

**NEW ZEALAND LAWYERS AND
CONVEYANCERS DISCIPLINARY TRIBUNAL**

[2009] NZLCDT 6

BETWEEN

AUCKLAND DISTRICT LAW SOCIETY
COMPLAINTS COMMITTEE
Complainant

AND

JOHN DORBU
Practitioner

Hearing: 24 April 2009

Appearances: Mr Keyte QC & Mr Treleaven for the Complainant
Practitioner Self-Represented

Chair: Judge D F Clarkson

Decision: 19 June 2009

**DECISION OF JUDGE D F CLARKSON
IN RELATION TO ISSUE SUMMONS**

APPLICATION

[1] Mr D who is a practitioner facing 10 charges of professional misconduct before the New Zealand Lawyers and Conveyancers Disciplinary Tribunal has applied to have a witness summons issued to compel the attendance at the hearing of His Honour Priestley J.

[2] In his application Mr D relies on s.126 of the Law Practitioners Act 1982. The proceedings against Mr D were laid under that Act and initially came before the previous Tribunal, the New Zealand Law Practitioners Disciplinary Tribunal.

[3] By virtue of the provisions of s.358 of the Lawyers and Conveyancers Act 2006 the New Zealand Lawyers and Conveyancers Disciplinary Tribunal has assumed responsibility for those matters undetermined by 1 February 2009. The proceedings must be determined by the new Tribunal according to the duties and powers that the New Zealand Law Practitioners Disciplinary Tribunal would have had, had the Law Practitioners Act 1982 not been repealed.

[4] It is common ground between counsel (Mr Keyte QC and Mr Treleaven for the Society and Mr D representing himself), that the issue for determination is whether His Honour is compellable as a witness. Section 74(d) of the Evidence Act reads as follows:

"Compellability of Sovereign and certain other persons

74 None of the following persons is compellable to give evidence:

- (a) the Sovereign:
- (b) the Governor-General:
- (c) a Sovereign or Head of State of a foreign country:
- (d) a Judge, in respect of the Judge's conduct as a Judge."

[5] That provision codified the earlier common law where a series of decisions made it clear that Judges were not to be compellable witnesses on any matters touching upon the performance of their judicial duties.

[6] A useful summary of the line of decisions is contained in a New Zealand Law Journal article (June 2000, p 198), entitled "Subpoena of Judges", by Tim Jenns.

[7] The immunity for Judges, to protect them from giving evidence concerning their adjudicative functions is, as pointed out by the author of that article, based on sound constitutional grounds. It forms part of the structure of judicial independence. It is clear that in any matter, the decision delivered by a judge must speak for itself as the final word on the issues before it.

[8] Mr D claims the Evidence Act does not apply because the decision given was in 2005 and the facts with which it was concerned arose in 2002, both dates being prior to the commencement of the Evidence Act 2006.

[9] Section 5 of the Evidence Act 2006 however states that s.5(3):

"This Act applies to all proceedings commenced before, on, or after the commencement of this [section] except ... "

[10] Proceedings is defined in s.4 as either:

- "(a) proceedings conducted by a Court; or
- (b) an interlocutory or other application to a Court connected with that proceedings."

[11] A Statutory Tribunal is not a Court. Under s.239 of the new legislation, that is the Lawyers and Conveyancers Act 2006, the Evidence Act is specifically incorporated. While s.126 of the Law Practitioners Act does not specifically incorporate the Evidence Act, s.127 of the Law Practitioners Act provides immunity of witnesses and counsel " ... in relation to proceedings under this part of this Act as if they were proceedings in a Court of law."

[12] Even if it could be argued that the strict provisions of the Evidence Act do not apply to proceedings before the Tribunal operating under the transitional provisions as outlined above, there would simply be a reversion to the common law principles to which I have already referred. The issue then becomes whether, in making the comments that His Honour Priestley J made, in the course of the decision

and in referring the decision to the Law Society for further investigation, he was acting in the exercise of his jurisdiction.

[13] Mr Keyte on behalf of the Law Society has throughout this application emphasised that the Society wished to take a neutral stance on this issue. However, having said that, he did point out that it would be difficult to see how a Judge sitting in Court making findings of fact and delivering decisions on those facts and the applicable law, could be seen as acting extra judicially.

[14] To the contrary Mr D argues that His Honour is a complainant in the disciplinary proceedings, that his judgment forms a significant part of the evidence to be presented by the Society and therefore he ought to be available for cross-examination on his findings of fact and application of the law. Alternatively Mr D submits that if that were not to take place, the judgment ought to be removed from the evidence and any associated transcript likewise.

[15] Mr D points out that he was not present at the hearing before His Honour and was not given prior warning of the critical comments which were made concerning his involvement in the case. Once again there is no dispute that Mr D was not present either as a witness or counsel in the proceeding in question to which the judgment relates. Further, it is agreed that the comments were made without prior reference to him, and therefore without his having the ability to refute any of the matters of concern to which His Honour referred in the judgment. Those will be matters which Mr D can address in his own evidence before the Tribunal in due course.

[16] As referred to in an earlier interim decision, the charges against Mr D fall into a number of different categories of complaints, there being three individual complainants and the "own motion charges" instituted by the Law Society itself. It is this category of charge that arose following the referral to the Society of the decision of His Honour Priestley J. The charges were referred by His Honour for investigation by the Society; they did not as such conform with the usual notion of "complaint".

RESULT

[17] In any event I am absolutely clear that the comments made by His Honour Priestley J in relation to Mr D in the course of his judgment and the referring of that judgment to means of the Registrar to the Auckland District Law Society for investigation were actions of the Judge acting in his judicial capacity and thus he cannot be compellable as a witness (*Warren v Warren* [1997] QB488 (Court of Appeal), *Zanatta v McCleary* [1976] 1 NSWLR 230).

[18] The application for issue of a summons is declined.

D F Clarkson
Chair
New Zealand Lawyers and
Conveyancers Disciplinary Tribunal