NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL

[2014] NZLCDT 18

LCDT 001/14

IN THE MATTER of an Appeal under s 42 of the Lawyers and Conveyancers Act 2006

BETWEEN **MUHAMMAD SHAMSUD-DEAN SAHU KHAN**
Appellant

AND **NEW ZEALAND LAW SOCIETY**
Respondent

CHAIR

Judge D F Clarkson

MEMBERS OF TRIBUNAL

Mr W Chapman

Mr A Lamont

Mr P Shaw

Mr S Walker

HEARING at AUCKLAND

DATE 2 and 3 April 2014

COUNSEL

Mr R Pidgeon for the appellant

Mr P Collins for the respondent

DECISION OF NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL

Introduction

[1] This is an appeal against the refusal to issue a practising certificate to the appellant. Such decisions are made by the Practice Approval Committee ("PAC") of the New Zealand Law Society ("NZLS"), which declined the appellant's application on 10 December 2013. The appellant filed three affidavits and was cross-examined on these affidavits before the Tribunal. None of the other deponents who included referees for the appellant and Mr C R Pidgeon QC who appeared for the appellant in the Fiji proceedings, were required for cross-examination. Process evidence was given for the respondent and that was also accepted without the need for cross-examination.

[2] At the conclusion of the hearing, having considered the matter the Tribunal announced that it considered the appellant to be a fit and proper person to practise in the category in which he had made application for a practising certificate, namely as an employed barrister, and therefore allowed the appeal. It reserved its reasons which are now set out in this decision.

Statutory Provisions

[3] The statutory provisions governing such an appeal are set out as follows:

> **41 Power to refuse to issue practising certificate**
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> (1) A regulatory society may refuse to issue a practising certificate to a person on the grounds that the person is not a fit and proper person to hold a practising certificate.
>
> (2) For the purposes of determining whether or not a person is a fit and proper person to hold a practising certificate, the regulatory society may take into account any matters it considers relevant and, in particular, may take into account any of the following matters:
>
> (a) in the case of lawyers, any of the matters that may be taken into account under section 55 for the purpose of determining whether or not a person is a fit and proper person to be admitted as a barrister and solicitor of the High Court:
>
> (b) in the case of conveyancing practitioners, any of the matters that may be taken into account under section 83 for the purpose of

determining whether or not a person is a fit and proper person to be granted registration as a conveyancer:

(c) the person has obtained a practising certificate because of incorrect or misleading information:

(d) the person has contravened a condition of a practising certificate held by the person:

(e) the person has contravened this Act or a correspondent law:

(f) the person has contravened an order of the Disciplinary Tribunal or a corresponding tribunal:

(g) the person has not undertaken any ongoing legal education required by practice rules made pursuant to section 97(1)(b) or section 98(1)(c):

(h) without limiting any other paragraph,-

(i) the person's name has been removed from a foreign roll or a foreign register; or

(ii) the person has failed to pay a required contribution or levy to the Lawyers' Fidelity Fund or the Conveyancing Practitioners' Fidelity Fund; or

(iii) the person does not hold any professional indemnity insurance required by rules made under section 99 or is otherwise in breach of any such rules; or

(iv) the person has failed to pay any costs or expenses for which the person is liable under this Act or any regulations, rules, or resolutions made under this Act:

(i) any other matters the regulatory society thinks appropriate.

(3) A person may be considered to be a fit and proper person to hold a practising certificate even though the person is within any of the categories of the matters referred to in subsection (2), if the regulatory society considers that the circumstances warrant the determination.

(4) If a matter was-

(a) disclosed in an application for admission as a barrister and solicitor or in an application for registration as a conveyancer in this or another jurisdiction; and

(b) determined by a High Court or the body considering the application for registration as a conveyancer not to be sufficient for refusing admission or registration,-

the matter cannot be taken into account as a ground for refusing to issue a practising certificate, unless later disclosures demonstrate that the matter is part of a course of conduct that may warrant refusal.

(5) Subsection (2) does not limit-

(a) the grounds on which it may be determined whether or not a person is a fit and proper person to hold a practising certificate; or

(b) the criteria that may be prescribed under section 94(a).

(6) In this section, **regulatory society** means-

(a) the New Zealand Law Society; or

(b) the New Zealand Society of Conveyancers.

42 Right to appeal

(1) A person may appeal to the Disciplinary Tribunal against any decision of the New Zealand Law Society or the New Zealand Society of Conveyancers to decline to issue, or to refuse to issue, a practising certificate to the person.

(2) Every appeal under subsection (1)-

(a) must be by way of rehearing; and:

(b) must be made within such time and in such form as may be prescribed by the Disciplinary Tribunal under section 227(g).

(3) On hearing an appeal under subsection (1), the Disciplinary Tribunal may confirm, reverse, or modify the decision appealed against.

55 Fit and proper person

(1) For the purpose of determining whether or not a person is a fit and proper person to be admitted as a barrister or solicitor of the High Court, the High Court or the New Zealand Law Society may take into account any matters it considers relevant and, in particular, may take into account any of the following matters:

(a) whether the person is of good character:

(b) whether the person has, at any time, been declared bankrupt or been a director of a company that has been put into receivership or liquidation:

(c) whether a person has been convicted of an offence in New Zealand or a foreign country; and

(i) the nature of the offence; and

(ii) the time that has elapsed since the offence was committed; and

(iii) the person's age when the offence was committed:

(d) whether the person has engaged in legal practice in New Zealand when not admitted under this Act or a corresponding law, or not holding an appropriate New Zealand practising certificate, as required by law:

(e) whether the person has practised law in a foreign country-

(i) when not permitted by or under the law of that country to do so, or

(ii) if permitted to do so, in contravention of a condition of the permission:

(f) whether the person is subject to-

(i) an unresolved complaint under a corresponding foreign law; or

(ii) a current investigation, charge, or order by a regulatory or disciplinary body for persons engaging in legal practice under a corresponding foreign law;

(g) whether the person-

(i) is a subject of current disciplinary action in another profession or occupation in New Zealand or a foreign country; or

(ii) has been the subject of disciplinary action of that kind that has involved a finding of guilty, however expressed:

(h) whether the person's name has been removed from a foreign roll, and that person's name has not been restored:

(i) whether the person's right of practice as a lawyer has been cancelled or suspended in a foreign country:

(j) whether the person has contravened, in New Zealand or a foreign country, a law about trust money or a trust account:

(k) whether the person is subject to an order under this Act or a corresponding law disqualifying the person from being employed by, or a partner of, a lawyer or an incorporated law firm:

(l) whether, because of a mental or physical condition, the person is unable to perform the functions required for the practice of the law.

[4] It was common ground that an appeal of this sort is dealt with by way of a *de novo* rehearing:

> "… As a result, 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 section 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 …"[1]

Factual Background

[5] The appellant is a 73 year old practitioner who obtained his legal qualifications in New Zealand. He holds three degrees from Auckland University, an LLB, an LLM and a PhD. He was admitted to the Bar in New Zealand and remains on the roll of Barristers and Solicitors of the High Court of New Zealand.

[6] He has 40 years of experience of legal practice, 38 of those having been in Fiji.

[7] His career has been outstanding. He was, from 1983 until 1987 President of the Fiji Law Society, the longest serving president of the Society.

[8] He has also held extremely high international positions in a sporting organisation, further comment will be made about the nature of his references and the matters disclosed in those later in this decision.

[9] Up until the matters about to be described, the practitioner was clearly held in enormously high regard in legal circles in Fiji and abroad.

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[1] *SNH v New Zealand Law Society* [2009] NZLCDT 2, at [27].

[10] However, following a complaint against him, he was found on 3 March 2011 guilty of professional misconduct by the Independent Legal Services Commissioner ("ILSC"). On 4 May 2011 the Commissioner struck him off the Roll in Fiji and made further orders that the practitioner pay a sum of $120,000 in relation to a deed of guarantee which was under consideration during the complaint. In addition he was to indemnify the complainant in respect of any monies payable by her. Finally he was to surrender his passport to the Commission to secure payment in respect of these two orders.

[11] The practitioner travelled to New Zealand in May 2011. In order to do so he was required to make payment of the $120,000 for the release of his passport. He paid not only this amount but also a further $120,000 to the complainant. He borrowed funds from his brother and his son in order to make these payments.

[12] The background to the complaint is itself somewhat complicated. Suffice it to say that the disciplinary findings of the ILSC were strongly challenged by the appellant in his evidence and submissions to the Tribunal and it was accepted by counsel for the respondent Law Society, that there was indeed an evidentiary basis for calling into question the factual findings which had been made by the Fiji disciplinary body. Thus it was accepted that the Tribunal is not simply bound by the fact of the ruling by a foreign disciplinary regime but could properly inquire into the circumstances leading to the orders made as a result of that disciplinary process.

[13] To complicate matters further there were two disciplinary findings against the practitioner.

[14] In summary the practitioner had acted for a judgment creditor who had registered his judgment against a leasehold title. On expiry of the lease due, to an apparent error in the office of the Registry of Lands, the caveat securing that debt was not endorsed upon the new lease. In the meantime the judgment debtor, the owner of the land, sold it to the complainant as if it had a clear title.

[15] In an action to recover the judgment creditor's funds, a settlement was achieved by the purchaser borrowing the outstanding funds to pay to the judgment creditor from new lenders arranged by the practitioner. This was facilitated by the practitioner underwriting, by means of a deed of guarantee, the risks of a contemplated legal

action to be taken against the Registrar of Lands. In return for this indemnity given by the practitioner the purchaser (who was the complainant in the subsequent disciplinary proceedings), Ms P, gave the practitioner an irrevocable authority to take any action for damages against the Registrar of Titles and/or the Attorney General in the name of the Purchaser. There was provision in the deed that if she revoked this authority and failed to take the action that the indemnity would be considered to be at an end.

[16] It is conceded that this was a highly unusual deed for any practitioner to enter into. It was most unwise in any circumstances, and in the face of the political disfavour of actions against the Government, as alleged by the practitioner, was very surprising indeed. However, notwithstanding that, it is clear that in entering into this arrangement, it enabled an overall settlement to be achieved without in fact putting any person at serious risk of financial losses except the practitioner himself. It would seem that he was overly zealous in advancing the interests of his clients rather than the opposite.

[17] Independent advice had been given to Ms P by another firm of solicitors, namely the practitioner’s brother. However that brother was unable to depose to this because he has subsequently died. It should be noted that the practitioner comes from a family of lawyers and indeed the practice conducted by him in Fiji for almost 40 years was one he had taken over from his father. The practitioner has lost the benefit of this longstanding practice following his move to New Zealand and is completely without income as a result.

[18] The relevant portion of the transcript of the proceedings was made available to the tribunal. Despite Ms P giving evidence that she had refused to instruct the practitioner to issue the proceedings against the Registrar of Titles, thus invoking the terms of the deed which voided the practitioner’s responsibilities to her, he was found guilty of failing to honour the deed. And it was that finding which founded the finding of professional misconduct against him. To complete the picture it should be added that part of that finding related to the practitioner’s conduct in taking proceedings to recover payment on behalf of his lender clients from Ms P (of the amount of $120,000 which had been advanced to her).

[19] The practitioner's evidence to the Tribunal was that he was able to take this step because Ms P had never actually become his client having failed to instruct him in the proceedings which had been contemplated and having, therefore, had no retainer from her which could have raised a conflict of interest, he considered himself free to take action against her on behalf of his existing clients.

[20] As indicated the practitioner was sentenced on 4 May 2011 and subsequently lodged an appeal.

[21] Mr Colin Pidgeon QC of Auckland was instructed to appear on his behalf and travelled to Fiji in May 2013 to represent the practitioner. Mr Pidgeon's affidavit sets out the circumstances of the hearing of the appeal, which certainly raised some concerns. In particular Mr Pidgeon was not permitted to address the Court on penalty, which had also been appealed, and was assured he would be given the opportunity to do so at a later time should the substantive appeal be declined. Notwithstanding that assurance Mr Pidgeon received a judgment some days later without having been given the opportunity of making submissions in relation to what he refers to as the "heavy penalties imposed".

[22] It should also be noted this appeal was a rehearing of an earlier appeal the previous year in which an Australian judge, Justice Marshall, was one of the presiding judges. Despite having promised the decision such decision never appeared and Justice Marshall was removed from office, thus necessitating the rehearing referred to with different Judges.

[23] In relation to the second disciplinary proceeding, briefly this was a matter where the deceased had mortgaged a property but initially denied having done so to the practitioner. Thus he instructed the practitioner to take proceedings to declare the mortgage invalid. When it became apparent from defence documents that the mortgage was indeed valid, the practitioner advised his client that the proceedings must be withdrawn. However the client died and the widow executrix appointed her son as attorney. That attorney was the eventual complainant in the second proceedings.

[24] The mortgagee bank was unprepared to extend time to allow for a refinancing arrangement that the attorney had arranged to be put in place. Thus the

practitioner's evidence is that the attorney (now referred to as the "complainant") begged him to arrange bridging finance on his behalf.

[25] The practitioner thus, under some pressure from his client, arranged bridging finance to prevent a mortgagee sale by arranging a purchase of the bank's mortgage from new lenders. The complainant subsequently defaulted on this loan and it was when the practitioner sued on behalf of the bridging finance lenders, that the complaint was made.

[26] In this matter the practitioner confirms that he had written authorities to act for multiple parties. The practitioner further confirmed that he had completed his retainer for the complainant well before this action and was not in possession of any knowledge which would have had disadvantaged the complainant in the subsequent action.

[27] The contextual matters to be noted in respect of what would, in a New Zealand context, probably be seen as unacceptable behaviour on the part of the practitioner is that these transactions occurred in the practitioner's town of Ba where in fact only 10 lawyers practised. Thus it seems that it was relatively common practice for lawyers to act for more than one party with informed consent on the part of all concerned.

[28] One of the concerns held by the PAC was the practitioner's depth of understanding about concepts of conflict of interest. It was for this reason that in the course of the proceedings an undertaking was offered by the practitioner's counsel that he would not seek to practise as a solicitor in transactional matters, but would remain as a barrister where these sorts of conflicts would be far less likely to arise.

[29] Following a finding of misconduct by the ILSC, in respect of the above-described circumstances, the practitioner was prohibited from seeking a practising certificate for 10 years. Once again this was regarded by both counsel appearing before us as an extremely punitive response.

Nature of the Opposition to the Practising Certificate

[30] In declining the appellant's application the PAC set out three concerns held by them:

[a] The seriousness of the matters resulting in the Fiji disciplinary proceedings;

[b] The practitioner's understanding of a lawyer's duty to avoid conflicts of interest; and

[c] The practitioner's lack of current knowledge of New Zealand law.

[31] However, having set out these concerns, counsel for the NZLS conceded that the starting point for a person on the New Zealand Roll of Barristers and Solicitors is that he is entitled to a practising certificate. The respondent can only refuse to grant that if he "is not a fit and proper person to hold a practising certificate".[2]

[32] Mr Collins for the NZLS fairly conceded that the practitioner had certainly raised, "a credible evidentiary basis" for the Tribunal treating the overseas disciplinary findings with caution. Although he referred to the "impenetrable jungle of re-litigation" he accepted that a proper inquiry into the circumstances leading to the striking-off and other penalties was proper in a *de novo* hearing of this kind.

[33] Furthermore by the conclusion of the evidence Mr Collins conceded that there was no longer a sufficient basis arising out of the first set of proceedings to suggest the practitioner was unfit to practice. In relation to the second proceedings, counsel accepted that what had been acceptable practice in a small town Fijian setting may not suffice in New Zealand but that was covered in any event by the undertaking which had been agreed.

[34] The further matter raised by Mr Collins, quite properly, was the serious error in professional judgment on the part of the appellant by entering into the deed of guarantee.

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[2] Sections 39(1) and 42(1).

[35] However Mr Collins did not challenge the fact that this was an isolated incident in an otherwise stellar career and which had had disastrous consequences for the practitioner.

Evidence in Support of the Practitioner

[36] Much of the appellant's evidence was directed towards his alleged unfair treatment and as to various commentaries on the state of the rule of law in Fiji. The practitioner's position was that that had a direct bearing on how he was dealt with because he was held in political disfavour by the governing regime.

[37] His supporting deponents, whose evidence was not challenged, gave very strong, indeed glowing evidence about his character and competence and in particular his integrity. Examples of this are that he, while President of the Law Society personally wrote the first Code of Ethics for Lawyers in Fiji.

[38] Furthermore the evidence establishes that in other settings the practitioner was very able to identify conflict of interest risks and acted with the upmost integrity. Indeed he has achieved international status and respect in respect of his roles within the sporting body FIFA, including disciplinary roles for 12 years, rising to Deputy Chair of the Disciplinary Committee. He has been awarded the FIFA Order of Merit.

[39] Dr Khan further evidenced a reference from Mr Shankar, for whom he proposes to work as an employed barrister. He also advised the Tribunal that he would have daily meetings with Mr Shankar to discuss cases and if necessary receive guidance.

[40] In submissions in addressing the concern that Dr Khan might not be sufficiently up to date with the current New Zealand law, his counsel pointed out that he was in no worse position than any new graduate in "learning on the job". With respect to that submission we would actually see Dr Khan, with 40 years of trial experience, to be in a far superior position to a recent graduate. But we note that he has been wise enough to secure an employer and mentor in Mr Shankar.

Decision

[41] Any assessment of whether a person is a fit and proper person to practise involves a balancing exercise of potential risk to the public (and the profession's reputation) against the risk of the practitioner to practise in the career for which he or she has trained. In this instance the practitioner has a long established career, indeed regards this as his vocation, and has been prevented from pursuing this in his home country.

[42] Dr Khan has lost the value of his practice in Fiji which he has built upon his late father's practice and his own 40 years. We consider there should be very clear evidence of risk to justify preventing him from resuming practice in New Zealand where he qualified and obtained his three degrees.

[43] The balancing exercise must give due weight to the glowing references and to the responsible international roles to which he has been appointed or elected.

[44] We have looked carefully at the findings against Dr Khan. Dr Kahn gave evidence before us which was at variance with some of those findings. Some findings appear illogical or in contradiction to the evidence, as recorded in the transcript of the proceddings. In our view the findings do not pose sufficient risk to outweigh the confidence reposed in Dr Kahn by his referees and reflected in his legal career up to 2011.

[45] Where process and errors raise issues of unfair treatment of the practitioner we are obliged to carefully scrutinise and not accept at face value, the findings made. In relation to the Court of Appeal decision we note that after recounting the facts and submissions provided there is simply a ruling that there is no merit in the appeal. No reasons are given. There is authority in New Zealand for regarding such a decision as a nullity.[3]

[46] Furthermore, even if the first instance decisions were factually correct we find that in New Zealand this would not have led to the penalties imposed. Certainly, as conceded by counsel for the NZLS, it is highly unlikely that strike-off would have followed. Furthermore, there would be no question of the practitioner's freedom to

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[3] *Connell v Auckland City Council* [1977] 630 at 633.

travel having been affected. In other words in this country there would not have been a finding which would have reflected on the practitioner's fitness to practise.

[47] We do not consider there are any matters of public protection which require us to impede this practitioner's right to practice beyond the undertaking given voluntarily by him.

[48] For the above reasons the appeal was allowed.

DATED at AUCKLAND this 30th day of April 2014

Judge D F Clarkson
Chair