NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL

[2013] NZLCDT 1

LCDT 013/11

IN THE MATTER	of the Lawyers and Conveyancers Act 2006
BETWEEN	**HAWKE'S BAY STANDARDS COMMITTEE**
	Applicant
AND	**M**
	Respondent

MEMBERS OF TRIBUNAL

Mr D Mackenzie (Chair)
Mr C Lucas
Mr P Shaw
Mr W Smith
Mr I Williams

HEARING at AUCKLAND on 8 November 2012

APPEARANCES

Mr P Collins, for the Standards Committee
Mr G M, Respondent in person

DETERMINATION ON VARIOUS INTERLOCUTORY APPLICATIONS

Introduction

[1] Mr M faces a charge of professional misconduct laid by the Hawke's Bay Standards Committee.

[2] The charge alleges misconduct on the basis that Mr M accepted instructions from a client (Ms H), and continued to act for her throughout the transaction involved, when he knew there was a conflict of interest. It was alleged that Mr M did not obtain the prior informed consent of Ms H, and did not disclose to her all information available to him which related to her affairs.

[3] The Tribunal convened in Auckland on 8 November 2012 to hear four interlocutory applications lodged by Mr M in respect of the charge.

[4] Mr M's applications were for:

(a) dismissal of proceedings;
(b) stay of proceedings;
(c) disclosure and discovery;
(d) name suppression.

[5] After hearing the applications the Tribunal reserved its decisions on each of the matters. This determination delivers those reserved decisions. The Tribunal was unable to finalise this determination prior to the 2012 Christmas holiday period because of its need to prioritise completion of determinations on various other substantive charges heard by it in November and December 2012.

Background to Charge

[6] The transaction from which the professional misconduct charge arose involved a sale of Ms H's home to a company called JCR Developments Limited ("JCR"), for a sum of $172,500.

[7] No deposit was required and settlement was to occur on 18 January 2008. Ms H had a right to buy back the property two years later for $182,500, with a "first right of purchase" operating in her favour should JCR wish to sell the property within the two year period.

[8] There was a subsequent variation to the contracted arrangements, on 3 April 2008, when a third party (Mr K Foote), said to be representing Ms H in her arrangements regarding the sale, agreed that the settlement of the sale of the property would be completed by payment of a lesser amount than the agreed purchase price of $172,500. The matter was to be settled by payment of an amount equivalent to Ms H's mortgages on the property and some other debt she owed.

[9] The buy back arrangement was also varied. Mr T Ellis, a director of JCR, confirmed at the time that the buy back could proceed at any point during the remainder of that year for a sum equivalent to the mortgages and other debt repaid from the funds he provided to purchase the property from Ms H.

[10] A sum of $50,000 was paid to Mr M's firm on behalf of JCR to settle the purchase of Ms H's property on that basis. The property was transferred to JCR. Approximately $47,900 was used to repay existing mortgages, and the balance was applied to costs. No other debts owed by Ms H were satisfied from the payment of $50,000.

[11] JCR defaulted on its obligations under a mortgage it had given over the property it had acquired from Ms H, and a mortgagee sale ensued. As a consequence Ms H was left in a position where she had sold her home, effectively, for $50,000, and her buy back right was incapable of being exercised.

[12] The Hawke's Bay Standards Committee alleges that Mr M had a solicitor and client relationship with Mr Ellis and JCR, and had a solicitor and client relationship with Mr Foote, as well as with Ms H.

[13] It also alleges that a document dated 17 December 2007, purporting to be consent by Ms H to Mr M acting in a potential conflict situation, was not valid as it was not signed by Ms H (it was signed by Mr Foote).

[14] Even if signed by Ms H, the Standards Committee alleges that the consent would have no validity because she had not had disclosed to her information known to Mr M which was relevant. In those circumstances it was said, any consent could not be properly informed.

[15] The Committee claimed that Mr M was aware of matters affecting the financial standing and creditworthiness of JCR, Mr Ellis, and Mr Foote. Mr M was also aware of, it was alleged, a commercial relationship between Mr Ellis and Mr Foote. These were all matters relevant to Ms H's transaction the Standards Committee said, and should have been disclosed to her.

[16] In his response of 17 October 2011 to the charge, Mr M denied the charge, stating that he had carefully discussed the matter with Ms H in obtaining her informed consent, and that he did not withhold any relevant information from Ms H in that process.

[17] Mr M also denied that he had a relevant solicitor and client relationship with Mr Ellis. In respect of Mr Foote, he said that he knew him as a finance broker and a person who assisted persons suffering financial distress, some of whom Mr Foote would refer to Mr M's firm. Mr M acknowledged that he had acted for Mr Foote on some relatively minor matters. Mr M also said that he did not at the relevant time, have any knowledge of material financial particulars regarding JCR, Mr Ellis or Mr Foote.

[18] It is against this background that the interlocutory applications have been filed by Mr M. We turn now to deal with each of those applications, all of which were opposed by the Standards Committee.

Application for Dismissal of Proceedings

[19] The Standards Committee opposed this application on the bases that the Tribunal had no power to strike out or dismiss without a substantive hearing, and that the matters in dispute could only be resolved in the course of a substantive hearing.

[20] We do not accept that the Tribunal has no power to strike out or dismiss without a substantive hearing in appropriate cases.[1]

[21] We do accept the Standards Committee's submission regarding the need for a proper resolution of evidence by hearing where there is a prima facie case, which we consider there is in this matter.

[22] This application for dismissal is based principally on the claim by Mr M that the affidavits filed by the Standards Committee provide:

> "no credible evidence …to support the allegation that the defendant had an established or ongoing association with either Mr Foote or Mr Ellis…"
>
> and;
>
> "no or insufficient evidence that the defendant held relevant information and that such information was harmful to the complainant and was not disclosed to the complainant…"

[23] It would be unfair and a breach of the rules of natural justice to allow the charge to proceed to hearing in those circumstances Mr M submitted.

[24] There were some other grounds cited,[2] but the two matters noted above are at the heart of the application for dismissal, on the basis that it would be unfair and a

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1 For example see the Court of Appeal in *McMenamin v Attorney General* [1985] 2 NZLR 274; and *Chow v Canterbury District Law Society* [2006] NZAR 160 at [15]; and the Tribunal's power under s 252 Lawyers and Conveyancers Act 2006.

2 Mr M also alleges "suspicion and gossip" highlighted by a relationship between what he describes as a branch manager (presumably a reference to the New Zealand Law Society Standards Solicitor at its Hawke's Bay branch) and "at least one member of the standards committee"; work carried out for Mr Ellis being "so trivial in context as to have no affect on the outcome or had (sic) any adverse harm…"; and no evidence that he did not carry out the instructions he was asked to accept.

breach of natural justice to allow the charge to proceed in the absence of sufficient evidence.

[25] In support Mr M deposes to his view of his lack of a substantive solicitor and client relationship with Mr Foote or Mr Ellis, his lack of knowledge of their business affairs, and the fact that Ms H had provided informed consent via Mr Foote.

[26] These disputed facts are key issues. The Standards Committee has raised a prima facie case based on these matters, so cross examination of Mr M and Mr Ellis (who has also given an affidavit in support of Mr M's position) and of the witnesses for the Standards Committee, is required to test these issues of fact. That dictates the matter being heard, rather than dismissed on this application.

[27] Mr M also suggested in his submissions that "*if an adverse finding for the defendant does not seem likely…"* his application for dismissal without a substantive hearing should be granted.

[28] What is required to take the charge to substantive hearing is that there is a prima facie case made out. The material filed in support of the charge by the Standards Committee, and even some of the matters raised by Mr M and Mr Ellis in their respective affidavits, indicate that there is a prima facie case to be enquired into. Matters of credibility are raised, which indicates the need for a substantive hearing. Even if Mr M's test, that an adverse finding was not likely, was accepted, the question of whether or not an adverse finding was likely on the evidence is not a conclusion that could be reached without the evidence being tested at hearing.

[29] The application for dismissal of proceedings is dismissed and costs are reserved.

Application for Stay of Proceedings

[30] This application by Mr M is based on the ground that because other disciplinary proceedings have been stayed, on the basis that [redacted] charges relating to the subject matter of those charges are pending, this matter should also be stayed. He considered there was a risk of miscarriage of justice if matters had to be put forward in evidence before this Tribunal in relation to this misconduct charge, prior to the outcome of the separate [redacted] charges.

[31] In Mr M's submission, there are features of this present matter involving Ms H's sale transaction where "*the evidence in regard to some elements of the stayed charges could be introduced in this case and visa versa some element of the evidence against the defendant in this case would apply in others."*

[32] Mr M suggested that these matters of concern relate to things such as the accuracy of trust account records, details of his firm's mortgage portfolio, and the firm's relationship with the persons who became debtors of the firm. He acknowledged that *"these features are of a general nature only"* but noted the possibility of Mr Ellis being called on to give evidence in regard to other charges before this Tribunal which have been stayed because of their connection to the subject matter that involves [redacted] charges against Mr M. He considered that the Standards Committee could obtain *"some kind of technical advantage"* in respect of the existing stayed disciplinary hearings relating to the [redacted] charges Mr M faces, in cross examining Mr Ellis in this matter.

[33] The Standards Committee opposed the application, submitting that there was no proper basis for a stay as there was no overlap between this charge, and matters the subject of the stayed charge and police charges. The Tribunal accepts that submission. Ms H's complaint is entirely divorced from the matters the subject of the [redacted] proceedings involving Mr M, and we see no valid basis for ordering a stay of proceedings pending completion of those separate [redacted] proceedings.

[34] The application for stay of proceedings is dismissed, and costs are reserved.

Application for Orders for Disclosure and Discovery

[35] In this application, which is opposed by the Standards Committee, Mr M seeks orders requiring the Standards Committee "*and all associated with it including the complainant"* to produce all their files and records relating to this matter.

[36] The grounds in support of this application, in general terms, are that the evidential material filed is selective, that the complaint process has been too drawn out, and that the provision of meeting minutes and correspondence with the complainant was required. This was said to be necessary to indicate why there has been a delay in formulating the charge, and to answer the question as to whether the complainant had lost interest in this matter and it was now being driven by the Standards Committee to "*gain an advantage"* given that other disciplinary charges touching on the [redacted] matters the subject of charges had been stayed.

[37] A lack of openness and transparency, if such matters were not provided, was said by Mr M to prejudice a fair hearing and would mean that there was a failure to observe the rules of natural justice.

[38] The Standards Committee has made full disclosure of its case in the material filed in the Tribunal with the charge on 11 August 2011, which material has also been served on Mr M. In an endeavour to address concerns expressed by Mr M, following a pre hearing judicial conference involving the parties, the Standards Committee has provided Mr M with some further material in the form of the Committee's correspondence file.

[39] Mr M's supporting material for this application, as summarised above, indicates a concern about a number of issues which are not relevant to discovery or disclosure practice in this professional disciplinary jurisdiction. In the view of the Tribunal the material which has been provided at all stages, including the preliminary enquiry, fully and fairly informs Mr M of the charge and the evidence against him.

[40] Mr M has not identified any matter of relevance in his application for further material. The Tribunal repeats, and for the same reasons, what it said in *Wellington Standards Committee (No 1) v McGuire*[3], that matters sought must relate to information that would be evidence on an issue arising in respect of the disciplinary charges faced, or which directly or indirectly enables the charged practitioner to advance his defence of the charges.[4]

[41] Mr M's requests are directed at matters such as discovering who may have assisted the complainant follow through the complaints process, including the completion of a sworn statement by the complainant, and whether the minutes of Standards Committee meetings might indicate why the complaints process took some 24 months from complaint to laying of charge.

[42] These are not matters which affect the defence of the charge by Mr M. They appear to reflect a concern Mr M has that the Standards Committee is *"seeking to gain an unfair tactical advantage in circumstances where it is evident, other than a request for some form of compensation, the original complainant has possibly lost all interest in the matter"* and that the Standards Committee is simply using this case as an opportunity to pursue Mr M because *"the other charges have been stayed".* [5]

[43] These matters do not reflect issues that should be dealt with in an application for disclosure or discovery. The case against Mr M has been fully disclosed to him by the Standards Committee, and his current requests do not indicate there is any other material which is relevant and which should be disclosed.

[44] There is value in bearing in mind what the role of the Standards Committee is in this professional disciplinary context. It is to enquire into a complaint, determine how the matter should be dealt with (including reference to the Tribunal), and, if referring the matter to the Tribunal after its preliminary investigation is complete, deciding the charge to be laid and laying those charges with supporting evidence. In due course it will then seek to prove the charge before the Tribunal. All of the

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3 *Wellington Standards Committee (No.1) v McGuire* [2011] NZLCDT 20.
4 Ibid at [7].
5 As indicated in his grounds for his application for disclosure and discovery filed with the Tribunal.

material on which the Committee will rely has been provided to Mr M, and in an attempt to meet some of Mr M's concerns it has also gone further and given him access to its correspondence file. There is nothing further that has been shown to be relevant.

[45] We see no valid basis for Mr M continuing to seek additional material which he considers may explain matters such as motive in charging him and in continuing with the charge. The application for further disclosure and discovery is dismissed, and costs are reserved.

[46] We should also note that Mr M made some criticism of the Standards Committee regarding its discovery/disclosure process, suggesting that sworn lists of items should be provided by it as is the norm in civil proceedings. The Tribunal does not consider that necessary or appropriate in this jurisdiction. The duty on the Standards Committee is to fully and fairly disclose matters relevant to the case against a practitioner, and, if a practitioner is dissatisfied, a directions conference may be called to consider the issue. In the absence of some matter of relevance that has not been disclosed being specifically identified by a charged practitioner, the Tribunal in such case will usually accept confirmation from counsel for the relevant Standards Committee that there is no relevant undisclosed material.

Application for Name Suppression

[47] In this application Mr M sought suppression of his name and any identifying detail. The grounds in support of this application may be summarised as follows:

(a) Mr M's health and well-being;
(b) The fact that the charge is denied and will be defended, involving his right to a presumption of innocence and that he not be unduly adversely affected pending the outcome of the charges;
(c) Issues in relation to Mr M's family;
(d) A risk to the successful completion of certain commercially sensitive and contentious matters, including repayment of client accounts.

[48] Before the Tribunal, Mr M relied on matters reflecting the same issues as his suppression application in the District Court, which was granted. He provided the

Tribunal with copies of his affidavit in support of his suppression application to that Court, the Crown's opposition, and the judgement of the District Court.

[49] In Mr M's affidavit to the District Court, dated 15 July 2011, he deposed, inter alia, that: he denied the [redacted] charges he was facing; he had lost his livelihood and his health had suffered; and that publication of his name made efforts to "*apply for appointments, jobs or positions ……hugely difficult"* noting that publication of his name, the nature of the charges, or reference to his firm would cause him irreparable harm. He accepted in that affidavit that if found guilty of the crimes with which he had been charged the question of publication may be different.

[50] Mr M noted in his application to the District Court that if acquitted (and he said he was to fully defend the charges), and his name had been published in the interim, his legal career would nevertheless be destroyed by publicity attached to the [redacted] charges, and he would be unable to successfully return to practice if his name was published.

[51] [suppressed information].

[52] Finally Mr M advised the District Court about his attempts to seek to repay amounts to clients and the adverse affect that publicity may have on his ability to obtain support for repayment proposals. At that time, July 2011, Mr M considered that "*in the weeks or few months ahead"* he would be able to assemble sufficient capital to make and negotiate reasonable repayment proposals, with assistance from some supporters who may not support him if there was publicity around the [redacted] charges he faced.

[53] In its decision on suppression, the District Court noted that there was evidence of there having been extensive publicity about the intervention in Mr M's practice by the Law Society, although no reference to [redacted] charges. The strongest argument in favour of suppression of Mr M's name was said by the District Court to be his state of health, and the risk of relapse if publication was to occur. On that basis, the District Court considered that interim suppression regarding the [redacted] charges should continue until the hearing of those charges.

[54] The Standards Committee opposed suppression before this Tribunal, noting that activities undertaken by Mr M were inconsistent with his claims of serious ill health. It also noted that the focus of the District Court suppression order had been with regard to the [redacted] charges. Professional matters, related to the subject matter of the [redacted] charges, had already been the subject of publicity it noted, and no suppression had been granted by the Tribunal in respect of those professional charges pending the disposal of the [redacted] charges.

[55] The Tribunal does not consider the application to the District Court, made some eighteen months ago of great relevance in the current application. It was addressing suppression in the context of [redacted] charges, and indeed the Judge noted that publicity regarding professional matters had already occurred.

[56] More importantly, the health issues addressed by the District Court relate to the [redacted] charges faced by Mr M and referred to a period up to July 2011. Mr M's general practitioner has provided an updated medical note for the Tribunal, dated 1 November 2012, confirming that in his opinion "*the present constraints on publicity and media reports are to be continued if [Mr M] is to have any prospect of recovery"* and that it was contrary to Mr M's interests "*if the status quo does not remain firmly in place".*

[57] The doctor is clearly referencing his earlier reports used for the purpose of obtaining suppression in the [redacted] matters, as there are no interim suppression orders in place for this disciplinary matter, nor for the disciplinary matter related to the subject matter of the [redacted] charges.

[58] Publicity involving [redacted] charges is more serious than a report about a professional misconduct complaint. We raise this to highlight that Mr M's general practitioner was referring to different circumstances when referring to the potential effect of publicity on his patient, just as the District Court (the decision of which Mr M says supports his current application to this Tribunal) was dealing with an entirely different set of circumstances when granting suppression in the context of [redacted] charges.

[59] The Tribunal has to weigh the private interests of Mr M against the public interest in knowing about these proceedings and who is involved. The starting point is the importance of freedom of speech as recognised by s 14 New Zealand Bill of Rights Act 1990, the importance of open judicial proceedings, and the right of the media to report proceedings. Notwithstanding the allegations are unproven, the prima facie presumption of openness applies[6] and the fact that allegations are to be defended and remain unproven at this point is simply a factor to be taken into account in the weighing up process.

[60] The Lawyers and Conveyancers Act allows suppression[7] but that has to be read in conjunction with s 3 of that Act which makes it clear that the Act is intended to maintain public confidence in the provision of legal services and to protect the consumers of legal services. These objectives are enhanced and facilitated if the public has open access to information about the disciplinary process and instances of its operation. The legislation has a clear consumer focus which militates against suppression except where there are strong grounds to depart from that normal position.

[61] Mr M also put forward in support of his application issues such as his risk of losing financial supporters (affecting his ability to make up shortfalls to some who may have lost funds with his firm) if his name is published regarding this disciplinary proceeding, or the fact that obtaining employment or other income producing activity would be made more difficult in such case. That highlights an important facet of publication – those dealing with Mr M should have the opportunity of making an informed choice.

[62] Activity undertaken by Mr M, dealing with his defence of [redacted] charges, negotiating repayment arrangements, appearing to argue his case before this Tribunal, and presenting himself publicly as a person available and capable of working, all indicate relatively normal functioning.

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6 *R v Liddell* [1995] 1 NZLR 538, 546 -7; *Muir v Commissioner of Inland Revenue* (2004) 17 PRNZ 365 (CA) at [29]; *M v Police* (1991) 8 CRNZ 14.

7 See ss 238 and 240.

[63] On balance, the Tribunal does not consider that a case for suppression of name in this disciplinary matter has been made out, and the application is declined. Costs are reserved.

Setting Down conference

[64] The original complaint was made in August 2008, relating to alleged conduct in 2007 and 2008. After investigation a charge of professional misconduct was laid in August 2011. It is important that these disciplinary proceedings be determined as soon as reasonably practicable. The Tribunal's Case Manager has been requested to arrange a setting down conference as soon as practicable, with a view to this matter being brought on for hearing of the substantive charge at an early date.

Suppression of other matters

[65] The name and identifying details of the complainant we have identified as Ms H is suppressed pending a determination of this charge against Mr M. Details of Mr M's health referred to in paragraph [51] of this decision are suppressed, as is any reference to the fact that Mr M faces [redacted] charges.

DATED at AUCKLAND this 24th day of January 2013

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DJ Mackenzie
Chair