

**IN THE HIGH COURT OF NEW ZEALAND  
AUCKLAND REGISTRY**

**CIV 2006-404-007264**

BETWEEN	AVOWAL ADMINISTRATIVE ATTORNEYS LIMITED First Applicant
AND	J B LLOYD CHARTERED ACCOUNTANTS LIMITED Second Applicant
AND	PETER JAMES BLOOMFIELD AND NORMA RAE CLARK Third Applicants
AND	AMANDA JANE CHISNALL AND IAN ANDREW FLEMMING Fourth Applicants
AND	DENISE ANNE CLARK Fifth Applicant
AND	WENDY CAROLINE VOOGHT Sixth Applicant
AND	LISA CHERRIE WATKINS AND WILLIAM DAVID WATKINS Seventh Applicants
AND	NIKYTAS NICHOLAS PETROULIAS Eighth Applicant
AND	THE DISTRICT COURT AT NORTH SHORE First Respondent
AND	THE COMMISSIONER OF INLAND REVENUE Second Respondent

Hearing: 17 December 2009

Appearances: G Clews and A A H Low for First, Fifth and Eighth Applicants  
J C Pike and P H Courtney for Commissioner

Judgment: 21 December 2009 at 2.30 p.m.

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**JUDGMENT OF VENNING J  
ON APPLICATION FOR RECALL/REVIEW**

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**This judgment was delivered by me on 21 December 2009 at 2.30 pm, pursuant to Rule 11.5 of the High Court Rules.**

**Registrar/Deputy Registrar**

**Date.....**

Solicitors: Buddle Findlay, Auckland  
Crown Law Office, Wellington  
Copy to: G Clews, Auckland

## **Introduction**

[1] This is an application to recall or review directions made by the Court in a minute of 8 October 2009, in particular the directions made at para [7] of that minute.

## **Brief background**

[2] In a judgment delivered on 8 May 2009 this Court dismissed the applicants' application for a stay pending the outcome of the appeal from the substantive decision delivered on 22 December 2008. The effect was to permit the Commissioner to begin a review of the electronic documents seized by the Commissioner's officers. The application for stay was dismissed on certain terms including a requirement that an affidavit be filed on behalf of the Australian Tax Office before the Commissioner was to make the electronic information available to officers of the Australian Tax Office.

[3] The Australian Tax Office later filed the affidavit required by the Court to enable it to access the documentation held by the Commissioner. The remaining issue was how privilege was to be dealt with. That was addressed by way of memoranda and at a telephone conference hearing. The minute of 8 October followed that telephone conference hearing. Paragraph [7] of that minute recorded:

[7] I confirm the following directions:

[a] The Commissioner is permitted to commence review of the electronic information removed from the Avowal and Motueka River Lodge sites in accordance with the following procedure:

[i] The Commissioner will cause the Computer Tax Audit Unit of the Department to carry out a key word search on the hard drives, using the terms that were used for the s 16 operation. All documents that produce hits will be provided electronically to the investigations team in Takapuna.

[ii] The investigations team will review those documents in a cursory manner. Any documents

that appear as though they may be subject to privilege or tax advice non-disclosure (potentially privileged documents) will be set aside and will not be read or looked at further.

- [iii] Copies of the potentially privileged documents will be provided to the respondents to enable them to pursue claims of privilege and tax advice non disclosure or set aside pending resolution of the privilege proceedings. Potentially privileged documents will not be made available to the ATO.
  - [iv] The Commissioner may review all remaining open documents as part of his investigation and will allow the ATO to view any relevant open documents.
  - [v] The Commissioner is to provide the applicants on an ongoing basis, a schedule(s) of the open documents so that the applicants can identify the documents that the Commissioner and the ATO have access to.
- [b] The Commissioner is permitted to allow officers of the ATO to review the electronic information in accordance with the above procedure.
  - [c] The ATO is permitted to copy and remove information that it is entitled to under the Australia-New Zealand Double Tax Agreement and previous decisions of this Court.

[4] The applicants seek further directions and/or recall directed at clarifying their ability to claim privilege in relation to documents which, following the Commissioner's cursory examination contemplated by para [7] [ii], will be *prima facie* open documents and not subject to privilege.

### **Jurisdiction for the application**

[5] The application is styled as a request for further directions and/or recall. Strictly it is not a recall application. The minute was not a judgment of the Court, to which an application for recall might apply.

[6] Although there was no formal application before the Court the orders were made on memoranda which the Court and parties treated as an application for directions. The orders made in the minute of 8 October are properly categorised as interlocutory orders, which may be varied or rescinded under r 7.49. While such an application should be made within five working days, no issue is taken with the

timing of the application. I extend time for the application to be made and treat this as an application to vary or rescind para [7] of the order made on 8 October.

### **Representation**

[7] A preliminary issue arises. Mr Pike sought clarification of who the applicants to this application were. Mr Clews confirmed that his instructions were from Avowal Administrative Attorneys Limited, Ms Clark and Mr Petroulias. They are the applicants and are the only remaining parties to the substantive appeal. In response to Mr Pike's observation that Avowal Administrative Attorneys Limited is no longer operating Mr Clews said that his instructions were that Ms Clark has authority to act in an administrative capacity on behalf of Avowal. The basis of that authority (i.e. from whom it emanates) is not entirely clear.

[8] However, for present purposes, the application is made by, and the parties claiming an interest in the electronic information are – Avowal Administrative Attorneys Limited, Ms Clark and Mr Petroulias.

### **The issue**

[9] The effect of the decision to decline the application for stay is that the Commissioner is permitted to commence the review of the electronic information removed from the Avowal and Motueka River Lodge sites. The procedure for the review is:

- a) A relevance search is first carried out. All documents identified as relevant are then provided to the Commissioner's investigations team at Takapuna.
- b) The investigations team review those documents in a cursory manner, setting to one side documents that appear as though they may be subject to privilege or tax advice non-disclosure (potentially privileged documents).

- c) Copies of potentially privileged documents are provided to the applicants to enable them to pursue claims of privilege and tax advice non-disclosure. Potentially privileged documents are not made available to the ATO.
- d) The open (and by definition not potentially privileged documents) are available for review by the Commissioner and the ATO.

### **The applicants' argument**

[10] The point advanced on behalf of the applicants by Mr Clews is that as the minute stands the procedure does not provide a process or any ability for the applicants to raise claims for privilege in relation to the open documents. He submitted that despite the cursory review there may be documents which the Commissioner considers to be open, but which the applicants may still wish and be entitled to claim privilege for.

### **The Commissioner's position**

[11] The Commissioner submits that the application is misconceived and that there is no basis to recall the previous orders. Counsel noted that the application seemed to be premised on the basis that the Commissioner had not provided schedules of the open documents as required but the reason for that was simply that the review had not got to that stage. The Commissioner submitted that the application was no more than an attempt to relitigate the matters that were dealt with in the 8 October minute.

### **Decision**

[12] The applicants and their former legal advisers are, in large part, the authors of the difficulties that both they and the Commissioner face in dealing with this matter. As a consequence of the blanket claim to privilege the Commissioner's officers did not feel able to carry out even a relevance search when the initial search was carried

out. Given that blanket claim to privilege was made on legal advice, for the reasons set out in the substantive judgment, it can hardly be said to have been unreasonable on the IRD officers' part to have accepted the claim to privilege and not have insisted on a keyword search at that time. But as a consequence there is an enormous amount of material to be reviewed.

[13] The process set out in the minute of 8 October represented an attempt to address that by a process consistent with the lawful violation of privilege concept as discussed in *Allitt v Sullivan* [1988] VR 621 and *JMA Accounting Pty Limited v Michael Carmody, Commissioner of Taxation* [2004] FCAFC 274.

[14] In carrying out the cursory examination of documents to identify those that may be potentially privileged, it is expected the Commissioner's officers will adopt a duly conservative approach and err in favour of setting the documents aside as potentially privileged. In the circumstances it is unlikely that there could be other, justified claims to privilege that could be raised by the applicants to the documents which are otherwise regarded as open. However, I accept that that possibility, remote as it may be, cannot be ruled out. The orders Mr Clews seeks are directed at providing a process to deal with such possibilities.

[15] During the course of oral submissions Mr Pike accepted in principle that if, on receipt of the list of open documents, the applicants considered any of the documents on that open schedule to be privileged, they could claim privilege at that time. To that extent Mr Pike and Mr Clews both recognise the potential for a further claim to privilege. They differ on how likely that may be. The issue is how to deal with that possibility and what further terms and conditions should be imposed. I acknowledge that the issue was not expressly dealt with in the minute of 8 October.

[16] Having heard argument I accept that the possibility exists the applicants may need to make further claims to privilege in relation to the documents otherwise identified as open by the Commissioner. The Commissioner (and no doubt the ATO) have two principal concerns. First that unjustified claims to privilege will be advanced, and second, that the applicants will use such claims to delay the review.

[17] The Commissioner's concern that unjustified claims to privilege will be made in an effort to frustrate the review by the Commissioner and the ATO can be addressed by, if necessary, the Commissioner seeking interim rulings on certain documents for which privilege is claimed in advance of dealing with the other claims to privilege in relation to the documents the Commissioner has set aside as potentially privileged. If necessary, time will simply have to be made available to deal with those matters as a priority, perhaps even by way of test sample for example. Further, full details of the claim for privilege will be required to show how the applicants to this case can claim privilege in the documentation.

[18] The Commissioner's other valid concern that the process will further delay the review process can be met by strict implementation of the timetables suggested by the applicants themselves. Mr Clews has suggested a process in the application which provides a time for the applicants to make any claim for privilege on receipt of the schedules of "open" documents and the process that follow thereafter. In the event a claim for privilege is not made within the time suggested then the documents will retain the status as open and may be reviewed by the Commissioner and made available to the ATO.

### **The Z drive**

[19] The applicants submit that it is necessary for a cloned copy of the Z drive to be made available to them to enable them to consider the list of open documents. The Commissioner resists that application. The Commissioner considers there is no need for a further copy of the Z drive to be made available to the applicants. The Z drive was cloned by the Commissioner's officers and agents at the offices of Avowal. The Z drive remained at the office and under the control of Avowal. From the Commissioner's point of view Avowal has control over the Z drive from which the clone the Commissioner will be working off was taken. There is no need for a further copy of the Z drive to be made available.

[20] Mr Clews advised the Court that although he was not aware how the Z drive had been removed, his instructions were that the Z drive had been taken from New Zealand and was now not readily available to the applicants.



[21] Although at first sight it might seem simple enough a thing for the Commissioner to clone a further copy of the Z drive and make that available to the applicants, the Commissioner resists doing so. Mr Pike explained the Commissioner resists doing so because at the time the search was undertaken and before the cloning commenced, the Commissioner understands that attempts were made off-site to corrupt the Z drive. The cloned copy the Commissioner has discloses what was corrupted and what was not corrupted. The Commissioner is concerned that if a copy of the cloned copy is made available to the applicants, that information will facilitate further avoidance which the Commissioner suspects the applicants are still engaged in.

[22] There is no direct evidence on this issue from either party. In the absence of evidence I am not prepared to make any findings.

[23] The position the Court is left in is this. The Z drive belonged to Avowal. It was left by the Commissioner's officers in the possession of Avowal. Mr Clews was not able to properly explain (I mean no criticism of counsel by recording this) how the Z drive came to be removed from New Zealand. There is no evidence before the Court about that or how it can be said that the Z drive, which was under the control of the applicants, is no longer available to them. In the circumstances I decline to make any order requiring the Commissioner to provide a further cloned copy of the Z drive to the applicants.

## **Result**

[24] It follows that I agree the existing procedure should be refined. The directions at [7] of the minute of 8 October are reviewed and replaced with the following directions:

- a) The Commissioner is permitted to commence review of the electronic information removed from the Avowal and Motueka River Lodge sites in accordance with the following procedure:

- i) The Commissioner will cause the Computer Tax Audit Unit of the Department to carry out a key word search on the hard drives, using the terms that were used for the s 16 operation. All documents that produce hits will be provided electronically to the investigations team in Takapuna.
- ii) The investigations team will review those documents in a cursory manner. Any documents that appear as though they may be subject to privilege or tax advice non-disclosure (potentially privileged documents) will be set aside and will not be read or looked at further. The remaining documents are classed as *prima facie* open documents.
- iii) The Commissioner is to provide the applicants on an ongoing basis, a schedule(s) of the *prima facie* open documents so that the applicants can identify the documents the Commissioner contends are *prima facie* open documents and that he intends to review and provide to the ATO for inspection.
- iv) The applicants will have five working days (subject to any other extension of time agreed in writing on behalf of the Commissioner) from receipt of the schedule of *prima facie* open documents to raise any claim to privilege and/or tax advice non-disclosure in respect of any of the documents listed on the schedule of *prima facie* open documents, provided that any such claim to privilege must be sufficiently particularised to enable the Commissioner to consider the basis of the claim to privilege and the entity on whose behalf the privilege is claimed.
- v) The Commissioner will not review and will not make available to the ATO any *prima facie* open documents until the expiry of the five working day period. Any documents that the applicants do not claim privilege for within five working days

will be confirmed as open documents. The Commissioner may then review all those confirmed open documents as part of his investigation and may allow the ATO to view any confirmed open documents.

- vi) The potentially privileged documents and any other documents for which privilege are claimed by the applicants will then be the subject of review by this Court. Pending resolution of the claims to privilege those documents will not be released to the Commissioner's investigators for review or to the ATO.
- vii) The Commissioner is permitted to allow officers of the ATO to review the electronic information confirmed as open and the ATO is permitted to copy and remove such documents confirmed as open under the Australian New Zealand Double Tax Agreement and previous decisions of this Court.
- viii) In the event the Commissioner wishes to test the applicant's challenge to privilege in relation to the documents on the *prima facie* open list, I reserve leave for such an application to be made in advance of the review of the documents identified by the Commissioner's officers as potentially privileged documents.

[25] I reserve leave for the parties to seek further directions to implement these orders if necessary.

### **Costs**

[26] Costs are to lie where they fall on this application.

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Venning J