NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL

[2016] NZLCDT 28
LCDT 014/16

UNDER	the Lawyers and Conveyancers Act 2006
BETWEEN	**OTAGO STANDARDS COMMITTEE** Applicant
AND	**GREG RODERICK STEWART** Practitioner

CHAIR
Judge D F Clarkson

MEMBERS OF TRIBUNAL
Ms F Freeman
Mr C Lucas
Mr G McKenzie
Mr W Smith

HEARING at Auckland District Court

DATE OF HEARING 6 September 2016

DATE OF DECISION 15 September 2016

COUNSEL
Mr J Shaw for the Standards Committee
Ms B Webster for the Practitioner

PENALTY DECISION OF THE TRIBUNAL

Introduction

[1] This penalty decision is the first in which the Tribunal has considered a breach of Rule 5.5.1 – that is the rule that prevents a lawyer operating a business which provides other services to a client, unconnected with regulated services. In this case the situation is particularly serious because the business in question was banking services.

[2] To his credit, Mr Stewart was fully cooperative from the inspection stage and throughout the disciplinary process. He has pleaded guilty to the two (amended) charges and taken responsibility for his actions. He has voluntarily stepped aside from practice.

[3] Because of the implications of the "banking services" charge, the Tribunal was cautious in approaching the agreed penalty schedule which had been negotiated by the parties. We requested that we receive full submissions on penalty.

Factors in determining Penalty

[4] As submitted by Ms Webster, in order to determine penalty the following factors are considered:

1. The seriousness of the conduct.

2. Aggravating features.

3. Mitigating features.

4. Relevant penalty decisions.

5. The need for specific or general deterrence.

6. The need for protection of the public.

In addition we consider there must be a further assessment:

7. The overall fitness of the practitioner.

[5] Taking all of those features into account, we determine what will be a proportionate response to this conduct, which will maintain the public's confidence in the legal profession, according to objects of the Act.

Charge 1 – The Nature of the Conduct

[6] The charges, as amended are set out in Appendix 1 to this decision. The practitioner has admitted Charge 1, which involved the management of his trust account. The practitioner conceded that he had been negligent to the level set out in s 241(c) of the Act[1] which states:

> "… has been guilty of negligence or incompetence in his or her professional capacity, and that the negligence or incompetence has been of such a degree or so frequent as to reflect on his or her fitness to practise or as to bring his or her profession into disrepute …"

[7] The background to the charges is as follows: Mr Stewart, who has been a lawyer for some 32 years, has practiced on his own account, with a trust account since February 2009. During a routine inspection on behalf of the Law Society in January and February 2014, a number of irregularities were noted in Mr Stewart's trust account record keeping. As set out in Mr Shaw's submissions, these fell into four categories:

- Failure to keep adequate records.
- Client balances overdrawn.
- Failure to reconcile trust bank accounts with trust ledger.
- Incorrectly certifying compliance with the Act and Regulations.

[8] Mr Stewart's trust account problems began when he transitioned from a manual ledger system to a computer based system. He received little training in the computer package and because he resided in a small provincial town he seemed unable to obtain ready assistance with his difficulties.

[1] Lawyers and Conveyancers Act 2006.

[9] The irregularities extended over a three-year period, and each time Mr Stewart was required to certify to the New Zealand Law Society ("NZLS") that his trust account was properly reconciled, he did so, telling himself that the residual errors which he was carrying forward each month "did not negatively impact on his clients, and that his manual system for correction complied with Law Society requirements".

[10] By his guilty plea he acknowledges that this was not the case. After this was pointed out by the inspector, Mr Stewart took steps to obtain further training and to put right all of the errors that had been found by the inspector. He was completely open with the inspector and on the inspector's third visit to check compliance, there were no remaining concerns.

[11] In his submissions Mr Shaw draws our attention to the following features, which he says underscore the seriousness of this conduct:

> "(a) The extended period of non-compliance and inadequate record keeping (three years).
>
> (b) The fact that client balances were repeatedly overdrawn with insufficient funds in the firm's float to cover the debit balance.
>
> (c) The failure to reconcile the various ledgers over an extended period (up to three years).
>
> (d) The filing of 30 monthly certificates which incorrectly certified compliance in spite of clear and obvious breaches."

[12] Mr Stewart has acknowledged the seriousness of his offending by his guilty plea to the s 241(c) charge invoking as it does questions about his fitness to practice and the effect of his actions upon the profession's reputation.

Charge 2 – Provision of Banking Services

[13] Mr Stewart also pleaded guilty to misconduct under Charge 2 on the basis that there had been:

> "… a wilful or reckless contravention of any provision of this Act or any regulations or practice rules made under this Act that apply to the lawyer … or of any other Act relating to the provision of regulated services …"[2]

[2] Section 7(1)(a)(ii).

[14] This charge is of even more concern than Charge 1. That is because it reflects seriously on the practitioner's lack of judgment, a fact which is recognised by Mr Stewart himself and precipitated his current retirement from practice.

[15] The background to the charge is important. Mr Stewart became acquainted, professionally, and later as a friend, with a former lawyer Mr Evgeny Orlov. Mr Stewart had been impressed with how Mr Orlov had conducted a matter, as counsel, on behalf of one of Mr Stewart's clients. Mr Orlov told Mr Stewart of his wife's company Equity Trust International Limited ("ETIL"). This company was said to be assisting a number of overseas people with funds, wishing to migrate to New Zealand and at some stage requiring legal services. Mr Stewart told us that it was his understanding that Mrs Soboleva, Mr Orlov's wife, had very little experience in international trust matters and no qualifications in relation to New Zealand law and thus, he was persuaded he could be of assistance, as a director in the company. It is likely that this occurred in mid-2013.[3]

[16] ETIL provided, according to its website material, which has been made available to us as part of the evidence, financial and other advice to overseas clients and referred such clients to associated advisors, of which Mr Stewart was one. ETIL's website promoted Mr Stewart's firm as a provider of banking services through his solicitor's trust account. In particular under a page titled "Escrow Account" it promotes the benefits of funds being held in a solicitor's trust account. It contrasts the trust account with an ordinary bank account in statements such as:

> "With today's increasingly bleak banking crisis in Europe as demonstrated by the situation in Cyprus and the freezing of the accounts of many European banks on the pretence of investigating source of funds, many people have realised, that European bank accounts and indeed many offshore bank accounts, may not be safe."

And

> "Since European banks are not Government guaranteed, the chance of bank accounts being frozen in upcoming European crises is quite significant, further with new anti money laundering laws designed to allow banks to freeze funds until further investigation, many high wealth depositors have found their money frozen in Europe with the onus on them to prove where funds came from."

[17] In referring to a solicitor's trust account the website says:

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[3] The Standards Committee material indicated that Mr Stewart was appointed a director of ETIL in June 2011, but he said that this could not be true because he had not met Mr Orlov until 2012 and was only a director of the company for something under a year. He resigned in mid-2014. Official records from the Companies Office were not made available to us.

> "The solicitor's firm holds an account in an "AAA" rated New Zealand Bank (in our case BNZ Group). Under this Trust Account the money is deemed in law not to be an investment in the bank but money belonging to the law firm's clients and therefore in the event of bank insolvency this account is not merged with other depositors."

Later the "advantages of an Escrow account" are set out as follows:

> - "Account can be open in 48 hours.
> - Due Diligence is done by the lawyer and us not the bank and money is accepted by our preferred lawyer on our certification that it has been cleared under our AML policy.
> - Account can be completely confidential.
> - No limit to quantum of funds sent.
> - Cannot be frozen or arrested by the bank because it is a part of a lawyer's trust ledger and therefore regulated by the law society not banks policies."

[18] Later the website stated:

> "1. In order to open an account in an "AAA" bank you will have to go through the bank's rigorous checking policies which may take weeks. Even then, if you do not appear in person or satisfy the bank why as a foreigner you wish to hold such an account the bank may delay opening an account or refuse to open the account. Further THE BANK has the discretion to freeze accounts if it is unhappy with the source of the funds because the bank does not give an opinion in advance whether it is satisfied with the source of funds. This is not the case with an Escrow account. The Escrow account makes the solicitor/lawyer responsible for due diligence and is not regulated by the bank's anti money laundering policies. That means the bank cannot freeze a trust account. An Escrow account can be opened within 48 hours.
>
> 2. In an Escrow account the beneficial owner's identity can be completely protected. Further under the doctrine of lawyer confidentiality and privilege, the lawyer cannot release the name of the beneficial owner to anyone including the bank (with the exception of serious crimes and only then if a criminal warrant is produced). That means that provided you satisfy our strict money laundering policies and we ascertain your source of funds in advance you have no more checks or inquiries to go through. This means you can hold an account in the name of a trust where the beneficial owner is secret but still operates and owns the account."

[19] As pointed out by Mr Shaw that page does not include any references to the provision of legal services by the lawyer whose trust account is used.

[20] When a client was referred to Mr Stewart by ETIL, he provided a letter of engagement which was issued on behalf of his firm and ETIL and recorded services provided as "Representation within New Zealand including the provision of banking services through our solicitors trust account with the Bank of New Zealand."

[21] Although Mr Stewart was at pains to point out that for the majority of these clients he also eventually provided some legal services, mainly of a conveyancing nature, the engagement letter referred to fee structures which related to the provision of **banking services** rather than legal services. His explanation was that the requirements for legal services were hard to discern in advance.

[22] Mr Stewart also emphasised that only five clients are referred to in the charges as having been provided with banking services in the absence of legal services. However he did concede in evidence that one of these clients, Capital Markets Investments Limited ("CMIL"), did generate a very high number of transactions through foreign currency accounts with third party customers.

[23] For completeness we note that one of the five clients to whom banking services alone was provided is a principal at a Panama-based law firm.

[24] In support of their case, the Standards Committee provided an expert opinion from Dr D Webb, who had reviewed the documentation surrounding the association with ETIL and expressed the opinion that it was clear that the practitioner was providing banking services, independently of regulated services.

[25] In the course of his evidence Dr Webb comments on the purpose of Rule 5.5 as follows:[4]

> "The Rule has two main functions. Most obviously it seeks to avoid a conflict of interest between the lawyer and the client where the lawyer is seeking to make profit from the client through the provision of services (or conceivably goods) other than legal services. However it is also a partial prohibition on a multi-disciplinary-practice in which a firm offers various kinds of professional services which may have no particular connection with each other."

[26] And at paragraph 12:

> "I also note that the provision of services other than regulated services under r 5.5 requires they be "associated" with the provision of regulated services. Given the purposes of the rule I understand that to mean that provision of the service must assist in the effective completion of the legal/regulated work that the lawyer is undertaking. In short a lawyer may not run a side business through his or her law firm offering services other than legal services."

[4] Paragraph [7], affidavit of D A Webb dated 12 May 2016.

[27] We consider that the seriousness of this misconduct is aggravated by the nature of the services provided, that is banking services. That is because of the privileged nature of a trust account, in the very manner promoted as a "selling point" by the ETIL website material.

[28] Mr Stewart operated in this manner from mid-2012 until shortly after the inspector's reports in February 2014. During this time he acknowledges he was entirely reliant on ETIL to carry out the due diligence in respect of the client's referred to him. However he confirmed to us in oral evidence that he was careful to always obtain some form of Government-issued identification for each client.

[29] During the period in question Mr Stewart confirms that he had complete confidence in Mr Orlov and thus his company, although he expressed to us some concern that employees appeared at times to be somewhat overburdened.

[30] In terms of his role as a director of ETIL, Mr Stewart also expressed concerns that at no time was he asked to attend a director's meeting, did not ever see annual accounts, nor was asked to sign any minutes. He said he resigned within the year because of his concerns. The records of his communication with the inspector, Mr L, would indicate the resignation was rather more prompted by the practitioner's wish to cooperate fully with the inspector, who was clearly expressing concerns about the banking business.

[31] Mr Stewart described his own disappointment in his lack of judgment as he became aware, particularly with the transactions relating to CMIL, that he was being used to provide a banking facility for clients who were not likely to provide instructions to him for other legal matters. He said it was this concern about his own naivety that in part prompted his guilty plea and retirement from practice. Mr Stewart stated that he no longer has any contact with Mr Orlov. He stated that he was "…not privy to the way in which their website was structured, nor the way that (he) was promoted on that website". The distant role the lawyer took in relation to the promotion of the banking services to be offered was lax and naïve.

[32] The risks of a practitioner allowing his trust account to be utilised in the manner that has occurred here, particularly via the intermediary of a company such as ETIL in

which the lawyer had no day to day management or even more distant governance role, are obvious. We consider this is very serious conduct indeed.

2. Aggravating features

[33] In respect of Charge 1, the length of time of the irregularities, namely three years is an aggravating feature, in addition to the inherent seriousness of the conduct itself.

[34] In addition, it is acknowledged by Mr Stewart that the filing of 30 incorrect certificates is an aggravating feature.

3. Mitigating features

[35] In relation to the offending itself, the following is mitigatory:

- Mr Stewart cooperated fully with the investigator;
- He took steps to remedy the accounting errors and arranged further training at significant cost to himself;
- He immediately acknowledged his errors and took responsibility for them. He conducted himself wisely in the disciplinary process by engaging competent counsel and negotiating a proper plea and penalty proposal.

[36] Personal mitigating factors are:

- Mr Stewart has been a practitioner for 32 years, and prior to the events leading to this matter had an unblemished disciplinary record. He deserves considerable credit for this.

[37] We also regard Mr Stewart's decision to remove himself from legal practice voluntarily as demonstrating insight into his offending, and his lack of judgment in relation to the banking matters. His disappointment in himself and contrition at letting down his own professional standards, and his profession as a whole was evident from his presentation at the hearing.

4. Relevant penalty decisions

[38] Counsel for the Standards Committee referred us to a number of decisions whereby misconduct or negligence in the operation of a trust account have been considered by a Tribunal.[5] As these cases demonstrate, all cases which come before the Tribunal are different, have relevant contextual framework in which they are considered and must be approached on an individual basis, bearing in mind the overall purposes of the Act to protect the public and uphold the standards of and trust reposed in the legal profession. On behalf of the practitioner Ms Webster also referred us to the *Daniels* decision[6] as well as two others.[7]

[39] We were reminded by *Daniels*[8] to impose the least restrictive outcome possible with the imposition of a proportionate response to serious offending.

[40] The joint submission of counsel was that a suspension of 12 months was proper.

[41] In respect of the more serious charge, the "banking offence", as stated at the outset of this decision, such conduct has not been considered by the Tribunal before.

We consider that the circumstances of this case, coupled with the other trust account offending, could well have justified a suspension of two years. In some cases conducting banking services might well justify strike-off. It will be a matter of assessment in each case. We make this assessment having regard to all of the authorities' referred to us as well as to the *Hancock*[9] matter, in which the practitioner was struck off.

5. Deterrence

[42] While we do not consider that there is a need for specific deterrence, for this practitioner, we do consider that there ought to be an element of general deterrence in the fixing of a penalty for the banking services charge. We have already referred to the

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[5] *Wellington Standards Committee v Manktelow* [2012] NZLCDT 30, *Auckland Standards Committee No. 5 v Patel* [2014] NZLCDT 67, *Wellington Standards Committee No. 2 v Jones* [2014] NZLCDT 52, *Auckland Standards Committee No. 2 v Hollins* [2014] NZLCDT 66, *Auckland Standards Committee No. 4 v Appleby* [2014] NZLCDT 34.
[6] *Daniels v Complaints Committee No. 2 Wellington District Law Society* [2011] 3 NZLR 850.
[7] *Hawkes Bay Standards Committee v Heaphy* [2014] NZLCDT 78, *Auckland Standards Committee No. 2 v Burcher & Ors* [2015] NZLCDT 47.
[8] See footnote 6.
[9] *The Hawkes Bay Lawyers Standards Committee v Hancock* [2011] NZLCDT 39.

privileged status of the solicitors trust account. This justifies a firm response where the Regulations which are in place to monitor its operations are breached. We also consider that if lawyers were to use the privileged status of the trust account to provide banking services in the manner which has occurred in this matter there is a serious risk of them breaching their obligations under the Act to uphold the Rule of Law and to "... facilitate the administration of justice in New Zealand".[10] For this reason there must be a deterrent component in the period of suspension to be imposed on this practitioner.

6. Protection of the public

[43] In Mr Stewart's case, he is taking time out of legal practice to reflect on the matters which have led him to this point and we consider that, having made that election, that there is not a current need to protect the public from him.

7. Overall fitness

[44] We share Mr Stewart's concerns about his judgment in allowing himself to become engaged in the business of ETIL without further scrutiny and without ongoing due diligence in his position. He was unwise to accept a directorship without insisting on regular meetings and properly administered resolutions, although these might well exist, the practitioner was not aware of them. When asked whether he had read the statements on the company's website he indicated that he had not read beyond the first page which he regarded as "puffery". That was irresponsible in our view.

[45] However against that is the practitioner's own decision to step aside from practice and to take responsibility.

[46] As indicated we would, but for the strong mitigatory features in this matter, have imposed a penalty of two years suspension. In these circumstances we consider that it is proper to impose a suspension of eighteen months from the date of the hearing. With that slight departure from the agreed penalty regime we adopt it as suggested by counsel and thus the orders are as follows:

[10] Section 4.

Orders

1. The practitioner will be suspended for a period of 18 months commencing from 6 September 2016.

2. There will be a censure as follows:

   Mr Stewart, as an experienced lawyer, you understand that the holding of a Trust Account, with the privileges and responsibilities that entails, is one of the fundamentals underpinning legal practice. Anything other than full and diligent compliance with the statutory provisions regulating the management of the trust account will not be tolerated by your professional body.

   As you have acknowledged, you fell well short of the required standards over a lengthy period. You were also lacking in caution and diligence in the way you managed the referral of clients from another entity with which you were associated, and in which you appeared to place almost blind trust. Your suspension from the practice of law will give you time to reflect further on these matters. You are censured accordingly.

3. There will be costs in favour of the Standards Committee in the amount of $16,000.

4. There will be an order pursuant to s 257 for the Tribunal's costs in the sum of $2,488.00.

5. The practitioner will reimburse in full the s 257 costs to the New Zealand Law Society.

DATED at AUCKLAND this 15th day of September 2016

Judge D F Clarkson
Chair

Appendix 1

CHARGES

CHARGE 1

The Otago Standards Committee charges Greg Roderick Stewart ("Mr Stewart") of Alexandra with:

> Negligence or incompetence in his professional capacity, and that the negligence or incompetence has been of such a degree or so frequent as to reflect on his fitness to practise or as to bring his profession into disrepute pursuant to s 241(c) of the Act.

The particulars of the charge are that:

Background

1. Mr Stewart was, at all relevant times, the sole director of Stewart & Associates Lawyers, Limited, an incorporated law firm ("the firm").

2. Mr Stewart was the principal of the firm and was also the firm's trust account supervisor. Mr Stewart was solely responsible for management of the firm's trust account.

Failure to keep adequate records

3. Between May 2011 and May 2014 the records Mr Stewart kept of the firm's trust account transactions did not clearly show the position of funds held for each client. The records kept had many errors due to poor recording of both the date and information relating to receipts and payment.

4. Mr Stewart was thus in breach of s 112 of the Lawyers and Conveyancers Act 2006 ("the Act") and regulation 11 of the Lawyers and Conveyancers Act (Trust Account) Regulations 2008 ("the Regulations").

5. Specifically, the trust account records:

   (a) Were not kept in such a manner as to enable them to be conveniently and properly reviewed by the inspectorate in breach of regulation 11(1).

   (b) Did not clearly show the amount of trust money held for each client in breach of regulation 11(2).

   (c) Were not otherwise kept in a manner that disclosed clearly the position of the money held in breach of s 112(1)(a) of the Act.

6. In respect of the above breaches:

   (a) Mr Stewart was or should have been aware of the relevant requirements.

(b) Mr Stewart acted negligently or incompetently in failing to adhere to the relevant requirements.

Client balances overdrawn

7. Between May 2011 and May 2014 various client balances have been in debit. No proper steps were taken to rectify this position.

8. At the relevant times the float or advance account balance maintained by the firm was not sufficient to cover the total of the debit balances. Mr Stewart was thus in breach of regulation 6.

9. In respect of the above breaches:

(a) Mr Stewart was or should have been aware of the relevant requirements.

(b) Mr Stewart acted negligently or incompetently in failing to adhere to the relevant requirements.

Failure to reconcile trust bank accounts with trust ledger

10. Between May 2011 and April 2014 the various trust bank accounts were not reconciled correctly with the trust ledger at the end of each month. Mr Stewart was thus in breach of regulation 14.

11. In respect of the above breaches:

(a) Mr Stewart was or should have been aware of the relevant requirements.

(b) Mr Stewart acted negligently or incompetently in failing to adhere to the relevant requirements.

Incorrectly certifying compliance with the Act and Regulations

12. For each month between May 2011 and November 2013 Mr Stewart filed the required certificate with the New Zealand Law Society certifying, inter alia, that:

(a) The trust ledger was correctly reconciled with the corresponding trust bank accounts (regulation 17(1)(a)(i)).

(b) The trust account records were a complete and accurate record of transactions during the month and of each client's position (regulation 17(1)(a)(ii)).

(c) The firm had complied with the Regulations (regulation 17(1)(b)(ii)(A)).

13. Each of the certificates filed were incorrect and Mr Stewart was thus in breach of regulation 17 in that:

(a) The trust ledger was not correctly reconciled with the corresponding trust bank accounts.

(b) Given the errors in the trust account records (noted above) the trust account records were not a complete and accurate record of transactions during the month and of each client's position.

(c) As detailed above, the firm had not complied with the Regulations.

14. In respect of the above breaches:

(a) Mr Stewart was or should have been aware of the relevant requirements.

(b) Mr Stewart acted negligently or incompetently in failing to adhere to the relevant requirements.

CHARGE 2

The Otago Standards Committee further charges Mr Stewart with:

> Misconduct in his professional capacity pursuant to section 241(a) of the Lawyers and Conveyancers Act 2006 ("the Act").

The particulars of the charge are that:

Background

15. The particulars at paragraphs 1. and 2. above are repeated.

Provision of banking services

16. Mr Stewart became a director of Equity Trust International Limited ("ETIL") in June 2011. He was not at any point actively involved in the governance of ETIL.

17. ETIL provided financial and other advice to overseas clients and referred such clients to associated advisers, including Mr Stewart.

18. ETIL's website advertised the availability of a solicitor's trust account for use by clients under a page titled "Escrow Account". That page did not include any reference to the provision of legal services by the solicitor.

19. ETIL's website advertised the advantages of an "escrow account" as follows:

(a) Account can be open in 48 hours.

(b) Due diligence is done by the lawyer and us not the bank and money is accepted by our preferred lawyer on our certification that it has been cleared under our AML [anti-money laundering] policy.

(c) Account can be completely confidential.

(d) No limit to quantum of funds sent.

(e) Cannot be frozen or arrested by the bank because it is a part of a lawyer's trust ledger and therefore regulated by the law society not banks [sic] policies.

20. When a client was referred to Mr Stewart by ETIL the letter of engagement issued by Mr Stewart (on behalf of the firm and ETIL) recorded the services provided as:

> "Representation within New Zealand including the provision of Banking Services through our Solicitor's Trust Account with the Bank of New Zealand."

21. The letter of engagement recorded the basis on which fees would be calculated as follows:

> "An annual fee of US$1,500.00 (inclusive of GST), which includes 10 transactions per month. This fee will be apportioned between Stewart & Associates and Equity Trust International Limited. Additional transactions in any month will incur fees at our standard rate of NZ$250.00 per hour plus GST and any disbursements (expenses incurred on your behalf)."

22. When ETIL referred clients to Mr Stewart, those clients would typically deposit funds into the firm's trust account and/or foreign currency accounts held by the firm. Mr Stewart would then complete further transactions in accordance with the client's instructions.

23. In this manner, Mr Stewart provided banking services to a number of clients referred by ETIL. In breach of rule 5.5.1 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, such banking services were not associated with the provision of regulated services.

24. Specifically, Mr Stewart provided banking services which were not associated with the provision of regulated services to the following clients:

(a) Beth Gray, Gray & Co

(b) Pacific Blue Limited Partnership

(c) GBFX Limited

(d) Ethos Capital Limited

(e) Capital Market Investments Limited

25. In respect of the above breaches:

(a) Mr Stewart was aware of the relevant requirements.

(b) Mr Stewart acted wilfully or recklessly in breach of the relevant requirements.