NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL

[2014] NZLCDT 19
LCDT 023/13

IN THE MATTER	of the Lawyers and Conveyancers Act 2006
BETWEEN	**AUCKLAND STANDARDS COMMITTEE No. 5** Applicant
AND	**CHRISTOPHER MICHAEL CLEWS** Practitioner

CHAIR
Judge D F Clarkson

MEMBERS OF TRIBUNAL
Mr S Grieve QC
Mr K Raureti
Mr P Shaw
Mr T Simmonds

HEARING at Hamilton District Court

DATE OF HEARING 3 March 2014

COUNSEL
Mr McCoubrey for Standards Committee
Mr Peter Gorringe for the Practitioner

DECISION OF NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL

Introduction

[1] The two charges set out below were heard on 3 March 2014. The Tribunal heard evidence from the practitioner, who was cross-examined by counsel for the Standards Committee. No other deponents were required for cross-examination. Submissions were then made by both counsel. After considering the matter the Tribunal gave an oral decision that it found misconduct proved in respect of both charges. It reserved its reasons for the decision which are now set out.

Charges

[2] At the outset of the hearing the charges were amended by consent. The amended charges are:

> Auckland Standards Committee 5 (**Committee**) hereby charges Christopher Michael Clews (**Practitioner**) with:
>
> **First Charge**
>
> Misconduct within the meaning of s.7(1)(a)(i) of the Lawyers and Conveyancers Act 2006 (**Act**), or, alternatively,
>
> Negligence or incompetence in his professional capacity, and the negligence or incompetence has been of such a degree as to reflect on his or her fitness to practise or as to bring his profession into disrepute (s.241(1)(c) of the Act), or; alternatively:
>
> Unsatisfactory conduct within the meaning of s.12(a) and/or s.12(b) of the Act.
>
> The particulars of the charges are as follows:
>
> 1 At all material times the Practitioner was enrolled as a barrister and solicitor of the High Court of New Zealand and held a current practising certificate.
>
> 2 He was counsel for Mr E at a trial at which Mr E was charged with one count of rape and one count of doing an indecent act on a young person under the age of 16 years.

3 Mr E was convicted and appealed against those convictions. The Court of Appeal held that it was not necessary for Mr E to waive the privilege that existed between Mr E and the Practitioner: *E v The Queen* [2010] NZCA 280. The Court of Appeal gave judgment on 24 November 2009.

4 In the knowledge that Mr E had not waived privilege, on 4 March 2010 the Practitioner sent to Crown Law (acting for the respondent to Mr E's appeal) a draft affidavit and "questions and answers" document, both of which contained privileged material.

5 This is conduct that occurred at a time the practitioner was providing regulated services and is conduct that would reasonably be regarded by lawyers of good standing as disgraceful or dishonourable.

6 Alternatively, it was negligent or incompetent, and the negligence or incompetence has been of such a degree as to reflect on his fitness to practise or as to bring his profession into disrepute.

7 Alternatively, this is conduct that occurred at a time the practitioner was providing regulated services and is conduct that falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent lawyer.

8 Alternatively, it is conduct that occurred at a time when the practitioner was providing regulated services and is conduct that would be regarded by lawyers of good standing as being unacceptable.

[3] A concession was made by the practitioner in cross-examination that his document of March 2010 plainly breached privilege. Furthermore in explanation for his behaviour, Mr Clews said he had decided to forward the material (which included Mr E's own brief of evidence) because he had decided "*to become proactive by putting something forward*".

[4] The practitioner had initially contended that he was not providing regulated services at the time he corresponded with the Crown, however he withdrew that submission at the hearing and accepted that he was providing regulated services.

Second Charge

Misconduct within the meaning of ss.7(1)(a)(i) and/or 7(1)(a)(ii) of the Lawyers and Conveyancers Act 2006 (**Act**), or, alternatively,

Negligence or incompetence in his professional capacity, and the negligence or incompetence has been of such a degree as to reflect on his fitness to practise or as to bring his profession into disrepute (s.241(1)(c) of the Act), or; alternatively:

Unsatisfactory conduct within the meaning of s.12(a) and/or s.12(c) of the Act.

The particulars of the charges are as follows:

1 At all material times the Practitioner was enrolled as a barrister and solicitor of the High Court of New Zealand and held a current practising certificate.

2 He was counsel for Mr E at a trial at which Mr E was charged with one count of rape and one count of doing an indecent act on a young person under the age of 16 years.

3 Mr E was convicted and appealed against those convictions. The Court of Appeal in *E v The Queen (No. 2)* [2010] NZCA 280 upheld the grounds of appeal relating to the Practitioner's closing address; and the lack of an identification warning with regard to one of the victims. In *E v The Queen (No. 3)* [2010] NZCA 544, the Court of Appeal applied the proviso and dismissed the appeal.

4 On 27 October 2011, a Wellington Standards Committee determined that there had been unsatisfactory conduct on the Practitioner's part. The Practitioner was censured and ordered to pay costs of $500.

5 At some point on or about 31 October 2011, the Practitioner approached Mr E and thereafter commenced to act for Mr E in an application to the Governor-General. Any such application would necessarily require reliance on the matters referred to in the Court of Appeal in relation to the Practitioner's handling of the case and/or the Law Society action taken against him.

6 This is conduct that:

(a) occurred at a time the practitioner was providing regulated services and is conduct that would reasonably be regarded by lawyers of good standing as disgraceful or dishonourable; and/or

(b) is conduct that occurred at a time the practitioner was providing regulated services and is conduct that wilfully or recklessly contravened Rule 5 (independence) and/or 5.4 and/or 5.4.1 (conflicting interests) of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008; or alternatively

(c) it was negligent or incompetent, and the negligence or incompetence has been of such a degree as to reflect on his fitness to practise or as to bring his profession into disrepute; or, alternatively

7 Alternatively, it was conduct that:

(a) occurred at a time the practitioner was providing regulated services and is conduct that falls short of the standard of competence and

diligence that a member of the public is entitled to expect of a reasonably competent lawyer; and/or

(b) occurred at a time the practitioner was providing regulated services and is conduct that contravened Rule 5 (independence) and/or 5.4 and/or 5.4.1 (conflicting interests) of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008.

Facts

[5] The practitioner had represented Mr E at a criminal trial following which Mr E was convicted of rape and doing an indecent act upon a young person. Mr E appealed and was represented by another practitioner on appeal. One of the grounds of appeal related to the practitioner's conduct during the trial. The Court of Appeal ultimately upheld two grounds of the appeal, namely a complaint concerning the practitioner's closing address and a further ground relating to the Judge's direction as to identification evidence. However the Court of Appeal applied the proviso and dismissed Mr E's appeal.

[6] Leading up to the hearing of the appeal there was a trail of correspondence between the practitioner and Mr E's new counsel. It concerned whether Mr E was required and prepared to waive privilege in respect of his communications with the practitioner. Ultimately the Court of Appeal found that he did not have to waive privilege and indeed Mr E at no stage confirmed privilege had been waived. Despite this the practitioner volunteered a considerable amount of information to the Crown thus breaching Mr E's privilege.

[7] It should be added that leading up to that point the practitioner had been aware that the Crown and Mr Pyke, Mr E's new counsel, had been having discussions about whether some accommodation could be reached in relation to privilege.

[8] However the practitioner did not await a clear notification that any such accommodation had been agreed or that he had clear authority to provide information to the Crown.

[9] These facts were not largely in dispute, it was the practitioner's contention that his actions constituted a simple error and thus ought to fall within the "*unsatisfactory conduct"* level of professional offending, rather than being so serious as to reach the standard of misconduct.

[10] In relation to the second charge this arose out of two visits on 31 October 2011 and 8 December 2011 which the practitioner paid to Mr E in prison. In his evidence the practitioner says:

> "The purpose of each visit was to see if I could help Mr E with any steps he may be considering to have his case further reviewed after the Court of Appeal decisions. I did not have any intention or wish to be instructed by him on anything."

[11] The practitioner accepted that accepting further instructions from Mr E in the circumstances would have been quite inappropriate. He recounted that he and Mr E talked about an application to the Governor-General for a pardon. The practitioner had with him an authority to uplift files and waiver of privilege already completed, indeed he had these forms with him on both visits, and Mr E signed both authorities.

[12] These were forwarded to Mr Pyke with a request that the files be forwarded to the practitioner. In the second communication the practitioner suggested that Mr Pyke and Mr E ought to speak directly about this. His evidence was that he simply wanted to help Mr E with his pardon application, however not as his lawyer for a number of reasons, including that he had no experience in the area. The practitioner's evidence was that he had simply been in Wellington on other business and had chosen to travel up to visit his former client out of kindness.

[13] Under cross-examination further information emerged which was not always consistent with the affidavit evidence. We note that the authorities to uplift files were set out on the practitioner's letterhead. He booked his prison visits as a lawyer.

[14] Finally the practitioner conceded that retrieving his own file from Mr Pyke assisted him in dealing with the Legal Services Agency over certain matters relating to payment for his attendances.

[15] Exacerbating the behaviour in our view, shortly before visiting Mr E the practitioner had been found guilty of unsatisfactory conduct by a Standards Committee in relation to his conduct of Mr E's trial. The practioner acknowledged telling Mr E about this despite which, the practitioner says Mr E was very glad to see him because he had so few visitors.

The practitioner contended he was not providing regulated services during these visits or in seeking to uplift the files.

Charge 1 - Level of seriousness of conduct

[16] It is the Standard Committee's contention that 'state of mind' is relevant in considering the level of seriousness. In the submission of counsel for the Standards Committee, the purported confusion on the part of the practitioner is negated, by the following:

[a] In a fax of 16 September 2009 Mr Pyke had stated to the practitioner "*the appellant as you know has not waived legal professional privilege*";

[b] Earlier in a letter to Crown Law of 14 September 2009 the practitioner had stated "*if and when privilege is waived*"; and

[c] In a letter to Mr Pyke of the same date, annexing a copy of his letter to the Crown, the practitioner refers to that letter as *"… justifying my stance in a very limited way because privilege has not been waived*".

[17] Between September and March no clear communication was made to the practitioner which could have justified him in thinking that the appellant had waived privilege. Furthermore in the letter sent to Crown Law on 4 March Mr Clews makes reference to "*a distinct likelihood of waiver*", rather than waiver actually having been given.

[18] Fortunately the Crown appreciated that this was a breach of privilege and promptly returned the letter, having made no use of it and informed Mr Pyke.

[19] It would appear that the practitioner was feeling somewhat defensive about the attack on his conduct of the trial on behalf of the appellant Mr E. He refers to being eager "to make the position plain". In addition the practitioner acknowledges that he was copied by the Crown a letter of 8 January 2010 which stated unequivocally that Mr E had not waived privilege.

[20] In evidence before us the practitioner said he took responsibility for "*taking too much from the letters*".

[21] Counsel for the practitioner, Mr Gorringe, submitted that the practitioner was uncertain at the time whether a waiver had been provided. He submitted that because of the ongoing negotiations between Mr E's counsel and the Crown that whilst there was no actual waiver there was "a flavour of it about".

[22] With respect we reject that submission. The letter of 8 January 2010 so clearly dispels any such flavour that it is unsustainable to argue that the practitioner did not know that waiver had not occurred.

[23] Furthermore in September 2009 the practitioner had already breached privilege with his "*eagerness*" to assist.

[24] Mr McCoubrey submitted on behalf of the Standards Committee that this was not to be considered a "*simple error*". He submitted that the fundamental nature of the protection of a client's privilege in relation to his communications with his legal representative means that a breach of such must be far along the continuum of professional misbehaviour.

[25] We accept that submission. A client must be able to have absolute faith in the confidentiality of his communications with his counsel. Mr Clews had been on notice since May that his former client had not waived privilege yet his letter of 14 September first breached that privilege; and then there was the very serious full disclosure to the Crown of 4 March.

[26] The practitioner indicated that he did not believe he had breached privilege in the September letter. Not only was Mr Clews put on notice in between these two letters that Mr E had not waived privilege and that his letter of 14 September raised the sort of concerns that ought to lead him to seek advice from senior counsel, the practitioner failed to do so. He accepted at the hearing that this was an error.

[27] We consider that the communications and the practitioner's *viva voce* evidence had a clearly defensive tone. He was clearly wanting to give his version of events relating to the trial and in doing so put his interests ahead of his client's and so committed the fundamental breach of trust.

[28] We consider that in doing so he has either behaved dishonourably in the eyes of the reasonable legal practitioner or has been negligent to such an extent as to bring the profession into disrepute. Either finding supports a finding of professional misconduct.

Charge 2 - Level of seriousness of conduct

[29] Submissions for the practitioner in relation to this charge were to the effect that he was attempting to help the prisoner rather than represent him. Nor, it was submitted, was he intending to terminate Mr Pyke's appointment as counsel since he only received his own file back.

[30] However the authorities (to uplift the files) do not read that way and the circumstances surrounding this visit lend weight to this as an instance of the practitioner providing regulated services. He went to the prison armed with written authorities, on his letterhead, apparently before he even knew of Mr E's attempt to seek a pardon. He booked the visits as a lawyer. He provided inconsistent answers as to the purposes for which he was obtaining Mr E's files. He finally conceded in his evidence that he was able to utilise the files to assist with his own negotiations with the Legal Services Agency concerning his fees.

[31] We consider the only reasonable interpretation is that he was providing regulated services. We refer to our decision in *Orlov*[1] where, at paragraph [45] we adopted an earlier decision of the Legal Complaints Review Officer to the effect that the concept of provision of regulated services *"… must be construed broadly and consistently with the wider purposes of the legislation to include any conduct which occurs in connection with the practice of law*".

[32] The practitioner aggravated his behaviour when, other than the use to which we have referred (negotiating with Legal Services Agency) the only use to which this file was put was to attack Mr Pyke in some considerable detail and in an unrestrained way, particularly in his submission to the Law Society.

[33] The charge pleads wilful or reckless contravention of Rule 5 as to a practitioner's independence from compromising inferences or loyalties as well as

[1] *National Standards Committee v Orlov* [2013] NZLCDT 45.

Rule 5.4 "*a lawyer must not act or continue to act if there is a conflict or risk of conflict between the interests of the lawyer and the interests of a client for whom the lawyer is acting or proposing to act*".

[34] We consider that in going to see a former client in respect of whose representation the practitioner had just previously had a finding of unsatisfactory conduct, seeking to uplift his files from his current counsel and putting them to the use referred to above we consider to be misconduct by "*reckless contravention of Rule 5 and Rule 5.4*".

[35] Accordingly the second charge of misconduct is proved.

Penalty submissions

[a] Counsel for the Standards Committee are to file penalty submissions within 14 days of the receipt of this decision.

[b] The respondent practitioner is to provide submissions in reply relating to penalty within a further 14 days.

[c] Counsel are to confer with the Tribunal Case Manager to allocate a two-hour fixture in relation to penalty. This fixture will in all likelihood have to take place in Auckland.

DATED at AUCKLAND this 30th day of April 2014

Judge D F Clarkson
Chair