IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2007-404-005853

BETWEEN	RADIO WORKS LIMITED Plaintiff
AND	THE COMMISSIONER OF INLAND REVENUE Defendant

CIV-2007-404-005854

AND BETWEEN	TV WORKS LIMITED Plaintiff
AND	THE COMMISSIONER OF INLAND REVENUE Defendant

Hearing: 20 April 2010

Appearances: L McKay and J W Comber for Plaintiffs
J Coleman and C Curran-Tietjens for Defendant

Judgment: 18 June 2010

RESERVED JUDGMENT OF COURTNEY J

This judgment was delivered by Justice Courtney
on 21 June 2010 at 12:00 noon
pursuant to R 11.5 of the High Court Rules.

Registrar / Deputy Registrar
Date……

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Introduction

[1] The plaintiffs, Radio Works Limited and TVWorks Limited, are challenging assessments made by the defendant, the Commissioner of Inland Revenue, disallowing deductions claimed in relation to optional convertible notes (OCNs) issued by the plaintiffs to other companies in the same group. The Commissioner wishes to obtain general discovery from the plaintiffs and discovery from a non-party, MediaWorks NZ Limited, which is the plaintiffs' parent company. Associate Judge Abbott dismissed applications by the plaintiffs for orders that general discovery not be required and granted the Commissioner's application for particular discovery against MediaWorks NZ Limited.[1] The plaintiffs and MediaWorks have applied to review the Associate Judge's decision.

[2] The order for general discovery against the plaintiffs was made under r 8.17(1) High Court Rules, which provides that "if discovery of documents is appropriate for a proceeding on the standard track, a Judge must make a discovery order." The Associate Judge's decision was given following a defended hearing and was fully reasoned. In these circumstances r 2.3(4) requires that the application for review of the order for general discovery proceeds as a rehearing. The correct approach is that explained in *Austin Nicholls Co Inc v Stichting Lodestar*.[2] The applicants must satisfy this Court that it should differ from the decision under appeal and if this Court considers that the decision is wrong it must then make its own assessment of the merits of the case.

[3] The plaintiffs' general proposition is that, although general discovery is not precluded in tax cases, it will only be appropriate in rare cases. This is because the purpose and effect of the statutory scheme in the Tax Administration Act 1994 (TAA) is to ensure that the Commissioner has the power to obtain all relevant documents and information prior to making an assessment. In most cases, therefore, the Commissioner will already have all relevant documents, making it inappropriate to put the taxpayer to the expense of formal discovery. The plaintiffs assert that the

[1] The Commissioner also obtained an order for particular discovery against another non-party, New Zealand Guardian Trust Company Limited (NZGT). That order is not the subject of challenge and NZGT did not appear or participate at the hearing of the present applications.
[2] [2007] NZSC 103

Associate Judge erred in holding that general discovery was appropriate in this proceeding:

a) As required by the TAA the plaintiffs have already given extensive information to the Commissioner both voluntarily and in response to notices issued under s 17 TAA;

b) The purpose of general discovery, namely to avoid trial by ambush and ensure all relevant material is before the Court, has already been satisfied;

c) General discovery in the context of these proceedings is contrary to the fundamental objective of r 1.2 of the High Court Rules being to secure just, speedy and inexpensive determination of the proceedings.

[4] The order for particular discovery against MediaWorks was made pursuant to r 8.26, under which a Judge "may" make an order for particular discovery against a non-party. But the Judge "may not make an order under this rule unless satisfied that the order is necessary at the time when the order is made". The order was, therefore, made in the exercise of a discretion and it is for MediaWorks to show that the Associate Judge acted on a wrong principle, failed to take into account relevant matters, took into account irrelevant matters or was plainly wrong.[3]

[5] MediaWorks asserts that the Associate Judge erred in:

a) Holding that the evidence exclusion rule in s 138G TAA did not require the parties to set out all the available documentary evidence in their statements of position but merely precluded them from asserting "wholly new facts" and, as a result, wrongly concluded that the documents sought on discovery fell within the parties' statements of position and were arguably not excluded by s 138G;

[3] *Alex Harvey Industries Limited v CIR* (2001) 15 PRNZ 361 at 364 (CA)

b) Failing to properly assess whether discovery of the documents sought through the non-party discovery application was "necessary" as required by r 8.26; and

c) Failing to adequately address the concessions made by the plaintiffs which rendered the documents sought by the Commissioner irrelevant.

Statutory scheme

[6] The arguments advanced by Mr McKay on behalf of the plaintiffs and MediaWorks were substantially based on the operation of the current statutory scheme. Mr McKay began his argument by tracing the history of the scheme. He submitted that the case stated procedure previously used to bring tax cases to Court for resolution had historically proceeded without the discovery process; it was not until the decision in *Cates v Commissioner of Inland Revenue* that it was considered that discovery may be available in some cases[4] and not until the decision in *Green v Housden* that discovery became generally accepted as being available in tax cases.[5]

[7] In 1994 a Review Committee headed by Sir Ivor Richardson undertook an organisational review of the Inland Revenue Department. The Review Committee considered that the existing tax disputes resolution procedure was deficient. It promoted a "cards on the table" notice supported by an evidence exclusion provision to provide an incentive for the disclosure of the factual basis for arguments advanced by both taxpayer and Commissioner. The Review Committee envisaged that, in the event that pre-assessment activity failed to resolve issues, there would be:

> Facility for the taxpayer to seek resolution of a dispute by starting proceedings in the ordinary way. As with other commercial litigation, the taxpayer and IRD would be subject to judicial management of all aspects of the case, including timing. (The Review Committee considers there is no need for special procedures, such as the case stated, for tax disputes and is of the view that because of the proposed "all cards on the table" pre-assessment approach, there will be only limited need for interlocutory procedures if the matter goes to court).

[4] [1982] 1 NZLR 530 (CA)
[5] [1993] 2 NZLR 273

[8] In a subsequent consultative document the then Ministers of Finance and Revenue referred to the Review Committee's recommendations, commenting on the proposed disclosure requirements:

> Achieving the best possible assessments requires a considerably higher level of information disclosure than often occurs under the current procedures. However, the department, has power under current provisions (in particular, ss 16 and 17 of the Inland Revenue Department Act 1974) to require taxpayers to provide relevant information. As part of the introduction of the proposed procedures Inland Revenue will review its use of these powers. It is consistent with the proposals made by the Review Committee and accepted by the Government that these existing powers should be used to ensure that all relevant information is available to the Commissioner when making an assessment…
>
> The new regime will place substantially increased emphasis on information disclosure as a means of ensuring that, as far as is possible, a correct assessment is issued.
>
> The benefit of the proposed regime will be significantly undermined if, as can occur under current procedures, parties to a dispute can withhold information throughout the process, in the hope of gaining the advantage of surprise at the litigation stage. "Trial by ambush" is inequitable and a waste of valuable resources. It will not be permitted under the new regime.

[9] Later in the same paper the Ministers commented on the resolution of tax disputes in the High Court:

> Currently, the usual interlocutory procedures, including discovery and interrogatories, are available in the High Court to both taxpayers and the Commissioner. Their use, however, is not encouraged by the High Court.
>
> The Government does not propose to change the current application of interlocutory procedures to tax disputes, although it expects use of these procedures to be relatively rare considering the degree of pre-assessment disclosure and discussion required under the proposed procedures.

[10] Parts 4A and 8A TAA were enacted in 1996 and introduced the changes recommended by the Review Committee. The "cards on the table" approach is reflected in the purpose of Part 4A, stated at s 89A(1):

> (1) The purpose of this Part is to establish procedures that will—
>
> (a) Improve the accuracy of disputable decisions made by the Commissioner under certain of the Inland Revenue Acts; and

> (b) Reduce the likelihood of disputes arising between the Commissioner and taxpayers by encouraging open and full communication—
>
> (i) To the Commissioner, of all information necessary for making accurate disputable decisions; and
>
> (ii) To the taxpayers, of the basis for disputable decisions to be made by the Commissioner; and
>
> (c) Promote the early identification of the basis for any dispute concerning a disputable decision; and
>
> (d) Promote the prompt and efficient resolution of any dispute concerning a disputable decision by requiring the issues and evidence to be considered by the Commissioner and a disputant before the disputant commences proceedings.
>
> (2) This Part does not apply with respect to any tax returns or notices of assessments that are, or become, subject to objection proceedings under Part 8.

[11] The process provided for in Parts 4A and 8A begins with either the Commissioner or the taxpayer issuing a notice of proposed adjustment under ss 89B, 89C, 89D or 89DA. The Commissioner has powers to obtain whatever documents and information he wishes ahead of issuing such notices. Part 3 of the TAA confers broad powers to gather information and documents. Section 17(1) provides:

> Every person (including any officer employed in or in connection with any Department of the Government or by any public authority, and any other public officer) shall, when required by the Commissioner, furnish in writing any information and produce for inspection any books and documents which the Commissioner considers necessary or relevant for any purpose relating to the administration or enforcement of any of the Inland Revenue Acts or for any purpose relating to the administration or enforcement of any matter arising from or connected with any function lawfully conferred on the Commissioner.

[12] The Commissioner is also entitled under s 17(5) to require any written information or particulars given under the section to be verified by statutory declaration. Further, where a person fails to provide information requested under s 17 the Commissioner can apply to the District Court under s 17A for an order requiring the person to produce the information. Alternatively, the Commissioner can prosecute such a person under s 143 or s 143A TAA.

[13] If the notice of proposed adjustment is not accepted, the other party must issue a notice of response stating the facts or legal arguments considered to be wrong and provide a statement of position. Section 89M(4) and (6) require that statements of position give an outline of the facts on which the party intends to rely, an outline of the evidence on which the party intends to rely, an outline of the issues that the party considers will arise and specify the propositions of law on which the party intends to rely "with sufficient detail to fairly inform" the other party.

[14] If it is the Commissioner issuing a disclosure notice he must also include in it a reference to s 138G (the evidence exclusion rule) and a statement as to the effect of that rule. The evidence exclusion rule contained in s 138G is an integral part of the new approach. It limits parties in later proceedings to the facts, evidence, issues and propositions of law specified in their statements of position.[6] Section 138G relevantly provides that:

> (1) Unless subsection (2) applies, if the Commissioner issues a disclosure notice to a disputant, and the disputant challenges the disputable decision, the Commissioner and the disputant may raise in the challenge only—
>
> (a) The facts and evidence, and the issues arising from them; and
>
> (b) The propositions of law,—
>
> that are disclosed in the Commissioner's statement of position and in the disputant's statement of position.
>
> (2) A hearing authority may, on application by a party to a challenge to a disputable decision, allow the applicant to raise in the challenge new facts and evidence, and new propositions of law, and new issues, if satisfied that—
>
> (a) The applicant could not, at the time of delivery of the applicant's statement of position, have, with due diligence, discovered those facts or evidence; or discerned those propositions of law or issues; and
>
> (b) Having regard to the provisions of section 89A and the conduct of the parties, the hearing authority considers that the admission of those facts or evidence or the raising of those propositions of law or issues is necessary to avoid manifest injustice to the Commissioner or the disputant.

[6] *Beckham v Commissioner of Inland Revenue* (2007) 23 NZTC 21,499; *Commissioner of Inland Revenue v Zentrum Holdings Limited* [2007] 1 NZLR 145 (CA)

[15] It is notable that s 89M(4) and (6) refer to "an outline" of the facts and evidence on which the party intends to rely, whereas s 138G refers to "the facts and evidence". This distinction assumed some significance in counsels' arguments over the effect of s 138G, which I discuss later.

[16] Mr McKay submitted that under the new procedures the issue of discovery rarely arose until the enactment of s 89N, which came into force on 1 April 2005. Prior to s 89N being enacted the Commissioner was not required to actually complete the disputes resolution process in Part 4A; as a result, the Commissioner was entitled to, and often did, issue amended assessments shortly after issuing a notice of proposed adjustment. The result was that since the Commissioner had not issued a disclosure notice, the evidence exclusion rule in s 138G did not apply. Assessments were often issued before the issues had been discussed in detail and before the Commissioner had exercised his powers under Part 3 to require information to be provided. Mr McKay acknowledged that discovery was appropriate in such cases.

[17] Section 89N requires the Commissioner to complete the dispute process under Part 4A which necessarily involves issuing a disclosure notice and the evidence exclusion rule being applied. Unless one of the exceptions to s 89N applies the Commissioner must consider the taxpayer's statement of position before issuing an amended assessment. The Commissioner will usually have obtained full disclosure for the purposes of producing the notice of proposed adjustment and statement of position. The taxpayer may have disclosed a significant amount of information and documents. Mr McKay says that, as a result, it is only now that the question whether discovery is appropriate has begun to assume significance, with taxpayers resisting being required to expend more time and money on the discovery process.

General discovery in this case

The parties' respective positions

[18] Mr McKay submitted that the current statutory scheme should be viewed in the context of the statements by the Review Committee and the then Ministers of

Finance and Revenue as to the extent to which discovery might be relevant under the new procedure. He said that it is clear that both the Review Committee and the Government at the time envisaged that there would be little need for discovery in substantive tax proceedings. He submitted that it was therefore wrong in principle for the information exchange process envisaged by the new scheme to be duplicated by general discovery in subsequent proceedings.

[19] I indicate now that I do not find the materials that Mr McKay relied on helpful in determining the availability of discovery in tax cases. They were not relied on by the Court of Appeal in *BNZ Investments v Commissioner of Inland Revenue*, where the Court accepted that there had been a "sea-change" in tax litigation over the preceding 15-20 years and that:[7]

> …Indicia of this sea-change include:
>
> (a) The increasing (and now routine) use of discovery (compare *Cates v Commissioner of Inland Revenue* [1982] 1 NZLR 530 (CA) at p533 per Cooke P, where the jurisdiction to order discovery was seen as one which would rarely be exercised and was appropriate only for "an occasional tax case");
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> …
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> (c) A change in practice as to costs (compare *Auckland Gas Co Limited v Commissioner of Inland Revenue* [1999] 2 NZLR 409 (CA));
>
> (d) A recognition that the Commissioner is entitled to take a commercial approach to the settlement of tax litigation (see, for instance, *Accent Management Limited*); and
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> (e) An open justice approach to publicity in relation to the affairs of taxpayers who do litigate (compare *Muir v Commissioner of Inland Revenue* (2004 17 PRNZ 365 (CA)).
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> 78. This sea-change is significant for a number of reasons:
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> (b) As the Commissioner faces the usual burdens of those engaged in commercial litigation, particularly discovery and exposure to costs if unsuccessful, it would be going against the tide of events to hold that he is not entitled to exercise the rights of ordinary litigants, particularly third party discovery and the subpoena duces ecum procedures...

[7] [2008] 1 NZLR 598, 619

[20] Mr McKay's argument was essentially that the Commissioner's broad powers to obtain information and documents under s 17 coupled with the evidence exclusion rule under s 138G means that only in rare cases will the Commissioner not have received all relevant information prior to making his assessment and, therefore, only in rare cases will discovery be appropriate. Discovery would not be appropriate in this case because there will be little or nothing to be gained through the discovery process whilst the cost to the taxpayer could be significant.

[21] The plaintiffs acknowledge the possibility that documents may exist which have not been disclosed. They say, however, that they have disclosed a substantial amount of documents and that, to the best of their knowledge, everything has been disclosed. Therefore, the fact that their responsible officers cannot be sufficiently certain to actually swear that every relevant document has been disclosed should not detract from the reality that this is probably the case.

[22] The Commissioner does not contend that the plaintiffs have failed to comply with the s 17 notices. Nor does he suggest that they are opposing discovery because they do not wish to disclose documents that would be harmful to them. However, the Commissioner asserts that the plaintiffs' response from the outset has been unsatisfactory and the plaintiffs' acknowledgement that documents may exist which have not been disclosed undermines any assertion that full disclosure has been given or any suggestion that the Commissioner should be content with the extent of disclosure given to date.

Disclosure under s 17

[23] I start by considering the proposition that all relevant material is likely to have been disclosed under s 17. Mr Coleman, for the Commissioner, submitted that the ambit of disclosure under s 17 was necessarily narrower than the ambit of discovery under the High Court Rules because of the wording in s 17; disclosure is only required under s 17 of information, books or documents "which the Commissioner considers necessary or relevant". This means that, whilst the Commissioner can attempt to word s 17 broadly, there is no objective criteria by

which to determine relevance. It is for the Commissioner, as best he can, to identify documents or categories of documents that are relevant.

[24] The ambit of disclosure under s 17 compared with discovery has been considered recently by the Court of Appeal in *ANZ National Bank Limited v Commissioner of Inland Revenue*.[8] The issue in that case was whether the taxpayer should be required to give discovery of tax advice which was, by virtue of s 20B-20F TAA, protected from disclosure under s 17. Although different from the present case in that what was sought were documents known not to have been disclosed, the decision contains statements of general application.

[25] It is apparent from *ANZ National* that the ambit of s 17 and that of discovery are different. Disclosure under s 17 requires only documents which "the Commissioner considers necessary or relevant". Ordinarily, this would only require disclosure of documents with direct relevance to the issues. In comparison, discovery requires disclosure by reference to the broad *Peruvian Guano* test which includes documents that are indirectly relevant in that they could lead to a train of inquiry that would enable the Commissioner to advance its case or damage that of the taxpayer. O'Regan J, delivering the judgment of the Court, referred first to the test in *Compagnie Financiere et Commerciale du Pacifique v Peruvian Guano Co* articulated by Brett LJ:[9]

> It seems to me that every document relates to the matters in question and the action, which not only would be evidence upon any issue, but also which, it is reasonable to suppose, contains information which *may* – not which *must* – either directly or indirectly enable the party requiring the affidavit either to advance his own case or damage the case of his adversary. I have put in the words "either directly or indirectly" because, as it seems to me, a document can properly be said to contain information which may enable the party requiring the affidavit either to advance his own case or damage the case of his adversary, if it is a document which may fairly lead him to a train of inquiry, which may have either of these two consequences…

[26] O'Regan J then went on to consider the application of the *Peruvian Guano* test to tax litigation , making it clear that it applied in such cases:

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[8] [2009] NZLR; this decision was delivered after the decision of Associate Judge Abbott that is under review.

[9] (1883) 11 QBD 55 (CA)

> [5] We consider it significant that relevance for discovery purposes is not necessarily the same as relevance in terms of s 7 of the Evidence Act 2006 (BNZ Investments (CA) at [41]). In particular, it is sufficient in the former case that a document may lead a party to a train of inquiry which enables that party to advance its own case or damage its adversary's case.
>
> [6] The breadth of the *Peruvian Guano* case test has been the subject of controversy. This Court described the test as "expansive" in NVL [1999] 1 NZLR 747 at p750, but it continues to apply, despite efforts at reform aimed at limiting its scope…
>
> [7] There is no exception from the *Peruvian Guano* test for tax litigation. In *Knight v Commissioner of Inland Revenue* [1991] 2 NZLR 30 (CA) at p35, Cooke P made it clear that the Commissioner is required to comply with the ordinary obligations of a litigant to make discovery of relevant documents. More recently, in *BNZ Investments*, this Court observed at para [78] that, as the Commissioner faces the usual burdens of those engaged in commercial litigation, it would be going against the tide to hold that he is not entitled to exercise the rights of an ordinary litigant. Requiring the tax payer involved in challenge proceedings to make discovery is one of those rights. This Court's decision in *Accent Management Limited v Commissioner of Inland Revenue* (2007) 23 NZTC 21,366 also made it clear that the Commissioner has the benefits and burdens of an ordinary party to litigation in challenge proceedings.
>
> [8] It is also necessary to distinguish the Commissioner's power to require disclosure of information under the TAA and the discovery requirements which apply once challenge proceedings have been commenced and the parties are engaged in litigation. At the investigation stage, the Commissioner can require information to be furnished to him under s 17 of the TAA, but ss 20B-20G of the TAA provide that a document which is a tax advice document does not need to be disclosed in response to a s 17 requirement. However, this has no relevance once challenge proceedings have been commenced and the parties are involved in what is essentially commercial litigation...

[27] In *BNZ Investments Ltd v Commissioner of Inland Revenue*, in an argument as to whether documents obtained pursuant to s 17 from one bank could be used by the Commissioner in litigation involving other banks, the Court of Appeal observed that[10]:

> [76] An ordinary litigant may access third party documents for use in litigation through the third party discovery and the subpoena duces tecum procedures...So, if the Commissioner had the everyday rights of an ordinary litigant, he could ensure that the documents he wishes to rely on were before the Court at trial. On the banks' argument, the existence and/or use of s 17 means that the Commissioner is, in this respect, in a worse position than that of an ordinary litigant. It is far from obvious to us why this should be.

[10] [2008] NZLR 598

[28] These statements are consistent with the earlier cases of *Dick v Commissioner of Inland Revenue*[11] and *Glenharrow Holdings Ltd v Commissioner of Inland Revenue*[12]. In *Dick*, Glazebrook J observed that:

> [88] …the disclosure procedure, while it requires disclosure of the material upon which the party intends to rely, does not necessarily cover material in the party's custody and control which is merely relevant to the issues. Finally, the disclosure regime procedures have no implications for third parties…

[29] Mr McKay was critical of Glazebrook J's comment that statements of position will not necessarily cover all relevant material. He submitted that this statement fails to adequately recognise the fact that in cases such as the present both the taxpayer and the Commissioner have devoted significant cost and effort to completing the disputes procedures, including providing relevant documents. I accept that the Judge's comment does not distinguish clearly between disclosure under s 17 and documents referred to in a statement of position. However, the issue in the present case is the distinction between disclosure under s 17 and discovery. The decision in *Dick* does not detract from the distinction between them drawn by the Court of Appeal in *ANZ National*.

[30] In *Glenharrow* the taxpayer obtained an order for general discovery against the Commissioner. The Commissioner had opposed the making of an order on the grounds that he had already answered extensive requests for information under the Official Information Act and s 138G precluded the use of any discovered materials unless it could be shown to fall within the exception in s 138G(2). This argument is very similar to that being advanced by the taxpayers in the present case. Master Venning viewed the discovery process as having a wider ambit than disclosure pursuant to the TAA for the same reasons as articulated at greater length in *ANZ National*.

[31] Mr McKay further argued that where issues were raised in a statement of position that indicated the existence of relevant documents not previously disclosed the Commissioner could issue a fresh notice under s 17. However, there is no obligation on the Commissioner to do so. On this point Barker J's comments in

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[11] [2003] 1 NZLR 741
[12] (2002) 20 NZTC 17,792 (HC)

Commerce Commission v Armourguard Security Limited, although directed towards the Commerce Commission, apply equally in relation to the Commissioner:[13]

> It is no answer to the discovery application for the defendants to say that the commission has wide powers of investigation, search and interrogation. Legislation has given this additional right of civil action to the commission. All the normal incidence of civil action, including discovery, must follow. A defendant to a claim must comply with discovery in the normal way subject to any defendant's right to seek privilege or claim confidentiality for specific categories of discovered documents.

[32] Parliament has left the process of discovery available in proceedings brought under the TAA. The fact that the Commissioner could have continued to pursue disclosure under s 17 should not preclude him from obtaining an order for discovery once proceedings have been issued.

[33] Three significant points emerge from these cases. First, because the discovery process is wider than the disclosure process under the TAA, discovery could result in the disclosure of documents that would not be required to be disclosed under s 17. Secondly, there is no reason to treat the Commissioner differently from other litigants, including in relation to the discovery process. Thirdly, the Commissioner should not be precluded from discovery because he did not make ongoing attempts to obtain further disclosure under s 17.

Section 138G – the evidence exclusion rule

[34] Mr McKay argued that s 138G, which precludes parties later relying on evidence not disclosed in the statements of position, supports his argument that discovery was not intended to be generally available. This is because the effect of s 138G is to effectively render inadmissible any documents not disclosed in the statement of position and it would therefore be inappropriate to put the taxpayer to the expense of producing a formal list of documents which the Commissioner will either already have or which will be inadmissible.

[35] The argument that discovery is inconsistent with or cuts across the effect of s 138G, was rejected in *Dick* and *Glenharrow*. In *Dick*, Glazebrook J said:

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[13] (1993) 8 PRNZ 86 at 91

> [90] Where a disclosure notice has been served then an additional burden is imposed on applicants for particular discovery. Applicants must show that the evidence they seek to have discovered is able to be raised within the exception to the evidence exclusion rule. If they cannot succeed at this point, then an order for discovery will be useless. To say, however, that the s 138G rule excludes the possibility of discovery is to confuse the discoverability of evidence with its subsequent admissibility.

[36] In *Glenharrow*, Master Venning said:

> [22] The effect of disclosure notices under the Tax Administration Act 1994 is to exclude evidence from the hearings. The purpose of the disclosure process and s 138G is to encourage the parties to disclose all relevant information relied upon at the statement of position stage and to provide a sanction for non-disclosure.

Having drawn the distinction between the ambit of discovery and disclosure Master Venning went on:

> [23] ...to make an order for discovery in these circumstances should not be seen as offending or as contrary to the purposes of s 138G.

[37] Mr McKay submitted that Master Venning's approach failed to place sufficient weight on the "all cards on the table" approach and on the effect of the Parliamentary materials already discussed. He also sought to distinguish *Glenharrow* because it involved allegations by the Commissioner of a sham. However, I do not accept those criticisms. I have already rejected the suggestion that statements of expectation contained in the Parliamentary materials relied on should be accorded greater weight than the more recent statements contained in *BNZ Investments* and *ANZ National* as to the availability of discovery in tax litigation. Nor can the fact that *Glenharrow* involved an alleged sham provide any ground for distinguishing these cases. It was the taxpayer in *Glenharrow* seeking discovery from the Commissioner. The Commissioner's allegation of a sham on the taxpayer's part could hardly have affected the appropriateness of requiring the Commissioner to give discovery.

[38] The Associate Judge accepted the Commissioner's arguments that s 138G did not render discovery futile. Mr McKay, however, submitted that the Commissioner's arguments were flawed and the Associate Judge erred in accepting them. The first argument was that s 138G had to be read together with s 89M(4)(b)

and (6)(b), which require only an "outline" of the evidence relied on, with the result that s 138G merely precluded a party from relying on "wholly new facts". Therefore, documents obtained on discovery could potentially fall within a category of documents identified in the statements of position and be admissible in proceedings even though not specifically referred to.

[39] Mr McKay submitted that this interpretation would undermine the "all cards on the table" approach intended by Parliament to apply to tax disputes. Mr McKay contended that the argument ignored s 89M(6B) which, he submitted, meant that only documents available to the Commissioner at the time the statement of position is prepared can be referred to in the statement of position and, accordingly, used in subsequent proceedings. As a result, documents obtained later on discovery could not be used, unless allowed as a result of an application under s 138G(2).

[40] Fundamental to this issue is the form in which evidence must be disclosed in the statement of position. Section 89M(4)(b) and (6)(b) require only "an outline of the evidence on which [the party] intends to rely". Section 89M(6B) provides that:

> In subsections (4)(b) and (6)(b) evidence refers to the available documentary evidence on which the person intends to rely but does not include a list of potential witnesses, whether or not identified by name.

[41] Section 89M(6B) only affects the ambit of the word "evidence" in s 89M(4)(b) and (6)(b). It does not affect the requirement that the statement of position only give "an outline of the evidence". It follows that s 138G cannot be read so as to require a different and higher standard of specificity than that required by s 89M(4)(b) and (6)(b). Nor should the words "available documentary evidence on which the person intends to rely" be read strictly so as to relate only to the point in time at which the statement of position is prepared. There is nothing in the wording to suggest a temporal limitation was intended. Since discovery is permitted in tax cases, the phrase "available documentary evidence" must include documents available to the Commissioner or the taxpayer through the discovery process.

[42] Mr McKay also asserted that the Associate Judge's logic was flawed because in this case the Commissioner did not choose to provide an outline of the evidence but provided extensive and detailed lists of the documents upon which he was

relying. This is not entirely correct because, as Mr Coleman pointed out, the statement of position in relation to Radio Works specifically relied on any document disclosed in discovery (the omission of a similar reference in the statement of position relating to TVWorks being an oversight). In any event, whilst this point might have some relevance to the ultimate question of whether discovery is appropriate in this particular case, it does not assist in determining whether s 138G should be read in conjunction with s 89M and what the effect of those sections is.

[43] The second argument advanced by the Commissioner and accepted by the Associate Judge was that s 138G anticipates discovery and, indeed, discovery is a necessary precursor to an application for leave pursuant to s 138G(2). This is because s 138G is directed towards evidence on which a party intends to rely. Self-evidently, a party will not rely on a document which may damage its case. But it is that very kind of document which would be liable to be discovered under the *Peruvian Guano* test.

[44] Mr McKay submitted that the implication from the Associate Judge's reasoning was that discovery was needed to ensure the parties do not rely only on documents favourable to them and that such reasoning confuses the process under which the statement of position is produced with the obligations of disclosure under s 17. No doubt the Commissioner will have attempted to exercise his s 17 powers to obtain documents he considers adverse to the taxpayer's position. But equally, there can be no denying that the ambit of s 17 is narrower than the discovery process and the only sure means of obtaining documents relevant in *Peruvian Guano* terms is through that process.

Background to application

[45] Before considering whether discovery is appropriate in the present case, I briefly review the circumstances giving rise to the substantive proceedings and the Commissioner's decision to seek discovery against the plaintiffs.

[46] In 1991 Canwest International Inc (CWIC), part of the Canwest group, acquired 20% of the shareholding in TV3 and an option to acquire a further 30%.

CWIC's acquisition involved the provision of funding to TV3 secured through the issue of OCNs. These OCNs were non-interest bearing, convertible to equity at the holder's option in certain circumstances and, if not converted, to be redeemed for cash at their face value.

[47] In 1996, another Canwest company, Canwest NZ Communication Limited (CWNZC) acquired the remaining 50% shareholding in TV3. This involved a restructuring of the previous funding arrangements with funding provided to enable the redemption of the 1991 OCNs and the acquisition of the remaining shares. These new arrangements also utilised OCNs issued by TV3. Also in 1997 the Canwest group acquired an interest in radio station More FM Group Limited and, later, an interest in Radio Works NZ Limited. Funding for these acquisitions involved the issue of OCNs by CWNZC.

[48] In 2004 the Canwest group restructured its New Zealand companies and undertook a partial initial public offering of shares. In this restructuring MediaWorks eventually acquired Radio Works' OCNs and shares. CW Media Limited (owned by MediaWorks) acquired TV Works' OCNs and shares. It is these OCNs that are the subject of the proceedings; from the time they were issued deductions had been claimed in respect of interest on them. The Commissioner, however, maintains that no such deductions were available; in essence, this is because the holders of the OCNs already owned, directly or indirectly, the shareholding in the issuer of the OCNs. As a result, the option to convert the notes to equity had no utility and the fact that the notes did not attract interest meant that their true nature was to provide interest-free funding.

[49] The Commissioner issued s 17 notices in March 2006, with the date required for response extended at the plaintiffs' request. It should be remembered that by this stage the plaintiffs had already provided documents and information informally. The s 17 notices sought documents in the various categories including:

> 3. Any independent valuation of the OCNs undertaken at the time of transfer

[50] MediaWorks advised that valuation of the OCNs formed part of the valuation of the group inherent in the NZX listing process which was being managed by Goldman Sachs JW Were in preparation for the initial public offering:

> The key issue of the valuation related to what enterprise value to EBITDA multiple was appropriate to list a New Zealand television and radio media company, relative to its Australasian peer media companies. Value was decided after a book build process undertaken by JBW with institutional investors. The following information has previously been supplied to the IRD but is included in this letter as it is the final key valuation summary:…

There followed a summary entitled "MediaWorks valuation based on book build process by Goldman Sachs JW Were with institutional investors".

[51] It was this response that prompted the Commissioner to write again to TV Works requesting "the actual valuation report or papers associated with that valuation process". MediaWorks advised that a separate valuation report did not exist. It explained the valuation process of the shares and the IPO process, concluding that:

> As per the explanations provided, the valuation of the company and OCNs was therefore determined by a robust arms-length commercial process with external and new cash paying investors.

[52] The information about Goldman Sachs' involvement also prompted the Commissioner to issue a s 17 notice against Goldman Sachs, as a result of which it received further documents, some of which it considered would have been held by MediaWorks or the plaintiffs. The Commissioner wrote again to TV Works, expressing concern that TV Works may not have responded fully to the s 17 notice. This letter elicited a strong response from TV Works, denying any failure to respond fully to the s 17 notice:

> Our view is that the concerns raised in your letter of 11 July 2006 are caused by the scope of information sought relating to the IPO process (including inherent valuation issues and the group restructuring) not being adequately agreed between the IRD, the company and advisors. As previously outlined, all of the value of the company when restructured and listed on the NZX was inherent in the value of the OCNs. Therefore, in the extreme, it could possibly be interpreted that cl 2 of the IRD's information request…covers all issues relating to the IPO…
>
> The issue for the IRD and ourselves to consider is where the line is to be drawn between the IPO process and the OCN information request. Referring

> to page 3 of the IRD letter, we acknowledge that our responses to date have not included information such as the restructuring timetable…or draft closing agenda…as planning documents relating to the wider IPO, or directors' resolutions, transfer forms, security transfers re Bank of Nova Scotia etc that are incidental to the main sale and purchase agreements or option agreements that have been supplied. On the basis of advice received from Russell McVeagh, these documents were not considered to fall within your information request of 16 March 2006.

[53] There followed a meeting in late July 2006 which resulted in a heavily redacted due diligence report being provided. Then, on 21 August 2006, the plaintiffs provided further documents. These came under cover of a letter from TV Works' chief financial officer, Mr Crossan, in which Mr Crossan referred to a further review of his own physical files and reconstruction of his and (chief executive) Mr Impey's archived email files. He specified certain categories of documents that were not included in the review concluding that:

> To the best of my knowledge, taking into account the basis of the review set out above, there was no further information held by the New Zealand Canwest group (which includes both the Canwest TV and Canwest radio groups) that relates to the tax disputes concerning the deductibility of accrual expenditure incurred in relation to the optional convertible notes.

[54] The Commissioner's senior investigator involved in this investigation, Mr Collier, has deposed that as a consequence of this representation the Commissioner made no further requests for information and proceeded on the basis that everything had finally been provided. However, the Commissioner's concerns were aroused following the subsequent exchange of statements of position under s 89M. TV Works referred to financial instruments issued to the Canwest group in 1990 and asserted that the OCNs had been acquired by a third party prior to MediaWorks' shares being listed on the NZX. Until then the Commissioner had been proceeding on the basis that the shares in MediaWorks were owned by the Canwest group, a fact relevant to his view that the OCNs had no value outside the Canwest group.

Is general discovery appropriate?

[55] The Commissioner asserts that general discovery is appropriate for two main reasons. First, it is common ground that s 17 notices may not have produced full

disclosure. There is dispute between the parties as to why this is and Mr McKay pointed out that any suggestion of non-compliance with the s 17 notices would be contrary to the fact that the Commissioner is not contending that the plaintiffs failed to comply with the notices. Further, Mr McKay pointed out that information and documents provided to the Commissioner led the Commissioner to obtain documents from Goldman Sachs and documents relating to the 1991 OCNs which have been provided.

[56] The second major area of concern for the Commissioner is the issue of ownership of MediaWorks' shares, this being a new area of factual dispute raised following disclosure under s 17. This arises more particularly in relation to the application for discovery against MediaWorks itself and I therefore deal with it later in the context of that application.

[57] When the Associate Judge considered whether general discovery was appropriate in this case, he first identified the question whether making an order would be meaningless because further documents were likely to be inadmissible. He rejected that suggestion and, for the reasons I have already discussed in relation to the ambit of s 17 and the effect of s 138G, I agree with that conclusion. The second point was that the Commissioner had had the opportunity to obtain the relevant documents through the exercise of his powers under s 17. The Associate Judge did not accept that either the exercise or the failure to exercise the power should determine whether general discovery was appropriate. He gave as an example the fact that even though the notices were drafted widely they still did not yield the documents later obtained from Goldman Sachs and that it was no answer to blame the Commissioner for the way in which notices were drafted because the Commissioner could not necessarily anticipate what documents existed. I agree with this conclusion also.

[58] The Associate Judge then identified the fact that documents as to tax advice were protected from disclosure under the statutory scheme but available upon discovery. Although the plaintiffs submitted that this category of documents was better dealt with by way of an application for particular discovery the point was properly made that they are documents which would emerge on general discovery.

The Associate Judge also considered that general discovery might well yield documents that would be helpful in establishing the context for the OCN transactions which could be important in the objective assessment of the transactions. I agree with this.

[59] The final point was balancing the cost and inconvenience of general discovery against the likelihood that nothing relevant or especially useful will emerge. There can be no doubt that compliance with an order for general discovery in a case such as this would require substantial effort and, no doubt, substantial expense. However, the disclosure process under s 17 seems to have proceeded somewhat haphazardly. There has clearly been doubt or misunderstanding by the parties as to the scope of the s 17 notice. This has led to a degree of ill-feeling at times. Sometimes the Commissioner has dealt directly with the plaintiffs but on some occasions with their solicitors. Looking back over the way disclosure has developed it is not surprising that the plaintiffs acknowledge the possibility that documents exist that have not been disclosed. What seems to have been lacking is a cohesive approach under which the categories of documents likely to be held by the plaintiffs and other parties were accurately identified, assembled and disclosed in an orderly fashion.

[60] I consider that the cost and inconvenience to the plaintiffs is outweighed by the risk that relevant documents may not have been disclosed and that the Court will be required to determine the issues between the parties without being confident that all relevant documents have been taken into account. Set against these considerations, it cannot be said that requiring the plaintiffs to give discovery is incompatible with the objectives provided for by r 1.2 High Court Rules of just, speed and inexpensive determination of proceedings. Speed and cost are necessarily relative to the requirement for justice.

Application for particular discovery against MediaWorks

[61] The Commissioner sought particular discovery against two non-parties, NZGT and MediaWorks. As already noted, NZGT does not challenge the order for

discovery against it. In relation to MediaWorks, the Commissioner specifically seeks documents:

- Received from Goldman Sachs J B Were (NZ) Limited relating to the 2004 initial public offering and which relate to NZGT's ownership and control of NZGT Canwest Limited or NZGT Canwest Limited's ownership and control of MediaWorks or CW Media Limited and the restructuring of TV Works Limited and Radio Works Limited with respect to the 2004 initial public offering, including any relating to restrictions and/or obligations in relation to those shareholdings.

- That relate to NZGT's ownership and control of NZGT Canwest Limited or NZGT Canwest Limited's ownership and control of MediaWorks or CW Media Limited and the restructuring of TV Works Limited and Radio Works Limited in relation to the 2004 initial public offering including any relating to any restrictions and/or obligations in relation to those shareholdings.

[62] MediaWorks resists giving discovery on two grounds. The first is that the documents sought do not relate to an issue in the proceeding. The second is that the documents would be excluded by s 138G and therefore discovery of them is not necessary as required by r 8.26(4)

Are the documents relevant?

[63] Whether the documents sought are relevant to a question in the proceeding arises from the Commissioner's assertion that the warrant component of the OCNs had no purpose or value because, at the relevant times, both the holders and the issuers were members of the Canwest group, that the OCNs were not priced at an arms-length price and had no value to anyone other than a member of the same group for the purposes of obtaining tax benefits.

[64] The Commissioner's belief that the issuers and the holders of the OCNs were all part of the Canwest group was based on email exchanges with Radio Works in

2005 and with the Commissioner's notice of proposed adjustment for Radio Works stating that the OCNs had been purchased by another group company. That statement, along with the other facts set out in the Commissioner's notice of proposed adjustment, were adopted by Radio Works in its notice of response. In his subsequent statement of position the Commissioner repeated that assertion. However, in its statement of position, Radio Works stated that this was incorrect:

> In paragraph 275 [of the Commissioner's statement of position] the Commissioner implicitly refers to MediaWorks as a member of the "Canwest group". That is incorrect. MediaWorks was incorporated by a trustee and, prior to the IPO, all of the shares in MediaWorks were held by that trustee. Accordingly, at the time of the transactions described by the Commissioner in paragraph 275, MediaWorks was not a member of the Canwest group.

[65] The Commissioner subsequently issued an addendum to his statement of position in respect of each of Radio Works and TV Works in which he referred to the earlier statements that the relevant OCNs had been acquired by a company in the Canwest group and the respective confirmation by the taxpayers of that fact.

[66] Enquiries by the Commissioner did, however, show that MediaWorks was owned by NZGT Canwest Limited which was, in turn, owned by NZGT. On those facts, there could hardly be any dispute that the documents relating to NZGT's ownership and control of NZGT Canwest Limited or NZGT Canwest Limited's ownership and control of MediaWorks or CW Media Limited were relevant. However, before the hearing of the application for particular discovery the plaintiffs advised that they would not be relying on the argument that NZGT Canwest Limited was independent of the Canwest group. Mr McKay submitted that this concession rendered non-party discovery unnecessary.

[67] The concession regarding the status of NZGT Canwest Limited and MediaWorks was contained in a letter from Russell McVeagh, the solicitors acting for the plaintiffs and MediaWorks 1 July 2008. Amongst other things, Russell McVeagh addressed a proposal by the Commissioner to resolve the issues arising from the application for non-party discovery by an agreed statement of facts. Russell McVeagh wrote:

> 19. …As noted in the IPO prospectus issued in 2004 and Companies Office records, NZGT Canwest Limited did have legal and beneficial ownership of all 100 shares issued by MediaWorks NZ Limited at that time, was not ultimately owned by a Canwest group company and was therefore independent of the Canwest group in that sense. As such, our clients are not able to agree to a blanket assertion that the companies were not independent. To do so could potentially mislead the Court.
>
> 20. Rather than agreeing something to be a fact which is not the case, our clients propose the parties conduct these proceedings on the basis that the parties agree, for the purposes of this proceeding, that the plaintiffs will not assert that NZGT Canwest Limited was a truly independent third party, as set out in the plaintiffs' respective statements of position. Our understanding from the affidavit evidence of Mr Collier and paragraph 2.5 of your letter 11 July 2008 is that the Commissioner only considers documents relating to this issue to be relevant by virtue of our clients' reliance on them in their statements of position. An agreement not to rely on this argument would make any such documents irrelevant to the proceeding.

[68] At [84] of his decision the Associate Judge recorded a further concession made by MediaWorks' counsel in argument:

> In his submissions for the hearing, counsel for the plaintiffs modified their position further. He reiterated that they would not argue that NZGT Canwest was independent of the Canwest group but then went further (as I understand the earlier position) and said that they no longer wished to advance an argument that transfer of the OCNs to MediaWorks established their value to a third party. On that basis counsel submitted that the only matter in issue was whether the OCNs would have had value to a third party, and that did not require discovery of any documents relating to independent NZGT Canwest…

[69] The Associate Judge concluded, however, that the plaintiffs' concessions did not render the documents irrelevant because they addressed only the way in which the plaintiffs intended to run their case:

> [85] …As I understand their case, the plaintiffs were saying that the OCNs had value because their transfer was between arms-length parties, for a value that can survive scrutiny, and there is a commercial rationale for the transfer ahead of the IPO restructuring. The concessions may well address the first of these points but I am not convinced that they are a complete answer to the Commissioner's position on the latter two.
>
> [86] The Commissioner has pleaded that the entities are not independent. He stated in his statement of position that they were part of the Canwest group. He contends that that is a necessary element of his case, which he will have to prove as the plaintiffs have not considered themselves able to agree on the point. He clearly sees the nature of the relationship as relevant to the valuation exercise and the commercial rationale.

[70] In response to the Associate Judge's reasoning on this point Mr McKay submitted that it is only the second issue (whether the transfer of the OCNs was for a value that could survive scrutiny) that could be relevant because the plaintiffs' concession regarding NZGT Canwest's independence had eliminated the first reason (whether the transfer was between arms-length parties) and the Commissioner was not arguing about the third reason (whether there was a commercial rationale for the transfer in the context of the IPO). Mr McKay submitted however that the question of the value of the OCNs was a matter for expert evidence as to the value of an OCN in a related party transaction.

[71] Mr Coleman, however, submitted that the Commissioner's case includes the assertion that the companies were not independent. This fact is critical to determining the value of the OCNs in the context of the related party transaction. In this sense the Commissioner is effectively proving a negative proposition and is entitled to the documents that would assist him to do so.

[72] In approaching this issue I am mindful of the fact that the Commissioner bears the onus of proving the assertions he makes regarding the nature and value of the OCNs. The concessions made by the plaintiffs may assist the Commissioner in advancing his argument. However, it seems to me artificial to expect the Commissioner (and the expert witnesses on both sides) to adequately address the question of the value of these OCNs without a full understanding of the nature of the related party transactions of which they formed a part. For this reason I consider that the documents the Commissioner seeks are relevant, notwithstanding the plaintiffs' concessions.

Would the documents be excluded by s 138G?

[73] This brings me to Mr McKay's argument that discovery of documents by the non-parties could only be necessary if such documents were admissible at the substantive hearing. He argues that the documents are excluded by s 138G(1) and that the Commissioner could not bring himself within s 138G(2) because he had not exercised due diligence in discovering the evidence.

[74] It is apparent from my earlier discussion that I do not accept that the documents sought are excluded by s 138G. I agree with the Associate Judge's conclusion at [92] that the value of the OCNs in the context of the pre-IPO restructuring was raised in the Commissioner's statements of position and that the independence of NZGT Canwest, MediaWorks and CW Media were, likewise, issues identified as relevant to the argument over value. The Commissioner was only required by s 89M to provide an outline of the argument and evidence to be relied on and, having done so, must be entitled to adduce in evidence further documents on that issue. Clearly, an order for particular discovery is necessary. The application of s 13G(2) does not arise. I see no error on the part of the Associate Judge in either his approach or the conclusion that he reached and no grounds on which to interfere with the exercise of his discretion.

Result

[75] I have concluded that discovery in tax litigation is not limited to rare cases. The ambit of disclosure under s 17 is narrower than the ambit of discovery under the High Court Rules by reason of the breadth of the *Peruvian Guano* test. The fact that the Commissioner might, by issuing further notices under s 17, have obtained more documents is no reason to refuse discovery. Nor, in the normal course, should the fact that parties may have expended substantial time and cost complying with s 17 notices preclude discovery being required in later proceedings.

[76] In relation to the evidence exclusion rule in s 138G, I have concluded that this ought to be read together with s 89M(4)(b) and (6)(b) so that a party is required only to provide an outline of the evidence relied on rather than identifying each piece of evidence. As a result, documents obtained later during the course of discovery are not necessarily excluded by s 138G.

[77] In relation to the general discovery order I find that the Associate Judge's conclusion was correct. In this case disclosure under s 17 has been an ongoing process that appears to have lacked adequate planning. This is not a criticism of any party but merely an observation as to the way the disclosure process developed. The Commissioner is now faced with an acknowledgement by the plaintiffs that

documents may exist which have not been disclosed and cannot be certain that he has all the documents that relate to the issues between the parties in the *Peruvian Guano* sense. The fact that the plaintiffs have already incurred costs in complying with s 17 is not a sufficient reason to refuse discovery. The application for review in respect of the general discovery order is therefore dismissed.

[78] In relation to the order for non-party discovery I find that there was no error on the part of the Associate Judge and that his exercise of his discretion was not plainly wrong. The issue of the independence of NZGT Canwest Limited, MediaWorks and CW Media are issues raised in the Commissioner's statement of position and are relevant to the question of the value of the OCNs. As a result, an order for discovery against MediaWorks was necessary. The application for review of the Associate Judge's order is therefore dismissed.

[79] Counsel may address the issue of costs in memoranda filed on behalf of the Commissioner within 14 days, on behalf of the plaintiffs within a further seven days and the Commissioner may reply within a further seven days after that.

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P Courtney J