NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL

[2016] NZLCDT 30

LCDT 009/16

IN THE MATTER of the Lawyers and Conveyancers Act 2006

BETWEEN **HAWKE'S BAY LAWYERS STANDARDS COMMITTEE**
Applicant

AND **MR E**
Practitioner

CHAIR

Judge D F Clarkson

MEMBERS OF TRIBUNAL

Ms C Rowe

Ms S Sage

Mr W Smith

Mr I Williams

DATE OF HEARING 30 & 31 August 2016

HELD AT Hastings District Court

DATE OF DECISION 3 October 2016

COUNSEL

Ms J Bonifant for the Standards Committee

Mr R Fairbrother QC for the Practitioner

REASONS FOR DECISION OF THE TRIBUNAL ON LIABILITY

Introduction

[1] Mr E faced two charges of misconduct (pleaded with lesser alternatives of negligence, or unsatisfactory conduct). Having heard the evidence and submissions, the Tribunal dismissed both charges. We now give brief reasons for that decision, and a decision in respect of a name suppression application which was made following our oral ruling that we had dismissed the charges.

[2] As often occurs, the charges arose out of circumstances near the end of the lawyer/client relationship, when communication between them was not at its best. The first charge alleged Mr E had misled the Court about the state of his instructions. The second, alleged that when sending the client's file to another lawyer, the practitioner omitted two items.

Charge 2 – missing items

[3] The second charge was one of straightforward credibility assessment. Since we accepted Mr E's evidence that he had sent everything he had held by way of file material, and later rechecked, we found that charge not proved to the requisite standard. The barrister to whom the file had been sent, had allowed his client to check the file when it first arrived. So the barrister's own evidence of missing items was not particularly relevant, especially having regard to the fact that we did not find the client to be a reliable witness. No more need be said about this charge.

Charge 1 – misleading the Court

[4] This charge had more substance. We accept, without question, that the privileged position of an advocate addressing a Court demands that the Court is able to be absolutely confident that it can rely on information that is provided to it by counsel.

[5] In this case however, the background contextual matters were such that we were satisfied that Mr E certainly did not intend to mislead the Court and that it is likely at the time, given his focus on information which he still awaited from his client, that he considered he was making an accurate statement.

[6] The brief background is this. The client instructed the practitioner in about March 2013 in relation to a civil claim to be filed arising out of a search of his premises by the police, which he alleged resulted in them wrongfully retaining goods which he was holding, and over which he claimed a civil lien.

[7] The client is no stranger to litigation. He conceded under cross-examination that he had over 160 criminal convictions, many of which were "obtaining by deception" or other varieties of fraud. Mr H also conceded he had been described by his own lawyer, making submissions on his behalf, as a "fantasist".

[8] The practitioner filed a statement of claim in May 2013 on behalf of Mr H, but it was quickly determined by the presiding District Court Judge that his claim as to the existence of a lien, on which his claim rested, needed to be established by resolution of the underlying dispute which was referred to the Disputes Tribunal for determination.

[9] Mr H failed to appear at the first Disputes Tribunal hearing and an order was made stating that the property was not his and was properly held by the third party, (who had been joined in the civil proceedings by the police).

[10] Mr H complained that he had not been properly notified of the hearing and sought a rehearing in the Disputes Tribunal. This was held and once again Mr H did not appear and a finding was made against him.

[11] In late 2014 Mr H sought a second opinion in respect of the proceedings from a Wellington barrister. In late January 2014 that barrister emailed the client and the practitioner his views on the proceeding in a document which was referred to as an "opinion". That opinion addressed numerous other causes of action but did not directly comment on the proceeding which was being conducted for Mr H by the practitioner.

[12] Meanwhile, in early January the practitioner sought further assistance in relation to the claim, from a senior colleague, Mr R. On 7 January 2015 he met with that lawyer and Mr H and canvassed in a lengthy and thorough way the future of the proceedings. It was the view of the practitioner, backed up by the senior lawyer from whom he had sought assistance, that Mr H's claim was doomed unless there was some procedural way of attacking the Disputes Tribunal decision. It was the senior lawyer's view that a common law possessory lien ended once the possession itself was lost and such had occurred in this case.

[13] Neither the practitioner nor Mr R the senior lawyer who he consulted, had seen a copy of the Disputes Tribunal decision and sought this from the client.

[14] It is the evidence of both lawyers that the client was "obdurate in the face of this argument and determined to keep the proceedings going, regardless of their merit". He had even suggested issuing another claim for some $16,000 (in relation to the underlying dispute) in order to found a claim in the District Court. Both advised Mr H that such would be an abuse of process given that the claim had already been determined in the Disputes Tribunal.

[15] A telephone conference was scheduled for early February and leading up to that time the practitioner made a number of efforts to seek further instructions from his client, and in particular to receive the Disputes Tribunal decision in order that he might advise the Court of his full instructions. On 29 January the practitioner and second lawyer had a meeting and discussed at length the legal issues, as a result of which Mr R, the second lawyer, emailed the client a very clearly stated view repeating their opinion and stating that the only possible course would be a procedural attack on the Disputes Tribunal decision.

[16] The practitioner and Mr R went to considerable lengths to fully explore any possible way in which they could assist Mr H, even meeting on a Saturday to discuss matters and review the submissions which the practitioner needed to file for the telephone conference.

[17] Mr H's response, by email on 29 January, was that he sought to instruct new counsel (the Wellington barrister) from whom he had obtained the "opinion" but that

counsel was unavailable until after 10 February. He added that the important thing was to “make sure that (the barrister’s) position and ability to further this is not prejudiced in any way”.

[18] This was a somewhat confusing instruction because the barrister’s opinion had not been directed towards the matters which were the subject of the telephone conference but to other possible claims under for example, the Bill of Rights Act.

[19] It is the practitioner’s evidence that, having sought a copy of the Disputes Tribunal decision, in order to consider any other possible avenues, he had not received these from his client and therefore had not received what he referred to as “updated instructions”. Accordingly having set out the position for the Judge in a memorandum of 2 February, the practitioner advised the Judge that he lacked updating instructions and it is this statement which is alleged to have been misleading.

[20] The practitioner states that he did not in any way prejudice what the barrister might do in terms of proceeding under other legislation in relation to the police search, and that in the absence of the possible procedural attack on the Disputes Tribunal matter it would have been an abuse of process to attempt to pursue the matter any further. As an officer of the Court he was not prepared to do that.

[21] Having adduced a considerable amount of evidence the Standards Committee, at the hearing sought to introduce four further emails which the client sought to adduce by way of credibility. These were an attempt to discredit another lawyer who had filed a supporting affidavit for the practitioner. That practitioner gave oral evidence and we are satisfied it was accurate evidence and the emails were not given any weight by us although they were accepted on a provisional basis. The client failed to discredit the third lawyer’s evidence and given his admission in the past he had been convicted of crimes which arose out of the creation of emails, the documents themselves were clearly of a highly suspicious nature, emerging as they did at the eleventh hour.

[22] We found Mr H to be an unreliable witness. He frequently prevaricated and did not answer a question, but rather made his own statements as to how he perceived

matters. He is clearly a highly litigious man who was very familiar with Court proceedings, but despite that did not specifically ask the practitioner to seek an adjournment on his behalf, simply referred to preserving the rights which had been raised in the second opinion by his new barrister. For completeness we note that the claim was struck out in a reserved decision of Her Honour Judge McIntosh, subsequent to the telephone conference.

[23] We consider that this was a practitioner who tried very hard to achieve his client's instructions, putting considerable effort into the proceedings, seeking peer support and guidance from a second lawyer, and through that lawyer not only giving oral advice to his client but following it up on 29 January with a written summary of the position, seeking further instructions. The client did not provide the instructions sought by the lawyer.

[24] In summary we did not find that the charge was proved on the balance of probabilities to the high standard required in relation to such a serious allegation.

Name Suppression

[25] The practitioner at the conclusion of the hearing, once we had indicated we proposed to dismiss the charges, sought permanent name suppression.

[26] This application was made on the basis of fairly narrow grounds which related to a website operated by the complainant client Mr H. The website is an extraordinarily negative one in which the author, identified by Mr E as the complainant in this case, Mr H, refers to numerous people in the Justice and Corrections sector by name, making very serious allegations and disparaging comments about them.

[27] The practitioner fears that if his name is not suppressed he may well be the subject of comment on this website.

[28] The Standards Committee do not oppose the application.

[29] The practitioner, having had these charges against him dismissed, is entitled to protect his reputation. We consider that there is no issue of public protection or public

interest in the proceedings which outweigh this right. We grant the order as to name suppression.

Costs

[30] The s 257 Tribunal costs are awarded against the New Zealand Law Society in the sum of $10,398.00.

DATED at AUCKLAND this 3rd day of October 2016

Judge D F Clarkson
Chair