NEW ZEALAND LAWYERS AND
CONVEYANCERS DISCIPLINARY TRIBUNAL

Decision No. [2009] NZLCDT 16

LCDT 003/09

IN THE MATTER OF	THE LAWYERS AND CONVEYANCERS ACT 2006
BETWEEN	MICHAEL RICHARD DEXTER GUEST Applicant
AND	NEW ZEALAND LAW SOCIETY Respondent

Hearing: 27, 28 July 2009

Venue: Southern Cross Hotel, Dunedin

Appearances: Mr R D Guest in Person (Applicant)
Mr L Andersen for New Zealand Law Society

Chair: Judge D F Clarkson

Tribunal: Mrs A Hinton QC
Ms T Kennedy
Dr I McAndrew
Mr P J Radich

Judgment: 30 November 2009

DECISION ON COSTS AND SUPPRESSION ORDERS OF NEW ZEALAND LAWYERS AND CONVEYANCERS TRIBUNAL

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[1] The substantive decision in respect of Mr Guest's Application for Restoration to the Roll of Barristers and Solicitors was delivered on 6 October 2009. In that decision we reserved the question of final suppression orders and costs for further submission and consideration by the Tribunal. Further Minutes concerning Suppression and seeking additional input from the parties were issued on 13 and 22 October respectively. Submissions have now been received in respect of both matters from Mr Guest and Mr Andersen on behalf of the New Zealand Law Society.

SUPPRESSION

[2] The issue arises whether the affidavit sworn by Mr Guest in relation to his Tauranga employment history, some 18 to 20 years ago, ought to continue to be suppressed. An interim suppression order was made in relation to this evidence following a hearing of the Tribunal on 7 July 2009.

[3] Mr Guest had sought to exclude the evidence relating to his period of employment between 1989 and 1991 on the grounds that there was a confidentiality agreement entered into between himself and the partners of his former employer relating to the ending of his employment. In addition, Mr Guest proposed to mount arguments based on ss. 53 and 57 of the Evidence Act 2006 that privilege surrounded the circumstances of his Tauranga employment coming to an end.

[4] That approach was opposed by the Law Society who wished to adduce evidence in relation to this period. The Tribunal was concerned to ensure that it had before it all relevant evidence which may impact on Mr Guest's fitness to practice and arranged for the issues which had arisen to be considered in advance of the substantive hearing. We refer to the minute issued by Mr D J McKenzie, Deputy Chairperson on 17 July 2009, which records what occurred during the preliminary hearing:

> "[4] During the court of the hearing, Mr Guest decided to submit to the Tribunal information he had been endeavouring to have excluded from evidence at the substantive hearing. He indicated that he wanted the matter to remain confidential, and hoped that it would satisfy the need for further enquiries by the Law Society on the issue.

[5] Mr Andersen, for the Law Society, indicated that if Mr Guest made and filed an affidavit which set out the particulars that Mr Guest had submitted during the hearing, and Mr Guest also confirmed that there was no other issue of a like nature related to Mr Guest's period of employment at (name of firm, hereafter omitted), then that would satisfy the Law Society on this issue.

[6] The Tribunal adjourned the interlocutory hearing to allow Mr Guest and Mr Andersen to finalise necessary arrangements.

[7] Mr Guest has subsequently made and filed two affidavits, one relating to his employment with . . . and the other relating to his resignation as a District Court Judge in May 1989. This latter matter was not the subject of Mr Guest's interlocutory application to exclude certain matters from evidence, and presumably has been filed at the same time as a result of matters raised by the Law Society regarding his substantive application.

[8] Mr Andersen has confirmed that the affidavit filed by Mr Guest, relating to the period of Mr Guest's employment with . . . is acceptable to the Law Society. As a consequence, the Law Society will not, in respect of the . . . matter, seek further evidence, cross examine Mr Guest, nor make enquiry of . . . That reflects the assurance Mr Andersen gave at the time Mr Guest first offered the information to the Tribunal, and Mr Guest's agreement to provide it in affidavit form.

[9] Accordingly, Mr Guest's interlocutory application to exclude certain evidence, and cross examination thereof, will not proceed. The information provided by affidavit from Mr Guest in the . . . matter has satisfied the Law Society that the information it sought is now disclosed and further enquiry is not required by the Law Society. Mr Guest appreciates that his affidavit in this matter will form part of the evidential base that the Tribunal will consider and take into account, giving it such weight as it considers appropriate.

[10] The information about the . . . matter proffered by Mr Guest at the hearing of 7 July 1009, and the affidavit subsequently made and filed by Mr Guest relating thereto, will be suppressed pending further order of the Tribunal at the substantive hearing. Costs are reserved, and will be dealt with as part of any order made following the hearing of the substantive application."

[5] In the course of delivering our decision the Tribunal set out the broad facts relating to the offending behaviour disclosed by Mr Guest in relation to the Tauranga matter. This is contained at paragraph [7] of the decision:

"[7] Mr Guest's employment in Tauranga came to an unhappy end. Mr Guest has deposed to what happened and we do no more than give the barest of summaries. A client of the firm had at the Tauranga District Court given Mr Guest $100 in cash for legal fees. Instead of paying that money into the Trust account of his employer, Mr Guest kept that sum for himself and did not disclose its receipt to his employer. He did this because he thought he was not being adequately remunerated for the work and travel he was doing for his employer. His client reported the matter to Mr Guest's

> employer who then confronted Mr Guest. He admitted the transgression, the relationship between Mr Guest and his employer became unstable, a senior retired lawyer was brought in as a mediator and a (confidential) written agreement was reached. The agreement was to the effect that Mr Guest would resign. He accepted and apologised for his misconduct and left the firm in about September 1991.

[6] After release of the Decision, some discussion occurred between counsel for the Law Society and one of the partners of the former employer of Mr Guest, who reportedly, expressed some difficulty with Mr Guest's version of the events of 1991. As a result of that conversation, Mr Andersen, for the Law Society has sought leave to vary the Interim Suppression Order to allow Mr Guest's affidavit on that topic to be released to the partner concerned.

[7] Mr Guest strongly objects to this course of action. He considers that to allow this information to be disclosed would breach the undertakings that were given by the Law Society during the preliminary hearing and which he says led to his abandoning his application to preserve confidentiality.

[8] In his memorandum of 18 October 2009 Mr Guest had the following to say:

> "But, before I disclosed to the Tribunal on 7 July what I had wished to claim confidentiality upon, an undertaking was given by counsel for the Law Society that if I filed an affidavit then that would be the end of the matter. That undertaking was proffered as an inducement to me to abandon my formal application and to provide an affidavit. It was an undertaking endorsed by the Tribunal. It was an undertaking not to make further enquiries of . . ., cross examine me or seek further evidence. In direct response to those undertakings I agreed to abandon my application for exclusion and I filed the affidavit. . . ."

He repeats this objection in his further submissions of 2 November, stating that:

> "..the affidavit was brought about by the undertaking" and "..I was swayed by the undertakings given by Mr Andersen and endorsed by the Tribunal before I disclosed any of the facts."

[9] We have considered the transcript of the Telephone Conference of 7 July 2009. We consider that what happened was that some indications were given to Mr Guest that once he made disclosure of what had happened in Tauranga, the Law Society would not in the context of the substantive hearing which was to follow the

Teleconference, take the matter further. Put another way, Mr Guest was left with the feeling that if an Affidavit covering the Tauranga events were sworn by him and lodged with the Tribunal, the Law Society would receive that Affidavit in good faith and would not cross examine Mr Guest about it. We also note that in the Teleconference the views which Mr Guest was expressing that the Tauranga events were able to be kept by him under a cloak of confidentiality were tested by a Tribunal member. In that testing we think the difficulties surrounding the position which Mr Guest was taking became apparent to him. He then told the Tribunal in the Telephone Conference about the Tauranga events and later followed this with an Affidavit.

[10] Mr Andersen submits that the assurances given by him as part of the process of formalising Mr Guest's admissions during the telephone preliminary hearing, related only to the conduct of the hearing. Mr Andersen submits that the assurances he gave during the Telephone Conference were complied with during the hearing and we confirm that to be so.

[11] The hearing was conducted in public, in terms of s.238 of the Act. The presumptive starting point of openness of justice is well recognised. In addition, although the law firm in question was not a party to the proceedings, it would be usual for a person, or group of people, about whom evidence has been given, to be able to see or hear that evidence. Because of the arrangement struck at the preliminary hearing, whereby no cross examination on the affidavit would occur, that evidence was not able to be heard by an affected party (the law firm). As indicated in its Minute of 13 October, in recording the decision of the substantive matter before it, the Tribunal considered that sufficient detail about the Tauranga employment situation must be recounted, because it involved dishonesty, albeit very dated. It was important to record that the Tribunal had had access to this information and weighed it. Thus to that extent the Interim Suppression Order has already been varied.

[12] We note that there is little further detail in the affidavit which is not recorded in the decision. What does not appear although it is perhaps implicit, is Mr Guest's

statement in his affidavit that apart from the matter involving $100 no other allegations were made against him at the time.

[13] We wish to make it clear that in relation to the substantive decision we consider ourselves to be *functus officio*. Thus, any dispute taken with the evidence upon which the decision was reached will not lead to a reconsideration of the decision by us.

[14] S.240(1)(b) provides jurisdiction for the Tribunal to restrict publication of a document produced at the hearing- which would encompass the affidavit in question. In this instance, publication is only sought to the law firm involved, so is to that extent is quite limited.

[15] Mr Guest has referred the Tribunal the decision of the Privy Council in *B and Others v Auckland District Law Soc and Another Privy Council Appeal No.43 of 2002, 19 May 2003.* In this decision their Lordships made particular mention of the dim view taken of argument put by the Law Society to support the abandonment of an undertaking given. We pay careful regard to those words, but do not consider they apply in the present instance. The information sought to be protected was in fact protected to the extent of the assurances which were given. We categorise those assurances as an undertaking meaning that the assurances were solemnly given and were intended to be relied upon.

[16] In his submissions in relation to suppression of the affidavit, Mr Guest confirms the affidavit is accurate. He argues that his having nothing to fear from the release ought not to provide a justification for the release of the affidavit. Mr Guest questions the motives of the Law Society and suggests that there is an element of duplicity in the Law Society on the one hand saying that it would not challenge the evidence at the hearing but then, after the hearing, making contact with his previous employers.

[17] We have carefully weighed what we believe to be the relevant issues. We have had careful regard to the natural desire of Mr Guest not to be exposed to what may be a further examination of events from a long time ago. After careful and

anxious consideration in which we have endeavoured to take all relevant matters into account, we have decided to allow the Application by the Law Society for the Affidavit to be released. We now summarise our reasons for so doing:

(a) Proceedings before this Tribunal are ordinarily to be open and before there is any suppression of evidence good cause must be shown;

(b) An applicant for reinstatement has to face a searching examination in the public interest and in the interests of upholding the reputation of the profession;

(c) While events in an applicant's past may have lost their importance through the passage of time the description of those events on an application for restoration is a contemporary event and it must be done truthfully;

(d) In this case Mr Guest, in relation to his account of the events of 1991 received a sympathetic response from the Law Society which agreed not to challenge the account of those events at the hearing;

(e) We do not consider that the concession by the Law Society was intended to be a concession to apply beyond the conclusion of the substantive hearing and in any event we do not think that any permanent concession of that kind, had it been made, would have been a proper concession for the Law Society to make. After all the Law Society has duties in the public interest and it has duties to the profession;

(f) We consider that the relevant partner in the Tauranga firm ought to be able to see what has been said about it in Mr Guest's affidavit;

(g) On the basis of Mr Guest's assurance that what he said in his affidavit was true, we can see no harm in allowing its release to one of his former Tauranga employers. While the release may expose Mr Guest

to some questioning of the accuracy of his recollection this, we believe, is the price that has to be paid by an applicant for restoration;

(h) We consider that the Law Society has met the obligations it assumed at the preliminary hearing.

[18] Accordingly we direct that Mr Guest's affidavit relating to the coming to an end of his Tauranga employment may be released to the relevant partner of the present Tauranga firm [the Tauranga firm]. We will nevertheless continue the suppression order for a further 14 days from the release of this decision. We direct that if no interim or final order has been made by the High Court preventing the release of the affidavit then the affidavit may be released at the end of such period.

COSTS

[19] We accept Mr Guest's submission, and agreed by Mr Andersen, that there is no power to order reimbursement of the costs of hearing pursuant to s.257. That section specifically refers to the situation where the Tribunal is hearing charges brought.

[20] In terms of costs pursuant to s.249, Mr Guest argues firstly that subsection (1) is restricted by the terms of the following subsections, particularly subsection (3) which refers to charges.

[21] We refer to our decision in *SNH v NZ Law Society, 5 May 2009*, in which we held that the s.249(1) referring to "any proceedings", gave the Tribunal a broad discretion to award costs in any matter before it. We confirm this decision.

[22] Mr Guest then argued that, because he had been successful in his application, that he ought not to have any costs awarded against him. He also noted that he was required and had undertaken, to repay to the Law Society, the sum of approximately $30,000 in respect of the Fidelity Fund payment made following his dishonesty leading to strike off.

[23] We accept the submission of Mr Andersen that the Law Society, to protect the public and the profession, was bound to test the Restoration application thoroughly, and incurred costs in the process.

[24] However, we take account of the financial burden already imposed on Mr Guest relating to the Fidelity Fund repayment, and his financial means generally and therefore will order only a contribution to the actual costs incurred of $34,412.52, which were reasonable, given the large number of issues raised in the hearing.

[25] Mr Guest is to pay the sum of $10,000 towards the costs of the New Zealand Law Society.

D F Clarkson
Chair