NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL

[2019] NZLCDT 39
LCDT 018/19

IN THE MATTER	of the Lawyers and Conveyancers Act 2006
BETWEEN	**NATIONAL STANDARDS COMMITTEE 1** Applicant
AND	**RICHARD ANDREW PETERS** Practitioner

CHAIR
Judge D F Clarkson

MEMBERS OF TRIBUNAL
Mr S Hunter QC
Ms G Phipps
Dr D Tulloch
Ms P Walker

DATE OF HEARING 4 December 2019

HELD AT Tribunals, Wellington

DATE OF DECISION 20 December 2019

COUNSEL
Mr H van Schreven for the National Standards Committee
Mr C Ruane for the Practitioner

REASONS FOR DECISION OF 4 DECEMBER 2019
AND RULING ON INTERIM SUPPRESSION ORDERS

Introduction

[1] Mr Peters faced one charge, framed with two alternative levels of culpability – misconduct or unsatisfactory conduct.

[2] The charge concerned statements made by him which were said to have breached the relationship of confidence and trust reposed in him by the lawyer-client relationship.

[3] Most of the particulars in support of the charge were accepted by Mr Peters, who acknowledged his error, but submitted that it should be assessed at the level of unsatisfactory conduct, not misconduct.

[4] Because the client concerned was still to come to trial, information about this hearing, including the practitioner's name, was suppressed, and the hearing was conducted in private. Ongoing suppression was the subject of submissions at the hearing.

[5] At the conclusion of the hearing, the Tribunal held that the conduct was at the level of misconduct, with reasons reserved for that finding. The issue of publication was also reserved.

[6] This decision provides those reasons and determines further interim suppression of the particulars of this charge.

Issues

1. Did Mr Peters wilfully or recklessly contravene any of the Rules,[1] or provisions of the Act,[2] pleaded in the charge?[3]

[1] Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008.
[2] Lawyers and Conveyancers Act 2006 (Act).
[3] The charge is attached as Schedule 1.

2. If not, was his conduct unsatisfactory as defined by s 12 of the Act?

> **12 Unsatisfactory conduct defined in relation to lawyers and incorporated law firms**
> In this Act, **unsatisfactory conduct**, in relation to a lawyer or an incorporated law firm, means—
> (a) conduct of the lawyer or incorporated law firm that occurs at a time when he or she or it is providing regulated services and is conduct that falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent lawyer; or
> (b) conduct of the lawyer or incorporated law firm that occurs at a time when he or she or it is providing regulated services and is conduct that would be regarded by lawyers of good standing as being unacceptable, including—
> (i) conduct unbecoming a lawyer or an incorporated law firm; or
> (ii) unprofessional conduct; or
> (c) conduct consisting of a contravention of this Act, or of any regulations or practice rules made under this Act that apply to the lawyer or incorporated law firm, or of any other Act relating to the provision of regulated services (not being a contravention that amounts to misconduct under section 7); or
> (d) (Not applicable)

3. Should the interim suppression order sought under s 240 of the Act be a blanket one, or should the decision be released to the client and to the Crown solicitor conducting his case?

Background Summary

[7] On the evening of 15 March 2019 Mr Peters was requested to speak by telephone (under the Police Detention Legal Assistance Scheme) to the suspect who had been arrested for the Christchurch Mosque shootings which had taken place earlier that day.

[8] Mr Peters spoke with the man that evening for a relatively brief period.

[9] The next morning Mr Peters was also the duty solicitor who appeared for the same accused at his first Court appearance on the Saturday morning, in the Christchurch District Court.

[10] Given the intense media interest in the matter and given that the Court was open only to the media, the Judge met with all counsel and representatives of the media, in advance, in connection with the various applications which had been made

by the media to film or otherwise cover the proceedings. The Judge was particularly careful to explain the role of the media "as the eyes and ears of the public".[4]

[11] His Honour referred to 11 media applications having been made, and set out the principles to be considered in respect of those applications, prefacing his remarks with the comment that:

> "I have reasonably wide powers to protect the integrity of the trial process and the rule of law."[5]

[12] In granting the applications to film and take photographs (albeit in pixilated form) of the defendant, His Honour noted that the coverage was to be provided on a "pool basis to others who seek it". In other words, it was contemplated that those who were within the Courtroom and able to directly report would make their material available more widely.

[13] Later His Honour commented:

> "I think it's important to note also that reporting that's not fair, accurate and balanced and that contains matters published out of context or beyond the purvey (sic) of what takes place here can risk imperilling the trial itself. This is an important point to bear in mind."[6]

[14] Mr Peters had seen the accused for approximately a further five minutes before appearing for him in Court and informing the Judge that he appeared as the duty lawyer. He informed the Court that there was no application for bail or name suppression to be made. He then sought a remand date for a callover in the High Court at the next available date.

[15] Mr Peters' role for the accused was always in the role of duty lawyer and was by its nature a relatively brief contact. Mr Peters ceased representing the accused when his role as duty lawyer concluded that morning in the Christchurch Court.

[16] Notwithstanding the brevity of the contact, Mr Peter accepts, as he must, that the Client Care and Conduct Rules apply to him as fully as had he been privately briefed and in a relationship of a much longer standing nature.

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[4] *Police v Tarrant* 16 March 2019, CRI-2019-009-002468, rulings of Judge P R Kellar at page 2.
[5] Above n 4 at page 2.
[6] Above n 4 at page 4.

[17] Mr Peters has described the "highly charged environment"[7] in the Court that morning with a very large number of members of the media present.

[18] Mr Peters is an experienced duty lawyer, having undertaken that role for almost 40 years, but it is accepted that this was a highly unusual and possibly overwhelming situation.

[19] After the Court adjourned, Mr Peters was approached at the back of the Court by a reporter from the Otago Daily Times (ODT). He accepts that he made comments as later reported on 20 March in the ODT. The only inaccuracy was that he was attributed as having said that the accused "… had not displayed any condolences or regret". Mr Peters confirmed that he had been asked about that but attempted to skirt the question by simply stating "our discussion didn't touch on that", so did not use the words attributed to him.

[20] Mr Peters acknowledges that at no time did he seek or have his client's instructions to speak to the media about any matter.

[21] Over the weekend and on Monday Mr Peters received numerous phone calls, he estimates at least 30, from the news media, seeking interviews with him, each of which he declined.

[22] On Monday evening he was at home sometime between 6.00 and 7.00 pm, in his kitchen, when he was contacted by a journalist from Radio New Zealand. For reasons which he cannot really explain now, he agreed to that interview, a transcript of which has been provided to the Tribunal, and that interview was aired on the following morning, on Morning Report 19 March 2019.

[23] Because it is relevant to the level of culpability, we record the number of comments below which Mr Peters accepts he made in the ODT interview together with the interview with Radio New Zealand on Monday 18 March 2019.

[24] The list is reproduced from the affidavit of Matthew Fogarty, Legal Standards Solicitor, as follows:

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[7] Affidavit of Richard Peters dated 22 November 2019

(a) "*He seems quite clear, lucid, seemed to be aware of what was going on. I explained the procedure to him and, you know, what would happen as far as that was concerned, and discussed with him issues of bail and name suppression, none of which he wanted to apply for. I'm not trained in psychiatry or psychology but it seemed to me that he was aware of things and, probably okay to give someone instructions if he decided to at any stage to instruct a lawyer, which he could do later on if he wanted to*."

(b) "*Your job is simply to get things moving, and say, discuss the issues of bail or name suppression, whether they want to apply for legal aid, and of course those are the main things that a duty lawyer would look at, and all three cases here he was not minded to make any applications*."

(c) "*I left Court feeling that way, thinking that here is someone who presents as quite normal, if I can use that word, but someone who presents as an everyday sort of person, yet, the allegation, usually for someone to be charged for something like that you would expect to see someone who is not functioning well – mentally. Whereas, he was. Which makes you think well gosh you know, anybody could do this then.*"

(d) "*What did seem apparent to me is he seemed quite clear and lucid, whereas this may seem like very irrational behaviour*."

(e) "*He didn't appear to me to be facing any challenges or mental impairment, other than holding fairly extreme views*."

(f) "*Our discussion didn't touch on that" [whether the accused had displayed any condolences or regret]*.

(g) "*I suspect that he won't shy away from publicity, and that will probably be the way he runs the trial. The job of the Trial Judge will be to deal with that*."

(h) "*But it's not a place for any views to be put forward, it's simply there to determine innocence or guilt. The Court is not going to be very sympathetic to him if he wants to use the trial to express his own views*."

(i) "*It's not an everyday event… it's difficult in this case to take a dispassionate view, but you've got to put that to one side and say, 'right, let's simply process things'.*"

(j) "*My job was simply to appear in Court and advise him of his rights and procedure*."

(k) "*I presume the basis for that [that the accused apparently wishes to represent himself] is that he thinks the job will be done better himself. That's my guess*."

(l) "*After the alleged gunman's first appearance in the District Court, Duty Lawyer Richard Peters told the Herald the accused 'seemed quite clear and lucid'*."

(m) "*He didn't appear to me to be facing any challenges or mental impairment, other than holding fairly extreme views Peter [sic] said, having briefly met and represented him*."

(n) "*The suspended gunman in New Zealand's Mosque attacks is lucid and understands the situation, according to the lawyer assigned to handle this case*."

(o) "*Tarrant declined to be represented by a lawyer, but the Court appointed Duty Lawyer, Richard Peters, to handle the case.*"

"*'He was lucid' Peters told Network Channel 9*."

"*'He seemed to appreciate what he was facing and why he was there', he said*."

(p) "*Peters said he had to put aside his personal shock and sadness and to do his job. 'Quite shocked and sad by what has happened, but in dealing with this fellow, I had to put that to one side and just deal with what's before me', he said*."

[25] It is accepted that although the above quotes refer to Mr Peters having "told the Herald" and "told Network Channel 9", that Mr Peters only had the two contacts with the media set out above, namely with the ODT, and with the Radio New Zealand journalist. The attributions from the other media outlets have occurred by reason of the sharing of news information rather than through direct contact with the practitioner, but the result was more extensive publicity of the comments.

Relevant Legislation

[26] Rule 8 and 8.1 of the Rules states:[8]

"8. A lawyer has a duty to protect and hold in strict confidence all information concerning a client, the retainer, and the client's business and affairs acquired in the course of the professional relationship.

8.1 A lawyer's duty of confidence commences from the time a person makes a disclosure to the lawyer in relation to a proposed retainer (whether or not the retainer eventuates).

The duty of confidence continues indefinitely after the person concerned has ceased to be the lawyer's client."

[27] Section 4 of the Act provides:

"**4 Fundamental obligations of lawyers**

[8] Above n 1.

> Every lawyer who provides regulated services must, in the course of his or her practice, comply with the fundamental obligations:
>
> (a) the obligation to uphold the rule of law and facilitate the administration of justice in New Zealand:
>
> (b) the obligation to be independent in providing regulated services to his or her clients:
>
> (c) the obligation to act in accordance with all fiduciary duties and duties of care owed by lawyers to their clients:
>
> (d) the obligation to protect, subject to his or her overriding duties as an officer of the High Court and to his or her duties under any enactment, the interests of his or her clients."

Discussion

[28] Although Mr Peters only gave two interviews to the media concerning this client, he now recognises that was two interviews too many. However, he initially did not consider that he had infringed the above Rules.

[29] Mr Peters' initial view was that since the Court was open to the news media, although the appearance was "remarkably brief",[9] he considered that the ability to make observations of his client was open to the media and therefore the public at large. He says that he did not pass on the contents of any discussion with the accused, merely made some observations, and qualified them by stating his limitations as a layman.

[30] Mr Peters has pointed out that since the Court has gone on to direct that a psychiatric report be undertaken in respect of the accused, his comments, as a non-expert in the field, could hardly impinge on the fair trial rights of the accused.

[31] We do not propose to make any comment on how a trial Court might determine the situation, we simply note that the fact that there was a risk posed in any way, by the practitioner's comments, is the concern. And this is the reason for the rules of confidentiality set out above, together with the fundamental obligations imposed on all lawyers by s 4.

[32] It is a primary obligation of a lawyer to advance his or her client's interests, and it should have felt wrong to the practitioner to have been making observations (some of which could be perceived as negative) about his client.

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[9] Submissions of practitioner to National Standards Committee 1 dated 3 May 2019, page 1.

[33] We do not accept that the practitioner's impressions were already in the public domain. No matter how insignificant his comments might be in the broader picture of the matter, the fact is that Mr Peters breached his duty of confidence to his client by speaking about the matter at all, without his client's express instructions.

[34] In doing so he may have damaged the confidence of clients in lawyers generally and therefore has put at risk the reputation of the profession in the eyes of the public. The public is entitled to have confidence in lawyers and the legal process generally, and we reiterate that it is the need for this confidence and for the respect for the rule of law generally, which underlies the fundamental obligations set out above.

[35] While we could accept that the Courtroom situation following which Mr Peters made some brief comments to a reporter, might have been an overwhelming situation for any practitioner, having regard to the nationwide sense of horror at the events which had preceded the arrest. But that is not the case with the interview given to Radio New Zealand.

[36] The practitioner was caught somewhat "on the hop" in his home after hours, but this was some three days after the Court appearance and was not a situation where the practitioner was, for example, mobbed leaving Court and then made some unwise comments.

[37] The District Court Judge presiding had taken great care to create an environment in Court and in the reporting of proceedings which kept the correct balance between openness in reporting and of the proceedings, and the obligation to ensure a fair trial to the accused.

[38] It is most unfortunate that Mr Peters was not sufficiently alert to the words of His Honour which we have quoted at paragraph [13].

[39] In terms of level of culpability, we consider that this error in judgement is more in the nature of a "reckless disregard" of the Rules, and accordingly misconduct, rather than a simple breach or lapse of professionalism.

[40] Had there been simply the one interview following Court, we may have found at the lower level. However, the later interview with Radio New Zealand, albeit brief and unprepared, takes the matter to the next level in our view.

Decision

[41] The answer to Issue 1 is that we do not consider that the practitioner **intentionally** breached his obligations to his client and therefore do not hold that this was a wilful breach. However, his failure to consider his obligations before speaking to the media on two occasions does, we consider constitute a reckless breach and therefore the answer to the question posed is "Yes".

[42] We do not consider the alleged breaches of rr 10 or 2 take the matter any further, having found a breach of the fundamental obligations in s 4, r 2 simply reiterates these obligations.

[43] We do not consider that r 10 has been breached. The reckless breach found by the Tribunal concerns r 8, 8.1 and s 4 of the Act.

Issue 2

[44] Since we have found the practitioner liable at the higher level this issue does not require an answer. However, if we are wrong in our assessment of a reckless breach having occurred, we note that the practitioner has accepted that he is guilty of at least unsatisfactory conduct and thus this question would be answered affirmatively.

Issue 3 – Continuation of Interim Suppression Order

[45] We accept the submission of both counsel that wider publication ought not to occur until the trial is concluded and all appeal rights exhausted. When there is an adverse finding about a practitioner's conduct involving the media the Tribunal should be careful to protect against its decision repeating the conduct until the matters of concern are concluded.

[46] The more vexing issue is whether there should be publication to the client and therefore the Crown.

[47] With force, counsel for the Committee and practitioner submitted that there was no benefit that would flow from providing a copy of this decision to the Crown or client and, no risk to the conduct of a fair trial if the decision was not published at time of issue. The conduct of the practitioner was played out in a public arena and is well known.

[48] The client in this instance was not the complainant in respect of professional conduct matters. The complaint originated from a member of the public.

[49] It would be usual for the affected or potentially affected client to have access to the Tribunal's decision, and we consider that it would be improper for this Tribunal to restrict access to the decision, whether it is relevant or not, to that client.

[50] The decision will be published in full once the trial matters are complete. That being the case, the Tribunal considers, from an abundance of caution and in the interests of transparency it would also be proper to provide a copy to the Crown Solicitor who is responsible for prosecuting the client at this time.

[51] For these reasons we direct that counsel for the National Standards Committee is to provide a copy to counsel for the accused in question and to the Crown Solicitor conducting the proceedings against him.

[52] In the meantime, all details concerning this matter will be suppressed, pursuant to s 240 of the Act, for the period referred to above, namely until the trial has been concluded and appeal rights exhausted.

Directions

[53] The Standards Committee are to file submissions on penalty within 10 working days of the date of this decision. Mr Peters may have a further 10 working days to file submissions on penalty.

DATED at AUCKLAND this 20th day of December 2019

Judge D F Clarkson
Chair

Schedule 1

Charge

The National Standards Committee 1 of the New Zealand Law Society (**Standards Committee**) charges **RICHARD ANDREW PETERS** of Christchurch, Barrister and Solicitor (**Practitioner**) with:

1. Misconduct, in that he wilfully or recklessly contravened:

   Rules 2, 8, 8.1, 10 and 13 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (**Rules**): Sections 4 and 241(a) of the Lawyers and Conveyancers Act 2006 (**Act**).

   OR ALTERNATIVELY

2. Unsatisfactory conduct that is not so gross, wilful or reckless as to amount to misconduct for the same contraventions: Section 241(b) of the Act.

THE FACTS AND MATTERS RELIED UPON AND THE PARTICULARS OF THE CHARGE ARE AS FOLLOWS:

1. The Practitioner is a barrister and solicitor of the High Court of New Zealand. He practices in Christchurch with the firm Alpers & Co–Northwest Law Office.

2. At a time when the Practitioner was providing regulated services, namely representing an accused person as Duty Solicitor, the Practitioner, and following the hearing at which the accused person appeared, made various public statements.

3. In making those statements, the Practitioner has disclosed his former client's confidential information.

4. The reports relied upon by the Standards Committee comprise:

   (a) An article dated 18 March 2019 in the Otago Daily Times under the heading "Accused gunman will represent himself";

   (b) Radio New Zealand "Morning Report" interview, and which was aired on 19 March 2019;

   (c) A New Zealand Herald article dated 5 April 2019 under the heading "Christchurch Mosque shootings: taxpayer foots bill for accused gunman's lawyers"; and

(d) An InfoSurHoy article dated 2 April 2019 under the heading "Lawyer suspected NZ Mosque gunman 'lucid'".

5. On 19 March 2019, the New Zealand Law Society received an email from a member of the public concerned about the statements attributed to the Practitioner.

6. On 20 March 2019, the Standards Committee, having commenced an own-motion investigation, wrote to the Practitioner seeking a written response from him and noting the Standards Committee's concern that the public statements attributed to the Practitioner could possibly affect the accused's right to a fair trial. A response was sought by 27 March 2019.

7. The Practitioner replied by letter dated 27 March 2019.

8. The Standards Committee determined it would conduct a hearing on the papers, and on 9 April 2019 wrote to both the Practitioner and his firm's principal, enclosing a formal notice of hearing. Submissions were to be filed by 3 May 2019.

9. The Practitioner filed submissions by email on 3 May 2019.

10. A hearing on the papers was conducted on 14 May 2019, and a determination made that the matter should be considered by the New Zealand Lawyers and Conveyancers Disciplinary Tribunal. Formal advice of that determination was sent to the Practitioner and the firm's principal on that same day.