NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL

[2016] NZLCDT 12

LCDT 007/15

BETWEEN	**AUCKLAND STANDARDS COMMITTEE 3**
	Applicant
AND	**PL**
	Respondent

CHAIR

Judge BJ Kendall (retired)

MEMBERS OF TRIBUNAL

Ms F Freeman

Mr W Smith

Mr B Stanaway

Mr I Williams

On the papers

DATE OF DECISION 5 May 2016

COUNSEL

Ms C Paterson for the applicant

Mr G Illingworth QC for the respondent

REASONS FOR THE DECISION OF THE NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL CONCERNING PENALTY

[1] Following its decision of 18 March 2016 that the respondent had been guilty of unsatisfactory conduct, the Tribunal has considered the appropriate penalty to impose on the respondent having received written submissions from counsel for both the applicant and the respondent.

[2] The Tribunal found in its majority decision that the respondent had breached Rule 13.9 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (Rules) in that he failed to ensure that discovery obligations were fully complied with by his client. The Tribunal found that the respondent's failure was of a low level. He failed to adequately instruct a member of his staff to enquire of another solicitor about the status of a relevant transaction or to make enquiry himself of that solicitor. He also failed to make a follow up enquiry to clarify an ambiguous response to his instruction.

[3] The Tribunal accepted that "*in legal practice generally, and in this client's practice particularly, the burden of making discovery is a task that could properly be delegated",* but that it observed that *"this case illustrates that delegation is always subject to the need for supervision, the competence of which is a matter of degree by context including the complexity of the subject matter; the number of records; and the knowledge of the participants in that process as to the content of those records and the issues arising in the proceedings".*

[4] The applicant has sought the following orders by way of penalty:

(a) Censure;

(b) A fine of $10,000.00;

(c) Costs;

(d) Reimbursement of the Tribunal's costs under s 257 of the Act.

Level of culpability

1. Applicant's submissions

[5] The submission was that the case called for a deterrent penalty when regard was had to the serious consequences that flowed from the respondent's failure and in order to meet the legislative requirements for the maintenance of professional standards and consumer protection.

[6] Counsel further submitted that the penalty imposed ought to serve as a reminder to all practitioners that the consequences of failing in one's discovery duties can be far-reaching. It was said practitioners must be proactive and vigilant and cannot rely on clients to be forthcoming, or to be understanding as to what may or may not be relevant and thus require to be discovered.

[7] With those matters in mind, the applicant submitted that censure and fine was the appropriate penalty.

2. Respondent's submissions

[8] Counsel for the respondent submitted that it was both unnecessary and inappropriate to impose any further penalty beyond the punitive consequences that the respondent had already suffered.

[9] In support of that submission he stressed the following:

(a) The respondent had also faced charges of an extremely serious kind being misconduct or in the alternative negligence or incompetence in his professional capacity reflecting on his fitness to practise or as to bring his profession into disrepute. Those charges failed.

(b) The Tribunal should take into account the cost and stress of the proceedings as a detriment to the respondent, having suffered a substantial penalty in having to defend proceedings in which his former client made very serious allegations of dishonesty against him.

(c) There were significant mitigating circumstances and no aggravating circumstances.

(d) The respondent has "learned his lesson" about the high level of personal care required in the discovery process.

(e) The administration of a censure and the imposition of a fine would produce a disproportionately severe outcome relative to the seriousness of the conduct for which he has been found responsible.

(f) The respondent should not be required to pay the full costs of the defended hearing in respect of which he has been cleared of all but the least serious charge.

[10] Counsel for the respondent was critical of the applicant for choosing to lay serious charges against the respondent alleging dishonesty based on the testimony of a complainant whose credibility was in question and who had been the subject of bad faith findings by the Weathertight Homes Tribunal and the High Court. He submitted that the applicant should have placed more weight on those findings.

[11] Counsel for the respondent has further criticised the applicant's refusal to accept a compromise plea from him. A proposal was put that the respondent would plead guilty to a charge of unsatisfactory conduct. It was said that proposal was not accepted at the Standards Committee stage of the investigation. Mr Illingworth had recommended to Ms Paterson that the Committee should reconsider the decision to proceed to a hearing of all the charges. He contended to the applicant that its choice to proceed was made in the face of the fact that the credibility of its primary witness was at risk and was likely to result in adverse findings.

[12] In answer to Ms Paterson's point in reply that no formal offer was made by the respondent to resolve the matter on the basis of an admission of unsatisfactory conduct, Mr Illingworth said that to make such an offer would have been a pointless exercise given the earlier response of the Standards Committee.

[13] As to adverse consequences, counsel for the respondent submitted that the respondent suffered extreme stress beyond that ordinarily suffered by a practitioner from facing a complaint of the kind presented to the respondent. He suffered a head injury during the course of these proceedings as the result of an accident. He was left with post-concussion syndrome and was nevertheless forced to respond to the complainant's allegations of dishonesty and gross negligence while significantly ill. He spent many hours preparing for and participating in the Tribunal proceedings which should have been spent recuperating or carrying out his normal professional duties, added to which was the costs of counsel's fees, a substantial proportion of which has had to be met by the respondent personally.

[14] Mr Illingworth submitted that the Tribunal should view the cost and stress of the proceedings as a detriment to the respondent when taking into account that the most serious allegations against him failed and that he was cleared of any deliberate, reckless or grossly negligent wrongdoing.

[15] He referred the Tribunal to its decision in *Hirschfeld*[1] where the Tribunal took into account the following factors when determining penalty and which were held to be so serious as having had a punitive consequence before any penalty to be imposed by it:

(a) He effectively ended his practice;

(b) The suffering of extreme emotional reaction leading to depression;

(c) The damage to his previously "spotless" professional reputation;

(d) His marriage breakdown and the destruction of his previously sound financial situation;

(e) The suffering of a stress induced heart attack.

[16] Mr Illingworth submitted his client's position was analogous.

[1] *Wellington Standards Committee No 2 v Hirschfeld* [2014] NZLCDT 48.

[17] Mr Illingworth stressed the following mitigating factors:

(a) No dishonesty or improper motive or personal gain on the part of the respondent;

(b) The respondent was found to be honest and diligent with a properly organised office employing professional and competent staff;

(c) He was entitled to delegate “discovery” responsibilities to trained and responsible staff;

(d) His error was unintentional;

(e) The situation in which the respondent has found himself was exceptional in that the client had lied to staff and the Weathertight Homes Tribunal despite being properly advised of his discovery obligations and despite knowing the relevance of the transaction to the proceedings before that Tribunal and of the discovery orders;

(f) The complainant was the primary author of any misfortune he suffered;

(g) The respondent had no reason to fail to make discovery of the relevant transaction and that it was reasonable of him to expect that staff would keep him informed of the status of that transaction;

(h) The respondent showed good intention by instructing his staff to make enquiry of other staff and did not ignore the possibility that the transaction may have proceeded to completion.

(i) The respondent has an unblemished record having been in practise in excess of 30 years and is held in high regard by his community attested to by affidavits filed in his support.

[18] The Tribunal accepts these mitigatory factors except to acknowledge the receipt of evidence from the applicant, referable to penalty, as to the respondent

having a finding of unsatisfactory conduct in May 2011 in respect of which remedial orders were made and did not include a censure or fine. We have found that the circumstances of that matter are not similar to the matter before us. We place significance on his contributions to the profession and the wider community.

Costs

[19] It was counsel's submission that the respondent should not be required to pay the applicant's costs in circumstances where he has been cleared of all but one low level charge in respect of which the applicant refused to accept a plea. Further the respondent was willing to accept a finding of unsatisfactory conduct which, if accepted, would have avoided the need for a defended hearing. In the end result the prosecution only just succeeded in establishing unsatisfactory conduct.

[20] The applicant has responded by submitting that the respondent should be required to pay costs for the following reasons:

(a) The respondent did not communicate in any formal way his willingness to admit unsatisfactory conduct. He swore a lengthy affidavit denying any personal responsibility.

(b) It was open to him to admit unsatisfactory conduct before the Tribunal and invite the applicant to prove the more serious charges. He did not do so.

(c) The respondent denied all the charges at the hearing including that of unsatisfactory conduct on which he was found guilty. That fact is particularly relevant given that the Tribunal found the respondent's conduct to be wanting and made an adverse finding against him in respect of that which he continued to deny throughout the lengthy defended hearing.

Publication

[21] The respondent seeks an order prohibiting the publication of his name and advances the following reasons:

(a) The conduct was at the lower end of the scale effectively being an error of judgment;

(b) That publication could result in the unsubstantiated allegations of the complaint being recited with resulting harm to the respondent;

(c) Publication of his name could cause significant and disproportionate harm to him otherwise;

(d) Publication could be used detrimentally to the respondent in respect of his professional partnership relationship.

[22] The applicant submits that the respondent's name should not be suppressed from the judgment and has stressed that the starting point is the presumption of open justice

(a) It accepts that the judgment makes it plain that the finding of unsatisfactory conduct was recorded at the lower end of the scale;

(b) It acknowledges the judgment also makes plain the findings against the complainant as to his lack of credibility;

(c) However it emphasises that concerns about possible professional consequences impacting on the respondent should not displace the presumption of open justice in the public interest.

Discussion

[23] The starting point for consideration of penalty is the advancement of the public interest; maintenance of professional standards; the imposition of sanctions on a practitioner for breach of his or her duties; and to provide scope for rehabilitation in appropriate cases. (See *Daniels*)[2]

[24] The Tribunal reminds itself of the "least restrictive intervention" as articulated in the *Daniels* decision.

[25] The conduct of the respondent having been found to be at the low end of the scale does not call for strike-off or suspension.

[26] We do not consider that the respondent should be censured. The Tribunal has found him to be honest and diligent and accepts that his unsatisfactory conduct was an error of judgment. It has had no direct detrimental impact as the client claimed. The client was primarily the author of his own misfortune.

[27] We do not find that the respondent is in need of specific instruction. The profession generally can be reminded of the consequences of failing in discovery duties by the publication of the judgment without identification of the practitioner or his practice partners.

[28] We do not find that this case gives rise to a need to protect the public and we are satisfied that he is unlikely to offend again.

[29] As to costs, there is strength in the applicant's argument that it was open to the respondent to inform the Tribunal at the commencement of the hearing that he was willing to admit the charge of unsatisfactory conduct rather than proceed to a fully defended hearing over several days.

[2] *Daniels v Complaints Committee 2 of the Wellington District Law Society* [2013] 3 NZLR 850.

Decision

[30] Accordingly we determine that the appropriate penalty is the imposition of a fine which we fix at $10,000.

[31] We consider that there should be a reduction in the costs to take into account that the two serious charges were not proved. We fix that reduction at one-third of the applicants costs which it has submitted in the sum of $43,686.41. The respondent will pay $29,124.27.

[32] As to publication of name, there will be an order prohibiting the publication of the respondent's name. There will also be an order prohibiting the publication of the name of the respondent's legal firm, the names of staff members; the name of the complainant and his business vehicle; and of the name of the transaction about which there was a failure to make discovery. We do so for the following reasons.

(a) There has been no need to protect the public;

(b) There was no detriment to the client to the degree the client complained of. Rather the respondent failed in his professional obligation to the Tribunal before which the proceedings were filed;

(c) We have taken into account the respondent's largely unblemished long career in the practice of the law and of his standing in his community.

Summary of orders

1. The respondent is to pay a fine of $10,000.

2. He is to pay costs to the New Zealand Law Society of $29,124.27.

3. He is to refund to the New Zealand Law Society two-thirds of the costs of the Tribunal which are certified at $17,535, pursuant to s 257. The sum to be reimbursed is fixed at $11,690.

4. There is an order prohibiting the publication of the respondent's name.

5. There is an order prohibiting the publication of the name of the respondent's law firm, the names of its staff members and of the complainant and of the name of the transaction about which there was a failure to make discovery.

DATED at AUCKLAND this 5th day of May 2016

BJ Kendall
Chairperson