

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

CIV 2007-404-005853

IN THE MATTER OF THE TAX ADMINISTRATION ACT
1994

AND

IN THE MATTER OF THE INCOME TAX ACT 1994

BETWEEN RADIOWORKS LIMITED
Plaintiff

AND THE COMMISSIONER OF INLAND
REVENUE
Defendant

CIV 2007-404-005854

AND BETWEEN TVWORKS LIMITED
Plaintiff

AND THE COMMISSIONER OF INLAND
REVENUE
Defendant

Hearing: 9-10 September 2008

Counsel: L McKay/J Comber for plaintiffs and non-party MediaWorks (NZ)
Limited
J Coleman/C Curran-Tietjens for defendant
S Bonney for non-party NZ Guardian Trust Company Limited

Judgment: 27 July 2009

JUDGMENT OF ASSOCIATE JUDGE ABBOTT

*This judgment was delivered by me on 27 July 2009 at 4pm,
pursuant to Rule 11.5 of the High Court Rules.*

Registrar/Deputy Registrar

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Introduction

[1] There are two applications before the Court. The plaintiffs apply for an order that general discovery is not appropriate in this dispute over tax assessments made by the defendant (the Commissioner). The Commissioner has applied for orders for discovery against two non-parties, NZ Guardian Trust Company Limited (NZGT) and the parent company of the plaintiffs, MediaWorks NZ Limited.

[2] The plaintiffs are related companies formed by amalgamation of various companies operating in the radio and television industries in New Zealand. After amalgamation the Commissioner disallowed deductions claimed in respect of optional convertible notes (OCNs) issued as intra-group funding instruments. The Commissioner took the view that the OCN arrangements infringed the general anti-avoidance provisions of the Income Tax Act 1994. He issued amended assessments in August 2007. The plaintiffs challenge those amended assessments pursuant to s 138B(1) of the Tax Administration Act 1994 (TAA). Their separate proceedings have been consolidated.

[3] An issue has arisen as to whether there should be general discovery:

- a) The plaintiffs say that discovery is not appropriate in this case. First they say that all relevant documents have been provided voluntarily or pursuant to statutory powers and under the disputes procedures of TAA. Secondly they say that any further documents that might exist are inadmissible under the evidence exclusion rule in s 138G of the TAA. They acknowledge a theoretical possibility that further documents could exist, but say that it is not appropriate to put the plaintiffs to the cost and inconvenience of general discovery when the context suggests that it is unlikely that there will be any further relevant documents.

- b) The Commissioner seeks an order for general discovery. He is concerned that all relevant documents have not emerged under the disputes procedure (noting that the plaintiffs accept this possibility). He contends that parties to litigation in the High Court are entitled to general discovery. He says that even if the documents will not be admissible in evidence (because of the operation of the evidence exclusion rule) they are still relevant as background to the transactions and for the purposes of cross-examination.

[4] The parties were unable to agree on the procedure for bringing this discovery issue before the Court. As general discovery orders tend to be made without formal application, and there is no specific procedure for opposing such orders, a direction was made at a case management conference that the plaintiffs (as the parties with the overall carriage of the proceeding) were to bring the application. There is still an issue, however, as to which party has the onus of showing whether an order is appropriate. The plaintiffs say that it is the Commissioner as the party seeking general discovery. The Commissioner says it is the plaintiffs as the parties seeking to exclude or limit general discovery.

[5] The Commissioner seeks the non-party discovery orders in order to obtain disclosure of documents which will show whether or not the plaintiffs were independent of the holders of the OCNs at relevant times. It says that this is an important element of its case that the OCNs have no commercial value and were issued only for tax advantages. NZGT abides the decision of the Court. MediaWorks opposes the application on the grounds that the documents are not relevant (because it does not intend to argue that MediaWorks is independent) and because the Commissioner has not shown that the order is necessary (because he has not shown that the documents will be admissible in evidence).

Relevant background

- a) **Optional convertible notes (OCNs)**

[6] The plaintiffs are part of the CanWest group of media companies (ultimately owned and controlled by CanWest Global Communications Corp., incorporated in Canada). RadioWorks Limited was originally named CanWest NZ Radio Communications Limited. TVWorks Limited is the successor to CanWest NZ Communications Limited, after amalgamation with other companies in the CanWest group.

[7] The OCNs that are in issue in this proceeding were issued to a CanWest group company, CanWest International Communications Inc (an off-shore company), either as part of the CanWest group's acquisition of its interest in New Zealand television through TV3 Network Holdings Limited or of its later acquired interest in New Zealand radio through the More FM group of companies and RadioWorks NZ Limited, or are in substitution for OCN's issued for that purpose.

[8] In mid 2004 the CanWest group restructured its New Zealand holdings ahead of a partial initial public offering of shares. In this restructuring both the shares in the plaintiffs and the OCNs were transferred to New Zealand companies:

- a) CanWest International Communications Inc (CWIC) distributed RadioWorks' OCNs to its parent Global Communications Limited, which in turn transferred them to its parent 1103400 Alberta Limited (Alberta). A New Zealand resident company, CanWest MediaWorks (NZ) Limited (name renamed MediaWorks), then acquired the OCNs from Alberta under a convertible notes option agreement dated 24 June 2004 in consideration for the issue of shares. At the same time MediaWorks acquired CWIC's shares in RadioWorks under a share option agreement also dated 24 June 2004 (the shares being transferred in July 2004).
- b) CWIC distributed TVWorks' OCNs to Global Communications Limited, which in turn sold them to a New Zealand resident company, CW Media Limited (CW Media) under a note sale agreement dated 24 June 2004. CW Media is owned by MediaWorks. At the same time CWIC sold its shares in TVWorks to CW Media under a share

sale agreement also dated 24 June 2004. Again the shares were transferred in July 2004. Immediately after settlement of the transactions TVWorks, CW Media and another CanWest group company amalgamated, with TVWorks being the surviving amalgamated company.

b) History of dispute

[9] The Commissioner commenced an audit of the plaintiffs' tax affairs in respect of the 2001 and 2002 income years in January 2003. In the course of the audit the Commissioner investigated the circumstances surrounding the issue and transfer of the OCNs and the deductions claimed in respect of them.

[10] In the course of his investigation, the Commissioner made a number of requests for information. These were made informally, as opposed to using the Commissioner's powers under Part 3 of the Tax Administration Act 1994. They included requests made to the plaintiffs' auditors, PricewaterhouseCoopers. Information was provided to the Commissioner, including supporting documentation, both by the plaintiffs and by PricewaterhouseCoopers. This informal exchange of information took place both before and after the restructuring of the MediaWorks Group.

[11] The Commissioner formed the view that the OCNs were not arms length commercial instruments and that their purpose was tax avoidance. A significant factor in the Commissioner's assessment was his view that MediaWorks was part of the CanWest group.

[12] The Commissioner issued notices of proposed adjustment (pursuant to the disputes procedures under Part IVA of the TAA) in respect of the plaintiffs' income years from 2001 to 2004, on 22 December 2005. The plaintiffs issued notices of response (again pursuant to the disputes procedures) rejecting the proposed adjustments, on 21 February 2006.

[13] On 16 March 2006 a senior investigator for the Commissioner (Mr Rex Collier) issued notices to the plaintiffs pursuant to s 17 of the TAA (the notices were subsequently amended but only by extending time for compliance). The notices referred to the dispute over the plaintiffs' claim for deduction of interest in respect of the OCNs and required information and documents considered necessary or relevant to establish the plaintiffs' correct taxation liability. The same four categories of documents and information were required from both of the plaintiffs:

1. All documents... and other information related to the issue of OCNs to related parties by members of the CanWest group;
2. All ... documents or information related to the transfer of OCNs issued by RadioWorks ... to the ultimate recipient, CanWest MediaWorks (NZ) Ltd ("MediaWorks") and by TVWorks ...to the ultimate recipient CWMedia Ltd, on 24 June 2004;
3. Any independent valuation of the OCNs undertaken at the time of transfer; and
4. All ... documents or information relating to the nature of the shareholding in RadioWorks' at the time the OCNs were transferred to MediaWorks, and relating to the contemporaneous transfer of TVWorks' ordinary shares to CWMedia Ltd ...

[14] The plaintiffs provided their responses to the s 17 notices by letter dated 20 April 2006. In so doing they referred to information previously supplied to the Commissioner and produced only four further documents, being the four agreements entered into on 24 June 2004 (referred to in paragraph [7] above).

[15] As noted above, one of the categories of documents required was any independent valuation of the OCNs undertaken at the time of the transfers. The plaintiffs' chief financial officer, Mr Crossan, gave the plaintiffs' reply. He stated that the value of the OCNs was the major component of a valuation of the Mediworks Group by Goldman Sachs JBWere (NZ) Limited (for the purposes of a planned Stock Exchange listing of the MediaWorks Group in 2004) and provided a summary of that valuation. In an affidavit in support of this application, Mr Crossan states that a copy of the valuation was not provided with the letter of 20 April 2006 as it did not relate specifically to the OCN transactions.

[16] Mr Collier was concerned that the plaintiffs' responses may not have contained all the information or documents requested. In particular (by letter dated 5 May 2006) he challenged their failure to produce the valuation or papers associated with it. Mr Crossan replied on 17 May 2006 repeating that the valuation of the OCNs was merely inherent in the valuation. He disputed Mr Collier's contention that TVWorks had failed to comply with the s 17 notice, stating that a separate valuation report in respect of the OCNs did not exist. Mr Crossan went on to provide further explanation of the valuation process and enclosing documents and further information in respect of it prepared for TWWorks Canadian parent company. The Goldman Sachs' valuation was not enclosed.

[17] The Commissioner subsequently issued a s 17 notice to Goldman Sachs. The notice was more specific than those issued to the plaintiffs. It required production of:

1. All ...documents... relating to the valuation of the CanWest group's New Zealand television and radio interests as part of the process of the initial listing of ordinary shares in CanWest MediaWorks (NZ) Limited ("Media Works") on the New Zealand Stock Exchange in July 2004 to the extent that any such valuation process:
 - a. Results in a value for those television and/or radio interests that differs materially from the consideration paid for CanWest TVWorks Limited and CanWest RadioWorks Limited, as specified in MediaWorks' [Prospectus] and/or
 - b. Discusses any matter relating to the TVWorks Convertible Notes and the RadioWorks Convertible Notes (as defined in the Prospectus);
2. All ...documents... relating to the restructuring of CanWest's New Zealand group, as summarised in ... the Prospectus; and
3. Any other documents or information... that relate to the TVWorks Convertible Notes and the RadioWorks Convertible Notes (as defined in the Prospectus) or any comparable optional convertible notes issued within the CanWest group.

Goldman Sachs provided more documents and other information in response to that notice.

[18] Further correspondence was exchanged in July 2006 as to the scope of the s 17 notices and the adequacy of the plaintiffs' responses. There was particular

focus on the significance of the restructuring in 2004 to the tax treatment of the OCNs. This correspondence led to a meeting between the parties on 26 July 2006, at which the plaintiffs agreed to review their files for any material that might fall outside their previous view of the scope of the s 17 notices.

[19] On 21 August 2006 Mr Crossan wrote to Mr Collier setting out the further review that Mr Crossan had undertaken, primarily of his physical files for MediaWorks' 2004 IPO and of the archived email files of himself and TVWorks' chief executive Mr Impey. This letter had earlier been put to the Commissioner as a draft for comment. The Commissioner's only comment on the draft had been that the letter should make clear that the response was on behalf of both plaintiffs. The letter of 21 August 2006 ended with the following:

Following that review, and given the basis on which the review has been undertaken, I **attach** further information relating [sic] the OCN dispute (as previously advised, that information would not have been within the scope of the approach taken in relation to previous information requests, and has been identified through the searching of the historical electronic archive which I have now had undertaken). Please note that the memorandum dated 14 March 2004 from PwC was based on a proposed restructuring of the OCNs, which is different from that implemented.

To the best of my knowledge, taking into account the basis of the review set out above, there is no further information held by the New Zealand CanWest group (which includes both the CanWest TV and CanWest Radio groups) that relates to the tax dispute concerning the deductibility of accrual expenditure incurred in relation to the optional convertible notes.

The additional information comprised email correspondence and two memoranda.

[20] The Commissioner did not respond to Mr Crossan's letter of 21 August 2006 nor make any further requests for information. Mr Collier says that, as a consequence of the last paragraph of Mr Crossan's letter, the Commissioner proceeded on the basis that everything had been provided.

[21] On 25 August 2006 the Commissioner issued a disclosure notice and his statement of position in respect of his proposed adjustments in relation to TVWorks. The statement of position was a substantial document, comprising 85 pages including appendices. One of the appendices was an 8 page list of documentary evidence relied upon, identifying 242 separate documents.

[22] On 10 October 2006 the Commissioner issued a disclosure notice and his statement of position in relation to his proposed adjustments for RadioWorks. The statement of position was again a substantial document, comprising 81 pages including appendices. The appendices included a 6 page list of documentary evidence which the Commissioner intended to rely on, listing 190 separate documents.

[23] TVWorks responded to the Commissioner's statement of position with a similarly substantial statement of position (65 pages in length) dated 20 October 2006. RadioWorks responded with a further substantial statement of position (66 pages) on 8 December 2006. The plaintiffs' statements of issues raised two new matters. The first was their reliance on OCN transactions entered into by the CanWest group in 1991 to finance its initial investment in New Zealand (acquisition of shares in TV3). The second was to state that at the time of the transfer of the OCNs in 2004, MediaWorks (and hence CW Media) was not part of the CanWest group – its shares were held by the trustee for the IPO, NZGT CanWest Limited. Both statements of position included a one page list of additional documents in relation to the CanWest's Group's 1991 acquisition of shares and convertible notes in TV3, its acquisition of further shares in 1996, and further documents relating to convertible notes generally.

[24] The Commissioner subsequently issued addendums to his statement of position in respect of both plaintiffs. The addendum in respect of TVWorks was issued on 19 December 2006. The addendum in respect of RadioWorks was issued on 7 February 2007. In these addendums the Commissioner disputed the relevance of the 1991 OCN transactions, and the claimed independence of MediaWorks and CW Media. Each addendum contained a shortlist of additional documentary evidence being relied on by the Commissioner.

Agreed positions

[25] Since the addendum was issued the plaintiffs have advised the Commissioner that they will not be relying on the argument in their statements of position that NZGT CanWest is independent of the CanWest group.

[26] At the commencement of the hearing counsel advised that it was common ground on the present application that:

- a) the Commissioner is not contending that the plaintiffs have not complied with the s 17 notices (he is not pursuing the dispute over the scope of the notices at this point) but rather he says that the plaintiffs may still have documents that could be relevant to the dispute; and
- b) the Commissioner is not contending that the plaintiffs are opposing the application because they do not wish to disclose documents that would be harmful to them.

A. The general discovery application

Which party has the onus?

[27] Since amendments to the High Court Rules in November 2004, discovery is available only by Court order. The availability and terms of discovery orders are now to be found in rr 8.16 to 8.18. Although a discovery order is no longer available as of right (as was the case under the previous rules following issue of a notice for discovery), r 8.17 provides that the Court must make an order in a proceeding on the standard track “if appropriate”.

[28] The present application is unusual. It arises out of the fact that there is no specific provision for seeking or opposing an order for general discovery. The rules direct the Court to make an order at the first case management conference unless there is good reason to make the order later: r 8.17(2). In practice parties need do little to obtain an order. An order for discovery at the first case management conference is regarded as the norm: *McGechan on Procedure* HR 8.17.01. This can be contrasted with the specific provisions for pre-commencement discovery, for particular discovery after commencement, and for non-party discovery. The lack of a specific procedure for opposing general discovery can be contrasted with the

position before November 2004 when former r 295 provided for applications to limit discovery otherwise required following issue of a discovery notice.

[29] The language of r 8.17 is clear and unambiguous - it requires the Court to be satisfied that an order is appropriate. In principle it should be for a party seeking the order to satisfy the Court. However, the rules appear to assume that general discovery will be appropriate in normal (standard track) civil proceedings. This can be inferred from the provisions that a party seeking discovery in a swift track proceeding or wanting to depart from the standard terms for a discovery order (which are set out in r 8.18) must make out a case for the order sought: r 8.17(3) and (4). Such an underlying assumption (that general discovery is appropriate in a standard track proceeding) is consistent with the nature of standard track proceedings, namely that they are likely to require facts to be established or disputes of fact to be resolved. Thus, in most cases an order on standard terms will be appropriate.

[30] Counsel for the plaintiffs accepted that in most civil proceedings it will be for the party opposing general discovery to show that it is not appropriate, in effect accepting that prima facie discovery is appropriate in standard track proceedings. However, he submitted that the position is different in tax cases because all relevant documents have already been obtained under the procedures of the TAA. He argued that in these circumstances it is for the party seeking general discovery to show that it is appropriate, and in order to do so that party needs to show that documents that might be obtained on general discovery will be admissible in terms of the exception to the evidence exclusion rule (s 138G(2) of the TAA).

[31] Counsel for the Commissioner submitted that tax cases were part of general civil litigation and should be subject to the same rules. Thus, as general discovery is the norm it remains for the party opposing discovery to show that it is not appropriate. He relied in particular on *Commerce Commission v Armourguard Security Limited* (1993) 8 PRNZ 86 and submitted that it should be for the person wishing to limit or dispense with discovery to demonstrate that it was oppressive or of little benefit in light of the cost and time involved in complying. He further submitted that s 138G did not alter the general onus.

[32] *Commerce Commission v Armourguard Security Ltd* was decided under the old r 295 (providing for applications limiting discovery following issue of a notice for discovery). It is not determinative of the point under the current rules.

[33] Counsel referred to two cases, in particular, where general discovery was sought in tax cases (and consideration was given to the effect of s 138G): *Commissioner of Inland Revenue v Dick* [2002] 2 NZLR 560 and *Glenharrow Holdings Limited v Commissioner of Inland Revenue* (2002) 20 NZTC 17,792. In the former, an appeal from a decision of the Taxation Review Authority, Glazebrook J held (at para [90]) that the onus lay on the applicants. That is understandable given that the application was for particular discovery. I also note that the application was made in the course of a hearing. In the latter case, an application for general discovery by the taxpayer, Master Venning (as he then was) did not comment on the onus, but took into account the fact that the dispute had been through the disputes procedures of the TAA as a matter going to the scope of the order he made.

[34] Although, in principle, it must be for the person seeking general discovery to show that the threshold has been met, that threshold is a low one which will be assumed in standard track proceedings. However, where the party opposing general discovery raises matters (such as prior provision of documents and exchange of information) which call that assumption into question, the party seeking general discovery will have the onus of showing that discovery is appropriate notwithstanding the matters raised. In the present case, it is for the Commissioner, therefore, to show that general discovery is appropriate notwithstanding the prior exchange of documents under the disputes procedure, and the potential inadmissibility of any further documents by reason of s 138G.

Is there any limitation of discovery in tax cases?

[35] The primary submission of counsel for the plaintiffs was that the scheme of the TAA precludes discovery, save in exceptional cases. Counsel for the Commissioner submitted that tax litigation was no different from ordinary civil litigation, so that discovery was available in the ordinary course. Although counsel for the plaintiffs has acknowledged the possibility of discovery in tax cases, it is

necessary to consider what that means before considering whether an order is appropriate. This involves consideration of the scheme of the TAA (including the Commissioner's powers of investigation), the effect of the evidence exclusion rule (s 138G), and applicable authorities.

a) The legislative scheme

[36] The following provisions of the TAA are relevant to the scope of disclosure in the disputes procedures, and the impact of that disclosure for civil litigation:

89A Purpose of this Part [IVA]

- (1) The purpose of this Part is to establish procedures that will—
 - (a) Improve the accuracy of disputable decisions made by the Commissioner under certain of the Inland Revenue Acts; and
 - (b) Reduce the likelihood of disputes arising between the Commissioner and taxpayers by encouraging open and full communication—
 - (i) To the Commissioner, of all information necessary for making accurate disputable decisions; and
 - (ii) To the taxpayers, of the basis for disputable decisions to be made by the Commissioner; and
 - (c) Promote the early identification of the basis for any dispute concerning a disputable decision; and
 - (d) Promote the prompt and efficient resolution of any dispute concerning a disputable decision by requiring the issues and evidence to be considered by the Commissioner and a disputant before the disputant commences proceedings.

89M Disclosure notices

- (1) ... the Commissioner must issue a disclosure notice in respect of a notice of proposed adjustment to a disputant at the time or after the Commissioner or the taxpayer, as the case may be, issues the notice of proposed adjustment.
....
- (3) Unless the disputant has issued a notice of proposed adjustment, the Commissioner must, when issuing a disclosure notice,—
 - (a) Provide the disputant with the Commissioner's statement of position; and
 - (b) Include in the disclosure notice—
 - (i) A reference to section 138G; and
 - (ii) A statement as to the effect of the evidence exclusion rule.

- (4) The Commissioner's statement of position in the prescribed form must, with sufficient detail to fairly inform the disputant,—
- (a) Give an outline of the facts on which the Commissioner intends to rely; and
 - (b) Give an outline of the evidence on which the Commissioner intends to rely; and
 - (c) Give an outline of the issues that the Commissioner considers will arise; and
 - (d) Specify the propositions of law on which the Commissioner intends to rely.

....

- (6) A disputant's statement of position in the prescribed form must, with sufficient detail to fairly inform the Commissioner,—
- (a) Give an outline of the facts on which the disputant intends to rely; and
 - (b) Give an outline of the evidence on which the disputant intends to rely; and
 - (c) Give an outline of the issues that the disputant considers will arise; and
 - (d) Specify the propositions of law on which the disputant intends to rely.

....

138G Effect of disclosure notice: exclusion of evidence

- (1) Unless subsection (2) applies, if the Commissioner issues a disclosure notice to a disputant, and the disputant challenges the disputable decision, the Commissioner and the disputant may raise in the challenge only—
- (a) The facts and evidence, and the issues arising from them; and
 - (b) The propositions of law,—
- that are disclosed in the Commissioner's statement of position and in the disputant's statement of position.
- (2) A hearing authority may, on application by a party to a challenge to a disputable decision, allow the applicant to raise in the challenge new facts and evidence, and new propositions of law, and new issues, if satisfied that—
- (a) The applicant could not, at the time of delivery of the applicant's statement of position, have, with due diligence, discovered those facts or evidence; or discerned those propositions of law or issues; and
 - (b) Having regard to the provisions of section 89A and the conduct of the parties, the hearing authority considers that the admission of those facts or evidence or the raising of those propositions of law or issues is necessary to avoid manifest injustice to the Commissioner or the disputant.

- (3) For the purposes of subsection (1), a statement of position includes any additional information that the Commissioner and the disputant agree (under section 89M(13)) to add to the statement of position.

[37] Counsel for the plaintiffs relied on two aspects of the TAA to support his submission that the legislature intended that general discovery would be available only in exceptional cases:

- (a) First, he relied on the Commissioner's information gathering powers in s 17, which he submitted gave the Commissioner power to compel disclosure of anything he considered necessary or relevant in relation to administration or enforcement of the Tax Acts:

17 Information to be furnished on request of Commissioner

- (1) Every person ... shall, when required by the Commissioner, furnish in writing any information and produce for inspection any books and documents which the Commissioner considers necessary or relevant for any purpose relating to the administration or enforcement of any of the Inland Revenue Acts

He submitted that discovery was unnecessary given the wide-ranging scope of these powers and the range of sanctions available if the Commissioner considered that the taxpayer had not complied with the notice. He noted that the Commissioner was able to determine what was relevant to him and that the taxpayer had no ability to withhold on grounds of relevance (as in discovery). The Commissioner also had the power to truncate the disputes procedures if he considered that the taxpayer had not complied with his notice, in which event (assuming that this was before the exchange of statements of position) s 138G would not apply.

- (b) The second key aspect was the evidence exclusion rule (s 138G), the effect of which is to limit parties to the facts, evidence, issues and propositions of law contained in their respective statements of position exchanged under s 89M. Counsel submitted that Parliament's intention in enacting s 138G was to curtail the use of interlocutory procedures, particularly discovery. He referred to Sir Ivor Richardson's *Organisational Review of the Inland Revenue Department* (April 1994), which led to the

enactment of the TAA, the “cards on the table” approach adopted for the pre-assessment disputes procedures, and the view expressed in the report (at paragraph 10.7) that there would only be limited need for the interlocutory procedures if the matter went to Court because of the proposed “all cards on the table” pre-assessment approach. He submitted that the information gathering and exchange procedures, coupled with the operation of s 138G, made it unlikely that any documents arising out of discovery would be admissible.

[38] Counsel for the Commissioner submitted that these provisions did not alter a party’s entitlement to discovery in any challenge proceeding:

(a) The Commissioner’s power of investigation under s 17 should not be taken as an indication of legislative intent that general discovery would not be available on a challenge either in this Court or the Taxation Review Authority. Counsel argued that if the Commissioner did not know of the existence of documents that could be detrimental to the taxpayer’s case, he would not know to make a request for them or whether a general request made to try to capture any such documents had been fully complied with. He submitted that the fact that a body had investigative powers did not mean that it loses entitlement to discovery, citing *Commerce Commission v Armourguard Security Limited* (1993) 8 PRNZ 86 where Barker J rejected a similar argument in respect of powers under the Commerce Act 1986. He also noted the potential loss of the Commissioner’s investigative powers once a challenge commences: *Vinelight Limited v CIR* (2005) 22 NZTC 19,298 (where S France J expressed the view that s 17 notices could not be issued once challenge proceedings had commenced “for the sole purpose of extracting information for the Court proceedings”).

(b) In relation to the effect of s 138G, he submitted that the evidence exclusion rule did not render discovery futile, as submitted by the plaintiffs. He argued that s 138G had to be read together with s 89M, which prescribes the disclosure notice and content of statements of position for the disputes procedures, which define the scope of the evidence exclusion rule. He

referred to the requirement (s 89M(4)(b) and (6)(b)) that the statements of position “outline the evidence on which that party intended to rely”. He argued that discovery was not inconsistent with those provisions of the TAA because documents could emerge that fitted within the category or class of documents outlined, there could be documents on which the party did not intend to rely, and the exception to the evidence exclusion rule was of little value without discovery as until that process was complete it was unlikely that a party would be in a position to know that there was further evidence for which an application could be made under s 138G(2).

[39] The TAA was enacted to address concerns about the previous tax disputes resolution process. Sir Ivor Richardson’s *Organisational Review* proposed a “cards on the table” approach in pre-assessment procedures, supported by an evidence exclusion rule “to provide an appropriate incentive for disclosure of the factual basis for the arguments of the taxpayer and Commissioner” (para 10.7). As I have already mentioned, the review committee took the view that if the matter then proceeded to Court, there would be only limited need for interlocutory procedures. This approach was confirmed by the subsequent Government consultative document *Resolving Tax Disputes: Proposed Procedures* (December 1994) which noted:

(a) the Commissioner’s powers under s 17 (para 5.2), the need for fully effective disclosure notice supported by any exclusion rule at the litigation stage (para 5.3), and the use of statements of position (in the pre-assessment process) to provide an outline of supporting evidence as distinct from exchange of full briefs or exhausted lists of documents (para 5.9);

(b) that the High Court and the Taxation Review Authority would have a discretion to admit evidence not disclosed in response to a disclosure notice (to be exercised in the same circumstances as discretion to accept new evidence in an appeal in civil litigation) (para 5.10); and

(c) that it was not proposed to remove interlocutory procedures (including discovery and interrogatories) available in the High Court, but that use of the procedures was expected to be relatively rare given the degree

of pre-assessment disclosure and discussion under the proposed procedures (paras 6.23 and 6.24).

[40] The pre disputes procedures (Part IVA) and challenge procedures (Part VIIIA) were introduced into the TAA in 1996. It is clear from them and the review and consultative documents that preceded them that:

- a) The underlying legislative purpose of the disputes procedures is to encourage open and full communication of information to enable the Commissioner to make as accurate an assessment as possible.
- b) The Commissioner is expected to use his powers under s 17 towards that end.
- c) The exchange of statements of position is intended to inform the taxpayer as to the Commissioner's view of the dispute with an outline of the facts and law on which he intends to rely, and for the taxpayer similarly to respond with its view of the dispute and the facts and law on which it relies in support of its view.
- d) The statements of position are only required to provide an outline of facts, evidence and issues, in sufficient detail to fairly inform (s 89M(4) and (6)).
- e) If the dispute is not resolved under the dispute procedures of Part IVA a taxpayer is entitled to challenge the Commissioner's decision. If that challenge is brought in the High Court, it proceeds as standard civil litigation to which the High Court Rules apply.
- f) The intention of the evidence exclusion rule is to ensure that the dispute remains confined to the facts and law raised and addressed in the pre-assessment stage, subject to the Court's discretion to admit new facts, evidence, issues and law if satisfied that the criteria in s 138G(2) are met.

[41] Although the ambit of the plaintiffs' challenge to the Commissioner's assessment is determined by the statements of position, the Court approaches those issues de novo. It is in the interest of justice that all relevant information be available to the Court, albeit within the statutory constraints of s 138G. It is for the Court to decide (either in the hearing or on application in advance of the hearing) whether any evidence is excluded pursuant to s 138G(1) or qualifies under the exception in s 138G(2). The distinction between relevance and admissibility in the context of discovery is well established generally (*Comalco NZ Limited v Broadcasting Standards Authority* [1995] 3 NZLR 469, confirmed on appeal (1995) 9 PRNZ 153 (CA)) and in tax cases (*Commissioner of Inland Revenue v Dick and Glenharrow Holdings Limited v Commissioner of Inland Revenue*).

[42] I am not persuaded that the scheme of the TAA precludes discovery in the ordinary course. Dealing first with the significance of the Commissioner's investigative powers under s 17, I do not accept they should be construed so as to preclude the possibility of discovery in challenge proceedings. The comments of Barker J in *Commerce Commission v Armourguard Security Limited* (at p 91) are apposite:

... It is no answer to the discovery application for the defendants to say that the commission has wide powers of investigation, search and interrogation. Legislation has given this additional right of civil action to the commission. All the normal incidents of civil action, including discovery, must follow. A defendant to a claim must seek to comply with discovery in the normal way subject to any defendant's right to seek privilege or to claim confidentiality for specific categories of discovered documents.

[43] Counsel for the plaintiffs sought to distinguish this case on the ground that s 80 of the Commerce Act 1986 makes specific provision for the Commission to obtain discovery and administer interrogatories. I do not regard that as a valid distinction. Barker J had already commented on the need for the provision (because discovery was not otherwise available when a penalty is sought) and had added that he did not consider that anything should be read into it so as to prohibit the Commission from obtaining discovery (at p 89). It is more telling in my view that Parliament chose not to forbid discovery explicitly.

[44] Counsel also referred me to recent authorities concerning the loss of these investigative powers once a challenge commences (*Vinelight Limited v CIR* (2005) NZTC 19,298 and *Chesterfield Preschools v CIR* (No 2) (2005) 22 NZTC 19,500). Although this may be a factor in deciding whether discovery is appropriate, it is neutral, in my view, on whether the legislative scheme precludes discovery.

[45] I turn now to consider the effect of the evidence exclusion rule. The essence of the plaintiffs' argument is that the rule renders discovery meaningless, as any documents not already disclosed in the parties' statements of position are likely to be inadmissible.

[46] Counsel for the Commissioner advanced three grounds for saying that s 138G did not render discovery futile:

(a) First he submitted that the section merely precluded a party from relying on "wholly new facts". As already mentioned, he said that this was the effect of reading s 138G in light of the language of s 89M (4)(b) and (6)(b), which require only an outline of facts and evidence. He submitted that any further documents obtained on discovery could potentially fit within a class or category of documents identified in the statements of position, and noted that the Commissioner's statement of position to RadioWorks specifically relied on any document disclosed in discovery. (He added that the omission of a similar reference in the Commission's statement of position to TVWorks was an administrative oversight).

(b) Secondly, he submitted that s 138G anticipates that there will be general discovery if the dispute is litigated. He referred to the fact that s 89M only required the parties to outline the evidence on which the party intended to rely. He contrasted this with discovery, where parties are required to discover any document which relates to an issue in question and which may advance the case of the opposing party: *Compagnie Financiere du Pacifique v Peruvian Guano Co* (1882) 11 QBD 55, 63. He argued that the natural corollary of this was that if a document was not helpful the taxpayer, would

not rely on it. In those circumstances discovery was a necessary precursor to an application for leave pursuant to s 138G(2).

(c) Thirdly, counsel for the plaintiffs submitted that, given the reforms in Parts IVA and VIIIA of the TAA, it is wrong in principle for the information exchange process to be duplicated by general discovery. Although there will inevitably be duplication (and possibly substantial duplication) that can be addressed by modifying the terms of the discovery order: see *Glenharrow Holdings Limited v CIR* at para [32].

[47] I do not regard the overlay of discovery on the information exchange under Part IVA of the TAA as wrong in principle for the reasons advanced by counsel for the Commissioner.

b) Authorities

[48] Counsel addressed me at some length on two recent authorities in this Court: (*Commissioner of Inland Revenue v Dick* and *Glenharrow Holdings Limited v CIR*) and two recent decision of the Taxation Review authority (*Case Y14* (2008) 23 NZTC 13137 and *Case Y23* (2008) 23 NZTC 13248).

[49] In *CIR v Dick* this Court had to decide an appeal by the Commissioner from findings of the Taxation Review Authority, including a procedural ruling that it was not possible for the Authority to order particular discovery during a hearing. One of the grounds for that ruling was that the ordering of discovery would cut across the evidence exclusion rule in s 138G. Glazebrook J found that the Authority had jurisdiction to make an order. She found (at para [88]):

[88] The second reason given was that it would cut across the disclosure and evidence exclusion regime. This is not the case. The first point is that the evidence exclusion rule does not apply in all cases. It will only apply where a disclosure notice has been issued. The second is that the disclosure procedure, while it requires disclosure of the material upon which the party intends to rely, does not necessarily cover material in a party's custody and control which is merely relevant to the issues. Finally, the disclosure regime procedures have no implications for third parties.

[50] She then added (at para [90]):

[90] Where a disclosure notice has been served, then an additional burden is imposed on applicants for particular discovery. Applicants must show that the evidence they seek to have discovered is able to be raised within the exception to the evidence exclusion rule. If they cannot succeed at this point, then an order for discovery will be useless. To say, however, that the s 138G rule excludes the possibility of discovery is to confuse the discoverability of evidence with its subsequent admissibility.

[51] Counsel for the plaintiffs submitted that Glazebrook J's findings that discovery would not cut across the disclosure and evidence exclusion regime should not be followed as the case was decided before an amendment to the TAA in 2004, which required the dispute resolution procedures to be completed before a challenge procedure could be commenced (subject to certain exceptions in s 89N). Although the first point relied on by Glazebrook J (the evidence exclusion rule does not apply in all cases) can be questioned on that basis, her second and third points cannot. I accept the submission of counsel for the Commissioner that the case illustrates the distinction between discovery and admissibility, and recognition that a statement of position will not necessarily include all relevant material in a parties' control.

[52] In *Glenharrow Holding Limited v Commissioner of Inland Revenue*, the taxpayer applied for and was granted an order for general discovery against the Commissioner. The case was decided after the High Court decision in *CIR v Dick*. The Commissioner opposed the orders on the grounds that he had answered extensive requests for information under the Official Information Act 1982, and that s 138G precluded the use of any discovered material unless it could be shown that it was within the exception in s 138G(2).

[53] After noting Glazebrook J's comments on the distinction between discoverability and subsequent admissibility, and that the disclosure procedure under Part IVA did not necessarily cover all relevant material, Master Venning (as he then was) stated (at paragraph [22] and [23]):

[22] The effect of disclosure notices under the *Tax Administration Act 1994* is to exclude evidence from the hearings. The purpose of the disclosure process and s 138G is to encourage the parties to disclose all relevant information relied upon at the statement of position stage, and to provide a sanction for non-disclosure.

[23] However, I accept Mr Mathieson's submission that the discovery process is a more general process that may disclose documents relevant to

the facts and evidence and the issues arising from them already stated in the statements of position. Put another way, discovery may result in the disclosure of a document which could add weight or force to the Plaintiff's cross-examination of a defence witness. To make an order for discovery in those circumstances should not be seen as offending, or as contrary to, the purposes of s 138G.

[54] Counsel for the plaintiffs submitted that this case too could and should be distinguished. He contended that there had been insufficient weight placed on the nature and extent of the investigation and information exchange processes when considering the application of the evidence exclusion rule. He also said that the Commissioner alleged a sham in that case. He submitted that where (as in the present case) the Commissioner bases his decision solely on the anti avoidance provisions of the Income Tax Act (s BG 1) an objective test applies (*Peterson v CIR* [2006] 3 NZLR 433) and cross-examination is not a significant factor as there is not the same need to enquire into the background of arrangements or examine the taxpayer's motives.

[55] I do not consider that this case should be distinguished as counsel suggests. Contextual material may still be relevant. The ambit of the relevant section has still to be decided on the facts of the particular case: *Challenge Corporation v CIR* [1986] 2 NZLR 513, 534.

[56] Counsel for the plaintiffs also invited the Court not to follow the recent decisions of the Taxation Review Authority (*Case Y14* and *Case Y23*) on various grounds. In both of those cases the Authority ordered general discovery despite arguments being advanced similar to those in this case. I do not see the need to traverse the various points of argument. It is sufficient to say that I agree with the finding of the Authority that there is no bar to general discovery (for the reasons I have set out above). I accept the submission of counsel for the Commissioner that in making the order for general discovery the Authority was recognising that the information exchange in the parties' statements of position did not necessarily include all relevant material, and that the Commissioner should not be limited to his investigative powers under s 17 (given the fact that he has no means of knowing what documents the taxpayer may hold).

[57] In summary, I consider that the authorities support a finding that the scheme of the TAA (both the disputes procedures as supplemented by the Commissioner's powers under s 17 and the evidence exclusion rule) does not preclude an order for general discovery, on the usual basis for civil litigation.

Conclusions as to discovery in tax cases

[58] I consider that the following conclusions can be drawn from the scheme of the TAA and the authorities:

- a) There is jurisdiction to order general discovery in tax cases. The jurisdiction is supplementary to the information exchange processes of the dispute resolution procedures of Part IVA of the TAA. Discovery does not cut across the disclosure and evidence exclusion regimes of the TAA: *Commissioner of Inland Revenue v Dick*; *Glenharrow Holdings Limited v Commissioner of Inland Revenue*.
- b) The Commissioner can be expected to have used his investigative powers under s 17 of the TAA to obtain relevant information prior to making his assessment at the conclusion of the Part IVA procedures. There is no certainty, however, that all relevant information will emerge by use of the s 17 power (primarily because the Commissioner will not necessarily know what information the taxpayer holds, and exactly what to seek).
- c) Relevant documents emerging from discovery may fall within a category of documents identified in the statements of position (and hence not fall within the evidence exclusion rule), or be the subject of an application under the exception to the evidence exclusion rule, or provide a basis for cross-examination.
- d) It is for the party seeking discovery to show that an order is appropriate notwithstanding disclosure in the dispute resolution procedures.

Is discovery appropriate in this case?

[59] Counsel for the Commissioner submitted that if the Commissioner was not entitled to discovery as of right, it was appropriate that an order for general discovery be made for several reasons. First, the possibility of further relevant material was acknowledged by the plaintiffs. He submitted that any such information had not emerged to date because of the narrow interpretation the plaintiffs had placed on the Commissioner's requests for information. Secondly, documents that had been withheld on the basis that they are protected from disclosure during the disputes process are discoverable in litigation (*Blakely v CIR* (2008) 23 NZTC 21, 865, at para [12] (3)). Thirdly, the documents could be used in the litigation notwithstanding s 138G for the reasons I have already set out in paragraph [38](b) above.

[60] In addition to his primary submission that the legislative scheme of the TAA and the way in which it has operated in this case precludes general discovery, counsel for the plaintiffs submitted that an order was not appropriate as the underlying rationale for general discovery (to allow all relevant evidence to be put before the Court) has been met. Counsel referred to the voluntary exchange of information that has taken place, the availability and exercise by the Commissioner of his statutory power to obtain relevant information, the exchange of information pursuant to the disputes procedures of the TAA, and the likely inadmissibility of any further documents by reason of the evidence exclusion rule (s 138G(1)).

[61] In support of this submission, counsel noted that the disputes procedures of the TAA required the same "all cards on the table" approach as discovery, and that those procedures were supplemented by the Commissioner's power to issue s 17 notices. He submitted that the Commissioner was in a position to define what was relevant to the dispute at an early stage through his notices of proposed adjustment and statements of position, and the use of the s 17 notices. He argued that the combined effect of these processes coupled with the earlier exchange of information in the audit process had put the Commissioner in the possession of all relevant information. He pointed out that the Commissioner had power to issue additional s 17 notices, and take steps to enforce any perceived non-compliance, but had not

done so. He argued that taking all those steps into account, it could not be said that all relevant and admissible evidence was not already available to the Commissioner. He submitted that there was no justification for the time and cost involved in providing discovery simply to explore what was at best a theoretical possibility of future documents that were unlikely to be admissible.

[62] There can be no doubt that the plaintiffs have already given extensive and reasonably comprehensive disclosure. The extent of that disclosure is clearly a relevant factor. The manner in which the Commissioner has exercised his powers under s 17 is an important element in that assessment. Equally, however, it is clear that there are grounds for believing further relevant documents could exist (the plaintiffs have acknowledged this possibility). Given the prospect that further relevant documents may exist, the issue for the Court is whether an order for discovery is still appropriate taking into account the matters advanced by the plaintiffs. In my view they come down to three points:

- a) The first is that an order would be meaningless as any further documents are likely to be inadmissible.
- b) The second is that the Commissioner had the opportunity to obtain these documents by use of his powers under s 17.
- c) The third is the cost and inconvenience to the plaintiffs of having to undertake general discovery.

[63] I have already rejected the first point (in paragraphs [46] – [47] above). I now deal with the other two in turn.

[64] Counsel for the plaintiffs submitted that an order for discovery was not appropriate given that the Commissioner had exercised his powers under s 17 ahead of issuing his statements of position, and had chosen not to exercise the powers again after receipt of the plaintiffs' statements of position, notwithstanding his view that those statements of position raised new matters.

[65] Counsel for the Commissioner submitted, in effect, that the issue was now simply whether there were further relevant documents to be disclosed. He added that the Commissioner did not accept that there had necessarily been full compliance with the s 17 notice, but that was not the issue for the present application (the Commissioner reserved his position as to proper compliance).

[66] I do not accept that either the exercise or the failure to exercise the power to issue s 17 notices necessarily determines whether general discovery should be ordered in this case. Even though the notices were drafted broadly, they did not yield the documents subsequently obtained from Goldman Sachs. The plaintiffs say that it was in the Commissioner's hands to draft the notices appropriately (pointing to the different wording in the notice sent to Goldman Sachs). However, this still overlooks the fact that the Commissioner cannot necessarily anticipate what to seek, and exemplifies his point that the plaintiffs construed the requests narrowly. Whilst noting that the Commissioner is not arguing (in this application) that the plaintiffs failed to comply with the notices, the disputes over the notices demonstrate that the issue of notices will not necessarily produce all relevant documents.

[67] Counsel for the Commissioner also noted that the s 17 notices did not (and could not) anticipate the new factual assertions in the plaintiffs' statements of position (the independence of MediaWorks and reliance on the use of convertible notes in 1991 as a factor in deciding to enter into the OCNs now in issue). The plaintiffs explain the omission of these documents from their response to the s 17 notices (the independence of MediaWorks is seen as a timing issue, and the documents in respect of the 1991 convertible notes were on the file of the solicitors who handled the transaction). Nevertheless, this again illustrates that s 17 notices do not necessarily produce all relevant documents. For example it is clear that there will be further documents regarding the ownership of MediaWorks at relevant times (I use this only as an illustration of the operation of the notices, as the plaintiffs are no longer relying on this ground for their substantive challenge). However, the information may still be relevant contextually.

[68] Counsel for the plaintiffs submitted that the Commissioner could have sought these documents under a further s 17 notice. There is some merit to this point, but I

do not consider that it justifies refusal of an order. The Commissioner did not state his reasons for not issuing a further notice, but there could well be grounds for this (the correspondence indicates a level of frustration as to the way in which the plaintiffs responded to the earlier notices, and the Commissioner may well have decided that discovery was a more appropriate mechanism).

[69] I also take two further matters into account in deciding that discovery is appropriate. First, documents as to tax advice are protected from disclosure in the course of the disputes procedures but are available upon discovery. Counsel for the plaintiffs submitted that this was more appropriate for an application for particular discovery than as justification for general discovery (because there are only two documents that have been identified). Nevertheless, they are documents that would emerge on general discovery. Secondly, general discovery may well yield documents that will be helpful in establishing the context for the OCN transactions (an important factor in the objective assessment of the transactions required in tax avoidance cases).

[70] The last point to address is the submission that the plaintiffs should not be put to the cost and inconvenience of general discovery given the disclosure to date and the prospect that nothing relevant or likely to be of any utility to the Commissioner will emerge (particularly given s 138G).

[71] Counsel for the plaintiffs relied on the comments of Glazebrook J in *Commissioner of Inland Revenue v Dick* (set out in paragraph [50] above) that an order for discovery would be useless if the applicant could not show that the document was able to be raised within the exceptions of the evidence exclusion rule. I accept that there is no certainty that relevant documents will emerge from discovery. Nevertheless, I consider that there is a sufficient basis for believing that documents could exist. I have already reached the view that an order would not be meaningless (paragraphs [46]-[47] above). I do not consider that Glazebrook J's comments apply in this case. They were made in the context of an application for particular discovery made in the course of a hearing.

[72] I accept that the plaintiffs will be put to some cost (and inconvenience) in the preparation of an affidavit of documents. The plaintiffs' concerns in this respect can be met, in due course, by an appropriate order as to costs.

B. The non-party application

Amendment to application

[73] At the commencement of the hearing counsel for the Commissioner sought an amendment to his application to seek documents not only relating to the control or ownership of NZGT CanWest Limited but also any companies owned or controlled by that entity (being MediaWorks and CW Media). There was no objection to that amendment. I make an order as sought, accordingly.

The application

[74] The Commissioner brings his application under r 8.26 of the High Court Rules (formerly r 302). The Court has a discretion whether to grant an order. It was common ground that the Commissioner has the onus of establishing that the non-parties may be (or have been) in control of documents that are relevant to a question in the proceeding, and that an order is necessary at the time the order is to be made: *Sterling Pharmaceuticals (NZ) Limited v The Boots Company (NZ) Limited* (1991) 3 PRNZ 337. Necessary has been interpreted as "reasonably necessary": *Comalco New Zealand Limited v Broadcasting Standards Authority* [1995] 3 NZLR 469, 471.

[75] There was no contest as to both of the non-parties being, or having been, in control of documents of the nature sought. MediaWorks opposes the orders on the grounds that the documents sought are not relevant (do not relate to a matter in question), and that an order is not necessary as the Commissioner has failed to show that the documents being sought will be admissible in the proceeding.

[76] The Commissioner seeks an affidavit from NZGT listing any documents in its control:

- a) Being the contractual documents between it and Goldman Sachs JB Were (NZ) Limited, being the lead manager and underwriter of the initial public offering of ordinary shares in MediaWorks NZ Limited as described in the offer document issued by MediaWorks NZ Limited on 25 June 2004 (the “2004 Initial Public Offering”); and/or
- b) Relating to its ownership and control of NZGT CanWest Limited or NZGT CanWest Limited’s ownership and control of MediaWorks NZ Limited or CW Media Limited and the restructuring of TVWorks Limited and RadioWorks Limited in relation to the 2004 Initial Public Offering, including any documents relating to any restrictions and or obligation in relation to those shareholdings.

[77] The commissioner seeks an order that MediaWorks file an affidavit listing any documents in its control:

- a) That were received from Goldman Sachs JB Were (NZ) Limited relating to the 2004 Initial Public Offering and which relate to NZ Guardian Trusts Company Limited’s ownership and control of NZGT CanWest Limited or NZGT CanWest Limited’s ownership and control of MediaWorks NZ Limited or CW Media Limited and the restructuring of TV Works Limited and RadioWorks Limited with respect to the 2004 Initial Public Offering, including any relating to any restrictions and or obligation in relation to those shareholdings.
- b) Relating to Guardian Trust Company Limited’s ownership and control of NZGT CanWest Ltd or NZGT CanWest Limited’s ownership and control of MediaWorks NZ Limited or CW Media Limited and the restructuring of TV Works Limited and Radio Works Limited in relation to the 2004 Initial Public Offering including any relating to any restrictions and or obligations in relation to those shareholdings.

Are the documents relevant?

[78] The ultimate issue for determination in this proceeding is whether the OCNs in dispute constitute tax avoidance arrangements resulting in a tax advantage to the plaintiffs in the form of a deemed deductible expense. The OCNs were issued at par value. Their terms provided for them to be redeemed at maturity either in cash for their face value, or by conversion into shares in the issuer. Although their terms do not include an entitlement to interest, under the accrual rules of the Income Tax Act 1994 a “deemed deductible expense” arises out of the entitlement to convert the debt into shares on maturity (referred to as their warrant component).

[79] The Commissioner contends that the warrant component is essentially purposeless and valueless because, at relevant times, the holders and issuers were members of the same wholly owned group of companies (the CanWest group). The Commissioner contends that the OCNs are not priced at an arms length price and would not be purchased by a rational third party, and that no person other than a member of the same group wishing to obtain tax benefits for the group would pay par value for them.

[80] The plaintiffs contend to the contrary that the warrant component of the OCNs has value. Initially they said that this was evidenced by the sale of the OCNs as part of the pre-IPO restructuring. They say that there is a justifiable commercial rationale underlying the value of the OCNs and their transfer as part of the pre-IPO restructuring.

[81] The Commissioner says that the documents as to ownership of NZGT CanWest Limited, MediaWorks and CW Media are relevant to his case that the warrant component of the notes is valueless because an independent third party would not purchase them. He says that to succeed in his defence he will have to prove that these entities are not independent of the CanWest group.

[82] The issue of whether or not NZGT CanWest Limited, MediaWorks and CW Media were part of the CanWest group at the relevant times was first raised by the plaintiffs in their statements of position in the disputes procedure. They said that the group relationship only arose after shares were transferred as part of the restructuring ahead of the IPO. Up to that time the Commissioner did not understand the plaintiffs to be contesting his position that at all material times these companies were part of the CanWest group. The Commissioner took up the point in his addendum to his statements of position. In more recent time it has been the subject of correspondence between the parties. Prior to the hearing the plaintiffs advised the Commissioner that they will not be relying on the argument that NZGT CanWest Limited was independent of the CanWest group. They maintain their position, however, that the warrant component of the notes has value.

[83] The Commissioner invited the plaintiffs to conduct the case on the basis of an agreed fact that NZGT CanWest Limited and MediaWorks were not independent of the plaintiffs. The plaintiffs were unwilling to do so. In a letter from their solicitors to the Commissioner's solicitor their position was put as follows.

20. Rather than agreeing something to be a fact which is not the case, our clients propose the parties conduct these proceedings on the basis that the parties agree, for the purposes of this proceeding, that the plaintiffs will not assert that NZGT CanWest Limited was a truly independent third party, as set out in that plaintiffs' respective statements of position. Our understanding from the affidavit evidence of Mr Collier and paragraph 2.5 of your letter of 11 July 2008 is that the Commissioner only considers documents relating to this issue to be relevant by virtue of our clients' reliance on them in their statements of position. An agreement not to rely on this argument would make any such documents irrelevant to the proceeding.

[84] The plaintiffs counter-proposed that the parties conduct the proceedings on the basis that "the plaintiffs will not assert that NZGT CanWest Limited was a truly independent third party. The parties had further correspondence in an attempt to find common ground. In his submissions for the hearing, counsel for the plaintiffs modified their position further. He reiterated that they would not argue that NZGT CanWest was independent of the CanWest group but then went further (as I understand their earlier position) and said that they no longer wished to advance an argument that transfer of the OCNs to MediaWorks established their value to a third party. On that basis counsel submitted that the only matter in issue was whether the OCNs would have had value to a third party, and that that did not require discovery of any documents relating to independence of NZGT CanWest (and, as a consequence of the amendment to the application, MediaWorks and CW Media). Counsel added that the plaintiffs were willing, if necessary, to amend their pleadings to make their position clear.

[85] I am not persuaded that the plaintiffs' concessions render the documents being sought irrelevant to issues in the case. They address only the way in which the plaintiffs intend to run their case, and not the issues being raised by the Commissioner. As I understand their case, the plaintiffs were saying that the OCNs had value because their transfer was between arms-length parties, for a value that can survive scrutiny, and there is a commercial rationale for the transfer ahead of the

pre-IPO restructuring. The concessions may well address the first of these points, but I am not convinced that they are a complete answer to the Commissioner's position on the latter two.

[86] The Commissioner has pleaded that the entities are not independent. He stated in his statements of position that they were part of the CanWest group. He contends that that is a necessary element of his case, which he will have to prove as the plaintiffs have not considered themselves able to agree on the point. He clearly sees the nature of the relationship as relevant to the valuation exercise, and the commercial rationale.

[87] It is not for me, on this application, to assess (let alone determine) the effect that a factual finding as to the relationship of these entities to the CanWest group will have on the central issue of the value that the OCNs would have to a third party. It is sufficient that the facts are not agreed and appear to have a bearing on that issue.

[88] I turn now to the second aspect of the opposition, namely that an order is not necessary.

Has the Commissioner shown that the documents are necessary?

[89] The main issue between the parties on this point again concerns the application of the evidence exclusion rule, and particularly the extent to which the Court must consider the exception to that rule (s 138G(2)) in deciding whether or not to make an order. Before I go on to address the respective arguments on this, I will comment generally on the relevance of s 17 of the TAA. I do not consider the Commissioner's powers under s 17 to be a bar to an application, given the uncertainty as to the extent of those powers after commencement of litigation: *Vinelight Limited v CIR; Chesterfield Preschools v CIR* (No 2).

[90] Turning to the significance of the evidence exclusion rule (s 138G), counsel for the plaintiffs submitted that the documents could only be necessary if they were admissible at the substantive hearing. He argued that this required the Commissioner to show that the documents fell outside, or came within the exception

to, the evidence exclusion rule. He contended that the Commissioner had failed to meet the tests under s 138G(2) as the documents could have been obtained with due diligence, and there was no manifest injustice in not allowing them to be admitted.

[91] As with the application for general discovery, counsel for the Commissioner submitted that the documents were part of the facts outlined in his statements of position (and so admissible) but in any event that the issue of admissibility (particularly the exception to the evidence exclusion rule) did not need to be considered on an application for non-party discovery. As a further argument, he also submitted that even if s 138G(2) had to be considered now, the Commissioner had made out a case for an exception with respect to these documents.

[92] I do not see that the evidence exclusion rule applies to these documents. The value of the OCNs is clearly an issue raised on the statements of position. The sale of the OCNs ahead of the pre-IPO restructuring was raised in the Commissioner's statements of position, and was obviously relevant in his view to the issue of value. Although there is a difference of view between the parties as to who said what, and when, as to independence of NZGT CanWest, MediaWorks and CW Media, I am in no doubt that that point has also been raised in the statements of position. I also accept the argument of counsel for the Commissioner that the statements of position do not require detail of every point, but simply that there be enough information to inform on the point generally. I consider that there is sufficient in this case. Although it is not to me to make a final determination on admissibility, I am satisfied that there is an argument for it.

[93] As counsel spent some time advancing argument on the point, I will also address briefly the arguments on the need to consider as part of an application for non-party discovery whether the documents come within the exception to the evidence exclusion rule. Counsel for the plaintiffs submitted that this application (for non-party discovery) should be treated in the same way as an application for particular discovery. He relied on *CIR v Dick* and the cases in the Taxation Review Authority (*Case Y14* and *Case Y23*) in submitting that the Commissioner would only establish that the documents were necessary if he satisfied the Court that they came within the exception (s 138G(2)) to the evidence exclusion rule.

[94] I am not persuaded, either as a matter of logic or on the basis of authority, that the Court must determine the issue of admissibility under s 138G(2) at the time of making an order for non-party discovery.

[95] An application for non-party discovery must be determined on what is known at the time of the application. If the issue of admissibility is clear, it is possible that an order will be useless (to adopt Glazebrook J's language in *CIR v Dick*). However, it is also necessary to keep in mind the distinction made in *CIR v Dick* between discoverability and subsequent admissibility. It may well be that the issue of admissibility cannot be determined appropriately at the point of the application for non-party discovery (I have already referred to the prospect of documents emerging from non-party discovery being the subject of a specific application under s 138G(2)).

[96] For the reasons I have already given, I do not regard *CIR v Dick* as authority for the proposition that admissibility must be determined at the same time as the application for non-party discovery. It is to be kept in mind that the application in *CIR v Dick* was made in the course of a hearing in the Taxation Review Authority when admissibility would have been far more apparent, and timing was a significant issue. In short, the point will have to be decided on a case by case basis. This indeed is the import of the Taxation Review Authority cases (*Case Y14* at [37] and *Case Y23* at [42]).

[97] I am satisfied in the present case that the Commissioner has established that the discovery is necessary at this time for the future conduct of his case. The plaintiffs' objections on the basis of cost and inconvenience can be met in the usual way by an order that the Commissioner meet the non-parties' reasonable costs.

Decision

[98] I am satisfied that an order for discovery is appropriate. Counsel did not address me on the terms of any order (and particularly as to whether or not it was necessary to list all of the documents provided informally, or in the lists attached to the statements of position. I would not have thought it a major task to incorporate

the lists in the statements of position into an affidavit of documents. However, I have no knowledge of what further documents the plaintiffs may have voluntarily provided to the Commissioner. I will make an order either on the filing of a joint memorandum (or separate memoranda if counsel cannot agree). The memorandum or memoranda are to be filed within 14 days.

[99] I make orders for non-party discovery as sought in the amended application. The Commissioner is to meet the non-parties' reasonable costs of compliance with the orders.

[100] As the successful party, the Commissioner is entitled to an order for costs in respect of both applications against the plaintiffs and MediaWorks respectively, on a 2B basis together with disbursements as fixed by the Registrar.

Associate Judge Abbott