NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL

[2011] NZLCDT 36

LCDT 021/10

IN THE MATTER	of the Lawyers and Conveyancers Act 2006
BETWEEN	**AUCKLAND STANDARDS COMMITTEE NO. 1** Applicant
AND	**MR BARRY JOHN HART** Respondent

CHAIR

Judge D F Clarkson

MEMBERS OF TRIBUNAL

Ms C Rowe

Ms M Scholtens QC

Mr P Shaw

Mr B Stanaway

HEARING at AUCKLAND on 5, 6 December 2011

APPEARANCES

Mr P Collins and Mr M Treleaven for the Applicant

Mr G King and Mr A Trenwith for the Practitioner

DECISION ON INTERLOCUTORY APPLICATIONS TO STRIKE OUT CHARGES 1, 2 AND 3 AND TO EXCISE PORTIONS OF AFFIDAVITS FILED

[1] In February 2011 counsel for the practitioner made an application that Charges 1, 2 and 3 be stayed or struck out. At the same time an application for interim name suppression was made. The interim name suppression application was heard and determined by decision dated 18 March 2011. In relation to the other interlocutory applications it was agreed during a telephone conference these would be considered at the commencement of the hearing proper. The hearing has been twice adjourned from 9 June and then an August date to the December date when the matter was set down for two days, following discussions with counsel about estimated hearing length. In the end the two days were absorbed by the interlocutory applications. In the meantime an application for judicial review was filed at 4.45 pm on the Friday preceding the two day hearing which commenced on Monday 5 December. The statement of claim in that matter did not raise any of the issues relating to these interlocutory applications and there was no impediment to our hearing them.

[2] An opposition to the application for stay or strike out was filed by the Standards Committee on 4 March 2011, an additional memorandum with casebook and materials was filed by Mr King in support of the application in so far as it related to Charge 3 on 30 September 2011 and a response was provided by the Standards Committee on 4 October 2011. Further submissions were also made by the Standards Committee in their opening submissions dated 25 November 2011. Each counsel had the opportunity of addressing the Tribunal orally as indicated above.

Charges 1 and 2 (in the alternative)

[3] The stay/strike out application is based on an allegation of delay and prosecutorial misconduct. The procedural unfairness was described as follows:

> *"(1) Mr Hart was advised in a letter dated 2 October 2009 by the New Zealand Law Society on behalf of the Auckland Standards Committee 1, that the Committee, had determined to refer the complaint to the*

Disciplinary Tribunal pursuant to section 152(2)(a) of the Lawyers and Conveyancers Act 2006.

(2) The letter further stated: 'Appropriate charges will be framed and served upon you as soon as possible, and to this end, our Mr Treleaven [sic] will be in touch with you in due course.'

(3) This charge was not laid until 7 December 2010.

(4) Mr Hart's solicitors were not served with this charge and supporting affidavit until 20 December 2010.

(5) The prosecution in causing this delay has acted contrary to the directions of Reg. 5 of the Lawyers and Conveyancers Act (Disciplinary Tribunal) Regulations 2008."

[4] Regulation 5 reads:

"The Standards Committee laying the charge must ensure that the person charged and the complainant (if any) are, without delay, served with -

(a) Written notice of the Committee's determination that the complaint or matter should be determined by the Disciplinary Tribunal; and

(b) A copy of the charge; and

(c) A copy of the supporting affidavit."

[5] In relation to Charges 1 and 2 it is common ground that there was a delay of some 14 months between the decision to refer the matter to the Tribunal and the filing of charges with the Tribunal. Mr King's submission on behalf of the practitioner is that having regard to his busy and stressful practice such delay was difficult to tolerate. Eventually it was this ground of stress to the practitioner which was the sole prejudice which was said to have been suffered on account of the delay. It was accepted that there has not been any difficulty posed in respect of evidence as a result of the effluxion of time; as put by Mr Collins in reply "*The evidential trail has not gone cold*."

Charge 3 - basis of strike out for delay

[6] Because the practitioner has raised the issue of lack of emotional tolerance of delay, it is appropriate to look at the evidential background which led to the decision made by the Standards Committee to lay Charge 3, because of the delays that occurred in that part of the process, and their cause.

[7] The background to Charge 3 is that it began with a complaint about the level of fees charged by the practitioner to a client, Mr W. A summary of the events leading up to the laying of the charge is as follows:

21 November 2006

[8] Mr Tomlinson, a new lawyer for Mr W, made a complaint to Auckland District Law Society ("ADLS") requesting a costs revision.

18 May 2007

[9] The practitioner and the client settled their costs dispute by private arrangement. It is noted in minutes of a meeting of Complaints Committee No. 2 dated 14 October 2008 that prior to the settlement having been reached Mr Tomlinson had inquired of the Law Society whether a settlement would preclude a professional misconduct investigation in respect of overcharging. It is recorded that Mr Tomlinson was informed that it would not. Mr Tomlinson then indicated to the Society that his client was now back in China and "did not want to take the matter any further". Mr Tomlinson's further comments are noted as "Mr Tomlinson stressed that it was now up to the Law Society to decide whether to take the matter further as a matter (sic) professional misconduct". It seems that this discussion with Mr Tomlinson took place in about August of 2007.

26 May 2008

[10] Complaints Committee No. 2 resolved pursuant to section 99 of the Law Practitioners Act ("LPA") to investigate the fees charged. On 30 June 2008 that resolution was advised to the practitioner.

1 August 2008

[11] The Lawyers and Conveyancers Act commenced and the transitional provisions came into effect.

14 October 2008

[12] The Complaints Committee No. 2 resolved to require the practitioner to produce files relating to Mr W's case for inspection. It is this request which forms the basis for the allegations contained in Charge 3. What is noteworthy is that from the time that the practitioner was notified in June 2008 until the subsequent resolution of

Standards Committee No. 1 to lay charges (through a transition of two further committees which will be referred to later in this decision), the practitioner, personally or through a number of different lawyers representing him sought, as far we are able to count, a total of 14 extensions of time in relation to this matter. Initially the extensions were sought because of the difficulty of collating the material that was sought in respect of the file, and in the latter period – following privilege and confidentiality being raised for the first time in January 2009 – on the grounds of legal impediments asserted. This would appear to have delayed the process from a decision to require production of the files in October 2008 to 20 November 2009 when resolution to lay Charge 3 was made by the Standards Committee. Thus, a similar period of some 13 months appeared to be able to be tolerated by the practitioner at that point, albeit we accept this was during the investigation phase and that the practitioner may have been hopeful that charges would not eventuate.

Legal Principles

[13] The leading authority on the issue of delay in formulating charges is the decision of *Chow v Canterbury District Law Society*[1] where at paragraphs 26 and 27 the Court had the following to say:

> "[26] We are in no doubt that a charge, or charges, must be filed with the relevant tribunal promptly. That conclusion, we think, may be reached in two ways. First, the express obligation in s 101(1) to inquire into complaints "as soon as practicable" may extend to the further step of preferring charges after a sufficient gravity finding. As the circumstances of this case demonstrate, the limits of the investigative process are not of a bright line nature. It may be artificial to say that the investigation is complete at the point of the sufficient gravity finding. After all, as occurred in this case, further work of an investigatory nature remained to be undertaken, being the obtaining and settling of affidavit evidence in support of the charges. Although this function was delegated to counsel, the statutory process is susceptible of the interpretation that counsel completed the investigation on behalf of the committee. On this approach the charges had to be laid as soon as practicable, regardless that such words do not appear in subs (2).
>
> [27] ... The extent of any delay which may be appropriate will depend on the circumstances, including the number and complexity of the charges and the work which is required to obtain supporting affidavit evidence. All of this is to be done against the background of the requirement in s 101(1) that the complaint is to be dealt with as soon as practicable which, if not expressly, in spirit at least informs the interpretation of subs (2)."

[1] [2006] NZAR 160 (CA).

[14] Later in that decision the Australian authorities were also reviewed and the following noted:

> "[35] ... concluded that a weighing process, similar to that undertaken in a criminal case, was required, but with account also to be taken of the protective nature of the disciplinary jurisdiction. That is, disciplinary proceedings are not punitive in nature, but essentially protective of societal interests.
>
> [36] We accept that the issue of remedy is to be approached on the basis of an application of administrative law principles. It follows that non-compliance with the statutory requirement that charges are brought as soon as practicable does not bring about an automatic response. In particular, the charges are not rendered "invalid", nor is a stay or dismissal of the charges necessarily appropriate.
>
> [37] Rather, a judicial assessment of all relevant factors is required. The extent of, and the effects caused by, the non-compliance and the disciplinary context itself, are all highly relevant considerations, as is the nature and seriousness of the charges."

[15] The *Chow* decision was applied in this Tribunal's decision of the *Auckland District Law Society Complaints Committee v John Dorbu.*[2] In that decision we distilled the following factors from the *Chow* decision as relevant to the assessment to be undertaken in considering an application to strike out for delay:

> "(1) The number and complexity of the charges faced.
>
> (2) The work required obtaining the supporting affidavit evidence, the number of witnesses, volume of evidence and number of issues to be considered. (In many ways the second factor flows directly from the first.)
>
> (3) The seriousness of the charges.
>
> (4) The effect of non-compliance with the obligation to proceed promptly, or put another way, prejudice suffered by delay.
>
> (5) The nature of the proceedings, namely professional disciplinary proceedings, a jurisdiction protective of public interest and the interest of the profession as a whole, as opposed to a punitive jurisdiction.
>
> **Additional Factor which may be present**
>
> (6) The contribution of the practitioner to the delay."

[2] [2009] NZLCDT 3, 18 May 2009.

[16] It will be noted that the Tribunal in that instance considered that the contribution of the practitioner to the delay was relevant.

Application to the facts of this case

[17] Mr Collins for the Standards Committee did not attempt to entirely excuse the 14-month period which had lapsed. However, he pointed to the fact that the delay had, in his submission, been to the practitioner's advantage because of the activity which occurred during that 14-month period. The key features of this activity (not challenged by the practitioner) are set out in paragraph 2.3 of the Standards Committee submissions:

> "(a) There was a significant process of refinement concerning the scope and subject matter of charges, resulting in the number of earlier determinations to prosecute being revoked (obviously, being to the advantage of the respondent);
>
> (b) There was a process of continuing discussion between the respondents then counsel and counsel for the Standards Committee; and
>
> (c) More generally, it is apparent that there was continuing activity and progression of the charges during 2010 and this was not a case where the Standards Committee or its counsel was simply 'sitting on its hands'."

[18] Furthermore it was pointed out that at the time in question, the new jurisdiction was clearly just being developed and learned by practitioners engaged in it. Mr Collins put to us, and it is accepted by the Tribunal, contrary to the strict wording of Regulation 5, the complexity of disciplinary charges and supporting evidential material, which is required to be filed with the charges at the outset, means that it is likely that the framing of the charges and the assembly of the supporting information will take some months rather than weeks. We consider that is probably a reasonable assertion in all but the most straightforward of cases. This is not one of those cases.

[19] The evidence indicates that there were initially six complaint matters concerning the practitioner and that by a process of negotiation and continuing discussions between counsel and further refinement of the Standards Committee's consideration of the charges these were pared back to the now four charges (two of which are not in the alternative) thus effectively three charges.

[20] At the hearing Mr King submitted that in addition we should be critical of the nine month period from the time the settlement was advised to the Law Society and the resolution to investigate the fees charged.

[21] That would seem to be an unfortunate delay, however we do not consider that we have jurisdiction to go back to the investigation or pre-investigation phase of the process, in terms of our statutory powers.

[22] Mr Collins was prepared to concede, with the benefit of hindsight, that the more straightforward charges, namely Charges 1 and 2 (alternative) could have been laid in advance of the later charges, however we accept his submission that those sort of decisions are often difficult in the early phases of brand new legislation.

[23] When we compare the delay in this instance with the delays referred to in both the *Chow* and *Dorbu* decisions we note that a delay of 16 months in *Chow* was not seen as sufficient, because of the protective nature of the jurisdiction, to justify the charges being struck out. In *Dorbu* although we were critical of the delay and emphasised the need for a more expeditious process in future, we allowed the charges to proceed despite a delay range of 18-21 months.

[24] In relation to Charges 1 and 2 there is the 14-month delay here, and in relation to Charge 3 a 12-month delay.

[25] While acknowledging the difficulty for the practitioner in this matter dragging on we do not find that to be sufficient reason to strike out the charges having regard to the public interest component in charges such as these being considered and the unique nature of the professional disciplinary jurisdiction.

[26] Furthermore, we do not consider that stress alone is a sufficient reason in this instance, having regard to the practitioner's own contribution to the lengthy delays which have occurred in bringing this matter before the Tribunal, including two adjournments delaying the matter by a further six months since the charges were laid.

[27] In terms of prejudice, we accept the submission that the refinement process which occurred over the 12 and 14-month periods respectively was in many respects

to the practitioner's benefit and has not impacted on his ability to call sufficient evidence to defend the charges. Indeed the flurry of recent affidavits filed up to and including the first day set down for the hearing supports the assessment that no prejudice has occurred in respect of loss of witnesses or memory difficulties. Thus the application for strike out on the basis of delay in respect of all three charges is refused.

Jurisdictional challenge to Charge 3

[28] We now move to consider the second limb of the strike out application relating to Charge 3, a "jurisdictional challenge", alleged grounds for which were set out in paragraph 1 of the practitioner's submissions of 15 September 2011:

> "(i) It was unlawful and unreasonable for the CC2 to undertake an own motion investigation based on privileged information.
>
> (ii) The resolution allegedly made by CC2 on 14 October 2008 was invalid, and failure to comply with it cannot properly be investigated.
>
> (iii) Even if the resolution of 14 October 2008 was valid which is not admitted, it was unlawful and unreasonable for CC2 to require production of confidential and/or privileged material.
>
> (iv) Even if the resolution of 14 October 2008 was valid, and was neither unlawful nor unreasonable, which is not admitted, the committee that convened on 15 May 2009 to consider File 15531 was either:
>
> (i) The ASC1, which was not empowered to convene to consider File 15531; or
>
> (ii) The s 356 committee, which was not empowered to undertake an own motion inquiry.
>
> (v) Even if the committee sitting on 15 May 2008 was an ASC1 sitting on File 1311, which is not admitted, the ASC1 had no grounds for supposing that Mr Hart's failure to render the files was not lawfully justified, as well as excused, and furthermore no grounds (sic) for supposing that the request for the files was lawful."

[29] Charge 3 reads:

> "In relation to a complaint by a former client R W, he refused to disclose his file, initially to the Auckland District Law Society Complaints Committee 2 and subsequently to the Auckland s356 Standards Committee, and thereby obstructed the Complaints Committee and the Standards Committee in the course of their investigations:

(a) On 6 November 2008 Auckland District Law Society Complaints Committee 2 notified Mr Hart that he was required to produce for inspection all his files in relation to the matter in which he had acted for Mr [W], and to provide information in relation to that file, pursuant to s101(3)(d) & (e) of the Law Practitioners Act 1982.

(b) He did not comply with the requirement notified to him by the Complaints 1 and did not subsequently comply with the requirements of the section 356 Standards Committee which assumed responsibility for the investigation of the complaint from the Standards Committee following the repeal of the Law Practitioners Act.

And he is thereby guilty of misconduct in his professional capacity."

[30] The Standards Committee argued that there are two underlying errors in the application to strike out based on the jurisdiction. One relates to the argument concerning privileged communication which, it is asserted cannot properly be claimed by the practitioner.

[31] The second error, Mr Collins submits, is in the *"... reliance on powers of Judicial review which the Tribunal does not possess*." It is the submission of the Standards Committee that the jurisdiction of the Tribunal is concerned with adjudicating upon the substance of the charge itself. We accept that submission. The powers of review of determinations, requirements, orders or directions of a Standards Committee, are contained in section 192 to section 205 of the Lawyers and Conveyancers Act and reside with the Legal Complaints Review Officer. The decision in question occurred on 14 October 2008 thus after the commencement of the LCA on 1 August 2008 and therefore the provisions of that Act apply.

[32] The practitioner also has the ability to challenge the validity of decisions of the Standards Committee by way of judicial review in the High Court. This is in fact what he has elected to do in relation to some of the charges before this Tribunal. This supervisory jurisdiction rests with the High Court. An analogous jurisdiction is not conferred on this Tribunal. Accordingly we do not discuss further the claims made by the practitioner about the validity of the decisions and actions of the committees that investigated and considered this matter.

[33] For clarity we should perhaps set out the changes in the constitution of the committee considering the matter. It was Complaints Committee No. 2 which had investigated and required files to be produced for inspection. In terms of the

transitional provisions of the LCA (section 353 to section 358) the role of Complaints Committee No. 2 passed to what was termed as a section 356 Committee. That Committee does not have "*own motion*" jurisdiction but merely continues investigations which had begun.

[34] When the file was not produced by the practitioner (and it is common ground it has not yet been produced) that was allegedly a default which occurred in the timeframe of the LCA and thus, one of the new Standards Committees formed under the LCA namely SC1, resolved on 15 May 2009 to investigate the failure to produce the files in terms of the 14 October 2008 requisition. When the file was not provided following numerous requests for extension and then more latterly an assertion of privilege, it was SC1 which made the resolution to lay Charge 3.

Privilege

[35] Practitioner raises issues based on an assertion of privilege. We consider that this assertion goes to the substance of the charge. It is an affirmative defence which ought to properly await the substantive hearing. We consider it would be improper for us to consider this issue in the absence of the other evidence to be called. Both parties are entitled to a full hearing of the evidence in this regard.

Application to excise portions of the affidavits of David Smith

[36] This application was filed by the practitioner on 28 November 2011, one week before the commencement of the hearing. It relates to affidavits made by Mr Smith on 7 December 2010 and 27 October 2011. Mr Trenwith made lengthy oral submissions in relation to this matter. When the Tribunal inquired why the evidence filed a year before had not been objected to at the time he indicated that it was expected by the practitioner that Mr Smith would change his approach when he saw the file. However this file was not provided by the practitioner, in answer to a request for discovery, for some seven months. This seems somewhat difficult to align with Mr Trenwith's contention.

[37] The objections to the affidavit reside largely in the assertions that the Standards Committee had not followed a process which provided natural justice to the practitioner. Mr Trenwith was under the misapprehension that Mr Smith had

been appointed pursuant to section 109, which was clearly an error. The Tribunal asked Mr Trenwith to provide us with a specific authority or statutory provision which allowed for the rejection of evidence in advance of the hearing and on the basis of breach of natural justice. However he was unable to go beyond section 252 which provides for the Tribunal to regulate its own procedure. Mr Trenwith submitted that there had been some very strong, indeed at one point he used the word "scurrilous" assertions made by Mr Smith in his affidavit about what he had deduced in the course of his inquiries. It was submitted that the comments were not directly relevant to the charges and were offered only to prejudice the Tribunal against the practitioner. Mr Trenwith took us through a number of statements in the two affidavits of Mr Smith, submitting that there was objectionable material.

[38] This affidavit relates to Charge 4 which is one of overcharging Mr A C. The decision of the Standards Committee to prosecute that charge before the Tribunal was the subject of a review before the Legal Complaints Review Officer and the decision of 23 September 2010 of Ms Bouchier, LCRO, is before us. Ms Bouchier records that the review had been sought of the determination *"... mainly on the ground that the Standards Committee had been unduly influenced by a cost assessors report (the S report) it had obtained. The practitioner contended that the S report made findings against him, or that his comments and observation effectively amounted to findings, and that the report took a more negative view of the practitioner's conduct than the circumstances warranted."* In other words similar aspects of the evidence of Mr Smith as were canvassed before us had already been canvassed by the LCRO. She addressed squarely the procedure of the Standards Committee and in particular, the process that had been followed by Mr Smith in dealing with the practitioner. We should note at this point that it was accepted by Mr Collins that Mr Smith was subject to the rules of natural justice since he was acting under the auspices of the Standards Committee.

[39] At paragraph 7 of her decision the LCRO had this to say:

> "[7] S contacted the Practitioner with view to interviewing him but for reasons which need not be included in any detail, I observed that the Practitioner raised a number of objections to the assessor's procedures and in the event, they did not meet. However, the Practitioner did provide, at S's request, a printout of his MYOB fees reporting system. S interviewed the Complainant and another person who had acted as a junior lawyer for the Practitioner. On 27 August 2009 S wrote to the Practitioner and informed him that he had interviewed certain individuals (who were identified), adding

> "*before completing a report, I would like to meet with you to put various concerns I had to so that you may respond*." Arrangements were sought for a meeting at a suitable time. By end October 2009 no meeting had yet taken place, and meanwhile the Standards Committee was making enquiries of the assessor as to the progress of his enquiry. The evidence on the file showed that S made a number of attempts to meet with the Practitioner and also answered the Practitioner's questions concerning his (S's) procedures. No meeting eventuated and on 23 December 2009 S presented his report to the New Zealand Law Society in which he reported his findings, the steps he had taken, and reasons why he had not met with the Practitioner.
>
> [8] The report was sent to the Practitioner for comment."

[40] As pointed out by the LCRO in paragraph 17 the reports of Mr Smith and the report of Mr Burcher engaged by the practitioner, expressed opinions which "*are opposed in almost every material respect and also reach different conclusions in relation to matters of dispute.*" She went on to point out that Mr Smith *"... did not have the advantage of meeting with the practitioner and therefore no opportunity to hear from him on the issues relating to his fees. The evidence on the file shows this is largely due to the practitioner's unwillingness to make himself available for a meeting. This resulted in S drawing conclusions and drawing some inferences on the basis of such information as he was able to obtain, and these limitations were made clear in the report.*"

[41] Finally the LCRO pointed out at paragraph 20 of her decision that it was proper for the Standards Committee to refer the matter to the Disciplinary Tribunal particularly in cases *"... where there is conflicting evidence of (sic) kind that is preferably resolved by cross examination procedures available in the Tribunal."*

[42] As Mr Trenwith took us at length through portions of the affidavit objected to we were left with the abiding impression the Tribunal was being treated as a jury from whom a certain portion of the evidence had to be kept.

[43] In reply Mr Collins pointed out that Mr Smith was appointed as a costs assessor under section 184(1). In relation to the suggestion that there were scurrilous or unsubstantiated claims of dishonesty made by Mr Smith, Mr Collins submitted that there was an evidential basis for the statement that inconsistencies in time recording had been observed. Mr Collins submitted that the issue of time recording is at the heart of the integrity of fees and arrangements for payment and therefore must be relevant to the charge before the Tribunal. He referred us to the

decision of *Harder v New Zealand Law Practitioners Disciplinary Tribunal*[3], a decision of Venning J in relation to the importance of all relevant evidence to be before the Tribunal in proceedings of a professional disciplinary nature.

[44] Section 252 certainly provides the Tribunal with the power to regulate its own process. This may well provide for a supervisory role including the power to require excision of evidence in advance of hearing in cases where truly scurrilous allegations are made without any form of evidential basis on the face of the affidavit. We consider that any such power would be exercised extremely sparingly. To do otherwise is to deny natural justice because it risks pre-empting a hearing where through the process of cross examination and further evidence to contextualise information, clarification and refinement can occur.

[45] We consider that all portions of evidence sought to be excluded by the practitioner are more properly tested by the process of cross examination and rebuttal evidence and do not require the exercise of our supervisory role.

[46] The application for excision is denied.

DATED at AUCKLAND this 16th day of December 2011

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Judge D F Clarkson
Chair

[3] HC Auckland, CIV-2008-404-3713, 24 June 2008