A SUPPRESSION ORDER APPLIES REGARDING THE NAME OF THE CHARGED PRACTITIONER

IN THE NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL

Decision No: [2012] NZLCDT 14

LCDT 004/12

IN THE MATTER	of the Lawyers and Conveyancers Act 2006
AND	
IN THE MATTER	of ABC [*name suppression applies*], of Auckland, Solicitor

TRIBUNAL

Chair
Mr D J Mackenzie

Members
Mr W Chapman
Mr K Raureti
Mr W Smith
Mr I Williams

COUNSEL
Mr D Carden, for Auckland Standards Committee No 5
Ms M Dew, for the practitioner

HEARING at Auckland on 13 June 2012

REASONS FOR DECISIONS OF THE TRIBUNAL MADE ON 13 JUNE 2012

Introduction

[1] The practitioner in this case faced charges arising from her making a written statement to a lending institution that she had Professional Indemnity insurance, when in fact she had no such cover.

[2] She was charged, in the alternative, with: misconduct; unsatisfactory conduct; and negligence or incompetence in her professional capacity of such a degree as to bring the profession into disrepute.

[3] The practitioner accepted that she had been negligent or incompetent to such a degree as to bring the profession into disrepute and pleaded guilty to that charge. The Standards Committee accepted that plea and did not pursue the other charges. A Statement of Facts, agreed by the practitioner, was filed by the Standards Committee.

[4] The Tribunal accepted that this was an appropriate way to proceed, and dealt with the matter on the basis that the practitioner had acknowledged that she had been negligent or incompetent, and that her negligence or incompetence was of such a degree as to bring the profession into disrepute.

[5] At the conclusion of the hearing on penalty, and after considering the practitioner's application for permanent name suppression, the Tribunal determined matters and made various orders. It also certified costs under s 257 of the Lawyers and Conveyancers Act 2006 at $6,800.

Record of Decisions

[6] In respect of penalty the Tribunal's decision was to order that the practitioner:

(a) be censured, in the terms recorded at the hearing and noted in this Reasons for Decisions;

(b) pay a penalty of $5,000 to the New Zealand Law Society;

(c) pay costs to the Standards Committee of $14,450; and

(d) reimburse the New Zealand Law Society the sum of $6,800 that it must pay the Crown as certified under Section 257 Lawyers and Conveyancers Act 2006

[7] In respect of permanent suppression of the practitioner's name, the Tribunal's decision was that permanent suppression be granted.

[8] The Tribunal advised that it would provide full reasons for its decisions in due course, which it now sets out.

Background facts

[9] The agreed Statement of Facts recorded the practitioner's professional background over a career involving in excess of 30 years in legal practice. It noted that in 2010 she had been acting for a long-standing client on the acquisition of a property. The acquisition was to be facilitated by funding from a bank to be secured by a mortgage over the property being purchased.

[10] Shortly before settlement, and after a solicitor's certificate had been lodged with the bank concerned in anticipation of draw down of funds, a last minute change of circumstances resulted in the practitioner's client obtaining loan funding from an alternative bank. Accordingly, the mortgage arrangements with the original bank were not pursued, and the practitioner received instructions from the alternative bank to act for it in funding the property acquisition with a first mortgage advance.

[11] Unlike the first bank originally proposing to fund the acquisition, the second bank had a specific requirement that a solicitor acting for it hold professional indemnity insurance at a level sufficient to cover the transaction. That had not been a requirement of the first bank.

[12] The practitioner did not notice this change in requirements as between the two banks, and signed the second bank's solicitor's certificate which contained the following provision, under the heading "*Practising Certificate*":

> "I confirm that I hold a current Practising Certificate issued pursuant to the Lawyers and Conveyancers Act 2006 and confirm that I / the Partnership / Incorporated Law Firm hold(s) a current professional indemnity insurance policy with a per claim limit equal to or greater than the total amount of lending required by this transaction."

[13] In fact, the practitioner did not have any professional indemnity insurance cover. In due course the mortgage funds were drawn down by the practitioner, in an amount of $524,000, settlement of the acquisition completed, and the mortgage security was registered. No problem was encountered and the transaction was largely unremarkable apart from the fact that the practitioner had not had professional indemnity insurance at the relevant times, despite certifying that she did.

[14] The issue of the practitioner having no professional indemnity insurance, but signing a certificate that stated she did have such insurance, came to the attention of the Law Society not as a result of any complaint, but as a result of it being noticed during the course of a normal Law Society practice audit about a year later.

[15] The practitioner, when the matter was drawn to her attention, promptly acknowledged her error and immediately sought and obtained professional indemnity cover to avoid such a situation in the future. In an affidavit filed with the Tribunal the practitioner said;

> "I signed the solicitors undertaking in some haste, it was an unfortunate oversight by me at the time, but I simply did not note the requirement for professional indemnity insurance. I certainly never intended to mislead the Bank."

Penalty Hearing

[16] As the practitioner had pleaded guilty to negligence or incompetence in her professional capacity that was of such a degree as to bring her profession into disrepute, the Tribunal moved directly to a penalty hearing. The position of the Standards Committee regarding penalty was that it considered a censure and fine appropriate in the circumstances of this case. It did not seek that the practitioner be removed from practice, either permanently by striking off, or temporarily, by suspension.

[17] The committee noted that the practitioner had failed to follow her instructions from the bank concerned, which had specified that she must have professional indemnity insurance, and she had given a solicitor's certificate that was wrong in this regard. It said that it was incumbent on a practitioner to take care in giving such a certificate to a bank, as banks needed to be able to rely on solicitor's certificates and to be confident that instructions had been followed.

[18] If matters had gone wrong in this particular transaction, the committee noted that the practitioner would not have been insured and the bank could not have relied on any professional indemnity insurer to cover any losses. It said that would have come as a complete surprise to the bank if there had been a problem and lack of cover had become an issue. The bank had specifically required such insurance in its letter of instruction and had received a certificate from the practitioner confirming that the cover was in place. The committee suggested that the practitioner had treated the certificate "*lightly".* Certainly, it was clear she had not taken careful account of what it said and what, as a result, she was certifying.

[19] For the practitioner it was acknowledged that she had failed to take proper care in signing a solicitor's certificate which contained a term with which she did not comply. As a consequence the bank concerned had been misled in to thinking its professional indemnity insurance requirement had been met, when it had not been met.

[20] It was noted for the practitioner that the Standards Committee accepted this had occurred unintentionally, and amounted to carelessness rather than anything deliberate.

[21] Counsel for the practitioner submitted that the context in which the matter had arisen gave some insight into why the mistake was made. The first bank, which was to originally fund the matter, had not required any professional indemnity cover. Documents had been prepared by the practitioner for that first bank and she had signed and lodged her solicitor's certificate in anticipation of settlement. A professional indemnity cover was not an issue at that point. When, at late notice and therefore with some urgency, a second bank stepped in to fund the transaction in place of the first bank, the insurance requirement was introduced, and the practitioner said (and this was accepted by the Standards Committee), that she did not notice the additional requirement for professional indemnity insurance.

[22] For the practitioner it was noted that this was an one-off event in a conveyancing career of over 30 years, and did not reflect a series of such events; there was no matter arising which resulted in a complaint by or loss to the bank concerned; and there was no deliberate or wilful disregard by the practitioner of her obligations, but a human error made by a usually competent member of the profession.

[23] It was also submitted that in assessing penalty the Tribunal could take into account mitigating factors such as the practitioner taking immediate steps to put in place professional indemnity cover when alerted to the matter the subject of the charge, her early guilty plea, her co-operation with the Law Society in the audit process, her apology, her many years in practice without complaints or disciplinary charges, and the references provided to the Tribunal attesting to her character and competence.

Reasons for decision on penalty

[24] After retiring to consider the submissions on penalty, the Tribunal returned and delivered its decision. It noted that the practitioner had pleaded guilty to a charge which thereby acknowledged that her conduct was negligent or incompetent to such a degree as to adversely affect the profession's reputation. The matter related to the giving of an undertaking that was wrong and therefore misleading. The reliability and accuracy of undertakings is an extremely important feature of legal practice.

[25] The evidence before the Tribunal indicated that this had arisen through honest mistake. Nevertheless, it was a mistake which had attached to it a reasonable degree of carelessness.

[26] The matter of professional indemnity insurance should have been front of mind for the practitioner in any event, as she said that she told all her clients that she was uninsured. She was well aware of the issue, and in this case appears to have failed to recognise that the bank itself was her client also, because she did not advise the bank in the normal way that she advised her other clients that she had no insurance.

[27] More importantly in this case, the practitioner has failed to read, or at least to comprehend, the requirement in the letter of instruction, that she must have professional indemnity insurance. Nor did she note that holding such insurance was an undertaking forming part of the solicitor's certificate signed by her. As a result of her carelessness, she gave a false undertaking.

[28] The practitioner suggested in submissions on penalty that the value of her assets meant that she was "self-insured" if there was an issue with a transaction. By that we understood her to mean that she would have been able to sell assets to meet any claim that may have arisen, either in this or in any other matter.

[29] A requirement to dispose of assets to release funds to meet any such claims raises a number of issues, including: adequacy (a multiplicity of claims, or

a significant claim, could leave a practitioner well short of required amounts, although we accept that the level of professional indemnity insurance cover taken by a practitioner may not be sufficient in some cases as well); ability to sell assets when required and at the assumed value (perhaps affected by an over-optimistic value attribution, or an unanticipated market shift); and transparency for clients (if told there is no insurance cover, what detail is given to properly inform a client about the availability for ready sale, value, and nature of assets constituting "self-insurance").

[30] We did not treat "self-insurance" as providing any element of mitigation. We note the matter now only because we wish to record that we consider there are some issues which need to be addressed if a practitioner suggests reliance on "self-insurance" in place of professional indemnity insurance.

[31] The practitioner was censured by the Tribunal for her negligence in giving a solicitor's certificate that was inaccurate. A solicitor's certificate contains various commitments, assurances and undertakings. If any such matter is inaccurate the whole basis of trust by those who rely on the certificate being accurate and capable of being honoured is put at risk. That is a matter about which the profession should be rightly concerned.

[32] The Tribunal has a discretion to impose a penalty of up to $30,000 in appropriate cases. The Tribunal accepted that this was an one-off piece of carelessness, but noted that giving a solicitor's certificate that cannot be relied on does affect the reputation of the profession. In the context of this negligence, and having regard to the matters raised in mitigation, we considered a penalty at the lower end of the Tribunal's discretion was appropriate, but the Tribunal considered it important that any penalty was of an amount sufficient to mark concern about the potential effects of such a mistake. Accordingly a fine of $5,000 was ordered.

[33] We accepted that this practitioner was unlikely to make the same mistake again. The penalty is intended to signal to both the profession and the public that there is little tolerance for even honest mistakes that affect matters as important as the trust implicit in the giving, and the reliance placed on, a solicitor's certificate,

and the undertakings and commitments contained therein. Indeed, if a deliberate act, or an attitude indicating indifference to accuracy, had been alleged and proven, rather than an one-off honest mistake, removal from practice would have been likely.

[34] The Standards Committee sought reimbursement of all of the costs it had incurred. Those costs amount to $14,540, on the basis outlined by counsel for the committee, and involve the normal discounted rate at which counsel acting on disciplinary matters charge for their attendances. The committee also sought reimbursement of costs the Law Society would incur under s 257 of the Lawyers and Conveyancers Act 2006.

[35] Counsel for the committee made the point that if costs in such matters are not met by the errant practitioner concerned then those costs fall on the remainder of the profession. We agree with the philosophy that submission reflects, but subject to the charges appearing reasonable and the ability of the practitioner to pay. If that was not the case there is a risk that costs could be unfair, punitive, or both.

[36] For the practitioner it was acknowledged that a costs burden would have to be met by the practitioner, and time to pay was requested in respect of any costs order made. While the practitioner had a reasonably sound capital position, with a commercial property and a shortly to be acquired residence, her income had not been substantial, partly because she had not been pursuing legal work as much as had been the case previously, with locum work and some private clients.

[37] We saw no evidence which required us to discount costs given ability to pay or unfairness in quantum, and costs orders were made as noted. As recorded by the Tribunal at the hearing, if some time is required for payment we consider the Law Society and its various institutions will act as responsible creditors and give reasonable consideration to any payment proposition made if there is in fact some difficulty in making full repayment in the normal course.

Reasons for Suppression

[38] The practitioner was granted interim name suppression until 13 June 2012 (the date set down for the penalty hearing) by the Tribunal, on 3 May 2012 after a hearing on the papers.[1] In that determination on interim name suppression the Chair, Judge D F Clarkson, noted the presumption of openness in disciplinary proceedings required by the public interest, and the need to balance that against the private interests of practitioners seeking suppression.

[39] Her Honour also noted that the Standards Committee consented to an interim order, but reserved its right to oppose a permanent order, given different factors applicable at that stage, which it eventually did.

[40] When submissions on penalty were complete at the hearing on 13 June 2012, the Tribunal received submissions from counsel on the application for permanent suppression. When the Tribunal retired to consider its determination on penalty it also considered and determined the application for permanent suppression.

[41] The Tribunal noted, when delivering its decisions on penalty and suppression on 13 June 2012, that the issue of whether to grant permanent suppression or not had been a finely balanced exercise. The Tribunal noted that this case had some unique characteristics which differentiated it from many other matters where suppression had been sought and declined. On that basis, the Tribunal granted the practitioner permanent suppression of name.

[1] [2012] NZLCDT 10.

[42] For the practitioner it had been submitted that there were proper grounds to grant her name suppression, in particular the fact that she was suffering from significant depression. A specialist psychiatrist had provided medical reports which were before the Tribunal with the consent of the Standards Committee.[2]

[43] Those medical reports indicated that the practitioner had been suffering from depression for some years. Background factors were: difficulties in the practitioner's personal relationship with her partner of some 17 years; relative social isolation following a move away from the city in which she had previously successfully practised over many years and where her closest friends remained; no stable home base as a result of her move and the relationship breakdown; and, compounding her depressive state, her recent discovery of matters involving her ex-partner that she had not been aware were occurring while they were together.

[44] The opinion and recommendation of the psychiatrist reporting on the practitioner was that it would be extremely detrimental to the practitioner's mental health and well-being to publish her name, and she continued to strongly recommend that there be no such publication. The Standards Committee noted that the psychiatrist's assessment of the practitioner relied on the practitioner's self-reported symptoms. The Tribunal is satisfied that an experienced specialist psychiatrist would be alert to potential issues arising from self-reported symptoms. The psychiatrist also observed and interviewed the practitioner on a number of occasions, and commented on how the practitioner presented on those occasions, which she considered supported her diagnosis of severe depression and her comments on risks arising from publication of the practitioner's name.

[2] By Minute of 12 June 2012 the Tribunal indicated that unsworn evidence of the psychiatrist concerned, would be considered by the Tribunal in the course of the Suppression Application only if there was no objection from the Standards Committee to her evidence being dealt with in that way. While the Tribunal has some evidential discretion under s 239 of the Lawyers and Conveyancers Act 2006, it would not normally admit evidence in unsworn letter form where there was an objection, especially if cross examination was not available and an aspect of the evidence was to be challenged. If that was not the position issues of natural justice would arise. The Standards Committee advised the Tribunal that it did not require cross examination and had no objection to the Tribunal considering what the psychiatrist said in her letters, which were produced by the practitioner. The Standards Committee did note some submissions it had made regarding the reliance the psychiatrist might have placed on information which had been reported to her by the practitioner.

[45] Name suppression is available to a person charged before the Tribunal.[3] The Tribunal is required by that section to have concluded that it is proper to grant any such suppression before making any such order. In reaching that conclusion it has to have regard to the interests of any person and to the public interest. This is a statutory embodiment of the well established legal principle that whether or not to grant suppression involves a careful balancing of the competing interests;[4] in this case the private interest of the practitioner and the public interest.

[46] The public interest is reflected in the importance of the freedom of speech recognised by s 14 of the New Zealand Bill of Rights Act 1990, the importance of open judicial proceedings, and the right of the media to report proceedings.[5] That principle has been reaffirmed on a number of occasions,[6] and the Court of Appeal has confirmed that open justice principles are equally applicable to civil cases.[7]

[47] Any exercise of the power to suppress the practitioner's name allowed by s 240 Lawyers and Conveyancers Act 2006 should also take into account the purposes of the Act as set out in s 3. Specifically, the Lawyers and Conveyancers Act is intended to maintain public confidence in the provision of legal services, to protect consumers of those services, and to recognise the status of the legal profession.

[48] In *S v Wellington District Law Society* the Full Court reflected this when it said:[8]

> "...whether the tribunal or Court, or on appeal this Court, should make an order prohibiting the publication...requires consideration of the extent to which the publication of the proceedings would provide some degree of protection to the public, the profession, or the Court. It is the public interest in that sense that must be weighed against the interests of other persons, including the practitioner, when exercising the discretion whether or not to prohibit publication."

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[3] Lawyers and Conveyancers Act 2006, s 240.
[4] As recently confirmed in *Hart v Standards Committee (No 1) of the New Zealand Law Society* [2011] NZCA 676 and in *Hart v Standards Committee (No 1) of the New Zealand Law Society* [2012] NZSC 4.
[5] *R v Liddell* [1995] 1 NZLR 538 at 546-7.
[6] For example *Hart*, supra*; M v Police* (1991) 8 CRNZ 14; *S v Wellington District Law Society* [2001] NZAR 465.
[7] *Muir v Commissioner of Inland Revenue* [2004] 17 PRNZ 365 (CA) at [29].
[8] Ibid at 469.

[49] In opposing the suppression application made by the practitioner, the Standards Committee pointed to the presumption of openness of justice and submitted that weighing all the circumstances suppression was not warranted.

[50] It was suggested on behalf of the committee that it was in the interests of the profession that the practitioner be identified. This would result in the public (both clients and financiers) being aware of who had made the error, and not having suspicions about whether other practitioners, on whom they may wish to rely, may be the practitioner concerned. The committee also submitted that it was important for other practitioners to be aware of the practitioner's identity, so that they could "*deal with her accordingly".*

[51] So far as these submissions are concerned, we note that the practitioner has been accepted as making an one-off honest mistake after over 30 years of satisfactory practice, and that there are particular circumstances applicable in this case which weigh in favour of suppression. We do not consider that disclosure of identity, to ensure that this practitioner can thereby be avoided or monitored in future by anyone concerned about her conduct, is a factor of great weight in the particular circumstances. Similarly, given the circumstances, we do not consider that other members of the legal profession should be unduly concerned that lack of publication means the public will be concerned that a practitioner they may deal with is the person who made this mistake.

[52] While not derogating from the fact that this negligence is of a nature which affects the reputation of the profession, we doubt that a reasonable person would require knowledge of who actually made the error in the particular circumstances of this case. We acknowledge that there is a public interest in knowing that such errors are discovered and dealt with, to assist the maintenance of confidence in the profession and its services. We do not consider that issues of avoidance and monitoring of the practitioner, or suspicion about who it actually was that committed the error, should weigh heavily in assessing whether to suppress the practitioner's name, in her particular circumstances.

[53] Counsel for the Standards Committee also drew the Tribunal's attention to *The Queen v Suttie*[9] where there were significant risks to the applicant in that case arising from psychiatric concerns. Name suppression was sought and declined, and that was upheld on appeal. We consider the current matter before us involving the practitioner is different in material respects from the facts applicable in *Suttie.*

[54] Firstly, *Suttie* involved serious criminal offending, involving the misappropriation of significant amounts of money. The practitioner before us has been accepted as making a mistake in a transaction undertaken in the normal course of her practice, with no deliberate conduct and no loss actually resulting from that mistake. The seriousness of the *Suttie* case is entirely different from seriousness of the case before this Tribunal, both in the nature of the conduct and its result.

[55] Secondly, the defendant in *Suttie* was sentenced to imprisonment, and it was specifically noted that the prison system was well able to deal with risks arising from psychiatric conditions, as it was not uncommon for newly admitted prisoners to be at risk of self harm. The risk was considered controllable within the prison system, so potential outcomes from the psychiatric condition were not matters weighing heavily in the overall assessment regarding suppression. The practitioner's position is quite different as she will not have an over-arching special purpose support system, having to rely on her social networks which have been disrupted to a certain extent by moves and personal circumstances.

[56] Thirdly, the psychiatric condition in *Suttie* was directly attributable to the fact of the prosecution and sentencing outcome. The Court considered that the risk would be largely alleviated by the completion of the criminal justice process. In the matter before us, the practitioner has had a longer depressive illness background with a range of matters affecting her, commencing before her act of negligence for which she has been prosecuted under the disciplinary regime, and compounded by that prosecution and its potential results. It is not just a reaction to prosecution

[9] [2007] NZCA 201.

that has caused the practitioner's state, but the various other matters noted by her psychiatrist as contributing to and compounding the practitioner's illness.

[57] For the practitioner, it was submitted that apart from the significant mental health concerns, other matters to take into account in considering suppression were: lack of risk of further offence; the fact this was a single event occurring two years ago: the practitioner's good record over the preceding 30 plus years; her immediate acceptance of her error and apology to the Law Society; the fact that the matter commenced by own motion rather than complaint; and that this arose as a result of a genuine error in the normal course of practice. So far as commencement by own motion rather than by complaint is concerned, we record that we treat that as a submission that no actual harm occurred to the bank, because how a proceeding commenced is not itself a matter of any real weight in this context.

[58] Weighing up all the matters submitted to us, and having regard to the starting premise that proceedings would normally be open, we reached the conclusion that in this particular case, suppression should be granted.

[59] The medical evidence was clear – the practitioner is suffering significant depression, not just as a result of these proceedings, but because of the collapse and loss of so many other important things in her life. As a consequence she is at risk of further deterioration and consequential significant risk to her well-being, if her name is published. That is the firm view of the specialist psychiatrist who has provided a number of unsworn reports for production by the practitioner which were admitted with the consent of the Standards Committee. We add that we think that a proper and responsible approach for the committee to have taken in the particular circumstances.

[60] Against that background we also must consider the purposes of the Act, and how those purposes are enhanced by openness. We also must consider whether, in the circumstances of this practitioner and the conduct to which she has pleaded guilty, suppression may prejudice those purposes. Our view was that there was no prejudice to the purposes of the Act by suppressing the practitioner's

name in the circumstances of this matter, and that the public interest did not require the usual publication of name when weighed against:

(a) the medical evidence and matters related thereto that we have outlined;

(b) there being little risk of the practitioner making a similar mistake again after the experience of this case, and as signalled by her acceptance of error and apology;

(c) the nature of the error not reflecting serious matters regarding the integrity and probity of the practitioner, in the sense that it was an one-off honest mistake made in the normal course of practice, with no person suffering loss. By its nature of course, it was a matter which could adversely affect the profession's reputation, but in the circumstances of this particular case we have taken the view that does not outweigh the circumstances of this practitioner; and

(d) the fact that the practitioner had a good record and standing in the profession over 30 plus years, apart from this blemish (together with some other relatively minor trust account process matters arising at the same time), indicating that there is no real risk to the public interest in the event of suppression, and also to give her some credit for that record in considering the effect on her of publication of her name.

Dated at Auckland this 28th day of June 2012

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D J Mackenzie
Chair