IN THE COURT OF APPEAL OF THE COOK ISLANDS
HELD AT RAROTONGA

CA NO. 1/13

BETWEEN **TATUROANUI GRAHAM CROCOMBE**
Appellant

AND **COLLECTOR OF INLAND REVENUE**
Respondent

Coram: David Williams P
Barker JA
Paterson JA

Hearing: 20 November 2013

Judgment: 22 November 2013

Counsel: Mr P David for Appellant
Mr M Ruffin & Ms M Henry for Respondent

JUDGMENT (NO. 3) OF THE COURT

Introduction

[1] In a judgment given on 3 August 2012 Hugh Williams J determined that the Respondent, the Collector, was correct in assessing the Appellant, Mr Crocombe, with amounts credited to Mr Crocombe's current account by The Rarotongan Beach Resort and Spa Limited ("The Rarotongan"). The Appellant appealed on various grounds, all but one of which were determined by this Court in a judgment given on the 11 March 2013.

[2] The remaining point of appeal which is being determined in this judgment is that in issuing the assessment, there was improper conduct by the Collector amounting to an abuse of process that vitiates the validity of the assessments.

[3] The basis of the allegation of improper conduct is that the Collector referred Mr Crocombe's tax situation to Mr Trevor Clarke for advice. Mr Clarke is a qualified lawyer who practised law in the Cook Islands for some years before retiring from his practice and undertaking a successful business career in the Cook Islands. He was

known to be a business competitor of Mr Crocombe's and Mr Crocombe submits that it was an abuse of power for the Collector to engage a business competitor to provide him with legal advice about how Mr Crocombe's tax affairs should be treated.

Factual Background

[4] It is not necessary to set out the detailed history of dealings between Mr Crocombe and his advisors on the one hand and the Collector prior to the assessments being issued. Much of this appears in this Court's earlier judgment. It is sufficient to say neither Mr Crocombe nor The Rarotongan filed tax returns within the statutory time limits. A letter written by the Collector to Mr Crocombe on 19 December 2003 referred to previous correspondent and advised that unless the returns were filed by 23 January 2004 he would prosecute.

[5] In June 2004 Mr Crocombe and his advisors had advised Mr Haigh, an officer of the Collector, that it was their wish to reopen the accounts of The Rarotongan and reclassify some of Mr Crocombe's director fees which had been credited to his current account. There were further negotiations between the parties and a formal request to reopen the accounts was made in a letter from The Rarotongan's accountants to the Collector on 7 May 2004. Despite further meetings and representations the Collector declined to allow the accounts to be reopened.

[6] The dates that the relevant tax returns were filed with the Collector were:

26/ 4/2002 - The Rarotongan's tax returns for the 1999 to 2001 years.

4/ 5/2004 - Mr Crocombe's individual tax return for the 1998 year.

10/11/2005 - Mr Crocombe's individual tax returns for the 1999 to 2003 years.

17/11/2005 - a further tax return by The Rarotongan for the 2001 year.

[7] Mr Crocombe became concerned when he discovered preparing for the hearing before Hugh Williams J that Mr Trevor Clarke had given advice to the Collector in respect of the tax returns.

[8] Mr Stoddart as the Collector at the time, advised Mr Crocombe's accountant on the 21st July 2004 that he would not allow The Rarotongan's accounts to be restated. Mr

Haigh, who later became the Collector himself, confirmed the position in a letter to The Rarotongan's accountant on 18 August 2004.

[9] The tax assessments were issued on 31 March 2006 after all returns had been filed. These assessments confirmed the advice that the Collector had given on 21 July 2004. One of the returns filed before the assessments were issued was The Rarotongan return for the 2001 year which was filed on 17 November 2005. That return raised the issue of fundamental error. This Court's earlier judgment dealt with this issue.

[10] Mr David for the Appellant relies mainly upon documentary evidence. It is only necessary to briefly refer to it at this stage although there will be a more detailed evaluation later. The documentary evidence relied upon is:

(a) a file note prepared by the Collector dated 21 July 2004 which included words "my legal advice is that you cannot change history."

(b) a further file note of the Collector dated 29 July 2006 which indicated that Mr Crocombe's and The Rarotongan files were with Mr Clarke.

(c) a record of a meeting between the Collector, Mr Crocombe and Mr Crocombe's counsel on 15 December 2006 which concluded with the words "Trevor Clarke – answer please?"

(d) the Collector's letter to Mr Crocombe's counsel of 19 December 2006 raising issues from the meeting held a few days earlier. A handwritten note on that letter said "Don't sent this, per TC". It is accepted by the Collector that the reference to TC was to Mr Clarke.

(e) a letter from one of the Collector's officials to Mr Clarke dated 29 February 2008 forwarding the Collector's file for Mr Clarke's perusal and comment.

(f) a letter of 4 April 2008 from one of Mr Stoddart's officers to Mr Clarke requesting that he arrange for representation in Auckland to advise the Collector.

(g) a letter of 13 June 2012 from the Crown Law Office to Mr Crocombe's New Zealand solicitors advising that Mr Clarke had given privileged legal advice.

[11] Mr Haigh was cross-examined on the Collector's legal representation and did state that to his knowledge Mr Clarke had not been involved in giving advice on the assessments dated 31 March 2006. However, it was also Mr Haigh's evidence that Mr Clarke was the closest thing on the island to a tax lawyer and that during the relevant period he was the person from whom the Collector would get advice from on draft bills etcetera. He confirmed that Mr Clarke was the Collector's legal advisor over the whole period and could see no reason why he would be replicated.

Issues

[12] There are two issues for this Court to determine:

(a) the factual issue of whether Mr Clarke did give advice to the Collector on Mr Crocombe's and The Rarotongan's tax matters and if so when he gave that advice; and

(b) if advice was given relating to Mr Crocombe's and The Rarotongan's tax affairs was this an abuse by the Controller of his power as Collector.

Factual Issue

[13] Mr Ruffin for the Controller submitted that there was no evidence that Mr Clarke gave advice before the battle lines were drawn in this case. He was referring to 31 March 2006, the date on which the assessments were issued. Referring to the file note of 21 July 2004, it was Mr Ruffin's submission that the document has no context and may have merely been a question asked of another lawyer. Even if it was asked by the Collector of Mr Clarke it may have merely been a telephone query without formal provision of the accounts and simply asking whether it was possible to rewrite accounts particularly those that had been audited.

[14] It was also submitted on behalf of the Collector that this Court should not draw any inferences from the Collector opposing the late application made by Mr Crocombe that the Collector and Mr Clarke be called to give evidence in this Court and from the Collector's failure to call Mr Stoddart. In this respect Mr Ruffin relied upon the New

Zealand Court of Appeal case of *Russell v Taxation Review Authority* [2003] 21 NZTC 18,225.

[15] The particular references relied upon from *Russell* were:

> [31] ... We record, however, that we agree with the view taken by O'Regan J that there can be no obligation based on the rules of natural justice requiring a litigant in a civil proceeding, whether or not a public authority, to identify and make available witnesses considered by the opposing litigant to be the "correct ones". We agree also that there is no breach of natural justice by a litigant opposing successfully an application for an order for discovery of documents.
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> [32] We are not persuaded that the Commissioner stands in a unique position in objection proceedings so as to be under wider obligations than other civil litigants. The nature and purpose of this proceeding already referred to in this judgment makes that unnecessary. The argument for that unique position is just another attempted justification for the type of investigation we have held to be inappropriate."

[16] In this Court's view the facts of this case do not fall neatly within the comments made in *Russell*. Here, the witnesses required namely the Collector and Mr Clarke had been identified, albeit the realisation of their possible importance came on the eve of the High Court hearing. The Collector was within his legal rights in opposing the application to have Messrs Stoddart and Clarke called as witnesses and in deciding not to give evidence. However, in this case there was an allegation of improper behaviour against the Collector, who had an obligation to act in a high-principled way. There was some evidence to support that allegation. In the circumstances this Court does not accept that the Collector's failure to give evidence which would explain or clarify the documentary and other evidence, cannot be a factor from which an inference can be drawn. It is noted that the New Zealand Court of Appeal was not referred to the English authorities which are referred to later in this judgment.

[17] However, this Court is satisfied, without having to make any inferences relating to the Collector's reluctance to give the information on when he sought legal advice and from whom, that it can form a view on the factual issue. On the balance of probabilities it concludes that Mr Clarke did advise the Collector on Mr Crocombe's and The Rarotongan's tax affairs before the assessments were issued and before Mr Crocombe's accountant was advised that the Collector would not permit the rewriting of The Rarotongan's accounts for tax purposes.

[18] The evidence given by Mr Haigh, the Collector's own tax auditor, was that Mr Clarke was the Collector's legal tax advisor throughout the relevant period. There was no other tax advisor on Rarotonga. The issue was an unusual matter of some complexity. It was being argued by a branch of a recognised international accounting firm that The Rarotongan was entitled to rewrite its accounts. The submission was that this could be done because the original accounts contained a fundamental error and that in accordance with international recognised accounting standards the accounts could then be rewritten. The issue is one in which the Collector would be expected to take legal advice before coming to a decision.

[19] The Collector's memorandum of 21 July 2004 analysed in a reasonably detailed manner the issues involved in this case. On one vital point he noted that "his legal advice was that you cannot change history". It is difficult to give any other interpretation to this comment other than that Mr Stoddart took legal advice on the issues being raised by Mr Crocombe and his advisors.

[20] There is clear evidence that Mr Clarke advised the Collector after the assessments were issued. The Collector's memo of 29 July 2006 raised issues and concluded that its intended focus was so that the Collector could see the important aspect. That file noted that the files at that time were with Mr Clarke. They were not with some other lawyer.

[21] The record of the meeting on 15 December 2006 detailed the matters discussed with Mr Crocombe and his counsel and concluded with "Trevor Clarke – answer please?" Clearly this was seeking legal advice.

[22] After the meeting of 15 December 2006 the Collector wrote to Mr Crocombe's counsel to record two aspects of the meeting. The handwritten note on that letter indicated that it was not to be sent through Mr Clarke. No explanation has been given as to the meaning of this comment although a possibility is that the Collector did not want Mr Crocombe to know of Mr Clarke's involvement.

[23] A timetable prepared by the Collector shows that on 29 February 2008 a letter was written by one of the Collector's officers to Mr Clarke asking for a draft submission and enquiring as to his availability to represent the Collector.

[24] On 4 April 2008 the Collector wrote to Mr Clarke asking him to arrange for Auckland counsel to represent the Collector.

[25] On 13 June 2012 Crown Law replied to a letter from Mr Crocombe's solicitors in which Crown counsel advised "Mr Clarke was instructed as counsel to provide legal advice to the Collector and as such his advice is privileged". The solicitors had sought information including details of Mr Clarke's involvement and the information disclosed to him. While advice given was privileged, the inquiries made were legitimate and the response inappropriate.

[26] Clearly Mr Clarke gave advice to the Collector from at least 29 July 2006, shortly after the assessments had been issued and the objections filed. By his own admission on the file note of 21 July 2004 the Collector had taken legal advice before advising Mr Crocombe that the accounts could not be rewritten. The only evidence of an involvement of a lawyer was that of Mr Clarke. Mr Haigh's evidence confirms that Mr Clarke was the regular legal advisor as there was no one else on the island that the Collector could turn. On the basis of this evidence, this Court is of the view that the Collector did, prior to the issue of the assessment, seek legal advice from Mr Clarke on the tax position of both Mr Crocombe and The Rarotongan. It is unnecessary in the circumstances to know the topics in which the advice were given. The clear inference from the facts is that the Collector, prior to the issue of assessments, sought advice from Mr Clarke on the tax position of both Mr Crocombe and The Rarotongan. To give this advice it is more likely than not that Mr Clarke would have received the tax files and the accounts for The Rarotongan.

The Legal Issue

[27] The legal issue, based on the factual finding that Mr Clarke did give legal advice to the Collector on The Rarotongan's tax matters before the assessments were issued, is whether the request for and the giving of that advice is an abuse of power which leads to the conclusion that this Court should set aside the assessments.

[28] Mr David relied on several cases, some from the House of Lords, to support the submission that there was an abuse of power in this case. It is not necessary to cite extensively from these cases but reference will be made to some of the principles which the cases establish.

[29] The House of Lords considered the abuse of power in *In re Preston* [1985] 1 AC 835. In that case Lord Templeman said at page 864:

(G) The court can only intervene by judicial review to direct the commissioners to abstain from performing their statutory duties or from exercising their statutory powers if the court is satisfied that "the unfairness" of which the applicant complains renders the insistence by the commissioners on performing their duties or exercising their powers an abuse of power by the commissioners.

[30] Lord Bingham in *The Queen v Commissioners of Inland Revenue ex parte Unilever plc* [1996] 68 Tax Cases 205, said at page 228:

> I would in general terms accept almost all these points, which reflect high authority and rest on sound legal principle. But I am very uneasy at the conclusion which the argument is said to compel in this case. Unilever is, I think, entitled to make a number of points on the facts of the present case: (1) The courts have not previously had occasion to consider facts analogous to those here. The categories of unfairness are not closed, and precedent should act as a guide not a cage. Each case must be judged on its own facts, bearing in mind the Revenue's unqualified acceptance of a duty to act fairly and in accordance with the highest public standards.

[31] Simon-Brown LJ, also in the *Unilever* case observed at pages 233 and 234:

> "Unfairness amounting to an abuse of power" as envisaged in *Preston* and the other Revenue cases is unlawful not because it involves conduct such as would offend some equivalent private law principle, not principally indeed because it breaches a legitimate expectation that some different substantive decision will be taken, but rather because either it is illogical or immoral or both for a public authority to act with conspicuous unfairness and in that sense abuse its power.
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> And there is this too to be said. Public authorities in general and taxing authorities in particular are required to act in a high-principled way, on occasions being subject to a stricter duty of fairness that would apply as between private citizens. This approach is exemplified in cases such as *Regina v Tower Hamlets London Borough Counsel ex parte Chetnik Developments Ltd* [1988] AC 858 and *Woolwich Equitable Building Society v Inland Revenue Commissioners* [1993] AC 70, and reflected in Lord Mustill's reference in *Matrix-Securities* to "the spirit of fair dealing which should inspire the whole of public life".

[32] The Court is satisfied that the following principles apply:

(a) a taxing authority has a duty to act fairly and in accordance with the highest public standards. It is required to act in a high-principled way.

(b) if it acts with conspicuous unfairness it may be abusing a power.

(c) the categories of what may amount to an abuse of power are not closed. Each case turns on its own facts.

(d) to establish an abuse of power it is not necessary to establish actual bias or improper motive or that either the Collector or Mr Clarke wished to disadvantage either Mr Crocombe or The Rarotongan. None of these elements are alleged by the Apellant to be present.

(e) if there has been an abuse of power a Court may set aside an assessment even if it believes it to be correct.

[33] The essence of the submission on behalf of Mr Crocombe is that by taking advice from a business competitor of Mr Crocombe, the Collector allowed the potential for bias and favour to become part of the taxation process. It was submitted that even if Mr Clarke did not actually act with any bias or favour, the reasonable person would see that having someone in Mr Clarke's position vis-a-vis Mr Crocombe advise on decisions determining Mr Crocombe's taxation liability, as demonstrating that there would be a real and apparent risk of bias. This is quite apart from the fact that because of the clear conflict, Mr Clarke should not have accepted the instruction in the first place or continued with the instruction.

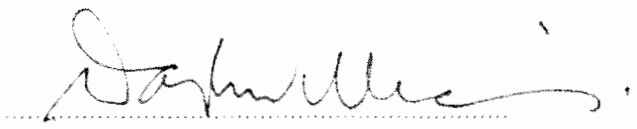
[34] The Court accepts this submission. It does not suggest that Mr Clarke was biased but accepts he was in an obvious position of conflict. It is not suggested that Mr Clarke gave legal advice other than what he believed to be completely impartial legal advice.

[35] However this Court has come to the conclusion that to ask a business competitor to advise on a rival's disputed tax position is unacceptable and improper and amounts to conspicuous unfairness. A taxpayer is entitled to expect that his financial position will not be disclosed by the tax authorities to a competitor and that legal advice will not be sought from a lawyer who is also a business competitor of the taxpayer. These points are sufficient to allow the appeal. The position is exacerbated in this case because of the relevant status of Mr Clarke and Mr Crocombe as prominent and leading businessmen who are competitors in the same small business environment. Thus this Court is of the view that asking Mr Clarke to give the legal advice and Mr Clarke giving it was improper.

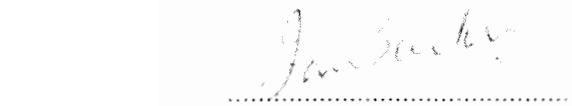
[36] The Court is therefore of the view that Mr Crocombe is entitled to the relief sought. The appeal is allowed and the assessments are quashed and the matter referred back to the Collector for new assessments to be made.

Costs

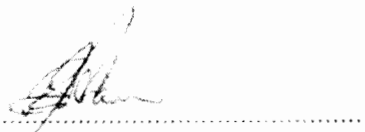
[37] Each party has succeeded under a judgment of this Court. Costs will therefore lie where they fall.



David Williams
President



Sir Ian Barker JA



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