IN THE DISCIPLINARY TRIBUNAL
SECTION 515 LEGAL PROFESSION ACT

IN THE MATTER OF:

Law Society Northern Territory

-and-

Ian John Rowbottam, a legal practitioner.

REASON FOR DECISION

[1] The Law Society Northern Territory (LSNT) has commenced proceedings against Mr Ian Rowbottam ("the practitioner") by a disciplinary application alleging two counts of professional misconduct. The charges come before this Tribunal by virtue of section 515, section 745 and Regulation 96A of the *Legal Profession Act* (2006) ("the current Act"). The latter section directs that a complaint once initiated under the *Legal Practitioners Act* ("the former Act") must be completed under the former Act as if it had not been repealed (s 745(2)). Regulation 96A directs that if, on the completion of an investigation under section 745(2), the LSNT would have been entitled to lay a charge of professional misconduct under the former Act then it must start proceedings in the Disciplinary Tribunal.

[2] The first charge concerns what transpired before Justice Southwood 17 May 2005 when the matter of *R v Ibbotson* came before His Honour for directions. The matter concerned a number of criminal charges brought against Ibbotson and after several directions hearings

before Justice Southwood, and a number of amended indictments, eventually five of the charges proceeded by guilty plea and, one contested charge was withdrawn.

[3] It is alleged by LSNT that on 17 May 2005 the practitioner breached Rule 17.6 of the Rules of Professional Conduct and Practice ("the Conduct Rules") and that the practitioner acted contrary to the requirements of section 44 (1) (c) (ii) of the former Act.

[4] Rule 17.6 of the Conduct Rules reads:
"A practitioner must not knowingly make a misleading statement to a court on any matter."

[5] Section 44(1)(c)(ii) of the former Act reads:

"(1) The following general principles apply to the professional of a legal practitioner in the course of practising the profession of the law:
(a) ...(not reproduced)
(b) ...(not reproduced)
(c)(ii) A legal practitioner must act with honesty and candour in all dealings with courts and tribunals and otherwise discharge all duties owed to courts and tribunals."

[6] The second charge concerns the contents of an affidavit sworn by the practitioner and filed in the Court of Appeal in *Ibbotson v The Queen* which was heard on 14, 16 and 22 February 2006. LSNT has again alleged the practitioner breached Rule 17.6 of the Conduct Rules and section 44 (1) (c) (ii) of the former Act.

General History.

[7] Ibbotson was a client of Withnall Maley, the firm at which the practitioner carried on his practice. Over a period of time leading up to the period when these charges are made, the firm had acted for Ibbotson on a number of matters. Initially, Ibbotson's matters were handled by Vanessa Farmer, a principal of the firm.

[8] An indictment dated 4 November 2002 charged Ibbotson with 9 breaches of the *Misuse of Drugs Act* for conduct in March 2002. Further versions of the indictment whittled down the charges to six. Five concerned conduct that was captured by video surveillance footage in a "sting" conducted by the police. The sixth charge involved the discovery by Police of drugs at the residence that Ibbotson shared with others. In the absence of direct evidence such as fingerprints or DNA, or admissions associating the drugs with him, it was intended that the sixth charge would proceed by way of a not guilty plea and a trial would be held.

[9] The practitioner intended to conduct the trial himself and all counts on the indictment were listed for hearing commencing on 23 May 2005 for five days and possibly 10 days.

[10] On 3 May 2005, the practitioner commenced a scheduled 3 week trial, *R v Oldroyd & ors*, before Justice Riley and as the hearing date for the Ibbotson matter approached it became apparent that the *Oldroyd* trial might not be finished before the listed commencement of the *Ibbotson* trial.

[11] In the same general period of time, Peter Maley, then a member of the Parliament of the Northern Territory and previously a principal in the

firm, had decided not to pursue his political career and to return to legal practice in the firm. Mr Maley and Ms Farmer were married but that relationship apparently broke down in or about May 2005. The breakdown clearly had an impact on those working in the legal practice and appears to have had some impact upon the factual matrix surrounding the first charge brought by the LSNT.

[12] The practitioners of the firm had "diary meetings" in which they would compare the commitments for a particular day and allocate matters to each other. It appears these meetings occurred when the occasion demanded. One of those occasions was that the legal practitioner was engaged in the *Oldroyd* trial, for the first three weeks of May 2005, thus rendering him unavailable to appear in other matters in normal court hours during that period. The diary meetings were typically held at about eight o'clock in the morning, and of short duration to allow time for the firm's lawyers to appear at mentions for matters at nine o'clock in the morning at both the Magistrates Court and the Supreme Court.

[13] On Friday 6 May 2005 a diary meeting was held, initially in Vanessa Farmer's room with Ms Farmer, Mr Maley and subsequently the practitioner, and then later between the practitioner and Mr Maley in the practitioner's room. The practitioner gave evidence that in the presence of Ms Farmer, he asked Mr Maley to be prepared to take over the *Ibbotson* matter as he expected that the *Oldroyd* trial in which he was then engaged would extend over to the first day of the period in which the *Ibbotson* matter was to go to hearing.

[14] In his evidence, Mr Maley did not deny that this conversation, or a conversation of a similar type, may have occurred but Mr Maley had no specific recollection of such a conversation. Mr Maley told the Tribunal

that if he had been told that he had to be ready to conduct a jury trial in the Supreme Court that was to last a week or two he would have been very concerned and would want to take plenty of time to prepare, as he had only previously conducted one trial in the Supreme Court.

[15] Ms Farmer made a statutory declaration and told the Tribunal that on 6 May 2005 the practitioner told Mr Maley in her presence that the Ibbotson trial was listed for 10 days commencing on 23 May, but it should proceed as a plea, as the practitioner was negotiating with the Crown on some aspects. If the matter proceeded to trial, it "would be a hearing on the facts". Ms Farmer told the Tribunal that Mr Maley confirmed his availability and said words to the effect of "locked and loaded".

[16] The practitioner also gave evidence that Mr Maley said to him words to the effect of "locked and loaded" when he asked him to be prepared to take over the *Ibbotson* matter. The phrase in quotations is apparently a term used by Mr Maley and intended to convey agreement to do the task offered. However, contrary to his general practice, Mr Maley did not enter the *Ibbotson* matter in his diary at that time or any other time. He took no steps to become familiar with it, to allow him to commence a trial or to make submissions on a plea.

[17] Given the evidence of the practitioner, Ms Farmer and Mr Maley, the purpose of the diary meeting on Friday, 6 May, that the trial date of 23 May had been allocated for the *Ibbotson* matter, that both Mr Maley and Ms Farmer were to travel interstate at midday on 6 May, not to return until the following Monday, and that the *Ibbotson* matter was to be mentioned that morning before Justice Southwood, the Tribunal finds that a conversation between the practitioner and Mr Maley mentioning the matter on 6 May 2005 would have likely taken place.

[18] The evidence of the practitioner is that the conversation between him and Mr Maley concerning the *Ibbotson* matter was short. No formal brief was provided by the practitioner to Mr Maley at that time or at all; nor was Mr Maley given a copy of the indictment, any witness statements, the committal papers or the file maintained by the firm. Mr Ibbotson was on bail, and attended the firm's office from time to time, but there was no arrangement for him to meet Mr Maley. The practitioner recollected that the *Ibbotson* file was on his desk and there it remained for the following week.

The first charge.

[19] At 9.28 a.m. on Tuesday 17 May 2005 the *Ibbotson* matter came before Justice Southwood. The prosecutor was Mr Elliott. On the previous occasion that the matter was before Justice Southwood, His Honour had requested the then prosecutor, Mr Adams, to arrange for Mr Karczewski QC, the Acting Director of Public Prosecutions to be present in Court on that day. The practitioner appeared on behalf of Mr Ibbotson.

[20] The first matter attended to at the mention was that the Crown presented a new indictment in which the contentious sixth charge was dropped. Consequently the matter was to proceed on Monday 23 May 2005 as a guilty plea in respect of five charges. The practitioner sought an adjournment of the matter from 23 May 2005 to the next day as it appeared that the *Oldroyd* matter in which he was involved would not finish until the Monday. That application was granted by Justice Southwood.

[21] There then followed a discussion between Justice Southwood and the practitioner concerning what would have occurred if the sixth charge had not been dropped and as a consequence a trial had proceeded on Monday 23 May 2005. This passage commences about quarter of the way down on page 3 of the transcript taken on that day. The relevant passage is: [1]

HIS HONOUR: Assume the trial was to proceed, Mr Rowbottam, what was going to happen to your client?

MR ROWBOTTAM: Sorry, I'm not quite with you ...

HIS HONOUR: Well, the matter is set down to start for trial if the indictment – assume the sixth count was to go ahead.

MR ROWBOTTAM: Sorry, Your Honour, I'm with you ...

HIS HONOUR: We would be having a trial on Monday.

MR ROWBOTTAM: Yes.

HIS HONOUR: How were you going to represent your client on Monday?

MR ROWBOTTAM: Sorry, I'd made some tentative arrangements for that for outsiders, your Honour.

HIS HONOUR: When with those arrangements made?

---

[1] This transcript has been altered as a result of correction by counsel for the parties and by the Tribunal.

MR ROWBOTTAM: They've been in place in terms of the potential -- -- --

HIS HONOUR: When were they made?

MR ROWBOTTAM: About a week, 10 days ago I think.

HIS HONOUR: So another person had a brief and was across this matter, were they?

MR ROWBOTTAM: Well, certainly from my office, yes.

HIS HONOUR: Who in your office was going to handle this matter in your absence?

MR ROWBOTTAM: Mr Maley.

HIS HONOUR: Mr Maley was, was he? Our Member of Parliament -- a Member of Parliament was going to represent an accused person in this court on Monday? And he was thoroughly across the brief was he?

MR ROWBOTTAM: Well, in terms of "thoroughly across the brief", your Honour, he's certainly a practitioner who's conducted trials.

HIS HONOUR: And that's about as far as it goes is it, in relation to this matter. Had he read the brief? Has he read the brief?

MR ROWBOTTAM: Well, I was prepared to brief him in terms of sit, of instructing with him, your Honour.

[22] Counsel for the practitioner made submissions concerning the degree to which the Tribunal could be satisfied that the transcript and the tapes[2] were accurate. The submission is discussed below at [45].

[23] Mr Maley subsequently wrote to Justice Southwood on 11 July 2005 and said: "I can assure the Court that Mr Rowbottam at no time spoke to me or made any arrangements for me to be briefed to have the care and conduct of this matter in his absence."

[24] On 12 July 2005 Justice Southwood forwarded the Maley letter and a copy of the transcript to the LSNT and requested that the matter be referred to the appropriate officers within the LSNT for investigation and report to the Council of the LSNT.

[25] The LSNT investigated the allegation pursuant to section 44 (1) (c) (ii) of the former Act, notwithstanding that Mr Maley subsequently contacted the Law Society to withdraw his "complaint".

[26] The charge laid by the LSNT is that the practitioner made a false statement to Justice Southwood that he had briefed Mr Maley to appear on behalf of Ibbotson.

[27] The answer of the practitioner to the question from Justice Southwood: "so another person had a brief and was across this matter were they?" when Mr Rowbottam responded "Well, certainly from my office, yes" is, in the view of the Tribunal, false and was intended to mislead the judge. There was no brief, howsoever described, ever

---

[2] "Tapes" is the term the Tribunal uses for the recording made by the Court Reporting Service of the proceedings in court, regardless of whether the eventual product is a compact disc, a tape or a file on a computer hard drive.

provided to Mr Maley and Mr Maley was not, at any time, "across this matter".

[28] It is likely that Mr Rowbottam had two conversations with Mr Maley about the Ibbotson matter. The first was at the diary meeting on the morning of 6 May 2005, and on one other occasion that was witnessed by Ms Anne Walker. Ms Walker was at the time a receptionist at Withnall Maley & Co. and told the Tribunal that she recollected Mr Rowbottam and Mr Maley departing the reception area of the firm's office and Mr Rowbottam saying something to Mr Maley to the effect that he could not do the *Ibbotson* matter and that Mr Maley responded "okay". Ms Walker could not say when the conversation was other than a lunchtime, but it was likely before the appearance of Mr Rowbottam at the mention on the morning of 17 May 2005 when the practitioner became aware that the matter would not be a trial but a guilty plea and that he would be available to attend to that because the Court would list the matter for the plea when he was available.

[29] It is clear from the transcript of the mention on 17 May 2005 that Justice Southwood was concerned with the manner in which the matter had proceeded in the several mentions between 13 April 2005 and 17 May 2005 to the extent that he required the attendance of the Director of Public Prosecutions on that later date. It is also clear that Mr Rowbottam had never briefed Mr Maley in the traditional sense of that word. The Tribunal finds the practitioner had notified Mr Maley that he might be required to appear at the trial but that Mr Rowbottam expected the contested sixth charge to be withdrawn before that time and for the matter to proceed by guilty plea.

[30] The Tribunal finds that Mr Rowbottam's assurance to Justice Southwood that someone from his office was briefed and was across the matter was untrue. It was said in circumstances where the practitioner was aware that Justice Southwood was concerned at the manner in which the matter had progressed and it was said by Mr Rowbottam with the intention of leading Justice Southwood to the view that counsel was briefed and across the matter and ready to conduct the trial on 23 May 2005. It is likely the practitioner gave the false response so that Justice Southwood would not make adverse comments concerning the failure to be properly prepared for the hearing.

[31] It is, as counsel for Mr Rowbottam said in submissions, important not to take sections of transcript out of context. Similarly, it can be the case that counsel will inadvertently make errors in their submissions to the Court. In those circumstances it is incumbent on counsel to correct those errors as soon as they come to the attention of counsel. While the Tribunal accepts that the practitioner may have initially been taken by surprise by the question from the judge regarding the hypothetical situation of the trial proceeding, Mr Rowbottam's response, was not a case of inadvertent error and nor is it a case, as the transcript shows, where counsel has endeavoured to correct an erroneous submission made to the Court.

[32] The Tribunal finds that Mr Rowbottam intended to mislead Justice Southwood and that he has thereby contravened Rule 17.6 and section 44 (1) (c) (ii). However, the Tribunal also finds that Justice Southwood was not so misled, as is apparent from the subsequent exchange in the transcript between Justice Southwood and Mr Rowbottam. That Justice Southwood was not misled does not, in the view of the Tribunal, displace the finding of the contravention by the practitioner.

The second charge.

[33] The *Ibbotson* matter was before Justice Southwood on a number of occasions between 13 April 2005 and 27 May 2005. Most of these were the mentions intended to prepare the matter for hearing on 23 May 2005.

[34] As stated above, the *Ibbotson* matter finally proceeded before Justice Southwood on 25 May 2005 by way of 5 guilty pleas. Mr Rowbottam appeared for Ibbotson and Mr Elliott appeared for the Crown with both counsel making submissions. Justice Southwood reserved his decision until the morning of 27 May 2005 when he handed down a sentence, encompassing all the offences, of three years imprisonment with a non-parole period of 12 months. As will be seen, the validity of this sentence vis-a-vis the *Sentencing Act* becomes a relevant consideration.

[35] Justice Southwood called parties back before him in the afternoon of 27 May 2005 pursuant to section 112 of the *Sentencing Act*, which allows the Court to make corrections to sentences in certain circumstances. The sentence did not comply with s.54 of the *Sentencing Act* because the non-parole period did not represent at least half of the head sentence. That is to say, with a three year term of imprisonment the non-parole period was required to be not less than half of that term, namely, 18 months.

[36] Upon recall of the matter, the practitioner began to make submissions that His Honour had intended that Mr Ibbotson serve a period of 12 months.Justice Southwood stated that Mr Rowbottam was

wrong, and His Honour the non-parole component of the sentence handed down by him that morning.

[37] Mr Ibbotson sought leave to appeal his sentence to the Court of Criminal Appeal. On that occasion the Court consisted of Justices Angel, Mildren and Riley; Mr Tippett QC appeared on behalf of Mr Ibbotson instructed by the NT Legal Aid Commission and Mr Lewis appeared on behalf of the Office of the Director of Public Prosecutions. There were four grounds of appeal: firstly that the sentencing judge failed to properly consider a partially suspended sentence; secondly that the sentence imposed was manifestly excessive; thirdly that the sentencing judge in notionally reducing the sentence by six months on account of the applicant's plea of guilty failed to discount the sentence enough on that account; and fourthly that when the judge reconvened the court pursuant to section 112 of the *Sentencing Act* the sentencing judge ought to have invited and heard further submissions on whether the three year head sentence should be partly suspended or whether the minimum non-parole period of 18 months necessitated by section 54 of the *Sentencing Act* should be fixed.

[38] In support of the application for leave to appeal, an affidavit by the practitioner sworn 9 February 2006 was tendered. In effect, paragraphs 6, 7, 8, 9 and 10 of the affidavit complain that the practitioner was dealt with in an aggressive and demeaning manner by Justice Southwood with the result that the practitioner was prevented from making submissions that the sentencing judge ought to impose a partially suspended sentence instead of the three-years imprisonment with a non-parole period.

[39] The charge of LSNT is that the facts averred to in the affidavit were untrue and that swearing an affidavit containing those facts breached

the practitioner's obligations under Rule 17.6 and section 44 (1) (c) (ii) of the former Act.

[40] In response, the practitioner asserts that he was intimidated by the conduct of Justice Southwood and that his submission to Justice Southwood that His Honour intended to suspend the head sentence (as suggested by the practitioner in his submissions) was correct and His Honour was wrong.

[41] It is relevant at this stage to refer to two technical matters raised by counsel for the practitioner. The first of these was that complaint 2.1 laid by the LSNT asserts that the conduct occurred whilst the practitioner was representing Mr Ibbotson. It seems clear from the affidavit itself and the location of appearance on the transcript before the Court of Criminal Appeal that the NT Legal Aid Commission was representing Mr Ibbotson at that time. The question is whether the inclusion of that assertion in the charge is necessary and if untrue is fatal to the proof of the charge.

[42] Counsel for LSNT submits that the tribunal has power under section 519 of the current Act to vary, on its own initiative, the charge to omit allegations, if it is satisfied it is reasonable to do so having regard to all the circumstances including any effect to the fairness of the proceedings [section 519(1) and (2)]. In the view of the Tribunal, it is not necessary to prove that a practitioner was or was not acting for a party to make out a breach of Rule 17.6 and section 44 (1) (c) (ii) of the former Act. Consequently nothing turns on the error made in the charge and the Tribunal amends the charge to delete the words "when representing his client Frederick Henry Ibbotson" from complaint 2.1.

[43] The second matter is that complaint 2.2 asserts that the practitioner "Failed to act with honesty and candour in his dealings with the Court..." The submission of counsel for the practitioner is that the words underlined require a degree of proximity between the practitioner and the Court and that the practitioner being a deponent in an affidavit that may or may not have been tendered before the court does not satisfy the necessary degree of proximity.

[44] The Macquarie Dictionary defines "dealings" as "1. Relations; trading: *business dealings*. 2. Conduct in relation to others; treatment: *honest dealing*." and thus supports a wider definition of the phrase. The Tribunal was not taken to any authority that supported the position advocated by the counsel for the practitioner. The affidavit was the sole support for the fourth ground of appeal and is some support for the first ground of appeal. When the practitioner swore the affidavit he knew that it might be filed with the court and might be tendered and sought to relied on in support of the application for leave to appeal. He admitted as much in the course of cross-examination. The Tribunal is of the view that to accept a narrow meaning of "in his dealings", as suggested by counsel for the practitioner, is not warranted by the definition of the word in its ordinary sense and militated against by the essential importance of the relationship between any Court and the legal profession.

[45] Counsel for the practitioner made submissions as to the sufficiency of the recordings and the accuracy of the transcript derived from them. The Tribunal listened to the recordings twice and various corrections were made to the transcript. In the main, the corrections inserted words upon which nothing turned although on one occasion a comment seemingly made by Mr Adams was attributed to the practitioner. The Tribunal is satisfied that the amended transcript is an

accurate transcription of the recordings. Counsel for the practitioner also suggested that LSNT failed to call an electronic expert who could attest as to the degree to what the Tribunal heard could be relied on as accurately reflecting the tone, pitch, and timbre of what was said in the court on the relevant occasion. This submission appeared to the most relevant in considering the difference in volume between Justice Southwood's voice and the voice of the practitioner. Indeed none of the practitioners who the Tribunal heard on the tapes were able to match the volume of the recording of Justice Southwood's voice and it seems likely that the difference in volume was caused by the proximity of the practitioners and the Judge from the microphones which were used to record what they had to say. It is true that the Tribunal did not hear from an electronic expert who might have been able to give a technical description of why it is that microphones pass on different volumes of sound but the Tribunal believes that it is able to take notice of its own experience in the machinations of microphones to conclude that the likely reason for the difference in volume in the recording of the voices of practitioners and the Judge is caused by the distance and direction of mouth to microphone. Regardless of any technical imperfections in the recordings, the Tribunal could not discern any difference in Justice Southwood's tone or volume when directed to Mr Rowbottam compared to the judges comments or questions to various representatives of the DPP who appeared in the *Ibbotson* matter.

[46] It was also a submission of counsel for the practitioner that the tapes could not demonstrate the Judge's body language and attitude and there is no doubt that that is so. For that, the Tribunal would have to rely upon those who were at court at the time. In fact, there was no evidence from any witness about any specific aspect of Justice Southwood's body language and attitude. Neither was it evident from the recordings that Justice Southwood was doing anything else other than

merely talking to practitioners appearing before him. There was, for instance, no recording of the Judge thumping the bench in punctuation of a florid pronouncement.

[47] What is important in considering this complaint is whether it was reasonable for the practitioner to consider that the conduct of Justice Southwood was such that it amounted to intimidation. The Tribunal is required to subjectively assess the impression of the practitioner and to determine whether that objectively amounts to intimidation or being dealt with in an aggressive and demeaning manner.

[48] To embark upon this exercise requires the Tribunal to consider the evidence of the practitioner concerning those aspects of the interaction between him and Justice Southwood that are said to substantiate his assertions that he was dealt with in an aggressive and demeaning manner or intimidated. In the event, the Tribunal found no objective evidence supporting the position of the practitioner.

[49] One of the grounds relied upon by the practitioner is that there is a discernible difference between the volume of the Judge's voice and the practitioner's voice in all of the recordings. The comments made above in [45] are apposite here. It was uniformly the case that the volume of Justice Southwood's voice and the voices of the practitioners appearing before him was disparate with His Honour's voice always being the loudest. It is the Tribunal's view that this difference in volume is simply a technical matter and does not justify any assertion that Justice Southwood spoke in a loud and aggressive manner to the practitioner.

[50] The next series of events that are relied upon by the practitioner concern the practitioner being told to "sit down" whilst attempting to make submissions. There are four different occasions.

[51] The first occasion in time that the practitioner asserts that he was, in effect told to sit down, occurred on 11 May 2005 [see page 4 of the transcript]. This is an interchange between the practitioner and Justice Southwood in which His Honour is suggesting to the practitioner that in the future, if it appears that the practitioner's diary is "overloaded", that the practitioner should brief matters out. In his defence, the practitioner pointed to a couple of matters which he thought exculpated him, notably, the fact that there were five other matters involving Mr Ibbotson and those matters had been attended to. His Honour said that he was not concerned about other matters not before him and finished by saying "Please take it on board and I'll hear no further from you on it." That phrase is said by the practitioner to amount to a direction to sit down in an aggressive and loud manner. Two matters emerge from hearing the tapes and reading the transcript. The first is that the exchange between Justice Southwood and the practitioner was not in the course of submissions, or evidence and was in the nature of advice to assist *the* practitioner in managing his affairs. It is not surprising that His Honour did not wish to engage in a wide-ranging discussion with the practitioner as to whether the position of the practitioner could be justified. The second matter is that the tapes do not demonstrate any aggressive tones in the voice of Justice Southwood.

[52] The second occasion is said to have occurred on 17 May 2005. The transcript on that occasion does not actually contain the words "sit down" but at about .5 on page 4 Justice Southwood speaks to the practitioner and moves from that discussion to an invitation to Mr Karczewski QC to come to the bar table so that His Honour might raise with him the question of delays in the *Ibbotson* matter. Again, the transcript does not disclose any raised tones or other indicia of loud and aggressive behaviour.

[53] The third occasion is referred to by the practitioner in his affidavit (paragraph 6) in which he avers that he was "... told to "sit down" in an aggressive and demeaning manner". This related to the circumstances where the matter was called back by Justice Southwood on the afternoon of 27 May 2005. Mr Lewis announced his appearance for the Crown and then the practitioner announced his appearance for Mr Ibbotson. Without waiting for the court to advise why the matter had been called back on and without waiting for the Court to invite him to speak, the practitioner addressed Justice Southwood and asked whether he was proposing to deal with the matter under section 112 of the *Sentencing Act*. His Honour said "Yes, I am. Just sit down for a moment, please, Mr Rowbottam." His Honour then explained why the matter had been brought back before him. There is nothing exceptional about the request by Justice Southwood to the practitioner to sit down whilst the judge explained to those in the court why the matter was recalled. There is nothing in the tone of his delivery that suggested the judge intended to be dismissive of the practitioner.

[54] The fourth occasion where the practitioner says that he was told to sit down occurred in another matter of *R v Hoffman* in September 2005. This was another occasion when the practitioner began submissions immediately after he announced his presence before the Court. Again, Justice Southwood asked the practitioner to sit down to allow the arraignment to occur. There was nothing untoward in the tone used by Justice Southwood and nor did it appear unreasonable that His Honour should have made that request. The practitioner sought to make a submission prior to the arraignment, regarding his continuing to act for the accused in light of the fact that Justice Southwood had passed on to LSNT the complaint of Mr Maley on 12 July 2005. It is not known to the Tribunal when the practitioner had obtained instructions from the

accused or when he became aware that his client was to be arraigned before Justice Southwood. The practitioner must have known by at least the day before because he took advice from senior counsel on the day before the arraignment. It was a matter of concern to Justice Southwood that instructions were not obtained from the client until the middle of the day upon which the arraignment was being heard. The only relevance of the *Hoffman* exchange is that it is one of the four occasions when he was asked to sit down by the Court which was referred to by the practitioner in paragraph 9 of his affidavit. The Tribunal cannot determine the relevance of this transcript of an interchange on 16 September 2005, to the assertion in the affidavit by the practitioner that he was so intimidated by Justice Southwood that he was prevented from making submissions on behalf of Mr Ibbotson on 27 May 2005.

[55] There is no doubt that, as a matter of fact, the practitioner was asked to sit down by Justice Southwood on three occasions and, by implication, on a further occasion. The question is whether the practitioner could have reasonably considered that the conduct of Justice Southwood was loud, aggressive and demeaning. Nothing of the sort was demonstrated on the recordings. The words used by Justice Southwood were not inflammatory or insulting. The practitioner gives no evidence of any other factor, such as body language, that the Tribunal might take into account in its considerations on this point. The conclusion that must be reached is that there is no objective evidence supporting the assertions of the practitioner. Consequently, in the absence of any objective evidence the Tribunal concludes that the assertions by the practitioner are untrue and that the practitioner knowingly made untrue assertions to the Court of Criminal Appeal through his affidavit.

[56] A further factual matter to consider concerns the practitioner's complaints that he was prevented from putting submissions to Justice Southwood on the afternoon of 27 May 2005 by virtue of the conduct of Justice Southwood. The practitioner complains that Justice Southwood interrupted him on two occasions. There is no doubt that this assertion is correct. On both occasions the practitioner was in the course of putting submissions to the effect that the sentence prescribed by Justice Southwood was intended by His Honour to be a suspended sentence rather than a head sentence with a non-parole period. Such a submission was intended to benefit his client and was, according to the practitioner, consistent with the submissions made by him to the sentencing judge. Justice Southwood is quite clear in his language, on the morning of 27 May 2005, that he was imposing terms of imprisonment on each of the five counts, with each sentence of imprisonment to be served concurrently, giving an aggregate period of imprisonment of 3 years, backdated to reflect the time that Mr Ibbotson had spent in custody. He then set a non-parole period of 12 months, and stated the non-parole period is to commence from 25 May 2005. After discussions with both counsel he revised the commencement of the non-parole period to 24 May 2005. Justice Southwood did not refer to suspending any of the sentences of imprisonment that he had imposed and no comment was made by either counsel concerning the question of a suspended sentence vis-à-vis the non-parole period.

[57] It seems likely that the practitioner believed that he had made persuasive submissions to the sentencing judge as to the merits of a partially suspended sentence because suspended sentences had been imposed in the three cases that he relied upon in the course of his argument. That is not to say, however, that the practitioner's belief must result in the judge suspending or partially suspending any of the terms of imprisonment.

[58] At the recall on the afternoon of 27 May 2005 the practitioner submitted that the sentencing judge: "clearly had in mind that Mr Ibbotson serve a period of 12 months".

His Honour: "No, that's not so, Mr Rowbottam."

Mr Rowbottam: "I took it from your Honour's comments. In my submission..."

His Honour: Yes, you're wrong about that. What's your next submission?"

Mr Rowbottam: Well, I simply put that because I've heard your Honour's comments, sorry your Honour."

His Honour: Yes. Thank you."

Mr Rowbottam: If your Honour pleases."

The sentencing judge then proceeded to comment on why he was vacating the non-parole period of 12 months and directing a non-parole period of 18 months.

[59] The Court of Criminal Appeal held that Justice Southwood should have specifically invited submissions from both counsel concerning the appropriateness of a suspended sentence or a sentence involving a non-parole period. His Honour did not do so, although he did invite submissions generally. Again, the recordings reveal that the interruptions by the judge did not demonstrate any loud, aggressive or demeaning conduct.

[60] It is true that the practitioner apologised to Justice Southwood after being told that his submission that His Honour intended some other result was wrong. It was put to the Tribunal that the apology must have been indicative of a counsel who has been so intimidated and so deflated by the denial by the judge that he thought he had to apologise. On the other hand, the apology was also consistent with counsel simply apologising because he had misinterpreted the judge's position. The Tribunal is of the view that no assistance one way or the other can be derived from that particular exchange.

[61] The Tribunal has listened closely to the recording of the afternoon of 27 May 2005 and can find no objective support for the practitioner's assertion that he was prevented from making submissions or being heard on any issue.

[62] The Tribunal finds that Mr Rowbottam knowingly intended to mislead the Court of Criminal Appeal as alleged by LSNT and that he has thereby contravened Rule 17.6 and section 44 (1) (c) (ii) of the former Act.

[63] Although disciplinary proceedings do not require a standard of proof of beyond reasonable doubt, the Tribunal, in the light of serious consequences flowing from such findings, considers that a high degree of certainty is required to find the charges proved. In this case LSNT has made out both charges to the required standard of proof.

[64] By virtue of the operation of section 45 of the former Act a breach of Rule 17.6 or of s44 constitutes professional misconduct if the breach was wilful (or reckless) and the Tribunal finds that the practitioner is guilty of professional misconduct in respect of both the complaints.

[65] The Tribunal will hear submissions from the parties as to what consequential orders should follow from these findings and gives liberty to the parties to make the necessary arrangements with the Registrar.

Dated: 12 September 2008

.....

Ian Morris: Chairman

.....

Joan Cruse: Member

.....

David Farquhar: Member