BEFORE THE NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL

[2011] NZLCDT 41
LCDT 006/011 and 007/011

UNDER	the Law Practitioners Act 1982 and the Lawyers and Conveyancers Act 2006
IN THE MATTER	of appeals against decisions of the Wellington Lawyers Standards Committee established by the New Zealand Law Society under Section 357 Lawyers and Conveyancers Act 2006
BETWEEN	GAIL DAWN McASEY of Wellington, Barrister and Solicitor First Appellant
AND	STEPHEN JAMES GILL of Wellington, Barrister and Solicitor Second Appellant
AND	the Wellington Lawyers Standards Committee established by the New Zealand Law Society under Section 356 Lawyers and Conveyancers Act 2006 Respondent

TRIBUNAL
Chair
Mr D J Mackenzie

Members
Mr W Chapman
Ms A de Ridder
Mr A Lamont
Mr C Rickit

HEARING: Tribunals Office, Ministry of Justice, Wellington, on 30 November 2011

REPRESENTATION:
Dr D L Stevens QC for the First and Second Appellants
Mr K Johnston for the Respondent

RESERVED DECISION OF THE TRIBUNAL ON THE APPEALS

Background

[1] Following a complaint made by a Mr C Munro in February 2008, the Wellington District Law Society Complaints Committee investigated the conduct of the First and Second Appellants (who were partners in the same legal practice) regarding matters the subject of Mr Munro's complaint.

[2] As a consequence of that investigation the committee resolved to lay charges against both appellants before the Wellington Law Practitioners Disciplinary Tribunal. Charges, dated 31 October 2008, were subsequently laid and served.

[3] As the Lawyers and Conveyancers Act 2006 had come into force on 1 August 2008, the disposal of the charges was to be dealt with under the transitional provisions of that Act.[1]

[4] The charges came before the Wellington Lawyers Standards Committee, established by the New Zealand Law Society in place of the former Wellington Law Practitioners Disciplinary Tribunal under Section 357 of the Lawyers and Conveyancers Act 2006, ("the 357 Committee"), on 14 April 2011. The charges were heard together, by consent.

[5] After a two day defended hearing the 357 Committee, in its decision of 4 May 2011, found the First and Second Appellants guilty under S.106(3)(c) Law Practitioners Act 1982 of negligence of such a degree as to tend to bring the profession into disrepute.

[6] On 14 June 2011 the 357 Committee, after hearing submissions from the parties, issued its decision on penalty and costs. That penalty determination censured the First and Second Appellants, made a recommendation for publication of their names, and ordered, inter alia, payment of costs, a requirement to take advice (including by way of attendance at professional courses), and a requirement to make reports.

[7] The First and Second Appellants, by notices dated 27 June 2011, each appealed against the findings of negligence, the publication recommendation, and the orders noted.

[8] By consent, the appeals were heard together by this Tribunal (acting in place of the former New Zealand Law Practitioners Disciplinary Tribunal under the transitional provisions of Sections 353 and 359 Lawyers and Conveyancers Act 2006), in the same way as the original charges were heard together. At the hearing

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[1] Under Section 353 Lawyers and Conveyancers Act 2006 such proceedings were to be continued as if the Law Practitioners Act 1982 had not been repealed by the Lawyers and Conveyancers Act 2006. Transitional Lawyers Standards Committees were to be established by the New Zealand Law Society under Sections 356 and 357 of that Act, to take the place of Complaints Committees and District Disciplinary Tribunals respectively.

the Second Appellant modified his appeal, accepting the finding of negligence made against him, but maintaining his appeal against penalty.

[9] These appeals are undertaken by way of rehearing.[2] As a consequence, this Tribunal is to decide matters appealed against afresh, on the basis of the evidence given at the hearing before the 357 Committee.

Charges against First Appellant

[10] The First Appellant had been charged, in the alternative, with misconduct[3], conduct unbecoming[4], or negligence or incompetence of such a degree or so frequent as to reflect on fitness to practise or as to bring the profession into disrepute[5]. The 357 Committee found that the First Appellant was not guilty of misconduct or conduct unbecoming, but had breached S.106(3)(c) Law Practitioners Act 1982, as it considered she had been negligent to such a degree as to tend to bring the profession into disrepute.

[11] The facts alleged against the First Appellant in support of the charges were that she had been contacted by Mr Munro who had advised her that he was negotiating with a neighbour regarding the possible sale to the neighbour of a small parcel of land Mr Munro owned. The land was on the mutual boundary between Mr Munro and his neighbour.

[12] Mr Munro had asked the First Appellant to accept his instructions to act for him in relation to the matter. The First Appellant had agreed to act and was advised by Mr Munro that she would be contacted by the neighbour concerned, or his solicitor. Mr Munro had requested that, once the First Appellant had heard from the neighbour or his solicitor, she contact him to advise him in relation to the proposal.

[13] On 1 October 2007 the neighbour had provided the First Appellant (via email) with draft wording for a fencing agreement in relation to the land proposed to be sold to him by Mr Munro.

[14] On 3 October 2007 the First Appellant, without any reference to Mr Munro it was alleged, had telephoned the neighbour advising that the terms of sale and the terms of the fencing covenant were approved, subject only to the neighbour agreeing to meet Mr Munro's reasonable legal costs.

[15] The neighbour had agreed to meet those costs, and on 4 October 2007 he had sent an Agreement for Sale and Purchase for signature by Mr Munro, together with a deposit cheque of $500, to the First Appellant.

[16] The First Appellant was alleged to have settled the terms on which the land was to be sold, received and banked the deposit to her trust account, and dealt with conveyancing aspects of the proposal, all without reference to Mr Munro.

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[2] Section 107(2) Law Practitioners Act 1982.
[3] Ibid, Section 106(3)(a)
[4] Ibid, Section 106(3)(b)
[5] Ibid, Section 106(3)(c)

[17] As a result, it was alleged that Mr Munro had become committed to proceed with the sale of his land on terms unknown to him and against his wishes. When Mr Munro was telephoned by the First Appellant on 11 October 2011 regarding an appointment to sign the transfer document, he had told her he did not wish to proceed, and instructed the First Appellant to advise the neighbour that he would not be proceeding with any sale of the land. Mr Munro's position was that he had told the First Appellant he wanted advice on aspects of the sale proposal, but had not instructed her that she should undertake any sale process.

[18] As a consequence of not proceeding with the sale, Mr Munro was sued by his neighbour, who was successful in a specific performance action against him in relation to the sale. The order for specific performance was granted on the basis that notwithstanding no agreement for sale and purchase had been signed by Mr Munro, there was sufficient part performance of a sale arrangement in relation to the land for the neighbour to succeed.

[19] That part performance, it was alleged, arose from the First Appellant's actions noted above, moving the sale and purchase of the land towards settlement without instructions to do so, thereby committing Mr Munro to a sale he did not wish to undertake.

[20] The First Appellant denied the allegation that she had acted without instruction, saying that at all times she was in contact with and advising Mr Munro on various issues regarding the sale.

[21] After the initial hearing of the charge against the First Appellant, the 357 Committee noted a substantial conflict between the evidence of Mr Munro and the First Appellant concerning the numbers and dates of meetings and communications regarding the sale, between Mr Munro and the First Appellant.

[22] The Committee said that matters had taken place some time ago and there was confusion as to what had occurred regarding meetings and communications as a result. Notwithstanding the conflict and confusion the Committee believed both parties had given their evidence honestly and to the best of their respective memory of events.

[23] The Committee then confirmed its findings of fact, noting that the precise details of the number and dates of the meetings and communications were not material to its decisions. Those findings of fact included the following;

(a) That on 3 October 2007, the First Appellant approved terms of the fencing provision, subject to the neighbour agreeing to meet Mr Munro's legal costs;

(b) That the neighbour had agreed to meet those legal costs, and had sent an Agreement for Sale and Purchase, which he had signed, together with a cheque for $500 by way of deposit, to the First Appellant on or about 4 October 2007;

(c) The First Appellant banked that cheque to her firm's trust account for the benefit of Mr Munro, and forwarded a settlement statement to the neighbour's lawyers, on10 October 2007;

(d) Mr Munro had not signed the Agreement for Sale and Purchase at the time the fencing provisions were agreed, nor at the time the deposit was banked and settlement statement forwarded;

(e) Neither of the steps taken by the First Appellant in (a) and (c) above had been expressed to be subject to any reservation that it was subject to and conditional on the Agreement for Sale and Purchase being signed by Mr Munro;

(f) The First Appellant, on receipt of a memorandum of transfer, advised Mr Munro on or about 11 October 2007 that the transfer had been received and requested that he come in to her office so that documents could be signed. On being instructed at that point by Mr Munro that he had decided not to proceed with a sale, she advised the purchasing neighbour's solicitor accordingly;

(g) Ultimately the neighbour was successful in obtaining a judgment for specific performance and costs against Mr Munro in the District Court in respect of the failure of Mr Munro to complete the sale.

[24] The 357 Committee found that the First Appellant had been negligent in her professional capacity in that the deposit cheque should not have been banked until the Agreement for Sale and Purchase had been signed by Mr Munro. Alternatively it said, the First Appellant should have informed the neighbour or his solicitor that banking the cheque, and the transaction, were subject to and conditional on the signing of the Agreement for Sale and Purchase by Mr Munro. Similarly, the 357 Committee found that the settlement statement should not have been sent, or if sent, should have also been subject to and conditional on such signing.

[25] The Committee found that the First Appellant's conduct contributed substantially to the neighbour being entitled to, and obtaining, judgment against Mr Munro in the District Court. As a consequence, it said that her conduct amounted to negligence of a degree as to tend to bring the profession into disrepute.

Appeal by First Appellant

[26] The First Appellant gave Notice of Appeal against the finding that she had been negligent to such a degree as to tend to bring the profession into disrepute, on two bases. First, on the basis that her actions did not amount to negligence, and second, that if she had been negligent, it was not negligence of such a degree as to tend to bring the profession into disrepute. She also appealed against the determinations of the 357 Committee recommending under S.134 Law Practitioners Act 1982 that her name be published, the amount of costs she was to pay, and orders requiring her to take advice (including by way of course attendance), and to make reports.

[27] At the hearing of that appeal before us, the First Appellant abandoned her first ground of appeal against the Committee's finding of negligence. She accepted there had been a degree of negligence, but she maintained her second ground of appeal, that her negligence was not of such a degree as to tend to bring the profession into disrepute, and we proceeded with her appeal on that basis.

[28] This Tribunal was concerned by the fact that the evidence of Mr Munro and the First Appellant heard by the 357 Committee was in such conflict. On the one hand Mr Munro alleged that he had never attended at the offices of Gill & McAsey to discuss the proposed sale to his neighbour. On the other hand, Ms McAsey gave evidence that Mr Munro had attended her office on a number of occasions to discuss terms and conditions of the sale with her as matters progressed.

[29] Mr Munro's evidence before the 357 Committee was that;

(a) He had never met the First Appellant, except on one occasion some eight years prior to the proposed sale to his neighbour, and he had not met with her on the occasions she claimed in connection with the sale transaction the subject of complaint; [6]

(b) After having a number of discussions with his neighbour regarding the sale Mr Munro telephoned the First Appellant to advise of his discussions regarding the proposed sale to his neighbour, and sent her a copy of the title by facsimile transmission;

(c) The First Appellant acknowledged receipt of the facsimile on 12 September 2007, recording that she understood Mr Munro wished to sell the land, and that the buyer should prepare an offer. In that facsimile she asked if Mr Munro had a view on value, and asked him to contact her if she could be of any assistance;[7]

(d) That a price of $3,500 and a fencing covenant to meet Mr Munro's concerns regarding fencing liability were proposed to Mr Munro by the neighbour wishing to purchase the land in a letter of 19 September 2007;[8]

(e) On 24 September 2007 Mr Munro confirmed to his neighbour that the proposal was acceptable, but that he wanted to get legal advice on the matter;[9]

(f) Mr Munro had no contact with the First Appellant until she called him (she had also written on 10 October 2007[10]) to come in to her office to sign

[6] Case on Appeal ("CoA") p191 sub-paragraphs 1(e), and (h)
[7] Ibid p198
[8] Ibid p28
[9] Ibid p221 lines 27 - 31
[10] CoA p191 paragraph 1(f)

transaction documents, and he told her he did not want to proceed with a sale;[11]

(g) The sale price of the land used for the purposes of the transaction had not been conveyed by him to the First Appellant;[12]

(h) Mr Munro did not ever agree the sale price, and the First Appellant had committed a sale without his instructions, including settling the price of the land;[13]

(i) On receipt by Mr Munro of proceedings against him on 6 December 2007, commenced by the neighbour who wished to enforce the sale arrangements after Mr Munro had instructed the First Appellant that he would not proceed with a sale, Mr Munro delivered the papers by hand to Gill & McAsey's Porirua office on 7 December 2007;[14]

(j) In the defence affidavit completed by Mr Munro in respect of proceedings brought against him by his neighbour, attempting to enforce the sale arrangement, he relied solely on the fact that he had not signed an Agreement for Sale and Purchase, and not on any lack of authority by the First Appellant;[15]

[30] The evidence of the First Appellant to the 357 Committee regarding the events related to the sale was completely contrary to Mr Munro's evidence. The First Appellant's evidence in defence of the charges against her was that;

(a) Mr Munro had attended on her at her office on 14 September 2007 to advise that he had decided to sell a small piece of land, which was in a separate title, to his neighbour. The neighbour and Mr Munro had discussed issues relating to the sale, and Mr Munro had told the First Appellant that he was concerned about any fencing liability he might face on sale;[16]

(b) Mr Munro advised the First Appellant that she should expect to be contacted by the neighbour regarding the purchase including arrangements around a fencing covenant;[17]

(c) The First Appellant was kept appraised of discussions Mr Munro was having with the neighbour regarding sale arrangements over the following two weeks via telephone calls from Mr Munro, and on 1

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[11] CoA pS216 lines16 - 27 *(Note pages numbered 210 -219 appear twice in Volume 2 of CoA, firstly as part of Mr Johnston's examination of Mr Munro, and secondly, as part of Dr Steven's cross examination of Mr Munro. The pages that have been duplicated are prefixed J or S in this decision to identify to which sequence we are referring)*
[12] Ibid p S216 lines 28-34 and p S217 lines 1-22
[13] Ibid p S217 lines 23 - 30 and p S219 lines 6 - 9
[14] Ibid p J213 lines 9 -21
[15] Ibid p236 lines 22 - 34 and p237 lines 1 - 16
[16] CoA p164 paragraphs 5 - 7
[17] Ibid p164 paragraph 8

October 2007 she received an email from the neighbour proposing some wording for a fencing covenant;[18]

(d) On receipt of that email the First Appellant telephoned Mr Munro and asked him to come into her office to discuss, which he did on 3 October 2007. He accepted her advice that the covenant was adequate and gave her a letter dated 19 September 2007[19] which he had received from the neighbour setting out arrangements and suggesting a sale price of $3,500;[20]

(e) Mr Munro confirmed to the First Appellant at this meeting of 3 October 2007 that he was prepared to sell on the basis noted in that letter, but wanted his neighbour to meet his legal costs. The First Appellant conveyed that to the purchasing neighbour, who agreed. With terms and conditions then settled, a contract was to be forwarded by the neighbour for signature by Mr Munro;[21]

(f) Mr Munro expressed pleasure at achieving the sale and the First Appellant advised him she would be in touch again when documents were available to sign;[22]

(g) On or about 8 October 2007 the First Appellant received an Agreement for Sale and Purchase on the terms agreed, and a cheque for $500 in payment of deposit. The purchasing neighbour had signed that contract. The First Appellant telephoned Mr Munro and asked him to come in to her office to sign the documents, confirming she had received a deposit. Mr Munro agreed to come in to sign, and indicated that he would uplift the deposit at that time;[23]

(h) To facilitate payment to Mr Munro of the deposit money the First Appellant banked it so that she would be in a position to provide him with a trust account cheque when he called to sign documents. The First Appellant's view was that Mr Munro was pleased to have sold, and she had no doubt that the sale was proceeding as agreed. The First Appellant issued a settlement statement so that final settlement could take place once the land transfer documents had been signed by Mr Munro;[24]

(i) On 11 October 2007, Mr Munro came into the First Appellant's offices, where he told the First Appellant that he had changed his mind and asked her if he could get out of the arrangement to sell the land. As instructed by Mr Munro at that time the First Appellant wrote to the

[18] CoA p165 paragraphs 11 and 13
[19] Ibid p28
[20] Ibid p165 paragraphs 17 - 18
[21] Ibid p165 paragraph 19 and p166 paragraphs 21 - 22
[22] Ibid p166 paragraph 23
[23] Ibid 166 paragraphs 24 -25
[24] Ibid p166 paragraphs 24 - 26, p167 paragraphs 28 - 30

> neighbour's solicitor advising that Mr Munro no longer wished to sell the land.[25]

[31] Clearly, there is a significant difference between what Mr Munro said had happened, and what the First Appellant said had occurred. The 357 Committee recognised the substantial conflict between the evidence of Mr Munro and the evidence of the First Appellant "*as to the number and the dates of meetings and other communications between [Mr Munro] and [the First Appellant]".*[26]

[32] Noting that matters had taken place some time prior to the hearing of the charges, the Committee considered that while evidence had been given honestly, as best as the parties could recall, there was confusion as to the meetings and communications which took place. The Committee then went on to say that "*the precise details of the number and dates of the meetings and communications are not material to the decision of the Committee."*[27] This Tribunal considers that the fact of whether meetings and communications took place as claimed by the First Appellant, or not, as claimed by Mr Munro, does have particular relevance to the charge found proven by the Committee for reasons we shall set out later in this decision.

[33] The Committee found the First Appellant guilty of negligence of such a degree as to tend to bring the profession into disrepute. It said her negligence arose from her banking the deposit cheque before the Agreement for Sale and Purchase had been signed, or alternatively, not advising the purchaser that banking the cheque was subject to and conditional on such signing. The negligence was also said to have arisen because the First Appellant forwarded a settlement statement before the agreement had been signed. The Committee said that it should not have been forwarded, or, if it had been, then it too should have been subject to and conditional on the Agreement for Sale and Purchase being signed.

[34] As a consequence the 357 Committee found that the First Appellant had been negligent to such a degree as to tend to bring the profession into disrepute under S.106(3)(c) Law Practitioners Act 1982. That section provides, so far as relevant, a professional disciplinary sanction where;

> "… *the practitioner has been guilty of negligence……in [her] professional capacity, and that the negligence ……has been of such a degree ……as to ……tend to bring the profession into disrepute.*

[35] S.106(3)(c) has two limbs; there must be negligence, and it must be of a nature that tends to bring the profession into disrepute. Dr Stevens QC submitted that while his client accepted that her unreserved actions in banking the deposit and sending a settlement statement prior to execution of the Agreement for Sale and Purchase by the vendor, Mr Munro, may have been negligent, it was not negligence of such a degree as to tend to bring the profession into disrepute.

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[25] CoA p167 paragraph 31
[26] 357 Committee substantive decision of 4 May 2011 at paragraph 3.1 (CoA p386)
[27] Ibid at paragraph 3.3

[36] Dr Stevens QC referred this Tribunal to *Complaints Committee of the Canterbury District Law Society v W*[28] and to *Auckland Standards Committee 3 of the New Zealand Law Society v W*[29], where the test to be adopted in determining whether negligence is of a degree as to tend to bring the profession into disrepute was discussed. The issue was described by the Full Court in *Canterbury v W* as;

> *" …it is relevant to consider whether the conduct falls below what is to be expected of the legal profession and whether the public would think less of the profession if the particular conduct was viewed as acceptable."*[30]

[37] Dr Stevens QC also noted that the 357 Committee had given no reasons in its determination of 4 May 2011 as to why the negligence it found existed was of such a degree as to bring the profession into disrepute, which meant the issue had to be considered afresh by this Tribunal.

Discussion

[38] There is no doubt in our mind that reasons for decisions should be given. We consider that the 357 Committee's determination on the charges dated 4 May 2011 did provide reasons. The findings of the committee are listed in paragraphs 3.1 – 3.15 of that determination. Those findings comprise its reasons for its decision, which is set out in paragraph 3.16, that the First Appellant had been negligent to the required degree under S.106(3)(c) Law Practitioners Act 1982. The key issue of course, as both counsel noted, is whether this Tribunal, rehearing the matter on appeal, is satisfied that the facts reflect that the required degree of negligence exists.

[39] So far as the question of whether the negligence is of such a degree as to tend to bring the profession into disrepute is concerned, the important issue is whether the evidence properly allows a finding that establishes the second limb of S.106(3)(c) Law Practitioners Act 1982, the First Appellant having admitted some level of negligence. That is, was the First Appellant's conduct of such a nature that it falls below what is expected of a legal practitioner, and would the public think less of the profession if that conduct was viewed as acceptable?

[40] In the present case, the allegation against the First Appellant was that she had proceeded without instruction to bind Mr Munro to sell his land. If, on the balance of probabilities, flexibly applied, which is the test we have to apply,[31] we were satisfied the evidence showed that Mr Munro's allegations were made out, the First Appellant would be guilty of conduct involving a significant fall below required standards which the statutory disciplinary regime would have to address.

[41] Having reviewed all the evidence, this Tribunal is not satisfied on the balance of probabilities that the First Appellant did proceed without instruction from Mr

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[28] [2009] 1 NZLR 514
[29] Auckland High Court, CIV 2010-404-005509, 11 July 2011
[30] Fn 28 supra at 532, paragraph [82]
[31] Z v Dental Complaints Assessment Committee [2009] 1 NZLR 1

Munro as claimed. It is for the 356 Committee[32] to show that it is more probable than not that the First Appellant acted as Mr Munro alleged. As noted by the Supreme Court in *Z:*

> "*Balance of probabilities still simply means more probable than not. Allowing the civil standard to be flexibly applied has not meant that the degree of probability required to meet this standard changes in serious cases. Rather, the civil standard is flexibly applied because it accommodates serious allegations through the natural tendency to require stronger evidence before being satisfied to the balance of probability standard."*[33]

[42] This Tribunal makes no criticism of the way in which the 356 Committee conducted its case before the 357 Committee. It was faced with a complainant's evidence involving serious allegations against the First Appellant. The First Appellant's evidence was diametrically opposite the complainant's. All the 356 Committee could do was put the evidence before the 357 Committee, for that latter committee to consider in exercising its judicial function.

[43] The 357 Committee did not resolve the differences in evidence between Mr Munro and the First Appellant so far as they related to meetings and communications between Mr Munro and the First Appellant. In our view that was critical to whether or not the committee could make the finding it did. The negligence is of an entirely different character if the situation was that Mr Munro had engaged with the First Appellant regarding the sale, its various steps and decision points, as the First Appellant claimed, rather than, as Mr Munro claimed, a situation where he received no advice, gave no instructions, and did not know the sale process was proceeding.

[44] The 357 Committee found negligence of a degree as to tend to bring the profession into disrepute. Such a finding requires evidence that the First Appellant did not keep Mr Munro advised, and acted unilaterally to move the proposal towards a sale without instructions from her client. Otherwise we cannot see how it can be safely said to represent conduct tending to bring the profession into disrepute, given that the First Appellant's evidence was that she attended on Mr Munro throughout and acted on his instructions. Her position was supported by other evidence, and there were some issues with Mr Munro's account which left the Tribunal with some unease.

[45] Mr Johnston submitted that there was negligence (which the First Appellant accepted) and that the 357 Committee had not erred in finding the charge proved, because "*any member of the public bringing a reasonable and responsible attitude to this case would be concerned about a solicitor negligently proceeding with a transaction without seeking and obtaining the client's instructions at every critical point in the process, so as ultimately commit the client.*"[34]

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[32] The Wellington Lawyers Standards Committee established by the New Zealand Law Society in place of the former Complaints Committee of the Wellington District Law Society under Section 356 of the Lawyers and Conveyancers Act 2006 is referred to as the 356 Committee.
[33] Supra, at 40, paragraph [102]
[34] Paragraph 18 of 356 Committee Synopsis of Submissions

[46] As a statement of the principle of the test to be applied in examining whether the negligence is of a degree as to tend to bring the profession into disrepute we agree, but of course the issue in this case is whether or not the First Appellant in fact failed to obtain Mr Munro's instructions at the critical points. Her evidence was that Mr Munro attended on and instructed her throughout, and, as we have noted, we do not consider that Mr Munro's allegations that was not the case have been proven.

[47] In light of the evidence, including; how the First Appellant came to have the details necessary to frame the sale transaction; the fact that she had sought and obtained the purchaser's agreement to pay Mr Munro's legal costs, something less likely to have occurred if no input from Mr Munro; the fact that the steps taken by the First Appellant reflect what could reasonably be expected to occur in a normal conveyancing transaction, (it is only Mr Munro's unusual allegations that affect that normality); supporting evidence for the position claimed by the First Appellant from her legal firm partner Mr Gill, and Ms Hurliman an employee, regarding attendances on Mr Munro by the First Appellant; evidence of Mr Munro's position on the sale and associated arrangements from the purchasing neighbour; and questions related to Mr Munro's ability to deliver documents to an office at Porirua which was normally closed on a Friday, the relevant day in this case; all leave us in a position where we cannot say that it is more probable than not that what Mr Munro claims took place is correct.

[48] We note also the uncertainties that emerged in cross-examination of Mr Munro regarding certain matters, such as the number of phone-calls he said he had with the First Appellant,[35] when and how he first became aware of a deposit being paid and various transaction processes undertaken,[36] how the First Appellant came to know of the proposed transaction and its detail,[37] and his approach to defending his position against the proceedings brought against him by the neighbour, with no mention whatsoever at that time of his claimed principal basis for not proceeding, the First Appellant's lack of authority.[38]

[49] We did not see Mr Munro give his evidence, but of course the hearing transcripts are available to us. While the matters noted in paragraph [48] above are not determinative, they all contribute weight to our view that on the balance of probabilities we cannot be satisfied that what Mr Munro says occurred is more probable than not to have occurred.

[50] All of these matters, together with the highly improbable likelihood that an experienced conveyancing practitioner would, or even could, run the transaction without instruction as suggested by Mr Munro, mean that on the balance of probabilities, this Tribunal cannot be satisfied that Mr Munro's allegations are proven.

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[35] CoA pS213 line 4 to pS215 line 27
[36] Ibid, p247 line 4 to p248 line 4, and p249 lines 1 - 19
[37] Ibid p221 line 8 to p222 line 16, and p223 lines 2 - 11
[38] Ibid p236 line 22 - p237 line 16, and p238 lines 1 - 10

[51] The 357 Committee, in its determination of 4 May 2011, while not reaching a conclusion on whether Mr Munro's allegations of no meetings, few communications, and acting without instruction were proven, said that it could make the negligence finding it did without resolving the evidential conflict. We do not agree that such a finding was available given the unresolved factual position regarding Mr Munro's meetings with the First Appellant.

[52] In our view the First Appellant's conduct would have to be of the nature alleged by Mr Munro before it could be confidently said that there was negligence of a degree as to tend to bring the profession into disrepute. On the balance of probabilities we do not think Mr Munro's allegations can be proven.

[53] The First Appellant's conduct had to fall within the factual parameters alleged by Mr Munro to satisfy the second limb of S.106(3)(c) Law Practitioners Act 1982. If it could not be shown that what Mr Munro claimed was correct, then the First Appellant's negligence is not of a nature where reasonable and responsible members of the public would consider the good reputation and standing of the profession adversely affected.[39]

[54] In the circumstances of this case we doubt that a reasonable member of the public would think less of the profession if the First Appellant's conduct in this matter was found to be acceptable. Her conduct has not been shown to be other than moving a sale proposal towards settlement while communicating with, meeting with, advising, and taking instructions from a client who indicated satisfaction with the transaction and a desire to complete the sale, at least until he instructed the First Appellant late in the piece that he would not proceed. With the advantage of hindsight, the First Appellant has acknowledged that she would now approach the transaction differently, to avoid the situation that has resulted in this case. She has accepted that she would have been better to deal with matters in an alternative way, so that the negligence she has acknowledged could be avoided.

[55] The proven facts in this case show no conduct by the First Appellant which amounts to conduct of such a degree as could reasonably be expected to result in the profession being brought into disrepute. As a consequence of our conclusion that Mr Munro's allegations are not proven to the required standard, we consider the 357 Committee erred in finding both limbs of S.106(3)(c) satisfied. There may have been an element of negligence, as the First Appellant acknowledges, but it is minor and not at a level as to tend to bring the profession into disrepute.

[56] Accordingly the 357 Committee finding of negligence by the First Appellant of such a degree as to tend to bring the profession into disrepute cannot stand. It was wrong because it was made without a finding on the lack of communication, attendance, and instruction, alleged by Mr Munro. Without such a finding there is no evidence of conduct which would satisfy the second limb of the relevant section, as in that case the conduct said to be negligent assumes a different character than might have been the case if was proven that there was no communication, attendance or instruction.

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[39] Fn 28 supra at 533, paragraph [91]

[57] On the evidence we have seen such a finding regarding Mr Munro's allegations could not be properly made, and in the absence of such allegations being proven we do not consider that the First Appellant could be said to have conducted herself in a way that has been negligent to such a degree as to tend to bring the profession into disrepute.

Determination on the appeal by the First Appellant

[58] The decision of the 357 Committee finding the First Appellant guilty of negligence of such a degree as to tend to bring the profession into disrepute is quashed. We find that while the First Appellant has acknowledged some negligent conduct, in the circumstances it is minor, and not negligence of the type referred to in S.106(3)(c) Law Practitioners Act 1982. For the same reasons we do not consider a finding against the First Appellant on either alternative charge (misconduct or conduct unbecoming) would be justified. The appeal is allowed and the charges against the First Appellant are dismissed.

[59] In light of this determination on the charges, the decision of 14 June 2011 of the 357 Committee is modified in respect of the First Appellant in that the recommendation that her name be published is reversed, and the orders for costs against her, the requirement that she take advice (including by attendance at a professional course), and that she make reports, are vacated.

Appeal by Second Appellant

[60] In his Notice of Appeal, the Second Appellant appealed both the substantive finding of negligence of such a degree as to tend to bring the profession into disrepute, as well as the recommendation for publication of his name, and orders regarding costs, and the requirement that he take advice and make reports. At the hearing before us, the Second Appellant abandoned his appeal against the Committee's negligence finding on the charge, but continued his appeal against the other matters.

The effect of delay

[61] The Second Appellant cited delay in prosecuting the original charges as a ground for not recommending that his name be published. He also argued that the delay made the amount ordered as costs against him inappropriate. Dr Stevens QC submitted that the delay in getting to resolution of the proceedings were "*inexcusable"* and "*the result of systemic delay and prosecutorial delay".*[40]

[62] The Second Appellant had been advised that charges would be laid against him, based on Mr Munro's complaint of 28 February 2008, in early August 2008.[41] The charge was prepared and filed, and served on the Second Appellant on 28 November 2008.

[63] By early May 2009 defence affidavits had been filed, but the matter was not set down for hearing as an affidavit in reply was then sought from Mr Munro. This was necessary because of the factual conflict that became apparent on receipt of

[40] Paragraph 29 of Submissions for Appellants
[41] CoA p88

defence affidavits when compared to the allegations Mr Munro had made, as described earlier in this decision.

[64] An affidavit in reply was signed by Mr Munro on 28 October 2009, and it was filed and served within a month after that date. Thereafter there was a period of approximately eight months until an issues telephone conference was proposed for 26 July 2010.

[65] In early September 2010 the Second Appellant (together with the First Appellant) sought a stay of proceedings on the grounds that undue delay in the charges being prosecuted and brought to an hearing had rendered the proceedings an abuse of process. At the hearing of the application for stay Dr Stevens QC submitted that the period of concern related to the time elapsed from the filing of defence affidavits on 8 May 2009.

[66] The 357 Committee, in its determination on the application for stay, found that the period from 8 May 2009 to the end of November 2009 was taken to enable the obtaining of a reply affidavit from Mr Munro to respond to issues raised in the defence affidavits, and that it did not represent an inordinate or oppressive delay.

[67] It found that the period from the end of November 2009 until July 2010 should not have occurred, and accepted that it had been caused by systemic and prosecutorial delays resulting in part from lack of administrative resources. It did not consider the delay in the charges being set down for hearing as justifying the application for stay being granted, and dismissed the application.

[68] Dr Steven QC submitted to this Tribunal that while the nature of the disciplinary regime may have militated against a stay in the circumstances, as noted by the 357 Committee in its decision on the stay application, citing principles attaching to the professional disciplinary regime noted in *Chow*[42] and *Leary,*[43] some relief in recognition of the delay should be granted in the area of publication of name and costs. His submission for such relief relied heavily on Canadian precedent, and its concept of the right to security of person and the harm to that right caused by delay in bringing charges.

[69] This matter took just over three years from initial complaint to substantive hearing. Dr Stevens QC acknowledged that the period of 10 months from complaint to filing and serving charges was not unreasonable. What his client complained about he said was the delay from the time of filing defence affidavits (May 2009) until the setting up of an issues conference in July 2010. It was that 14 month delay to which objection was made and in respect of which the prejudice was claimed.

[70] The 357 Committee had found on hearing the application for stay (and this finding was not appealed by Dr Steven's clients) that the delay from May 2009 until the end of November 2009 was not prejudicial. That six month period was utilised to obtain and file a reply affidavit from Mr Munro. The Committee did find that the eight month period from the end of November 2009 until late July 2010 was unduly long,

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[42] Chow v Canterbury District Law Society and the New Zealand Law Practitioners Disciplinary Tribunal, CA 85/05

[43] Auckland District Law Society v Leary, HC AKM 1471/84

but not of a nature that entitled a stay in professional disciplinary proceedings. This Tribunal does not consider that this eight month delay gives rise to any requirement to recognise the delay by providing some relief regarding publication or costs.

[71] The Tribunal takes the view that Canadian precedent is particular to Canadian matters by virtue of the Canadian Charter of Rights and Freedoms, and that its application is to criminal proceedings. It is not something to be followed in New Zealand professional disciplinary proceedings. In any event, and taking into account Dr Stevens' submission that the New Zealand Bill of Rights Act also protects against disproportionately severe treatment, given the extent of the delay found by the 357 Committee (approximately eight months) it is not clear to us that such relief is demanded on the basis of that delay.

Publication

[72] The 357 Committee recommended that the name of the Second Appellant be published. We see no basis for interfering with that recommendation. The Second Appellant has accepted he is guilty of the conduct with which he was charged. The openness of justice is an important aspect in professional disciplinary proceedings. S.14 Bill of Rights Act specifically protects freedom of speech and the right to know.

[73] The Second Appellant has withdrawn his appeal against the finding that he was negligent to such a degree as to tend to bring the profession into disrepute. Having been found to have conducted himself in a way that breached professional disciplinary standards, the factors requiring non-publication of name require some weight,[44] and nothing put before this Tribunal, including the delay and harm thereby claimed to security of person, outweighs the public right to know.

Costs

[74] The 357 Committee ordered costs totalling $7,620.77 against the Second Appellant. This Tribunal would not normally interfere with discretionary orders of costs, unless plainly wrong in principle or clearly unreasonable. Dr Stevens QC suggested that we could intervene because no credit had been given to reflect the impact of delay caused by the prosecution side, there had been no recognition that the misconduct charge had not succeeded, and, as the 357 Committee had given no reasons for its decision on costs, the matter could be revisited by this Tribunal.

[75] We decline to interfere with the cost orders made against the Second Appellant. There is nothing about those costs which signals they were wrong in principle or unreasonable. Charges were lodged in the alternative, and one of those alternatives was proven. We do not consider that in such a case a practitioner should be entitled to any reduction simply because one of three particular alternative charges, all based on the same facts and issues, is found proven as distinct from any other of the alternative charges. There is in fact no hierarchy of charges in S.106(3) Law Practitioners Act 1982.[45] We note also that

[44] T v Director of Public Proceedings CIV-2005-409-002244, HC, Christchurch, 21 February 2006
[45] Canterbury v W, supra at 531, paragraph [80]

costs may be ordered against a practitioner even where a matter is not proved if considered the proceedings were justified.[46]

[76] The delay of eight months, caused by the inaction of the prosecution side, which was pressed for administrative resources at the time, would not have caused any significant additional cost, and we do not consider there is any applicable issue of prejudice to security of person which demands a reduction in costs.

Taking advice by course attendance

[77] So far as the order to take advice, by attending a course, under the provisions of S.106(4)(i) is concerned, we do not agree that the section is limited to taking advice on administrative matters regarding a law practice as suggested by Dr Stevens QC. The phrase "*to take advice in relation to the management of his practice"* in that sub-section is able to be comfortably taken as including all aspects of a practitioner's management of his practice, including client management, conflict protocols, and similar. The words of the sub-section do not require a restricted interpretation of only administrative matters regarding the business affairs of the practice. That interpretation accords with the purposes of the regulatory regime governing professional conduct, and we do not accept that the sub-section should be read as restricting advice to matters of administration of the business affairs of the practice, including its trust account.

[78] A second point raised by the Second Appellant was that the 357 Committee did not specify, in its order that the Second Appellant take advice by attending a professional course, from which person the advice was to be taken. It is sufficient to specify that person by status rather than by name.[47] The order made by the 357 Committee may be construed as specifying the presenter of the course, which would satisfy S.106(7) Law Practitioners Act 1982.

[79] We consider the order validly made and importantly, appropriate to be made. There was an objection to the Second Appellant being required to pay for the course. If he is ordered to attend a course, and there is a fee payable for such attendance, then whether or not specified in the order, the Second Appellant, if to comply, will have to attend that course and if that incurs a cost as a normal consequence of such attendance, then that is a cost he will have to bear unless he decides he will not comply with the order, which of course would have more onerous consequences.

Taking advice from a person to be nominated

[80] The 357 Committee also ordered that the Second Appellant take advice in respect of the management of his practice *"from such person as may be nominated and approved from time to time by the NZ Law Society General Manager Regulatory"* for a period of two years.

[81] The Second Appellant appealed against this order on the basis that it was unwarranted in the circumstances and that no person from whom he was to take advice had been specified. An unknown person, specified neither by name nor

[46] Section 129(1)(b) Law Practitioners Act 1982
[47] Section 106(7) Law Practitioners Act 1982

office, but to be nominated in the future (by whom not being clear) and approved by an officer of the New Zealand Law Society, does not meet the requirement that a person be specified by name, office, or appointment in the order.

[82] Whether such an order is warranted or not was a matter for the 357 Committee, not the Second Appellant, and in the circumstances the Committee was entitled to reach the view it did in ordering the taking of advice, but we do agree that Ss 106(4)(i) Law Practitioners Act 1982 does require some additional specificity around who is to provide the advice. Also, it is not clear from the order whose duty it is to nominate such a person for approval. Of course, this Tribunal can remedy such a defect by modifying the order if it wishes, having regard to all the relevant matters. We have decided not to remedy the defect because of the passage of time and also because we consider the objectives of the disciplinary regime will be adequately met in this case by the other orders that remain extant.

Making reports as directed by an officer of the New Zealand Law Society

[83] The Second Appellant objected to an order that for two years he make reports on his practice in such manner as may be directed from time to time by the NZ Law Society General Manager Regulatory. Again, he submitted that it was unwarranted. He also noted the lack of specificity, with no guidance as to the person to whom reports were to be made, the manner of matters to be reported on, or the frequency of such reports.

[84] Ss 106(4)(h) Law Practitioners Act 1982 does require more specific parameters than provided by the order, but again, this Tribunal can modify the order to remedy the concerns expressed. Our view is that with the passage of time there is no need to make such an order, with the real value being in the Second Appellant attending the professional course we will order. We note that the 357 Committee took a similar view, having made its order in this matter conditional.

Determination on appeal by Second Appellant

[85] For the reasons we have noted above, the Second Appellant's appeal against the decision of the 357 Committee dated 14 June 2011 is dismissed in respect of his appeal against a recommendation of publication of name, payment of costs of $7,620.77, and an order that he take advice by attending a professional course. With regard to that professional course attendance, the order is modified by providing that the Second Appellant attend the next New Zealand Law Society Ethics for Litigators course reasonably available.

[86] The Second Appellant's appeal is partially allowed in respect of the two orders noted below, and the decision of the 357 Committee is modified by this Tribunal in respect of the Second Appellant in respect of those orders as follows;

(a) The order under paragraph 4.2.5 of that decision, providing for the Second Appellant to take advice in relation to management of his practice from a person to be nominated and approved is quashed.

(b) The order under paragraph 4.2.6 of that decision, providing for the Second Appellant to make reports on his practice in a manner to be directed is quashed.

[87] Leave is reserved for either party to make an application, on notice, seeking any variation of the course attendance mandated, if it is not practicable to attend such a course in 2012, for example because no such course is planned next year, or because it is not in a place reasonably accessible to a practitioner in the Wellington area.

Other matters

[88] The 357 Committee decision of 14 June 2011 provided for some compensation, by effectively providing that Mr Munro not be required to pay any costs for the proposed sale to his neighbour, nor for the defence of the neighbour's proceedings against him. Those costs totalled $1,322.50, of which $193.75 was attributed to the conveyancing associated with the proposed sale by Mr Munro. No reference was made to compensation in the appeals. We have presumed that either these costs have been refunded, or that they have been written off by the First and Second Appellant's firm. The compensation relating to the neighbour's court proceedings against Mr Munro is not affected by this Tribunal's determination regarding the Second Appellant in any event, and, in the circumstances, we do not think it appropriate to interfere with the order regarding the part of the compensation relating to the allegation of negligence against the First Appellant, an amount of $193.75.

[89] If the parties can agree any costs issues arising out of these appeals, the Tribunal is happy to leave the matter for the parties. If agreement cannot be reached, we will receive costs memoranda from the parties.

Dated at Auckland this 21st day of December 2011

D J Mackenzie
Chair