NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL

[2009] NZLCDT 3

BETWEEN	AUCKLAND DISTRICT LAW SOCIETY COMPLAINTS COMMITTEE Appellant
AND	JOHN DORBU Respondent

Hearing: 24 April 2009

Appearances: Mr Keyte QC for the Appellant
Mr Pidgeon QC for the Respondent

Chair: Judge D F Clarkson

Members of Tribunal: Ms C Rowe
Ms S Sage
Mr W Smith
Mr O Vaughan

Judgment: 18 May 2009

DECISION IN RELATION TO APPLICATION FOR DISMISSAL OR STAY OF PROCEEDINGS

INTRODUCTION

[1] This preliminary hearing concerned an application brought by the practitioner to strike out or stay the proceedings brought against him by the Complaints Committee No. 2 of the Auckland District Law Society ("the Society") on the grounds of delay. This was heard as a preliminary matter before the Tribunal and an oral decision given on 24 April declining the application. The reasons were reserved to be delivered in writing. These are those reasons.

BACKGROUND

[2] The practitioner faces 10 charges which have been laid by the Society. Seven charges arise out of a complaint by Mr B, two relate to a further complaint by Mr G and a final charge relates to a complaint by G F Limited. A chronology is somewhat complicated by there being multiple complaints and therefore multiple starting points, but can be summarised as follows.

[3] On 27 October 2005 His Honour Priestley J released a reserved decision in the matter of *Barge v Freeport Development Limited & Ors*. In the course of that decision there were a number of comments made by His Honour about the practitioner in this matter. In paragraph 130 of the decision His Honour directs the Registrar of the High Court to refer his judgment to the Auckland District Law Society for " . . . appropriate investigation and, if necessary, action by that body's disciplinary committee."

[4] The Society then on 8 November 2005 wrote to Mr Dorbu seeking a response by 24 November. On 23 November Mr Dorbu sought an extension of time to respond to the High Court Judgment and this was subsequently granted twice extending the time to 16 January 2006.

[5] On 28 November 2005, as a result of the receipt and consideration of this decision the Council of the Auckland District Law Society resolved to investigate, of

its own motion, the circumstances, pursuant to s.99 of the Law Practitioners Act 1982.

[6] Between December and March 2006 Mr Dorbu's counsel Mr Pidgeon QC became involved and sought a further extension until 10 March 2006. The Society had, in the meantime, referred the file to counsel for further advice.

[7] On 14 March 2006 Mr B made a complaint through his solicitors. As a result of this specific complaint and further correspondence between the Society and counsel for Mr Dorbu, explanations and responses concerning this complaint continued until mid-August 2006. On 21 July 2006 a second complaint was received by the Society from solicitors for Mr B. Correspondence took place between the Society and the practitioner between July and November 2006 by which time the matter was under consideration by counsel who advised the Society on 14 December 2006.

[8] On 3 November 2005 the Society had received a further complaint from Mr G in relation to the practitioner. Again there is active correspondence from that time until February 2007 when the Society resolved to lay charges.

[9] On 13 February 2007 the Society resolved to lay charges with the New Zealand Law Practitioners Disciplinary Tribunal ("the NZLPDT"). On 15 February 2007 the Society resolved to lay charges in respect of the second Mr B complaint.

[10] On 11 April 2007 the Society resolved to lay charges in respect of the "Own Motion" Inquiry.

[11] On 17 January 2008 a further complaint was received from solicitors for G F Limited in respect of Mr Dorbu. Again the practitioner was given the opportunity of responding and correspondence was entered into between the Society and Mr Dorbu, culminating in a resolution on 13 May 2008 to lay further charges before the NZLPDT.

[12] On 30 September 2008 all 10 charges were filed with the New Zealand Lawyers and Conveyancers Disciplinary Tribunal by virtue of the transitional provisions of the Lawyers and Conveyancers Act 2006.

[13] In summary, from the date of the initiation of the complaints process (November 2005 until 30 September 2008) when the charges were preferred a period of some 34 months elapsed.

[14] Whilst Mr Pidgeon, counsel for the practitioner, is not suggesting that entire period can be the subject of criticism he does point to the considerable delay between the periods from April of 2007 when the various decisions were made to bring charges against Mr Dorbu and 30 September 2008 when the charges were eventually filed.

[15] Mr Pidgeon relies upon the decision of *Chow v Canterbury District Law Society* [2006] NZAR 160, Court of Appeal, to support his contention that the delays are such as to justify dismissal of all charges.

THE AUTHORITIES

[16] The relevant portions of the *Chow* decision, in the view of the Tribunal are as follows:

> "[26] We are in no doubt that a charge, or charges, must be filed with the relevant tribunal promptly. That conclusion, we think, may be reached in two ways. First, the express obligation in s 101(1) to inquire into complaints "as soon as practicable" may extend to the further step of preferring charges after a sufficient gravity finding. As the circumstances of this case demonstrate, the limits of the investigative process are not of a bright line nature. It may be artificial to say that the investigation is complete at the point of the sufficient gravity finding. After all, as occurred in this case, further work of an investigatory nature remained to be undertaken, being the obtaining and settling of affidavit evidence in support of the charges. Although this function was delegated to counsel, the statutory process is susceptible of the interpretation that counsel completed the investigation on behalf of the Committee. On this approach the charges had to be laid as soon as practicable, regardless that such words do not appear in subs (2).
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> [27] The second approach is, in effect, that for which Mr Hair contended. The terms of subs (2) are clear. At the point that the conclusion of sufficient gravity is reached, the Committee or District Council shall make a charge

> before the appropriate tribunal. This is language which does not permit of delay, at least beyond that which is reasonably necessary in the particular statutory context. The extent of any delay which may be appropriate will depend on the circumstances, including the number and complexity of the charges and the work which is required to obtain supporting affidavit evidence. All of this is to be done against the background of the requirement in s 101(1) that the complaint is to be dealt with as soon as practicable which, if not expressly, in spirit at least informs the interpretation of subs (2)."

[17] And later (paragraph 28):

> "We are satisfied that there is a statutory obligation to proceed promptly, perhaps better captured in the notion "as soon as practicable"."

[18] The Court then turned to consider the issue of remedy for non-compliance with such duty. The Court considered the Australian authorities dealing with the issue of stay of disciplinary proceedings on the grounds of delay. They had this to say (paragraph 35):

> "Both the High Court of Australia and the Federal Court concluded that a weighing process, similar to that undertaken in a criminal case, was required, but with accounts also to be taken of the protective nature of the disciplinary jurisdiction. That is disciplinary proceedings are not punitive in nature, but essentially protective of societal interests."
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> The Court went on to uphold that the application of administrative law principles meant that the breach of the statutory requirement to bring charges "as soon as practicable" … does not bring about an automatic response. In particular, the charges are not rendered "invalid", nor is a stay or dismissal of the charges necessarily appropriate.
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> [37] Rather, a judicial assessment of all relevant factors is required. The extent of, and the effects caused by, the non compliance and the disciplinary context itself, are all highly relevant considerations, as is the nature and seriousness of the charges.

[19] The Court emphasised (at paragraph 42) that they regarded "… the protective nature of the jurisdiction as highly significant," and referred to Auckland District *Law Society v Leary* HC Ak M1471/84 and quoted from that decision as follows:

> "(This) is a special jurisdiction having the principal protective purpose I have already discussed. That purpose requires that there should be a full investigation of allegations of misconduct, and that the Court should be slow to adopt a course which may inhibit such an investigation. The interests of justice extend far beyond the interests of the practitioner."

[20] The end result in the Chow case was that the Court considered the protective nature of the jurisdiction as decisive in those circumstances despite "an unexplained delay of 16 months". This was seen as of such significance that the Court held it was "….unthinkable that the disciplinary charges should not proceed to hearing, despite the unfortunate delay which has occurred."

FACTORS DISTILLED FROM THE *CHOW* DECISION

(1) The number and complexity of the charges faced.

(2) The work required obtaining the supporting affidavit evidence, the number of witnesses, volume of evidence and number of issues to be considered. (In many ways the second factor flows directly from the first.)

(3) The seriousness of the charges.

(4) The effect of non-compliance with the obligation to proceed promptly, or put another way, prejudice suffered by delay.

(5) The nature of the proceedings, namely professional disciplinary proceedings, a jurisdiction protective of public interest and the interest of the profession as a whole, as opposed to a punitive jurisdiction.

Additional Factor which may be present.

(6) The contribution of the practitioner to the delay.

1. Number and complexity of charges

[21] There are 10 charges to be considered against this practitioner involving multiple complainants. Some of the charges are straightforward but at least one of the charges, the first charge, is a complex matter involving an allegation of the

practitioner being a party to a conspiracy by unlawful means. In respect of that charge the factual situation is complicated and forms the subject matter of the High Court decision of His Honour Priestley J, which began the investigation in November of 2005.

2. Complexity of the evidence

[22] The affidavit evidence provided to the Tribunal is contained in 10 volumes of affidavits and exhibits, numbering in total over 2000 pages. The Society was required to brief the evidence of 11 witnesses. There is no doubt that this investigation has proved to be an enormous piece of work to properly prepare the proceedings. Whether it can be argued that it required the 17 to 19 months which it took between resolution to prefer charges and laying of those charges is another matter entirely upon which the Tribunal will comment later in this decision.

3. Seriousness of the charges

[23] As Mr Keyte states in his submissions to the Tribunal, it is rare for a Judge to be so concerned about the alleged behaviour of a practitioner as to specifically refer a matter to the Law Society on the issue of seriousness. It is clear that the Learned High Court Judge has raised a number of concerns in respect of Mr Dorbu's involvement in his client's transactions. As Mr Pidgeon pointed out, Mr Dorbu was not represented at that hearing nor was he present as a witness. He has, as yet, had no opportunity to respond, other than directly to the Society, to the concerns raised about him by the Learned Judge. Those concerns are referred to in the following paragraphs of the decision:

> "[90] These affidavits, on which Mr Dorbu's name appears as counsel, possibly carefully crafted are incorrect and misleading. … In short the affidavits before Master Faire were not only misleading but probably constituted perjury.
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> [91] I therefore direct the Registrar to place my concerns before the Solicitor General for appropriate investigation and action."

[24] Later in the judgment there is a heading "Comment on Mr Dorbu". At page 128 His Honour says:

> "Two things are abundantly clear from the evidence. The first is that Mr Dorbu provided extensive professional assistance (quite apart from his role as counsel in this and related proceedings) for all defendants, particularly in the form of preparing deeds of trust, a settlement statement, and various conveyancing documents. Again, depending on Mr Dorbu's instructions (which might not necessarily provide him with a shield) it is a matter of concern to the Court that a New Zealand lawyer should be instrumental in assisting to carry out a series of arrangements which has the clear objective of attempting to collapse the plaintiff interests in the building. It is not improper, and indeed in a commercial context it is legitimate, for a lawyer to endeavour to extricate a client from one contract for the purpose of achieving a better result through another contract. But such a process must be achieved by lawful, not unlawful means.
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> [129] The second thing apparent to the Court is that, particularly in July and August of 2002, Mr Dorbu, who was a barrister, did solicitor's work. This is not normally appropriate or indeed permitted work for a barrister."

[25] Mr Pidgeon sought to persuade the Tribunal that the charges were not as serious as those which had been considered by the Court of Appeal in the *Chow* matter.

[26] Whilst that might be an arguable proposition in respect of the complaint by G F Limited, the comments quoted above of His Honour Priestley J satisfy the Tribunal that the matters alleged are very serious indeed.

4. Prejudice

[27] Quite properly Mr Pidgeon did not raise this as a factor for consideration by the Tribunal in this matter. There is no particular prejudice suffered by Mr Dorbu in relation to the delay in terms of availability of witnesses or other matters. Whilst clearly the charges provide an ongoing stress for Mr Dorbu and his family, there is no evidence before the Tribunal that this has been in any way worsened by the delay in bringing charges.

5. Protective jurisdiction

> As already indicated, in the Chow decision, this issue was finally determinative of the refusal to stay those proceedings. ."

6. Practitioner's delay

[28] In his submissions Mr Keyte QC pointed to the total time occupied by the Society waiting for responses from Mr Dorbu as amounting to nine and a half months. This of course includes what would be regarded as a normal and proper response time and must have reference to the fact that there were five sets of complaints to which he was required to respond. Mr Keyte did not put this to the Tribunal to be in any way critical of Mr Dorbu but simply to emphasise the point he had previously made that these matters were complicated and time consuming and that Mr Dorbu's repeat requests for extensions reflected just that fact. Whilst this is a factor to which we do not give a great deal of weight it is certainly indicative of the complexity of the matter although of course that cannot explain the quite unacceptable period of 17 to 19 months between the decision to prosecute and laying of charges.

Comments on delay

[29] The Tribunal is extremely concerned at this last delay to which we have referred. Even with complicated charges, given the very long period of investigation which led up to the decision to lay the charges, a delay of this magnitude is totally unacceptable.

[30] Mr Pidgeon also referred the Tribunal to the decision of the NZLPDT in *D S M* dated 19 June 2008. In that decision the Tribunal was critical of a delay of 17 months – that is a very similar period to the present case – between the decision to prosecute and laying of charges. In the *D S M* matter the Tribunal found the charges not to be proved but went on to comment that had the charges been proven then they would have in any event dismissed the charges because of the delay to properly progress the inquiries and prosecute. However in that matter, although some of the charges were similar to the present case, there were none as serious as those faced by Mr Dorbu. It cannot be assumed that had that been the case the Tribunal would have taken the same view.

[31] We wish to emphasise that in future we would expect the Society to prosecute charges within a shorter time frame having regard of course to the complexity and seriousness of the matters concerned, and all of the surrounding circumstances.

DECISION

[32] As indicated to counsel on 24 April the application for stay or dismissal is declined and the matter is to proceed to hearing.

D F Clarkson
Chair
New Zealand Lawyers and
Conveyancers Disciplinary Tribunal