IN THE SUPREME COURT OF NEW ZEALAND SC 8/2012

[2012] NZSC Trans 8

BETWEEN **COMMISSIONER OF INLAND REVENUE**
Appellant

AND **REDCLIFFE FORESTRY VENTURE LIMITED**
First Respondent

GARRY ALBERT MUIR
Second Respondent

ACCENT MANAGEMENT LIIMITED
Third Respondent

LEXINGTON RESOURCES LIMITED
Fourth Respondent

BRISTOL FORESTRY VENTURES LIMITED
Fifth Respondent

BEN NEVIS FORESTRY VENTURES LIMITED
Sixth Respondent

CLIVE RICHARD BRADBURY
Seventh Respondent

GREGORY ALAN PEEBLES
Eighth Respondent

Hearing: 19 June 2012

Court: Elias CJ
Tipping J
McGrath J
William Young J
Gault J

Appearances: B W F Brown QC, T G H Smith and J D Kerr for the Appellant
C T Gudsell QC for the First and Second Respondents
M S Hinde for the Third and Fourth Respondents
R B Stewart QC and N S Gedye for the Fifth, Sixth, Seventh and Eighth Respondents

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CIVIL APPEAL

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5 **MR BROWN QC:**

May it please your Honours, I appear with Mr Smith and Ms Kerr for the Commissioner.

ELIAS CJ:

Thank you Mr Brown, Mr Smith, Ms Kerr.

MR STEWART QC:

May it please your Honours, I appear with Mr Geddes for the fifth to eighth respondents.

ELIAS CJ:

Thank you Mr Stewart, Mr Gedye.

MR GUDSELL QC:

May it please your Honours, I appear for the first and second respondents.

ELIAS CJ:

Thank you Mr Gudsell.

MS HINDE:

May it please your Honours, Ms Hinde, I appear for the third and four respondents.

ELIAS CJ:

Thank you Ms Hinde. Yes Mr Brown.

MR BROWN QC:

I hope your Honours will have written submissions, two bundles of authorities and a small bundle of material that was handed up on Friday which comprises five matters, a better copy of the *McGechan on Procedure* commentary, the former and current UK rule relating to what is now called disputing the Court's jurisdiction and then the House of Lords' decision in *Kuwait Airways Corp v Iraqi Airways Co* [2008] EWHC 2039 (TCC) and the subsequent decision of Justice Steel in the Commercial Court in England. And I will speak to those submissions.

I will commence with an overview, your Honours, to try and capture the issues that are raised in this appeal. Some nine months after the delivery of this Court's decision in *Ben Nevis Forestry Ventures Ltd v Commissioner of Inland Revenue*

[2008] NZSC 115, [2009] 2 NZLR 289, the respondents brought the new proceeding that is now before you, which sought to set aside the first instance decision of Justice Venning in December 2004. The Commissioner filed a protest to jurisdiction under r 5.49 and Justice Venning accepted that he did not have jurisdiction to consider that new proceeding and he dismissed the proceeding.

The Court of Appeal reversed that decision. The decision is in the pink volume, under tab 13. And its reason for doing so was it viewed that r 5.49 was not the appropriate vehicle for the challenge. The Court of Appeal considered that a strikeout application under r 15.1 was the appropriate course, and hence the Court of Appeal's reference at paragraph 58 of its judgment on appeal, turned on a relatively confined issue but the basis for that conclusion was the Court of Appeal's view that the Commissioner's protest which was at the High Court, was functus officio, that the matter had reached this Court and a question of law was involved.

The Court of Appeal's view was that that was not a challenge to jurisdiction in the strict sense, rather it was a challenge to what the Court of Appeal called jurisdiction in the broader sense and on that basis, the Court considered that being a challenge in the broader sense, r 5.49 did not apply because it would only apply in its view to a strict sense jurisdiction issue and on the grant of leave, two questions were approved by the Court. They are under tab 2, at page 8 of the pink volume.

First of all, whether the Commissioner's challenge was appropriately brought under 5.49 which, in our submission, directly raises the issue of the meaning of strict jurisdiction and whether a functus officio challenge is encapsulated within strict jurisdiction. Secondly, whether the judgment of the High Court, that is Justice Venning, should have been upheld in any event. So they're two distinct strands, the second would, in a sense, almost presuppose failure on the first but it doesn't necessarily.

Now, on the, what I think is the primary issue, the proposition that this is in some way a fraud case that justifies a proceeding being entertained by the High Court to set aside its decision with the ramifications it has for the decision of the Court of Appeal but more particularly this Court and *Ben Nevis*. Our case is captured in six propositions which I'll put in this way –

WILLIAM YOUNG J:

Are they in your submissions, or are they –

MR BROWN QC:

No, these are really a distillation, or trying to capture the key points. They are in the submissions but not in this manifestation. Firstly, and one suspects this will be common ground, where a final judgment is sought to be impugned as having been obtained by fraud, such that the true state of the evidence amounts to new subject matter not previously before the Court, in a sense, a horizontal extension to the factual substratum that was before the Court, then the mode of challenge is by a fresh proceeding in a trial Court alleging and proving fraud and that is clear from the decision of many decisions but we put up, as an example, the House of Lords decision in *Kuwait Airways Corporation* and you will find a very clear statement of that by Lord Slynn at paragraph 24, where he refers to this principle and I draw attention in particular at paragraph 24 to his words, "A challenge to the decision on the basis that it had been obtained by fraud, must be made by a fresh action alleging and proving the fraud."

Then we see the consequences of that, having, in paragraph 47, made that ruling and in a subsequent paragraph saying, "Well the proper way to proceed with this," at paragraph 26 you will see the quotation from Lord Diplock in *De Lasala v De Lasala* [1980] AC 546 (PC) and the reference to a fresh cause of action, or a fresh proceeding and that was what came before Justice Steel after the House of Lords decision and relevant paragraphs in this judgment are at paragraphs 147 and 149, where he found that perjured evidence had been given in relation to the activities of the Iraqi Airway Corporation and that perjured evidence meant that he was presented with a new evidential substratum and he then proceeded to exercise the setting aside jurisdiction, as only the trial Court could in that scenario.

The second proposition is this. Where the attack on a judgment –

McGRATH J:

Just before you leave the first proposition.

MR BROWN QC:

Yes.

McGRATH J:

Those authorities don't seem to, directly anyway, address the element of your proposition that the true state of the evidence is new –

MR BROWN QC:

Well the –

McGRATH J:

– which is a qualification that you've obviously got to the propositions?

MR BROWN QC:

Well they do in this sense your Honour, that the – when you have perjured evidence and it is found that evidence is perjured and the proper evidence is different from that that was before the trial Court, that is due subject matter. It is not the same chrysalis of material that the trial Court had.

McGRATH J:

But your argument, I think in this case, is that this is not a case in which is based on false evidence, if you like, it's –

MR BROWN QC:

No, it's not about –

McGRATH J:

– based on something else and you've introduced into your first proposition a qualification by reference to the state of the evidence being new. All I'm saying is that when you get to deal with the authorities in more detail I would wish to see something that indicated that a proposition of, if you like, misleading on the law is not covered.

MR BROWN QC:

I see your Honour. Well I understand that and I will bear that in mind.

McGRATH J:

Thank you.

MR BROWN QC:

It's essential to our proposition however, that the setting aside of jurisdiction relates to evidence, relates to facts or documents, to perjury, to the factual substratum having changed. The second –

TIPPING J:

Well the fact – as a result of the proved fraud, the facts must now be shown to be materially different.

MR BROWN QC:

Exactly, exactly.

TIPPING J:

That's as I've always understood it.

MR BROWN QC:

That's right and that's why the – and what's more materially different in the sense that the judgment is obtained by fraud –

TIPPING J:

Yes, exactly.

MR BROWN QC:

– there's a causation element there. The second proposition and I'm sorry Justice McGrath if I've caused a difficulty by sort of emphasising the new material but it's academic to the proposition that we make because we are distinguishing the situation where the error that is complained of is an error of law. It doesn't go to fact at all. The facts remain the same. The proposition is – and this is the key point we'll come to in relation to my learned friend's argument, is that the law that should have been applied was different and our second proposition is where an attack on a judgment is founded on an alleged error of law, that is some departure from the principle that was applied in the previous litigation, then the proper route is the appellate process in the original litigation and that is captured – if I can take you to our written submissions at paragraph 62.

We say that we're unaware of any case in which the High Court has asserted jurisdiction to reopen a judgment on the basis that it was not properly informed as to the law except by way of the re-call jurisdiction which, of course, cannot survive an

appeal from the judgment and the most dramatic statement of that is really the statement of Lord Jessel in *Re St Nazaire Co* (1879) 12 Ch D 88 (CA) which is in our second and larger bundle of authorities.

The first bundle deals with the cases, with procedure and the *Trinity* cases. The second volume deals with other cases and under tab 17 you will find the decision of the Court of Appeal in the *Re St Nazaire Co* case and the passage that I'm referring to is a rather stirring passage at the bottom of page 96 and the top of 97 where, in the last four lines of 96, he says, "Therefore we consider the original or an amended petition. It's a petition presented to a Judge of the High Court to re-hear a decision of the Appeal Court. I should have thought the mere statement of that would be sufficient to show that the Judge below had no jurisdiction. It would be a wonderful result indeed if the Judicature Act empowered a Judge in an inferior Court to re-hear a decision of the Appeal Court which perhaps had reversed his decision. Upon that theory, how long is the thing to go on? If the Judge below has this power, he may exercise it by reversing the decision of the Appeal Court where the Appeal Court has reversed his decision." You can see immediately, of course, facts, evidence, are an entirely ambit –

TIPPING J:

It's interesting that his Lordship uses the word "jurisdiction".

MR BROWN QC:

Yes, it is. Although jurisdiction –

McGRATH J:

The re-hearing must postulate, this is your argument, that the re-hearing must postulate a situation in which the facts are the same and that's what he's saying can't take place.

MR BROWN QC:

That's right, that is right. Now, the third point, is that the essence, no matter how it's dressed up, the essence of the respondents' complaint concerns the asserted applicability of section EH of the Income Tax Act which the Court will remember was sought to be ventilated in the course of the argument before this Court in *Trinity*, where Mr Gudsell sought leave to advance that argument in this Court, heard, entertained – heard the submission and then refused to entertain it.

Now such a complaint concerns an alleged error of law and on that point we say – and if I could take you to the judgment of Justice Venning which is in the pink volume under tab 7 and at page 52, paragraph 51. I appreciate I'm plunging you right into the middle of the decision but this is pivotal to his decision, paragraph 51 on page 52. He says, "No matter how it's pleaded, nor how artfully counsel may seek to phrase it, the underlying basis of the allegation of the false case by the plaintiffs in this case is that the Commissioner was wrong as a matter of law, or had no proper basis to have assessed tax in relation to the licence premium, one aspect of the black letter law, by applying EG rather than EH."

Then a couple more sentences and he said – and this is specific to your Honour Justice McGrath's question, he said, "Unlike evidence, the applicability of a statutory provision cannot by definition be concealed or suppressed. The present case is far removed from the presentation of false case as that phrase has been applied and understood in the authorities cited by the plaintiffs," and really, our – I think the case pivots on whether the Court agrees with that paragraph.

So, I say no matter how the proposition is dressed up and it certainly has been variously attired in my learned friend's submissions, or no matter how much it is directed personally at officials of the CIR or indeed, their solicitors because that is how the statement of claim is drafted, it's a matter of law.

TIPPING J:

Are there particulars of the fraud alleged?

MR BROWN QC:

No your Honour, the –

TIPPING J:

Because there ought to be in there aren't.

MR BROWN QC:

Well –

TIPPING J:

In the pleading I mean.

MR BROWN QC:

The pleading is under tab 3. I don't want to –

TIPPING J:

I don't want to divert you Mr Brown but this seemed like a convenient moment to be informed on this point. I haven't read the pleading.

MR BROWN QC:

No. Well, in my submission, what this pleading raises and what the pleading in the *Accent Management Ltd v Commissioner of Inland Revenue* [2007] NZCA 230, (2007) 23 NZTC 21,323 case raised is that this proceeding was commenced nine months after *Ben Nevis*. The *Accent Management* case, which purported to be a judicial review of the same assessments, went to Justice Keane, and was commenced four days after this Court's decision in *Ben Nevis*.

That pleading which is also here, this pleading and indeed, the argument that was in an endeavour to persuade this Court to entertain EH, all raise the same essential matters and indeed, they're listed in my learned friend Mr Gudsell's submissions to this Court in 2008 and they're listed in various materials here. But they all involve – if we look at the pleading under tab 3 and go to page 16, paragraph 31, there is the asserted obligation that the Commissioner had an obligation to refer the authority and opposing counsel to the existence, application and effect, a VH8, as if that wasn't known because Ms Lloyd was actually cross-examined in the first instance before Justice Venning about EH but you move to 34 –

WILLIAM YOUNG J:

It is actually in – the section EH, is it section EH, or part EH?

MR BROWN QC:

It's part EH.

WILLIAM YOUNG J:

Right, part EH was referred to in the initial NOPA, wasn't it?

MR BROWN QC:

Yes, there were alternative ways that the – Ms Lloyd explains in her affidavit, which is also in the bundle, the difficulties the Department had in assessing and deciding whether it was a financial arrangement and all that of course was discussed with your Honours in *Ben Nevis*, the promissory note, that it was deferred payment and all the rest of it.

McGRATH J:

Is it part of your argument that we can take into account these matters, or are they more relevant perhaps in a strikeout context, if at all?

MR BROWN QC:

My argument is – and I'll jump right to it. When we come to jurisdiction and I'm jumping right beyond my six points here, I will submit to you that a fraud setting aside case is really sui generis, in as much that the Court has to be satisfied, before it even engages with the case, that it has jurisdiction and in a phrase that my co-counsel have encouraged me not to use but which Lord Justice Willmer and Lord Justice Diplock used in the *Garthwaite v Garthwaite* [1964] P 356 (CA) case, they talked about a "proleptic" inquiry, which I had to look up, but it means looking at something and having done so, stepping back and deciding whether you have jurisdiction or not in limine but there has to be this inquiry as to whether the Court has jurisdiction, has a properly fraud case pleaded before it.

Albeit, *Garthwaite* was a domicile case where the Court actually has to be satisfied it has – the party is domicile –

McGRATH J:

I think that's enough for my purposes. You're saying fraud is special and –

MR BROWN QC:

Fraud is special.

McGRATH J:

– before you go back to your six points, are you going to finish the pleadings, explaining the pleadings to us because I think –

MR BROWN QC:

Well yes –

McGRATH J:

– there was a document handed in at some stage in the Court of Appeal that might be relevant to that too.

MR BROWN QC:

Yes, there was a – well, I wasn't going to go to that, I mean, my learned friend has – there have been various, sort of, various collections of material handed up but they all go to this proposition that the Department knew about EH and there was some collusive strategy to not disclose either EH, which of course is absurd, because EH was known, or that the Department really believed that EH was the operative provision. The thesis being, I think, that although it was essential to the arrangement that EG be deployed and that you have the Court member and the Court – I know Justice Gault and Justice Tipping, I've looked at the transcript, both discuss this issue, the deductions were flat line as opposed to a sort of Richter scale graph that all the benefit comes at the end.

They all deal with that theory of suppression of that belief as to the law and you only have to sort of look at that and say well, how would you deal with that even in cross-examination. Justice Woodhouse pursued this recently in the same litigation, when there was an attempt to have the Crown Law people not appear in the litigation now and saying well, what would you cross-examine on, à la *Penny v Commissioner of Inland Revenue* [2011] NZSC 95, [2012] 1 NZLR 433, do you put to some counsel – you know, when you made that submission you really, really believed that some other section applied. You haven't put your best case and you had an obligation to us to put your best case against us, this is what it comes down to.

TIPPING J:

If this one that all the fuss is about now, EH is it?

MR BROWN QC:

Yes.

TIPPING J:

If it had applied, would that have been better for the respondents?

MR BROWN QC:

Well no, they would never have framed the arrangement because EG was fundamental to the arrangement. I think what it really comes down to saying is that if you had pressed harder on EH and we had decided not to make the arrangement, then we wouldn't have ended up as tax avoiders and all would be well. It's sort of the like the Omar Kiam, the hand is –

WILLIAM YOUNG J:

Well, can I just put it as I understand it and no doubt Mr Stewart will correct me, or alternatively, adopt what I say later. If part EH applied, then the practical result would be pretty similar in terms of taxation liabilities, in that the deductions would have been largely disallowed but there would have been a very small allowance for the frontend under the accruals regime. There would also perhaps have been an argument that the notwithstanding provision in part EH excluded the general anti-avoidance provision but in reality, the end position of the taxpayers would have been practically the same as it was as a result of the Supreme Court decision. At best, they would have got a very small deduction.

MR BROWN QC:

Mmm. They would also not be liable for penalties –

WILLIAM YOUNG J:

Well –

MR BROWN QC:

– as a result of not having been in a tax avoidance arrangement and the like.

WILLIAM YOUNG J:

Well maybe. The tax avoidance, because the Commissioner was arguing that the insurance premium and the licence premium were not deductible is a matter of black letter law anyway, which would have resulted in section BG not applying but the Commissioner was still seeking penalties on the basis that the whole deal wasn't a goer anyway –

MR BROWN QC:

That's right, that's right, this is –

WILLIAM YOUNG J:

– and presumably –

MR BROWN QC:

– basis that you don't get – you'd have to – it would be long after your death that you would have had any benefits –

WILLIAM YOUNG J:

Yes but –

MR BROWN QC:

– and the chart is in the volume, volume 4, at page 749, as to the different, shall we say, deduct –

WILLIAM YOUNG J:

What I'm really getting at, would it make a difference, in terms of penalties, if the taxpayers had failed on part EH, in the alternative to failing for avoidance, would the position they adopted by any the less unacceptable?

MR BROWN QC:

I'm wrestling with the unacceptable your Honour. The penalties flow from the tax position that the taxpayers take, not the correct position, and if they assess themselves in effect on the basis that this is –

WILLIAM YOUNG J:

A $2 million deduction and it's only actually tuppence ha'penny –

MR BROWN QC:

Yes and that is –

WILLIAM YOUNG J:

– then –

MR BROWN QC:

– if that is found not to be the correct position then of course penalties follow, but if it's found also that there's a tax avoidance arrangement, then of course it doesn't automatically follow that you move into the necessary serious level of penalties, but that is frequently the position.

WILLIAM YOUNG J:

Now, what I'm interested in is what the supposed motive for the Commissioner to present a false case is said to be? What advantage for the Commissioner was there in succeeding on section BG, as opposed to on part EH? It can't really be the difference between tuppence ha'penny deductions at best and no deductions?

MR BROWN QC:

Well I don't mean to be evasive but I don't think I'm the one to which that question is directed.

WILLIAM YOUNG J:

All right, okay, well I've signalled that I'm going to ask Mr Stewart that then.

TIPPING J:

Now at paragraph 34 of the statement of claim which we were looking at Mr Brown, this is these particulars of fraud. The defendant is referred to generically as "the defendant", no particular officer or person whose mind was said to be fraudulent with supporting particulars as identified here, that I can see. It's all "the defendant"?

MR BROWN QC:

Yes, it's a collective, although when you look at paragraph 31, the obligation is said to extend not only to the defendant but also to solicitors employed or attained by the defendant –

TIPPING J:

Yes but no person is alleged –

MR BROWN QC:

No.

TIPPING J:

– to have known anything. It's just – and I don't imagine they mean the Commissioner personally because there would have to be some particulars of how he knew certain things, so the whole thing is very amorphous.

MR BROWN QC:

Well that may be, I mean, and of course my learned friends might reply to that by saying well, until we get discovery and derogatories and all the rest of it we can't progress that, but we say this is flawed from the very start, this can't –

GAULT J:

Is the situation that, before the Court of Appeal, it was said that there will be amended pleadings and have we got in front of us the final pleadings?

MR BROWN QC:

In the Court of Appeal in this series?

GAULT J:

Yes.

MR BROWN QC:

Yes, my learned friends always argue, well of course, we were taken by surprise, this is something of an ambush, we haven't sort of had the chance to put our best case forward on fraud –

GAULT J:

But they haven't sought to do that.

MR BROWN QC:

No, we get bundles of material referred to but we say and that's why paragraph 51 of Justice Venning, we say is essential. It doesn't matter how you try and draft it and I think his word "artfully" is – though he's very careful in his words, I think it conveys a great deal. You cannot package this complaint about part EH as evidence, as fact, that brings, invokes, or justifies, the High Court, as we're starting again on the fraud jurisdiction, the setting aside jurisdiction, that we see in *Kuwait Airways Corporation*.

McGRATH J:

I suppose, I think that you would also recognise that if an error of law was induced, there would always be the possibility of an application for re-call –

MR BROWN QC:

Yes.

McGRATH J:

– but that would have to be made to the Supreme Court –

MR BROWN QC:

Exactly –

McGRATH J:

– rather than to the High Courts and –

MR BROWN QC:

– that has always been our position and indeed, I think, I believe it's recorded in the Court of Appeal's decision, that we made that submission and that's why we have to –

McGRATH J:

I don't think it's in dispute but it just seems to me as the final – you're not ruling out error of law, a sort of a complete oversight –

MR BROWN QC:

No.

McGRATH J:

– whether induced by bad conduct or not –

TIPPING J:

Well it would have to be something within the re-call rubric.

MR BROWN QC:

Yes.

TIPPING J:

You can't just come along and say well, we overlooked something and it might have made a difference. It's got to be a king hit just about, hasn't it, if it's an error of law that's...

MR BROWN QC:

I don't think I need to go too far –

McGRATH J:

No.

MR BROWN QC:

– on that. I mean, in terms of *Saxmere Company Ltd v Wool Board Disestablishment Co Ltd* [2009] NZSC 72, [2010] 1 NZLR 35 (SC) and *R v Bow Street Metropolitan Stipendiary Magistrate ex parte Pinochet Ugarte (No 2)* [2000] 1 AC 119 (HL), this Court has the power, in my submission, to entertain a re-call, it's in the original proceeding, it's not this idea of we're asking this Court to grapple with this proceeding, it's in that original proceeding, it can re-call and if it sufficiently sees a serious error of law, the Court might entertain it –

McGRATH J:

It's pretty tightly circumscribed, that's your point –

TIPPING J:

What I'm having difficulty with Mr Brown and maybe I'll just let you run on this, is it's not as if section EH was – or part EH, was overlooked in this Court –

MR BROWN QC:

No.

TIPPING J:

– it was expressly asked to be raised –

MR BROWN QC:

Yes.

TIPPING J:

– and for reasons that were given, it was refused. So where's the problem?

MR BROWN QC:

Well I think the problem – and I find this the most, the hardest thing, well the most surprising thing to deal with. I think that, in theory, what happens is this: counsel runs before this Court in 2008 wanting to raise a new point and the Court says well, you can't raise that now because this is the structure of the tax processes and the

NOPAs and laws and no we won't and so, counsel walks out of the Court and says, oh well that doesn't matter because I go back and I raise it with the High Court because the Supreme Court hasn't dealt with it and that's exactly what they're seeking to do, start again and it's a sort of a brazen proposition that if you can't get this Court to entertain it, then you just go back to the first instance Court and it comes back up through the process and you will be presented with it, as it were, irrevocably, notwithstanding –

TIPPING J:

Well presumably, lower down, before the Supreme Court, the respondents didn't think that EH was a runner, or they didn't think it was worth raising. It's pretty odd to suggest that they weren't aware of it.

MR BROWN QC:

Well you wouldn't want to, you wouldn't want to be running it as a respondent because EG is critical to the arrangement that you present and that the Commission then attacks as being avoidance. This is very much a revisitation of the world, consequent upon their resistance, or their challenge because it's their case, they're the plaintiff and even in the original case, they having failure on avoidance. Now they say well, forget all that –

WILLIAM YOUNG J:

We should have failed on something else.

MR BROWN QC:

Yes.

McGRATH J:

Mr Brown, I think we can probably get back to the pleading and I take it that really, in so far as the original pleading is concerned which is I think the current pleading, the kernel of the fraud allegation is, you're saying, is really in paragraphs 29 to 32, is that right?

MR BROWN QC:

Yes, that's right.

McGRATH J:

In any event, 33 refers to the judicial review proceeding. Now that's presumably the proceeding that Justice Keane decided, is that right?

MR BROWN QC:

Yes, yes.

McGRATH J:

An appeal was brought against that but was abandoned?

MR BROWN QC:

Yes, what happened was the, Justice Venning's – although the *Accent* case started first, nine months ahead, Justice Venning's decision was delivered about three months before Justice Keane, Justice Keane delivered his judgment without reading Justice Venning's judgment. So then Justice Keane issued another judgment, granting indemnity costs to the respondents, on the basis – the reasons he'd struck the case out, abuse of process and basically, it's the very matters that we're discussing here again because we say that, although crafted as a judicial review attacking the assessments, they raise essentially the same issues as the *Redcliffe* proceeding before Justice Venning.

Now the Commissioner applied to consolidate what were then four cases: there was Justice Keane's judgment on the main issue, Justice Keane's cost judgment, there was Justice Venning's judgment and another judgment and sought consolidation and come to the Court of Appeal at the same time. In the back of our [material], under tab 2 of our submissions, you will find a quite detailed chronology, which is helpful to identify this and you will see, this was interspersed with a whole lot of other matters, like judicial complaints, Commissioner about Justice Venning and that were all said to justify adjournments.

For example, on 12 May you'll see an adjournment application was made to the Court of Appeal that Justice Arnold declined. That had followed on 20 April the appellant seeking indefinite adjournment of the Court of Appeal fixture until the judicial Commissioner complaints had been resolved and the Commissioner had applied and succeeded in having these things consolidated and then, with the then appeal date looming of 24 June, you'll see on 7 June notices of abandonment of appeal were filed in all the *Accent Management* matters and the one other *Redcliffe*

matter, leaving this particular *Redcliffe* matter and that hearing was then adjourned from June to 17 August, when it was heard.

So the significance of Justice Keane's judgment applies when we come to this Court's approved question 2 because we say, even if the Court of Appeal was right on r 5.49 and, in my submission, they clearly weren't but even they were right and even if this Court then said well, first question is answered in favour of the Court of Appeal's, we say that for a number of reasons, including the intervening abandonment of the *Accent Management* appeals, that then to pursue this was a collateral attack on Justice Keane's conclusions and it should have been dismissed as an abuse of process at that point. So that's how they intertwine.

Although, it's fair to say also, that it can be illuminating to look at the pleading, I don't want to take you there just now because of other things I want to say but just as the pleading in the case before Justice Keane bears significant similarities to the pleading in this case and that is reflected in the yellow volume, you will find our Court of Appeal submissions and in those submissions there is a chart – sorry, I'll just find the reference.

It's at page 283, this is under tab 25, which are our submissions in the Court of Appeal in *Redcliffe* and at 283 you will see a schedule of the comparison of pleadings and unappealed findings. So you will see, in the left-hand column – sorry, this is a landscape presentation where we sought to capture the point, being the nature of the *Redcliffe* claim, the point being made, the nature of the claim made in *Accent Management* and the *Accent Management* findings. So there's essentially a continuum in all of that material. Indeed, that continuum largely starts with the written and oral submissions of my learned friend Mr Gudsell in this Court in 2008, when he sought to have this Court entertain the EH point.

Now, I'd got to my third point. I'd like to deal with four, five and six. We say that because the respondents real complaint –

WILLIAM YOUNG J:

Sorry, you've lost me. What was your third point?

MR BROWN QC:

My third point your Honour, was that the essence of the respondents' complaint concerns law.

WILLIAM YOUNG J:

Oh sorry, right.

MR BROWN QC:

So the first point is the law on setting aside on fact. The second point is an error of law is different. The third point is that they are raising an error of law and the fourth point is the point that you've really just engaged me with, is that because the real complaint is error of law because *Ben Nevis* reached this Court, it follows that only this Court may entertain the point but there's more to it than that. It's this. That the High Court thereby is not competent and I used that word advisedly because I'll be taking you to the discussion about strict jurisdiction, in particular in the House of Lords decision in *Tehrani v Secretary of State for the Home Department* [2006] UKHL 47, [2007] 1 AC 521 we say the High Court is not competent to now entertain that issue of law. If any Court is going to entertain it, it would be this Court and –

ELIAS CJ:

Well that's a strict sense of jurisdiction.

MR BROWN QC:

Yes –

ELIAS CJ:

Yes –

MR BROWN QC:

– absolutely and the fundamental –

ELIAS CJ:

– and for your argument, it's not necessary to apply the English rule which seems to be wider.

MR BROWN QC:

The English rule, the new rule –

ELIAS CJ:

Yes.

MR BROWN QC:

– helpfully, if I could just take you to the part of the bundle –

ELIAS CJ:

Don't if it interrupts your argument.

MR BROWN QC:

Well what I'm going to say about jurisdiction your Honour is this, I'm going to say that there is no such thing really as broader jurisdiction. I would say to you there is not an umbra of strict jurisdiction and a penumbra of broader jurisdiction. The Court either has jurisdiction or it doesn't. There is –

TIPPING J:

Is a substitute or a synonym for jurisdiction, in this context, power?

MR BROWN QC:

Well the exercise –

TIPPING J:

Exercise of power, if you like.

MR BROWN QC:

– of the jurisdiction and that is why I was going to take you to the English rule which is currently framed as quite helpful because it explains that you can dispute the jurisdiction of the Court, either the Court's power to try, power to do it, or how it exercises it. Now, in fact, I'm not –

ELIAS CJ:

But our rule doesn't go that far –

MR BROWN QC:

No –

ELIAS CJ:

– and it's not necessary, it seems to me, for your –

MR BROWN QC:

No, it isn't.

ELIAS CJ:

– argument to go further because you're saying that this is a question where the High Court was not able to enter into the inquiry, not able to entertain the question that the plaintiffs were raising because only the Supreme Court would have jurisdiction.

MR BROWN QC:

Yes. The High Court was functus officio –

ELIAS CJ:

Yes.

MR BROWN QC:

– it was not competent, because it's not competent and that is the word that's used, the discussion of Lord Rodger and Lord Scott in *Tehrani*, they're discussing it in the sense of forum non conveniens but they make the point that the old cases were really forum non competens and it's a competency issue and we've got to remember, we're in this sui generis setting. My learned friend – some counsel will say well, the High Court has unlimited jurisdiction to do –

WILLIAM YOUNG J:

Well it's got jurisdiction to consider whether it's got jurisdiction.

MR BROWN QC:

Yes, it has and –

McGRATH J:

Well that's fundamental but can I just come back, the earlier rule in England, was the rule – it was very similar to the rule with which we're concerned?

MR BROWN QC:

There have been a number of manifestations your Honour and we've had trouble trying to track down precisely –

McGRATH J:

Okay. I think probably it's better if we let you take us through it because the case of *Hoddinott v Persimmon Homes (Wessex) Ltd* [2007] EWCA Civ 1203, [2008] 1 WLR 806 and Lord Justice Dyson, as he was, was a passage that seemed to me to be relevant but I think you may be pitching your argument at a higher level, in view of your responses to the Chief Justice –

MR BROWN QC:

I am, I am –

McGRATH J:

– not concerned with power, you're concerned with jurisdiction in the strict sense.

MR BROWN QC:

I am. The word, might I say however, we've had – it is said that our rule derives from the English rule. We've had trouble identifying the precise English rule but the very words that are in our rule, jurisdiction to try, or hear and determine, are curious enough the words that Lord Justice Diplock uses in *Garthwaite* several times. Those words, wherever they came from, they seem to be the English mantra that was applied prior to the restatement in UK rule 11 which has been discussed by Lord Justice Dyson in *Hoddinott*.

TIPPING J:

You say you fit the rule even on the strict approach but do you have a fallback that even if that's not right you fit it – you would invite us to have a –

MR BROWN QC:

We would argue –

TIPPING J:

– or are you not –

ELIAS CJ:

You don't need it.

MR BROWN QC:

I don't need to.

TIPPING J:

Well all right, I just wanted to be clear.

MR BROWN QC:

If you were to ask me would – my argument is that certainly r 5.49 deals with jurisdiction in the strict sense and –

TIPPING J:

It certainly must.

MR BROWN QC:

– we are strict sense and therefore we're within it. If you were to ask me is rule 5.49 limited to jurisdiction in the strict sense, I would argue no, it's not because it has the same, it is – if you look at forum non conveniens and see the Privy Council's decision in *Kuwait Asia Bank EC v National Mutual Life Nominees Ltd* [1990] 3 NZLR 513 (PC) to see that the rule is being applied, not just to –

TIPPING J:

That's all right, I understand perfectly, thank you. I just wanted to have it clear.

ELIAS CJ:

That is your second argument. You first have to get through the gateway of saying that these pleadings are not a pleading of fraud.

MR BROWN QC:

Mmm.

ELIAS CJ:

If they're not a pleading of fraud then they are only seeking to challenge the determination on the basis of a question of law that has been resolved in the Supreme Court?

MR BROWN QC:

That's right. Now, we say the fundamental underlying error in the Court of Appeal's analysis which is –

TIPPING J:

Is this point five?

MR BROWN QC:

No, this is the last part of point four, capturing my competence point is, the Court of Appeal's analysis is very brief, it's in paragraphs 58 and 59 and it doesn't engage with the point that we make in our submissions at paragraph 52 and could I take you to that submission at paragraph 52 because my learned friends, the Court and my learned friends, seek to characterise the Commissioner's challenge as being for tenability. The Court of Appeal says to itself well, a tenability, this case can't succeed on this proposition, it is a tenability case and that's archetypally r 15.1.

We say we're not a tenability at all and when I take you to *Shannon v Shannon* (2005) 17 PRNZ 587 (CA), there are just so many things for you to look at but when I take you to *Shannon*, you'll see the clear difference between a jurisdiction inquiry and then the strikeout inquiry and we say in 52, "In characterising the Commissioner's challenge as being to the tenability or bone fide of the claim rather than to jurisdiction in the strict sense, the Court of Appeal has overlooked the dual points that the High Court cannot: (1) engage with this claim without engaging with the question of whether the Supreme Court relied on the wrong statutory provisions in confirming the assessments, or; (2) make the order which the respondents seek without impliedly re-calling *Ben Nevis* on the basis that that it was wrong in law."

When you look at those two, could I ask you to anticipate what I'm going to say in terms of *Garthwaite*. In *Garthwaite*, Lord Justice Diplock as he then was, states three aspects going to strict jurisdiction. One is the location of the person within the jurisdiction, the in personam step. The second is the subject matter and the third is the relief and we are here on second and third. We are subject matter and we are relief and all of those are in the strict jurisdiction category.

TIPPING J:

So you could have a situation where one and two are satisfied but the Court had no jurisdiction or power to grant the relief sought –

MR BROWN QC:

Yes and –

TIPPING J:

– and that would still be lack of jurisdiction in the strict sense, à la, or Justice Diplock?

MR BROWN QC:

Yes, it would be, he says, "or any combination thereof," when he comes to that and it's – but yes, it would be and the Court of Appeal, the Court of Appeal – you'll see paragraph 58 is their reasoning about well, functus officio is not a strict sense but then in paragraph 59, they go on to deal, or rely on the *Doug Hood v Gold & Resource Developments (NZ) Ltd* (1999) 13 PRNZ 362 (CA) case, which is a case they found themselves and they, as I say, transpose a statement there contrasting, as it were, a power to determine on the one hand and relief on the other which is actually understandable in the *Doug Hood* context, as I come to tell you about. It's an application for leave to appeal from an arbitration but in terms of – it is not a principle jurisdiction in terms of jurisdiction – it's not a principle to distinction in terms of jurisdiction and flies directly in the face of Lord Justice Diplock's restatement of Lord Justice Pickford's –

ELIAS CJ:

Sorry, what is not the principle to distinction?

MR BROWN QC:

To say that there is a distinction between having the power to hear and having the power to grant any relief. The Court of Appeal is saying well, on this rule, the former would be strict and the relief is well, that's –

McGRATH J:

Is the Court of Appeal then, in *Doug Hood*, simply confining jurisdiction to the question of whether you've got jurisdiction?

MR BROWN QC:

I would submit so.

McGRATH J:

Mmm.

MR BROWN QC:

It's an unfortunate paragraph 59, it's a little hard to follow but I'll –

McGRATH J:

So it's really concerned with the inquiry into – obviously the High Court can always inquire into jurisdiction, it has jurisdiction for that and that goes back to Salmond J and –

MR BROWN QC:

It does.

McGRATH J:

– all of that sort of thing but – and the Court of Appeal is saying that is all that was involved?

MR BROWN QC:

They rely on a passage from *Doug Hood* to sustain the conclusion they've reached in paragraph 58 and I say that was just confounding the error that they'd made in paragraph 58.

WILLIAM YOUNG J:

You'd have to show that there was no relief that could be obtained, wouldn't you?

MR BROWN QC:

Yes.

WILLIAM YOUNG J:

Because it wouldn't be enough to show that aspects of the relief sought are out of jurisdiction –

MR BROWN QC:

Yes.

WILLIAM YOUNG J:

– because that's really, in the end, the tenability issue.

MR BROWN QC:

I agree with that, yes. We of course, we're not limiting ourselves to relief here, we're saying subject matter, we're saying that the High Court can't just start with EH and make a decision that will ultimately come to you via another round of appeals.

Now, the fifth point and this goes to 5.49, is that the Court of Appeal itself recognised that this scenario of only one Court within the territory having jurisdiction to deal with the matter, was within 5.49. If you come to the Court of Appeal's decision, which is in the pink volume under tab 13, at page 102, 103, the Court of Appeal considered the ambit of r 5.49 in anticipation of discussing this case and you'll see they've got 52, they've got the effect of case law in 5.49 and its predecessor one through one can be summarised as A, procedure of filing an appearance and objecting. One, not subject to the jurisdiction in New Zealand Courts, so that's the in personam point that we'll see with Lord Justice Diplock, then secondly, the case can, by law, only be determined by a different New Zealand Court or authority and we say that's absolutely apposite here.

You can understand someone saying well, does that mean say, the Employment Court rather than the High Court, or a small claims tribunal or somebody else but it applies as much to this situation. If the High Court is incompetent and the Supreme Court is the only Court that it can entertain, then it sits squarely within 5.49 and the – I'm not quite sure what was in the Court of Appeal's mind but when you come to paragraph 57, you will see that they, in the second sentence, they say, "In summary, under rule 5.49", this is harking back to what they've discussed at paragraph 52, they said, "Our outline of the requirements and principles applying to each demonstrates the differences. In summary, under 5.49, the Court's concern is the effect on its jurisdiction of territorial considerations or of statutory or contractual provisions excluding the Court's jurisdiction to entertain the case at all." Now, where that came from –

McGRATH J:

So what are you reading from, paragraph?

MR BROWN QC:

Paragraph 57, the second sentence on page 105.

McGRATH J:

Thank you, thank you, yes.

MR BROWN QC:

Now where the limitation of statutory or contractual came from, I'm not sure but the appellate –

ELIAS J:

Are they talking about arbitration or something there, what are the contractual provisions?

MR BROWN QC:

Possibly your Honour because by that time they had discussed *Doug Hood* in the previous paragraph 51.

ELIAS J:

Yes.

MR BROWN QC:

In fact, *Doug Hood* seems to have been the Court of Appeal –

TIPPING J:

In the little three in 52, A3, they talk about the High Court's jurisdiction is precluded by the operation of a contractual term –

MR BROWN QC:

Yes.

TIPPING J:

– which is classic arbitration.

MR BROWN QC:

That's right.

TIPPING J:

So that's what they're referring to.

MR BROWN QC:

Yes, well I had difficulty seeing in the second sentence of 57 where 52(a)(2) –

TIPPING J:

Well they've omitted that.

MR BROWN QC:

Well I think so. I would submit that, yes.

ELIAS J:

Sorry, they've omitted?

TIPPING J:

They've omitted the reference that they made at (a)(2) in 52.

MR BROWN QC:

The second sentence of 57 doesn't capture all –

ELIAS J:

Yes, yes.

MR BROWN QC:

– the ones.

McGRATH J:

I think their thinking by that stage was looking at a question, say, of the Employment Court or something like that.

MR BROWN QC:

I suspect it was.

McGRATH J:

Whereas the argument that you're making was something that they didn't turn their mind to.

TIPPING J:

Was it expressly put to them that this was a case within the rubric of only another Court can consider?

MR BROWN QC:

Yes. Yes you're definitely wrong, yes.

TIPPING J:

And that's in the –

MR BROWN QC:

Yes, in fact if we look at the – we can take you back to the submissions. The submissions that were made are recorded by the Court at a series of paragraphs. Page 95, beginning at paragraph 32, under the heading "The CIR's position." At 34, appellants wrong to sit at the High Court of general jurisdiction. Can it be correct? At 37, the ultimate attack is a collateral attack on the *Ben Nevis* judgment and in fact it's expressly said here that the re-call is the only way in which it could be dealt with which recognises the Supreme Court as being the Court with the power to –

TIPPING J:

Well it's 37 effectively, isn't it?

MR BROWN QC:

Yes.

TIPPING J:

But when they wrote at (a)(ii), they didn't link that with that submission presumably?

MR BROWN QC:

That's right.

TIPPING J:

They don't discuss, do they, the applicability of (a) to that submission?

MR BROWN QC:

No. Anyway, then I come to my sixth point in overview. We say that being clearly the position here, that is that this was a situation where one Court and one Court

alone in the hierarchy of Courts had competence to deal with the matter then the appropriate course for the Commissioner, and indeed the only appropriate course, was to lodge a r 5.49 protest to jurisdiction. To have taken the other step to the Court of Appeal proposed, 15.1 and strikeout, would be to accept the Court's jurisdiction.

WILLIAM YOUNG J:

But that's not right really is it. I mean if you had applied for a strikeout, you could have applied for a strikeout on the basis the claim's hopeless because only the Supreme Court can grant you the relief you seek.

MR BROWN QC:

That's true but it would be a step down. If you look at *Shannon* it would be a step down the pass.

WILLIAM YOUNG J:

But I mean the jurisdiction, the Commissioner couldn't confer on the High Court jurisdiction to review a Supreme Court decision by applying to strikeout rather than under rule 5.49.

MR BROWN QC:

Yes, well if I can put it back to you this way, you're saying to me, I think, that the Commissioner could say to the Court, "I am going to make an application under 15.1 recognising your jurisdiction to strikeout this case for you not having jurisdiction."

TIPPING J:

I would have thought you could have pleaded it in the alternative. That's what I would have done.

MR BROWN QC:

Well, yes, well –

ELIAS J:

Isn't it really sequential too, shouldn't it – mightn't you have applied to strikeout the pleading on the fraud basis and then protested jurisdiction?

MR BROWN QC:

Yes.

ELIAS J:

I mean in the same application obviously.

MR BROWN QC:

Yes. So often when you reach this Court, your Honour, you say with the benefit of hindsight, one would do that as well, the two. But the point was the 5.49 was done. But on that, can I jump you right ahead to *Shannon* because that captures exactly what the Chief Justice is putting to me. *Shannon* is in our bundle of authorities under – or the decision of the High Court in *Shannon* under tab 20 and it captures the two stages perfectly. It's a decision of Justice Potter, a decision of the Court of Appeal at a different stage is under tab 19, but if we go to Justice Potter's decision and if I could just take you through these few paragraphs.

Paragraph 1 records that there was an application for a strikeout under r 186, second line of paragraph 1. Then if we come through to paragraph – so the paragraph 5, there was a statement of defence filed, particulars were sought of the alleged perjured evidence but, "Following a conference," it says in 6, "before Master Faire and a subsequent conference before me, orders were made with the agreement of counsel for both parties to bring before the Court as a preliminary issue the Court's jurisdiction to hear and determine the proceeding as raised by the defendant's statement of defence."

So what they did by agreement was to have a first hearing on jurisdiction and 8 records that by consent the issues about particulars and the like were deferred until the jurisdiction issue was being determined and then 9 says it was a jurisdiction issue which fell for determination at the preliminary issue hearing and the hearing was held and her Honour considered that there was jurisdiction and if you come over to paragraphs 50 to 52, you'll see at paragraph 50, her Honour's reasoning for the finding that it was sufficient and at paragraph 51 she says, "In reaching it, you have considered carefully the concerns voiced by Lord Justice James in the same case about the risk of proliferation of litigation of the Courts do not insist that judgments of superior Courts are final and binding. The appropriate response to those concerns lies in the next step of the process. The threshold the plaintiff faces is high. The fraud alleged, in this case perjury, must be fully and distinctly pleaded and particularised and unless it is so particularised and raises a reasonable prospect of

success the action will be stayed or dismissed as vexatious and abuse of process." In 52, at that stage the defendant, if she thinks fit, may pursue a strikeout action.

Now that is the sequence that your Honour the Chief Justice is, with respect, referring to and in my submission entirely correctly. Yes, we could have jumped to 15.1 and said well, we'll do both at once, or we'll have a 15.1 first on jurisdiction and another 15.1 if we fail in jurisdiction on strikeout for untenability but –

ELIAS CJ:

But you had to do it the other way round really because there's no question but that the Court has jurisdiction in the case of an application on the fraud ground. So first you had to clear that away and then you raise the point which could, I would have thought, equally be done on strikeout, as under the rule you've proceeded under, that there's no jurisdiction.

MR BROWN QC:

Mmm. I agree. If we had filed in the alternative we would have avoided the procedural hiccup in the Court of Appeal.

TIPPING J:

Mr Brown, is the kernel of this case, the proposition that absent a proper claim of fraud only the Supreme Court could entertain this allegation –

MR BROWN QC:

Yes.

TIPPING J:

– and there isn't a proper claim of fraud.

MR BROWN QC:

Yes. There's only an allegation of a mistake of law by all the Courts – I mean they, much must have been – I know they say this Court didn't entertain EH but the error must perpetuate –

TIPPING J:

On their premise we must have been, we were wrong in failing to entertain it.

MR BROWN QC:

That's right.

McGRATH J:

But if you fail on that, you say that on abuse of power, *Henderson v Henderson* principles, that the matter has been argued and decided anyway by Justice Keane?

MR BROWN QC:

Yes. We say that –

McGRATH J:

The same matter as is alleged here.

MR BROWN QC:

The same matter, we say that having argued it before Justice Keane the proceedings haven't been brought together as cognate for the purposes of appeal to the Court of Appeal to then abandon the appeals from Justice Keane's judgment and then pursue the point in the Redcliffe proceeding was an abuse of process but the Court should have said we're not taking, we're not entertaining this further. We also say –

McGRATH J:

It's abuse of process but it's abuse of process by re-litigating something that was already argued –

MR BROWN QC:

Yes.

McGRATH J:

– or should have been encompassed and argued in an earlier proceeding. Is that the form of abuse of process?

MR BROWN QC:

I put it more as the Court's power or obligation to control its own process and the intervention of the abandonment of those appeals having occurred, the Court where we say on reliance on *Bryant v Collector of Customs* [1984] 1 NZLR 280 (CA) in our submissions, ought to have said at that stage, no we're not entertaining this now. Alternatively we do say that the Court of Appeal could still have used 15.1 because it

is, as Justice Young I think would say, it's a pure point of law. If it's functus officio and you haven't got jurisdiction then it is a rather sterile proposition to say, well you've come under the wrong rule, it should be 15.1, we'll send it back to Justice Venning. That seems to be just letting this crusade perpetuate.

McGRATH J:

Well I think Ms Hinde has an argument on that. One of the provisions, she says, gives a direction as to what's to happen if the r 5.49 onus is not discharged but we'll – we can deal with that in reply.

MR BROWN QC:

Yes, thank you your Honour. They're my six points in overview and we say then, I would say that on this the Court of Appeal really made three errors sequentially. First of all the Court of Appeal misdirected itself on the meaning of strict jurisdiction and as I say the broader sense is a misnomer. If the Court has jurisdiction then it has, if it doesn't, it doesn't. Secondly, it erred in holding that the state of the High Court being functus officio does not go to strict jurisdiction, to jurisdiction in the strict sense, and that is captured in our submission at paragraph 46, if I could take you to that, and in paragraph 46, at the top of page 17 of our written submissions, we refer to the general rule derived from *St Nazaire* and in terms of modern authorities reflected in the Supreme Court of Canada's decision in *Chandler v Alberta Association of Architects* [1989] 2 SCR 848 is that "the power to re-hear disputes has been transferred by the Judicature Acts to appellate courts and, consequently, a first-instance court has no power to 'hear and determine' the subject matter… and that is what is meant by functus officio in this context". And that is strict jurisdiction, that's paragraph 46.

Then thirdly, we say the Court erred in overlooking what it had already identified as rule – as in paragraph 52A(2), that is the applicability of r 5.49 to the circumstance where only another Court within the New Zealand jurisdiction is competent to deal with it.

Now what I'd like to do now in terms of addressing question 1 is to take you directly to the strict sense law because I submit that the key issue underpinning that first question is what does jurisdiction in a strict sense embrace and there are a small group of cases. If you could take our volume 2 and although I could probably do it just by going to *Garthwaite* I think it's helpful to see the sequence. The first one is

under tab 12, it's the *Guaranty Trust Co of New York v Hannay & Co* [1915] 2 KB 536 (CA) case and in particular the decision of Lord Justice Pickford at page 563.

At the top of page 563, Lord Justice Pickford, as he was, is the author of the proposition that there is only one sense of jurisdiction that is strict and he says, "The word 'jurisdiction' and the expression 'the court has no jurisdiction' are used in two different senses which I think often leads to confusion. The first, and in my opinion, the only really correct sense of the expression that the court has no jurisdiction is that it has no power to deal with and decide the dispute as to the subject matter before it, no matter in what form or by whom it is raised. But there is another sense in which it is often used, i.e. that although the court has power to decide the question it will not according to its settled practice do so except in a certain way and under certain circumstances." And as we will see in *Tehrani* the forum on convenience principle probably sits nicely in that second leg.

The judgment came to be considered by the Court of Appeal in *Garthwaite v Garthwaite* which is under tab 11 of the bundle. It was a foreign divorce decree case and there are judgments by all of Lord Justices Willmer, Danckwerts and Diplock and on this point I was only going to take you to Lord Justice Diplock, although when I come to deal with that proleptic inquiry I will be going to Lord Justice Willmer's judgment. But in *Garthwaite*, if we go to Lord Justice Diplock at page 387, and he actually takes issue with Lord Justice Pickford's decision as having been too narrow a definition of strict sense.

If you look at the third full paragraph which begins, "The High Court is the creation of statute," he says, "As was pointed out by Lord Justice Pickford in *Guaranty*, the expression jurisdiction of the Court may be used in two different senses. A strict sense," which he regarded as the only correct one, and a "wider sense". I think with respect that he defined the strict sense too narrowly for it would not embrace the Court's lack of jurisdiction to entertain a suit based on the personality of the party, as for instance the case of *Hasood v Foreign Sultan Ambassador*. It's important for the purpose of the present appeal to distinguish between the two senses in which expression is used. In its narrow and strict sense the jurisdiction of a validly constituted Court connotes the limits which are imposed upon its power to hear and determine issues between persons seeking to avail themselves of its process by reference to (1), the subject matter of the issue, or (2), the persons between whom

the issue is joined, or (3), to the kind of relief sought or to any combination of those factors."

Now I'm sorry when I referred you – when I took you to our 52 and I said it's 2 and 3, it really should be 1 and 3. It's subject matter and relief. He has the in personam point as his second –

ELIAS CJ:

Whereas it is usually thought of as the first –

MR BROWN QC:

It's invariably that way and –

ELIAS CJ:

And that's why it's an objection to –

MR BROWN QC:

Yes.

ELIAS CJ:

And this is a protection.

MR BROWN QC:

Then he says, "In its wider sense," which I disavow the use of jurisdiction to it, but he says, "It embraces also the settled practice of the Court as the way in which it exercises its power to hear and determine issues which fall within its jurisdiction in the strict sense." Or as to the circumstances in which it will grant a particular kind of relief which it has jurisdiction in a strict sense to grant, and that is why the – I say the English rule, which is in the bundle now before you, is the hand up, is very helpful in as much as it is crafted to distinguish between 11.1, a defendant who wishes to dispute the Court's jurisdiction to try the claim or (b), argue that the Court should not exercise its jurisdiction, may apply to the Court for an order to declare it has no jurisdiction or should not exercise any jurisdiction it may have. So it captures both under the one rule.

McGRATH J:

Under the current r 11?

MR BROWN QC:

Current r 11, yes.

ELIAS CJ:

That, I must say, to me, does seem a much wider proposition than Lord Justice Diplock is referring to there –

MR BROWN QC:

Oh yes, yes it is –

ELIAS CJ:

Yes, yes.

MR BROWN QC:

– I mean, it's only item one of that that he's referring to –

ELIAS CJ:

Yes.

MR BROWN QC:

– and exercise his broader one, would be the second leg of that rule.

ELIAS CJ:

Yes and we don't have the second leg in our rule.

MR BROWN QC:

Well we use the words that Lord Justice Diplock uses here to, I think, hear and determine, that is our phraseology but, in my submission, if we – and, in a way, I'd rather not get distracted to it at this stage but the *Kuwait Asia Bank* case which I know Justice Chambers, who was on this panel, was familiar with, he was junior counsel in that case and that is a case that recognises the broader application of rule 5.49. It may be this Court may doubt whether that is right but in fact the practice has been that r 5.49 has been allowed to be used for – certainly for forum non conveniens type issues and it's curious, when you look at our High Court rules, one of the last ones we put up to you, I think in here, is 6.29 which wasn't before you before, that the current High Court rule – this is in the small bundle we've given you.

If you go to rule 6.29, it has three layers of how you deal with things. It says in 6.29, this is the service – I'm really get right away from the case here but it says, "If service or process is affected out of New Zealand without leave and the Court's jurisdiction has processed it under 5.49, the Court must dismiss the proceeding unless," and then (2) is, "If the process has been affected out of New Zealand under rule 6.29," that is correctly, "and the Court's jurisdiction has protested under 5.49, then the Court may," but then (3), "When service has been validly affected within New Zealand but New Zealand is not the appropriate forum for trial, the defendant may apply for status under 15.1."

So the High Court rules have taken – made that distinction in terms of different rules to be used. That would a forum conveniens type argument. So it would be an interesting, I'd be delighted to argue sometime in this Court, what is the present state of that but as far as strict jurisdiction is concerned –

ELIAS CJ:

Yes.

MR BROWN QC:

– and the three categories of Lord Justice Diplock –

ELIAS CJ:

You're within it, you say –

MR BROWN QC:

– the ratio of this case, in my submission, is that we are within one and three. There is no basis for saying that rule 49 only applies to one and not three but, in any event, we're within one, functus officio.

So, that I think is the – and now just to finish the little group of cases, those cases were then discussed by Lord Justice Scott and Lord Rodger in *Tehrani* which is under tab 22 of your second bundle. This is a judicial review, asylum seeker resident in Scotland case and at page 543, 544, Lord Scott deals with this in a forum non conveniens context. So could I take you first of all, on page 543, to paragraph 66, at the top of the page and we're sort of boiling cabbages a bit when I read this 66. He says, "When issues are raised as to whether or not a Court of law has jurisdiction to

deal with a particular matter brought before it, it is necessary to be clear about what is meant by jurisdiction. In its strict sense, the jurisdiction of the Court refers to the matters that the Court is competent to deal with."

Then he goes on to deal with Courts greater by statute and refers to, among other things, rules of Court. Then in 67 – then he quotes from Lord Justice Pickford in *Guaranty*, then he quotes from Lord Justice Diplock in *Garthwaite* and then at 67, there's an interesting passage where he applies this in the context of forum non conveniens and he says this, "The doctrine of forum non conveniens is a good example of a reason established by a judicial authority why a Court should not exercise a jurisdiction that in the strict sense it possesses. Issues of forum non conveniens do not arise unless there are competing Courts, each of which has jurisdiction in the strict sense, to deal with the subject matter of the dispute."

This is important. He says, "It seems to me plain, that if one of the two competing Courts lacks jurisdiction in a strict sense, a plea of forum non conveniens could never be a bar to the exercise by the other Court of its jurisdiction." That's the situation where there is only one Court that is competent to deal with it. Then in 69, he says, "If the plea is indeed based on the lack of competence, a lack of jurisdiction in the strict sense," and so on and deals with the facts in relation to the Scottish situation.

Lord Justice Rodger, at page 549, is also helpful on this issue because he focuses on this question of exclusivity. If you look at page 549, paragraph 88, he says, "For the Court of session to have jurisdiction, two elements must combine. First, the person against whom, with reference to whom decree of sought, must be subject to jurisdiction," so that is the in personam point. "Secondly, the cause or proceeding must be a fit subject for judicial termination, must not belong to the exclusive jurisdiction of another Court." Citing *McKay*, the practice of the Court of session and then about, just three lines under (g), he says, "An objection of the second kind," that is the exclusive jurisdiction, "is really a plea to the competency of the proceedings."

Then opposite, line 8, he says, "The substance of the pleas is reflected in the older phrase forum non competens properly used and understood." Then he says, at the last line of that page and over the page, "This gave rise to Lord Dunedin's observations that in that context competens should not be translated as competent but as appropriate."

So that captures the case law, in my submission, on this issue. For completeness, I should mention to you, in terms of judgment writing, there is a judgment under tab 10 which is another decision, a later decision, of the House of Lords in *Fourie v LeRoux* [2007] UKHL 1, [2007] 1 WLR 320. I don't – it isn't really particularly helpful in this case because it was dealing with the circumstances in which the Court might issue a freezing order. So it's what you might call a broader than exercise case but it is a case that, following shortly after the decision in *Tehrani*, sets it all out again.

So at page 329 for example, in the decision of Lord Scott, under the heading, "The first issue", you will find a recitation of the same material I've been discussing with you, Lord Justice Pickford's decision, Lord Justice Diplock, etcetera but of course, this was relating to the circumstances of where the High Court Judge clearly did a jurisdiction to issue a freezing order but in what circumstances those orders should be exercised, Anton Piller jurisdiction.

McGRATH J:
So it's the appropriateness question?

MR BROWN QC:
Yes. So our next proposition is that, following on in this first question, is that a Court that is functus officio lacks jurisdiction in the strict sense and that is in our submissions at 43 to 46, it reflects – we've taken you, I think, to 46. You may care to see the statement to that effect in *Chandler* which is under tab 9 of our second bundle and which you will find at page 860, in the judgment of Justice Sopinka. It's under –

WILLIAM YOUNG J:
Sorry, I'm missing *Chandler*, where is it?

MR BROWN QC:
It's under tab 9 of our larger bundle of authorities. It's a very short statement, under the heading "Functus officio," on page 860 and we say, "That by virtue of being functus officio, in respect of the subject matter of the issue," that is this question of the applicability or otherwise of section, or part EH, "the High Court is not competent to re-hear and determine that subject matter," or for that matter, to grant any relief in relation to it. I mean, the idea that the Court would even entertain it and then say well, I'll pull back now because I shouldn't be making the orders quashing a decision

that is the foundation of decisions of the Court of Appeal and the Supreme Court above me.

We say, "This constitutes an absence of jurisdiction in the strict sense," and I invoke the words of Lord Scott in *Tehrani* and, "That is demonstrably the situation where the subject matter is the correctness of the law applied in the original proceeding. That can only be revisited in the appellate structure and in the original case," and there's a wealth of authority on that. I've taken you to Lord Jessel, perhaps in a New Zealand context it might be useful just to mention the judgment of, albeit at first instance but the judgment in *Hikuwai v Sanford Ltd* (1996) 9 PRNZ 587 (HC) under tab 13, a judgment of Justice Thorpe which was in the context of the new trial jurisdiction, very short judgment under – well, not that short but under tab 13, where at page 591, at line 35, he says, "While the Court of Appeal, as in *Rainbow Corporation v Ryde Holdings Ltd* [1991] 1 NZLR 434 (CA), is empowered to re-call its judgments if it considers that sufficient case is made out for that step, the hierarchical Court structure cannot, in my view, be reconciled with this Court having power under rule 494 or 540 or in its inherent jurisdiction to re-call a vacated judgment of the Court of Appeal," and that's what Lord Jessel was saying in rather more affirmative language.

So, paragraph 58 of the Court of Appeal's judgment – 58 and 59 are the operative paragraphs, this is under tab 13 – you will see that in rejecting our argument – this is the last sentence of 58, it says, "The Commissioner's argument was the High Court had no jurisdiction, because jurisdiction now lay with the Supreme Court on an application by the appellants to re-call the judgment of the Supreme Court." That emphasises the point we were making that it has to happen in the structure of the *Trinity* litigation and, contrary to my learned friend Ms Hinde's submissions at paragraphs 40 and 62 and 69, and I think Mr Stewart at 24, the Commissioner is not suggesting, and has never suggested that the Supreme Court has some original jurisdiction to hear and determine a fresh setting aside proceeding. We're not saying that, "File this proceeding in this Court", we're saying it's the re-call jurisdiction.

Now, there are two incidental points to that. The first one is to caveat the point I've already made, or that's been made to me I think, that our argument focuses on strict sense jurisdiction, that is, the Court of Appeal's 52(a)(ii). For the avoidance of doubt, we do not accept that the Court of Appeal was correct to say that 59, that 5.49 is restriction to jurisdiction, strict sense jurisdiction process –

ELIAS CJ:

Sorry, where are you referring to?

MR BROWN QC:

Well, I'm making just two incidental points.

ELIAS CJ:

I see, yes.

MR BROWN QC:

I wanted to say that we don't need, for the purposes of our argument, to go beyond a strict jurisdiction proposition but –

ELIAS CJ:

Yes.

TIPPING J:

You don't accept that it's limited to that?

MR BROWN QC:

Yes, we don't accept that it's limited to that and our submissions at paragraphs 37 and 38 refer to the UK rule and to *Hoddinott* and I would take you, if it was necessary, to the discussion in *Kuwait Asia Bank* but I don't think it's necessary.

Secondly, we say that this issue of strict jurisdiction is central to this appeal and referring to my learned friend's submissions now, it is quite wrong to suggest, we say, as my learned friend Mr Stewart does at paragraph 14, that the issue of strict sense jurisdiction is, says, "ultimately irrelevant to the just outcome of this appeal," or another expression he uses, "ultimately arid". Similarly, it is quite wrong to suggest, as he does in paragraph 1, that the correctness of the Court of Appeal's decision on r 5.49 is, "ultimately moot." Those contentions are no more than quite a bold attempt to move this Court away from its approved question one which is, was the Court of Appeal right on the r 5.49 which in turn is, what does strict jurisdiction mean and does the basis of the Commissioner's protest on functus officio come within it?

Now, I don't propose to step further through the Court of Appeal's analysis, which is at 58 and 59, save perhaps to make two points. It seems, it's my submission that the Court of Appeal was probably making two errors at the same time. First, it equated, in the sense of confining, strict jurisdiction to in personam jurisdiction, it didn't extend it to subject matter jurisdiction or relief jurisdiction, contrary to *Garthwaite*, and inevitably then, of course, because we are subject matter and relief, we fell outside the very narrow view that the Court took to strict jurisdiction hence, on their thinking, we must be in broader jurisdiction, hence, because broader jurisdiction is dealt with by rule 15.1, that was the way to go, QED.

Secondly, it did equate broader jurisdiction with untenability, which is not jurisdiction at all, a point we make in our footnote 95. I don't think it's going to be necessary for me to take you through the reasoning about *Doug Hood* but could I just, just so that it doesn't fail for want of notice. The 58 of the Court of Appeal's decision is its reasoning, 59 is then a supportive paragraph that draws the distinction between or accuses the High Court of falling into error by confusing the power to grant relief with the jurisdiction to hear and determine the proceedings.

So the error's already made by this stage. But you'll see it's footnoted to 48 and *Doug Hood*, and the reference back to *Doug Hood* then is to paragraph 51, and there are two paragraphs quoted at paragraph 51, bearing in mind that – and this is not intended as a criticism because the Court of Appeal located these cases itself it didn't have submissions on them from the parties – the key to *Doug Hood* is in the quoted paragraph 16, "The High Court can no doubt determine on an application for leave, whether it had jurisdiction to grant it," that's no problem with that. But what the Court of Appeal did was to italicise those words you'll see up in paragraph 15, the statement to this effect, "The argument for the appellant confuses the jurisdiction of the Court to grant relief with its jurisdiction to entertain and decide a claim for relief."

Now that's the *Doug Hood* Court criticising the argument made before it and what the Court of Appeal in this case seems to have done is to have taken that italicised sentence, its own, it italicised it and transposed it onto the setting we have here, and that is why in 59 you'll find essentially the same wording saying, in dealing with it in the second sentence, in dealing with it as a protest to jurisdiction, the Court of Appeal fell into error by confusing its power to grant relief with its jurisdiction to hear and determine the setting aside proceeding, and that it's not, as it were, a separate error, but it's just confounding the situation that had been reached in paragraph 58.

Would that be a convenient time?

ELIAS CJ:

Yes, thank you, Mr Brown, we'll take the adjournment now.

COURT ADJOURNS: 11.28 AM

COURT RESUMES: 11.48 PM

MR BROWN QC:

Now Your Honours, before I progress, could I engage with a matter that I think may be in some of your minds, that is, well, wouldn't it all have been much easier just to deal with it by 15.1 and pragmatically, you could say, well yes, one could. We feel we, perhaps erroneously, did that in *Accent* and in cross-appeal, moved back to the protest to jurisdiction point but if I could perhaps make three points about that.

First of all, our submissions at paragraph 26. We say that, having formed a clear view that the High Court didn't have the power to revisit the subject matter, then it was really incumbent on the Commission to register an objection, and we have quote there, and it's footnoted, the observations of Lord Justice Auld in *Atkinson v Director of Public Prosecutions* [2004] EWHC 1457 (Admin), [2004] 3 All ER 971, that it's only if there is jurisdiction may the more elastic notion of abuse of process arise for consideration, and I appreciate it's not a case that you have before you, although it is footnoted there in paragraph 50, we see that in the Court of Appeal's decision, a Court of Justices Richardson, Henry and Blanchard in 1996, in the *Advanced Cardiovascular Systems Inc v Universal Specialities Ltd* [1997] 1 NZLR 186 (CA) case which was a forum convenience case involving exclusive jurisdiction clause and an attempt to have summary judgment, and there was an argument there run by then Mr Randerson that, well, you could deal with the summary judgment first before going to deal with the jurisdiction, and the Court made a number of, a judgment delivered by Justice Henry, made a number of quite telling observations on this –

WILLIAM YOUNG J:

So, have we got this case?

MR BROWN QC:

No, you don't, I'm sorry. It's 1996 at 9, procedure report 632, and I'll have copies made for you.

WILLIAM YOUNG J:

632?

MR BROWN QC:

Yes, 9 PRNZ, 632. First of all, there are three points I'd make. They drew a distinction between *Kuwait Asia Bank* and this case, because they said they were directly concerned with *Advanced Cardiovascular Systems* protested jurisdiction, they said, "Which must be considered and determined before any question of exercising the discretionary jurisdiction to stay on the ground of forum non conveniens arises, and the same would apply to a strikeout application.

Then in response to Mr Randerson's submission that the Judge could have dismissed the application and set aside the appearance, but only insofar as each related to the summary judgment application, they, the Court said, "In our opinion, that course is not open," the inquiry under 1313 or 5 is not directed to an interlocutory application which forms part of a proceeding but to the proceeding itself, and they therefore concluded it was a procedural error in allowing a summary judgment to go ahead before the initial question of jurisdiction is determined. So, it may appear a little pedantic to say, well, 5.49 rather than 15.1, but they are dealing with differences –

TIPPING J:

Does it help if I, for myself, were to say that I can fully understand how it shook out like this, and personally I don't think it's going to make any real difference to the outcome, as far as I'm concerned.

MR BROWN QC:

Well, I understand that –

McGRATH J:

Mr Brown, did that case, the judgment of Justice Henry's, summary judgment was actually given in the High Court, wasn't it –

MR BROWN QC:

Yes, I –

McGRATH J:

– on the matter, and the jurisdictional – well, that's as I recall it, I had a brief look at it. I mean, it doesn't seem to me it takes your position any further.

MR BROWN QC:

Oh, no, no, it – I was addressing the proposition that really couldn't this all be done on a strikeout application? I was justifying the point of saying that a jurisdictional protest like this is properly made by 5.49…

McGRATH J:

If it isn't all that the case says though, if the protest rule is invoked, the Court has to determine that at the outset –

MR BROWN QC:

Yes.

McGRATH J:

– and can't go into questions of summary judgment or anything else first, if the rule's invoked.

MR BROWN QC:

True.

McGRATH J:

But it doesn't – if you are arguing that the rule had to be put up first on its own, you're saying that, that only, the r 5.49 application had to be brought on its own without a contingent application to strikeout –

MR BROWN QC:

No, no –

McGRATH J:

You're not saying that?

MR BROWN QC:

No, no, I'm not saying that, I'm not saying – I'm just justifying our doing 5.49 rather then 15.1, you know, it would have been cleaner to strikeout. And although a lot of these cases involve, you know, the 15.1 forum non conveniens arguments often involve, or stay applications, often involve the same propositions of law –

McGRATH J:

On your argument, this is a case of jurisdiction and clearly r 5.49 addresses that subject and so no one can criticise you, if your argument is correct, for bringing it under that head –

MR BROWN QC:

That's right.

McGRATH J:

– just simply because the Courts are a bit more used to strikeout applications.

MR BROWN QC:

Yes. Well, what I would though, also in terms of that, is that the – and I'll very briefly go to this proleptic operation point but the – I'm going to say to you that, waving that flag, for the proleptic operation to apply, for the Court to say, in this sui generis situation, as you would in a domicile of cases, well a different scenario, that actually you don't have jurisdiction, that an appropriate vehicle to do that is a 5.49 protest. It tells the Court, you actually shouldn't be dealing with this, as opposed to you should be dealing with this and in your discretion you should do X or Y or Z with it.

Now if I can very briefly go to *Garthwaite* because it's just possible –

ELIAS CJ:

But isn't the real issue, I mean, I'm not sure that it really matters at all which rule you went under. It's a question of substance really but you did have to clear away the contention that this was an attack on the fraud basis and that's really a strikeout one because there's question that there's jurisdiction in relation to that.

MR BROWN QC:

Well no, there is – if this was properly brought as a fraud case dealing with evidence that was perjured, or the like, whereby the judgment had been obtained by fraud then

there would be the appropriate application. If you wanted to deal with that in advance of trial would a strikeout –

ELIAS CJ:

Yes.

MR BROWN QC:

– but here, when we say the pleading, to borrow the – it's written, I think, into the pleading, lexicon now, your Honour Justice Tipping's panel beating metaphor about how – but this is not a case of a pleading that's capable of panel – this is never going to get on the –

TIPPING J:

A repair job or a total write off.

MR BROWN QC:

Yes. Well this is not something that is allowed to go on the road, this is – because this is an error of law, the way to cause the Court to look at it and say yes, this pleading doesn't raise something that I'm entitled to deal with. You fly that flag with a r 5.49 protest to jurisdiction with an application to dismiss, that's what the rule provides are the two steps to be dealt with, to make the Court conduct this proleptic inquiry to see if it has jurisdiction to embark upon it and that is what Justice Venning was doing and decided he didn't have jurisdiction and it is what Justice Potter did, albeit it was a rather messy situation there because they'd filed a defence in a strikeout application but by agreement, they'd conducted that inquiry and she decided she did have jurisdiction and then a strikeout application could come later to say look, I've got jurisdiction but this, as pleaded, this case is so untenable you'll never succeed in proving fraud. That's a stage beyond.

ELIAS CJ:

Yes.

TIPPING J:

Mr Brown, am I right in thinking that the jurisprudence, on what I might call the threshold for fraud, is what you concentrate on the pleadings?

MR BROWN QC:

Yes.

TIPPING J:

You simply examine the pleadings and you say, if all this could be established, would this amount to fraud within the rubric that you took us to earlier this morning?

MR BROWN QC:

Exactly.

TIPPING J:

If it would, if established, you've got a tenable case of fraud, if it wouldn't, you haven't?

MR BROWN QC:

That's right, that's right. Now my learned friends –

ELIAS CJ:

But tenable case is your second stage –

MR BROWN QC:

Well yes –

ELIAS CJ:

– on what you've just put to us, so it's perhaps not helpful to speak in those terms. It may be that you can however telescope your jurisdiction or challenge which is effectively what you have done by clearing away the fraud allegation, simply saying that the pleadings don't disclose a claim of fraud, it's a question of law, therefore there's no jurisdiction.

MR BROWN QC:

The wording, I regret to say, we do have to be – and when I say "we", I mean advisedly we, have to be extremely careful in the words that were used here because if you look at our paragraph 49, Mr Gudsell in his submissions seizes on this and says look, you're talking about untenability, you're talking about striking out. Our paragraph 49 says and I'm going from the latter half, "The Commissioner took the view then, as now, that this argument has no prospect of success," which my learned friend, in his submissions, highlights and says, ha ha, you're talking untenability but

what we say is, "Because the conduct in which the Commissioner is said to have engaged is not, however pleaded or particularised, legally capable of characterisation as fraud."

Fraud is sui generis. When I say "sui generis", I suspect that it's the only one in this category where, looking at the pleading, it isn't just to see is the word fraud used because they're not just, put it through a scanner and see if it comes up with a word –

TIPPING J:
Well perhaps we should say legally tenable?

MR BROWN QC:
Yes.

WILLIAM YOUNG J:
Well are you saying – and this is perhaps what I think the respondents think you're saying, because there's no credible allegation of fraud, no credible tenable allegation of fraud, there is no jurisdiction?

MR BROWN QC:
We are saying –

ELIAS CJ:
That's what I meant by telescope.

WILLIAM YOUNG J:
Yes.

MR BROWN QC:
Yes. Well, yes, that's why I would, if I may adopt him, Justice Venning put it so well in paragraph 51. He's saying, "No matter how you plead this, or try and plead it, you cannot plead your EH complaint as a fraud case, that caused the judgment to be obtained by fraud, to trigger the setting aside jurisdiction," and we're saying that although *Garthwaite* is a rather different case, it's dealing with, as it were, truly jurisdictional fact in terms of domicile, the Court talks about is it odd that if there is domicile pleaded then we have jurisdiction, if there isn't we don't.

That's where, if I can just take you to it, this curious phrase arose. It's under tab 11, the separate part of the judgment, where in engaging with this issue of jurisdiction – and this is different, this is jurisdiction actually in fact, not just – this is domiciled in fact, proved, as opposed to fraud pleaded, so it's a different issue. But you'll find this at Lord Justice Diplock, at 392, 393. At the top of 392 he says, and it's the fourth line, "There is thus a preliminary issue which the Court has to decide, namely whether it has jurisdiction to adjudicate upon the claim for relief or not."

Then down the bottom of the page and dealing of course with the domicile situation, he says, "The test is whether the Court is bound to decline jurisdiction in limine is whether the facts alleged in the petition would, if true, deprive the Court of jurisdiction to hear indeterminate. And then he says, about the fifth line, "Lord Greene, in *De Renville* referred to the test as a proleptic operation. This esoteric phrase has, I think, misled Justice Ormrod as to the simple basis in which the High Court acts in the same way as any other Court of limited jurisdiction, declines jurisdiction in limine," and Lord Justice Willmer made a similar statement at page –

ELIAS CJ:

What does that mean?

MR BROWN QC:

In limine means at the threshold.

ELIAS CJ:

No, no, I don't mean that. I mean, what's he saying here?

MR BROWN QC:

What he's saying is, it's almost like a –

ELIAS CJ:

The simple basis?

MR BROWN QC:

– I think probably to borrow from the patent jurisdictions, sometimes the smell test, the Court – if you imagine an ordinary case, it wasn't this fraud situation, you would have a proceeding issued, you could have a strikeout to say that this case can never succeed – we didn't, we acknowledge all the facts that are alleged – but it won't

succeed, and then if that fails then you'd have a trial. I'm saying that in the sui generis situation of fraud, setting aside an existing judgment, that you have the same proleptic operation here that the Court has to be satisfied that it has jurisdiction to embark on the process. It makes this little inquiry, as it were, to see that, can I say, a proper case of fraud is pleaded or, shall we say, let's keep to my words in 49, something legally capable of characterisation of fraud, which error of law is not. Now, if the Court says, "Well, on the pleading it looks to me like it is," it says, "Well, I've got jurisdiction, I'll go ahead." But in those cases where the Court can look at the pleading and say, "Look, no way in the world is this fraud or can you make it fraud," the Court has to –

TIPPING J:

Qualifying fraud.

MR BROWN QC:

Qualifying fraud – the Court has said, "Unfortunately, I don't have jurisdiction," and at the same time, of course, the flip side of that decision that this is an error of law, the Court is at the same time saying, "Yes, well that's for another Court," when it's been in the appellate structure, it's a heads and tails situation, and that's the –

McGRATH J:

Mr Brown, you're saying fraud is something, is a special situation but doesn't Lord Justice Diplock's approach really indicate that fraud's not special, that in any case where the argument is simply tenable to support the relief sought, then in any such case you can establish there's no jurisdiction because we're dealing really with an exception –

MR BROWN QC:

Yes.

McGRATH J:

– here, aren't we? This is the fraud exception and we're really saying that it's an exception only where a tenable allegation of fraud is pleaded but, in one sense, as it applies to domicile, it could apply anywhere where there was no tenable allegation.

MR BROWN QC:

Well, why I called it sui generis is that it seems to me, reading this judgment, in terms of domicile, the Court actually has to make a decision on domicile. It makes the decision, sort of, that on fraud is only made at the very end of the case because the Court can only proceed if domicile is demonstrated, in fact, so it will received evidence on that point. Whereas I'm saying that the fraud jurisdiction –

McGRATH J:

Yes.

MR BROWN QC:

– is a little bit different because it actually turns on the pleading.

TIPPING J:

But there must be a very strong –

McGRATH J:

Yes.

TIPPING J:

– public interest in not letting people just waffle the word "fraud" and stymie the execution of a judgment for years.

MR BROWN QC:

Yes, well –

TIPPING J:

That's why the law puts this threshold, if you like, in there, to give some assurance that there's something realistic here.

MR BROWN QC:

That's right and of course this case was said "false case". The word "fraud", Mr Forbes, who was then acting in the High Court and, in my submission, no record of him using the word "fraud" and my learned friend said well, if we'd managed to, you know, we'd put our best case, you know, we would, if we had our chance to amend and do the rest of it and we say look, you can do what you like but in terms of, when EH is the foundation for this, there is no pleading, as Justice Venning said, "that can get you to the point that you can pass the threshold test," and so the Court,

in the perhaps rare case where the Court looks at it and says no, it can't be that and the Court steps back across the threshold and says this is not my, this is not for me, go somewhere else.

McGRATH J:

Is part of this sort of sui generis element, that the Courts are not, if you like, tolerant of a pleading that's a bit rough but can be repaired, in the case of fraud, it is looking to whether fraud is properly established on the pleading, it's not going to allow you to repair or call evidence to make it up normally, fraud is different in that respect to striking out generally?

MR BROWN QC:

Yes, although that pervades the whole fraud. I mean, if the Court were to look at this and say yes, I have got jurisdiction and then, as Justice Potter did, move to the strikeout, she said, "It's got to be fully particularised," that requirement pervades the whole of a fraud case. Why I called it sui generis and only I have, I hasten to add, though I'm not, but I haven't seen a comparator where the Court is being asked to exercise a jurisdiction to set aside, the High Court, being asked to set aside a previous decision and fraud in the true sense, in the *Derry v Peek* sense, has only been regarded as the way in which you could do that and that's why I called it sui generis. There may be other cases where the Court has to conduct a proleptic operation, á la domicile but that goes actually to proof of the existence or otherwise. So it's truly a threshold situation.

Anyway, so I say in short that the, coming back to the point I opened on just after morning tea, that that is why ru 5.49, when you look at the rule, is the New Zealand vehicle whereby you would flag that. If you want a strikeout, well, you can certainly go 15.1, but you can't, I don't submit, you can raise that proleptic inquiry by a strikeout application, that's, I'm often taken by Lord Steyn's words in *Attorney General v Blake* to the effect that if you ask the right questions in the right sequence you're more likely to get the right answer, and that applies particularly in this situation. If you put up to the High Court a series of strikeout cases, or strikeout applications, the Court's going to wonder well, what's going on here?

TIPPING J:

But if you establish what is necessary to show no jurisdiction, you must necessarily establish grounds for strikeout, mustn't you?

MR BROWN QC:

Well, yes, but the strikeout is a separate and discretionary jurisdiction.

TIPPING J:

I appreciate that, Mr Brown –

MR BROWN QC:

Yes.

TIPPING J:

– but I'm saying the one must necessarily – I think there's danger that everyone's getting too hung up over these sort of procedural…

MR BROWN QC:

Yes, well, but again, again in fairness, it was the Court of Appeal's ratio that we've –

TIPPING J:

Oh, yes, you have to deal with it.

MR BROWN QC:

The wrong vehicle.

TIPPING J:

But, frankly, I'm left cold, unless driven to it, to think that it could make, logically make any difference.

TIPPING J:

No, well, I agree, I agree. But strict jurisdiction, of course, is something over which the Court has no discretion to continue, whereas the strikeout, the Court can say well, in my discretion I'm going to let this carry on. So functionally they are different, albeit you would think logically that if you could convince a Court that the Court had no jurisdiction, that you had convinced them, the same effect that they should have struck out, if you went that way. Now –

TIPPING J:

And are you going to return to the pleadings?

MR BROWN QC:

I wasn't actually, I was –

TIPPING J:

No, I'm not asking you to, I was just enquiring.

MR BROWN QC:

No, I wasn't, I –

TIPPING J:

Because it all turns on those, as it seems to me, at least at the moment, as to whether or not looking at those and confined to those, there is, however you describe it, a sufficient case of fraud.

MR BROWN QC:

Well, in my submission, it's been accepted all along that there isn't a sufficient case. My learned friend's, well, the pitch to the Court of Appeal was, "Well, we need to have a chance to put the pleadings in order and that's why you should send this back to Justice Venning, because on a strikeout we would have had a chance to put forward our best case," and the like. As those pleadings stand, in my submission, no one maintains that they are a sustainable pleading of fraud for the purposes of getting past that step.

TIPPING J:

What do you say about the capacity in our present circumstances on a jurisdiction issue of them saying that they can regroup and do a bit better when they've got further down the track, what's your …

MR BROWN QC:

Well, I say that the jurisdiction issue had been well and truly heralded, it had been argued really all the way through, that the whole arguments of nullity and the like had been argued all the way through before Justice Venning, they were argued before Justice Keane, the notice of opposition was clear, and my learned friend's aspirations to produce a better piece of paper, in my submission, can't sit with what Justice Venning says in paragraph 51, they simply –

McGRATH J:

I suppose Mr Brown, that Justice Venning's judgment is the status quo on this, isn't it?

MR BROWN QC:

Yes.

McGRATH J:

The Court of Appeal didn't get to the matter.

MR BROWN QC:

No.

McGRATH J:

So you say you have, on this issue, you have the findings of Justice Venning and you support them and you –

MR BROWN QC:

Yes, well you see, I ask this Court –

McGRATH J:

– and then you'll want your reply to what Mr Stewart says as to why those findings can't stand.

MR BROWN QC:

Exactly. I mean, all that this appeal, on the first question is, was the Commissioner right to bring it by r 5.49? If the answer is yes, then the application he made to Justice Venning was properly before him and Justice Venning's decision stands.

My learned friends I apprehend and I think they want me to get on to it, really want, in this Court, to renew the nullity argument rather than the fraud and that is where I anticipate I'll be responding more in terms of argument.

TIPPING J:

Well they'll have to keep within the grounds of leave.

MR BROWN QC:

Well...

McGRATH J:

Well I think it's the second question probably leaves it all open for both sides. I mean, I don't think for myself that Mr Stewart would be inhibited from arguing anything that would address the second question.

MR STEWART QC:

Would it help if I indicate the two points that we're interested in?

ELIAS CJ:

Well, perhaps I'll just find out from Mr Brown where he's heading to because I am getting a little anxious about the time.

MR BROWN QC:

Yes, so am I, your Honour. The structure of what followed was I was going to make a brief reply to – in anticipation of those parts of my learned friend's submissions that try and assert there are questions of fact here. Then I was going to deal reasonably quickly with the nullity point which we say disappeared from view in the Court of Appeal but has resurrected and then I was going to deal with the approved question two to the extent that I need to. I've already canvassed that a little bit with Justice McGrath, in terms of the abuse. So, I was aiming to try and finish well before lunchtime but it would be helpful I think to know the points and emphasis my learned friend has.

ELIAS CJ:

Yes, all right. Mr Stewart.

MR STEWART QC:

Thank you your Honours. If we can't get up on fraud, then the only remaining point is the nullity point and we would accept that this Court is the appropriate Court to deal with the nullity issue.

ELIAS CJ:

So you don't in fact take issue with this being a jurisdictional impediment?

MR STEWART QC:

No –

ELIAS CJ:

If you don't get up on fraud, that there is a jurisdictional impediment and the Court of Appeal was wrong in the view it took, is that right?

MR STEWART QC:

Yes, we didn't have a – I can see why they took the view they took because with the fraud issue being at the forefront, the concern was that there should be opportunity to – an obligation in fact, it's more than an opportunity. There's a detailed discussion of this in the Court of Appeal case in *Shannon*, to not only plead fully the particulars of the fraud but also to provide affidavit evidence, put all your cards on the table and there's nothing held back and that's what usually happens in a strikeout.

Now, the Court of Appeal made it clear in the course of discussion and it's in the transcript, that even in a jurisdictional application, or issue, the Court can adjourn the matter to allow the matter to be re-pleaded to see if it can come within the jurisdiction and indeed to file evidence. So for its part, it didn't see that there was a significant difference between proceeding under the jurisdiction or proceeding under strikeout but it felt that the matter had misfired because the matter fell between two stools and that the parties weren't really joined on the issues but for today, my submission will be, to Your Honours, that fraud is sustainable on the current pleading, I haven't accepted it's not, notwithstanding that we have an error of law as part of the component and –

TIPPING J:

But if you fail on that Mr Stewart, I understood you to say you will fail on the appeal?

MR STEWART QC:

No, if I fail on that then the only issue is that we have, on our submission and no one arguing –

ELIAS CJ:

What does the nullity arise out of, if you fail on the fraud?

MR STEWART QC:

It arises out of the fact that there is a statutory prohibition on assessing financial transactions, financial arrangements, under anything other than EH. Now, it's not that – there's no choice here, it is an express prohibition that could not be clearer.

ELIAS CJ:

Well don't –

TIPPING J:

But don't you have to come back to us?

ELIAS CJ:

Yes, don't you have to come back to us?

TIPPING J:

Don't you have to come back to us?

MR STEWART QC:

Yes, that's right, we would come – and that's what –

TIPPING J:

And that would be a separate proceeding?

MR STEWART QC:

It could be, or you could adjourn this proceeding for that.

TIPPING J:

Oh, no. This proceeding is not –

MR STEWART QC:

I mean, this Court –

ELIAS CJ:

No, you'd have to make an application for re-call.

MR STEWART QC:

Yes and on its inherent jurisdiction, the same way it did in *Saxmere* and the House of Lords did, as it was then called, in *Pinochet* –

TIPPING J:

Mmm.

MR STEWART QC:

– and there are authorities on why it's desirable in the interests of the administration of justice that that happened –

ELIAS CJ:

But that's not today's case. So on today's case, if you don't get there in convincing us that the fraud issue is alive on the pleadings, that's the end of it?

MR STEWART QC:

Yes, I'm happy to proceed on that basis. We'll deal with the – I'll have to get an application to Your Honours –

TIPPING J:

Is that everybody's stance on your side of the case Mr Stewart?

MR STEWART QC:

Well I don't know, we don't communicate a great deal but it might helpful. So I will focus on the fraud issue when I'm properly before Your Honours.

ELIAS CJ:

Yes, thank you. Mr Gudsell.

MR GUDSELL QC:

Thank you your Honours. The submissions that my friend has put before the Court do address nullity to a considerable extent, i.e. Mr Stewart's submissions. I had not intended to address them but the position is that the nullity issue is essentially the core, that there was never any valid assessment in the first instance –

ELIAS CJ:

And is that –

MR GUDSELL QC:

If there was –

ELIAS CJ:

– not a re-hearing application too?

MR GUDSELL QC:

No, it's a valid matter, there would be nothing to come before this Court, there would have been nothing to go to the Court of Appeal and nothing to come to this Court. If the argument is valid, then there's no –

TIPPING J:

But surely the High Court can't say that a decision of the Supreme Court is a nullity?

MR GUDSELL QC:

Well it wouldn't be Sir, with respect, what it would be saying is that the matter is addressed by this Court on the black letter law analysis where a proper assessment on the basis the way the matter was put. If the matter in reality was that the matter should have been dealt with by the Department under EH in the first instance no –

TIPPING J:

But don't you have to get the orders of the Supreme Court set aside by somebody and surely only the Supreme Court can set aside its order? No other Court can set aside an order of the Supreme Court, I wouldn't have thought.

MR GUDSELL QC:

On the basis of the arguments that have been put before this Court, that would be right, in my submission, but –

TIPPING J:

Well then it's fraud or nothing, isn't it, today?

MR GUDSELL QC:

Well certainly those are not my instructions. I had understood –

TIPPING J:

Well never mind your instructions, are you willing to argue that –

MR GUDSELL QC:

Yes, I am Sir –

TIPPING J:

– the High Court –

MR GUDSELL QC:

– and I had understood –

TIPPING J:

– is capable of setting aside orders of the Supreme Court?

MR GUDSELL QC:

The High Court is capable of determining, in my submission, that the assessment made was a nullity as an exception –

ELIAS CJ:

You mean the assessment as approved by this Court was a nullity?

MR GUDSELL QC:

Yes.

ELIAS CJ:

Yes, all right, thank you.

TIPPING J:

Well I hope –

McGRATH J:

You say that's an exception to the general of finality?

MR GUDSELL QC:

Correct.

McGRATH J:

Right.

ELIAS CJ:

Thank you Mr Gudsell. Ms Hinde, do you have anything to add to that, any different point that you'll be advancing?

MS HINDE:

No Your Honours, I would accept what Mr Gudsell said, that represents my position too.

ELIAS CJ:

Yes, thank you Ms Hinde. Well Mr Brown, we may have wasted a lot of time this morning.

MR BROWN QC:

Well I'm sorry if that's your case your Honour but certainly I'm – what my learned friends have said about nullity, what Mr Stewart says I agree with, it's an unusual proposition – unless they were to argue asymmetrically that only a challenge, only their – only judgment could be found in their favour in the High Court on the challenge and that a decision against them on the tax conclusion was a nullity, asymmetric result, either the Court has jurisdiction at the stage or it doesn't and they simply can't go back to Justice Venning on that issue –

TIPPING J:

Well would you be better off to wait and see what they say about nullity and how they get on Mr Brown?

MR BROWN QC:

I think so your Honour.

ELIAS CJ:

I think it really is the argument that you have advanced to us, that the error alleged is one of law which was determined by this Court and that being so, your submission is that the High Court doesn't have jurisdiction?

MR BROWN QC:

Yes. In fact the way it developed Your Honour, is that this, the nullity point, from our position, emerged in the High Court as a extension, or another basis like fraud upon which you could set aside a judgment. That is why they sit beside each other but in fact they're – but what the nullity, I think, argument serves to highlight is that the

fraud argument is, in a way, essentially similar, you are seeking to invalidate from the outset because of the factual substratum being different, and that is why the –

TIPPING J:

Well, Mr Gudsell says there's another exception, so we'd better –

MR BROWN QC:

Yes.

TIPPING J:

– wait and see where it comes from.

MR BROWN QC:

Should I stop at this point?

ELIAS CJ:

Well, I think that's probably a good point for you to stop.

MR BROWN QC:

I think it makes sense, yes.

ELIAS CJ:

Yes, thank you, Mr Brown.

MR BROWN QC:

There is the second point but I've already discussed that with Justice McGrath, that it'll be, I think you were coming from a *Henderson v Henderson* perspective on that but your approved second question is whether the judgment should be upheld, not withstanding the first, but I think we could leave that for…

McGRATH J:

That's directed at Justice Keane's judgment?

MR BROWN QC:

Particularly, but also we do argue in our submissions that the Court of Appeal could have treated our application under 5.49 as a 15.1.

McGRATH J:

Yes.

MR BROWN QC:

That doesn't really come through in the judgment but in the transcript it's clear the Court of Appeal was preoccupied with not having that written form of application before it but if – the Court of Appeal could as easily have said well, I think the procedure is academic, the principle that you're challenging is the same and we'll treat it as 15.1 but it elected not to do that and said, you've done the wrong way, we're turning this over and back it goes and that's the process that we say is –

McGRATH J:

So are those the two points of your argument on the second question?

MR BROWN QC:

Yes.

McGRATH J:

And I think that's all we need to hear from you at the moment on that.

MR BROWN QC:

Thank you, your Honour.

ELIAS CJ:

Thank you, Mr Brown. Yes, Mr Stewart.

MR STEWART QC:

Now the fact that the word fraud does not appear in the pleading does not mean that fraud is not asserted or relied upon. Again, the deployment of the word fraud does not assist the accuser if the essential ingredients of the fraud allegation are not present.

ELIAS CJ:

Where's the allegation of dishonesty in the pleading?

MR STEWART QC:

Tab 3, so if we start at paragraph 29. "The defendant has a statutory duty to refer to the existence application and effect of section EH8 and in no position to the plaintiffs." Then we go down to 31, "The defendant, as a party to the challenge proceedings brought by the plaintiff, had an obligation to refer the authority," that's the High Court, "and opposing council to the existence application and effect of section EH," and that obligation also existed independently in relation to any solicitors employed or retained by the defendant, who were involved in either the preparation of the NOPAs and/or the challenges.

Now, had the defendant discharged his statutory duties or obligations in relation to the NOPAs and his obligations to the Court, as a party they would not have made, the Court would not have made the order it did in confirming the assessment. Now, the dishonesty lies in the fact that the Commissioner was aware that, with respect to financial arrangements, he was obliged to assess under EH and no other section, notwithstanding any other provision and any other legislation. Now, in this case –

TIPPING J:

Well, the pleading is that he had an obligation, not that he was aware he had an obligation, so far –

ELIAS CJ:

And not that he deliberately flouted his obligation or concealed –

McGRATH J:

Concealed is the key thing, there's no indication he concealed it.

MR STEWART QC:

Yes, well, you see, he had advice from a senior accruals expert, before the assessment, saying that it is mandatory to assess in, under EH8 and no other section, and that it's not permissible to assess under EG. Now, on the material that we've got so far, we see that the Commissioner appears to have, within his own ranks, adopted a strategy that they wouldn't assess it as dictated by Parliament under EH, but they would do the assessment under EG and then wait and see what, if anything, the plaintiffs do.

Now, the reason that he would do that, in my submission, is because it makes tax avoidance so much easier because if he does the assessment under EH which is a

code or provision directed at anti – tax avoidance transactions, it's an anti-avoidance provision and it deals with situations where there's a mismatch between the expenditure and the profits coming 20, 30 or 40 years later.

TIPPING J:

So you say the reason was that it, on the way he adopted it, tax avoidance was so much easier to establish, is that –

MR STEWART QC:

Yes, yes, and so much harder to establish if he assessed under EH. Now, I can take you to –

WILLIAM YOUNG J:

But what's the point of that, because they were also alleging black letter nonconformity, which would also have obviated section BG?

MR STEWART QC:

Well, they lost on all of that, didn't they?

WILLIAM YOUNG J:

I know, but, I mean, that's a really cunning plot if they were putting up sort of arguments they were going to lose on to, as it were, accentuate the BG argument, and that's, it's a bit far fetched.

MR STEWART QC:

I can't defend the logic of the decision, but at no stage has the Commissioner ever denied that EH was mandatory and the assessment by him had to be under EH. So, why did you do it under EG?

WILLIAM YOUNG J:

Well, perhaps they did, perhaps they've got different advice. I mean, perhaps it's, perhaps they've got different views on it within the Department.

MR STEWART QC:

Well, it may be, but their Senior Approvals Officer, they have clear advice that it was mandatory to assess under EH.

TIPPING J:

Well, why didn't –

MR STEWART QC:

Now you can't speculate and say, "Well, look, it doesn't look good, there's no explanation on the face of it as to why he would do that but he's done it, but he's entitled to remain silent," do you say, your Honour?

TIPPING J:

It was so obvious, yet the respondents all missed it.

MR STEWART QC:

Well, the respondents – and let me just deal with that, I've two points about that. The first one is this. The respondents' case was this was not a financial arrangement and therefore EG was the appropriate section. The Commissioner's case was this was a financial arrangement. Now, in the High Court the Commissioner lost on that issue. Now the respondents were not focusing on EH because they were adamant that, not being a financial arrangement, EG was the relevant provision.

Now that's a matter of evidence as to what credibility the Court would give to the respondents' evidence on that but what we do know is that the Commissioner had it fairly and squarely put to him by his own adviser that EH is mandatory. Now he didn't do EH, he didn't tell the Court about EH in terms of, we've done the assessment under EG Your Honours but there is EH which, when you look at its terms, are so very clear, that it has to be assessed under EH because it's a financial arrangement. There is no doubt that the Judge or any Court would have been extremely interested to know from the Commissioner well, why then have you assessed it under EG, please explain? Now –

GAULT J:

Where does this constitute fraud?

MR STEWART QC:

Well, because he has, by suppressing his knowledge and –

GAULT J:

That's an allegation –

MR STEWART QC:
Well, it's not just –

GAULT J:
– of intention that you haven't pleaded or justified. It could have been a mistake –

MR STEWART QC:
No.

GAULT J:
– it could have been a misapprehension. You say it's an intentional deception, and you haven't pleaded that.

MR STEWART QC:
Well yes, we have, we'll go through it, we haven't finished here. We pleaded there was a suppression, of the real information and the truth. I've got –

ELIAS CJ:
Sorry, can I just ask you – I don't want to interrupt that but it's my fault that I don't understand this. Is your argument wholly based on the opinion that the Commissioner received?

MR STEWART QC:
No. The Commissioner had published other material –

ELIAS CJ:
I see, that's all right, I just wanted to know how that fitted in.

MR STEWART QC:
Yes, yes, and there's not been a whisper, not even a suggestion, from the people representing the Commissioner, that EH was not mandatory. Now you'd think at the very least, after the three years that this issue's been batted backwards and forth, that you might have had in some forum, or even as between counsel, an argument that it was not mandatory. And of course the nullity argument springs out of that.

ELIAS CJ:

I'm sorry, I interrupted. Did you get an answer?

TIPPING J:

So you're really – the core of this allegation is that the Commissioner intentionally adopted EG, knowing that EH was mandatory and intending to deceive, thereby deceive?

MR STEWART QC:

And mislead the Court. Those are the elements. Knowing he had an obligation, a statutory obligation to assess according to law. Now what he does, according to this report we've seen – and the Judge hasn't seen that report – he says, as the Commissioner, the assessing officer, "I will assess under EH and let's see what they do." Now that in itself is wrong. He has a statutory duty to assess according to law, not according to how the taxpayer puts the return in. He must assess it for himself according to law. He didn't do that. He assessed it contrary to the law, and did that deliberately.

WILLIAM YOUNG J:

But he did justify, in the notice of proposed adjustment, they did justify the assessment by reference to inter alia subpart EH.

MR STEWART QC:

Well, they mentioned it very briefly, about three lines in one of the NOPAs, and they dropped it out of view thereafter.

WILLIAM YOUNG J:

But that's after that was challenged.

MR STEWART QC:

No –

WILLIAM YOUNG J:

Well, presumably in, the notices of response didn't accept that section, subpart EH applied?

MR STEWART QC:

No but he said, “We will do the assessment on this basis and wait and see what they do.”

WILLIAM YOUNG J:

So issue was engaged and then they abandoned it?

MR STEWART QC:

Well, there’s no evidence about to what extent it was engaged. It featured – and that NOPA also wasn’t before the Court. I mean, that's in another –

WILLIAM YOUNG J:

But it is now. I mean what’s – there’s a sort of an issue of substantiality that, at least in my mind, you have to engage with.

MR STEWART QC:

Well, that's because, you see, we haven't had the opportunity to file the affidavits and there’s been no response from the other side, so it’s in a vacuum, this –

ELIAS CJ:

Well, what prevented your filing affidavits if there were matters that should have been put before the Court?

MR STEWART QC:

All right, I’ll just take your Honours through that. Under the red – volume 1, at page 23 – this is the protest to jurisdiction. This is how the respondents whom I represent perceived the matter. “Paragraph 1 of the application appears to protest, to object to the jurisdiction of the Court to hear and determine this proceeding, because it’s been dealt with already, has been the subject of appeals to the Supreme Court, the High Court as functus officio, and has no jurisdiction in relation to an application to set aside the High Court judgment, and any application to set aside a judgment in the previous proceedings must be made to the Supreme Court.” So it doesn’t say that there’s no sustainable case of fraud and then you get the strikeout application which is at page – sorry, the notice to dismiss, the proceeding, at page 27.

ELIAS CJ:

Why does it have to say anything about fraud because it’s taking the line that there’s nothing on the pleadings that – it’s you coming back saying but it’s all about fraud?

MR STEWART QC:

Well yes, we know that we then have to establish the fraud case and we say it does on these pleadings which I haven't finished taking you through. Now, here's a strikeout application which mirrors the grounds in the protest, except that in paragraph 3 –

McGRATH J:

So what page are you on now?

MR STEWART QC:

Page 29 Sir. Paragraph 3 refers to some authorities, nowhere near the fraud regime, just dealing with when the Court is functus officio.

WILLIAM YOUNG J:

So this is the same proceeding?

MR STEWART QC:

Same proceeding. There's a protest Sir and then this is the application to dismiss filed on the same –

McGRATH J:

Both these documents are filed contemporaneously, I presume?

MR STEWART QC:

Yes, they were.

McGRATH J:

And the rule appears to contemplate that will happen?

MR STEWART QC:

Yes, then the matters move very quickly. I wasn't involved in this case at this stage but there was a notice of opposition filed, at page 31, by Mr Forbes, representing all of the respondents and then, as Your Honour Justice Elias mentioned, at paragraph 4 it's picked up on the fact that they've got two – under *Kuwait Airways Corp v Iraqi Airways Co* –

TIPPING J:

Well *Meek v Fleming* [1961] 2 QB 366 (CA) is a fraud case.

MR STEWART QC:

Yes, it is. Not only is it a fraud case as I come to it, it's a case which says obiter that fraud – if you mislead the Court on a matter of fact or a matter of law –

TIPPING J:

It was a policeman who misrepresented his rank.

MR STEWART QC:

That's right, it was and advised by senior counsel that was an appropriate tactic.

TIPPING J:

Yes, it's a bit obiter dodgy.

MR STEWART QC:

Yes and the interesting thing, at the end of the judgment, senior counsel appears to make an apology to the Court which is then recorded at the foot of the judgment.

WILLIAM YOUNG J:

Victor Durand QC.

MR STEWART QC:

Beg your pardon?

WILLIAM YOUNG J:

He was Mr Victor Durand QC, it didn't do his career much good.

MR STEWART QC:

No, they just put his name at the bottom as Durand.

WILLIAM YOUNG J:

The interrelationship between the application to dismiss and the protest. Was that addressed by Justice Venning, or not?

MR STEWART QC:

No. You can file them simultaneously.

WILLIAM YOUNG J:

Yes.

McGRATH J:

But the rules contemplate that both will exist?

MR STEWART QC:

Yes.

McGRATH J:

I just read something that seemed to explain, I think in r 5.49 –

MR STEWART QC:

You can either file a protest and then if the person who has the receipt of the protest can bring an application to set aside the protest.

McGRATH J:

Yes, yes, that's right.

MR STEWART QC:

That's one way of doing it, or in this case –

WILLIAM YOUNG J:

So was the application to dismiss, was on the table when Justice Venning heard the proceedings in February 2010?

MR STEWART QC:

Yes, it was filed on the same day that the protest was filedon 19 October. Then there was quite a rapid development after that where Justice Venning was assigned as counsel at the request of the Commissioner and he timetabled the matter for a hearing with no provision for affidavits, just the exchange of submissions, the Commissioner's submissions to be in on 17 December, the respondents' submissions to be in on 26 January, just right at the end of the Christmas holidays and the matter was heard on 2 February.

You can see – I'll just take your Honours to the green volume, volume 2, at 173 – sorry, no, that's the wrong one, 143.

ELIAS CJ:

In the green volume?

McGRATH J:

It's a yellow volume.

MR STEWART QC:

Oh yes – 161, third time lucky. Three pages was the extent of my – the *Ben Nevis* respondents, if I can call them that, the clients I represent, of the opposition and you can see in the first paragraph reference is made to *Shannon,* Court of Appeal decision – High Court decision of Potter J, I beg your pardon which had this two-stage approach.

First of all, was there jurisdiction for the Court to hear and determine this? We say as a fraud matter, of course there was. Then the second stage, if the Court was satisfied that there was jurisdiction there would be a strikeout. So that's where, if you like, the matter misfired –

WILLIAM YOUNG J:

It's not really fraud that's relied on, is it? It's –

MR STEWART QC:

Well I'm going to address your Honour on that –

ELIAS CJ:

And your notice of appeal, I notice, is all about equitable fraud.

MR STEWART QC:

Not my one.

ELIAS CJ:

Oh no, not yours. Did you have another one?

MR STEWART QC:

Yes.

TIPPING J:

Your para 3 does seem to engage with the question of fraud?

WILLIAM YOUNG J:

What page is that?

MR STEWART QC:

Oh yes, we saw –

TIPPING J:

Page 162.

MR STEWART QC:

We accepted that a –

TIPPING J:

But one way through this problem for you was to have a, parte the word, tenable case of fraud established?

MR STEWART QC:

Yes. Now –

ELIAS CJ:

Even a pleaded case –

TIPPING J:

A pleaded case, a tenably pleaded case.

MR STEWART QC:

Yes. Well I have to say to you that it was pleaded.

TIPPING J:

Yes, of course, we're coming back to that.

MR STEWART QC:

Yes sure but we took the jurisdictional point, meaning that with fraud the Court has jurisdiction, for a starter we were going on that. We saw a different issue in respect to nullity because we could see that there's no reason why you could even suggest in our case, I'm not speaking for the other respondents, that the High Court could be invited on a matter of law to make a determination as to the lawfulness of a Supreme Court decision and that ultimately the matter ended up here, that's where that argument was most likely to be run and resolved. I accept that that needs to be the matter of a separate application to this Court.

McGRATH J:

Now at this stage, Mr Gudsell has argued *Accent Management*'s case before Justice Keane but judgment is reserved, is that right?

MR STEWART QC:

Yes, that is right.

McGRATH J:

So the judicial review argument had been run and then, am I right in saying that this is the first time fraud is appearing in your submissions?

MR STEWART QC:

My learned friend –

McGRATH J:

You may want to come back after lunch on that.

MR STEWART QC:

Yes. I think the – my learned friend Mr Gudsell appeared, I wasn't involved in the hearing before Justice Keane but I think it was March 2010, was the hearing, so the hearing was after this.

McGRATH J:

March 2010 was when the –

MR STEWART QC:

Oh no, no –

McGRATH J:

– judgment was delivered –

MR STEWART QC:

– the hearing was July –

McGRATH J:

– by Justice Keane.

MR STEWART QC:

Yes, the hearing was in July 2009.

McGRATH J:

Yes.

MR STEWART QC:

And the decision was on 12 March 2010.

McGRATH J:

And this document that we're looking at now, these submissions are prepared in January 2010?

MR STEWART QC:

Yes, yes.

ELIAS CJ:

Mr Stewart, do we have the statement of claim in the judicial review proceedings? I'm just not sure what –

WILLIAM YOUNG J:

I think we do somewhere, don't we?

ELIAS CJ:

Don't take time –

McGRATH J:

Mr Gudsell will know where that is.

MR GUDSELL QC:

Tab 31.

ELIAS CJ:

Thank you. Don't take time on that, I'll have a look at it, you carry on.

MR STEWART QC:

So we're back to the statement of claim at tab 3, paragraph 34. Here's the allegation of the dishonesty, "That the defendant presented a false case to the authority which resulted in an order being made in favour the defendant which it could not legally make and would not otherwise have made," that is, upholding the assessment under EG.

TIPPING J:

What paragraph were you referring to there, I'm sorry.

MR STEWART QC:

Paragraph 34 Sir.

TIPPING J:

Paragraph 34?

MR STEWART QC:

Yes.

TIPPING J:

Presented a false case?

MR STEWART QC:

Yes.

McGRATH J:

And you're saying false case equates to fraud, is that...

MR STEWART QC:

Saying it's dishonest, yes.

TIPPING J:

Well it doesn't say knowingly presented a false case which you would expect –

MR STEWART QC:

Well that does –

TIPPING J:

– is if it was a pleading of fraud.

MR STEWART QC:

Well that – if you go down to the particulars, the defendant had been –

TIPPING J:

Well why on earth – Mr Stewart look, if it was to be an allegation of dishonesty, surely it would say knowingly presented, or wilfully, or some – this is quite neutral.

MR STEWART QC:

If you either let me step you through it or you read it, my submission is that you'll come to the conclusion at the end that all the ingredients of fraud have been alleged, without using the F word.

ELIAS CJ:

Well it sounds to be using the P word that Mr Brown was so fond of, proper, what was it?

MR STEWART QC:

Yes.

WILLIAM YOUNG J:

Proleptic.

ELIAS CJ:

Looking at it from a distance.

MR STEWART QC:

As we said to the Judge, you know, there's no F in perjury but that's –

WILLIAM YOUNG J:

But why not say fraud? I mean, the pleading is addressed to things such as whether the outcome was according to law, whether the assessment was lawful or unlawful –

MR STEWART QC:

Well I didn't do the pleading but –

TIPPING J:

No well I'm sure you're pleased you didn't.

MR STEWART QC:

Well, if the allegation is and it certainly is, that there was this intentional decision to breach a statutory duty and not to disclose the matters fully to the Court, having assessed on the wrong basis, then fraud would have been up in lights but I say that, as it stands, it has the ingredients here and it is fraud and I said to his Honour that, you know, this will be repeated and the fraud word will be there.

So here are the particulars. He had been advised when issuing the NOPAs on which the assessments were based, the debt was a financial arrangement. Subpart EH applied which prohibited him from making the assessment he made in relation to the debt. The defendant was also of the view – that was his own view as to the obligation to assess under EH when there's a financial arrangement. He had a duty to refer to the existence, effect and likely application of subpart EH and the NOPAs in his submissions to the High Court and its discovery the defendant was aware of the duties referred to but chose to ignore them. It was a litigation strategy of the defendant not to do the things referred to in subparagraph (c) above.

As a consequence, there was a suppression of the truth so that the evidence and the arguments advanced by the defendant carried a suggestion or an insinuation of something false. The defendants presented a false case by deliberately refraining from putting before the authority relevant and material facts and the law for the purpose of securing an order which he knew was unlikely to be made if he made full disclosure as he was required to. Now –

TIPPING J:

But that's putting before the authority. Once the thing goes on appeal, by way of re-hearing, what about putting it before the higher Courts?

WILLIAM YOUNG J:

The authority is the High Court.

TIPPING J:

Sorry, I meant the Court of Appeal and they did put it in front of the – well your –

MR STEWART QC:

No, we won in the High Court, on the fact that it wasn't a financial arrangement.

TIPPING J:

Yes.

MR STEWART QC:

So we still weren't troubled by EH but the Commissioner had that reversed in the Court of Appeal and in this Court and then of course Mr Gudsell sought leave of this Court – it does seem like a long time ago now, thank goodness –

ELIAS CJ:

It was a long time ago.

MR STEWART QC:

It was.

TIPPING J:

As I recall it, other parties expressly disassociated themselves from that?

MR STEWART QC:

Oh yes, they had the –

TIPPING J:

But are you now trying to –

MR STEWART QC:

– optimism –

TIPPING J:

– are your clients now having, in effect, having lost they now want to associate themselves with it?

MR STEWART QC:

Well what happened is that when they did lose and that they were focusing on that this – when they looked at EH more closely and looked at its mandatory terms, they said that well, the Commissioner here has assessed under the way section. Now if that was just a matter of a mistake, error of law, overlooked, as you say, nothing sinister, so be it but when they went into it, when they got hold of this report of Mr McKay's and started to get onto it, well this is a strategy and he knew what the position was, he chose to ignore it, then you get into the dishonesty and this is made more serious because the Commissioner is under a statutory duty, section 89F of the Tax Administration Act, to bring to the Court's attention all of this relevant material that the law, the likely effect and you'll see that in our submissions.

At the end, at page 25 of the written submissions, "The reality, in the notoriously specialised, technical and complex field of tax law, the Courts rely heavily on the Commissioner to inform the Courts of the correct position under tax law," and I mention section 89F in the footnote there. "This includes which statutory provision applies and in what way. This reliance is critical in tax cases, given the intimate knowledge the Commissioner's staff have of the Income Tax Act. The ethical obligations owed by counsel and solicitors as officers of the Court to bring all relevant matters to the attention of the Court, even if those matters prove inconvenient or problematic in respect of the outcome sought by the client." Now, there are a couple of relevant provisions there –

TIPPING J:

Is it suggested that those who were advising the Commissioner and who presented the Commissioner's case in various Courts were complicit in this dishonesty, Mr Stewart?

MR STEWART QC:

The Commissioner had solicitors on his staff, and that is the suggestion there, yes – not that, yes.

TIPPING J:

Well, I think I'm entitled to a straight answer.

MR STEWART QC:

Yes.

TIPPING J:

The answer is yes?

MR STEWART QC:

To the solicitors working in the Commissioner's ranks. There were two, who were involved throughout in this case. One of them was the Director of Litigation Management, and quite what roles they played in it – but, yes, that is the allegation, and that is why there is reference –

TIPPING J:

And it's somewhere in this statement of claim, is it?

MR STEWART QC:

Not in this one, it's in the document that I handed up to the Court of Appeal, which they referred to and –

TIPPING J:

Well, it's not much use if it's not in the pleadings, is it?

MR STEWART QC:

It's a developing – a work in progress document, your Honour, which, after lunch in the hearing before Justice Venning, some alterations was given to the Judge to indicate the direction that the sort of re-pleading may take. And it wasn't the pleading as such, there were some explanatory notes, but setting out the landscape, if you like, developing this allegation. And it – not the names, but the status of, the positions occupied by some of the Revenue's solicitors are disclosed in that.

TIPPING J:

Is there any authority that says that dishonesty as to the law is a ground for impeaching a final decision as well as dishonesty as to fact?

MR STEWART QC:

There's an obiter comment, which I'll take you to, but as a matter of –

TIPPING J:

At what level of authority?

MR STEWART QC:

English Court of Appeal.

TIPPING J:

Are you able just to – because I'd like to look at it over the lunch adjournment.

MR STEWART QC:

Yes, yes, I know. There's a –

TIPPING J:

Are you able to identify it, Mr Stewart?

MR STEWART QC:

Yes, I can.

TIPPING J:

But that's the only authority that your diligent researchers have been able to find?

MR STEWART QC:

Yes, and that's *Meek v Fleming*, of which I have copies here.

TIPPING J:

Right.

ELIAS CJ:

I suppose it is important to this argument you make that the Commissioner was under a duty to assist the authority on matters of law, is that right?

MR STEWART QC:

On matters of –

ELIAS CJ:

Law?

MR STEWART QC:

– taxation, and law, yes, a specialist knowledge that the Commissioner has.

ELIAS CJ:

Do we have that provision in front of us? I'm just not…

MR STEWART QC:

Yes.

TIPPING J:

89F.

MR STEWART QC:

Tab 17, of the respondents' bundle of authorities.

ELIAS CJ:

It's not tab 17, is it, of the respondents…?

MR STEWART QC:

I'll just – this bundle, Your Honour.

McGRATH J:

One issue, it seems to me, Mr Stewart, is you talk about the duty to help the authority, but isn't this really a duty to disclose –

MR STEWART QC:

Yes.

McGRATH J:

– in litigation to the other party?

MR STEWART QC:

There is that too. Now, if I could just read you from a Privy Council case –

ELIAS CJ:

Sorry, which section – is it 89F?

McGRATH J:

Yes.

ELIAS CJ:

And the law.

MR STEWART QC:

2(v), "Provide a concise statement of the key facts in the law in sufficient detail to inform the disputant of the grounds the Commissioner proposed to adjustments or inducements."

ELIAS CJ:

This is for the NOPA, is it?

MR STEWART QC:

Yes, yes. In the NOPA they form the basis of the assessment, and then the challenge.

WILLIAM YOUNG J:

But the NOPA did include section – part EH, subpart EH.

MR STEWART QC:

Well, we can get hold of that, Sir.

WILLIAM YOUNG J:

Okay, well – I just – all right. I just, looking through the documents, I see that there was, the issue, the applicability of part EH was considered in an Ernst & Young opinion, who were emphatic that it didn't apply.

MR STEWART QC:

I'm not aware of that, Sir.

WILLIAM YOUNG J:

It's at tab 573 – sorry, page 573, tab –

McGRATH J:

Mr Keating advanced a different view at an earlier stage of…

MR STEWART QC:

Oh, he's an employee –

WILLIAM YOUNG J:

No, you know, but this is Ernst & Young for the taxpayer, so…

MR STEWART QC:

Well, Mr Keating was deep –

WILLIAM YOUNG J:

Mr Keating is advising the Commissioner.

MR STEWART QC:

Deep in side the enemy camp, he was employed by the Commissioner, I believe.

WILLIAM YOUNG J:

Right.

MR STEWART QC:

And he was driving this litigation.

WILLIAM YOUNG J:

Yes, I understand that. But this is – just for a different view about it. We've got Mr McKay's view, but then we've got a view that is obtained by the taxpayers from Ernst & Young, who say that the accruals regime doesn't apply.

MR STEWART QC:

Well, that's –

WILLIAM YOUNG J:

So, but it's on the table, the whole issue is…

MR STEWART QC:

It's contrary to –

TIPPING J:

Obviously it's contestable, it must be contestable, surely. I mean, it can't be as clear as all that, if we've got different experts saying different things.

MR STEWART QC:

Well, no, it is as clear as all that, and if it wasn't as clear as all that we wouldn't be suggesting a nullity. And, you know, sometimes – and I'm not suggesting this is an instance – advice is sought on particular terms or provided on those terms, and it doesn't reflect what the Commissioner's understanding is. He produces bulletins, and has done, that we've discovered, about the applicability of EH, and it's a bit hard to get around the wording of EH when it says, "Financial arrangements must be assessed."

TIPPING J:

The question is, presumably, whether it was a financial arrangement.

MR STEWART QC:

Well, it was.

WILLIAM YOUNG J:

Well, whether it's an accepted financial arrangement, I think that is the question, isn't it?

TIPPING J:

Yes, within the terminology.

McGRATH J:

Mr Stewart, could I just – you may like to reply to this later, but it seems to me that section 89F is really concerned with the parties, the Commissioner being open and putting on the table everything he's going to argue, and documents that relate to it. So it's really a matter of disclosure to ensure there are no surprises. It's that more than the Commissioner' having some duty to apprise the hearing authority of arguments that are available that he may not wish to us.

MR STEWART QC:

Well, that's what I was just coming to, was the solicitors' obligations, solicitors advising the Commissioner, working for the Commissioner, employed by the Commissioner. There are two sections, there's rule 13.11 of the ethical rules –

McGRATH J:

Yes, this doesn't answer my question, but you're no doubt coming to the obligation on, that lawyers, counsel, usually have, are you, that, to disclose an authority adverse to them to the Court?

MR STEWART QC:

Yes, and – absolutely.

McGRATH J:

That is not a question of what the statutory obligation is under section 89F. I'm putting it to you, it's not concerned with the sort of duty of informing the Court of available arguments and arguments against you. Section 89F is solely concerned with the other party to the litigation having all the information about what you intend to argue and the facts you're relying on in respect of it.

MR STEWART QC:

Yes, at that stage, but –

McGRATH J:

And the problem here is that the other side knew all about section EH.

MR STEWART QC:

Well, they knew it had application, if it wasn't a financial arrangement, but it's not a matter that they considered. Now, the Judge –

WILLIAM YOUNG J:

But is that – look, is that really realistic? I mean, this whole tax scheme has been carefully calculated and carefully structured. Is it really plausible to assume that those responsible for it would have overlooked something as obvious as the accruals regime?

MR STEWART QC:

Well, I mean, they were obsessive about the scheme of which they were the architects. I imagine quite likely. And that's a matter that you can't assess at the Bench, it has to be assessed in the witness box, your Honour, of course.

WILLIAM YOUNG J:

Well, they must have known from the Ernst & Young opinion, presumably, that the accruals regime probably did apply unless it was an accepted financial arrangement.

MR STEWART QC:

Yes, I imagine –

WILLIAM YOUNG J:

So they're pretty hot on the trail of the point.

MR STEWART QC:

Yes.

WILLIAM YOUNG J:

And you're now arguing –

MR STEWART QC:

But they weren't aware –

WILLIAM YOUNG J:

– the point's so obvious that to ignore it was dishonest, when – now, when the point was raised in the Supreme Court all the taxpayers, other than those represented by Mr Gudsell said, "No, we don't want a bar of it."

MR STEWART QC:

But what you get, the Commissioner going to Court, arguing that it's financial arrangement, so it's not depreciable property, but not giving the Court the information ever that EH in those circumstances require it to be assessed much differently than EG, and it makes a very, very significant difference to the outcome. The Commissioner get no more money out of it, but he gets his penalties and he gets his tax avoidance, with a hundred percent abuse of tax position.

WILLIAM YOUNG J:

But why would it be different if it was otherwise an abuse of tax scheme and it fails on a black letter basis as well as under section BG or –

MR STEWART QC:

Well, that was a – well, he was wrong on the black letter basis, wasn't he, as it turned out? But he got his tax avoidance as, virtually, laid down in *Nazaire* –

WILLIAM YOUNG J:

Well, that's with the benefit of hindsight, it wasn't –

MR STEWART QC:

But the Commissioner knew, he had a document which said, "There will not be tax avoidance if it's done under EH." Now, if I take your Honour to that…

ELIAS CJ:

Well, perhaps we should take –

WILLIAM YOUNG J:

Well, this is Mr McKay.

McGRATH J:

Yes.

WILLIAM YOUNG J:

But, I mean, that's not necessarily true. I mean, I understand the argument, there's a notwithstanding provision in subpart EH, but it's –

MR STEWART QC:

Let's say it's not decisive. It's lunchtime. It's still a big factor for the Commissioner and that's why he did it.

WILLIAM YOUNG J:

But the Commissioner wouldn't have had avoidance if he'd won on his other black letter challenges, because there wouldn't have been an avoidance problem.

MR STEWART QC:

Well, it would have been lovely –

WILLIAM YOUNG J:

There would have been nothing to avoid.

MR STEWART QC:

It would have been lovely if he had have gone to Court just on the black letter and didn't bother about avoidance –

WILLIAM YOUNG J:

No, but – sorry, but what I'm trying to put to you, and I'm sure you're really engaging with it, is this. The suggestion is that the taxpayers have been lured into hoisting themselves on their own tax-avoidance petard, which has now, to continue the metaphor, blown up in their faces, and what you say is, really the Commissioner should have done it on a less aggressive basis, on a black letter basis, that they simply weren't entitled to the reduction they obtained, and –

MR STEWART QC:

Okay. Well, if it –

WILLIAM YOUNG J:

– on the face of it, section, subpart EH gives a reasonably credible basis upon which, you know, at least – I mean, I myself have not heard an answer to what you're saying as to its applicability. But, in the end, the taxpayers would still have lost, in the end it still would have been a complex, artificial device which, for two reasons instead of one, couldn't pass muster.

MR STEWART QC:

Well, I – you can only look at that once you've done the, established the core acquisition price under EH, part 8 and done the analysis and then there is no tax advantage to the taxpayers to cancel, if it's going to be assessed under EH, there's no tax position to counteract.

WILLIAM YOUNG J:

Yes but that's the same as if the other arguments had succeeded, there would have been no tax benefit to counteract.

MR STEWART QC:

Yes but –

ELIAS CJ:

Perhaps we should come back to this Mr Stewart. I don't mean to choke you off, I just would like to choke off Justice Young and we'll take the adjournment now, thank you.

COURT ADJOURNS:1.03 PM

COURT RESUMES: 2.14 PM

ELIAS CJ:

Yes Mr Stewart.

MR STEWART QC:

Your Honours, I am continuing on the obiter reference, citing Justice Denning as to misleading the Court on matters of fact or law. That was at page 538.

ELIAS CJ:

Sorry, which volume are we in?

MR STEWART QC:

I handed up –

ELIAS CJ:

Oh sorry, yes, thank you.

MR STEWART QC:

Yes. Page 538 and it's the paragraph about halfway down the page. Lord Justice Denning said, "This raises an important question of professional duty. I do not doubt that if a favourable decision had been obtained by any improper conduct of a successful party this Court will always be ready to grant a new trial. A duty of counsel to his client in a civil case when defending an accused person is to make every honest endeavour to succeed. He must not, of course, knowingly mislead the Court either on the facts or on the law but short of that he may put such matters as are in his discretion he thinks would be most to the advantage of his client."

ELIAS CJ:

Well where does this go?

MR STEWART QC:

This goes to the – Justice Tipping asked me how I'd be able to find any case where the Court had been misled on the law which gave rise –

WILLIAM YOUNG J:

But it wasn't misled on the law here.

MR STEWART QC:

No but as I said, it was an obiter comment.

WILLIAM YOUNG J:

Right, okay.

MR STEWART QC:

That's what it's referred to –

ELIAS CJ:

And it didn't say it amounts to fraud. This is a reference to the, is it, to the ethical obligations of counsel.

MR STEWART QC:

A case where the Court was misled on the facts –

ELIAS CJ:

Yes.

MR STEWART QC:

– by failure to disclose the demotion of the senior chief sergeant to a lower rank as a result of his conduct.

ELIAS CJ:

I see. And so what happened?

WILLIAM YOUNG J:

Well there was a new trial direction.

ELIAS CJ:

New trial direction, okay.

MR STEWART QC:

New trial direction, yes.

WILLIAM YOUNG J:

This was an appeal too.

TIPPING J:

He was a chief inspector and he'd been up to no good and he had his reputation, in a defamation case, was it, or no it was to do with false imprisonment wasn't it?

WILLIAM YOUNG J:

He was referred to without correction when giving evidence as inspector.

ELIAS CJ:

But it just seems to me to be a mile away from what we're talking about here.

MR STEWART QC:

It's much more mild. It's nowhere near was egregious as a Commissioner allegedly knowingly concealing and withholding a mandatory obligation in order to get an advantage of tax avoidance.

WILLIAM YOUNG J:

You say the motive is that if they'd taken the subpart EH point that would've cleared their pitch in terms of section BG 1?

MR STEWART QC:

Yes and you know really –

WILLIAM YOUNG J:

But except that they were prepared to –

MR STEWART QC:

– the motive's irrelevant isn't it?

WILLIAM YOUNG J:

But they were prepared to clear their pitches to BG 1 by taking other points.

MR STEWART QC:

It's not for us to speculate what made him not bring to the attention of the Court this mandatory provision. Now if you've got a good explanation, tell us, we all go home.

But he had a report that said it was mandatory, he'd had a report saying it was under EH, it won't be taxable earnings.

Now just finally, if we go to the final page of the statement of claim that I wanted to refer you to which I didn't get through, volume 1 at page 18. And halfway down the page at D, "The defendant was aware of the duties referred to in subparagraph C above but chose to ignore them. It was a litigation strategy of the defendant not to do the things referred to in subparagraph C above. As a consequence there was a suppression of the truth so the evidence and arguments advanced to the defendant carried a suggestion or insinuation of something false. The defendant presented a false case."

Now my learned friend Mr Brown said that in the context of 5.49 you determine, or you look at the tenability or sustainability of a fraud allegation on the pleadings and we either do it on the pleadings or we get the opportunity to put in the affidavit evidence. Now in this case there has been no application to the Court of Appeal or to this Court for the Commissioner to adduce further evidence than was before Justice Venning and indeed in the – the Court of Appeal declined to look at the McKay opinion because it wasn't in evidence before Justice Venning and there was no application to adduce further evidence but in the casebook filed in this case by the Commissioner there is other factual material put in such as the Ernst & Young affidavit. The Tracey –

WILLIAM YOUNG J:

It's the Tracey Lloyd affidavit.

MR STEWART QC:

Yes, putting it in –

WILLIAM YOUNG J:

Where was that, I don't have the intituling, was that in the Court of Appeal or the High Court?

MR STEWART QC:

No that was before Justice Keane.

WILLIAM YOUNG J:

I see, sorry.

MR STEWART QC:

It's a completely different proceeding. Now it would be short changing the respondents yet again if the Court has regard to this further material without the respondents being able to file their affidavits. Now this is why I say this matter misfired for whatever reason and in my – the transcript will show in the Court of Appeal I said, look whether you say it was the Commissioner's fault for coming under rule 5.49 or the respondents' fault in resisting it on the skinny basis, there was a lost opportunity. An opportunity that anybody in a strikeout action gets, that is to file affidavit evidence and to fully particularise in light of that evidence the fraud. Now there's a further matter and your Honour Chief Justice in the –

ELIAS CJ:

I'm sorry I'm just thinking about it. It's not that common to have affidavits in strikeout applications is it?

MR STEWART QC:

Yes.

ELIAS CJ:

Is it?

MR STEWART QC:

Yes it is.

McGRATH J:

We've got to be careful that we're talking about – when you're talking about fraud the rule is that it must be fully particularised and it must face a reasonable prospect of success from the outset. You can't put in a repairable statement of claim and then bolster it up as you go along.

MR STEWART QC:

The Court of Appeal judgment in *Shannon* goes into this aspect in great detail about the obligation to put in the evidence. When you're looking to attack the finality of litigation on the basis of fraud then you are required, it's not that you have the

opportunity to, you are obliged to file affidavits on the – on an application to strikeout the –

McGRATH J:

Affidavits that will support the allegations that are made.

MR STEWART QC:

That's right.

McGRATH J:

If in fact, on the face of it, the allegations made do not support fraud, then evidence isn't going to matter and my understanding was that the Courts won't tolerate that because they don't want allegations of fraud to be tossed around when on the face of the pleading they're not sustainable.

MR STEWART QC:

Yes. What *Shannon* says is that you not only have to make the allegations, you have to put in evidence to support it. We haven't had that opportunity yet.

TIPPING J:

You mean to resist strikeout or to – in order to cross this threshold Mr Brown and I were discussing?

MR STEWART QC:

Well either. Certainly *Shannon* was in order to resist the strikeout. Having had the jurisdiction point decided in the plaintiff's favour in *Shannon* the next stage was a strikeout.

TIPPING J:

Are you saying that *Shannon* is an exception to the ordinary rule that you take the facts as pleaded to be true, you actually have to verify the facts, are you saying?

MR STEWART QC:

If you're going to allege fraud in order to resist the finality litigation principle and quite a lot of articles and authorities are cited in the Court of Appeal decision. It's not a choice, it's an obligation that a litigant has when they are seeking to have a judgment overturned, which has been right through the appellate system.

McGRATH J:

Perhaps you want to get onto *Shannon* because I don't see how it helps you if the basic allegations that are pleaded are not adequate to have an opportunity to verify them by affidavit.

MR STEWART QC:

All right. Then we get the opportunity to re-plead again but any re-pleading would have to be supported with evidence and if they don't get up to the mark on that then that's the end of it.

McGRATH J:

What I'm suggesting to you is that there's no – that the Courts are not as tolerant of inadequate proceedings as to – which they – it's not a situation in which they would generally allow you to re-plead if you're alleging fraud. You're expected to get it right the first time by putting up a pleading that can sustain fraud.

MR STEWART QC:

Yes, well –

McGRATH J:

If it's proved.

MR STEWART QC:

Rightly or wrongly that was the approach that was taken by Justice Potter in the High Court and endorsed by the Court of Appeal. Now if it was wrong to go that way –

McGRATH J:

Can we have a look at that because I'd be most interested to see the passages you're relying on?

MR STEWART QC:

It's volume 2 of the Commissioner's bundle.

ELIAS CJ:

Tab?

MR STEWART QC:

Tab 20.

WILLIAM YOUNG J:

That's the judgment of Justice Potter?

MR STEWART QC:

Yes. And the Judge – possibly it's a matter of agreement too, but accepted a process where the jurisdiction point was determined on the pleadings and then on the strikeout they were ordered to provide the further particulars supported by affidavits. Now that was dealt with in the Court of Appeal, in fact, as the appropriate course in much more detail.

WILLIAM YOUNG J:

That's tab 19?

MR STEWART QC:

Tab 19, paragraph 104, it's a lengthy discussion, the article is by Mr D M Gordon.

TIPPING J:

This discussion distinguishes perjury as a species of fraud where it is said that the test for support is even higher –

MR STEWART QC:

Yes.

TIPPING J:

– because of the credibility findings that will necessarily have been impeached.

MR STEWART QC:

But it does discuss – the whole discussion here is – see *Shannon* was about perjury.

TIPPING J:

Yes, quite.

MR STEWART QC:

But in my submission if an officer of the Court, or the Commissioner, is concealing information and refraining from its duty to disclose, from performing it, and the Court is misled, the same applies. Now we have to put in – have the opportunity to put in that evidence that we rely on otherwise we're left with the speculation that his Honour Justice Young put to me before lunch, well how do you know he didn't have another report that said to the contrary? Now we do have the decision of *Westpac Banking Corporation & Anor v MM Kembla New Zealand Ltd* [2001] 2 NZLR 298 (CA), which is in the bundle your Honour, where the Court cautioned against striking out a defendant's claim in circumstances where all the relevant knowledge pertaining to the litigation is held by the plaintiff or vice versa. They're at a great disadvantage and the way to overcome that was to require discovery.

WILLIAM YOUNG J:

But this is, I suppose, this is an aspect of the case that intrigues me because really the case is about whether the tax scheme worked. It's not about the contents of the Commissioner's file, that's only a subsidiary issue material to discovery.

MR STEWART QC:

Well Mr Gudsell is going to address you on that, he's far more experienced at that than I am, but you can't begin to make those assessments until you've done the exercise of assessing the core acquisition price. You simply don't, in my submission your Honour, strike down a transaction as taxable if there is no tax advantage. Even if there's an attempt to obtain a tax advantage and it didn't work, if properly assessed by the Commissioner so that that tax advantage that might have flowed through is removed, it is not then taxable.

WILLIAM YOUNG J:

Well I sort of understand that but what I'm saying is that what's an issue in the case is the validity of a tax scheme, not the state of the Commissioner's files. I mean you are, and Mr Brown picked up the expression, you are turning it back on the Commissioner.

MR STEWART QC:

Well yes and we wouldn't have to have done that if the Commissioner had discharged his duty in the first place. He is the person that we allege who has misled the Court by disregarding a direction from Parliament and not disclosing to the Court the mandatory requirement to assess under EH. Nothing to do with the respondents

in that regard and you can't absolve the Commissioner's conduct by saying, oh yes but you were asking for EG, and that's what the Commissioner did. When the return came in he said, let's just assess it on the way they have.

WILLIAM YOUNG J:

But they didn't assess it on the way they did, they disputed the applicability of the part EG, on grounds that in the end they were unsuccessful on.

MR STEWART QC:

Who's that, the…

WILLIAM YOUNG J:

The Commissioner. They disputed –

MR STEWART QC:

Yes, but that was part of it. But also he assessed under EG, which meant that the taxpayers on his assessment got the very substantial deductions up front, that was a –

WILLIAM YOUNG J:

But they didn't assess them for deductions, they denied the deductions.

MR STEWART QC:

Well –

WILLIAM YOUNG J:

They said that, "Under EG you're not entitled to these deductions."

MR STEWART QC:

Well, no, they allowed the deductions first, let's be clear on this. And then they assessed it as tax avoidance –

WILLIAM YOUNG J:

No. They didn't accept that the premiums were deductible as a matter of black letter law.

MR STEWART QC:

Oh, well, that –

WILLIAM YOUNG J:

I held in the Court of Appeal or wrote the judgment for the Court of Appeal which said –

MR STEWART QC:

Yes –

WILLIAM YOUNG J:

– that they were entitled to do that.

MR STEWART QC:

Yes, all right –

WILLIAM YOUNG J:

And in doing that, I made the mistake of bringing in an EH clause, which perhaps, when my error was being unpicked, would have raised the part EH issue more clearly. But the Commissioner denied the deductibility under part EG.

MR STEWART QC:

Yes, and we say, and the respondents say, is a belt and braces approach. He said, "But we'll get it on tax avoidance if we're wrong on that," and he did.

WILLIAM YOUNG J:

So I had two arguments, and you say they should have had three. They should have said, "It doesn't work under EG, it doesn't work under EH, and section BG applies."

MR STEWART QC:

Yes. All he had to do, Sir, very simply, perform his statutory duty and to apply EH. Quite a different picture then goes to the Court.

McGRATH J:

Mr Stewart, it's been my understanding that, for the fraud to be pleaded in this situation, the pleading has to be that the judgment was procured by the fraud, and that's why perjury is a fairly plain instance, provided the perjury was material. Now, I wonder how, in this case, the Commissioner's error, as you pleaded, can have

procured the judgment when the other parties, your clients, Mr Gudsell's clients, knew of EH and had made their own decisions of the extent to which they would apply it. How can it be said that the failure to discharge the duty, which you say is owing by the Commissioner, has procured anything?

MR STEWART QC:

Because we say that the Commissioner knowingly adopted that strategy to procure that result, knowing that Parliament had prohibited it.

McGRATH J:

Well, let's just accept for the moment that you say that the Commissioner disobeyed a statutory duty to bring to the attention of the Court, as the hearing authority, the full extent of EH, notwithstanding the rest of it. How can that be said to have procured the judgment when it was known by the opposing party and the opposing party elected, for its own good reasons, not to make submissions on the point?

MR STEWART QC:

Well, what it did was that it allowed the High Court to confirm the assessment under EG, which had prohibited by Parliament. Had the Commissioner brought EH to the attention of the Court, the Court would not have confirmed the Commissioner's assessment under EH – under EG.

GAULT J:

That's a bit of a long shot, isn't it, when everybody was arguing for that particular provision to be applied, and if that, as you submit, it shouldn't have been, it's a mistake, it's a mistake of law?

MR STEWART QC:

Well, that's the issue, isn't it, Sir? That is the issue. Was it a mistake or was it a deliberate strategy, knowing that he was doing what Parliament has prohibited?

GAULT J:

I understand your argument, which, interestingly, has advanced as time has gone along to the deliberate strategy point that you have now reached. But you've got to have some foundation for that.

MR STEWART QC:

Well, the foundation that I do have currently is that it's not only the opinion that he had from Mr McKay, he had issued these bulletins and other determinations, saying that financial arrangements have to be assessed under EH.

WILLIAM YOUNG J:

But he'd never say, "Accepted financial arrangements have to be assessed under subpart EH," because they don't.

MR STEWART QC:

No, but this wasn't an attempt to –

WILLIAM YOUNG J:

Well, according to Ernst & Young it was.

MR STEWART QC:

Well, look, we don't even know who –

WILLIAM YOUNG J:

That's just a fighting opinion –

MR STEWART QC:

– that opinion was sent to –

WILLIAM YOUNG J:

It was by Ms Jo Doolan.

MR STEWART QC:

Well, it was redacted, the recipient in my copy.

WILLIAM YOUNG J:

Oh, I see, the person who wrote it's not redacted.

MR STEWART QC:

No, and it's 1999, because it was even on the respondents' radar. And, I mean, that wasn't before Justice Venning. So if that's going to have any play in this, the respondents have to have the opportunity to put in their affidavit evidence.

Alternatively, you say you'll deal with it on the pleadings, and we get an opportunity to re-plead this matter.

WILLIAM YOUNG J:

Which will –

TIPPING J:

If it was in your client's interests, as you now say it would have been, to have it looked at, as you say, properly, under EH, why didn't your clients ask for it to be looked at under EH?

MR STEWART QC:

Because I considered that it was not a financial arrangement – and that wasn't pie in the sky, they succeeded at first instance on that.

TIPPING J:

But if it were held to be, why didn't they say, "Well, look, if contrary to our first proposition, it is a financial arrangement, and not an accepted financial arrangement," look at it under EH, you must, the Court must. This is what is puzzling me, Mr Stewart.

MR STEWART QC:

It's not a civil suit here, Sir, we're not looking at negligence and contributory negligence. Because whatever the respondents –

ELIAS CJ:

But if we're looking at negligence we're not looking at fraud.

MR STEWART QC:

Well, no, and our case is that –

ELIAS CJ:

Well, you say that the Commissioner has done it as a matter of deliberate tactics but the respondents didn't.

MR STEWART QC:

That's right.

TIPPING J:

They did it as a matter of legitimate tactics.

MR STEWART QC:

Yes.

TIPPING J:

It seems to have bitten them if –

ELIAS CJ:

Or negligence tactics.

WILLIAM YOUNG J:

But they must have known it was a pretty credible argument by the time that Mr Gudsell floated it.

MR STEWART QC:

Half the team did –

TIPPING J:

Expressly disavowed it.

MR STEWART QC:

– the other one said, "No, the Court of Appeal got it wrong, the High Court was right, this is not a financial arrangement."

WILLIAM YOUNG J:

So if that's the position, it's pretty hard to say that anyone who takes another view is necessarily fraudulent.

MR STEWART QC:

No, it's right, and we're not saying that. And another view, genuinely taken, is it's fine, there's no complaint.

WILLIAM YOUNG J:

Or it may just be, "Gee, this is quite complex, I'm not sure which way it goes."

MR STEWART QC:

No evidence of that. The evidence is – well, the only evidence that we have is McKay's opinion, said, "You must do it this way," then you see in the report he says, "But I understand you're adopting a strategy," the Commissioner is, the assessing officer, "to assess it the way that the taxpayers have had it, and let's see what they do about EH." He had the legal obligation and duty to do that.

WILLIAM YOUNG J:

But this is after the assessment, isn't it, or not? Is –

MR STEWART QC:

This is after the taxpayers had filed their return under EG –

WILLIAM YOUNG J:

Yes.

MR STEWART QC:

– and then he did the assessment at the time he issued the first NOPA.

WILLIAM YOUNG J:

But the first NOPA refers to EH.

MR STEWART QC:

Just fleetingly.

WILLIAM YOUNG J:

But I thought Mr McKay came in after that, perhaps I got the timing wrong.

MR STEWART QC:

No, no, Mr – well, you see, that's another thing that it would narrow, since discovered, is that the opinion that they gave us was dated May 2002, which was after the assessment, but on further discovery we find that there were a number of these opinions, by and large the same, with some minor differences, and they had an opinion as early as the date of the assessment. So what that showed –

WILLIAM YOUNG J:

But at the date of the assessment EH has been flagged, hasn't it?

MR STEWART QC:

No, the assessment was done at the same time as the NOPA, I believe.

WILLIAM YOUNG J:

And did the NOPAs flag an EH?

MR STEWART QC:

It mentions EH, it – in fact I haven't got it with me, I, it's not in evidence, is it?

TIPPING J:

You've put quite a lot of weight on this decision in the Court of Appeal in *Shannon*, and I can see that at paragraph 122 of the judgment, on page 614 of the report, there is foundation for the proposition that fraud may be a special, more onerous case when it comes to questions of resisting strikeout. But there's also a reference in 123, seemingly with approval, to the judgment of Justice Harrison in *Paper Reclaim Ltd v Aotearoa International Ltd* HC Auckland CIV-2004-404-4728, 14 February 2005, where it caught my eye, para 18 of that citation on 615, "There is no room for a provisional or equivocal claim, based on suspicion, to be bolstered by fishing expeditions through the problematical process of interrogatories and discovery." Well, one might be tempted to the view that that's exactly what we've got here.

MR STEWART QC:

Well, since this proceeding was filed we have got more evidence, and what's being sought – and where's the harm in this, in these respondents having the opportunity that you –

WILLIAM YOUNG J:

Delay, that's the harm.

MR STEWART QC:

Well, let's make it it has to be done in 21 days, I mean –

WILLIAM YOUNG J:

Well –

MR STEWART QC:

– and my learned friend said that she's happy for it to be dealt with on the pleadings. This will then have to be a pleading –

WILLIAM YOUNG J:

No, I'm not just talking about delay from now, I'm talking about delay going back to when the first review proceedings were filed, what? It's nearly four years gone past now.

MR STEWART QC:

Yes, well what do you do Sir? Do you say, no we're going to cut it off here, it's all over, end up with these disgruntled taxpayers who feel that they haven't been heard on this matter or do you say, for the sake of an extra few weeks, 21 days –

WILLIAM YOUNG J:

You asked me what's the problem, I've told you what I think the problem is.

MR STEWART QC:

I know and I'm just saying do you do that at the cost, you know, they've spent an awful lot of time and money on this investment, they're at the end of the road, they have further evidence, let them file their amended pleading. Now that's the very least that you usually get if there's any doubt about what the pleadings are achieving.

TIPPING J:

Do we have a draft of the amended pleading?

MR STEWART QC:

No.

McGRATH J:

What – didn't you give a draft to the Court –

MR STEWART QC:

It was an amalgam of observations and – it wasn't part of the pleading, it said here are some of the factors that would be relevant in taking into account in alleging this sort of material and that was a work in progress. I have not advanced that but I understand the client has.

McGRATH J:

You don't want to advance it to us as a way in which you can –

MR STEWART QC:

No –

McGRATH J:

– improve on the pleading?

MR STEWART QC:

Not this afternoon but I would certainly do it within 21 days and then my learned friend says it's acceptable in 5.49 terms

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TIPPING J:

Would it ever, Mr Stewart, go beyond the Commissioner knowingly and with intent to deceive, suppressed the EH dimension. I'm putting it colloquially but you know what I'm – would it ever go beyond that?

MR STEWART QC:

It would have to be that he did that dishonestly.

TIPPING J:

Well, intent to deceive sounds fairly dishonest to me.

MR STEWART QC:

Yes, that's right. That's right. He doesn't have to succeed on that, you see, Justice McGrath, it has to be, we get people prosecuted every day for it attempting to deceive or mislead like in the Digitex scheme where the promoters of that scheme got prosecuted because they actually got the wrong people they were trying to – the prosecution said they were to mislead and deceive the investors but the Judge found that the investors went into the transaction with their eyes wide shut. The person – the entity that was attempting to mislead and deceive was the Commissioner, and they got off on that basis, but you don't have to succeed in doing it. It's just that they suppressed evidence intentionally with a view to mislead and deceive the Court.

TIPPING J:

But if you don't succeed on it you haven't obtained your judgment by fraud.

MR STEWART QC:

Well, well they did succeed on it though in this case.

TIPPING J:

Well I'm sorry, I'm finding you very difficult to follow on this.

MR STEWART QC:

Well they did succeed, didn't they Sir –

TIPPING J:

Are you saying they don't have to succeed? Why are you saying that if they did succeed?

MR STEWART QC:

Well, sorry. No they didn't, no you're quite right. What would have happened is that in the first round of this litigation in 2004 there would have been a finding that it was mandatory to apply EH and –

WILLIAM YOUNG J:

Well maybe.

MR STEWART QC:

Well no one has conceded in another argument that you don't have to.

WILLIAM YOUNG J:

Well it's possible that section BG could prevail over a highly artificial and contrived EH regime – application to the EH regime. I know it's difficult because EH is itself an avoidance provision – an avoidance code.

MR STEWART QC:

And the information a Commissioner has is that it wouldn't be taxable under EH.

WILLIAM YOUNG J:

Well because a taxable component would normally be mopped up under EH.

MR STEWART QC:

Yes and it would've been. They wouldn't have got anything out of this transaction by way of deductions until 33-34 years into the journey where they start to lift off the baseline and get minimal deductions and frankly Sir, it's hard to see why it would've gone past the High Court because EH is in such mandatory clear terms. I mean –

WILLIAM YOUNG J:

Well you are singing from a somewhat different song sheet than the one that was deployed four years ago.

MR STEWART QC:

Mr Carruthers was –

WILLIAM YOUNG J:

He had the wrong song sheet.

TIPPING J:

It was in a different key I suspect.

MR STEWART QC:

So that's what I urge on that. Now there is this statement from, Justice Young will remember, a Privy Council decision of *Adams v R*. Mr Adams was an Equiticorp director –

WILLIAM YOUNG J:

I recall it well.

MR STEWART QC:

And the reference, I'm sorry I don't have copies, is *Adams v R* (1994) 12 CRNZ 379 (PC) and I refer Your Honours to – at page 391, the penultimate paragraph where it says, "In Their Lordships' view, a person can be guilty of fraud when he dishonestly conceals information from another which he was under a duty to disclose to that other or which that other was entitled to require him to disclose." And Mr Adams was convicted on that for establishing a, what was the yeoman loop, has as its objective, or one of the purposes, to make more difficult the task of other directors and auditors from ascertaining what transactions were about.

TIPPING J:

Is the duty in this case that you posit based solely on 89F?

MR STEWART QC:

No and also the duty which the Commissioner's agents and solicitors have –

TIPPING J:

But from a statutory point of view, I'm sorry I didn't say that precisely. The only thing in the statute is 89F.

MR STEWART QC:

He has –

TIPPING J:

We shouldn't look elsewhere.

MR STEWART QC:

No well you can look at *Reckitt and Colman (New Zealand) Ltd v Taxation Board of Review* [1966] NZLR 1032 (CA) at 1045 which is in the bundle.

TIPPING J:

I'm not worried about – I'm just talking about the statute because you talked about it being a statutory duty.

MR STEWART QC:

89F is a statutory duty?

TIPPING J:

Yes and you expressed your submissions in terms of that the Commissioner was under a statutory duty and I'm anxious to know whether it goes beyond 89F of the statute, the Tax Administration Act I think it is, isn't it?

MR STEWART QC:

Yes. Not for the Commissioner.

TIPPING J:

No, no.

MR STEWART QC:

Now Your Honours did you note the decision of *Westpac v Kembla* about the reluctance of Courts to order a strikeout when the information that is pertinent to the allegations are in the hands, in the control of one party, in this case the Commissioner. The Commissioner knows more than anybody else what he did and why he did it and I would say that these respondents want limited discovery, re-plead and evidence, in short order.

Now your Honours that's as much as I wish to say on the core matter and what we're seeking from this Court, unless the Court wishes to, of course, refer the matter back to the High Court and the matter then proceeds either by way of a re-hearing of the application to dismiss, which is the way it should happen in my submission, but with the defendants having the opportunity to re-plead and put their evidence in.

WILLIAM YOUNG J:

Could I just ask you –

MR STEWART QC:

I –

WILLIAM YOUNG J:

Sorry, carry on, sorry.

MR STEWART QC:

Thank you Sir. That course also addresses the Court of Appeal's conclusion that the hearing misfired and in two paragraphs said that the respondents have not had a fair opportunity or been denied the opportunity that you normally have in these situations.

WILLIAM YOUNG J:

Can I ask you this? By the time a case got to the Court of Appeal, the parallel proceedings challenging the assessment had been dismissed and the appeal against that dismissal was abandoned.

MR STEWART QC:

Yes.

WILLIAM YOUNG J:

And the proceedings dealt with by Justice Keane were effectively based on the statement of claim that was effectively this statement of claim but with its fingers crossed. It's just a focus on the assessment, rather than on the assessment plus litigation strategy.

MR STEWART QC:
Is this coming in under the heading that this might be a reason why the Court should uphold the High Court judgment?

WILLIAM YOUNG J:
Yes.

MR STEWART QC:
Okay.

WILLIAM YOUNG J:
It's really to evoke a response from you as to that possibility.

MR STEWART QC:
Yes. Well, there was no application made until my learned friend was part way through his submissions in the Court of Appeal for it to be struck out on that basis, and the Court made it very clear in strong terms that they wouldn't consider that for a moment.

WILLIAM YOUNG J:
But if it was an abuse of process, didn't the Court really have to grapple with it?

MR STEWART QC:
Well, there was no application before the Court.

WILLIAM YOUNG J:
Well, there was from Mr Smith.

MR STEWART QC:
Well, no, there wasn't, he –

WILLIAM YOUNG J:

An invitation rather than an application.

MR STEWART QC:

Yes, and that's dealt with in short order by Justice Chambers at paragraphs – of the transcript, you've got the transcript of the Court of Appeal hearing?

WILLIAM YOUNG J:

I have somewhere here.

MR STEWART QC:

I'll just give you the references.

ELIAS CJ:

I'm just wondering about this use of the transcript. What are you saying we can use it for?

MR STEWART QC:

Well, I –

ELIAS CJ:

It's not in the judgment.

MR STEWART QC:

No, but the Commissioner put the transcript in evidence, in this Court. I'm not sure why but…

ELIAS CJ:

I wasn't sure what – might be illuminating.

MR STEWART QC:

Well, it's one of these…

ELIAS CJ:

Whereabouts is it?

MR STEWART QC:

It's a separate bound volume.

McGRATH J:

We've got it. What page is it at?

MR STEWART QC:

Page 43.

WILLIAM YOUNG J:

Page 43.

MR STEWART QC:

Page 43, 53 – what I'll do, I'll just get you to mark or tick the paragraphs at page 43, the bottom half of the page, and then at 44 the second paragraph –

WILLIAM YOUNG J:

I don't think I've got page numbers.

MR STEWART QC:

You do?

WILLIAM YOUNG J:

I don't have page numbers.

McGRATH J:

Have you got that version?

WILLIAM YOUNG J:

I'm sorry, I may have something else. I think I've got it printed earlier, so I'll just see if I can find it.

MR STEWART QC:

Bottom of 43, page 44, the second paragraph.

WILLIAM YOUNG J:

Sorry, I do have it, thank you.

MR STEWART QC:

The second paragraph, and the third-to-last paragraph – rather than taking time reading it I'm just going to mark the paragraphs, if that's acceptable. Page 45, the first paragraph, page 46, the first –

ELIAS CJ:

Can you just tell us what it is we're going to this for?

MR STEWART QC:

Well, this was –

ELIAS CJ:

Just, shortly.

MR STEWART QC:

This was at the Court of Appeal –

ELIAS CJ:

Yes.

MR STEWART QC:

– declined in application in robust terms for the, setting aside that claim to be struck out as a result of the abandonment.

WILLIAM YOUNG J:

When was the – how much earlier than this was the abandonment?

MR STEWART QC:

Several months.

WILLIAM YOUNG J:

Right. So was the – the abandonment was in June, then, well, I think it might have been in June, and this is August.

MR STEWART QC:

It was abandoned on the date that the respondents had to file their submissions, and it was about May, I think. But it's in the chronology attached to my learned friend's submissions, document at 10.42, 31 May 2011. The hearing was on 17 August.

WILLIAM YOUNG J:

Abandonment on 31 May.

MR STEWART QC:

I'm conscious that there are other counsel to be heard but…

ELIAS CJ:

Is there a ruling in here that you're taking us to?

MR STEWART QC:

No, this is just the oral refusal of the Court.

ELIAS CJ:

Right. And how far through do we have to read it?

WILLIAM YOUNG J:

Well, essentially they're saying they're not going to do it.

MR STEWART QC:

Well, and –

WILLIAM YOUNG J:

And that it would be unfair because –

MR STEWART QC:

Yes.

WILLIAM YOUNG J:

– it hasn't been signalled and so on.

MR STEWART QC:

Yes and also the reasons that, you know, the Judge had exchanged with Mr Smith. He said, well, they had two proceedings on foot, it could have been an abuse to have maintained them both. The judicial review was a collateral attack on the judgment, whereas the setting aside proceeding was a direct attack. And to abandon one and go on the direct course, which is what the respondents said they did it for, isn't an

abuse, it may have been an abuse to maintain the appeal at the same time to be running the appeal. But there are other reasons why it wouldn't support a strikeout. They are mentioned, some of those reasons are mentioned at paragraph 57 of my written synopsis, and there are these other reasons, if I give you orally.

The last case in the Commissioner's bundle is a decision of this Court, *Z v Dental Complaints Assessment Committee* [2008] NZSC 55, [2009] 1 NZLR 1, which emphasises the breadth of the test for strikeouts on abuse of process. And the question is, does the proceeding in substance – that's this proceeding – re-litigate a controversy already settled by final determination?

WILLIAM YOUNG J:
Which it sort of does seem –

MR STEWART QC:
No, there's been no final determination.

WILLIAM YOUNG J:
– to be possibly a bit applicable.

MR STEWART QC:
Justice Keane's was a strikeout, so it wasn't a final determination. You have to have – and there was very little evidence filed, no cross-examination on the evidence, but this Court adopted the statement of Lord Bingham, which said –

ELIAS CJ:
What page are you at?

MR STEWART QC:
I suppose really on this my learned friend should be going first and I should be replying, shouldn't I, but…it's paragraph 63, at the top of the page, line 5. Now, the next point is that this was a judicial review case, not a final determination of issues, and I wish to note the following points. A strikeout creates no estoppel, that was acknowledged by my learned friend Mr Smith at page 51 of the transcript, as to why he didn't pursue an estoppel argument. Two, it did not concern the decision of the hearing authority in 2004, but only the Commissioner's 2002 assessments.

Next, the Judge expressly declined to rule on tenability, at paragraph 107. Four, the ratio of the case was based on section 109 and section 114 of the TAA, and those provisions are not relevant to the current action. Five, it's unclear what evidence the Judge considered.

At paragraph 91, he refers to the assessing of his answer, but no mention is made of the evidence as opposed to the pleading. In particular, there was no reference to the McKay opinion, and full evidence was not adduced, let alone tested. It was essentially a strikeout on the pleadings. Six, no clear or separate findings on the nullity point – that's probably not relevant today. In paragraph 107 the Judge indicates he did not find it necessary, and there was no identifiable reasoning on nullity as a ground, separate from false case.

WILLIAM YOUNG J:

You're not trying to worry about a nullity – you're not worrying about a nullity now?

MR STEWART QC:

Not today. At eight, "It's not essentially the same facts, there was one affidavit by Lloyd that does not comprise all the facts." At nine, "Justice Keane's decision is not a directly contrary decision. Judicial review has major differences and limitations relevant to the current action, especially having regard to 109 and 114."

WILLIAM YOUNG J:

There is a sort of a – have you finished with your list, or not?

MR STEWART QC:

Nearly Sir.

WILLIAM YOUNG J:

Sorry.

MR STEWART QC:

Now, given the nature and significance of the issues in the current case, that is a deliberate withholding of evidence and disclosure, there is another public interest at play in this proceeding, in having the issues determined after fully developed pleadings and all the evidence.

WILLIAM YOUNG J:

What's the other public interest?

MR STEWART QC:

The other public interest is that identified by Lord Bingham's reference of balancing – take account of public and private interest that I mentioned at paragraph 63 of the *Z* decision.

WILLIAM YOUNG J:

There are broader concepts of abuse of process that go beyond what strictly raised to *Carter* and there is, from recollection, a judgment of the Court of Appeal *New Zealand Social Credit Political League Inc v O'Brien* [1984] 1 NZLR 84 (CA), where Mr O'Brien did keep on ringing the changes on his claim so as to avoid the inextricable operation that raised you to *Carter* rules but in the end he was shown the door because it was, in substance, a re-litigation, different guises of the same underlying issue and if you look at it broadly, if the underlying issue is, is the Commissioner's assessment correct, it's been litigated to death, one might think in the *Trinity* litigation.

There's been the litigation in front of Judge Barber where the same sorts of issues have been run. There's been the litigation in front of Justice Keane and now there's this one. So there is rather a lot of coming back to the same issue but through a different route or in a different guise.

MR STEWART QC:

Not so much Sir because the first time that the suggestion was made that the Commissioner got the assessment wrong was, in this Court, put up by my learned friend Mr Gudsell. Now there's no suggestion at that stage that there's any strategy by the Commissioner. He just said that he got the provision wrong. There was not a submission that it was a nullity, or that he'd deliberately disregarded the direction of Parliament and it's only since that date that two actions have happened. There's been the attack on the Commissioner's assessment and that was made harder when the *Westpac* case came out and of course recently *Tannadyce Investments Ltd v Commissioner of Inland Revenue* [2011] NZSC 158, which made that a very difficult field –

WILLIAM YOUNG J:

Quite a challenging argument.

MR STEWART QC:

Yes – to play on. First we'll deal with just this one, this is the only action going on this issue which is an important one in my submission and they, in my submission, are entitled to have the opportunity that is usually accorded to litigants to file their amended claim and the affidavit evidence and the discovery.

Unless your Honours have any other questions?

ELIAS CJ:

Thank you Mr Stewart. Yes Mr Gudsell.

MR GUDSELL QC:

Thank you your Honours. Well much of what I have set out in written submissions has been traversed already. So, the way I perceive the discussion going, is essentially that fraud – you've had an attempted, in particular your Honours, in your fraud, you've come up short, you've come up short, there's no exception to the finality principle. So essentially, there's the door.

Now, my submission comes down to the principled position between a strikeout application and an application under 5.49 and essentially, the 5.49 position is to determine whether the Court is in a position to hear the matter in dispute and the way I perceive the Commissioner's argument that developed this morning is well, the subject matter of this dispute is essentially setting aside the assessment that was made some years ago. My submission on that point is the subject matter of the proceeding is the fraud. The relief is a consequence of a determination if there is fraud.

So that if a party wants to particularise fraud, it gets its day in Court, it's not caught by finality res judicata, seeking to overturn the decision of this Court, it's seeking to have a fair hearing in respect of its fraud allegation.

As your Honours are aware, counsel was not counsel in the High Court or the Court of Appeal in respect of this matter, so I have looked at it on the basis of a simple principled approach to the two distinct clauses, or rules because the debate, in my submission, that's gone around today is but if you pleaded this but if you pleaded

that, where is your evidence of this or where is your evidence of that. Now *Shannon*, in my submission, is a good example of how it is that the Court ought to approach and the distinction between 5.49 and rule 15.1.

A decision you don't have in front of you and I'll take responsibility that that is not there and that is the 2004 decision of Justice Potter, after she dealt with her original decision and dismissed the strikeout application, so that the first decision of Justice Potter addressing essentially the fraud – the position your Honour Justice McGrath raised, is there is a duty on counsel to ensure that the particulars of fraud are particularised and thoroughly, precisely –

TIPPING J:

Could I just have an understanding, Mr Gudsell, of where you're heading? We all accept that if fraud is properly pleaded it can go ahead and the issue about that is to this case but is it your argument that nullity is another exception to the finality principle?

MR GUDSELL QC:

It is and that's been accepted –

TIPPING J:

Are you addressing that now, or are you addressing some preliminary point?

MR GUDSELL QC:

No, I'm not. I'm addressing essentially the fraud issue Your Honour.

TIPPING J:

Well everyone accepts that if it's properly pleaded it can go ahead. Do you want –

MR GUDSELL QC:

The debate appears to me –

TIPPING J:

– to have another look at the pleading?

MR GUDSELL QC:

The debate appears to me your Honour, to surround a point that Justice McGrath raised earlier, is the need for fraud to be pleaded precisely and the point that my friend Mr Stewart, my learned friend, finished off on and that is the opportunity to re-plead because there's nothing clearer in this case that that's what the respondents to this appeal seek to do.

McGRATH J:

I think it also go to what the obligation under section 89F is, the character of that, just so that's completely on the table.

MR GUDSELL QC:

Yes, it is –

TIPPING J:

It's a question of what can amount to fraud in these circumstances –

MR GUDSELL QC:

Well –

TIPPING J:

– because it's really misleading as to the law, if it's anything and Mr Brown says that doesn't qualify. Now, are you challenging that proposition or are – I just don't understand quite what we're focusing on.

MR GUDSELL QC:

What I'm challenging, your Honour, is the opportunity, because what we're dealing with today, it appears to counsel, in the last hour or two, is debating what possible particulars could satisfy the criteria of fraud, the definition of fraud.

TIPPING J:

So you're wanting an opportunity to further particularise?

MR GUDSELL QC:

Indeed.

TIPPING J:

Yes, well, I understood that.

MR GUDSELL QC:

So that what's occurred here – and I was using the *Shannon* example that I was developing, is that what Justice Potter did was say, "No, I'm going to allow you the opportunity to put a proper pleading in," that was the point Justice McGrath raised. The 2004 decision, Justice Potter, then says, "No, you've had your go," and that's the end of that.

TIPPING J:

Well, it might be –

MR GUDSELL QC:

And that's what was appealed.

TIPPING J:

If – a Judge might exercise his or her discretion to allow you to further particularise in the High Court, but it's a very long shot to say you should be allowed to do it once it's reached this Court, without even a draft.

MR GUDSELL QC:

Well, the point in the Court of Appeal was that the, obviously the respondents in this Court, succeeded in saying to the Court, and the Court said, "Yes, that's exactly what you do," because they made timetabling directions for that to be done, they said, "Get on and re-plead it."

TIPPING J:

Yes, I appreciate that, but you knew that that was under attack in this Court, and we don't even know now how you could re-plead.

MR GUDSELL QC:

Well –

TIPPING J:

And do you accept Mr Stewart's, I think inevitable acceptance, that the essence of this is the Commissioner knowingly suppressing the EH line with intent to deceive?

MR GUDSELL QC:

No, the extent of the possible re-pleading is a matter that I'm unsure, as counsel for one of the parties, in what precise form that will take.

ELIAS CJ:

Why?

MR GUDSELL QC:

Well, I've come into this matter, as I've mentioned earlier, at this very late point, to address specifically this jurisdictional issue. I have not been instructed or turned my mind to what precise particulars would satisfy the ethical duties that would be on the draftsperson to bring allegations of fraud before this Court, before the High Court.

ELIAS CJ:

Well, it strikes me as extraordinary really that counsel would not be able to give this Court some indicate of how matters would be re-pleaded. Otherwise, we're looking at this on a wholly hypothetical basis.

MR GUDSELL QC:

Well, it is in essence hypothetical, because then this Court would be grappling with the merit of particulars that hadn't been refined.

WILLIAM YOUNG J:

But why didn't – I mean, the Court of Appeal judgment came out in December, inviting you to re-plead. Why wasn't there a re-pleading? Six months has gone by.

MR GUDSELL QC:

I can't take matters further than what Mr Stewart said.

WILLIAM YOUNG J:

I don't know that Mr Stewart answered that actually, probably because he wasn't asked it, I think.

TIPPING J:

Yes, I don't think, to be fair, he was asked it.

WILLIAM YOUNG J:

Yes.

TIPPING J:

Well, frankly, Mr Gudsell, it all seems very unsatisfactory. It suggests that your clients are just kicking for touch.

MR GUDSELL QC:

No, with respect, Your Honour, if the Court of Appeal, the opportunity that they had to address the matter, saw fit to direct, that's what they should do.

TIPPING J:

But shouldn't you have been getting on with it in the meantime?

MR GUDSELL QC:

Well, I'm standing before you as representing –

TIPPING J:

I don't mean you personally, I mean –

MR GUDSELL QC:

I'm standing before as representing –

TIPPING J:

– your clients.

MR GUDSELL QC:

– two of the respondents. I accept that point, Your Honour.

TIPPING J:

All right, thank you.

WILLIAM YOUNG J:

One of whom is the principal mover.

MR GUDSELL QC:

I beg your pardon?

WILLIAM YOUNG J:

One of whom is the principal mover in the scheme.

MR GUDSELL QC:

Well –

WILLIAM YOUNG J:

Or is that unfair?

MR GUDSELL QC:

I can't speak for the other parties, your Honour, it would be inappropriate for me to do so. I know that the view of the Court in earlier judgments reflects the architect of the scheme, and if that's the person for whom you mean –

WILLIAM YOUNG J:

Yes, then you're acting for him –

MR GUDSELL QC:

– is the prime driver.

TIPPING J:

I don't think it matters who they are, they just simply haven't been getting on with it.

MR GUDSELL QC:

If we come back to the principled approach though, of the gate through which this matter should have been progressed and the Court of Appeal's principled approach as to the propriety of that because had the matter been by way of strikeout, had the *Shannon* model been followed, the respondents before this Court would have had their final day in Court because, as Justice Potter did in that case, "You've fallen short on establishing the particulars, I'm going to give you an opportunity to re-plead," that's exactly what happened and they did re-plead. And, as my friend said, evidence was supplied in support of perjury allegations on that occasion.

Justice Potter then dismissed it, it went to the Court of Appeal and that was the end of the statement of claim. What counsel perceives is in the discussion this morning is that 5.49 is a vehicle now in respect of its broader approach, not just territoriality, contract and such like, but to say if, in the event, you come before this Court pleading fraud, there can be an application to set aside under r 5.49 and you will not have an opportunity to re-plead, the obligation is to plead that type of allegation precisely,

you've failed to do so, you're out. No, in my submission, that is not the gate through which the matter should be dealt –

WILLIAM YOUNG J:

Well, the problem that I think you have to address, is that the repeated litigation of this does raise the issue of whether it's an abuse of process. And in that context, this putting up something that's rather coyly expressing, losing going to the Court of Appeal, winning, sitting on hands for another six months, isn't, doesn't provide a very auspicious sort of background for the analysis of the issues the case raises.

MR GUDSELL QC:

Well, except your Honour, it's capable of being seen as not a good look. But when you look at the remarks in *Shannon* which, in my submission, is helpful to this Court, not only in the two decisions in the booklet, the bundle, but also others, that, I think in that instance, the Court, at tab 20, at page 575, paragraph 53, they talked about the history to date, "I have reached my conclusions with considerable caution, been a matter of concern that more than five years after the parties separated, the Court of Appeal, Privy Council, that perjury is now alleged and proceedings filed in February this year."

Talked about, "A tortuous round of litigation pursued to avoid the consequences of the Court's decision," but what the Court had said in a previous paragraph – and this is the judgment that says, "No, the strikeout is unsuccessful, 21 days to file an amended statement of claim" – but after looking at paragraph, at 49 at *Hikuwai* and other decisions relevant to res judicata principles, the hierarchy of the Courts, upon which the Commissioner in this case relies, the Court went on to remark though at paragraph 50 about those authorities, as being, "Determined of the Court's jurisdiction when fraud or perjury are alleged," and it is an allegation.

If fraud were to be proved in remarking, reference to the *Flower v Lloyd (No 1)* (1877) LR 6 Ch D 297 case, it would be wrong that a Court had no power to deprive a successful but fraudulent party of the advantages to be derived of a judgment obtained by fraud.

Now, the hypothetical that your Honour the Chief Justice referred to is, well, what is it about the particulars of fraud that you're saying to this Court or the Court of Appeal

said, “Get them right,” would justify the Court stepping in and allowing the matter to proceed to a hearing? 5.49 is not the vehicle. What would normally happen in an instance of this case, in my submission to you, is that a strikeout application would have been made and the Court would have done just as the Court of Appeal has done, precisely.

McGRATH J:

Mr Gudsell, I think that the problem I see is that, whereas *Shannon’s* dealing with an allegation of perjury, so a different matrix of facts are said –

MR GUDSELL QC:

Yes.

McGRATH J:

– to be the true facts –

MR GUDSELL QC:

Yes.

MR GUDSELL QC:

– and the Court would naturally investigate those, the pleading, such as it is at the moment, is making an allegation of misleading the Court insofar as the law is concerned. Now, there was a problem I think initially with whether the provision in the Tax Administration Act means what Mr Stewart and, implicitly, you, submitted means. Now, that is the sort of matter that isn’t immediate, it’s not immediately obvious how, if there is an error, that can be corrected by further pleading, it’s not a matter of fine tuning or something of that kind and it also raises the question of whether fraud is available on a pleading of that kind of error of law. So it’s not the sort of matter in which, as I say, a Judge is conscious that you need to give someone an opportunity just to see if they can put this a bit better. It’s really a fairly fundamental point and that’s I suppose why, it seems to me, that if the concern in the submissions of Mr Brown are right on it, it’s such a fundamental flaw that may well go to the whole question of whether there’s any jurisdiction, depending how we decide it.

Now, that's what I think you've got to address and that's why we're really looking for something, by way of submission or amended pleading which shows your best case on dealing with that particular aspect of it.

MR GUDSELL QC:

Well I can't, standing before you as counsel, deal with the latter of your points and that is amended pleading. I can't deal with, on basis of instruction, for all the parties whom are before you by way of respondents, on how they would be particularised with precision. So I'm not in a position –

McGRATH J:

It's really a matter of legal argument, so how can you put the legal argument that there is a statutory obligation here that's required the Commissioner to inform the Court of certain matters. Now that's been questioned by Mr Brown as whether it can amount to fraud. It's also been questioned as to what the obligation is, it may just be an obligation to put cards on the table vis-à-vis the opposing party. Is there anything, as a matter of legal submission, you can say to us on that?

MR GUDSELL QC:

Mr Stewart has already addressed you on, in my submission, on the questions of what their obligation is to do.

McGRATH J:

Yes.

MR GUDSELL QC:

He put before the Court of Appeal a document that he talked, not with any – it wasn't put forward to the Court as precision of the particulars of a fraud allegation and it's really a matter of the obligation to put forward matters to this Court. If it thought EH applied, if it had a process by which it had examined that issue critically and had not discovered, disclosed that material to the – to say the respondents in this matter, what arises from that? I take His Honour Justice Young's remarks that, "Well, weren't you wanting to have dollar each way, if you missed out on the benefits of the EG application, that you could fall back on an EH?" My submission is that the law is very clear, as I said before this Court, I think in 2008, that EH does apply.

My friend Mr Stewart has made the remark more than once that there's been no contest that that is the case. Does it concern the Court that matters of that stricture have not been on the table before the Court in a way that is transparent and my submission –

TIPPING J:

But they were on the table, to some extent, in the Supreme Court when you applied to take the additional point.

MR GUDSELL QC:

Yes. My submission is that we're really talking about its infancy, is how these proceedings launched off before they –

TIPPING J:

Well I'd be more concerned –

MR GUDSELL QC:

– were dealt with by Justice Venning –

TIPPING J:

– with whether the ultimate judgment was vitiated by fraud and if it was on the table at the time when the ultimate judgment of the Supreme Court was given, then I can't see how it can be said that those orders which are the dispositive orders, were obtained by or procured by fraud.

MR GUDSELL QC:

Well that again, is a matter that, as I was said before, it needs particularising and testing and if –

TIPPING J:

Well I don't see how it could be –

MR GUDSELL QC:

Well I'm looking at –

TIPPING J:

– never mind the –

MR GUDSELL QC:

– the position in this way, if I may as counsel, say that if the principled approach that is being espoused by the Commissioner is that fraud needs to be particularised precisely, then you're going to get involved in essentially pre-commencement discovery related issues to determine whether you can actually mount an appropriate case of fraud because if you can't, on an instance like this, then you will not be able to upset the ultimate judgment because you only get one go and if you go only one go, unlike *Shannon*, even though it was a perjury matter, it's still regarded as falsehoods. Her Honour remarks about perjuries, falsehoods and frauds draws distinctions, falsehoods are sufficient and my friend has made remarks about deceit or dishonesty that don't currently appear in a pleading, strategies, matters of that nature, you need to do it at infancy or there's no jurisdiction for the Court, as opposed to alternate route of 15.1.

If the matter had been done in that way I maintain the position, on behalf of the clients for whom I act, that the matter would have been dealt with in accordance with the principles set down by the Court of Appeal, i.e. re-plead.

TIPPING J:

Is there any authority that would help us on the question of whether misleading as to the law, as opposed to as to fact, is fraud for the purposes of the finality rule?

MR GUDSELL QC:

I have nothing of my own research your Honour and I heard you put that to my friend and he answered you in respect of that as best he could but –

TIPPING J:

Yes, so you have nothing –

MR GUDSELL QC:

– and it's a point that indeed Justice McGrath raised about 10 minutes into this hearing –

TIPPING J:

So it would have to be viewed as a matter of principle if we were to – there's no authorities to support it, you'd have to satisfy us that it's a matter of principle, misleading as to the law –

MR GUDSELL QC:
Well –

TIPPING J:
– should qualify as fraud?

MR GUDSELL QC:
– the question arises in terms of, once again in the hypothetical sense, whether there are matters of fact that also set the matter on a different route because if there are matters of fact that have been withheld that would have taken this down an EH route, as opposed to an EG route, then that's not just a matter of law, it's the evidential foundation, the factual foundation that takes you down one or other tax route –

TIPPING J:
I thought the proposition was, at least from somewhere on your side of the case, that this EH was mandatory?

MR GUDSELL QC:
Yes, it's mandatory in terms of –

TIPPING J:
Provided it's not an accepted?

MR GUDSELL QC:
No, it's mandatory on a finding that this is what the particular tax arrangement is about. So if you determine that is the tax arrangement, there is no moving off in another direction. So if you're factually – if there is evidence and this is why it's hypothetical, if there is evidence that the Department was aware of the factual basis that triggered EH and did not disclose that but it went down the EG route because that's what the respondents in this Court had sought all along, then that would be of concern.

WILLIAM YOUNG J:

But there's no – all the core facts as to whether subpart EH applied or not were in the public domain initially, solely in the knowledge of your client and the other taxpayers but by the time the case got to a hearing everything was pretty clear. Are you suggesting that what should have been discovered are the internal musings and workings within the IRD that would have shown a line or argument about subpart EH and the graph and so on?

MR GUDSELL QC:

As it turns out, they were all available.

WILLIAM YOUNG J:

But is that what you're saying are the factual issues that were suppressed?

MR GUDSELL QC:

Well I was responding to Justice Tipping's remark, are we just concentrating on an error of law here, or are there some factual matters –

WILLIAM YOUNG J:

Yes I know but I tried to put a little bit of meat on the bone. What are the factual matters that –

MR GUDSELL QC:

Well that would be one example.

WILLIAM YOUNG J:

Are there any others?

MR GUDSELL QC:

I'm not sure. I don't have any instructions to, at this point, lame as that might seem, to develop because I've been brought in to address this particular issue. Other counsel have been involved throughout, not only in the earlier trial but in this matter.

TIPPING J:

What about this nullity business as a separate, should we be addressing that now because you seem to have exhausted the...

MR GUDSELL QC:

Well my submission in respect of that your Honour, is that I had not addressed that in the written submissions that I placed before this Court. I was aware however, that not only had Justice Venning addressed the point in his judgment with regard to nullity and an exception to the finality principle but also, my friend Mr Stewart's submissions addressed that comprehensively –

TIPPING J:

Well he agrees that that can only be dealt with by application to this Court but you apparently –

MR GUDSELL QC:

Well not in the written submissions your Honour –

TIPPING J:

Mmm?

MR GUDSELL QC:

Not in the written submissions –

TIPPING J:

No, well he did just a few minutes ago –

MR GUDSELL QC:

– and so I can't take anything, that further but to say, as your Honour remarked, was whether all respondents agreed with that approach.

TIPPING J:

Well you said you didn't.

MR GUDSELL QC:

Correct.

ELIAS CJ:

So are you adopting –

TIPPING J:

What argument –

ELIAS CJ:

– are you adopting Mr Stewart's written submissions?

MR GUDSELL QC:

Yes, I am.

TIPPING J:

Which he's disavowed. Well, I mean –

MR GUDSELL QC:

Yes, he has.

TIPPING J:

What is the essence of the point? I'm afraid I shut off when I got to Mr Stewart's nullity because I didn't think it was a runner – now, if we now – and he's confirmed that, from his point of view but what is it, why should it be an exception to fraud?

MR GUDSELL QC:

Well, I –

TIPPING J:

Because it's really just another way of the Court got the law wrong, isn't it?

MR GUDSELL QC:

Well, the –

WILLIAM YOUNG J:

Is it the N word instead of the W word?

TIPPING J:

Yes.

WILLIAM YOUNG J:

Isn't it.

MR GUDSELL QC:

The nullity exception to the finality principle which was addressed by His Honour Justice Tipping said clearly the principle is an available one, it's the same sense as a fraud exception, and my friend addresses that, comprehensively indeed, at, from paragraph 34 of his submissions, and, in essence, there is not a valid assessment at the commencement of this process.

TIPPING J:

So you adopt 34 and following of Mr Stewart's submissions?

MR GUDSELL QC:

Through to 46.

TIPPING J:

Right, thank you. But can you just help with the proposition that it's just another way of saying that the Court, that is, this Court, got its law wrong? Whether you call it a nullity or an error of law, ultimately this is a question of whether the correct law was applied, isn't it?

MR GUDSELL QC:

Well, the matter before this Court did not address whether section EH applied to the tax arrangement that was in place in this case. So it looked at the matter on the basis upon which it was put, by the predominant number of appellants that were before the Court at that time.

WILLIAM YOUNG J:

And it is really a little bit odd if you can fail in 2008 in an attempt to rely on subpart EH, and then come along four years later and say, "Well, I'm relying on it now –

ELIAS CJ:

The decision was a nullity.

WILLIAM YOUNG J:

– because the decision not to listen to me was a nullity," and…

MR GUDSELL QC:

Well, what happened in the Supreme Court on that occasion was that I had sought leave to develop the argument concerning the application of EH and, contrary to

my learned friend's submission before the Commissioner, that argument was not developed in the Court. The argument, the Chief Justice and the Court ruled that the argument would not be received by the Court because the second ground, as I recall, of the approved grounds of appeal, didn't allow for it to be argued, so the leave was –

TIPPING J:

Well, we heard it sufficiently to get some feel for what it was all about, and then we said it wasn't within the – amongst other things – it wasn't within the grounds.

MR GUDSELL QC:

Yes. My recollection of the judgment is that it wasn't within the grounds, so that the – you got a feel for it, I think, in about a 30, 40 minute discussion and then came back and said no, not hearing it.

WILLIAM YOUNG J:

Yes but the point I put to you still applies, that you try to raise the point unsuccessfully in the Supreme Court. It can't really be the case that you can then say, oh well, I'm not going to worry about the Supreme Court judgment, I'm just going to raise it again because their judgment's a nullity.

MR GUDSELL QC:

Well, the –

ELIAS CJ:

Because you didn't, because it didn't deal with the point.

MR GUDSELL QC:

Well, the particularisation of a nullity submission before the High Court has not been put, and I think I join with my friend and Ms Hinde, the respondents for whom we act, seek to do exactly that, to put that before the High Court.

TIPPING J:

But it's not a nothing. If anything, it's an erroneous conclusion.

MR GUDSELL QC:

Well, if it's at its infancy, its inception, it was a nothing, then it remains that, no matter what.

WILLIAM YOUNG J:

It's a very formal view of administrative law that hasn't –

ELIAS CJ:

Hasn't lasted.

WILLIAM YOUNG J:

– had a lot of currency lately.

TIPPING J:

Yes, it's usually valid until set aside, if I think it's what the members of the Court are suggesting.

MR GUDSELL QC:

Well, that's the position that's being taken, and is actually addressed, indeed, Justice Venning addressed that in the lower Court and –

TIPPING J:

But anyway, we can read what Mr Stewart –

MR GUDSELL QC:

– is addressed in Mr Stewart's submissions.

TIPPING J:

Yes, we can read what Mr Stewart had to say about that.

McGRATH J:

What's the best case you've got on nullity, Mr Gudsell?

MR GUDSELL QC:

The best case nullity is that, right at its inception – this was always in the H transaction –

ELIAS CJ:

No, no, the best authority.

McGRATH J:

The best authority.

MR GUDSELL QC:

Oh, the best authority.

ELIAS CJ:

Is it the 1902 House of Lords case, which seems to be in the –

McGRATH J:

Or *R v Nakhla (No 2)* [1974] 1 NZLR 453 (CA).

ELIAS CJ:

Or *Nakhla* – very different. But the 1902 case –

MR GUDSELL QC:

I had understood that –

ELIAS CJ:

– seems to be a tax case.

MR GUDSELL QC:

I had understood –

ELIAS CJ:

Or 1904, *Toronto Railway Company v Corp of the City of Toronto* [1904] AC 809 (PC), is that it?

MR GUDSELL QC:

Is it? My friend had addressed this in his submission, so I had not intended to be addressing it but…

ELIAS CJ:

Well, that's all right. If you're not –

MR GUDSELL QC:

That's the position that – I can't take it any further, your Honour.

McGRATH J:

You're probably addressing it more than your friend is, that's why – we just want to make sure that we've got you on record, because it seems to me it's something we will probably have to decide, or may have to decide, but, yes.

MR STEWART QC:

Not about my client.

ELIAS CJ:

No. Because you want to make an application to this Court, Mr Stewart?

MR STEWART QC:

If we can get the temerity up, yes.

TIPPING J:

I think we need to know whether Mr Gudsell is actually formally putting it forward as a ground on which the case should be allowed to continue. I think you are, aren't you? So we have to address it.

MR GUDSELL QC:

Excuse me, your Honour.

GAULT J:

I understood he was accepting Mr Stewart's position.

ELIAS CJ:

Yes.

MR GUDSELL QC:

Could I confirm, your Honour, currently –

TIPPING J:

I didn't understand that at all.

ELIAS CJ:

No, in the written submissions.

TIPPING J:

Oh, he was…

MR GUDSELL QC:

My apologies. Currently, my instructing person is not in New Zealand and I would like to confirm the matter with the Court in writing.

ELIAS CJ:

As to whether you're persevering –

MR GUDSELL QC:

Pursuing the nullity issue.

ELIAS CJ:

– with this argument?

MR GUDSELL QC:

Yes.

ELIAS CJ:

But you aren't in a position to develop it further with us at the moment –

MR GUDSELL QC:

I am not, your Honour.

ELIAS CJ:

– in any event?

MR GUDSELL QC:

No, I'm not.

TIPPING J:

I think we should close it, I think we should, frankly, this, the history of – I'm thinking aloud – the history of this case suggests to me that anything that's remotely floatable should be dealt with, because otherwise it'll come back a fifteenth time, in front of some tribunal or other.

ELIAS CJ:

Well, for myself, I would have thought – and in agreement with Justice Young – that the law has moved on a long way from simple assertions of things being void ab initio, and there needs to be some process in which a decision can be set aside. So I don't think you can simply assert that it's a nullity.

MR GUDSELL QC:

Well, I think it's, the only responsible position I can take, your Honour, is to do what I indicated to the Court I will do.

ELIAS CJ:

Well, Mr Gudsell, it's most unsatisfactory. But if you need to take instructions we'll receive an indication as to whether you're persevering with that. That's not to say, however, that we won't deal with the point.

MR GUDSELL QC:

No, I accept that entirely, your Honour. I had started this morning's exercise on the basis that that submission was going to be put –

ELIAS CJ:

Yes.

MR GUDSELL QC:

– so I have been taken by surprise.

WILLIAM YOUNG J:

So Mr Stewart was going to take the flak.

McGRATH J:

In the end, whether it's a nullity or not would be a matter for a decision of this Court. There's an argument before us in writing in Mr Stewart's submissions. We could decide it, I suggest, on the matter, the argument we've had today, coupled with the written submissions, or we could decide in terms of whether we should look at, as a Court, whether the *Ben Nevis* judgment would be revisited on that basis. I mean, what it seems to me is really unacceptable is to face the possibility that this will become the subject of a fresh application. It's a matter that's here.

If it's – I understand your position if your clients are overseas, but you obviously have come along to support an argument, and that's been your position to date. It seems to me that you really should face the fact that we may decide this issue as a Court, because we are the Court that's going to have to decide it, and it's before us, on the material we've got.

MR GUDSELL QC:

Point taken. Those are my submissions.

ELIAS CJ:

All right. So what you'll be doing is letting us know whether we are to attribute to you this argument, which we may well deal with in any event.

MR GUDSELL QC:

Thank you.

ELIAS CJ:

Thank you. Yes, Ms Hinde. I just wonder Ms Hinde, we're just wondering whether it would suit the Court to take a break now and go till five, or whether we'd stop at four. All right, we'll go on. Yes, Ms Hinde.

MS HINDE:

I'll make the assumption that your Honours have not run out of flak. Like my learned friend Mr Gudsell, I'm more interested in rule 5.49 and that appears very clearly from my written submissions. All of your Honours are Judges of the High Court which, under the Supreme Court Act, appears to be more important than being Judges of the Supreme Court and that shows how important this Court is, that it has to be staffed by Judges of the High Court. The High Court rules provide the procedure and the power for the High Court to decide if a protest to jurisdiction of the High Court can be allowed, and one of your Honours did acknowledge that earlier in the day, that there is no dispute about that point.

The scheme of the hierarchy of the Courts is that your Honours are only required to consider things that he been thoroughly winnowed in the Courts below you. Rule 5.49 is like a computer: it's either nought or one. Rule 5.4 –

TIPPING J:

Or 5.49.

MS HINDE:

Rule 5.49, paragraph 4, gives the High Court two possibilities. When there's a protest, it's either in or it's out. It does not require the Court to then consider any of the things which this learned Court has been entertained with today and that's why I've got no submissions to make on nullity and fraud and re-pleading and *Shannon* and all those things that are downstream of a protest. My learned friend Mr Brown, told the Court why protest was chosen instead of strikeout. In actual fact, you don't have to protest and that is very clear, that's in my written submission, it's very clear from the terms of the rule, it says "may", it's not "must".

On the basis that it was the simple question of, can the High Court consider a setting aside proceeding, that was all the High Court was being asked to do, it wasn't being asked to go in to the proceeding and speculate on what the evidence was, how it might have been re-pleaded, or any of those multitude of things that the High Court would consider in its normal jurisdiction. The High Court was just being asked to role the pitch so it could get on with it, and that is as far as my clients go.

My submission is that this Court should not feel under attack by the things that are being said to it, if it does feel under attack. The Courts are accustomed to litigants who come back and back and back and maybe that's something in the ethos of New Zealand but the most important thing is that everybody retains confidence that the Courts will hear and not only hear but determine. If you are not being heard, you will not accept it, the determination that comes from the hearing and that is what is at stake in this proceeding, flowing for a very simple r 5.49, something probably that's drafted by the most junior person, because it's so easy, it's so simple. You just put the two little bits of paper in, and you can see for yourself how short they were. Just one page, one and a half pages, word processed, if that's the phrase we still use, you put in the authorities and away it goes. Nobody expects to end up in this Court on something like that.

So all the argument about EH and EG and 89F and what the Commissioner did or did not do is not really what this proceeding is about. It's about whether the High Court, of which you are all members, has got sufficient authority to decide a real dispute between the state and a number of taxpayers and it may have gone on for some years now because that is the nature of tax. Tax is an annual, income tax is an

annual event but somehow it becomes forever, once you have all the procedures for disputing assessments and that is as it should be because it's such an important function. Assessment of tax is so important.

So my submission basically is, this was a case where the High Court did have jurisdiction – and that was what the Court of Appeal confirmed – and the High Court at this stage is in the position to take it and hear it and determine it. And then if either side does not like what the High Court has done, then it goes through the proper steps. But at the end of that you should not have disgruntled taxpayers or a disgruntled Commissioner. The integrity of the Courts and the system is really what's on trial here. And though we talk about nullity and fraud and how you can distinguish things and what somebody said a hundred years ago, all that's going to appear in the newspaper is, "Oh, look, the Courts have just said you can get away with anything."

WILLIAM YOUNG J:
Really? I mean –

MS HINDE:
The newspapers –

WILLIAM YOUNG J:
– you just do, you do – I'm about to say that of you actually, Ms Hinde. I mean, this is, is not an engagement with the issues in the case. We have to address whether this proceeding can remain on foot, in the context of the particular process invoked by the Commissioner. If we think that it shouldn't then we will say so, and not be troubled by the sort of comment that you've made as to how the media might portray it, do you understand that?

MS HINDE:
Yes, Sir, I do. And I am very concerned that the High Court is given its due position in this role of having sufficient jurisdiction to make that decision, and possibly that might be the end of it.

McGRATH J:
Ms Hinde, I think my understanding is that you're putting reliance in 5.49(4)(b) and saying, "That applies, the Court has jurisdiction and the word 'must' requires that it go on and hear and determine the proceeding," that's your essential point, isn't it?

MS HINDE:

Yes.

McGRATH J:

So that really means, doesn't it, that you, will you now be engaging with Mr Brown's submissions on jurisdiction as to how the – as to what meaning we give the word "jurisdiction", having regard to the cases he's referred to?

MS HINDE:

In my written submissions this was really about the *Tehrani* case.

McGRATH J:

Yes.

MS HINDE:

Garthwaite, *Tehrani* in those cases and I did pick those up in my written submissions. The *Tehrani* case is actually quite relevant to this one because that was a case where there was dual jurisdiction. Two Courts had jurisdiction.

McGRATH J:

Yes.

MS HINDE:

But what the Court, and they did in the end decide which Court was going to hear it purely because it was out of time and the other available Court so the unusual situation –

ELIAS J:

So there was only one Court that could hear it?

MS HINDE:

Both of them could have heard it but they had brought the proceeding in one and then by the time they worked out it should have been in the other one, the time limit had run –

ELIAS J:

They couldn't have it?

MS HINDE:

– so they left it in the one that still did have jurisdiction. That wasn't a problem.

ELIAS J:

Yes.

MS HINDE:

But what was perhaps most important about the *Tehrani* case was that was a case of a refugee that had turned up in London then got distributed to Glasgow, hence the Scottish aspect, but nowhere did anybody address the merits of Mr Tehrani being a refugee. They solely argued about jurisdiction of those two Courts and that, in my submissions, is where this case lies. We're not arguing about who was right about EH or EJ or nullity or fraud or things like that. We're saying which Court has got the jurisdiction to hear that argument and determine it.

TIPPING J:

Do you accept Mr Brown's proposition that absent a properly pleaded allegation of fraud, the High Court is functus officio?

MS HINDE:

No.

TIPPING J:

Well could you explain succinctly why?

MS HINDE:

The functus officio argument in the High Court was that because that Court had already heard the proceeding and that it had gone on appeal, it was functus officio and I have covered this in my written submission also –

TIPPING J:

Yes, yes. I read them but I just need to hear it again –

MS HINDE:

Yes, yes.

TIPPING J:

– because I couldn't quite understand it.

MS HINDE:

I apologise for that your Honour. The thing was what the High Court did not recognise was it was a new High Court, it just happened to have the same Judge but it was a new proceeding.

TIPPING J:

What do you mean a new High Court? There's only one High Court.

MS HINDE:

Sorry, it was a new proceeding –

TIPPING J:

Well that's the whole point of functus officio.

MS HINDE:

No –

TIPPING J:

You can't have a new proceeding.

MS HINDE:

It was a new proceeding to set aside an earlier one, it had, it had a new file number, it was a new proceeding. It was not a continuation of the old proceeding. Nobody could tag onto the old proceeding. They had to start again, as in *Shannon*, you have to start again and that was what was happening. It was a new proceeding.

WILLIAM YOUNG J:

But say the end of the – the proceeding went to trial and the Judge at the end of it said the Court doesn't have jurisdiction, the only Court that has jurisdiction to entertain this argument is the Supreme Court. Would you accept that that would provide a basis for dismissing the claim?

MS HINDE:

That would be the argument that was touched on in *Garthwaite* where the domicile hadn't been pleaded and that really was essential to the Court to be able to take the jurisdiction but in that case, in *Garthwaite*, the Court, one of the Judges did say that and I've – that's also in my written submission, that it may be at the end of a hearing we would find that there was no jurisdiction and that is always a risk that a Court might say well, this looks like the sort of case that this Court would hear because who else is going to hear it but then once the case has been heard, yes it would be open to the Court at that stage to say, having heard the proceeding –

WILLIAM YOUNG J:

Say the Court is satisfied, as soon as the proceedings are filed, by their nature, the parties, their subject matter and the relief sought, that it doesn't have jurisdiction, can it not reject the proceedings on that basis or does it have to hear them?

MS HINDE:

Is this on a?

WILLIAM YOUNG J:

On a protest to jurisdiction.

MS HINDE:

On a protest to jurisdiction. Well in that case, jurisdiction –

WILLIAM YOUNG J:

Let us say I issue proceedings against my wife in the High Court for divorce. Would that have to go to trial before a High Court Judge says, well sorry, we don't do divorce?

MS HINDE:

No, that would be a proceeding and that's what I was saying, that if it's the sort of case that the Court does then you have to move into it and act –

WILLIAM YOUNG J:

But if the Court – okay, well let's take a more difficult case which, like this one, if it was simply a decision to set aside the judgment of the High Court because it was wrong despite it having been upheld in the Supreme Court, would the High Court

have to listen to that or could it say no, we don't have jurisdiction to do that sort of thing?

MS HINDE:

I'm not quite sure that I'm following how you're getting there your Honour?

WILLIAM YOUNG J:

Well I'll just put it to you. Say the application, the proceedings that were filed sought the setting aside of the High Court judgment on the basis it was wrong?

MS HINDE:

That would be a very bald proceeding indeed.

WILLIAM YOUNG J:

Yes, yes, I know that but assume that was the case, would it be susceptible to being dismissed on a protest to jurisdiction?

MS HINDE:

The assumption would be that that would be a litigant in person one would hope –

TIPPING J:

Not necessarily.

MS HINDE:

– and the Court would sometimes, I would imagine, want to see what was behind it but probably yes, it could just say no jurisdiction because there was nothing here at all. It was so bald there was nothing for it to engage its jurisdiction. Just a dispute, I'm in dispute, that would not be enough on the High Court rules in itself but then they could start again, properly pleaded.

ELIAS J:

I mean, they are only rules. They're only the adjectival law, they're not the source of jurisdiction and there's flexibility for – I just don't see why the Courts can't go straight to what the real problem is and fix it, whether or not the correct rule has been invoked and it seems that really the parties aren't too far apart in what they say, or at least Mr Stewart's not too far apart from Mr Brown in this. He seems to be accepting that only the Supreme Court can – if it's not the fraud exception and you say you're not

arguing fraud, you don't want to be heard on fraud, if it's a jurisdictional thing then it's only the Supreme Court that's got jurisdiction once the High Court determination has been appealed and dealt with finally in the Supreme Court.

MS HINDE:

Your Honour, this Court is deciding whether the Court of Appeal was right or wrong.

ELIAS J:

Yes.

MS HINDE:

Which, in turn, of course, decided whether the High Court was right or wrong. So the jurisdiction ends here if you say the High Court have no jurisdiction and so that then leaves the proceeding without a base for being heard by anyone and then the litigants are in the position where there is no Court in New Zealand that can hear the dispute.

ELIAS J:

Well are you saying that the dispute is the protest to jurisdiction, is that what you're saying it is?

MS HINDE:

No, I'm saying that the dispute is whether the High Court has jurisdiction to hear a setting aside-type proceeding.

WILLIAM YOUNG J:

Well put at that level of generality, of course it does but what's perhaps more material is whether it has jurisdiction to hear this setting aside proceeding.

MS HINDE:

That is what the High Court never determined. It hasn't been given a chance.

ELIAS CJ:

So we should remit to the High Court to decide no, we don't have jurisdiction.

MS HINDE:

No, I'm not saying you don't have jurisdiction, you have jurisdiction –

ELIAS CJ:

No, no, sorry, sorry.

MS HINDE:

Yes.

ELIAS CJ:

So the High Court Judge would say I don't have jurisdiction. You want us to go through that formal process even if we decide that the High Court doesn't have jurisdiction?

MS HINDE:

No. If you say that the Court of Appeal was wrong –

ELIAS CJ:

Yes.

MS HINDE:

– and the High Court had no jurisdiction to hear the setting aside proceeding, that leaves the litigants in the position where they're unable to get a hearing of their grievance.

ELIAS CJ:

Just say to me, very briefly, what their grievance is that you're raising here? This is to have EH/EG point ventilated, is it?

MS HINDE:

That's what's going to be brought out when it gets there but at this stage we haven't got there. We're still at the point where the High Court hasn't been told yes, you have got power to do this, go and do it and knock them out if necessary, knock out the litigants if necessary but do it properly.

ELIAS CJ:

Well suppose the High Court gets it back and says I, the High Court Judge, cannot deal with this because the case has already been finally resolved the Supreme Court. If you want this re-ventilated, you have to go and apply for re-call of the Supreme Court judgment. You'd say that's fine if that decision is taken by the High Court

Judge, would you? I'm just trying to feel for whether – it's a very formal approach that you're adopting here.

MS HINDE:

Yes, it is Your Honour.

TIPPING J:

That's exactly what Justice Venning did. He said, "The proceedings are dismissed because there's no jurisdiction for this Court to consider them."

MS HINDE:

Your Honour, he actually said he was functus officio. Now the thing was, this was a fresh proceeding. He was not functus officio –

TIPPING J:

Heaven help us, heaven help us.

MS HINDE:

Sorry?

TIPPING J:

I said, "heaven help us," Ms Hinde, you're obviously not understanding me. I've had enough frankly but you carry on and address but I've had enough of trying to explore this point, that's what I meant.

McGRATH J:

Ms Hinde, one point that concerns me is what the force of regulation 5.49(4) is. Does it permit an applicant who is minded to go under the protest to jurisdiction procedure, to have as a backup or contingency application, a strikeout application? I thought that your submissions might be touching on that, I didn't think they quite addressed it but that's something that's been put to us and we should probably decide, if not for the benefit of this case, for the benefit of future cases.

MS HINDE:

Your Honour, it was my understanding that r 5.49 does not allow for a backup case of a 15.1 strikeout application and that is actually made clear by the very different way

in which the foreign based cases go because in 6.29(3), the Court is actually given express power to make and order 15.1, a strikeout there, no such link –

McGRATH J:

So you've got an argument by comparison –

MS HINDE:

What happens –

McGRATH J:

– of 5.49 with the other rule?

MS HINDE:

Yes, yes but 5.49(4), it only gives the two options but that does not close out the person who protested because they could immediately file a strikeout once the protest is –

McGRATH J:

Yes but your point is that they cannot bring a strikeout proceeding into the courtroom until the Judge has decided the matter under 5.49A or B –

MS HINDE:

Yes, that is my position.

McGRATH J:

– and if he decides that there is jurisdiction, that's the end of the matter of that particular proceeding. Only then you can bring a strikeout application. Now –

MS HINDE:

Yes, that's my position.

McGRATH J:

– that seems to me, I mean, acknowledge that subrule (4) gives two stark choices, I acknowledge that but I don't see that that precludes, as an option, bringing a reserve application at the same time which the Court might then go on and address if it –

MS HINDE:

The –

McGRATH J:

– reached the appropriate decision that it had jurisdiction.

MS HINDE:

The practical difficulty would be that if it filed the strikeout application which is the only way it could be in front of the Court, assuming it's not going to be an oral application –

McGRATH J:

As an alternative contingent application –

MS HINDE:

Yes.

McGRATH J:

– in the event the Court wasn't persuaded on the jurisdiction point –

MS HINDE:

If it does that, it's very difficult to see how it avoids submitting to the jurisdiction of the Court and so tainting the protest.

McGRATH J:

It would only be a contingent submission to the jurisdiction of the Court, if the Court had decided that it had jurisdiction.

MS HINDE:

What would then happen would be of course that the other parties, the original plaintiffs, they would not be given the opportunity to actually meet the strikeout in the normal way and take the steps under the rules that they needed to take.

TIPPING J:

Why not?

MS HINDE:

They wouldn't have time to bring any affidavits –

TIPPING J:

They'd do it contingently too.

WILLIAM YOUNG J:

I think it's possible for everyone to multi-task in this arena. The plaintiff can say well, we think it's a jurisdictional issue, in case you don't, in the alternative we seek to strikeout. The defendants can say we don't think it is a jurisdiction issue and we've got a pretty good case, here's our pleading and if relevant, here's our affidavits. I mean, it's sort of one hearing instead of two which is probably quite a good thing.

MS HINDE:

In which case it might be worthwhile not having protest at all because they are optional, they're not mandatory.

WILLIAM YOUNG J:

Can I just ask something? You said that if the High Court judgment stands, the grievance of the taxpayers will not be heard. What is the grievance?

MS HINDE:

The grievance is apparently under the EH/EG.

WILLIAM YOUNG J:

So the grievance is that they're –

MS HINDE:

It's a tax assessment.

WILLIAM YOUNG J:

– they should be taxed under, is that they should be taxed under EH which, on the pole, one might think was an issue before the Supreme Court in 2008 because that was an argument that was advanced and was held to be not available, for procedural reasons.

MS HINDE:

And this proceeding is all about procedure, not about the substantive grievance.

WILLIAM YOUNG J:

Well it's just that you said that if the judgment stands there's going to be a unheard grievance. Now if the unheard grievance is simply a rehashing of the *Trinity* case then I'm unmoved by that. If there's a grievance that's not intimately connected with that, then I would be prepared to sit up and listen to it. That's the point.

MS HINDE:

That's not been reached and like my learned friend Mr –

ELIAS CJ:

I think we understand that argument now, thank you. Were there other matters you wanted to address us on Ms Hinde?

MS HINDE:

No your Honour, that was all.

ELIAS CJ:

Thank you.

MS HINDE:

Thank you your Honours.

ELIAS CJ:

Mr Brown, we'll take a short adjournment.

MR BROWN QC:

I'm happy to – yes, yes, that's fine.

COURT ADJOURNS: 4.08 PM

COURT RESUMES: 4.09 PM

NO AUDIO FROM 16:09:26 TO 16:18:51

MR STEWART QC:

If you read the submission and looked at those three cases in particular, *Macfoy v United Africa Co Ltd* [1962] AC 152, [1962] 3 All ER 1169 (PC) at page 1172H.

ELIAS CJ:

Which bundle are these in?

McGRATH J:

Respondents' joint bundle of authorities.

MR STEWART QC:

And all of the *Toronto* case, it's not too long and *National Westminster Bank Plc v Spectrum Plus Ltd* [2005] UKHL 41, [2005] 2 AC 680 at page 38, paragraph –

McGRATH J:

So paragraph 38, is it?

ELIAS J:

Thank you. Thank you Mr Stewart.

MR STEWART QC:

Yes, thank you. So I have nothing further to add there.

ELIAS J:

Yes Mr Brown.

MR BROWN QC:

Thank you Your Honour. I have a reasonably confined number of points to make, first of all dealing with Justice McGrath's last point to Ms Hinde about proceeding onwards.

Certainly when read with r 4 about the objective of the High Court rules, sufficient, cost effective etcetera, sub-r 8 of 5.49 would assist that conditional dispatch. It envisages the Court doing anything it might do in an application for directions under 7.9.

Secondly, I want to deal to the proposition that my learned friend, Mr Stewart, I think was making when he cited the *Adams* case about an attempt to mislead the Court. In the fraud jurisdiction we are dealing with judgments obtained by fraud and possibly the best statement of that which we haven't been to before but I'm sure is familiar to all of your Honours is *The Ampthill Peerage* [1977] AC 547 (HL) case which is under

tab 23 of our second volume of authorities and there is a statement there that I think might also be of some comfort to Justice Tipping, not precisely on the point of law because there is no case and hardly surprisingly, no case that says law isn't fraud but there's a statement in page 591 of the *Ampthill Peerage* case and it's about letter B if you have that page.

TIPPING J:

Just looking it up, 23?

MR BROWN QC:

Tab 23, page 591, the judgment of Lord Simon of Glaisdale and by B he says, "To impeach a judgment on the ground of fraud, it must be proved that the Court was deceived into giving the impugned judgment by means of a false case known to be false or not believed to be true or made recklessly without any knowledge on the subject." I interpolate how you would do that in relation to the law is something to muse about but then he goes on and says, "No doubt suppression of the truth may sometimes amount to suggestion of the false," citing the *The Afred Nobel* [1918] P 293 case, but then says, "Short of this, lack of frankness or an ulterior or oblique or indirect motive is insufficient."

Now while of course, the Commissioner denies any such motive but this constant reference to strategy and the like indicates, in my submission, that even if there was such a basis or such an allegation that quote would give the lie to it and the point that a number of your Honours including, I think Justice McGrath made it and I think Justice Gault, there is no effect of obtaining by the EH point here.

TIPPING J:

And there's – at letter C, his Lordship talks about, "You can't just allege fraud in the hope of discovering as the case develops."

MR BROWN QC:

Oh exactly. He's got very much the flavour of what then ended up in Justice Harrison's judgment and indeed, further down, line F, "You can't say I alleged to obtain your judgment, let me rummage through your papers," and it was interesting, I think my learned friend Mr Stewart's comments were, you know, "If you let it go back then we have our pleading and of course, discovery." Well that's the real object of this exercise. This is a pleading, get into the High Court, resist the

5.49, now let's have discovery and see what we can find to generate something that might give rise to the fraud allegation.

It's all very well to refer to what the Court of Appeal said about the evidence in *Shannon* but the only evidence that you can be required then to lead to support the allegation is as good as the allegation that you've made in the pleading. The allegations follow the pleading, not vice versa.

McGRATH J:

You've reminded me, as you referred to the Lord Simon passage which I wasn't familiar with, but Lord Wilberforce, page 571 speaks, "That there must be conscious and deliberate dishonesty and the declaration must be obtained by it."

MR BROWN QC:

Yes.

McGRATH J:

Which I think is the same idea.

MR BROWN QC:

Yes, absolutely.

ELIAS J:

It's interesting also the reference to Spencer-Bower by Lord Simon because I suppose that's right, these sort of – that is where this sort of issue would often crop up, in cases of raised judicature.

MR BROWN QC:

Yes, whereas you can change your legal position –

ELIAS CJ:

Yes.

MR BROWN QC:

– people do it not infrequently, I suspect. Now, I don't make this point in any way as a cheap shot, my learned friends, Mr Stewart's position on nullity has changed dramatically from his written submissions and indeed, from yesterday when this large

bundle of authorities came in that are really directed at nullity but the reason I raise that is it feeds through to fraud in this way.

Your Honour Justice Young put to Ms Hinde the situation of the Judge who is confronted with something that doesn't look like fraud but hears it and gets to the end and says well, there isn't fraud but let's take the opposite hypothesis. The Judge feels that there's sufficient case in the pleading that he or she has to consider it and then goes to trial, gets to the end of the trial and says oh yes, there is fraud because the Court was misled about EH. Now that's a finding of fraud premised on EH and the finding about EH is at the same time saying that the Supreme Court was wrong on EH. That's the inevitable result of a so-called fraud allegation that is hinged on a proposition of law.

ELIAS CJ:

But won't that always be so? If you have a fraud exception it will mean that it impugns whatever decision preceded it –

MR BROWN QC:

No, it doesn't –

ELIAS CJ:

– in this case, the Supreme Court.

MR BROWN QC:

– it doesn't involve saying that the Court was wrong in the conclusion it reached. The Court is – as in *Kuwait Asia*, the decision of the House of Lords was entirely right as a matter of law on the facts that were visited upon it from the trial Court but this would be a finding where the High Court Judge would be saying there's been fraud because I was misled about the law which is actually EH. I know the Supreme Court said it's EG but it's actually EH. Now that, at that point, is saying the Supreme Court is wrong on the law and that is what you can't have. It's exactly what Lord Jessel was saying the lower Courts cannot do and that's why if you except that, as Justice Venning said in 51, no matter how it's pleaded it's a question of law.

He also said in a paragraph we haven't looked at, earlier, if we go to tab 7, paragraph 43 –

McGRATH J:

So this is tab 7 of?

MR BROWN QC:

Tab 7 of the pink volume, of volume 1 of the case on appeal. You see, he was taken to all these cases by my learned friends. If you come back to page 49, you'll find his discussion of *Meek v Fleming* which my learned friend Mr Stewart proffered the obiter comment to Justice Tipping on the question of whether there was any finding on a case on law but then the Judge's conclusion, you see, is at 43. He said, "While a false case involving false evidence, the suppression of material, the evidence the creation of false documents will be fraud," none of that is pleaded in the present case and then he says what the gravamen of the pleading is.

He said, "The plaintiffs say that because of Mr McKay's opinion, the Commissioner knew EH rather than EG was applicable," but then he concludes, "If the Commissioner was wrong to assess an EG when EH applied, he was wrong at law, it's not fraud."

WILLIAM YOUNG J:

The para 45 is quite material because actually it makes it clear that the argument before the Supreme Court was pretty close to the argument advanced here. There was –

MR BROWN QC:

Yes, it was.

WILLIAM YOUNG J:

– reference to Mr McKay's opinion, the Commissioner's own document reflect that it believed there was a financial arrangement in the form of a deferred property settlement.

MR BROWN QC:

Yes indeed, Mr Gudsell's written argument to the Supreme Court refers to the view of Mr McKay. Not the document but to the view of Mr McKay which they'd ascertained and indeed, his oral submissions and I'm afraid you don't have the transcript before you, although I'm sure it's –

WILLIAM YOUNG J:

I think I've seen it, I'm pretty sure I have actually.

MR BROWN QC:

Yes, well I commend to you pages 189, 192, 195 and 196 because, in my submission, what Mr Gudsell was making clear to you in his attempt to have you entertain EH, was that it was really a pure question of law that you're being asked to consider, the facts had been resolved below and that's why that can't sit with this – all my friends, you see, in fairness to them, all my friends here, learned friends, have discomfort when you put to them are you saying fraud of the Commissioner and his lawyers and logically, of his counsel at the time? They have difficulty in framing an allegation that manages to have its grounding in EH which Ms Hinde acknowledged is what it's about, with sufficient clothing and the like to appear to be an allegation of fraud that is in some way evidential based, that's the problem and that's why – it is of no avail for them to say, you know, give us 21 days and the like. I mean, Justice Young made the point well, it's six months since the Court of Appeal's decision. It's over two years since Justice Venning's decision, when he said you can't do it and 21 days isn't going to do it either.

Now, I was interested then in my learned friend Mr Stewart's concession, he said well if the –

WILLIAM YOUNG J:

Is this what, point four is it?

MR BROWN QC:

Point four, mmm. He said well, if there's nothing sinister, if it's a simple error in not applying EH then that would be a different matter. He didn't say exactly what but that would be different but he said, "The motive of the Commissioner, that's when things change," and I, against that proposition, quite apart from *Ampthill Peerage*, I pose this Court's decision in *Tannadyce*, the decision of the majority in paragraph 55, correctness and legality go hand in hand. If the Commissioner is right on this, or the Supreme Court is right – at the moment, that is the law because this Court has stated it.

So when I look at the nullity argument and I would, perhaps as my point four, Justice Young, perhaps give a potted version of what our nullity argument would be and I'll

be extremely brief on this. We say that nullity came in on a bit of a side wind in the High Court, it was Mr Forbes arguing the point and his submissions are valuable in the sense that – and you will find them in the yellow volume, tab 16, at page 157, they recognise that nullity means the plaintiff – this is on page 157 of the yellow volume, "Nullity in a sense that the plaintiff had no right to obtain a judgment at all."

Now of course the plaintiffs commenced the proceeding in the High Court seeking to have the Commissioner's assessments set aside. They say this Court has jurisdiction for what we want but then they say you haven't got jurisdiction to find the other way. Nullity doesn't work that way, it's not asymmetric. The same matter was really engaged in before Justice Keane and I must admit I was a little surprised that my learned friend Mr Gudsell wasn't prepared to grasp the nettle because he ran the argument on nullity before Justice Keane and I commend Justice Keane's judgment to you on this as well but the nullity point – and then in the Court of Appeal it didn't get any mileage and little wonder why because if you look at my learned friend Mr Stewart's written submissions to you, footnote 17, the pages aren't numbered but it's below paragraph 40.

Paragraph 40, footnote 17, the last sentence, it says, "The respondents did not ask the Court of Appeal to determine the nullity point substantively." The Court of Appeal proceeded on the basis that the nullity point had been abandoned but as he says in that paragraph and indeed in, I think, paragraph 44, they are seeking to advance it here, so you really don't have the benefit of the Court of Appeal's judgment on this either but he nullity point can be disposed of shortly. It is vulnerable to exactly the same criticism, functus officio but it also collapses for the reasons that Justice Venning, that's section 138P, the hearing authority in the form of the High Court, has the authority to cancel or to confirmed, as indeed then does the Court of Appeal, as indeed this Court does and this Court is the Court that has confirmed the assessments. You can't challenge the assessments without challenging the judgment of this Court.

So a combination of section 138P and *Tannadyce* means that the nullity proposition is simply not a runner and if it were, then it could only be by a re-call application to this Court which would involve, really Mr Gudsell trying to rerun the argument that you were asked to entertain in 2008 and rejected then.

Now, there are just a couple of other parts of our submissions I'd like to commend to you. I won't read them but I will ask you to note them in the light of the submissions that have been made to you. First of all we do not say, in fact, that any Court is limited to the pleading before it in terms of the proleptic operation. My learned friends could have put in affidavit evidence. Indeed, any of the material before you we say could be relied upon then to try and convince you that there is, sitting somewhere here, a pleadable case of fraud but there isn't.

Indeed, if I could just draw your attention specifically and we won't read them through but to our submissions at 66 and 67. They're quite a substantial piece of our submissions but they answer so much of the submission that was made to you and the Court of Appeal's criticism of the process in the case. So this is at page 24 of our submissions responding to the proposition that the – or asserting the High Court hearing did not misfile.

First of all, on that page at footnote 123 you will find our reference to the *Tannadyce* decision in paragraph 55 and then all of paragraph 67 which is in a number of subrules or subparts reflects the history of what actually happened in the argument. And in particular could I draw to your attention to 67.4.2 because on this idea that my learned friends don't know what they could refer to mount the claim. We say in 67.4.2 that every document that is referred to in the *Redcliffe* statement of claim was engaged in the *Accent Management* argument before Justice Keane and indeed that is why the affidavit of Tracey Lloyd, the woman who was cross-examined at first instance before Justice Venning about EH, that is why her affidavit was filed in the *Accent* proceeding to annex all those documents that were referred to in the pleading.

So the proposition that my learned friends did not know or do not know what was possibly said to be relied upon them is defeated, in our submission, by the material referred to in those paragraphs, coupled with the fact that Mr Gudsell's submissions, which are referred to in 67.2.4 and which you will find in the written submission, I won't take you to it but at volume 4, tab 47, of the case on appeal, they are his written submissions which refer to various other matters that Mr Stewart was referring to. For example, statements of the Commissioner about the application of the Act and the like.

Now it's very clear from that, in my submission, that the respondents absolutely knew that fraud was in play on the protest to jurisdiction and you only have to look at their notice of opposition which is at page 33 of the bundle, the pink volume, to see all the cases that are cited there which are fraud cases. They knew how they had to respond to the Commissioner's protest to jurisdiction and you'll see for example, *Meek v Fleming* and the *Kuwait Airways Corp v Iraqi Airways Co* case there and of course, they got our extensive written submissions which in volume 2, tab 15, that's the yellow bundle, tab 15, and you may care to look at page 115 at the index to see how comprehensive the Commissioner's submission on functus officio and 5.49 was and in particular dealing with the issues of what amounts to fraud, fraud false case, suppression of the truth and the like so this idea that they've been sort of ambushed in some way is nonsensical.

Lastly, I think the last point I would make is this, that it is said – it's a popular sort of proposition my learned friend said, that the Commissioner has never denied that EH applies, as if it's some sort of res integra. That is not the position and indeed, there is no statement defence in the Redcliffe proceeding because we filed a notice of protest but it's interesting if I give you the references to the pleadings in the *Accent Management* litigation which are respectively, this is in the green volume, it is tab 31 for the statement of claim and tab 33 for the statement of defence and in each case it's paragraph 10. So you'll find paragraph 10 of the statement of claim at page 330 and you will find the denial of that paragraph, paragraph 10, at page 346.

WILLIAM YOUNG J:

I haven't got it in front of me. Is a detailed denial or is it just a denial?

MR BROWN QC:

It's a denial and then goes to make a series of points. It is an engaging denial and –

TIPPING J:

It directly engages with the fact that the promissory note was a present obligation, not a future obligation?

MR BROWN QC:

Yes and we've consistently said that the financial arrangement didn't apply and indeed, you find the argument is set out in – it's in the Supreme Court decision, this Court's decision, for example – and it's in volume 1, tab 3. Again, I won't take you

there but paragraph 67 and 68 and 127 recite the Commissioner's reference to EH and the like so it's –

McGRATH J:

What page is the denial at?

MR BROWN QC:

Page 346.

McGRATH J:

Page 346, thank you.

TIPPING J:

Expressly there pleaded but this is not covered by EH.

MR BROWN QC:

That's right and yet they say we've never denied, as if to say look – they admit now it is as if it's all now sort of common ground. It all depends on the – what is or is not an arrangement or an accepted financial arrangement and that all comes back at the – it all unwinds when you bring it back to the fact that this arrangement which was then found to be tax avoidance, hinges on EG being deployed. I commend to you in that regard Justice Keane's judgment which again written with care and reservation but still at the end says look, you just can't be running this, this is the antithesis of what has been run in the *Trinity* litigation.

Now there is much I could say but I think that captures the matters that I should engage with in response. I do – unless there's any matters that the Court wishes to ask me?

ELIAS J:

No, thank you Mr Brown.

MR BROWN QC:

Thank you Your Honours.

ELIAS J:

Well thank you counsel for your submissions. We will reserve our decision in this matter. Thank you.

COURT ADJOURNS:4.43 PM

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