NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL

[2016] NZLCDT 34
LCDT 007/16

IN THE MATTER	of the Lawyers and Conveyancers Act 2006
BETWEEN	**WAIKATO BAY OF PLENTY STANDARDS COMMITTEE No. 2** Applicant
AND	**MR M** Practitioner

CHAIR
Judge D F Clarkson

MEMBERS OF TRIBUNAL
Ms J Gray
Mr C Lucas
Ms C Rowe
Mr W Smith

DATE OF HEARING 8 November 2016

HELD AT Specialist Courts and Tribunals Centre, Auckland

DATE OF DECISION 24 November 2016

COUNSEL
Mr P Davey for the Standards Committee
Practitioner In Person

REASONS OF THE TRIBUNAL FOR DECISION ON PENALTY

Introduction

[1] In our decision of 6 September 2016 we found Mr M guilty of one charge of negligence such as to tend to bring the profession into disrepute. We found Mr M to have been well motivated but that he had breached a number of Rules under the Client and Conduct Care Rules, Lawyers and Conveyancers Act 2006.

[2] The background to this conduct is set out in our September decision.

Submissions of the Standards Committee

[3] The Standards Committee submitted that the seriousness of the conduct justified a short period of suspension and sought a number of other orders including compensation for legal fees incurred by the complainant, a refund of some legal fees paid by the complainant to the lawyer, censure and costs.

[4] Mr Davey correctly pointed out that the lawyer had been acting for a vulnerable elderly woman, and a long-time friend, with some cognitive impairment. This situation certainly does increase the seriousness with which the offending is viewed. However we note that we are constrained to reflect, in our imposition of penalty, that the period during which the breaches occurred was only a matter of weeks and that perhaps the more egregious and conflicted behaviour had begun during the period when Mr M did not hold a practising certificate and before Mr M had been issued with a practising certificate in mid-July 2014. That earlier conduct cannot be reflected in penalty although the continuation of the conflict was, as was clearly expressed to Mr M a very serious matter in the Tribunal's view.

[5] The Standards Committee referred the Tribunal to other cases of negligence such as *Johnston*,[1] *Monckton*,[2] and *Grave.*[3]

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[1] *Auckland Standards Committee 3 v Johnston* [2011] NZLCDT 14.
[2] *Waikato Bay of Plenty Standards Committee 1 v Monckton* [2014] NZLCDT 51.
[3] *Canterbury Westland Standards Committee No. 1 v Grave* [2016] NZLCDT 8.

[6] We consider each of these cases to involve a more serious level of conduct and note that in *Grave*, no suspension was imposed and in *Monckton* only one month suspension was imposed.

[7] It is accepted by the Standards Committee Mr M, who is an older practitioner is no longer in practice and has indicated that he will not seek a practising certificate again.

[8] In this sense, there is no question about direct protection of the public, it is a more indirect protection in the sense of the public being able to perceive the proper upholding of professional standards in the Tribunal's response.

[9] The Standards Committee also point to the lack of insight or remorse demonstrated by Mr M.

[10] Mr Davey also points to Mr M's failure to take responsibility also taking the form of raising a number of technical defences throughout the process, which has not only prolonged it but also increased the level of costs for the prosecution committee.

[11] The Standards Committee also opposed final name suppression which had been granted on an interim basis. We will deal with these submissions separately.

Submissions for the Practitioner

[12] Mr M, who represented himself, sought to gain credit because of what he referred to as a less than professional approach by the Standards Committee. We reject that assertion. Mr M complained that there had been a failure to observe s 143 of the Act[4] when his suggestion of mediation had not been pursued. A reply affidavit was filed on behalf of the Standards Committee by Mr Garreth Heyns, which refuted that assertion. The complainant declined to engage in the mediation process and in addition both her counsel and the Standards Committee considered the matter to be too serious to take the mediation approach.

[13] Mr M also complained about the lack of expeditious process when there was an eight-month delay while legal opinions were obtained, before a Standards Committee

[4] Lawyers and Conveyancers Act 2006.

determination to prosecute. And then, subsequently, a further six months before charges were laid.

[14] While these are unfortunate delays, they were not unconnected with the technical approach that was taken by Mr M himself. Although the Tribunal accepts that it is highly stressful for a practitioner who is facing possible charges to await the outcome of decisions, in this instance the Society was apparently taking a responsible and considered approach to the matter.

[15] More relevantly, Mr M sought to draw, as mitigation, support from what he described as his "exemplary conduct" in his 33 years as a lawyer. He has no history whatsoever of disciplinary action against him in the past and has been a significant contributor to his profession in the following ways:

- He is clearly an accepted expert in his particular field.

- He has obtained the significant achievement of authoring a leading textbook in this subject.[5]

- We accept his submission that in 33 years he has been more focused on legal teaching and writing and the charity and community service which is the focus of his work, than on financial rewards of private practice.

- He has made significant pro bono contributions to the development of facilities for his particular charity and to the law in the subject of ethics pertaining to his field.

- He has also made a contribution to significant community projects through service on a pro bono basis.

- He has been an advisor to Government.

- He has held posts in relation to his particular field, both at national and international level.

[5] The suppression order which we will discuss means that details of the particular area of expertise cannot be stated without risk of identification of the practitioner.

- He has received a number of awards in recognition of 40 years of community service.

[16] Normally, the Tribunal is reluctant to record too much credit for such service if it is being weighed against the need for public protection. As already stated this is not relevant in the current instance because this practitioner is no longer serving clients and is fully retired.

[17] Finally, on the "credit side of the ledger", although his actions involved the payment by his (later) client of a significant amount of money to a charity, the practitioner's diligence in respect of taking on the management of her affairs in fact uncovered almost double that sum in a bank account of which his client had previously been unaware.

[18] The lawyer's health is extremely poor at the present time and he is awaiting major surgery. His emotional health has also been poor and at times he has suffered from depression and anxiety according to his general practitioner.

[19] His sole form of income is from national superannuation.

Decision

[20] Taking the approach of the least restrictive intervention[6] we consider that the seriousness of the conduct, having regard to the mitigating features does not demand suspension, to reflect a proportionate response.

[21] Instead, we propose to impose a fine and censure and other consequential orders, which will have a considerable financial impact on the practitioner.

Name Suppression

[22] The reasons for interim name suppression are set out in our interim decision of 25 July 2016.

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

[23] The Standards Committee submit that the public interest in openness of the disciplinary process demands that the practitioner's name be published.

[24] We accept that an adverse finding means that the threshold for suppression is higher than at an interim stage.[7]

[25] Mr Davey accepted the decisions of *H*[8] and *ABC.*[9] Both allowed permanent suppression in cases where the practitioners had serious health concerns. In the latter case the likely detriment to the practitioner's mental health had been certified by a psychiatrist. Mr Davey submits that, in the absence of a certificate from a psychiatrist, the Tribunal ought not to be satisfied in this regard. In the *H* matter both psychological and physical health problems were involved and the serious adverse consequences which might be suffered by the practitioner were his name published, tipped the balance against publication in that matter.

[26] In the present case there is ample information before the Tribunal to accept that there are both psychological and physical health conditions at a serious level. In addition to that, as referred to in our interim decision, the practitioner has in the past been pursued by a litigious and irrational person who might be expected to re-engage in a campaign against the practitioner should the present matters come to that person's attention.

[27] The litigation pursued by this person has been the subject of adverse judicial comment at all levels.

[28] Given that there is no risk to the public posed by this practitioner in the future, we consider that the combination of factors referred to above do, in this unusual set of circumstances, justify the permanent name suppression of the practitioner, his former client and any identifying details.

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[7] *T v Director of Proceedings* HC Christchurch CIV-2005-409-2244, 21 February 2016, Panckhurst J.
[8] *H v Waikato Bay of Plenty Standards Committee 1* [2013] NZHC 2090.
[9] *Auckland Standards Committee No. 5 v ABC* [2012] NZLCDT 14.

Consequential Orders

[29] We consider that it is proper for the order for repayment of the fee rendered to the complainant by the practitioner, in the sum of $3,648.94, be refunded to the complainant.

[30] We decline to make an order for compensation to cover the costs of subsequent legal advice for the complainant. There are a number of reasons for this. The invoices include attendances at the Citizens Advice Bureau, attendances in relation to the matters for which the complainant will have received value in terms of general legal advice which she would have been required to pay for in any event. Finally, we do not wish to encourage complainants to engage counsel once a complaint is made, given that they are then represented by the Standards Committee counsel and there is a risk of duplication of costs and unfairness thereby to the lawyer concerned. We accept that in this case the complainant was somewhat impaired, however we do not consider this ought to change our approach in this matter.

Costs

[31] The costs in this matter are significant and are likely to exceed $34,000.

[32] Some of this is of the practitioner's own making because of the technical defences adopted by him. However we note that the hearing occupied less than one day. There was the interlocutory matter of name suppression but again we consider that was a proper application. Perhaps most importantly we take account of the practitioner's own personal circumstances where he is in delicate health, is dependent on national superannuation as his only source of income and will face, overall significant financial penalties arising out of the orders in this matter including the fine against him which we fix at $5,000. We have determined that a contribution of $15,000 by the practitioner to the costs of the Standard Committee is proper in these circumstances.

Section 257 Costs

[33] The s 257 costs are certified at $7,027 and are to be paid by the New Zealand Law Society.

Reimbursement of Section 257 Costs

[34] The practitioner is to reimburse the s 257 costs in full to the New Zealand Law Society.

Censure

> Mr M, in paragraph [32] of our decision on liability we set out the list of failings, which were acknowledged by you in evidence. We encourage you to reflect carefully on those failings, and remind you that the combination of those actions meant that you let your client, yourself and your profession down, albeit in an unintentional way.
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> We consider that, in addition to the other consequences set out in this decision, we must formally censure you, and now do so.

DATED at AUCKLAND this 24th day of November 2016

Judge D F Clarkson
Chair