NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL

[2011] NZLCDT 6

LCDT 017/10

IN THE MATTER of the Law Practitioners Act 1982 and of the Lawyers and Conveyancers Act 2006

AND

IN THE MATTER OF **PETER JOHANNES DENEE**

CHAIR

Judge D F Clarkson

MEMBERS OF TRIBUNAL

Mr W Chapman

Ms S Cole

Ms A de Ridder

Mr S Grieve QC

HEARING at WELLINGTON on 29 March 2011

APPEARANCES

Mr J Upton QC counsel for Legal Complaints Review Officer

Mr J Scragg for the Respondent

DECISION OF NEW ZEALAND LAWYERS AND CONVEYANCERS TRIBUNAL

Introduction

[1] At the conclusion of the hearing on 29 March the Tribunal announced the orders to be made to counsel and reserved the written reasons for the Tribunal's decisions. These are those written reasons.

[2] This is the first case in which charges have been brought by the Legal Complaints Review Officer ("LCRO") to the New Zealand Lawyers and Conveyancers Disciplinary Tribunal ("the Tribunal") pursuant to the Lawyers and Conveyancers Act 2006 ("the Act"). The circumstances in which this arose are that a complaint was made to the Wellington Branch of the New Zealand Law Society. A Standards Committee then found the complaint proved but not so serious as to warrant bringing charges before the Tribunal. Instead the Standards Committee imposed the maximum fine available to it in respect of behaviour which had occurred prior to the commencement of the Act. This was $2,000 and in addition it censured the practitioner and ordered the payment of costs of $3,230. The Standards Committee declined to publish the name of the practitioner. The complainant appealed the Standards Committee decision to the Legal Complaints Review Officer who, on 21 July 2010 gave a decision pursuant to sections 211(b) and 152(2) of the Act that the matter be referred to the Tribunal. Pursuant to section 212 charges were framed and served on the practitioner concerned, Mr Denee. There were two charges framed in the alternative, as follows:

> **Charge 1**
>
> He prepared a will dated 3 May 2006 for the late Ms T (who died at Wellington on [X] January 2008), under which half her residuary estate was left jointly to him and his former partner in circumstances where:
>
> [a] He should have refused to act on her behalf in the preparation of her will; and/or
>
> [b] He should have insisted that she obtained independent legal advice elsewhere on her proposal and in the preparation of her will.
>
> **Charge 2**
>
> (Alternatively), he should have given her written advice to obtain independent legal advice on what he proposed before the will was prepared.

[3] Following discussions between counsel the practitioner pleaded guilty to Charge 1[b] and the remaining charges were withdrawn by leave of the Tribunal at the commencement of the hearing.

Background

[4] Mr Denee is an experienced legal practitioner, now a sole practitioner but formerly in partnership with another lawyer in Wellington. His partner had acted for the late Ms T for many years. Following the partner's retirement in mid-2001 Mr Denee took over the late Ms T as his client. Soon after that time, in September 2001, the client instructed Mr Denee to prepare a new will for her. The will was prepared and differed in a significant respect from earlier wills in that she left half of her residuary estates to Mr Denee and his former partner.

[5] The will, originally was inaccurate and created an intestacy as to one quarter of the residue. This was corrected on 10 October with the execution of a further will which also left half the residue to Mr Denee and his retired partner.

[6] After that time a further seven wills and five codicils were signed by the testator within a period of less than five years. All of the changes related to minor dispositions to friends or relatives. The disposition to the practitioners remained the same throughout. There is no evidence from the practitioner's files to suggest why the disposition was being made to her lawyers. However Mr Denee recounts how the relationship had become cordial over the years, that the late Ms T would ask about his children and their progress and often bring small gifts of fruit or baking when she attended at his office.

[7] Mr Denee says that he told his client "on one occasion" that she ought to instruct another solicitor and provided her with the names of other solicitors practising nearby to where she lived. The client apparently rejected this suggestion, indicating that she did not want to go to any other lawyer and that she wished Mr Denee to be her lawyer only. Mr Denee became more concerned over time about the issue of independent advice and so when she came to execute her will in February 2004 he says "probably against her wishes" he made an appointment for her to be interviewed by Ms R in order to obtain independent advice.

[8] Unfortunately Ms R did not open a file or make notes of her interview on this occasion with the late Ms T. However the Tribunal accepts Mr Denee's evidence that he delivered his client to Ms R's office and collected her from there and that she was there for about 45 minutes, this leading him to think that she had been provided with full advice rather than a mere witnessing of the will, which was Ms R's most recent recollection.

[9] It is Mr Denee's evidence, confirmed by that of the investigator engaged by the LCRO that the late Ms T was alert and clear in her instructions as to testamentary disposition. Mr Denee was "... never in any doubt she had a complete understanding prior to its execution." She was described as independent, strong willed and somewhat feisty.

[10] It is these qualities that Mr Denee says made it difficult or impracticable for him to insist on independent advice on the occasion of every testamentary disposition. He says it "... would have caused considerable exasperation in the strong minded independent woman". Mr Denee now accepts that he ought to have been prepared to overcome such irritation on the part of his client and ought to have insisted on independent advice on every occasion.

Submissions

[11] On behalf of the LCRO Mr Upton QC sought censure, the maximum fine available under the Law Practitioners Act 1982 ("1982 Act") (the behaviour being complained of having occurred in 2006 at the time of the operative will prior to the testator's death) and costs.

[12] Mr Scragg, on behalf of the practitioner, did not attempt to minimise the behaviour and accepted that this was serious professional misconduct, which required sanction. The primary argument between counsel related to the level of fine and to the issue of publication of name.

[13] Mr Upton correctly points out that although the current rules of professional conduct specifically prohibit gifts or testamentary dispositions in the absence of independent advice, this merely codified what was clearly understood as the requirements of practitioners under the 1982 Act. Counsel described the testator as vulnerable, an elderly widow who might well have been lonely. Mr Upton

emphasised the obligation of the Law Society to "... suppress dishonourable or improper practices by members of the legal profession, preserve and maintain the integrity and status of the legal profession and promote and encourage proper conduct among members of the legal profession" as the objects of the 1982 Act. The objects of the current Act under which these charges are brought are as follows:

> "**3 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."

[14] Because of these purposes Mr Upton submitted that this was an "unequivocal case for publication" of the name of the practitioner. Counsel referred the Tribunal to the decision of *Krishnayya v Director of Proceedings & Anor*[1] which in turn extracted principles from previous cases including *S v Wellington District Law Society*.[2] While stating that disciplinary proceedings are not criminal proceedings nor are they punitive, rather they are protective of the public and the profession, the Courts have held that it is in the interests of the public to know about proceedings affecting a practitioner; that the Tribunal is required to consider "the extent to which publication of the proceedings would provide some degree of protection to the public or profession" and weigh this against the interests of the practitioner (and others); that the discretion is unfettered but must have regard to the principles of the legislation; and that there is a presumption in favour of publication.

[15] Mr Upton referred us to section 238 of the Act which provides for proceedings to be conducted in public unless the Tribunal can find some interest, including privacy of the complainant, which means it is proper to hold that in private. We were further referred to *Dean v Wellington District Law Society & Anor*[3] which

[1] HC Auckland, CIV-2007-441-631, 16 October 2007.
[2] [2001] NZAR 465.
[3] HC Auckland, CIV-2006-485-2961, 26 July 2007.

overturned a Disciplinary Tribunal decision to suppress the name of the practitioner. Similarly in *S v Wellington District Law Society* (supra) the High Court endorsed a refusal to grant name suppression referring to the presumption of openness.

[16] Mr Scragg accepted that section 238 created a "starting point" of openness, however emphasised the discretion in section 240 to grant suppression orders. He submitted that the purposes and principles of the Act could be achieved without publication of the practitioner's name. He submitted that public confidence would still be maintained in the profession because the profession would be seen to be properly regulating its members by bringing the proceedings and imposing a significant penalty.

[17] Mr Scragg further submitted that an anonymous account published to other practitioners would also be sufficient to warn them against similar practices. He pointed to the risk of identification of Mr Denee's former partner who was not the subject of charges and the resultant harm that might cause.

[18] He further submitted that the early guilty plea and indication of remorse meant that Mr Denee would not be a risk to the public nor was there any likelihood of repeated misconduct. He properly pointed to the fact that in 35 years of practice Mr Denee has never been the subject of an adverse disciplinary finding.

[19] Mr Denee has not personally benefited from the bequest; indeed his actions have cost him considerably in terms of legal fees and the costs which he now faces arising out of these proceedings. Mr Scragg submitted that publication, when combined with the other penalties, would create a punishment disproportionate to the level of his offending.

Discussion

[20] We were referred by Mr Upton to an English decision in similar circumstances to the present matter (*Re a Solicitor*[4]), in which the solicitors involved were struck off the roll. Mr Upton submitted that Mr Denee was lucky that the LCRO was not pursuing suspension or strike off but that the maximum fine payable was proper in the circumstances to reflect the seriousness of the misconduct.

[4] [1974] 3 All ER 853.

[21] We accept that this is serious misconduct and that this must be reflected in the penalty imposed by the Tribunal. His behaviour was totally unacceptable, as reflected by the new Client Care Rules.

[22] However the Tribunal gives Mr Denee credit for his long unblemished record as well as the fact that he did on at least one occasion in 2004, prior to the behaviour complained of, attempt to obtain independent advice for his client. For these reasons we do not consider the maximum fine is appropriate and instead impose a fine of $3,500.

[23] There is no doubt that the behaviour concerned demands a clear censure from the Tribunal to reflect the disapproval of this behaviour.

Name Suppression

[24] We accept that the public interest factors in this case outweigh the personal interests of the practitioner.

[25] We have carefully weighed up the risk to the practitioner and his practise but note that the public will not only know the nature of this transgression but also that this is the practitioner's first such transgression. We accept that these proceedings have brought considerable personal and financial cost to the practitioner. However these do not outweigh the public interest factors as follows: This is very serious misconduct. There is a trend to openness in Courts and Tribunals alike. The consumer protection aspect of this legislation is clear from the purposes quoted above. The interest is not only in how the legislation operates and that proceedings are brought against practitioners who depart from professional standards but also in the identity of the particular practitioner involved. In this way existing and potential clients may weigh firstly the behaviour itself and secondly, how seriously the profession regards it, in making decisions about their choice of professional adviser. Other members of the profession are also entitled to know who of their colleagues has been found guilty of professional misconduct unless there are strong reasons for privacy.

Costs

[26] The following costs are sought:

- The LCRO seeks her costs of $1,200;
- The costs of her private investigator of approximately $4,700;
- Prosecution counsel's fee of a little under $8,000;
- Recovery of the section 257 Tribunal costs which will be ordered against the New Zealand Law Society which are fixed by the Chairperson of the Tribunal pursuant to section 257(3) at $6,000.

[27] The practitioner has deposed as to his current income and the costs of these proceedings as well as earlier High Court proceedings brought by the original complainant and other family members, and we take account of the somewhat straightened circumstances of the practitioner as a result. There will be an order as to costs of $9,000 in favour of the LCRO. In fixing this sum we have disallowed the private investigator's costs entirely and rounded the remaining costs. There will be a further order in respect of fixing the amount payable by the New Zealand Law Society for the Tribunal's cost of hearings pursuant to section 257 in the sum of $6,000.

Summary of Orders

- The practitioner is censured.
- The practitioner is fined $3500.
- The practitioner is ordered to pay costs to the LCRO in the sum of $9,000 (the earlier awarded costs order by the Standards Committee is vacated).
- The New Zealand Law Society is to pay the sum of $6,000 in respect of the Tribunal costs.
- Pursuant to section 249 the practitioner is to reimburse the New Zealand Law Society for the section 257 costs in full.

- The order seeking suppression of the practitioner's name is refused. There will be an order suppressing the name of his former partner, the practitioner referred to as Ms R and the practitioner's client, the late Ms T.

[28] On the oral application of counsel for the respondent there is an interim suppression order in respect of the practitioner's name to stand until seven days after the release of these written reasons for decision.

DATED at AUCKLAND this 1st day of April 2011

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Judge D F Clarkson
Chairperson