

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

**CA274/2023
[2023] NZCA 465**

BETWEEN

BARRY EDWARD BRILL
Applicant

AND

AUCKLAND STANDARDS COMMITTEE
2
Respondent

Court: Miller and Mallon JJ

Counsel: Applicant in person
L P Radich for Respondent

Judgment: 22 September 2023 at 11.00 am
(On the papers)

JUDGMENT OF THE COURT

- A The application for leave to appeal is declined.**
- B The applicant must pay the respondent costs for a standard application on a band A basis together with usual disbursements.**
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REASONS OF THE COURT

(Given by Miller J)

[1] Mr Brill is a solicitor who was admitted in 1964 and at all material times practised as an in-house lawyer employed by his own company, B E Brill Ltd. He held a practising certificate as an in-house lawyer. It did not entitle him to practise on his own account.

[2] Between March 2015 and September 2017 Mr Brill acted as solicitor and counsel for himself, his wife, and four neighbours in a dispute with the Body Corporate of the Gateway complex in Paihia, in which they all owned apartments. The litigation did not go well.

[3] A Standards Committee of the New Zealand Law Society began an investigation of its own motion and charged Mr Brill with misconduct. The Lawyers and Conveyancers Disciplinary Tribunal found that Mr Brill had misconducted himself by providing regulated services to the public other than in the course of his employment, contrary to s 9(1) of the Lawyers and Conveyancers Act 2006.¹ The Tribunal censured Mr Brill, fined him \$7,500 and ordered that he pay 75 per cent of related costs.²

[4] Mr Brill appealed liability and penalty to the High Court. Downs J dismissed the liability appeal but quashed the censure, noting that Mr Brill had not solicited the role of solicitor for the parties in the litigation or benefitted financially from it and there was no need for personal deterrence.³

[5] Section 254 of the Act permits a second appeal, by leave, to this Court on a question of law which, by reason of its general or public importance or for any other reason, ought to be submitted to this Court for its decision.

[6] Mr Brill sought leave to appeal from the High Court. Downs J listed the proposed questions of law for this Court:⁴

- a. Whether s 9(1) extends to a lawyer who is not “being an employee” (ie is acting in a different capacity) in providing the regulated services in question?
- b. Whether a co-owner and/or a co-litigant of an employed lawyer comprises “the public” within the meaning of s 9(1)?
- c. Whether a legal practitioner may enter two or more part-time in-house contracts at the same time?

¹ *Auckland Standards Committee 2 v Brill* [2022] NZLCDT 3 [Tribunal decision].

² *Auckland Standards Committee 2 v Brill* [2022] NZLCDT 13.

³ *Brill v Auckland Standards Committee 2* [2022] NZHC 3036 [High Court judgment] at [91]–[96].

⁴ *Brill v Auckland Standards Committee 2* [2023] NZHC 929 [Leave judgment] at [5].

- d. Whether an in-house lawyer is entitled to practise on his or her own account if so authorised under s 22 of the Law Practitioners Act 1955?

[7] The Judge found that none of these questions warranted leave. With respect to the first, s 9(1) plainly means that a lawyer is guilty of misconduct who, being an employee, provides regulated services to the public other than in the course of his or her employment.⁵ With respect to the second, the Judge held that in s 9(1) the phrase “the public” plainly means anyone other than the employer of the lawyer.⁶ The third question was not a question of law, and even if it was it could not be of general or public importance.⁷ The fourth question was a question of law but, as it only affected practitioners admitted under earlier enactments who had not practised on their own account for more than 10 years and now wished to do so, it was not of general or public importance.⁸

[8] Mr Brill sought to reframe these questions for this Court as:

- (a) Is the purpose of s 9(1) to impose a general ban on non-lawyers facilitating the provision of legal services by their non-lawyer employers? He also wishes to contend that r 15.1.4 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (which allows an in-house lawyer who is engaged on a part-time basis to enter into a separate in-house lawyer contract with another non-lawyer on a part-time basis) supplies a complete defence.
- (b) What is the meaning and effect of “being an employee”, bearing in mind that it is common ground that he was not acting as an employee of his company when he represented the plaintiffs in the litigation?
- (c) What is the meaning of the term “the public” in s 9(1) and does it mean anyone other than the employer of the lawyer? He contends that it excludes a private, family or other particular group which share a confined common interest with the lawyer.

⁵ At [6]–[7] quoting the High Court judgment, above n 3, at [39].

⁶ At [8] quoting the High Court judgment, above n 3, at [46].

⁷ At [11].

⁸ At [12].

- (d) What is the scope and effect of s 31(1) of the Act? He contends that it is a stand-alone provision that applied to him.

[9] Generally, Mr Brill contends that these questions of law are of considerable importance to members of the legal profession. He contends that for many years the New Zealand Law Society has provided formal written advice to countless in-house lawyers which is inconsistent with the Judge’s findings.

[10] A little more background is in order at this point. We take it from the decision of the Tribunal, which included the Hon Paul Heath KC.⁹ The Tribunal explained that Mr Brill has been employed by BE Brill Ltd as its in-house solicitor since 2007.¹⁰ The company appears to be an investor. It does not offer legal services to the public.

[11] Mr Brill allowed his practising certificate to lapse at some point and in 2013 he applied for a new one.¹¹ He gave an affirmative answer to the question “[w]ill you be engaged as an In-House Lawyer (meaning a lawyer who is engaged by a non-lawyer and who, in the course of his or her engagement provides regulated services to the non-lawyer on a full-time or part-time basis)?”¹² He confirmed that he would not be in practice on his own account.¹³ In answer to queries from the Law Society, he stated that he would be providing services to BE Brill Ltd under a contract of service.¹⁴

[12] At no time has Mr Brill applied to practise on his own account or met all the requirements for doing so.

[13] Mr Brill accepted before the Tribunal that he had provided regulated services in connection with the litigation.¹⁵ He argued that his clients were not the public. The Tribunal put the position of his wife to one side and found the charge proved on the basis that the other parties quite clearly were “the public”.¹⁶

⁹ Tribunal decision, above n 1.

¹⁰ At [9].

¹¹ At [9].

¹² At [12].

¹³ At [12].

¹⁴ At [15].

¹⁵ At [41].

¹⁶ At [47] and [53].

[14] Mr Brill wishes to argue that Downs J was wrong to hold that s 9(1) creates a general prohibition against in-house lawyers providing regulated services to the public. The Standards Committee responds that the Judge spoke in general terms and did not overlook the existence of certain limited exceptions none of which (including r 15.1.4 of the Client Care Rules) applies on the facts.

[15] In our view it is not seriously arguable that Mr Brill complied with s 9(1). The relevant objective of the legislation is to confine employed lawyers, including in-house lawyers, to offering regulated services in their capacity as employees subject to specified exceptions. Mr Brill undoubtedly provided regulated services otherwise than in the course of his employment. The public for these purposes plainly included the neighbours for whom he acted. We have hesitated over Downs J's finding that the public is anyone other than the employer, but we are not persuaded that this is the appropriate case in which to examine the issue.

[16] For these reasons the first, second and third proposed questions do not merit leave on the merits. The fourth does not warrant the attention of this Court, and we note that it seems Mr Brill's purpose is to argue that, because he was entitled to practise on his own account, he could not contravene s 9(1) notwithstanding that at no relevant time had he sought to practise on his own account or met all the necessary requirements. To the extent that is so the argument is misconceived.

[17] The application for leave to appeal is declined.

[18] Mr Brill must pay the Standards Committee costs for a standard application on a band A basis together with usual disbursements.

Solicitors:
Crown Solicitor, Manukau for Respondent