

**IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY**

**CIV-2011-485-002487
[2013] NZHC 1220**

UNDER the Judicature Amendment Act 1972
the Tax Administration Act 1994
the Contractual Mistakes Act 1977
the Contractual Remedies Act 1979

BETWEEN CHYE HENG LIM
Plaintiff

AND THE COMMISSIONER OF INLAND
REVENUE
Defendant

Hearing: 20-21 May 2013

Counsel: J H Coleman for Applicant
M Deligiannis and K F Whitiskie for Respondent

Judgment: 28 May 2013 at 2.15pm

RESERVED JUDGMENT OF COLLINS J

Introduction

[1] In this proceeding I am required to answer a question of fact. That question is:

Did Mr Lim honestly rely on two Inland Revenue Department (IRD) forms (IRD forms) when his painting partnership decided not to deduct withholding tax in the 2003 to 2005 income tax years from payments made by the partnership to a number of painting subcontractors?

Context

[2] This question arises in the context of a multi-faceted civil proceeding commenced by Mr Lim against the Commissioner of Inland Revenue (the Commissioner). Mr Lim alleges that he and his wife relied upon statements

contained in the IRD forms (which are tax declaration forms) when his partnership stopped deducting income withholding tax (withholding tax) in relation to payments it made to painting subcontractors. It transpired the IRD forms were not entirely accurate. Although the focus of attention is upon Mr Lim's motives when the partnership stopped deducting withholding tax, Mrs Lim played a significant role in managing the partnership's business affairs.

[3] Mr Lim's proceeding contains seven causes of action:

- (1) three causes of action allege breach of contract;
- (2) two causes of action are framed as applications for judicial review;
- (3) the final two causes of action seek declarations that the debt Mr Lim now owes to the IRD should not be collected in the circumstances of this case.

[4] Counsel for both parties have helpfully reduced my task to one that involves me making a finding as to whether or not Mr Lim did in fact honestly rely on the IRD forms when his partnership failed to deduct withholding tax in the 2003 to 2005 income tax years.¹ The parties have reached agreement about the legal consequences which flow from my factual finding, thereby rendering it unnecessary for me to engage with the many interesting legal issues raised in the pleadings.²

Background

[5] Mr Lim came to New Zealand from Malaysia in 1988.

[6] On 21 November 2000 Mr Lim and Ms Sia started a partnership (the partnership) which continued a painting and decorating business that Mr Lim had previously run in partnership with another person. The partnership continued until

¹ See Minute of Ronald Young J in *Lim v Commissioner of Inland Revenue* HC Wellington CIV-2011-485-2487, 5 November 2012.

² The parties have reached an agreement whereby the Commissioner has agreed to set aside the outstanding debt and penalty payments if I am satisfied that Mr Lim held an honest belief in respect of the IRD forms.

31 March 2005 when the partnership business was taken over by K L Decorators Ltd, a company that was 60 per cent owned by Mr Lim and 40 per cent owned by Mrs Lim.

[7] The partnership business primarily involved it entering into contracts to paint houses. The partnership would in turn engage subcontractors who carried out each painting job.

[8] There were two types of subcontracting arrangements which the partnership engaged in when arranging to paint a property. One type of subcontract involved the subcontracting painter only supplying their labour (labour only subcontracts). The majority of the subcontracts however involved the subcontractor supplying their own paint and materials, as well as their labour (labour and materials subcontracts).

[9] At this time the Income Tax (Withholding Payments) Regulations 1979 (the regulations)³ set out the rates of deduction for specific categories of work for which withholding tax payments should be paid to the IRD. The purpose of the withholding tax regime was to ensure IRD received withholding tax payments from those who employed others under contracts of service, in circumstances where there was a risk that those employed under contracts of service would not pay income tax. Clause 8 of Part A of the Schedule to the regulations provided that a rate of deduction of 20c⁴ in the dollar applied to:

8. Payments for work done or services rendered under contracts or arrangements which are wholly or substantially for the supply of labour in or in connection with the ... decoration ... of buildings or other constructions ... being work or services of any nature–

...

- (c) That is undertaken in connection with the hanging of wallpaper, other decorative wall coverings or furnishing, or the painting or decoration (including plastering) of the exterior or interior of any buildings or other construction;

...

³ The regulations were replaced by s ZA(1)(i) of the Income Tax 2007 with effect from 1 April 2008.

⁴ A higher rate of 35c in the dollar applied where a tax code was not declared by those employed under a contract for service.

[10] In March 2000 the IRD issued the first of the IRD forms which are the focus of attention in this case. The 2000 tax code declaration form contained a section relating to withholding tax payments. It listed a number of categories of persons employed under contracts for service in respect of whom the person who engaged the contracting party was required to make withholding tax deductions from payments made to that contracting party. One of those categories referred to persons employed under contracts of service in the building industry. The 2000 IRD form said “labour only contracts in the building industry” were to be subject to a deduction rate of 20c in the dollar (or 35c in the dollar if no tax code had been declared).

[11] When the partnership commenced, Mrs Lim took primary responsibility for looking after the partnership books and attending to the partnership’s tax responsibilities. She had access to an independent accountant, Mr Lin, who was also Mr and Mrs Lim’s tax agent up until October 2006.

[12] For the tax year ending 31 March 2001 the partnership complied with the regulations. During that tax year the partnership was required by the regulations to make withholding tax payments totalling \$99,235 to IRD. The partnership paid that sum to IRD in full.

[13] In the following tax year the partnership again fully complied with its obligations under the regulations when it paid IRD \$320,533 withholding tax. IRD have acknowledged this was the total amount of withholding tax the partnership was required to pay that year in relation to its many subcontractors.

[14] However, in the tax year ending 31 March 2003 the partnership’s approach to paying withholding tax changed. During the course of that tax year the partnership employed at least 17 subcontractors. Withholding tax was only paid in relation to nine of the partnership’s contractors, and even then, withholding tax was only paid intermittently. The partnership ended up paying just \$98,076 in withholding tax in the tax year ending 31 March 2003. IRD have calculated the partnership should have paid \$799,873.35 withholding tax during this period.

[15] In January 2003 IRD issued a new tax declaration form. That form was in all material respects identical to the IRD tax declaration form issued in January 2000. The 2003 IRD form was sent to the partnership in March 2003.

[16] In the tax year ending 31 March 2004 the partnership continued its recent practice of not paying IRD withholding tax. During this period the partnership paid just \$5,510 withholding tax in relation to just one subcontractor for the months of April and May 2003. IRD have calculated that the partnership should have paid IRD \$544,119.54 withholding tax for the tax year ending 31 March 2004.

[17] Similarly, in the tax year ending 31 March 2005 the partnership paid no withholding tax to IRD. According to IRD's calculations the partnership should have paid \$1,005,471.20 withholding tax for the tax year ending 31 March 2005.

[18] In January 2006 IRD issued a new IR330 form. The new form said that "contracts wholly or substantially for labour only in the building industry" were to be subject to withholding tax.

[19] When K L Decorators Ltd took over the partnership business from 1 April 2005, it also paid minimal withholding tax to IRD. For the tax year ending 31 March 2006 K L Decorators Ltd paid IRD just \$38,454 withholding tax. IRD have calculated K L Decorators Ltd should have paid \$757,476.22 withholding tax during this period.

[20] Similarly, K L Decorators Ltd paid very small amounts of withholding tax during the tax years which ended on 31 March 2007 and 2008.

[21] On 1 September 2006 IRD wrote to the partnership's accountant, Mr Lin, and explained that the Commissioner was proposing to investigate the partnership's tax affairs.

[22] At almost the same time Mr Lin ceased to be involved in providing accounting and tax advice to Mr and Mrs Lim and their business. Ms Chan took

over Mr Lin's practice and became the tax agent for Mr and Mrs Lim in October 2006.

[23] The investigations undertaken by the IRD on behalf of the Commissioner included interviews with Mr and Mrs Lim. The first of those interviews occurred on 30 October 2007. Those present at the interview were Mr Ambikar and Mr Rowley from the IRD as well as Mr and Mrs Lim and their tax agent, Ms Chan.

[24] At that meeting Mr Rowley and Mr Ambikar asked Mr and Mrs Lim a series of pre-prepared questions. The answers were recorded by both Mr Rowley and Mr Ambikar, who later collated their interview notes and forwarded them to Ms Chan for her to make any alterations or additions she considered necessary.

[25] During the course of the interview Mr and Mrs Lim were asked about withholding tax exemption certificates. The collated interview notes record:

[Q] Do you know what a certificate of exemption is?

[A] Mrs Lim said she did. She said it was to get an exemption from the payment of withholding tax.

[Q] How did you learn about this exemption?

[A] Mrs Lim said she did not know how she learnt of the exemption. She said she learnt about it many years ago.

She also said it is mentioned on an IR330 but said that as the subcontractors for K L Decorators provided their own materials she did not have to take into consideration withholding tax.

[Q] Did anyone advise you about this piece of tax legislation?

[A] Not sure.

[Q] Did you ever ask any of your subcontractors to fill out a certificate of exemption?

[A] Yes. Mrs Lim said at one stage she was not sure if withholding tax needed to be deducted so she had asked Mr Lim to go to the IRD office and pick up a pile of certificate of exemption forms. Mr Lim said he had given these out to the subcontractors.

[Q] Why did you ask him to do this?

[A] Mrs Lim said she wasn't sure whether withholding tax needed to be deducted. Hence she felt that the subcontractors could fill out this

form to make sure of it. Mr Lim said some of the subcontractors filled out the form at his office which he gave to IRD. Some of them took them home to fill. Some brought them back, some didn't. The ones who didn't weren't chased up as Mr Lim said they were too busy.

...

[Q] Their applications for a certificate of exemption were rejected by the IRD. Why did you not deduct withholding tax at that point?

[A] Mrs Lim said she had asked Mr Lim to get the certificate of exemption. She was not sure if withholding tax needed to be deducted afterwards. She was sure that K L Decorators were not liable for payment of withholding tax as the subcontractors provided labour plus materials.

On showing Mr and Mrs Lim that some of the subcontractors had stated they provided labour only services in their application Mrs Lim said they had probably put it down wrongly as it should have been put down labour and materials.

[26] When Ms Chan reviewed the interview notes she made two additions that are relevant to this proceeding.

[27] Ms Chan added to the response that had been recorded about advice that Mr and Mrs Lim had received about the tax legislation, the following words:

Not sure but vaguely remember the previous accountant (Fong Lin) may have mentioned it.

[28] Ms Chan also added that Mrs Lim said that none of the subcontractors were asked to fill out an IR330:

since they were *non-labour only* subcontractors. (emphasis in original)

[29] Ms Chan ceased to be the tax agent for Mr and Mrs Lim in May 2008. At that time Ms James took over Ms Chan's business and became the tax agent for Mr and Mrs Lim.

[30] As from 1 April 2008 K L Decorators Ltd deducted withholding tax from all payments made to all of its subcontractors.

[31] On 28 July 2008 Mr and Mrs Lim created a new company called K L Building Services Ltd. Mrs Lim was the sole shareholder of this company, although

Mr Lim was also a director of the company. K L Decorators ltd continued to exist until late 2010.

[32] On 19 September 2008 the IRD wrote to Ms James and explained that IRD was in the process of assessing the total tax and penalties that would be imposed on Mr Lim and Ms Sia as a result of the partnership's failure to pay all the withholding tax it was required to pay for the tax years ending 31 March 2003 to 31 March 2005.

[33] On 20 February 2009 IRD provided Mr Lim with a contract for adjusted tax for the tax years ending 31 March 2003 to 31 March 2005. The total unpaid tax was assessed as being \$602,669.76. A penalty, based on the Commissioner's assessment that Mr Lim had been grossly careless,⁵ was set at \$120,533.95.

[34] On 11 March 2009 Ms James sought advice from Mr Owens, a specialist tax advisor and accountant. Mr Owens met Mr and Mrs Lim on 1 April 2009. In his notes of that meeting Mr Owens recorded "... no w/h tax from subbies. IR330 – believes not just labour". Mr Owens interpreted Mr and Mrs Lim to be saying that the contracts with the subcontractors were material plus labour contracts. Mr Owens understood Mr and Mrs Lim were saying that as the subcontracts were "not substantially for labour only contracts", the partnership was not required to pay withholding tax. However, Mr Owens considered that the subcontracts "would objectively be classified as being 'substantially for labour only'". As that was the test in the regulations, Mr Owens advised Mr and Mrs Lim that the partners were liable for the unpaid withholding tax. Mr Owens wrote to Ms James on 3 April 2009 setting out his advice.

[35] On 8 April 2009 Mr Lim signed the agreed adjustment contracts.

[36] Thereafter a series of negotiations took place between officers of the IRD and Mr Lim and Ms James in which the IRD declined Mr Lim's offers to pay sums that were significantly less than the amounts of unpaid tax and penalties that had been assessed. When no settlement was achieved Mr Coleman, an experienced tax

⁵ Section 141C(3) of the Tax Administration Act 1994 which defines gross carelessness as doing or not doing something in a way that, in all the circumstances, suggests or implies complete or a high level of disregard for the consequences.

barrister, was engaged to act for Mr and Mrs Lim. Mr Coleman became involved in advising Mr and Mrs Lim in October 2010.

[37] In November 2010 the Commissioner settled the dispute with Ms Sia.

[38] On 9 December 2010 K L Decorators Ltd was placed into liquidation. Its business was effectively continued by K L Building Services Ltd.

[39] In early February 2011 Mr and Mrs Lim consulted their local Member of Parliament, the Hon Trevor Mallard. On 18 February 2011 Mr Mallard wrote to the IRD in which he explained Mr Lim had relied on the 2000 IR330 form when concluding that withholding tax deductions only needed to be made in relation to labour only subcontracts.

[40] At about the same time Mr and Mrs Lim showed Mr Coleman the 2000 IR330 form. Mrs Lim explained to Mr Coleman she had relied on that form when deciding that withholding tax deductions were only required in relation to labour only subcontracts. At this point Mr Coleman appreciated that Mr and Mrs Lim may have been honestly misled by the IRD forms and that there was a possible legal basis for them to challenge the size of the assessments that had been made.

[41] On 21 July 2011 IRD issued a bankruptcy notice against Mr Lim. On 30 November 2011 Mr Lim commenced his civil proceeding against IRD and on 5 December 2011 he applied to set aside the judgment obtained by default against him by the IRD.

[42] K L Building Services Ltd changed its name to Kayel Ltd on 12 April 2012.

Did Mr Lim honestly rely on the IRD forms when the partnership decided not to deduct withholding tax during the 2003 to 2005 tax years?

[43] Before addressing this question I make three preliminary observations.

[44] First, the parties agree that in this case the onus is upon Mr Lim to establish on the balance of probabilities that he did honestly rely on the IRD forms when the

partnership decided not to deduct withholding tax from payments made to the subcontractors during the tax years that ended on 31 March 2003 to 2005.

[45] Secondly, Ms Deligiannis and Ms Whitiskie, counsel for the Commissioner quite properly proceeded on the basis that Mr and Mrs Lim's dramatic change in approach to withholding tax deductions probably occurred after they had read one or both of the IRD forms. To this extent counsel for the Commissioner agreed that Mr Lim had probably relied on the IRD forms. They submitted, however, that Mr Lim did not honestly rely on those forms because if he did read those forms he simply took advantage of the minor error in those forms and in doing so deliberately chose not to comply with his tax obligations.

[46] Thirdly, in assessing Mr Lim's honesty I have relied, so far as is possible, on:

- (1) contemporaneous materials; and
- (2) objectively established facts; and
- (3) the apparent logic of events⁶

rather than on the demeanour of Mr and Mrs Lim when they gave evidence.

[47] This approach is important in this case because it would be extremely difficult to accurately assess the credibility of Mr and Mrs Lim solely on the basis of their demeanour when they gave evidence. Both are Malaysian and English is not their first language. The combined effect of their language challenges and cultural background would make it very unsafe to assess their credibility solely upon their demeanour when giving evidence.

[48] In answering the question asked of me I shall examine the evidence in more detail under the following headings:

⁶ *R v Munro* [2008] 2 NZLR 87 (CA) at [77].

- (1) Do Mr and Mrs Lim's various accounts about relying on the IRD forms undermine their credibility?
- (2) Are Mr and Mrs Lim's explanations about the IRD forms a recent invention?
- (3) What advantages would accrue to Mr and Mrs Lim by not deducting withholding tax?
- (4) Is it logically likely that Mr and Mrs Lim would have dishonestly relied upon the IRD forms?

Do Mr and Mrs Lim's various accounts about relying on the IRD forms undermine their credibility?

[49] Ms Deligiannis explained that Mr and Mrs Lim have given a number of inconsistent explanations about their reliance on the IRD forms.

[50] Mr and Mrs Lim's various explanations can be summarised in the following way:

- (1) Initially Mr Lim said that he relied on the 2000 IRD form "with respect to the withholding tax issue".⁷
- (2) In his second affidavit sworn on 26 June 2012, Mr Lim explained that it was "... more accurate to say that [Mrs Lim] relied on the 2000 IR330 as she did tax administrative functions relating to the partnership and attended to compliance with tax obligations".⁸
- (3) In his affidavit in reply sworn in October 2012 Mr Lim explained that "technically" Mrs Lim relied on the 2003 IRD form during the latter part of 2003 and for the 2004 and 2005 tax years.⁹

⁷ Affidavit of C H Lim, 25 November 2011.

⁸ At [12].

⁹ Affidavit of C H Lim, October 2012 at [3].

- (4) During his cross-examination Mr Lim explained that when he and his wife received the 2000 IRD form he told his wife that they did not need to deduct withholding tax.¹⁰
- (5) When cross-examined further, Mr Lim said that it was after he and his wife received the 2003 IRD form that they stopped deducting withholding tax.¹¹
- (6) Later, still in his cross-examination, Mr Lim said that when they “came across” the 2003 IRD form they believed they were “on the right track”.¹²
- (7) In her first affidavit, Mrs Lim explained:¹³

... where the contracts with subcontractors were for labour and materials I did not make any withholding tax deductions. I paid the full amount to the subcontractors. I did this because I had read the 2000 IRD 330 “tax declaration form” ...

That form worked through what we must check off concerning withholding tax. As one works through the document the reader was referred over the page to a list of categories in respect of which withholding tax deductions are required.

The relevant entry for the partnership business was “labour only contracts in the building industry”. Since the contracts that the partnership entered into were for labour and materials I concluded there was no obligation to deduct withholding tax ...

- (8) In her reply affidavit Mrs Lim explained that she had relied upon the 2003 IRD form. Mrs Lim said that she could recall receiving the new IRD form in about March 2003 and noted that it said the same thing as the 2000 IRD form, and that this reassured her she was doing things correctly and not deducting withholding tax.¹⁴

¹⁰ *Lim v Commissioner of Inland Revenue* HC Wellington CIV-2011-485-2487 Transcript, 20 May 2013 at 7, lines 25-35.

¹¹ Transcript at 26, lines 9-15.

¹² Transcript at 35, lines 26-31.

¹³ Affidavit of F L Lim, 26 June 2012 at [16]-[18].

¹⁴ Affidavit of F L Lim, October 2012 at [9].

[51] Mr and Mrs Lim's changing accounts of when they say they relied upon the IRD forms and which forms they actually relied upon would, if considered in isolation, justify the IRD's suspicions that Mr and Mrs Lim did not honestly rely on the IRD forms when they decided to discontinue deducting withholding tax from payments made to subcontractors by the partnership.

[52] However, in my assessment, it is important to understand Mr and Mrs Lim's evidence on this issue in context. There are two important factors that I need to take into account when assessing whether or not Mr and Mrs Lim's "changing accounts" about the IRD forms impugns their integrity:

- (1) First, it is apparent that Mr and Mrs Lim had commenced decreasing the amount that the partnership should have been deducting as withholding tax during the course of the tax year that ended on 31 March 2003. Thus, for present purposes, the critical events probably occurred during the latter half of 2002 and early in 2003. After such a long passage of time, it is understandable why there was some inconsistencies and contradictions in Mr and Mrs Lim's evidence about precisely when they say they relied on the IRD forms, and precisely which form they say it was that they relied upon.
- (2) Secondly, it transpired that it was only after Mr Lim had sworn his second affidavit that Mr and Mrs Lim discovered a spiral folder which included the original 2000 and 2003 IRD forms.

[53] In my assessment, I think it highly likely Mr and Mrs Lim relied initially on the 2000 IR330 form, and when they received the 2003 IR330 form this confirmed for them that they were "on the right track" in not deducting withholding tax.

[54] In my view, the evidence of Mr and Mrs Lim's changing accounts about which IRD form they relied upon and when does not undermine their credibility because:

- (1) the events in question occurred almost a decade ago;

- (2) not all the relevant contemporaneous documents were available when Mr Lim swore his first two affidavits; and
- (3) the contemporaneous documentation and objective evidence strongly suggests Mr and Mrs Lim probably relied to varying degrees upon both IRD forms.

Are Mr and Mrs Lim's explanations about the IRD forms a recent invention?

[55] The IRD maintain that the first occasion that Mr and Mrs Lim claimed they had relied upon the IRD forms was when Mr Mallard wrote to the IRD on behalf of Mr and Mrs Lim on 18 February 2011. When he gave his evidence, Mr Rowley, the IRD investigator in this case, continued to maintain that Mr Mallard's letter was the first occasion that Mr and Mrs Lim claimed they had relied upon the IRD forms when they decided not to continue deducting withholding tax from payments made by the partnership to subcontractors during the years in question.

[56] In my assessment, it is clear from the interview that Mr Rowley and Mr Ambikar conducted on 30 October 2007 that Mr and Mrs Lim told the IRD at that time that they had relied upon the IRD forms when they decided not to continue deducting withholding tax from payments made by the partnership to the subcontractors.

[57] Mr Rowley acknowledged that at the time of this interview he did not know about the unfortunate wording in the IRD forms. It is therefore possible that his lack of understanding of the details of those forms led him to misunderstanding what Mr and Mrs Lim were saying about those forms.

[58] Nevertheless, by any objective analysis, it is clear that Mr and Mrs Lim raised the issue of the IRD forms as early as 30 October 2007. There is also a record of Mrs Lim's explanations about the IRD forms in an IRD document written on 17 February 2009 when consideration was being given to imposing a shortfall penalty on Mr Lim. Furthermore, Mr Owens' file note of 1 April 2009 undermines the suggestion that Mr and Mrs Lim did not raise issues about the IRD forms until they spoke to Mr Mallard early in 2011.

[59] Mr and Mrs Lim's explanations about their reliance on the IRD forms was raised well before Mr Mallard's letter of 18 February 2011. Their explanations about the IRD forms is not a recent invention and their credibility is not undermined in the way the IRD has contended.

What advantages would accrue to Mr and Mrs Lim by not deducting withholding tax?

[60] Mr and Mrs Lim correctly point out that there was no tax advantage to the partnership or them when the partnership failed to deduct withholding tax from the payments made by the partnership to its subcontractors. That is because the sums which should have been deducted by the partnership as withholding tax were in fact paid to the subcontractors. If the subcontractors did not pay income tax then it was the subcontractors and not the partnership or Mr and Mrs Lim who gained a "tax advantage".

[61] However, in my assessment, the question about what benefit Mr and Mrs Lim received needs to be viewed more broadly than just by reference to possible tax advantages.

[62] By not deducting withholding tax the partnership provided a potential advantage to those subcontractors who avoided paying income tax. This in turn would have made the partnership an attractive entity for those subcontractors "to do business with". Thus, I believe there were likely to be business advantages to the partnership, and therefore to Mr and Mrs Lim, in not deducting withholding tax. This is therefore a factor that weighs against Mr and Mrs Lim's submission that they had no incentive to dishonestly fail to deduct withholding tax.

Is it logically likely that Mr and Mrs Lim would have dishonestly relied upon the IRD forms?

[63] While it is possible that Mr and Mrs Lim had a business incentive to dishonestly construe the IRD forms to mean that withholding tax did not have to be deducted by the partnership, in my assessment, it is logically more likely they acted honestly when they relied upon the IRD forms.

[64] I reach this conclusion for two reasons:

- (1) First, although they are obviously intelligent people, Mr and Mrs Lim are not sophisticated in the details of New Zealand tax law. They construed the 2000 and 2003 tax forms in a way that was objectively logical, even though the consequences of their interpretation was clearly contrary to the regulations. In a similar context, Lord Hoffman explained:¹⁵

... that while it might be appropriate in a case of dealings between the Revenue and sophisticated tax advisors to insist upon a high degree of clarity in the alleged representation, this need not necessarily be required in other cases. Kosovar refugees cannot be expected to check the small print.

- (2) The 2000 and 2003 IRD forms were inaccurate and were accordingly replaced in 2006 when the IRD realised its earlier forms were potentially misleading. By that time however, Mr and Mrs Lim were convinced that the partnership did not have to deduct withholding tax. Their lack of understanding of the intricacies of New Zealand tax law helps explains why, in all likelihood, they were honestly misled by the IRD forms.
- (3) Secondly, when Mr and Mrs Lim received clear and competent tax advice in 2008 they ensured their business deducted withholding tax in relation to all payments made by their business to subcontractors. I accept IRD's submission that no explanation has been provided by Mr and Mrs Lim about why they did not remedy their practices after the 2006 IRD form was issued. However, in all likelihood, I think it was only when the IRD commenced its investigation and Mr and Mrs Lim consulted new tax advisors that the significance of their error was understood by them.

Conclusion

[65] The question posed in paragraph [1] is answered in the following way:

¹⁵ *R (Zeqiri) v Secretary of State for the Home Department* [2002] UKHL 3 at [44].

Mr Lim honestly relied on the 2000 and 2003 IR330 forms when his painting partnership decided not to deduct withholding tax in the 2003 to 2005 income tax years from payments made by the partnership to a number of painting subcontractors.

[66] At the request of the parties I have reserved the issue of costs. If the parties require a decision on costs they should file memoranda explaining their respective positions within 20 working days of the date of this judgment.

D B Collins J

Solicitors:
Dyhrberg Drayton Employment Law, Wellington for Applicant
Crown Law Office, Wellington for Respondent