IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2006-404-007264

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

Judgment: 22 May 2009 at 11.00 a.m.

RECALL JUDGMENT OF VENNING J

This judgment was delivered by me on 22 May 2009 at 11.00 a.m. 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

[1] The Registrar has referred a memorandum from the applicants' counsel seeking clarification of the judgment dated 8 May 2009 to me. The memorandum was filed on 18 May 2009. A response was filed by the respondent on 20 May 2009.

[2] Although the applicants' memorandum refers to clarification, in part it seeks amendments to the judgment. The usual course where clarification or amendment to the judgment is sought is to apply for recall: r 11.9. Reference can also be made to the recent case of: *Ben Nevis Forestry Ventures Ltd & Ors v Commissioner of Inland Revenue* [2009] NZSC 40. However, rather than requiring a formal application for recall I propose to deal with the matter on the basis of counsels' memoranda.

[3] The judgment of 8 May 2009 related to the applicant's application for orders in the nature of stay pending the hearing of the appeal from the substantive decision in this matter. The judgment confirmed the Commissioner could review and use the electronic material on the basis set out at [31] and [41]. The effect (and also the intent) of the judgment was that the ATO could also review and use the electronic material if an affidavit in the terms referred to in [42] of the judgment was sworn and filed by a senior officer of the ATO.

[4] The memorandum seeks to clarify the basis upon which the Australian Tax Office (ATO) can review the electronic documents prior to the hearing of the appeal. Mr Clews raises four matters in the memorandum. The first is:

> (a) Your Honour provided for the ATO affidavit to be filed but made no order as to the Applicants being served with the affidavit. They should be served.

[5] I agree that the affidavit to be filed by the ATO should be served on the parties. The judgment will be amended accordingly.

[6] The second matter is:

> (b) The judgment is silent as to whether the Applicants could be heard on the content of the ATO affidavit and its adequacy to meet the Court's requirements and their concerns. If this was overlooked

> they seek confirmation that they have leave to apply to be heard within 7 days of being served with the ATO affidavit.

[7] The reason the judgment does not provide a process for the applicants to be heard in relation to the affidavit filed is because I did not intend there would be any further hearing on that issue. As the judgment notes, I accepted the evidence filed on behalf of the Commissioner and counsels' submissions as to the steps the New Zealand Commissioner would take to ensure that the appeal was not rendered nugatory from the applicants' point of view if they were ultimately successful. Nothing further is required from the Commissioner. The judgment went on to record that I would be prepared to accept the same assurances if contained in an affidavit filed on behalf of the ATO. The judgment identified the matters the affidavit was to address. The purpose of the affidavit is to satisfy the Court's requirement on that issue.

[8] The applicants have already been heard on the issue of access by the ATO pending the appeal. Their concerns in relation to that were recorded and considered in the judgment. I did not intend the applicants would be heard further on the content of the affidavit because I had already considered and settled what was required to be in the affidavit in the judgment. For that reason no provision was made for the applicants to be heard further.

[9] To give practical effect to the judgment on this aspect, I anticipate the Registrar will refer the affidavit to me when filed. Provided the affidavit addresses the issues identified in [42] of the judgment nothing further will be required. The terms of the declaration will be satisfied. To avoid doubt, I will issue a minute to that effect. If, on the other hand, I consider the affidavit does not adequately address the issues in [42] of the judgment I will again set that out in a minute and, if necessary, may relist the matter.

[10] The third matter is:

> (c) Your Honour's judgment records reliance on the Commissioner's representations (written and oral) that electronic information will be made available to the ATO *in New Zealand*. The Applicants wish to clarify that this does not permit information to be copied (by the

> IRD or the ATO) and provided to the ATO for removal from New Zealand.

[11] It is implicit in the judgment that the review (by both the CIR and the ATO once the affidavit is filed) may necessitate further copying of some of the information in the course of the review: see [31]. Further, while the review of the electronic information by the ATO officers is to take place in New Zealand, (as raised in submission and referred to at [42]) the purpose of the search in the first place was to assist the ATO. It follows that the information reviewed by the ATO officers in New Zealand will be used by the ATO in Australia. That will necessitate the removal of the relevant information (once reviewed) to Australia and its use there. That was the reason an affidavit was required from the ATO. So while, (once the affidavit is filed), the initial review will take place in New Zealand, I confirm that relevant electronic materials may later be copied and removed to Australia.

[12] The fourth question raised is:

> (d) The declarations made by Your Honour could be taken to mean that the Commissioner is permitted to begin reviewing electronic material immediately, whereas there are still claims of privilege in relation to the accessed information which need to be resolved. The declarations should be subject to those matters being attended to.

[13] Again, it was implicit in the judgment that the review of the electronic information was subject to the issue of privilege. That issue had been expressly referred to at para [35] of the judgment. The Commissioner accepts that. To the extent that the matter needs to be clarified further I confirm that the review process must, of course, incorporate provisions to deal with the issue of the privilege claimed on behalf of the applicants.

Result

[14] I recall the judgment and amend [44] to read:

> [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 and served the

> Commissioner may make the electronic information available to the ATO officers for their review.

[15] Apart from that, I consider the other issues raised by the applicants are sufficiently clarified in the above paragraphs.

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Venning J