**NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL**

[2011] NZLCDT 5
LCDT 021/10

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| **IN THE MATTER** | of the Lawyers and Conveyancers Act 2006 |
| **BETWEEN** | **STANDARDS COMMITTEE No. 1**<br>Applicant |
| **AND** | **BARRY JOHN HART** Barrister<br>Respondent |

**CHAIR**

Judge D F Clarkson

**MEMBERS OF TRIBUNAL**

Dr I McAndrew
Ms C Rowe
Ms M Scholtens QC
Mr B Stanaway

**HEARING** by teleconference on 10 March 2011

**APPEARANCES**

Mr P Collins for the Standards Committee
Mr P Rzepecky for Mr Hart

## DECISION OF TRIBUNAL ON INTERIM NAME SUPPRESSION

### *Introduction*

[1] The practitioner faces three charges of misconduct in his professional capacity and one alternative charge of conduct unbecoming a Barrister, brought by the Auckland Standards Committee No. 1. The practitioner seeks interim suppression of his name pending determination of these charges.

### *Arguments*

[2] The practitioner denies each of the charges brought and has filed evidence in support of that denial and in support of an application for stay or strike out of the proceedings which is to be heard at a later date.

[3] In his evidence there is one paragraph which addresses the reasons for interim suppression. He indicates that he is a senior and prominent member of the Criminal Defence Bar and has a high media profile. His counsel submits, and indeed the Tribunal can take notice of the fact that he is asked by the media from time to time to comment on matters of criminal prosecution generally, in addition to his appearing as defence counsel in a number of high profile criminal trials.

[4] In particular he deposes that his link to a recent high profile case may result in further media interest. However his counsel conceded that, as a complainant in respect of one of the charges, that person's name would be suppressed in any event and therefore the link would not be apparent. The practitioner deposes that it would be "... more difficult for me to conduct my practice and would I believe, have a negative impact on my work".

[5] Mr Rzepecky argued on behalf of the practitioner that because of his prominence that he was not a "run of the mill lawyer" but rather a media figure and as such, the Tribunal was asked to accept that he would thereby be at greater risk of damage to his reputation and the business arising from that reputation than would another practitioner.

[6] Counsel for the practitioner quite properly conceded that there was a strong public interest in openness of proceedings but argued that this was outweighed by the "significant and irreparable harm" which would be suffered if his name were published before the proceedings are heard. Mr Rzepecky drew a comparison with the Appellant in *J v Serious Fraud Office* [1] who had earned a high reputation in the community, and where Baragwanath J held that the potential for unwarranted serious injury to the interests of the applicant outweighed the public interest in openness of proceedings.

[7] While Counsel concluded that Mr Hart's seniority in his profession and his high media profile meant he would suffer "significant and irreparable harm" if his name were published, no specific evidence was called in respect of the likelihood of that harm resulting. This was presumably a necessary inference to be taken by the Tribunal.

[8] Mr Rzepecky submitted that interim name suppression was a procedural step intended to ensure the accused person was not unfairly prejudiced by the publicity of the proceedings.

[9] For the Standards Committee Mr Collins argued that pursuant to section 238 of the Lawyers and Conveyancers Act 2006, the starting point is openness of proceedings. That section prescribes that hearings be held in public unless there is a proper privacy or other interest to be protected. Mr Collins argued that carried with it an expectation that Tribunal business is to be conducted in and available to the public. That provision is subject to section 240 which provides the jurisdiction to consider in proper circumstances, suppression of the name and details of any person involved in the proceedings.

[10] Mr Collins relied on the Tribunal's decision in the matter of *Hill*[2], where at pages 6 and 7 the Tribunal had this to say:

> "[9] The Tribunal does not accept the submission made on behalf of Mr Hill that s 240 of the Act should be interpreted in the same manner as s 111 of the now repealed Law Practitioners Act 1982 in *S v Wellington District Law Society*[3]. We do not consider that authority and the test proposed by Mr Hill are relevant to s 240 of the Act, as they were to s 111 cl1. We do not accept

[1] *J v Serious Fraud Office* [A126.01] 10 October 2001.
[2] *Hawkes Bay Standards Committee v R H Hill* [2010] NZLCDT 28.
[3] Supra, footnote 1.

that the resulting narrow construction of 'public interest' can be read to mean exclusively 'protection of the public'. To the contrary, we believe that s 240 (and s 238) of the Act must be read in conjunction with s 3 "Purposes", which reads:

> *"**Purposes***
>
> *1. The purposes of this Act are—*
> *a. to maintain public confidence in the provision of legal services and conveyancing services:*
> *b. to protect the consumers of legal services and conveyancing services:*
> *c. to recognise the status of the legal profession and to establish the new profession of conveyancing practitioner.*
>
> *2. To achieve those purposes, this Act, among other things,—*
> *a. reforms the law relating to lawyers:*
> *b. provides for a more responsive regulatory regime in relation to lawyers and conveyancers:*
> *c. enables conveyancing to be carried out both—*
> *i. by lawyers; and*
> *ii. by conveyancing practitioners:*
> *d. states the fundamental obligations with which, in the public interest, all lawyers and all conveyancing practitioners must comply in providing regulated services:*
> *e. repeals the* Law Practitioners Act 1982*."*

The Tribunal considers public confidence in the provision of legal services is maintained by the ability of the public to access and scrutinise information about disciplinary proceedings and the workings of the disciplinary process. The legislation was enacted, with a clear consumer focus, to reform the oversight of the provision of legal services.

For these reasons, although reached by a different route, we agree with the Society's submission that a presumption of "openness" is implicit and in the absence of a body of case law specifically relating to s 240 and s 238, we adopt the principles expressed in R v Liddell[4] by the Court of Appeal relating to s 140 of the Criminal Justice Act 1985, as principles that best support the purposes of the Act:

> *"In considering whether the powers given by s 140 should be exercised, the starting point must always be the importance in a democracy of freedom of speech, open judicial proceedings, and the right of the media to report the latter fairly and accurately as "surrogates of the public."*
>
> *"Departures from the principles are necessary at times to avoid prejudice in pending trials."*
>
> *"What has to be stressed is that the prima facie presumption as to reporting is always in favour of openness."*[5]

[4] Supra, footnote 3.ht.
[5] Supra at 546 and 547.

> [10] In adopting these principles the Tribunal is mindful that proceedings before it are disciplinary and not criminal proceedings and that their purpose is not punitive but those detailed in s 3 of the Act."

[11] Mr Collins objected to the notion that status as a prominent and senior member of the Criminal Defence Bar ought to confer some privilege that was not available, for example, to a junior and unknown lawyer.

[12] Mr Rzepecky had distinguished the *Hill* decision on a number of bases: that decision dealt with charges involving serious dishonesty, which is not the case in respect of the charges faced by the practitioner. Secondly, in that case the practitioner had already engaged in comment with the media on charges or the situation surrounding the charges being brought. Mr Rzepecky argued that the seriousness of the charges faced by his client was at a much lower level than those in the *Hill* matter.

[13] Without conceding this necessarily to be the case because the substantive matter was yet to be determined, Mr Collins argued that Mr Rzepecky's reliance on the low level of the charges in distinguishing the *Hill* decision undermined the notion that publicity would cause harm. If the charges were deemed to be at a low level, Mr Collins submitted, and any reporting of this matter explained the differences from the *Hill* case; the public could be expected to view the charges as not serious; and that overall the principles of openness and the public interest in that process would not be displaced.

[14] Mr Rzepecky disagreed that the seriousness of the charges would be understood by the public.

***Discussion***

[15] In respect of the issue of comparative notoriety ("the high profile argument"), the Tribunal recognises that the practitioner enjoys a high profile, but recognises also the reality that operating at that level brings both considerable benefits and some negative consequences, and the practitioner inevitably has to accept the one with the other. Notwithstanding that comment the Tribunal notes there is in fact no evidence before the Tribunal that any publicity surrounding these charges would necessarily be adverse or lead to a loss to the practitioner, either in respect of his business or his

reputation. Certainly there was no evidence that this would occur to such a degree as to justify a departure from the principle of openness.

[16] This principle and the public interest in being able to observe and scrutinise the workings of the professional disciplinary process in relation to lawyers is broader than simply protection from allegedly dishonest practitioners. That is but one aspect of the justification for openness. There is also of course an interest in the public being aware of the various charge-out rates of practitioners and the reasonableness having regard to experience and expertise. These matters are no longer cloaked in mystery or secrecy. The client care rules of the legal profession provide to the contrary. In addition the Tribunal considers that the public is aware of the presumption of innocence which includes a practitioner facing disciplinary charges and that any publicity can also address the fundamental nature of that presumption.

[17] Whilst the Tribunal accepts that there is a greater need for openness and public protection in cases involving alleged serious dishonesty, which is not the case here, that alone is not determinative of a suppression application. As in *Hill,* we have regard to the statutory purposes incorporated in section 3 of the Act (see above).

[18] The Tribunal distinguished *F v Serious Fraud* on the basis that in that case the charges were of a very serious nature involving dishonesty, and that damage to reputation was likely to be correspondingly greater than if the Appellant had been facing lesser charges. It could be expected that lower level charges such as those Mr Hart is facing, would result in a corresponding reduction in any damage to his reputation and/or business from media publicity. The statutory purpose, for example the maintaining of public confidence in the provision of legal services, are advanced when the public can know of the range of matters that practitioners can be disciplined for, including “less serious ones” like overcharging.

[19] The Tribunal considers that in order to maintain a public confidence in the provision of legal services an open and transparent disciplinary process is necessary and is to be displaced only in very unusual circumstances by “strong cause”[6].

[6] Above at [18].

***Decision***

[20] The application for interim suppression is declined except in so far as it relates to the names of complainants or former clients of the practitioner. The practitioner's name is to remain suppressed for seven days following the release of this decision.

**DATED** at AUCKLAND this 18th day of March 2011

Judge D F Clarkson
Chairperson