

**NEW ZEALAND LAWYERS AND
CONVEYANCERS DISCIPLINARY TRIBUNAL**

[2018] NZLCDT 33

LCDT 006/16

IN THE MATTER OF The Lawyers and Conveyancers
Act 2006

BETWEEN **SUSAN BARBARA LEWIS**
Appellant

AND **NEW ZEALAND LAW SOCIETY**
Respondent

CHAIR

Judge D F Clarkson

MEMBERS

Mr M Gough

Dr I McAndrew

Mr S Maling

Mr S Walker

DATE OF HEARING 28 June 2018

HELD AT Christchurch District Court

DATE OF DECISION 4 October 2018

COUNSEL

Mr A McKenzie for the Appellant

Mr H van Schreven for the Respondent

**RESERVED DECISION OF THE TRIBUNAL ON APPEAL
AGAINST REFUSAL TO ISSUE A PRACTISING CERTIFICATE**

Introduction

[1] This is an appeal against the refusal by the New Zealand Law Society to renew the practising certificate of Susan Lewis, following a period of her suspension from practice. Ms Lewis challenged the basis of the refusal and was critical of the approach taken by her professional body, which she considered to be unsupportive and discriminatory.

[2] Relevant to the decision, which is considered afresh, are the previous disciplinary findings against Ms Lewis, and the degree of insight she has developed into her conduct which led to those findings. In the course of the proceedings, more recent findings of unsatisfactory conduct against Ms Lewis were brought to the Tribunal's attention. These had not been addressed by Ms Lewis in her primary evidence or submissions, and the implications of that omission must also be weighed in the balance.

Process on Appeal

[3] The appeal was brought pursuant to s 42 of the Act and subs (2)(a) provides that it "*must be by way of rehearing*". We refer to our decision in *SNH v New Zealand Law Society*,¹ where we held:

"... 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."

[4] In order to grant a practising certificate, the appellant must satisfy the Tribunal that she is a "*fit and proper person*" to hold a practising certificate.

¹ *SNH v New Zealand Law Society* [2009] NZLCDT 2 at [27].

Issues to be Determined

1. What concerns about Ms Lewis' competence and general conduct can be discerned from the previous findings?
2. Does Ms Lewis have insight into her previous failings?
3. What steps has she taken to address these failings?
4. What risks are posed to the public and to the profession by Ms Lewis' proposal to practice in Family Law area?
5. What positive qualities and safeguards does Ms Lewis offer?
6. Is she a fit and proper person to be issued a practising certificate?

Background

[5] Ms Lewis applied for a practising certificate on 27 November 2015, following a six-month suspension from practice which had ended the previous day. She indicated that her intention was to operate as a sole practitioner, in the area of Family Law.

[6] After a period of correspondence between the appellant and the society during which various questions were asked of Ms Lewis, and responses made by her, the Practice Approval Committee of the New Zealand Law Society declined to issue a practising certificate to Ms Lewis, in a decision dated 16 February 2016. This decision was conveyed to Ms Lewis on 22 February 2016 with the following explanation:

“The Committee’s role is not to punish, but rather to consider a person’s fitness to practise going forward. The essential quality of a fit and proper person is that the person can confidently be expected to discharge his or her duties to the Courts and to clients and that he or she may be accredited to the public. This is a higher standard where the person intends to practise on own account without supervision.

The Committee considered the changes you had made to the way you practise (by making records of telephone conversations and verifying arrangements by email) and the letter from Mr Coumbe that he is willing to assist you when he can, but it did not consider this was enough to allay the Committee’s concerns as outlined in my letter of 26 January 2016, or to ensure public protection.

The Committee was not currently satisfied that you met the required standard of a fit and proper person for the following reasons –

- You had demonstrated a lack of competence to such a degree that it had twice resulted in suspension, and had had serious consequences for your clients;
- Your lack of understanding and insight regarding the competency issues; and
- You had no appreciation of the need to change, or how to change your practice to address these issues.”

Disciplinary History

1. In 2004 Ms Lewis pleaded guilty to three charges of misconduct which directly related to professional competence on three files. While it would seem, with hindsight, that Ms Lewis was disadvantaged by her employment situation, and that her employer’s involvement in one of the charges was the subject of comment by the Tribunal,² it is clear that Ms Lewis also took personal responsibility.

At the time, she was able to point to one of the areas of her acknowledged weaknesses, which was becoming too involved with clients. This concern persisted over some years.

Ms Lewis presented significant mitigating personal circumstances, which were taken into account and the outcome was she was censured, fined and an order made restricting the areas in which she could practice.

2. In 2008 Ms Lewis admitted a charge of incompetence in her professional capacity of such a degree as to reflect on her fitness to practise. This charge related to her advice on an adoption matter and resulted in a three-year suspension from 12 February 2008.

That matter resulted in considerable distress and damage to her client, and Ms Lewis acknowledges that she felt guilty and remorseful and thus entered a guilty plea and voluntarily withdrew from practice. She told the Tribunal that she now considered she had been poorly advised.

² Ms Lewis was at the time employed by Mr Therese Sisson who has subsequently been struck off the Roll for her own professional misconduct, see *Standards Committee (2) of the Canterbury Branch of the New Zealand Law Society Complaint Service v Sisson* [2011] NZLCDT 35 (upheld on appeal).

On 12 May 2015, the Tribunal found Ms Lewis guilty of unsatisfactory conduct in relation to a Family Court matter, where the Court had been misled. Although it found that this had been unintentional on Ms Lewis' part, the Tribunal imposed a further six months suspension (unusual on a finding of unsatisfactory conduct) and emphasised that it did so because the conduct was seen as:³

“... Not dissimilar to the conduct referred to in the earlier disciplinary matters involving her and notably in Family Law. It arises from her becoming too closely aligned with the interests of her client(s), and responding to client demands impulsively especially in situations of perceived emergency.”

The Tribunal then concluded that:⁴

“... The respondent has yet to learn from past errors and mistakes such that a period of suspension from practice is the appropriate penalty that must be imposed.”

3. Finally, there is a further determination of unsatisfactory conduct dated 14 January 2016. This finding arose from complaints filed about six individual matters, in respect of which the Standards Committee found four to be proven. It commented that individually each “*fell short of the standard required, it also considered that collectively the above matters fall short of the standard expected of a reasonably competent lawyer.*”

[7] The Standards Committee went on to point out that the complaints were significant because they not only impacted on:

“... Ms Lewis' dealings with fellow practitioners but, in the case of delays with the filing of evidence, it has the potential to significantly impact the level of service provided to her clients.”

[8] The Committee was not impressed with Ms Lewis' assertion to it that:

“Examples of almost identical behaviour of practitioners are not unique to the writer. They are all simply incidents which occur from time to time.”

The Standards Committee considered that that showed a:

“Distinct lack of understanding of the standards required of our profession.”

³ *Canterbury Westland Standards Committee 3 of the New Zealand Law Society* [2015] NZLCDT 18 at [38].

⁴ *Ibid* at [39].

[9] The findings resulted in a modest costs order and a direction that, *“should she hold a current practising certificate, seek advice in relation to the management of her practice and undergo practical training on file management, Family Court procedure and her duties and responsibilities as counsel and officer of the court ...”*.

[10] It is necessary to briefly refer to the specifics of these complaints particularly because of Ms Lewis’ failure to refer the decision to the Tribunal in her appeal documents of February 2016, the month after it had been received by her.

[11] The six matters referred to the Standards Committee all arose from a single complainant, who was a fellow practitioner, but related to six different cases, which seem to have taken place in and around 2015. Of those upheld by the Standards Committee the first related to failures to serve documents and late filing of affidavits as well as forwarding witnesses emails which should have been restricted to counsel and the parties. The defaults were the subject of adverse comment by the Family Court Judge concerned.

[12] Within that complaint was also an allegation that Ms Lewis had given “the finger” to her fellow practitioner and her client. Ms Lewis’ denials were not persuasive to the Committee, which expressed itself unclear as to why Ms Lewis would have a “vague recollection” of an “incident” and the Committee found that she had failed to treat a colleague with integrity, respect and courtesy, in breach of Rule 12. Breaches of Rules 10, 11, 12 and 13.2.1 were found to have occurred.

[13] The next matter which was upheld related, again, to late filing of affidavits but also with somewhat bizarre behaviour, in that Ms Lewis was said to have shouted “shut up, shut up” while her own client was giving evidence. This led to an intervention by the Judge. Ms Lewis was again found to be in breach of Rules 12 and 13.2.1.

[14] The next matter related to filing an affidavit without leave, which by itself may well have been a matter which could have been excused, however Ms Lewis advanced no mitigating circumstances and given the other conduct, the Standards Committee again found a breach of Rules 3, 10 and 11.

[15] The final matter which was found to have been established, was a failure to attend a Judge led mediation at which the client had attended and had expected

Ms Lewis to appear. Ms Lewis' response that she had not been notified of the mediation was not found by the Standards Committee to fit well with the fact that her client appeared, presumably having been notified of the date by Ms Lewis. A breach of s 12 of the Act, namely unsatisfactory conduct by conduct falling short of the standard of competence and diligence expected from a reasonably competent lawyer was found.

[16] When this latest set of findings against her was raised with Ms Lewis she referred to them largely as minor matters of gossip and hearsay. She also referred to them as "petty" complaints. This does not accord with the careful and proper analysis carried out by the Standards Committee.

[17] It is notable that in her affidavit and submissions Ms Lewis sought to impugn all of the previous disciplinary findings against her.

Issue 1 – Previous Concerns

[18] It is clear from reading the decisions in the previous four sets of disciplinary proceedings brought against Ms Lewis, that there have been wide ranging concerns relating to her competence. These include legal knowledge in specific areas (leading to the restriction in her areas of practice that was imposed). Further concerns relate to her lack of perspective and distance from clients and thus her proven tendency to fail to assess matters objectively in a thoughtful and mature way.

[19] There are certainly concerns, particularly exposed by the more recent complaints, about her dealings with other practitioners and with her somewhat casual attitude to dealings with the Court.

[20] Inability to manage her conduct and behaviour at times, by giving "the finger" and shouting at a client who was giving evidence to "shut up" are not minor or "petty" niggles.

[21] Unmodified and unchecked these sorts of concerns could pose considerable risks for clients and the profession alike.

Issue 2 – Insight

[22] Discussing the assessment of “fit and proper”, the High Court in *Leary*⁵ affirmed that making such a value judgment involves “... *drawing on evidence of an applicant’s past actions*” and assessing insight about them:

“That exercise, too, necessarily requires an inquiry into the actions which led to the striking-off, which, in its turn, involves acceptance by an applicant that those actions occurred and that they transgressed the legal and ethical standards of the profession. Without recognition that the actions breached applicable standards and the consequences of that breach – particularly to the public, the courts and to all other practitioners – it would be difficult for the Tribunal to conclude the same actions would not be repeated should similar circumstances arise in the future.”⁶

[23] There are a number of statements which have been made by Ms Lewis that give the Tribunal cause to be concerned about her lack of insight. For example, referring to the Law Society’s concerns, (in correspondence with them), as “irrational” because she has never “repeated” any “historical concerns” would appear to be quite lacking in insight, having regard to her pattern of behaviour as found by the various Tribunals and as illustrated by the most recent findings of the Standards Committee in 2016.

[24] Furthermore, in her written evidence and submissions, she sought to relitigate the hearings which had led to her sanctions including supervision, despite having pleaded guilty to the charges at the time. In her submission, she expressed the belief that from the time she returned to work following her serious head injury, she had:

“... Been the focus of ongoing unjustified critical assessment from the Canterbury-Westland Area of the New Zealand Law Society. She is of the opinion that similar errors or wrong practice of other practitioners receives a lower level of criticism and penalty...”.

[25] Ms Lewis challenged the thoroughness of the Law Society investigations of the historical complaints, seemingly unaware of the inappropriateness of such a submission at this point.

[26] Ms Lewis stated repeatedly that she had been wrongly held responsible for her client’s action. It was only at the actual hearing before us that she accepted personal

⁵ *Leary v New Zealand Law Practitioners Disciplinary Tribunal* [2008] NZAR 57 at [43].

⁶ *Ibid* at [44].

responsibility. Indeed there was some glimmer of insight in her evidence to the Tribunal, which was not only very late, but at odds with her written presentations.

[27] In summary, her portrayal of the errors which led to her three-year suspension displayed gross minimisation of her failings.

[28] In her submission Ms Lewis records her cooperation with disciplinary processes but goes on to state:

“... There is no lack of insight, no differing value system nor any behavioural issues”.

[29] We consider Ms Lewis has been so distressed by her battle with the Law Society that her ability to stand back and objectively assess her past conduct has been significantly impaired.

Failure to Disclose

[30] Putting the best possible interpretation of it, that lack of objectivity is best demonstrated by Ms Lewis’ failure to refer to the findings against her in the January 2016 Standards Committee decision. It was omitted from her February 2016 appeal and the affidavit which she swore in March 2016.

[31] Ms Lewis’ submissions to the Tribunal prepared only a few weeks before the hearing in June 2018, did her no credit. As well as the criticisms of the New Zealand Law Society and attempts to relitigate, they were discursive, unfocussed and repetitive.

[32] In referring to the unsuccessful prosecution⁷ of her, Ms Lewis characterised the decision to prosecute as resulting in a view (presumably hers) “... *that the profession as an entity, is dishonourable and untrustworthy*”.

[33] Later, she accused the Society of having an ulterior purpose in the (M complainant) prosecution and the current assessment which demonstrated their “*unacknowledged bias against female practitioners but (sic) against a female practitioner who had a head injury*”.

⁷ *Canterbury-Westland Standards Committee 3 of the New Zealand Law Society v Lewis* [2017] NZLCDT 23.

[34] Mr McKenzie, who kindly stepped in late in the proceedings to represent Ms Lewis, distanced himself from his client's submission. He attempted to adopt a more future oriented focus, to look at what safeguards could be put in place to prevent future transgressions, or risks to clients.

[35] Unfortunately, without close supervision, if a practitioner has no understanding of where she has gone wrong previously, she is unlikely to know when to ask for help and thus we declined Mr McKenzie's offer, after further consideration, to set out a detailed set of undertakings and a supervision arrangement.

[36] The answer to Issue 2 must be "no". Following an independent inquiry and examination of the evidence we have reached the same point as the Practice Approval Committee in respect of Ms Lewis' lack of insight.

Issue 3 – Steps Taken to Address Failings

[37] We note that Ms Lewis has taken some very positive steps, despite our concerns about her lack of insight. She has undertaken professional development through a tertiary level course on business management and development. She has also taken university papers in counselling and courtroom advocacy.

[38] We record that Ms Lewis is receiving ongoing counselling herself to address issues that would better manage her stress and in particular, issues such as proper boundaries and distance from clients.

[39] All of these efforts are commendable, but with ongoing denial and minimisation of past conduct they cannot in themselves ensure an improved standard of conduct.

Issue 4 – Future Risks to Clients and Professional Standards

[40] Ms Lewis proposes to practice in the Family Law area. While we acknowledge that she does have considerable experience in this area of practice, and while we acknowledge that she has proposed that she have considerable mentoring and file supervision, there are aspects of Family Law which make for greater risks to the public:

- (a) Applications are often required to be sought on an urgent basis. This makes cross checks and consultation with mentors much more difficult.
- (b) The recent findings in 2016, as well as the older ones, demonstrate (as Ms Lewis acknowledges) difficulty she has in over involvement or identification with clients. This has led to friction in dealing with other lawyers and has led to departures from proper process in the past.⁸ At one stage in evidence, Ms Lewis said that if the parties agreed, she did not need to consult with lawyer for the child, which was quite wrong.
- (c) There is the suggestion, which she made to the Standards Committee, that standards in the Family and Criminal jurisdictions were somewhat lower – which is plainly incorrect.
- (d) This is an area where the clients are particularly vulnerable.
- (e) The suggestion made by her counsel that the Legal Aid process and the Court's provide additional oversight and supervision is, unrealistic except in the broadest sense.

Issue 5 – Positive Aspects

[41] We have tried to weigh in the balance the very positive reports that have been given by some practitioners and by Ms Lewis herself in relation to her work ethic and commitment to her clients. We have no doubt that she is an extremely diligent practitioner who works hard for her clients at times over long hours, even attending her clients at home.

[42] We are also mindful that she is extremely well intentioned and highly motivated to look after her clients and has a love of the law. We accept her evidence that her recent professional development will have honed skills in dispute resolution and client communication.

⁸ For example, the misleading memorandum which was filed in Court leading to the last six-month suspension period.

Issue 6 – Determination of “Fit and Proper”

[43] In making this assessment, s 41(2) provides that the Law Society (and by implication the Tribunal on appeal) may take into account any matter it considers relevant including those listed in the subsection or under s 55 of the Act.

[44] Adverse disciplinary findings will be relevant factors but with the proviso as set out in the *Leary*⁹ decision above, full insight and an understanding of where things have gone wrong in the past may overcome such findings.

[45] As set out in the affidavit of Ms Inder:¹⁰

“The essential quality of a fit and proper person is that the person can confidently be expected to discharge his or her duties to the courts and to clients and that he or she may be accredited to the public.”

[46] Ms Inder goes on to point out the principles include that the inquiry is “*not limited to considerations of moral character*” and that competency and physical or mental impairment may be involved.

[47] It is relevant to note at this point that, because of concerns about long-term effects of her head injury, Ms Lewis provided the Tribunal with a full neuropsychological assessment which she had recently had carried out.

[48] We emphasise that neurological difficulties did not form part of the Practice Approval Committee decision but since we have been provided with this evidence, we should note that there were matters of some concern highlighted by it. Ms Lewis was assessed as a very high functioning and highly intelligent person with excellent language abilities. There were difficulties however noted in her attention, which might cause “*lapses in her concentration where mistakes are more likely*”. In addition, there were demonstrated “*significant difficulties on a measure which required cognitive flexibility*”. It was recommended that she receive further rehabilitation because “*these difficulties may have been overlooked or masked by her high level of functioning in other areas*”.

⁹ See note 3.

¹⁰ Secretary of the Practice Approval Committee, at page 5 BOD.

[49] The medical specialist confirmed that “*Ms Lewis’ interactions with the Law Society have been a significant source of stress for her. It would seem that Ms Lewis perceives the current assessment of her being a fit and proper person as bringing into question her overall integrity. It is not surprising that she finds that distressing and stressful.*”

[50] We are mindful that this decision has very serious consequences for Ms Lewis in that if the appeal is refused she will be unable to apply her training and skills to earn income and to follow her calling.

[51] However, we remind ourselves that sympathy to an individual, in Ms Lewis’ position must take second place to the Tribunal’s responsibility to uphold the purposes of the Act as set out in s 3. In summary, the primary focus must be on protection of the public and the upholding of the reputation of the profession and the standards of service provided by lawyers, so that the public may continue to have confidence in lawyers.

[52] Regrettably, in weighing those matters we have reached the view, having regard to the factors set out, particularly under the heading of insight into previous failings, that we cannot endorse Ms Lewis as a fit and proper person to engage in legal practice.

Determination

[53] The appeal against refusal of the practising certificate is dismissed.

DATED at AUCKLAND this 4th day of October 2018

Judge D F Clarkson
Chair