IN THE NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL

[2013] NZLCDT 41
LCDT 030/09

IN THE MATTER of the Lawyers and Conveyancers Act 2006

AND

IN THE MATTER of the **WELLINGTON STANDARDS COMMITTEE (NO.1)**

AND

IN THE MATTER of **JEREMY JAMES McGUIRE** of Wellington, Barrister and Solicitor

TRIBUNAL

Chair
Mr D J Mackenzie
Members
Ms S Gill
Mr M Gough
Mr C Rickit
Mr S Walker

HEARING on 3 September 2013 at Wellington

REPRESENTATION

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

RESERVED DECISION ON PENALTY AND COSTS

Introduction

[1] Mr McGuire pleaded guilty to a charge of unsatisfactory conduct before the Tribunal on 19 and 20 October 2011. This plea followed the withdrawal of one charge of misconduct, and the amendment of a second charge of misconduct to one of a lesser charge of unsatisfactory conduct. The background and detail are set out in the Tribunal's substantive determination of 25 October 2011.[1]

[2] At the substantive hearing the Standards Committee and counsel for Mr McGuire had proposed a rehabilitative solution to sanction. Mr McGuire had indicated a preparedness to commit to a mentoring and supervision programme involving a practitioner of appropriate standing. At the time the Tribunal acknowledged that it would be prepared to consider such an outcome to sanction, provided it was satisfied that the proposal would meet the public interest purposes of the Lawyers and Conveyancers Act 2006.

[3] At the time counsel expected that such an agreement could be formulated, and agreed and signed-off by the parties, by early November 2011. It was anticipated that the proposed mentoring and supervision programme would operate for 18 months.

[4] In the event, a signed arrangement was not submitted to the Tribunal for approval, although it appeared that the mentoring and supervision was occurring in any event. The Standards Committee, seeing the arrangement operating, did not pursue obtaining an executed copy of the mentoring and supervision agreement at that time.

[5] While the Standards Committee had thought throughout that an agreement for the mentoring and supervision arrangement had not been signed, it turns out that it had been signed by Mr McGuire (having previously been signed by the Standards Committee when first sent to Mr McGuire for execution) on some date in August 2012. That position is accepted by the Standards Committee. It appears that its

[1] *Wellington Standards Committee (No.1) v McGuire* [2011] NZLCDT 28.

earlier advice to the Tribunal, that the agreement had not been signed by Mr McGuire, arose from a misunderstanding by Mr McGuire's counsel that a signed copy had been provided to the Standards Committee after the agreement had been signed by Mr McGuire in August 2012.

Sanction sought at the penalty hearing

[6] At the penalty hearing held in Wellington on 3 September 2013, the Standards Committee sought that the Tribunal impose a sanction on Mr McGuire by way of censure or reprimand. It also sought orders for its costs and reimbursement of the amount the Law Society would pay under s 257 Lawyers and Conveyancers Act 2006.

[7] Mr McGuire opposed the imposition of a censure or reprimand, noting that he had undertaken the mentoring and supervision programme as required, and in the circumstances of the rehabilitative approach taken a censure or reprimand was not required. He also resisted any order for costs, and suggested that in all the circumstances he was entitled to some costs.

[8] Dealing first with the issue of sanction. In its memorandum to the Tribunal of 25 May 2012, the Standards Committee made it clear that it saw the mentoring and supervision arrangement as satisfying the need for any separate sanction. In that memorandum it noted that the actual document setting out the terms and conditions of the mentoring agreement had not been signed by Mr McGuire (which was correct at that time). It commented that the failure by Mr McGuire to actually sign the agreement was frustrating, but acknowledged that had to be set against the fact that while unsigned, nevertheless Mr McGuire was complying with the agreement's terms. It said that if Mr McGuire did not commit to the agreement "*then the matter will have to go back to the Tribunal to impose an available sanction.*"[2]

[9] Mr McGuire did not resile from the mentoring and supervision arrangements, and has undertaken mentoring and supervision for some 18 months, as required. For the Standards Committee, Mr Sainsbury confirmed that the Standards Committee

[2] Memorandum of the Standards Committee to the Tribunal dated 25 May 2012, at paragraph 10.

was satisfied that Mr McGuire had properly undertaken the mentoring and supervision required by the agreement, but it was concerned that Mr McGuire did not appear to accept that he had been properly dealt with under the disciplinary provisions applicable.

[10] In its Memorandum of 6 August 2012 to the Tribunal, the Standards Committee had noted that Mr McGuire appeared to be changing his attitude regarding his professional conduct, suggesting that the Standards Committee had made errors for which it should be required to pay substantial costs to him. In a memorandum submitted to the Tribunal at the penalty hearing Mr McGuire continued this theme, quantifying his costs sought from the Committee at $141,033.60.

[11] The Committee rejected this proposition from Mr McGuire, noting that it had withdrawn one charge, and amended another to which Mr McGuire had pleaded guilty in the context of the rehabilitative outcome constituted by the mentoring and supervision arrangement. It did not accept that the disciplinary process followed represented any fault or gross misjudgement by the Committee which would justify Mr McGuire's criticism, or any costs being ordered against it.

[12] We agree with the Committee on this issue. The fact of the matter is that Mr McGuire conducted himself in a way which amounted to unsatisfactory conduct, as he acknowledged by his guilty plea. The fact that the charges first came before the Tribunal in another form, and were withdrawn or amended by agreement as noted above, as part of the establishment of a rehabilitative outcome, does not indicate fault or gross misjudgement by the Standards Committee. It is a reasonable evolution of the substance of the original charges in the circumstances applicable in this case.

[13] After indicating initially that a mentoring and supervision arrangement would itself satisfy the public interest, the Standards Committee has now moved to a position where it also seeks censure or reprimand of Mr McGuire. It does this because it considers that Mr McGuire's "reinvigorated" position following his agreement to the charge being amended, his guilty plea to that amended charge, and his commitment to undertake mentoring and supervision, indicates that Mr McGuire does not recognise that what he did was professionally unacceptable.

[14] Mr McGuire's position is that he accepts he was wrong, has sought mentoring and supervision assistance, and is simply seeking costs for what he perceives was mismanagement of his prosecution by the Standards Committee.

[15] The costs of the Standards Committee were $22,100. The costs certified under s 257 Lawyers and Conveyancers Act 2006 were $18,700, payable by the Law Society as required by that Act. The Standards Committee sought a substantial contribution from Mr McGuire to all of these costs, on the basis that disciplinary costs should not fall on the profession, but on the practitioner responsible for those costs being incurred.

[16] We do have a concern about Mr McGuire's continuing attitude to these proceedings. He has undertaken the required mentoring and supervision programme (and has indicated that he will continue it voluntarily, as he has found it useful), and has undertaken psychological counselling to address matters (described by his psychologist as learning to deal with personal issues, becoming more aware of self and others, and developing coping mechanisms including increased circumspection and tact), but his submissions to support an award of costs against the Standards Committee are somewhat contrary to his acceptance that he was wrong to conduct himself as he did.

[17] He seeks substantial costs from the Standards Committee. He bases his entitlement to costs on matters set out in his "*Award of Costs – Submissions by Practitioner*" filed with the papers for the penalty hearing. They include:

(a) Claims of "*a serious issue about the propriety of the way the complaints were managed from the outset".*[3]

(b) Suggestions that the involvement of a particular Complaints and Standards Officer involved "*a serious and fundamental breach of the rules of natural justice*".[4]

[3] At paragraph 5 of the practitioner's submissions.
[4] At paragraph 8 of the practitioner's submissions.

(c) That the Committee had '*never mentioned at any time in any place why it genuinely thought the practitioner was a threat to the public interest*".[5]

(d) Suggesting that "*there was not even any hearing"* because the charges originally laid could not be proven and were withdrawn accordingly.[6]

(e) A summary submitting that the "*proceedings were a waste of time and money"*, that they were *"effectively prosecutorial, not regulatory"*, that they *"were effectively an abuse of power and process",* and accusing the Standards Committee of breaching "*many aspects of the rules of natural justice".*[7]

[18] For Mr McGuire, Mr Lithgow QC countenanced Mr McGuire's claim for costs as an appropriate response which Mr McGuire considered he was entitled to make, and that the Standards Committee should not react with indignation and seek censure or reprimand together with substantial costs simply as a result of Mr McGuire's claim for costs. He appeared to base this on the fact that originally the Committee had been content with the mentoring and supervision agreement as an outcome, and had been prepared not to seek its own costs, and sought only half of the s 257 costs. This position on sanction and costs had been set out in an earlier memorandum to the Tribunal from the Standards Committee.[8]

Discussion

[19] We share the concern of the Committee that Mr McGuire is demonstrating views here that indicate his continuing lack of appreciation of the professional obligations which contributed to the position he has found himself in with regard to the charge. In this context we note also the comments of Mr Winter in his report of 26 August 2013 before the Tribunal. Mr Winter says in that report that it is very clear that Mr McGuire feels he has not been treated fairly in the disciplinary process, noting that Mr McGuire considers he has genuine grievances. Mr Winter, a person on whose

[5] At paragraph 11 of the practitioner's submissions.
[6] At paragraph 12 of the practitioner's submissions.
[7] At paragraph 27 of the practitioner's submissions.
[8] Memorandum of the Standards Committee dated 25 May 2012 at paragraph 6 (confirming an earlier position), and paragraph 9.

judgment and advice Mr McGuire says he relies, comments that he does not expect Mr McGuire's perspective to change, despite numerous findings against him by various Courts and tribunals.

[20] In his submissions seeking substantial costs against the Standards Committee, Mr McGuire makes allegations of improper processes and procedures in the bringing of the charges against him, claims that effectively there was no case against him (which overlooks that he pleaded guilty to an amended charge), and suggests that there is no issue of the public interest being threatened.

[21] This position he has adopted does leave the Tribunal with a residual concern. It indicates to the Tribunal that Mr McGuire has not fully accepted that it was his unsatisfactory conduct that resulted in a breach of the professional obligations placed on him as a barrister and solicitor. Mr McGuire suggests that it is in fact the Standards Committee that has got it wrong, and implies improper activity by the Standards Committee in the way it dealt with his conduct. In these circumstances we consider that a sanction of censure is appropriate, to mark his conduct as unacceptable and reinforce with Mr McGuire that there can be no on-going risk around his interactions with the public.

[22] The value of Mr McGuire's participation in the mentoring and supervision programme, and benefit from the psychological assistance he obtained, are at risk of being lost if he does not recognise that he was at fault, not the Standards Committee. His continuing attack on those involved in disciplinary regulation, and on the processes of the disciplinary regime, does not assist in providing us with confidence that he accepts his conduct for what it was and that there is no on-going risk of a similar incident.

[23] We have no issue with Mr McGuire seeking costs (although for the reasons we shall give we do not consider he has a basis in law for such costs), but we are concerned by the way he has continued to demonstrate a lack of insight into his own conduct, and blames the Standards Committee for the position he has found himself in, as demonstrated by his submissions on costs.

Determinations on sanction and costs

[24] As a result of the content of what Mr McGuire has claimed in his submissions on costs, with its continuing criticisms and suggestions of inappropriate actions by the Standards Committee, and the concern arising from that which we have that Mr McGuire has not yet arrived at a point where he realises that it was his conduct that has caused what has occurred, we consider a censure is appropriate.

[25] Censure will mark the unacceptability of his conduct, and hopefully reinforce that it was Mr McGuire's conduct which was unsatisfactory, not the Committee's. We record that the Committee was originally prepared to seek a rehabilitative outcome and sought little in the way of a contribution to costs. That Mr McGuire will also face censure is entirely of his own making, as his attitude to his professional obligations, as demonstrated by the content of his submissions on costs, shows that he does not yet fully accept his responsibility for his conduct the subject of the charge to which he pleaded guilty. Censure is needed to reinforce that his conduct has not been acceptable. When Mr McGuire fully accepts that and moves on from any sense that he has been wronged, then the public interest will be more likely to be better protected.

[26] Mr McGuire is formally censured for his conduct. It was conduct that was unsatisfactory and has not reflected well on Mr McGuire. He has been too caught up in this, and as Mr Winter noted, appears to be having difficulty accepting the position he has found himself in, claiming improper and inappropriate treatment in the disciplinary process. For his own sake, as well as those he will deal with in the future, Mr McGuire needs to move on, accepting that his conduct was unsatisfactory and that the regulatory system has responded in the way it had to, to ensure the public interest is protected.

[27] We decline Mr McGuire's application for costs. There is no basis demonstrated to us which would justify an order against the Standards Committee. The principles applicable when considering a costs order against the Standards Committee require that there be a good reason for such an order, such as the prosecution being misconceived, without foundation, or born of malice or some other

improper motive.[9] None of those apply here, where Mr McGuire has pleaded guilty to a charge of unsatisfactory conduct relating to a breach of s 161 Lawyers and Conveyancers Act 2006. That charge was an agreed amendment to an earlier charge of misconduct relating to a breach of s 161.

[28] The Standards Committee sought a contribution to its costs, which amounted to $22,100, and reimbursement of the Law Society's s 257 obligation of $18,700, an aggregate amount of $40,800.

[29] After considering submissions from Mr McGuire's counsel on his ability to pay, we do not consider that Mr McGuire is in a position to meet costs of that magnitude.

[30] The Tribunal will order some costs against Mr McGuire, as the costs to which he has put the profession through his conduct should not fall entirely on others, and Mr McGuire must accept some responsibility for the costs incurred in addressing his conduct.

[31] Ordering all costs as sought by the Standards Committee against Mr McGuire would be punitive. As noted, we consider that some costs should be paid by Mr McGuire, and recognising his income situation, we limit that to $14,700, representing approximately two thirds of the Committee's costs of $22,100. No order is made against Mr McGuire regarding the s 257 costs, as we consider a total of $14,700 appropriate.

DATED at AUCKLAND this 3rd day of October 2013

D J Mackenzie
Chair

[9] *Baxendale-Walker v The Law Society* [2006] 3 All ER 675; and on appeal, [2007] EWCA Civ 233.