NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL

[2015] NZLCDT 35
LCDT 002/15

IN THE MATTER	of the Lawyers and Conveyancers Act 2006
BETWEEN	**AUCKLAND STANDARDS COMMITTEE 4** Applicant
AND	**ANTHONY BERNARD JOSEPH MORAHAN** Practitioner

CHAIR
Judge B J Kendall (retired)

MEMBERS OF TRIBUNAL
Mr W Chapman
Ms C Rowe
Mr W Smith
Mr I Williams

HEARING at District Court Auckland

DATE 14 October 2015

DATE OF DECISION 21 October 2015

COUNSEL
Mr DCS Morris for the Standards Committee
Respondent in person

DECISION OF THE NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL CONCERNING PENALTY

[1] The Tribunal convened in Auckland on 14th October 2015 to consider the appropriate penalty to impose on the respondent, Mr Morahan.

[2] This hearing followed its decision of 21st August 2015[1] that the practitioner had been guilty of three charges of misconduct under s 7(1)(a)(ii) of the Lawyers and Conveyancers Act 2006 for breaches of the Intervention Rule[2], which provides that a Barrister Sole must not accept instructions to act for another person other than from a person who holds a practising certificate as a Barrister and Solicitor.

[3] The first charge related to a breach of the Intervention Rule. The second charge was an allegation that the respondent had misled the Court, opposing counsel and the Standards Committee that Mr Thompson was his instructing solicitor when that was not the case. The third charge was an allegation that the respondent used the name of Mr Thompson on Court documents without his knowledge, consent or authority.

[4] In finding the respondent guilty of the charges we found (*inter alia)* that:

(a) He could not sensibly contend that a contract of retainer existed between the client and Mr Thompson[3].

(b) It would have reasonably been evident to him that there was no *ad idem* about the retainer from the perspective of the solicitor[4].

(c) He had no reasonable ground to believe that a retainer was in place, there being evidence that he knew a retainer was not in place.

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[1] *Auckland Standards Committee 4 v Anthony Bernard Joseph Morahan* [2015] NZLCDT 29.
[2] Rule 14.4 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008.
[3] See note 1 at [25].
[4] See note 1 at [26].

(d) He turned a blind eye to the requirements of the Intervention Rule which he acknowledged he should comply with[5].

[5] The Tribunal heard submissions from Mr Morris on behalf of the applicant. The respondent filed a submission and addressed the Tribunal.

[6] Mr Morris for the applicant sought the following orders:

(a) Suspension of the respondent for a period between three and six months.

(b) A fine of $5,000.00.

(c) Censure of the respondent.

(d) That he pay the costs of the applicant in the usual way.

(e) That he pay compensation to Mr Thompson.

[7] In addition to the matters set out in paragraph [4] above, Mr Morris submitted that the respondent chose to ignore the requirement that he have an instructing solicitor and Mr Thompson's expectations if he was to be the instructing solicitor. Such actions exposed Mr Thompson to potential liability to the client and to professional obligations owed to the Court by filing documents referring to Mr Thompson as the instructing solicitor.

[8] The use of Mr Thompson's name without his knowledge is submitted to be an aggravating feature of the respondent's conduct.

[9] Mr Morris further submitted that the respondent's history of prior Professional Conduct Complaints indicated a failure to comply with statutory or professional conduct requirements of practice.

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[5] See note 1 at [30].

[10] The respondent appeared before the Auckland Law Practitioners Disciplinary Tribunal in 1991 and before the New Zealand Law Practitioners Disciplinary Tribunal in 1994. He has had matters of complaint before the Standards Committee on three occasions since 1 August 2008, namely in 2011, 2014 and 2015.

[11] We find that it is not necessary to discuss the details of the individual complaints. What are relevant are the respondent's responses to the complaints of 2011, 2014, and 2015 and to these charges including his submissions on penalty which we will discuss later in this decision.

[12] The respondent made a plea to the Tribunal that it should not suspend him from practice. He said that he had no intention to breach the Intervention Rule while accepting that his arrangements with Mr Thompson were too casual. At the hearing before us he emotionally stated that since our decision he had become more aware of the rules and that he would never come before the Standards Committee again.

[13] We commence our deliberation by considering the seriousness of the respondent's conduct.[6] We found that he had turned a blind eye to the requirements of the Intervention Rule and that he had consciously elected to breach the rule. His proposition that he could rely on what he asserted was an informal convention of practice of the Family Court Bar whereby Family Court barristers, in some cases, elected not to have instructing solicitors was contradicted by the fact that the respondent acknowledged that he was bound by the rule and made the claim that he had an arrangement in place with Mr Thompson. We found against him in that regard.

[14] We have concluded that the respondent's conduct is at the lower end of seriousness which would not of itself invite a penalty of suspension. His offending did not involve dishonesty or personal gain. It did not penalise any client or third party with the exception of Mr Thompson who was prejudiced personally and financially. In that respect, Mr Thompson was himself the subject of an own motion complaint and investigation by the Standards Committee which put him to

[6] *Hart v Auckland Standards Committee No.1* [2013] 3 NZLR 103.

professional time and expense including his involvement in the prosecution of these charges.

[15] We are required to make a wider consideration of all of the circumstances in making a decision whether or not to suspend the respondent.[7] Absence of remorse, failure to accept responsibility, lack of insight and manner of response are all relevant matters to be taken into account when determining an appropriate penalty.[8] In this regard, we find that the respondent's response to these charges continued a theme evident in the earlier complaints referred to in paragraph [9] above. He has displayed a belligerent attitude to the Standards Committee an example of which is his description of its behaviour as acting *"more like a secret inquisition or a secret star chamber than a judicial tribunal".* That theme was evident in his responses to the earlier complaints. The respondent was decidedly uncooperative with the investigation of the complaints made against him. His conduct of the defence to the charges before us was a continuation of the theme which we have identified. His submissions on penalty again continued the theme. In paragraph [5], he attacked the Standards Committee and its representatives, including Mr Morris, as being untruthful. He further accused Mr Morris of trying to trap him into making an allegation that *"the Committee and/or Mr Christie redacted exhibits".*

[16] The respondent stated his belief that the *"Standards Committee and/or the Complaints Office pressured Mr Thompson to give his evidence against the practitioner and the prosecution coached Mr Thompson to give his evidence in the precise manner in which he did".*

[17] We deplore the respondent's attacks of which those mentioned are but a few. Mr Morris took time to rebut the criticisms. We have accepted his rebuttal.

[18] We have concluded that there is no evident remorse on the part of the respondent. His request at the penalty hearing that we should revisit his state of mind demonstrated a lack of insight into his conduct and a lack of understanding of his wrong-doing. His emotional expression at this hearing was more obviously based on the stress of facing his peers in the context of the prosecution.

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[7] *Daniels v Complaints Committee No.2 of the Wellington District Law Society* [2011] 3 NZLR 850.
[8] See above n 7 at [29], [30] and [32] and see above n 6 at [187].

[19] We thus find that there is no option but to suspend the respondent from practice. We have assessed that a three month period is necessary in all the circumstances. That will give him time to reflect on his conduct and realise that proper professional standards must be upheld.

[20] We accept (as did Mr Morris for the Standards Committee) that the respondent is impecunious. We do, however acknowledge the submission made by Mr Morris that his impecuniosity is a matter of personal choice dictated in part by his sphere of practice. The respondent stated that he does not seek to earn a living from his law practice and has "*eschewed materialism".* As a consequence we do not order him to pay compensation to Mr Thompson. We do consider that he should make a payment in respect of the Standards Committee's costs and to the Tribunal's costs which the Law Society must pay in the first instance. We consider that the costs of the Standards Committee were unnecessarily increased by the respondent's lack of cooperation with the process of enquiry and prosecution. We fix that payment at 20%.

[21] We make the following orders:

(a) The respondent practitioner is suspended from practice as a barrister or as a solicitor, or as both, for three months commencing 2 November 2015, pursuant to s 242(1)(e).

(b) The costs of the Law Society are fixed at $27,512.79 of which the respondent is to pay 20%, pursuant to s 249.

(c) The s 257 costs of the Tribunal are certified at $6,916.00, 20% of which the respondent is to refund to the Law Society, pursuant to s 249.

DATED at AUCKLAND this 21st day of October 2015

BJ Kendall
Chair