NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL

[2014] NZLCDT 21

LCDT 026/13

IN THE MATTER	of the Lawyers and Conveyancers Act 2006
BETWEEN	**AUCKLAND STANDARDS COMMITTEE** Applicant
AND	**JOHN ALAN VAN DER ZANDEN** of Auckland, Practitioner

CHAIR

Judge D F Clarkson

MEMBERS OF TRIBUNAL

Mr J Clarke

Mr C Lucas

Ms C Rowe

Mr I Williams

HEARING at Auckland

DATE OF HEARING 31 March 2014

COUNSEL

Mr Morris and Ms Cameron for Standards Committee

Mr Fairbrother QC for the Practitioner

DECISION OF NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL

Introduction

[1] The practitioner faced one charge which was framed with two alternatives. The primary charge was of misconduct. The first alternative charge was unsatisfactory conduct and the second alternative charge was negligence or incompetence. The practitioner admitted the first alternative of unsatisfactory conduct and denied misconduct and negligence or incompetence. The charge and supporting particulars are annexed as Appendix I.

[2] The Standards Committee called five witnesses, three of whom were required for cross-examination, namely Mr Webby, Mr Speir and Ms Pidgeon.

[3] The practitioner gave evidence and was cross-examined. He called two witnesses as to character one of whom Inspector McIlwraith, was briefly cross-examined by way of video conference link.

[4] The parties agreed a chronology which was submitted to the Tribunal and forms the basis of the brief background facts set out below.

[5] The conduct under consideration is that of misleading the Court of Appeal in affidavits which effectively alleged prosecutorial misconduct and reneging on an arrangement prior to plea. This was a serious allegation to make and indeed was the only basis for the appeal.

[6] There is no dispute that the Court of Appeal was, at least temporarily, misled. The issue was the intention of the practitioner and whether he knowingly misled the Court or was negligent or incompetent in his communication or alternatively merely careless as accepted by him.

Background

[7] The practitioner appeared for a Mr B in the Criminal Jurisdiction of the District Court between 15 March 2011 and 5 April 2012. During that period there were approximately 15 appearances in Court. In the course of these appearances, some of which occurred over a period of a week during which there was to be a standby trial, a number of different Crown prosecutors were involved. The practitioner says he had dealt with a total of 11 prosecutors, and the Meredith Connell diary, provided in the bundle of documents, names at least eight of their prosecutors as having appeared over the period in question and at times the file passed back and forth between two prosecutors on a number of occasions.

[8] The initial indictment contained three counts of Male Assaults Female ("MAF") as well as the lead offence which was injuring with intent to injure. During the week of a standby trial, namely 18 to 20 April, Mr Webby had carriage of the prosecution for the Crown. On the Wednesday of that week, 28 April, he advised the practitioner that he would be seeking to add three additional counts of MAF. Mr van der Zanden indicated that he could not oppose this course. It is the practitioner's evidence that it was during this brief conversation that he raised with Mr Webby the possibility of home detention as an outcome for a plea. But Mr Webby recalls no such conversation and says that it would not have conformed with the standard practice of the firm never to bind the Crown in relation to sentence until a pre-sentence report is available, particularly if home detention is proposed.

[9] Furthermore Mr Webby points out it would not be logical to be adding counts to an indictment in the course of a plea discussion (which is normally where counts are removed or reduced).

[10] The charges were duly amended and the file then returned to Mr Speir to prosecute for a standby trial in July. Mr van der Zanden alleges that during this week while awaiting a further standby trial he approached Mr Speir seeking an assurance that the Crown would not oppose home detention. Mr Speir does not recall this conversation but does recall a subsequent exchange of emails in October, relating to an agreed summary of facts and a suggested plea to one count of injuring with intent to injure, the MAF charges to be withdrawn. (By this time there had been further appearances with two different prosecutors in attendance). Mr Speir recalls

contacting the officer in charge of the matter about this but the matter then went to a sentence indication hearing in November 2011 with a different prosecutor in attendance. However Mr B reconsidered his position and decided not to plead.

[11] The file was then reallocated to Ms Pidgeon immediately following which she was contacted by the practitioner:

> "Just a brief synopsis of where this trial is at present. Nathan Speir and I on behalf of (Mr B) have almost resolved this matter twice. B was going to plead to the charges of injures with intent to injure and the Crown would withdraw all charges of MAF.
>
> Unfortunately I had to brief B on the sentencing indication which was predicated on guilty pleas to 1 and 6 … times MAF. The starting point was above the minimum Court would consider for home detention.
>
> However, I now suspect it is very likely this matter will go to trial …"

[12] Ms Pidgeon responded concerning disclosure of expert evidence intended to be called by the defence and later that day (23 November 2011) had a telephone conversation with Mr van der Zanden in which he advised that he was "*confident that the matter might be resolved*". The plea discussions which then occurred related to withdrawal of the six MAF charges on the entering of a guilty plea to the injuring with intent to injure charge. Ms Pidgeon consulted with her supervising partner Mr Hamlin then responded to Mr van der Zanden that the arrangement proposed was acceptable provided the summary of facts remained the same, subject to the correction of a small factual error. There was no mention of home detention at this point.

[13] On 29 November 2011 Mr B pleaded guilty to the charge of injuring with intent and was remanded for sentence on 5 April 2012. In advance of that hearing submissions were provided to the practitioner. In the usual manner, according to Ms Pidgeon the Crown's position on the type of sentence was reserved until after the pre-sentence report was received. The probation officer who prepared the pre-sentence report did not refer to the agreed summary of facts and thus little weight was placed on it by Ms Pidgeon who attended sentencing on 5 April and opposed home detention having regard to the nature of the offending and a failure to comply with bail conditions.

[14] Ms Pidgeon has no recollection of Mr van der Zanden referring to an agreement with Mr Webby or anyone else at Meredith Connell regarding sentence. She points out that, had this been raised with her, she would have stood the matter down and sought further instructions. Furthermore she refers to Mr van der Zanden's own written submissions on sentence to the Court which, while advocating home detention, made no reference to the Crown's attitude.

[15] Mr B was sentenced to two years imprisonment. He subsequently sought to appeal this sentence represented by different counsel, relying on the affidavit sworn by Mr van der Zanden which deposed that the Crown prosecutor (Mr Webby) had agreed that the Crown would accept the final sentence ought to be one of home detention and that an application to that effect would not be opposed. He alleged this arrangement was not adhered to at sentence. This affidavit was sworn on 27 June 2012 and was responded to by Ms Pidgeon immediately, denying that she had agreed to consent to home detention at any time and annexing the email exchange between herself and Mr van der Zanden on 23 and 24 November 2011.

[16] Unsurprisingly, the Court of Appeal was particularly concerned at the material before it. In a Minute issued on 24 August 2012 His Honour Harrison J said (at paragraph 5):

> "This conflict (in the evidence) gives rise to serious questions about Mr van der Zanden's conduct. It appears that when swearing his affidavit he failed to disclose to the Court the existence of his email exchange with Ms Pidgeon which contradicts his assertion on oath about the nature and extent of a sentencing agreement with the Crown. As an officer of the Court he was bound to make full and accurate disclosure of all relevant material when swearing his affidavit. On its face his affidavit is seriously misleading."

[17] His Honour went on to express that the present view of the Court was that the matter ought to be referred to the New Zealand Law Society but before taking that step gave the practitioner *"… an opportunity to explain his position on oath*."

[18] In response to this the practitioner did indeed file a second affidavit in which the following three paragraphs are of particular importance:

> "9. Mr Speir, Meredith Connell, was Counsel-on-Instructions when he appeared for the Crown in the matter of R v B. I discussed with Mr Speir whether the Crown would amend the Summary of Facts and whether the Crown would oppose an application for Home Detention. Mr Speir

advised me that he was not in a position give an indication on the Crown's position because he did not have the seniority to make the decision.

10. On or about 1 September 2011, Crown Prosecutor, Mr Nick Webby, Meredith Connell, appeared for the respondent. After the adjournment of the case, we had some meaningful discussions regarding guilty in the Crown Room opposite Courtroom 7, Auckland District Court. Mr Webby is a more senior Crown Counsel than Mr Speir. I addressed the concerns of Mr B regarding a guilty plea to the charges before him. I advised Mr Webby that Mr B would indicate a guilty plea but for the wording of the Caption Summary which Mr B disputed.

11. Mr Webby and I agreed that Mr B probably would be sentenced to approximately two years imprisonment if he entered a guilty plea to the charges. I asked Mr Webby what his position would be if I were to make an application for Home Detention upon sentencing. In particular, I asked Mr Webby whether the Crown would oppose an application for Home Detention. Mr Webby verbally indicated to me that he would not oppose an application of Home Detention."

[19] Mr Webby then swore an affidavit, in answer, pointing out that he had had nothing to do with this file after 20 April and thus the assertion about discussions on 1 September could not be true. This was commented on by the Court of Appeal in a further Minute of 22 November 2012 in which at paragraph [6] the Court said:

> "[6] Two aspects of Mr van der Zanden's second affidavit are particularly material. First, he has continued his omission to refer to his email exchange with Ms Sarah Pidgeon of Meredith Connell … which directly contradicts his earlier account of evidence given on oath. Second Mr van der Zanden repeated his earlier assertion that he had reached a relevant agreement on sentence with Mr Nicholas Webby of Meredith Connell."

[20] The Court then referred to Mr Webby's affidavit in answer, and commented:

> "[8] Our earlier concerns that Mr van der Zanden has misled the Court are compounded by the terms of his second affidavit. This is a serious issue. We direct the Registrar to refer our Minutes to the President of the New Zealand Law Society for investigation …"

[21] Mr van der Zanden has subsequently said that he was in error in referring to September as the date in which he had discussions with Mr Webby. In a further affidavit produced as part of the Standards Committee evidence, Mr van der Zanden acknowledged that his conversation with Mr Webby could not have occurred after 20 April and thus it was on or before 20 April 2011.

[22] Before us Mr van der Zanden gave evidence about his discussion with Mr Webby which he said occurred in the Crown Room. He said he asked if, were a guilty plea entered, "*would it be around two years imprisonment*" and that he thought

Mr Webby had said "*yes*". He recalls asking Mr Webby if the Crown would oppose an application for home detention, but the response he then reported was that Mr Webby asked if he would agree to the amendment of the indictment to add three further charges.

[23] It was Mr van der Zanden's evidence that there was a connection between the two statements from which he drew the inference there would not be opposition to home detention. He accepts in his affidavit to the Tribunal that he made two errors in his affidavits to the Court of Appeal, firstly the September date and secondly:

> "… That I appear to have overstated what I believed to be a mutual understanding of the outcome of a discussion with Mr Webby".

And later:

> "Reflecting upon the matter, as these proceedings have required of me, I can see I failed to confirm with Mr Webby my belief we had reached an agreement. Whilst my file has no record of the outcome of that discussion, I did proceed thereafter to give expression to my understandings. My strategy at all times was to work towards a sentence of home detention. My actions, following upon my discussion about the indictment with Mr Webby, was to give effect to that strategy."

[24] He went on to indicate he regretted his lack of care in not recording or clarifying the agreement that he thought had been reached. It will be remembered that Mr Webby did not recall any discussion about home detention having occurred at all.

[25] It was the practitioner's evidence that new counsel for Mr B wrote the affidavit, that he had the file and interviewed Mr van der Zanden on the phone.

[26] We note the practitioner's evidence to the effect that he had never appeared on a sentence appeal or even appeared in the High Court.

[27] It is clear from his evidence that he lacked experience in appellate work and had no mentoring or guidance in this regard. His counsel contrasted this with the strong mentoring and well-supported professional development available to the three Crown prosecutors.

[28] Under cross-examination Mr van der Zanden described how he had come to the September 2011 date (which he had assigned to the conversation with Mr Webby) by a process of elimination in consultation with new counsel, without having the file

available to him. He accepted this was wrong and should have gone to inspect the file personally before swearing an affidavit to the Court of Appeal.

[29] He conceded he had not even corrected this error before the second affidavit in response to the Court of Appeal's Minute. He indicated that he was very concerned about meeting the filing time limit imposed upon him and was unable to contact counsel who had the file. He confirmed he did have access to the email trail because that was in digital form but says he knew he had had the conversation with Mr Webby rather than with Ms Pidgeon and therefore did not see the importance of the emails exchanged with her. He said that he did not think that was what the Court of Appeal was asking for and thought he had addressed the email exchange. When asked if he got advice from a senior colleague after the first Court of Appeal Minute he said that he did not, he had just drafted an affidavit in response and that the other counsel and he were both busy at the time.

[30] Mr van der Zanden then referred in evidence to having told Ms Pidgeon that he and Mr Webby had an agreement on sentence, but was not prepared to dispute Ms Pidgeon's recollection which was specifically that he had not, at sentencing, referred to any agreement regarding sentence.

[31] Nor we note did Mr van der Zanden in any of his affidavits refer to this conversation with Ms Pidgeon about a prior arrangement. He simply says in his affidavit of 20 September 2012:

> "On 5 April 2012, I recall that I verbally advised Ms Pidgeon prior to sentencing that I would make an application for Home Detention before the sentencing judge, District Court Judge Mark Perkins that I would make an application for Home Detention. Ms Pidgeon advised me that she would be opposing the application."

[32] It was clear from his evidence before us the practitioner had persuaded himself that Mr Webby, seeking his cooperation in adding additional counts to the indictment, along with what the practitioner belatedly described Mr Webby's "demeanour", led him to expect that there would be a sentence of home detention as an outcome.

[33] It was put to the practitioner that had there been such an agreement with Mr Webby that one would expect him to have been anxious for a plea to have been

entered that very day - that this was the prime time. Mr van der Zanden's reponse to this question was:

> "Yes it probably is the position that I didn't plead then because there was no agreement."

[34] Subsequently his client changed his mind a number of times about his plea.

[35] Mr van der Zanden conceded that by the time he swore his fourth affidavit on 24 June 2013 he was referring to his understanding:

> "… Was that Mr Webby would consider not opposing a sentence of home detention to the amended indictment not the final indictment."

[36] In cross-examination he acknowledged that he had conflated his advice and what was later known of the Crown's position. Mr van der Zanden conceded that he was completely out of his depth in this matter and did not seek advice about his own position until after he had filed the two affidavits with the Court of Appeal. Indeed he did not recall that he had taken any advice even prior to the fourth affidavit sworn in the proceedings before the Legal Complaints Review Officer ("LCRO").

Submissions by the parties

[37] Mr Morris took us through the variations of description by the practitioner of what had occurred as the four affidavits progressed. The omission of the email trial (with Ms Pidgeon) demonstrated a lack of care and failure to fulfil an obligation of utmost candour and precision, as an Officer of the Court. Mr Morris submitted that his approach to the first affidavit, preparing it without even his file in front of him was "*cavalier and reckless"*. We accept Mr Morris' submission that he was alleging prosecutorial misconduct as the sole ground of a criminal appeal, and he had an obligation to be accurate and open.

[38] On behalf of the practitioner Mr Fairbrother pointed out that his client had been a barrister for but a short time when these events occurred and was unaware of the Crown's standard practice in relation to sentence indications. He pleaded inexperience on behalf of his client.

[39] He submitted that it was to his client's credit that as other perspectives were revealed by further affidavits filed with the Court of Appeal that his client was

prepared to resile from his initial version. He submitted that his client had managed the file with a particular strategy of two years imprisonment as a finishing point in order to qualify for a home detention application. Mr Fairbrother submitted that a careless use of words did not equate with dishonesty, rather not having adequate tools as a practitioner. He was in a muddle and so convinced of his strategy that the appeal was based on that.

[40] Mr Fairbrother submitted that there was no intention to set out to deceive and that the misleading of the Court was entirely unintentional. Mr Fairbrother drew our attention to the character evidence from the police inspector and Mr Powell, both of whom attested to the practitioner's honesty and integrity, and army service with high level of access to classified information. It was submitted that this was relevant when assessing whether the misleading was intentional as opposed to being due to inexperience and muddled thinking.

[41] Mr Morris referred us to the decision of *Queen v K*[1] as to the admissibility of general evidence as to veracity under s 37 of the Evidence Act. In that decision it was held:[2]

> "Such generalised evidence of a person's reputation for veracity is unlikely to approach substantial helpfulness."

We considered that while such information may be important at a penalty stage, it did not reach the "substantial helpfulness" test in s 37 and thus was inadmissible.

Discussion

[42] The issue for the Tribunal to determine is whether the practitioner's default in this situation goes beyond the level of unsatisfactory conduct, which he has admitted, to reach the threshold of misconduct under s 7(a)(i) head namely:

> "… Conduct that would reasonably be regarded by lawyers of good standing as disgraceful or dishonourable".

[43] Or in the alternative whether his conduct represents negligence or incompetence as defined in s 241(c) namely:

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[1] [2009] NZCA 176.
[2] At [66].

> "… Negligence or incompetence in his … professional capacity, and that the negligence or incompetence has been of such a degree or so frequent as to reflect on his … to practise or to bring his … profession into disrepute …"

Misconduct

[44] We consider that in order to reach the misconduct threshold, the conduct would need to be viewed as either intentional misleading of the Court or that the statements made were prepared in such a cavalier way as to demonstrate "an indifference to an abuse of the privileges which accompany registration as a legal practitioner".[3]

[45] The standard of proof, is on the balance of probabilities, (s.241 of the Lawyers and Conveyancers Act 2006 ("LCA")). However, having regard to the very serious nature of the allegation of intentionally misleading the Court, there must be clear evidence to draw that conclusion.[4]

[46] We found the three witnesses from Meredith Connell to be impressive and clear witnesses. We accept their evidence, as indeed has the practitioner, eventually, that there was no actual arrangement about sentencing outcome. As submitted by Mr Morris "*if such a deal existed then it ought to have been put to the sentencing Judge who was the most important person to hear this*".

[47] Whilst we found the Standards Committee's witnesses to be impressive and reliable, we do not consider that the evidence is sufficient as to satisfy us, on the balance of probabilities, that the practitioner's actions in recording 'his version' were intentionally dishonest.

[48] The practitioner's professional background is that after he was admitted in 2002 he was a staff solicitor in a small firm in general practice for approximately one year, following which he was a barrister sole for two to three years. He served in the Army for a year and then spent another one to two years as a solicitor in a small firm before resuming as a barrister sole.

[49] It is very clear from his presentation and the manner in which he gave evidence that he has had little in the way of guidance from senior practitioners at the Bar and is very much in need of careful mentoring.

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[3] *Complaints Committee No. 1 of the Auckland District Law Society v C* [2008] 3 NZLR 105 at [33].
[4] *Z v Complaints Assessment Committee* [2008] 1 NZLR 65.

[50] Certainly the first affidavit and the manner in which Mr van der Zanden went about preparing it was sloppy and inexperience alone does not excuse that. Although we do not consider he appreciated quite how serious the allegations were that he was making, as an Officer of the Court he ought to have been aware of the rigour with which evidence supporting an appeal for a person in custody and when alleging prosecutorial misconduct must be prepared.

[51] Having been warned by the Court of Appeal and attention drawn to the email trail, the practitioner ought to have been on very clear notice that he was being given a chance to correct what were apparently misleading statements to the Court. A warning was given about referral to the New Zealand Law Society for investigation. It is clear the practitioner simply did not understand the peril that he faced. It was utterly reckless of him to file the second affidavit with the lack of care it involved and without clear and careful reference to the file in order to clarify whether his expression of his memory of events could be supported. As a result he repeated his errors, and his failure to the Court, rather than rectifying the errors, as could have occurred. In its Minute of 22 November 2012, the Court left the practitioner in no doubt it considered his actions to be seriously flawed. With respect we agree with the Court's view, albeit not at the level of knowingly misleading.

[52] For these reasons we consider that the practitioner's negligence or incompetence is so serious that it certainly brings the profession into disrepute and may well reflect on Mr van der Zanden's fitness to practice. Thus we find the third alternative charge proved to the necessary standard on the balance of probabilities. We dismiss the two alternative charges.

Directions

(1) The Standards Committee is to file submissions as to penalty within 21 days of the date of release of this decision.

(2) The practitioner is to file any submissions in response within a further 14 days.

(3) The matter is to be set down for a penalty hearing of two hours after consultation with counsel and panel members as to availability.

DATED at AUCKLAND this 2nd day of May 2014

Judge D F Clarkson
Chair

Appendix 1

CHARGE

1. The Auckland Standards Committee of the New Zealand Law Society No 5 charges **John Alan van der Zanden**, of Auckland, barrister, with **misconduct** within the meaning of s7(1)(a)(i) of the Lawyers and Conveyances Act 2006 ("the Act"), being conduct that occurred at a time when he was providing regulated services and is conduct that would reasonably be regarded by lawyers of good standing as disgraceful or dishonourable.

PARTICULARS

The facts and matters relied upon, and the particulars of the charge are as follows:

(a) At all material times, Mr van der Zanden held a current practising certificate as a Barrister, issued under the Act.

(b) Between March 2011 and April 2012 Mr van der Zanden acted for Mr B in respect of a criminal proceeding before the Auckland District Court. Mr B pleaded guilty to one charge of injuring with intent to injure and was sentenced to two years imprisonment.

(c) On or about 26 April 2012 Mr B appealed to the Court of Appeal from his sentence. Mr Lawry appeared for Mr B in respect of the appeal.

(d) On or about 26 June 2012 Mr van der Zanden swore an affidavit in support of Mr B's appeal ("First Affidavit"). In the First Affidavit Mr van Der Zanden deposed:

"2. …Leading up to the trial, I liaised with Crown counsel prosecuting this matter. As a result of the discussion, the Prosecutor Nick Webby and I discussed possible resolution. ***The Crown Prosecutor agreed that if the Appellant were to plead guilty to a representative count on the summary offered then the Crown would accept that a final sentence ought to be one where the Court would impose home detention and further that the defence application for home detention would not be opposed.***

4. I discussed this with the Appellant and his father. Although the Appellant did not accept all that was set out in the summary of facts, I advised him that if he pleaded guilty then the Crown would not oppose a sentence of home detention.

5. On the basis that the sentence would be one of home detention, the Appellant accepted my advice and pleaded guilty to the amended indictment.

6. ***In hindsight I could have asked the Court for a sentence indication but I did not do so as I was left in no doubt of the final sentence.***

7. …."

[emphasis added]

(e) In making the First Affidavit Mr van der Zanden misled the Court of Appeal as:

(i) Mr van der Zanden was aware that none of the Crown Prosecutors involved in the file had agreed that the Crown would not oppose a defence application for home detention; and

(ii) Mr van der Zanden failed to refer the Court of Appeal to an exchange of emails between himself and Crown Prosecutor Sarah Pidgeon on 23 and 24 November 2011. Such emails contradicted Mr van der Zanden's assertion on oath about the nature and extent of the sentencing agreement with the Crown.

(f) On or after 24 August 2012 and before 7 September 2012, Mr van der Zanden provided a further unsworn affidavit to the Court of Appeal in support of Mr B's appeal replying to an affidavit sworn by Crown Prosecutor Sarah Pidgeon (later sworn on 20 September 2012) ("Second Affidavit"). In the Second Affidavit Mr van der Zanden deposed, inter alia, that:

"…I asked Mr Webby whether the Crown would oppose an application for home detention. Mr Webby verbally indicated to me that he would not oppose an application for home detention."

(g) In making the Second Affidavit Mr van der Zanden misled the Court of Appeal as Mr van der Zanden was aware that Mr Webby had not at any stage agreed that he would not oppose a defence application for home detention.

ALTERNATIVE CHARGE

2. In the alternative, the Auckland Standards Committee of the New Zealand Law Society No 5 charges **John Alan van der Zanden** of Auckland, Barrister, with **unsatisfactory conduct** within the meaning of s12(b) of the Act, being conduct that occurred at a time when he was providing regulated services and is conduct that would reasonably be regarded by lawyers of good standing as being unacceptable.

PARTICULARS

The facts and matters relied upon, and the particulars of the alternative charge are as follows:

(a) At all material times, Mr van der Zanden held a current practising certificate as a Barrister, issued under the Act.

(b) Between March 2011 and April 2012 Mr van der Zanden acted for Mr B in respect of a criminal proceeding before the Auckland District Court. Mr B pleaded guilty to one charge of injuring with intent to injure and was sentenced to two years imprisonment.

(c) On or about 26 April 2012 Mr B appealed to the Court of Appeal from his sentence. Mr Lawry appeared for Mr B in respect of the appeal.

(d) On or about 26 June 2012 Mr van Der Zanden swore the First Affidavit in support of Mr B's appeal. In that affidavit Mr van Der Zanden deposed:

"2. …Leading up to the trial, I liaised with Crown counsel prosecuting this matter. As a result of the discussion, the Prosecutor Nick Webby and I discussed possible resolution. ***The Crown Prosecutor agreed that if the Appellant were to plead guilty to a representative count on the summary offered then the Crown would accept that a final sentence ought to be one***

where the Court would impose home detention and further that the defence application for home detention would not be opposed.

4. I discussed this with the Appellant and his father. Although the Appellant did not accept all that was set out in the summary of facts, I advised him that if he pleaded guilty then the Crown would not oppose a sentence of home detention.

5. On the basis that the sentence would be one of home detention, the Appellant accepted my advice and pleaded guilty to the amended indictment.

6. ***In hindsight I could have asked the Court for a sentence indication but I did not do so as I was left in no doubt of the final sentence.***

7. ….”

[emphasis added]

(e) In making the First Affidavit Mr van der Zanden misled the Court of Appeal as:

(i) Mr van der Zanden was aware, or ought to have been aware if he had properly reviewed his file before making the First Affidavit, that none of the Crown Prosecutors involved in the file had agreed that the Crown would not oppose a defence application for home detention.

(ii) Mr van der Zanden failed to refer the Court of Appeal to an exchange of emails between himself and Crown Prosecutor Sarah Pidgeon on 23 and 24 November 2011. Such emails contradicted Mr van der Zanden's assertion on oath about the nature and extent of the sentencing agreement with the Crown.

(f) On or after 24 August 2012 and before 7 September 2012, Mr van der Zanden provided the Second Affidavit to the Court of Appeal in support of Mr B's appeal replying to an affidavit sworn by Crown Prosecutor Sarah Pidgeon. In the Second Affidavit Mr van der Zanden deposed, inter alia, that:

“…I asked Mr Webby whether the Crown would oppose an application for home detention. Mr Webby verbally indicated to me that he would not oppose an application for home detention.”

(g) In making the Second Affidavit Mr van der Zanden misled the Court of Appeal as Mr van der Zanden was aware, or ought to have been aware if he had properly reviewed his file, that Mr Webby had not at any stage agreed that he would not oppose a defence application for home detention.

FURTHER ALTERNATIVE CHARGE

3. In the alternative, the Auckland Standards Committee of the New Zealand Law Society No 5 charges **John Alan van der Zanden** of Auckland, Barrister, with negligence or incompetence in his professional capacity and that negligence or incompetence has been of such a degree as to reflect on his fitness to practice or as to bring the profession into disrepute.

PARTICULARS

The facts and matters relied upon, and the particulars of the further alternative charges are as follows:

(a) At all material times, Mr van der Zanden held a current practising certificate as a Barrister, issued under the Act.

(b) Between March 2011 and April 2012 Mr van der Zanden acted for Mr B in respect of a criminal proceeding before the Auckland District Court. Mr B pleaded guilty to one charge of injuring with intent to injure and was sentenced to two years imprisonment.

(c) On or about 26 April 2012 Mr B appealed to the Court of Appeal from his sentence. Mr Lawry appeared for Mr B in respect of the appeal.

(d) On or about 26 June 2012 Mr van Der Zanden swore the First Affidavit in support of Mr B's appeal. In that affidavit Mr van Der Zanden deposed:

"2. …Leading up to the trial, I liaised with Crown counsel prosecuting this matter. As a result of the discussion, the Prosecutor Nick Webby and I discussed possible resolution. The Crown Prosecutor agreed that if the Appellant were to plead guilty to a representative count on the summary offered then the Crown would accept that a final sentence ought to be one where the Court would impose home detention and further that the defence application for home detention would not be opposed.

4. I discussed this with the Appellant and his father. Although the Appellant did not accept all that was set out in the summary of facts, I advised him that if he pleaded guilty then the Crown would not oppose a sentence of home detention.

5. On the basis that the sentence would be one of home detention, the Appellant accepted my advice and pleaded guilty to the amended indictment.

6. In hindsight I could have asked the Court for a sentence indication but I did not do so as I was left in no doubt of the final sentence.

7. …."

[emphasis added]

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