NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL

[2015] NZLCDT 11

LCDT 034/14

BETWEEN	**JANET MASON**
	Appellant
AND	**THE NEW ZEALAND LAW SOCIETY**
	Respondent

CHAIR

Judge BJ Kendall (retired)

MEMBERS OF TRIBUNAL

Mr W Chapman
Ms S Gill
Mr A Marshall
Mr S Morris

HEARING at Wellington Tribunals

DATE 6 March 2015

DATE OF DECISION 22 April 2015

COUNSEL

Mr P McBride for the Appellant
Mr K Johnston 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

Introduction

[1] The appellant has appealed against the decision of the respondent to refuse to issue her with a certificate to practise as a barrister and solicitor on her own account. The appeal is brought under s 42 of the Lawyers and Conveyancers Act 2006 ("the Act"). Section 42(2)(a) provides that every appeal must be by way of rehearing. Section 42(3) of the Act provides that the Tribunal may confirm, reverse, or modify the decision appealed against.

[2] The Tribunal heard the appeal on 6 March 2015 and reserved its decision.

[3] Both of counsel for the appellant and the respondent referred the Tribunal to the Tribunal's decision in *SNH v New Zealand Law Society* [1] where it said:

> "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"

Background

[4] The appellant has been a practitioner for 17 years and has held senior positions in the public and private sectors.

[5] In 2005, she established her own practice which eventually became Pacific Law Limited (the Company). She was the sole director of the Company and was

[1] [2009] NZLCDT 2 at 27.

responsible for its affairs. The Company specialised in constitutional and public law over a number of areas including Treaty of Waitangi claims.

[6] The Company was put into liquidation on 24 June 2014 on the application of the Inland Revenue Department ("IRD"). The appellant said that the debt to the IRD arose during the period July 2010 – January 2012. It was made up of non-payment of three PAYE payments, and 10 GST payments. Additionally, there were amounts for interest and penalties.

[7] At the time that the Company was put into liquidation, its debt to the IRD totalled $364,666.57. The IRD was the sole creditor.

[8] The appellant advised the respondent of the liquidation of the Company on 27 June 2014.

[9] She applied to the respondent for the renewal of her practising certificate on 3 July 2014. She wished to practise on her own account.

[10] The respondent advised her by letter dated 15 September 2014 that it had decided to decline her application for renewal. She has since continued in practice as an employed lawyer. In summary, the respondent's reasons for declining to renew the appellant's practising certificate were stated to be:

1. Financial mismanagement resulting in the liquidation of the Company.

2. Concern about adequate safeguards to ensure a non-repeat of the same thing.

3. The amount of the debt aggravated by the fact that it involved non-payment of GST and PAYE.

4. The failure to address the matter earlier in circumstances where the responsibility lay with the appellant.

5. That the liquidation was avoidable.

6. That the public perception would be that, despite incurring such a significant debt, she would, without pause, continue to practise in essentially the same manner

The case for the appellant

[11] The appellant filed a voluminous amount of material in support of her appeal which was largely repetitive. The Tribunal is thankful to her counsel for his work in reducing that material to manageable proportions.

[12] The appellant has presented her case for the issue of a practising certificate on three principal grounds:

1. That she is a person of integrity and of demonstrably good character. She is thus a fit and proper person to hold a certificate entitling her to practise on her own account.

2. That there are exceptional and mitigating circumstances surrounding the liquidation of the Company which allow the Tribunal to determine that she is a fit and proper person.

3. That remaining in practice on her own account will not create in the mind of the public a perception of harm to the reputation and standing of the profession.

[13] The Tribunal records that the respondent has clearly acknowledged the integrity and good character of the appellant. It is therefore not necessary for it to consider 12(a) above any further.

[14] The primary issue then becomes whether or not the liquidation of the Company of which the appellant was the sole director is such that the appellant should not hold a certificate to practise on her own account.

[15] In support of the submission that there are exceptional and mitigating circumstances surrounding the liquidation, counsel has made the following points:

1. The application to place the Company in liquidation was made by the IRD who was the only creditor.

2. The debt owed was a historic aged debt and was directly attributable to the non-payment of invoices by a private client and Legal Aid Services ("LAS").

3. The Company had met all of its obligations to the IRD over the two years preceding the liquidation.

4. She made good faith attempts to reach an agreement with the IRD in relation to the debt.

5. It is likely that the debt will be repaid in full upon recovery of the funds owed by the private client and other creditors.

[16] The appellant undertook work for a private client between February 2009 and March 2010. At the time of liquidation the client owed the Company in unpaid invoices a total of $264,101.01 inclusive of interest and GST. The appellant said she was unable to pursue recovery of the amount outstanding because the client laid a complaint with the respondent about the level of fees charged. That was done in March 2011. It was not until March 2014 that the complaint was resolved in favour of the appellant. The debt cannot yet be recovered because the client has applied to the Legal Complaints Review Officer for a review of that decision.

[17] There were further difficulties for the Company caused by delays in the making of payments by LAS as it processed a backlog of Waitangi Tribunal legal aid invoices from the middle of 2012 through to the early months of 2013. In the case of the appellant's company the claimed fees to LAS totalled $525,000.00.

[18] These were paid by LAS as to $200,000.00 in the year ending 31 December 2012. The balance of $325,000.00 was paid by LAS to the appellant's company between January and August 2013.

[19] The appellant has submitted that for the two years prior to the liquidation, the Company had met all of its PAYE and GST obligations to the IRD such that the debt owed to IRD was directly attributable to the two discrete situations referred to in paras [17] and [18] and not to any general mismanagement of the affairs of the company.

[20] The appellant has described the steps she took to resolve the debt to the IRD. Those steps were not accepted by the Commissioner. The appellant said that there was nothing more that she could do.

[21] Her belief is that the debt will be paid in full upon the recovery of funds owed by the private client.

[22] As to public perception the appellant submits that her remaining in practice on her own account would not create a perception of harm to the reputation and standing of the legal profession. She advances the following matters in support:

(a) The factual reality that she has suffered enormous consequences as a result of the liquidation;

(b) She has made a number of changes to her practice;

(c) It is likely that the Debt will be repaid in full; and

(d) The Committee was required to take into account all of the circumstances of the liquidation in light of the broad purposes of the Act.

[23] The appellant has set out that she has suffered financially. The full debt owed by the Company was in the region of $400,000.00. The original debt was $120,000.00. The balance was made up of penalties and interest. She had expected with the support given by LAS to have a waiver of at least half of the penalties and interest. She then anticipated that the remaining $200,000.00 would have been available to her to develop the practice.

[24] The appellant deposed that she has suffered significant stress and reputational damage because the matter was reported in local papers.

[25] A further consequence is that she is not able to be a director of a "phoenix company".

[26] The appellant has set out the changes she proposes to make to her practice which will ensure public confidence and that the circumstances leading to the liquidation of the Company will not arise again. The changes are:

1. Even distribution of her time between the financial management of practice and client responsibilities.

2. Reduction of her billing time to four hours per day.

3. Contracting administrative work of the practice to an external administration/accountancy firm.

4. Reducing the amount of legal aid funded work so that there is consistency of payments and the ability to undertake higher paying work for private clients.

5. Abandoning deferred payment arrangements with clients in favour of arrangements by which clients make payments promptly.

6. A senior practitioner will provide financial oversight.

[27] The appellant relies on *L v Canterbury District Law Society*[2] where the High Court held that:

> "On an application for authority to resume full practice it is for the practitioner to demonstrate that the circumstances which have made the original restrictions necessary have since disappeared. On the last point **we accept that the primary purpose of such a restriction is not penal,** but to sustain public confidence in the integrity of the profession and to protect members of the public [emphasis added]."

[2] [1999] 1 NZLR 467.

[28] The appellant submits that the circumstances leading to the liquidation of the Company have disappeared and that the safeguards she has put in place are sufficient to discharge the risk of any potential public perception of harm to the reputation and standing of the legal profession.

[29] Mr McBride for the appellant has acknowledged that there is little substantive dispute about the liquidation and the appellant's responsibility as the director of the Company. He has submitted that the Tribunal must consider whether the single fact of the liquidation when weighed against all the factors in favour of the appellant is such that she should not hold a certificate to practice on her own account. He submitted that the respondent approached the matter on a wrong basis in that it proceeded on the basis that the Company was put into liquidation and that therefore it must follow that the appellant is not a fit and proper person to practice on her own account.

[30] He submitted that when the positive factors in favour of the appellant are weighed against the one negative factor, then on the particular facts of the case she is a fit and proper person.

[31] Mr McBride argued that the matter had to be considered in the context of:

1. Cultural factors.

2. Obligations to the IRD.

3. Engagement with IRD.

4. Personal references.

[32] As to cultural factors the nature of the appellant's practice was her involvement with Treaty of Waitangi proceedings and Pacifica matters such that there was a heavy overlay of such factors which created demands on her time. This led to financial issues in that she allowed a deferred payment system for her cultural clients which were compounded by delays in the processing of legal aid payments by LAS.

[33] He submitted that there was an irony in that one arm of the Crown (LAS) was delaying the provision of funds while another arm of the Crown (IRD) was taking action. He emphasised that LAS had admitted its failures. He further noted that the claim in respect of a private client arose in the cultural context where there was a deferred payment arrangement. The appellant had taken on additional staff to deal with the complexity of the work required for that private client.

[34] As to obligations to the IRD, Mr McBride submitted that the appellant set about a restructuring of the staff with staff leaving the employment. He referred to external pressures involving unsubstantiated matters raised against her.

[35] He further submitted that the appellant had actively engaged with IRD and that current obligations to it are up to date. He referred to the appellant's intention to meet the historical debt despite the liquidation

[36] Mr McBride referred to the strongly supportive references that the appellant had received from persons prominent in the profession and within the cultural contest which he said demonstrated the high regard held for her despite the liquidation of the Company and which could lead to the conclusion that she is a fit and proper person to hold a certificate to practise on her own account.

[37] He submitted that the result of looking at the matter contextually was:

1. Her failure to keep everything under control or as he put it to keep the balls in the air is understandable;

2. That there is no adverse input in regard to the protection of the general public taking into account the references which indicate nothing detrimental in terms of any client interests;

3. That the cumulative effects of the debts and personal issues involving litigation created a snap shot of time with the likelihood that the 'storm' will not reoccur.

[38] Mr Mc Bride highlighted:

1. That the appellant is now able to say no to demands made by clients.

2. That she has a network of colleagues for support.

3. That recognition of her failure with IRD possibly encourages the imposition of conditions on her practice, although this is a fall back position for her.

4. That the appellant is committed to put matters right with the IRD by assisting to pursue the debts and secure as much as can and that she finally stands behind any shortfall.

[39] He submitted that the facts are clear and that the context is crucial to understanding the circumstances of the liquidation. When that is considered, then it can be concluded that she is a fit and proper person to practice on her own account. If considered necessary, she could practice under supervision or in conjunction with others.

The case for the respondent

[40] Mr Johnston referred to *Jaques v New Zealand Law Society*[3] in which it was made clear that, in any case where an applicant was applying for a practising certificate, primacy is to be afforded to the "*fit and proper"* test. He referred to that portion of the decision which made it clear that the intended mode of practice is a "relevant (s 41(2)) and "appropriate" (s 41(2)(i)) matter to be taken into account. A person applying to practise on his or her own account must be capable of being accredited to the public without supervision, and a higher standard is therefore required to ensure protection of consumers (s 3(1)(b)).

[41] The respondent argues that the appellant is not a fit and proper person to hold a practising certificate to practise on her own account and advances three interrelated issues for doing so. These arise out of the appellant having been the sole director of the Company which had been the subject of an order of the High Court placing it into liquidation on 24 June 2014. They are:

[3] [2012] NZLCDT 27.

1. Evidence of mismanagement which the appellant has not dispelled.

2. The matter of public perception.

3. The ongoing risk to the public which is insufficiently addressed by the appellant's proposals for the management of her intended new practice.

[42] In discussing the test, Mr Johnston has submitted that the cases such as *Jaques (supra)* make it clear that the test encompasses character, qualifications and experience and fitness in a more general sense. The respondent relies only on the issue of fitness in the more general sense.

[43] Counsel made reference to s 3(1) of the Act as to the purposes of the Act as being:

1. To maintain public confidence in the provision of legal services.

2. To protect consumers of legal services.

3. To recognise the status of the legal profession.

[44] He submitted that consistent with those purposes the New Zealand Law Society takes the position that it must be satisfied that an applicant for a practising certificate to practise on own account must satisfy it that he/she can be safely accredited to the public as someone who can "*manage [her] legal practice to the required high standard without supervision or immediate accountability*."

[45] Under the heading of mismanagement, counsel made the following points:

1. That the statutory demand by the IRD to the Company of which the appellant was sole director was not met and that in the course of time the Company was the subject of an order for liquidation by the High Court.

2. The fact that the appellant was a director of a company put into liquidation is a matter expressly relevant to the determination of whether she is a fit and proper person to hold a practising certificate to practise on her own account. (ss 41(2)(a) and 55(1)(b).

3. Such a circumstance raises the question of whether it is appropriate to issue a practising certificate the effect of which is to endorse her to the public as able "*to manage her legal practice to the required high standard without supervision*".

4. That while it is accepted that the Company had cash flow difficulties, the appellant sought to manage them by not discharging the obligations to pay GST and PAYE. That was a breach of one of the fundamental obligations of lawyers set out in s 4 of the Act to meet her obligations under an enactment.

5. That failure demonstrates a level of mismanagement highly relevant to to a judgment as to whether the appellant, as the former director of the Company, is a fit and proper person to be held out to the public as a practitioner capable of managing her own legal practice to the required high standard without supervision.

6. That the appellant's assertion that the Company's tax obligations in respect of tax periods for the two years prior to liquidation were met is wrong for the reason that the Company's tax obligations were ongoing to the year ending 31 March 2015 and obviously were not met. Interest and penalties accrued daily, and those incurred prior to liquidation were not met.

7. That the appellant's assertion that *"no negative consequences were suffered by any other member of the public…"* ignores that the Company in failing to meet its obligations to IRD created a negative consequence for every other tax payer.

8. That the IRD was the only creditor has no significance because the company chose to prefer other creditors. The Company during the relevant period received payments totalling $525,000.00 and did not apply any of it in reduction of its tax obligations. The inference has to be that the Company met its overheads, paid salaries and other debts.

9. That it is speculative that the likelihood that the debt owing to the IRD will be paid in full when recovery is achieved in respect of the funds owed by the private client, noting that the client has taken the matter to the LCRO with delay that necessarily follows from that.

[46] As to Public Perception, Mr Johnston made the following points:

1. Lawyers who practise on their own account and those who elect to practise through incorporated companies, should be treated similarly, so that the bankruptcy of a lawyer and the liquidation of a company in which a lawyer is a director should be considered on the same footing (s 55(1)(b)). To do otherwise would result in lawyers being treated differently, depending on the way in which they elected to structure their practices.

2. That a distinction is to be made between lawyers who are directors of companies not engaged in providing legal services and those who use a company structure through which to practise. In the latter case it would be difficult to envisage a circumstance where a director would be permitted to go on practising on own account.

3. That there should be truly exceptional circumstances for a lawyer in either category to be granted a practising certificate to practise on own account without having first obtained a discharge in bankruptcy. The lawyer practising through an incorporated company should not do so for the statutory bankruptcy period of three years.

[47] As to Risk to the Public, counsel submitted that this is a case of conscious failure to comply with statutory obligations. It is not an answer for the appellant to

say that she has suffered as a consequence of the liquidation and of not being granted a certificate to practise on her own account. It is a matter of holding out to the public that it can have confidence in the practitioner.

[48] The submission was that the proposals made by the appellant would not mitigate the risk altogether. A supervised employment arrangement whereby the appellant did not have responsibility for the firm's tax obligations would provide protection for the public.

[49] The appellant had not addressed the mismanagement factors which led to the liquidation. She would need to do so and establish satisfactorily that, if financial difficulties occurred again in the future, the same outcome would not be the result.

Discussion

[50] The Tribunal accepts the principle that there must be truly exceptional circumstances to allow a person in the position of the appellant to be granted a certificate to practise on her own account.

[51] This necessarily follows from the decision in *Jaques (supra)* where the requirement that a person applying to practise on his or her own account must be capable of being accredited to the public. A higher standard is required to ensure consumer protection.

[52] It also follows that the circumstances of the bankruptcy/liquidation become relevant in deciding the question whether or not truly exceptional circumstances exist to allow an applicant to practise on his or her own account notwithstanding the event.

[53] The appellant through her counsel has accepted that principle and has argued for exceptional circumstances for the reasons set out in para [15].

[54] It has to be said that there is no issue taken with the appellant's good character and her qualifications and experience. The Tribunal observes that the appellant has struggled with the fact of the liquidation of the Company. It has caused her much embarrassment and personal grief. It is apparent to the Tribunal

that she is yet to work through that grief. She might consider engaging some personal and professional support in that regard.

[55] The primary question for the Tribunal is then are there exceptional and mitigating circumstances that would allow the issue of a certificate to the appellant allowing her to practise on her own account without supervision.

[56] The Tribunal has considered the evidence and submissions and finds that there are no exceptional and/or mitigating circumstances that would dictate that a certificate be issued to allow the appellant to practise on her own account.

[57] The appellant as the sole director of the Company was responsible for the management of the Company's affairs including the payment of its tax obligations.

[58] She made a conscious decision not to pay PAYE and GST which was a breach of s 4(d) of the Act. She preferred to apply monies received to meet the day to day costs of operating and maintaining the practice rather than at least make proportionate payments to all creditors.

[59] The fact of debts owed by others to the Company did not create an extraordinary circumstance. It is not an uncommon event faced by those in practice. In this case the appellant failed to prioritise her responsibilities and mismanaged the situation of the Company.

[60] The Tribunal finds that the appellant failed to recognise and accept responsibility for the liquidation. She now says that she does so.

Decision

[61] The failures in respect of the management of the Company's financial affairs together with the need for the appellant to achieve better management practices indicates that presently the appellant, if granted a certificate to practise on her own account, would pose a risk to the public and undermine public confidence in the provision of legal services.

[62] Those considerations lead the Tribunal to the conclusion that this appeal must fail.

[63] The appeal is dismissed and pursuant to s 43(3) the decision of the respondent is confirmed.

ADDENDUM

[64] Since completing this decision and before publication, the Tribunal has had its attention drawn to s 30 of the Act. That section relates to practise by a lawyer on his or her own account. It provides as follows:

> "**Practice by lawyer on his or her own account**
>
> (1) No lawyer may commence practice on his or her own account, whether in partnership or otherwise, unless-
>
> (a) he or she-
>
> (i) meets the requirements with regard to practical legal experience and suitability that are imposed by rules made under this Act; and
>
> (ii) meets any other criteria that are prescribed by rules made under this Act"

[65] Regulation 12 of the Lawyers and Conveyancers Act (Lawyers: Practice Rules) Regulations 2008 ("the Regulations") sets out the requirements and criteria that a lawyer must meet to satisfy the Law Society that he or she may practise on his or her own account.

[66] The Tribunal queried whether Ms Mason's appeal was wrong procedurally and that the Tribunal was without jurisdiction to consider it.

[67] It invited counsel to make submissions on the matter. Counsel for Ms Mason advised the Tribunal that he did not wish to do so and that he would abide the Tribunal's decision. Counsel for the Law Society has filed submissions which are now addressed.

The Law Society's Submissions

[68] The submission on behalf of the Law Society is that the appeal is properly brought pursuant to s 42 and that the Tribunal has previously accepted that interpretation of the legislation in its decision in *Jaques (supra).*

[69] Counsel submitted that:

1. Ms Mason's underlying application was to renew her then practising certificate entitling her to practise on her own account (s 39 of the Act) which was declined. It is that decision which is now under appeal;

2. The New Zealand Law Society decision to decline renewal of the practising certificate to practise on her own account was made under s 41 because it was not satisfied that she was a "fit and proper person" to hold such a practising certificate;

3. Section 30 applies to applications for approval to commence practise on own account for the first time. The appellant was approved to practise on her own account in June 2005 under s 55 of the Law Practitioners Act 1982. Such an interpretation is reinforced by s 31 relating to a practitioner wishing to recommence practise on own account after a time of not so practising;

4. Sections 39-42 of the Act apply to practising certificates. Section 42 is capable of being interpreted as applying only to a situation where the New Zealand Law Society has declined to issue any form of practising certificate, but that would ignore the fact that the Society issues different practising certificates entitling different modes of practice – practising certificates entitling a practitioner to practise as an employed barrister and solicitor or a barrister, and practising certificates entitling a practitioner to practise as a barrister and solicitor, or barrister on own account. Such an interpretation is not inconsistent with the legislation;

5. Ms Mason's application was not for a practising certificate *simpliciter* but for a practising certificate as a barrister and solicitor on her own account. She was granted a certificate to practise as an employed barrister and solicitor.

Discussion

[70] Practising Certificate is a defined term in s 6 of the Act. It means a practising certificate issued under s 39(1) by the New Zealand Law Society. Section 39(1) provides for only two such certificates – a certificate as a barrister and a certificate as a barrister and solicitor. There is no provision for a limited or special purpose practising certificate such as a practising certificate to practise on own account.

[71] The Tribunal holds that it is not correct to say that s 39(1) allows the Society to issue the different types of certificates entitling different modes of practice as submitted in para [69](d) above.

[72] Limitations on mode of practice can be controlled by the New Zealand Law Society pursuant to s 30. This distinction is referred to in *Jaques (supra)* at paras [5] and [6] where the reference is to the Society's *"responsibilities when receiving the discrete applications:*

1. *For the issue of a practising certificate; or*

2. *For permission for a lawyer to commence practice on his her own account.*

[73] Jaques failed at the first step because the New Zealand Law Society did not consider him to be a fit and proper person to hold a practising certificate. There was no need (and indeed no ability) to consider whether or not he should be permitted to practise on his own account. It is a necessary prerequisite to practising on own account that the practitioner hold a practising certificate.

[74] Ms Mason applied for a practising certificate and for permission to practise on her own account. As acknowledged by the respondent, that application was made in

a single form. It failed to recognise the two discrete applications identified in *Jaques.* It was however treated by the New Zealand Law Society as two discrete applications. The Society granted the first application for a practising certificate and declined the second application which was for permission to practise on own account. Emphasis is here placed on the granting of *permission* as distinct from the granting of a *certificate.*

[75] The Tribunal does not accept counsel's submission that s 30 relates only to an application for permission to commence practice on own account and implicitly continues for ever. A practitioner is required under the Act to satisfy the New Zealand Law Society each year that he or she is a fit and proper person to hold a practising certificate and by implication remain able to practise on his or her own account. That is the distinction between the similar provision of the earlier legislation where the right to practise continued in the absence of intervention by the Tribunal so long as the fee was paid.

[76] The Tribunal concludes that an appeal under s 42(1) is restricted to the decision by the New Zealand Law Society to decline to issue a practising certificate and does not include a decision refusing permission to practise on own account.

[77] Accordingly the result is that the Tribunal does not have jurisdiction to determine this appeal.

[78] Ms Mason does have recourse to apply to the High Court pursuant to s 30(3) of the Act for leave to practise on her own account. Rule 13 of the Regulations sets out the criteria that the High Court is required to take into account

[79] If we are wrong on the finding we have made about jurisdiction, then we would dismiss the appeal as determined in para [63] above.

DATED at AUCKLAND this 22nd day of April 2015

BJ Kendall
Chairperson