NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL

[2014] NZLCDT 15

LCDT 031/13

IN THE MATTER of the Lawyers and Conveyancers Act 2006

BETWEEN **AUCKLAND STANDARDS COMMITTEE 5**

Applicant

AND **MOHAMMED KHAN**

Respondent

CHAIR

Judge D F Clarkson

MEMBERS OF TRIBUNAL

Mr G McKenzie

Mr W Smith

Ms S Sage

Mr M Gough

HEARING at Auckland Specialist Courts and Tribunals Centre

DATE OF HEARING 18 March 2014

APPEARANCES

Mr R McCoubrey for the Auckland Standards Committee

Ms B McCarthy and Ms H Twomey for the Practitioner

ORAL DECISION OF NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL

[1] The Tribunal has been considering charges laid against Mohammad Khan who is a practitioner from South Auckland. The process today has been that at the commencement of the hearing, the Standards Committee sought leave to withdraw one of three alternatives namely, a charge of conduct unbecoming and that charge was withdrawn without opposition. That left to be considered by the Tribunal a single charge in the alternative of either misconduct in his professional capacity or negligence or incompetence in his professional capacity and that that negligence or incompetence has been of such a degree as to reflect on his fitness to practice as a Barrister or Solicitor or as to bring the profession into disrepute.

[2] Responsibly, Mr Khan had already indicated that he had admitted the second alternative charge of negligence or incompetence, and today what remained for the Tribunal to determine was whether the higher level had been reached. That is, the facts were considered as to whether they would amount to misconduct or whether the Tribunal found the lesser charge of negligence proved.

[3] After hearing from counsel and Mr Khan, we determined that the charge of negligence or incompetence had been established and dismissed the charge of misconduct and then proceeded to consider penalty submissions from each counsel.

[4] In relation to our rejection of the misconduct charge, we have noted that Mr Khan accepted that his behaviour fell so far below the standards of competent legal practice as to amount to negligence or incompetence such as to bring the profession into disrepute. The issue is whether the next stage was reached, and we were referred to the *Pillai v Messiter*[1] standard of conduct to which I will shortly refer. The facts which support the particulars in this matter are set out in summary in the opening submissions of counsel for the Standards Committee Mr McCoubrey and I will simply quote from those submissions to set out facts.

[1] *Pillai v Messiter* (1989) 16 NSWLR 197.

> "The solicitors certificate arose from an instruction to the practitioner by General Finance Limited to secure a mortgage and term loan agreement for a property in Swanson. General Finance Limited was the lender a named company was the borrower and a client of the firm was the director and shareholder of that company. The practitioner was instructed to include the individual client as guarantor and covenanter in the term loan agreement. He was also instructed that no amendments were to be made to the term loan agreement form without General Finance Limited's prior written consent. In fact, the reference to the client as covenanter was crossed through on the term loan agreement and further the practitioner failed to obtain the signature of that client as guarantor or covenanter as such the solicitors certificate was deficient when it stated:
>
> (a) The mortgage and term loan agreement has been duly executed by the borrower mortgagor and the covenanter
>
> (b) That the mortgage and term loan agreement constitutes legal valid and binding obligations of the borrower, mortgagor and the covenanter and is in proper legal form for enforcement against the borrower, mortgagor and covenanter.
>
> As a consequence of the practitioners failure to ensure that the term loan agreement was executed properly and in accordance with instructions, General Finance Limited was advised that it was not able to enforce the guarantee."

[5] The facts then record the practitioner's response to that was largely to the effect that he could not recall the circumstances surrounding the signing of the solicitors certificate and that he believed that one of his employees Mr Raheman most likely crossed out the word 'covenanter'. Mr Kahn was unable to explain why the client had not signed the agreement as guarantor or covenanter.

[6] To complete the picture, it is also necessary to refer to the fact that there was an associated fraud in relation to this transaction perpetrated by the practitioners former employee Mr Raheman which in fact resulted in proceedings against Mr Raheman being brought to this Tribunal and an order subsequently being made that Mr Raheman not be employed by any legal firm in future.

[7] Thus it is quite clear that the practitioner was let down by his employee.

[8] The Tribunal considers that it is axiomatic that extreme care has to be taken in completing any Solicitor's Certificate. As Mr McCoubrey submitted, this is in a

special category of documents which are reserved to be the province of legal practitioners. Furthermore, lending organisations rely on the integrity and the care of lawyers in completing these forms and must be able to rely on the face of the document, the Solicitor's Certificate itself.

[9] Having said that, at the end of the day we did not find that the practitioner's actions were so negligent as to amount to misconduct in the *Pillai v Messiter* sense. And if I simply refer to the *Auckland District Law Society v C*[2] decision: which adopted *Pillai v Messiter* :

> *"while intentional wrong doing 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 evidence is an indifference to and an abuse of the privileges which accompany registration as a "legal practitioner".*

[10] And, also in that decision, his Hon. Justice Kirby said:

> *"but the statutory test is not met by mere incompetence or by deficiencies in practice of the profession something more is required. It includes a deliberate departure from accepted standards or such serious negligence as although not deliberate to portray indifference to and abuse of the privileges which accompany registration as a medical practitioner".*

[11] We found that the practitioner's conduct however only fell short of misconduct by a narrow margin and thus we consider it demands a serious response. So we move to consider the issue of penalty.

[12] In the decision of *Daniels v Wellington Standards Committee*[3] it was pointed out that the starting point is the seriousness of the conduct and we have already referred to that. We consider it conduct which falls just on the side of the negligence/incompetence fence but is in our view, relatively close to misconduct.

[13] We address in the balancing exercise that we are required to undertake in this matter, firstly the mitigating features put forward by the practitioner. This practitioner

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[2] *Complaints Committee No.1 Auckland District Law Society v C* [2008] 3 NZLR 105.
[3] *Daniels v Complaints Committee 2 of the Wellington District Law Society* [2011] 3 NZLR 850.

has had 33 years of practice with only this offence relating to a Solicitor Certificate, and the other three adverse findings all fall within a two year band of behaviour.

[14] We take account of the fact in mitigation that the practitioner promptly admitted negligence and took a responsible approach to the disciplinary process. Co-operation of this sort is certainly given weight by the Tribunal. We note that this is a practitioner who has carried out for a number of years pro-bono work for the community and was able to provide to us positive references as to his integrity from colleagues working with him to this date.

[15] Finally, there is nothing in his behaviour to indicate dishonesty or personal gain as a feature of the conduct.

[16] In terms of aggravating features it is conceded by both counsel that there is authority both in the criminal province and indeed in the *Daniels* case itself to take account of subsequent and indeed all behaviour in the penalty process. There are three other unsatisfactory conduct findings relating to the practitioners behaviour between 2008 and 2011. These were particularly concerning to the Tribunal because two involved acting in situations where a clear conflict of interest existed. These situations were canvassed with Mr Khan today and he attempted to explain how this had come about. Mr Khan assured the Tribunal that the firm now had strict policies against acting for more than one party.

[17] Now moving to consider the issue of suspension, the Tribunal refers to the decision of *Daniels* at paragraphs 24 and 25:

> "A suspension is clearly punitive but its purpose is more than simply punishment. Its primary purpose is to advance the public interest. That includes that of the community and the profession by recognising that proper professional standards must be upheld and ensuring that there is deterrence both specific for the practitioner and in general for all practitioners. It is to ensure that only those who are fit in the wider sense to practice are given that privilege. Members of the public who entrust their personal affairs to legal practitioners are entitled to know that a professional disciplinary body will not treat lightly serious breaches of expected standards by a member of the profession."

[18] And further, in paragraph 25:

> "…the real issue is whether this order for suspension was an appropriate and necessary response for the proven misconduct of the appellant having regard not only to the protection of the public from the practitioner but also to the other purposes of suspension."

[19] We accept that *Daniels* case was discussing misconduct however those remarks are apposite in respect of this matter in any event. We do not consider that any response short of suspension would be adequate to reflect the seriousness of the practitioner's conduct taken as a whole.

[20] The practitioner openly acknowledges that he has let his profession down and expresses regret. His counsel urged the Tribunal to stop short of suspension however having regard to the other three adverse findings and their reflection on the practitioner's fitness, we must reject that submission that a lower penalty or a lesser penalty would suffice.

[21] We take into account the dicta in *Fendall*[4], where remorse and contrition are relevant factors but that is not sufficient to displace the seriousness of the offending.

[22] Furthermore we consider that a period of suspension can be properly used for the practitioner to reflect upon his practice.

[23] Protection of the public and the profession's reputation demands a strong response as was also pointed in *Daniels* at paragraph 34:

> "The public are entitled to scrutinise the manner in which a profession disciplines it's members because it is the profession with which the public must have confidence if it is to properly provide the necessary service to maintain public confidence in the profession members of the public need to have a general understanding that the legal profession and the tribunal members that are set up to govern conduct will not treat lightly serious breaches of standards."

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[4] *Auckland Standards Committee v Fendall* [2012] NZLCDT 1.

ORDERS

The orders that we make are as follows:

1. An order that the practitioner be suspended from practice as a barrister or solicitor for a period of three months commencing one week from today pursuant to s 112(2)(b).

2. An order censuring the practitioner pursuant to s 112(2)(e) and I should state that the section is in the Law Practitioners Act 1982 by reason of the transitional provisions of the Lawyers and Conveyancers Act 2006 because the behaviour under scrutiny occurred before the commencement of the current Act.

3. An order that the practitioner repay to the complainant the sum of $5,000 pursuant to s 112(2)(f) and s 106(4)(e) of the Act which is the maximum amount able to be awarded.

4. An order that the practitioner makes available his practice for inspection at such time and by such person as may be nominated and directed by the Law Society for a period of 12 months commencing after the suspension expires that is pursuant to s 106(4)(g).

5. Under s 249 of the Lawyers and Conveyancers Act the costs of the Standards Committee are to be paid by the practitioner, Mr McCoubrey is to provide a note of those costs to the Tribunal and to the practitioners counsel within 7 days.

6. The s 257 costs of the Tribunal are to be certified and are to be paid by the New Zealand Law Society.

7. Reimbursement of s 257 costs are to be met by the practitioner to the New Zealand Law Society.

DATED at AUCKLAND this 18th day of March 2014

Judge D F Clarkson
Chair