

**NEW ZEALAND LAWYERS AND
CONVEYANCERS DISCIPLINARY TRIBUNAL**

[2015] NZLCDT 33

LCDT 046/14

UNDER

the Lawyers and Conveyancers Act
2006

IN THE MATTER

of disciplinary proceedings under
Part 7 of the Act

BETWEEN

**AUCKLAND STANDARDS
COMMITTEE 3**

Applicant

AND

YOON BOO LEE

Practitioner

CHAIR

Judge D F Clarkson

MEMBERS OF TRIBUNAL

Mr C Lucas

Mr P Shaw

Mr T Simmonds

Mr W Smith

HEARING 25 September 2015

HELD AT Auckland District Court

DATE OF DECISION 8 October 2015

COUNSEL

Mr R McCoubrey for the Standards Committee

Mr Lee in Person

REASONS FOR DECISION ON CHARGE

[1] Mr Lee was embroiled in lengthy litigation on behalf of a client. He was frustrated by the course the litigation was taking. In December 2013, a Judge rejected Mr Lee's arguments, and ordered costs against him personally. Her Honour directed that, until these costs were paid, Mr Lee was not to act further for his client in the litigation.

[2] One week later, Mr Lee twice contacted the lawyer for the real estate agent who held the deposit for the land transaction in dispute.

[3] These actions have brought Mr Lee before the Tribunal, facing a charge of misconduct or, alternatively unsatisfactory conduct.

Issues

[4] The issues for determination were:

1. Did Mr Lee breach the order of the District Court Judge on the (three) occasions alleged?
2. If so, in the particular circumstances, was that breach either:
 - (a) Disgraceful or dishonourable as reasonably viewed by "lawyers of good standing"? or
 - (b) A wilful or reckless breach of Rule 13.2?
3. If the answer to [2] is "no", was the conduct either:
 - (a) Unacceptable and "unprofessional", as reasonably regarded by "lawyers of good standing"? or
 - (b) A contravention of Rule 13.2?

1. Did a Breach Occur?

[5] The order was made on 9 December 2013 in the course of a relatively lengthy oral decision delivered by Her Honour Judge M-E Sharp. Her first comments related to the defendant, as recorded at paragraph [53] of the decision:¹

“To permit the defendant to continue to litigate with the Konishis in this proceeding despite unpaid costs awards in the High Court and the Court of Appeal is an abuse of process in any Court. I therefore now make an order preventing her from taking any steps in this proceeding unless and until those costs awards are met. ...”

[6] Her Honour then goes on to refer to Mr Lee’s own position at paragraph [54]:

“To make it doubly clear I make the order that I just have which is that they may not take any steps at all in this proceeding while cost awards remain unmet. The same goes for Mr Lee. I have made an award of costs against him personally in respect of this application to set aside my judgment of 30 April 2013. That must be paid before he may represent them on this piece of litigation at any time. ...”

And further at paragraph [55]:

“... In respect of Mr Lee personally he has 14 days to meet the costs award failing which I would imagine that steps will be taken to refer the matter to the Law Society.”

[7] Her Honour then went on to address the issue of quantum and made timetable directions for the filing of submissions in that regard.

[8] Before making the orders just quoted Her Honour had made remarks which ought to have made it extremely plain to Mr Lee her concern at the manner in which he had conducted the litigation. For example at paragraph [43] Her Honour was highly critical of Mr Lee’s performance in Court and unwillingness to accept the guidance of the Court.”

“... He speaks over the Judge; he insists on taking the Court to places the Court refuses to go and he is an inveterate time waster. ...”

[9] There is no dispute that on 16 and 17 December, Mr Lee contacted the lawyer representing the real estate agent who held the deposit for the transaction in question in the litigation. Mr Lee was motivated by a wish to settle the litigation and considered

¹ *Y Konishi and Monishi v R J* CIV-2011-044-000085 Auckland District Court, 9 December 2013, M-E Sharp DCJ.

that if the deposit could be returned to the plaintiffs, the litigation may well go away. It appears that counsel for the plaintiff had not requested the return of the deposit for tactical reasons.

[10] Mr Lee contends that he was not aware that this was a breach of the order preventing him from taking steps on behalf of his client pending the payment of the costs award. The costs award had not been paid at this point because it had not been quantified and therefore could not be paid.

[11] Counsel for the plaintiff in the proceedings reported to Her Honour Judge Sharp by memorandum, the steps taken by Mr Lee, which he had learned about from the other solicitor.

[12] On 20 December Her Honour issued a minute in which she referred to the communications between Mr Lee and solicitor for the agent as follows:

“[3] I was, I hope completely clear in my direction on 9 December 2013 that Mr Lee was not to act for the defendant in this proceeding until he made payment of the costs order that I made against him. It seems to me that engaging in communications about the litigation (or subject matter of it) with the stakeholder’s solicitor comes close if not actually is a breach of that order and therefore a contempt.”

[13] After requesting the Registrar to refer the matter to the New Zealand Law Society Her Honour said:

“I do however make it plain that if Mr Lee continues his communications with any person involved in this proceeding whether as a witness, or as a party, relevant to the litigation, I will have no hesitation in citing him for contempt and requiring that he appear before the Court.”

[14] Mr Lee received that minute on 23 December, at which time he also received the written record of the oral decision of 9 December.

[15] The costs were not quantified until 31 January 2014. The order was notified to Mr Lee on 4 February and he made full payment (albeit initially to the Court rather than to the plaintiff) on 10 February 2014.

[16] In directions on 30 January 2014 Her Honour made comments concerning the fixing of costs and the order barring Mr Lee which, with respect, might be seen as

somewhat confusing. However, we do not consider that these directions are relevant, given that the alleged breaches had already occurred.

[17] Under cross-examination Mr Lee confirmed that he had been told clearly “not to do anything in relation to the litigation”. This contrasted with his documents in response to the charge, in which Mr Lee denied that he had been in breach of the order, stating that the real estate agent and his solicitor were not parties to the litigation, and that he was attempting to save the Court time and his client expense.

[18] In his papers Mr Lee had attempted to engage in what we would regard as sophistry concerning the “parties” and the actual meaning of the Judge’s orders. However by the conclusion of his cross-examination he had largely abandoned this approach, acknowledging he was upset at the time he was hearing the oral decision of 9 December and that it was not until he saw it in writing that he was fully clear about the order against him.

[19] In his evidence he acknowledged that he was acting for his client when he contacted the agent. He also agreed that the order stood until it was set aside on appeal (which subsequently occurred), or was discharged.

[20] He confirmed his understanding of Her Honour’s order was that:

“Until the costs are paid I am not to act for Ms J.” (NOE, page 28, line 5).

[21] The Standards Committee pleaded a further breach on 11 February 2014, when Mr Lee again approached the lawyer for the real estate agent, however did not pursue this particular after the Tribunal indicated its view that, by payment into Court, Mr Lee had met his obligations and was therefore free to continue acting by that time.

[22] In answer to questions from the Tribunal Mr Lee accepted the Judge had been expressing disapproval of him in her oral decision and subsequent minute of 20 December. Mr Lee said he read the 20 December minute as limiting the persons who he could not approach to “witnesses or parties”, and for the first time apologised if he was incorrect. When put to him that he ought to have appreciated that the Judge was making it clear to him that he was not to contact anyone in respect of this litigation, Mr Lee responded that he was:

“... Looking, stretching the boundary because I want to resolve the issue for my client. ...” (NOE, page 41, line 6).

[23] It is clear that Her Honour Judge Sharp, having made an order for costs against Mr Lee personally, then directed him to take no further steps until this order was complied with. Until costs were quantified it could not be complied with. We consider that until Mr Lee could comply with the order, he ought not to have considered himself free to take any steps directly or indirectly connected with the litigation. His acknowledgement that he was “stretching the boundary” in order to achieve a result for his client does not provide a proper explanation for his actions. We consider that he breached the order of the District Court Judge.

2. Was this at the level of misconduct?

[24] To add some context to Mr Lee’s conduct it needs to be pointed out that he was ultimately vindicated in his approach to both the litigation and the costs order against him. The order as to costs was set aside on appeal by His Honour Gilbert J on 28 May 2014.² Furthermore, Her Honour Judge Sharp herself, at the formal proof hearing in December 2014, accepted that the proper course forward was for the plaintiff to accept a return of the deposit. This was facilitated and indeed the rest of the claim was unsuccessful.

[25] We accept that during the three to four years this litigation endured Mr Lee was frustrated that the matter was not able to be resolved in a much more straightforward manner.

[26] We also accept that he was motivated by a wish to assist his client when he approached the solicitor for the real estate agent on 16 and 17 December. It is possible that Mr Lee lost objectivity in his overzealousness. He certainly managed to disregard what ought to have been a perfectly clear prohibition and that suggests that he had become too involved in the litigation personally and as a result his judgment was impaired.

[27] However, we do not consider that the breach in this manner demonstrated either “disgraceful or dishonourable” conduct. Nor do we regard it as a “wilful or reckless” breach of his obligation to the Court as contained in Rule 13.2. Rather we consider it

² *Jin and Lee v Konishi* [2014] NZHC 1150.

a misguided attempt to skirt around the terms of that order by adopting an overly literal and self-serving interpretation.

[28] The onus of proof is on the Standards Committee to establish, on the balance of probabilities, that the breach was wilful or reckless. By a relatively fine margin we have determined that they have not reached this standard, having regard, in particular, to the oral evidence of Mr Lee. We accept that, having received the written decision on 23 December, he took no further steps in relation to the matter until he had paid the award of costs. This suggests that his earlier breach was less likely to be a deliberate or reckless one.

3. Was the conduct unacceptable and unprofessional?

[29] We consider that lawyers of good standing would certainly consider the practitioner's behaviour unacceptable. He ought to have been scrupulously careful in relation to this matter and awaited the quantification of the costs order against him, paid it promptly and then begun to act after that stage. His failure to do so demonstrates a lack of understanding of his professional obligations, or at least a loss of focus on those obligations in these particular circumstances of acrimonious and protracted litigation on behalf of his client.

[30] If we are incorrect in this finding we consider that the alternative limb of the charge to be proved. This is a contravention of Rule 13.2 which states:

“A lawyer must not act in a way that undermines the processes of the court or the dignity of the judiciary.”

[31] This provision exists to protect the integrity of the justice system as a whole. It is the protection of the dignity of the judicial office itself, rather than the individual judicial officer which is essential.

[32] It is not for lawyers to second-guess Court orders with which they disagree. There is a clear process of appeal and judicial review if an order is to be disputed. It cannot simply be ignored or, as in this case, circumvented by sophistry in the interpretation of its meaning. We consider the practitioner breached his obligation to the Court by approaching the solicitor for the real estate agent on two occasions, on 16 and 17 December 2013.

[33] For these reasons we entered a finding of “unsatisfactory conduct” at the conclusion of the hearing on 25 September.

[34] Directions have already been made for the filing of penalty submissions. A two-hour penalty hearing is to be allocated forthwith, having regard to that timetable.

DATED at AUCKLAND this 8th day of October 2015

Judge D F Clarkson
Chair