NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL

[2016] NZLCDT 25

LCDT 010/10

BETWEEN	**AUCKLAND STANDARDS COMMITTEE No. 1** Applicant
AND	**FRANCISC CATALIN DELIU** of Auckland, Lawyer

CHAIR

Ms M Scholtens QC

MEMBERS OF TRIBUNAL

Ms S Hughes QC

Ms J Gray

Mr W Smith

Mr P Shaw

HEARING at Auckland

DATE 30 September – 9 October, 10 December 2015 (with LCDT 008/12)

DATE OF DECISION 15 September 2016

APPEARANCES

Mr P Morgan QC for the Standards Committee

Mr F Deliu in Person

DECISION OF THE TRIBUNAL ON THE AUCKLAND STANDARDS COMMITTEE CHARGE – (THE 'INTERRUPTION OF MEETING' CHARGE) – LCDT 010/10

Introduction

[1] This charge was consolidated with charges LCDT 008/12 ('the Judges charges') by consent on 18 March 2014. The charges were heard together over 10 days, from 30 September to 9 October, and 10 December 2015. Further charges ('the incompetence charges' – LCDT 014/15) were heard by the same Tribunal on 22 February 2016. The decisions on the three sets of charges are given together.

[2] Mr Deliu (the practitioner) is the sole director and principal of Justitia Chambers Limited, a law firm that operates from premises in central Auckland. In October 2008 he was a staff solicitor in the Auckland law firm known as Equity Law.

The interruption of meeting charge

[3] The Auckland Standards Committee 1 charged the practitioner with unsatisfactory and unprofessional conduct while providing regulated services by interrupting a meeting of the Auckland District Law Society Complaints Committee ("ADLS Committee") on 14 October 2008 at Auckland when acting as counsel for Mr Evgeny Orlov, a colleague at Equity Law.

[4] The particulars of the charge are:

- That on 14 October 2008 he and his client Mr Orlov, without invitation or leave to do so, entered a meeting room at the offices of the Auckland District Law Society ("ADLS") in which the ADLS Committee was sitting;
- That he refused to leave the meeting room when requested to do so by Mr Godinet, the Chair of the ADLS Committee;
- That he interrupted, shouted at and made demands of the ADLS Committee members to such an extent that he caused the Chair of the ADLS Committee to adjourn the meeting;

- That he failed to competently counsel and advise Mr Orlov not to enter and/or to withdraw from the meeting room, but by his continued presence and behaviour as aforesaid he encouraged Mr Orlov to improperly remain in the meeting room and to disrupt the meeting;

- By virtue of his conduct as aforesaid he engaged in conduct when providing regulated services that would be regarded by lawyers of good standing as unacceptable, in that it was conduct that was unbecoming a lawyer (the first three particulars) and unprofessional conduct (the fourth particular).

Relevant facts and factual disputes

[5] The genesis of the charge arose out of a complaint received by the ADLS from the Court manager of the Whangarei District Court regarding the conduct of another practitioner, Mr Evgeny Orlov. Mr Laubscher, Professional Standards Director of the New Zealand Law Society ("NZLS"), and acting as Secretary to the Auckland Standards Committee, wrote to Mr Orlov advising him that the matter had been referred to the Complaints Committee (2) of the Auckland Society for consideration at its meeting on 14 October 2008.

[6] Mr Orlov responded in writing on 25 September 2008, but did not at that time indicate that he sought an opportunity to address the Committee.

[7] The first Mr Laubscher knew of a desire for Mr Orlov to appear before the Committee was an email from the practitioner on 6 October 2008. That email concludes with the following:

> Can you lastly confirm the room and time when the Complaints Committee 2 will meet on 14 October 2008? **Mr Orlov has asked me to represent him as counsel** at that meeting and **I am therefore entitled to attend as his legal representative**. (emphasis added)

[8] Mr Laubscher responded on the same day and advised:

> Attendance of a meeting of the Complaints Committee is by invitation only. The meetings are not open to the public or members of the profession. As far as I know Mr Orlov has not been invited to attend, but I shall make enquiries. Please advise on what basis you claim your entitlement to attend.

[9] The practitioner responded by email the following day:

> As a member of the Society, Mr Orlov is entitled to attend because he is a fee paying member. Secondly, Mr Orlov is entitled to attend by virtue of s 27 of the New Zealand Bill of Rights Act 1990, i.e., the Society cannot hold, for want of a better term, a Star Chamber-type hearing …. As it appears the complaint against me is going ahead, then I too have the same rights to attend either by myself or with counsel, Mr Orlov …..

[10] Mr Laubscher did not respond further. It was established that there was no outstanding complaint against the practitioner on 14 October 2008 and that was known to him.

[11] On 14 October 2008, Mr Laubscher was advised by a staff member that Messrs Deliu and Orlov were in reception seeking to attend the Committee meeting. Mr Laubscher directed the practitioner and Mr Orlov to a meeting room and then went to meet with them where they repeated their desire to attend the meeting. Mr Laubscher advised them that they had no such entitlement but he would ask the Committee if they might be prepared to hear from them. The practitioner told Mr Laubscher that he and Mr Orlov had a right to attend.

[12] When the meeting commenced the request to attend was to be the third item on the agenda, however just as that matter came on for consideration the practitioner and Mr Orlov entered the meeting room.

[13] There is some debate as to the exact sequence of events once the two practitioners had entered the room, but the following seems to be beyond dispute:

- Mr Orlov entered first followed closely by the practitioner;
- The two practitioners were repeatedly requested to leave;
- The requests for them to leave came from Ms Lethbridge initially, but were then repeatedly made by Mr Godinet who was the Chair of the Committee;

- When the practitioners declined to leave Mr Godinet adjourned the meeting with some present seeking to have some of the lunch provided and the Committee then vacated the meeting room;

- Mr Godinet then returned to the meeting room to check that no Committee papers had been left behind;

- Witnesses describe exchanges between Messrs Godinet, Orlov and the practitioner as heated;

- Insults were exchanged between the men. Various witnesses heard Mr Godinet call Mr Orlov one or more of “a farce”, “a joke”, “a poor excuse of a man” and ”boring”. Some of the witnesses said that they heard Mr Orlov call Mr Godinet “a coward”, inviting him “to be a man” and “a joke”;

- These matters were repeated in the reception area of the Law Society, when a staff member, Mr Hetherington, endeavoured to persuade the practitioners to leave. During that discussion Mr Godinet came down the stairs and the exchange described above continued;

- The incident ended when the police arrived and escorted the practitioners off the premises.

[14] The Committee called evidence from 5 witnesses.

[15] The first was Lapa Laubscher who at that time was the Professional Standards Director of the NZLS. The other witnesses were Mesdames Lethbridge and Fitzgibbon and Messrs Darby and Ahern, all of whom were committee members. All were cross-examined carefully by the practitioner as to the sequence of events and none gave evidence that was substantially inconsistent with the bullet pointed summary above. Differences arose as to how individuals characterised the exchange.

[16] The practitioner’s cross-examination of Mr Laubscher focussed on two primary arguments – namely that it was Mr Orlov who had behaved badly and not the practitioner and, further, that the Auckland District Law Society had acted

inconsistently in not seeking to investigate the behaviour of Mr Godinet in relation to this incident.

[17] In summary, Mr Laubscher accepted that Mr Godinet did not seem to provide a tempered response to Mr Orlov and the practitioner, but described his conduct as having been provoked. He described Mr Godinet's behaviour as a minor matter, with the focus being on what he described as the "invasion" of the Committee meeting. When challenged as to the use of that word Mr Laubscher replied:

> …what I mean with the word invasion is people barging in on a meeting without an invitation to do so and you must see this in the context of what happened… and then I came up there and shortly before the meeting started, and you and Mr Orlov indicated you wanted to attend. I explained to you that I would convey your request to the Committee and I can clearly recall that both of you indicated to me in no uncertain terms that it wasn't a request, as far as you were concerned you had the right to be there. And I said "I'll get back to you ". Now then thereafter the meeting starts and I think the meeting was probably underway 10, 15 minutes and then you just walked in on the meeting and caused such a commotion that the meeting had to be adjourned. Now when I talk about the invasion of a meeting and outrageous conduct that is what I am referring to. And a refusal to leave when you are asked to do so.[1]

[18] Mr Ahern said that with the passage of time, his memory had become hazy as to who said what to whom and characterised the exchange as:

> I don't know, I mean I can't say he, I can't say he (Mr Godinet) didn't, right, because I don't recall exactly what was said. I recall it being a relatively heated exchange and I have said in my affidavit that it went from being uncomfortable to being extremely uncomfortable and my general sense of it at the time is that things were getting pretty heated but I don't remember exactly what was said by people sorry.[2]

[19] Mr Ahern then went on to say:

> Well I think it is fair to say that there was a measure of, I recall a sense of real frustration personally, and I wasn't engaged – I wasn't involved in the exchanges but a real frustration that the request, when you came into the room, of both you and Mr Orlov to leave, weren't being adhered to… The people had gone to some lengths to try and ask the two of you to leave, um, I accept it probably got quite, quite heated…

[20] He described the practitioner's behaviour as:

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1 Transcript p140/31.
2 Transcript p231/29.

being aggressive and intimidating[3]

[21] Mr Darby categorised the interaction at the meeting as "a bit unfortunate" and expressed the view that it may have arisen from a mistaken understanding of the legal position of the practitioner and Mr Orlov.[4]

[22] He described the exchange between Messrs Godinet, Orlov and the practitioner as "fairly undignified".[5]

[23] Ms Fitzgibbon recollected Mr Godinet calling Mr Orlov a farce[6] and a disgrace,[7] and Mr Orlov called Mr Godinet a coward.[8]

[24] She recalled multiple requests for Mr Orlov and the practitioner to leave the room and believes that the exchange within the Committee room occupied approximately 10 minutes.

[25] Significantly she recollected when asked whether anyone had threatened to call the Police that:

> I think you asked that we call the Police because your and Mr Orlov's view was that you were entitled to be in the room and when Mr Godinet said for you to leave there was an exchange, something to the effect, "we are entitled to be in this building if you don't like it get the Police" or something like that "call the Police".[9]

[26] Like other witnesses Ms Lethbridge struggled to recollect the detail of the exchanges between the various witnesses but did accept that there had been an exchange primarily between Messrs Orlov and Godinet. Like the other witnesses, she recorded the atmosphere as being tense and that Mr Orlov and the practitioner had been asked to leave the meeting on more than one occasion. She described herself as feeling "physically intimated" by the actions of the practitioner.[10]

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3 Transcript p236/29.
4 Transcript p246/13.
5 Transcript p251/8.
6 Transcript p265/9.
7 Transcript p265/11.
8 Transcript p265/13.
9 Transcript p267/10.
10 Transcript p306/29.

[27] The practitioner sought to subpoena a number of witnesses. Those associated with the Auckland Committee indicated their voluntary attendance. These included Messrs Godinet (the Chairman of the Committee), Treleaven, Heyns (both employed by the ADLS at the date of the incident) and Pyke (who had initially been instructed to prosecute the matter) and Ms Margaret Malcolm, then executive director at ADLS. All appeared as the practitioner's witnesses.

[28] Mr Heyns described the interaction between Messrs Orlov, Deliu and Hetherington. He described Mr Hetherington as seeking to deny the practitioner access to the Society's offices. He described them as:

> …basically chest to chest…[11]

[29] He, like the witnesses called for the prosecution, confirmed that Mr Orlov and the practitioner had been repeatedly asked to leave the meeting but had declined to do so. While he could not remember the precise words used, he did accept that those involved had raised voices.

[30] Under cross-examination he further described the interaction between Mr Hetherington and the practitioner as:

> Two men with puffed out chests.[12]

[31] Mr Godinet recollected Mr Orlov inviting him to stop being a coward and face him like a man and recollected saying to Mr Orlov that he was a farce or a joke.[13]

[32] Mr Pyke had initially been instructed to prosecute the practitioner on behalf of the Auckland Standards Committee Number 1. Issues of privilege arose in respect of his evidence. The practitioner indicated that he wished to question Mr Pyke as to why no charges were laid against Mr Orlov, why a charge was laid against himself, "without prejudice" discussions held between the practitioner and Mr Pyke and Mr Pyke's opinion regarding the meeting charge itself. Finally, he sought Mr Pyke's opinion about inconsistencies he, the practitioner, perceived as to the treatment he had

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[11] Transcript p655/11.
[12] Transcript p666/18.
[13] Transcript p673/11.

received and the treatment of Mr M QC. As he was not a witness to the interaction, his evidence has little bearing on the matter at hand.

[33] The next witness called by the practitioner was Mr Skelton QC who was appointed to the National Standards Committee in September 2010. The practitioner endeavoured to advance his view that he was treated more harshly than New Zealand born lawyers. In that regard he referred to other lawyers, who he considered had transgressed ethical obligations and had not been treated as he had been.

[34] The practitioner also summonsed Mr Stuart Grieve QC as Convenor of the Auckland District Law Society Standards Committee 1 which had received an "own motion" complaint regarding the conduct of Messrs Orlov and the practitioner in relation to the interrupted meeting. Among other things Mr Grieve was questioned about why Messrs Godinet and Hetherington were not the subject of disciplinary proceedings.

[35] Thereafter Mr Treleaven was called, who was at the time of the meeting interruption events an in-house prosecutor employed by the Auckland District Law Society. He was present at the meeting on 14 October 2008. As with other witnesses, he recollected the exchange between the practitioner and Messrs Orlov and Godinet as becoming heated but could not remember specific words. He, like Mr Heyns, described the later interaction between the practitioner and Mr Hetherington as chest butting.[14]

[36] The practitioner also called Mr Orlov under summons, who confirmed the exchange of insults between himself and Mr Godinet and his view that he had been wrongly pursued by Mr Laubscher on behalf of the Law Society.

Primary defences

[37] The practitioner did not dispute that he was present at the meeting and had been repeatedly asked to leave. He sought to defend this charge on the following primary bases:

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[14] Transcript p778/15.

[1] He was not providing a regulated service at the time;

[2] He has been subjected to unequal treatment in that there had been no prosecution of Messrs Godinet and Hetherington who he claimed had assaulted him during this exchange; furthermore he complained that Mr Godinet's words addressed to Mr Orlov should have been the subject of charges.

Not providing regulated services

[38] We deal with the contention that he was present at the meeting in a capacity other than as a provider of regulated services. Assistance is found in the following evidence:

(a) The words used by the practitioner prior to the meeting and in particular in the email of 6 October 2008 referred to in para [7] above when he confirmed that he was to appear as Mr Orlov's counsel;

(b) After the 14 October 2008 meeting the practitioner wrote on 17 October to Ms Malcolm, the then Chief Executive of the ADLS:

> ….Would this raise in your mind a breach of the privacy rules or even natural justice as you disallowed Mr Orlov **and his lawyer to attend**?... (emphasis added)

(c) On 5 December 2008 the practitioner wrote to Mr Shaw who had been appointed to investigate the complaint against Mr Orlov and the practitioner regarding the meeting and said:

> ….for example were you informed that; a) we announced ahead of time with legal authorities cited, that we would be attending by right, **I as Mr Orlov's lawyer**;…. (emphasis added)

[39] In the practitioner's response of 2 April 2014, he records at para 1.1 that:

> " …it is also particularly denied that I was providing regulated services at the material times and/or that I am responsible for the actions of Mr Orlov (who is the one who did interrupt the meeting)"

[40] In his affidavit of 10 December 2014 the practitioner stated at [28]:

> "I deny that I was providing regulated services to anybody on 14 October 2008. I was not engaged by Mr Orlov to attend the meeting as his Counsel because he specifically told me that he wanted me there as his support person and/or witness in case things needed to be independently verified and not as his lawyer."

Discussion

[41] We prefer the contemporaneous correspondence to the later statements made by the practitioner and find therefore that he was present at the ADLS committee room on 14 September 2008 as Counsel to Mr Orlov and as such was providing regulated services.

[42] Having established that threshold we must now consider whether he interrupted that meeting. It is accepted that Mr Orlov entered the room first but that the practitioner was shortly behind him. The evidence is clear that the practitioner was not there as a bystander but also joined in the exchange asserting the right of Mr Orlov and himself to be there. It is equally clear that the instruction to leave was delivered to both of the practitioners and not simply Mr Orlov. It follows that having interrupted the meeting and having declined to vacate as requested that the practitioner's portrayal of himself as a bystander is not tenable. We find that he did interrupt the meeting and that he declined to leave when asked.

Unequal treatment

[43] The practitioner contended that the failure to charge Mr Godinet amounted to unfair and unequal treatment.

[44] Unquestionably, the exchange of insults between Messrs Godinet and Orlov reflects no credit on either. However it must be remembered that Mr Orlov and the practitioner refused to acknowledge the authority of Mr Godinet to require them to leave the meeting that they had interrupted. It is clear from the evidence that Mr Godinet had made that request more than once. Not only did they fail to comply with that request but rather they challenged those present to call the Police as they were not going to voluntarily remove themselves. It can be properly said that Mr Godinet was provoked.

[45] Putting that to one side, it is important to remember that the focus of the charge that the practitioner faces relates to his conduct in interrupting the meeting, refusing to leave causing the meeting to be adjourned and not counselling Mr Orlov to leave. Having been told that they had no right to attend, having been assured by Mr Laubscher that a desire to be heard would be conveyed to the Committee and an audience sought, the only proper thing for Mr Orlov and the practitioner to do was to await the decision of the Committee. They had no automatic right of audience. The Committee was not sitting in a judicial role but rather in an investigative or inquisitorial role and at a preliminary stage.

[46] Happily, Standards Committees, and other Committees of the Law Society, are not habitually confronted by those who seek an audience when told that none exists. There are therefore no valid comparisons to be made with the conduct of others. It is not accepted that there has been unequal treatment meted to the practitioner.

[47] Furthermore, the practitioner in his opening address sought to develop an argument that it was Mr Orlov who had interrupted the meeting or at least was as engaged as the practitioner in that process and by implication if he didn't face charges then the practitioner should be treated the same. We understand the reason that Mr Orlov did not ultimately face charges is because the Committee was advised, and accepted, that in Mr Orlov's case he was acting out of concern for himself and so was not providing regulated services at the time that he entered the room.

Other defences

[48] The practitioner submitted that the alleged misconduct was not sufficiently serious to be put before the Tribunal, or indeed to be subject to a charge at all.

[49] We do not accept there is a threshold.[15] The charge is either proven or not.

[50] The practitioner asserts the prosecution of him is a form of persecution carried out because of his foreign nationality, or his status as an outsider (compared to Mr Godinet – an insider). He says it is selective and discriminatory. He also calls it wrongful treatment of a political nature. These assertions are rejected. We do not

[15] *Orlov v New Zealand Law Society* [2013] 3 NZLR 562.

accept his submission that those guilty of unsatisfactory conduct in this case were Messrs Godinet and Hetherington. The National Standards Committee considered the complaints made about their conduct and decided that they warranted no further action. This was not racist or improperly discriminatory. While it is not our task to evaluate the reasonableness of the Standards Committee decisions in other cases, we can see that different considerations would have applied and we do not accept that the decisions were unreasonable.

[51] The practitioner refers to other cases of unsatisfactory conduct where he says those involved have merely received a "slap on the wrist", whereas his conduct is either similar or less egregious and so should not warrant the disciplinary action taken.

[52] We do not consider such comparisons can be made at this stage of proceedings. They are submissions for penalty when comparing the similarity or otherwise of the actions of others and the penalties received with the actions of the practitioner. Every case will turn on its own facts. As noted earlier, there are no directly comparable cases. The effective operation of the disciplinary process is very important in the public interest. Lawyers involved must give up their time voluntarily to consider the complaints that come to their notice. They are busy people with limited time. Not only was the meeting brought to an end by the conduct, but at least one member felt intimidated by the practitioner.[16] It is conceivable that lawyers might be put off volunteering for such duties in future by actions such as this. The disruption of the disciplinary process in this way is a serious act of misconduct. How serious is a matter for penalty. However we agree with Counsel for the Committee that the practitioner's conduct cannot be downplayed in the way it was by the practitioner.

[53] The practitioner claims there has been an abuse of process. The prosecution is said to be pursued for ulterior motives, i.e. to shield the New Zealand Law Society from the practitioner's civil actions such as for malicious prosecution. As an aside, this seems to us to make little sense in that if the prosecution is indeed malicious, surely pursuing it through the Tribunal would only bolster the merits of the practitioner's civil action rather that provide a shield. More particularly the practitioner argues that the previously instructed prosecutor, Mr Pyke, sort to improperly coerce him into withdrawing his civil claim against the Law Society and was also guilty of blackmail in

[16] Transcript eg p305/29.

threatening to proceed with the incompetence charges, notwithstanding his view that they lacked merit.

[54] All the matters of fact relating to this aspect of the case are governed by s 57 of the Evidence Act 2006, the privilege attaching to 'without prejudice' communications. In our view the matter can be dealt with on that basis, i.e. that there is no admissible evidence for consideration. However we have an ability to disallow privilege and consider matters in certain circumstances.[17] Without accepting there is any prima facie case of blackmail, as the practitioner alleged, we consider it open to us in the circumstances, and with the co-operation of counsel, to consider the facts.

[55] The practitioner seeks to rely on 'without prejudice' discussions at meetings between himself and Mr Pyke. The practitioner makes assertions that are not accepted by Mr Pyke. The practitioner recorded the relevant meetings. However he did not produce those recordings. The Tribunal does not have the best evidence of what was said. However it does have documents which clearly demonstrate that the practitioner was attempting to use his civil case as a means to negotiate a reduction in the charges and the seriousness of the charges (this extends to all the charges under consideration). His characterisation of the matter as an abuse of process is extraordinary and not accepted.

[56] Because of the abuse of process allegations, Mr Pyke was required to stand down as prosecutor given his potential role as a witness.[18]

[57] The practitioner also submitted a 'lack of due process', or unlawful procedures.

[58] Nothing advanced under this head meets that description. The practitioner weaves a distrustful, suspicious, almost paranoid thread through the actions of people who, on inspection, are just doing their job. Messrs Laubscher, Shaw, Moore QC (as he was), Hesketh and Godinet all come in for unwarranted criticism.

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17 Evidence Act 2006 s 67.
18 *Deliu v Auckland Standards Committee (Counsel debarment)* [2014] NZAR 1473.

Decision

[59] We find that on 14 October 2008 the practitioner and his client Evgeny Orlov, without invitation or leave to do so, entered a meeting room at the offices of the ADLS in which the ADLS Committee was sitting. The first particular is proved.

[60] We find that Mr Deliu refused to leave the meeting room when requested to do so by Frank Godinet, the Chair of the ADLS Committee. We find that Mr Deliu interrupted, shouted at and made demands of the ADLS Committee members to such an extent that he caused the Chair of the ADLS Committee to adjourn the meeting. The second and third particulars are proved.

[61] We do not find the fourth particular proved in that we accept that Mr Orlov's behaviour was not within the control of Mr Deliu. While he did not advise Mr Orlov to leave, and by his presence and behaviour did encourage Mr Orlov's inappropriate conduct, we consider those matters are sufficiently covered by the first three particulars.

[62] We find that by virtue of his conduct, the practitioner engaged in conduct when providing regulated services that would be regarded by lawyers of good standing as unacceptable, in that it was conduct unbecoming a lawyer.

[63] It follows, therefore, that this charge is proved to that extent.

DATED at WELLINGTON this 15th day of September 2016

M T Scholtens QC
Chair