NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL

[2014] NZLCDT 23
LCDT 035/13

IN THE MATTER of the Lawyers and Conveyancers Act 2006

AND

IN THE MATTER of **JOHN EICHELBAUM** (name displayed because suppression subsequently discharged) of Auckland, Barrister

CHAIR
Judge D F Clarkson

MEMBERS OF TRIBUNAL
Mr C Lucas
Mr W Smith

HEARING on the papers

COUNSEL
Mr A H Waalkens QC for the Applicant
Ms K Davenport QC for the Respondent

DECISION OF NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL
(ON APPLICATION FOR INTERIM NAME SUPPRESSION AND RESTRICTED ACCESS TO FILE)

Introduction

[1] The practitioner, who faces five charges laid under the Lawyers and Conveyancers Act 2006 ("LCA") seeks interim suppression of his name or identifying details. Furthermore he seeks an order that there be no access by members of the public to the file pending hearing of the charges.

[2] These applications are opposed by the Canterbury Westland Standards Committee No. 2 who have preferred the charges.

Statutory Provisions

> **240 Restrictions on publication**
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> (1) If the Disciplinary Tribunal is of the opinion that it is proper to do so, having regard to the interest of any person (including (without limitation) the privacy of the complainant (if any)) and to the public interest, it may make any 1 or more of the following orders:
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> (a) an order prohibiting the publication of any report or account of any part of any proceedings before it, whether held in public or in private:
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> (b) an order prohibiting the publication of the whole or any part of any books, papers, or documents produced at any hearing:
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> (c) subject to subsection (3), an order prohibiting the publication of the name or any particulars of the affairs of the person charged or any other person."

[3] It is common ground that the starting point is that of the desirability of open justice and that s 238 of the LCA provides for all hearings to be in public to that end. The Tribunal and the Higher Courts have referred on numerous occasions for the need for the public to scrutinise the workings of a Tribunal presiding over professional disciplinary matters. This is because one of the primary purposes of the

Act is the protection of the public which involves the upholding of professional standards including through the means of disciplinary processes.

[4] Mr Waalkens QC properly concedes that the hearing will in due course be held in public and that this application can only be regarded as an interim one pending determination of the charges.

[5] Mr Waalkens submits that this client is entitled to the presumption of innocence at this stage. There can be no argument with that submission and indeed Ms Davenport, quite properly does not attempt to answer it.

[6] Mr Waalkens points to the rigorous defence intended in respect of each of the charges and refers to his client's concerns as to his reputation in the meantime, which, it is submitted, could suffer irreparable damage even if the charges are dismissed.

[7] Both of these matters (strong defence and reputational concerns) are common to many practitioners facing disciplinary charges and do not take this matter outside of the ordinary.

[8] Having referred the Tribunal to a number of the criminal cases underlying the law as to name suppression, Ms Davenport QC takes the Tribunal to three cases where name suppression has been refused by the Tribunal (and in the case of *Hart*[1] upheld on appeal). In the other two cases namely *Hirschfeld*[2] and *Hill*[3] and also in a further case not referred to by counsel, *Hall*[4], one of the primary bases for refusing an order for suppression was that in each case the information was already in the public domain, having been the subject of some prior publicity. That is not the situation in this case.

[9] The *Hart* matter was somewhat different but what was declined in that case was the submission that a practitioner with high public profile ought somehow to be accorded greater privacy than another practitioner.

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[1] *Hart v Standards Committee No. 1 of the New Zealand Law Society* [2011] NZCA 676.
[2] *Wellington Standards Committee No. 2 v Hirschfeld* [2013] NZLCDT 26.
[3] *Hawke's Bay Standards Committee of the New Zealand Law Society v Hill* [2012] NZLCDT 28.
[4] *Wellington Standards Committee No. 2 v Donna Hall* [2011] NZLCDT 23.

[10] In his submissions Mr Waalkens refers the Tribunal to a series of cases involving medical practitioners where there has been a somewhat more detailed examination of the threshold to be reached before an order for suppression can be made. It has to be noted that this series of cases has not previously been put before the Tribunal as relevant to legal practitioners, but we accept they are relevant. The decisions are: *The Director of Proceedings v I*[5], followed in *ABC v Complaints Committee.*[6] In addressing the threshold issue, having[7] acknowledged the starting point of open justice in any proceedings before Civil and Criminal Courts, Her Honour has this to say at paragraph [72] in relation to professional disciplinary proceedings:

> "[72]The most significant difference, I believe, is in the threshold to be attained in each case before the balance is tipped in favour of name suppression. In cases before the Tribunal the criteria is whether the suppression is "desirable". In the Court's the word commonly used is "exceptional"."

[11] Her Honour then goes on to examine the dictionary differences between "exceptional" and "desirable" to support her view that the latter is clearly a lower standard to be attained.

[12] In the *ABC* case[8] this view was echoed by His Honour Chisholm J:

> "[44]Not surprisingly it is common ground that the "desirable" test in s.106 involves a lower threshold than the "exceptional" test commonly used by the Courts. … I agree that the test in s.106(2) involves a threshold that is significant lower than the test generally used by the Courts.

[13] To complicate matters somewhat the test in the LCA, s 240 refers to neither "desirable" nor "exceptional". The word used is "proper". The section itself sets out the weighing exercise which has in previous decisions been referred to by the Tribunal in matters in such of this sort.

[14] Examination of a dictionary definition of "proper" does not assist greatly. Meriam-Webster Dictionary refers to: "correct according to social or moral rules, exactly correct or befitting". The Oxford English Dictionary refers to words such as "right, correct, appropriate or suitable". The Penguin Concise English Dictionary: "suitable, appropriate, strictly accurate and correct". It could be argued that "proper" is somewhere between the "exceptional" and "desirable" threshold level. What is

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[5] Unreported, High Court CIV 2003-485-2180, 20 February 2004 Frater J.
[6] [2012] NZHC 1901.
[7] At para [67].
[8] At para [44].

accepted by the Tribunal is that, as with medical disciplinary matters it must be accepted that the threshold is somewhat lowered by use of the word "proper" than that imposed in the Civil and Criminal jurisdictions generally.

[15] The balancing exercise in s 240 was referred to by the Supreme Court in *Hart*[9] where it said at paragraph [3]:

> "A Tribunal or Judge deciding whether to order suppression is exercising a discretion which, in a disciplinary context, must allow for any relevant statutory provisions as well as the more general need to strike a balance between open justice considerations and the interests of the party who seeks suppression. The likely particular impact of publicity on that party will always be relevant, but it is untenable to suggest that professional people of such high public profile, such as the appellant, have anything approaching a presumptive entitlement to suppression. …"

[16] Thus we move to consider the more specific circumstances relied upon by this practitioner in support of his application.

[17] Mr A has sworn three affidavits in support of this application, the final one of which provides the most compelling reasons to support it. We accept that the practitioner has a particularly unusual surname, indeed a name which, in New Zealand, is restricted to his extended family. In referring to the interest of "any person"[10] he refers to various family members including his father who has a particularly unique reputation to be preserved.

[18] Mr Waalkens then referred us to the decision in *B v R.*[11] Among other things that decision referred to the need for publicity as a factor, when it could lead to the revelation of further offending. It is submitted that in this case there is no likelihood that publication of this practitioner's name is likely to reveal any further offending given the nature of the charges. In contrast, for example, were the charges to relate to overcharging, there may well be good reason for publication to "flush out" other examples of similar conduct. We accept the submission that there is no need for publication to that end in this case.

[19] However *B v R* also referred to the factors, which can be weighty ones, relating to consequences to family members of publication. In that decision it was found that

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[9] Above, n 1.
[10] Section 240(1).
[11] *B v The Queen* [2011] NZCA 331.

"*incalculable hurt to individual family members and the extended family as a group*" was clear and formed a solid basis to justify suppression.

[20] We consider that, on balance, similar considerations apply to this practitioner's family and that for this reason, in the absence in countervailing public interest reasons which might tip the balance, that an order ought to be made. No application has been made for interim suspension of this practitioner, for example, which would suggest that he is in any way a risk to the public in continuing to practise or that publication of his name is required for public protection for the sort of reasons referred to above. We consider that on this occasion, in the interim, that public interest considerations are outweighed by the factors referred to, and having regard to the presumption of innocence.

[21] For the same reasons we consider that the file ought not be searched other than with the prior approval of the Tribunal Chair, having given notice of such application and provided the parties the opportunity to make submissions.

[22] In her submissions in response Ms Davenport agreed that this order ought to follow any interim suppression order.

[23] As acknowledged by the applicant, quite different considerations arise should any of the charges be proved. The making of this order is not to be taken as any indication in relation to publication following determination of the charges.

Orders

[24] The order sought as to interim suppression and restriction on search of the Tribunal's file are granted as sought.

DATED at AUCKLAND this 2nd day of May 2014

Judge D F Clarkson
Chair