LCRO 163/2010

CONCERNING	an application for review pursuant to section 193 of the Lawyers and Conveyancers Act 2006
AND	
CONCERNING	a determination of the Wellington Standards Committee 1.
BETWEEN	**DS** Of Hamilton Applicant
AND	**WH** Of Wellington Respondent

The names and identifying details of the parties in this decision have been changed.

DECISION

Background

[1] In November 2009 the Applicant applied to the Supreme Court for leave to appeal a decision of the Court of Appeal which involved tax assessments issued by the Inland Revenue Department for the Applicant, his wife, and a partnership between them.

[2] The application was declined, and one of the reasons given by the Court for declining the Application was recorded in the following terms:-

> The case is very unusual because it involves the issuing of manual instead of computer generated assessments. The facts are therefore quite special and we cannot regard them as giving rise to any point of law of general or public importance or of commercial significance.

[3] In his submissions to the Court, the Respondent had stated that "the facts of this case are unusual, in that it is very rare for manual "Notices of Assessment to be issued"". This submission was drafted by Mr WF who had acted for the Commissioner of Inland Revenue in the Taxation Review Authority, the High Court, and the Court of Appeal.

[4] The Applicant complained to the Complaints Service of the New Zealand Law Society that the Respondent had breached Rule 13.5.4 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (the Client Care Rules.) which provides as follows:-

> A lawyer must not make submissions or express views to a Court on any material evidence or material issue in a case in terms that convey or appear to convey the lawyer's personal opinion on the merits of that evidence or issue.

[5] In support of the complaint, the Applicant submits that the evidence before the Court did not support the submission and that therefore the Applicant was conveying his own opinion, (or that of Mr WF) to the Court.

The Standards Committee decision

[6] The Standards Committee declined to take any further action in respect of the complaint pursuant to s 138(2) of the Lawyers and Conveyancers Act 2006.It provided the following reasons:-

1. There was no evidential basis for Mr DS's assertion that Mr WH had breached Rule 13.4 [this should be a reference to Rule 13.5.4].

2. Mr WH's submissions had an evidential foundation and a clear factual basis.

3. The complaint appeared to be an attempt by Mr DS to re-litigate the matter.

[7] The Applicant has applied for a review of that decision and asserts that there is no evidential foundation to support the submission made to the Court. He requested that the matter be properly and honestly investigated and the decision reversed or modified.

[8] In his original complaint to the Complaints Service, the Applicant sought an apology and an order that the Crown apply to recall the judgment, as well as costs. It must be noted that neither the Standards Committee nor this Office have any power to order the Respondent to apply for a recall of the judgment and the focus of this review is on the conduct of the Respondent.

Procedure

[9] The review proceeded by way of a hearing in Hamilton on 7 July 2011, attended by the Applicant, the Respondent and Mr WF.

[10] Before proceeding with the substance of the review, I must first address procedural issues that arose immediately prior to the hearing, as a result of which the Applicant

advised that he attended the hearing under protest, and alleged that my decision would be tainted by unfairness.

[11] The Applicant did not consent to the matter being dealt with on the papers and the review hearing was scheduled to take place on 7 July in Hamilton. The Respondent was to come from Wellington, Mr WF and myself from Auckland.

[12] In his response to the application for review, the Respondent referred to a letter from Mr WF to him which had been provided to the Complaints Service which refers to evidence of the IRD witness, Mr DT. The Respondent asserted that this provided the evidential foundation for his submission to the Supreme Court and was the subject of Mr WF's oral submissions to the Court of Appeal.

[13] In response, the Applicant stated:-

> I was present at the Court of Appeal hearing, and confirm that no such submissions were made by Mr [WF] and if there were such submissions made by Mr [WF] we have a situation again where counsel has given evidence under the guise of a submission.

[14] That statement echoes a statement made by the Applicant in an email to the Complaints Service dated 1 June 2010 where he stated:-

> I was at the Court of Appeal hearing and Mr [WF] spoke for less than five minutes and he definitely did not state manual assessments are a rare thing. I recall that at the TRA hearing it was stated that file corruption was a rare thing but nothing was said about manual assessments. I understand a transcript of the hearing in the Court of Appeal may be available to confirm that Mr [WF] said nothing about the rarity of manual assessments. Had he done so there was no evidential basis.

[15] The Applicant again asserted in a letter of 25 March 2011 that:-

> "Mr [WF] did not give evidence or state or make any submissions that manual assessments were a rare thing in the Court of Appeal. The issue never arose there. The issue only became relevant pursuant to section 13 of the Supreme Court Act regarding public interest. This appears a false statement of Dr [WH]."

[16] In response to an enquiry from this office as to whether the content of Mr WF's oral submissions could be verified, the Respondent advised that the Court of Appeal Registry had told him that there was no transcript available from the hearing of the appeal.

[17] On 18 April, Mr WF made formal written inquiry of the Court of Appeal Registrar as to whether or not a recording of the hearing was made.

[18] That request was acknowledged on 5 May by email from the Acting Registrar at Auckland where the hearing had taken place.

[19] On Monday 4 July, the Respondent forwarded to this Office a copy of a letter from Mr WF sent to him on the previous Friday 1 July, in which Mr WF stated:-

> Following my request to the Court of Appeal by letter 18 April 2011 about audio recording of [DS] appeal, the Court of Appeal advised me late last week that they had located it and sent it by email to the Auckland High Court Manager [X]. After I had left voice mail messages for him on Friday 24th and Monday, 27th [X] rang me on Tuesday, 28th June and I went up to Court and listened to the audio the same day at 11.30 a.m. Apparently it was recorded as a "wave file" and it needed to be played on the Court audio system.

[20] Mr WF included his transcript of the audio hearing which recorded the submission as follows:-

> This was an unusual case because there was some corruption in the IRD computers in relation to Mrs [DS]'s statement of accounts or ledgers and they were issued manually. So it is not a common occurrence and in all my experience of tax cases .....[Judge interrupts with a question].

[21] That letter was forwarded by this Office by email to the Applicant on 4 July at 1.14 p.m.

[22] On the morning of 6 July, this Office received an email from the Applicant seeking an adjournment of the hearing for the reason that the Applicant had intended to have his barrister, Mr DU, attend the hearing as counsel. Mr DU had represented the Applicant at the Court of Appeal hearing and also appeared for him in support of the Application to the Supreme Court. I am unsure as to whether he had represented the Applicant at the Taxation Review Authority or the High Court, but that is of no relevance to this review.

[23] It must be noted that the Applicant had not previously advised this Office that Mr DU was to attend the hearing as counsel, notwithstanding that the letter from this office advising of the scheduled hearing noted that "if you intend to bring a support person or a representative to the hearing, please contact our Office immediately to discuss this if we have not already been advised of this."

[24] The reason provided by the Applicant for the request for an adjournment was that in the light of the evidence provided by Mr WF "it is obvious that Mr [DU] is now a potential witness". Mr DU had advised the Applicant that in those circumstances he could not appear as Counsel as he considered that to do so would put him in breach of Rules 13.5.1 and 13.5.4 of the Client Care Rules.

[25] Because Mr DU considered that he could not appear as Counsel and also provide evidence to the hearing, the Applicant advised that he needed time to consider alternative counsel, and that was not possible in the time available. He requested confirmation by 3.00 p.m. that the hearing was adjourned.

[26] I was mindful of the travel arrangements that all parties would have made to attend the hearing, and in addition, of previous communications from the Applicant to this Office complaining about the delays that had occurred in processing the complaint and this review. In that correspondence, the Applicant had referred to the common saying that "justice delayed is justice denied".

[27] I therefore determined that an urgent teleconference should be convened to discuss the application for the adjournment. However, in a telephone conversation with a member of staff, the Applicant advised that he was unavailable for any telephone conference until 4.30 p.m.

[28] At 11.48 a.m., the following email was sent to the Applicant from this Office:-

> Following receipt of your email, the LCRO directed that a teleconference be scheduled with you, Mr [DU], and the Respondent as soon as possible today.
>
> We have however been unable to make contact with Mr [WH] as yet. In addition, you have indicated that you are unavailable for a teleconference until 4.30 p.m. That is too late, particularly given your indication that you required a response by 3 p.m. today. In addition, it is understood that Mr [WH] is coming from Wellington and Mr [WF] from Auckland, as is the LCRO, for the hearing tomorrow.
>
> The LCRO has indicated an intention to proceed with the hearing. LCRO hearings are not subject to the same rules as to admissibility of evidence as the Court, and subject to any objection by Mr [WH], the LCRO is prepared to allow Mr [DU] give evidence notwithstanding that he is appearing as Counsel.
>
> Confirmation of this will be provided before 3 p.m. today.

[29] I subsequently spoke to the Respondent who advised that he had no objection to Mr DU being allowed to give evidence as well as appear as counsel. Following that discussion the following Minute was forwarded by email to the parties at 2.49 p.m.

> [1] The Applicant has sought an adjournment of the hearing scheduled for 11 am in Hamilton tomorrow 7 July 2011 on the grounds that his Counsel Mr [DU] may be required to give evidence as a result of the provision on 4 July of a transcript of the Court of Appeal hearing, thereby necessitating appointment of new Counsel, which is unable to be achieved in the time available.
>
> [2] Section 207 of the Lawyers and Conveyancers Act 2006 provides that the Legal Complaints Review Officer may receive and take into account any relevant evidence or information, whether or not that evidence or information would normally be inadmissible in a court of law. Section 206(5) provides that the Legal Complaints Review Officer may regulate his or her procedure in such manner as he or she thinks fit.
>
> [3] If Mr [DU] wishes to give evidence then I am prepared to accept that evidence from him, notwithstanding that he appears as Counsel.
>
> [4] The Respondent has no objection to this.
>
> [5] The application for adjournment of the hearing is declined.

[30] A staff member of this Office attempted to telephone the Applicant to advise him that the email had been sent. The Applicant somewhat vehemently contends that no such call was made.

[31] As noted at the hearing, until the adjournment was granted, the hearing was scheduled to continue. In addition, the disputed call was a courtesy call only to advise the Applicant that the Minute had been sent and whether or not it was made (or received by the Applicant) does not affect the fact that unless the hearing was adjourned it would take place as scheduled.

[32] At the commencement of the hearing the Applicant read from an email sent to him at 5.13 p.m. by Mr DU. This reads as follows:-

> I have reviewed the document from the LCRO. Whilst what they write is arguable, I believe my overriding duty is covered by the Rules of Professional Conduct and particularly rule 13.5.1 and 13.5.4. It follows I do not want to risk acting in a proceeding where evidence of a contentious nature may be given. At this stage I would not want to pre-empt any legal advice as to what evidence I may add to the matter. In the end there may be no problem but I do not want to risk your position.
>
> However, as the LCRO seems intent on having the hearing tomorrow I suggest you turn up by yourself and record your objection to taking part. If the matter proceeds have them record you are taking part under protest and then do the best you can. Any decision would appear to be tainted with unfairness after that.
>
> If you wish you may forward this email to the LCRO so they can understand my awkward position.

[33] Mr DU did not appear to address his concerns in person at the hearing. I invited the Applicant to advise the general nature of any evidence which it was considered necessary for Mr DU to give. The Applicant was uncertain, but offered the general comment that Mr DU was present at the Court of Appeal hearing, from which I infer that it was contemplated that Mr DU was to provide evidence to dispute the transcript of the hearing provided by Mr WF.

[34] In his opening comments, the Respondent advised that he would have no objection to my having an Applicant only teleconference with the Applicant and Mr DU following the hearing. I indicated to the Applicant that I was available for such a hearing from late in the afternoon of the hearing, or the next day. The Applicant advised however that he was unavailable after the hearing, and that Mr DU was due to go on leave for six weeks the following day. I record that no telephone communication from either the Applicant or Mr DU was received at this office following the hearing.

[35] The other point of contention raised by the Applicant, and which was potentially the subject matter on which Mr DU may have given evidence, was that the transcript of the

hearing provided by Mr WF had not been independently verified. He suggested that the first line of the transcript could be punctuated in the following way:-

> This was an unusual case. Because there was.....

Punctuated in this way, he suggests that the audio could have a different meaning than that provided by Mr WF.

[36] Following the hearing, this Office contacted the Court to request to listen to the recording to verify the transcript provided by Mr WF. This required approval by a Judge of the Court of Appeal, and it was not until 29 July that such approval was finally provided. Unfortunately, rather than approval being provided for myself to listen to the audio, approval was granted to the Case Manager. Further delays were encountered in establishing a time that was convenient to the Court Manager for the Case Manager to attend, but this was finally achieved on 12 August. The Case Manager listened to the audio in the presence of the Court Manager and has confirmed that the transcript provided by Mr WF is correct, with minor exceptions being that the first two lines of the transcript read as follows:-

> This **is** an unusual case **solely** because there was some corruption in the IRD computer_**.....**

This adjustment means that the punctuation suggested by the Applicant would not make sense.

The Review

Rule 13.5.4

[37] The Applicant complained that the Respondent had breached Rule 13.5.4 of the Client Care Rules. This Rule provides as follows:

> A lawyer must not make submissions or express views to a Court on any material evidence or material issue in a case in terms that convey or appear to convey the lawyer's personal opinion of the merits of that evidence or issue.

[38] In his complaint to the Complaints Service, the Applicant submitted that the submission made by the Respondent to the Supreme Court was unsupported by the evidence and could only therefore be the Respondent's personal view or opinion. He contends that this is a breach of the Rule.

[39] He further contends that the Judges of the Supreme Court relied on this submission to his detriment.

[40] A large part of the correspondence from the parties in respect of the complaint focused on whether or not evidence had in fact been given which supported the submissions made by the Applicant to the Supreme Court.

[41] The evidence in question is the evidence given by the IRD witness, Mr DT, whose evidence was given before the Taxation Review Authority (TRA). This evidence was summarised by the Respondent in his submissions for this hearing as follows:-

- the Inland Revenue Department computer system became corrupted in relation to Mr DS's file [this should have referred to Mrs DS's file];
- the corruption was a rare thing;
- it was so rare that the Inland Revenue Department had to deal with it by means other than fixing the computer accounts;
- for that reason Inland Revenue prepared manual assessments.

[42] Comparing this evidence to the submission to the Supreme Court there is a difference, namely, that while the evidence is that corruption of the IRD computer system is a rare thing, necessitating the issue of manual assessments for the DSs, the Respondent's submission was that issue of manual assessments is a rare thing.

[43] The essence of the Applicant's complaint is that because the submission by the Respondent does not correctly reflect the evidence provided by Mr DT, the Respondent is thereby giving evidence or his own opinion to the Court in breach of Rule 13.5.4.

[44] At paragraph 21.4 of his Statement of Evidence, Mr DT stated that "the Department's computer tax ledger accounts for Mrs DS were corrupt and could not be used to produce computer assessments. I decided to issue all the notices of assessment for the relevant periods, partners and partnership manually in the form of schedules headed Notices of Assessment."

[45] Expanding on that at the TRA hearing, Mr DT gave oral evidence that "as a result of getting some advice from the National Office about when it would be fixed, …they said it was such a rare thing that we would have to deal with it with by other means and that's what we've done. We prepared handwritten assessments, typed assessments. That was the reason for it."

[46] The matter to be fixed which Mr DT refers to is a computer malfunction.

[47] This was referred to by Mr WF in his opening submission to the Court of Appeal where he said:-

> This is an unusual case solely because there was some corruption in the IRD computer in relation to Mrs [DS]'s statement of account or ledgers and they were issued manually. So it is not a common occurrence and in all my experience of tax cases …[Judge interrupts with a question].

This submission correctly reflects the evidence provided by Mr DT.

[48] The Applicant has asserted that there was no reference in the Court of Appeal to the fact that these circumstances were unusual. The provision of the transcript obtained from the audio refutes that claim.

[49] That issue was not however the focus of the Court of Appeal hearing. It has only arisen by reason of the fact that the Supreme Court declined leave to appeal for the reason (amongst others) that "the case is very unusual because it involves the issuing of manual instead of computer generated assessments." The case did not therefore meet the requirements of the Supreme Court Act for appeals to that Court to be considered.

[50] Rather than being a breach of Rule 13.5.4, it could be suggested that the Respondent has misled the Court and has therefore breached Rule 13.1 which provides that

> "A lawyer has an absolute duty of honesty to the court and must not mislead or deceive the court.

[51] I acknowledge that this Rule was not the focus of the complaint, the investigation or the Standards Committee decision. However, the onus is not on the Applicant to identify which Rules have potentially been breached and in his email of 1 June 2010, the Applicant alleged that the Respondent "submitted to our highest Court matters not factual and thereby misled the Court."

[52] The issue comes down to a consideration of whether the Respondent's submission represents such a distortion of the evidence that it amounts to personal opinion, or misleads or deceives the Court.

[53] I have considered whether the matter should be returned to the Standards Committee to examine the matter afresh, including a consideration of whether there has been a breach of Rule 13.1. The reason for doing so is that it would be unfair to the Respondent to come to a decision that there has been a breach of that Rule, when all of the focus previously has been on Rule 13.5.4.

[54] However, for the following reasons I do not consider there has been a breach of either Rule and given that I have all of the powers of the Standards Committee, it is best that the matter be finally dealt with at this stage.

[55] The evidence provided by Mr DT was that corruption of the IRD computer was a rare thing and that as a result of that, manual assessments were provided. The difference between this and the submission made by the Applicant has already been noted by me.

[56] In considering the matter it is relevant to consider the material that would have been before the Supreme Court, and the submissions of the Respondent as a whole.

[57] The Court would have had the Court of Appeal decision before it. I have not been provided with a copy of this, but it is reasonable to assume that all of the circumstances giving rise to the dispute between the Applicant and the IRD were correctly recorded. Furthermore, in paragraph [4] of the Respondent's submissions to the Supreme Court, the Respondent stated as follows:-

> Inland Revenue's computer system FIRST (Future Inland Revenue Systems and Technology), contained a corruption for Mrs [DS]'s tax information. As a result, manual notices of assessment were prepared for the Applicants on 26 September 1996. It is extremely rare that manual notices of assessment would be created for tax payers as they are computer generated. It is these manual notices of assessment that form the basis of the Applicant's grounds.

Even within this paragraph itself, the circumstances in which the manual notices of assessment were created are quite clear – they were created by reason of a corruption in the Inland Revenue computer system.

[58] The Court therefore, had before it, both in the Respondent's own submissions, and other material, information that would have left it in no doubt as to the circumstances which had given rise to the necessity to issue the manual assessments.

[59] Whilst the Respondent's submission may, if considered in isolation, not strictly reflect the evidence given by Mr DT, the other material provides the factual background giving rise to the creation of the manual assessments. It is perhaps unfortunate that the wording was repeated in the judgement of the Supreme Court, but I am left in no doubt that neither Rule 13.5.4 or Rule 13.1 has been breached by the Respondent.

[60] For these reasons, I confirm the decision of the Standards Committee that no further action is necessary or appropriate.

Decision

[61] Pursuant to section 211(1)(a) of the Lawyers and Conveyancers Act 2006 the decision of the Standards Committee is confirmed.

DATED this 16th day of August 2011

_____

Owen Vaughan
Legal Complaints Review Officer

In accordance with s.213 of the Lawyers and Conveyancers Act 2006 copies of this decision are to be provided to:

Mr DS as the Applicant
Mr WH as the Respondent
Wellington Standards Committee 1
The New Zealand Law Society