IN THE COURT OF APPEAL OF NEW ZEALAND

CA431/2012
[2013] NZCA 155

BETWEEN	ACCENT MANAGEMENT LIMITED First Appellant
AND	BEN NEVIS FORESTRY VENTURES LIMITED Second Appellant
AND	BRISTOL FORESTRY VENTURE LIMITED Third Appellant
AND	CLIVE RICHARD BRADBURY Fourth Appellant
AND	GARRY ALBERT MUIR Fifth Appellant
AND	GREGORY ALAN PEEBLES Sixth Appellant
AND	HILLVALE HOLDINGS LIMITED Seventh Appellant
AND	LEXINGTON RESOURCES LIMITED Eighth Appellant
AND	PETER ARNOLD MAUDE Ninth Appellant
AND	REDCLIFFE FORESTRY VENTURES LIMITED Tenth Appellant
AND	WAIKATO RESIDENTIAL PROPERTIES LIMITED Eleventh Appellant
AND	THE COMMISSIONER OF INLAND REVENUE Respondent

Hearing: 12 March 2013

Court: O'Regan P, Arnold and Miller JJ

Counsel: G A Muir for Fifth Appellant
No appearance for other Appellants
M S R Palmer and R L Roff for Respondent

Judgment: 15 May 2013 at 11.00 am

JUDGMENT OF THE COURT

A The appeal is dismissed.

B The appellants must pay the respondent indemnity costs (the actual costs incurred by the respondent in relation to the appeal) and usual disbursements. The liability of the appellants is joint and several.

C We reserve leave to apply in the event of a dispute about the amount of costs.

REASONS OF THE COURT

(Given by O'Regan P)

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Introduction

[1] This is an appeal against a decision of Woodhouse J dismissing the applications made by the appellants (the taxpayers) for orders that Crown Law and Crown counsel be debarred from acting for the respondent, the Commissioner of Inland Revenue (the Commissioner) in various proceedings to which the taxpayers and the Commissioner are parties.[1]

[2] The taxpayers argued that Crown Law would not be able to act with the degree of independence required of lawyers and that counsel from Crown Law would not be able to comply with their duties to the Court. This was said to arise because Crown Law allegedly colluded with the Commissioner in making certain tax assessments knowingly contrary to law and in wrongly maintaining that position in tax challenge proceedings. That, in turn, was said to mean that Crown Law and Crown counsel would face actual or potential conflicts in the ongoing challenge proceedings between the taxpayers and the Commissioner.

[3] The High Court Judge rejected these allegations and dismissed the taxpayers' application. He awarded indemnity costs against the taxpayers. In this appeal, they challenge both of those rulings.

[4] Like Woodhouse J, we will use the term "Crown Law" as including both Crown Law as an institution and Crown counsel, unless it is necessary to differentiate them.

[5] Dr Muir appeared in support of the appeal. He claimed to be appearing as a litigant in person (he is the fifth appellant) but was gowned and the submissions he

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[1] *Commissioner of Inland Revenue v Accent Management Ltd* [2012] NZHC 1430, (2012) 25 NZTC ¶20-130.

filed were filed by the solicitors on the record for all the taxpayers. The other appellants adopted Dr Muir's submissions and requested that they be excused from appearing. We granted their request. After some discussion at the beginning of the hearing Dr Muir agreed he was appearing as counsel. This raised a number of issues, not the least of which was that Dr Muir had sworn an affidavit in the proceedings. But, rather than delay the hearing, we proceeded on the basis that Dr Muir appeared as counsel for himself and on the basis that the other taxpayers adopted his submissions. There was a certain irony in Dr Muir's position, given the subject matter of the appeal.

Issues

[6] Dr Muir changed tack during his oral argument to the extent that the matters in issue were substantially limited. He addressed us for some time on why he considered that Woodhouse J had not adequately addressed the taxpayers' arguments in the High Court, and initially sought as the remedy for this the remission of the case to the High Court. But, in his closing address, he said the only issue on the appeal (other than the indemnity costs issue) was whether Crown Law should be debarred because it was insufficiently independent to comply with its professional obligations. As the other taxpayers had adopted Dr Muir's written submissions that predated this change of position, we will address the arguments made in the written submissions and in Dr Muir's initial oral submissions as well as the indemnity costs issues.

[7] Adopting that approach, we need to address the following two broad issues:

(a) Whether Crown Law is sufficiently independent from the Commissioner so that it is able to fulfil its professional obligations. In particular, this issue turns on the effect of a protocol in place between the Solicitor-General and the Commissioner.[2] We will refer to this as "the Protocol".

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[2] The Protocol is a document signed by the Solicitor-General and Commissioner of Inland Revenue dated July 2009. It sets out the Solicitor-General's and Commissioner's respective constitutional roles and records the processes that they have agreed to in order to enable them work together while carrying out their respective roles.

(b) Whether Woodhouse J found that there was an estoppel preventing him from considering the application of the Lawyers and Conveyancers Act 2006 (LCA) and Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (Client Care Rules) to Crown Law. If Woodhouse J did find that there was an estoppel, was he correct to do so?

[8] The taxpayers' arguments in relation to the first issue extended to arguments that Crown counsel may be required to give evidence and that Crown Law's advice may be in issue in the proceedings. It was also argued that Crown Law could not comply with the Client Care Rules. These were either not pursued or were secondary arguments in this Court but we will address them briefly.

[9] Once we have resolved those issues, we will need to decide whether Woodhouse J was correct to award indemnity costs against the taxpayers.

[10] In his written submissions, Dr Muir sought an order remitting the case to the High Court so that the substance of the taxpayers' application could be addressed. However, in his oral submissions he asked that we determine whether Crown Law should be debarred ourselves. We have sufficient information before us to determine the issue ourselves and that is what we will do.

[11] Before addressing the issues identified above, we will outline the factual background and summarise the High Court judgment.

Background

[12] This appeal relates to the long-running Trinity tax avoidance litigation. The Trinity scheme taxpayers had claimed deductions for the 1997 and 1998 tax years under subpart EG of the Income Tax Act 1994. The Commissioner disallowed the deductions on the basis of s BG 1, and imposed penalties. The Supreme Court upheld the Commissioner's decision in *Ben Nevis*.[3] In the Supreme Court, some of

[3] *Ben Nevis Forestry Ventures Ltd v Commissioner of Inland Revenue* [2008] NZSC 115, [2009] 2 NZLR 289. The Commissioner also succeeded in the High Court and Court of Appeal: *Accent Management Ltd v Commissioner of Inland Revenue* (2004) 22 NZTC 19,027 (HC) and *Accent*

the taxpayers sought leave to argue, for the first time, that deduction and spreading issues should have been determined under subpart EH of the Act, rather than subpart EG. The Court declined to hear those arguments.[4]

[13] Some of the taxpayers from the *Ben Nevis* litigation have attempted to relitigate the proceeding. Three further proceedings are of particular relevance: the judicial review proceeding, the set aside proceeding, and the present proceedings.

Judicial review proceeding

[14] The judicial review proceeding was brought on 23 December 2008, four days after the delivery of the Supreme Court's judgment in *Ben Nevis*. The plaintiff was Accent Management Ltd, the first appellant in this proceeding, claiming for itself and six other plaintiffs from the *Ben Nevis* proceeding. The application was for review of the Commissioner's decision not to apply subpart EH to the 1997 and 1998 assessments. The taxpayers alleged that the Commissioner knew that the taxpayers' liability should have been assessed under subpart EH and chose to disregard the law. Declarations were sought that the Commissioner had no power to make the 1997 and 1998 assessments and that those assessments were invalid. Keane J struck out the judicial review proceeding and awarded indemnity costs against the taxpayers. He summarised his conclusions as follows:[5]

> [105] Accent's challenge to the validity of the 1997–98 assessments does not lie within the two exceptional categories of case, beyond the reach of the statutory presumptions in ss 109 and 114 of the Tax Administration Act 1994. The sources of any invalidity on which Accent relies in its statement of claim to contend for the one or the other do not begin to found the conclusion that the Commissioner either made no assessment or was culpable of conscious maladministration.
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> [106] Accent's present review challenge relies, moreover, on a proposition that it could easily have advanced from the outset. But that proposition is antithetical to the deduction Accent actually sought and defended until the hearing in the Supreme Court. Accent only advances it now because of the

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Management Ltd v Commissioner of Inland Revenue [2007] NZCA 230, (2007) 23 NZTC 21,323.

4 *Ben Nevis* at [149]–[155].

5 *Accent Management Ltd v Commissioner of Inland Revenue* (2010) 24 NZTC 24,126 (HC). Costs judgment: *Accent Management Ltd v Commissioner of Inland Revenue* (2011) 25 NZTC ¶20–022 (HC). Relevant parts of these judgments are set out at [9]–[14] of the judgment under appeal.

> adverse decisions it has suffered in this Court and on appeal. And its challenge now has to be a collateral attack not just on the two assessments, deemed by statute to be correct and valid, but on the three decisions vindicating their correctness. In all of these senses it constitutes an abuse of process and must be struck out.

[15] An appeal against this judgment was abandoned by the taxpayers.

Set aside proceeding

[16] On 15 September 2009, the set aside proceeding was filed by Trinity scheme taxpayers. The plaintiffs were all but one of the plaintiffs in *Ben Nevis*, together with Dr Muir personally. The taxpayers sought an order setting aside the judgment of the High Court in the *Ben Nevis* proceeding on two grounds. Neither ground was upheld and their application was eventually dismissed by the Supreme Court.[6]

[17] The first ground was that the judgment had been obtained by fraud on the basis that the Commissioner had presented a false case to the High Court. The taxpayers alleged that the Commissioner knowingly assessed the taxpayers under the wrong statutory provisions (i.e. subpart EG), and that the Commissioner had a duty to refer to the existence and likely application of subpart EH but had not done so. The Supreme Court rejected this allegation for two reasons. First, because the error allegedly induced by fraud was an error of law. If an error of law had been made, that was a matter for appeal, not recall.[7] Second, a party invoking the fraud exception must show that its ability to mount an effective case was compromised by the alleged fraud. That was not the case because the possible applicability of subpart EH was signalled in the Commissioner's Notice of Proposed Adjustment and subpart EH was inherently incapable of being concealed, which meant the taxpayers' argument that it had been concealed was untenable.[8]

[18] The second ground was that as there had been no lawful basis for the assessments confirmed by the High Court (because subpart EG had been invoked),

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6 *Commissioner of Inland Revenue v Redcliffe Forestry Venture Ltd* [2012] NZSC 94, [2013] 1 NZLR 804.
7 At [39]–[41].
8 At [42].

the High Court had acted without jurisdiction. The Supreme Court rejected that as a basis for recall as well.[9]

[19] To summarise, the judicial review proceeding and set aside proceeding were based on the premises that:

(a) the Commissioner had assessed the Trinity scheme taxpayers' liability under subpart EG of the Act, but then disallowed them under s BG 1;

(b) the Act required that the taxpayers be assessed under subpart EH, and the Commissioner knew this as he had obtained independent expert advice to that effect;

(c) the Commissioner's failure to assess the taxpayers' liability under subpart EH, and failure to raise subpart EH in the *Ben Nevis* proceeding, has resulted in the 1997 and 1998 assessments being invalid and the High Court judgment in *Ben Nevis* being invalid.

Present proceedings: application to debar Crown Law

[20] The present proceedings relate to further challenges against other tax assessments that relate to the Trinity scheme. The taxpayers seek orders that Crown Law cease acting as solicitors for the Commissioner, and that no Crown counsel appear in proceedings for the Commissioner, in respect of these challenge proceedings and some related proceedings.

[21] There are three proceedings relating to the Trinity scheme to which the applications to disbar Crown Law relate (Woodhouse J called these the "extant challenges" and we will do the same). *Ben Nevis* dealt with challenges by participants in the Trinity Scheme to assessments for the financial years ending 31 March 1997 and 31 March 1998. The Commissioner's position is that Ben Nevis resolved the position for those years but Dr Muir argued in the Taxation Review Authority that the position for those years remains unresolved because the

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9 At [44].

assessments were unlawful (because of the reliance on subpart EG not subpart EH). His challenges (and those of others involved in the scheme) relate to those two years as well as later years. The Commissioner's position is that for taxpayers involved in the Ben Nevis proceedings, only the assessments for later years are able to be challenged.

[22] The first two of the extant challenges are appeals brought by Dr Muir to the High Court against decisions of the Taxation Review Authority of 1 February 2011 and 16 June 2011. The February decision related to an application by Dr Muir for declarations that assessments of his tax liability for each of the 10 financial years ending 31 March 1997 to 31 March 2006 were unlawful or should be replaced by assessments allowing deductions under subpart EH. Dr Muir argued that the assessments he challenged were prohibited as the Trinity scheme had been incorrectly analysed by all Courts, including the Supreme Court, in terms of subpart EG rather than subpart EH. The Authority found the assessments were lawful and also found they were correct. It struck out the challenges.[10] In the June decision the Authority dismissed an application by Dr Muir to recall the February decision.[11]

[23] The third proceeding, with 11 taxpayer respondents, is an originating application by the Commissioner for orders transferring to the High Court from the Taxation Review Authority 66 challenge proceedings of the taxpayers relating to the Trinity scheme; consolidating the transferred challenge proceedings with two other challenge proceedings previously transferred to the High Court; and consolidation of all the challenge proceedings with Dr Muir's appeals. That has been heard but judgment has not yet been delivered.

High Court decision

[24] Woodhouse J recorded that the application to debar Crown Law was primarily based on an allegation that Crown Law could not act with the required degree of independence and could not comply with its duties to the Court. This was

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10 *TRA 42/03* [2011] NZTRA 2, (2011) 25 NZTC ¶1–006.
11 *TRA 42/03 (No 2)* [2011] NZTRA 6, (2011) 25 NZTC ¶1–010.

because Crown Law had allegedly colluded in assessments being made fraudulently or knowingly contrary to law and had wrongly maintained the position in the *Ben Nevis* proceedings.[12]

[25] Later he recorded further grounds advanced by Dr Muir, all of which were directed to Crown Law's involvement in the 1997 and 1998 assessments upheld in *Ben Nevis*. These were:[13]

(a) Crown counsel may be required to give evidence in the extant challenges proceedings;

(b) the relationship between Crown Law and the Commissioner is too close;

(c) advice given by Crown Law is "the subject matter of the proceeding"; and

(d) Crown Law "cannot comply with the [Client Care] rules".

[26] There was also an allegation that Crown Law had breached its discovery obligations. Dr Muir said this was not now pursued so we say no more about it.

[27] There was also an allegation of a breach of r 13.11 of the Client Care Rules, which requires counsel to put all relevant and significant law known to the lawyer before the Court. The alleged breach was a failure to tell the Court that subpart EH was applicable and had to be applied to the 1997 and 1998 assessments.

[28] Woodhouse J dismissed the taxpayers' application on two grounds:

(a) first, the allegations about misconduct of the Commissioner or the collusion of Crown Law could have no relevance in the extant challenges; and

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12 *Commissioner of Inland Revenue v Accent Management Ltd*, above n1, at [2].
13 At [33].

(b) second, the history of past litigation meant that the taxpayers could not establish an arguable factual foundation to support their applications.

[29] The first reason why Woodhouse J dismissed the taxpayers' application was that he saw an assessment of the merits of the taxpayers' allegations against Crown Law as irrelevant to resolution of the extant challenges. The questions in the extant challenges will all be questions of law, that is, which subpart the taxpayers' liability should be assessed under. The taxpayers' factual allegations against Crown Law cannot assist in determining the correctness of the tax assessments that are challenged.

[30] The second reason for dismissing the applications was that the prior litigation history demonstrated that the taxpayers could not establish a factual foundation to support their applications. Woodhouse J found that the taxpayers' factual allegations were essentially the same as those made in the judicial review proceeding. He held that Keane J's findings of fact in the judicial review proceeding were sufficient to conclude that the taxpayers did not have a reasonably arguable factual foundation to advance their allegations of misconduct against Crown Law or the Commissioner. Woodhouse J noted that he was satisfied that the applications to debar constituted an abuse of process and were an attempt to delay the resolution of the tax disputes.

[31] In light of these findings, Woodhouse J noted that he did not need to consider the taxpayers' submissions about whether there was a loss of independence arising out of the special relationship between Crown Law and the Commissioner as a government department subject to the Cabinet Directions for the Conduct of Crown Legal Business and protocols between the Solicitor-General and the Commissioner relating to the conduct of litigation.[14]

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[14] At [38].

Applicable law

[32] The Court has jurisdiction to debar counsel or solicitors from acting where that is necessary in order for justice to be done or to be seen to be done.[15] Removal will usually be ordered where counsel will not be able to comply with his or her duties to the Court: where there is a conflict of interest, or where there is a real risk that a client will not be represented with objectivity.[16] The threshold for removal is a high one, requiring something extraordinary.[17] The Court should guard against allowing removal applications to be used as a tactical weapon to disadvantage the opposing party.[18]

[33] Lawyers' professional obligations, as set out in the LCA and Client Care Rules, may be relevant to a court's decision whether to debar counsel. The Client Care Rules set out a number of rules dealing with independence in litigation, which reflect the obligation on lawyers to be independent in providing regulated services to clients in s 4(b) of the LCA. Chapter 5 sets out rules emerging from a lawyer's obligation to "be independent and free from compromising influences or loyalties when providing services to" clients. Dr Muir referred especially to chapter 13 of the Rules, which begins:

> **Lawyers as officers of court**
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> 13 The overriding duty of a lawyer acting in litigation is to the court concerned. Subject to this, the lawyer has a duty to act in the best interests of his or her client without regard for the personal interests of the lawyer.

[34] In particular, Dr Muir focused on r 13.5, and particularly r 13.5.3, which sets out rules dealing with independence in litigation:

> **Independence in litigation**
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> 13.5 A lawyer engaged in litigation for a client must maintain his or her independence at all times.

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15 *Black v Taylor* [1993] 3 NZLR 403 (CA).

16 *Clear Communications Ltd v Telecom Corporation of New Zealand Ltd* (1999) 14 PRNZ 477 (HC); *Beggs v Attorney-General* [2006] 2 NZLR 129 (HC); *Kooky Garments Ltd v Charlton* [1994] 1 NZLR 587 (HC).

17 *Clear v Telecom* at 483.

18 *Clear v Telecom* at 482.

> 13.5.1 A lawyer must not act in a proceeding if the lawyer may be required to give evidence of a contentious nature (whether in person or by affidavit) in the matter.
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> 13.5.2 If, after a lawyer has commenced acting in a proceeding, it becomes apparent that the lawyer or a member of the lawyer's practice is to give evidence of a contentious nature, the lawyer must immediately inform the court and, unless the court directs otherwise, cease acting.
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> 13.5.3 A lawyer must not act in a proceeding if the conduct or advice of the lawyer or of another member of the lawyer's practice is in issue in the matter before the court. This rule does not apply where the lawyer is acting for himself or herself, or for the member of the practice whose actions are in issue.
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> 13.5.4 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.

[35] He also relied on r 13.11, which provides that counsel's duty to the Court includes a duty to put all relevant and significant law known to the lawyer before the Court.

Is Crown Law sufficiently independent?

[36] As indicated at [6] above, the allegation that Crown Law was insufficiently independent of the Commissioner to meet its professional obligations under r 13.5 of the Client Care Rules was the principal focus of the appeal. Indeed, Dr Muir said it was the sole focus. We will deal with it first.

[37] The assessment of the merits of the argument requires us to consider the terms of the Protocol.[19]

[38] The Protocol begins by setting out the respective roles of the Solicitor-General and the Commissioner. It states that the Solicitor-General is "the Crown's principal professional legal adviser" and has "constitutional responsibility to see that the executive government is conducted according to law". It provides that, as part of this role, the Solicitor-General has responsibility for "determining the Crown's view

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[19] See [7](a) above.

of what the law is and conducting the Crown's litigation in the Courts". The Commissioner is "an independent officer of the Crown" and has statutory roles including "protecting the integrity of New Zealand's tax system" and "collecting the highest net revenue that is practicable within the law" having regard to certain factors. The Protocol notes that in performing his or her functions the Commissioner will at times require legal advice on the meaning of the law.

[39] The Protocol then records its purpose as setting out the processes that the Solicitor-General and Commissioner will follow "in order to enable them to discharge their respective roles". The Protocol records that Crown Law and Inland Revenue will "respect each other's roles" and "must work together with the aim of ensuring that [both departments] have consistent positions on the interpretation and application of tax laws".

[40] Dr Muir's argument focused on part 5 of the Protocol and Dr Palmer's response focused on part 4. Given this, we set out the relevant provisions of these parts in full:

> 4. **IMPLEMENTATION**
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> 4.1 Inland Revenue is responsible for ensuring that its staff, who are responsible for issuing Interpretive Statements, Statements of Position, Binding Rulings and Adjudication Reports, are aware of whether a legal issue is the subject of significant dispute in litigation. Where a legal issue is central to a significant dispute in litigation and is due to be the subject of an Interpretive Statement, Statement of Position, Binding Ruling, or Adjudication Report or escalation, then Inland Revenue will consult with Crown Law on the issue and, if necessary, obtain Crown Law's formal advice before issuing that Statement, Ruling or Report.
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> 4.2 If Crown Law becomes aware that a legal issue that is the subject of significant dispute in litigation is about to be the subject of an Interpretive Statement, Statement of Position, Binding Ruling or Adjudication Report, then it must advise Inland Revenue of that as soon as practicable.
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> 4.3 If the Solicitor-General concludes that Inland Revenue has misunderstood or misapplied the law, the decision as how Inland Revenue will apply the Solicitor-General's advice on the law is a matter for the Commissioner.
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> 5. **CONDUCT OF LITIGATION**

> 5.1 The Solicitor-General is ultimately responsible for the conduct of all litigation in the name of the Commissioner. Disagreements between Inland Revenue and Crown Law about the conduct of litigation will be discussed respectfully and constructively and escalated within each organisation. ... Ultimately the Solicitor-General, after consultation with the Commissioner of Inland Revenue, will resolve any outstanding issues over the conduct of litigation.
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> 5.2 The Solicitor-General is ultimately responsible for determining which counsel will represent the Commissioner. In practice, the Team Leader of the Tax and Commercial Team in Crown Law will make those decisions up to High Court level, the Deputy Solicitor-General at Court of Appeal level, and the Solicitor-General at Supreme Court level. In each case, Inland Revenue will be fully consulted and their views will be taken into account.
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> ...
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> 5.6 Counsel appointed by the Solicitor-General to represent the Commissioner will be responsible for ensuring that the Crown's discovery obligations are discharged.
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> 5.7 All communication with the Court must be authorised by counsel appointed by the Solicitor-General to represent the Commissioner.

[41] Dr Muir said cls 5.1 and 5.2 of the Protocol provided that the Solicitor-General had an absolute discretion over the conduct of litigation involving the Commissioner and over which counsel will act for the Commissioner. Dr Muir stated that these provisions meant that Crown Law was not independent from the Commissioner when conducting litigation. He said this meant that, in effect, Crown Law was both client and advocate. This breached Crown Law's obligations of independence. This was particularly significant in the present context because, where a tax case is before a hearing authority, the hearing authority can make an assessment. He argued that the Solicitor-General was controlling how that assessment would be made. Crown Law should not be allowed to act for the Commissioner.

[42] Dr Palmer for the Commissioner replied that the Protocol simply reflected constitutional orthodoxy. The Solicitor-General is constitutionally responsible for determining the Crown's view of what the law is and for conducting the Crown's litigation. The Commissioner is independent with certain statutory roles. He noted that cl 4.1 sets out that the Commissioner will consult the Solicitor-General on legal issues, but under cl 4.3 the Commissioner retains independence for determining how

Inland Revenue will apply the Solicitor-General's advice. The provisions of part 5 of the Protocol simply reflect that the Solicitor-General is constitutionally responsible for conducting the Crown's litigation.

[43] Dr Palmer pointed to the Cabinet Directions for the Conduct of Crown Legal Business 2012 to reinforce the point that the Solicitor-General is responsible for conducting the Crown's litigation. Clause 18 of the Cabinet Directions provides:

> It is for the Solicitor-General to decide, in consultation with the relevant Minister or government department, whether legal advice or representation in a core Crown legal matter is to be dealt with by the Crown Law Office or by briefing the matter to lawyers in private practice (or a combination). The primary concern of the Solicitor-General is to obtain the optimum advice or representation for the Crown within the available resource.

[44] Woodhouse J rejected the allegation relating to r 13.5.3 on the basis that the conduct of Crown Law was not in issue in the extant challenges, which meant that no conflict of the kind described in r 13.5.3 could arise. His decision predated the Supreme Court's decision in *Redcliffe* but is consistent with it.[20] Dr Muir argued that the present context (challenges yet to be adjudicated) was different from that applying to the judicial review proceeding and the set aside proceeding, so that what was decided in those cases did not apply to the extant challenges. But, putting aside that difference, it is clear that the factual findings of the Supreme Court in *Redcliffe* are not an auspicious context for an argument that the Court needs to inquire into Crown Law's conduct in relation to the assessments under challenge.

[45] The Supreme Court in *Redcliffe* found that the taxpayers could not credibly claim that the Commissioner's litigation strategy (based on subpart EG, not subpart EH) compromised the taxpayers' ability to argue that subpart EH applied. It also found that Crown Law did not conceal the potential applicability to subpart EH and that the subpart was inherently incapable of concealment.

[46] In our view, therefore, Woodhouse J was correct to find that there was not a proper factual underpinning for the taxpayer's claim that Crown Law's position vis-a-vis the Commissioner was a live issue in the extant challenges.

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[20] *Commissioner of Inland Revenue v Redcliffe Forestry Venture Ltd*, above n 6.

[47] However, because the matter was fully argued before us and in order to ensure that we provide a clear answer to the taxpayers' application for removal of Crown Law that will be applicable to similar proceedings between the taxpayers and the Commissioner, we will also address the impact of the Protocol.

[48] Dr Muir argued that under cls 5.1 and 5.2 of the Protocol the Commissioner has unlawfully delegated the Commissioner's statutory duty to manage the tax assessment process fairly and impartially.[21] He submitted that the tax assessment process includes litigation, and that by giving the Solicitor-General the final say in the conduct of litigation involving the Commissioner, the Commissioner unlawfully delegated the Commissioner's assessment powers. This, he submitted, meant that the Solicitor-General and the Commissioner were too closely intertwined for the Solicitor-General to comply with his or her duties to the Court under r 13 of the Client Care Rules.

[49] Dr Muir's argument is flawed in two respects. First, the Protocol does not have the effect that he alleges. Clause 4.3 makes it clear that how the Commissioner applies the law is left to the Commissioner: the Commissioner does not delegate the Commissioner's assessment power.[22] Second, the issue under r 13.5.3 is whether the Solicitor-General and Crown lawyers can discharge their duties to the Court. Even if Dr Muir's interpretation of the Protocol were correct, cls 5.1 and 5.2 make it clear that the Solicitor-General is free to conduct litigation as he or she chooses – the Protocol does not restrict the Solicitor-General in what he or she can do before the Court and so he or she is free to comply with his or her obligations to the Court.

[50] Indeed, the practical impact of cl 5.1 of the Protocol enhances rather than detracts from the Solicitor-General's ability to act in accordance with his or her duty to the Court. That applies equally to Crown counsel or other counsel acting on instructions from Crown Law. Rule 13 seems to us to address a concern that a client exerts too much influence over a lawyer, such that the lawyer is not free to meet his

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21 As provided in the Tax Administration Act 1994, ss 6 and 6A.

22 This Court has also commented that ss 6 and 6A of the Taxation Administration Act do not call for a special or different approach to High Court tax litigation from general civil litigation: *Auckland Gas Co Ltd v Commissioner of Inland Revenue* [1999] 2 NZLR 409 (CA) at 416–417.

or her obligation to the Court. Dr Muir's complaint is the opposite: that Crown Law has too much influence over its client.

[51] The Protocol sets out the boundaries of a consultative working relationship between the Solicitor-General and the Commissioner, reflecting their constitutional roles. The Commissioner is an independent officer of the Crown and cl 4.3 of the Protocol recognises that the Commissioner retains independence in determining how the Inland Revenue Department will interpret the law. The Solicitor-General is the Crown's junior law officer, and as such is the chief legal adviser to the government (subject to any views expressed by the Attorney-General) and is the government's chief advocate in the courts.[23] Litigation against the Commissioner is litigation against the Crown,[24] and so it is constitutionally proper that the Solicitor-General should have the final say about how litigation involving the Commissioner is conducted, as recognised in cls 5.1 and 5.2 of the Protocol. Indeed, part 5 ensures that the Solicitor-General retains the independence necessary in litigation to be able to discharge his or her duties to the Court.

[52] The Court's concern when determining whether to debar counsel from acting focuses squarely on whether there is a real risk that counsel will not be able to discharge his or her professional obligations to the Court. The simple answer to this ground of appeal is that there is nothing in the Protocol that raises a risk that Crown lawyers will not be able to discharge their professional obligations in the extant challenges. The rules in the Client Care Rules concerning independence are focussed on ensuring that lawyers remain free of conflicts between their duties to the Court or their clients and their own interests or apparent influences. Having determined that the taxpayers' allegations of misconduct against Crown Law are not relevant to the determination of the extant challenges, there is nothing to suggest that Crown Law would have any "compromising influences or loyalties" (r 5) that would prevent it from acting. When pressed, Dr Muir could not identify a specific factual foundation for why Crown Law could not be independent, relying instead upon the terms of the Protocol generally.

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23 John McGrath "Principles for Sharing Law Officer Power: The Role of the New Zealand Solicitor-General" (1998) 18 NZULR 197; Matthew Palmer "The Law Officers and departmental lawyers" [2011] NZLJ 333.

24 *Cates v Commissioner of Inland Revenue* [1982] 1 NZLR 530 (CA).

Will Crown counsel be required to give evidence?

[53] In the High Court, the taxpayer argued that one of the reasons for debarring Crown Law was that Crown Law's conduct would be an issue in the extant challenges and that Crown counsel would be required to give evidence. As will be apparent from our earlier findings, we can see no proper basis for that contention. But, in any event, Dr Muir told us that he did not rely on that ground in this Court.

Is Crown Law's advice in issue in the extant challenges?

[54] In the High Court Dr Muir also argued that Crown Law's advice to the Commissioner in the context of the assessments which will be subject to the extant challenges would be, itself, in issue in the proceeding. Again, for the reasons we have already given we reject that contention.

Can Crown Law comply with the Client Care Rules?

[55] The fourth basis on which Dr Muir argued in the High Court that Crown Law should be debarred was that Crown Law "cannot comply with the Rules". This does not seem to add anything to the earlier grounds, but, in any event, for the reasons we have given already we do not accept that Crown Law cannot comply with the Rules.

The "estoppel" issue

[56] The taxpayers' "estoppel" ground of appeal is based on their allegation that Woodhouse J found that "estoppels exist in favour of the Crown Law Office" preventing the Court from considering the application of the LCA to Crown Law. In fact, Woodhouse J did not find that there was an estoppel. Rather, he determined that, in light of the litigation history between the parties, the taxpayers had no reasonably arguable factual foundation for their allegations against Crown Law. Woodhouse J expressly stated that he made no finding of estoppel:[25]

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[25] At [54].

> In the judicial review proceeding, Keane J made important findings of fact which are sufficient for the purposes of these applications to conclude that the taxpayers do not have a reasonably arguable factual foundation to advance the applications to debar. It is not necessary to find that the taxpayers are estopped by the relevant findings of fact in the judicial review proceeding.

[57] In the face of that clear statement, Dr Muir's contention that Woodhouse J did find there was an estoppel is obviously untenable.

Indemnity costs

[58] Woodhouse J ordered indemnity costs against the taxpayers based on his findings that the taxpayers' allegations against Crown Law had no relevance to the extant challenges and had no reasonable factual foundation; and his conclusion that the application to debar Crown Law was an attempt to game the system, an abuse of process and an attempt delay the resolution of tax disputes.[26] The taxpayers challenge the award of indemnity costs against them.

[59] Rule 14.6(4)(a) of the High Court Rules sets out when a Judge may award indemnity costs:

> (4) The court may order a party to pay indemnity costs if—
>
> (a) the party has acted vexatiously, frivolously, improperly, or unnecessarily in commencing, continuing, or defending a proceeding or a step in a proceeding;
>
> ...

[60] This Court listed circumstances in which indemnity costs have been ordered in *Bradbury v Westpac Banking Corp*:[27]

> (a) The making of allegations of fraud knowing them to be false and the making of irrelevant allegations of fraud.
>
> (b) Particular misconduct that causes loss of time to the Court and to other parties.

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[26] *Commissioner of Inland Revenue v Accent Management Ltd* [2012] NZHC 2389.
[27] *Bradbury v Westpac Banking Corp* [2009] NZCA 234, [2009] 3 NZLR 400 at [29].

(c) Commencing or continuing proceedings for some ulterior motive.

(d) Doing so in wilful disregard of known facts or clearly established law.

(e) Making allegations which ought never to have been made or unduly prolonging a case by groundless contentions; that is, advancing a hopeless case.

[61] Dr Muir stated that the Commissioner had suffered no time prejudice from the application to debar. He also noted that senior counsel appeared for some of the taxpayers in the High Court, and that the award of indemnity costs "impugns the decision" of senior counsel to appear. The Commissioner replied that the taxpayers had not advanced a coherent argument against the award of indemnity costs, and noted in particular that the senior counsel was no longer acting in this proceeding and was therefore unable to address Dr Muir's attempt to associate him with the bringing of the application to debar.

[62] The award of indemnity costs is the exercise of a judicial discretion, and the taxpayers have not demonstrated that the Judge erred by acting contrary to principle, disregarding a material factor or being wholly wrong. The present proceeding is one in a long line of attempts to relitigate the *Ben Nevis* proceedings, and another attempt to make allegations of fraud and concealment against the Commissioner and Crown Law that were dealt with by the High Court in the judicial review proceeding and the Supreme Court in the set aside proceeding. The presence of senior counsel does not immunise a party from indemnity costs. Woodhouse J's finding that the taxpayers were attempting to game the system and his award of indemnity costs were open to him.

Conclusion

[63] The appeal is dismissed.

Costs

[64] We see this appeal as a further step in the "gaming" referred to by Woodhouse J. Dr Palmer sought indemnity costs in relation to the appeal. Under r 53E(3) of the Court of Appeal (Civil) Rules 2005 this Court may award indemnity costs on the same basis as the High Court can do so. In the present appeal, the reasons for which indemnity costs were awarded in the High Court apply equally to the appeal. We therefore award indemnity costs against the taxpayers, jointly and severally. The Commissioner is also entitled to usual disbursements. We reserve leave to the parties to apply in the event of a dispute about the amount of costs.

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