

**NEW ZEALAND LAWYERS AND  
CONVEYANCERS DISCIPLINARY TRIBUNAL**

[2013] NZLCDT 54  
LCDT 017/12, 018/12

**IN THE MATTER** of the Lawyers and Conveyancers  
Act 2006

**AND**

**IN THE MATTER** of **MURRAY IAN WITHERS**  
Lawyer, of Christchurch

**CHAIR**

Mr D Mackenzie

**MEMBERS OF TRIBUNAL**

Mr W Chapman

Mr A Lamont

Dr I McAndrew

Mr S Walker

**HEARING** at Christchurch on 20 November 2013

**APPEARANCES**

Mr D Webb and Mr R Kay for the Standards Committee

Mr A Hughes-Johnson QC and Ms C Bibbey for Mr Withers

**RESERVED DECISION OF NEW ZEALAND LAWYERS AND  
CONVEYANCERS DISCIPLINARY TRIBUNAL ON PENALTY AND COSTS**

***Introduction***

[1] Three charges of misconduct, laid against Mr Withers by Canterbury Westland Standards Committee No. 3, were found to be proven after a defended hearing before the Tribunal on 8 and 9 July 2013. Detail of the charges and the Tribunal's findings are set out in its decision of 5 September 2013.<sup>1</sup>

[2] In summary, the Tribunal found that Mr Withers:

- (a) had deliberately failed to perform an undertaking he had given, and had not taken any timely steps to remedy his failure when pressed on the matter by the beneficiary of the undertaking;
- (b) had acted for more than one party in the same transaction without the prior informed consent of all parties, and without disclosing an interest he had in the transaction concerned and how that affected his ability to give independent advice; and,
- (c) had remained engaged and advised on some further matters arising from the transaction referred to in (b) above, notwithstanding his inability to provide independent advice on such further matters.

[3] On 20 November 2013, the Tribunal convened to consider submissions on penalty. At the conclusion of that hearing the Tribunal reserved its decision. This determination now delivers that reserved decision.

---

<sup>1</sup> *Canterbury Westland Standards Committee No.3 v Withers* [2013] NZLCDT 39.

***Position of the Standards Committee***

[4] The Standards Committee submitted that by his conduct Mr Withers had shown that he was not a fit and proper person to be a practitioner and that his name should be struck off the roll of barristers and solicitors. It was also noted for the Committee that the lesser option of suspension was not appropriate in the circumstances, but that if the Tribunal concluded that Mr Withers' name should not be struck off the roll, the Committee considered the maximum suspension period of 36 months was required.

[5] In support of its submissions the Standards Committee noted that Mr Withers' conduct was egregious, involving a sustained course of misconduct in which he preferred his own interests to those of his clients, and to those of the Christchurch City Council (the beneficiary of his undertaking).

[6] The Standards Committee also submitted that Mr Withers' approach to the disciplinary proceedings compounded his wrongdoing, that he had a professional disciplinary history which demonstrated a pattern which was of grave concern, that he failed to appreciate the gravity of his offending which had involved elements of deception and dishonesty, and that he had little awareness of his professional obligations.

[7] All of these matters, the Committee said, meant that the only appropriate penalty was an order striking Mr Withers' name from the roll, to ensure public protection and to demonstrate a proper response to his wrongdoing.

***Position of Mr Withers***

[8] For Mr Withers, it was submitted that striking off was not the appropriate penalty in this case. The Tribunal was asked to balance factors which favoured an alternative sanction.

[9] Among those factors were Mr Withers' proposals to address deficiencies in his practice. A systemic change in his practice meant that the interests of the public could be properly protected without his removal from practice it was submitted.

[10] Central to this submission was the engagement by Mr Withers of a senior and experienced practitioner, Mr Mackintosh, as a consultant. Mr Mackintosh was noted as a person who had skills in practice management and who had advised numerous practitioners on such matters over the years.

[11] Mr Withers had committed himself to a coaching programme designed by Mr Mackintosh. This programme, it was said, concentrated on effective client communication, good file management, and appropriate time management.

[12] As part of the programme, Mr Mackintosh was said to be "*schooling*" Mr Withers in relation to the identification of conflicts of interest and the taking of steps to avoid such conflicts. It was also noted that Mr Withers' staff would be more vigilant in relation to ensuring that conflicts were identified and managed properly.

[13] It was submitted for Mr Withers that the coaching programme provided by Mr Mackintosh would continue for some five months. Mr Mackintosh anticipated that sufficient structures would be in place by that time to ensure that if any particular difficulties arose in Mr Withers' practice, Mr Withers would then be in a position to deal with them.

[14] Mr Withers had also appointed some senior practitioners of good standing in the profession to act as his mentors. These mentors were available for Mr Withers to consult if he had any particular concerns or needed advice.

[15] There were also some other matters proposed, included terminating Mr Withers' interest in certain companies for which he had previously acted, agreeing not to act for two parties in any transaction without the approval of his mentors or Mr Mackintosh, undertaking to the Tribunal that he would not act for any party where he had an interest, agreeing to establish a log of undertakings which would be available for inspection by the Law Society, notifying his mentors and Mr Mackintosh of any

complaints, and authorising Mr Mackintosh to advise the Law Society if Mr Withers failed to follow the coaching programme put in place by Mr Mackintosh.

[16] It was submitted that collectively the steps noted above should ensure that the public interest was met.

[17] Mr Withers' involvement in community service was also noted as being a matter the Tribunal should take into account, as was some medical evidence which was said to provide background to the offending the subject of the charges.

[18] As to penalty, the submission for Mr Withers was that all of the processes and procedures to be put in place would ensure the public interest was adequately met. It was submitted that a fine and orders requiring Mr Withers to take advice in relation to the management of his firm and to undertake the education arising from his consultation arrangements with Mr Mackintosh would be sufficient to help him identify and deal with conflict issues and better manage his practice.

### ***Discussion***

[19] The Tribunal is obliged to have regard to the public interest when exercising its disciplinary functions. That interest is reflected in the requirement to maintain public confidence in the provision of legal services, and to protect the consumers of legal services.<sup>2</sup> The Tribunal has carefully considered the submissions for Mr Withers, but it does not consider that the arrangements proposed by Mr Withers would be sufficient to protect the public interest.

[20] The serious shortcomings demonstrated by Mr Withers' professional conduct which resulted in the misconduct charges proven, cannot in any way be satisfactorily met by mentoring, education and advice, revamped practice arrangements, and staff vigilance to help identify conflict issues.

[21] The ability to identify issues of conflict and lack of independence was not the issue arising in these charges. Mr Withers was well aware of his conflict and

---

<sup>2</sup> Section 3(1)(a) and (b) Lawyers and Conveyancers Act 2006.

resulting inability to be independent, but chose to ignore his professional responsibilities arising in that situation, and instead embarked on an extended course of conduct which included misleading his clients about his involvement.

[22] Mr Withers' conduct in respect of the charges raises serious issues of integrity. He has deliberately ignored his professional obligations to his client, he has been deceptive, and his client has suffered as a consequence.

[23] In the circumstances of his conduct relating to the current charges, the detail of which is extensively set out in the Tribunal's substantive determination<sup>3</sup>, reliance on the various arrangements Mr Withers has proposed is not an adequate position. We find it telling that a barrister and solicitor of his experience (some 36 years) suggests that his commitment to seek approval from his mentors or Mr Mackintosh if he wishes to act for more than one party in a transaction is a satisfactory position, or that there is some comfort in the fact that his staff will help him identify and manage conflicts.

[24] Similarly, the proposed practice management advice, a log of undertakings, commitments not to act for clients in matters where he has a personal or family interest, and his agreement to draw any complaints to the attention of his mentors or coach, do not give the Tribunal any comfort that this is a practitioner who has insight and understanding in respect of his professional obligations. The proposals do not go far in ensuring protection of the public interest.

[25] We note also that many of the arrangements proposed would only be operative if Mr Withers understood that there was a situation where he should involve others, and then requested that involvement.

[26] We do not accept that in the circumstances of these charges the arrangements proposed by Mr Withers give any surety that the public interest would be protected. The Tribunal considers that removal from practice is necessary, and the issue is whether it should be striking off or suspension.

---

<sup>3</sup> Supra, fn 1.

[27] If Mr Withers is to have his name struck off the roll of barristers and solicitors, the Tribunal is required to have a unanimous view that Mr Withers is, by reason of his conduct, not a fit and proper person to be a practitioner.<sup>4</sup>

[28] The Standards Committee submitted that Mr Withers' conduct was egregious, and we accept that submission.

[29] In respect of the first misconduct charge, relating to the breach of undertaking, not only was the undertaking breached but the beneficiary of the undertaking had to resort to legal advice to finally obtain payment when it was well overdue pursuant to the undertaking. A further aggravating factor was that Mr Withers had a personal interest in delaying payment pursuant to the undertaking, as a company in which he was interested received a financial advantage from the arrangement on which the undertaking was based.

[30] Mr Withers then compounded matters regarding his breach of undertaking by claiming that a Deed of Settlement entered into with clients had prevented him from honouring the undertaking, something he eventually accepted was not correct.

[31] Mr Withers' breach of undertaking was a deliberate and serious departure from accepted standards, affecting an important aspect of the profession's ability to undertake legal work and maintain public confidence. His behaviour following his failure to honour his undertaking compounded his professional wrongdoing.

[32] In respect of the second misconduct charge, relating to a conflict of interest and inability to provide independent advice to multiple parties, Mr Withers showed a complete indifference to his obligation to ensure a client was fully informed regarding his conflict and his inability to provide independent advice.

[33] Mr Withers was not open about his personal interest in the transaction. He took financial advantage of his client, making recommendations for adjustments to the transaction consideration and, eventually, for an interest free unregistered

---

<sup>4</sup> Section 113(1) and (2) Law Practitioners Act 1982 for pre 1 August 2008 conduct and section 244(1) and (2) Lawyers and Conveyancers Act 2006 for conduct from that date.

second mortgage, which was given by his vendor client to the purchasing company in which it turned out Mr Withers had an interest.

[34] In respect of the third misconduct charge, relating to his conflict and lack of independence when giving advice on the rights of his vendor client to recover overdue money owing on the mortgage from the purchasing company, he did not take adequate steps to ensure prompt recovery of those mortgage funds.

[35] Mr Withers said at the hearing of the charges that he had guaranteed the mortgage, but it was clear that he had not told his client that he had done so and that consequently his client had a right against him to seek recovery. This highlights the hopeless conflict position he had, and his inability to be properly independent in giving advice. In fact the evidence showed that Mr Withers had misled his client regarding his interest in the company giving the mortgage on which default was made, and continued to advise his client mortgagee as if a completely independent legal adviser.

[36] Eventually Mr Withers' client sought independent legal advice from other solicitors and obtained an agreement for repayment of the overdue amount as part of a Settlement Deed arising out of the relevant High Court proceedings. Repayment pursuant to the Settlement Deed was late, but was eventually obtained.

[37] The lack of integrity and probity involved in any one of these charges is itself serious, and may on its own have justified removal from practice. Taken together, the three misconduct charges, involving a continuing course of serious misconduct in each case, put it beyond any doubt that Mr Withers is not a fit and proper person to be a practitioner.

[38] His misconduct has involved a deliberate failure to meet an undertaking. When his failure was discovered by the beneficiary of the undertaking, Christchurch City Council, a year after the undertaking was due for payment, Mr Withers' failure to pay the overdue amount continued. The Council had to resort to legal action to obtain the promised payment.



[39] There has been dishonesty and deception regarding the provision of advice that was not independent, as it was required to be, regarding the sale and purchase negotiations. The mortgage back from the purchaser to the vendor in respect of part of the purchase price which could not be paid on settlement, on an interest free unregistered second mortgage, involved a serious failure of duty by Mr Withers, and self interest.

[40] His failure to properly advise the mortgagee of all options on default under the mortgage, particularly where it later became known that Mr Withers was a personal guarantor under the mortgage, is a serious professional failure. Mr Withers' client had to seek alternative legal advice to resolve the matter, and even then the settlement arrangement was not performed on time by the mortgagor. Again, elements of deception are evident in the conduct proven under this charge.

[41] The issues arising in respect of each charge of misconduct were compounded by the personal financial advantage accruing to Mr Withers, at the cost of the City Council regarding the undertaking, and at the cost of his client as a result of the altered sale terms and mortgage back on which default occurred.

[42] Mr Withers' conduct constitutes serious misconduct, involving multiple professional failures. The conduct demonstrates that Mr Withers has little regard for his professional obligations.

### ***Determination***

[43] The Tribunal finds that Mr Withers, by reason of this conduct, is not a fit and proper person to be a practitioner. Viewed overall, we consider that striking off is the appropriate regulatory response to his conduct. The charges are serious and involve the various elements noted above and in our determination on the charges.<sup>5</sup> A period of suspension cannot provide surety that the public interest would not remain at risk after the suspension period was complete. The proposals made by Mr Withers are inadequate to protect the public.

---

<sup>5</sup> Supra, fn 1.

[44] We have no confidence that there is no risk of further professional wrongdoing by Mr Withers. As well as the serious nature of the current charges, Mr Withers has a disciplinary history which indicates an unacceptable approach to his professional responsibilities. Mr Withers has been found guilty of professional failures previously, including breaches of his professional obligations that involved conduct of a similar nature to the current charges.<sup>6</sup>

[45] The proposals put forward for Mr Withers regarding new systems and procedures, and mentoring and education, do not go any way towards realistically mitigating the risk of further wrongdoing. Nor do we consider the medical evidence of much weight in assessing Mr Withers' conduct and risk. In the view of the Tribunal the public interest requires that Mr Withers be removed from practice until he is able to show that he is substantially reformed.

[46] The calculated approach and the extended period of Mr Withers' conduct shows it was not a momentary error. His professional offending is serious, with aggravating elements. Mr Withers did not respond well to the charges, causing many delays in the various processes that he was required to follow prior to the charges being heard.<sup>7</sup> He has an unsatisfactory professional disciplinary history. These factors support a view that Mr Withers tends to ignore his responsibilities, and also suggest that he is unlikely to change, which makes strike off appropriate.<sup>8</sup>

[47] The Tribunal accepts that a determination to remove a practitioner from practice, whether by way of striking off or suspension, will have serious repercussions for that practitioner, but that is an inevitable consequence of the

---

<sup>6</sup> This history was put before the Tribunal by the Standards Committee at the penalty hearing, and while not charged as misconduct the earlier matters do involve conduct that raises issues of integrity and probity. In 2003 Mr Withers was found by the Standards Committee to have given an undertaking that proved to be false. In 2012 he was charged with having made some arrangements in respect of cleaning the property of a client's deceased estate. Contrary to the executor's instructions Mr Withers retained and paid his son's football team to do the work. That resulted in a cost to the estate in excess of amounts expected to have been incurred if commercial cleaners had been used. The Standards Committee found the charge proven. The Committee's determination included a requirement that Mr Withers make a refund to the estate. Mr Withers failed to make that refund, and the estate had to pursue him for payment in the District Court. In 2013 Mr Withers was further charged by the Standards Committee, in respect of his conduct in failing to make the refund to his client estate as ordered, and found guilty.

<sup>7</sup> The history of Mr Withers' conduct in this regard is set out in the various minutes issued by the Tribunal prior to hearing the charges.

<sup>8</sup> *Hart v Auckland Standards Committee 1 of the New Zealand Law Society* [2013] 3 NZLR 103, at [186] – [189].

necessary operation of the public protection regime established by the Lawyers and Conveyancers Act. The Tribunal's role is not punishment, but to ensure that the public interest is properly protected by imposing appropriate sanctions,<sup>9</sup> and in this case we consider strike off is necessary to do that for the reasons we have noted.

### **Costs**

[48] The Standards Committee sought its costs of \$41,742.50. There is no doubt in our mind that Mr Withers' should meet the costs he has caused by his conduct which has resulted in the charges. These costs should be borne by the practitioner concerned, rather than being a further imposition on the profession which already contributes to regulatory costs to maintain a Complaints Service and associated professional disciplinary institutions and services.

[49] Mr Withers did not resist an order for costs, save in respect of an invoice from the Standards Committee which may have included \$1,900 for costs incurred regarding a hearing set down for 7 May 2013 which was vacated as notice requirements had not been complied with.<sup>10</sup> Whether the invoice included that \$1,900 was not clear, but if it did Mr Withers should be given credit for that amount as the Standards Committee acknowledged in its memorandum of 13 May 2013 on this issue that the work represented by the \$1,900 had no value, being "wasted" time. That was a valid position to justify additional costs at the time, where Mr Withers had sought a late adjournment, but in the circumstances which became apparent<sup>11</sup> Mr Withers should not be responsible for those costs, and they should remain with the Standards Committee.

[50] Costs under s 257 Lawyers and Conveyancers Act 2006 were certified at \$23,900. As part of his required contribution to the costs of the proceedings against him, Mr Withers is also to reimburse this amount to the Law Society, which is obliged to pay these costs to the Crown. We note that Mr Withers' approach to these proceedings, prior to the substantive hearing itself, and then following those

---

<sup>9</sup> *Dorbu v New Zealand Law Society (No.2)* [2012] NZHC 564, at [43], and *Daniels v Complaints Committee 2 of the Wellington District Law Society* [2011] 3 NZLR 850, at [22].

<sup>10</sup> See Tribunal's minutes of 6 May 2013 and 24 May 2013.

<sup>11</sup> Above, fn 10

proceedings, with the making of an application to bring further evidence he had omitted to have available at the hearing, which application was declined, has contributed additional cost.

### **Compensation**

[51] An order for compensation against Mr Withers, to the maximum permissible amount of \$25,000, was sought under s 156(1)(d) Lawyers and Conveyancers Act 2006. This amount was sought towards reimbursement of legal costs incurred by Mr Withers' client, the SCK Trust, in pursuing its mortgage debt and obtaining advice from its accountant. This application was opposed by Mr Withers.

[52] The legal costs incurred by the trust in pursuing the mortgage debt were the subject of settlement under a formal Settlement Deed dated 6 April 2011. The Tribunal does not consider that the agreed and concluded arrangements regarding those costs should be reopened. Disbursement costs subsequently incurred by the trust in respect of the liquidation of the mortgagor company were not within the contemplation of the arrangements noted in the Settlement Deed, but we do not consider that those costs can be said to arise "*by reason*" of an act or omission by Mr Withers, as required by s 156(1)(d) to allow an order for compensation.

[53] For Mr Withers it was also submitted that the costs paid to the trust's accountant could not be safely identified as representing a loss suffered as a result of his conduct. We accept that submission. Much of the accountant's work in relation to the trust involved tax advice, and there is uncertainty concerning the proper allocation of those costs. What amount may be properly allocated to the costs of investigating Mr Withers' involvement with the company concerned in the charges, compared to what costs were attributable to the substantial tax investigation, on which the accountant was also advising, is not clear. For that reason we do not think compensation for this element should be ordered.

**Orders**

[54] The Tribunal makes the following orders:

- (a) The name of MURRAY IAN WITHERS shall be struck off the roll of barristers and solicitors;
- (b) Mr Withers shall pay legal costs of \$41,742.50 to the Standards Committee, reduced to \$39,842.50 if the sum of \$1,900 referred to in paragraph [49] above was included in the amounts claimed for costs by the Standards Committee as part of the sum of \$41,742.50. Within 7 days of this determination the Standards Committee shall file a certificate with the Tribunal, with a copy to Mr Withers, confirming whether its costs claimed included that sum of \$1,900 or not. If the certificate confirms that its costs claimed did not include that \$1,900, the costs payable by Mr Withers to the Standards Committee shall remain at \$41,742.50. If it shows that the amounts claimed did include the \$1,900, the costs payable by Mr Withers under this part shall be reduced to \$39,842.50.
- (c) Mr Withers is to reimburse the New Zealand Law Society the amount of \$23,900 it is required to pay the Crown under s 257(1)(a) Lawyers and Conveyancers Act 2006

**DATED** at AUCKLAND this 2<sup>nd</sup> day of December 2013

DJ Mackenzie  
Chair