NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL

Decision No. [2010] NZLCDT 19

LCDT 002/10, 005/09

IN THE MATTER of the Lawyers and Conveyancers Act 2006 and Law Practitioners Act 1982

BETWEEN **AUCKLAND STANDARDS COMMITTEE**

Applicant

AND **CHRISTOPHER PATRICK COMESKEY**

Respondent

CHAIR

Judge D F Clarkson

MEMBERS OF TRIBUNAL

Ms S Hughes QC
Ms C Rowe
Ms M Scholtens QC
Mr W Smith

HEARING at AUCKLAND on 5 & 6 July and 15 July 2010

APPEARANCES

Mr J Billington QC and Mr M Treleaven for New Zealand Law Society
Mr R Fairbrother for the Respondent

DECISION OF NEW ZEALAND LAWYERS AND CONVEYANCERS TRIBUNAL

Introduction

[1] During a hearing of this Tribunal on 5-6 July 2010 in Auckland, Mr Comeskey has pleaded guilty to three charges of misconduct in his professional capacity laid by the New Zealand Law Society. A further charge (or set of alternative charges) has been withdrawn by the Society. The hearing was adjourned for a sanctioning hearing until 15 July 2010 where the Tribunal made an order pursuant to section 242(1)(e) of the Lawyers and Conveyancers Act 2006 ("the 2006 Act") that Mr Comeskey be suspended from practice as a barrister or solicitor for a period of 9 months; an order that Mr Comeskey pay costs to the Law Society; and that Mr Comeskey reimburse the Law Society for two thirds of the costs of the Tribunal to reflect the split between the two charges under the 2006 Act and one charge under the Law Practitioners Act 1982 ("the 1982 Act"). The penalty expressly recognises certain undertakings given by Mr Comeskey to the Tribunal. The order of suspension was stayed until delivery of this written decision.

The Charges giving rise to misconduct

[2] The summary of the charges laid against Mr Comeskey is as follows:

(a) Auckland Standards Committee 1 of the New Zealand Law Society charged Mr Comeskey with misconduct pursuant to ss 241(a) and 7(1)(a)(ii) of the Lawyers and Conveyancers Act 2006 ("the Act") being conduct that occurred between 1 September 2008 and 31 August 2009 when Mr Comeskey was providing regulated services and was conduct that consisted of a wilful or reckless contravention of the Client Care Rules in relation to his instruction to act as assigned counsel for Ms F.

(b) Auckland Standards Committee 1 of the New Zealand Law Society charged Mr Comeskey with misconduct pursuant to ss 241(a) and

7(1)(a)(i) of the Act being conduct that occurred at a time when he was providing regulated services and was conduct that would reasonably be regarded by lawyers of good standing as disgraceful or dishonourable in that he rendered a criminal legal aid invoice dated 18 February 2009 charging for services that he was not entitled to charge for.

(c) Auckland Section 356 Standards Committee of the New Zealand Law Society charged Mr Comeskey pursuant to the 1982 Act that on or about 14 February 2008 he made a misleading submission to the Court of Appeal and in doing so was negligent or incompetent in his professional capacity to such a degree as to tend to bring the profession into disrepute.

(d) Auckland Standards Committee 1 of the New Zealand Law Society charged Mr Comeskey pursuant to s 241(a) or (b) of the Act with the alternative charges of misconduct or unsatisfactory conduct or negligence or incompetence in relation to comments made to the New Zealand Herald on or about 22 November 2009. (These charges were withdrawn).

Background

[3] Mr Comeskey pleaded guilty to charges (a) to (c) above, and the charges in (d) above were withdrawn following Mr Comeskey's guilty pleas for the first three charges. The three charges on which the Tribunal was required to determine a penalty relate to professional misconduct which occurred during the twelve month period from February 2008 to February 2009. For the purposes of this decision, we have bracketed charges (a) and (b) above because they are connected.

Charge (a) in relation to Ms F and (b) the Legal Services Agency

[4] In September 2008 Mr Comeskey was assigned by the Legal Service Agency to act for Ms F who had been charged with serious indictable offences. Mr Comeskey was at that time the only practitioner in his practice who was entitled through his contract with the Legal Services Agency to appear as Counsel for Ms F. However the evidence from the Court file was that on at least two occasions, Ms F was represented in court appearances by employees of Mr Comeskey's practice, Ms Vikki Reid and Mr Soondrum. We note for completeness that there was some disagreement between the evidence of Ms F and that of her former partner Mr P (untested) about who represented her on specific occasions. Mr Comeskey told us he did not know, Mr Soondrum was not called as a witness, and the evidence of Mr P was not tested because Mr Comeskey pleaded guilty to the charges before Mr P had been called for cross-examination. We do know that Mr Comeskey represented Ms F on 22 September 2008, Ms Reid appeared on 6 November 2008, and Mr Soondrum on 17 February 2008. Neither Ms Reid nor Mr Soondrum was authorised under the Legal Services Act 2000 to appear for Ms F.

[5] It was as a result of Mr Comeskey's failure to act for Ms F that she complained to the Legal Services Agency and sought the assignment of new counsel, which occurred on 2 December 2009.

[6] Ms F complained that Mr Comeskey had failed to appear for her, failed to contact her, failed to make appointments, and failed to return her telephone calls. The Client Care Rules[1] are explicit about a lawyer's responsibilities to his/her client, and can be summarised as follows:

> "The obligation to act in accordance with all fiduciary duties and duties of care owed by lawyers to their clients."[2]

[7] Mr Comeskey rendered the prescribed Legal Services tax invoice dated 18 February 2009 to the Legal Services Agency claiming for payment of the sum of $3,157.00 calculated at the rate for Senior Counsel of $154.00. Mr Comeskey was

[1] Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008
[2] Client Care Rules paragraph 11 section 4

at that time the only practitioner in his practice who was legally entitled to act for Ms F, and the only practitioner entitled to claim at the Senior Counsel rate.

[8] This invoice claimed for each of the court appearances representing Ms F as if Mr Comeskey himself had appeared as Counsel. He had not done so. Even if Mr Soondrum or Ms Reid had been authorised under the Legal Services Act to appear as counsel, which they were not, the fees applicable would have been significantly less than those charged by Mr Comeskey.

[9] The invoice referred to also claimed for 15 hours' preparation time in Mr Comeskey's name, including a claim for "preparation of callover memorandum" when in fact no such memorandum had been prepared by Mr Comeskey or anyone else in his office. There was no evidence confirming the 15 hours' preparation by Mr Comeskey. Indeed an affidavit was received from Mr Duff, the counsel to whom the file was referred, which confirmed that there was no evidence of time recording on the file, nor any evidence of the preparation of documents by Mr Comeskey or any member of his staff.

[10] Although not the subject of a charge, a subsequent invoice dated 31 August 2009 contained a claim for a further 25 hours' preparation in relation to the F matter. Ms F told us she had had no contact from Mr Comeskey's office except in August 2009 when Mr Soondrum (not the authorised practitioner Mr Comeskey) had advised her to plead guilty to "a lesser charge." The indictment contained five counts (not two) and it is not clear which of the lesser charges Mr Soondrum had advised her to plead guilty to. Under cross-examination Mr Comeskey was unable to assist us with this issue. Mr Comeskey recalled having meetings with Ms F, and this was corroborated by the untested evidence of Mr P. However, there is certainly no evidence of preparation on the scale of the 40 hours claimed across the 2 invoices. We restrict ourselves to commenting only on the invoice which is the subject of charges, and there is no evidence to support the hours claimed in preparation on that particular invoice. By pleading guilty after being cross-examined on this subject, we take Mr Comeskey to accept that finding.

[11] When the Legal Services Agency learned that Mr Comeskey had not acted as assigned for Ms F, and that the tax invoices received were apparently incorrect, they wrote to Mr Comeskey seeking an explanation and, given the lack of response, complained to the Law Society which initiated its own investigation. Mr Comeskey did not respond to either the Law Society or the Legal Services Agency when asked to explain his conduct. The Law Society subsequently brought the charges of failing to act for Ms F in terms of the Client Care Rules; and rendering a false invoice to the Legal Services Agency.

[12] In an affidavit dated 29 March 2010 seeking strike-out of the Legal Services charges against him, Mr Comeskey admitted, inter alia, that the invoices referred to were consistent with most, if not all, Legal Aid invoices emanating from his practice; that he did not personally prepare or sign these invoices which bore a facsimile stamp only of his signature; that the amounts invoiced and claims made complied with his understanding of his contract with the Legal Services Agency; that there had never been an intention to mislead the Legal Services Agency; and that – in his view – the practices he adopted were those commonly applied by practitioners who maintain a professional office, train staff and meet the demands of a demanding criminal practice in all jurisdictional levels, including in all Courts in the larger Auckland area, and from time to time, elsewhere in New Zealand. We shall return to this latter egregious claim later.

[13] In the same affidavit Mr Comeskey went on to say that he believed the Legal Services Agency was aware of and accepting of the practices mentioned.

> "Otherwise legal aid work would not be affordable or efficiently disposed of in all but the exceptional and some of the bigger cases."

[14] We note that this submission was rejected by Ms Edmonds of the Legal Services Agency.

[15] In the same affidavit, Mr Comeskey referred to his mutually beneficial relationship with the Legal Services Agency whereby he was often called at short notice to take on a case, and that if he was engaged elsewhere he would arrange for representation from his office, there being no question:

> "Other than that I personally will receive the assignment and invoice out all appearances and appropriate preparation."

[16] Mr Comeskey went on to explore his practice of engaging newly qualified, inexperienced barristers whom he supported in employment and collegially until they were experienced enough to venture forth independently. Mr Comeskey says this practice reflects what he learned when he himself was assisted by Mr Charl Hirschfeld, and he is clearly convinced that this is of benefit to the profession as a whole. We accept Mr Billington's submission that such mentoring is only a positive contribution if the juniors are being instructed appropriately, rather than acquiring bad habits. In this case, Mr Comeskey was not meeting the minimum standards of client care required of a barrister. He was flouting the statutory and contractual requirements for claiming legal aid and, on his own evidence, had delegated a junior employee to make legal aid claims on his behalf.

[17] We have referred to this affidavit in some detail because the arguments are at the core of Mr Comeskey's defence of his actions, and even following his guilty pleas, he has not resiled from them. Mr Comeskey said in cross-examination that he did not attend to any administration in his practice and that he had never done any Legal Aid billing. He told us that junior barristers employed by him had done this work at least during the last 10 years. So while he has acknowledged that he filed a false invoice to the Legal Services Agency, he reasons that because he did not do the invoicing, he was not acting dishonestly.

[18] As a consequence of Mr Comeskey's admissions the Legal Services Agency has undertaken an investigation of 25 other files and Mr Comeskey has been asked to explain his conduct in relation to these files. We have not taken this further ongoing investigation into account in our findings, except in relation to the undertakings Mr Comeskey has made, and to which we will refer later.

[19] In summary, and in relation to the F/Legal Services Agency charges, Mr Comeskey has admitted that he breached both his statutory obligation under the Legal Services Act and the Rules of Client Care in that he did not provide any meaningful advice or representation for Ms F at any time during the currency of the

retainer, and the invoice provided to the Legal Services Agency was accordingly false.

Charge (c): Court of Appeal Charges

[20] Mr Comeskey has pleaded guilty to the charge that he misconducted himself in his professional capacity by misleading the Court of Appeal when appearing as Counsel for the appellant in *The Queen v Xiao Hui Huang*[3]. In delivering its judgment in the appeal against conviction and sentence the Court of Appeal said at paragraph 46 that:

> "It emerged Mr Comeskey's submissions to us on this third ground were more misleading than inept.
>
> Mr Comeskey initially misled us. Need we mention the fundamental importance of counsel accurately stating the position, and being absolutely candid and forthright with the Court?"

[21] The background to this charge is that in April 2007 Mr Comeskey appeared as Counsel for the appellant Ms Huang in a criminal trial before Justice Clifford and a jury in the High Court at Wellington. Ms Huang was convicted of possession of methamphetamine for supply and conspiracy to supply methamphetamine. She appealed that conviction and Mr Comeskey appeared as her Counsel at the appeal hearing on 14 February 2008.

[22] Mr Comeskey commenced his oral submission at the Court of Appeal hearing by saying:

> "The grounds of appeal are that the conduct of the Crown prosecutor was misleading and that this has resulted in a miscarriage of justice." (Transcript page 5)

[23] Initially this submission was directed to the issue of whether the placebo substance in the appellant's possession was milk powder alone or a combination of milk powder and Thai sugar. (Transcript page 8). Mr Comeskey said this was important because the appellant had told the interviewing police officer the substance smelt like milk powder and the Crown evidence at trial that it also contained Thai sugar undermined her credibility. He said this evidence ambushed

[3] The Queen v Xiao Hui Huang CA 577/08, [2008] NZCA 46

him and he was unable to have the substance analysed so as to bolster the appellant's credibility (Transcript page 8).

[24] Later in the hearing, in response to a question from Justice Glazebrook, Mr Comeskey said that if his expert had said it looked like sugar but smelt like milk powder he would have advised the appellant to plead guilty (Transcript page 35). However no such analysis was carried out. It was unclear to the Court, and it is unclear to us, how such a submission could have assisted an appeal against conviction.

[25] In support of his submission that the Crown had acted unfairly Mr Comeskey submitted that there was a second ambush at trial relating to evidence as to whether the appellant's backpack found with the drugs and scales would, contrary to her claim, contain all the paraphernalia so it could be transported for supply. (Transcript page 20).

> Comeskey –
>
> "Now my submission on the milk powder was that she makes repeated references to it in her submission. It's beyond belief that you could have these two fundamental coincidences in trial: A the Thai sugar aspect coming in and B the aspect of a full bag and it's fundamental to the safety of the verdict in that the defence could only rely upon the erroneous disclosure at trial and it undermined the credibility of her explanation as to what she thought and believed the substance was from feel, touch and smell." (Transcript pages 20-21).

[26] Earlier in his submission Mr Comeskey said:

> "The bags were not disclosed to the defence except in the photographs." (Transcript page 16).

[27] At page 17:

> "I had the opportunity at trial to see on the basis of the milk powder issue, to have a look myself, I had a fleeting glance in a room out the back."

[28] However at page 27 Mr Comeskey said that after the Detective McKay evidence "shock", that everything would have fitted in the bag, he would have loved the exhibits to come to Court:

> "Because I had a firm belief that she wouldn't have crammed all that stuff in there. You have this McKay evidence that's sneaked in, against the disclosure when he says in the thing the bags full and then he says everything else could have fitted in there. Nothing is produced in Court and that would have been a proper exercise for the jury to have a feel and a sniff and push into the bag."

[29] At page 39 of the Transcript Mr Comeskey said in explanation as to why there was a miscarriage of justice, and speaking of the placebos and the backpack:

> "Something had gone wrong at this trial. On two occasions, on the two major planks of the defence case if you like, the defence have been misled."

[30] The Crown drew the Court's attention to the following material facts:

30.1 Mr Comeskey had raised the issue of calling a milk powder expert with the trial Judge in Chambers during the course of cross-examination of Crown witnesses.

30.2 The backpack and scales were brought to Court during the trial at the request of Mr Comeskey so he could examine them. This was prior to Detective McKay giving evidence. Accordingly Mr Comeskey knew the backpack was at the Court and was available.

30.3 When Detective McKay gave evidence about which Mr Comeskey later complained, Mr Comeskey did not cross-examine on it.

30.4 Following conviction and in relation to a disputed fact issue prior to sentencing of Ms Huang, Mr Comeskey abandoned the claim that the items would not fit in the backpack. (Transcript pages 50-54).

[31] Both matters Mr Comeskey had complained of in oral submissions had been resolved either at trial or before sentencing. In particular his submission to the Court that he had been ambushed by the Crown in relation to the backpack and that it would not hold all the items was wrong in that the police had brought the backpack to Court for Mr Comeskey to examine and significantly Mr Comeskey had agreed before sentencing that the backpack would hold all the items.

[32] The Court of Appeal concluded at paragraph 46:

> "Mr Comeskey's submissions to us were more misleading than inept."

[33] Mr Comeskey did not accept the Court's judgment that it had been misled, and applied to recall the judgment. On application for recall the Court of Appeal confirmed its previous judgment, stating, variously as follows:

> "36 We do not accept Mr Fairbrother's submission that there was no evidential foundation for the statement that Mr Comeskey misled the Court ...
>
> 43 The duty not to mislead the Court applies generally to all aspects of interaction with the Court.
>
> 46 The conduct which formed the basis of the Court's comments was conduct in the face of the Court which breached Counsel's overriding duties to the Court. ...
>
> 49 Counsel take an oath on admission, where they swear truly and honestly to conduct themselves in the practice of a barrister and solicitor according to the best of their knowledge and ability. It is a fundamental duty of counsel in terms of this oath not to mislead the Court.
>
> 53 Mr Comeskey would be expected to have been aware that he made misleading statements and that he was under a duty not to do so. He had every opportunity during the hearing to correct those statements. Indeed it is very clear….that Mr Comeskey was well aware of his obligation not to mislead the Court. He said at one point "I'm being careful here." He was then warned by Hansen J: "well you need to be careful."
>
> 54 In any event, Mr Comeskey has had full opportunity, in the course of the recall application, to put forward any explanation for the comments that he had not put forward at the hearing of the appeal. He chose not to provide any evidence to the Court.
>
> 56 We do note that the matter is now in the course of disciplinary proceedings. It is worth making the point that the decision-makers in those proceedings will decide the matter on the basis of the information and evidence before them. This may be different from the material we have considered."

[34] In the course of this hearing we heard evidence by way of telephone link from Detective Senior Sergeant Chenery, currently serving as Chief of Police of Niue. He had been a Crown witness in the *Huang* trial. His evidence is important because it has a bearing on the extent to which Mr Comeskey misled the Court of Appeal.

[35] Mr Comeskey's evidence was to the effect that he had only looked at the backpack, briefly, in the witness room before court started on the day in question, in order to check the appearance and smell of the placebo, not in relation to the issue of whether all the equipment could fit into the backpack. This, he contends, is because that issue had not arisen at that stage, and really did not arise until the Crown's closing address. This is despite the fact that the prosecutor had specifically asked about the fit of the equipment, in his last question to Detective McKay, on the very day that Mr Comeskey had inspected the backpack. Mr Comeskey says that he missed the significance of this question and therefore did not cross examine on it. We find that difficult to accept, particularly when put with the evidence of Mr Chenery that the issue of the fit into the backpack had arisen in the course of the trial- "..*outside of the actual court being convened, from memory, because I know that there was an issue as to why there were six bags - why the bags were separated..."*, and that is why he had it brought to court to demonstrate to Mr Comeskey that he was "on the wrong track". This is, in our view a much more credible explanation than that proffered by Mr Comeskey.

Plea

[36] On 6 July 2010, at the conclusion of day two of this hearing and part way through his cross examination, Mr Comeskey pleaded guilty to the three charges (a) to (c) above, and the fourth set of charges was withdrawn by the Law Society.

[37] Even at this late stage, Mr Comeskey did not take the step expected of counsel who had been found to mislead the court by apologising to the court. Instead he chose to criticise the court in a national newspaper.

[38] Mr Comeskey wished to emphasise the following statement from the recall judgment:

> "43 The fact that the issue arose out of questioning from the Court does show that there was no premeditated plan to mislead ..."

[39] The Court refused to recall their earlier judgment.

[40] We refer briefly to the substance of the withdrawn charge because it is referred to in passing later in this decision. The facts are that on 22 November 2009 Mr Comeskey made a number of highly critical comments to the New Zealand Herald about the Court and the Judges, as opposed to their judgments, saying that the Judges were mediocre, the Court of Appeal was sub-standard and it could not treat counsel decently. He made similar derogatory comments about a Prosecutor. To set the comments in context, they were made soon after the Court of Appeal had refused Mr Comeskey's application to recall the judgment critical of him.

Penalty

The Law Society's position

[41] The Law Society sought strike off as the appropriate penalty for the Legal Services Agency charge; and suspension in relation to the F and Court of Appeal charges.

[42] Mr Billington QC for the Law Society drew the Tribunal's attention to the following decisions which applied the legal test for striking from the roll:

> "(a) *Complaints Committee of Auckland District Law Society v Robert Manfield Hesketh*
>
> (b) *Complaints Committee of Auckland District Law Society v Faleauto*
>
> (c) *Auckland Standards Committee v David Flewitt*"

[43] And for misleading the Court:

> "(d) *Canterbury District Law Society v Wood*"

[44] Mr Billington did note that Mr Comeskey's change of plea would result in significant cost saving for all parties and therefore some credit ought to be given to Mr Comeskey for a plea of guilty, albeit at a late stage.

Mr Comeskey's position

[45] In relation to the charge of having misled the Court of Appeal, Mr Fairbrother's Memorandum of Submissions on Penalty states that Mr Comeskey accepted that the Court was misled, but this was unintended and that he had apologised. He was referring here to the following answer to Mr Billington under cross-examination on 5 July 2010:

> "We. Okay, let's take it they've been misled by something I've said. I have not said anything intending to mislead them. I may have said things that I was confused of, that I was mistaken by, and for that, you know, I regret that and I apologise accordingly." (Transcript p.93)

[46] In the same Memorandum Mr Comeskey accepted his misconduct in relation to his client care obligations to Ms F, but did not accept the breadth of the criticisms made of him by Ms F.

[47] Mr Comeskey accepted responsibility for the "wrongly constructed" invoice to Legal Services Agency, and the poor invoicing practices which had been allowed to develop in his office. He did not accept that he had acted dishonestly.

[48] Mr Fairbrother, for Mr Comeskey, presented just prior to and during the Sanctions hearing a number of references and testimonials, some of which were spontaneous and some the result of an approach. Also produced was a report from an experienced Chartered Accountant, a Mr Ballu Khan of GK Accounting who had been engaged on 8 July 2010 to report on necessary improvements to "bring his (Mr Comeskey's) practise into the administrative 21st century."

[49] Mr Fairbrother submitted that Mr Comeskey's admissions of guilt and all the circumstances made striking off unnecessary. He argued that Mr Comeskey above all needs training and guidance, and that the publicity surrounding this case and costs sanctions were a significant and appropriate penalty. Mr Fairbrother submitted that censure and a costs award, was an appropriate sanction for the Tribunal to impose.

The Practitioner Mr Comeskey

[50] We move now to reflect on the practitioner's demeanour and responses we observed during the course of this hearing because they did assist us in our determination about penalty.

[51] We have already noted that Mr Comeskey did not initially cooperate with the Legal Services Agency and the Law Society in relation to the investigations they were engaged in separately about Mr Comeskey. We have also spelt out in some detail at paragraph 12 above what Mr Comeskey deposed in his affidavit, albeit in relation to strike-out of the Legal Services charges. In essence Mr Comeskey appeared to believe that he was providing the legally aided public with legal services at a lower cost than was appropriate; that this somehow justified his practice of charging at the full rate for all work done for Ms F regardless of who did it; that legal aid practitioners needed to earn a certain income and that if they did not charge at the highest hourly rate they would have to work outrageously long hours; that keeping a proper record of time was not feasible and that the person who prepared the invoice could estimate an appropriate time to charge depending on the nature of the file; that most Auckland practitioners in the same line of work were using a similar model; and that the fact Mr Comeskey did not personally sign off on false invoices absolved him of any responsibility. The impression we gained was confirmed by a comment Mr Comeskey made in response to a question from the Chair during cross-examination. When asked whether he appreciated the serious nature of the charges against him, and the possibility of strike-off, Mr Comeskey responded that he had left the matter to his lawyer; that he found the whole thing "unpalatable".

[52] It had become clear at this point in the hearing that Mr Comeskey's administrative and business practices were simply chaotic, and that he had done little or nothing to prepare for the hearing before us, in the many months leading up to it. He told us he had left those matters to his counsel, apart from some searches the previous evening for telephone and email records in relation to the F matter. The latter resulted in a late affidavit from Ms F's former partner Mr P, which as we have said was not tested because Mr Comeskey had by that stage pleaded guilty to the

charges. Mr Comeskey was unable to tell us under cross-examination from Mr Billington what if any time records he had kept about the F matter, and whether those records might have been passed with the file to Ms F's newly assigned Counsel. Mr Billington requested an adjournment to enable him to seek out the file to confirm the facts including perhaps speaking to the Crown Solicitor's office about the asserted plea bargain. However, shortly after that Mr Comeskey decided to alter his plea.

[53] We were particularly troubled by the assertions by Mr Comeskey and his Counsel throughout these proceedings that his unlawful practices in relation to legal aid were "standard practice" throughout the legal profession. Neither Mr Fairbrother nor Mr Comeskey produced any evidence that such practices go beyond Mr Comeskey's own practise, let alone being common, and we are not surprised at this lack of evidence. We would not expect erring practitioners to place themselves in a queue for investigations by either the Legal Services Agency, the Law Society, or this Tribunal. Additionally, if other lawyers are engaged in unlawful conduct, it is not going to excuse the actions of Mr Comeskey. But importantly we emphasise that the submission that everyone is doing it casts unfair and unsupported aspersions on the whole legal profession, particularly those who give their time and expertise to assist people who would not otherwise be able to afford representation, and do so at some personal sacrifice. We accordingly viewed these unsavoury submissions from Mr Fairbrother and Mr Comeskey extremely seriously. We certainly do not accept them.

[54] Mr Comeskey having pleaded guilty to three charges, and the fourth being withdrawn, we were expecting to observe some genuine contrition from Mr Comeskey and robust strategies for the future if he were to remain in practice. The hearing was adjourned for over a week, so this ought to have been possible. We were disappointed that this did not initially occur at the penalty hearing. Accordingly, following submissions from Counsel, Mr Fairbrother and Mr Comeskey were advised by the Chair of matters which were still live for the Tribunal and which did not seem to have been addressed. The transcript records at page 166 from line 24 as follows:

> "And the first of those is that there isn't a proper apology to the Court of Appeal. The apology which was given in evidence and, as pointed out by Mr Billington, was in cross-examination some distance in, was, in our view, perfunctory, and particularly so after such a long period of denial and, although not the subject of charges any longer, the offence of misleading was in fact aggravated by the comments made publicly about Their Honours after the recall judgment was published.
>
> And given those matters, it seems to me that at the very least Mr Comeskey should have been able to present us copies of written apologies to each of Their Honours.
>
> And the second real concern we have obviously resides around the Legal Services invoice and the lack of evidence of any real insight that Mr Comeskey has about the seriousness of this issue. Perhaps some modest sense of contrition may have been conveyed through your submissions but there's nothing again directly from Mr Comeskey.
>
> There's no mentor suggested and made available to the Tribunal so that we can assess whether that might be a person who might allow your client to continue in practice by very careful monitoring and oversight. We don't have that opportunity because there's been no mentor provided.
>
> There's no undertakings or evidence about his future practice management and oversight, other than the suggestions in the report. Indeed, we don't even have a confirmation from Mr Comeskey himself that he accepts the recommendations and will adopt them and will undertake that to the Tribunal.
>
> And, of course, that accountant was engaged very much at the eleventh hour.
>
> So, we've still got some concerns that haven't been answered this morning. We are just about at morning adjournment time. What I propose is that we give you and your client perhaps 30 minutes to consider those issues and see whether those can be addressed and perhaps come back to us after that time."

[55] Following the adjournment cited in the transcript above, Mr Comeskey requested the opportunity to address the Tribunal on five matters as follows:

> (Transcript page 168)
>
> "I must say they are not easy matters for me to address but I do believe that I need to make unreserved apologies to people and I'm going to try and particularise them as best I can.
>
> Firstly to Their Honours Justice Glazebrook, Hansen and Wild who sat on the Court of Appeal. I extend to them a fulsome and unreserved apology for that aspect.

> I also apologise to the judiciary of New Zealand for the comments that I have made which were unwise and are deeply regretted, and I accept that.
>
> I also apologise to the Tribunal, to the members of the legal profession and to the Law Society, and that's an unreserved apology for errors that I have obviously made and for any hurt or embarrassment that I've brought upon the profession.
>
> In terms of the report by Ballu Khan, I could accept that in its entirety and going forward, if I were able to practice, I would fully implement all of his recommendations. Also I would endorse him reporting independently to the Law Society at some regular interval.
>
> I also advise the Tribunal that in terms of a mentor, I would be happy to have that. I think that is a good thing. I don't think it should be a person that I put up because I would obviously put up people that I know and may not mentor me as rigidly as they ought to otherwise but I would be quite happy for the Law Society, I think it would be more appropriate for the Law Society if that were to be an option, to put up a list of mentors. And, in that respect, they would be free to report back independently to the Law Society but I certainly have no qualms having someone effectively assisting me.
>
> I have also come to the realisation that in having employed juniors, while it is a good thing because it assists in giving people experience, it has the downside effect of growing the practice to a level beyond the means of any individual practitioner to operate and, in that sense, I would advise the Tribunal that it would be my intention to not use junior employees in the future.
>
> In terms of my Legal Services provider contract, I advise the Tribunal that I am happy to relinquish that contract and also to continue to provide assistance in their ongoing enquiries.
>
> Line 26: And just finally, members of the Tribunal, I would – this period has been very distressing for me and my family. I have six children and last Thursday when I arrived home my 7 year-old said to me 'Dad, you never told us you were a crook.' And one doesn't know how to answer that to a 7 year old who's been watching the news but my final apology is to my family for the distress that I have caused them and I make no secret of the fact that I have worried myself sick as to what their future would be."

[56] Mr Comeskey subsequently, at the Tribunal's request, committed the above undertakings to writing, and these signed undertakings form part of our decision.

Decision on penalty

[57] We agree with Mr Billington that Mr Comeskey was right to plead guilty to the charge of misleading the Court of Appeal. The only question was whether or not it was premeditated. Mr Billington referred us to the decisions of the High Court under the 1982 Act which considered the same or similarly worded charges, and were applicable in this case.[4] Mr Billington accepted, and we agree, that while Mr Comeskey may not have intentionally misled the Court, that he was nevertheless negligent and incompetent in this matter, and that his conduct has the potential to undermine the standing of counsel appearing in the Courts. Mr Comeskey breached his obligation as Counsel which was not to make submissions which are misleading. We agree that the appropriate penalty is suspension.

[58] Mr Billington submitted that this Tribunal, the New Zealand Lawyers and Conveyancers Disciplinary Tribunal, has been specifically constituted under s.226 of the 2006 Act to set standards for the profession and to exercise discipline within the profession. In relation to the F charges, Mr Comeskey has admitted that his conduct was wilful or reckless contravention of the Client Care Rules at s.4 of the 2006 Act. We agree that suspension is the appropriate penalty in this case.

[59] The Legal Services Act charge to which Mr Comeskey pleaded guilty was in our view delicately balanced, and we had significant difficulty deciding whether Mr Comeskey's misconduct reached the threshold which would attract strike-off. Our deliberations concentrated on the following factors:

59.1 While Mr Comeskey admitted filing a false invoice, and ultimately accepted that his office practices were well below what would be expected of any practitioner, particularly one receiving public monies (we would say entirely unacceptable), did his behaviour involve blatant dishonesty? On balance, we believe not. We were influenced on this matter by the fact that Mr Comeskey never wavered from his frank admission that he was not a good businessman, that he did not ever

[4] *Complaints Committee No 1 of the Auckland District Law Society v C [2008] NZLR 105*
Complaints Committee of the Canterbury District Law Society v W [2009] 1 NZLR 515

see the invoices which were prepared by others, and that he thought his invoicing practise was unexceptional. While this amounts to recklessness and wilful blindness on his part, including a wholly unacceptable disregard for his legal obligations, it falls just short, in our view, of blatant dishonesty.

59.2 Unlike the cases of Mr Hesketh[5] and Mr Flewitt[6], Mr Comeskey has not been convicted on these matters in the criminal jurisdiction.

59.3 Unlike the case of Mr Faleauto[7], there is no current evidence that Mr Comeskey is a serial offender in these matters. We have noted the case of *The Queen v Cavanagh*[8] to which Mr Billington referred us, in which Rodney Hansen J found that Mr Comeskey's fees charged for representing one defendant were based on grossly excessive hours recorded, some plainly inaccurately. We are also cognisant of the ongoing enquiries by the Legal Services Agency, with which Mr Comeskey has undertaken to cooperate. However neither of these matters are relevant to the charges before us and we consider it would not be appropriate for us to take them into account in setting this penalty.

59.4 In the end – and we recognise that it was late in the piece and following significant prodding – Mr Comeskey has finally acknowledged that his practice is an administrative mess, and he has taken and will take steps to remedy that situation for the future when he has the opportunity to return to his practice.

59.5 Mr Comeskey has undertaken to relinquish his legal services contract, and not employ any counsel in his practice without leave of the New Zealand Law Society. We consider that this provides protection to

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[5] *Complaints Committee of Auckland District Law Society v Robert Manfield Hesketh* – Decision 17 September 1997

[6] *Auckland Standards Committee v David Flewitt* –Decision 22 June 2010

[7] *The New Zealand Law Society v Faleauto* [2009] NZLCDT 19 and *The New Zealand Law Society v Faleauto* [2010] NZLCDT 2

[8] *The Queen v Cavanagh* – HC CIV 2002-404-3798 – 7 December 2006

recipients of legal aid and the taxpayer in relation to legal aid. It also reduces the possibility that young and inexperienced lawyers will learn bad habits from working in a practice whose business processes are, to put it mildly, clearly unsatisfactory.

59.6 We had regard to the fact that this was the first occasion that Mr Comeskey had appeared before the Tribunal and, as noted above, that the charge related to only one invoice.

59.7 We have noted the comments of the various testimonials and references presented in support of Mr Comeskey for the Penalty hearing.

59.8 Mr Comeskey has demonstrated appropriate remorse and apologised for his misconduct and its aftermath.

[60] Taking all the charges and admissions into account, and having received the undertakings set out below from Mr Comeskey, we have decided that the appropriate penalty for Mr Comeskey is a nine month suspension from practice as a barrister and solicitor effective from the delivery of this written decision. We believe this penalty, together with the undertakings and order for costs balances the expectation that lawyers who engage in misconduct will be punished and the need to protect the public, including the taxpayer, from incompetence and dishonesty on the one hand, with the opportunity for Mr Comeskey to continue to practise in the future but subject to a considerable and essential improvement in his administrative and client care practices.

[61] We note that the significant media coverage of Mr Comeskey's transgressions is a penalty in its own right, and have had regard to the likely and potential effects on him and his family of both suspension and strike-off.

[62] The following undertakings from Mr Comeskey are to be read as forming part of this penalty decision:

62.1 Mr Comeskey repeats his unreserved apology to the Judges of the Court of Appeal in R v Huang, to members of the judiciary and members of the legal profession for his actions in misleading the Court of Appeal and his unwarranted criticisms of the Bench and a practitioner.

62.2 Mr Comeskey undertakes to engage GK Consulting (Mr B Khan, Chartered Accountant) to implement in its entirety the recommendations in Mr Khan's report filed in mitigation on behalf of Mr Comeskey. Further, Mr Comeskey undertakes that Mr Khan will report to the New Zealand Law Society at regular intervals on the implementation of this report and on the conduct of the business aspects of Mr Comeskey's practice. Mr Comeskey undertakes to support this reporting as often as required and for as long as required but suggests, in the first instance, quarterly for a 12 month period from 16 July 2010.

62.3 Mr Comeskey will engage a professional mentor (qualified legal practitioner) to be approved by the New Zealand Law Society and to report regularly to the New Zealand Law Society and unless otherwise directed, quarterly for 12 months from 16 July 2010 or as long as is required. Mr Comeskey will submit a list of proposed mentors, with his preference, to the New Zealand Law Society with the indicated consent of the proposed mentor on or before 30 July 2010.

62.4 My Comeskey undertakes to relinquish his Legal Services Contract from 16 July 2010 and to assist Legal Services Agency, fully, in any present or future enquiries in relation to his practice.

62.5 Mr Comeskey undertakes not to employ any counsel in his practice without leave of the New Zealand Law Society.

62.6 The time periods noted in point 2, 3, and 4 will be extended by agreement from Mr Comeskey on written notice to that effect addressed to him by those nominated in these paragraphs.

62.7 Leave is reserved for Mr Comeskey to apply to the Tribunal for further directions in relation to these proceedings.

Dated at Auckland this 15th day of July 2010 and signed by Christopher Patrick Comeskey.

[63] The reporting provisions in the above undertakings – which were given prior to our decision being made – will commence from the date that Mr Comeskey recommences practice. In relation to the mentor, Mr Comeskey is to notify the mentor to the New Zealand Law Society one month prior to recommencing practice.

[64] Mr Comeskey will meet any and all costs of these undertakings, and there will be no expectation that the New Zealand Law Society will contribute to any costs of implementing these undertakings.

Costs

[65] We make an order pursuant to section 249 of the 2006 Act that the costs of the New Zealand Law Society, $44,133.10 be paid by Mr Comeskey.

[66] We make an order under section 249 of the 2006 Act that Mr Comeskey reimburse the New Zealand Law Society for the order which will be made against it for the costs of the Tribunal under section 257. These costs will be two thirds of the actual costs of the Tribunal to reflect the split between the two charges under the 2006 Act and on the charge under the 1982 Act. They are fixed at $22,264.

Suppression

[67] The suppression of Ms F's name is permanent.

DATED at AUCKLAND this 23rd day of July 2010

Judge D F Clarkson
Chair