IN THE NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL

Decision No: [2012] NZLCDT 19

LCDT 003/12

IN THE MATTER of the Lawyers and Conveyancers Act 2006

AND

IN THE MATTER of RUSSELL ERIC WILSON MAWHINNEY, Lawyer of Queenstown

TRIBUNAL

Chair

Mr D J Mackenzie

Members

Mr W Chapman
Mr A Lamont
Mr C Lucas
Dr I McAndrew

COUNSEL

Mr J Guest, for Otago Standards Committee
Mr F Barton, for Practitioner

HEARING at Dunedin on 5 July 2012

RESERVED DECISION OF THE TRIBUNAL ON PENALTY

Introduction

[1] Mr Mawhinney was charged with misconduct under s 7(1(a)(i) Lawyers and Conveyancers Act 2006. That sub-section provides that a lawyer is guilty of misconduct if his conduct at a time when he is providing regulated services is conduct that would reasonably be regarded by lawyers of good standing as disgraceful or dishonourable.

[2] A plea of guilty was made, and the matter was set down for a penalty hearing on 5 July 2012. At the conclusion of the hearing the Tribunal reserved its decision. It did this partly because Mr Mawhinney was not present at the hearing, and as a consequence the Tribunal had no ability to deliver any censure that may have been part of its decision directly to Mr Mawhinney.

Background

[3] The charge arose out of Mr Mawhinney's conduct regarding a former client of his who had made a complaint about Mr Mawhinney's continuing failure to supply her files to her, despite repeated requests that he do so.

[4] That complaint had been made in November 2010, and as a consequence an enquiry had been made of Mr Mawhinney at that time by the Complaints and Standards Officer as to when the requested files would be made available. In response, Mr Mawhinney had confirmed that he was collecting the files from storage and hoped to get them to his former client by late December 2010.

[5] This may well have been the end of the matter if the files had been supplied as indicated, but in late January 2011 the client advised that she had not received her files and remained concerned about Mr Mawhinney's failure to supply the files to her. As a consequence, the complaints process was formally

commenced, and Mr Mawhinney was given the opportunity to respond to the allegation that he had failed to supply the files.

[6] There was some ongoing correspondence between the Standards Committee and Mr Mawhinney from February 2011 to April 2011, whereby Mr Mawhinney variously stated that he had not given his former client's original requests high priority, that he had no intention of not supplying her files despite the fact that she had not paid her accounts, that the files had been misplaced during an office move, and that he was now giving the location of her files high priority. The committee noted that Mr Mawhinney's former client had first requested files during 2008, and that he had not moved offices until November 2009.

[7] In the meantime the client continued to express concern at the fact that her files had not been supplied, and on 17 May 2011 the complaint was set down for hearing on the papers. At that point Mr Mawhinney was given until 3 June 2011 to file any submissions he wished to make.

[8] On 1 June 2011 Mr Mawhinney filed his submissions on the complaint, stating that the reason the files had not been supplied was that they had been misplaced as a result of him moving offices, that they had now been located, and that they would be supplied on the basis that his former client paid $80.50 to cover photocopying and postage and immediately withdrew her complaint.

[9] Mr Mawhinney followed that with an enquiry to the Standards Committee on 2 June 2011, asking if the hearing was necessary because he was then able to comply with the request to supply the files. He noted also that he had not deliberately withheld the files and that the failure to supply had been due to his inability to locate them until that time. He said he had not been paid for work carried out for his former client and that he believed she was being vindictive.

[10] In a letter of 29 June 2011 from Mr Mawhinney's former client to the Standards Committee, she recorded that she had not paid Mr Mawhinney $80.50 as he had requested because she did not agree to a requirement he had placed

on his supply of her files, that she immediately withdraw her complaint. She said that she had suffered considerable frustration regarding the time and difficulty experienced in trying to uplift her files, and for that reason was not prepared to withdraw her complaint. She was happy to pay the $80.50 she said, if she did not have to withdraw her complaint in exchange for her files.

[11] The Standards Committee considered that Mr Mawhinney's requirement of his former client that she withdraw her complaint about his failure to make her files available to her when requested, as a condition of him providing those files, was a matter that warranted investigation. It commenced an own motion enquiry into that matter.

[12] Mr Mawhinney was advised of this further disciplinary investigation on 15 July, 2011. He replied to the committee on 21 July 2011, apologising for not responding to the client's requests in a timely manner, and for not keeping her informed. He also acknowledged that as a consequence of discussing the matter with a colleague he now understood that his requests for payment of photocopying and withdrawal of the original complaint by the client may not have been appropriate. Mr Mawhinney said that he had made those requests once he had located the files so that the matter could be settled "in a sensible fashion".

[13] At its hearing, the Standards Committee determined that for his failure to supply the files as requested by his former client, Mr Mawhinney was guilty of unsatisfactory conduct. In respect of the requirement he had placed on the client, that she pay him $80.50 for photocopying and postage and withdraw her complaint against him for his failure to supply her files, as a condition of the client obtaining her files, the committee decided that may be a matter of misconduct and laid the misconduct charge before this Tribunal.

[14] Mr Mawhinney pleaded guilty to the charge of misconduct, and this Tribunal convened at Dunedin on 5 July 2012 to consider matters of penalty and costs.

Position of the Standards Committee

[15] For the Standards Committee it was submitted that this was a serious instance of misconduct. Simply put, a client had not been able to get her files from her lawyer despite numerous requests over an extended period. In the end she complained about that fact to the Law Society, and her lawyer, in the course of that disciplinary process, had advised her that she could have her files if she paid him photocopying fees and postage of $80.50, and withdrew the complaint against him.

[16] We agree with the submission of the Standards Committee that this is misconduct that goes to the heart of the disciplinary process. Not only was there pressure from a practitioner on his client to withdraw a complaint properly made, but the suggested withdrawal was predicated on a requirement to allow something the practitioner was obliged to do in any event, supply the files. The failure to supply was the whole basis of the original complaint by the client concerned.

[17] Because Mr Mawhinney took advice from a colleague when the own motion matter commenced and then promptly accepted that he should not have done what he had in imposing conditions of return of the files, the Standards Committee said that it would not seek more serious penalties that may have been available. It sought censure, a penalty, full payment of its costs, and reimbursement to the New Zealand Law Society of costs certified for payment by the Society under s 257 Lawyers and Conveyancers Act 2006. The committee submitted that a fine in the vicinity of $3,000 would be appropriate as a penalty.

Position of Mr Mawhinney

[18] For Mr Mawhinney, it was submitted that a penalty by way of fine was not appropriate. Instead it was suggested that an appropriate response would be to require Mr Mawhinney to formally apologise to his former client and to the Standards Committee.

[19] The basis of this submission was that Mr Mawhinney had co-operated and promptly recognised his error when the Standards Committee commenced its own motion enquiry into the conditions Mr Mawhinney had attempted to impose on his client if she was to get her files. He was apologetic, and on receipt of the charge immediately admitted the facts set out by the committee and pleaded guilty. On this basis, it was said, any penalty should be at the lower end of the scale.

[20] It was also suggested that there was an element of "double penalty" in that the misconduct charge arose as part of Mr Mawhinney making his files available to his former client in an attempt to resolve her earlier complaint relating to his failure to provide those files.

[21] As Mr Mawhinney had already been censured, fined, and required to pay costs for that failure to provide files, it was submitted that any further penalty in relation to matters arising from the supply of the client's files would be "*akin to double punishment*". It was also noted for Mr Mawhinney that his former client had suffered no loss in respect of the matters leading to the misconduct charge, as Mr Mawhinney withdrew his request for payment and provided the files as soon as his conduct was called into question. On that basis, it was submitted, a financial penalty was not required.

[22] The fact that the files could not be located was said to arise from them being mislaid and that there was "*nothing sinister*" in the delay in providing the files. The Tribunal was also invited to take account of the difficult relationship said to exist between Mr Mawhinney and his former client. This was said to arise from her having failed to pay accounts for work undertaken by Mr Mawhinney, which had resulted in his firm advising her that it would no longer act for her. It was submitted that the request to the client to withdraw her complaint was simply Mr Mawhinney seeking what he believed to be a pragmatic resolution.

[23] It was accepted for Mr Mawhinney that an order for costs would be appropriate, but that it should not be an order for more than $1,000. That amount was said to be the amount awarded in respect of the unsatisfactory

conduct charge arising from Mr Mawhinney's failure to supply the files when requested by his former client. It was submitted that Mr Mawhinney's co-operation with the Standards Committee and his prompt recognition that his actions were inappropriate, militated against any significant costs order.

Discussion

[24] The Tribunal considers that the misconduct which Mr Mawhinney has acknowledged involves serious issues. Effectively Mr Mawhinney has used his position to endeavour to force a complainant, a former client, to withdraw her complaint after the relevant disciplinary proceedings for failure to supply files to her had formally commenced. That constituted an attempt to derail the disciplinary process, and it offended not only the purposes of the disciplinary regime, but the complainant's rights. Mr Mawhinney accepted that his former client was entitled to her files, but at the relevant time he indicated to her that she would only receive them on the condition that she paid him a small amount of money (to cover photocopying and postage) and that she withdrew her complaint.

[25] It was submitted to us that there was a background of difficulty between solicitor and client, arising principally as a result of non payment of accounts said to be due by the client to Mr Mawhinney. It was suggested this was inconsequential so far as Mr Mawhinney's motives were concerned, and that there was nothing sinister in his non-supply of the files, as he had simply mislaid them. The only relevance, it was suggested, was that it may have clouded Mr Mawhinney's judgment at the time. We have some difficulty reconciling the two positions represented by these submissions, but in any event, we are satisfied that for whatever reason Mr Mawhinney decided to apply improper pressure to his former client in respect of things he required of her before he would comply with his obligation to supply her files.

[26] There was a continuing pressure applied to the client by Mr Mawhinney as this matter progressed following commencement of the initial proceedings for his failure to provide her files.

[27] In his email to the client of 2 June 2011, Mr Mawhinney said that he would provide her files "*on the following basis:*

> *You pay us $80.50 (to cover estimated photocopying and postage charges) immediately……*
>
> *You immediately withdraw Complaint 3820[1] and advise Nicky Hay[2] accordingly.*"

[28] Again, on 8 June 2011, Mr Mawhinney emailed the client, attaching a form of letter he was going to send her with her files, which said in the last paragraph:

> "*Please also confirm that you have immediately withdrawn complaint 3820 and advised Nicky Hay at Otago District Law Society.*"

[29] On both of these two separate occasions, when the matter of his failure to provide the client's files was a matter before the Standards Committee, Mr Mawhinney can be seen to be applying undue and inappropriate pressure to her to have her withdraw the complaint. He has suggested that her compliance is a condition of the provision of her files by him, and that he required her "immediate" compliance.

[30] His behaviour is similar to that which might have been anticipated if he was in some confrontational settlement situation representing a client's interests, but of course he was not doing anything other than trying to force his own client to end the disciplinary complaint process she had started against him. By adopting that approach, Mr Mawhinney was effectively using his position and experience as a lawyer against his former client, instead of responding professionally and providing her files as she had requested. His conduct did nothing but upset the complainant, and confused her as to her rights and what the disciplinary process meant, as shown by her correspondence with the Standards Committee.

[31] Mr Mawhinney's conduct also showed no respect for the disciplinary process. His actions had the potential to subvert the process, and as a result he now quite rightly faces this misconduct charge. We accept that he appears to

[1] Ms Burton's complaint that he had failed to supply her files despite many requests over an extended period.
[2] Nicola Anne Hay was the Legal Standards Solicitor at Dunedin for the New Zealand Law Society.

have done this without stopping to think about what he was really doing. Copying correspondence to the Standards Committee which contained his demands is indicative of his lack of insight at the time. It was only after talking to a colleague when faced with the more serious misconduct charge, that it appeared to dawn on him that what he had done was serious misconduct.

[32] If we did not accept that Mr Mawhinney's actions were thoughtless and careless of his responsibilities in this way, and constituted instead a deliberate attempt to subvert the disciplinary process, removal from practice for a period would have been likely. As it is, we consider the matter sufficiently serious that we view the penalty suggested by counsel for Mr Mawhinney as inadequate.

Determination

[33] Mr Mawhinney has pleaded guilty to misconduct. That misconduct involved his undue and inappropriate requirement that his former client withdraw her complaint regarding his failure to provide her with her files and pay him a sum of money to cover disbursements he may incur in supplying the files. The serious issue is the demand for withdrawal of the complaint, including the manner and timing of that demand.

[34] For his misconduct Mr Mawhinney is censured. His behaviour fell well short of standards expected of a barrister and solicitor of the High Court. There has been a considerable lapse of judgment, and unacceptable treatment of a client, imposing demands he was not entitled to impose and causing his client some confusion and uncertainty as to her rights. It was a matter that had the potential to subvert the disciplinary process, and it also breaches the trust members of the public should be able to rely on when dealing with a lawyer.

[35] In our view there is no question at all of "double penalty" risk, as claimed for Mr Mawhinney, when this matter is analysed. Mr Mawhinney was found guilty of unsatisfactory conduct because he failed to supply files to a client when requested. He has now pleaded guilty to misconduct because, while those unsatisfactory conduct proceedings were in process, he attempted to force the

complainant to withdraw her complaint by making that a condition of supply of her files, something he was obliged to supply in any event.

[36] They are two different events, and the only connection is that they both involve his former client, first as the complainant in respect of the non-supply of her files, and second, as the person on whom Mr Mawhinney imposed the improper requirements which constituted his misconduct.

[37] Mr Mawhinney appears to have taken advantage of his position as the client's former solicitor, and he should give an apology to her for his misconduct.

[38] The Tribunal has jurisdiction to impose a penalty by way of fine of up to $30,000. We will treat this as a matter at the lower end of that scale, but we consider a penalty of a relatively significant amount is required given the serious nature of the misconduct as noted earlier. We do not accept the suggestion of no penalty because of double counting, or because Mr Mawhinney did not recognise what he was doing for what it really was. As we have noted, a situation involving a deliberate plan with full appreciation of what he was doing would probably have involved removal from practice, and in this present situation a monetary penalty, at least, is required. We give some credit for the fact of his acknowledgment and early acceptance of error.

[39] The Standards Committee sought its costs of $5,219.50 and reimbursement of costs the New Zealand Law Society would incur under s 257 Lawyers and Conveyancers Act 2006. The costs of the Standards Committee appeared reasonable. The position of the Tribunal on costs is that it considers an errant practitioner should meet all costs, otherwise they fall on the profession. There may be exceptions in certain circumstances, affected by matters such as ability to pay or reasonableness of quantum. These matters do not affect our view that Mr Mawhinney should meet all costs in this case. We record that Crown costs are certified at $6,100 under s 257.

Orders

[40] Accordingly we make the following orders. Russell Eric Wilson Mawhinney, is hereby:

(a) Censured for his misconduct, in the terms noted in paragraph [34];

(b) Required to pay a penalty of $5,000 to the New Zealand Law Society;

(c) Required to provide a letter of apology to his former client, as soon as practicable and in a form approved by the Standards Committee, regarding his failure to provide her files and his subsequent misconduct in imposing inappropriate conditions for the provision of such files; and,

(d) Required to pay the Standards Committee its costs of $5,219.50 and to reimburse the New Zealand Law Society the amount of $6,100 it must pay under s 257 Lawyers and Conveyancers Act 2006.

Other matters

[41] There is one further matter we wish to record. At the hearing of this matter before the Tribunal in Dunedin on 5 July 2012, Mr Mawhinney did not attend. He was represented by counsel, who indicated there had been some confusion by Mr Mawhinney over the date of hearing.

[42] A Notice of Hearing had been issued to counsel via email by the Tribunal on 21 June 2012, nominating the date, time, and place of hearing. The Tribunal cannot see how confusion could have arisen. There was some suggestion of Mr Mawhinney receiving his copy of the Notice of Hearing (presumably from his counsel) in a form that affected his ability to read the date. No comment was

made on why in the course of conversation with his counsel he did not ascertain the hearing arrangements. We are left feeling somewhat concerned about whether Mr Mawhinney has given the disciplinary process his due attention, although we have ignored that concern for current purposes.

[43] We do note however that, subject to any prior application based on special circumstances being granted, the Tribunal expects the personal attendance at the substantive hearing of charges, and at any subsequent penalty hearing, of those persons the subject of charges before it, notwithstanding any representation of such person by counsel. Mr Mawhinney is fortunate that the Tribunal did not adjourn the hearing to another day to facilitate his attendance. That would have increased the costs he is to reimburse the New Zealand Law Society in respect of payment it must make under s 257, by a relatively significant amount. The Tribunal would appreciate the Society drawing this attendance expectation to the attention of practitioners.

DATED at AUCKLAND this 13th day of July 2012

D J Mackenzie
Chair