

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

**CIV 2006-485-1228 to 1230**

|         |  |
|---------|--|
| UNDER   | the Income Tax Act 1994 and the Tax<br>Administration Act 1994 |
| BETWEEN | YANDINA INVESTMENTS LIMITED<br>Plaintiff                       |
| AND     | DORSET ENTERPRISES LIMITED<br>Second Plaintiff                 |
| AND     | RAQUEL DEVELOPMENTS LIMITED<br>Third Plaintiff                 |
| AND     | COMMISSIONER OF INLAND<br>REVENUE<br>Defendant                 |

**CIV 2010-485-2582**

|             |   |
|-------------|---|
| AND BETWEEN | YANDINA INVESTMENTS LIMITED<br>Plaintiff        |
| AND         | ANZ NATIONAL BANK LIMITED<br>First Defendant    |
| AND         | WESTPAC BANKING CORPORATION<br>Second Defendant |
| AND         | BNZ INVESTMENTS LIMITED<br>Third Defendant      |

Hearing: 7 September 2011

Counsel: C Carruthers QC and R Cullen for Plaintiffs  
M Palmer and M Deligiannis for Commissioner  
S Fitzgerald for ANZ  
R Lange for Westpac  
J Farmer QC and A Barker for BNZ

Judgment: 16 September 2011 at 12pm

---

## JUDGMENT OF MALLON J

---

### Contents

|  |             |
|--|-------------|
| <b>Introduction .....</b>  | <b>[1]</b>  |
| <b>Background.....</b>   | <b>[3]</b>  |
| <b>The tax proceeding .....</b>  | <b>[7]</b>  |
| <b>The “equity” proceeding.....</b>  | <b>[11]</b> |
| <b>Joinder application.....</b>  | <b>[14]</b> |
| <b>Order for proceedings to be heard together?.....</b>  | <b>[21]</b> |
| <i>Jurisdiction.....</i>   | <i>[21]</i> |
| <i>Yandina’s first reason: the Banks are potentially affected by the issues in the tax proceeding....</i>      | <i>[25]</i> |
| <i>Yandina’s second reason: equity proceeding has relevant consequences for Yandina in tax proceeding.....</i> | <i>[30]</i> |
| <i>Third reason: possibility of different decisions.....</i>   | <i>[35]</i> |
| <i>Other reasons? .....</i>  | <i>[36]</i> |
| <b>Result.....</b>   | <b>[37]</b> |

### Introduction

[1] Yandina has on foot two proceedings in the High Court arising out of a leasing partnership arrangement. One proceeding challenges tax assessments.<sup>1</sup> The other claims in equity against ANZ, Westpac and BNZ (the Banks).<sup>2</sup> Yandina applies to have the proceedings heard at the same time. All the defendants in the two proceedings oppose the application.

[2] The tax proceeding is scheduled to be heard in Wellington on 14 to 16 November 2011. The equity proceeding is not ready to be heard and does not have a trial date. The Banks have applied to transfer the equity proceeding from Wellington to the Commercial List in Auckland. Yandina opposes the application for transfer.

---

<sup>1</sup> CIV 2006-485-1228 to 1230.

<sup>2</sup> CIV 2010-485-2582.

The application for transfer is scheduled to be heard in Auckland on 30 September 2011.

## **Background**

[3] In 1982 the Banks, together with another party, formed a partnership to acquire an aircraft and lease it to Air New Zealand. The lease was structured so as to give rise to little or no taxable income to the leasing partnership in the earlier years but with taxable income arising in later years.

[4] In 1995 a new partnership (the Yandina partnership) was formed in which Yandina was the 99.99% non-active partner. The Yandina partnership was managed by Babcock and Brown which held the remaining 0.1% interest in the partnership. The Yandina partnership companies took an assignment of the Banks' interest in the leasing partnership for the period 1995 to 1997. Yandina had tax losses available to it which were to be used to offset the taxable income accruing under the lease. Before the assignment was entered into, the Banks obtained binding rulings from the Commissioner as to the tax treatment of the transactions from their perspective.

[5] For the 1996, 1997 and 1998 tax years Air NZ paid \$23 million as rental for the aircraft. The Banks paid this to the Yandina partnership.<sup>3</sup> This formed only part of the income under the assigned arrangement because the Banks also had non-cash income from recouped tax depreciation deductions and other accruals. The Banks advised the Yandina partnership that the total income was \$83 million (being the combination of the cash and non-cash income). The Yandina partnership filed tax returns with this income.<sup>4</sup> Tax losses and deductions available to the Yandina partnership were claimed so that the returns showed that Yandina had no tax to pay.

[6] In 2002 the Commissioner issued a notice of proposed adjustment to the Yandina partnership for the 1996 and 1997 tax years. This led to three decisions by the Commissioner on 26 September 2003 for the 1996, 1997 and 1998 tax years which are now the subject of the tax proceeding in this Court. The decisions

---

<sup>3</sup> The payment was credited to Yandina but the money was then almost immediately transferred out in accordance with the complex arrangements entered into.

<sup>4</sup> This is as per the schedule attached to Yandina's submissions for the hearing before me.

assessed Yandina's income at \$83 million (as returned) while disallowing the losses and deductions claimed against that income. The Commissioner formed the view that Yandina was a party to tax avoidance arrangements. The losses and deductions were disallowed to overcome the effect of those tax avoidance arrangements. The practical effect for Yandina was that it was assessed as liable on the basis of income of \$83 million when it had not received that income. It does not have realisable assets or cash to pay the tax for which it has been assessed.

### **The tax proceeding**

[7] Yandina challenged the assessments in proceedings commenced in the Taxation Review Authority on 25 November 2003. In May 2005 those proceedings were transferred to the High Court.<sup>5</sup>

[8] Yandina's Amended Notice of Claim refers to and describes the arrangement with the Banks as follows:

- (a) the establishment of a new purchasing partnership, its partners being the 'purchasing company' (to have a 99.9% interest in the purchasing partnership, but to be passive in that partnership's activities), and the 'managing company' (to have a 0.1% interest in the purchasing partnership, to be in active control of that partnership); and
- (b) a short term sale or sales of equitable interest(s) in the Maroro partnership [ie the Banks' partnership] , for the period from 1995 to 1997, by an existing Maroro partner(s) [Bank] to a nominee company of the purchasing partnership, the assigned partnership interest(s) to be carrying substantial, non-cash, taxable income items of the existing Maroro Partners [the Banks], being their recouped tax depreciation deductions; and
- (c) the Maroro partner(s) [the Banks] would arrange the funding of the full purchase price for the purchasing partnership under a secured borrowing arrangement, guaranteed by them, whereby the purchasing partnership would assign all of its cash income from the acquired Maroro equitable partnership interest(s) to the lender as security (the assignment to be made from the nominee company of the purchasing partnership to the lender); and
- (d) under which the purchasing partnership was to have no cash income from which it's partners could meet their purchasing partnership taxation liabilities; and

---

<sup>5</sup> CIV 2005-487-837 HC Wellington, 23 May 2005.

- (e) The purchasing partners were to be required to meet their taxation liabilities from tax losses available to them; and
- (f) that Salisbury Securities Limited was to find a company with available tax losses that could purchase the above mentioned 'purchasing company' and make its tax losses available to the 'purchasing company' and/or have the 'purchasing company' enter into transactions from which the 'purchasing company' would have tax losses available so the 'purchasing company' could meet its share of the purchasing partnership's taxable income; and
- (g) that there would be one or two transactions by which Maroro Partnership [the Banks] equitable interests would be assigned.

[9] The Amended Notice of Claim sets out Yandina's challenge to the assessments as follows:

- (a) that the arrangements assessed as being void for income tax purposes by reason of being a tax avoidance arrangement extended to and included the equitable assignments of interests in the Maroro Partnership by the Maroro Partners [the Banks], with the result that those equitable assignments were also void for income tax purposes, the assigning parties continued to own the equitable interests they had purported to assign, and continued to derive the taxable income therefrom, and the disputant therefore derived no taxable income from the equitable assignments that were part of the tax avoidance arrangement; and
- (b) that the Commissioner should exercise the power available to the Commissioner under the tax avoidance provisions to adjust the taxable income from the tax avoidance arrangement to recognise and reflect the fact that the disputant derived no real or tax benefit or gain from the tax avoidance arrangement, and that the tax benefits and gains from the tax avoidance arrangement were by the Maroro Partners [the Banks], and fees were earned by Babcock & Brown Pty Limited and Salisbury Securities Limited; and
- (c) that the transactions were genuine transactions and were not sham transactions; and
- (d) that there should be no penalties for the disputant other than the late filing penalty and no use of money interest.

[10] The issues in the tax proceeding are therefore whether Yandina was involved in a tax avoidance arrangement and whether the Commissioner's decision to disallow the claimed tax losses was the appropriate response to the tax avoidance arrangement. As part of those issues, Yandina contends that the income it has been

assessed on was part of a wider arrangement which is void for tax purposes, that it was therefore taxable income derived by the Banks and not it, and that it received no gain from the arrangement.

### **The “equity” proceeding**

[11] The equity proceeding was filed by Yandina against the Banks on 23 December 2010. The statement of claim was amended on 31 March 2011. In this proceeding Yandina refers to the arrangement under which it took an assignment of the Banks’ equity participations in the partnership. Yandina alleges that it has been assessed on income of an amount as advised to it by the Banks. It alleges that the Banks have failed to pay \$72 million of this income to the Yandina partnership which has meant that Yandina has not received the cash from which it could pay its tax liabilities. It alleges that the effect of various provisions in the assignments operate to require the Banks to pay any fine, penalty or other cost for the Yandina partnership.

[12] The relief sought is:

- A orders that the first, second and third defendants [ie the Banks] account in terms of their equitable obligations to Yandina in the amount of \$72 million as yet unpaid by payable to Yandina under the equitable assignments in favour of Yandina; and
- B orders that the first, second and third defendants pay all penalties and interest assessed against Yandina by the Commissioner by reason of their obligations under the tax warranty provisions in the respective equitable assignment deeds; and

...

[13] Counsel for Yandina describes the claim as a cause of action in equity, with the nature of the equitable interest turning on the nature of the assignment. Counsel for the Banks says that the claim is in reality a claim in contract (the assignment) which depends on the correct interpretation of the contract’s provisions. The Banks have foreshadowed an application for strike out on the basis that, on a correct interpretation of the assignment, the claim cannot succeed. In any event, the issue in the proceeding (however the cause of action is described) is the amount of income

the Banks were required to pay to Yandina under the arrangements entered into between them.

### **Joinder application**

[14] The equity proceeding was commenced after Yandina had unsuccessfully applied in the tax proceeding to add the Banks to that proceeding (the joinder application). For the purposes of the joinder application a draft amended statement of claim was prepared in the tax proceeding. The relief claimed as against the Commissioner was the same as that set out at [9] above. The proposed cause of action against the Banks in the tax proceeding and the relief sought against them was materially the same as that set out in [11] and [12] above. The joinder application was opposed by the Commissioner and heard by the High Court (MacKenzie J) in December 2010.<sup>6</sup>

[15] The first reason advanced by Yandina as to why the Banks should be joined to the tax proceeding was that: if its claim against the Banks was successful then it would have the resources (which otherwise it does not) to pay the tax claimed by the Commissioner; and if unsuccessful in its claim against the Banks, then this would be relevant to the Commissioner's assessment. The High Court rejected this as a basis for ordering joinder. The Judge said that in the ordinary case it is not relevant to a Commissioner's assessment that assessable income to which a taxpayer is entitled has not been paid.

[16] The Judge did not see this case as being any different because Yandina would not have the money to meet the tax liability. The Judge said that the tax proceeding was concerned only with the extent of Yandina's tax liability not with recovery by the Commissioner. It also did not see this as being any different from the ordinary case because what was in issue as against the Banks was not whether the money had been paid by them to Yandina but whether it was payable. The Judge said that in the tax proceeding Yandina would be able to raise this (the legal effect of arrangements between the taxpayer and third parties being a common feature in tax disputes) and

---

<sup>6</sup> CIV-2006-485-1228 HC Wellington, 20 December 2010.

the issue would be capable of being addressed in the tax proceeding without the presence of the Banks.

[17] The second reason advanced by Yandina as to why the Banks should be joined to the tax proceeding was that: if there was a tax avoidance arrangement, it was an arrangement that was much wider than that alleged by the Commissioner. Yandina submitted that if there was a tax avoidance arrangement then that arrangement included the assignment of the interests to the Yandina partnership. Yandina submitted that if the assignment was also void for income tax purposes then the Commissioner must exercise the power available to him to adjust the taxable income to reflect the wider tax avoidance arrangement. This would mean that Yandina had received no taxable income under the lease.

[18] The Commissioner opposed this as a basis for joinder because it said that it is for the Commissioner to determine what steps make up the tax avoidance arrangement. In support of this it referred to a passage in *Peterson v CIR*.<sup>7</sup> The Judge was not sure in the context of the limited argument he had heard that this passage would preclude a challenge by Yandina as to the extent of the tax avoidance arrangement identified by the Commissioner. The Judge proceeded on the basis that it could be put in issue, but said that this did not make the Banks a necessary party to the tax proceeding. The Judge said that Yandina would not be precluded from making any argument it wished to make about any wider tax avoidance arrangement if the joinder application were not granted.

[19] The last reason advanced by Yandina for the joinder was that it had tax warranties as against the Banks. This was rejected by the Judge because the tax proceeding was to determine Yandina's tax liability and the warranties would not provide a basis on which the Banks could dispute the proper assessment of Yandina's tax liability

[20] The application for joinder was therefore declined.

---

<sup>7</sup> *Peterson v CIR* [2006] 3 NZLR 433 (PC) at [33].



## **Order for proceedings to be heard together?**

### *Jurisdiction*

[21] The application that the proceedings be heard together is made under rule 10.12 of the High Court Rules. The grounds on which an order can be made under rule 10.12 are broadly framed. Those grounds are directed to where there is some factual or legal overlap in the proceedings that makes it appropriate that they be consolidated, or heard together or consecutively. But even that is not necessary. An order can be made if “for some other reason it is desirable” to make it.<sup>8</sup> The intended breadth of the rule is reinforced by rule 10.13 of the High Court Rules which, amongst other things, states that rule 10.12 applies even though the relief claimed in the proceedings is not the same.

[22] The making of an order is, however, discretionary. It is common ground that the discretion is to be exercised in the interests of justice. A wide range of considerations may be relevant to this assessment. In general terms an order that proceedings are to be heard together ordinarily will be made if it is expeditious for some reason to do so (for example, because of the degree of overlap in the proceedings) and does not cause any party prejudice.<sup>9</sup>

[23] One of the grounds on which the Court “may” make an order under that rule is if it is satisfied that “some common question of law or fact arises in both [proceedings].”<sup>10</sup> Another of the grounds on which the order may be made is if the Court is satisfied that “the rights to relief claimed therein are in respect of or arise out of...the same event and the same transaction.”<sup>11</sup> These are the grounds that Yandina relies upon. Yandina submits that the common question that arises in both proceedings is “what was the arrangement between the Banks and Yandina.” It says that the rights to relief in both proceedings arise out of the arrangement between the Banks and Yandina.

---

<sup>8</sup> Rule 10.12(c) of the High Court Rules.

<sup>9</sup> The submissions for the Banks set out a helpful list of the relevant considerations that have emerged from the cases.

<sup>10</sup> Rule 10.12(a) of the High Court Rules.

<sup>11</sup> Rule 10.12(b)(iii) of the High Court Rules.

[24] The Commissioner submits that there is no jurisdiction to make the order on either of these grounds. However, that submission is based in part on a submission that Yandina will not be able to raise the wider arrangement in the tax proceeding. The Commissioner made the same submission to me as to the effect of *Peterson v CIR* as was made to the Judge hearing the joinder application (refer [18] above). That will be a matter for the Judge at the substantive hearing to consider. On this application, for there to be jurisdiction to make the order, it is sufficient that Yandina intends to raise the nature of the wider arrangement in the tax proceeding as giving rise to relief in that proceeding and that the claimed relief in the equity proceeding also arises out of the same arrangement. To the extent the Commissioner's submission that there is no jurisdiction depends on there being an insufficient commonality in the proceedings, that is a factor that is relevant to the exercise of the discretion. The real question here is whether the discretion to order that the proceedings be heard together ought to be exercised, not whether the rule applies at all.

*Yandina's first reason: the Banks are potentially affected by the issues in the tax proceeding*

[25] Yandina's written submissions<sup>12</sup> for this hearing assert that there was a tax avoidance arrangement.<sup>13</sup> Yandina says that, by the device of equitable sales of equity participations in the Banks' partnership, the rental monies for the aircraft were to remain in the hands of the Banks as non-assessed income, while being assessed for income purposes to Yandina, with Yandina to provide tax losses to discharge the tax on the income. It says that with the rental income assessed to Yandina, the income could not be assessed to the Banks.<sup>14</sup>

[26] Yandina's written submissions say that Yandina contends in the tax case that the Commissioner was correct to disallow the losses claimed by Yandina as part of the void arrangement, but that Yandina's stated income was also part of the tax

---

<sup>12</sup> Counsel for Yandina at the hearing, however, put this in a more qualified way.

<sup>13</sup> It submits that the arrangement cannot survive analysis under the test as formulated by the Supreme Court in such cases as *Penny v CIR* [2011] NZSC 95.

<sup>14</sup> Because s GB1(2) of the Income Tax Act 1994 provides that income included in the assessable income of any person is deemed to be derived by that person and not to have been derived by any other person.

avoidance arrangement. Yandina says that the income was properly assessable to the Banks and not to Yandina. Yandina submits that the Court is empowered to direct the Commissioner to make an assessment that he was able to make at the time of assessing the taxpayers.<sup>15</sup> It submits that in the tax proceeding the Court could direct the Commissioner to assess the Banks. It says that, although this could occur in the absence of the Banks, “practically, at a general level it would be preferable for the banks to explain to the Court hearing in the tax case why they were not part of the tax avoidance arrangement, if that is their view.” It says that this is one of the reasons why the equity and tax cases must be consolidated.

[27] The Commissioner’s response to this submission is that there is no power for the Court in the tax proceeding to direct the Commissioner to assess the income to the Banks. Counsel for the Commissioner submitted that it had never been suggested that the Court could direct the Commissioner to assess an entirely different tax payer in the context of a challenge to the assessment made of one particular tax payer. While the Commissioner might be correct about that, if Yandina wishes to make that submission in the tax proceeding then it will be for the Judge hearing that proceeding to make a decision about that. In the context of the application before me, there are other reasons why I reject Yandina’s argument.

[28] First, Yandina does not submit that the power can only be exercised if the Banks are involved in the tax proceeding. It submits only that it is “preferable” that they are. Against that, the Banks do not wish to be involved in the tax case (their counsel made that clear in oral submissions at the hearing on the present application) and the Commissioner opposes that too (both through his opposition to the joinder application and through the opposition to the present application). In light of the Banks and the Commissioner’s position about this and with knowledge of what Yandina seeks to raise at the tax proceeding, it is difficult to see that Yandina could be prevented from raising whatever relevant arguments it seeks to make in respect of the Commissioner’s assessments of it, even if they involve the Banks who are not represented at the hearing.

---

<sup>15</sup> Section 138P of the Tax Administration Act 1994.

[29] Secondly, to order that the equity proceeding be heard with the tax proceeding, in order to seek to have the Banks explain in the tax proceeding why they were not part of any tax avoidance arrangement, is an indirect way of seeking to achieve what was declined on the joinder application and not appealed. It is indirect because the tax proceeding will determine whether the Commissioner has correctly assessed Yandina. The equity proceeding will determine whether Yandina has a claim against the Banks for the income it declared on its return and on which it has been assessed. Hearing those two proceedings together will not alter what arguments can be raised in the tax proceeding (which concerns what is void for tax purposes) nor in the equity proceeding (which concerns whether the Banks must pay money/account to Yandina). If Yandina wished to pursue the possibility of having the Banks directly involved in the tax proceeding then it needed to appeal the High Court's decision on the joinder application.

*Yandina's second reason: equity proceeding has relevant consequences for Yandina in tax proceeding*

[30] Turning then to the second reason advanced by Yandina on the present application, Yandina submits that if it is correct in its equity proceeding (and the Banks have failed to pay income to Yandina) then it cannot maintain its dispute of the correctness of the assessments made against it. That is because Yandina would be entitled to the money and assessable on it. If it is incorrect in its equity proceeding, then it submits that the tax assessments against Yandina are also wrong because they are assessments of the Bank's income under a tax avoidance arrangement, not its income.

[31] This too raises an issue raised in the joinder application and rejected. In rejecting it, the Judge said that the legal effect of arrangements between a taxpayer and a third party was a common feature of tax disputes (here whether, under the arrangement between the Banks and Yandina, Yandina did or did not have income as declared in Yandina's tax returns). I do not understand Yandina to be contesting this. The issue for Yandina is not whether the equity proceeding will determine the outcome of the tax proceeding but rather that the tax proceeding will be heard first. If the Commissioner's decision is upheld then Yandina will not have the funds to

meet its tax liability unless and until it succeeds on the equity proceeding. The Commissioner could take enforcement steps against Yandina before it is able to enforce its claim (if successful) against the Banks. That puts Yandina in a potentially difficult position.

[32] However, the Commissioner's assessments were made, and Yandina's challenge to those assessments was commenced, in 2003. The application for joinder was not made until November 2010 and the equity proceeding against the Banks was not commenced until December 2010. The application that the proceedings be heard together was not made until May 2011. Yandina says that, as the non-active partner, it did not know the detail of the arrangements with the Banks and it has taken some time to obtain that detail. It says it has been seeking to obtain the detail since 2004. However, in the context of the significant tax liability with which it had been assessed and in respect of income it did not have, it ought to have taken steps (obtaining information and commencing proceedings) much sooner as against the Banks. Not having done so, the assessment of the correct tax liability payable by Yandina should not be dictated by the timing of Yandina's claim against the Banks from which it hopes to obtain funds to pay its tax liabilities (if any).

[33] In saying that, I acknowledge that the Commissioner requested that the tax proceeding be put on hold for a period of somewhere between one and two years (the parties had different views about the exact period) pending the outcome of a tax avoidance case that was being determined by the Supreme Court.<sup>16</sup> That detracts a little from the Commissioner's point that an order should not be made under rule 10.12 because the determination of Yandina's tax position should not be delayed by Yandina's debt claim against the Banks. However, it might also be said that the Commissioner's request that the tax proceeding be put on hold for a period gave Yandina the opportunity to pursue the equity proceeding against the Banks (to seek to ensure it would have funds to meet its tax liability if its challenge to the assessments failed).

[34] Moreover, and as MacKenzie J said in respect of the joinder application, the assessment of tax and recovery of a debt by the taxpayer as against a third party are

---

<sup>16</sup> *Penny v CIR* supra.

separate matters. As the Commissioner submits, to allow the two separate matters to be joined in this case has potential ramifications in other cases. Tax assessments in other cases could be challenged and then delayed by the taxpayer's pursuit of another claim.

*Third reason: possibility of different decisions*

[35] Yandina says that there is the possibility of different decisions for different taxpayers on what is the scope of the tax avoidance arrangement. It is difficult to see why that warrants an order that Yandina's equity proceeding to be heard with the tax proceeding. The Commissioner has not made an assessment of the Banks. Ordering that the proceedings be heard at the same time will not alter that. If Yandina succeeds in contesting its assessment on the grounds that the Commissioner should have looked at the wider arrangement (and as part of that recognised that it never received the income) then Yandina will have succeeded. Whether there are any consequences for the Banks in that (despite the binding ruling they obtained) is irrelevant to Yandina's position. If Yandina does not succeed in showing that the whole of the arrangement should be voided for the purposes of the assessment against it, then it still has its equity proceeding to pursue.

*Other reasons?*

[36] There is, therefore, an insufficient overlap between the two proceedings to justify the exercise of the discretion. Yandina submits that time and cost would be saved because of the common issues. If that is so at all, it is only so for Yandina. For the Commissioner and the Banks it potentially adds time and cost to the extent that each of them becomes involved in a proceeding they have no wish to be part of. For the Commissioner it would cause delay in the determination of Yandina's tax and has potential prejudicial wider consequences for other taxpayer determinations. Yandina submits that judicial resources will be saved. If that is so, it is not to any great degree given that the tax hearing is ready to proceed and will be heard over three days in November 2011. It is not such that it could override the other considerations. There are no other reasons which support the order in the interests of justice.

## **Result**

[37] The application that the proceedings be heard together is declined. Unless the parties wish to be heard on this, costs should follow the event. If the parties are unable to agree then memoranda may be filed within 30 days of the date of this judgment.

Mallon J