NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL

Decision No: [2011] NZLCDT 24
LCDT 026/09, 004/09

IN THE MATTER	of the Lawyers and Conveyancers Act 2006 and the Law Practitioners Act 1982
BETWEEN	**NEW ZEALAND LAW SOCIETY** Applicant
AND	**JOHN EVANS DORBU** of Auckland, former Barrister

CHAIR
Judge D F Clarkson

MEMBERS OF TRIBUNAL
Ms J Gray
Ms C Rowe
Ms M Scholtens QC
Mr W Smith

HEARING at AUCKLAND on 22 September 2011

APPEARANCES
Mr H Keyte QC and Mr M Treleaven for New Zealand Law Society
No appearance for the Respondent

PENALTY DECISION OF THE NEW ZEALAND LAYWERS AND CONVEYANCERS TRIBUNAL

Preliminary

[1] John Dorbu faces penalty on 10 charges being 8 of misconduct in his professional capacity under the transitional provisions of the Lawyers and Conveyancers Act 2006 (the Act), and 2 of misconduct under section 7 of the Act. These charges, which this Tribunal found proved in its decision of 8 June 2010, were not disturbed by the High Court on judicial review.

[2] The review judgment delivered on 11 May 2011 set aside the finding on charge 1, leaving it to the Tribunal to determine whether a rehearing would be held. A rehearing has been directed and charge 1 is to be considered by a newly constituted Tribunal.

[3] His Honour Brewer J set aside penalties on all charges because he was not able to assess what weight had been given to charge 1 in the overall sentencing exercise. In that way Mr Dorbu was enabled "... to make submission on penalty whether or not there is a rehearing of the first charge".

[4] The Tribunal considers it is appropriate to sentence on these charges now. Clearly the sentencing exercise must be carried out separately from sentencing on charge 1, if proved on rehearing, because the "new" Tribunal which will consider charge 1, cannot sentence on the upheld charges 2-8 and 10-12 heard by the original Tribunal.

[5] Mr Dorbu has not appeared to make submissions nor has he provided the Tribunal with written submissions on penalty as directed some weeks ago. Instead he filed a memorandum on the day before the hearing suggesting any penalty hearing would be a nullity but not expressly seeking an adjournment. We are satisfied that Mr Dorbu's non-appearance in all the circumstances should not impede us from proceeding to our decision on penalty.

Background

[6] The charges, history and findings are set out in our decision of 8 June 2010. We do not propose to repeat these. In summary the charges are:

Charge 2

[7] Acting as a solicitor in 2002 when holding a practising certificate as a barrister sole.

Charge 3

[8] Acting for more than one party in the same transaction where irreconcilable conflicts of interest among the parties existed.

Charge 4

[9] In 2003 swearing a false affidavit of discovery.

Charge 5

[10] In 2002 communicating directly with the client of another practitioner having previously dealt with that practitioner.

Charge 6

[11] Between 2002 and 2006 failing to promote and maintain proper standards of professionalism in relation with other practitioners.

Charge 7

[12] In 2003 swearing a false affidavit.

Charge 8

[13] Between 2005 and 2006 attacking another practitioner's reputation without good cause.

Charge 10

[14] In 2007 misleading a Court by swearing an affidavit with false answers to interrogatories.

Charges 11 and 12

[15] Failing to maintain proper standards of professionalism by undermining the dignity of the Judiciary.

[16] The New Zealand Law Society asks that the practitioner be struck off the roll of barristers and solicitors. Mr Keyte submits on their behalf that Mr Dorbu is not "a fit and proper person" to be a barrister or solicitor. That is the test which is essentially the same under the provisions of both the Law Practitioners Act 1982 ("the LPA") and the Lawyers and Conveyancers Act 2006 ("the LCA") which these charges straddle. The Law Society says:

> "He does not understand his obligations to the Court or to other practitioners; he is dishonest; and he does not abide by the rules of conduct of barristers".

[17] The following words of Professor Webb in his textbook *Ethics, Professional Responsibility and the Lawyer:*

> "The test is the same as that applicable when considering whether a candidate for admissions is a fit and proper person. It has been recognised that such a standard is impossible to clearly define. While misconduct involving dishonesty is usually required to warrant striking off, there may be cases where such an order is appropriate in the absence of dishonesty. Certainly if it can be said that the dishonesty was "wilful, advertent and calculated" striking off should follow as a matter of course and any other conclusion would be manifestly wrong. However, each case must be examined by itself. The facts surrounding the incident and the individual's history and characteristics must be considered."

Issues and factors to be taken into account in considering strike off

(1) Are there elements of dishonesty in the practitioner's behaviour?

(a) If so was it wilful, deliberate or calculated?

(b) If not deliberate is there still sufficient concern about honesty to render the practitioner "unfit"?

(2) Is reoffending likely?

(a) Have previous offences been committed?

(b) What steps have been taken by the practitioner towards rehabilitation or reform?

(3) Is the conduct such that to allow Mr Dorbu to continue to practice would bring the legal professional into disrepute?

(4) Do questions of public protection arise?

Dishonesty

[18] Charges 4, 7 and 10 each involved elements of dishonesty. In respect of Charge 4 we found:

> "There can be no doubt that Mr Dorbu knew that these particular documents existed and were relevant to, and covered by, the orders for discovery."[1]

[19] In charge 7 we found at para [150]:

> "Furthermore, Mr Dorbu well knew the address for service given by Mr B was the offices of Castle Brown, thus he has misled the Court in that respect in paragraph 3 of his affidavit."

[20] Each of these involves dishonesty which fits within the category of "... wilful, advertent and calculated ..." We found that it demonstrated flagrant disregard of the truth, his obligations to the Court, to colleagues and his client.

[21] In relation to charge 10, we were not so strongly persuaded that the manner in which Mr Dorbu answered the Interrogatory was deliberately untrue but we found his purported interpretation of it, as part of his defence, demonstrated the sort of sophistry which *"... did not fit comfortably with the obligation of an officer of the Court to fully and freely provide the unvarnished truth to the Court".* We went on to point out *"it is somewhat ironic that having been warned to be "scrupulously accurate and honest" to the Court that Mr Dorbu would then go on to characterise this finding of the Complaints Committee as dismissal."* We noted that the earlier complaint from Chambers J established that this had not been the first time that Mr Dorbu's integrity and communications with the Court had been impugned. Whilst on that occasion no charges were laid Mr Dorbu was clearly warned by the Standards Committee as to his behaviour.

[1] [134] 8 June 2010 decision.

Likelihood of reoffending

[22] In submissions to us the New Zealand Law Society provided a determination of the Auckland Standards Committee No. 3 of 1 June 2010 which had found Unsatisfactory Conduct by Mr Dorbu. The circumstances of that offending was that he had used *"inappropriate and intemperate language in his communications ...."* by *"... threatening criminal conspiracy proceedings against each partner of the firm when he had no evidence to believe this was appropriate"* and thereby *"... inappropriately seeking to place the firm in a position of conflict where he wanted them to place pressure on their own client in order to avoid the proceeding threatened against them personally."* Mr Dorbu was fined $5000 and ordered to pay $1000 costs in respect of that offending.

[23] We have already referred to the complaint raised by His Honour Chambers J concerning a misleading communication by Mr Dorbu in the course of proceedings. It can be seen that the previous offending is of a similar character to that now under scrutiny.

[24] Mr Dorbu's blatant disregard for Court processes, timetabling orders and time limits are not only exemplified by his actions within these proceedings but we note the decision of Associate Judge Abbott, in the proceedings to declare him bankrupt, narrates the same pattern. His Honour traces the path of the proceedings where adjournment after adjournment had been sought by Mr Dorbu; timetable orders not met and extensions sought in last minute applications. "Mr Dorbu's history of inaction speaks against any merit in his application ..."

[25] And:

> "He was fully aware of the judgments long before the bankruptcy notice was issued, he took no steps to set aside the bankruptcy notice, and he did his best to avoid facing the consequences of his failure to pay the judgments ..."

[26] And quoting the Court of Appeal which referred to him as a:

> "Judgment debtor who has already forced the creditor to jump a series of interlocutory hurdles. This also suggests the bona fides of Mr Dorbu's application is questionable."

[27] Furthermore, in the costs decision of His Honour Brewer J, following the judicial review proceedings:

> "Mr Dorbu conducted his own case. Much of that case, in written and oral form, was muddled, irrelevant or plain wrong. By any professional standard he needlessly prolonged the hearing of the case and added to the work of the second respondent."

[28] Had the practitioner accepted his wrongdoing and taken steps to reassure the Tribunal of his clear understanding of his professional obligations in respect of future behaviour; or had he attempted rehabilitation in some form, perhaps by observing senior counsel or otherwise further educating himself, the Tribunal may have been able to place some reliance on that. However at no time has this occurred and Mr Dorbu has continued to maintain a stance of complete denial of any wrongdoing whatsoever.

[29] Finally, in terms of the overall topic of reoffending and lack of understanding of professional obligations we note that Mr Dorbu has not held a practicing certificate since he was struck off by this Tribunal in August 2010, by which time he had already been adjudicated bankrupt. However, he has continued to write to the Tribunal on letterhead which describes him as a barrister and indeed, as recently as two days before this penalty hearing, signed the memorandum to the Tribunal as barrister.

[30] It should also be recorded that Mr Dorbu says he has appealed against the decision of Brewer J and has forwarded to the Law Society and to the Tribunal a notice of appeal and notice of application for leave to appeal on point of law. Both of these documents are some three months out of time and there is no evidence to show that they have in fact been filed in the Court of Appeal. Furthermore, in terms of Rule 16 of the Court of Appeal Rules an appeal is deemed to have not commenced until all relevant papers have been served. Mr Keyte QC pointed out that no supporting affidavit has been received and thus the appeal cannot be regarded as having been commenced. This is a further example of the continuation of the practitioner's pattern of denial and procedural deficits.

Overall conduct

[31] In the course of submissions counsel for the New Zealand Law Society referred us to the decision of *Osmond*.[2] That decision held that in assessing whether a

[2] *Complaints Committee of the Waikato and Bay of Plenty District Law Society v Osmond* [2003] NZAR 162.

practitioner is a "fit and proper" person before making a striking off order there must be a:

> "consideration of the practitioner's overall conduct. It is necessary to have regard to the behaviour which gives rise to the finding of misconduct, and to the practitioner's behaviour which occurs after the filing of the charge and up to the date of hearing. Such may tend to show that notwithstanding his earlier behaviour he is a fit and proper person."

[32] And later in the decision the Full Court held:

> "... an order for striking off and the determination of being a fit and proper person to practise depends on honesty, knowledge and ability. A striking off order, although obviously a punishment, has primarily a different function, namely protection of the public and, in its broadest sense, the profession."

[33] The Law Society contends that the number of charges and the seriousness of charges in a variety of contexts over a long period of time establish that Mr Dorbu is not a fit and proper person to practise. We have referred to related offending and subsequent behaviour. There is one further matter as to his honesty and subsequent behaviour which must be pointed out and that is the declaration he made to the Queensland Law Society in making an application to practise in that jurisdiction. He referred to the current disciplinary proceedings in the past tense and went on to say that he knew of no other matter which might bear on his fitness to be registered in Queensland as a legal practitioner. In our decision we said:

> "The use of the past tense in this manner, and the failure to disclose that the disciplinary proceedings, the subject of this decision, were unresolved once again demonstrates either Mr Dorbu's lack of appreciation of the need for scrupulous honesty in dealings with the court and his profession, or worse demonstrates flagrant dishonesty."

[34] Practitioners have a fundamental obligation to the Court. This obligation is core to the practice of law, fundamental to the operation of the legal system in this country and distinguishes practitioners as members of the profession from members of the public. Mr Dorbu's breaches of the rules of professional misconduct under both the LPA and the LCA demonstrate his willingness to flaunt this core obligation of practitioners and undermine the respect due from members of the profession to the Judiciary.

[35] Mr Dorbu's inability to treat fellow practitioners with respect and courtesy is a clear breach of the rules of professional conduct and again demonstrates Mr Dorbu's inability to understand the fundamentals which underpin the operation of the profession and distinguish those who practise in it from other members of the public.

[36] The Tribunal found the number and frequency of Mr Dorbu's breach of the Rules on matters which are core to the profession and to the fundamental obligations which practitioners owe to the Court to be serious breaches. Mr Dorbu's ongoing lack of appreciation and understanding of these core fundamental requirements of a practitioner presents an unacceptable risk to the public and the profession.

[37] We note that charges 11 and 12 were the only ones in which any expression of responsibility or remorse has been accepted and that came at the eleventh hour in the course of the lengthy hearing before us.

[38] No professional disciplinary decision would be complete without reference to the authority of *Bolton v Law Society*:[3]

> "It is required of lawyers practicing in this country that they should discharge their professional duties with integrity, probity and complete trustworthiness."

[39] The *Bolton* judgment then went on to emphasise the purposes of disciplinary orders:

> Although a punitive element might exist that is not the primary purpose of professional disciplinary proceedings. The first purpose is to ensure "that the offender does not have the opportunity to repeat the offence" and the second purpose is to maintain the reputation of the profession which the Court then goes on to describe is one in which every member must be able to be "trusted to the ends of the earth";

And

> "... a member of the public ... is ordinarily entitled to expect that a solicitor would be a person whose trustworthiness is not, and never has been, seriously in question. Otherwise, the whole profession, and the public as a whole, is injured. A profession's most valuable asset is its collective reputation and the confidence which that inspires."

Protection of the public

[40] Of the 10 charges there are only two charges which directly put a member of the public at risk. That is the conflict of interest charge 3 and the charge of approaching another lawyer's client directly, charge 5. However what elevates the Tribunal's concern under this heading, which in many ways is the most important factor to be taken into account, is the practitioner's lack of awareness of his professional obligations or indeed of his lack of competence. The manner in which

[3] [1994] 2 All ER 486, 491.

he conducted the proceeding before us, which occupied 10 hearing days, was described by us as demonstrating an alarming lack of awareness of his obligations. In the Judicial review proceedings Mr Dorbu's pleadings were described by His Honour thus:

> "The applicant's amended statement of claim in relation to the *Barge* litigation charges is inchoate. He does not address the charges individually. Instead, he pleads matter of fact, matters of law, and matters of submission. These pleadings are jumbled together. His written submissions repeat most of his pleadings and then add to them; again in a way which makes it difficult for the Court to discern the applicant's position with regard to all of the individual charges.
>
> The applicant's oral submissions were largely repetitive of his written material."

[41] We consider that given the numerous shortcomings and dishonesty found by this Tribunal, that the public would be at risk were Mr Dorbu to be allowed to practise.

Suspension

[42] We turned our mind to this alternative penalty since taking the step of depriving a practitioner of his livelihood is a severe one. Mr Dorbu was not present to argue for this course or to present the Tribunal with any evidence under which such an order could be properly imposed. Furthermore Mr Keyte persuaded us that the number of charges and level of seriousness mean that suspension would not be a proper response. Furthermore, we considered that Mr Dorbu's lack of acceptance and remorse would exclude suspension as a proper outcome.

[43] Regrettably we are forced to the unanimous view that there is no other course but to strike the name of this practitioner from the role of barristers and solicitors.

Costs

[44] This prosecution covered eight offences in respect of which penalties are imposed as if the Law Practitioners Act 1982 had not been repealed and the remaining two charges - charges 11 and 12 - to be dealt with under the Lawyers and Conveyancers Act 2006. Costs are sought by the New Zealand Law Society. Their total costs have amounted to $72,616.75. Mr Keyte submits that approximately 40 to 50 percent of that can be attributed to the 10 charges under consideration, thus

providing a range of $29,000 to $36,300. *K v Auckland District Law Society*[4] is cited as authority for the ability of the Tribunal to make a costs order against a bankrupt barrister.

[45] The Tribunal has no further information about the practitioner's financial means. As to the order pursuant to section 257 for the Tribunal's costs, in our earlier decision we calculated that some 4 percent of the Tribunal's costs related to charges 11 and 12, which fell for consideration under the 2006 Act. The Tribunal's costs were then fixed at $68,000, 4 percent of which was $2720. To that figure will need to be added the costs of the present hearing to reach a total of $74,830, 4 percent of which is $2993. There will be an order that the practitioner pay the costs of the New Zealand Law Society in the sum of $30,000 pursuant to section 112(2)(g) of the Law Practitioners Act and section 249(3) of the Lawyers and Conveyancers Act.

[46] There will be an order pursuant to section 257 that the New Zealand Law Society pay the costs of the Tribunal in the sum of $2993.

[47] There will be an order pursuant to section 249 of the Lawyers and Conveyancers Act that Mr Dorbu pay to the New Zealand Law Society the above Tribunal costs awarded against them.

[48] There has been no application for suppression. Mr Dorbu's name has been published in many previous decisions, and an order is sought recommending publication to the profession. That application is granted.

DATED at Auckland this 30th day of September 2011

Judge D F Clarkson
Chairperson

[4] [1998] 1 NZLR 151.