was arrived at on an erroneous view of the law – that would be entirely contrary to s 109 and its predecessors. (citations omitted)

[27] The 1996 legislation, and its impact on earlier case law concerning the separate availability of judicial review of validity of tax assessments, was further considered (but without reference to the above passage in the *Ti Toki Cabarets* judgment) by the Court of Appeal in *Westpac Banking Corp v Commissioner of Inland Revenue*.[50] The Court noted that the provisions of Parts 4A and 8A had been described as a code for resolution of taxation disputes and observed that they "provide[d] what might be thought to be a particularly inauspicious statutory context for judicial review" outside of the Tax Administration Act's challenge process.[51]

[28] The Court of Appeal said it was appropriate to continue to apply established principles as to judicial review in tax cases. It accepted that under the Tax Administration Act as amended,[52] judicial review of assessments was available where "what purports to be an assessment is not an assessment".[53] Judicial review was also available in exceptional cases and "may be available in cases of conscious maladministration".[54] This could be "reconciled" with ss 109 and 114 as what is challenged is either not an assessment or not the sort of assessment that Parliament contemplated when enacting those provisions. But the Court decided that any

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49 At [40].

50 *Westpac Banking Corp v Commissioner of Inland Revenue* [2009] NZCA 24, [2009] 2 NZLR 99.

51 At [47] per William Young P.

52 Including provisions in s 6A (vesting responsibility for care and management of the tax system in the Commissioner) and the binding rulings regime.

53 At [59] per William Young P.

54 Ibid.

broader approach to judicial review would be inconsistent with the statutory scheme generally and s 109 in particular. Liability to tax existed independently of assessment and if the assessment were correct, it was difficult to see why complaints about the process should result in a taxpayer paying tax on an incorrect basis. It was also of concern to the Court of Appeal that allowing collateral challenges through judicial review could provide scope for gaming and diversionary behaviour by taxpayers. The judgment was also influenced by the approach of the majority of the High Court of Australia in *Commissioner of Taxation v Futuris Corp Ltd*.[55] The Court read that judgment, decided under similar legislation, as confining judicial review to those categories of cases.[56]

[29] The judgment in *Westpac* did not, however, address the line of authority of the Court of Appeal and Privy Council under the 1976 Act's provisions, which has sought not only to give general priority to statutory challenges to assessments, but also to recognise that in some cases they will not address rule of law considerations as adequately as judicial review. As there is no significant change in the current statutory scheme or relevant provisions from that under the 1976 legislation, the Court of Appeal should not have approached the 1996 provisions as if they were new legislation.

[30] Insofar as the Court was influenced by the approach of the High Court of Australia in *Futuris*, it should be borne in mind that the jurisdiction of the Federal Court in judicial review was conferred by legislation which replicated provisions in s 75(v) of the Constitution. Whether judicial review was available did not turn on whether there had been an error of law by the Federal Commissioner of Taxation, but on whether there had been jurisdictional error.[57] The High Court's

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55 *Commissioner of Taxation v Futuris Corp Ltd* [2008] HCA 32, (2008) 237 CLR 146.

56 At [52].

57 *Futuris* at [4] per Gummow, Hayne, Heydon and Crennan JJ.

continuing adherence to the distinction between errors within and outside of jurisdiction[58] is criticised in the separate judgment of Kirby J in *Futuris*.[59] It is, of course, no longer recognised in New Zealand, as a significant error of law is a ground of review in itself.[60] Because of this fundamental difference between the two jurisdictions on the scope of judicial review, the majority judgment in *Futuris* is of limited assistance in that it only ascertains the meaning of the similarly expressed provisions of the Australian legislation protecting assessments.[61] Nor does a comparison of the two sets of provisions assist in the interpretation of ss 109 and 114 of the current New Zealand Act. The better guide to their meaning and effect is that given by the Court of Appeal and Privy Council in applying the provisions in the 1976 Act which are not materially different. That approach, reflecting principles applied generally in New Zealand for over 25 years,[62] was developed by interpreting the legislation in a way which did not impair the courts' ability to hold public officials to account, particularly where there were allegations going to the legitimacy of the process, but preferred the statutory route of appeal where that was more appropriate.

[31] This Court dismissed an application for leave to appeal against the *Westpac* judgment.[63] It regarded the proposed appeal as having no prospect of success. The Court of Appeal in the current case, however, seems to have treated this leave judgment as confirming the correctness of the judgment in *Westpac*. That was not the Court's intention.

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58 This dichotomy was recently affirmed in *Plaintiff M70/2011 v Minister for Immigration and Citizenship* [2011] HCA 32, (2011) 280 ALR 18 at [57]–[59] per French CJ, [106]–[109] per Gummow, Hayne, Crennan and Bell JJ and [207] per Kiefel J.

59 At [129]. See also Michael Taggart "Australian Exceptionalism in Judicial Review" (2008) 36 FL Rev 1 at 9.

60 *Bulk Gas Users Group v Attorney-General* [1983] NZLR 129 (CA) at 136; *Peters v Davison* [1999] 2 NZLR 164 (CA) at 181 per Richardson P, Henry and Keith JJ.

61 Income Tax Assessment Act 1936 (Cth), ss 175 and 177(1).

62 Since *Bulk Gas Users Group* was decided – see [15] above.

63 *Westpac Banking Corp v Commissioner of Inland Revenue* [2009] NZSC 36, (2009) 24 NZTC 23,435.

The principles to be applied

[32] Applying these principles of statutory interpretation, the investigation and assessment of liability to tax is an area of public administration which can give rise to circumstances where judicial review is not excluded by ss 109 and 114. That is in part because proper exercise of the administrative functions of assessment of tax by the Commissioner is crucial to the effectiveness of the statutory scheme. This was reinforced in the 1995 amendment to the 1994 Act by the emphasis which ss 6, 6A and 6B placed on the requirement that the Commissioner and departmental officers use their best endeavours to protect the integrity of the tax system, and the Commissioner's particular responsibility for its care and management. The latter duty requires the Commissioner to have regard to the importance of promoting compliance, especially voluntary compliance, with the Inland Revenue Acts by all taxpayers.[64] Protection of the integrity of the tax system includes both taxpayers' perceptions of that integrity, and the determination of liability fairly and impartially and according to law.[65] They are closely linked to the maintenance of voluntary compliance with the Inland Revenue Acts.[66]

[33] These important provisions are part of the wider context of the Tax Administration Act in which ss 109 and 114 are to be interpreted. Section 109 shields from the High Court's supervisory jurisdiction "disputable decisions", one meaning of which is "assessments". As we have indicated, reference to that wider context of the Act as a whole clarifies what are "assessments" under the legislation.

[34] In proposing that these provisions form part of the core responsibilities of the Commissioner and officers of the Inland Revenue Department, the concern of the Organisational Review Committee was that independent judgment should be exercised in all decisions involving the tax affairs of individual taxpayers. While independence from political influence was part of this imperative, the Committee

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64 Tax Administration Act 1994, s 6A(3)(b).

65 Tax Administration Act 1994, s 6(2)(a) and (b).

66 *BNZ Investments Ltd v Commissioner of Inland Revenue* [2008] NZSC 24, [2008] 2 NZLR 709 at [51].

also saw the integrity of the tax system as concerned with "the interaction between the total tax administration and individual taxpayers".[67]

[35] In this context, defective administration in the exercise of what can be highly intrusive statutory powers can give rise to departures from the statutory purposes of such significance that resulting assessments, or other decisions affecting taxpayers, should be invalidated. That may be the case if fresh appellate determination of the correct tax liability is not adequate to uphold Parliament's requirements in tax administration. It follows that at times, when allegations are made of such situations, judicial review will be available, where proper grounds are made out, as the better means of providing the necessary judicial scrutiny of departmental actions.

[36] The approach the courts in New Zealand have taken to date when deciding whether judicial review is permitted by the legislation, despite the statutory protection of assessments in the tax jurisdiction, has not been to frame a definitive rule. The situations that can arise have been considered too diverse to permit that sort of test. Rather the approach has been in general to recognise that the full right of appeal to a court or Review Authority that is required to act judicially is able to provide superior remedies to judicial review, while also recognising that there will be exceptional situations where judicial review should be permitted, without regarding the class of cases where that is so as closed.[68]

[37] The particular statutory provision for the scope of the right of appeal is important. Under the 1996 Act, the very broad scope of the Court's remedial powers under s 138P gives a right to a fresh hearing by a Court or the Taxation Review Authority. It also has a duty to act judicially, which of course includes acting independently. The focus is on determining the correct position in relation to liability to tax on the evidence that is heard by the Court or Authority. Such an appeal right is a prime instance of a right of appeal which will usually, but not always, provide all that procedural fairness requires.

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67 At 60.

68 The factors are those summarised in the *New Zealand Wool Board* case above at [13].

[38] Finally the Court must consider whether the *overall* effect of exercise of the appeal right will be to ensure that a taxpayer will have its tax position determined "fairly, impartially, and according to law".[69] Relevant to this will be whether the taxpayer will continue to face any substantial prejudice if required to proceed under the statutory challenge and appeal procedure instead of review. Substantial prejudice itself must be considered in the context of the integrity of the tax system, including in this respect the responsibility of taxpayers to comply with the law so that they are assessed and pay tax that is duly assessed. The public interest in efficient and prompt determination of liability to tax must also be weighed. But if the appeal will in substance remedy the prejudice which otherwise resulted to the complaining party, the court may exercise its discretion against granting relief.[70]

[39] The judgment of Blanchard, Tipping and Gault JJ confines judicial review to cases where a taxpayer is unable to bring the grievance within the statutory process. It does so without analysis of the prior case law that provides a basis for ascertaining within a framework of interpretation of the relevant provisions whether judicial review or the statutory scheme best serves the ends of justice. That basis has regard to the purpose of the Tax Administration Act 1994 as a whole and the relevant constitutional context of statutory provisions addressing court processes. It is unfortunate that a departure from this approach to interpretation should occur in a case in which that question was not argued as it has led to an undue focus in the judgment of Blanchard, Tipping and Gault JJ on the literal meaning of ss 109 and 114 to the neglect of wider indications of meaning. Counsel for the respondent Commissioner, Ms Clark QC, accepted the Court of Appeal's approach in *Westpac* as the basis for submissions. The approach of the judgment of Blanchard, Tipping and Gault JJ is even more restrictive of the availability of judicial review.

Application

[40] We now apply the principles we have set out. At issue is whether the appellant is able to challenge in judicial review proceedings the validity of default

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[69] In terms of s 6(2)(b) of the 1994 Act.

[70] *Singh v Attorney-General* [2000] NZAR 136 (CA) at 141 and *Nicholls v Registrar of the Court of Appeal* [1998] 2 NZLR 385 (CA) at 436–437 per Tipping J.

assessments of income tax. The appellant, through its company director Mr Henderson, contends that it needed to have access to its financial records in the possession of the Department to file annual returns of its income for the 1993 to 1998 years. It had told the Inland Revenue Department that it held the relevant records but the Department denied that was so. Subsequently, however, the Department accepted that it continued to hold documents of the appellant. The appellant had filed returns on a global basis covering the years in question on the basis of which it had claimed losses of $1,539,733. The default assessments, however, allowed a carried forward loss of only $209,373. In these circumstances, the appellant contends that the Commissioner's default assessments were acts of conscious maladministration involving abuse of powers and breach of natural justice. The assessments were not, as a result, true assessments as contemplated by the 1996 Act, and were accordingly not protected by ss 109 and 114.

[41] The appellant says it was impossible for it to proceed to initiate the dispute process under Part 4A of the Act, which was a necessary preliminary to challenge proceedings under Part 8A, and for that reason it did not do so. The Commissioner's response has been to seek that the proceedings be struck out.

[42] If the Inland Revenue Department were to act in bad faith, by withholding documents in its possession which it knew a taxpayer required, judicial review might be the most appropriate and effective process for holding officials to account for such an abuse of power. The factors identified by the Court of Appeal in *New Zealand Wool Board* might well apply. However, we are not persuaded that a proper foundation has been made for these contentions in this case. As the judgment of Blanchard, Tipping and Gault JJ has pointed out, there is a lack of specificity in the appellant's allegations that the Department is withholding documents. The appellant does not specify which of its documents are or were being withheld, nor why they were necessary to file annual returns. The appellant was able to provide a "global" tax return claiming losses totalling $1,539,733, which indicates that it was in possession of some documents that would enable a return to be filed and a notice of proposed adjustment issued. Also, the appellant actually said it was "for the avoidance of doubt" that a letter written on 15 July 2004 was to act as its notice of proposed adjustment as it disputed the assessment made by the Commissioner. This

indicates that the appellant, through Mr Henderson, apparently was of the opinion at that time that it did have sufficient information to engage the statutory scheme.

[43] In that part of its second amended statement of claim relating to its application for judicial review, the appellant also alleges that the respondent made untruthful, inaccurate, incomplete, contradictory and deliberately misleading statements as to the nature and extent of the appellant's documents held by the Department and the extent to which they had been returned to the appellant. It is contended that the Department wrongfully stated that it did not hold documents and information about Tannadyce, when it did in fact hold them, and that it subsequently failed or refused to disclose the documents under the Official Information Act 1982. This was despite the fact that the Department had been put on notice by the appellant and knew that these documents were required by the appellant to file its tax returns. The tenor of the pleading invites an inference of sinister intent on the part of departmental officers. In asserting that information was deliberately and improperly withheld, the appellant relies on the fact that 200 Eastlight folders of documents relating to Tannadyce were held by the Department. This came to light when the Department agreed to provide information in response to the appellant's Official Information Act request in 2008. The respondent, however, maintains that much of this is duplicate material, relating not only to Tannadyce, but also to Mr Henderson personally and other companies he is associated with. If correct, this offers a plausible and benign explanation for the events unfolding as they did. Indeed, the lack of specificity in the appellant's statement of claim rather lends support to the view that the "withholding" of documents was not done with dishonest intent.

[44] We are satisfied that, in the absence of detailed information to support the allegations by indicating that there is the type of conduct that takes the act of assessment outside of the exclusionary provisions in the 1994 Act, the statutory challenge process at all times offered the most expedient and appropriate way of addressing the appellant's claims of abuse of power. If it was concerned about the Commissioner withholding documents, either the Authority (under the District Court Rules) or the High Court (under the High Court Rules) could order discovery from the Commissioner and scrutinise compliance with its order. Requiring a taxpayer in the position of the appellant to follow the statutory process in that situation would

not cause prejudice to the appellant. If it transpired that the Department did hold relevant information, its significance could be addressed through the appeal process by which the correct tax position in the relevant years is ascertained according to the evidence heard by the Court. It does not appear likely that the appellant would have been prejudiced by this procedure.

[45] The appellant, of course, preferred not to challenge the assessment in this way within the time allowed. We are satisfied it was not precluded from doing so effectively. This is an approach which the courts have discouraged and ultimately is fatal if the Court considers that, in the circumstances considered objectively, the statutory challenge approach is to be preferred.

[46] Accordingly, in agreement with other members of the Court, we are of the view that the conclusion reached in the judgment of the Court of Appeal was right. For these reasons, we also would dismiss the appeal and uphold the order to strike out the claim for judicial review.

BLANCHARD, TIPPING AND GAULT JJ

(Given by Tipping J)

Introduction

[47] Tannadyce Investments Limited, a company controlled by Mr David Henderson, appeals against the striking out by the Court of Appeal of its application for judicial review of tax assessments made by the Commissioner of Inland Revenue.[71] The first point in the appeal concerns the circumstances in which a taxpayer may seek to challenge by judicial review assessments and other disputable decisions made by the Commissioner. The second point is whether, in the light of those circumstances, the Court of Appeal was correct to strike out Tannadyce's application for judicial review as an abuse of process. Put very shortly and simply,

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[71] *Tannadyce Investments Ltd v Commissioner of Inland Revenue* [2010] NZCA 233, (2010) 24 NZTC 24,341.

Tannadyce contends that it could not make various tax returns required of it because the Commissioner was in possession of, and withheld from it, the documents necessary for it to do so, he having earlier obtained those documents from Tannadyce. It is said that this inability to file returns vitiated the assessments which the Commissioner then purported to make. This is all that needs to be said at this stage in order to introduce the legal issues which must be addressed before further consideration is given to the circumstances of the present case.

Statutory procedures

[48] The Tax Administration Act 1994 sets out procedures whereby taxpayers may contest decisions and assessments made by the Commissioner. In the interests of brevity and simplicity we will, in the following summary, concentrate on the main features. There are essentially two steps involved.[72] The statute describes the first as the disputes procedures and the second as a challenge. The disputes procedures generally follow the filing of a return and go up to the point at which the Commissioner issues an assessment.[73] A challenge follows the issuing of an assessment and is the means by which the taxpayer contests the assessment.

[49] Part 4A of the Act deals with the disputes procedures.[74] Section 89A sets out the purpose of the Part which is to establish procedures that will (i) improve the accuracy of disputable decisions, (ii) reduce the likelihood of disputes arising by encouraging open and full communication between taxpayers and the Commissioner and vice versa, and (iii) promote early identification of the basis of disputes and their prompt and efficient resolution. It is not necessary at this point to go into the details of the Part 4A procedures.

[50] Part 8A,[75] which deals with challenges, takes over if and when the disputes procedures have failed to resolve the matter and the Commissioner has issued an

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72 We leave aside objection proceedings under Part 8 as they are historical.

73 The Commissioner may issue an assessment in the absence of a return; but a taxpayer who has not filed a return cannot dispute an assessment except by filing a return: s 89D(2).

74 Comprising ss 89A–89P.

75 Comprising ss 138A–138S.

assessment which the taxpayer wishes to challenge.[76] In order to do so the taxpayer must file proceedings in a hearing authority, which is defined as either a Taxation Review Authority or the High Court. Taxpayers may elect to have their Part 8A proceedings heard by the High Court rather than by a Taxation Review Authority. A challenge commenced before a Taxation Review Authority can be transferred to the High Court or vice versa.[77] Section 138P sets out in some detail the powers of a hearing authority when considering a challenge. They do not differ as between a Taxation Review Authority and the High Court. In short, a hearing authority may "confirm or cancel or vary" an assessment; it may reduce or increase the amount of the assessment; and, importantly, it is empowered to make any assessment the Commissioner was able to make at the time he made it.

[51] A hearing authority, whether it be a Taxation Review Authority or the High Court, has all the usual powers to deal with preliminary issues ahead of and separately from other matters of challenge. For example, if there is a proper basis for doing so, a hearing authority can deal as a discrete threshold point with a question which, if answered in a particular way, would be conclusive of the whole challenge. The relevant High Court rule is r 7.9, giving the court the power to give directions to secure the just, speedy and inexpensive determination of a proceeding. The corresponding provision for a Taxation Review Authority is reg 29(f) of the Taxation Review Authorities Regulations 1998. This permits an authority to make any appropriate direction appearing to promote the resolution of the proceedings in a just, expeditious and economical way.

[52] Because of their importance in the present case ss 109 and 114, which are in Part 6 dealing with assessments, should be set out in full:

> **109 Disputable decisions deemed correct except in proceedings**
>
> Except in objection proceedings under Part 8 or a challenge under Part 8A,—
>
> (a) no disputable decision may be disputed in a court or in any proceedings on any ground whatsoever; and

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[76] See s 138B. An assessment cannot be challenged unless the disputes procedures have been undertaken.

[77] See s 138N.

(b) every disputable decision and, where relevant, all of its particulars are deemed to be, and are to be taken as being, correct in all respects.

114 Validity of assessments

An assessment made by the Commissioner is not invalidated—

(a) through a failure to comply with a provision of this Act or another Inland Revenue Act; or

(b) because the assessment is made wholly or partially in compliance with—

(i) a direction or recommendation made by an authorised officer on matters relating to the assessment:

(ii) a current policy or practice approved by the Commissioner that is applicable to matters relating to the assessment.

[53] The protective purpose of s 114 is of general application; no assessment is invalidated by any of the circumstances set out in the section. The definition of a disputable decision includes an assessment,[78] so the effect of s 109 is that no assessment or other disputable decision, as defined, may be disputed in any court or in any proceedings on any ground whatsoever, except in proceedings taken under the Act. It is clear that by means of s 109 Parliament was concerned to ensure that disputes and challenges capable of being brought under the statutory procedures were brought in that way and were not made the subject of any other form of proceeding in a court or otherwise.

[54] The words "on any ground whatsoever" must have been designed to emphasise the comprehensive nature of the embargo on bringing proceedings outside the statutory framework. Conversely, Parliament must have contemplated, by the use of those words, that disputable decisions could and should be contested and challenged under the statutory procedures on any ground whatsoever, including the ground that what the Commissioner claimed to be a decision or assessment was not a

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[78] See s 3 of the Act.

decision or assessment at all. If that could be established, the hearing authority's power to cancel on any ground whatsoever would appropriately be invoked.[79]

[55] The advantage Parliament saw in this approach must have been that, whatever the claimed ground of error, illegality or invalidity, a hearing authority, which will be the High Court if the taxpayer so elects, is empowered to adjudicate upon it. Furthermore, the hearing authority can go on in the same proceeding, as far as necessary or appropriate, to determine whether the Commissioner's assessment is correct and, if not, what the correct assessment ought to be. There is thereby no potential for separation of matters of legality from matters of correctness. This leads to a much more efficient and satisfactory process overall, particularly when regard is had to the various time limits that apply throughout the tax administration processes.

Availability of judicial review

[56] Judicial review, as provided for in the Judicature Amendment Act 1972, is a valuable remedy of general application and the conventional means of testing the legality of decisions made by those subject to its reach. Clearly the Commissioner's statutory power to make assessments is, prima facie, within the reach of judicial review. The question is whether, and if so how, the remedy of judicial review can stand with s 109. As the Court of Appeal confirmed in *Bulk Gas Users Group v Attorney-General*, judges should be slow to conclude that a statutory provision ousting or limiting access to the courts was intended to preclude applications to the High Court for judicial review alleging unlawfulness of any kind.[80]

[57] But in the present case, there is no need to strain to reconcile the terms of s 109 with the general availability of judicial review in the interests of preserving taxpayers' access to the High Court when taxpayers need it. This is because the challenge procedure has a built-in right for the taxpayer to take the matter to the

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[79] A hearing authority may address issues otherwise apt to be raised on judicial review: *Golden Bay Cement Co Ltd v Commissioner of Inland Revenue* [1996] 2 NZLR 665 (CA) at 671–672, applying the Privy Council decision from Hong Kong of *Harley Development Inc v Commissioner of Inland Revenue* [1996] 1 WLR 727 (PC).

[80] *Bulk Gas Users Group v Attorney-General* [1983] NZLR 129 (CA) at 133.

High Court, if that is thought necessary or desirable. There cannot therefore be any question of s 109 preventing access by taxpayers to the High Court. Giving effect to its terms does not have that consequence. It cannot matter whether the taxpayer seeks relief from the High Court pursuant to an application for judicial review or pursuant to a challenge under Part 8A. As we have seen, the statutory procedures are framed so as to give hearing authorities power to consider a challenge made to an assessment on any ground whatsoever and to cancel, vary or confirm the assessment as may be appropriate.

[58] But despite the comprehensive scope of the challenge procedure and the powers of hearing authorities, it is necessary to recognise the possibility that there may be rare cases in which it is not practically possible for a taxpayer to challenge an assessment under Part 8A. Indeed Tannadyce claims that the present is such a case. If that is so, proceedings for judicial review cannot be regarded as precluded by s 109 because the premise on which that section is framed, namely the ability of hearing authorities to consider any challenge, on whatever ground, is not present.

[59] We should add, for completeness, that judicial review will also be available when what is in issue is not the legality, correctness or validity of an assessment but some suggested flaw in the statutory process that needs to be addressed outside the statutory regime, because it is not provided for within it. An example might be the case of a well-founded concern that a particular Taxation Review Authority should, for whatever reason, be restrained from considering a challenge; for example because of alleged bias on the part of the Authority. In such a case it would not be the disputable decision that was being disputed in a court but rather the legality of the process by which the challenge to that decision is to be determined under Part 8A. This is a different matter from a challenge to the legality of the process which led up to the making of the disputable decision. That process and any challenge to it directly puts in issue the disputable decision. Hence the challenge to that decision or its antecedents must follow the statutory procedure.

[60] It is important to be clear that the fact that judicial review is very largely excluded in favour of the statutory processes by s 109 does not in any way diminish the general importance and availability of judicial review for examining the legality

of conduct and decisions that fall within its compass. The exclusion of judicial review is a product of the text and purpose of s 109 in its particular statutory setting.

[61] In summary therefore we would hold that disputable decisions (which include assessments) may not be challenged by way of judicial review unless the taxpayer cannot practically invoke the relevant statutory procedure. Cases of that kind are likely to be extremely rare. We will examine whether the present is one of those rare cases a little later in these reasons.

[62] Before doing so, it is appropriate to acknowledge that the conclusion we have reached as regards the availability of judicial review differs from the way the issue has been addressed in various decisions of the Court of Appeal, including the decision in the present case which effectively followed that Court's decision in *Westpac Banking Corp v Commissioner of Inland Revenue*.[81] It is not necessary, for present purposes, to undertake any historical survey of the decisions of the Court of Appeal. The most significant recent case is the decision in *Westpac* just mentioned. In that case the Court of Appeal said:

> [59] ... We accept that judicial review is available where what purports to be an assessment is not an assessment. Associated with this, we accept that judicial review is available in exceptional cases and thus may be available in cases of conscious maladministration (as was recognised in *Futuris*). We can reconcile this with ss 109 and 114 on the basis that in such cases (that is, no genuine assessment or conscious maladministration) what is challenged is either not an assessment or, at the least, not the sort of assessment which the legislature had in mind in enacting those sections. On this basis we see the availability of judicial review as depending on the claimant establishing exceptional circumstances of a kind which results in the amended assessment falling outside the scope of ss 109 and 114 and thereby not engaging those sections.

[63] For reasons already given we do not consider the kind of assessment the Court was there addressing can properly be said to be "not the sort of assessment which the legislature had in mind when it enacted" ss 109 and 114. The purpose of those sections and the comprehensive terms in which s 109, in particular, is framed, lead us to the view that Parliament had in mind that assessments which are

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[81] *Westpac Banking Corp v Commissioner of Inland Revenue* [2009] NZCA 24, [2009] 2 NZLR 99 (CA).

challenged as legal nullities should fall within s 109 as well as assessments which are challenged on other grounds.

[64] The *Westpac* Court took its reference to "conscious maladministration" from the decision of the High Court of Australia in *Commissioner of Taxation of the Commonwealth v Futuris Corp Ltd*.[82] The reasoning in the *Futuris* case was that an assessment which had resulted from conscious maladministration was not an assessment at all for the purposes of the Australian equivalent of s 109. But that equivalent was couched in terms materially different from s 109, as we will show in a moment. Summarising what it took out of *Futuris*, the *Westpac* Court said:

> [52] ... In effect the Court confined judicial review to two circumstances: first, where what is said to be [an] assessment is not in truth an assessment; and secondly, where there has been conscious maladministration. We note, however, that these concepts were, to some extent, run together as both not producing the sort of assessment which is immune from challenge outside the statutory process.

[65] Two statutory provisions were in issue in *Futuris*. They were ss 175 and 177(1) of the Income Tax Assessment Act 1936 (Cth). They provide:

> **175 Validity of assessment**
>
> The validity of any assessment shall not be affected by reason that any of the provisions of this Act have not been complied with.
>
> **177 Evidence**
>
> (1) The production of a notice of assessment, or of a document under the hand of the Commissioner, a Second Commissioner, or a Deputy Commissioner, purporting to be a copy of a notice of assessment, shall be conclusive evidence of the due making of the assessment and, except in proceedings under Part IVC of the Taxation Administration Act 1953 on a review or appeal relating to the assessment, that the amount and all the particulars of the assessment are correct.

As can be seen, the Australian s 175 parallels part of the New Zealand s 114. The Australian s 177(1), while in some respects akin to the New Zealand s 109, is not couched in nearly so comprehensive and exclusionary terms as s 109, with regard to the unavailability of any other proceedings than those under the statute.

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[82] *Commissioner of Taxation of the Commonwealth v Futuris Corp Ltd* [2008] HCA 32, (2008) 237 CLR 146 at [25].

[66] The High Court in *Futuris* held that the crucial matter for the determination of the appeal was the proper construction of s 175.[83] The Court nevertheless went on to make some remarks, necessarily by way of obiter dicta, about s 177(1). Their Honours observed that this section was not a privative clause in the ordinary sense of that term.[84] It did not purport to oust the jurisdiction of any other Court. Its reach was simply evidentiary. That is different from the ex facie reach of the New Zealand s 109 which is clearly designed to oust the jurisdiction of courts generally, other than in proceedings brought under Part 8A.

[67] The decision in *Futuris* is not therefore a sound basis upon which to determine the correct construction and application of the New Zealand s 109. Furthermore, we do not consider the *Westpac* Court, and hence the Court in the present case, gave enough weight to the purpose of s 109, in particular when that section is considered against the availability of resort to the High Court when a challenge is made under Part 8A, and the breadth of a hearing authority's powers under that Part. We have already referred to the Court's strong inclination to read sections like s 109 in a way that preserves the availability of judicial review to deal, at least, with matters of vitiation which render the decision involved no decision in law at all. But that is not the right way to approach s 109 in its particular statutory context. By insisting that the statutory disputes and challenge processes be followed, as s 109 does, Parliament has not deprived taxpayers of the ability to have all their concerns about tax assessments determined by the High Court. The legislative policy evident in s 109 is not at odds with the right of citizens to have matters of legality determined by the High Court. There is therefore no reason to read down, on the premise of presumed parliamentary purpose, the clear and unequivocal words of s 109 and, in particular, its use of the words "on any ground whatsoever".

[68] This approach to s 109 is consistent with the approach the Court of Appeal took in broadly similar circumstances in *Ramsay v Wellington District Court*.[85] At

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83 At [62].

84 At [64].

85 *Ramsay v Wellington District Court* [2006] NZAR 136 (CA) at [28]–[33]. This case also held that judicial review was available only if the basis upon which it was sought could not be determined under the mandated statutory process.

issue in that case was s 134(4) of the then Accident Insurance Act 1998 which provided that if a person had a right to apply for a review or appeal under the Act about a matter, that person had no other remedy in relation to the matter, whether in any court or otherwise. The Court of Appeal construed those words as precluding judicial review. In coming to that conclusion the Court was influenced by the fact that the procedure to which Parliament was limiting litigants was a procedure which enabled them to take the matter to the High Court in appropriate circumstances. Hence the normal concern, recognised in *Ramsay*, about precluding access to the High Court in relation to matters of legality was substantially reduced.[86] In the present case taxpayers may take their challenge to the High Court as of right. That makes this case, if anything, a stronger case than *Ramsay* for construing the words of s 109 in their ordinary and natural sense.

Response to Elias CJ and McGrath J

[69] It is appropriate to respond to the views expressed by McGrath J, in which the Chief Justice has joined. There are two aspects: the procedural and the substantive. Their Honours express concern that the views we have reached were not the subject of argument. The point at issue is, however, ultimately one of statutory interpretation; that is, the proper effect of s 109 of the Tax Administration Act 1994 in its particular statutory context. The responsibility of the courts is to give effect to the true construction of that section irrespective of what the arguments of counsel may or may not have been. The possibility that the view we favour might be the correct one was raised from the Bench during argument.

[70] Substantively, we have not overlooked the previous case law but do not consider it necessary to discuss it in any detail. The essence of the earlier cases was captured in *Westpac*, where the conclusion that there is an exception to s 109 permitting judicial review in exceptional circumstances was perpetuated. We agree

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[86] See also the High Court's application of *Ramsay* in *Phan v Minister of Immigration* [2010] NZAR 607 (HC) at [37] and [41] per Brewer J and the Court of Appeal's similar approach in *Dean v Chief Executive of the Accident Compensation Corporation* [2007] NZCA 462, [2008] NZAR 318 (CA) where it was recognised that if the statutory process cannot be invoked judicial review will be available.

that judicial review performs an important constitutional role. But it is also important that the terms in which Parliament enacts legislation such as s 109 be respected. In our view the words "no disputable decision may be disputed in a court or in any proceedings on any ground whatsoever [except in ... a challenge under Part 8A]" should not be construed so as to create an exception where the circumstances are "exceptional" or where there are "proper grounds" for judicial review, as McGrath J suggests at [35].

[71] The earlier case law, both under the 1976 Act and the current 1994 Act, does not take sufficient account of the fact that hearing authorities (whether a Taxation Review Authority or the High Court) both had and have the same powers as the High Court on an application for judicial review. The earlier case law also seems not to have recognised sufficiently that objection and challenge proceedings, which contain the ability to elect to have the matter dealt with by the High Court, give the taxpayer exactly the same forum, and indeed broader rights and remedies than would be available on judicial review; but with the crucial advantage that all matters at issue can be dealt with at the same time. Requiring the use of the statutory procedures removes the opportunity which the availability of judicial review would present, and has presented, for gaming the system.

[72] There is no disadvantage, constitutional or otherwise, in giving effect to what Parliament has enacted and every reason for doing so. Allowing for an unwritten "exceptional circumstances" or "proper grounds" escape from s 109 would not be consistent with the purpose which Parliament was trying to achieve in what it enacted. In these circumstances it is not appropriate to apply any presumption that Parliament's purpose, when enacting s 109, was to preserve judicial review.

[73] It may be that in a different statutory context words such as those contained in s 109 should be construed as not precluding judicial review. But, in the present context, it is not necessary, for the reasons already given, to adopt that view. Indeed, the best construction of s 109 in its particular statutory context is that it precludes judicial review, save where the statutory procedures could never be invoked.

Compliance with statutory procedures

[74] In light of Tannadyce's argument in the present case it is appropriate to add something about the apparently mandatory nature of some of the steps and requirements in the disputes and challenge processes set out in the Act. In order to demonstrate practical inability to comply with the stipulated procedures, it will not necessarily be sufficient to show that literal compliance with an apparently mandatory requirement was not possible. The courts no longer attempt to classify procedural requirements as strictly mandatory or only directory. No longer does failure to comply with an apparently mandatory requirement lead automatically to the process miscarrying, or to a statutory body such as the Inland Revenue Department having to decline to accept a proffered document. The statutory language or framework may, of course, indicate, particularly as regards time issues,[87] that failure to comply exactly will have certain consequences. But the correct modern approach to procedural requirements is for the courts to focus not on literal classification but rather on what should be the legal consequence of non-compliance with a statutory or regulatory provision. That, as was held in *London & Clydeside Estates Ltd v Aberdeen District Council*,[88] is seldom a black and white issue. Lord Hailsham described a spectrum of possibilities which it is not necessary to cite here.[89]

[75] In *Charles v Judicial and Legal Service Commission*[90] the Privy Council agreed with Lord Hailsham's approach and concluded that the crucial question was whether the legislature intended a failure to comply with a procedural provision to vitiate all that followed. Their Lordships adopted the approach of the New Zealand Court of Appeal in *New Zealand Institute of Agricultural Science Inc v Ellesmere County*.[91] In that case Cooke J, speaking for the Court, said:[92]

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87 See for example *Hawkes Bay Hide Processors of Hastings v Commissioner of Inland Revenue* [1990] 3 NZLR 313 (CA).

88 *London & Clydeside Estates Ltd v Aberdeen District Council* [1980] 1 WLR 182 (HL) at 189–190.

89 Ibid.

90 *Charles v Judicial and Legal Service Commission* [2002] UKPC 34, [2003] 2 LRC 422.

91 *New Zealand Institute of Agricultural Science Inc v Ellesmere County* [1976] 1 NZLR 630 (CA).

92 At 636.

> Whether non-compliance with a procedural requirement is fatal turns less on attaching a perhaps indefinite label to that requirement than on considering its place in the scheme of the Act or regulations and the degree and seriousness of the non-compliance.

[76] There is nothing novel in this approach. It can be traced back at least as far as the judgment of Lord Campbell LC in *The Liverpool Borough Bank v Turner*.[93] There his Lordship said, in relation to the issue of implied nullification for disobedience of a statute, that the duty of the courts was "to try to get at the real intention of the legislature, by carefully attending to the whole scope of the statute to be construed".[94] These principles should be borne in mind by those administering the Act and in particular when the ability of a taxpayer to observe the processes set out for disputes and challenges comes under consideration. As we have said earlier, it will be a rare case indeed in which it will be appropriate to hold that compliance with the statutory requirements was not possible, with the result that the matter in issue was never capable of being resolved under the processes prescribed in the Tax Administration Act.

The present case

[77] The Court of Appeal accurately described the core of the present dispute as involving an allegation by Tannadyce that the Inland Revenue Department had held and continued to hold financial records which Tannadyce needed to file its income tax returns for the years 1993–1998. The Department originally maintained that it had returned all documents belonging to Tannadyce. Quite recently, however, the Department was constrained to accept that it was still holding documents relating to Tannadyce.

[78] In August 1999 Mr Henderson filed on behalf of Tannadyce a "global" return for the relevant tax years, together with such supporting accounts and information as he was able to provide. The global return claimed losses for the tax years in question totalling $1,539,733. This return was a response to the issue by the Department, on 5 March 1999, of a default "nil" assessment for the relevant years. This assessment

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93 *The Liverpool Borough Bank v Turner* (1860) 30 LJ Ch 379 (CA).

94 At 381.

was reissued on 25 May 2004 after various communications between the parties and other steps had failed to resolve matters. In October 2006 the Department issued assessments for the 2000–2004 tax years. Those assessments did not make provision for the losses Tannadyce had claimed as available to be carried forward in its earlier global return. The crucial question, in terms of the earlier legal discussion, is whether Tannadyce has established a sufficient factual foundation for its contention that it was not practically possible to bring challenges under Part 8A to the several assessments issued to it.

[79] Mr Forbes QC, for Tannadyce, submitted that this was not possible because Tannadyce did not have the documents which were necessary for the mounting of such a challenge. They were in the possession of the Department which, at all material times, was withholding them from Tannadyce. Counsel supported his argument by referring to ss 89D and 89F of the Act. These sections are in Part 4A dealing with the disputes procedures. Section 89D provides that, if the Commissioner issues a notice of assessment to a taxpayer, the taxpayer may issue a notice of proposed adjustment (NOPA). Section 89D(2) says that a taxpayer which has not furnished a return may dispute the Commissioner's assessment only by furnishing a return.[95] Tannadyce's argument is that its inability to file individual returns, for want of the necessary documents, prevented it from disputing the Commissioner's assessments and hence from making a challenge to them under Part 8A.

[80] Section 89F deals with the content of NOPAs. Subsection (3) requires any NOPA issued by a disputant taxpayer to:

> (a) identify the adjustment or adjustments proposed to be made to the assessment; and
>
> (b) provide a statement of the facts and the law in sufficient detail to inform the Commissioner of the grounds for the disputant's proposed adjustment or adjustments; and
>
> (c) state how the law applies to the facts; and

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[95] Section 33 specifies the requirements for a return.

> (d) include copies of the documents of which the disputant is aware at the time that the notice is issued that are significantly relevant to the issues arising between the Commissioner and the disputant.

Again, the argument is that without the necessary documents Tannadyce could not serve a valid NOPA and could not therefore further its dispute and, on that account, could not make a challenge under Part 8A.

[81] For the Commissioner, Ms Clark QC submitted that it was practically possible for Tannadyce to follow the required statutory procedures. She contended that this was shown, at least to a substantial extent, by what Tannadyce had in fact done. In particular Ms Clark referred to the fact that Tannadyce had been able to file a global return. Furthermore, in a letter written on 15 July 2004 Mr Henderson had written to the Department:

> For the record, and avoidance of doubt, the assessment you have filed is disputed. In the absence of your cooperation to provide copies of the records you hold, this document and the previous returns filed are to stand as our NOPA.

[82] The reference to "this document" was to the letter itself in which Mr Henderson had earlier said that Tannadyce was "satisfied that its returns have been filed, received and accepted by the IRD". Ms Clark submitted that it hardly lay in Tannadyce's mouth to maintain it could not file its returns and NOPA when it had earlier professed that this is exactly what it had done. The global return seems, initially at least, to have been accepted by the Department but several years later the Department took the stance that the global return was not a sufficient compliance with the statutory requirements.

[83] While it might appear that the Department's ultimate stance as regards the global return and Tannadyce's NOPA prevented Tannadyce from invoking the challenge procedure, the reality is, for reasons to which we are about to come, that Tannadyce has not shown that if it had been in possession of the documents held by the Department it would have been able to invoke the challenge procedure.

[84] In order to resist the striking out of its application for judicial review, Tannadyce was obliged to establish a sufficient factual foundation for its contention

that it was not practically possible for it to follow the statutory procedures. Because of the clear parliamentary indication in s 109 that, if possible, the statutory procedures must be followed, litigants who seek to invoke judicial review and are challenged by way of an application to strike-out must persuade the Court that there is a valid basis for invoking judicial review. If the strike-out test were not at that level the whole purpose of s 109 would be open to subversion.

[85] It is particularly significant that Tannadyce has never pointed either in its pleadings or in argument, with any clarity or specificity, to what documents it was lacking to enable it to comply with the statutory disputes and challenge procedures. Nor has Tannadyce ever said, with any clarity or specificity, what documents it claims to be in the hands of the Department. The allegations Tannadyce has made have consistently been general in nature. It is perfectly plain that Tannadyce had sufficient information and records to enable it to file the global return. We do not consider it would have been a difficult exercise, if necessary by way of reasonable estimation, to have apportioned the global return between the various tax years that were in issue.

[86] It is also of some considerable significance that the global return was able to claim a loss for the years in question down to the last dollar. There was no suggestion of any need for estimation. Furthermore, according to evidence to which counsel referred in the course of argument, Tannadyce had not been trading since 1992. How the claimed inability to file returns or a NOPA in respect of the 1993–1998 tax years could be reconciled with cessation of trading in 1992 was not satisfactorily explained. In the same vein Tannadyce recorded in the notes to its financial statements for the year ended 31 March 1992 that this was its first year of operation. Hence its trading activities cannot, so it seems, have lasted for much more than 18 months at the most.

[87] For these various reasons we are satisfied that Tannadyce has not shown a valid basis for its contention that it was not practically possible for it to comply adequately with the statutory requirements. We therefore consider the Court of Appeal came to the right conclusion in ordering that Tannadyce's application for

judicial review should be struck out. The appeal must accordingly be dismissed with costs.

Solicitors:
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