

**NEW ZEALAND LAWYERS AND
CONVEYANCERS DISCIPLINARY TRIBUNAL**

[2016] NZLCDT 23

LCDT 011/15

IN THE MATTER

of the Lawyers and Conveyancers
Act 2006

BETWEEN

**AUCKLAND STANDARDS
COMMITTEE 5**
Applicant

AND

ROBERT JOHN MOODY
Practitioner

CHAIR

Judge D F Clarkson

MEMBERS OF TRIBUNAL

Mr J Bishop

Ms C Rowe

Ms S Sage

Mr B Stanaway

HEARING at Auckland

DATES OF HEARING 22 February, 21 July 2016

DATE OF DECISION 2 September 2016

COUNSEL

Ms Paterson (February) and Mr Hodge (July) for the Standards Committee

Mr Godinet for the Practitioner

**DECISION OF THE NEW ZEALAND LAWYERS
AND CONVEYANCERS DISCIPLINARY TRIBUNAL
ON STAY OF PROCEEDINGS**

Introduction

[1] This decision is the first in which the Tribunal has been asked to consider a permanent stay of proceedings on the grounds of ill health of the practitioner. The practitioner was charged in June 2015 with serious failures in his charging practices, including overcharging, to the extent that his conduct was alleged to amount to misconduct, (pleaded with lesser alternative charges). This allegedly covered a period from 2008 to 2013.

[2] Although Mr Moody initially represented himself, his family was concerned as to his capacity to do so and Mr Godinet stepped in to assist. Counsel then experienced significant difficulties in obtaining clear instructions from the practitioner and finally, an assessment of Mr Moody by a psychogeriatrician, Dr Jane Casey, was undertaken.

[3] In the interim, the Tribunal had become so concerned about Mr Moody's functioning and the risk posed to clients, as to initiate a hearing as to interim suspension. An order was made suspending Mr Moody from practice on 17 November 2015.

[4] On 17 February 2016 an application was filed seeking a permanent stay of the proceedings because the practitioner suffered from dementia and therefore was said to lack the capacity to instruct and retain counsel and fully participate in the proceedings. The application relied on the evidence of Dr Casey who was available for the hearing on 22 February 2016.

[5] Having heard Dr Casey's evidence, and while accepting the high calibre of that evidence, the Tribunal was concerned about making such a significant decision on the evidence of only one doctor, who had been retained by the practitioner.

[6] The hearing was adjourned to obtain a further report from a neurologist, Dr Ernest Willoughby, who had seen Mr Moody on a number of occasions, dating back to 2010.

[7] The stay hearing resumed on 21 July 2016 when Dr Willoughby was also available for cross-examination.

[8] Following his evidence, the Standards Committee did not oppose the stay.

[9] We are grateful to Mr Hodge and Ms Paterson for their detailed and fair submissions filed on behalf of the Standards Committee which have greatly assisted the Tribunal in conducting the necessary balancing exercise in this difficult matter.

Partial Suppression

[10] Before detailing the medical evidence we note that it was agreed at the conclusion of the hearing that in order to enunciate proper reasons for the decision and provide guidance for future similar situations, it would be proper to record the nature of Mr Moody's illness and the evidence supporting his lack of capacity. To this extent the interim suppression order concerning medical information is therefore lifted. However, it remains in relation to matters which are of a more personal or personality related nature. These more private aspects of the illness are not required to be published in order to provide a coherent account of the situation and we consider the practitioner's interests outweigh the public interest in this limited aspect. For that reason there will be an order that any inspection of the file is to be subject to the approval of the Chair. The decision itself omits reference to such matters and therefore may be published in full.

Medical Evidence

[11] Dr Casey is a consultant psychiatrist specialising in old age care and is a practitioner of considerable experience. Dr Casey had examined Mr Moody in October 2014, twice in late 2015 and twice in early 2016. She diagnosed him as suffering from frontotemporal dementia. Dr Casey's evidence is that the frontal lobes are responsible for personality, decision-making, problem-solving, judgement and

insight and the temporal lobes are more responsible for memory. She confirmed that in 2013 a CT scan had indicated some frontal lobe atrophy as being evident.

[12] Dr Casey described Mr Moody's presentation and the formal cognitive testing undertaken by her. In particular Dr Casey referred to the Addenbrookes 3 Cognitive Examination, in which a cut-off of 82 out of a score of 100 normally leads to a diagnosis of dementia. The practitioner's score was 63 and thus he was significantly impaired. Unfortunately his level of insight was low and the issues of insight and denial had been problematic for some years according to both Dr Casey and Dr Willoughby, neurologist, who also gave evidence. Dr Casey explained how an intelligent and educated person such as Mr Moody often has reasonably well preserved language and can present in a manner which disguises the cognitive impairment for some time.

[13] It was Dr Casey's opinion that Mr Moody was "*... unable to give instructions to counsel in these matters, has difficulty understanding and manipulating relevant information, and has difficulty foreseeing the consequences of the situation. Mr Moody lacks the capacity to partake in these proceedings.*"

[14] Dr Casey expanded on this by pointing out that with the temporal lobe impairment there were memory problems meaning that Mr Moody would have a reduced ability to learn, retain and record information. Secondly there is an inability to problem-solve or foresee consequences of thinking and decision-making. She considered that Mr Moody would become overwhelmed. Indeed Dr Casey put the disability at a level that were there matters in the criminal setting she would consider that he would be unable to plead nor instruct counsel.

[15] Dr Willoughby's evidence supported that of Dr Casey. Dr Willoughby, a specialist neurologist, is also a practitioner of many years experience. He had first seen Mr Moody in December 2010 and subsequently in December 2013, April and June 2014 and April 2016, for an updating assessment. Dr Willoughby confirmed Dr Casey's evidence that the disease was a progressive and irreversible one for which there is no effective treatment.

[16] Dr Willoughby's assessment was also that the practitioner's "*impairment of cognitive function is substantial*".

[17] In relation to the charges faced by Mr Moody, Dr Willoughby considered that there was no chance of Mr Moody registering the details of specific charges (of fees) and recalling detail as to what he had in his mind at the time nor make suggestions to his lawyer about how to deal with the allegations faced by him.

[18] Dr Willoughby observed that his examination in April 2016 revealed that Mr Moody was much more severely affected than on previous occasions and there was obvious impairment of his memory and general functioning. Dr Willoughby reiterated that Mr Moody was, in his opinion, not fit and able to understand the nature and consequences of the current proceedings as a result of his medical condition.

Submissions from the Standards Committee

[19] Counsel set out a number of decisions where, in professional disciplinary settings, the practitioner's mental state and cognitive ability had been considered in the context of stay applications. In the *Green* decision¹ charges were stayed by the Medical Council where Professor Green was found to have suffered from "a chronic and progressive brain syndrome of such severity as to limit his ability to communicate adequately with counsel". This authority would seem to be on all fours with the present situation.

[20] In contrast, in *Re A*², the stay was refused. In that case the practitioner's delicate psychological state was advanced as the reason for a stay, her general practitioner stating "*(Ms A's) mental health is not sufficient to go through with the stress of a Court case and would be harmed as a result. The repeated mental battering is not indefinitely sustainable and she has long reached the limits of what is reasonable to cope with.*" That evidence was rejected as insufficient to support a stay, which was said to require a condition "... so severe that they could not possibly properly instruct counsel or understand or participate in their trial ...". That accords with the standard adopted in the *Green* case and we consider is a proper one for adoption in this jurisdiction.

¹ (1990) 130 NZMJ 284.

² HPDT 29/NUR05/18D, 28 March 2006, Health Practitioner's Disciplinary Tribunal.

Discussion

[21] It is clear to the Tribunal from the uncontradicted and extensive evidence now before us that Mr Moody would simply not be able to receive a fair hearing in a manner in which he was a full participant. The requirements of the Act,³ in particular s 236, are that the Tribunal must observe the rules of natural justice. We do not consider that we would be able to do so, were the hearing of the charges against the practitioner to proceed, in his current cognitive state.

[22] We have carefully considered the serious nature of the charges and the public interest in the resolution of charges against practitioners. We have sought to ensure the fullest evidence is available for a robust testing of the type of application. We have referred to the high threshold required before such an application can be granted.⁴

[23] We have also had regard to the position of the complainant. We recognise that there are five serious charges which have been laid. However, these proceedings are not primarily for restitution purposes. Complainants will often have civil remedies, separate from the disciplinary process. The primary purpose of proceedings under the Act are for protection of the public and maintenance of the public's confidence in the legal profession.

[24] Public protection has been achieved by the suspension of Mr Moody from practice and his subsequent acknowledgement that he will not seek a further practising certificate. Indeed the Standards Committee sought that it be a condition of any stay that should the practitioner seek to obtain a practising certificate in the future that the charges would have to be revived and heard. We accept that is a proper position to take, unlikely as it might seem.

[25] Mr Moody's deterioration has been a gradual one, although obviously more apparent in recent years. It would be disappointing if colleagues had not proactively attempted to persuade him to cease practice at an earlier time, although we do not underestimate the difficulty in doing so. We are not aware of what might have occurred "behind the scenes". It may be that this was attempted, unsuccessfully.

³ Lawyers and Conveyancers Act 2006.

⁴ See para [20].

Given the purposes of the Act to protect consumers of legal services, and maintain public confidence in the provision of such services, we encourage the profession to be attuned to such matters in a general sense in the future.

Decision

[26] For all of the above reasons the application for a stay is granted. It is on the condition set out in paragraph [24].

Suppression

[27] We have referred to the issue of suppression earlier in this decision (see paragraph [10]).

Costs

[28] The Standards Committee have incurred significant costs in this matter. There have been a number of delays occasioned by the practitioner's conduct and it has been a novel point which has required considerable research on the part of the Standards Committee. A contribution to costs of two thirds of the \$36,634.23 is sought. We consider that is a proper contribution. The proceedings have been brought in the public interest on a proper basis, with sound evidential footing. There will be an order for payment of \$24,000 costs to the Standards Committee.

[29] Section 257 costs are now certified in the sum of \$13,644.00. We do not have specific information about the practitioner's financial circumstances and in the absence of any indication that there is no ability to make a further contribution to costs we consider that the s 257 costs ought to be reimbursed by the practitioner to the New Zealand Law Society in full.

DATED at AUCKLAND this 2nd day of September 2016

Judge D F Clarkson
Chair