IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2022-404-74
[2022] NZHC 488

BETWEEN	THE COMMISSIONER OF INLAND REVENUE Applicant
AND	RICHARD ALLEN PARORE Respondent

Hearing: 9 March 2022

Counsel: A B Goosen and C Russell for Applicant
D P Weaver for Respondent

Judgment: 16 March 2022

JUDGMENT OF HARVEY J

This judgment was delivered by me on 16 March 2022 at 4.30pm, pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Date: ……

Solicitors: Crown Law, Wellington
Holland Beckett Law, Tauranga

Introduction

[1] Richard Parore is a 78 year old real estate agent. He was adjudicated bankrupt on 2 April 2009 and discharged on 10 October 2014. Even so, he continued working as a real estate agent both during and after his bankruptcy. For the years 2012 to 2017, the Commissioner of Inland Revenue contended that Mr Parore failed to pay Goods and Services Tax (GST) and had not filed income tax returns. Mr Parore responded that any tax issues during that period were the responsibility of the Official Assignee.

[2] In 2018, the Commissioner commenced the civil tax dispute procedure under the Tax Administration Act 1994 (the TAA) against Mr Parore. The civil proceedings were then effectively adjourned or deferred in June 2018 when the Commissioner advised Mr Parore that he would be subject to criminal prosecution. Those proceedings did not succeed, as the District Court found that Mr Parore's rights to a fair trial had been compromised irreparably because of the Commissioner having commenced civil proceedings; compelling Mr Parore to disclose information during that civil proceeding; and then deferring those proceedings to commence a criminal case against him in reliance on that disclosed information. This Court dismissed the Commissioner's subsequent appeal in December 2021.

[3] The Commissioner now applies for leave to commence a proceeding under s 89L(1B) of the TAA by way of originating application.[1] She seeks an order, in accordance with s 89L(2B), for an extension of the time for issuing a challenge notice to Mr Parore by eight months from the date of the Court's order.

[4] The Commissioner seeks more time because the civil tax disputes procedure she instituted was effectively deferred for three years and five months while criminal proceedings against Mr Parore ran their course. The Commissioner submitted that this is an "exceptional circumstance" which prevented her from issuing challenges to Mr Parore within the four-year time limit in s 89P. If she does not receive this extension of time, then the Commissioner will be unable to issue a challenge notice within the statutory timeframe and will be deemed to accept the content of Mr Parore's

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1 High Court Rules 2016, r 19.5

Notice of a Proposed Adjustment or NOPA, bringing the civil dispute to an end in Mr Parore's favour.[2]

[5] Mr Parore opposes the order sought extending the time to issue a challenge notice. He argued that the Commissioner has failed the statutory test because her decision not to advance the disputes resolution process, which had already commenced while criminal proceedings were in train, was not an event or circumstance beyond her control. Further, any delays in the criminal proceedings were of her own making. Accordingly, Mr Parore argued that there was no exceptional circumstance nor reasonable justification for failing to complete the disputes process within the four years. He does not oppose the application for leave to bring the proceeding by way of originating application. Mr Parore's counsel also submitted that the case involves essentially a dispute over $54,000 in tax that has been in train, in one court or another, since 2018.

[6] In any event, as Mr Parore issued his notice of proposed adjustment in the civil process on 2 March 2018, the four-year period within which to issue a challenge notice would have lapsed on 1 March 2022. By minute dated 21 February 2022, Fitzgerald J extended the time for issuing a challenge notice to 9 March 2022 at 5 pm, enabling any further extension to be considered at the hearing of the application.

[7] The principal issue for determination is whether the application for an extension of time for issuing a challenge notice, essentially in order to enable to the Commissioner to effectively recommence the civil tax dispute process, should be granted. The following questions are relevant:

(a) Was there a qualifying event or circumstance?

(b) Does that qualifying event or circumstance provide a reasonable justification for the delay?

(c) Should the court exercise its residual discretion?

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[2] Tax Administration Act 1994, s 89H(4).

Background

Civil proceedings

[8] Mr Parore's tax affairs have been under audit since 3 March 2017. Clint Tully, a compliance specialist employed by the Commissioner, has been the officer principally responsible for the investigation since April 2017. Mr Tully deposed that Mr Parore had carried on the taxable activity of being a real estate agent during the tax years ending 31 March 2012 through to 31 March 2017. During that time, Mr Parore had not registered for GST, had failed to pay any GST to the Commissioner, and did not file income tax returns for that period.

[9] On 22 January 2018, Mr Tully wrote to Mr Parore notifying him of his tax obligations, advising him that the Commissioner was going to issue default assessments for income tax and GST, as well as considering bringing a criminal prosecution. The following day, 23 January 2018, Mr Tully issued Mr Parore with default GST and income tax assessments for the relevant periods from 2011 to 2017. The accompanying letter advised Mr Parore of the default assessments and stated that if he wished to dispute them, he was required to file a NOPA together with the outstanding tax returns within four months under s 89AB(4)(b) of the TAA.

[10] Mr Parore submitted his NOPA to the Commissioner on 2 March 2018. This marked the beginning of the four year period within which the Commissioner must issue a challenge notice to a disputant under s 89P(1). In his NOPA, Mr Parore denied that he had an obligation to file GST returns during the period of his bankruptcy.

[11] Central to the dispute between the Commissioner and Mr Parore was whether he was liable for GST during his bankruptcy. The Commissioner issued a notice of response or NOR to Mr Parore's NOPA on 24 April 2018 accepting as correct his tax returns for the relevant periods but advising that his claim that he was not liable for GST for the periods during his bankruptcy was not accepted. That notice contained a heading "What you must do now" advising that Mr Parore must reject the notice of response within two months. This was duly done by a Mr Carruthers, Mr Parore's accountant, on 26 April 2018.

[12] At this point, the proceedings continued into the conference phase. Mr Tully wrote to Mr Carruthers on 3 May 2018 inviting him to attend a facilitated conference where IRD officials, including an in-house lawyer for the Commissioner, would attend. According to the Commissioner's staff, the conference procedure is intended to allow the taxpayer and IRD officials to exchange information and to attempt to resolve issues of law and fact. Mr Tully wrote again on 11 May 2018 proposing a date and time. However, the conference between the parties held on 6 June 2018 was ultimately unsuccessful in resolving the dispute. On 19 June 2018, Mr Tully wrote to Mr Carruthers thanking him for his attendance together with Mr Parore and noting that the Commissioner was considering a potential prosecution.

[13] Mr Tully stated that the next step in the disputes procedure would typically be to notify a disputant that the conference phase is at an end and issue a disclosure notice. The disputant would be required to issue a statement of position within two months. However, Mr Tully confirmed that he made the decision, following discussion with his team leader, to place the GST civil dispute on hold while a criminal prosecution was instituted against Mr Parore for evading GST payments. This was recorded in Mr Parore's case notes in the Inland Revenue system on 26 June 2018.

[14] Subsequently, on 28 June 2018, the Commissioner advised Mr Parore by letter that she would be prosecuting him for offences committed against the TAA and that the civil GST dispute would be "parked" during that time and pending the outcome of the prosecution. Mr Tully eventually stated in his evidence that the reason the civil dispute was 'parked' at the conference stage was to protect Mr Parore's fair trial rights. Mr Parore did not accept that assertion.

Criminal proceedings

[15] The criminal prosecution against Mr Parore was unsuccessful. On 26 August 2018, 13 charges were laid against Mr Parore alleging that he had evaded the payment of GST and that $84,226,05 had been wrongfully collected without being reported or paid to the Commissioner. Eventually, on 14 July 2020, Mr Parore's trial commenced before Judge D F Clarkson. Part way through the trial, following the Crown case, Mr Parore applied under s 147 of the Criminal Procedure Act 2011 to dismiss the seven

charges related to his period of bankruptcy. He argued that there was no case to answer.

[16] On 24 August 2020, Judge Clarkson granted the application dismissing the seven charges.[3] The Commissioner successfully appealed and the case was remitted by Jagose J on 8 March 2021 for the trial to be completed.[4] Mr Parore sought leave to appeal to the Court of Appeal which was declined on 12 July 2021.[5] The proceedings returned to Judge Clarkson for determination and the trial was to continue. However, in the meantime, counsel for Mr Parore became aware of a decision *R v Safi*, which had considered a similar case where the intertwining of civil and criminal proceedings had resulted in a breach of fair trial rights for the defendant.[6]

[17] Consequently, Mr Parore applied for a stay of proceedings on the basis that, because the civil process initiated by the Commissioner under the TAA was well underway before the criminal proceedings were launched, he had lost his right to silence. Judge Clarkson granted the stay by judgment dated 14 September 2021.[7] She found that, as the civil process had significantly progressed before the criminal prosecution commenced, Mr Parore had in the course of that process, either directly or through his advisers, disclosed a considerable amount of information. That included the basis on which he would defend any criminal prosecution. In particular, Mr Parore had been compelled to provide a NOPA to protect his position in the civil dispute, which had the effect of compelling Mr Parore to disclose his defence to the criminal charges. He had not been advised of his right to decline to issue a NOPA; in fact, contrary to the Commissioner's own published policy, Mr Parore was compelled to do so.

[18] Accordingly, the Judge found that a stay was appropriate. At no stage had Mr Parore been informed of his option to resist filing a NOPA and he had no opportunity to consult with counsel in relation to the suggested criminal charges.[8] The

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3 *Commissioner of Inland Revenue v Parore* [2021] NZDC 16363.
4 *Commissioner of Inland Revenue v Parore* [2021] NZHC 420.
5 *Parore v Commissioner of Inland Revenue* [2021] NZCA 312.
6 *R v Safi* [2018] NZDC 19698.
7 *Commissioner of Inland Revenue v Parore* [2021] NZDC 17946.
8 At [46].

Commissioner had, with significant impropriety, ignored the warnings given by the senior courts in various judgments as to the order of criminal and civil proceedings in cases such as these.[9] Accordingly, Mr Parore had lost his right to silence. A stay, she found, was not a disproportionate response given the impropriety of the Commissioner's conduct which had compelled Mr Parore to provide information concerning all of the charges against him. The prosecution of all 13 charges was stayed.

[19] The Commissioner's appeal was heard on 7 December 2021 and dismissed by Wylie J on 13 December 2021.[10] Citing the Supreme Court's comments in *Skinner v R*, Wylie J noted that the risk of the Commissioner triggering the civil disputes process under the TAA ahead of a prosecution in a criminal trial had been well recognised, in the legislation and case law.[11] His Honour found that it was clear that the Commissioner was contemplating a criminal prosecution from the outset, as set out in Mr Tully's letter of 22 January 2018. Nonetheless, the Commissioner issued default assessments on 23 January 2018 without advising Mr Parore that he could postpone any response, instead compelling him to provide a NOPA within four months. This, as the Commissioner herself accepted, was characterisable as misconduct.[12]

[20] As Wylie J found:

> [72] When the Commissioner was dealing with the civil dispute, she had not charged Mr Parore. However, when she subsequently charged him on 26 August 2019, in my judgement, she put Mr Parore in an impossible position. She had used her statutory powers under the TAA to effectively require Mr Parore to disclose his prospective defence, to deprive him of the right to remain silent, to get him to acknowledge the actus reus of certain of the offences and to disclose his hand in relation to other of the offences. When the charges were laid, a fair trial for Mr Parore was already an impossibility.
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9 At [51]. The judge noting that she made no comment as to whether this was intentional disregard but noting that the "prosecution actions or omissions would now seem to be disregarded in a plethora of rebuttals to defence arguments."

10 *Commissioner of Inland Revenue Department v Parore* [2021] NZHC 3405.

11 At [55], citing *Skinner v R* [2016] NZSC 101, [2017] 1 NZLR 289.

12 At [62].

[21] Wylie J concluded that a stay was the only appropriate remedy when Mr Parore's fair trial rights had been breached from the outset, observing that the civil process was still a potential pathway for the Commissioner:

> [80] … There is an alternative remedy for the Commissioner. She retains the ability to pursue the alleged GST liabilities through the civil disputes process and she can impose penalties if appropriate.

Current status of the civil proceedings

[22] Following the "parking" of the civil proceedings while the criminal prosecution was underway, the civil process is now at the point where the Commissioner issued a disclosure notice on 3 February 2022 to Mr Parore. However, the four-year statutory period in which to issue a challenge notice will lapse on 9 March 2022 (after being extended from 1 March 2022). In order for the Commissioner to issue a challenge notice she must first issue a statement of position.[13] However, the Commissioner may not do so until Mr Parore has issued his own statement of position in response to the disclosure notice.[14] As Mr Parore has a two-month response period from the issuance of the disclosure notice on 3 February 2022 in which to do so, his statement of position is not due till 2 April 2022.

[23] Accordingly, I accept that the Commissioner is not in a position to issue a challenge notice before the four-year period has expired. The corollary of this is that, unless a further extension of time to issue a challenge notice is granted, the Commissioner will be deemed to accept Mr Parore's proposed adjustment as set out in his NOPA.

Application to commence proceeding by originating application

[24] As a preliminary point, I find it appropriate that the proceeding be brought by way of originating application. Mr Parore does not oppose this aspect of the Commissioner's application. Rule 19.5 of the High Court Rules 2016 sets out that the Court may, in the interests of justice, permit any proceeding not mentioned in rr 19.2 to 19.4 to be commenced by originating application. The interests of justice mean

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13 Tax Administration Act 1994, s 89P(3). None of the exceptions which would allow the Commissioner to issue a challenge notice before a statement of position apply here.

14 Sections 89M(5) and 89M(6BA).

that the Court must secure the just, speedy and inexpensive determination of this proceeding.[15]

[25] It is accepted that this is a proceeding suited to the originating application procedure. Neither the TAA nor the High Court Rules prescribes a rule of commencement for an application under s 89L(1B). Proceedings under s 89L(1B) have previously commenced by originating application.[16] Notwithstanding that this application for an extension of time is opposed, the nature of the application under the statutory test is such that it is suited to the originating application procedure, given the confined subject matter and evidence, and it is in the interests of justice that this be permitted for the "just, speedy, and inexpensive determination" of the issues".[17]

Extension to period for issuance of challenge notice

[26] Pursuant to s 89L(1B) of the TAA, the Commissioner may apply for an order allowing her to issue a challenge notice after the expiration of four years if:[18]

(a) She considers an exceptional circumstance applies or has prevented her from issuing the challenge notice within the four years; and

(b) She applies within the four years.

[27] Under s 89L(2B), the High Court then may make an order for the purposes of subs (1B) on such terms as it thinks fit or decline to make an order. The latter point is not at issue. I accept that the Commissioner filed the application on 27 January 2022, and that is within the four-year time limit in s 89P (1). Therefore, the only issue for determination is whether the circumstances are exceptional.

Legal principles

[28] An "exceptional circumstance" is defined in s 89L (3) of the TAA as:

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15 *Solar Bright Ltd v Martin* [2019] NZHC 300 at [18] and [26].
16 See *Commissioner of Inland Revenue v Faghriyar* [2020] NZHC 1256 at [28].
17 See *Hong Kong and Shanghai Banking Corporation Ltd v Erceg* (2010) 20 PRNZ 652 (HC) at [25]–[26].
18 Section 89P (1).

> … an event or circumstance beyond the control of the Commissioner or officer of the department that provides the Commissioner with the reasonable justification for not rejecting the adjustment proposed by a disputant within the response period.

[29] Counsel accepted that, following the Court of Appeal's decision in *Commissioner of Inland Revenue v Fuji Xerox NZ Ltd,* the Court is required to approach the evaluation in stages:[19]

(a) The event or circumstance relied on by the Commissioner must be identified and the Court must then ascertain whether that was beyond the control of the Commissioner or an officer of the department.

(b) If there is such a qualifying event or circumstance, the Court must then decide whether that event or circumstance provides the Commissioner with a reasonable justification for not rejecting the respondent's NOPA within the response period.

(c) If there is such a reasonable justification, the Court must finally exercise its residual discretion.

Was there a qualifying event or circumstance?

The Commissioner's submissions

[30] Mr Goosen for the Commissioner submitted that the need to delay the progression of the civil dispute to protect the taxpayer's fair trial rights is the event or circumstance relied on in the context of s 89L (3). He contended that this was beyond the Commissioner's control since, consistent with the Supreme Court's dicta in *Skinner*, as the hearing of a civil proceeding before a criminal trial carries the risk of interfering with the fair trial rights, she had to allow the criminal prosecution to proceed first.[20] Counsel argued that that was a reasonable justification for not acting within the proper timeframe.

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19 *Commissioner of Inland Revenue v Fuji Xerox NZ Ltd* (2002) 20 NZTC 17,470 (CA) at [12] – [13].

20 *Skinner v R* [2016] NZSC 101, [2017] 1 NZLR 289.

[31] In addition, Mr Goosen submitted that another specific event or circumstance beyond the control of the Commissioner was the statutory timeframes for the civil procedure that continued to run. The Commissioner had no power to alter those timeframes, so counsel contended that this was "a circumstance beyond the Commissioner's control".

Mr Parore's submissions

[32] Mr Weaver, for Mr Parore, argued that the central issue before the Court is whether an exceptional circumstance exists that justifies a reasonable delay. Counsel submitted that Mr Parore does not accept either point and accordingly he contended that the application should be dismissed.

[33] Counsel argued that there is no credible evidence in support of the claim that the exceptional circumstance was the Commissioner's decision to delay the civil process to enable the criminal proceedings to progress. Mr Weaver highlighted that the event or circumstance, in accordance with the statutory definition, must be "beyond the control of the Commissioner". The Commissioner appeared to claim that her officials were ignorant of the law and sought to justify her misconduct despite that approach being rejected on two previous occasions by the courts.

[34] In any event, Mr Weaver contended that the Commissioner had been forewarned of the risks to fair trial rights in proceeding with a dual approach by the dicta in *Skinner v R*. Then, two years later, in *R v Safi*, the District Court ordered a stay against the Commissioner for the same misconduct eleven months earlier. Counsel also contended that while the Commissioner asserts that the misconduct was unintentional, intent has no bearing on the statutory test which has to be satisfied.

[35] Mr Weaver then cited the principles identified in *Commissioner of Inland Revenue v Fuji Xerox NZ Ltd*. Counsel submitted that, as early as 22 January 2018, Mr Tully wrote to Mr Parore requesting GST returns or to issue default assessments for the period 31 May 2011 to 31 March 2017. According to counsel, Mr Tully also asked for reasons why prosecution should not occur. The import of this statement, Mr Weaver argued, was that Mr Tully was contemplating criminal proceedings at the

time he issued the default GST assessments. Moreover, counsel pointed out that this was a clear finding of fact in the stay decision.

[36] Counsel again referred to *Skinner* where O'Regan J held that if the Commissioner triggered the civil disputes process ahead of a criminal trial, this would interfere with the fair trial rights of a defendant. The Supreme Court also referred to risks of infringing on s 25 of the Bill of Rights Act 1990. According to Mr Weaver, the Commissioner ignored the Supreme Court's earlier warning about acting in contravention of the Commissioner's own practice.

[37] Mr Weaver then referred to the Supreme Court decision, *Allen v CIR*, where Anderson J confirmed that under s 89D, when a taxpayer wished to dispute an assessment, a disputes procedure must be complied with. That involved the filing of a return and the issuing of a NOPA.[21]

[38] Mr Weaver submitted that the statutory four-year period within which a challenge notice must be issued was triggered per s 89P of the TAA as a consequence of Mr Tully issuing default assessments to Mr Parore. That was an action on the part of the Commissioner's staff and therefore clearly within her control. Consequently, the Commissioner had until 1 March 2022 to issue a challenge notice. Mr Parore continued to dispute the requirement to be registered or file and pay GST during the period of his bankruptcy, per s 58 of the GST Act 1985. Mr Parore's NOPA also set out part of his defence was that he was not liable for GST during the period he was an undischarged bankrupt. Mr Parore then filed his NOPA and tax returns within six weeks, well within the statutory four-month response period. Counsel submitted that in order to protect his position, Mr Parore filed the GST returns and issued the NOPA, all the while acknowledging that these were not provided voluntarily as Mr Parore was compelled to do so. This was also the finding of Judge Clarkson in her decision.

[39] After recounting the facts, Mr Weaver contended that the Commissioner did not park the civil dispute following the exchange of Mr Parore's NOPA and the Commissioner's NOR. The Commissioner in fact advanced the civil dispute to the

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21 *Allen v CIR* [2006] NZSC 19.

conference phase of the process. The eventual outcome was the letter from Mr Tully to Mr Parore, dated 28 June 2018, about the commencement of a prosecution and the "parking" of the conference stage of the civil proceeding.

[40] Mr Weaver argued that, since then, and following the unsuccessful criminal prosecution, the Commissioner now asserted that the reason for deferring the civil dispute process was to protect Mr Parore's fair trial rights. Counsel submitted that, on the contrary, the evidence does not support the Commissioner's assertion, which appeared to be an argument of convenience.

[41] Moreover, Mr Weaver submitted that even if the asserted rationale for deferral of the civil dispute was correct, it was the Commissioner and not Mr Parore who made that decision, in the full knowledge that the four-year time period for issuing the challenge notice was in train, as Mr Tully himself accepted during cross examination:

> Q. And you knew, Mr Tully, that the timeframe or the time bar expired on 1 March 2022, didn't you?
> A. Yes.
> Q. So it was critical that the disclosure notice be issued as soon as possible, wasn't it?
> A. Yes.
> Q. But you delayed, or the Commissioner delayed, the issuing of the disclosure notice herself to the point Mr Parore didn't even have the two month response period.
> A. Yes.
> Q. Well, that's not Mr Parore's fault is it? It's the Commissioner's decision to do that?
> A. Yes.
> Q. Mr Tully, I just want to put this to you, there was no reason the disclosure notice couldn't have been issued in December, or after, in December 30 2021, was there?
> A. No, but I was advised by my legal team to delay issuing the disclosure, yes.
> Q. Okay –
> A. No, there was no, no reason.
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> …
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> Q. Mr Tully, it wasn't the fault of Mr Parore that this matter has been delayed to the point of needing an extension of time, is it?
> A. No.

[42] Indeed, counsel submitted that the Commissioner's own standard practice statement, dated November 2016, makes it plain that the law provides very narrow grounds for an exceptional circumstance. The examples cited include flood damage or where a staff member is absent on leave without cover, neither of which apply in this case. In short, Mr Weaver submitted that the Commissioner's argument that the

deferral of the civil process was to protect Mr Parore's rights to a fair trial is simply unsustainable.

Discussion

[43] As foreshadowed, in her judgment of 14 September 2021, Judge Clarkson found that the risk of fair trial rights "was well understood in 2016", long before Mr Tully had issued his default assessments and initiated the civil dispute process.[22] The Judge also cited Judge Collins, who found in *Safi* that the effect of the Commissioner in commencing criminal proceedings, having just engaged with a taxpayer in a civil dispute resolution process, meant that a defendant in the criminal proceedings had to disclose their defence. Undoubtedly, the Judge found, that was a breach of trial rights and, accordingly, must be "presumptively unfair".[23]

[44] Put another way, as Mr Weaver underscored, once the civil process had commenced, Mr Parore was compelled to provide a NOPA and, as Mr Tully confirmed, the subsequent meeting with Mr Parore and his advisers, on the one hand, and Mr Tully and his "legal team", on the other, made it perfectly plain as to the nature of the meeting. Mr Tully did not deny during cross-examination that, consistent with his correspondence of January 2018, the risk of prosecution (or at the very least, its possibility) was a point raised during the June meeting. That possibility then turned into reality soon after when his letter of 28 June 2018 was issued.

[45] In any case, as cited by counsel, the Supreme Court put the matter beyond doubt in *Skinner and Rowley v R* that:[24]

> Hearing the civil proceedings before the criminal trial would carry the risk of interfering with the fair trial rights of the defendant. As he or she would have the burden of proof in the civil proceedings, he or she would be required to disclose information supporting his or her position, and in effect, disclose his or her defence to the criminal charge in advance of the trial.

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22 At [38].
23 *R v Safi* [2018] NZDC 19698 at [34].
24 *Skinner and Rowley v R* [2016] NZSC 101 at [65].

[46] Even more unequivocal, in paragraph [6] of his judgment in *Safi*, Judge Collins concluded that the risk of breach of fair trial rights "was well known to the Commissioner or the Commissioner's officers before the breach occurred". The Judge went on to hold that the senior courts had all been informed by counsel for the Commissioner in completely separate litigation that "the risk was known and how the risk would be avoided".[25] Judge Collins concluded that any suggestion of excluding information obtained by the Commissioner through the civil process "would make the resulting trial a farce since, in any event, the exclusion of evidence was not an appropriate remedy". In the related stay proceedings involving Mr Parore, Judge Clarkson confirmed that she had arrived at "precisely the same conclusion".[26]

[47] Congruent with the decision of Judge Clarkson is the judgment of Wylie J dismissing the Commissioner's appeal against the stay. For present purposes, the most relevant aspects of the decision are set out in paragraph [70] - [72] in the context of the obvious breach of Mr Parore's rights to a fair trial, for example:

> [70] I agree with the Judge that the civil tax dispute process **proceeded a significant way down its path before the prosecution commenced**, and that as a result, as he was obliged to do, Mr Parore had either directly or through his advisors disclosed a considerable amount of information on the basis on which he would defend some of the charges and that he had admitted the actus reus of other of the charges.
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> (Emphasis added)

[48] Yet, in the context of exceptional circumstances beyond the control of the Commissioner, the filing of criminal proceedings in the District Court was delayed by some 14 months. Then there was the reality that, by August 2019, the *Safi* decision had been known to the Commissioner for 11 months before the charges against Mr Parore were filed. In my assessment, none of the submissions made on her behalf concerning the rationale for this delay are compelling. It was entirely within the Commissioner's power as to when the criminal proceedings were to commence. That there may have been ongoing proceedings with unsuccessful appeals cannot distract from the reality that the Commissioner could have filed criminal proceedings much sooner than August 2019. That would have then enabled the civil process to have been

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25 *R v Safi* [2018] NZDC 19698 at [6].
26 At [46].

completed well within the four year period. To then come to this Court seeking an extension, without providing a reasonable explanation for the delay, is not a viable pathway to the remedy that the Commissioner now seeks.

[49] As to the Commissioner's claims that the delay to the civil process was to protect Mr Parore's fair trial rights, even Mr Tully accepted that there was no evidence of this during his cross-examination:

> Q. You haven't made any notes in the system about protecting Mr Parore's fair trial rights, have you?
> A. No, it was just a brief note which I had with my team leader and I was advised to, how to proceed with the case.
> Q. I'm just asking, have you made any notes at the time that your lawyers are saying you made the decision to protect his fair trial rights, is there any notes that you have made about that?
> A. No.
> Q. Okay and have you ever sworn an affidavit in any of the proceedings that we've had in relation to these stay applications that you were trying to protect his fair trial rights by parking the dispute?
> A. Yes.
> Q. Where is that?
> A. No, no, no, sorry.
> Q. Just so we're clear, you've never raised the issue of protecting his fair trial – parking the dispute to protect his fair trial rights in the past, before this application?
> A. No but it was documented in my letter to him that we are parking the disputes to protect your fair trial rights.
> Q. Was that the letter that we just looked at, at tab 20?
> A. No it's not, sorry, my bad. I was, I got a bit confused there, yes that is the letter I sent, no, it doesn't mention, no.
> **Q. So you accept then Mr Tully that before this application, you've never, ever put anything in writing about parking the dispute to protect Mr Parore's fair trial rights, have you?**
> **A. No.**
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> (Emphasis added)

[50] In any event, despite the submissions of the Commissioner, I do not accept her argument that the conduct described amounted to a qualifying event or circumstance. Indeed, at almost every significant juncture, the decision to proceed or not lay with her, not Mr Parore. Putting the point beyond doubt, Mr Tully accepted that Mr Parore had no control over the timing of either the civil process or the criminal proceedings and that in fact, this was within the Commissioner's hands:

> Q. So just so we're clear, there was nothing within Mr Parore's control to advance the civil dispute was there?
> A. No.

> Q. So the delay in charging Mr Parore and the delay in the civil dispute was at the Commissioner's fault, or hands?
> A. Yes.

[51] In this context, I also distinguish the decision of Andrews AJ in *Commissioner of Inland Revenue v Faghriyar*. That was an unopposed application dealt with *after* the conclusion of a successful criminal prosecution. In *Faghriyar* the Judge found that:[27]

> … the disputes procedure being held in abeyance for a period of approximately two-and-a-half years to protect the first respondent's fair trial rights in criminal proceedings is:
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> (a) A qualifying exceptional circumstance beyond her control;
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> (b) That provides reasonable justification for not issuing timely challenge notices; and
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> (c) that the Court should exercise its residual discretion to grant the extension sought so that the tax positions of the company and the first respondent can be determined according to law.

[52] However, this is quite different from the present case. In *Faghriyar*, the Commissioner had "parked" the civil disputes procedure at the stage where the company and the first respondent had rejected the Commissioner's NOR. As mentioned, the civil proceedings were recommenced at the conference stage but only following the conclusion of the successful criminal prosecution against the respondent in that case on 14 December 2018. Here, as both Judge Clarkson and Wylie J determined, the tax disputes procedure was considerably more advanced when it was suspended to allow for the criminal proceedings. In *Faghriyar*, there was no suggestion that the defendant's fair trial rights had been breached. Moreover, the criminal proceedings appear to have been advanced in a timely way and, as foreshadowed, were ultimately successful.

[53] In my assessment, the situation that has unfolded in this case could not properly be described as a qualifying event or circumstance to provide the relief that the Commissioner is seeking. On the contrary, I agree with Wylie J that, "from the outset", the Commissioner had breached Mr Parore's fair trial rights. I also agree with

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[27] *Commissioner of Inland Revenue v Faghriyar* [2020] NZHC 1256 at [39].

Mr Weaver that, in the particular circumstances of this case, the delays have been largely as a consequence of the Commissioner's own decisions. The evidence confirmed that Mr Parore, for the most part, responded promptly and provided the information when requested, except where he considered he had a genuine point of dispute to contest the Commissioner's position. In short, I do not accept that the ground argued by the Commissioner, that the need to delay the progression of the civil dispute to protect the taxpayer's fair trial rights, amounted to a qualifying event or circumstance in the context of s 89L(3).

Does that event or circumstance provide a reasonable justification for the delay?

The Commissioner's submissions

[54] On the issue of reasonable justification, Mr Goosen submitted that the Commissioner could not advance the civil dispute for a period of three years and five months while the criminal proceeding ran its course. Accordingly, the Commissioner argued that this is a reasonable justification for not rejecting the adjustment proposed by Mr Parore within the four-year response period.

[55] In order not to breach the fair trial rights, the Commissioner could have taken one of two pathways, according to counsel. As Mr Parore had not filed income tax or GST returns, then the time bar in ss 108 and 108A of the TAA was not engaged. This meant that the Commissioner could have taken the decision not to issue the default assessments until the criminal proceedings had been concluded. Alternatively, the Commissioner could have issued default assessments and drawn attention to the provisions of s 89K allowing a taxpayer to issue a notice of proposed adjustment outside the response period in an exceptional circumstance.

[56] Counsel then argued that there were disadvantages to taxpayers if the Commissioner did not issue an assessment notice at the earliest opportunity and where, if a taxpayer had been made aware of the contents of s 89K, then there would be no breach of a taxpayer's fair trial rights. Use of money interest liability for taxpayers was also a potential risk, according to counsel. In addition, Mr Goosen submitted that the Commissioner has a duty to collect over time the highest net revenue that is practicable within the law under s 6A of the TAA.

Mr Parore's submissions

[57] Mr Weaver for Mr Parore submitted that the delays caused in this case were within the control of the Commissioner and that there is no reasonable justification for the four-year time limit to have elapsed without her completing the statutory procedures. In summary, counsel argued that, given the District Court and High Court decisions finding that the Commissioner breached Mr Parore's fair trial rights by commencing the criminal proceedings, there was no evidence that the Commissioner actually "parked" proceedings to protect Mr Parore's fair trial rights.

[58] Moreover, Mr Weaver argued that there was no reasonable justification for the Commissioner to have then deferred the civil disputes procedure, having delayed bringing the criminal case for 14 months while the four year period was running. The Commissioner unjustifiably ignored appellate authority warning against the same misconduct the Commissioner was committing, and which was contrary to the Commissioner's own policy, by not only continuing proceedings but also by pursuing appeals. To compound the situation, the Commissioner then failed to issue a disclosure notice until 3 February 2022 when Wylie J's decision was issued almost two months before on 13 December 2021.

[59] Counsel submitted that even if the first limb of the statutory test had been met, which is denied, the Commissioner fails on the second limb in that there is not reasonable justification for delay. Even though the Commissioner, through Mr Tully, told Mr Parore on 28 June 2018 that a criminal prosecution was to commence, this did not occur until August 2019 when charges were filed with the District Court at Auckland, a period of 14 months from when Mr Parore had been advised of his prosecution. Mr Weaver submitted that had the Commissioner not delayed commencement of the criminal prosecution, then there would have been ample time within which to complete the civil dispute.

[60] Mr Weaver submitted that, despite all of that background, and the failings of the Commissioner and her staff, for reasons unknown, she chose not to issue a disclosure notice until 3 February 2022, while being fully aware that the disputes procedure needed to be completed by 2 March 2022. The result was that the

Commissioner now has had to make the present application seeking an extension of time. Mr Weaver submitted that the Commissioner should have known that the four-year period expired on 2 March 2022 with the result that it was essential for the Commissioner to issue a disclosure notice within the proper timeframe. Instead of doing that, the Commissioner delayed until 3 February 2022, when it was too late. It is this conduct of the Commissioner that has caused the time bar to expire.

Discussion

[61] As foreshadowed, Mr Parore was advised that he would be the subject of criminal prosecution in June 2018. The *Safi* decision was then issued in September 2018. Then in August 2019, 14 months after Mr Tully's letter to Mr Parore, the Commissioner commenced her criminal prosecution by formally laying charges in the District Court. This was a decision of the Commissioner that contributed to the delay. In any event, even accepting, hypothetically, that the "parking" of the civil proceedings while the criminal proceedings advanced was a qualifying circumstance, which I do not necessarily accept as correct, once the stay appeal proceedings concluded on 13 December 2021, there was no justification for the Commissioner not having concluded matters within the four-year timeframe. Any consideration of an appeal of Wylie J's judgment would have doubtless been informed by the relevant Court of Appeal and Supreme Court decisions on these issues.

[62] This is a situation where, if the Commissioner had acted promptly following Wylie J's decision in December 2021, a disclosure notice could have been issued prior to 2022 and Mr Parore compelled to respond by February 2022 pursuant to the two-month statutory timeframe. This would have provided the Commissioner with enough time, acting promptly, to issue a statement of position and a challenge notice before 1 March 2022. I find little attraction to the submission that this was not done because the Commissioner does not take such steps during December, the start of the holiday period. Indeed, Mr Tully commented that he was "confused" about this point in his evidence, given the examples cited by Mr Weaver during cross-examination.

Should the court exercise its residual discretion?

The Commissioner's submissions

[63] Finally, turning to the issue of the Court's residual discretion, Mr Goosen contended that, in the appeal against the stay decision heard in this Court, Wylie J observed that the alternative remedy for the Commissioner was the ability to pursue the GST claimed through the civil disputes process. Counsel submitted that, in any event, the breach of Mr Parore's fair trial rights in relation to the criminal proceedings was unintentional. He then referred to the fact that, at the time, the Commissioner did not have a policy statement that addressed the issue of the conduct of civil disputes where a criminal investigation was also underway. That had been remedied on 22 July 2020 when the Commissioner issued SC20/24, the dispute resolution process and fair trial rights. Counsel submitted that, equally importantly, the District Court judgment, *R v Safi* had not been delivered when the breaches complained of occurred.

Mr Parore's submissions

[64] Counsel invited the Court to exercise its residual discretion on practical and policy grounds. Mr Parore is 78 years old and has been the centre of years of criminal and civil litigation brought by the Commissioner for $54,000 of disputed tax since 2018. When the Commissioner's decision to commence and then "park" the statutory procedures under the TAA in contemplation of prosecution was *itself* the misconduct leading to breach of fair trial rights, it would be contrary to policy to allow that prosecutorial misconduct to now be accepted as the "exceptional circumstance" justifying an extension of time.

[65] Mr Weaver contended that the Commissioner now attempts to justify her conduct but on grounds and for reasons that are not sustainable. In addition, there was never a lawful requirement or justification to issue the default assessments since they are not a prerequisite for criminal proceedings. This was confirmed by the Court of Appeal in *R v Allan.*

[66] In summary, Mr Weaver contended that there is no evidence to support the Commissioner's assertion that the civil process was deferred to protect Mr Parore's

fair trial rights. On the contrary, Mr Tully accepted that there was no evidence of this. Even if that was the intent, that is not an exceptional circumstance under the first stage of the test. If the Court were to accept that it was, there was no reasonable justification for the Commissioner for then to have delayed the civil procedure for the following reasons:

(a) The Commissioner failed to commence the criminal case for 14 months after parking the civil procedures while the four-year period was in train;

(b) Filing charges late, in August 2019, when it was known that a stay had been granted in *Safi* for the same misconduct in September 2018, 11 months earlier;

(c) Taking such steps with the full knowledge of the Supreme Court, High Court and District Court decisions expressly warning against the same misconduct which eventually led to the successful stay application in this case;

(d) Opposing the stay and wasting time pursuing an appeal to the High Court while the four-year period was running, contrary to her published policy of 22 October 2020; and

(e) Failing to issue a disclosure notice until 3 February 2022, leaving insufficient time to complete the statutory process.

[67] For these reasons, counsel submitted that the Commissioner's application for an extension should be dismissed.

Discussion

[68] Having carefully reviewed the submissions of both counsel, I consider that in this case, I must exercise my residual discretion so as to decline the application. However, I need not do so, given that I am not satisfied that the Commissioner has identified qualifying exceptional circumstances; and, even if the circumstances she has identified do qualify, I do not accept that they constitute reasonable justification. The remedy is disproportionate at this late stage of a lengthy process. I also consider that little would be gained by allowing the extension of time, and in any event doing

so would further penalise Mr Parore for the Commissioner's apparent ill-handling of this case. As has been said, it would be inappropriate for the Commissioner's own prosecutorial misconduct – regardless of fault – to now be accepted as an "exceptional circumstance" justifying an extension of time.

Decision

[69] The Commissioner's application under s 89L(1B) of the Tax Administration Act 1994 for an extension of time in which to issue a challenge notice is declined.

Costs

[70] I am inclined to award costs on a 2B basis. If counsel have a different view, they may exchange memoranda of up to 10 pages within 20 working days.

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Harvey J