NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL

[2016] NZLCDT 20
LCDT 008/16

IN THE MATTER of the Lawyers and Conveyancers Act 2006

BETWEEN **OTAGO STANDARDS COMMITTEE**
Applicant

AND **RAELENE MARIE KELLY**
Practitioner

CHAIR
Judge D F Clarkson

MEMBERS OF TRIBUNAL

Mr W Chapman
Ms S Fitzgerald
Mr M Gough
Ms C Rowe

HEARING at the Auckland Specialist Courts and Tribunals Centre

DATE OF HEARING 19 & 20 July 2016

DATE OF DECISION 27 July 2016

COUNSEL
Mr J Shaw for the Standards Committee
No Appearance for the Respondent

REASONS FOR DECISION OF 20 JULY 2016

[1] This hearing proceeded by way of formal proof, there having been no steps taken by the practitioner and no appearance by her at the hearing. Ms Kelly was charged as follows:

> "Being convicted of offences punishable by imprisonment, which convictions reflect on her fitness to practise or bring the profession into disrepute – s 241(d) of the Act."[1]

[2] The Tribunal made orders striking the practitioner from the Roll and consequential costs orders which are set out at the conclusion of this decision. Reasons for decision were reserved and are now set out.

Background

[3] Ms Kelly is an experienced practitioner who had practised on her own account since 2010. The incorporated law firm under which she operated her practice, Kelly Chambers Limited ("KCL") was placed into liquidation sometime prior to 12 September 2014, which was the date the Otago Standards Committee resolved to initiate an 'own motion' investigation into the firm and Ms Kelly.

[4] On 22 September 2014 Inland Revenue filed 31 charges against Ms Kelly alleging the aiding and abetting of KCL in committing a tax offence, namely the application of PAYE deductions for a purpose other than payment to Inland Revenue.

[5] In November 2014 a further 15 charges were filed by Inland Revenue again alleging the aiding and abetting of KCL in committing tax offences, namely knowingly failing to provide a GST return.

[6] On conviction, each of the above described offences carries a maximum penalty of five years imprisonment.

[7] Until April 2015, Ms Kelly was in contact with the Otago Standards Committee and indeed provided a full response to the own motion investigation in which she

[1] Lawyers and Conveyancers Act 2006.

indicated she would be defending the criminal charges. She conceded that should they be established, they might constitute misconduct under the Act.

[8] At the conclusion of her response to the Standards Committee the practitioner had this to say:

> "Please be assured of my co-operation and continued respect for the standards and honour of the profession of which I have been a proud member for 28 years. I am horrified at the prospect that I may be the cause for it to be brought into disrepute, even as I am horrified by the wrong assumptions and misapprehensions that are involved in the charges against me. I have a hard-won reputation for straight dealing, and I intend to ensure that reputation is vindicated."

[9] On 1 May 2015 Ms Kelly affirmed in an affidavit, which was presumably in support of an application to allow her to travel outside New Zealand while on bail, that she intended to return to Australia but undertook to the Court to appear for trial on 14 September 2015, in relation to the 46 charges faced.

[10] As recorded by Judge Kellar in his reasons for judgment given on 17 September 2015[2]:

> "… Significantly, Ms Kelly undertook to the Court to appear for trial on 14 September 2015. Ms Kelly deposed that as a barrister of 28 years standing she understood the gravity of her undertaking and the consequences of failure to honour it."

[11] Notwithstanding that solemn undertaking and the assurances surrounding it, Ms Kelly failed to appear at trial on 14 September. His Honour Judge Kellar heard from 10 witness by way of formal proof, following which he issued a lengthy decision entering a guilty finding in respect of each of the 46 charges. Ms Kelly was remanded for sentence on 14 October 2015.

[12] Ms Kelly also failed to appear at the sentencing date and a warrant for her arrest was issued. It is assumed she is now somewhere in Australia. Nothing further has been heard from her since her departure.

[13] These charges were served on her by registered post and email to her last known addresses.

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[2] [2015] NZDC 18451 at [2].

[14] That background is set out because of the aggravating features which are disclosed by it.

[15] In relation to the offending itself, the decision of His Honour Judge Kellar notes that:

> "There are transfers of funds from Kelly Chambers Limited's bank account into her personal account which are then used to cover extensive expenditure on mortgage payments, air travel, alcohol, private school fees, a trip to Europe and a $2,855.30 monthly payment for a Jaguar motor vehicle. There were sufficient funds in the company's bank account to pay PAYE and GST liabilities as they fell due. Ms Kelly spent that money on other things."

[16] The Tribunal had no difficulty in finding, following consideration of the material provided by the Standards Committee that the charge as pleaded had been made out. There was no question but that conviction of offences such as these, not only reflect on Ms Kelly's fitness to practice, but also tend to bring the profession into disrepute.

[17] Following the establishment of liability counsel made submissions as to penalty in which the Standards Committee sought that the practitioner be struck off. We accept the following factors set out by Mr Shaw, on behalf of the Standards Committee, as significant features for penalty consideration:

A. Gravity of the offending

[18] Both the amount of the unpaid tax liability of $183,626 and the period over which the offences arose, namely three years, measures the seriousness of this offending.

B. Nature of the offending

[19] We accept the submission that this ought not to be characterised as merely a failure to pay a tax debt, but that it contains an element of dishonesty, indeed fraud, because the funds owing were deducted from employees' wages and therefore held on their behalf in a relationship of trust until paid to the Inland Revenue. Similarly GST has been charged to and received from clients and then not passed on to Inland Revenue.

[20] The dishonest elements of this offending most certainly go to the question of fitness to practice.

C. Failure to Answer the Charge

[21] As submitted by Mr Shaw "this is a particularly troubling aspect of Ms Kelly's conduct …". We have referred to an affidavit sworn by her and presented to the District Court in support of an indulgence granted to her to be able to leave the country while facing these charges. She obtained that indulgence by relying on her reputation as a lawyer of many years experience and one who took seriously her obligations as an officer of the Court. She utterly betrayed those principles and her duty as an officer of the Court in failing to appear and confront the charges laid against her. This is a seriously aggravating feature of the offending itself.

D. Previous Disciplinary History

[22] There is a finding of unsatisfactory conduct of 24 March 2016 in relation to this practitioner. While it is based on different subject matter, it reflects on her failure as a practitioner and must be given some weight, if not significant weight.

Decision

[23] The Tribunal, as a panel of five, unanimously determined that all of the above factors meant that there was no penalty short of strike-off which could properly reflect the gravity of the practitioner's conduct. The public protective purpose of the Tribunal meant that any practitioner who has so lost her way in relation to her professional obligations cannot be entrusted with a client's affairs and their funds.

[24] Given her conduct in respect of the criminal proceedings, and lack of engagement in the disciplinary process, there could be no consideration of a more rehabilitative approach.

[25] There is one further matter to which we should refer and that is that we have considered two other decisions where practitioners have been found guilty of misconduct relating to tax returns. In one of them, the decision relating to *Shaan Stevens,*[3] the practitioner was also convicted of other serious offences such as using documents to obtain pecuniary advantage and was struck off.

[3] [2014] NZLCDT 30.

[26] In the other decision, namely *name suppressed*[4] the situation was significantly different from the present case. The conduct spanned both the present legislation and the previous disciplinary regime, whereby 'conduct unbecoming' was found. There were extenuating circumstances and a level of cooperation from that practitioner which completely distinguishes it from the present matter. There was no dishonesty found to be involved in that matter, rather a "wilful blindness" approach. There was no conviction entered against the practitioner and the aggravating features present in the present matter were completely absent, that practitioner having fully cooperated with both Inland Revenue and with the disciplinary process. Thus although the penalty in that matter was significantly less than the present matter (censure and significant costs award), it is not a matter which can be considered in any way analogous to the present.

Orders

1. The practitioner is struck off the roll of barristers and solicitors pursuant to s 242 of the Act.

2. Costs of $12,683 are awarded in favour of the Standards Committee, s 249.

3. Section 257 costs in the sum of $938.00, are awarded against the New Zealand Law Society.

4. The s 257 costs of $938.00 are to be reimbursed by the practitioner, to the New Zealand Law Society.

DATED at AUCKLAND this 27th day of July 2016

Judge D F Clarkson
Chair

[4] [2014] NZLCDT 83.