NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL

Decision No. [2009] NZLCDT 11

LCDT 08/09

IN THE MATTER	of the Lawyers and Conveyancers Act 2006
BETWEEN	**CANTERBURY DISTRICT LAW SOCIETY**
AND	**DAVID ALAN WOOD**

CHAIR

Mr D J Mackenzie

MEMBERS OF TRIBUNAL

Mr W Chapman
Ms J Gray
Mr A Lamont
Ms S Ineson

DECISION ON PENALTY

Background

[1] By its decision of 21 August 2009, this Tribunal found that Mr Wood had deliberately misled an Associate Judge of the High Court and a fellow practitioner, and, as a consequence, that he was guilty of misconduct in his professional capacity.

[2] The Tribunal requested submissions on penalty from the parties, which have now been received and considered as part of its deliberations on sanction.

Key Findings on Charges

[3] The facts and detail relevant to the charges, and this Tribunal's findings and reasons, are set out in our decision of 21 August 2009. For present purposes we will briefly recap the key findings relevant to sanction:

[a] In response to a direct question to Mr Wood from Associate Judge Christiansen at a judicial conference on 31 January 2007, a conference also attended by Mr C A McVeagh QC, Mr Wood advised that no legal aid was available to his client, Mr M, in respect of a non-party discovery application Mr M had made.

[b] Mr M had received a grant of legal aid for the non-party discovery application some two months prior to the judicial conference. Mr Wood himself acknowledged that such legal aid was available, in a letter to the Legal Services Agency written by Mr Wood five days after he advised the Court that there was no such legal aid.

[c] Mr Wood must have known that his statement as to legal aid made in reply to the Judge's direct question would mislead. His claims as to his genuine belief as to the true position regarding legal aid were not supported by the evidence, which indicated a contrary position.

[d] His behaviour in the months leading up to the judicial conference of 31 January 2007 supports a view that his answer given to the Court was the culmination of, and a continuation of, a deliberate and deceptive approach taken to the issue by Mr Wood.

[e] Over a period of some months, Mr Wood had been aware that both the Court and Mr McVeagh QC were endeavouring to ascertain the true position regarding whether Mr M had legal aid for the non-party discovery. Requests, questions, and judicial directions regarding this legal aid issue all indicated to Mr Wood the importance of the issue, but he failed to provide the information sought.

[f] There was a continuing and deliberate approach to this matter by Mr Wood. His answer misled the Judge and Mr McVeagh QC as to the true position regarding the extension of legal aid to cover the non-party discovery application.

[g] As this Tribunal noted in its decision of 21 August 2009, we do not consider Mr Wood made an innocent mistake about the legal aid. The evidence shows a deliberate approach, and an implausible position taken by Mr Wood to justify that approach, by suggesting rationale and interpretations that were unsupported by the evidence.

Submissions on Penalty

[4] In his submissions on penalty, Mr Nation, for the Standards Committee (whom we inadvertently referred to as for the Complaints Committee in our decision of 21 August 2009), submitted that there were aggravating features that were relevant to sanction. We agree that there are aggravating features, which we note later in this decision.

[5] He also noted that Mr Wood had, in an attempt to justify his position, proffered contrived explanations, and portrayed documents as saying things that could not reasonably be accepted. Mr Nation suggested this indicated a continuation of Mr Wood's deliberately misleading behaviour which took no account of the obligations and responsibilities of a barrister and solicitor. Having heard and seen Mr Wood respond to cross examination, and having reviewed the documentary material, this Tribunal accepts that Mr Nation's submission on this point has some force.

[6] Mr Wood, in the way he responded to the Judge's question at the judicial conference of 31 January 2007, appeared to fail to understand some of the prime obligations he has an officer of the Court. His duty to the Court cannot be subjugated to his preferred manner of conducting proceedings and the tactics he may employ in pursuing those proceedings. His conduct fell significantly short of acceptable professional behaviour.

[7] In the words of Parker J in *Kyle v Legal Practitioners' Complaints Committee* [1999] WASCA 115, at paragraph 66, referring to the duty of a lawyer to act with honesty and candour to the Court;

> *"The duty of counsel not to mislead the court in any respect must be observed without regard to the interests of the counsel or of those whom the counsel represents. No instructions of a client, no degree of concern for the client's interests, can override the duty which counsel owes to the court in this respect. At heart, the justification for this duty, and the reason for its fundamental importance in the due administration of justice, is that an unswerving and unwavering observance of it by counsel is essential to maintain and justify the confidence which every court rightly and necessarily puts in all counsel who appear before it."*

[8] In his submissions, Mr J Katz QC, makes the point that Mr Wood is *"well known as a crusader for his clients"*, and that Mr Wood is *"no stranger to hard fought contests involving the establishment"*. That accords with the conclusion this Tribunal came to after completing the hearing of the charges against Mr Wood on 27 July 2009. We were concerned that Mr Wood had let his personal views on the merits of proceedings, and the parties involved, affect his behaviour, with deliberate disregard for required standards of behaviour and integrity.

[9] Mr Nation invited this Tribunal to conclude that the driver of Mr Wood's behaviour was that Mr Wood wanted to deflect the risk of a costs order against him personally. While we accept that reducing the risk of an order for costs against him personally may have been a factor in Mr Wood's behaviour, we cannot be reasonably sure of that and accordingly do not attribute that motive to Mr Wood. We consider it more likely that Mr Wood was motivated by a view that his client was up against what Mr Wood saw as the establishment, and that he had decided he was not going to provide any information about his client's legal aid position.

[10] Whatever his motive, to knowingly mislead fellow counsel, and a Judge, in the way Mr Wood did, was unacceptable, and far below an acceptable standard of professional behaviour. It demonstrates a lack of understanding of the responsibilities of a barrister and solicitor of the High Court.

[11] Mr Katz QC has also raised the Bill of Rights Act with regard to the application of a sanction for misconduct against a legal practitioner. We do not consider that the Act affects the statement of principle contained in *Bolton v Law Society* [1994] 2 All ER 486 (CA), to the effect that a practitioner who discharges his professional duties with anything less than complete integrity, probity, and trustworthiness, has to expect severe sanctions to be imposed, and that it would be rare in such cases to impose a sanction less severe than suspension. As to the application of that principle, the sanctions noted in *Bolton* remain within the range of responses available to this Tribunal in deciding how Mr Wood should be sanctioned given his particular misconduct and the established purposes of disciplinary proceedings.

[12] Mr Wood also filed some personal submissions which we have considered. He stated in those submissions that, at all times, he had acted in what he thought were the best interests of his client Mr M, and that he regarded himself as a zealous litigator. In this regard we note our comments in paragraph [8] above and the comments of Parker J in *Kyle*, noted above at paragraph [7]

[13] Mr Wood submitted that he had been working under severe and increasing strain at the relevant time, to the point where the quality and standard of his professional work suffered *"very badly"*. He said he sought medical advice for severe headaches, but nothing was found. It does appear that Mr Wood's approach to practice may well

contribute to his stress, but in any event stress and a busy workload do not justify the behaviour of Mr Wood we have found proven in this case.

Conclusion

[14] We consider that Mr Wood has committed a serious breach of his professional obligations. The continuing nature of his actions over three months, his knowingly misleading response to a direct question from a Judge, as well as his attempts to justify what he did and offer explanations that were unsupported and implausible, all point to a need to mark his conduct as totally unacceptable.

[15] Mr Wood stated that he was an experienced litigator and that he has over 35 years in practice. Such a practitioner cannot rely on inexperience to mitigate such a failure in required standards. The conduct was not naïve, but a deliberately executed approach by a senior practitioner who should have known better.

[16] *Bolton* is often quoted in cases involving the discharge of professional duties by legal practitioners. That case makes it clear that the standard required of practitioners is high – professional duties must be discharged with integrity, probity, and complete trustworthiness. In this case Mr Wood has not met those requirements. His approach was deliberate, he must have known that he would mislead as a result of what he did, and his response to the charges, implausible explanations attempting to justify what he did as acceptable, indicates to us he does not understand his professional obligations.

[17] This Tribunal has come to the conclusion that Mr Wood's behaviour needs to be marked as serious. It breached fundamental matters of integrity and trust, and could have put his client at risk of a substantial costs order. As it turned out, Mr M, then represented by new counsel in place of Mr Wood and relying on the legal aid that Mr Wood had said was not available, was able to resist a costs order that might have been made in the absence of such legal aid.

[18] In considering penalty, we accept that this is a matter arising from one charge, but nevertheless there were aggravating features; a continuing course of action over a period of months culminating in the deliberately misleading response, a planned response to enquiries made, involving deceit, and a deliberate misleading of a fellow practitioner and the Court.

[19] Mr Wood claimed that his response was necessary to protect what he saw as his client's best interests. As a matter of fact we doubt that what he did was in his client's best interests, but quite apart from that issue, such a response is not open to a practitioner. Deliberately misleading the Court and a fellow practitioner, even as a matter of tactics thought to be in the interests of a client, is never acceptable. The matter is compounded by Mr Wood claiming a genuine belief, which we have not accepted, based as it was on implausible explanations and interpretations.

[20] This Tribunal has a range of sanctions available to it under the Law Practitioners Act 1982, the applicable Act under the transitional provisions of the Lawyers and Conveyancers Act 2006. For serious offences striking off is one of those options.

[21] This Tribunal has considered the submissions made by counsel, and Mr Wood's own statement (including a late personal statement from Mr Wood), and testimonials lodged by others on his behalf. We have considered all matters that were raised.

[22] While this is a serious offence, the Tribunal does not consider that striking off is the necessary response to Mr Wood's conduct. We do however consider that suspension is justified, to mark the serious failings we have identified in Mr Wood's conduct. In our view, a sanction comprising four months suspension from legal practice and censure is within the range of responses appropriate to this matter. This is our unanimous view.

[23] This Tribunal also sees value in signalling that when such behaviour is detected it will be subject to a sanction that marks the serious nature of such conduct as unacceptable. Misleading conduct is not always easy to detect. Detection may not have occurred in this case without the continuing enquiries by Mr McVeagh QC to the Legal Services Agency. That difficulty highlights the need for honesty and candour by practitioners, and an understanding by practitioners that if such conduct is detected there will be serious consequences. Such an approach also demonstrates to the public that such conduct is not acceptable from a legal practitioner.

[24] We hope that the experience of suspension will cause Mr Wood to think carefully about what he did. It is an opportunity for him to reflect on and recognise that it has been a significant departure from acceptable standards and a breach of important duties that all practitioners must observe.

[25] Mr Wood should endeavour to ensure that when he returns to practice he will do so with a changed attitude and a determination to observe the required standards. Objectivity and a balanced professional approach are important attributes for a practitioner. If Mr Wood has concerns about his health, and the effect that may have had on his performance and standards, he may consider that taking some professional advice from an appropriate source would be worthwhile during the period of suspension.

Orders

[26] The Tribunal, having found the charge of misconduct in his professional capacity proven against Mr Wood, as set out in our decision of 21 August 2009, now orders as follows;

[a] Mr Wood is suspended from practice as a barrister and solicitor, including as a barrister sole, for a period of four months, commencing at midnight on 18 October 2009 and ending at midnight on 18 February 2010.

[b] Mr Wood is censured for deliberately misleading an Associate Judge of the High Court and a fellow practitioner.

[c] Mr Wood is to pay, as a contribution towards costs and expenses, the sum of $18,000 to the New Zealand Law Society.

[27] We note that under s.135(1) Law Practitioners Act 1982, publication of detail relating to a suspension order is mandatory, so make no further order under s.134 of that Act.

[28] We record that this decision is the unanimous decision of all members of this Tribunal.

[29] Mr Wood has given notice of appeal against our decision of 21 August 2009 finding him guilty of misconduct in his professional capacity. Accordingly the orders we have made above shall not come into force until 18 October 2009. That will give Mr Wood time to seek appropriate orders from the High Court if he is to proceed with an appeal, and if he

is not proceeding, it will give him time to make arrangements for his clients to be referred back to instructing solicitors and for alternative counsel to be arranged.

[30] The real name of Mr Wood's client, described herein as Mr M, is suppressed, as are the names of the parties to the proceedings (both substantive and interlocutory) between Mr M and others which gave rise to these charges, with the exception of the Canterbury District Law Society. It became involved as a respondent to the non-party discovery application, but as it also laid the charges (which were prosecuted by its successor, the Canterbury Standards Committee of the New Zealand Law Society under the transitional provisions), we do not consider that it is appropriate to suppress the name of the Canterbury District Law Society.

DATED at WELLINGTON this 2nd day of October 2009

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D J Mackenzie
Chair