NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL

[2010] NZLCDT 16

LCD 005/10

IN THE MATTER OF	THE LAWYERS AND CONVEYANCERS ACT 2006
BETWEEN	MICHAEL RICHARD DEXTER GUEST Appellant
AND	NEW ZEALAND LAW SOCIETY Respondent

Hearing: 25 June 2010

Venue: Weathertight Homes Tribunal, Auckland

Appearances: Mr R D Guest in person (Appellant)
Mr Paul Collins for New Zealand Law Society

Chair: Judge D F Clarkson

Tribunal: Mrs A Hinton QC
Ms T Kennedy
Dr I McAndrew
Mr P J Radich

Judgment: 14 July 2010

DECISION OF THE NEW ZEALAND LAWYERS AND CONVEYANCERS TRIBUNAL

INTRODUCTION

[1] This is an Appeal by the Appellant pursuant to Section 42 of the Lawyers and Conveyancers Act 2006 against the Decision of the Respondent made on or about 26 February 2010 to decline to issue the Appellant with a Practising Certificate to practise law.

[2] By Decision 6 October 2009 this Tribunal, on the Application of the Appellant made an Order, subject to certain undertakings being given by the Appellant, that his name should be restored to the Roll of Barristers and Solicitors. This Tribunal came to its decision, on the basis of the evidence which it then heard, that the Appellant was ... *a fit and proper person* to practise as a Barrister.

[3] The background to the Appellant's Application for Restoration, the issues that had to be addressed and the reasons for the decision of this Tribunal are all set out at length in the written Decision of this Tribunal and do not need to be repeated in detail here. It will be enough for us to say that the Appellant was admitted to the Bar on 2 December 1972, he had a very successful career as a Barrister and Solicitor and this led to his appointment as a District Court Judge in May 1987. While a Judge he fell into financial difficulties and when bankruptcy was threatened he resigned from his position as a Judge. He then obtained employment with a law firm in Tauranga in May 1989 and his employment ceased there in October 1991. The Appellant then returned to his home city of Dunedin and began practising as a Barrister and Solicitor from January 1992. While practising as a Barrister and Solicitor the Appellant came to the attention of the Otago District Law Society but initially not to an extent that was seriously concerning. Then in August and September 2001 the Appellant faced very serious charges before the then New Zealand Law Practitioners Disciplinary Tribunal. The Appellant was found guilty of two charges of professional misconduct and his name was struck from the Roll of Barristers and Solicitors. The Appellant then appealed to the High Court but the High Court confirmed the decision of the Tribunal and confirmed the removal of the Appellant's name from the Roll.

[4] There then followed a period of years during which the Appellant sought to rehabilitate himself and his reputation. He worked hard in Dunedin and became an accepted member of that community. He also became a representative of that community through being elected a number of times as a Councillor on the Dunedin City Council, a position he continues to hold. When the Appellant initially came before this Tribunal he was able to point to some 178 letters or expressions of support some of which came from senior and respected members of the Otago community.

[5] The Tribunal which heard the Appellant's Application for Restoration is the same Tribunal which has heard this present Appeal. We record that the Appellant was, in the preliminary stages before this Appeal was due to be heard, given the opportunity of electing whether to have the same Tribunal which dealt with his restoration application deal with the present Appeal or have another differently constituted Tribunal do so. The Appellant elected to have the presently constituted Tribunal hear and determine this present Appeal. This Tribunal has therefore been able to approach this matter with an understanding of the background but we emphasise that the matters which we have taken into account in this present Appeal are those which have been presented to us in the context of this present Appeal. We also emphasise that we are not reconsidering our restoration decision as we are *functus officio* in relation to that. Nevertheless we are required to consider in this present appeal some matters which arose in the previous hearing and during its preliminary stages.

MATTERS PRELIMINARY TO RESTORATION

[6] In the present Appeal we have had to have regard to matters which were put before us and which related to the way in which the path to the hearing of the restoration application was cleared and developed. The Appellant when considering his Application for Restoration plainly took heart from the Decision of the High Court in *Leary v New Zealand Law Practitioners Disciplinary Tribunal* [2008] NZAR 57. There it was held in a broad way that when an Application for Restoration is to be considered, the focus should be forward looking and undue emphasis ought not to be placed on past wrongdoings where an applicant has

redeemed himself, has accepted his past wrongdoings and gives the confidence that he is a fit and proper person to practise as a Barrister in the future.

[7] In the early stages of the Appellant's Application for Restoration, the Law Society raised questions about the Appellant's time in Tauranga and made reference to rumours that all had not been well in Tauranga as far as the Appellant was concerned. The Appellant initially took the position that there was no proper basis for him to be required to give any details about what may or may not have happened in Tauranga particularly as it was a very long time ago. A question about the extent, if at all, to which the Appellant was required to disclose what had happened at Tauranga arose before the Tribunal as a preliminary matter. In the course of the telephone conference which followed it was suggested to the Appellant by a Tribunal member that perhaps the Tribunal was entitled to know anything that was relevant in relation to Tauranga although it was a long time ago. The point was reached in the telephone conference where there was a general understanding that the Appellant would disclose what there was to be disclosed in relation to Tauranga and the Law Society would accept those disclosures and leave the matters so disclosed for the Tribunal to evaluate without the Law Society undertaking further investigations or subjecting the Appellant to cross examination. It was implicit and fundamental that the Appellant's disclosure would be full and truthful. This is demonstrated by the following exchange between the Acting Chair, Mr Mackenzie and the Appellant:

> "MR MACKENZIE
> My understanding was, and Mr Anderson will speak to this in a moment but my understanding was that if you made that sort of statement, together with another statement that there was no other allegation of dishonesty, then I understood Mr Anderson to say that would be acceptable and there would be no further enquiry, is that correct?
>
> MR GUEST
> On that basis and on the possibility that it will be suppressed then I will do that and I'll do that within 48 hours."

[8] What was disclosed in the course of the telephone conference, was that the Appellant had misappropriated the sum of $100.00 from his employers. The circumstances were that he had received this amount from a client in cash at a Court hearing and he had kept this sum for himself, justifying this action on the basis that

he was not being properly recompensed for his work and expenses. The Appellant then swore and filed an Affidavit in which this matter was addressed and at all times then and afterwards the Appellant accepted that he had acted very wrongly in taking the sum of $100.00. In our Decision of 6 October 2009 we dealt with this issue in the following way.

> "[7] Mr Guest's employment in Tauranga came to an unhappy end. Mr Guest has deposed to what happened and we do no more than give the barest of summaries. A client of the firm had at the Tauranga District Court given Mr Guest $100.00 in cash for legal fees. Instead of paying that money into the Trust account of his employer, Mr Guest kept that sum for himself and did not disclose its receipt to his employer. He did this because he thought he was not being adequately remunerated for the work and travel he was doing for his employer. His client reported the matter to Mr Guest's employer who then confronted Mr Guest. He admitted the transgression, the relationship between Mr Guest and his employer became unstable, a senior retired lawyer was brought in as a mediator and a (confidential) written agreement was reached. The agreement was to the effect that Mr Guest would resign. He accepted and apologised for his misconduct and left the firm in about September 1991."

[9] Having taken the Tauranga matter and all other matters that were before the Tribunal into account, the Tribunal nevertheless made the Restoration Order which the Appellant had sought. The restoration of the Appellant's name to the Roll did not on its own enable him to begin practice in the limited way in which he was authorised, in terms of the undertakings he was required to give. It was also necessary for him to hold a Practising Certificate. In accordance with the usual practices the Appellant completed a form of Application for a Practising Certificate on 19 November 2009 and submitted this to the New Zealand Law Society. The Appellant's Application was considered by the Board of the Society which declined the Appellant's Application. By letter 1 March 2010 the Appellant was given formal advice by the President of the Society of his Application having been declined. The letter from the Society made it clear that the substantial reason for the Application being declined was because of another event in Tauranga and because of the way in which the Appellant had dealt with that event before the Tribunal when considering his Restoration Application.

THE OTHER TAURANGA EVENT

[10] The Decision of the Tribunal on the restoration Application was published. It came to the attention of the Appellant's former employers in Tauranga or it was brought to their attention by the Law Society. In any event, persons who were partners of that firm at the time when it employed the Appellant advised the Law Society that there were issues of concern at Tauranga additional to the matter involving $100. There was another minor matter, the detail of which we need not refer to and there was also a serious matter.

[11] The serious matter involved a Waihi client of the firm who had consulted the firm in relation to significant matrimonial issues with associated conveyancing.

[12] We did not have direct evidence from the Tauranga partners before us and had only an unsworn statement of their recollections. On the other hand we had sworn evidence from the Appellant before us in which he explained this event. The client was allocated to the Appellant who says that he spent a considerable amount of time dealing with the professional affairs of this person with much of this time being at nights and at weekends. The Appellant says that he reached an arrangement with this client that some of the work, which he categorised as being extraordinary work done outside usual office hours, would be charged for by himself with the remainder of the work being charged for by the firm.

[13] He says that this issue did not come to light until after he had left Tauranga and was back in Otago. He says that he had a call from the same Tauranga Barrister who had been engaged by the Appellant's employer to resolve issues associated with the termination of the Appellant's employment. He says that the Barrister, now dead, telephoned him to say that something had arisen and that the question was raised ...*have you been moonlighting*? Then the events involving the Waihi client were addressed and the Appellant says that he agreed to make restitution to his former employers. The amount which the Appellant says he paid his former employers by way of restitution was $22,000. He stated that this amount was approximately twice what the proper figure ought to have been but he was in no position to argue and paid the amount demanded to bring the matter to an end.

[14] Both the Appellant and his wife (in a letter provided to the Tribunal) are very clear about this repayment, because it involved borrowing the entire amount at a time when the family was financially stretched. This was clearly a major event and there is no possibility of this having slipped the Appellant's mind.

[15] As with the $100 incident, the Appellant was in effect setting himself up as a practitioner in his own right while also acting as a practitioner in the employ of the Tauranga firm. Such an arrangement was clearly unlawful. Not only was it in breach of the practitioner's obligations to his employer, it was also in breach of the obligations which lawyers have to the public and to the Law Society to observe proper processes and standards in the operation of their practices. The Waihi incident was much more serious in scale and quantum than the $100 incident, yet the Appellant had not disclosed it at the Restoration Hearing.

[16] The Appellant says that the Barrister who was involved in the termination of his Tauranga employment was engaged as a mediator. He also says that confidentiality agreements were completed at the time he left the employment of the Tauranga firm. The Appellant has consistently said that the matters which arose before and at the time he left the Tauranga firm should be kept private because they arose out of mediation or were intended to be kept confidential. As noted earlier however, the Appellant in the course of the telephone conference to which we have referred, agreed to allow the only Tauranga matter which he said arose before he left Tauranga, that being the matter of the $100, to be put before us. The Appellant has deposed that when the Barrister called him from Tauranga in relation to the Waihi client the Barrister said words to the effect *the same rules apply*. By this the Appellant said it was meant and understood that the cloak of confidentiality which was intended to cover the first offence was extended to cover the Waihi matter. Thus, in a broad way, the Appellant in the present Appeal before us has taken the position that the matter of the Waihi client ought not to have been taken into account by the Law Society on his Application for a practising certificate nor should it be taken into account by this Tribunal on this present Appeal. The Appellant has raised various arguments why this should be so and we will deal with them later in this Decision.

THE RESTORATION HEARING

[17] In the course of the restoration hearing the matter of the Tauranga employment thus arose in quite a limited way. There were several reasons why the Tauranga matter did not receive heavy attention. First it was a long time ago and secondly the sum of money ($100) understood to be involved was small. Additionally the Appellant accepted his wrongdoing. Furthermore, there had been the understanding that if the Tauranga matters were disclosed, the disclosures would be accepted by the Law Society and there would not be cross-examination on them. This commitment by the Law Society was met.

[18] The Tribunal, having regard to its own responsibilities quite independently of any commitment by the Law Society, plainly wanted to be satisfied that the matter which was disclosed in relation to Tauranga was the only matter which arose in Tauranga which could give cause for any concern. The Appellant represented himself before the Tribunal on his restoration application and as the Applicant, he prepared and presented extensive submissions. In all of these submissions the Appellant disclosed nothing in relation to Tauranga other than the $100 incident and the way in which he dealt with that matter plainly designed to have the Tribunal believe that there was nothing else arising out of Tauranga that could give cause for concern.

[19] In the course of the hearing Tribunal members asked the Appellant questions and he gave answers. We record some of these questions and answers taken from the transcript of evidence and slightly edited for coherence:

> "Mrs Hinton QC
> Q. ...you said to us that when you were first asked whether you had retained the $100 and hadn't accounted for it, you initially denied it?
> A. Yes.
> Q. and then subsequently acknowledged that was correct?
> A. Within hours.
> Q. and a second point was that I think you were asked by [the firm] whether there were other examples of your having done that, they were concerned that there were?
> A. Yes, of course, of course.

Q. and you said that was not the case?
A. That was not the case no.

Mr Radich
Q. Mr Guest can I please ask you whether your Affidavit of the 8th of July 2009 dealing with the [the Tauranga firm] matter is a comprehensive coverage of all of the issues that arose, all of the financial issues that arose?
A. Yes."

THE APPELLANT'S RESPONSE

[20] Faced with the position taken by the Law Society that he had intentionally misled the Tribunal at his restoration application hearing the Appellant has denied that this was so. He has said before us that he had no intention to mislead the Tribunal and that answers which may appear to have been misleading arose because of his tiredness, difficulty in hearing questions and his misunderstanding the breadth of the questions. He says that he thought that the questions were directed at the reasons why he left his Tauranga employment and that the Waihi client matter arose after he had left his Tauranga employment and that therefore the scope of the questions directed at him did not require him to reveal the Waihi client matter.

[21] The recollections of the partners in the Tauranga firm would suggest that the Waihi client matter arose before the Appellant left Tauranga and was part of the reason for his leaving Tauranga. The Appellant on the other hand is adamant that the issue arose later in the way that we have described. He has linked his recollection of the matter having arisen later to his associating the call from the Tauranga Barrister with his being in Otago and watching the memorable television images of the events of the first Gulf War. The Appellant thought that first Gulf War was in early 1992 by which time he would have been Otago but in fact the first Gulf War was in early 1991 and if the memory linkages which the Appellant referred to were correct the matter would have been raised with him a year before. We have been left without certainty about the timing of the raising of the Waihi client matter but on balance we are prepared to accept that it happened after the Appellant was back in Otago. We consider the timing makes no difference.

[22] We do not think that the Appellant was entitled to withhold from the Tribunal considering his restoration application, the information relating to the Waihi client. We think that the questions which the Appellant faced in relation to Tauranga at various stages before and during the substantive hearing were sufficiently clear to require answers giving disclosure of the Waihi client matter. Additionally, we consider that the way in which the Appellant presented his case, giving some focus to the $100 matter but no reference to the more serious and significant Waihi client matter, was misleading.

[23] During this appeal, Mr Guest acknowledged that at the time of the preliminary teleconference, he had the Waihi matter in his mind and he had manipulated the situation that emerged at the teleconference, taking the calculated approach of providing an affidavit on the reasons for his leaving the Tauranga firm (the $100 matter) in exchange for what he saw as a commitment by the Law Society, endorsed and accepted by the Tribunal, to not inquire further into his employment in Tauranga.

[24] Mr Guest acknowledged that he had relied on carefully worded answers to precise questions and a carefully worded affidavit to, in his submission, provide evidence confined to reasons for leaving his employment in Tauranga without lying to the Tribunal in either the preliminary teleconference or the full hearing on the matter of his application to be restored to the roll.

[25] Mr Guest's explanation in relation to both of the exchanges set out above is that he interpreted the questions as relating exclusively to the reasons why he **left** Tauranga, and that it did not occur to him that the questions quoted at [19] above were broad enough to encompass also other instances of dishonesty in which he was involved during his time at the firm, including the Waihi matter which only came to light some months after his departure from the firm. He insists that at the restoration hearing the Waihi incident had gone out of his mind entirely. The Tribunal does not accept that as being a credible explanation, and accordingly concludes that Mr Guest knowingly mislead the Tribunal in both his affidavit and oral evidence at the hearing on his application for restoration. He appears not to have regarded the omissions as dishonest. We do not agree.

[26] We have reached the conclusion that the Waihi client matter must have been in the mind of the Appellant before he started his restoration application and it must have remained in his mind throughout the process which led to his application for restoration being granted. As we look back at the various steps which the Appellant took, we think it is clear that he was trying to negotiate a path towards restoration which avoided having to refer to the Waihi client matter. He employed a number of approaches to this. One was to plead in the early stages that privilege and confidentiality applied to cloak this event. Then, when some compulsion came upon him to disclose the Tauranga events the Appellant gave selective and minimal disclosure to relieve the pressure that there had been for disclosure. When in the course of the hearing the questions arose in relation to Tauranga the Appellant answered them in a way that was not truthful but which relieved the pressure for further answers. Later when the Waihi client matter became known to the Law Society the Appellant has sought to cloak that with confidentiality and privilege and has sought to argue that questions about Tauranga seemingly answered incorrectly were misunderstood or misheard. We see all of this as being a sorry almost desperate overreaching by the Appellant for restoration to a position where he could practise as a barrister which he saw as within his grasp. This manipulative approach designed to keep the Waihi matter a secret from the Tribunal considering his fitness to be restored to the roll, is itself clearly relevant to whether Mr Guest is a fit and proper person to be granted a practising certificate.

WHAT MUST AN APPLICANT FOR RESTORATION DISCLOSE

[27] We believe there to be a longstanding practice and understanding that an applicant for restoration of his or her name to the Roll of Barristers and Solicitors has to disclose to the Tribunal considering such application all material that is relevant. This was the approach that was taken in the High Court in *Harder v New Zealand Law Practitioners Disciplinary Tribunal & Others* (HC, Auckland, CIV 2008-404-003713, 24 June 2008, Venning J). In that case, the applicant was seeking to segregate from examination certain behaviour which had allegedly occurred before strike off was effected, but which was not in the circumstances that prevailed in that

case, considered by the then Tribunal. On the question of whether a subsequent Tribunal considering a restoration application was prevented from considering such evidence the Court said:

> "[25] The answer to the issue in my judgment is that, as Mr Jones submitted, the Tribunal's role is investigative. It has, as its overriding function, consideration of the public interest. While the Tribunal must focus on and consider whether the applicant for reinstatement to the roll has, since committing the conduct which led to his or her being struck off, rehabilitated him or herself, the extent of that conduct leading to the strike-off and also other relevant conduct of concern must be a relevant consideration. That is apparent from the decisions referred to in *Leary* itself, for example in the decision of *Incorporated Law Institute of New South Wales V Meagher* the Court suggested that an error, though flagrant, proving to be a solitary lapse may have been addressed after sufficient time**. If there was more than one lapse in conduct that must be relevant**. (*emphasis ours*)
>
> [26] If a person seeking to be readmitted has engaged in a number of different acts which might impinge on his or her fitness for practice as a law practitioner, then it must be open to the Tribunal to consider those actions whether or not they formed the basis of the strike-off order in the first instance. The role of the Tribunal is to have regard to the public interest and particularly those members of the public dealing with practitioners. It seems to me there is force in Mr Jones' submission that if a person was struck off for dishonesty but evidence became available at a later date of other character failings which made that person unfit to practise as a solicitor then the Tribunal could not ignore that other evidence. It would be open to the Tribunal to consider such evidence when considering an application for reinstatement even if the person had addressed the issue of dishonesty."

[28] In our opinion, the relationship between an applicant for restoration, the Law Society and the Tribunal considering restoration, is a relationship where the utmost of good faith on behalf of the applicant is required. This is because the Society and indeed the Tribunal, have public interest duties to fulfil. In the fulfilment of these duties, the character and conduct of an applicant for restoration will be of primary importance. Neither the Society nor the Tribunal will be in a position to know all that may be relevant about an applicant's character and conduct and because these things are so important, the responsibility falls upon the applicant to make full, fair and truthful disclosure of such information. Such disclosure then allows the Society and the Tribunal to fulfil their respective public duty responsibilities. If this were not the case, then an applicant could keep back information of an important and relevant kind, thereby leaving the Society and the Tribunal without the benefit of such

information with risks to the public interest then arising. We think that the same principles arise in relation to an application by a lawyer for a Practising Certificate where the Society with the responsibility for making the decision should be given, in the public interest, all relevant information. (This responsibility is incorporated in Regulation 5(3) of the Lawyers and Conveyancers Act (Lawyers: Practice Rules) Regulations 2008), which requires:

> "**5 Application for practising certificate**
> (3) Every application form must require the applicant to –
> (a) make a statement that he or she undertakes to comply with the fundamental obligations of lawyers as set out in section 4 of the Act; and
> (b) declare whether, during the period since his or her admission or since receipt of the last practising certificate (whichever is more recent), any matter has arisen that does nor might affect the person's fitness to be issued with a practising certificate; and
> (c) declare whether he or she has complied, or is complying, with any applicable orders of a Standards Committee, the Legal Complaints Review Officer, and the Disciplinary Tribunal."

[29] Without wishing to limit what might be relevant, this will include any matters impacting on work practices, or reflective of character and ethical standards in relation to clients, fellow practitioners, or the courts.

ISSUES OF ADMISSIBILITY

[30] We return to and address issues of admissibility in more detail. The Appellant has taken the position before this Tribunal on the present appeal that the evidence in relation to the Waihi client matter and any other matter in relation to Tauranga is inadmissible because he has the statutory right pursuant to Sections 53 and 57 of the Evidence Act 2006 and that in reliance on that statutory right, he is able to assert to this Tribunal that it is barred from considering such matters. Although the Appellant has disclosed what happened in relation to the Waihi matter, he has been at pains to do so while preserving what he considers to be his privilege in relation to such matters. The Appellant argues that his privilege arises in two respects. First he says that the Waihi client matter was the subject of a mediation process and that in these circumstances, all matters associated with the Waihi client and the Appellant are protected from disclosure. Secondly, he says that the evidence

which the Society has obtained from the Tauranga employers was obtained in breach of an undertaking by the Society that on the Appellant's disclosure of matters involving the Tauranga firm, the Society would take its investigations no further. This second points was not strongly pursued at the hearing.

[31] Even if the matter involving the $100 was the subject of a "mediation" and was the subject of a confidentiality agreement, we are not satisfied that such confidentiality and privilege that might have arisen over the $100 matter was in fact extended to the Waihi client matter involving $11,000.00 or $22,000.00. We do not accept that the discussions between the Tauranga barrister and the Appellant some months after the Appellant had left Tauranga were a continuation of the asserted previous mediation process, under the same rules including confidentiality. As we understand the explanation, the Tauranga barrister relayed the Tauranga firm's discovery of the direct billing of the Waihi client by the Appellant and demanded full restitution. After a brief debate about quantum, the Appellant agreed to pay the full amount claimed of $22,000.00. We consider that on this occasion (and it may well be on the previous occasion), the Tauranga barrister was acting as agent or counsel for the Tauranga firm. It follows that no cloak of mediation confidentiality can apply to excuse the Appellant's failure to disclose the Waihi matter to the Tribunal at the 2009 hearing or to exclude evidence of the matter from the present consideration of the Appellant's appeal against refusal of a practising certificate.

[32] Additionally, if there had been a mediation in relation to the Waihi client matter, any cloak of confidentiality could apply only to the process and its outcome. It could not produce a result where the events giving rise to the mediation became invisible to everybody except the parties to the mediation. The reality is that the Waihi client and the employers of the Appellant were dealt with by the Appellant in a way that was very wrong and there were substantial amounts of money involved. It is inconceivable to us that a mediation could in some way make the events which happened vaporise.

[33] There is a further issue: the rules which applied to law practitioners then and now, require lawyers who become aware of improper conduct committed by other lawyers to report this conduct to the Law Society. These matters were not reported

when it may well be that they ought to have been. If it were the case that they ought to have been reported and they were not, but were instead made the subject of a confidentiality arrangement, any such arrangement would in our view be contrary to public policy and would not be sustainable.

[34] In relation to the second matter of breach of undertaking by the Society, the Appellant says that at the prehearing telephone conference to which we have already referred, the Law Society agreed not to pursue any matter related to his employment at Tauranga in exchange for his waiving his privilege and confidentiality protections to the extent of providing an affidavit disclosing his reasons for leaving the Tauranga firm in 1991. He says that under the terms of that agreement, accepted and endorsed by the Tribunal, he had no obligation to disclose the Waihi matter or any other matter adverse to his interests that arose during his employment with the Tauranga firm, if it was not the subject of discussions leading to his departure of the firm. He says that the agreement reached in the prehearing teleconference was arrived at without misleading the Tribunal in any way. He says further that the Law Society breached its undertaking by essentially inviting the Tauranga firm, after our first decision was released, to raise additional issues of alleged impropriety by the Appellant beyond those leading to his departure from the firm.

[35] In the teleconference this Tribunal's understanding was that the Appellant would be providing an affidavit that set out his reasons for leaving the Tauranga firm and provided assurance that there were no other matters of dishonesty associated with his employment in Tauranga. This is reflected in the following exchange between the Deputy Chair of the Tribunal and the Appellant, recorded in paragraph [7].

[36] The carefully worded affidavit of the Appellant dated 8 July 2009 was then sworn and filed. In that affidavit the Appellant referred in some detail to the issue of $100.00. He said this was the only matter raised. The Appellant then concluded his affidavit by stating:

> "10 Mr William Wright has detailed the rumours as were related to him in paragraph 6 of his affidavit. I respond to each.

(a) I resigned following only the one allegation relating to the $100.00 which I have already covered.
(b) No allegation was ever made that I had taken cash as well as legal aid payments for the same job. I have never done this at all in my entire career.
(c) I have no knowledge of "inappropriate disbursements being charged to clients". No such allegation has ever been made to me. I never did such a thing."

[37] It can be seen that the Appellant has carefully phrased his affidavit in an endeavour to achieve technical truthfulness. In so doing, we consider that his affidavit ended up as a misleading statement of the situation as it failed to tell the whole truth and it was designed to divert attention from the Waihi client matter. The course which the Appellant set took him onto rocks. When in the hearing he was asked questions which clearly called for the Waihi matter to be disclosed, he failed to make disclosure.

[38] For these various reasons, we do not think that the efforts of the Appellant to rule off the Waihi matter from consideration by this Tribunal in this appeal can possibly succeed. We do not think that the approach that the Appellant took to hide the Waihi matter from the Law Society and from this Tribunal during the restoration hearing process, was acceptable.

[39] We do not know what would have happened had full disclosure of the Waihi client matter been made at the earliest opportunity. That is not material for present purposes. This is not an appeal of the restoration decision, which stands. What is material is that instead of being clear as to his past misdemeanour and demonstrating a new honesty when the Appellant embarked on the process of applying for restoration of his name to the Roll, concerned as he clearly was about the Waihi client matter, he embarked on a course which we can only describe as being deceptive. The actions of the Appellant in taking the approach which he did to the Waihi client matter, give a contemporary view of his character and fitness although the (clearly material) events themselves were a long time ago.

[40] Finally, Mr Guest raised a number of other arguments, including inappropriate exercise by the Society of its right to decline a practicing certificate,

bias on the part of the Society, estoppel, and res judicata. Mr Guest did not pursue these arguments vigorously before the Tribunal.

CONCLUSION

[41] We address the simple question which this appeal raises. That is whether the Law Society was justified in refusing to issue the Appellant with the Practising Certificate. The substantial grounds upon which the Society relied related to the events involving the Waihi client and the way in which the Appellant dealt with the Waihi client matter in his application for restoration and during the hearing of his application. The Society's view of these matters was that the Appellant was not a fit and proper person to hold a Practising Certificate as a lawyer. In essence the questions to be answered are these:

(1) Should Mr Guest have made full disclosure of the Waihi client incident at the restoration hearing? Yes

(2) Do we consider that Mr Guest knowingly misled the Tribunal at the restoration hearing, either by lies or calculated omission? Yes we do

(3) Do we accept as credible and sufficient, his explanations for not making full disclosure? We do not.

(4) Was the non-disclosure material? Yes.

[42] In our view, for the reasons set out in this decision and in particular the answers to the questions above, the Law Society was justified in refusing to issue a Practising Certificate. We therefore uphold the decision made by the Society and confirm that a Practising Certificate was properly withheld from the Appellant on the grounds that he is not a fit and proper person to hold a Practising Certificate.

SUPPRESSION

[43] There is a Suppression Order in force preventing details of this appeal and the evidence before this Tribunal being published. That order according to its terms would ordinarily come to an end upon the release of this Decision which signifies the completion of the hearing.

[44] We will continue the Suppression Order for a period of fourteen (14) days after the release of this Decision to give the Appellant should he so wish, an opportunity to make further submissions in relation to suppression. Any further submissions by the Appellant must be filed with this Tribunal and served on the Law Society within seven (7) days of the release of this Decision. The Society is required to respond to any such submissions forthwith with its own submissions in relation to suppression.

[45] Without predetermining any application that may be made, we do express the preliminary view that neither this Decision nor the evidence before this present Tribunal should be suppressed except to the extent necessary to ensure that the names of clients of the Tauranga firm are not published. It may be that the Tauranga firm concerned wishes to make submissions also in respect of the comments made about the confidentiality agreement and publication of its name. Thus we authorise the release of this decision to the firm concerned.

D F Clarkson
Chair