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

**CIV 2006-404-007264**

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| BETWEEN | AVOWAL ADMINISTRATIVE ATTORNEYS LIMITED<br>First Applicant |
| AND | J B LLOYD CHARTERED ACCOUNTANTS LIMITED<br>Second Applicant |
| AND | PETER JAMES BLOOMFIELD AND NORMA RAE CLARK<br>Third Applicants |
| AND | AMANDA JANE CHISNALL AND IAN ANDREW FLEMMING<br>Fourth Applicants |
| AND | DENISE ANNE CLARK<br>Fifth Applicant |
| AND | WENDY CAROLINE VOOGHT<br>Sixth Applicant |
| AND | LISA CHERRIE WATKINS AND WILLIAM DAVID WATKINS<br>Seventh Applicants |
| AND | NIKYTAS NICHOLAS PETROULIAS<br>Eighth Applicant |
| AND | THE DISTRICT COURT AT NORTH SHORE<br>First Respondent |
| AND | THE COMMISSIONER OF INLAND REVENUE<br>Second Respondent |

Hearing: 1 May 2009

Appearances: G Clews and A A H Low for Applicants
J C Pike, P H Courtney and C R Bryant for Respondents

Judgment: 8 May 2009 at 4.00 p.m.

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**JUDGMENT OF VENNING J**
**ON APPLICATION FOR STAY**

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**This judgment was delivered by me on 8 May 2009 at 4.00 pm, pursuant to Rule 11.5 of the High Court Rules.**

**Registrar/Deputy Registrar**

**Date.....**... ...

Solicitors: Buddle Findlay, Auckland
Crown Law Office, Wellington
Copy to: G Clews, Auckland

## Introduction

[1] In a decision delivered on 22 December 2008 the Court delivered a final judgment on the application for judicial review, an interim judgment having earlier been delivered on 26 February 2008.

[2] The various applicants had sought judicial review, particularly of the Commissioner of Inland Revenue's action to assist the Australian Tax Office (ATO) and in searching, copying, and/or removing for copying documents and hard drives from the computers at the premises of the various applicants.

[3] Prior to the final hearing the applicants abandoned their challenge in relation to the hard copy documents.

[4] In summary, the decisions were:

- the Commissioner was entitled to use his search powers under s 16 to assist the ATO;

- to dismiss the challenges to the searches, copying and removal of the hard drives at the Avowal and J B Lloyd sites;

- to uphold the challenge to the removal for copying of the back-up hard drive at the Browns Bay home of Ms Chisnall, but to dismiss the challenge to the removal of her laptop hard drive;

- to uphold the challenge to the copying of Mr Petroulias' personal laptop and the second hard drive in the inner office at Motueka River Lodge, but otherwise to dismiss the challenge to the copying and removal of the encrypted hard drives at Motueka River Lodge;

- to dismiss all other challenges to the actions of the Commissioner.

[5] Avowal, Ms Clark and Mr Petroulias have appealed the decisions of this Court in relation to the Commissioner acting to obtain information for the ATO and the findings that the copying and removal or removal for copying of hard drives from the offices of Avowal and the premises of Motueka River Lodge were lawful.

[6] By notice dated 11 February 2009 the applicants sought an injunction, pending a decision on the appeal, preventing the Commissioner from:

a) reviewing or disclosing copies of seized electronic documents;

b) treating as at an end an arrangement for the secure storage and isolation of the electronic documents; and

c) inspecting or dealing with electronic documents over which privilege has been claimed and which were with the District Court

[7] The applicants now accept that an injunction cannot lie against the Crown but pursue an application for an order in the nature of a stay pending appeal. That is opposed by the Commissioner.

**Jurisdiction**

[8] The proceedings before the Court were an application for judicial review. The application was finally determined, subject to appeal, by the final decision delivered on 22 December 2008. There is no longer any ability to make interim orders under s 8 of the Judicature Amendment Act, the application for judicial review having been finally determined subject to appeal: *cf Area One Consortium Limited v Treaty of Waitangi Fisheries Commission* (1993) 7 PRNZ 200. However, I accept for present purposes that if the Court came to the view an order in the nature of a stay was required or appropriate, it could invoke its inherent jurisdiction to make a declaration directed at the preservation of the parties' rights pending the determination of the appeal (hereafter referred to as a stay). I adopt the reasoning of Fisher J in *Faavae v Minister of Immigration* (1997) 11 PRNZ 168, 170 as follows:

> ... it would be anomalous if there were no remedy in the present situation. Section 16 of the Judicature Act 1908 preserves inherent jurisdiction. The Court has a general equitable jurisdiction to make declarations — see further the decisions found in *Sim's Court Practice*, Wellington, Butterworths, para J72S4(1).10. While counsel were not aware of any direct precedents for it, it seems to me that I ought to adopt that source of jurisdiction as the foundation for making the requisite declaration. ... Although the matter is not a simple one I am prepared to draw upon the inherent jurisdiction to make a declaration by way of analogy to the inherent jurisdiction to grant an interim injunction in similar circumstances.

**Principles**

[9] In reliance on the decision of Anderson J in *Area One*, Mr Clews submitted the following general considerations should apply to the application for stay:

- whether refusal to grant a stay would render the right of appeal nugatory;
- whether the successful party, the Commissioner, would be injuriously affected by a stay;
- the bona fides of the appellants as to prosecution of the appeal;
- the novelty and importance of the questions involved;
- the public interest in the proceedings; and
- the balance of convenience and the status quo.

[10] In the present application the focus is on the first two considerations. I accept the appellants are *bona fide* in bringing the appeal, in that they intend to pursue it. I also accept that the amended points on appeal are arguable and that the points raised are important, not just for the parties to this case but also as precedent for future investigations by the Commissioner.

[11] Two other preliminary issues arise out of the principles relied on by the applicants. The first is whether the concepts of "balance of convenience" and "status quo" really advance matters on an application for stay of this nature. Typically,

status quo and the balance of convenience are considerations more relevant to injunctive relief prior to a substantive hearing. The concepts had some relevance in *Area One* because the case had not been the subject of a full hearing. Interim relief had been sought and declined. The refusal of interim relief was appealed. In those circumstances the existing status quo assumed more relevance than it does when, as in this case, there has been a substantive hearing. While *Dymocks Franchise Systems (NSW) Pty Ltd v Bilgola Enterprises Ltd* (1999) 13 PRNZ 48 (HC and CA) is often cited as authority for the consideration of the status quo and balance of convenience on stay applications, the Court of Appeal did not expressly refer to the concept and at first instance Hammond J doubted whether it was a correct legal test on a stay application pending appeal: at [28]; p 54). I agree with Hammond J. I have some doubt as to the point of considering the concepts of preserving the status quo and balance of convenience as separate issues when the Court is considering the respective positions of the appellant and respondent under the first two heads in any event. To the extent they are relevant, they inevitably will be covered by consideration of whether the appeal will be rendered nugatory and the prejudice to the respondent.

[12] There was also some debate between counsel in their written submissions as to whether the applicant should face a higher threshold test when the respondent was a public authority. Ms Courtney submitted that was so, relying on the decision of *Smith v Inner London Education Authority* [1978] 1 All ER 411. For present purposes, while acknowledging that the case involved an injunction, I adopt the approach of Eichelbaum J in *De Luxe Motor Services (1972) Ltd v Wellington Education Board* HC WN CP38/88 25 November 1988 to that submission:

> Mrs Scholten referred to the defendant's position as a public authority, citing *Smith v Inner London Education Authority* [1978] 1 All ER 411. Reference was especially made to Lord Denning MR's opinion (p 418) that a higher threshhold test was applicable to public authorities, a distinction not favoured by Browne LJ (see p 419) nor one, so far as I am aware that has gained acceptance in this country. Where in my view a defendant's position as a public authority is relevant is that depending on the nature of its duties to the public, one may have to look at the question of the balance of convenience more widely (see per Browne LJ in *Smith v Inner London Education Authority* at p 422).

[13] I approach the application on the basis that because of the Commissioner's position, the Court can look at the balancing of interests of the appellant and respondent rather more widely, but that is not to say that the applicants face a higher threshold to achieve a stay.

**Basis for the stay**

[14] A number of affidavits have been filed in support of the application for stay. The applicants have filed two affidavits by Ms Denise Clark, one of the appellants, together with affidavits by Wendy Vooght, Lisa Watkins and a Dr Lamont. In response the Commissioner has filed an affidavit by a senior investigator, Ms Edwards, and has sought and obtained leave for a further affidavit of Ms Edwards (originally filed in the District Court) to be read.

[15] Ms Edwards notes that prior to the second hearing the applicants confirmed they did not intend to pursue the challenge in respect of hard copy documents. As a result of the limited access to those hard copy documents the Commissioner has ascertained that New Zealand taxpayers have participated in at least one arrangement considered to be a tax avoidance arrangement, the Employment Entitlement Plan (EEP). The Commissioner wishes to inspect the further computer records to continue his investigation and also intends to make the documents available (in New Zealand) to officers of the ATO.

[16] There is a vast amount of information held on the computer records seized by the Commissioner. The computerised information uplifted from the premises of Avowal alone amounts to approximately 1.5 terrabytes which, if printed out, would create a tower 36 kilometres high. The practical position is that it will take some months, if not years, for the Commissioner to review the material.

[17] In large part, the affidavits filed on behalf of the applicants appear to be directed at convincing the Court the only tax arrangement in issue is the EEP, that no records relating to that are held on the seized computer drives, and that the Commissioner has all the information about New Zealand taxpayers that he needs in order to pursue any action in relation to them. Ms Vooght, who was an applicant in

the judicial review proceedings but who is not an appellant, says in her affidavit that between 2001 and 2004 she provided administration services on a contract basis to Avowal related primarily to the EEP. She says that none of the documents she produced relating to that plan could possibly be on the Avowal server as to her knowledge no electronic copies were kept.

[18] Dr Lamont gives evidence that about four years ago he became the technical director to businesses associated with Avowal and had input into the development of the product ruling made to the Inland Revenue Department in relation to the EEP. He says that Avowal commenced business in 2006 and the Avowal computer server does not contain EEP files. He expresses the opinion that given the material the Inland Revenue Department already has there will be no impediment in it identifying clients associated with the EEP or identifying the issues in producing consistent position paper document in relation to each client.

[19] Ms Watkins, who again was an applicant in the judicial review proceedings, but is not an appellant, details her involvement in relation to the development of the EEP documentation while she was an employee of Atlas Trustees Limited. She deposes that as far as she is aware no New Zealand client files were placed on the Avowal server. She expresses the opinion that in her view as long as the IRD is provided with a pro forma set of documents the client name and the amounts the IRD would have all of the available information it would be entitled to.

[20] Ms Clark expresses her concern that any successful appeal will have no effect if the Commissioner is able to have unrestricted access to the information seized. She also says that there are a large number of unrelated third parties whose documents were on the Avowal server and also on the computer at Motueka River Lodge. In her second affidavit Ms Clark says that the Commissioner will be able to issue assessments prior to the time bar if he elects to do so, and says that there were no other arrangements other than the EEP that the Commissioner could properly have an interest in. She says all the participants in it have been identified.

[21] There is force in Mr Pike's criticism of the affidavits filed on behalf of the applicants. To the extent they repeat matters raised at trial they are irrelevant. To

the extent that they seek to convince the Court there is no purpose in the Commissioner inspecting the computer records or considering the material further it seems to be a case of they "doth protest too much". It is not for the applicants and their deponents to determine whether the Commissioner has all the information he needs to make appropriate decisions under the relevant tax legislation, that must be a matter for the Commissioner to determine.

[22] The Commissioner and this Court are also entitled to treat the evidence that there is no further relevant information available with a degree of caution. Ms Clark has recently been held not to be a reliable witness in taxation proceedings in Australia: *Brown v Commissioner of Taxation* [2006] AATA1107. Mr Clews suggested the finding was unfair, but it was a finding by a Judge after hearing. Further, the applicants' own affidavits raise issues. Ms Clark says that she represents the Bayoud Family Group, based in Lebanon, with a management team in Malaysia. The group own Avowal Administrative Attorneys Holdings Limited based in Hong Kong, which is the shareholder of the first applicant. As Mr Pike pointed out, Ms Clark's affidavit of 11 February 2009 was the first time that was disclosed. Mr Clews took instructions and advised that the relationship was disclosed by Dr Boyd in an affidavit sworn in September 2007 and that he was instructed Dr Boyd was in fact a Bayoud who took the name of Boyd. Dr Boyd does not disclose that in the affidavit referred to, and nor does he expressly disclose the relationship referred to by Ms Clark. All he says is that the Bayoud family are the "ultimate beneficial owners" of many entities the searches relate to.

[23] Next, Mr Petroulias, who is a significant participant in the operation under investigation has been convicted of corruption during his time as an officer with the Australian Tax Office. While Mr Clews pointed out that the conviction relates to actions that took place some years ago, Mr Petroulias' recent actions also provide cause for concern. Ms Edwards attached email correspondence between Mr Petroulias and other parties where during the email exchanges it was said to be "urgent getting things (electronic and physical files) removed from the [Avowal] office". The flavour of the communications is that Mr Petroulias and, it follows Avowal, had something they did not want the authorities to find.

**Submissions on principal issues**

[24] I return to the applicants' submissions on the main issues, namely whether, if a stay is not granted the appeal rights will be rendered nugatory and the prejudice to the Commissioner in a stay. Mr Clews submitted that if a stay is not granted pending the appeal, then even if the appeal was successful it would be worthless, because although an institutional blind eye may be turned by the Commissioner to information, individual officers concerned would make decisions affecting the applicants based on what they know and what they are deemed to know.

[25] Next, Mr Clews noted that inspection of the records will mean that many people whose affairs would otherwise have remained confidential will be seen and could be used by the Commissioner or supplied to overseas authorities.

[26] Mr Clews then submitted that the Commissioner could not resist a demand by the Australian Tax Office for that information under the double tax agreement and once information has been supplied outside New Zealand no amount of institutional amnesia on the part of the Commissioner could prevent the information being used by parties beyond the jurisdiction of the New Zealand Courts. The applicants are particularly concerned at the prospect the ATO could have access to the documents.

[27] Mr Clews submitted that, on the other hand, the Commissioner would not be prejudiced by a stay. He submitted that if the Commissioner was of the view that the one structure identified so far involved tax avoidance, namely the EEP structure then the Commissioner could notify proposed adjustments (NOPAs). Mr Clews submitted there was no basis for concern by the Commissioner that the appellants or any of them had been engaged in fraud or dishonesty, but if there had been fraud the timebar would not apply against the Commissioner in any event.

[28] Mr Clews accepted that the Commissioner's statutory duties under the Tax Administration Act included preserving the integrity of the tax system, but submitted the integrity of the tax system is defined to include:

- tax payer perceptions of that integrity;

- the rights of tax payers to have their liability determined fairly, impartially and according to law;

- the responsibilities of those administering the law to do so fairly, impartially and according to law

all of which meant that public interest lay in the Commissioner exercising his powers in a lawful fashion. He submitted there is no public interest in the Commissioner simply investigating, assessing and collecting taxes as he sees fit. He must act according to law and within the law.

[29] Mr Clews also addressed the merits of the points on appeal. I do not propose to discuss the merits in any detail. I have already accepted for present purposes that the points that are raised are not frivolous and are arguable. However, there are difficulties with the challenge to the seizure at the Avowal premises. Not only was the material seized without review because the appellant claimed privilege but, in addition, consent was given to the removal of the computer records.

**Decision**

[30] The principal issue on the application for stay is whether the appellants' rights would be rendered nugatory if the Commissioner was permitted to review the information contained on the hard drives and take steps in reliance on that information but then subsequently the appeal is allowed. The Commissioner wants to review the information and also proposes to make it available, in New Zealand, to officers of the ATO for review. Depending on what the review discloses, the Commissioner may then issue NOPAs and pursue tax that may be assessed as due in New Zealand.

[31] If the appellants ultimately succeed, then the copies of the computer hard drives will be destroyed or returned to the appellants and neither the Commissioner nor the ATO will be able to use the information contained on those hard drives. As Mr Pike confirmed the Commissioner accepts that if, pending the appeal, he is able to review that information but the appeal is allowed, then in addition to the hard

drives being destroyed or returned at his cost, all information obtained as a result of the review will be deleted from the Inland Revenue records and any assessments based on that information will have to be unwound. If that is done, then the only prejudice to the applicants will be that, for a period of time, the Commissioner (and perhaps the ATO) will have had access to information which they should not have, but which importantly, they will not be able to use against the applicants, or for that matter any other party.

[32] On that basis, I cannot accept the applicants' submission that a successful appeal would be rendered nugatory if the Commissioner is able to review the information pending the appeal. The information obtained as a result of the review will not be able to be used against the appellants.

[33] Ms Edwards deposes, and I accept, that the Commissioner has taken steps with the information he has already been able to review (the hard copy information) to identify it and use it in a way that any use or derivative use can be unwound. Similar steps can be taken in relation to material from the hard drives.

[34] The role and responsibility of the Commissioner and his officers is important when considering this issue. The Commissioner is a public official subject to the Official Information Act 1982 and Parliamentary enquiries. The Commissioner and his officers are subject to the secrecy provisions in the legislation. The effect of s 81 of the Tax Administration Act 1994 is to control and restrict the use to which the Commissioner can put the information he may obtain on any such review. If the appeal is successful then the Commissioner would clearly not be holding information for the purposes of the revenue acts and he and his officers are bound to preserve the secrecy of it.

[35] The concern that information relating to third parties may be seen by the Commissioner can also be addressed. To the extent issues of privilege arise, a process is provided to recognise and deal with claims to privilege. To the extent the information discloses parties with a relationship to the appellants and is relevant to the Commissioner's tax inquiry, there is no principled reason why the Commissioner could not use it (subject, of course to it being undone in the event the appeal

succeeds). To the extent it concerns third parties and is not relevant to the inquiry at all, the Commissioner will not be interested in it and the secrecy provisions of the Act will apply. If criminal activity is disclosed and the Commissioner has an obligation to pass it on, then the affected party will have rights to challenge the use of that information in any subsequent criminal proceedings.

**Decision**

[36] In my judgment, the applicant's argument that the appeal will be rendered nugatory is overstated. Their proper concerns can be addressed by the Commissioner's agreement to unwind any assessments or other action taken in reliance on the information. Against that there is a real risk of prejudice to the Commissioner from the delay associated with the appeal in this case. The effect of s 108 of the Tax Administration Act 1994 is that the Commissioner is unable to amend a taxpayer's assessment so as to increase the amount of tax assessed after the expiration of four years from the date the return was furnished. Returns relating to the 2004 income year became time barred 31 March 2009. Mr Clews accepted that there could be tax avoidance arrangements that were not fraudulent, so the fraud exception is not a complete answer to the time bar.

[37] Nor can it be said as the applicants argue, that the Commissioner has already identified all relevant parties and has sufficient information to conclude his investigation. The investigation is directed at a number of parties other than the ones referred to in the applicant's affidavits. The investigation will also consider the role of promoters, sub-promoters, vehicle entities facilitating arrangements and all other participants in the arrangements. The Commissioner is not satisfied that all participants have been identified to date. He does not have to accept the applicants' word on that.

[38] There is also force in the Commissioner's concern over the ability to recover debts arising from increased assessments of tax.

**Conclusion**

[39] Standing back and looking at the matter overall the applicants fail to make out their case for a stay against the Commissioner pending the hearing of the appeal.

[40] In coming to that conclusion I record that I have been influenced by and rely upon both the evidence for the Commissioner and counsel's submissions on behalf of the Commissioner that in reviewing the information the Commissioner will put in place a process to ensure that the information reviewed will be able to be identified in such a way that if, ultimately the appellants are successful, the Commissioner will be able to unwind any use or derivative use that information may have been put to and that the Commissioner will carry out that unwind at his cost.

[41] That leaves the issue of whether in the circumstances the information should be made available to officers of the ATO as is intended. Mr Clews emphasised the applicants were particularly concerned about that given the background to the relationship between the applicants and the ATO. In response Mr Pike submitted that the Commissioner of Taxes in Australia and his officers in the ATO are just like the Commissioner in New Zealand, responsible government officers and there is no reason to suggest that they would not act appropriately and properly. In principle of course I accept that but, as noted I rely in this case on the evidence before the Court and counsel's confirmation and submissions as to the express acceptance by the Commissioner in New Zealand of the steps that will be taken in relation to the use of the information. At present there is no such express confirmation before the Court on behalf of the ATO.

[42] The matter could be addressed by an appropriately senior officer of the ATO providing an affidavit to this Court to confirm that the ATO would put in place a process to ensure that the information reviewed by the ATO will be able to be identified in such a way that the ATO would be able to unwind any steps or action taken on the basis of information the ATO might obtain from a review of the documentation and also confirm that the ATO would carry out such an unwind at the ATO's costs. Provided such an affidavit is sworn and filed in these proceedings then there could be no objection to the material being made available to the ATO officers

in New Zealand for review on that basis. The Commissioner should not however make the information available until such an affidavit is sworn.

**Result**

[43] The existing order made by agreement that the Commissioner's investigators will not commence reviewing the electronic information from the Avowal and Motueka River Lodge premises is set aside.

[44] There will be a declaration that the Commissioner should not make the electronic information available to the ATO officers until an affidavit as contemplated by [42] is sworn and filed in these proceedings. For the avoidance of doubt once such an affidavit is filed the Commissioner may make the electronic information available to the ATO officers for their review.

[45] Otherwise the Commissioner may review the electronic information pending the hearing of the appeal on the understanding discussed at [40].

**Costs**

[46] The Commissioner as successful respondent is entitled to costs which are to be on a 2B basis for the application and hearing together with disbursements as fixed by the Registrar.

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Venning J