NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL

[2012] NZLCDT 27

LCDT 014/12

IN THE MATTER	of the Lawyers and Conveyancers Act 2006
BETWEEN	**J**
	Appellant
AND	**NEW ZEALAND LAW SOCIETY**
	Respondent

CHAIR

Judge D F Clarkson

MEMBERS OF TRIBUNAL

Mr C Lucas

Mr S Morris

Mr W Smith

Mr I Williams

HEARING at Auckland on 30 August 2012

APPEARANCES

Mr J, Appellant

Mr P Collins, for the New Zealand Law Society

Introduction

[1] This is an appeal, pursuant to s 42, against the refusal to issue a practising certificate to the appellant.

[2] The appellant made an application for a practising certificate and an application for membership of the New Zealand Law Society (voluntary) in a standard form intituled such on 26 September 2011[1]. This was supported by a letter to the New Zealand Law Society from the appellant dated 4 March 2012[2] where at paragraph 2 the appellant said:

> "I consider the issue for the Committee is whether I am a fit and proper person, with the right competence, to practice as a barrister on my own account and not bring the profession into disrepute."

[3] The underlining has been added as at the hearing before this Tribunal the appellant contended his competence, a shorthand expression for his having relevant experience in his area of practice, was not at issue. The appellant made the simple submission, which as he put in a colloquial but accurate way, *"the only door open to the Society to oppose is if there is a character inquiry"*.

He submitted that once the Law Society conceded that his character was not impugned, that he fell within the provisions of s 31, whereby a grant of the Practising Certificate was automatic.

[4] Before we consider this proposition, we make two prefatory points. First, it was common ground between the parties that *character*, in the sense of the appellant's suitability to practice, was not challenged by the respondent. Secondly, though the appellant did not develop much argument on the point, when cross-examined he maintained his clear belief that he was competent. This was drawn in largest measure from life and business experience but he also expressed confidence as to an innate ability to learn on the job.

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1 Exhibit A, affidavit M.E. Ollivier sworn 22nd August 2012.
2 Exhibit M, affidavit M.E. Ollivier sworn 22nd August 2012.

[5] The legal submissions made by the respondent have required the Tribunal to take close consideration of s 39 and then the relationship between the respondent's duties when receiving the discrete applications:

(1) For the issue of a practising certificate; or

(2) For permission for a lawyer to commence practice on his or her own account.

[6] The provisions of the Lawyers and Conveyancers Act 2006 which are pertinent are as follows:

> **"30 Practice by lawyer on his or her own account**
>
> (1) No lawyer may commence practice on his or her own account, whether in partnership or otherwise, unless –
>
> (a) he or she –
>
> (i) meets the requirements with regard to both practical legal experience and suitability that are imposed by rules made under this Act; and
>
> (ii) meets any other criteria that are prescribed by rules made under this Act; or
>
> …
>
> **31 Exceptions to section 30**
>
> (1) Despite anything in section 30, a lawyer may, at any time, commence practice on his or her own account, whether in partnership or otherwise, if, immediately before the commencement of this section, he or she would have been entitled to do so under the Law Practitioners Act 1982 had this Act not been passed; and, for the purposes of this subsection, section 55 of that Act has effect as if it had not been repealed.
>
> …
>
> **39 Issue of practising certificates**
>
> (1) The New Zealand Law Society, on application made to it by any person whose name is on the roll, must issue to that person a practising certificate either as a barrister or as a barrister and solicitor.
>
> …
>
> **41 Power to refuse to issue practising certificate**
>
> (1) A regulatory society may refuse to issue a practising certificate to a person on the ground that the person is not a fit and proper person to hold a practising certificate.
>
> (2) For the purposes of determining whether or not a person is a fit and proper person to hold a practising certificate, the regulatory society may take into account any matters it considers relevant and, in particular, may take into account any of the following matters:

(a) ...

(i) any other matters the regulatory society thinks appropriate;"

[7] As emphasised already, the appellant's application, the subject of the present rehearing, was for the issue of a practising certificate. In terms of s 41(1) the Tribunal is directed to concern itself as to whether the applicant is a *"fit and proper person"*. This is a venerable expression which requires the inquirer to investigate the applicant's character on the one hand and skill and competence on the other. See, for example, the discussion on point by the leading academic, G.E. Dal Pont[3].

[8] In our view the plain and obvious meaning of *fit* is to include an appraisal of the appellant's competence to practice unsupervised. The appellant was right to face-up to this by his letter to the Society of 4 March 2012.

[9] If we are wrong however, then we find that it is a matter of *"relevance"*, referring to the first part of s 41(2). Further, it is a matter which the Tribunal thinks is appropriate to consider, in terms of s 41(2) (i). In answer to a submission made by the appellant, the Tribunal is not minded to read down s 41 so as to restrict relevant matters to a context of poor character or failure to comply with the law. We consider to do so would be to fail in our statutory obligations as expressed in the purposes of the Act.

3 Purposes

(1) The purposes of this Act are—

(a) to maintain public confidence in the provision of legal services and conveyancing services:

(b) to protect the consumers of legal services and conveyancing services:

(c) to recognise the status of the legal profession and to establish the new profession of conveyancing practitioner.

(2) To achieve those purposes, this Act, among other things,—

(a) reforms the law relating to lawyers:

(b) provides for a more responsive regulatory regime in relation to lawyers and conveyancers:

(c) enables conveyancing to be carried out both—

(i) by lawyers; and

(ii) by conveyancing practitioners:

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[3] G.E. Dal Pont *Lawyers' Professional Responsibility in Australia and New Zealand* at p. 27-29.

(d) states the fundamental obligations with which, in the public interest, all lawyers and all conveyancing practitioners must comply in providing regulated services:

(e) repeals the Law Practitioners Act 1982.

[10] The concern for professional skill and competence is critical. The New South Wales Court of Appeal put it nicely when, though speaking of the examination system, it said there is a:

> "… responsibility of the Court and all who administer the examination system to give full weight to the clear public interest of ensuring that only those who have, inter alia, the requisite professional and competence should be permitted to go forth to the public as practitioners in the law. Members of the public must of necessity place considerable reliance upon the competence of persons who are duly admitted to practice in one or other of the branches of the legal profession. This in turn imposes a responsibility to ensure that the public's trust is not misplaced."[4]

[11] The thrust of the appellant's case was to deter the Tribunal from exercising any inquiry for such under s 41 by submitting that the application was, in effect, one to enable him to practice as a lawyer on his own account under s 30. This both ignores the terms of his own understanding of the process when first bringing the application, and misunderstands the relationship between the two sets of provisions. Putting the matter shortly, the respondent could not give leave to a lawyer to practice on his own account unless that lawyer first has a practising certificate. They are two discrete processes.

[12] As counsel for the respondent said, by way of illustration to his opposing submission, otherwise there could be a quite anomalous result, one with far-reaching and detrimental consequences. If the respondent is right, a lawyer suspended from practice and returning after the expiry of the suspension could conceivably require mandatory readmission to practice on his or her own account in circumstances where that might be entirely inappropriate. Parliament did not intend this sort of result.

[13] With that said, we turn to consider the submissions made on the evidence as to the appellant's fitness to practice in terms of his competency.

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[4] *Re Templeton* [1981] 1NSWLR 1 at 8.

References and Evidence for Appellant

[14] In support of his application for the Practising Certificate and in this appeal, Mr J provided references, including one from a lawyer. He also provided an affidavit sworn by himself, and made himself available for cross-examination. He did not avail himself of the opportunity of giving further evidence in chief until later invited to do so by the Tribunal in response to specific concerns raised. In the course of the hearing, he was offered the opportunity to seek independent legal advice, but swiftly declined to do so.

[15] Two references were provided from business associates and then there was the reference of Mr W, solicitor of Z. This last reference was expanded to an affidavit and Mr W was also cross-examined. Although the 2 lay referees confirmed confidence in Mr J's ability, they were insufficiently informed or relevant to the matters under examination in this context.

[16] While Mr J said he had been in practice (part time) as a barrister for 6½ years before his bankruptcy, there was no reference from a previous instructing solicitor, as might have been expected.

[17] Despite the fact that he had been in practice in a small provincial area, Mr W had not been aware of Mr J as a barrister in that area. Mr J explained that his work as a barrister was in various locations. Mr W only knew Mr J, as a client from 2006, during the latter's bankruptcy, and had had little contact with him in the past 3 years. However, despite acting for Mr J during this period, he had not been made aware of the bankruptcy status of his client until some time in 2008. While Mr J later stated that Mr W was incorrect and had acted for him for about a year before his bankruptcy, we have no corroborating evidence either way.

[18] Mr W described Mr J as having had a "commercial mindset" and being "entrepreneurial". Since renewing their acquaintance, on the day of the hearing, Mr W, who had in his reference to the Society indicated that this mindset would need to change to a "professional mindset", stated that his current impression was that Mr J seemed to have moved away from the "high-risk, high-reward"

entrepreneurial approach he previously had.

[19] There are two concerns which arise from this evidence: first, that this assessment was a new one, gained only from a conversation on the way in to town from the airport; secondly, that when Mr J had previously presented to him as "entrepreneurial", it was during a time when he was a bankrupt, and ought not to have been carrying out any such entrepreneurial activities. This information, when put with the information that Mr J had in fact admitted two charges relating to trading while insolvent (management of a business and obtaining credit, without informing the creditor of his status) is of concern in terms of our assessment of his judgment and ability to self-regulate. We make this comment despite the fact that Mr J was discharged without conviction on the two (indictable) charges.

[20] We were unable to place any weight in favour of the application based on the references provided. They were of limited, if any assistance. Only that of Mr W was directed to competence (as we have defined it). And in relation to Mr W the applicant conceded that he *"[was] not in a position to attest to my technical ability".*[5]

[21] We concluded that the evidence of Mr W showed a superficial relationship, in terms of our being able to assess competence. Mr W did not observe the applicant in recent years, so as to be able to offer any assistance as to the applicant's current ability and experience.

Appellant's Evidence

[22] It was of some concern that, at paragraph [7] of his affidavit, Mr J referred to his "significant experience in liquidations and receiverships" without putting that statement into a context and disclosing that he had been bankrupt himself. Having subsequently heard his evidence on the topic of his bankruptcy, we are more inclined to think that this was not an attempt to deliberately mislead the Tribunal (given that the Law Society was bound to inform us of this) but, rather, as indicative of his dismissive attitude to what he saw as an interruption of his career and life

[5] Exhibit O, affidavit M.E. Ollivier sworn 22nd August 2012.

progress; occurring with little fault on his part, and now consigned to the past. Mr J referred to his bankruptcy as a "blip on the radar", and considered his error had merely been that he had "allowed all (his) eggs to be in one basket".

[23] Under cross-examination he confirmed that his current work (self-employed) was buying businesses, improving their performance and then selling them. He also "deal(s) in residential property". Mr J stated he was also involved in mentoring others in business. He wished to be able to give legal advice to the "commercial community". This may involve advocacy if litigation was "unavoidable". But he assured the Tribunal that he would only act for people unrelated to his own businesses or mentoring work.

[24] Mr J provided us with no detail of the briefs he had formerly received, or of the solicitors who had instructed him, the number of cases undertaken previously, while a barrister for over 6 years. Thus he did not support his bare assertions of competence by evidence which could be tested. When cross-examined about areas of expertise, he stated the only area in which he claimed expert status, as opposed to competence, was defamation. On further questioning it transpired that his actual experience in this field was as a litigant in person before he was a qualified lawyer, in 1993, and one other case in 2004. This left us unsatisfied as to his ability to assess his own expertise, or in other words a concern that he was overconfident.

[25] In answer to questions about what work he intended to undertake, he referred to contract drafting, possibly some trust work, litigation (as a "last resort"), insolvency and traffic. He indicated he would self-regulate by refusing work where he did not consider himself to be competent. Some of this work would seem to be more that of a solicitor than a barrister.

[26] Another area of concern held by the Tribunal was in the appellant's attitude to continuing education. He has only attended one Continuing Legal Education seminar since qualifying in 1998, and says he derived little benefit from it. One seminar in a 14 year period is insufficient in our view. Mr J saw himself as giving "pragmatic advice, with a knowledge of the law", rather than undertaking "academic

written opinion work". He stated that he saw himself as a professional communicator who put considerable weight on life experience and accorded technical legal knowledge as "25% of the job".

[27] We accept the Society's submission that Mr J is person of potential, but who requires a period of supervision and mentoring. We consider some consolidation and demonstration of competence is required in a practitioner who has been absent from practice, with little prior evidenced experience before his bankruptcy, and with no recent legal education.

[28] We acknowledge we considered Mr J's offer to restrict his area of practise and his reference to assistance he might obtain from instructing solicitors, but this does not answer our basic concerns as to his proficiency in the law.

Function on Appeal

[29] Finally, we confirm that we have approached the appeal, as will have become apparent, on a *de novo* basis. As held in our decision in *SNH v New Zealand Law Society*[6]:

> "...it is the Tribunal's duty in such cases to reach its own independent findings and decision on the evidence which adheres or admits, and while entitled to give such weight as it considers appropriate to the opinion of the [respondent Law Society], it is in no way bound thereby. In brief, in a s 42 appeal, the Tribunal does not see that there is any presumption in favour of the decision under appeal. It considers that the Tribunal has to approach the matter afresh.....*Austin Nichols & Co and Stitching Lodestar [2008] 2 NZLR 141"*

[6] *SNH v New Zealand Law Society* [2009] NZLCDT 2, at [27].

Result

[30] The appeal is refused.

DATED at AUCKLAND this 28th day of September 2012

Judge D F Clarkson
Chair