NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL

[2011] NZLCDT 15

LCDT 022/10

IN THE MATTER	of the Lawyers and Conveyancers Act 2006
BETWEEN	**AUCKLAND STANDARDS COMMITTEE 1 OF THE NEW ZEALAND LAW SOCIETY**
	Applicant
AND	**X**
	Respondent

CHAIR

Judge D F Clarkson

MEMBERS OF TRIBUNAL

Mr W Chapman

Mr C Lucas

Mr A Lamont

Mr M Gough

HEARING at AUCKLAND on 16 May 2011

APPEARANCES

Mr G Illingworth QC and Mr M Treleaven on behalf of applicant

Dr R Harrison QC and Mr R McLeod on behalf of respondent

DECISION OF NEW ZEALAND LAWYERS AND CONVEYANCERS TRIBUNAL

Introduction

[1] The practitioner Ms X faces one charge of misconduct. An Agreed Summary of Facts has been provided to the Tribunal following discussions between counsel prior to the hearing and telephone conferences with the Chair. It was determined that no disputed-facts hearing was required. The Society has indicated today that it had some serious concerns about the credibility of one of its main witnesses and properly made concessions in relation to the facts on that basis and thus we have before us the Agreed Summary of Facts which I propose to read to a large extent into this decision.

[2] Ms X is enrolled as a barrister and solicitor of the High Court of New Zealand having been admitted to the bar on 28 July 2006. At all material times she held a practising certificate under the Lawyers and Conveyancers Act 2006 ("the Act"). On or about 28 February 2009 Ms X and her then boyfriend Mr Y went to Okahu Bay in Auckland. Later that day they discovered their car had been broken into and some items stolen.

[3] The same day Ms X rang her best friend in Dunedin Ms A and told her about the break-in and theft. Ms A asked Ms X what had been stolen and Ms X briefly discussed the stolen items in general terms. Ms A offered to see if her insurance policy would cover the stolen items as a way of helping Ms X out. Ms X expressed surprise that her policy would extend to stolen items that she did not own. Ms A said she thought it would be alright to claim on her policy and that she could check first with her insurer. Ms X went along with the suggestion despite believing as she put it in paragraph 15 of her affidavit sworn on 10 March 2011: "my gut feeling told me that the insurer was unlikely to allow it".

[4] Ms A mentioned that she had a few items of her own that she needed to submit a claim for and so could enquire about the stolen items when she was talking to the insurer about her own items. Ms X expected Ms A to make enquiries and come back to her to advise her of the outcome.

[5] On 9 March 2009 Ms A telephoned her insurance company to make a claim. She explained that she had been to Brighton Beach in Dunedin the day before and when they got home they discovered that a backpack containing cameras, a cellphone and other items had been stolen.

[6] Ms A also reported the theft to the police and said a number of items had been stolen. Twelve items are set out in the Agreed Summary. The total property stolen was $4,492 as claimed by Ms A. Ms A did not advise Ms X of the outcome of her enquiry with the insurer as she said she would.

[7] On or about 10 March 2009 Ms A rang Ms X in a distressed state. Ms X learned for the first time that Ms A had submitted an insurance claim for Mr Y's items and additional items. Ms A told Ms X:

(a) She had not made any enquiries with her insurer about whether her policy could claim for Mr Y's items;

(b) She knew she was not entitled to claim for Mr Y's items;

(c) She knew she was not entitled to claim for the additional items as they had not been lost or stolen;

(d) She intended to involve a person by the name of B to hide some items to support the claim that the items had been lost or stolen and submit legitimate receipts;

(e) She knew that the claim was false but they were desperate for money to make ends meet. She had been pressured by her husband to do it.

[8] Upon learning of this Ms X urged Ms A to withdraw the claim immediately, as what she had done was legally and morally wrong. Ms X advised her to act quickly so as to mitigate the consequences of her actions and offered to put her in touch with a lawyer to provide her with legal advice.

[9] This advice was repeated by Ms X over the next few days however Ms A declined the offer of a lawyer and ignored Ms X's repeated advice to her to withdraw the insurance claim. Ms X asked her friend Mr P to visit Ms A to try and calm her down and make her see sense in the situation. Mr P told Ms A to do the honest thing and put a stop to the claim and straighten things out. Ms A told him she had contacted the insurance company to cancel her insurance policy and was hoping that the matter would go away. She admitted to Mr P that Ms X had not told her to make an insurance claim.

[10] The police prosecuted Ms A, her husband, Ms X and Mr B. Ms X agreed to accept diversion. The outcome of her appearance at the District Court was of course that there was no conviction. She received permanent name suppression.

[11] To complete the background details of this matter it is necessary to add that when applying for a practising certificate to be renewed Ms X disclosed the full facts of the police investigation and in due course its outcome to the Law Society and as a result there was a hearing before the Fitness to Practise Committee, which she describes as having involved a robust interview with four senior practitioners where all of the facts were known and discussed. The outcome of that was she was found fit to practise and a practising certificate was, in due course, issued.

[12] Although there was no disputed-facts hearing there was a small disagreement over the inference to be taken from the facts in terms of Ms X's level of involvement. Mr Illingworth submitted to the Tribunal that Ms X's conduct had promoted or in some way encouraged, fraudulent conduct on the part of her friend Ms A, and furthermore that fraud was a foreseeable consequence of her actions.

[13] The Tribunal unanimously rejects that view of the matter. We do not consider that Ms X promoted fraudulent conduct. We think that is drawing too long a bow, as put by Dr Harrison (counsel for the practitioner), and indeed we do not consider that fraud was a reasonably foreseeable consequence of a telephone discussion with a friend at an emotional time about a theft.

[14] Ms X's wrong step or error of judgement was simply that, in talking to her friend, she took up the offer that her friend made to make an enquiry with her insurance company. She should of course immediately have said this was not an option.

[15] Although Ms X entered a guilty plea to the criminal charges she faced she explained that this was a pragmatic decision. She wished to avoid embarrassment to her family and to save face. She also wished to avoid the emotional and personal costs of a defended hearing. She says that she accepted diversion but did not at any stage acknowledge the version of facts the prosecution outlined and has always, while accepting responsibility for her error of judgement, denied any intentional dishonesty.

[16] The Tribunal has heard arguments about the definition of misconduct as set out in section 7(1)(b)(ii) of the Act. This subsection deals with misconduct unrelated to the provision of regulated services, which is what is under consideration in this case. Further it was accepted that the overlay of the common law in decisions of this nature must also apply.

[17] Section 7(1)(b)(ii) reads as follows:

"**7 Misconduct defined in relation to lawyer and incorporated law firm**

(ii) conduct of the lawyer or incorporated law firm which is unconnected with the provision of regulated services by the lawyer or incorporated law firm but which would justify a finding that the lawyer or incorporated law firm is not a fit and proper person or is otherwise unsuited to engage in practice as a lawyer or an incorporated law firm."

[18] On behalf of the Standards Committee Mr Illingworth submitted firstly that the subsection had two levels of behaviour or conduct built into it. The first level was such as to justify a finding that the lawyer is not a fit and proper person to practice. In other words for this level to be established the Tribunal must be persuaded that the conduct is such as would lead to strike off. Then, separated by the word "*or*" he submits, is a somewhat less serious level where the lawyer is unsuited to engage in practice as a lawyer.

[19] The second argument advanced by Mr Illingworth is that the use of the word "*includes*" at the beginning of section 7(1)(b), as contrasted with the word *"means"* at the beginning of section 7(1)(a), which deals with misconduct while providing regulated services, means that there is an inclusive definition which permits of conduct less serious than would lead to strike off, falling within section 7(1)(b)(ii).

[20] Although his client had indicated a guilty plea to the charge prior to his involvement, Dr Harrison did not seek to resile from his client's acceptance of responsibility and in submissions he also referred to the inclusive possibilities of section 7(1)(b)(ii). However Dr Harrison argued against the first proposition put by Mr Illingworth. That is, the proposed interpretation of the subsection allowing of two levels of conduct.

[21] He submitted that the words *"to engage in practice as a lawyer"* applied to and joined both earlier parts of the subsection. In other words, this section refers to a single standard. The Tribunal accepts Dr Harrison's submission. Whilst we consider the subsection is worded to address conceivably different situations, both the words *"not a fit and proper person"* and *"otherwise unsuited"*, in our view, reflect an intention that the practitioner is not able to practise as a lawyer.

[22] In terms of proof, regardless of plea the onus of proof is on the Standards Committee to make out a finding of misconduct on the evidence before the Tribunal. The standard of proof is on the balance of probabilities having regard to the seriousness of the matters to be proved. Departing from the terms of the definition in the statute, the leading authority on professional misconduct is *Complaints Committee No 1 of the*

Auckland District Law Society v C[1] and also *Re A (Barrister and Solicitor of Auckland)*,[2] both of which decisions adopted the standard of misconduct in the decision of *Pillai v Messiter (No 2)*.[3]

[23] In the *C* decision Her Honour Justice Winkleman held:

> "[33] ... While intentional wrongdoing by a practitioner may well be sufficient to constitute professional misconduct, it is not a necessary ingredient of such conduct. The authorities referred to above (and referred to in the Tribunal decision) demonstrate that a range of conduct may amount to professional misconduct, from actual dishonesty through to serious negligence of a type that evidences an indifference to and an abuse of the privileges which accompany registration as a legal practitioner."

[24] Whilst this dicta refers to the provision of regulated services, we consider the tenor is still relevant to the present situation. Even had we accepted that section 7(1)(b)(ii) allowed of a lesser level of misconduct than that leading to a fitness to practise scrutiny, we would not have found it was established in this case.

[25] The practitioner made an error in dealing with a friend in a telephone call. She did not know of the friend's previous dishonesty conviction. She has always accepted that her profession could rightly expect better judgement of her. But we do not accept that this amounts to misconduct. Our finding is strengthened by the finding of the Fitness for Practise Committee. While not bound by that outcome we are entitled to give it considerable weight.

[26] In all of the circumstances the charge will be dismissed.

[27] The practitioner seeks permanent suppression. She was granted this in the District Court. The Standards Committee have indicated they will abide by the decision of the Tribunal. In the circumstances of the dismissal of the charge and in all of the overall circumstances, personal and professional, that have been put before the Tribunal, we consider that in this case permanent suppression is indeed justified.

Costs

[28] The Tribunal is obliged to make an order against the Society in terms of section 257 for the Tribunal costs which will be fixed in due course and notified in writing. There is a discretion to order reimbursement of that by the practitioner. In this case we

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[1] [2008] 3 NZLR105 (HC).
[2] [2002] NZAR 452 (HC).
[3] (1989) 16 NSWLR 197.

determine not to make any reimbursement order against the practitioner and in all other respects we consider that costs ought to lie where they fall. So other than the section 257 order there will be no order as to costs.

DATED at Auckland this 16th day of May 2011

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Judge D F Clarkson
Chairperson