NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL

[2018] NZLCDT 21

LCDT 010/17 and LCDT 011/17

UNDER	The Lawyers and Conveyancers Act 2006
BETWEEN	**CANTERBURY / WESTLAND STANDARDS COMMITTEE 3** Applicant
AND	**RONALD BRUCE JOHNSON** Practitioner

CHAIR

Judge D F Clarkson

MEMBERS

Ms F Freeman

Mr S Grieve QC

Mr C Lucas

Mr W Smith

HEARING 1 May 2018

HELD AT Auckland

DATE OF DECISION 22 May 2018

COUNSEL

Mr S Waalkens for the Standards Committee

Mr P Napier and Ms N Pye for the Practitioner

RESERVED DECISION OF THE TRIBUNAL AS TO PENALTY

Introduction

[1] In its reserved decision of 9 March 2018 the Tribunal found Mr Johnson guilty of:

(a) Negligence in his professional capacity of such a degree as to bring the profession into disrepute (s 41(c)).[1]

(b) Two counts of misconduct relating to reckless breaches of the Trust Account Regulations[2] in one case, and wilful and reckless breach of the same Regulations in the other.

[2] In addition to penalty the Tribunal was asked to consider suppressing the name of the practitioner.

Purposes of Penalty

[3] The purposes of penalty, in the context of legal professional disciplinary proceedings, are now well known. One of the most succinct statements of these is contained in the leading case of *Daniels:*[3]

> "It is well known that the Disciplinary Tribunal's penalty function does not have as its primary purpose punishment, although orders inevitably will have some such effect. The predominant purposes are to advance the public interest (which include "protection of the public"), to maintain professional standards, to impose sanctions on a practitioner for breach of his/her duties, and to provide scope for rehabilitation in appropriate cases."

[4] The process of assessing penalty begins with consideration of the seriousness of the conduct (*Hart*).[4]

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[1] Lawyers and Conveyancers Act 2006 ("the Act").
[2] Lawyers and Conveyancers Act (Trust Account) Regulations 2008.
[3] *Daniels v Complaints Committee No. 2 of the Wellington District Law Society* [2011] 3 NZLR 850, at [22].
[4] *Hart v Auckland Standards Committee 1 of the New Zealand Law Society* [2013] 3 NZLR 103.

[5] Aggravating and mitigating factors are taken into account. If there are comparable decisions these are reviewed with an eye to consistency, bearing in mind that in this jurisdiction, context can be very important and each situation is assessed on a case by case basis.

[6] Finally, there is an overall assessment of fitness to practice, in cases where suspension or strike-off is sought.

Broad Submissions on behalf of the Standards Committee

[7] The Standards Committee sought that the practitioner be censured, that he be suspended for a period of three to six months and that he be ordered to pay the Committee's and Tribunal's costs. Name suppression was opposed.

Broad Submissions on behalf of the Practitioner

[8] In response Mr Napier, for Mr Johnson, submitted that the proposed penalty was excessive and that a censure and fine was a more appropriate penalty in the circumstances.

Seriousness of the Offending

[9] We found misconduct proved in respect of Charges 2 and 3, which related to trust account defaults.

[10] While we stopped short of finding misconduct in respect of Charge 1, which related to the failures to Mr Johnson's clients, we found "high end negligence" pursuant to s 241(c), that is of such a degree as to bring the profession into disrepute. We consider this charge to be the one which is of most concern in terms of maintaining the reputation of the profession and the public's confidence in it. We found it a very significant failure that the practitioner had not turned his mind to whether the clients had been influenced by their relationship with Ed Johnston.[5]

[5] The conflicted practitioner who was a co-trustee selling to the inexperienced lay trustees, and also their lawyer.

[11] In our liability decision we set out other significant failures which we attributed to Mr Johnson, including failing to see the trustees separately, failure to properly advise the nature of the conflict of the co-trustee and lawyer, and failure to take account of the trustee's lack of sophistication or to ascertain their understanding of their role as trustees.

[12] In our decision we found *"… that Mr Johnson had badly let his clients down and in turn brought his profession into disrepute*."[6] We accept the submissions made by Mr Waalkens that the following factors impact on how seriously the conduct under Charge 1 is regarded:

> "The vulnerability of the clients in this case was high. Mrs H spoke poor English and was elderly. Ms D was an unsophisticated trustee. Neither had ever had their trustee duties explained to them. Independent advice was therefore crucial to ensure that the trustees made their decision to purchase (or not) on an informed basis; and
>
> The value and significance of the transaction: the trust's main asset (Mrs H's unencumbered family home) was being mortgaged to finance the purchase of a house from Mr Ed Johnston. This was not a transaction to be entered into lightly and a transaction that called out for independent advice."

[13] The overall conduct we must then consider, alongside the failings to clients, are two findings of misconduct which involve numerous breaches of the Rules, minor and significant. Some of the features of the offending in relation to these two charges are better considered under the heading of aggravating features but we do note that any false certification to the New Zealand Law Society has always been treated very seriously by the Tribunal.

[14] Mr Napier submitted that the three charges ought not to be considered cumulatively. However, this has been the Tribunal's invariable practice and has been endorsed by the High Court in *Hart*,[7]. It is proper to assess overall conduct, either under the heading of "seriousness", or under the overall assessment of the practitioner's fitness to remain in practice as a lawyer. We reject the submission on behalf of the practitioner that we ought not to stand back and look at the overall picture of the offending.

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[6] *Canterbury Westland Standards Committee 3 v R B Johnson* [2018] NZLCDT 5 at [119].
[7] See note 4.

Aggravating Features

[15] The non-compliance with the Trust Account Regulations was widespread and prolonged.

[16] It is also regrettable that it was not until late on the second day of the hearing, at the very end of his cross-examination that Mr Johnson conceded the false certification of the monthly certificates. He accepted that the trust account had not reconciled from at least August 2015 to January 2016 and that he knew that to have been the fact. He accepted that he had signed certificates saying that the trust account did reconcile and that he had declared such to the New Zealand Law Society in the knowledge that he had not yet reconciled the trust accounts. He accepted finally, that this meant that he had misrepresented the position to his professional body.

[17] His counsel submitted that this was, in a sense, self-deception, in that he had not intended to mislead the New Zealand Law Society. It was submitted that because he always intended to rectify the trust account imbalance, that he persuaded himself that he was not doing anything wrong, at least not intentionally.

[18] This type of self-deception cannot be tolerated in a practitioner, particularly concerning trust account management - which goes to the very heart of a lawyer's responsibilities.

[19] Furthermore, his late acknowledgment led to the hearing being prolonged and a considerable increase in the costs of its prosecution.

Mitigating Features

[20] It is accepted by the Standards Committee that no client funds were lost or misappropriated and that some of the errors in respect of the trust accounting were relatively minor.

[21] The strongest mitigating feature, and that to which we attribute considerable weight, is that this is a practitioner who comes to the Tribunal with an unblemished disciplinary history of some 30 years practice in the profession.

[22] We also note that Mr Johnson has taken active steps in relation to the management of his trust account, not only correcting the outstanding errors but ensuring that he now has systems in place, and employees to assist, in order to prevent the reoccurrence of these types of errors in the future. He receives credit for that also.

[23] A glowing reference has been provided by a senior member of the profession on behalf of Mr Johnson, although it has to be noted this practitioner also describes himself as a close friend. And in a protective jurisdiction, such personal commendations are not able to be given as much weight as perhaps some other contexts. However, we do note the comments about the practitioner's integrity and his engagement in community activities.

[24] Mr Napier further submitted that, despite having appealed the Tribunal's decision on liability, his client still expressed considerable remorse and regret for his actions. He is said to have been chastened by the disciplinary process and will exercise considerably more care in future, in similar circumstances.

Comparable Cases

[25] Both counsel have referred us to a number of decisions, where practitioners have in the past avoided suspension, but which had only considered breaches of Trust Account Regulations and did not have the additional serious negligence finding in the overall assessment.

[26] It was acknowledged by counsel that none were on all fours with the present case. We do not propose to rehearse all of the submissions helpfully and carefully advanced by both counsel in relation to these cases, save to comment on one or two.

[27] We consider that the *Grave*[8] decision is the one most comparable in terms of seriousness of offending (the need to protect a beneficiary having been overlooked, and a conflict unresolved) by a senior practitioner with an otherwise unblemished past.

[28] The difference between that case and the present is that there were not the two additional findings of misconduct relating to trust account failures. Furthermore,

[8] *Canterbury Westland Standards Committee No. 1 v Grave* [2016] NZLCDT 8.

Mr Grave acknowledged his failure and admitted the charge at an early stage, thereby availing himself of that as a mitigating feature.

[29] In the *Appleby*[9] matter, while the trust account errors in that matter were more serious than the present, there was not the additional charge of serious negligence. Furthermore, there were significant mitigating features relating to extraordinary personal stress being suffered by the practitioner at the time, which together with the steps taken towards rehabilitation, and openness to the New Zealand Law Society during the investigation, meant that the practitioner was not suspended.

Fitness – Overall Assessment

[30] Throughout the three-day hearing the practitioner conducted himself with dignity, but at least until penalty stage, without significant insight into his failings.

[31] We consider that the combined effect of this conduct is so serious that any penalty short of suspension would be an inadequate response by the Tribunal. We are unanimous in that conclusion[10].

[32] As stated in *Daniels:*[11]

> "The public are entitled to scrutinise the manner in which a profession disciplines its members, because it is the profession with which the public must have confidence if it is to properly provide the necessary service. To maintain public confidence in the profession members of the public need to have a general understanding that the legal profession, and the Tribunal members that are set up to govern conduct, will not treat lightly serious breaches of standards."

[33] While we also bear in mind that *Daniels*[12] urged upon us, the principle of the least restrictive intervention, we do not consider that serious negligence, combined with a relatively lengthy period and numerous examples of trust account mismanagement can go without the mark of a short period of suspension. This will provide the practitioner with the opportunity of reflecting on his conduct, without unduly interfering with his ability to continue in his chosen profession.

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[9] *Auckland Standards Committee 4 of the New Zealand Law Society v Appleby* [2014] NZLCDT 34.
[10] Section 244(2).
[11] See note 1 at [34].
[12] See note 1.

[34] Mr Johnson has advised us that he was in the process of taking in a partner so there will not be a disadvantage to his clients, during the short period of suspension which we intend to impose, namely three months. This period takes account of the relatively strong mitigating features to which we have referred.

Name Suppression

[35] The practitioner seeks suppression of his name and identifying particulars, pursuant to s 240. He acknowledges that "… The Act contains a presumption of open justice".

[36] There is no evidence filed in support of this application. Mr Napier simply makes the submission on behalf of the practitioner that because the matter is currently under appeal, *"… if the appeal is successful then what has been found against Mr Johnson may change. This is of particular concern when considering the practitioner's previously unblemished record and stage of practice*."

[37] The application for name suppression is opposed by the Standards Committee.

[38] Whilst it would be inappropriate to comment on the practitioner's appeal prospects, it has to be acknowledged in respect of Charges 2 and 3 at least, that he acknowledged his defaults and, by the conclusion of the evidence, the intentional nature of the false certifications to the New Zealand Law Society.

[39] In those circumstances, it is highly unlikely that the practitioner's "unblemished record" will remain.

[40] We consider that the public interest in openness and in the specific outcome of disciplinary proceedings outweighs the personal interests of the practitioner. There is no medical or other evidence adduced to support a suggestion that negative consequences might flow from publication.

Costs

[41] The Standards Committee have incurred costs in excess of $68,000. These are high, despite the very reasonable hourly rate charged by counsel. The matter spanned three days of hearing plus a further half-day for penalty hearing. There was,

for reasons that have already been outlined (in relation to the practitioner's reluctance to admit the trust accounting errors), the need for considerable accounting evidence. In addition, there were two expert witnesses called in relation to Charge 1. As pointed out by counsel for the Standards Committee, if the false certifications had been conceded at the outset, considerable costs would have been saved.

[42] Given that we shall be imposing a period of suspension, thus interfering with the practitioner's livelihood, we propose to order less than the full costs sought. The practitioner will be required to pay costs to the Standards Committee in the sum of $50,000.

Censure

[43] The Tribunal delivers the following censure:

> Mr Johnson, the Tribunal does not propose to rehearse to you the particular failings it has found in the manner in which you represented the two trustees of the H Family Trust in this matter. Those are set out in our liability decision. We remind you that these clients were poorly served by you, to the extent that we consider that you brought your profession into disrepute.
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> We further remind you that in future, you will undoubtedly see the need to take more time and care in providing independent advice in situations where the client's usual lawyer is in a position of conflict.
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> We further note your efforts to ensure there is no repetition of the multiple and sustained defaults in the manner of managing your trust account, which formed the subject of Charges 2 and 3.
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> We urge you to ensure that those new standards are maintained and carefully monitored by you.

Summary of Orders

1. The practitioner is censured in terms of paragraph [43] above.

2. The practitioner is suspended for a period of three months commencing seven days from the date of this decision.

3. The practitioner is to contribute the sum of $50,000 to the Standards Committee costs, s 249.

4. The s 257 costs are certified at $12,508, and ordered against the New Zealand Law Society.

5. The s 257 Tribunal costs are to be reimbursed in full by the practitioner to the New Zealand Law Society.

6. There will be an order suppressing the names of the complainant and the clients in this matter, pursuant to s 240, but in all other respects the matter can be reported.

DATED at AUCKLAND this 22nd day of May 2018

Judge D F Clarkson
Chair