NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL

Decision No. [2010] NZLCDT 24
LCDT 029/09

IN THE MATTER of the Lawyers and Conveyancers Act 2006

BETWEEN **AUCKLAND STANDARDS COMMITTEE**

Applicant

AND **J**

Respondent

CHAIR

Judge D F Clarkson

MEMBERS OF TRIBUNAL

Mr G McKenzie
Ms C Rowe
Mr P Shaw
Mr B Stanaway

HEARING at AUCKLAND on 10 August 2010

APPEARANCES

Mr D C S Morris and Mr M Treleaven for the Standards Committee
Mr K Muir for the Practitioner

DECISION OF THE NEW ZEALAND LAWYERS AND CONVEYANCERS TRIBUNAL

Introduction

[1] This matter was heard by the Tribunal on 10 August and both remaining charges were dismissed. We reserved our reasons for the decision. These are those reasons.

[2] The practitioner was facing three charges, as amended:

Charge 1
Misconduct in his professional capacity

AND IN THE ALTERNATIVE

Charge 2
Conduct unbecoming a Barrister or a Solicitor

AND IN THE ALTERNATIVE

Charge 3

Negligence or incompetence in his professional capacity and that the negligence or incompetence has been of such a degree as to tend to bring the professional into disrepute

[3] At the conclusion of the evidence Charge 2, that of "conduct unbecoming" was withdrawn by leave on the application of the Standards Committee.

Background

[4] The charges arise in the context of a commercial building contract and the eventual insolvency of both the developer and the subcontractor. The parties to the contractual dispute were D Limited ("the developer") and CCG Limited ("the

contractor"). A dispute arose in December 2005 over amounts payable for works completed by the contractor and certified on 16 December 2005 by the engineer appointed to supervise construction as completed for the purpose of payment. The dispute arose because the developer had paid $100,000 in advance, on the signing of the contract, and argued that this amount covered the certified works.

[5] By 10 January 2006 the dispute had reached a stage where both the developer and the contractor had instructed their respective solicitors. The contractor had not been working on the site for some weeks and the developer wanted an immediate restart or was threatening to cancel the contract and find another contractor. Mr J, the practitioner in this matter, was the solicitor acting for the developer and Mr R was the solicitor acting for the contractor. (Subsequently Mr D C, barrister, took over the file from Mr R or another intermediate barrister but this was much later into the dispute.)

[6] On 10 January 2006 Mr R sent the following email to Mr J:

> "Enclosed for your attention an email forwarded to M C of your office.
>
> My client is anxious to resolve this matter, and is prepared to attend a meeting with all parties present.
>
> My client requires the payment of the $91,003.64 before any meeting takes place.
>
> The "engineer to the contract" was to determine progress payments, and also variations.
>
> The above payment was approved by the "engineer to the contract" on 16 December 2005.
>
> I look forward to your reply."

[7] Mr J responded to Mr R later that day as follows:

> "Thanks for your email. I have advised my client to make all future communications through our firm. However, I am instructed that Mr S of your client continues to phone mine, the most recent being this morning. Please accordingly advise him to cease such communication as well.
>
> My client is not prepared to pay the $91,003.64 as a condition of the meeting, and treats such condition as further evidence of your clients continued efforts to frustrate the contract and delay resolution issues.

> In the meantime I advise and undertake that my client has paid the $91,003.64 into my trust account which I hold pending satisfactory resolution of this matter. My client's position is that payment claim and consequently your notice, are defective. My client will accordingly defend any legal proceedings issued for its recovery. It will also treat suspension of works, following on as it does from your clients repeated failures to perform the contract, as unlawful and as a repudiation of the contract, for which my client will be entitled to cancel and appoint a new contractor.
>
> I note that my client has already issued a default notice under clause 14.2.1(a) of the contract which expires on Friday 13/1/06.
>
> My client accordingly puts yours on notice that it will cancel the contract and appoint a new contractor at 5pm on Friday 13/1/06 unless your client meets with mine beforehand and a resolution is reached to my clients satisfaction at that meeting.
>
> I look forward to hearing from you."

[8] It will be noted that within the second email quoted was the one-sentence undertaking which is relied upon by the Society. But we consider that the whole of the email and surrounding context needs to be considered particularly in regard to the intended timing of the undertaking.

[9] A site meeting was arranged for a date shortly after this exchange of emails. However it clearly lasted only a few minutes, with Mr S, the representative of the contractor departing almost immediately after a very brief exchange with Mr D, the representative of the developer. No agreement as to any matters in contention resulted therefore.

[10] Subsequently the developer resumed possession of the site on 20 January 2006 in terms of its contract and gave notice of substantial claims that it made as a result of the contractor's breach.

[11] On 18 January 2006 the contractor lodged an application for summary judgment in the District Court. It was heard before His Honour Judge R Joyce QC on 11 May 2006. His Honour's reserved judgment was delivered on 19 May 2006 and declined the contractor's claim on the basis that:

- The plaintiff had failed to show an entitlement to the summary remedy provided for under the Act.

- The plaintiff had failed to show that, in ordinary contractual terms, it had a claim for the sum it had sought that was free of dispute as to immediate recovery entitlement or arguable setoff.

[12] Subsequently the funds remained in Mr J's trust account but payments were in due course made to other creditors and in payment of fees and disbursements for Mr J himself on the instructions of his client, over the period 24 March 2006 to 12 February 2008.

[13] The next exchange between the parties occurred on 19 May 2006 (the day after release of the decision refusing summary judgment to the contractor). That letter has not been produced in evidence and was apparently not available from the receiver, but Ms C, an associate of Mr J's firm responded in writing on 22 May acknowledging the letter and an email of the same date and under the heading "**no continuing undertaking**". She wrote:

> "You have misinterpreted Mr J's email of 10 January 2006 and have not put it in context of correspondence between our respective firms.
>
> This firm did not give an open undertaking. The undertaking was given in the context of my client proposing a meeting between our respective clients before 13 January 2006 to resolve the matter. Your client refused to meet before that time and as indicated in Mr J's email, a new contractor has now been appointed to complete the works. Accordingly the matter has now been resolved to our client's satisfaction.
>
> My client has been informed by the new contractor that your client had contacted it and advised it that if it took on the work it would be breaking the law. If your client continues to interfere with the completion of the works and my client's contractual relationships with third parties in relation to the works any additional costs or losses resulting will be included in any counterclaim against yours."

[14] We consider that this letter clearly put Mr R's firm on notice that Mr J no longer considered himself bound by the undertaking.

[15] No reply emanated from Mr R or any subsequent representative of the contractor to this assertion.

[16] Proceedings were subsequently issued in the High Court and they came before His Honour Lang J on 4 June 2008. By that time counsel for the developer,

having strongly resisted the claim for two years was granted leave to withdraw and the matter proceeded on an undefended or default basis. Thus on 4 June 2008 when Mr C appealed for the contractor before His Honour Lang J the judgment was given by default in the sum of $298,004.63 together with interest of $197,857.12, a total of $495,861.75 (clearly significantly in excess of the original amount in dispute). Mr C was apparently unaware that on 28 May 2008 the developer company was placed in receivership. Subsequently on 28 August 2008 it was placed in liquidation.

[17] Mr C subsequently wrote to Mr Js' firm indicating that he now considered that a "satisfactory resolution of the matter" had been achieved by judgment against the developer, and sought the funds he considered would still be held on the undertaking by Mr J. When Mr J resisted such payment indicating that the undertaking had long expired, Mr C, on behalf of his contractor client made a complaint to the Society which has resulted in the prosecution of these charges before the Tribunal.

Legal Issues

[18] The practitioner has conceded, following obtaining expert opinion on the matter, that he unintentionally has breached the undertaking of January 2006. The issue then becomes:

> Is this particular breach of this particular undertaking so serious as to meet the legal tests for professional misconduct in terms of the first charge? Alternatively does this breach represent negligence on the part of the practitioner of such a degree as to bring the profession as a whole into disrepute, in terms of Charge 3?

Arguments for the Standards Committee

[19] The case for the Society was based on an examination of the one sentence in which the word undertaking was contained, that is "in the meantime I advise and undertake that my client has paid the $91,003.64 into my Trust account which I will hold pending satisfactory resolution of this matter." It is the Society's view that this was a clear and unambiguous undertaking which was subsequently breached when

the practitioner paid the funds out of his Trust account without there being a "satisfactory resolution" to both parties.

[20] Quite properly the Society argues that the real issue is as stated above, whether the breach of this undertaking and the circumstances of it being given, is the basis for a proper finding of either misconduct or negligence or incompetence on the practitioner's part so as to bring the profession into disrepute.

[21] The Society put before us the relevant authorities in respect of misconduct which I refer to below, and submitted that it involved "a consideration of the statutory and professional obligations of the lawyer and a consideration of whether those standards had been breached in the particular context". In terms of the third charge of negligence such as to bring the profession into disrepute, the Society referred the Tribunal to the *W* case - *Complaints Committee of the Canterbury District Law Society v W*[1]. In that case the Court found there was negligence in the failure to obtain a valuation and further in failing to perceive conflicts of interest and deal with this appropriately, and that in the circumstances this was conduct which would likely bring the profession as a whole into disrepute if it became publicly known.

Arguments for the Practitioner

[22] The practitioner has called expert evidence from a Mr C D who considered this to be a particularly unusual case of an undertaking. Mr D's evidence was that although on a simple reading of the undertaking there had been a breach, there were significant mitigating circumstances which ought to be taken into account, namely that:

(a) The undertaking was provided gratuitously.

(b) The recipient of the undertaking did not rely upon it or act in any way to its detriment in response to the undertaking.

(c) There was no element of personal gain to the practitioner.

[1] *Complaints Committee of the Canterbury District Law Society v W* [2009] 1 NZLR 514.

(d) The practitioner genuinely believed that the undertaking was "spent" once the January meeting had occurred and no agreement had been reached.

[23] It was Mr Muir's submission on behalf of the practitioner that there was no question of this breach of undertaking in any way indicating an indifference to or abuse of the privileges of legal practice. Counsel contrasted the present case with the decision of *Complaints Committee No 1 v A P C*[2] and with the decision of *Bhanabhai v Auckland District Law Society.*[3] In the latter case there was a situation where the practitioner's personal interests conflicted with his duties and an ongoing and deliberate failure to meet his obligations to the Commissioner of Inland Revenue.

[24] In relation to the third charge, it was submitted on behalf of the practitioner that his failure in honouring the undertaking was not "of such degree to question his competency and has not and will not lower the standards of the legal profession". It is submitted that the public would not think less of the practitioner or the legal profession as a whole if the circumstances of the giving and breach of the undertaking were known.

[25] It is accepted law that a mere act of negligence is not sufficient to find professional misconduct. It is submitted that a mere error or misjudgement is not something which will lead to a lowering of the standing or reputation of the profession as a whole in the eyes of the public.

Discussion and/or Authorities

[26] In the *Countrywide*[4] decision it was held that:

> "An order compelling performance of an undertaking does not constitute a finding of unprofessional conduct against the defendant. There are many examples of solicitors being required to honour clear undertakings given purely to assist their clients and with no motive of personal gain whatsoever."

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[2] *Complaints Committee No. 1 v A P C* [2008] 3 NZLR 105.
[3] *Bhanabhai v Auckland District Law Society* (Auckland High Court, CIV-2008-404-5736, 7 April 2009, Priestley, Heath, Winkelmann JJ).
[4] *Countrywide Banking Corporation v Cooke* (1990) 4 PRNZ 252 (H. Court 257, per Barker J).

[27] This was relied on in the *Bhanabhai* decision where it was held at paragraph [60] that:

> "While a breach of an undertaking will, generally, be regarded as professional misconduct, that result does not automatically follow."

[28] The decision of this Tribunal in the matter of *Stirling* which was also a case concerning breach of an undertaking, said at paragraphs [40] through to [46]

> "[40] The accepted test for misconduct in professional capacity is that set out in the portions of the *Pillai* decision relied upon in recent decisions of the High Court. In *C* (above) para [40], and in *W* (above). The relevant passages are from the dictum of Kirby P:
>
> > "The words used in the statutory test ('misconduct in a professional respect') plainly go beyond that negligence which would found a claim against a medical practitioner for damages: *Re Anderson* (at 575). Departures from elementary and generally accepted standards, of which a medical practitioner could scarcely be heard to say that he or she was ignorant could amount to such professional misconduct: ibid. But the statutory test is not met by mere professional incompetence or by deficiencies in the practice of the profession. Something more is required. It includes a deliberate departure from accepted standards or such serious negligence as, although not deliberate, to portray indifference and an abuse of the privileges which accompany registration as a medical practitioner ..."
>
> [41] In the *C* case, the necessity to establish intentional wrongdoing in order to establish professional misconduct was rejected, see para [19] above.
>
> [42] As to undertakings, although professional obligations in this regard are clearly understood we consider that we ought to briefly quote from the *Bhanabhai v ADLS* decision (above), a decision of the full Court of the High Court, where at paragraph [21] the Court repeated the Disciplinary Tribunal findings as follows:
>
> > "[30] Undertakings must be honoured. If an undertaking is given it must be able to be fulfilled when the solicitor is called on to do so.
> >
> > [31] If an undertaking is given by a solicitor and a solicitor is unable to fulfil it that in itself would warrant disciplinary action.
> >
> > [32] If an undertaking is given and it is capable of fulfilment and is not fulfilled then that warrants disciplinary action as well."
>
> [43] At paragraph [40]:

> "Two duties flow from a solicitor's undertaking. The first is a personal duty to honour the undertaking, which may be enforced at the suit of the party to whom the undertaking is given. The second is an ethical obligation, the breach of which may result in disciplinary sanctions by the relevant professional body. The two obligations are different in nature but run coextensively. They ought not be conflated."

[44] And at paragraph [55] having set out Rule 6.07, in addressing the issue of whether the breach constituted professional misconduct the Court had this to say:

> "Section 112(1)(a) of the Law Practitioners Act 1982 identifies the charge of professional misconduct. It is a distinct charge and represents the most serious finding that can be made against a practitioner. The charge can be contrasted for lesser breaches of professional obligations to which section 112(1) also refers."

[45] The Court went on to find that in deliberately choosing not to honour the undertaking he had given, Mr Bhanabhai showed (paragraph 58):

> "... complete indifference to his professional obligation to honour the undertaking. In our view the breach after 27 April 2007 was deliberate. It is an accepted basis for finding of professional misconduct ..."

[46] And finally at paragraph [59]:

> "The giving of undertaking by solicitors and the practice of acting upon them is widespread. It is a practice which enables many transactions to be completed without interruption or delay. An undertaking is generally accepted as a substitute for strict performance of some commercial, contractual or procedural requirement: see Laws NZ*, Law Practitioners,* paragraph 101. In cases where a solicitor undertakes to hold proceeds of sale and to apply them in accordance with the undertaking, the High Court will require the solicitor to honour the undertaking given: for example, re *C* (a solicitor) [1982] 1 NZLR 137 (HC)."

[29] The provisions of Rule 6.07 of the Code of Professional Conduct as at 2006:

> "Every practitioner has a professional duty to honour an undertaking, written or oral, given in the course of legal proceedings or in the course of practice; and this rule applies whether the undertaking is given by the practitioner personally or by a partner or employee in the course of the practice."

[30] These provisions were clearly breached by the practitioner. He acknowledged in his evidence that he had been "imprecise" in his drafting of the undertaking which he expected would only have effect for a matter of days, and so perhaps was somewhat more casual than he would otherwise have been because of his intention as to the brevity of its currency.

[31] The *Stirling* matter concerned an undertaking of a quite different sort. It was an undertaking which was required in respect of a significant refinancing arrangement. It was an undertaking containing some detail. In that case we found specifically that the practitioner had on three occasions, certified that significant deposits were held "and was indifferent to the truth of that". The sort of undertaking under scrutiny in the *Stirling* case was the type of undertaking on which the legal profession and banking and financial institutions constantly rely and must be scrupulously honoured.

[32] By comparison in the present case, it is able to be seen that the practitioner might have thought that he had honoured the undertaking. This is because when the single sentence undertaking is read in its entirety in the context written the practitioner's intent for the undertaking is more readily understood.

[33] The Tribunal does consider it is significant that the undertaking itself made no difference to the eventual outcome of the matter. Although the complainant eventually obtained judgment, by default, against the practitioner's former client, it had prior to judgment in fact been placed in receivership. Even had the $91,000 still been held by the practitioner it would have gone into the pool reserved for secured creditors, which was many millions of dollars in deficit in any event, and it would not have assisted the complainant in any way.

[34] Furthermore, we are satisfied that the complainant, in immediately issuing proceedings for summary judgment, was not at all disadvantaged by the practitioner's view that the undertaking had expired. He did not withhold from further action as a result of feeling reassured by the undertaking, but rather pursued his claim to the full extent that he was able. The summary judgment application itself was unsuccessful because the practitioner's client had arguable defences.

[35] Furthermore, the fact that there was no response to the practitioner's letter in May 2006 - which made it abundantly clear that the practitioner no longer considered himself bound by the undertaking given, and that no further steps were taken to enforce the undertaking for some two years, marks this case out from others such as

the *Stirling* matter. This is not a situation where as a result of a reliance on an undertaking, funds were advanced to the practitioner's client.

Conclusion

[36] It was for the above reasons that we did not consider that the practitioner had acted in such a way as to invoke the finding that he was indifferent to his responsibilities and privileges as a legal practitioner, and thus the evidence did not reach the standard of proof required to establish professional misconduct. The first charge was accordingly dismissed.

In respect of the third charge

[37] Again, we do not consider that the evidence met the standard required in terms of the public perception of the legal profession. We do not consider that the opinion of the public about the standards of the legal profession would be lowered taking into account full knowledge of the circumstances and context in which the giving of this undertaking arose.

Costs

[38] There will be an order pursuant to s.257 against the New Zealand Law Society for the costs of the Tribunal, in the sum of $12,300.

DATED at AUCKLAND this 10th day of September 2010

Judge D F Clarkson
Chair