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**THE FISCAL NULLITY DOCTRINE IN
NEW ZEALAND**

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Abstract

This paper considers whether the fiscal nullity doctrine is part of New Zealand law with particular reference to Ben Nevis Forestry Ventures Ltd v Commissioner of Inland Revenue and some discussion of cases relating to fiscal nullity from the United Kingdom, Australia and Canada.

Word length

The text of this paper (excluding abstract, table of contents, non-substantive footnotes and bibliography) comprises approximately 15,000 words.

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I Introduction

This paper considers whether the fiscal nullity doctrine, as it has become known, is part of the law of New Zealand governing the interpretation of tax legislation.

5 The House of Lords first articulated the fiscal nullity doctrine in *W T Ramsay v Inland Revenue Commissioners*.¹ Part II of this paper provides a description of that decision and background information on the doctrine such as the development of fiscal nullity and the reception of fiscal nullity
10 in jurisdictions outside the United Kingdom including New Zealand.

Sections II.B and II.C will explain that in jurisdictions outside the United Kingdom there is support for the view that the fiscal nullity doctrine operates as a judge-made general anti-avoidance rule, that fiscal nullity reflects the particular legal
15 context in the United Kingdom at the time that the House of Lords decided *Ramsay* and that fiscal nullity is not applicable in jurisdictions where the tax legislation includes a statutory general anti-avoidance provision.²

20 In New Zealand the most significant decision relating to the fiscal nullity doctrine is *Ben Nevis Forestry Ventures Ltd v Commissioner of Inland Revenue*.³ In that case the Supreme Court, by a majority (Tipping, McGrath and Gault JJ), took an approach that is inconsistent with treating fiscal nullity as being
25 part of New Zealand law. Given the significance of this decision to any discussion of fiscal nullity in New Zealand, part III of this paper analyses the reasoning of the majority with a view to demonstrating how the court could have taken a fiscal nullity approach in that case.

30 Parts IV and V will then consider other possible grounds for arguing that the fiscal nullity doctrine is not part of New Zealand law. These grounds are that fiscal nullity is not compatible with the existence of a general anti-avoidance provision in New Zealand's income tax legislation, that fiscal

¹ *W T Ramsay v Inland Revenue Commissioners* [1982] AC 300 (HL).

² In this paper a reference to a statutory general anti-avoidance provision means a general anti-avoidance rule similar to section BG 1 of the Income Tax Act 2007 that is included in the relevant taxing statute.

³ *Ben Nevis Forestry Ventures Ltd v Commissioner of Inland Revenue* [2008] NZSC 115, [2009] 2 NZLR 289.

nullity is not reconcilable with the *Duke of Westminster*⁴ principle and that fiscal nullity produces too much uncertainty in the application of tax legislation. This paper will argue that the better view is that fiscal nullity is part of New Zealand law because fiscal nullity is merely an application to tax legislation of the purposive approach to statutory interpretation.

II *The Fiscal Nullity Doctrine*

A *The Ramsay Case: The Inception of the Fiscal Nullity Doctrine*

Ramsay concerned transactions entered into by a taxpayer in an attempt to avoid capital gains tax on a gain from an earlier transaction by generating a loss on a disposal that could be offset against the gain. The taxpayer had embarked upon a series of transactions in order to produce both the requisite loss and a corresponding gain. It was intended that the nature of the corresponding gain was such that, relying on a technicality, it would not be subject to capital gains tax.⁵ By generating a tax-free gain, this part of the scheme would have ensured that while the taxpayer sustained a loss in a technical legal sense, there was no loss in a substantive economic sense. The Crown disputed the effectiveness for tax purposes of the taxpayer's scheme, and invited the House of Lords to view the transactions as producing neither a loss nor a gain. The Crown suggested that the court should treat the transactions as a fiscal nullity.

The House of Lords accepted this argument. Lord Wilberforce considered that it is the court's task to determine the relevant transaction to which it is sought to attach a tax consequence.⁶ In doing so, he said, a court is not bound to consider individually each separate step in a composite transaction that is intended to be carried through as a whole.⁷ Where the relevant transaction *for taxation purposes* emerges from a series or combination of transactions that are intended to

⁴ *The Commissioners of Inland Revenue v The Duke of Westminster* [1936] AC 1 (HL).

⁵ At 301.

⁶ At 323-324.

⁷ At 324.

operate as such, it is that series or combination as a whole that should be considered.⁸

Applying this approach to the facts of *Ramsay*, the nature of the taxpayer's scheme was such that once set in motion it would proceed through all the stages to completion.⁹ The scheme was designed to produce, and did produce, a loss and a matching gain that cancelled each other out.¹⁰ Therefore, in determining whether the taxpayer was allowed a deduction in relation to the loss, the court was not bound to view the loss in isolation from the corresponding gain. In the words of Lord Wilberforce, "[t]he true view, regarding the scheme as a whole, is to find that there was neither gain nor loss".¹¹ The House of Lords was unanimous in dismissing the taxpayer's appeal.

B The Fiscal Nullity Doctrine: A Purposive Approach to Statutory Interpretation

The House of Lords in *Ramsay* emphasised that the finding that the taxpayer's scheme had resulted in neither a loss nor a gain did not require the creation of a new doctrine. According to the House of Lords, the decision was reached by applying orthodox principles of statutory interpretation. Lord Wilberforce stated that the Crown's argument that the taxpayer's scheme should be treated as a fiscal nullity introduced no new principle.¹² Rather, the Crown's argument invoked the power and duty of the courts, in relation to new and sophisticated legal devices, to determine the nature of those legal devices and to relate them to existing tax legislation.¹³

In determining the nature of legal devices and relating them to existing tax legislation, the court must take a purposive approach. This approach can be inferred from Lord Wilberforce's statement that "[t]he capital gains tax was created to operate in the real world, not that of make-belief."¹⁴ Lord

⁸ At 324.

⁹ At 328.

¹⁰ At 328.

¹¹ At 328.

¹² At 326.

¹³ At 326.

¹⁴ At 326.

Wilberforce appears to be saying that when the United Kingdom Parliament passed the Finance Act 1965 in order to impose a capital gains tax, Parliament passed the Act to operate in the real world by taxing real gains and allowing deductions in respect of real losses. Thus, Parliament did not intend that taxpayers would be able to produce “make-believe” losses that would qualify as deductions in order to avoid paying tax on capital gains. That would defeat the purpose of the capital gains tax legislation, which was to raise taxes from capital gains. On a purposive interpretation, such losses were not allowable deductions under the Finance Act. Lord Wilberforce went on to say that a finding that such a loss is not the kind of loss that the legislation is dealing with is well within the judicial function.¹⁵ This observation is a further indication that the court’s decision not to recognise the loss in question as a real loss was based on a purposive interpretation of the relevant legislation, and not on the creation of a new general anti-avoidance doctrine.¹⁶

Despite the court’s reliance in *Ramsay* on ordinary principles of statutory interpretation, the case was widely viewed as creating a judge-made general anti-avoidance rule, known as the doctrine of fiscal nullity.¹⁷ This misconception was probably caused by the approach of the courts in the cases that followed *Ramsay*. The court applied the fiscal nullity doctrine in *Furniss (Inspector of Taxes) v Dawson*.¹⁸ Lord Brightman’s precise formulation of the doctrine in that case suggested that the doctrine was a judicial rule that went beyond statutory interpretation.¹⁹

Courts have since reaffirmed that the fiscal nullity doctrine is founded on a purposive approach to the interpretation of tax legislation. In *Inland Revenue Commissioners v McGuckian*, Lord Steyn stated that:²⁰

¹⁵ At 326.

¹⁶ See Christopher Ohms “Macniven v Westmoreland Investments Ltd: The Role In New Zealand Of Fiscal Nullity” (2001) 7 NZJTL 195 at 204 for the same opinion.

¹⁷ Ohms, above n 16, at 196.

¹⁸ *Furniss (Inspector of Taxes) v Dawson* [1984] AC 474 (HL).

¹⁹ John Prebble and Lisa Tat *The Doctrine of Fiscal Nullity through the Cases* (unpublished, available from the author) at [24.12].

²⁰ *Inland Revenue Commissioners v McGuckian* (1997) 69 TC 1 (HL) at 80.

5 The new Ramsay principle was not invented on a juristic basis independent of statute ... The principle was developed as a matter of statutory construction. The new development was ... founded on a broad purposive interpretation, giving effect to the intention of Parliament. The principle enunciated in the Ramsay case was therefore based on an orthodox form of statutory interpretation.

10 In the same case, Lord Cooke observed that while the fiscal nullity doctrine is commonly seen as being specific to the construction of tax legislation, it would be more helpful to recognise the doctrine as an application to tax legislation of the general approach to statutory interpretation whereby weight is given to the purpose of the legislation.²¹

15 In conclusion, the *Ramsay* decision did redefine the role of the courts in interpreting and applying tax legislation for the purposes of determining the tax effect of related transactions. Before *Ramsay* it was expected that courts would respect the legal form of each transaction entered into and would not have regard to the economic substance of transactions,²² except where
20 a statutory general anti-avoidance provision was invoked by the revenue authorities. *Ramsay* introduced a new possibility, which is that a court may treat certain transactions as having no effect for tax purposes, that is, as a fiscal nullity, where it is appropriate to do so in order to give effect to the purpose of the
25 tax legislation in question. This new possibility is founded on and gives appropriate weight to the purposive approach to statutory interpretation. In this paper the term “fiscal nullity” refers to the concept that a court may treat certain transactions as having no effect for tax purposes where it is appropriate to do so
30 in order to give effect to the purpose of the relevant taxing provisions. This explanation is not intended to limit the potential scope of the fiscal nullity doctrine and it is recognised that courts will further develop and refine the doctrine.

C Fiscal Nullity in New Zealand

35 New Zealand courts have not explicitly acknowledged that fiscal nullity is part of New Zealand law relating to statutory interpretation. A possible explanation is the mischaracterisation

²¹ At 84. See also *Barclays Mercantile Business Finance Ltd v Mawson (Inspector of Taxes)* [2004] UKHL 51, [2005] 1 AC 684.

²² Prebble and Tat, above n 19, at [1.4].

of fiscal nullity as being a judge-made general anti-avoidance rule, as explained in section II.B. That is, because the fiscal nullity doctrine is viewed as being a judge-made general anti-avoidance rule, fiscal nullity is seen as having application only in jurisdictions that have no statutory general anti-avoidance provision in the relevant legislation, and so as having no application in jurisdictions that *do* have a statutory general anti-avoidance provision. Another possibly relevant factor is the *Duke of Westminster* principle, which may not be reconcilable with the fiscal nullity doctrine.

Nevertheless, New Zealand courts do apply a purposive approach to statutory interpretation. When it comes to statutory interpretation, tax statutes are no different from any other statute.²³ As the purposive approach to statutory interpretation is the generally accepted modern approach,²⁴ and is indeed mandated by s 5 of the Interpretation Act,²⁵ it follows that when interpreting tax statutes New Zealand courts should take a purposive approach. Given that the fiscal nullity doctrine is an application of a purposive approach to interpreting tax legislation, there is a strong argument for treating fiscal nullity as part of New Zealand law.

New Zealand courts have recognised that the generally accepted purposive approach to statutory interpretation extends to tax legislation, whether the general anti-avoidance provision is invoked or not. One example is *Hadlee v Commissioner of Inland Revenue*, in which the court considered the proper treatment in tax law of an assignment of partnership income.²⁶ Richardson J had no doubt that the assignment of income fell within the general anti-avoidance provision, but he was of the opinion that it was unnecessary to consider that provision.²⁷ He resolved the case in favour of the Commissioner by taking a purposive approach to interpreting the Income Tax Act 1976 as a whole. Richardson J's approach is consistent with treating

²³ JF Burrows and RI Carter *Statute Law in New Zealand* (4th ed, LexisNexis, Wellington, 2009) at 216–217.

²⁴ Burrows and Carter, above n 23, at 205.

²⁵ Interpretation Act 1999, s 5(1).

²⁶ *Hadlee v Commissioner of Inland Revenue* [1991] 3 NZLR 517, (1991) 13 NZTC 8,116 (CA).

²⁷ At 534.

fiscal nullity as part of New Zealand law, as the following paragraphs will explain.

Richardson J found that the assignment was effective in equity,²⁸ and the Income Tax Act 1976 was silent as to the tax effect of an assignment of partnership income. Nonetheless,
5 Richardson J concluded that under the provisions of the legislation the partnership income was derived by the taxpayer and taxable in his hands notwithstanding the assignment.²⁹

Richardson J reached this conclusion through an exercise of
10 statutory interpretation. He found that the structure of the legislation as a whole, and in particular the provision dealing with partnership income, put the liability for income tax in respect of partnership income on the partner and made it impossible for the partner to shift that liability by an assignment
15 of a fractional part of his share in the partnership while still remaining a partner in respect of that fractional interest.³⁰

Richardson J went on to consider the position of wage and salary earners. He found that there was a statutory assumption underlying the derivation of income for tax purposes that the
20 person whose personal exertion earned the income under the contract of employment derived that income and would pay the tax.³¹ He said that it could not have been contemplated by Parliament that individual employees could opt out of the application to their salaries and wages of the graduated tax rate
25 structure.³² These considerations, in Richardson J's view, applied equally to the earnings of the self-employed.³³ He regarded it as wrong to impute an intention to Parliament that income splitting with its inevitable undermining of the graduated rate structure should be available to professional and
30 commercial taxpayers although denied to salary and wage earners.³⁴ As a result, the assignment of partnership income was of no effect for tax purposes. In giving effect to the purpose of

²⁸ At 529.

²⁹ At 534.

³⁰ At 531.

³¹ At 531.

³² At 532.

³³ At 532-533.

³⁴ At 533.

the legislation by finding that the assignment had no effect for tax purposes, Richardson J's reasoning in *Hadlee* is consistent with a fiscal nullity approach.

English Authority provides further support for the idea that
 5 fiscal nullity is part of New Zealand law. As explained in
 section II.B, Lord Cooke suggested in *McGuckian* that fiscal
 nullity should be recognised as merely an application to taxing
 Acts of a purposive approach to statutory interpretation.³⁵ Lord
 Cooke went on to say that "this approach to the interpretation of
 10 taxing Acts does not depend on general anti-avoidance
 provisions such as are found in Australasia. Rather, it is
 antecedent to or collateral with them."³⁶ It is apparent that Lord
 Cooke thought that fiscal nullity would apply in jurisdictions
 that have statutory general anti-avoidance provisions, such as
 15 New Zealand.

Some Privy Council judgments have taken it for granted that
 fiscal nullity is part of New Zealand law. In *Commissioner of
 Inland Revenue v Auckland Harbour Board* Lord Hoffman said
 that some of the work that general anti-avoidance provisions
 20 used to do has been taken over by the more realistic approach to
 the construction of taxing Acts exemplified by *Ramsay*.³⁷ This
 statement indicates that the more realistic approach to the
 construction of taxing Acts exemplified by *Ramsay* is part of
 New Zealand law, despite the existence of the general anti-
 25 avoidance provision in the Income Tax Act.

The Privy Council again advanced this proposition in
Peterson v Commissioner of Inland Revenue, stating that the
 Commissioner was probably entitled to look beyond the form of
 a transaction to its economic substance even without the general
 30 anti-avoidance provision.³⁸ To look behind the form of a
 transaction requires a purposive interpretation of the relevant
 provisions. A literal approach such as that applied by the
 majority in *Ben Nevis*, as will be explained in section III.C, does

³⁵ *McGuckian*, above n 20, at 84.

³⁶ At 85.

³⁷ *Commissioner of Inland Revenue v Auckland Harbour Board* [2001] UKPC 1, [2001] 3 NZLR 289 at [11].

³⁸ *Peterson v Commissioner of Inland Revenue* [2005] UKPC 5, [2006] 3 NZLR 433 at [51]; See also Nadine Zoë Armstrong "Scheme and Purpose, the Longstop, and Other Selected Tax Avoidance Themes in Light of the Westpac Decision" (2011) 17 NZJTL 443 at 462–463.

not allow a court to go behind the legal form of a transaction. The Privy Council in *Peterson* must be taken as saying that New Zealand courts should take a purposive approach to the application of tax legislation even without invoking the general anti-avoidance provision. It follows that the reasoning in *Peterson* is consistent with treating fiscal nullity as being part of New Zealand law.

Notwithstanding the consistency of fiscal nullity with the foregoing New Zealand and English case law and the statutory authority contained in the Interpretation Act, Australian and Canadian authorities throw doubt on the idea that fiscal nullity is part of New Zealand law. As will be explained in section IV.A, the courts in *John v FCT* and *Stuart Investments Ltd v The Queen* viewed the fiscal nullity doctrine as being a judge-made general anti-avoidance rule and as such not compatible with a statutory general anti-avoidance provision, which covers the same area.³⁹

More significantly, fiscal nullity appears not to have found favour with New Zealand's Supreme Court. In *Ben Nevis* the Supreme Court, by a majority, took an approach that is inconsistent with fiscal nullity. The following sections critically analyse the reasoning of the majority in that case.

III Ben Nevis: Fiscal Nullity Not Treated as Being Part of New Zealand Law

A The Facts of Ben Nevis

Ben Nevis was the first case in which New Zealand's Supreme Court considered the application of the general anti-avoidance provision in the Income Tax Act 1994 to a tax avoidance arrangement.⁴⁰ The case concerned a tax shelter that benefited its participants (the taxpayers) by generating expenses that they incurred immediately in legal terms, and could therefore deduct from their taxable income, but that they would not incur in a substantive economic sense for fifty years, if ever.⁴¹

³⁹ Prebble and Tat, above n 19, at [24.2] and [24.7]; *John v Federal Commissioner of Taxation* (1989) 166 CLR 417, 20 ATR 1 (HCA); *Stuart Investments Ltd v The Queen* [1984] 1 SCR 536.

⁴⁰ Income Tax Act 1994, s BG 1.

⁴¹ The majority found that the taxpayers would "probably never incur the real expenditure", *Ben Nevis*, above n 3, at [127].

In order to generate these expenses, the promoters of the tax shelter designed the scheme to exploit provisions of the Income Tax Act 1994 relating to allowances for depreciation of intangible property. The taxpayers also claimed a deduction in relation to an insurance premium. For the purposes of this paper it is sufficient to focus on the deduction claimed in relation to depreciation allowances.

The provisions in question were the definitions of “depreciable property” and “depreciable intangible property” in section OB 1, in conjunction with Schedule 17, which listed types of depreciable intangible property.

Section OB 1 excluded intangible property from the definition of depreciable property unless it was depreciable intangible property. Section OB 1 stated:

- “Depreciable property”, in relation to any taxpayer, —
- (a) Means any property of that taxpayer which might reasonably be expected in normal circumstances to decline in value while used or available for use by persons —
 - (i) In deriving gross income; or
 - (ii) In carrying on a business for the purpose of deriving gross income; but
 - (b) Does not include
 - ...
 - (iv) Intangible property other than depreciable intangible property
- “Depreciable intangible property” means intangible property of a type listed in Schedule 17, which Schedule describes intangible property that has —
- (a) A finite useful life that can be estimated with a reasonable degree of certainty on the date of its creation or acquisition; and
 - (b) If made depreciable, a low risk of being used in tax avoidance schemes.

Schedule 17 listed the following types of depreciable intangible property:

1. The right to use a copyright.
2. The right to use a design or model, plan, secret formula or process, or other like property right.
3. A patent or the right to use a patent.
4. The right to use land.
5. The right to use plant or machinery.

6. The copyright in software, the right to use the copyright in software, or the right to use software.
7. The right to use a trademark.

Section EG 1 of the Income Tax Act 1994 permitted taxpayers in calculating their income for tax purposes to deduct an allowance to reflect depreciation of capital assets employed in earning income. This paper refers to the provisions relating to depreciation that the taxpayers were seeking to exploit, including the relevant definitions, as the “fixed-life depreciation provisions”.

In order to exploit the fixed-life depreciation provisions, the promoters needed to create an asset for the taxpayers to buy that they would be able to depreciate. The longer the asset lasted, and the more expensive it was, the more depreciation allowances there would be available for the taxpayers to deduct from their taxable income. Because the scheme required an asset that would last for a long time, the promoters bought land. The scheme involved planting and harvesting Douglas Fir, the promoters choosing Douglas Fir because it takes fifty years to mature.

Ordinarily, if a person needs land for fifty years, he or she will buy it or lease it. Those transactions, however, would not have achieved the result that the taxpayers wanted because they would not have yielded depreciable property since land is not depreciable. The promoters needed to find a way of converting land into an intangible asset. Not only did the asset need to be intangible, but it also needed to have a finite useful life in order to qualify as depreciable intangible property under s OB 1.

The promoters created a licence to use land, the cost of which was depreciable if the licence had a finite useful life. The more the licence cost, the more the taxpayers would be able to claim as depreciation. Accordingly, it made sense purely from a tax perspective to overvalue the licence so that the taxpayers could depreciate large sums. The promoters set the premium payable for the licence at a very high figure, which was more than the value of the land, and the taxpayers bought the licence on credit.

Under the Income Tax Act 1994, in order for property to qualify as depreciable, it was necessary that a person had not only bought the property but had incurred the cost of it. This is

because, under section EG 2 of the Act, the formula for calculating depreciation deductions included “the cost of the property to the taxpayer”, meaning that the cost of the property must have been incurred in order for a taxpayer to claim a depreciation deduction for the property. People who buy property on credit on commercial terms are treated as incurring “the cost of the property” and, at least as far as this requirement is concerned, qualify to claim allowances for depreciation.

It follows that the purchase of the licence on credit might have been sufficient for the taxpayers’ purposes because they had incurred the cost. However, to make certain that the licence would be depreciable, the taxpayers paid for the licence, the payment being called a licence premium, by a promissory note. In using a promissory note to pay for the premium, the taxpayers seem to have been relying on *Commissioner of Inland Revenue v Glen Eden Metal Spinners Ltd* in which the court stated that “[a]n expenditure is incurred in an income year although there has been no actual disbursement if in that year the taxpayer is definitively committed to that expenditure.”⁴²

The sum involved was grossly inflated. The promoters were able to grant a long and inflated amount of credit because (a) they had bought the land much cheaper than the amount of the licence premium and (b) they had charged the taxpayers certain other amounts, some of which were actually paid by the investors and which equated to the cost of the land. The promoters had need of real cash to enable them to pay for the land and to plant and maintain the trees.

B An Overview of the Case

The taxpayers claimed that the fixed-life depreciation provisions permitted the deductions. The Commissioner of Inland Revenue claimed that the taxpayers’ use of the provisions in relation to the claimed deductions amounted to tax avoidance and that the general anti-avoidance provision applied.

In applying the general anti-avoidance provision, it is necessary for the court to take a two-step approach, as the majority recognised in their judgment.⁴³ The first step is to

⁴² *Commissioner of Inland Revenue v Glen Eden Metal Spinners Ltd* (1990) 12 NZTC 7,270 (CA) at 7,271.

⁴³ At [107].

determine whether the arrangement at issue satisfies the taxing provisions that the taxpayer relies upon as providing a tax benefit. Thus, in *Ben Nevis* the court's first step was to decide whether the fixed-life depreciation provisions relied upon by the taxpayers allowed the claimed deductions.

The second step, if the taxing provisions are satisfied, is to determine whether the arrangement at issue is a tax avoidance arrangement to which the general anti-avoidance provision applies. In the context of *Ben Nevis*, if the general anti-avoidance provision applied to the arrangement, then the deductions claimed by the taxpayers would be disallowed despite the taxpayers having complied with the fixed-life depreciation provisions.

In relation to the second step of the inquiry, the court was unanimous in finding that the general anti-avoidance provision applied, and the deductions were accordingly disallowed. Where the majority and the minority (Elias CJ and Anderson J) disagreed was in their approach to the first step of the inquiry, when considering whether the arrangement at issue satisfied the fixed-life depreciation provisions. At this stage, the minority adopted an approach that is consistent with the fiscal nullity doctrine.

The minority argued that all provisions of the Income Tax Act 1994 should be purposively and contextually interpreted, with the result that recourse to the general anti-avoidance provision is not necessary to prevent uses of taxing provisions that fall outside their intended scope.⁴⁴ The minority recognised that on this view, since the decision in *Ramsay*, there are no stark differences between the approach to the interpretation of tax legislation in New Zealand and in the United Kingdom.⁴⁵ In other words, they viewed the approach taken by the House of Lords in *Ramsay* as being equally applicable in the New Zealand context. Applying this approach to the case before them, the minority doubted that the fixed-life depreciation provisions, purposively construed, allowed the deductions claimed by the taxpayers.⁴⁶

⁴⁴ At [2].

⁴⁵ At [2].

⁴⁶ At [6].

The majority, on the other hand, effectively took a literal approach to interpreting and applying the fixed-life depreciation provisions, as the following section will explain. On this approach, the majority found that the provisions allowed the deductions claimed by the taxpayers, and that only by applying the general anti-avoidance provision could the court disallow the deductions. This approach is inconsistent with the fiscal nullity doctrine.

C The Majority's Approach to Interpreting and Applying Taxing Provisions

The fiscal nullity doctrine was not put to the court and the majority did not refer to fiscal nullity in their judgment. Nevertheless, it is implicit in the majority's disagreement with the minority, who took a fiscal nullity approach, and in the majority's application of a literal rather than a purposive approach to interpreting taxing provisions, that the majority did not consider fiscal nullity to be part of New Zealand law.

That the majority applied a literal approach is not immediately apparent on the face of their judgment. In fact, the majority stated the opposite, describing their approach as purposive.⁴⁷ The majority no doubt bore in mind that the Interpretation Act requires a purposive approach and that it would be remarkable for a court to state that this statutory direction does not apply in the case of tax legislation. In several places in their judgment, the majority took care to emphasise that they were interpreting the fixed-life depreciation provisions purposively. For example, the majority stated that before the court considers the application of the general anti-avoidance provision the taxpayer must first satisfy the court that the taxpayer's use of the taxing provision in question is within its intended scope.⁴⁸ The words "intended scope" clearly indicate a purposive approach. Further, the majority went on to say explicitly that the ordinary meaning of the words of a provision includes the purpose of the provision.⁴⁹

⁴⁷ At [2].

⁴⁸ At [107].

⁴⁹ At [107].

Nevertheless, the so-called purposive approach that the majority applied when interpreting the fixed-life depreciation provisions is not the same as the purposive approach that the minority favoured. While the minority were of the opinion that a purposive interpretation of the provisions would not allow the deductions claimed by the taxpayers,⁵⁰ the majority found that the deductions were within the intended scope of the provisions.⁵¹ If the majority and minority both interpreted the fixed-life depreciation provisions purposively then how did they each come to a different conclusion when applying the provisions? The difference of opinion is explained by the restrictive nature of the majority's approach to analysing the purpose of the provisions in comparison to the minority's approach.

The minority argued that the facts of a case must be viewed realistically, and whether or not the court is concerned with the economic substance of transactions will depend on the context.⁵² The majority, on the other hand, stated that at the first stage of the inquiry, when considering the application of individual taxing provisions, the court is primarily concerned with the legal structures and obligations that the parties have created.⁵³ The majority denied that the court could, at this stage of the inquiry, conduct an analysis of the economic substance and consequences of the arrangement at issue, and emphasised that the court must respect that there are different means of producing the same economic result that have different tax consequences.⁵⁴

That the majority took a narrow view of the facts when applying the fixed-life depreciation provisions is emphasised by contrasting this view of the facts with the view that the majority took when applying the general anti-avoidance provision. The majority stated that at this second stage of their inquiry, "a further question arises based on the taxpayer's use of the

⁵⁰ At [6].

⁵¹ See [54] and [107].

⁵² At [6].

⁵³ At [47].

⁵⁴ At [47].

specific provision viewed in the light of the arrangement as a whole.”⁵⁵

5 This statement shows that when determining whether the fixed-life depreciation provisions allowed the claimed deductions, the majority did not consider the arrangement as a whole. That is, at this stage the majority focused exclusively on the relevant transaction, which was the payment of the licence fee in exchange for certain legal rights, and did not take into account the circumstances surrounding that transaction. For
10 example, when deciding whether the licence fee was deductible the majority did not take into account the fact that the licence fee was paid for by a promissory note or the fact that the arrangement was never intended to produce any income for the taxpayers.⁵⁶

15 Thus, when considering whether the fixed-life depreciation provisions were satisfied the majority directed their attention to ascertaining what legal rights were granted to the taxpayers in exchange for the licence fee.⁵⁷ On their view, “the deductibility of the licence premium [turned] on whether it was to be paid for
20 “the right to use land”.”⁵⁸

Not only did the majority take a restrictive approach when determining what the relevant facts were for the purposes of applying the fixed-life depreciation provisions, the majority also took a restrictive approach when determining the meaning of the
25 provisions. Similarly to their decision to view the relevant transaction in isolation from the surrounding circumstances, the majority also chose to consider the application of the fixed-life depreciation provisions in isolation from the rest of the Income Tax Act 1994. Despite observing that the ordinary meaning of
30 the provisions included their purpose,⁵⁹ the majority did not, at the stage of applying the provisions, consider the purpose of the provisions in the context of the Act as a whole.

This approach is apparent from the distinction that the majority drew between the “intended scope” or “specific

⁵⁵ At [107]

⁵⁶ At [123] and [126].

⁵⁷ At [48].

⁵⁸ At [54].

⁵⁹ At [107].

purpose” of provisions on the one hand,⁶⁰ which the majority considered when applying the fixed-life depreciation provisions, and the “intended scope [of provisions] *in the overall scheme of the Act*”⁶¹ on the other hand, which the majority considered when applying the general anti-avoidance provision. This distinction shows that at the stage of interpreting and applying the fixed-life depreciation provisions the majority did not consider the intended scope of the provisions in the overall scheme of the Income Tax Act 1994.

As the minority observed, settled principles of statutory construction require that if the use of a provision falls outside its intended scope in the overall scheme of the Income Tax Act then that use is not authorised within the meaning of the provision.⁶² Thus, the fact that the majority when interpreting the fixed-life depreciation provisions considered their intended scope in isolation from the rest of the Income Tax Act and not in the context of the Act as a whole provides further support for the argument that the majority’s approach was not a purposive approach.

Moreover, at no place in their judgment did the majority address the question of what Parliament’s purpose was in enacting the fixed-life depreciation provisions, and whether that purpose would be furthered or defeated by a finding that the provisions permitted the taxpayers’ claimed deductions.

Looking at the fixed-life depreciation provisions, why did Parliament enact those provisions as they appeared in the Income Tax Act 1994? Initially, the allowance for deductions in respect of depreciation provided for by section EG 1 related to tangible assets only. According to the 1998 Tax Compliance Report, Parliament amended the Income Tax Act to enable people to claim depreciation allowances in respect of intangible property in order to promote equity between businesses that use tangible, and thus depreciable, assets and businesses that use intangible assets, which were formerly non-depreciable.⁶³

⁶⁰ At [103] and [107].

⁶¹ At [106].

⁶² At [2].

⁶³ Sir Ian McKay, Tony Molloy, John Prebble, John Waugh *Tax Compliance: A Report to the Treasurer and Minister of Revenue by a Committee of Experts on Tax Compliance* (December 1998) at [6.117].

Although Parliament intended to make the tax system fairer for businesses that use intangible assets, Parliament must have been aware at the same time that many tax avoidance schemes involve intangible assets, due to such factors as the ease with which intangible assets can be created and transferred and the difficulty in valuing such assets. Parliament's concern that taxpayers might misuse the provisions relating to depreciable intangible property in order to gain unfair tax advantages is reflected in the unusual wording of the definition of depreciable intangible property in section OB 1. The definition stated that the types of intangible property listed in Schedule 17 have a low risk of being used in tax avoidance schemes if made depreciable. Despite this legislative wishful thinking some very aggressive tax avoidance schemes involving intangible property have been devised and marketed.⁶⁴

Given that Parliament's purpose in enacting the fixed-life depreciation provisions relied upon by the taxpayers in *Ben Nevis* was to make the tax system fairer for businesses using intangible property without simultaneously providing opportunities for tax avoidance, should a purposive interpretation of those provisions have permitted the deductions claimed in *Ben Nevis*? The answer is probably no, and so the minority found.⁶⁵

It is worth noting that it is sometimes possible to overvalue intangible property without provoking suspicion, which is one of the attractions of intangible property for people engaging in tax avoidance. However, the valuation of the intangible property at issue in *Ben Nevis* immediately raised suspicions because the cost of the licence (the intangible property) was many times the cost of the land that the licence permitted the taxpayers to use for their forestry business.⁶⁶ This clear overvaluation raises real questions about whether the licence was depreciable intangible property within the meaning of the fixed-life depreciation provisions, purposively construed.

In summary, when interpreting and applying the fixed-life depreciation provisions, the majority did not consider as relevant

⁶⁴ For example, *Acton Investment Joint Venture v Commissioner of Inland Revenue* (2002) 20 NZTC 17,818 (HC).

⁶⁵ At [6].

⁶⁶ At [121].

to this exercise the economic substance or consequences of the relevant transaction, the circumstances surrounding the transaction, the intended scope of the provisions in the overall scheme of the Income Tax Act 1994, Parliament's purpose in enacting the provisions or whether that purpose would be furthered or defeated by allowing the taxpayers' claimed deductions. The majority limited their inquiry to determining whether the legal rights and obligations created by the parties satisfied a literal reading of the words of the provisions.

10 It is submitted that the majority's approach as described above is more like a literal approach than a purposive approach to interpretation. In their book, "Statute Law in New Zealand", John Burrows and Ross Carter describe the literal approach as entailing an "excessive and destructive adherence to the letter".⁶⁷ They explain that an over-literal approach can thwart Parliament's intention, since small insufficiencies in, or narrowness of, expression can lead to the evident purpose of the legislation not being carried out.⁶⁸ Further, Burrows and Carter observe that the literal approach goes hand in hand with a very narrow view of context whereby, if the words of the section in question have a meaning on their own, there is no need to look further.⁶⁹ On such an approach, it may not even be necessary to read the section in the context of the rest of the Act in which it stands.⁷⁰ Burrows and Carter conclude that the literal approach can lead to "decisions that [are] out of line with the overall scheme and purpose of the legislation, and which [are] stricter and more literal than any ordinary reader would arrive at."⁷¹

30 This explanation of the literal approach to interpretation is an apt description of the *Ben Nevis* majority's analysis and interpretation of the fixed-life depreciation provisions as described in the foregoing paragraphs. For example, the majority seemed to interpret the provisions in isolation without taking into account the context of the rest of the Income Tax Act 1994. This approach is the narrow view of context that Burrows

⁶⁷ Burrows and Carter, above n 23, at 197.

⁶⁸ At 197.

⁶⁹ At 199.

⁷⁰ At 199.

⁷¹ At 199.

and Carter describe as going hand in hand with literal interpretation.⁷² More notably, the *Ben Nevis* majority's interpretation of the fixed-life depreciation provisions permitted the use of intangible property as part of a tax avoidance scheme in contravention of Parliament's expressed intention that intangible property should not be used in tax avoidance schemes. This result is arguably out of line with "the overall scheme and purpose of the legislation".⁷³ So too is the majority's decision that an amount that will not be paid for fifty years, if at all, is deductible as depreciation. Such a decision may well be "stricter and more literal than any ordinary reader would arrive at".⁷⁴ Indeed, it is difficult to imagine a more literal interpretation than the majority's finding that a payment for the right to use land was deductible as depreciation on depreciable property merely because one of the relevant provisions listed "the right to use land" as a type of depreciable intangible property.⁷⁵

As a result of their literal interpretation, the majority concluded that the taxpayers' expenditure satisfied the fixed-life depreciation provisions, and that the deductions claimed by the taxpayers could only be disallowed by the application of the general anti-avoidance provision. Thus, the majority rejected the notion that New Zealand courts can deny a taxpayer the advantage of a taxing provision on the basis that the provision in question, purposively construed, does not apply to the facts before the court, realistically viewed.⁷⁶ In taking this approach the majority appears not to have considered fiscal nullity to be part of New Zealand law.

The most likely explanation for the majority not treating fiscal nullity as part of New Zealand law is that the existence of the general anti-avoidance provision precludes the application of

⁷² At 199.

⁷³ Burrows and Carter, above n 23, at 199.

⁷⁴ Burrows and Carter, above n 23, at 199.

⁷⁵ At [54].

⁷⁶ The approach preferred by the *Ben Nevis* minority, above n 3, at [5]; This was the court's approach in *Collector of Stamp Revenue v Arrowtown Assets Ltd* (2003) 6 HKCFAR 517 at [35], and this approach was endorsed by the House of Lords in *Barclays Mercantile Business Finance Ltd v Mawson*, above n 21, at [32], a fiscal nullity case.

an approach that is consistent with fiscal nullity, as the following section explains.

D The Majority's Reasoning: The Existence of the General Anti-Avoidance Provision Precludes a Fiscal Nullity Approach

The majority's reasoning seems to be that the existence of the general anti-avoidance provision precludes the application of an approach that is consistent with fiscal nullity. The majority were of the opinion that it is necessary to distinguish between the purpose of individual taxing provisions and the purpose of the general anti-avoidance provision. They said that:⁷⁷

"We consider Parliament's overall purpose is best served by construing specific tax provisions and the general anti-avoidance provision so as to give appropriate effect to each. ... Each provides a context which assists in determining the meaning and, in particular, the scope of the other. ... The presence in the New Zealand legislation of a general anti-avoidance provision suggests that our Parliament meant it to be the principal vehicle by means of which tax avoidance is addressed. ... In short, the purpose of specific provisions must be distinguished from that of the general anti-avoidance provision."

These words suggest that, in the majority's view, there should be no overlap between the purpose of the general anti-avoidance provision and the purpose of individual taxing provisions. This approach means that the scope of the general anti-avoidance provision will affect the scope of individual taxing provisions. If, as the majority state, the general anti-avoidance provision is intended to be "the principal vehicle by means of which tax avoidance is addressed",⁷⁸ and if the purpose of taxing provisions must be distinguished from the purpose of the general anti-avoidance provision, it follows that the purpose of taxing provisions does not include the purpose of preventing tax avoidance. That is, according to the majority's reasoning, it is unnecessary when interpreting a provision to consider whether Parliament intended the provision to apply to the particular transaction before the court.

⁷⁷ At [103].

⁷⁸ At [103].

On this approach, because the court is not concerned at this stage with the possible misuse of provisions, it is also unnecessary to consider the economic substance or consequences of the relevant transaction, or any surrounding
5 circumstances that might suggest that a provision is being used in a way that Parliament did not intend. In other words, the court should not apply a broadly purposive approach when interpreting taxing provisions. Such an approach implies that fiscal nullity is not part of New Zealand law, since fiscal nullity
10 is based on a broadly purposive interpretation of tax legislation.

If the court, when applying a provision, is not concerned with the economic substance or consequences of the relevant transaction, or with whether Parliament intended the provision in question to apply to the transaction, the court must only be
15 concerned with the legal form of the transaction and with whether that form satisfies a literal reading of the words of the provision. This approach is the literal approach that the majority applied to the fixed-life depreciation provisions at issue in *Ben Nevis*, as explained in section III.C.

Such an approach is necessary to ensure that there is no overlap between individual taxing provisions and the general anti-avoidance provision, and to ensure that the proper emphasis is placed on the application of the general anti-avoidance provision. The majority viewed Parliament's "overall purpose"
20 as requiring this result.⁷⁹ That is, Parliament's purpose in enacting the general anti-avoidance provision makes it necessary to interpret taxing provisions literally in order to give appropriate effect to the general anti-avoidance provision.⁸⁰

The foregoing analysis of the majority's reasoning explains
30 why the majority described their literal approach to interpretation as a purposive one. Although the majority did not explain themselves in this way, the effect of the majority's reasoning is that because of the presence of the general anti-avoidance provision, a purposive interpretation of taxing
35 provisions in the context of the Income Tax Act as a whole is a literal interpretation. The intention that the majority attributed to Parliament, which is that the general anti-avoidance provision

⁷⁹ At [103].

⁸⁰ See [103].

should be the primary means of addressing tax avoidance, is given effect to by interpreting taxing provisions literally. Taking a broadly purposive approach to interpreting taxing provisions would make it unnecessary in many cases to invoke the general anti-avoidance provision. Such a result would, from the majority's point of view, frustrate Parliament's purpose in enacting the general anti-avoidance provision. For this reason, if the majority's approach is to be preferred to the minority's approach, the fiscal nullity doctrine, which is based on a broad purposive interpretation and application of taxing provisions, cannot be part of New Zealand law.

The corollary of the majority's view that the general anti-avoidance provision should be the primary means of addressing tax avoidance is that the general anti-avoidance provision is not in the nature of a longstop. The longstop conception of the general anti-avoidance provision was suggested by Lord Hoffman in *Auckland Harbour Board*.⁸¹ The longstop concept is consistent with a purposive approach to interpreting tax legislation and so is consistent with a fiscal nullity approach. The following section considers the *Ben Nevis* majority's response to the longstop approach.

E The Majority's Response to the Longstop Approach

The majority appears to have disapproved of Lord Hoffman's characterisation of the general anti-avoidance provision as a longstop, stating that this view places significantly less emphasis on the application of the general anti-avoidance provision than did previous decisions.⁸² The majority's reservations regarding the longstop approach further indicate that the majority discounted the possibility of treating fiscal nullity as part of New Zealand law.

As noted in section III.B, the majority took a two-step approach in their judgment. First, they considered the application of the fixed-life depreciation provisions relied upon by the taxpayers. Secondly, having found that the provisions were satisfied, the majority considered whether the general anti-

⁸¹ *Auckland Harbour Board*, above n 37, at [11].

⁸² At [100].

avoidance provision nonetheless disallowed the taxpayers' use of the fixed-life depreciation provisions, and found that it did.

Notwithstanding what the majority said, from a logical perspective the majority's two-step approach is consistent with the longstop approach. Any difference is a matter of emphasis. In *Auckland Harbour Board*, Lord Hoffman, delivering the judgment of the Privy Council, stated that some of the work that general anti-avoidance provisions used to do has been taken over by the more realistic approach to the interpretation of tax legislation exemplified by the *Ramsay* case, but he noted that the general anti-avoidance provision was useful as a longstop for the Commissioner.⁸³ Lord Hoffman's characterisation of the general anti-avoidance provision as a longstop envisages that individual taxing provisions act as the wicketkeeper.⁸⁴ Thus, in order to succeed, a tax avoidance arrangement must first get past the wicketkeeper, that is, satisfy the taxing provision. If the arrangement gets past the wicketkeeper, the arrangement may nonetheless be caught by the longstop, that is, be characterised as a tax avoidance arrangement and accordingly rendered void for tax purposes. This approach would appear to correspond precisely with the *Ben Nevis* majority's two-step approach.

The majority's problem with the longstop approach is not that a tax avoidance arrangement must drive through both the relevant taxing provision and the general anti-avoidance provision if the arrangement is to succeed. Rather, the majority disagreed that the role of the general anti-avoidance provision is in the nature of a longstop because this analogy implies that tax avoidance generally will be caught by the relevant taxing provision, and that consequently the general anti-avoidance provision usually will not be needed.⁸⁵ That the majority disagrees with this conception of the general anti-avoidance provision is apparent from the majority's statement that Parliament intended the general anti-avoidance provision to be

⁸³ At [11].

⁸⁴ Armstrong, above n 38, at 462. As Armstrong acknowledges (at fn*) this article develops a research paper supervised at the Victoria University of Wellington by professor John Prebble. Several parts of the article including the discussion of the longstop approach are based on Professor Prebble's analysis.

⁸⁵ Armstrong, above n 38, at 462.

the primary means of addressing tax avoidance,⁸⁶ as explained in section III.D. That is, the majority's view seems to be that taxing provisions as wicketkeepers will not catch many tax avoidance arrangements, and that such arrangements will have to be caught by the longstop (the general anti-avoidance provision). Therefore, unless Lord Hoffman in using the longstop metaphor had in mind a particularly butterfingere wicketkeeper, the *Ben Nevis* majority's view of the respective roles of individual taxing provisions and the general anti-avoidance provision is not consistent with the significance that the longstop approach accords to individual taxing provisions. That is, although the two approaches are consistent in that they both require the court to consider the same two steps in reaching a decision, the emphasis placed on each step differs according to whether the court applies the *Ben Nevis* majority's approach or Lord Hoffman's longstop approach.

As Nadine Armstrong explains in her article "Scheme and Purpose, the Longstop, and Other Selected Tax Avoidance Themes in Light of the Westpac Decision", Lord Hoffman's longstop approach is essentially the same approach as that preferred by the *Ben Nevis* minority.⁸⁷ The minority's approach of interpreting taxing provisions purposively is consistent with fiscal nullity, as explained in section III.B. Lord Hoffman in *Auckland Harbour Board* similarly endorsed a purposive approach to interpreting taxing provisions, referring to the more realistic approach to taxing acts exemplified by *Ramsay*.⁸⁸ Lord Hoffman thought that by applying this more realistic approach courts could treat as ineffective for tax purposes transactions that defeat the intention and application of the statute without recourse to the general anti-avoidance provision.⁸⁹ The logical result of such an approach is that the general anti-avoidance provision would not be routinely invoked as a matter of necessity, which explains why Lord Hoffman described the general anti-avoidance provision as a longstop.

⁸⁶ At [103].

⁸⁷ Armstrong, above n 38, at 460.

⁸⁸ At [11].

⁸⁹ At [11]; Armstrong, above n 38, at 460.

That the majority did not embrace the longstop concept is consistent with the majority's adoption of a literal approach to interpreting the fixed-life depreciation provisions and provides further support for the view that the majority did not consider
 5 fiscal nullity to be part of New Zealand law.

F Problems with the Majority's Approach

The majority judgment in *Ben Nevis* provides clear support for the view that the presence of the general anti-avoidance provision in the Income Tax Act precludes treating fiscal nullity
 10 as being part of New Zealand law. This section of the paper considers whether the majority judgment presents a compelling case for that view.

The majority's judgment relies on the proposition that Parliament intended the general anti-avoidance provision to be
 15 the primary means of addressing tax avoidance. The majority did not provide any support for this proposition, merely noting that "[t]he presence in the New Zealand legislation of a general anti-avoidance provision *suggests* that our Parliament meant it to be the principal vehicle by means of which tax avoidance is
 20 addressed".⁹⁰ This proposition is not self evident and given its use by the majority as a basis for deciding that the generally accepted purposive approach to interpretation does not apply to taxing provisions this proposition would have benefited from some support.

25 There is considerable support for the opposite view, which is that Parliament did *not* intend the general anti-avoidance provision to be the primary means of addressing tax avoidance. Parliament has enacted many specific anti-avoidance provisions that address tax avoidance by limiting opportunities to exploit
 30 taxing provisions or legal structures. An example in the Income Tax Act 1994 was the exclusion in the definition of "depreciable property" in section OB 1 of intangible property that did not fall within the defined category of "depreciable intangible property". As explained in section III.A, the definition of depreciable
 35 intangible property limited this category to the types of intangible property that were listed in Schedule 17, which were types of intangible property that had a finite useful life that

⁹⁰ At [103] *emphasis added*.

could be estimated with a reasonable degree of certainty and that, if made depreciable, had a low risk of being used in tax avoidance schemes. By limiting the types of intangible property in respect of which taxpayers could claim depreciation allowances, Parliament thereby limited the opportunities for exploitation of the fixed-life depreciation provisions.

The Income Tax Act 1994 contained many other specific anti-avoidance provisions, as does the Income Tax Act 2007. Parliament's attempts to limit the opportunities for tax avoidance by enacting specific anti-avoidance provisions strongly suggests that parliament did not intend the general anti-avoidance provision to be the primary means of addressing tax avoidance. If Parliament did so intend, it was not necessary to go to the trouble of enacting specific anti-avoidance provisions, because Parliament could have relied solely upon the general anti-avoidance provision to prevent the misuse of taxing provisions and legal structures by taxpayers.

Further, there is good reason to believe that Parliament intended there to be some overlap between individual taxing provisions and the general anti-avoidance provision. It is therefore not necessary to distinguish the purpose of one from the other. In *Challenge Corporation Ltd v Commissioner of Inland Revenue* Lord Templeman, giving the judgment for the majority of the Privy Council, in considering the potential for overlap between individual taxing provisions and the general anti-avoidance provision, stated that:⁹¹

“[a] likely explanation is that ... in view of the well-known difficulties encountered in the formulation and enforcement of effective anti-tax avoidance provisions, Parliament thought that an overlap might be useful and could not be harmful.”

It must be noted that Lord Templeman's statement is not precisely on point. That case concerned the relationship between a specific anti-avoidance provision and the general anti-avoidance provision. The taxpayer argued that the existence of a specific anti-avoidance provision in section 191 of the Income Tax Act 1976 that was intended to prevent the exploitation of that provision meant that Parliament did not intend tax avoidance arrangements that exploited section 191 to be

⁹¹ *Challenge Corporation Ltd v Commissioner of Inland Revenue* [1986] 2 NZLR 513 (PC) at 559.

addressed by means of the general anti-avoidance provision. Nevertheless, Lord Templeman's answer to this argument, that an overlap between individual taxing provisions and the general anti-avoidance provision cannot be harmful and might be useful, is an equally compelling answer to the *Ben Nevis* majority's argument that because the purpose of the general anti-avoidance provision is to prevent tax avoidance, Parliament cannot have intended tax avoidance to be addressed by means of a purposive interpretation of taxing provisions.

10 If the purpose of individual taxing provisions and the purpose of the general anti-avoidance provision do overlap, then the role of the general anti-avoidance provision must be something other than being the primary means of addressing tax avoidance. The other possibility is that Parliament intended the general anti-avoidance provision to act as a longstop, which was the suggestion of Lord Hoffman in *Auckland Harbour Board*,⁹² as explained in section III.E. The idea that the general anti-avoidance provision was enacted as a backup, to counter tax avoidance arrangements that cannot be dealt with by a purposive interpretation of taxing provisions, is supported by the *Ben Nevis* majority's own explanation of the legislative concern that led to the enactment of the general anti-avoidance provision. They said that Parliament's concern was that "however carefully the general [anti-avoidance] provision might be drafted, the results of taxpayers' ingenuity in adapting the forms in which they did business could not be predicted."⁹³ Parliament's concern as to the ingenuity of taxpayers in engaging in tax avoidance explains why Parliament would enact a general anti-avoidance provision despite the availability of other means of addressing tax avoidance, just in case those other means prove to be insufficient.⁹⁴

The majority's view of the primacy of the general anti-avoidance provision is not shared by Sir Ivor Richardson. Writing extra-judicially, Sir Ivor stated of the general anti-avoidance provision that:⁹⁵

⁹² *Auckland Harbour Board*, above n 37, at [11].

⁹³ At [101].

⁹⁴ See also Armstrong, above n 38, at 461 for this view.

⁹⁵ Sir Ivor Richardson "Comment: Countering Tax Avoidance" (2004) 10 NZJTL 301 at 307.

... it is not the peg on which the whole system should rest. The practical answer surely lies in tax design including specific avoidance provisions, rate structures and sound, workable and timely quantification and dispute resolution processes, which substantially reduce the incentives for tax avoidance. Ideally then, a general anti-avoidance provision will be relatively infrequently invoked.

Accordingly, it was open to the majority to decide that the general anti-avoidance provision is not intended to be the primary means of addressing tax avoidance. Given that this proposition is not self-evident and is a key component of the majority's reasoning, some support for the idea might have been expected.

Even if the majority had provided support for their view that Parliament intended the general anti-avoidance provision to be the primary means of addressing tax avoidance, the majority's reasoning in relation to the interpretation of taxing provisions would still not be compelling. There is a logical contradiction in the majority's reasoning that the following paragraphs will explain.

Having determined that the fixed-life depreciation provisions being relied upon by the taxpayers were satisfied, the majority then went on to consider whether the general anti-avoidance provision applied to the arrangement at issue. At this stage, the majority asked whether the steps taken by the taxpayers were within the purpose and contemplation of Parliament when it enacted the fixed-life depreciation provisions.⁹⁶ The majority concluded that the use of the provisions was "outside of the scope" of the provisions,⁹⁷ and cannot have been within the contemplation of Parliament when it enacted them.⁹⁸ The majority reached this conclusion despite having earlier found that the use made of the fixed-life depreciation provisions was within their intended scope, as explained in section III.C.

This curious result highlights the problem with the majority's argument. At the stage of applying the fixed-life depreciation provisions, and taking what they described as a purposive approach, the majority found that the provisions were

⁹⁶ At [115].

⁹⁷ At [130].

⁹⁸ At [148] and [156].

satisfied. The majority then reached a different conclusion when considering the purpose of the provisions in the context of applying the general anti-avoidance provision. On the majority's approach, taxing provisions have a different purpose depending on whether the general anti-avoidance provision is invoked. This approach is confusing. A taxpayer's use of a provision is either within its purpose or it is not.

One possibility is that when Parliament enacted a provision, Parliament was not concerned about the potential for the misuse of that provision, but simply intended that taxpayers whose arrangements satisfied the words of the provision on a formal legal analysis should enjoy the benefit provided for by the provision. If this is the case, then it does not make sense for the court to use the general anti-avoidance provision to deny a taxpayer the benefit of a taxing provision that is formally complied with on the basis that Parliament did not intend that taxpayers would be able to use the provision in such a way.

Another possibility is that when Parliament enacted a taxing provision, Parliament did not intend that taxpayers would get the benefit of that provision through mere formal compliance with its literal terms. If this is the case, then the provision has not been complied with unless it is satisfied in substance. It would therefore be unnecessary for the court to apply the general anti-avoidance provision in order to prevent taxpayers who have not substantively complied with a particular taxing provision from enjoying its benefits.

In *Ben Nevis*, the majority, when applying the general anti-avoidance provision, found that the taxpayers' use of the fixed-life depreciation provisions was outside the purpose of those provisions. Given that finding it was open to the majority to find that the arrangement at issue did not satisfy the provisions. That is, the majority could have applied a purposive approach when interpreting the fixed-life depreciation provisions and found that the taxpayers had not incurred expenditure in the sense contemplated by the provisions to entitle the taxpayers to deductions. The majority accordingly could have disallowed the claimed deductions without relying on the general anti-avoidance provision. Such a decision would have been consistent with treating fiscal nullity as being part of New Zealand law.

The minority's reasoning, which was consistent with a fiscal nullity approach, was not fully developed but has left open the possibility that fiscal nullity may be found to be part of New Zealand law in the future. The following section considers whether there are other arguments for not treating fiscal nullity as part of New Zealand law.

IV Is Fiscal Nullity a Judge-Made General Anti-Avoidance Rule and Excluded by Statutory General Anti-Avoidance Provisions?

A Australian and Canadian Authority

Courts in Australia and Canada have found that fiscal nullity is not part of the law of those jurisdictions, in the cases of *John v FCT* and *Stubart Investments*.⁹⁹ Sir Ivor Richardson summarised these cases as finding that the Australian and Canadian general anti-avoidance provisions “covered the field leaving no room for the implication of any further matter on the same topic.”¹⁰⁰ That is, the courts in these cases viewed the fiscal nullity doctrine as being a judge-made general anti-avoidance rule that could not arise in a jurisdiction with a statutory general anti-avoidance rule, which covers the same area.¹⁰¹

Because New Zealand also has a statutory general anti-avoidance provision, the same argument could be made against applying a fiscal nullity approach in New Zealand. It is therefore necessary to assess the reasoning in *John v FCT* and *Stubart Investments* in order to determine whether these cases provide a sound basis for finding that fiscal nullity is not part of New Zealand law.

B John v FCT: A Mischaracterisation of the Fiscal Nullity Doctrine

In the case of *John v FCT* the Commissioner of Taxation argued that the fiscal nullity doctrine was a principle of statutory construction and applicable to the case.¹⁰² The High Court of

⁹⁹ *John v FCT*, above n 39; *Stubart Investments Ltd*, above n 39.

¹⁰⁰ Richardson, above n 95, at 303.

¹⁰¹ Prebble and Tat, above n 19, at [24.2] and [24.7].

¹⁰² At 434.

Australia rejected this argument, finding that it was not appropriate to apply fiscal nullity in the construction of the provision at issue or in the construction of the Income Tax Assessment Act generally.¹⁰³ The court stated that:¹⁰⁴

5 If any such or similar principle is to be applied in relation to
the Act, it is one that must be capable of implication consonant
with the general rules of statutory construction. One such
general rule, expressed in the maxim *expressum facit cessare*
10 *tacitum*, is that where there is specific statutory provision on a
topic there is no room for implication of any further matter on
that same topic. The Act, in [the general anti-avoidance
provision], makes specific provision on the topic of what may
be called tax minimization arrangements and thereby excludes
any implication of a further limitation upon that which a
15 taxpayer may or may not do for the purpose of obtaining a
taxation advantage.

Thus the court found that the fiscal nullity doctrine could not
apply to tax legislation that contained a general anti-avoidance
provision, because of the operation of the maxim *expressum*
20 *facit cessare tacitum*, meaning that where there is a specific
statutory provision on a topic there is no room for implication of
any further law on the topic.¹⁰⁵ As John Prebble and Lisa Tat
explain in their book on fiscal nullity, the court was probably
not correct in applying this maxim.¹⁰⁶ A general anti-avoidance
25 provision is not a code that replaces an uncoded substantive
area of the law but rather it is a statutory rule that exists
alongside, and that is supplemented by, a large body of common
law.¹⁰⁷ As common law rules can exist alongside statutory
general anti-avoidance provisions, such provisions do not trigger
30 the maxim relied upon by the court in *John v FCT*.¹⁰⁸ Further,
fiscal nullity is merely a principle of interpretation and there is
no imperative to interpret legislation to displace principles of
interpretation.¹⁰⁹ Thus, even if general anti-avoidance provisions

¹⁰³ At 435; Income Tax Assessment Act 1936 (Cth).

¹⁰⁴ At 434.

¹⁰⁵ Prebble and Tat, above n 19, at [24.7].

¹⁰⁶ Prebble and Tat, above n 19, at [24.7].

¹⁰⁷ Prebble and Tat, above n 19, at [24.5]

¹⁰⁸ Prebble and Tat, above n 19, at [24.6] – [24.7].

¹⁰⁹ Prebble and Tat, above n 19, at [24.6] – [24.7].

were to trigger the application of the maxim, this would not oust the fiscal nullity doctrine.

To apply this reasoning in the New Zealand context, New Zealand's general anti-avoidance provision should not be interpreted as a code that displaces fiscal nullity. This argument is particularly applicable in New Zealand since New Zealand's general anti-avoidance provision does not exclude or even mention fiscal nullity,¹¹⁰ and New Zealand's Interpretation Act provides statutory authority for treating fiscal nullity as part of New Zealand law, as explained in section II.C.

In *John v FCT*, the problem appears to be that the court mischaracterised fiscal nullity as being a judge-made general anti-avoidance rule that could not apply alongside a statutory general anti-avoidance provision. This mischaracterisation is apparent from the fact that the court regarded fiscal nullity as placing a "further limitation upon that which a taxpayer may or may not do for the purpose of obtaining a taxation advantage."¹¹¹

The fiscal nullity doctrine is merely a specific application of the principle that statutes should be interpreted purposively. As such, fiscal nullity can only be described as placing a limitation on what a taxpayer may do for the purpose of obtaining a taxation advantage in so far as a taxpayer may be prevented by the operation of fiscal nullity from doing that which is not permitted by the statute, purposively construed. That is, a taxpayer may only gain a tax advantage in a way that is permitted by the applicable legislation, and the fiscal nullity doctrine is an interpretation tool that a court uses to determine whether the tax advantage is so permitted.

The court in *John v FCT* probably did not intend to be taken as saying that so long as a tax minimization arrangement does not fall afoul of the general anti-avoidance provision the resulting tax advantage must be permitted even if it is contrary to another provision of the Income Tax Assessment Act or to the Act as a whole. It follows that in regarding the fiscal nullity doctrine as placing a further and inappropriate limitation on what a taxpayer may do for the purpose of obtaining a tax

¹¹⁰ See Prebble and Tat, above n 19, at [24.6].

¹¹¹ At 434.

advantage, the court must have considered that fiscal nullity goes beyond statutory interpretation and constitutes a judge-made general anti-avoidance rule.

The court's description of fiscal nullity as a "new principle of construction" further demonstrates that the court mischaracterised the fiscal nullity doctrine.¹¹² This description shows that the court did not recognise fiscal nullity as being an application to tax legislation of the long-established and generally accepted purposive approach to interpretation. Rather, the court viewed fiscal nullity as being a new principle with special application to tax legislation that had been created by judges to combat tax avoidance.¹¹³ As explained in section II.B, the House of Lords in *Ramsay* expressly disavowed the idea that they were creating any judge-made general anti-avoidance rule and emphasised that the finding in that case was the result of applying orthodox principles of interpretation. This view of fiscal nullity was reaffirmed in *McGuckian*.¹¹⁴

A likely explanation for the court's mischaracterisation of fiscal nullity is that *John v FCT* was decided in the 1980s when fiscal nullity was in its early stages of development.¹¹⁵ As discussed in section II.B, the precision of Lord Brightman's formulation of the fiscal nullity doctrine in *Dawson* suggested that the doctrine was a judge-made rule going beyond statutory interpretation.¹¹⁶ This explains why the court in *John v FCT* treated the fiscal nullity doctrine as a judge-made general anti-avoidance rule despite Lord Wilberforce's explanation in *Ramsay* as to the true nature of the principles applied in that case.

The court in *John v FCT* based the decision that fiscal nullity could not apply alongside a statutory general anti-avoidance provision on a misunderstanding as to the true nature of the fiscal nullity doctrine that the case law of the time had created. This misunderstanding has since been resolved in favour of the original approach from *Ramsay*, whereby the fiscal nullity

¹¹² At 435.

¹¹³ Compare *McGuckian*, above n 20, at 84.

¹¹⁴ *McGuckian*, above n 20, at 80 and 84.

¹¹⁵ Prebble and Tat, above n 19, at [24.12].

¹¹⁶ Prebble and Tat, above n 19, at [24.12]; See *Dawson*, above n 18.

doctrine is merely a principle of interpretation. As a result, even if the argument in *John v FCT* against applying fiscal nullity was correct at the time that the case was decided, the decision does not sit comfortably with the modern understanding of fiscal nullity. It follows that the case does not provide much, if any, support for the proposition that fiscal nullity is not part of New Zealand law.

A similar misunderstanding appears in the decision of the Supreme Court of Canada in *Stubart Investments*.

10 *C Stubart Investments: A Further Example of a Mischaracterisation of Fiscal Nullity*

In *Stubart Investments*, the Canadian general anti-avoidance provision was potentially applicable,¹¹⁷ but the Crown chose not to invoke the general anti-avoidance provision in the hope that the court would instead found the tax liability of the taxpayer upon the genuine business purpose test.¹¹⁸ The Crown argued that the principle from *Ramsay* applied in Canada, and that this principle provided that a transaction without a valid business purpose is not to be taken into account in the computation of liability for tax under the Income Tax Act.¹¹⁹ Essentially, the Crown attempted to establish that a broad business purpose test existed in Canadian tax law and relied in part upon the fiscal nullity doctrine to support that proposition.

Estey J, with whom the other members of the court concurred, considered United States authority supporting the existence of a business purpose test, but noted that it was important to remember that there was no general anti-avoidance provision in the relevant United States legislation¹²⁰. Estey J compared the situation in Australia where the legislature had chosen to enact a general anti-avoidance provision. According to Australian authority, where the legislature has provided the standards of unacceptable avoidance procedures, the court has no authority to legislate new limits.¹²¹

¹¹⁷ *Stubart Investments*, above n 39, at 546-547.

¹¹⁸ At 547.

¹¹⁹ At 547.

¹²⁰ At 555.

¹²¹ At 557.

Turning to consider the United Kingdom fiscal nullity cases, Estey J said that there was some evidence that the United Kingdom courts were developing a principle approaching the United States business purpose test.¹²² Similarly to his
5 observation regarding the United States business purpose test, Estey J stated that it was important to note that the doctrine developing in the fiscal nullity cases reflected.¹²³

... the role of the court in a regime where the legislature has enunciated taxing edicts in a detailed manner but has not super-
10 imposed thereon a general guideline for the elimination of mechanisms designed and established only to deflect the plain purpose of the taxing provision.

That is, Estey J drew attention to the lack of a general anti-avoidance provision in the United Kingdom tax legislation as
15 being an important factor in the development of the fiscal nullity doctrine.

Estey J's understanding of fiscal nullity was influenced by his reading of *Dawson* and in particular the judgment of Lord Brightman.¹²⁴ As explained in relation to *John v FCT* in section
20 IV.B, Lord Brightman's precise formulation of the fiscal nullity principle indeed comes close to being a judge-made general anti-avoidance rule rather than an application of orthodox principles of interpretation. As a result, when considering whether the court should recognise the doctrine of fiscal nullity
25 as being part of Canadian law, Estey J assumed that this principle was the same, or nearly so, as that applied in the United States business purpose cases.¹²⁵ According to Estey J, such a principle would provide that conduct of a taxpayer that is not dictated by a genuine commercial or business purpose and
30 that has been designed wholly for the avoidance of tax otherwise payable under the relevant statute can be set aside as though the transaction were a sham.¹²⁶ Estey J understandably rejected the proposition that such a principle existed in Canadian law.¹²⁷

¹²² At 557.

¹²³ At 560; see also at 563.

¹²⁴ At 562.

¹²⁵ At 564.

¹²⁶ At 564.

¹²⁷ At 575.

Thus, Estey J mischaracterised the fiscal nullity doctrine in the same way as did the court in *John v FCT*, and for the same reason. Estey J, relying in part on Lord Brightman's formulation of fiscal nullity in *Dawson*, saw fiscal nullity as going beyond statutory interpretation and he treated it as being a judge-made equivalent of the Canadian statutory general anti-avoidance provision.¹²⁸ For this reason, *Stubart Investments* no more provides a sound basis for rejecting the view that fiscal nullity is part of New Zealand law than does *John v FCT*.

Moreover, the case actually provides support for treating fiscal nullity as being part of New Zealand law. What is notable about Estey J's judgment, for the purposes of this paper, is that having characterised fiscal nullity as being a judge-made general anti-avoidance rule akin to the United States business purpose test, Estey J then proposed to resolve the case by taking a purposive approach to interpreting and applying the relevant legislation. He stated that:¹²⁹

It seems more appropriate to turn to an interpretation test which would provide a means of applying the Act so as to affect only the conduct of a taxpayer which has the designed effect of defeating the expressed intention of Parliament. In short, the tax statute, by this interpretative technique, is extended to reach conduct of the taxpayer which clearly falls within "the object and spirit" of the taxing provisions.

The "interpretative technique" described by Estey J is none other than the purposive approach that is applicable to the interpretation of all legislation, as Estey J acknowledged.¹³⁰ Notwithstanding his conclusion that fiscal nullity is not part of Canadian law, by suggesting that the generally accepted purposive approach to statutory interpretation should be applied to tax legislation, Estey J effectively endorsed an approach that is consistent with the fiscal nullity doctrine.

In this context, it is interesting to compare the approach of the majority in *Ben Nevis* with the interpretation guidelines that Estey J provides in *Stubart Investments*. Speaking of cases in which the general anti-avoidance provision does not apply or has not been invoked, Estey J described the situations in which

¹²⁸ At 574.

¹²⁹ At 576.

¹³⁰ At 578.

taxpayers will not be assisted by the formal validity of their transactions. One such situation is where the provisions of the applicable tax legislation necessarily relate to an identified business function.¹³¹ This approach can be contrasted with the

5 *Ben Nevis* majority's approach to the application of taxing provisions where the majority was primarily concerned with the legal structures and obligations a taxpayer created, and not with the economic substance and consequences of the relevant transaction.¹³² On Estey J's approach, depending on the proper

10 interpretation of a provision, it will sometimes be necessary for the court to consider whether a taxpayer has entered into a transaction for a business purpose. This approach is similar to that of the *Ben Nevis* minority, who argued that whether a court is concerned primarily with the legal structures and obligations

15 created by the parties or with the economic substance of what they do will depend on the context.¹³³

Another situation identified by Estey J in which formal compliance with a taxing provision will be insufficient is when "the object and spirit" of the allowance or benefit provision is

20 defeated by the procedures blatantly adopted by the taxpayer to synthesize a loss, delay or other tax saving device".¹³⁴ In such a situation, Estey J explained, the relevant provision may, when taken in isolation and read narrowly, be stretched to permit the claimed benefit.¹³⁵ However, when the provision is read in the

25 context of the whole statute, with the purpose of the provision in mind, the accounting result that the taxpayer has produced will not by itself qualify a taxpayer for the benefit provided for by the provision.¹³⁶ As explained in section III.C, the *Ben Nevis* majority took the opposite approach to that suggested by Estey J

30 and did, in relation to applying individual taxing provisions, consider the provisions in isolation from the rest of the Income Tax Act 1994 and read the provisions narrowly.

¹³¹ At 579.

¹³² *Ben Nevis*, above n 3, at [47].

¹³³ At [5].

¹³⁴ At 580.

¹³⁵ At 580.

¹³⁶ At 580.

Estey J's judgment in *Stubart Investments* provides support for the approach of the minority in *Ben Nevis* by taking a purposive approach to the interpretation and application of taxing provisions despite the existence of a general anti-avoidance provision. *Stubart Investments* is inconsistent with the *Ben Nevis* majority's approach, and does not support the proposition that fiscal nullity is not part of New Zealand law.

This paper has so far shown that it was open to the *Ben Nevis* majority to treat the fiscal nullity doctrine as part of New Zealand law and that the Canadian and Australian authorities on the subject do not provide support for the proposition that fiscal nullity is not part of New Zealand law. The following section will consider whether fiscal nullity is inconsistent with the principle from *Duke of Westminster* and if so whether the importance of certainty in commercial cases is a convincing reason for preferring continued recognition of the *Duke of Westminster* principle over the view that fiscal nullity is part of New Zealand law.

V *The Fiscal Nullity Doctrine, Duke of Westminster and the Importance of Certainty*

In *Duke of Westminster*, Lord Tomlin articulated the celebrated principle that:¹³⁷

Every man is entitled if he can to order his affairs so as that the tax attaching under the appropriate Acts is less than it otherwise would be. If he succeeds in ordering them so as to secure this result, then, however unappreciative the Commissioners of Inland Revenue or his fellow taxpayers may be of his ingenuity, he cannot be compelled to pay an increased tax.

In *Stubart Investments*, Wilson J invoked the *Duke of Westminster* principle in support of Estey J's judgment rejecting fiscal nullity. Wilson J said that "Lord Tomlin's principle is far too deeply entrenched in our tax law for the courts to reject it in the absence of clear statutory authority."¹³⁸ Sir Ivor Richardson, commenting on fiscal nullity extra-judicially, suggested that this

¹³⁷ *Duke of Westminster*, above n 4, at 19-20.

¹³⁸ *Stubart Investments*, above n 3999, at 540.

should also be the position in New Zealand.¹³⁹ The assumptions underlying this argument are that applying fiscal nullity would be a rejection of the *Duke of Westminster* principle and that there is no clear statutory authority to justify such a rejection.

5 The legislature has in fact placed a significant limit on the operation of the *Duke of Westminster* principle in New Zealand by enacting the general anti-avoidance provision. By applying the general anti-avoidance provision a court can, in direct contravention of the *Duke of Westminster* principle, compel a
10 taxpayer to pay an increased tax even though the taxpayer has succeeded in arranging his or her affairs in a way that attracts less tax. The application of the general anti-avoidance provision is thus a situation where there is clear statutory authority that justifies rejecting the *Duke of Westminster* principle. If there is
15 no such justification in respect of the fiscal nullity doctrine and if the fiscal nullity doctrine is inconsistent with the *Duke of Westminster* principle then arguably the *Duke of Westminster* principle should be preferred to the fiscal nullity doctrine.

 Sir Ivor noted further that there is a particular need in
20 commercial cases for certainty. In his view:¹⁴⁰

 Commercial [people] are entitled to order their affairs to achieve the legal and lawful results which they intend. ... It is what they choose to do that counts and their rights and obligations should be determined on that basis except where
25 the legislation has itself directed otherwise.

 The argument can therefore be made that, subject to the application of the general anti-avoidance provision, the *Duke of Westminster* principle is a fundamental principle of New Zealand tax law and that continued recognition of the principle
30 is justified by policy considerations, specifically the need for certainty in commercial life. This argument raises two questions. First, is fiscal nullity inconsistent with the *Duke of Westminster* principle? Secondly, if so should this inconsistency be resolved in favour of the *Duke of Westminster* principle?

¹³⁹ Ivor Richardson, “Appellate Court Responsibilities and Tax Avoidance” (1985) 2 ATF 3 at 19-20; See also: David Simcock, “A Banned Substance: Form and Substance in the Judgments of Sir Ivor Richardson – A Clarity of Vision” (2002) 8 NZJTL 209 at 218.

¹⁴⁰ Richardson, above n 139, at 20.

The question whether the fiscal nullity doctrine is inconsistent with the *Duke of Westminster* principle was answered by Lord Wilberforce in *Ramsay*. He made it clear that his approach to resolving the case did not require the rejection of Lord Tomlin's principle but merely required recognition of its limitations. In relation to the *Duke of Westminster* principle he stated that:¹⁴¹

This is a cardinal principle but it must not be overstated or over-extended. While obliging the court to accept documents or transactions, found to be genuine, as such, it does not compel the court to look at a document or a transaction in blinkers, isolated from any context to which it properly belongs. If it can be seen that a document or transaction was intended to have effect as part of a nexus or series of transactions, or as an ingredient of a wider transaction intended as a whole, there is nothing in the doctrine to prevent it being so regarded; to do so is not to prefer form to substance, or substance to form. It is the task of the court to ascertain the legal nature of any transaction to which it is sought to attach a tax or a tax consequence and if that emerges from a series or combination of transactions, intended to operate as such, it is that series or combination which may be regarded.

Thus, Lord Wilberforce respected the importance of the *Duke of Westminster* principle and did not think that it should be disregarded. Nor did he think, however, that the principle should be interpreted in such a way as to prevent the court from fulfilling its duty. That duty is to determine the nature in law of a transaction to which it is sought to attach a tax consequence and to relate the transaction to the relevant legislation.¹⁴² To do so the court must establish the facts and make a legal analysis.¹⁴³ Nothing that was said in *Duke of Westminster* and no perceived right of a taxpayer to have certainty when entering into a transaction prevents the court from engaging in this exercise.

Lord Wilberforce further noted that "legislation cannot be required or even be desirable to enable the court to arrive at a conclusion which corresponds with the parties' own intentions."¹⁴⁴ Thus, it is not for taxpayers to usurp the duty of

¹⁴¹ *Ramsay*, above n 1, at 323-324.

¹⁴² At 323-324 and 326.

¹⁴³ At 326.

¹⁴⁴ At 326.

the court to determine the proper treatment of a transaction in tax law by deciding for themselves what the tax consequences of a particular transaction should be.

5 In other words, in accordance with *Duke of Westminster* taxpayers have the right to arrange their affairs in a way that attracts less tax. Taxpayers do not have the right to dictate to the court what amount of tax is payable based on the way in which the taxpayers have chosen to arrange their affairs. The fact that
10 taxpayers have arranged their affairs in a way that was intended to have particular tax consequences does not require the court to interpret the relevant legislation in a way that accords with those intention.

If the court finds against the taxpayer, this is because the taxpayer has failed to arrange his or her affairs in a way that
15 attracts less tax. In such a case, the *Duke of Westminster* principle has no application. If the court, taking a purposive approach to applying the relevant legislation, finds that the proper tax treatment of an arrangement accords with the taxpayer's intention in entering into the arrangement, then the
20 taxpayer will have succeeded in arranging his or her affairs in a way that attracts less tax. In accordance with the *Duke of Westminster* principle, the court cannot then compel the taxpayer to pay more tax merely because the court disapproves of the tax saving.

25 This view of the relationship between the *Duke of Westminster* principle and the fiscal nullity doctrine accords with the views expressed in the cases following *Ramsay*. In *Inland Revenue Commissioners v Burmah Oil Co Ltd*, Lord Diplock reaffirmed that applying fiscal nullity does not
30 necessitate the over-ruling of *Duke of Westminster* or any other earlier cases.¹⁴⁵ He pointed out that Lord Tomlin's principle provides little or no guidance as to what methods of ordering one's affairs will be recognised by the courts as effective to lessen the tax that attaches under the appropriate legislation.¹⁴⁶
35 This observation supports the argument that a taxpayer may not rely on *Duke of Westminster* to prevent a court from taking a fiscal nullity approach when considering whether the taxpayer

¹⁴⁵ *Inland Revenue Commissioners v Burmah Oil Co Ltd* (1982) 54 TC 200 (HL) at 214.

¹⁴⁶ At 214.

has in fact succeeded in arranging his or her affairs in a way that attracts less tax. Lord Diplock's observation was quoted with approval in *Dawson* and in *McGuckian*.¹⁴⁷

5 A New Zealand case that illustrates the proper relationship between the *Duke of Westminster* principle and the fiscal nullity doctrine is *Hadlee*, discussed in section II.C. There is no mention in the case of either fiscal nullity or *Duke of Westminster*. Nevertheless, Richardson J in his judgment respected the taxpayer's right to choose how to arrange his
10 affairs while still exercising the court's prerogative to determine the correct tax treatment of the transaction that the taxpayer had chosen to enter into.

As explained in section II.C, *Hadlee* concerned the proper treatment in tax law of an assignment of partnership income.
15 Richardson J drew a distinction between the effect of the assignment in equity and the effect of the assignment for tax purposes. Considering the effect in equity, Richardson J found that the assignment by the taxpayer was a binding equitable assignment and that the taxpayer never beneficially owned the
20 income referable to the assigned interest in the partnership.¹⁴⁸ Thus Richardson J did not deny that the taxpayer was entitled to assign his share of the partnership income. Nor did Richardson J re-characterise the transaction on the basis of the economic consequences of the transaction or because he disapproved of
25 the taxpayer's ingenuity in so arranging his affairs in order to pay less tax. It follows that Richardson J's judgment in *Hadlee* is consistent with the *Duke of Westminster* principle.

Nevertheless, Richardson J went on to say that the effect of the assignment for tax purposes and thus the income tax
30 obligations of the taxpayer were to be determined by the income tax legislation.¹⁴⁹ Based on a purposive interpretation of the Income Tax Act as a whole, Richardson J found that the assignment had no effect for tax purposes and that under the provisions of the Act the partnership income was derived by the
35 taxpayer and taxable in his hands notwithstanding the

¹⁴⁷ *Dawson*, above n 18, at 524; *McGuckian*, above n 20, at 79-80; See also: Prebble and Tat, above n 19, at [21.3].

¹⁴⁸ *Hadlee*, above n 26, at 529.

¹⁴⁹ At 529.

assignment.¹⁵⁰ This conclusion is consistent with a fiscal nullity approach.

The foregoing analysis shows that Richardson J's reasoning in *Hadlee* is consistent with both the *Duke of Westminster* principle and the fiscal nullity doctrine. In effect, although
 5 Richardson J did not express himself in this way, he accepted that the taxpayer was entitled to arrange his affairs however he wished but found that the taxpayer had not succeeded in arranging his affairs so that less tax was payable under the
 10 Income Tax Act.

Given that his judgment in *Hadlee* appears to reflect the operation of the fiscal nullity doctrine in New Zealand, why does Sir Ivor argue extra-judicially that fiscal nullity is not part of New Zealand law?¹⁵¹ This ostensible inconsistency can be
 15 explained by the same mischaracterisation of fiscal nullity that led the courts astray in *John v FCT* and *Stubart Investments*.¹⁵² As did the courts in those cases, Sir Ivor referred to *Dawson* when discussing the fiscal nullity doctrine.¹⁵³ As explained in section II.B, the precise formulation of fiscal nullity in *Dawson*
 20 was more suggestive of a judicial rule than of a principle of interpretation. It is likely that Sir Ivor considered that fiscal nullity is not part of New Zealand law on the basis of the view that fiscal nullity goes further than being a principle of interpretation and amounts to a judge-made general anti-avoidance rule. Thus there is not necessarily any inconsistency
 25 between Sir Ivor's extra-judicial commentary on fiscal nullity and his decision in *Hadlee* to take an approach that is consistent with fiscal nullity as it is properly understood, which is as a principle of interpretation.

30 A further point that can be made is that even if the fiscal nullity doctrine is inconsistent with the *Duke of Westminster* principle, such an inconsistency would not be a reason for finding that fiscal nullity is not part of New Zealand law. As explained at the beginning of this section, judges and
 35 commentators argue that because *Duke of Westminster* is a

¹⁵⁰ At 534.

¹⁵¹ Richardson, above n 139, at 19-20.

¹⁵² *John v FCT*, above n 39. *Stubart Investments*, above n 39.

¹⁵³ Richardson, above n 139, at 18-19; *Dawson*, above n 18.

longstanding authority and because certainty is particularly important in a commercial context the *Duke of Westminster* principle should not be discarded in the absence of clear statutory authority.

5 There is, however, clear statutory authority supporting the proposition that fiscal nullity is part of New Zealand law. Section 5 of the Interpretation Act mandates a purposive interpretation of statutes. Since the fiscal nullity doctrine is merely an example of purposive interpretation of tax legislation,
10 s 5 of the Interpretation Act is clear statutory authority that the *Duke of Westminster* principle must give way to the operation of the fiscal nullity doctrine.

 Fiscal nullity should be treated as being part of New Zealand law even though fiscal nullity, and indeed the purposive
15 approach to interpretation generally, may cause some uncertainty for people entering into commercial transactions. Although certainty is an important rule of law value,¹⁵⁴ and is commonly viewed as being particularly important in the commercial context, the importance of certainty does not take
20 precedence over the statutory direction in the Interpretation Act to ascertain the meaning of an enactment from its text and in the light of its purpose.¹⁵⁵ This statutory direction does not contain an exception in respect of tax statutes.

 Such a conclusion does not mean that certainty is irrelevant.
25 A purposive interpretation may take into account basic values and principles as well as the social and economic context in which a particular provision sits.¹⁵⁶ Since certainty is an important rule of law value and is considered particularly important in a commercial context a court may take the
30 importance of certainty into account when determining how Parliament intended a taxing provision to apply. Thus, the importance of certainty may be one relevant factor that is considered as part of a broad purposive interpretation, rather

¹⁵⁴ Rebecca Prebble and John Prebble “Does the Use of General Anti-Avoidance Rules to Combat Tax Avoidance Breach Principles of the Rule of Law?” (2010) 55 Saint Louis University Law Journal 21 at 41.

¹⁵⁵ Interpretation Act, s 5(1).

¹⁵⁶ Ross Carter and Jason McHerron *Statutory Interpretation – A 2012 Guide* (NZLS CLE, Wellington, 2012) at 101 and 80-81.

than being a factor that prevents a court from undertaking a purposive analysis at all.

In conclusion, the argument that the fiscal nullity doctrine is inconsistent with *Duke of Westminster* and produces uncertainty is not a convincing basis for arguing that fiscal nullity is not part of New Zealand law, for two reasons. First, fiscal nullity is reconcilable with the *Duke of Westminster* principle. Secondly, if there is an inconsistency between fiscal nullity and *Duke of Westminster* there is clear statutory authority for preferring the view that the fiscal nullity doctrine is nonetheless part of New Zealand law, even if the operation of the doctrine produces uncertainty.

VI Conclusion

Once it is accepted that the fiscal nullity doctrine is merely an example of purposive interpretation of tax legislation it logically follows that fiscal nullity must be part of New Zealand law. This proposition is supported by both statutory and judicial authority.

Nonetheless, a number of arguments have been put forward that throw doubt upon the existence of fiscal nullity in New Zealand law. The purpose of this paper is to show that none of these arguments provide a strong basis for rejecting the view that fiscal nullity is part of New Zealand law.

The strongest argument against recognising the existence of fiscal nullity in New Zealand law is that the decision of the majority of the Supreme Court in *Ben Nevis* is inconsistent with a fiscal nullity approach. However, the minority judgment in *Ben Nevis* put forward an alternative basis for deciding the case, which is consistent with a fiscal nullity approach. For the reasons outlined in section III.F, it is submitted that the minority approach is the better approach and that the majority judgment should not be relied upon as a basis for arguing that fiscal nullity is not part of New Zealand law.

There are other arguments that a statutory general anti-avoidance provision excludes the operation of the fiscal nullity doctrine, that the fiscal nullity doctrine is inconsistent with the *Duke of Westminster* principle and that the doctrine produces uncertainty. These arguments are largely based on a mischaracterisation of fiscal nullity as being a judge-made general anti-avoidance rule and do not undermine the

- proposition that fiscal nullity is part of New Zealand law. More importantly, because fiscal nullity is merely a consequence of applying a purposive approach to interpretation to tax legislation, the statutory direction in New Zealand's
- 5 Interpretation Act that enactments are to be interpreted purposively is an effective answer to any argument against the view that the fiscal nullity doctrine is part of New Zealand law.

VII Bibliography

A Cases

1 New Zealand

Actonz Investment Joint Venture v Commissioner of Inland Revenue (2002) 20 NZTC 17,818 (HC).

Ben Nevis Forestry Ventures Ltd v Commissioner of Inland Revenue [2008] NZSC 115, [2009] 2 NZLR.

Challenge Corporation Ltd v Commissioner of Inland Revenue [1986] 2 NZLR 513 (PC).

Commissioner of Inland Revenue v Auckland Harbour Board [2001] UKPC 1, [2001] 3 NZLR 289.

Commissioner of Inland Revenue v Penny and Hooper [2010] NZCA 231, (2010) 24 NZTC.

Commissioner of Inland Revenue v Glen Eden Metal Spinners Ltd (1990) 12 NZTC 7,270 (CA).

Hadlee v Commissioner of Inland Revenue [1991] 3 NZLR 517, (1991) 13 NZTC 8,116 (CA).

Peterson v Commissioner of Inland Revenue [2005] UKPC 5, [2006] 3 NZLR 433.

Westpac Banking Corporation v Commissioner of Inland Revenue (2009) 24 NZTC 23 (HC).

2 Australia

John v Federal Commissioner of Taxation (1989) 166 CLR 417, 20 ATR 1 (HCA).

3 Canada

Stuart Investments Ltd v The Queen [1984] 1 SCR 536.

4 England and Wales

Barclays Mercantile Business Finance Ltd v Mawson (Inspector of Taxes) [2004] UKHL 51, [2005] 1 AC 684.

The Commissioners of Inland Revenue v The Duke of Westminster [1936] AC 1 (HL).

Furniss (Inspector of Taxes) v Dawson [1984] AC 474 (HL).

Inland Revenue Commissioners v Burmah Oil Co Ltd (1982) 54 TC 200 (HL).

Inland Revenue Commissioners v McGuckian [1997] 69 TC 1 (HL).

W T Ramsey Ltd v Inland Revenue Commissioners [1982] AC 300 (HL).

5 *Hong Kong*

Collector of Stamp Revenue v Arrowtown Assets Ltd (2003) 6 HKCFAR 517.

B Legislation

1 *New Zealand*

Income Tax Act 1976.

Income Tax Act 1994.

Income Tax Act 2007.

Interpretation Act 1999.

2 *Australia*

Income Tax Assessment Act 1936 (Cth).

3 *Canada*

Income Tax Act 1952.

C Books

JF Burrows and RI Carter *Statute Law in New Zealand* (4th ed, LexisNexis, Wellington, 2009).

Ross Carter and Jason McHerron *Statutory Interpretation – A 2012 Guide* (NZLS CLE, Wellington, 2012).

D Journal Articles

Nadine Zoë Armstrong “Scheme and Purpose, the Longstop, and Other Selected Tax Avoidance Themes in Light of the Westpac Decision” (2011) 17 NZJTL 443.

Christopher Ohms “Macniven v Westmoreland Investments Ltd: The Role In New Zealand Of Fiscal Nullity” (2001) 7 NZJTL 195.

John Prebble & Rebecca Prebble “Does the Use of General Anti-Avoidance Rules to Combat Tax Avoidance Breach

Principles of the Rule of Law?” (2010) 55 Saint Louis University Law Journal 21.

Ivor Richardson, “Appellate Court Responsibilities and Tax Avoidance” (1985) 2 ATF 3.

Sir Ivor Richardson “Comment: Countering Tax Avoidance” (2004) 10 NZJTLTP 301.

David Simcock, “A Banned Substance: Form and Substance in the Judgments of Sir Ivor Richardson – A Clarity of Vision” (2002) 8 NZJTLTP 209.

E Reports

Sir Ian McKay, Tony Molloy, John Prebble, John Waugh *Tax Compliance: A Report to the Treasurer and Minister of Revenue by a Committee of Experts on Tax Compliance* (December 1998).