



# Court of Appeal of New Zealand

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## Russell v Taxation Review Authority [2011] NZCA 158 (19 April 2011)

Last Updated: 26 April 2011

IN THE COURT OF APPEAL OF NEW ZEALAND

CA65/2009  
[\[2011\] NZCA 158](#)

UNDER The Judicature Amendment Act 1972

BETWEEN JOHN GEORGE RUSSELL  
Appellant

AND THE TAXATION REVIEW AUTHORITY  
First Respondent

AND COMMISSIONER OF INLAND REVENUE  
Second Respondent

Hearing: 8 March 2011

Court: Glazebrook, Wild and Clifford JJ

Counsel: Appellant in Person  
No appearance for the First Respondent (which abides the Court's decision)  
M J Ruffin and C R Gwyn for the Second Respondent

Judgment: 19 April 2011 at 3.30 p.m.

### JUDGMENT OF THE COURT

**A The appeal is dismissed.**

**B. The appellant is to pay the second respondent's costs as for a standard appeal on a band A basis, with**

## usual disbursements.

### REASONS OF THE COURT

(Given by Wild J)

#### Introduction

[1] Judge Barber, in a decision on 27 July 2005, had refused an application by the appellant (Mr Russell) to recuse himself as Taxation Review Authority (TRA) from hearing a proceeding brought by Mr Russell challenging tax assessments by the Commissioner of Inland Revenue (the Commissioner). In a judgment he delivered on 19 December 2008, Cooper J upheld that decision. The issue put to us on this appeal is whether Cooper J was in error.

[2] In contending Cooper J erred, Mr Russell does not suggest the Judge misstated the law. Nor does he suggest the Judge overlooked any of the three factual grounds on which Mr Russell based his recusal application. Rather, Mr Russell argues that when the law is applied to the facts of this case, disqualification of Judge Barber from hearing Mr Russell's challenge proceeding should have resulted, and that Cooper J erred in holding to the contrary.

[3] We do not need to decide that issue. That is because we consider any apparent bias on Judge Barber's part has been cured by Wylie J's judgment<sup>[1]</sup> on Mr Russell's appeal to the High Court from Judge Barber's substantive decision on his tax challenge, with the result that this appeal must be dismissed. Before explaining our reasons for that conclusion, we set out the background and state the law.

#### Background

[4] Mr Russell practised as a chartered accountant. He contrived a scheme – the so-called “Russell template” – to enable a taxpayer to avoid paying income tax. He made this available to his clients, starting around 1985. Broadly, the Russell template involved entities controlled by Mr Russell purchasing a profitable trading company (or companies) from the client. The Russell controlled entities paid the purchase price by instalments roughly equating to the profits of the company, which the client continued to run as if no ownership change had occurred. Maintaining that the payments were capital rather than revenue, the client did not declare them as taxable income. This brief summary of the Russell template suffices because its detail is irrelevant to this appeal.<sup>[2]</sup>

[5] The Commissioner regarded the Russell template as a tax avoidance arrangement contravening s 99 of the Income Tax Act 1976 and s GB(1) of the Income Tax Act 1994. In assessing the Russell clients who used the template for income tax, the Commissioner disregarded the arrangement. Successively, Russell clients objected to the Commissioner's assessments.

[6] In approximately 65 cases heard by the TRA over the period 1989 to 2005, Judge Barber consistently disallowed the taxpayer's objection, and upheld the Commissioner's assessment. Whenever a taxpayer appealed the TRA's decision, appellate Courts upheld the TRA. At least one of the cases went as far as the Privy Council where Lord Hoffman, giving their Lordships' reasons, described the arrangements comprising the Russell template as “highly artificial”, and categorised it as “a plain case” of tax avoidance caught by s 99 of the Income Tax Act 1976.<sup>[3]</sup>

[7] Having assessed the taxpayers who used the Russell template, the Commissioner then addressed Mr Russell's own tax position. Through a web of entities he controlled, Mr Russell had purported to offset the profits resulting from the sale of the Russell template arrangement and the receipt of a 5% consultancy fee against tax losses accumulated by companies that had been purchased by Russell controlled entities.<sup>[4]</sup> As Mr Russell considered he had not personally received any of the resulting taxable income, he did not declare any of it. The Commissioner disagreed and assessed Mr Russell for some \$15 million. When accumulated shortfall penalties and interest were added to this, the Commissioner claimed Mr Russell owed a total of some \$138 million.

[8] Mr Russell challenged those assessments. On 26 May 2005 he applied to the TRA that Judge Barber recuse himself from hearing Mr Russell's challenge proceeding. Judge Barber, in a decision on 27 July 2005, declined to disqualify himself.<sup>[5]</sup> Mr Russell responded by seeking judicial review of

Judge Barber's decision. He did that in a proceeding he commenced in the Auckland High Court on 15 September 2005. He named the TRA as first defendant, and the Commissioner as second defendant. Quite properly, the TRA indicated it abided the Court's decision. But the Commissioner actively defended the proceeding.

[9] Pursuant to s 8 of the Judicature Amendment Act 1972, Mr Russell sought an interim order prohibiting Judge Barber from hearing his challenge proceeding. He did that because Judge Barber was scheduled to begin hearing the proceeding on 3 October 2005, initially dealing with contested discovery issues, for which the Judge had allocated four weeks of hearing time.

[10] In a judgment on 29 September 2005, Keane J declined to make any interim order.<sup>[6]</sup> He was informed that hearings and rulings on discovery and inspection were expected to occupy the remainder of 2005, and that the substantive hearing was unlikely to start until the second half of 2006. Keane J took the view that Judge Barber should not be precluded from dealing "even with the discovery and management phases" of the proceeding during which he saw "little or no room for bias and predetermination".<sup>[7]</sup> The Judge added:<sup>[8]</sup>

Moreover, should Judge Barber in the discovery or management phases act in a way Mr Russell contends is coloured by bias, he will retain his remedy. In his statement of claim, on which his substantive application rests, there is a retrospective prayer directed to just that possibility.

[11] Keane J may have envisaged a result in the substantive judicial review proceeding before the substantive hearings of Mr Russell's challenge proceeding began. For whatever reason(s) – and they were not explained to us – that did not happen. Although neither Mr Russell nor counsel for the Commissioner could be precise as to the timing, it seems that the substantive hearing of Mr Russell's challenge proceeding was underway at least by April 2008. Mr Ruffin based that on the existence of an agreed statement of facts dated 22 April 2008.<sup>[9]</sup>

[12] The substantive hearing of Mr Russell's judicial review application did not take place until 31 March-2 April 2008, with Cooper J delivering his judgment on 19 December 2008.<sup>[10]</sup>

[13] It is Mr Russell's appeal from that judgment of Cooper J that we are dealing with. Mr Russell filed his Notice of Appeal on 5 February 2009.

[14] The hearings of Mr Russell's challenge proceeding ended on 30 April 2009. Judge Barber gave his decision on 17 September 2009.<sup>[11]</sup> He decided each of the five process and eight substantive issues against Mr Russell, confirming the Commissioner's assessments and the shortfall penalties the Commissioner had imposed on Mr Russell.

[15] Mr Russell appealed the decision of the TRA. The appeal was set down for hearing before Wylie J in the Auckland High Court commencing on 26 July 2010. On 14 April 2010 Wylie J heard an application by Mr Russell to adjourn the appeal hearing until this appeal against the judgment of Cooper J was disposed of. Wylie J summarised the timing as it had been explained to him in this passage:<sup>[12]</sup>

... However, the hearing of this appeal was delayed. I understand that this was because the proceedings by Judge Barber were by then so far advanced that it made sense to wait for the Authority's determination before hearing the appeal on the disqualification issue. The Commissioner, at Mr Russell's request, consented to a delay by Mr Russell in filing his case on appeal. Eventually the case on appeal was filed and in February 2010, the appeal was allocated a fixture date of 5 August 2010.<sup>[13]</sup>

[16] Wylie J dismissed Mr Russell's adjournment application. He took the view that the Commissioner and the wider public were entitled to expect that the appeal would be dealt with promptly, particularly because a considerable amount of tax was at stake. He indicated a willingness to accommodate Mr Russell's counsel by adjourning the hearing of the tax appeal to enable counsel to attend the 5 August 2010 judicial review appeal fixture in the Court of Appeal.

[17] Wylie J heard the substantive tax appeal on 26-30 July and 3 August 2010, delivering his judgment with admirable promptitude on 3 September 2010.<sup>[14]</sup> He dismissed the appeal.

## The law

[18] Mr Russell alleged (both in his written and oral submissions) actual bias on Judge Barber's part. However, we clarified with Mr Russell that the nub of his complaint was that Judge Barber, after hearing and deciding 65 Russell template cases, was unable to change his mind or take a fresh look at the arrangements in issue. In short, Mr Russell alleged predetermination on Judge Barber's part in dealing with his challenge proceeding. In his 27 July 2007 ruling declining to recuse himself, Judge Barber made this self-assessment:[\[15\]](#)

... My personal view is that if it is in any way possible that I could show bias to the disputant to any degree, then I should recuse myself. However, I believe that I am only interested in the parties receiving full justice and fairness in this case in terms of whatever the facts, issues, and law may be. I am not prejudiced against the disputant in any way.

[19] Mr Russell submitted the Judge was honestly mistaken in believing he could put aside the views he had formed in the Russell template cases. That was, Mr Russell urged us, "not humanly possible". Mr Russell contended that the informed lay observer would say that Judge Barber could not hear Mr Russell's challenge proceeding with a fresh and open mind.

[20] It is clear from this that Mr Russell's allegation is of apparent bias, and not of actual bias, on Judge Barber's part.

[21] In *Saxmere Company Ltd v Wool Board Disestablishment Company Ltd*[\[16\]](#) the Supreme Court held that a Judge is disqualified "if a fair-minded lay observer might reasonably apprehend that the Judge might not bring an impartial mind to the resolution of the question the Judge is required to decide".[\[17\]](#) Blanchard J explained:[\[18\]](#)

... Two steps are required:

(a) first, the identification of what it is said might lead a judge to decide a case other than on its legal and factual merits; and

(b) secondly, there must be "an articulation of the logical connection between the matter and the feared deviation from the course of deciding the case on its merits".

The fair-minded lay observer is presumed to be intelligent and to view matters objectively. He or she is neither unduly sensitive or suspicious nor complacent about what may influence the judge's decision. He or she must be taken to be a non-lawyer but reasonably informed about the workings of our judicial system, as well as about the nature of the issues in the case and about the facts pertaining to the situation which is said to give rise to an appearance or apprehension of bias. ...

[22] The requirement for specificity and a degree of rigour in applying the test was emphasised by McGrath J:[\[19\]](#)

An important aspect of meeting the reasonable apprehension test which bears on its support of public confidence in the system is the requirement to be specific concerning the perceived connection between the circumstances giving rise to concern and whether they establish reasonable apprehension of impartiality. In this case the facts in relation to the association relied on must be spelt out, as well as why it is reasonable to be concerned that they, objectively, might lead the judge to decide the case other than on its true merits. Establishing the existence of an association is never of itself enough to disqualify the judge. It must be shown that its nature is such as to cause concern objectively that it may influence the judge's decision making. This requirement of articulation of the connection ensures that disqualification is not established through a superficial impressionistic reasoning. In other words, the public can be reassured that parties to litigation are not able to change composition of the court, or to have cases reheard following an unfavourable decision unless there is sound reason, based on principle, for that course.

[23] The nature of Mr Russell's allegation of apparent bias causes us to mention three further cases, and jurisprudence developed in the United States. The first of the cases is the English Court of Appeal's decision in *Locabail (UK) Ltd v Bayfield Properties Ltd*.[\[20\]](#) In a passage that has

subsequently been widely endorsed in both New Zealand and the United Kingdom,[\[21\]](#) the Court said this:[\[22\]](#)

... The mere fact that a judge, earlier in the same case or in a previous case, had commented adversely on a party or witness, or found the evidence of a party or witness to be unreliable, would not without more found a sustainable objection. ...

However, the earlier judgment of the High Court of Australia in *Livesey v New South Wales Bar Association*[\[23\]](#) demonstrates that there can be exceptions to the statement in *Locabail*. In *Livesey* two of the three Judges of the Court of Appeal of the Supreme Court of New South Wales had, in an earlier case, decided two of the central issues they were again required to deal with. And, in the previous case, both had discredited a critical witness who gave evidence in the later trial. The High Court was unanimous in its decision that the two Judges were disqualified from hearing the subsequent case. The third case is this Court's decision in *R v Palmer*.[\[24\]](#) Coincidentally, the issue there was also whether two of the three Judges who had heard an appeal should have recused themselves. This Court had little difficulty in holding that the two Judges were not disqualified. All this underlines the observation of the English Court of Appeal in *Locabail* that "every application (for recusal) must be decided on the facts and circumstances of the individual case".[\[25\]](#)

[24] The United States jurisprudence is discussed by Richard E Flamm in his text *Judicial Disqualification: Recusal and Disqualification of Judges*.[\[26\]](#) Based largely on the judgment of the United States Supreme Court in *Liteky v US*.[\[27\]](#) Flamm observes:[\[28\]](#)

The maxim that adverse rulings, standing alone, do not warrant disqualification applies regardless of whether the motion to disqualify is predicated on the judge's rulings in the same proceeding, a prior or different proceeding involving one or more of the same parties, or a proceeding that is only factually similar to a pending matter. The rule also applies without regard to the subject matter of the rulings, the type of case in which they were rendered, or whether the rulings were of a legal, factual, or evidentiary nature.

### **Cause of action estoppel**

[25] Mr Judd appeared for Mr Russell on his appeal to the High Court from Judge Barber's decision in Mr Russell's tax challenge proceeding. When the hearing began on 26 July 2010, Mr Judd advised Wylie J that Mr Russell was not pursuing several of his grounds of appeal, including ground 1. Ground 1 was an assertion that Judge Barber should have disqualified himself from hearing Mr Russell's challenge proceeding. Wylie J mentioned to Mr Judd that "if Mr Russell did not pursue the assertion made in ground 1 in the notice of appeal, this might well count against him when and if the (judicial review) appeal proceeds before the Court of Appeal". Wylie J gave Mr Judd the opportunity to discuss the position with Mr Russell. Having done so, Mr Judd confirmed his advice to Wylie J that Mr Russell chose not to pursue ground 1 on appeal. Wylie J then dismissed that ground along with the other grounds Mr Russell had chosen not to pursue. Wylie J recorded the discussion of this issue in his judgment.[\[29\]](#)

[26] The Commissioner's resulting position was summarised at the start of his written submissions to us in this way:

When the appeal against that substantive decision was heard before the High Court, the appellant did not pursue his first ground of appeal that the Authority should have disqualified himself. That ground of appeal was dismissed. In addition, the appeal proceeded on the basis that the appellant accepted the basic facts of the transactions set out in the Commissioner's statement of position and the Authority's decision.

There was no amplification of this in the Commissioner's submissions, beyond a reference to [71]-[73] of Wylie J's judgment.

[27] Strictly, what occurred before Wylie J is an absolute bar[\[30\]](#) to Mr Russell pursuing his complaint of apparent bias on this appeal. That is because a cause of action estoppel operates against him, as explained by Diplock LJ in *Thoday v Thoday*:[\[31\]](#)

... cause of action estoppel ... prevents a party ... from asserting or denying, as against the other party, the existence of a particular cause of action, the non-existence or existence of which has been determined by a court of competent jurisdiction in previous litigation between the same parties. If the cause of action was determined to exist ie judgment was given upon it, it is ... merged in the judgment. ... If it is determined not to exist, the unsuccessful plaintiff can no longer assert that it does; he is stopped per rem judicatam.

[28] We prefer not to dispose of this appeal on the basis that Mr Russell is estopped. Pursuing his apparent bias cause of action before Wylie J would have required Mr Russell to invite Wylie J to differ from the judgment Cooper J had given on 19 December 2008. Whilst not bound by that judgment, it is unlikely Wylie J would have differed from it, absent some cogent reason for doing so. None is suggested. The more logical course was for Mr Russell to pursue this appeal, which he had already brought, and as of right. Ideally, determination of this appeal should have preceded Wylie J's hearing of Mr Russell's substantive tax appeal. We note that Mr Russell's ill health was one of the reasons that thwarted that.

[29] To summarise, although strictly a cause of action estoppel stands in Mr Russell's path in pursuing this appeal, we prefer to deal with the appeal on its merits.

### **An arguable case for recusal**

[30] We noted above at [\[18\]](#) that the nub of Mr Russell's complaint against Judge Barber is pre-determination. The Judge having spent over 15 years dealing with Russell template cases, Mr Russell contends he was simply unable to bring a fresh and open mind to bear on the arrangements entered into by Mr Russell, which the Commissioner regarded as tax avoidance. Mr Russell maintained the result before the TRA bore out his concerns.

[31] Sensibly, Mr Russell accepted that there could be no objection to Judge Barber dealing with all the template cases, for the very reason that the arrangement in issue in each was a template one. Much of the evidence was transported from one case to the next. There was no application to Judge Barber to disqualify himself.

[32] However, Mr Russell submitted that the arrangement in question in his own tax challenge proceeding was different from that under scrutiny in the Russell template cases. We accept that. No longer was the spotlight on the arrangement pursuant to which the taxpayers in the Russell template cases claimed they had received capital payments not liable to income tax. Scrutiny had shifted to the arrangement pursuant to which the entities controlled by Mr Russell dealt with the income from selling the Russell template to taxpayers and the consulting fee. The two arrangements were obviously related, but they were different.[\[32\]](#)

[33] There are good arguments both ways about some of the aspects of Mr Russell's recusal argument. Take, as an example, Judge Barber's comments in *Case R25*.[\[33\]](#) *Case R25* was one of the Russell template cases. In the course of his decision Judge Barber variously described the Russell template as "patently an arrangement for tax avoidance"[\[34\]](#), "a blatant case of tax avoidance"[\[35\]](#), and as of involving "the brazen conversion of assessable income into non-assessable capital"[\[36\]](#). However, it was the following observations that were the focus of Mr Russell's concern:[\[37\]](#)

In my view JGR (Mr Russell) is a person who is in business substantially as a tax avoidance specialist as well as an accountant and business consultant. Inter alia, he is also a specialist at receiverships and liquidations. In the course of that, he provides experienced commercial advice. Mr Grierson described JGR as "The Great Tax Mitigator" and "The Old Master of Tax". Mr Ruffin suggested that "The Master Tax Avoider" is more apt. The officers of the respondent's Department are very concerned that the respondent's obligations towards all taxpayers be carried out properly and that seeming avoidance schemes of JGR be disposed of fairly and as soon as possible, because of their implications on The Revenue and because of the number of taxpayers involved. Just as I think that JGR's obsession with saving tax means that he has a mental block over schemes which have gone beyond tax planning into the realm of tax avoidance, so the sense of duty within the respondent's Department may have become close to an obsession for some officers of the Department who, after all, are deployed almost full-time on JGR matters. ...

[34] Those comments were forcefully adverse to Mr Russell. They provide support for his submission that the Judge who made those comments should have recused himself from deciding whether a different, but related, arrangement entered into by Mr Russell was tax avoidance.

[35] But there are counter points. First, as Mr Ruffin pointed out, Judge Barber's decision in *Case R25* was not wholly adverse to Mr Russell. The Judge partly restored [\[38\]](#) the deductibility of Mr Russell's consultancy fee, which the Commissioner had wholly disallowed. Secondly, the Judge gave his decision in *Case R25* on 13 July 1994 – some 14 years before he embarked in 2008 on hearing Mr Russell's challenge proceeding. In *Locabail* the English Court of Appeal observed: [\[39\]](#)

... The greater the passage of time between the event relied on as showing a danger of bias and the case in which the objection is raised, the weaker (other things being equal) the objection will be.

[36] Thirdly, we reiterate the point that no-one objected, following Judge Barber's decision in *Case R25*, to his hearing the further Russell template cases.

[37] We need not grapple with Mr Russell's "process" complaints about Judge Barber, for example that he denied Mr Russell proper discovery, or curtailed his cross-examination of witnesses.

[38] It is sufficient for us to acknowledge the possibility that Mr Russell had some basis for objecting to Judge Barber hearing his case. For reasons we now explain, we do not need to decide whether Cooper J erred in upholding Judge Barber's refusal to recuse himself.

### Appeal by way of rehearing

[39] The appeal to the High Court from Judge Barber's substantive decision of 17 September 2009 was pursuant to s 26 of the Taxation Review Authorities Act 1994. Although that Act specifies the way in which the case on appeal is to be prepared, it is silent as to the conduct of the appeal. That is governed by the High Court Rules, which apply to the appeal. [\[40\]](#)

[40] The High Court Rules provide that the appeal was by way of rehearing. [\[41\]](#) "Rehearing" has a settled meaning in the law. It involves an appeal court reaching its own conclusion based on the material presented to the first instance decision maker (here the TRA), plus any further evidence admitted on the appeal. [\[42\]](#)

[41] The correct approach on an appeal such as Mr Russell's is as mandated by the Supreme Court in *Austin Nichols & Co Inc v Stichting Lodestar*. [\[43\]](#) In particular, the Supreme Court said: [\[44\]](#)

Those exercising general rights of appeal are entitled to judgment in accordance with the opinion of the appellate court, even where that opinion is an assessment of fact and degree and entails a value judgment. If the appellate court's opinion is different from the conclusion of the tribunal appealed from, then the decision under appeal is wrong in the only sense that matters, even if it was a conclusion on which minds might reasonably differ. In such circumstances it is an error for the High Court to defer to the lower Court's assessment of the acceptability and weight to be accorded to the evidence, rather than forming its own opinion.

[42] Dealing with the background facts at [7] and [8] of his judgment, Wylie J referred first to the large amount of documentary evidence filed, we gather in the form of agreed folders of documents. He listed the witnesses called by Mr Russell and by the Commissioner, recording the length of one of the briefs of evidence. He mentioned that the notes of evidence totalled 2455 pages. Wylie J then said this: [\[45\]](#)

... Moreover, during the hearing, the parties presented the Authority with an agreed statement of facts. In itself this is a lengthy document. It is 123 pages (467 paragraphs) long.

In its decision, the Authority referred to the agreed statement of facts and recorded that, if necessary, it could be made a schedule to its decision. It can similarly be annexed to this decision. The following is very much a truncated summary.

[43] Thus, the summary of facts that occupies [9] to [58] of Wylie J's judgment is a truncated

summary of the agreed statement of facts.

[44] In [71]-[74] Wylie J deals with the notice of appeal. After formally dismissing the appeal in respect of the grounds Mr Russell's counsel advised him were not being pursued (one of which was the recusal ground), Wylie J turned to the five live issues. They can shortly be summarised thus:

- (a) Was Judge Barber wrong to find there was an arrangement as alleged by the Commissioner?
- (b) Was the Judge wrong to find that the alleged arrangement was a tax avoidance arrangement?
- (c) Was the Judge wrong to find that Mr Russell was affected by the alleged tax avoidance arrangement?
- (d) Was the Judge wrong to find that Mr Russell obtained a tax advantage from the alleged arrangement?
- (e) Must any reconstruction involve only the commercial management partners?[46]

[45] Wylie J then proceeded to decide these issues. The effect of his "rehearing" those issues was that he formed his own opinion on them. And he did that, not upon facts which had been found by Judge Barber in the TRA, but upon agreed facts. In saying this, we do not overlook Mr Russell's submission to us in reply that, although he signed the agreed statement of facts, it was not in fact agreed. But by signing the agreed statement of facts, Mr Russell must be taken to have agreed to it. It follows that, even if apparent bias affected Judge Barber's decision, and Cooper J erred in holding that Judge Barber was not required to recuse himself, the situation has been cured by the judgment of Wylie J on appeal. Upon undisputed facts Wylie J decided the issues with a fresh mind, unaffected by any suggestion of apparent bias or predetermination.[47]

## Result

[46] The appeal is dismissed.

[47] Mr Russell must pay the Commissioner's costs of the appeal as for a standard appeal on a band A basis, together with usual disbursements.

Solicitors:

Crown Law Office, Wellington for the First and Second Respondents

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[1] *Russell v Commissioner of Inland Revenue (No 2)* [2009] NZCA 568; (2010) 24 NZTC 24,463.

[2] The template arrangement is described in more detail at [6]-[8] of the judgment of the Privy Council in *Miller v Commissioner of Inland Revenue* [2001] UKPC 17, [2001] 3 NZLR 316.

[3] *Miller v Commissioner of Inland Revenue* [2001] UKPC 17 at [9].

[4] These arrangements, detailed in evidence which Wylie J described as "of labyrinthine complexity", are summarised in [11]-[33] of his judgment.

[5] *Russell v Commissioner of Inland Revenue* TRA 003/03 Decision No 10/2005, 27 July 2005.

[6] *Russell v The Taxation Review Authority & Anor* HC Auckland, CIV 2005-404-5203, 29 September 2005.

[7] At [45].

[8] At [46].

[9] This is referred to in [2] of Judge Barber's decision cited in footnote 11 following.

[10] *Russell v The Taxation Review Authority & Anor* HC Auckland CIV 2005-404-5203, 19 December 2008.

[11] Reported as *Case Z19* (2009) 24 NZTC 14,217.

[12] *Russell v Commissioner of Inland Revenue* [2009] NZCA 568; (2010) 24 NZTC 24,181 at [3].

[13] This Court's record shows that the 5 August 2010 fixture was vacated on 26 July 2010 on the appellant's application on grounds of ill health. The Commissioner consented to the adjournment.

[14] *Russell v Commissioner of Inland Revenue (No 2)* (2010) 24 NZTC 24,463.

[15] *Russell v Commissioner of Inland Revenue* Decision No. 10/2005, 27 July 2005 at [38].

[16] *Saxmere Company Ltd v Wool Board Disestablishment Company Ltd* [2009] NZSC 72; [2010] 1 NZLR 35.

[17] Per Blanchard J at [3], McGrath J at [89], Gault J at [121] and Anderson J at [127].

[18] At [4]-[5].

[19] At [93].

[20] [1999] EWCA Civ 3004; [2000] 1 All ER 65 (CA).

[21] In New Zealand, see: *Jessop v R* [2007] NZSC 96 at [6]; *Ida Valley Holdings Ltd v Roberts* [2010] NZCA at [5]-[9]; *WAH v WTW* [2010] NZCA 577 at [22]- [25]; *Man O'War Station v Auckland City council* [2001] 1 NZLR 552 at [17] (upheld by the Privy Council in *Man O'War Station v Auckland City Council (Judgment No 1)* [2002] UKPC 28; [2002] 3 NZLR 577); and *Taylor v R* [2010] NZCA 628 at [5]. In the United Kingdom, see *Diedrichs-Shurland v Talanga-Stiftung* [2006] UKPC 58 at [22].

[22] At [25].

[23] [1983] HCA 17, (1983) 151 CLR 288.

[24] CA334/03, 18 October 2004.

[25] At [25].

[26] (2nd ed) Banks and Jordan Law Publishing Co, Berkley CA, 2007) at Chapter 16.

[27] (1994) 510 US 540; 114 S. Ct 1147 (1994).

[28] At p 444.

[29] *Russell v Commissioner of Inland Revenue (No 2)* [2009] NZCA 568; (2010) 24 NZTC 24,463, at [72]-[73].

[30] *Joseph Lynch Land Co Ltd v Lynch* [1995] 1 NZLR 37 (CA) at 41, applying *Arnold v National Westminster Bank Plc* [1991] 2 AC 93 at 104, although there is a slightly more equivocal statement in *Meates v Taylor* [1992] 2 NZLR 36 (CA) at 40.

[31] [1964] P 181 at 197-198.

[32] Wylie J made this point in his judgment, *Russell v Commissioner of Inland Revenue (No 2)* [2009] NZCA 568; (2010) 24 NZTC 24,463, in footnote 4 at 24,498.

[33] (1994) NZTC 6,120.

[34] At 6,130.

[35] Also at 6,130.

[36] At 6,132.

[37] At 6,144.

[38] At 6,138.

[39] At [25].

[40] High Court Rules, r 20.1.

[41] High Court Rules, r 20.18.

[42] The authorities are collected in *McGechan on Procedure* at HR20.18.01.

[43] [2007] NZSC 103, [2008] 2 NZLR 141.

[44] At [16].

[45] At [7]-[8].

[46] This refers to the partners in an entity called Commercial Management Partnership.

[47] This gives effect to the test for determining whether an appeal can cure a denial of natural justice in an earlier proceeding, as set out by Tipping J in *Nicholls v Registrar of the Court of Appeal* [1998] 2 NZLR 385 (CA) at 436-437, and approved by this Court in *Malkit Singh v Attorney-General* [2000] NZAR 135 (CA) at 141 and *White v New Zealand Stock Exchange* [2002] NZAR 342 (CA) at [27]-[28].

