

**IN THE NEW ZEALAND LAWYERS AND
CONVEYANCERS DISCIPLINARY TRIBUNAL**

[2011] NZLCDT 28

LCDT 030/09

LAWYERS AND CONVEYANCERS ACT 2006

IN THE MATTER of WELLINGTON STANDARDS COMMITTEE
(No. 1)

AND

IN THE MATTER of JEREMY JAMES McGUIRE, Barrister and Solicitor

TRIBUNAL

Chair
Mr D J Mackenzie

Members
Ms S Gill
Mr M Gough
Mr C Rickit
Mr S Walker

HEARING

19 and 20 October 2011, at Wellington

REPRESENTATION

Mr N Sainsbury and Ms Robertson for the Standards Committee
Mr R Lithgow QC and Ms N Levy for Mr McGuire

**RECORD OF PLEADINGS AND DETERMINATIONS IN RESPECT OF
THE HEARING OF THE SUBSTANTIVE CHARGES**

Introduction

1. The Tribunal convened at Wellington on 19 October 2011 to hear two charges brought against Mr McGuire by Wellington Standards Committee (No.1). The charges both alleged misconduct by Mr McGuire in the provision of regulated services.

2. The first charge alleged misconduct against Mr McGuire in that;

“...in breach of section 66 of the Legal Services Act 2008, he rendered an invoice to his client Lee Grace Sheridan for \$29,771 for legal services in respect of which Ms Sheridan had received a grant of legal aid on 18 June 2008.”

3. The second charge alleged misconduct against Mr McGuire in that;

“...in breach of section 161 of the Lawyers and Conveyancers Act 2006 he commenced proceedings to recover the amount of the bill of costs referred to herein notwithstanding that he had been notified by a Standards Committee that it had received a complaint under section 132(2) of the said Act from the complainant about the bill of costs.”

Amendment of first charge sought

4. At the commencement of the hearing, Mr Sainsbury, for the Standards Committee, sought to amend the first charge. The Standards Committee proposed to amend this charge by alleging that Mr McGuire’s actions in rendering an invoice and seeking payment of that invoice, in circumstances where any payment would be in breach of section 66 Legal Services Act 2008, constituted misconduct.

5. Effectively, by this amendment, the Standards Committee proposed to abandon the allegation contained in the original charge, that Mr McGuire was guilty of misconduct because he had breached section 66 as a consequence of rendering the invoice. In support of the Standards Committee’s application to amend the first charge, Mr Sainsbury said it resulted from the view of the Standards Committee that Mr McGuire was under an obligation *“not to take any concrete steps such as entering into a contract that amounts to a top-up or alternative payment when a grant of legal aid remains in existence.”*

6. Mr Sainsbury said that section 66 was intended to prevent practitioners receiving additional payment from a legally aided client without permission of the Legal Services Agency (as it was then). He submitted that the course of conduct followed by Mr McGuire, in agreeing additional fees with his legally aided client, and attempting to enforce payment against her, was the *“the essence”* of the original charge, and the amendment sought did not substantially alter that position.

7. The amended charge proposed by the Standards Committee was as follows;

“The Wellington Standards Committee (No. 1) HEREBY CHARGES JEREMY JAMES McGUIRE of Wellington, Barrister and Solicitor with misconduct in the provision of regulated services in that he rendered an invoice to his client Lee Grace Sheridan for \$29,771, for legal services in respect of which Ms Sheridan had received a grant of legal aid on 18 June 2008, and sought to enforce payment of that invoice, where such payment would be in breach of section 66 of the Legal Services Act 2008.”

8. In support of his amendment application, Mr Sainsbury made the point that it was no answer to the misconduct allegation originally contained in the first charge against Mr McGuire, to say that the practitioner’s conduct was satisfactory because, notwithstanding the various steps taken in an endeavour to get payment, in the end no payment was actually taken. In other words, it wasn’t for the want of trying on Mr McGuire’s part, and, in the absence of an authority from the Legal Services Agency, there was an attempt to secure a payment of fees that would have been in breach of section 66. That was the misconduct which formed the essence of the original charge Mr Sainsbury submitted.
9. Mr Sainsbury, while noting that the charge was not intended to be directed at the actual taking of fees, its essence being Mr McGuire’s conduct in trying to facilitate the taking of fees, did accept that the wording of the charge could have been better framed.
10. For Mr McGuire, Mr Lithgow QC opposed the amendment. He noted, inter alia, that the amendment application was made some eight months after a Court of Appeal¹ decision had confirmed that section 66 Legal Services Act was not breached until a lawyer actually took an unauthorised payment. The Standards Committee had been aware of that decision, as it related to the dispute between Mr McGuire and Ms Sheridan regarding the fee arrangements which had led to these disciplinary proceedings, but no notice regarding this issue had been given until the hearing, or very shortly beforehand.
11. Mr Lithgow said that the amendment was unfair to Mr McGuire, and that if it was allowed an adjournment would be required, as it prejudiced Mr McGuire’s defence.
12. The Tribunal has power to amend or add to a charge if it considers it appropriate to do so. If it does exercise that power, the Tribunal must adjourn the hearing if it considers that the amendment or addition would either take the person charged by surprise, or prejudice the conduct of the case.²
13. The Tribunal retired to consider the amendment application, and determined that the application should be declined. When the Tribunal reconvened it advised that it had declined the application because it considered the late amendment was

¹ McGuire v Sheridan [2011] NZCA 15

² Regulation 24 Lawyers and Conveyancers Act (Disciplinary Tribunal) Regulations 2008

unfair and prejudicial to Mr McGuire. Mr McGuire had always denied that he had breached section 66, and his defence of the charge of misconduct arising from an alleged breach of that section proceeded on that basis. To allow an amendment, from an allegation of a breach of the section, to an allegation of misconduct comprising the taking steps that could have led to a breach if payment had actually been made, on the basis that those steps were always the essence of the charge, is a step too far in the Tribunal's view.

14. While we accept that the particulars supporting the original first charge itemise the conduct of Mr McGuire in seeking payment from his legally aided client, they also focus on actual breach of section 66,³ and Mr McGuire was charged with misconduct because he was alleged to have breached section 66 by rendering the invoice. It is a marked change to now accept there was no breach of section 66, and to rely instead on the unsuccessful attempt to obtain payment of the bill of costs, which if paid would have breached section 66.
15. In summary, the application to amend the first charge was disallowed for the following reasons;
 - (a) the amendment proposed would have changed the charge in a significant way. The amendment would have resulted in a shift of focus, from an allegation of a breach of section 66, to an allegation of a course of conduct that was inappropriate given the restrictions on taking payments contained in section 66. That would have been prejudicial to the position Mr McGuire proposed to take in defending the misconduct charge as laid in November 2009;
 - (b) the timing of notice of the application to amend, shortly before the hearing and notwithstanding the question of what was necessary to show a breach of section 66 had been an issue known, or which should have been known, since the Standards Committee became aware of the Court of Appeal decision in February this year, is unduly prejudicial to Mr McGuire;
 - (c) the amendment, if granted, would have required the hearing to be adjourned, because it had taken Mr McGuire by surprise, or prejudiced the conduct of his defence. An adjournment of matters which have been in train since the decision to prosecute was made in March 2009, involving further delay, probably into 2012 giving current sitting timetables, would be unsatisfactory and unfair to Mr McGuire; and,
 - (d) Further delay arising from such an adjournment does not sit well with the statutory requirement that the disciplinary regime under the Lawyers and Conveyancers Act 2006 be responsive.⁴ The Tribunal interprets that as having elements which not only reinforce the observance of appropriate standards, but also, which ensure timely disposition of allegations which result in charges before the Tribunal.

³ See paragraph 1.10 of particulars

⁴ Section 3(2)(b) Lawyers and Conveyancers Act 2006

Second Charge

16. For the Standards Committee, Mr Sainsbury then outlined the Committee's position regarding the second charge, alleging misconduct by Mr McGuire as a result of him allegedly breaching section 161 Lawyers and Conveyancers Act 2006.
17. He said that the evidence would show that Mr McGuire had been notified of a complaint which had been received regarding the amount of the bill of costs he had rendered against Ms Sheridan. Mr Sainsbury noted that section 161 operated to stay a claim for quantum, but not liability itself, noting that the section did not prevent determination of liability by a court. The charge against Mr McGuire was that he had pursued a claim for quantum, and that breached section 161.
18. Mr Sainsbury then proposed to have Ms Rice, an officer of the Standards Committee, confirm her evidence as filed with the Tribunal and answer any questions from Mr Lithgow QC in cross examination on behalf of Mr McGuire.

Position of Mr McGuire regarding charges

19. Before Ms Rice was called, Mr Lithgow QC asked if he might present opening submissions at that point, intimating that there may be an outcome available that could result in an early disposition of the charges.
20. Mr McGuire had denied the misconduct charges, but Mr Lithgow outlined the prospect of his client accepting some aspects of the allegations, and a preparedness to commit to a mentoring and supervision programme involving a practitioner of appropriate standing. The Tribunal indicated that it would consider an agreed resolution of the charges between Mr McGuire and the Standards Committee along those lines, but the over-riding issue would be whether any proposal submitted to the Tribunal accorded with the public interest purposes of the Lawyers and Conveyancers Act.
21. It was agreed by counsel that they would consider matters overnight, and revert to the Tribunal when reconvened the following day. On that basis the matter was adjourned until the following day.

Proposal for disposition of charges

22. When the Tribunal reconvened next day, Mr Lithgow QC indicated that overnight a practitioner of appropriate standing, and approved for such purposes by the Standards Committee, had agreed to act as a mentor and supervisor for Mr McGuire. Mr Sainsbury indicated the Committee's agreement to such a proposal, subject only to the detail being mutually agreed between the parties for submission to the Tribunal.
23. As part of these arrangements, Mr Sainsbury indicated that the Standards Committee wished to withdraw the first charge and amend the second charge. The second charge was no longer to allege misconduct, but would allege

unsatisfactory conduct under section 12(b)(i) Lawyers and Conveyancers Act 2006 (conduct unbecoming a lawyer) in the following terms;

*“The Wellington Standards Committee (No.1) **HEREBY CHARGES JEREMY JAMES McGUIRE** of Wellington, Barrister and Solicitor with unsatisfactory conduct in the provision of regulated services in that, in breach of section 161 of the Lawyers and Conveyancers Act 2006 he commenced proceedings to recover the amount of the bill of costs referred to herein notwithstanding that he had been notified that the Standards Committee had received a complaint that included complaint about the amount of a bill of costs.”*

24. The amended second charge was read into the record and substituted for the original second charge with the consent of Mr Lithgow QC on behalf of Mr McGuire. The Tribunal granted the Standards Committee leave to withdraw the first charge, and it was withdrawn accordingly. Mr McGuire then pleaded guilty to the second charge, as amended.
25. The Tribunal provided some indication of content it would expect to see in any agreement between Mr McGuire and the Standards Committee arising from his acceptance that he was guilty of unsatisfactory conduct as set out in the amended second charge. Matters such as a minimum term of 18 months of supervision and mentoring, regular reporting by Mr McGuire and his supervising practitioner to the Law Society, appropriate continuing education commitments by Mr McGuire (particularly around matters such as the Rules of Conduct and Client Care), and provision for replacing the practitioner undertaking the mentoring and supervising should that practitioner become unavailable for some reason during the term of the agreement, were noted. While costs are finally a matter for the Tribunal, counsel were advised that if costs as between the Standards Committee and Mr McGuire relating to the investigation and charges can be agreed then that could be a matter included in the agreement to be submitted to the Tribunal for its approval.
26. In respect of the Tribunal's costs under Section 257 Lawyers and Conveyancers Act 2006, the Tribunal will certify a final figure after it has received and considered any agreement and made any order it considers appropriate in respect of that agreement. As at the date of this record of pleadings and determination, the Tribunal's costs are approximately \$13,500.
27. Counsel indicated that a form of agreement incorporating various provisions to assist Mr McGuire in acting properly and professionally in his practise of the law, and to meet the public interest issues arising, should be able to be submitted to the Tribunal by 1 November 2011. The Tribunal will consider the agreement and its terms, and if satisfied it meets the purposes of the Lawyers and Conveyancers Act 2006 (and in particular the maintenance of public confidence and the protection of the public), it proposes to formally endorse the agreement by an order under Section 156(1)(a) Lawyers and Conveyancers Act made pursuant to section 242(1)(a) of that Act.

28. The Tribunal will be seeking some surety that the agreement will meet the public interest purposes of the disciplinary regime, and has indicated to counsel the matters it considers would be of value in such an agreement. If costs cannot be agreed they should be left aside, and separate submissions on costs lodged at the same time as the proposed agreement, and the Tribunal will make the orders it considers appropriate taking into account submissions received.
29. The Tribunal intends to convene via telephone conference pursuant to R.33 Lawyers and Conveyancers Act (Disciplinary Tribunal) Regulations 2008 for the purposes of considering the proposed agreement and any issues which arise, including costs (if not agreed between counsel), and will make orders accordingly following that hearing.

Dated at Auckland this 25th day of October 2011

D J Mackenzie
Chair