NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL

[2016] NZLCDT 32
LCDT 042/14

UNDER	the Lawyers and Conveyancers Act 2006
BETWEEN	**OTAGO STANDARDS COMMITTEE** Applicant
AND	**RICHARD ZHAO** Respondent

CHAIR
Judge D F Clarkson

MEMBERS OF TRIBUNAL
Mr W Chapman
Mr M Gough
Ms C Rowe
Mr I Williams

HEARING at Specialist Courts and Tribunals Centre, Auckland

DATE OF HEARING 31 October 2016

DATE OF DECISION 23 November 2016

COUNSEL
Mr J Shaw for the Standards Committee
Mr F Deliu for the Respondent

DECISION OF THE TRIBUNAL ON PENALTY

Introduction

[1] Mr Zhao was found guilty of one charge of misconduct, which contained four categories of professional default. The defaults were acknowledged by Mr Zhao although he sought to argue they represented a lower level of professional failing than misconduct. The background facts and reasons for the misconduct finding are contained in our decision of 19 August 2016 (the Liability Decision).[1]

[2] This decision determines the penalty to be imposed and reasons for that penalty.

[3] The process by which penalty is determined is now well established. The starting point is the seriousness of the conduct.[2] Next, is consideration of aggravating and mitigating features relating to the conduct and to the lawyer. Finally, the Tribunal references cases where similar conduct has been considered, although almost every situation has unique qualities and must be individually assessed.

Seriousness of Conduct

[4] We found that Mr Zhao had been "reckless"[3] in relation to "… his professional and fiduciary obligations …" by the manner in which he had failed to deposit his client's $50,000 into his trust account for six and a half weeks, leaving it sitting in various (including interest bearing) of his personal accounts.

[5] We found the three further defaults in his conduct, as set out in the Liability decision, "… intensif(ied) the level of wrongdoing".[4]

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[1] *Otago Standards Committee v Zhao* [2016] NZLCDT 22.
[2] *Hart v Auckland Standards Committee 1* [2013] 3 NZLR 103.
[3] See note 1 at [81].
[4] See note 1 at [82].

[6] We held that compliance with the Regulations and Rule around the treatment of client funds was "… a fundamental obligation of legal practice".[5] We do not accept the submission that Mr Zhao was merely naïve.

[7] In summary we regard Mr Zhao's professional failings as serious, although not at the very top of the scale (such as the cases involving deliberate theft of client monies, for example).

Aggravating Features

[8] Mr Shaw submitted that the level of recklessness, the amount of client funds at risk and the period of time over which they were at risk, are significant aggravating features. We accept that submission. Mr Deliu submitted on behalf of Mr Zhao that the funds were not in fact at risk and indeed that no loss was sustained (other than the loss of interest on the funds), by the client.

[9] That submission entirely misses the point that any funds held on trust for a client are entitled to the special protection offered by the stringent rules surrounding the administration of trust accounts, and that we have found that by retaining client funds within his own savings accounts the practitioner recklessly disregarded these rules and placed the client's funds potentially at risk.

[10] The more serious aggravating feature in our view is, however, the practitioner's recent disciplinary history.

[11] These five findings were the subject of considerable discussion at the penalty hearing. That is because Mr Zhao has challenged each of those five findings of unsatisfactory conduct against him. By the conclusion of the penalty hearing we had become aware that two of the decisions of the Standards Committee had been upheld by the LCRO.[6]

[12] A further decision was the subject of judicial review in which a decision had been reserved. The fourth finding (the Caveat case) was now the subject of a stay of the review by the LCRO pending the outcome of civil proceedings being taken against the lawyer by the complainants.

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[5] See note 1 at [81].
[6] Legal Complaints Review Officer.

[13] The fifth finding was also awaiting a decision from the LCRO.

[14] Mr Deliu submitted that the Tribunal should either ignore the previous findings against his client, a number being subject currently to challenge, or alternately endeavour to express, in assessing penalty, the weight attributed to such previous findings, in case they should be set aside.

[15] Mr Deliu's earlier indication that he might need to seek an adjournment until all previous disciplinary findings have been finally determined was not ultimately pursued at the hearing before us.

[16] In response to the submission as to previous conduct, Mr Shaw submitted that "each of the prior findings is currently extant …" and that not only was it "an entirely orthodox principle" that previous disciplinary history is to be considered but also that it is necessary to give effect to the public protection purposes of the Tribunal's penalty function.

[17] Mr Shaw submitted that:

> "To adjourn imposition of penalty until all review or appeal options have been exhausted would give rise to unconscionable delay and would undercut the statutory emphasis on ensuring the expeditious determination of proceedings".

[18] We accept that submission entirely and repeat that adjournment was not pressed by Mr Deliu at the hearing. Mr Shaw went on to submit that it would be "doubly inappropriate" to disregard prior findings in the context of Mr Zhao raising his prior good character in his submissions, and through endorsements from clients which he provided to the Tribunal.

[19] We accept Mr Shaw's submission that "establishing an overall picture of Mr Zhao's approach to his professional and ethical obligations is essential to the present penalty exercise".

[20] The Tribunal has a statutory obligation to observe the dominant purpose of the Act[7] set out in s 3:

[7] Lawyers and Conveyancers Act 2006.

"3 Purposes

(1) The purposes of this Act are—

(a) to maintain public confidence in the provision of legal services …

(b) to protect the consumers of legal services …

(c) to recognise the status of the legal profession …"

[21] We accept that it would have been an entirely artificial approach to ignore prior findings when considering the current (and sixth) set of professional failings by the practitioner, over the short period of under three years.

[22] Mr Shaw emphasised:

> "The prior disciplinary history is an important factor in assessing ultimate fitness to practice and the associated concerns regarding public protection and maintaining professional standards."

[23] He further submitted that:

> "Stepping back the overall picture established by the proven misconduct and the prior findings is of a practitioner who has been repeatedly ignorant or indifferent to his professional and ethical obligations …"

[24] In contrast Mr Deliu submitted:

> "… There is no need to protect the public. The offending is stale and there is no indication of current risk. The other history is or has nothing to do with public danger."

[25] We disagree with this submission strongly. In particular, the Standards Committee finding, upheld by the LCRO, of the practitioner's overcharging of the complainant in the current matter before us is a seriously aggravating feature of the present conduct. Moreover, it distinguishes the present case from the *Jones*[8] case cited by Mr Deliu in support of his client's submissions that suspension is not required. In that matter "… there was no suggestion of overcharging of fees …".

[26] The lengthy decision of the LCRO in relation to the overcharging matter in fact arrived in the course of the hearing as to penalty before us. The unsatisfactory conduct found (and upheld) was based on the practitioner having charged a total of $50,000 (precisely the amount paid on amount of costs by Ms L and banked to the practitioner's personal accounts) when the costs assessment investigation fixed $10,000 as the

[8] *Wellington Standards Committee 2 v Jones* [2014] NZLCDT 52 at [6].

proper figure to have been charged, taking account of a number of specific and articulated factors. This finding also establishes that in fact the funds were "in danger" and there was a "loss to the client", contrary to Mr Deliu's submissions.[9]

[27] That is very serious, indeed 'high end' unsatisfactory conduct, directly connected with the presently considered conduct and weighs heavily in our assessment of penalty. The LCRO did reduce a compensation order of $7,000 to $2,000 but otherwise left the findings of the Standards Committee intact including the order to repay to Ms L the $40,000 together with the $2,000 compensation and to amend his fees account accordingly.

[28] Mr Shaw submitted that the Caveat case was the most serious of the previous findings because it involved the finding that the lawyer had deliberately misled his clients. We do not propose to place much weight on this decision for a number of reasons. Firstly, the matter is the subject of extant civil proceedings between the lawyer and his former clients and secondly we note that the lawyer produced to us further evidence which may not have been before either the Standards Committee or the LCRO and which may be relevant.

[29] As to the other findings, these included a pleading of the tort of deceit without proper foundation and failing to comply with client instructions to obtain an adjournment as well as other more minor aspects of the surrounding circumstances of the present case.

[30] We note that these findings are relevant in terms of the overall assessment of the practitioner's fitness but would not have moved us significantly to impose a firmer penalty in the sense that we consider the current matter and the overcharging previous finding to be in themselves justification for a serious response from the Tribunal.

Mitigating Features

[31] Mr Deliu made a number of submissions on mitigating features in relation to his client. In particular, we note his acceptance of the facts (while challenging the degree of seriousness of his conduct). This mitigation can only be given limited weight given that his own bank records could hardly be disputed in any event.

[9] Para 23 and 24 Submissions for Respondent.

[32] We accept that Mr Zhao has taken steps to prevent further trust accounting problems, by engaging an independent external trust accountant.

[33] Mr Deliu submitted that his client has shown contrition and remorse. Given his approach to the proceedings we consider the remorse to be somewhat belated, however we were impressed by Mr Zhao's actions in the course of the hearing. After the LCRO decision arrived, which obliged him to pay $42,000 back to his client, we invited Mr Zhao to consider writing a cheque for that sum or making arrangements for the payment to Ms L immediately, to demonstrate his level of remorse and acceptance of responsibility.

[34] Although he indicated that he might well wish to challenge the LCRO upholding of the unsatisfactory conduct finding further in some forum, Mr Zhao indicated that he was prepared to make the payment immediately. Mr Zhao enacted that by payment to counsel for the Standards Committee that very same day and we took that to be a genuine expression of a willingness to put things right.

[35] Mr Deliu pointed to the *pro bono* work carried out on behalf of Chinese clients in Auckland and Mr Zhao provided letters from grateful clients. While these letters are to his credit, they of course are not provided from a position of full information about the present proceedings. Mr Zhao adduced letters to demonstrate he was held in high regard in the Chinese community. However, it was also notable that there was not a single reference from a legal colleague, which is a unique situation in our experience.

[36] While Mr Deliu submitted that Mr Zhao had fully cooperated with the disciplinary apparatus we note that the hearing, despite agreed facts, occupied some three days and included a number of interlocutory applications (such as for recusal of members), which were unsuccessful.

[37] While fully exercising one's rights as a respondent is not an aggravating feature, having done so, a practitioner cannot then rely on 'full acceptance of responsibility' as a mitigating feature.[10]

[38] We accept the submission that Mr Zhao has suffered personally with the stress and publicity of the proceedings and that he is regretful of his actions.

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[10] *Daniels v Complaints Committee 2 of the Wellington District Law Society* [2011] 3 NZLR 850.

[39] We also accept as a mitigating feature, the significant financial consequences as a result of the repayment and high costs of the present litigation. However we do note that to a greater extent the level of the costs has been of Mr Zhao's own making by the manner in which he conducted this hearing, which might well have been restricted to half a day, given the acceptance of all relevant facts. We also note he cannot be given more significant credit for his repayment of the $40,000 which he was said to have overcharged, that being a legal obligation.

Relevant Cases

[40] We have referred to and distinguished already the *Jones*[11] *case.*

[41] Mr Deliu also referred us to the *Appleby*[12] decision. We note that in that matter there were significant and serious deficits in the practitioner's operation of his trust account which led to a finding of misconduct. The Tribunal stopped short of suspension in that matter having regard to strongly mitigatory personal circumstances and the isolated nature of the conduct. He was not a practitioner facing his sixth (or even third) disciplinary finding as in the present matter.

[42] He referred us to decisions of *Manktelow*[13], a practitioner who was suspended for 12 months and who had previously been warned about the management of his trust account. We accept that the conduct of that practitioner was more serious than the present conduct.

[43] Mr Deliu referred to two other decisions when submitting at his para [9], "There is a clear line of authorities where suspension resulted from far greater violations". In addition to those we have mentioned in the foregoing paragraphs, he cited *Holmes*[14] and *Salter*[15]. In fact, in each of those judgments the Tribunal did not suspend the practitioner. And, as we have found when comparing the *Appleby* decision, the conduct of the subject practitioner was less serious or concerning than that in the present instance. In *Holmes*, the practitioner was charged for issuing pro forma invoices to remove "stale" balances for clients he believed could not be located or companies

[11] See note 8 at [24].
[12] *Auckland Standards Committee 4 v Appleby* [2014] NZLCDT 34.
[13] *Wellington Standards Committee v Manktelow* [2012] NZLCDT 30.
[14] *Auckland Standards Committee 5 of the New Zealand Law Society v Holmes* [2011] NZLCDT 31.
[15] *Auckland Standards Committee 2 v Salter* [2015] NZLCDT 28.

whose liquidations had been completed. There were comparatively small amounts of money involved and no suggestion of any significant net benefit. The practitioner had an exemplary disciplinary record beforehand.

[44] In *Salter* the practitioner was not suspended following a charge of misconduct, similarly. Again, the charged conduct was not of such a serious nature as we have found in relation to Mr Zhao. In *Salter,* the practitioner lost control of clients' funds relating to transactions by reason that they were in a trust account of another practice. There were aggravating factors, but on balance we find the conduct in the present case to be more serious, for the reasons developed already, including a significant overcharging of the client whose money was at risk.

[45] We accept that the most comparable case is that of *Chen.*[16] However we consider the current case more serious in the sense that the amount involved in the *Chen* matter was only $5,000 not $50,000 as in the present case and he had only one previous finding against him. In addition Mr Chen was able to take some credit from having admitted the charge and supporting particulars from the outset. Also, Mr Chen was an employee and not the trust account supervisor.

[46] We also note the decision referred to us of *Patel*[17] in which the practitioner was suspended for three years. That was a significantly more serious matter than the present and with a practitioner who had had three previous unsatisfactory conduct findings against him.

Decision

[47] Even had we put all of the previous findings against this practitioner to one side, the seriousness of the present conduct could certainly have justified a suspension.

[48] The practitioner has been found wanting in a number of areas of professional obligations (trust account operation, charging practices, and client service). We consider this must raise questions over his fitness and require for him to undertake a period of reflection on his conduct as a lawyer and manner of operation of his practice

[16] *Auckland Standards Committee 5 v Chen* [2015] NZLCDT 2.
[17] *Auckland Standards Committee 5 v Patel* [2014] NZLCDT 67.

and a period of rehabilitation. He has indicated that he is willing to retake the next available trust account supervisor's course and we propose to direct that he must do so.

[49] The six month period of suspension sought by the Standards Committee is not unreasonable, but having regard to Mr Zhao's willingness to recompense the complainant immediately, in the significant sum of $42,000 together with the costs orders which will be in place, we recognise he faces significant financial consequences. For that reason we are minded to impose the minimum period of suspension necessary to reflect the seriousness with which we regard the overall picture and thereby allow the practitioner to return to productive work as soon as is proper. We direct that the practitioner will be suspended from practice for a period of four months commencing one week from the release of this decision.

Costs

[50] The Tribunal costs pursuant to s 257 are certified in the sum of $15,508, and will be ordered, as is mandatory, against the New Zealand Law Society.

[51] We consider that it is proper that the practitioner reimburse the full costs of the Tribunal to the New Zealand Law Society and there will be an order pursuant to s 249 accordingly.

[52] The applicant seeks full reimbursement of the Standards Committee costs in this matter. We have already referred to the drawn out nature of the hearing and a number of interlocutory matters raised including the seeking of summonses and recusal of members.

[53] Mr Deliu had an opportunity of making submissions on costs and challenged a number of the attendances referred to on the invoices provided by Mr Shaw. There have been adjustments following those submissions, however Mr Deliu seeks time records from the Prosecutor. The earlier invoices, before Mr Shaw had carriage of the matter, do not detail time and attendances but certainly do not, on their face, appear to be in any way unreasonable and were charged out at the very responsible and modest hourly rate of $250 per hour throughout. That is for the partner and the solicitor assisting at $150 per hour. We consider, having regard to the subtractions made by Mr Shaw relating to two matters referred to by Mr Deliu at the hearing, that the charges are

proper and reasonable. The charges are also in line with other matters of similar complexity which the Tribunal has considered.

[54] The Tribunal has a broad discretion to award costs under s 249 and the total adjusted amount sought is $47,903. We accept Mr Shaw's submission that attendances relating to attempted resolution of the proceedings are properly chargeable. There will be an order for costs against Mr Zhao in the sum of $47,903.

[55] In addition we consider that in this case as well as suspension, that a censure ought to be imposed on Mr Zhao which we now deliver in the following form:

> **Censure**
>
> Mr Zhao, you have been censured three times by a Standards Committee in a general way. The Tribunal takes the view that having found you guilty of misconduct, you need to be censured in terms that are more specific to your wrongful behaviour. The Tribunal has found and you have admitted that you knew the rules about the need to hold clients funds in a trust account and not your personal account. At the time of your offending you had not long completed the Trust Account Supervisor qualification and were well aware of your obligations yet you chose to ignore them as if the rules, for some reason, did not apply to you. You were of the opinion that as long as you tidied up at the time of billing, all would be well and there was no need to ensure client funds were held in trust.
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> That attitude Mr Zhao, is unacceptable to the Tribunal and would be unacceptable to all practitioners and to informed members of the public. It is the Tribunal's role to protect members of the public generally and your fellow practitioners from such wrong behaviour and to signal on behalf of those groups by way of censure, the Tribunal's disapproval. It is to be hoped that you will reflect on this censure and the earlier general censures to encourage you to improve your practices.
>
> Mr Zhao, you are censured accordingly.

Summary of Orders

(1) The practitioner is censured as per paragraph [55] of this decision.

(2) The practitioner is suspended from practice for a period of four months from the 1st day of December 2016.

(3) The practitioner is to undertake the next available course as a trust account supervisor.

(4) The practitioner is to pay costs to the Standards Committee in the sum of $47,903.

(5) The New Zealand Law Society is to pay the s 257 costs of the Tribunal in the sum of $15,508.

(6) The practitioner is to reimburse the New Zealand Law Society for the full s 257 costs as ordered.

DATED at AUCKLAND this 23rd day of November 2016

Judge D F Clarkson
Chair