IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2017-404-133
[2017] NZHC 1413

BETWEEN	COMMISSIONER OF INLAND REVENUE Plaintiff
AND	GARRY ALBERT MUIR Defendant

Hearing: 13 June 2017

Appearances: S Leslie and C Hollingsworth for the Plaintiff
R B Hucker and D van Hout for the Defendant

Judgment: 23 June 2017

JUDGMENT OF ASSOCIATE JUDGE R M BELL

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*This judgment was delivered by me on **23 June 2017** at **4:00pm***
pursuant to Rule 11.5 of the High Court Rules

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Registrar/Deputy Registrar

Solicitors:
Crown Law (S Leslie), Wellington, for the plaintiff
Edmonds Judd (K Hetherington), Te Awamutu
Hucker & Associates (R B Hucker), Auckland, for the Defendant

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Introduction

[1] This is another decision in the long-running Trinity tax dispute. Dr Muir, the defendant, is the architect of the Trinity scheme. The Commissioner says that the scheme was bad for tax avoidance. Dr Muir did not accept that. On the whole, the courts have upheld the Commissioner's position. She now says that Dr Muir has exhausted his challenges to income tax assessments. She sues him for unpaid income taxes, interest and penalties for the years ended 31 March 1997 to 31 March 2010, claiming debts as at 27 January 2017 totalling $8,179,830.94. She has applied for summary judgment.

[2] In response, Dr Muir says that her application is premature. He still has proceedings on foot, under which he challenges the Commissioner's amended assessments. Until the Taxation Review Authority and this court acting under Part 8A of the Taxation Administration Act 1994 have finally determined his challenges, the Commissioner is barred from suing him for his unpaid taxes. On a summary judgment application to collect taxes, this court cannot even decide whether Dr Muir has exhausted his challenges and the proceeding should be stayed or adjourned until his challenges have been finally determined. Moreover, I should recuse myself because of bias or predetermination.

[3] To start it is helpful to understand the distinct régimes under the Tax Administration Act for challenging assessments and for collection of taxes, and the relationship between them.

[4] An assessment for income tax is a disputable decision.[1] While there are a number of ways to prove liability for taxes, in tax collection proceedings the Commissioner relies on tax assessments. Section 109 of the Tax Administration Act provides a powerful tool for the Commissioner:

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1 Tax Administration Act 1994, s 3 – definition of disputable decisions.

109 Disputable decisions deemed correct except in proceedings

Except in objection proceedings under Part 8 or a challenge under Part 8A,—

(a) no disputable decision may be disputed in a court or in any proceedings on any ground whatsoever; and

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

So long as there is no challenge under Part 8A, the Commissioner can rely on assessments of income tax as being correct in all respects.[2] That is reinforced by the Supreme Court's decision in *Tannadyce Investments Ltd v Commissioner of Inland Revenue*[3] limiting the scope of judicial review to challenge assessments. Accordingly, so long as any assessment is not subject to a challenge, it is deemed correct in tax collection proceedings.

[5] Part 8A of the Tax Administration Act provides that challenges to tax assessments can be heard by hearing authorities, the Taxation Review Authority or the High Court. A taxpayer disputing an assessment must first follow the disputes procedure under Part 4A of the Tax Administration Act.[4] In the typical case, a taxpayer will file a return in which tax is self-assessed, the Commissioner may give a notice of proposed adjustment and the taxpayer is required to give a notice of response within two months. If the Commissioner and the taxpayer cannot resolve matters, the Commissioner will give a disclosure notice and statement of position. The taxpayer must respond within two months with a statement of position. Any continuing differences are referred to the Inland Revenue's adjudication decisions unit. If the taxpayer does not accept the decision of the adjudication unit, the Commissioner may issue an amended assessment, which the taxpayer may challenge by bringing a proceeding in a hearing authority. Under s 138B(1)(c) the proceeding must be filed within "the response period" – two months following the issue of the relevant notice of assessment.

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2 Objection proceedings under Part 8 are irrelevant for this case. Part 8 applies only to disputes started before 1 October 1996: Tax Administration Amendment Act (No 2) 1996.

3 *Tannadyce Investments Ltd v Commissioner of Inland Revenue* [2011] NZSC 158, [2012] 2 NZLR 153.

4 *Allen v Commissioner of Inland Revenue* (2005) 22 NZTC 19,473 (CA), upheld on appeal *Allen v Commissioner of Inland Revenue* [2006] NZSC 19, [2006] 3 NZLR 1.

[6] While a challenge is pending in a hearing authority, under s 138I(2) the Commissioner is barred from taking tax collection proceedings:

> **138I Payment of disputed tax**
>
> …
>
> (2) A disputant is not liable to pay—
>
> (a) the deferrable tax relating to any tax in dispute; or
>
> (b) a shortfall penalty, where the penalty is payable in respect of any tax in dispute; or
>
> (c) the interest accruing under Part 7 on that deferrable tax or that shortfall penalty—
>
> until the due date for payment of that deferrable tax.
>
> …

These definitions apply:[5]

> **deferrable tax**, for a person who is a taxpayer or disputant, means—
>
> (a) an amount of tax, assessed under a tax law as payable by the person, in relation to which the person makes a competent objection under Part 8 or that the person challenges under Part 8A:
>
> …
>
> **period of deferral**, in respect of deferrable tax, means the period that starts on the later of—
>
> (a) the day on which the notice of an assessment of tax, … in relation to which proceedings challenging the assessment are issued under Part 8A, is given to the taxpayer or the Commissioner; and
>
> (b) the day that immediately succeeds the due date for payment of the tax,—
>
> and ends at the expiry of the day that, in relation to the deferrable tax, is the day of determination of final liability.

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5 Tax Administration Act 1994, s 3.

day of determination of final liability—

…

(b) for the purposes of Part 8A, means—

(i) the day on which the Commissioner is notified by the disputant that the disputant is discontinuing a challenge:

(ii) [Repealed]

(iii) if a challenge is determined by a Taxation Review Authority in its general jurisdiction, and not by a court, the day on which the Authority determines the challenge:

(iv) if a challenge is determined by a court, whether or not by way of appeal, the day on which the challenge is finally determined, whether in those proceedings or in a subsequent appeal:

(v) to the extent the Commissioner concedes a challenge, the day on which the Commissioner notifies the disputant of the concession.

[7] Section 142F says:

142F Due date for payment of deferrable tax

Deferrable tax is due and payable on the day which is the 30th day after the last day of the relevant period of deferral.

Accordingly, on the 30th day after the last day of the relevant period of deferral, the bar on suing under s 138I comes to an end, and the Commissioner is entitled to take tax collection proceedings. A taxpayer is not barred from paying before then.

[8] The overall effect of these provisions is that so long as a taxpayer disputes his liability under an assessment following the disputes procedures under Part 4A and by bringing a timely challenge before a hearing authority under Part 8A of the Tax Administration Act, collection by the Commissioner of the tax disputed by the taxpayer is deferred until the 30th day after the end of the deferral period.

Proof of the taxes claimed

[9] The debt claimed by the Commissioner is shown in a statement of account attached to the statement of claim. For the years 1997 to 2010, Dr Muir was assessed for income tax totalling $2,291,528.83. For the years 1998-2003 he was assessed for shortfall penalties totalling $1,077,038.22, having taken an abusive tax position. For

all years he has also been charged interest, totalling $4,593,981.35 and late filing and late payment penalties totalling $310,724.80. The only payments he has made are $98,248.31 for the year ending 31 March 1997. There are no challenges to the Commissioner's calculations showing the debt of $8,179,830.94 as at 27 January 2017.

[10] The Commissioner's case relies on assessments of income tax, but proof of the amounts of the assessments was not straightforward. The Commissioner's statement of account is no more than a statement in accounting terms of what the Commissioner claims. It is no more proof of a debt than an invoice issued by any other creditor. I infer that income taxes have been assessed, because the Commissioner put in evidence judgments of the Taxation Review Authority and this court in challenge proceedings, which dealt with assessments for all the years.[6] Those decisions did not however state the amounts of the assessments. Exhibits to Dr Muir's affidavit showed the amounts of the assessments for the years 1997 and 1999-2004. That evidence filled some of the gaps.

[11] The Commissioner put in evidence screen-dumps from the Inland Revenue computer system. These were alleged to show assessments of Dr Muir's income taxes in the relevant years. These may mean something to the staff of the Inland Revenue Department, but they are not intelligible to an outsider. While the documents have some words which correspond to words in English, there are acronyms, abbreviations, symbols and words that do not correspond to English. If I quoted one of the lines of the screen dumps, "Rtn Cat-0> Stndrd Rsp Cd: 05>", to a native speaker of English, he or she would not have a clue what I was going on about, and I would not either.

[12] There is a risk in translation from a foreign language in assuming that a word that looks like an English word has the same meaning as the English word. Think, for example, of the different meanings of "Gift" in English and German.[7] These screen-dumps are in a private language of the Inland Revenue Department. As they

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6 *Muir v Commissioner of Inland Revenue* [2011] NZTRA 2, (2011) 25 NZTC 1-006; *Muir v Commissioner of Inland Revenue* [2015] NZHC 792, (2015) 27 NZTC 22-004.

7 "Gift" being German for "poison".

are in a language other than English, a translation is required.[8] It is not acceptable to provide a document in a foreign language and then assert the effect of the document without proving its meaning. That would involve the court dispensing with proof and acting on the unsubstantiated word of one party. Section 110 of the Tax Administration Act allows for production of departmental records, including those in electronic form, but it does not relieve the Commissioner from the requirement to translate any document not written in English.

[13] None of the screen dumps which are said to relate to income tax contain the word "assessment". It is not possible for a native speaker and reader of English not familiar with the private language of the Inland Revenue Department to understand from the screen-dumps whether Dr Muir has been assessed for income tax or the amounts of those assessments.

[14] The Commissioner also included screen-dumps of assessments of penalty tax. While these were also in the Inland Revenue Department's private language, there were enough words in English to make them intelligible. These showed that there was a shortfall penalty assessment, with the amount specified and the reason given as abusive tax position.

[15] In reply evidence, an Inland Revenue officer stated the dates of the assessment, but not the amounts. That left the amounts of the assessed income taxes unproved for the years 1998 and 2005-2010. During the hearing, the Inland Revenue officer swore a fresh affidavit which filled the gaps by explaining the meaning of certain entries in the screen-dumps as representing the amounts of assessed income tax. Mr Hucker for Dr Muir objected to the evidence coming in late and sought an opportunity for response. In my judgment that was not required. Dr Muir had not taken that point of proof in his notice of opposition. He was apparently aware of the amounts of tax in the assessments and indeed included some of the assessments in his own evidence. The point arose only because of my difficulty in understanding the Commissioner's evidence. The late affidavit filled a gap in evidence. Dr Muir could not take issue with that evidence.

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[8] By analogy with r 1.15 of the High Court Rules 2016.

[16] With the late affidavit, I am satisfied that taxes from 1997 to 2010 were assessed at the amounts shown in the Commissioner's statement of account. The charges for interest and late payment penalties followed as a matter of calculation. The Commissioner has proved the amount of the debt.

Dr Muir's challenges to the assessments

[17] There were a number of investors in the Trinity scheme. Many of them used LAQCs (loss-attributing qualifying companies) as vehicles for their investments. The investors claimed deductions from their income taxes which the Commissioner disallowed after investigation. The procedures for dispute resolution under Part 4A of the Tax Administration Act were followed to the point where the investors filed challenge proceedings. Most were filed in the Taxation Review Authority, but five were filed in the High Court. Some of the proceedings in the Taxation Review Authority were transferred to the High Court, but others remained with the Authority.[9] Some cases were designated as test cases under s 138Q of the Tax Administration Act. That resulted in further cases being transferred to the High Court, but not all. Venning J dealt with the substantive challenges to assessments for 1997 and 1998 for only some of the investors and LAQCs.[10] Dr Muir's challenge proceedings were not the subject of his judgment. The Court of Appeal dismissed the appeal from Venning J's decision.[11] The Supreme Court dismissed the appeal from the decision of the Court of Appeal.[12] The plaintiffs in the original hearing applied for Venning J to recuse himself.[13] Venning J dismissed the application. The Court of Appeal dismissed the appeal from that decision.[14]

[18] While Dr Muir was a leading figure in all these cases – he was the architect of the scheme and gave evidence – these decisions did not directly decide his

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9 *Commissioner of Inland Revenue v The Taxpayer* (2003) 21 NZTC 18,001.

10 *Accent Management Ltd v Commissioner of Inland Revenue* (2005) 22 NZTC 19,027.

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

12 *Ben Nevis Forestry Ventures Ltd v Commissioner of Inland Revenue* [2008] NZSC 115, [2009] 2 NZLR 289.

13 *Accent Management Ltd v Commissioner of Inland Revenue* (2006) 22 NZTC 19,758.

14 *Accent Management Ltd v Commissioner of Inland Revenue* (2007) NZCA 231, (2007) 23 NZTC 21,366.

challenges for the assessments of his income taxes. He still had challenges pending in the Taxation Review Authority and in this court.

[19] The Commissioner relies on decisions in Dr Muir's challenge proceedings. In *Muir v Commissioner of Inland Revenue*, a decision of 1 February 2011 of the Taxation Review Authority on Dr Muir's challenge proceedings, Judge Barber said that the assessments in issue were for taxes payable for the years ending 31 March 1997 to 31 March 2006. His decision concluded:[15]

> While the hearing before me has focused on a preliminary issue raised by the disputant that the challenge assessment are prohibited and I have no statutory power to hear challenges to them, there was also a succinct application for the defendant that these challenge proceedings of the disputant be struck out. I find that the assessments are not prohibited and that I have power to consider whether or not they are correct in the usual way. For reasons I have set out above I must regard the assessments as correct. Accordingly these challenge proceedings are hereby struck out. I reserve leave to apply should there be any consequential matters.

[20] Dr Muir applied for re-call. Judge Barber dismissed that application.[16]

[21] Dr Muir appealed against Judge Barber's decision of 1 February 2011. Faire J heard the appeal at the same time as he dealt with an application by the Commissioner to strike out a challenge proceeding by Dr Muir pending in this court under CIV-2011-404-1132. The assessments in that proceeding were for the years 1997 and 2007-2010. The parties agreed that the challenge proceedings the subject of Judge Barber's decision of 1 February 2011 did not relate to the 1997 year.[17]

[22] Faire J held against Dr Muir:

> [39] I conclude that the current plaintiffs are estopped from disputing the determinations of the Supreme Court judgments as binding on them as if they were parties to those proceedings. They therefore are estopped from raising arguments concerning the treatment of the Trinity Scheme and appropriate assessments.
>
> [40] This is a clear case of an abuse of process which must not be allowed to continue. It may also be viewed as a collateral attack on the final decisions of the Supreme Court and is equally an abuse of process on that ground.

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15 *Muir v Commissioner of Inland Revenue* [2011] NZTRA 2, (2011) 25 NZTC 1-006 at [92].
16 *Muir v Commissioner of Inland Revenue* [2011] NZTRA 6, (2011) 25 NZTC 1-1010.
17 *Muir v Commissioner of Inland Revenue* [2015] NZHC 792, (2015) 27 NZTC 22-004 at [6].

Orders

> [41] For the above reasons, I conclude that the Commissioner is entitled to an order striking out the current proceedings and also an order dismissing the appeal against the 1 February 2011 decision. I also dismiss the appeal against the 16 June 2011 decision.

[23] Faire J's decision states that the proceedings are struck out and that the appeals against the Taxation Appeal Authority's decisions of 1 February 2011 and 16 June 2011 are dismissed.

[24] Dr Muir was not satisfied with Faire J's decision and sought another opinion. The Court of Appeal dismissed his appeal:[18]

> [43] In our judgment it would be an abuse of the Court's process to allow Mr Muir to continue his claim. It would commit judicial resources for no purpose and bring the administration of justice into disrepute. It would also be unfair to require the Commissioner to expend further costs in defending a position on taxation liability which has been unequivocally and authoritatively answered in the Commissioner's favour.
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> [44] This claim must fail.

[25] Dr Muir was still not satisfied. He asked the Supreme Court to take a different view. It gave Dr Muir leave to appeal for all tax years except 1997 and 1998.[19] Dr Muir applied for leave to change his grounds of appeal and raise a matter that had not been raised at any stage of the proceedings, including the dispute procedures under Part 4A of the Tax Administration Act. He no longer wished to pursue the ground for which he had been granted leave. The Supreme Court said:

> [11] In oral argument, the appellant accepted that, given the nature of the new argument foreshadowed by his amendment application, the leave to appeal granted by this Court should be revoked, a concession which was correctly made. The consequence is that the decision of the Court of Appeal will stand, and the appellant's proceedings will remain struck out in their entirety.[20]

[26] To explain the Supreme Court's decision, over time Dr Muir had been changing grounds to challenge assessments. In the round of cases that ended with the Supreme Court's decision in *Ben Nevis*, the disputants had run arguments based

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18 *Muir v Commissioner of Inland Revenue* [2015] NZCA 591, (2015) 27 NZTC 22-034.
19 *Muir v Commissioner of Inland Revenue* [2016] NZSC 90, (2016) 27 NZTC 22-060.
20 *Muir v Commissioner of Inland Revenue (No 2)* [2016] NZSC 113, (2016) 27 NZTC 22-067.

on subpart EG of the Income Tax Act 1994. Dr Muir next alleged that he had alternative grounds of challenge under subpart EH. This surfaced in the *Redcliffe Forestry Venture Ltd* cases.[21] It was continued in the decisions up to the Court of Appeal's decision in [24] above. In the Supreme Court he abandoned that argument and sought leave to raise a new one.

[27] The Commissioner's case is that Dr Muir's challenges to the 1997 and 1998 tax assessments were finally determined on 20 July 2016, the date of the Supreme Court's first decision, and his challenges for 1999-2010 were finally determined on 26 August 2016, the date of the Supreme Court's second decision. The deferral periods came to an end. The Commissioner began this proceeding on 31 January 2017, outside the 30 day period under s 142F and after the Commissioner had made demand for payment.

[28] On the other hand, Dr Muir says that his challenges to all the tax assessments are not yet over. He does not accept that the decisions of the Supreme Court are the last word on his challenges to the Commissioner's assessments of the income tax payable for the 1997-2010 years. On 26 August 2016, he attempted to file in the Taxation Review Authority a second amended notice of claim. By a minute dated 21 September 2016 the Authority decided that as Dr Muir's challenges had been struck out the entire proceeding had been determined and no further amended notice of claim could be filed or accepted. Dr Muir has begun a judicial review proceeding in this court under CIV-2016-404-2908 to set aside the Authority's decision not to accept his amended notice of claim for filing. The Commissioner successfully applied to be joined as a party to that proceeding.[22]

[29] On 26 August 2016 Dr Muir filed in this court an amended statement of claim in CIV-2011-404-1132 challenging assessments for the years 1997 and 2007-2010. The Commissioner has applied to set aside the Registrar's decision to accept that pleading for filing.

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21 *Redcliffe Forestry Venture Ltd v Commissioner of Inland Revenue* [2011] 1 NZLR 336 (HC); *Redcliffe Forestry Venture Ltd v Commissioner of Inland Revenue* [2011] NZCA 638, [2012] 2 NZLR 823; *Commissioner of Inland Revenue v Redcliffe Forestry Venture Ltd* [2012] NZSC 94, [2013] 1 NZLR 804.

22 *Muir v Taxation Review Authority* [2017] NZHC 846, (2017) 28 NZTC 23-013.

[30] On 3 July 2017 the court is to hear two applications by the Commissioner in CIV-2011-404-1132: to extend time under r 2.11 of the High Court Rules and to review the Registrar's decision to accept the documents filed on 29 August 2016.

[31] On 19 July 2017 the court will hear Dr Muir's judicial review of the decision of the Taxation Review Authority not to accept his amended pleadings for the 1998-2006 years.

[32] The new pleadings of 26 August 2016 disavow any reliance on subparts EG and EH of the Income Tax Act 1994, but allege other matters, also based on the Trinity scheme, which are said to give rights of deduction. In particular both refer to a payment in money's worth of $5,200,000 by Redcliffe Forestry Venture Ltd to Trinity Foundation (Services No 3) Ltd in July 2009 under an agreement between Southern Lakes Forestry Joint Venture and Trinity dated 23 July 2009.

[33] Under the Commissioner's case, the day of determination of final liability of Dr Muir's assessments for the 1997 and 1998 years was 20 July 2016 when the Supreme Court refused leave to appeal for those two years. The 30 days for payment under s 142F expired on 19 August 2016. Dr Muir filed his fresh documents challenging assessments for those years on 29 August 2016, after the tax debts for those years had fallen due under s 142F. Dr Muir's amended pleading in this court challenges tax for the 1997 year. As the Taxation Review Authority rejected the documents he tendered, there is no proceeding in the Authority for the 1998 year.

[34] For the assessments for the 1999-2010 years, the challenges to the assessments came to an end on 26 August 2016 when the Supreme Court revoked leave to appeal. Under s 142F the tax for those years became due and payable on 25 September 2016, 30 days after the Supreme Court's decision.

[35] For the years 1998-2006 there is no current proceeding, because the Taxation Review Authority rejected the documents which Dr Muir attempted to file. The pleading which the Registrar of this court accepted deals with the assessments for 2007-2010 which were the subject of the Supreme Court's decision of 26 August

2016. They were filed before the debts became enforceable under s 142F – 25 September.

Have Dr Muir's challenges to all his assessments been determined?

[36] The argument for Dr Muir is generally as follows. He continues to have the benefit of the moratorium under s 138I of the Tax Administration Act. His challenges to the assessments have not been finally determined on their merits. In his earlier proceedings, the pleadings were struck out, but he remains entitled to continue those proceedings with fresh pleadings. His new pleadings raise matters that were not the subject of the earlier decisions. As there are now proceedings pending before hearing authorities, this court cannot and should not decide the outcome of those proceedings. It is possible that the hearing authorities may decide that he does not owe the Commissioner any income taxes. When this court hears a tax collection proceeding, it should not pre-empt that decision.

[37] It would make this decision shorter if I could say that Dr Muir's challenges had been determined on their merits, but I cannot. An explanation is required as to why res judicata does not apply. That is a rule of substantive law.[23] A successful defence of res judicata goes to the merits. It means that the party asserting a particular substantive position fails because of an earlier final decision on the merits binding that party. That is to be distinguished from abuse of process when applied to bar a person from suing by reason of some earlier decision or settlement, which may not necessarily give rise to res judicata. In *Johnson v Gore Wood & Co* Lord Millett said:[24]

> While, therefore, the doctrine of res judicata in all its branches may properly be regarded as a rule of substantive law, applicable in all save exceptional circumstances, the doctrine now under consideration can be no more than a procedural rule based on the need to protect the process of the Court from abuse and the defendant from oppression. In *Brisbane City Council v Attorney General for Queensland* [1979] AC 411, 425, Lord Wilberforce, giving the advice of the Judicial Committee of the Privy Council, explained that the true basis of the rule in *Henderson v Henderson* 3 Hare 100 is abuse of process and observed that it "ought only to be applied when the facts are

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23 *Canada and Dominion Sugar Co Ltd v Canadian National (West Indies) Steamships Ltd* [1947] AC 46 (PC); *Associated Electric and Gas Insurance Services Ltd v European Reinsurance Co of Zurich* [2003] UKPC 11, [2003] 1 WLR 1041 at 1048.

24 *Johnson v Gore Wood & Co* [2002] 2 AC 1 (HL) at 59.

> such as to amount to an abuse: otherwise there is a danger of a party being shut out from bringing forward a genuine subject of litigation".

Whereas res judicata tends to apply black letter rules, the abuse of process test is a:[25]

> broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is using or misusing the process of the court by seeking to raise before it the issue which should have been raised before. As one cannot comprehensively list all possible forms of abuse, so one cannot formulate any hard and fast rule to determine whether, on given facts, abuse is to be found or not.

[38] The reason why it might be suspected that res judicata applies is the references to issue estoppel in the decisions of the Taxation Review Authority and this court. Judge Barber said:[26]

> It seems to me that, for the purposes of *issue estoppel* that Supreme Court judgement finally determined all matters between the defendant and the plaintiffs in the Trinity litigation including their privies of which the disputant is one. There is a sufficient mutuality of interest to find that the disputant and the plaintiffs in *Accent Management/Ben Nevis* are privies. The appellant stood to gain by the Trinity scheme, both as its architect and as an investor and, indeed, was the guiding hand behind *Redcliffe*. Accordingly, for the purpose of *issue estoppel*, that Supreme Court judgment is binding on him as if he were a named party to it.

[39] In the judgment quoted at [22] above, Faire J accepted the Commissioner's submission as to issue estoppel. Both also found abuse of process. Issue estoppel is part of res judicata as Diplock LJ famously explained in *Thoday v Thoday*.[27] It is to be contrasted with cause of action estoppel, which prevents a party from asserting or denying a particular cause of action because it has been determined by a court of competent jurisdiction in a proceeding between the two parties. Significantly, Judge Barber and Faire J did not rely on cause of action estoppel. That is because the causes of action in the other litigation were different. They involved different taxpayers. Income tax owed by a taxpayer for a particular tax period is a debt distinct from income tax for a different tax period or payable by another taxpayer. The distinct character of each tax debt is shown by the transfer provisions of the Tax

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25 Above n 24, at 31 per Lord Bingham.
26 Above n 16, at [39].
27 *Thoday v Thoday* [1964] P 181 (CA) at 197-198.

Administration Act.[28] A claim for income tax payable by one taxpayer for one period is a different cause of action from a claim for a different period or against a different taxpayer.[29] Equally a challenge to an assessment for one tax period is a different cause of action from a challenge for another period or for another taxpayer.

[40] Findings of issue estoppel are made only for matters that do not dispose of a cause of action entirely. If a court holds in a strike out application that a taxpayer can no longer pursue a challenge because of an issue estoppel binding that taxpayer, the court must have made additional findings to bring the proceeding to an end. In this case those were findings of abuse of process. That is borne out by the decision of the Court of Appeal which decided against Dr Muir relying only on abuse of process and did not make issue estoppel findings.[30] It is accordingly arguable for Dr Muir that his challenge proceedings have not been decided on their merits but were struck out on procedural grounds only.

[41] That leads to the question whether in the circumstances he is able to continue his challenges with amended pleadings or by filing a new challenge proceeding. For Dr Muir, it was submitted that a strike-out decision, unlike a judgment, does not bar a plaintiff from starting again. The Court of Appeal's decision in *Westpac Banking Corp v M M Kembla NZ Ltd* was cited:[31]

> Summary judgment is a judgment between the parties on the dispute which operates as issue estoppel, whereas if a pleading is struck out as untenable as a matter of law the plaintiff is not precluded from bringing a further properly constituted claim.

[42] A qualification is probably required to note that a strike out based on substantive grounds bars a further claim on the same cause of action. For example, a decision that a claim is time-barred will prevent a further claim whether the decision is made after a full defended hearing, in a summary judgment application or in a strike out application.[32] But aside from that qualification, in principle a strike out

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28 Tax Administration Act, ss 173L 73O; *Commissioner of Inland Revenue v Robertson* [2017] NZHC 31 at [56].

29 *Commissioner of Inland Revenue v Watkins* [2015] NZHC 1780 at [24].

30 See paragraph [24] above.

31 *Westpac Banking Corp v M M Kembla NZ Ltd* [2001] 2 NZLR 298 (CA) at [60].

32 *Matai Industries Ltd v Jensen* [1989] 1 NZLR 525 (HC) at 13; *Murray Morel & Co Ltd* [2007] NZSC 27, [2007] 3 NZLR 721 per Tipping J at [32]-[34].

decision made on procedural grounds may leave it open to a party to start again. That can be seen in proceedings dismissed for want of prosecution. If the limitation period has not expired a plaintiff may start again. Hence the standard approach that proceedings are not normally dismissed for want of prosecution unless the limitation period has expired.[33]

[43] For Dr Muir, the point was taken that only his pleadings had been struck out, not his proceedings. Rule 15.1 of the High Court Rules recognises the distinction:

> **15.1 Dismissing or staying all or part of proceeding**
>
> (1) The court may *strike out all or part of a pleading* if it—
>
> (a) discloses no reasonably arguable cause of action, defence, or case appropriate to the nature of the pleading; or
>
> (b) is likely to cause prejudice or delay; or
>
> (c) is frivolous or vexatious; or
>
> (d) is otherwise an abuse of the process of the court.
>
> (2) If the court strikes out a statement of claim or a counterclaim under subclause (1), it may by the same or a subsequent order *dismiss the proceeding* or the counterclaim.
>
> (3) Instead of striking out all or part of a pleading under subclause (1), the court may stay all or part of the proceeding on such conditions as are considered just.
>
> (Emphasis added)

[44] For this case there is nothing in that submission. The decisions of the Taxation Review Authority, the High Court and the Court of Appeal are clear that the decisions went to the proceedings – not just to pleadings. The sealed orders reflect that. The Supreme Court said so too.[34] Once a proceeding is at an end it is not possible to file fresh pleadings in the same proceeding to resume the litigation. That applies both to a judgment on the merits and to a decision to terminate on other grounds. That leaves the question whether in the circumstances Dr Muir can start a fresh challenge proceeding.

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[33] *Birkett v James* [1978] AC 297 (HL); *Roe v Cullinane Turnbull Steele & Partners* [1985] 1 NZLR 33 (HC).

[34] See paragraph [25] above.

[45] It is clear from the Tax Administration Act that Dr Muir cannot start a fresh proceeding to challenge the 1997-2010 income tax assessments. There is a time limit for bringing challenge proceedings. Under s 138B(1)(c) Dr Muir was required to bring any challenge proceedings in the Taxation Review Authority or the High Court within the response period following the issue of the relevant notice of assessment. In this case that is two months.[35] The last notice of assessment, for the year ending 31 March 2010, was issued on 28 March 2013. The earliest notice was issued on 26 March 2002. Any proceeding issued on 29 August 2016 is clearly out of time under s 138B(1)(c).

[46] Mr Hucker referred to s 138D to submit that a new proceeding was still feasible. That section provides that a hearing authority may allow the disputant to commence a proceeding after the response period in exceptional circumstances, which are defined.

[47] In *Commissioner of Inland Revenue v Fuji Xerox NZ Ltd*, the Court of Appeal said:[36]

> [11] For the purposes of s 138D the term "exceptional circumstance" has a specific statutory meaning. By virtue of s 3(1) of the Act the term "is defined in s 138D(2) for the purposes of that section". As indicated in s 138D(2) an exceptional circumstance is:
>
> - an event or circumstance beyond the control of a disputant
> - that provides the disputant with a reasonable justification for not commencing a challenge to a disputable decision within the response period.
>
> But an act or omission of an agent of a disputant will not be an exceptional circumstance unless certain conditions are satisfied. These are that:
>
> - the act or omission of the agent was caused by an event or circumstance beyond the control of the agent;
> - such event or circumstance could not have been anticipated; and
> - the effect of the act or circumstance could not have been avoided by compliance with accepted standards of business organisation and professional conduct.

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35 Section 89AB(2).

36 *Commissioner of Inland Revenue v Fuji Xerox NZ Ltd* (2002) NZTC 17,470 (CA) at [11]-[13].

> [12] Where a hearing authority has to consider an application under s 138D it is logically required by the included and excluded features of the statutory definition of exceptional circumstance to approach the issue in stages involving identification, evaluation and discretion.
>
> - First, it must identify the events or circumstances relied on by the disputant and then ascertain whether those events or circumstances, or any of them were beyond the control of the disputant. Any which were not beyond the control of the disputant cannot be relied on. Nor can any act or omission of an agent of the disputant be invoked unless it meets the conditions for such specified in s 138D(2).
>
> - If (following the exclusion of events or circumstances not beyond the control of the disputant and not falling within the constraints relating to acts or omissions of agents specified in section 138D(2)) there remain any events or circumstances for consideration, the hearing authority must then decide whether such events or circumstances may provide the disputant with a reasonable justification for not commencing a challenge within the response period.
>
> - If they do provide a reasonable justification, the hearing authority must exercise the residual discretion indicated by the use of the word "may" in section 138D(1).
>
> [13] In short, s 138D requires identification of events or circumstances with the qualifying characteristics, evaluation of those in terms of justification; and the exercise of a residual discretion…

[48] Dr Muir has not applied to the Taxation Review Authority or to this court for orders under s 138D to begin a fresh challenge proceeding after the response period. There is nothing in his evidence to suggest any arguable case for an exceptional circumstance within the section. After all, he did begin challenge proceedings within the appropriate response period. Now he wishes to raise arguments which he did not include at the outset. Dr Muir is a specialist in tax law. He was the architect of the Trinity scheme and has been assiduous in putting up arguments to defend the scheme. The belated attempt to raise a fresh argument not raised before is not a matter beyond Dr Muir's control and is therefore not an exceptional circumstance.

[49] Given the absence of any application under s 138D and the absence of any arguable exceptional circumstance, it is not necessary to carry out any evaluation of justification or to exercise any residual discretion. Even so, any hearing authority now invited to carry out any evaluation or exercise a discretion under s 138D is

bound to recognise the inherently abusive nature of any fresh challenge by Dr Muir. Section 138D cannot provide any escape route for Dr Muir.

[50] The point reached now is that Dr Muir's challenge proceedings in the Taxation Review Authority and this court have been determined by the decisions of the authority, this court, the Court of Appeal and the Supreme Court. While the grounds for the dismissal of the proceedings were procedural rather than substantive, new challenge proceedings cannot be started because they would be out of time and there is no arguable case for extending time under s 138D. His final liability has been determined and his income taxes have become payable under s 142F.

[51] In coming to that conclusion I have not considered the merits of Dr Muir's arguments in his new pleadings. I suspect that Dr Muir would in any event be barred from running them. Under s 138G the Commissioner and a disputant are barred from raising issues that they did not include in their statements of position under s 89M. It seems improbable that the matters he now pleads were raised in his statements of position. Surely he would have included them in his arguments in earlier cases. But I cannot rule on that definitively because no statements of position have been put in evidence.

The jurisdiction challenge

[52] Dr Muir says that I should not be making these findings. This is a tax collection proceeding, not a challenge under Part 8A of the Tax Administration Act. Only hearing authorities under Part 8A can decide these matters. Dr Muir's objection is based on his two proceedings: the judicial review of the refusal of the Taxation Review Authority to accept his amended pleading and his fresh pleading in this court. In his submission I should not decide this case while he still has a challenge proceeding pending in a hearing authority.

[53] Generally when a court or tribunal has jurisdiction to determine a proceeding before it, it may determine all matters in that proceeding, including the law, matters to be proved by plaintiffs, and any defences raised by defendants. The

Commissioner of Inland Revenue may take proceedings to collect unpaid taxes.[37] While the District Court has jurisdiction to decide tax collection proceedings no matter the amount involved, that does not oust this court's general jurisdiction under s 12 of the Senior Courts Act 2016.[38] In a tax collection case the court decides what tax has been assessed, whether it is due and payable, and whether it has been paid. When the court applies s 109 of the Tax Administration Act it needs to find whether there has been a challenge under Part 8A. If so, it needs to make findings as to the outcome of the challenge: in particular, whether the challenge has been determined, whether the deferral period has expired and the tax has become due and payable under s 142F. To that end, it will need to make findings as to any challenge proceedings before a hearing authority under Part 8A. Those will not be findings as to the correctness of assessments, but whether there is a challenge proceeding and whether it has reached a day of determination of final liability. Accordingly, I can decide whether Dr Muir's challenges to the assessments for 1997 to 2010 have been determined. That does not involve any encroachment on the jurisdiction of hearing authorities under Part 8A.

[54] I accept that in some cases a court hearing a tax collection proceeding may wish to await the outcome of another proceeding before deciding whether the deferral period has come to an end. But that would not be right in this case. To accede to Dr Muir's submission would give the other proceedings more respect than they deserve. For the reasons I have set out above, those proceedings are pointless and doomed to fail. The tax debts have fallen due under s 142F. As the challenges have already been determined, it is futile for Dr Muir to continue to dispute the assessments. These new pleadings are no more than shadow-boxing.

Adjournment application

[55] Dr Muir applied for an adjournment on two grounds:

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37 Tax Administration Act, s 156.

38 *Body Corporate 324525 v Stent* [2016] NZHC 2442 at [9]-[10].

[a] to await the decision of this court on the judicial review application and on the Commissioner's application to strike out the amended pleading filed in CIV-2016-404-1132; and

[b] because counsel had been instructed only recently.

[56] As to the first ground, for the reasons I have already given those proceedings are pointless and there is no need to await their outcome when the taxes have clearly fallen due.

[57] As to the late instruction, counsel originally instructed withdrew on 6 May 2017 because of heavy work commitments. In a conference on 11 May 2017, counsel instructed only for that conference submitted that any lawyer instructed now would not have enough time in which to prepare for a hearing on 13 June. Mr Hucker had been instructed by 24 May 2017. I am satisfied that there has been no injustice to Dr Muir. Mr Hucker presented comprehensive submissions in opposition to the Commissioner's summary judgment application. They reflected considerable preparation and care. Mr Hucker professed not to be an expert in tax law but this case does not require him to deal with the finer points as to the merits of Dr Muir'sargument. Dr Muir himself is a tax specialist and as a barrister he is well versed in the law relating to challenges under Part 8A of the Tax Administration Act. Mr Hucker's client could give him detailed instructions, not only on the facts but also the law. I doubt very much that with any adjournment Dr Muir's case could be presented any better than it was in the hearing.

The recusal application

[58] Dr Muir asked me to recuse myself from hearing the case on the ground of reasonable apprehension of bias. The particular aspect of bias was alleged pre-determination. Mr Hucker emphasised that he was not alleging actual bias or pre-determination but only apprehended bias.

[59] On 11 May 2017 there was a telephone conference called in response to a request by the Commissioner of Inland Revenue. The purpose of the request was to

deal with Dr Muir's application for leave to begin a summary judgment application in this proceeding. I declined leave for Dr Muir's application for summary judgment, primarily because everything he wished to raise in his summary judgment application he would also be able to raise in opposition to the Commissioner's summary judgment application. I also declined to adjourn the hearing set for 13 June 2017.

[60] Objection is taken to paragraph [2] of my minute:

> [2] There are three other proceedings:
>
> [a] CIV-2011-404-1132 – a tax challenge under Part 8A of the Tax Administration Act which has already been finally determined but Dr Muir and Hillvale Holdings Ltd have filed amended pleadings.
>
> [b] CIV-2016-404-2908 – a judicial review proceeding by Dr Muir challenging the refusal of the Taxation Review Authority to file an amended pleading.
>
> [c] CIV-2017-404-473 – an application by Hillvale Holdings Ltd to set aside a statutory demand by the Commissioner.

[61] I also said:

> [8] I understand the case to be this. The Commissioner has assessed Dr Muir for income tax and penalties. Dr Muir has challenged those assessments which have been considered by the courts. The Commissioner's case is that the rights of challenge have now been exhausted and the assessments are no longer open to challenge. Dr Muir contends, on the other hand, that he still has rights to challenge the assessments. The task of counsel instructed will be to adduce arguments in support of Dr Muir's position.

[62] Dr Muir objects that by paragraph [2](a) an observer may believe that I had already predetermined the outcome of this case.

[63] Following my minute, solicitors instructed for Mr Muir filed a memorandum enquiring whether paragraph [2](a) still stood, noting that ascertaining the "day of final determination" was a critical issue. I did not reply to that memorandum.

[64] The test is whether a fair-minded and informed lay observer would have a reasonable apprehension that the Judge might not bring an impartial mind to the

resolution of the question that the Judge is required to decide. In *Saxmere Company Ltd v Wool Board Disestablishment Company Ltd*, Blanchard J said:[39]

> [4] It was pointed out in *Ebner* that the question was one of possibility ("real land not remote") not probability. The High Court of Australia also warned against any attempt to predict or enquire into the actual thought processes of the Judge. Two steps are required:
>
> (a) first, the identification of what it is said might lead the Judge to decide a case other than on its legal and factual merits; and
>
> (b) secondly, there must be "an articulation of the logical connection between the matter and the feared deviation of the course of deciding the case on its merits".
>
> [5] The fair-minded lay observer is presumed to be intelligent and to view matters objectively. He or she is neither unduly sensitive or suspicious, nor complacent about what may influence the Judge's decision. He or she must be taken to be a non-lawyer but reasonably informed about the workings of our judicial system, as well as about the nature of the issues in the case and about the facts pertaining to the situation which is said to give rise to an appearance or apprehension of bias.
>
> …
>
> [8] The observer must also be taken to understand three matters relating to the conduct of Judges. The first is that a Judge is expected to be independent in decision-making and has taken the judicial oath "to do right to all manner of people after the laws and usages of New Zealand without fear or favour, affection or ill will". Secondly, a Judge has an obligation to sit on any case allocated to the Judge unless grounds for disqualification exist. Judges are not entitled to pick and choose their cases, which are randomly allocated. Making this point in *Muir*, the Court of Appeal referred to the following passage from the judgment of Mason J in *Re JRL ex p CJL:*
>
> > "[I]t is equally important that judicial officers discharge their duty to sit and do not, by acceding too readily to suggestions of appearance of bias, encourage parties to believe that by seeking the disqualification of a Judge, they will have their case tried by someone thought to be more likely to decide the case in their favour."
>
> Thirdly, our judicial system functions on the basis of deciding between litigants irrespective of the merits or demerits of their counsel.
>
> …

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[39] *Saxmere Co Ltd v Wool Board Disestablishment Company Ltd (No 1)* [2009] NZSC 72, [2010] 1 NZLR 35 at [4].

> [10] Finally, and perhaps most obviously, the matter is not to be tested by reference to the perhaps individual and certainly motivated views of the particular litigant who has made the allegation of bias and is endeavouring to influence a result or overturn a decision and is therefore the least objective observer of all. Nor is it to be tested by reference to any statements by the Judge as to what did or did not have an influence. The Court is not making a judgment on whether it is possible or likely that the particular Judge was in fact affected by disqualifying bias and the Judge is obviously not well placed to assess the influence of something which may have operated on the mind subconsciously.

[65] The recusal guidelines issued by the Chief High Court Judge under s 171 of the Senior Courts Act 2016, give similar guidance. After recording some of the above principles, the guidelines say:

> 1.5 The question of recusal is for the Judge hearing the case. Some of the matters that the Judge should consider are:
>
> 1.5.1 A Judge should apply the above principles firmly and fairly and not accede too readily to suggestions of bias.
>
> 1.5.2 A Judge should be mindful of the burden that passes to other Judges if the Judge recuses him or herself unnecessarily.
>
> 1.5.3 A Judge is not required to recuse him or herself merely because the issues involved in a case are in some indirect way related to the Judge's personal experience or that the Judge has previously dealt with the case.
>
> 1.5.4 The making of a complaint to the Judicial Conduct Commissioner against a Judge does not of itself serve to disqualify the Judge from hearing cases involving the complainant.
>
> 1.5.5. If, after considering all relevant circumstances, there is doubt about whether there may properly be an appearance of bias, it may be prudent for the Judge to decline to sit on that case.

[66] In my judgment, no fair-minded lay observer would believe that I had predetermined this case on the basis of my minute of 11 May 2017 and the solicitor's subsequent memorandum. A fair-minded observer would read the entire minute, not just paragraph [2]. The paragraph did no more than identify three proceedings before the court. While the description might have been framed better, it was not inaccurate, given the incontrovertible failure of Dr Muir's appeal to the Supreme Court. The lay observer would understand from paragraph [8] that there was still a live issue whether Dr Muir could continue to challenge assessments, or whether his

rights of challenge had been exhausted. It is fanciful to suggest that any informed layman would believe in the light of my minute of 11 May 2017 and the lawyers' memorandum of 12 May 2017, that I was biased for having predetermined the result of the summary judgment application.

Outcome

[67] As required for a summary judgment application, the Commissioner of Inland Revenue has shown that Dr Muir does not have any arguable defence to her case for unpaid income taxes, interest and penalties for the years 1997 to 2010, and that those debts amounting to $8,179,830.94 as at 27 January 2017 are due and payable under s 142F of the Tax Administration Act. The Commissioner is accordingly entitled to judgment.

[68] While the Commissioner has proved the debts owing as at 27 January 2017, she has not adduced any evidence to update the amount of the debts to the date of hearing by taking into account further interest and penalties in respect of those taxes that have fallen due since then. The Commissioner accordingly recovers judgment for $8,179,830.94. That establishes Dr Muir's indebtedness to her as at the date of judgment. The Commissioner of Inland Revenue is entitled to recover interest and penalties after judgment in accordance with the tax legislation rather than under r 11.27 of the High Court Rules 2016.[40] Interest and penalties will be calculated according to the amount of the judgment debt as from the date of judgment.

[69] I make these orders:

[a] The Commissioner recovers judgment against Dr Muir for $8,179,830.94.

[b] Dr Muir will pay the Commissioner costs on the proceeding. If the parties cannot agree costs memoranda may be filed.

…….....
Associate Judge R M Bell

[40] *London Borough of Ealing v El Isaac* [1980] 2 All ER 548 (CA); *Commissioner of Inland Revenue v Watkins* [2015] NZHC 1780.