NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL

[2013] NZLCDT 56

LCDT 013/13

IN THE MATTER	of the Lawyers and Conveyancers Act 2006
BETWEEN	**AUCKLAND STANDARDS COMMITTEE No. 3** Applicant
AND	**GRANT SHAND** of Auckland, Barrister

CHAIR

Judge D F Clarkson

MEMBERS OF TRIBUNAL

Mr K Raureti

Ms S Sage

Mr T Simmonds

Mr W Smith

HEARING at the Auckland District Court

DATE OF HEARING 11 November 2013

APPEARANCES

Mr M Hodge for the Auckland Standards Committee No. 3

Mr C Morris for the Practitioner

REASONS FOR DECISION OF NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL

Introduction

[1] The practitioner admitted one charge of negligence or incompetence in his professional capacity "... of such a degree ... as to tend to bring the profession into disrepute (s 241(c))".

[2] We considered submissions on penalty made on behalf of the Standards Committee and on behalf of the practitioner on 11 November. At the conclusion of the hearing after some deliberation, the Tribunal made orders and reserved reasons for the making of those orders. The decision which follows forms those reasons.

Background

[3] The full background to this matter is contained in an agreed summary of facts provided to the Tribunal by the parties. The salient features are as follows:

[4] Mr Shand and a colleague had been conducting proceedings on behalf of the complainant. In the days leading up to the hearing Mr Shand had been negotiating with opposing counsel and his colleague had been taking instructions from the complainant. The complainant had indicated for some period that while he would seek to recover $150,000 from the proceedings, if he could receive $100,000 net of legal fees he would be prepared to accept that on advice. In the late afternoon of the Friday preceding the Monday hearing, opposing counsel came back to Mr Shand with an offer of $120,000 in cash and a balance of $30,000 to be paid by instalments of $1,000 per month. However, there was a clause that should the complainant die before the repayments were completed, they would cease.

[5] Mr Shand's colleague telephoned the complainant who initially accepted the offer but 15 minutes later telephoned him back to indicate he wished to reject it. The

complainant's problem was with the instalments clause and the cessation on death aspect which, having discussed with his family he was unhappy about.

[6] This was reported back to Mr Shand by his colleague. Mr Shand reassured him that he would sort it out and not to worry further. Mr Shand or his colleague had earlier indicated that although they had time recorded fees in the order of $78,000, they would charge the complainant $50,000 (so that a $150,000 settlement would give him the $100,000 clear which he sought).

[7] Mr Shand then decided that he could make the settlement proposal work by assuming the risk of the instalment payments on the part of the firm and ensuring that the complainant received his $100,000 clear, from the $120,000 initial payment. In other words the firm would take its fee of the balance of $30,000 from the instalment payments. Mr Shand persuaded himself that since this met the client's earlier indicated wishes of receiving $100,000 nett of fees, he was acting within his instructions. However he did not clear that arrangement with the complainant and indeed did not telephone and tell him about what he had arranged until the client contacted him on the Sunday preceding the scheduled hearing.

[8] The complainant was somewhat surprised to discover that the matter had resolved, given that he had thought he had rejected the last offer and of course he had not had the arrangement that Mr Shand had intended to put in place to make the settlement work explained to him.

Penalty Submissions for Standards Committee

[9] It was submitted that departing from a client's clear instructions in respect of settlement of civil proceedings was a serious breach of the fiduciary relationship between lawyer and client. This was so even if the lawyer considered that he was acting in his client's best interests.

[10] It was submitted that a suspension of at least three months was justified as a proper disciplinary response and in order to reflect the public protective role of the disciplinary process and ultimately the Tribunal.

[11] We were referred to a previous finding against the practitioner of unsatisfactory conduct, which resulted in a small fine and an order of costs, in relation to his discourtesy to another practitioner. This finding was in 2011.

[12] In addition an order for compensation for the complainant's costs in obtaining legal advice arising out of the practitioner's conduct was sought. We rejected a, less forcefully advanced, request for compensation to reflect the complainant's lost opportunity in the civil proceedings. We considered the assessment of such would involve a great deal of conjecture on the part of the Tribunal and was certainly not supported by the evidence.

[13] Finally costs of the prosecution were sought by the Standards Committee and reimbursement of the Tribunal costs in due course.

Penalty Submissions for the Practitioner

[14] The practitioner accepted responsibility for his conduct by his plea and by making in the course of the hearing a direct apology to the complainant. He accepted openly that his conduct was below the standard expected of lawyers in the particular circumstances. In mitigation he raised the fact that his client had on a number of occasions indicated he would settle for $100,000 clear of legal fees and that he had considered at the time this result was being achieved for the client.

[15] It was submitted on the practitioner's part that he had practised for some 20 years without significant previous disciplinary concerns, and that this had occurred in the context of his area of practice which was complex, multi-party and frequently multi-million dollar litigation.

[16] The practitioner has been engaged by the New Zealand Law Society as a costs reviser and a reference from a senior member of the profession, Mr Templeton, verified and endorsed his capabilities in this regard. The references provided by the practitioner were, in the Tribunal's view important and influential. They were influential because they specifically addressed the area of communication between the practitioner and his clients which was said to be at the highest level and that keeping his clients fully informed and properly and competently advised was a priority for him. It is apparent that this complaint has had a significant impact on the

practitioner and we consider that his practice has benefited. The references were provided not only by clients but from a commercial mediator with whom Mr Shand had had a number of dealings and also from colleagues. The theme of competence, commitment and good communication skills on Mr Shand's part was consistent.

[17] Pointing against suspension also were the interests of his current client base, which consists of over 200 clients, with approximately 100 claims currently lodged before the Courts.

[18] Furthermore counsel referred us to a number of previous decisions of the Tribunal which had addressed conduct which was either more serious or at a similar level to support the submission that suspension was not necessary to address this level of offending and in the case of this particular practitioner. We note we were referred to the following decisions: *Auckland Standards Committee v Comesky,*[1] *Auckland Standards Committee v Stirling*,[2] *Taranaki Standards Committee v Flitcroft*,[3] *Canterbury District Law Society v Horne*,[4] *Complaints Committee No. 1 of the Auckland District Law Society v C*,[5] and *Auckland Standards Committee (No. 2) v Slack.*[6]

[19] It was submitted that suspension is usually reserved for cases where fitness to practice is of concern and the removal of the privilege of practice is necessary given the seriousness of, usually, the misconduct. That was contrasted with the present case where the finding was of negligence, in the absence of any dishonesty. There was also submitted to be an absence of any pattern of conduct of this sort. We were asked to have regard to "*the context in which the offending occurred*".

[20] In the end we accepted the submissions of counsel for the practitioner that the public interest does not require a period of suspension. We consider a censure and monetary payment by way of costs and compensation to be an appropriate disciplinary response to the offending on this occasion.

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[1] [2010] NZLCDT 19.
[2] [2010] NZLCDT 13.
[3] [2010] NZLCDT 36.
[4] [2009] NZLCDT 4.
[5] [2008] 3 NZLR 105.
[6] [2012] NZLCDT 40.

Having regard to the penalties imposed in the above quoted cases and having regard to our finding that there was no need for protection of the public in respect of this practitioner nor were there fitness to practice issues, we made the following orders:

Summary of orders

(1) Censure in relation to behaviour of acting in a manner contrary to the client's instructions.

(2) Fine of $2000.

(3) An order for compensation in favour of the complainant in the sum of $1899.28.

(4) An order the practitioner pay the costs of the prosecution to the Standards Committee of $16,508.

(5) The Tribunal costs under s 257 are awarded against the New Zealand Law Society, the amount is certified at $3,369.

(6) Practitioner to refund to the New Zealand Law Society the s 257 Tribunal costs in the sum of $3,369.

DATED at AUCKLAND this 19th day of December 2013

Judge D F Clarkson
Chair