NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL

[2017] NZLCDT 15

LCDT 024/16

BETWEEN **M**

Appellant

AND **THE NEW ZEALAND LAW SOCIETY**

Respondent

CHAIR

Judge BJ Kendall (retired)

MEMBERS OF TRIBUNAL

Ms A Callinan

Mr G McKenzie

Ms C Rowe

Mr W Smith

HEARING at Specialist Courts and Tribunal Centre, Auckland

DATE 23 May 2017

DATE OF DECISION 13 June 2017

COUNSEL

Dr R Harrison QC for the Appellant

Mr P Collins for the Respondent

RESERVED DECISION OF THE NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL CONCERNING AN APPEAL UNDER SECTION 42 OF THE LAWYERS AND CONVEYANCERS ACT 2006

[1] The appellant has appealed against the decision of the respondent to refuse to issue him with a certificate to practise as a barrister and solicitor on his own account.

[2] The Tribunal heard the appeal on 23 May 2017 and reserved its decision.

[3] The appellant was admitted on 15 March 1985. He was approved to practise on his own account as a barrister and solicitor in 1991. He is now 59 years old.

[4] He was adjudicated bankrupt on his own petition on 8 November 2012. He was discharged from bankruptcy on 8 November 2015.

[5] He was approved to practise as an employed barrister on 10 January 2017.

[6] The appellant applied in February 2016 for a practising certificate permitting him to practise as barrister and solicitor on his own account with a trust account. That application was declined on 8 September 2016 notified to him by letter of that date. The reasons for declining the application were set out in detail as follows:

> "(a) Your bankruptcy was as a result of failing to meet tax obligations at a time when a family trust that you controlled increased its asset base and you showed a lack of insight as to why this would be of concern to the Committee;
>
> (b) The Committee was not persuaded that a combination of modest living requirements and regular payments to IRD would ensure that tax obligations would be met in the future or that it was appropriate to accept your assurances that you would stop practice if it was not profitable;
>
> (c) While it is understandable that you would wish to practice on your own account since you are unable to obtain employment, the Committee needs to be satisfied that such a practice is likely to be viable;

(d) The Committee is not persuaded that your proposed mode of practice is viable and it felt that you have a completely unrealistic view of the challenges you would face getting work, the costs of providing an adequate level of service to clients, and your ability to properly provide to your clients the Client Care required by law;

(e) You do not claim any expertise in general criminal work such that you could reasonably expect to obtain a legal aid contract but are restricting your work to defended drink driving charges in a situation where you have no established source of actual or potential clients and the only information you could provide to establish that there is currently a demand for such defences either in Auckland or in the provinces is that a practitioner advertises such services on the North Shore;

(f) Your client base is proposed to come solely from clients who answer newspaper advertisements, being drink driving defendants who wish to defend the charge on the basis that the prosecution may make a mistake in proving the elements of the charge;

(g) There is an overall lack of privacy in relation to clients' affairs:

i. Your flat which is shared with your son will also be your office;
ii. You will meet clients and discuss their confidential affairs in public places such as cafes;
iii. You intend to use the computer and/or Wi-Fi facilities of public libraries for communications affecting your clients;

(h) Even if you did obtain the 10 clients you budgeted for in your first year, it is likely that no more that 5 would have their cases completed within 12 months bearing in mind a likely average of at least 5 months delay in having judge alone trials meaning that your maximum gross income for the first 12 months would be $22,500 plus GST before expenses;

(i) Using loans from family members to overcome your lack of capital would not change the lack of viability of your business and is likely to result in your incurring debt that you cannot repay;

(j) The Committee is not satisfied that you understand that the requirements of criminal practice have changed significantly in the four years since you practised which relates both to the procedural requirements introduced by the Criminal Procedure Act and the reduction in the number of drink driving charges as a result of the reduction in permissible blood alcohol levels;

(k) You do not propose to own a scanner when one is necessary to be able to scan Case Management Memoranda so they can be emailed to the court and your proposal that the documents be scanned at the public library does not recognise or give effect to clients' right to have such information kept confidential;

(l) You did not persuade any of the four committee members who interviewed you that you have the basic understanding of accounting required to enable you to ascertain whether your business is solvent or profitable at any given time;

(m) The budget you presented did not allow for all the basic costs that you would necessarily incur in running a solicitor's practice with notable omissions being the cost of Continuing Professional Development and the basic library requirements necessary to have access to the latest decisions in order to properly conduct drink driving defences;

(n) The information that you provided about your practice prior to your bankruptcy strongly suggested that the reason you were unable to meet your tax obligations at that time was as a result of a lack of sufficient income being generated from your practice to enable you to make ends meet which should have been obvious to you at the time if you had a basic understanding of the solvency or profitability of your practice."

[7] The essence of the decision was that the appellant was not a fit and proper person to hold a practising certificate (s 41(1)) because he had been absent from legal practise for over 4 years, and lacked resources to practise responsibly on his own account.

[8] Counsel for the respondent in seeking that the appeal be dismissed summarised the respondent's position as follows:

(a) There was a lack of evidence to show that the appellant could sustain an independent legal practice.

(b) There was a lack of evidence to show that the appellant was current in the areas of law in which he intends to practise such that it was in the public interest that he serve a reasonable period of time as an employed barrister before being entitled to practise unsupervised.

(c) There is an unacceptable risk of financial adversity leading to the same position he was in when he was bankrupted in 2012.

[9] The appellant's argument is that there is no question that he does not fit the "character" aspect of the fit and proper person test or that he lacks "skill and competence" when that is considered against the lengthy period when he practised on his own account prior to his bankruptcy.

[10] As a preliminary matter both Counsel have addressed the question of the Tribunal's jurisdiction to hear and determine this appeal. That arises because in its decision in *Mason*[1] the Tribunal, by way of addendum, held that it did not have jurisdiction to hear and determine an appeal against a decision which it held was a refusal to practise on own account as distinct from the refusal of a practising certificate. That decision differed from the earlier decision in *J*[2] where the Tribunal found that the category of practising certificate being applied for was a relevant matter to be taken into account in assessing the appellant's suitability as a fit and proper person.

[11] Counsel for the respondent argued that the effect of *Mason* was to remove the mode of practice from the range of matters the New Zealand Law Society is entitled to take into account and whether the person is fit and proper to practise on his or her own account.

[12] Counsel for the appellant has adopted the submissions of the respondent. He added that s 30 imposes a general prohibition on the commencement of practise on own account unless certain requirements are met. The means by which s 30 is policed is by means of applications for practising certificates under s 39. And, in the event of a refusal, appeal under s 42 to the Tribunal. Such a right makes the Act work as intended.

[13] Dr Harrison further submitted that the Practice Rules plainly contemplate, in Regulation 5, "different kinds of practising certificates", and applications for the same. Regulation 12(5) requires the practitioner on own account to have "satisfied the Law Society that he or she is suitable to practise on his or her own account as a barrister and solicitor or as a barrister sole (as the case may be)". Counsel went on to say that the Regulations do not prescribe or make it mandatory that the Society address this by means of separate application (and decision) to any consideration of the lawyer's application for a practising certificate. Accordingly, it was submitted that the Society when considering an application by a lawyer intending to practise on own

[1] *Mason v New Zealand Law Society* [2015] NZLCDT 11.
[2] *J v New Zealand Law Society* [2012] NZLCDT 27.

account has the power to refuse under s 39. In such event the disappointed applicant has the right to appeal against that decision to the Tribunal under s 42.

[14] Having reconsidered the matter in the light of Counsels' submissions, the Tribunal accepts that it has jurisdiction to hear and determine this appeal.

[15] Dr Harrison emphasised that there has been no challenge to those aspects of the "fit and proper test" being character and skill and competence. He submitted that the fact of the appellant's previous bankruptcy should not be seen as going to "character" as such and that "skill and competency" should be considered in relation to his practise of the law during the lengthy period he was in practice on his own account prior to his bankruptcy.

[16] The respondent has expressed concern about the appellant's lack of currency and recent CPD training.

[17] In answer to that concern, the appellant has deposed that he has studied the Criminal Procedure Act, the Criminal Disclosure Act and the current Client Care Rules and other relevant legislation. He has completed a CPD course in 'Running an Effective Jury Trial Intensive' on 18 March 2017 together with a two hour seminar on Jury Trial matters conducted by a District Court Judge. He has gained approval from the Ministry of Justice as a Legal Aid provider for Criminal PAL1 matters, with a supervision condition.

[18] The appellant has been employed on average three days a week by two barristers whose focus in practice is criminal law. The appellant has assurance that he can continue in that employment while building his own client base. He described his future practice as a barrister and solicitor on his own account as being to "start small".

[19] Dr Harrison correctly points out that the appellant is independently entitled to practise on his own account (if issued with a practising certificate) by reason of the provisions of s 31. The obstacle to his being able to do so at present is the Society's refusal to issue him with a practising certificate.

[20] The respondent has challenged the viability of the appellant's intended practice on own account. Its contention is that the appellant is significantly under resourced to practise responsibly on his own account. It has expressed concern about the following:

(a) The appellant's very low "projected fee intake" of $30,000.00 which after deducting expenses of practice does not indicate a sustainable practice on his own account.

(b) The appellant's reference to "seeing clients in up-market cafes" suggests that the appellant's intended practice would be fragile and improbable. It would lead to the practice lacking credibility and irresponsibility for a lawyer to so hold himself out to the public.

(c) Concern about the appellant's ability to attract work in a competitive field such that he should work as an employed lawyer until regaining his stature in the profession.

(d) Concern about the appellant's family trust thereby reflecting on his ability and lack of judgment and irresponsibility in financial matters. He became bankrupt with taxation and other debts exceeding $0.5m while at the same time managing the affairs of a family trust which had substantial assets, which should count against his status as a fit and proper person to conduct a business and professional practice on his own account.

[21] The appellant's counsel, in response to those concerns, submitted that he should be entitled to "start small" and cautiously proceed to develop a viable and profitable practice there being no other approach for him to take at present. He submitted that the Society had imposed unreasonably high expectations and standards and that this Tribunal should not do likewise.

[22] Dr Harrison criticised the objections of the Society to the appellant's use of third party facilities such as scanners and other aspects such as interview facilities

as falling outside the traditional law firm/barrister's chambers models as approaching legal snobbery. He argued that so long as the appellant is able to comply with his professional practice obligations and in that sense is able to manifest "skill and competence" in the practice of the law, that should suffice to entitle him to a practising certificate. The appellant's ability to attract sufficient work to make full time legal practice viable is not relevant to the question whether he satisfies the statutory test.

[23] As to the appellant's bankruptcy, the appellant does not dispute that it is a relevant consideration to the fit and proper person test. It is argued on his behalf that its relevance is now extremely limited for the following reasons:

(a) He now has a discharge from his bankruptcy.

(b) His bankruptcy came about because of unpaid income tax debt which ballooned because of IRD-imposed interest and penalties alongside difficult personal health and family circumstances.

(c) He is entitled to rely on his discharge from bankruptcy as constituting a "clean slate", in "character" and purely financial terms.

(d) He has now, by necessity arising out of unemployment for an extended time, acquired considerable budgeting skills and is motivated to avoid a repeat of insolvency.

[24] As to the Family Trusts, Dr Harrison was critical of the Society's statement, maintained on appeal, that the appellant showed lack of judgment and irresponsibility by managing the trust while he was hopelessly insolvent such as to count against his status as a fit and proper person to conduct a practice on his own account.

[25] The appellant was the settlor of the trusts and was not a beneficiary. Dr Harrison asserted that the appellant was not at liberty to make use of the trusts to discharge his personal debts. He was not under any moral or professional obligation

to do so. The existence of the trusts was made known to the Official Assignee who accepted the appellant's explanation and did not attempt to seek recovery from the assets of the trusts. Dr Harrison submitted that there should be no criticism of the appellant in relation to management of the assets held by the trusts on moral or any other grounds.

[26] The Tribunal agrees.

[27] As a final matter, the appellant has engaged the help of a senior lawyer to provide him with mentoring and supervision of his billing. He also has the support of an experienced businessman engaged in the business of assisting clients develop their business. He will offer the appellant mentoring and back office support.

[28] In reaching a decision on this appeal the Tribunal has taken into account the following:

(a) The experience that the appellant has earlier had as a practitioner on his own account without any previous history of disciplinary matters.

(b) That by virtue of s 31 he is entitled to practise on his own account subject to obtaining a practising certificate.

(c) He is a fit and proper person in terms of character and skill and competence.

(d) He has a practising certificate as an employed barrister.

(e) He has taken steps to make himself up to date with areas of law in which he is interested.

(f) He has approval as a Legal Aid provider in a supervised role.

(g) He has had recent employment with practising barristers.

(h) That issues around his bankruptcy and management of trusts are now not a bar to a finding that he is a fit and proper person.

[29] The Tribunal confirms that it has approached this appeal on a *de novo* basis as required by s 42(2)(a). We refer to the Tribunal's statement in *SNH v New Zealand Law Society*[3]:

> "…it is the Tribunal's duty in such cases to reach its own independent findings and decision on the evidence which it hears or admits, and while entitled to give such weight as it considers appropriate to the opinion of the [Respondent Law Society] it is in no way bound thereby. In brief, in a s.42 appeal, the Tribunal does not see that there is any presumption in favour of the decision under appeal. It considers that the Tribunal has to approach the matter afresh."

[30] Accordingly we allow the appeal.

DATED at AUCKLAND this 13th day of June 2017

BJ Kendall
Chairperson

[3] *SNH v New Zealand Law Society* [2009] NZLCDT 2 at [27].