NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL

[2019] NZLCDT 18

LCDT 006/19

IN THE MATTER	of the Lawyers and Conveyancers Act 2006
BETWEEN	**AUCKLAND STANDARDS COMMITTEE 1** Applicant
AND	**ARLAN ARMAN** Respondent

CHAIR

Judge DF Clarkson

MEMBERS

Ms J Gray

Mr S Hunter

Ms C Rowe

Mr W Smith

ON THE PAPERS

DATE OF DECISION 8 July 2019

COUNSEL

Ms C Paterson and Ms E Mok for the Standards Committee

Respondent - Self-Represented

DECISION OF THE TRIBUNAL ON PENALTY

Introduction

[1] Mr Arman has pleaded guilty to one charge of misconduct pursuant to s 7(1)(a)(i) of the Lawyers and Conveyancers Act 2006 (the Act). The amended charge to which the plea was entered is annexed as Appendix I. The client's names have been anonymised for reasons of their privacy.

[2] The charge related to multiple professional failures by the practitioner to his client Mr J, the most serious of which was particularised as subjecting Mr J to pressure to plead guilty to a very serious charge. That guilty plea was subsequently set aside, and following a jury trial in July 2018 the client was acquitted.

[3] Many of the particulars of the charge were initially denied by Mr Arman, but in May of this year counsel sought leave to amend the charge, and to delete certain particulars. The remaining particulars are agreed. Through his former counsel, Mr Morris, the practitioner indicated a guilty plea.

[4] The matter was set down for a penalty hearing on 29 May 2019. At that hearing the practitioner was absent and his counsel informed the Tribunal that Mr Arman was overseas. Although counsel had agreed a proposed penalty of six months suspension be put to the Tribunal, it was acknowledged by Mr Arman, through his counsel, that the Tribunal was not limited to the penalty which had been sought by the Standards Committee.

[5] Given that there were a number of unanswered questions in the Tribunal's mind concerning the practitioner's conduct, and his acknowledgement of factual matters, as found by the Judge who presided over Mr J's application to set aside his

conviction,[1] we indicated to counsel that we required his client's presence at the hearing. The hearing was adjourned accordingly.

[6] Shortly after that time, the Tribunal was informed by counsel for the practitioner that his client was not intending to return from overseas in the immediate future and counsel sought leave to withdraw, which was granted.

[7] Subsequently, Mr Arman has directly filed a memorandum with the Tribunal, setting out, in a limited way his position in relation to some of the matters which had been raised by the Tribunal as requiring explanation.

[8] Mr Arman's explanation as to his changed position, from a complete denial of the findings of His Honour Judge McNaughton, to an acceptance of the particulars pleaded, was explained by him simply as a pragmatic decision, largely based on the costs of disputing the findings against him.

[9] Mr Arman informed the Tribunal that he was no longer resident in New Zealand and had no intention of returning in the foreseeable future.

[10] On that basis this matter has had to be determined on the papers, without the Tribunal having had the benefit of hearing from the practitioner directly and thereby making an assessment of such matters which would in the usual circumstances be available to him, such as claiming insight or remorse.

Issue

[11] The only issue to be determined is that of a proportionate disciplinary response to the practitioner's wrongdoing. In particular whether the proposed penalty of six months suspension, costs, and an order prohibiting the practitioner from practising on his own account, represented such a proportionate response.

[12] The answer to this question can be stated at the outset. The Tribunal did not consider that the proposed orders went far enough. A longer period of suspension

[1] His Honour McNaughton DCJ in *W T J v The Queen*, 2017 NZDC 27385, 14 December 2017.

and a compensatory order were seen as necessary to properly reflect the seriousness of this matter.

[13] This decision provides the reasons for that conclusion.

Background

[14] The agreed facts in this matter are set out in the particulars of the charge annexed as Appendix I. In summary, Mr Arman was engaged by Ms O to act for her partner WJ in respect of criminal proceedings. WJ had been charged with sexual violation by rape, and two charges of sexual violation by unlawful sexual connection. The stated victim was Ms O's then 15-year-old daughter.

[15] Ms O had found Mr Arman in a Google search for "best lawyers in Auckland". The practitioner's website had included testimonial stating that he was "best lawyer in town".

[16] A fee arrangement of $15,000 for representing WJ if the matter proceeded to jury trial was agreed. Despite the limited income of both Ms O and WJ, Mr Arman did not advise WJ about his ability to apply for legal aid.

[17] WJ and Ms O borrowed $5,000 which was paid to Mr Arman in October 2014. No further payments were made after that time. WJ began a series of court appearances in September 2014, but at these appearances Mr Arman was frequently represented by an agent who did not always have full instructions.

[18] Mr Arman failed to retain proper written records of his instructions to agents and indeed, managed to lose WJ's file, a fact which was discovered when the matter came under scrutiny later.

[19] On three occasions in late 2015 the practitioner failed to attend or arrange an agent to appear at all for WJ.

[20] As at late August 2016, when a firm trial was scheduled to commence, Mr Arman had not appeared for WJ or met with him in person for over a year.

[21] Disclosure had been provided in three tranches in September, October and November of 2014. At no time before 29 August 2016 when WJ pleaded guilty to the charges did Mr Arman (a) Provide WJ with a copy of the disclosure or discuss it with him; (b) Arrange for WJ to view the complainant's evidential video, or provide WJ with a copy of the transcript of same; or (c) Show WJ any other witness statements.

[22] At no stage did Mr Arman meet WJ at the practitioner's office. All meetings were at Court immediately before or immediately following scheduled court appearances. The meetings generally lasted less than 30 minutes with the exception of the meeting on 29 August 2016 when the guilty plea was entered.

[23] At no stage did the practitioner discuss trial strategy with WJ or Ms O. Nor did he seek or obtain instructions from WJ about his version of events, possible defence witnesses, or the possibility of non-party disclosure from Child Youth and Family or others. Nor did he discuss the nature of the defence for trial.

[24] On the morning that the trial was due to commence, 29 August 2016, Mr Arman met WJ at the Manukau District Court. The agreed facts placed before this Tribunal acknowledged that Mr Arman pressured WJ to plead guilty rather than proceed to trial; that he told WJ he had no chance of successfully defending the charges and advised him wrongly in respect of likely sentencing outcomes.

[25] It was found by Judge McNaughton that "*neither the applicant nor Ms O were actually aware that 29 August was the date for the firm fixture*". His Honour rejected Mr Arman's evidence that his client had got "cold feet" and pointed to the obvious discrepancy between that and the urgent summonsing of Ms O concerning the plea proposal that day.

[26] Prior to obtaining his client's instruction about the change of plea Mr Arman did not advise him that he would receive a first strike warning under the Three Strikes Regime in the Sentencing Act 2002.

[27] Although WJ signed a document indicating "*we are ready to proceed to trial and wish to plead guilty anyway*" the evidence as found by Judge McNaughton found to the contrary, that Mr Arman was not properly prepared for the trial:

- he had not obtained instructions about key issues;

- he had not discussed key evidence with WJ including the complainant's evidential video; and

- he had not been paid the balance of the $15,000 quoted fee and the numerous appearances leading up to the trial would indicate that the $5,000 paid had by then been used up.

[28] On or about 30 September 2016 Mr Arman instructed an agent Mr N, to appear at the sentencing hearing for WJ on 7 November 2016.

[29] After speaking with WJ, Mr N was not prepared to proceed with the sentencing hearing and the matter was adjourned to 31 January 2017.

[30] WJ subsequently sought independent advice and advanced, successfully, an application to vacate his guilty plea.

[31] Mr Arman was given leave to withdraw as counsel and Shane Tait was assigned to act in his place. Mr Tait requested a copy of the practitioner's file for WJ at which point the practitioner advised that it was lost. The explanations about how it had been lost were inconsistent and found to be implausible by Judge McNaughton.[2] His Honour was unable to "… *avoid a conclusion that Mr Arman was never in possession of a physical file. … On the face of it, it seems inconceivable that a criminal lawyer could represent a client on charges involving serious sexual offending for over two years without ever printing the material disclosed electronically by the prosecution, but that is at least a reasonable possibility in this case*."

[32] In his careful decision, Judge McNaughton granted the application to vacate WJ's guilty pleas, having found there had been a substantial miscarriage of justice. The Judge concluded there had always been an available defence and that WJ had not received competent or correct legal advice, and that he had not pleaded guilty freely or on an informed basis.

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[2] See above n 2 at [115] to [119].

[33] The Judge's comments about the practitioner's evidence were that he had been "*glib, discursive, careless as to matters of detail and ultimately a completely unconvincing witness*".[3]

[34] The Client Conduct and Care Rule breaches set out in the charges, and acknowledged by Mr Arman's plea are breaches of Rules 3.4, 3.5, 9.5, 11, 13 and 13.1.

Applicable Principles

[35] The purpose of the imposition of a penalty on a practitioner in disciplinary proceedings is not a punitive one. Primarily, the Tribunal has regard to the purposes of the legislation – protection of the public and protection of the reputation of the profession in the eyes of the public and the upholding of professional standards.

[36] Purposes of rehabilitation, denunciation and deterrence are borne in mind.

[37] So, also, is the principle of the least restrictive intervention set out in the decision of *Daniels v Complaints Committee 2 of the Wellington District Law Society*.[4]

[38] The *Daniels* decision also noted that the practitioner's conduct could be considered in a broad sense, including the way in which he or she had conducted him or herself in respect of the disciplinary proceedings.

[39] The practitioner's absence at his penalty hearing was a matter of considerable concern. While his former counsel was at pains to submit that this should not be taken as a sign of disrespect towards the Tribunal, at the very least, it provides an insight into the practitioner's priorities.

[40] As submitted by the Standards Committee, Mr Arman's latest statement that his guilty plea to the misconduct charge was a "pragmatic" decision, based at least in part on reducing his liability for costs, meant that the practitioner has failed to demonstrate insight or remorse for his conduct. Given the extremely serious nature

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[3] See above n 2 at [65].
[4] *Daniels v Complaints Committee 2 of the Wellington District Law Society* [2011] 3 NZLR 850.

of his failures to his client this is a matter of considerable concern to the Tribunal and a matter to be weighed in its overall assessment of his fitness to practice.

[41] The starting point in determining proportionate response to misconduct is the seriousness of the offending. As stated, we consider the practitioner's professional failings to have been very serious indeed. The consequences for his client were significant, as we understand it WJ ended up spending some four months in custody, as well as the ignominy of at least a temporary conviction for one of the most unpleasant types of criminal offending.

Mitigating Features

[42] There are two mitigating features to be taken into account. One is the, albeit late, guilty plea. However, the lack of remorse and insight which could have accompanied such a plea was absent in this matter.

[43] The second mitigating feature is that this is the practitioner's first disciplinary offence in his relatively short career.

Aggravating Features

[44] Although the default to the client continued for a fairly lengthy period and involved multiple facets of legal practice failure, we regard this as going more to the seriousness of the offence than being strictly aggravating, therefore we take account of no aggravating features.

Precedents

[45] In reaching a recommendation of six months the Standards Committee has had regard to previous similar offending, in particular the recent decision of *Otago Standards Committee v Claver*.[5]

[5] *Otago Standards Committee v Claver* [2019] NZLCDT 8.

[46] It is pointed out that, in that matter, failures were recorded in respect of 14 different clients not just one as in this matter. The practitioner in that case was suspended for 12 months and ordered not to practice on his own account.

[47] It has to be noted however that there were strong mitigating features in the *Claver* decision which led to the relatively modest period of suspension, having regard to the multiple failures to many clients and at different levels.

[48] Mr Claver had not only acknowledged fault willingly, he had, well prior to the disciplinary proceedings, implemented a number of changes in his practice which provided safeguards for the public and addressed not only the mental health problems that he was experiencing, but the underlying concerns behind those issues. In other words, the practitioner had proactively sought assistance of his own initiative and at his own cost in order to mitigate his offending.

[49] As we have already stated, these features of remorse and insight are sadly lacking in the present case.

Decision

[50] We do not consider that a six-month suspension properly reflects the seriousness of this matter.

[51] Having regard to consistency with other decisions we do not consider it would be proper to suspend the practitioner for more than 10 months. However, we accept the Standards Committee submission that he ought not to practice alone.

[52] Further, we consider that there ought to be a compensatory order in favour of the client to refund the $5,000 fee paid by the client.

[53] This matter had to be unnecessarily adjourned from the date which had been set down for hearing and the practitioner's counsel was warned at the time that there would be a reflection of that in the costs order. We do consider that in this matter the full costs of this proceeding ought to be met by the practitioner.

Orders

1. The practitioner is suspended from practice for 10 months from 11 June 2019, pursuant to s 242(1)(e) of the Act.

2. There will be an order pursuant to s 242(1)(g) of the Act prohibiting the practitioner from practising on his own account until authorised by the Disciplinary Tribunal to do so.

3. There will be an order pursuant to s 156(f) and (g) of the Act that the practitioner refund to WJ $5,000 in respect of his fees account.

4. The costs of the Standards Committee in the sum of $12,317 are awarded against the practitioner, pursuant to s 249 of the Act.

5. The New Zealand Law Society will pay the Tribunal costs of $3,707 pursuant to s 257 of the Act.

6. The practitioner is to refund the full s 257 costs to the New Zealand Law Society, pursuant to s 249 of the Act.

DATED at AUCKLAND this 8th day of July 2019

Judge DF Clarkson
Chairperson

APPENDIX I

Charge: Misconduct within the meaning of s 7(1)(a)(i) and/or (ii) of the Lawyers and Conveyancers Act 2006 (**Act**)

The particulars of the charge are as follows:

Introduction

1 At all material times, the Practitioner was enrolled as a barrister and solicitor of the High Court of New Zealand, and held a current practising certificate.

2 At all material times, the Practitioner held a practising certificate as a barrister and was a director of his firm, Arman Law.

Background

3 On 22 September 2014, the Practitioner was contacted by Ms O to act for her partner, WJ, in criminal proceedings.

4 Mr J was charged with one charge of sexual violation by rape and two charges of sexual violation by unlawful sexual connection (**charges**). The alleged offending related to Mr J sexually assaulting Ms O's daughter, Mr J's step-daughter, who was then aged 15, on one occasion when Ms O was overseas.

5 Ms O had been influenced to contact the Practitioner as a result of undertaking a Google search for "best lawyers in Auckland" which brought up the Practitioner's website, www.underarrest.co.nz, and then viewing the Practitioner's website, including testimonials stating the Practitioner was the "best lawyer in town".

Fee arrangements

6 The Practitioner advised Mr J that he would charge a fixed fee of $15,000 (including GST) for representing him if the matter proceeded to a jury trial.

7 The Practitioner's standard terms of engagement set out that the Practitioner's fixed fee encompassed a number of services, including preparation and attending Court appearances, trial preparation, strategy and legal research, defence witness briefings as required, client meetings and briefings, and "further investigations in respect of friends, family and potential witnesses as necessary to advance the case". The Practitioner did not, however provide Mr J with a copy of his terms of engagement or otherwise provide client care information as required by rules 3.4 and 3.5 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (**Rules**).

8 Mr J and Ms O advised the Practitioner that they had limited income. Mr J earned between $560 and $680 per week, and Ms O was unable to work and was receiving ACC benefits. Despite knowing about these matters, the Practitioner did not advise Mr J about his ability to apply for legal aid at any stage.

9 The Practitioner was paid a total of $5,000 in legal fees in respect of Mr J's matter in October 2014 (paid in two instalments of $1,500 and $3,500 respectively). No further payments were made by Ms (sic) J or Ms O after this time.

Court appearances

10 Mr J's first appearance in relation to the charges was on 22 September 2014. Mr J appeared and pleaded not guilty to the charges on 9 October 2014.

11 A firm trial was scheduled to commence on 29 August 2016 after a number of standby fixture dates in the preceding months did not proceed. As addressed further below, Mr J pleaded guilty to the charges when he appeared on 29 August 2016.

12 Mr J appeared in court on numerous occasions between 22 September 2014 and 29 August 2016.

13 The Practitioner appeared at Mr J's court appearances on most occasions in the first year after the Practitioner was engaged to act for Mr J. After this period the Practitioner often instructed an agent to appear. In particular, the Practitioner appeared at six out of eight of Mr J's court appearances between 22 September 2014 and 4 August 2015. Following 4 August 2015, the Practitioner instructed an agent to appear for Mr J on at least five occasions, being 7 and 8 December 2015, 24 March 2016, and 4 and 5 April 2016. The Practitioner failed to retain proper written records of his instructions to the agents who appeared for him at Mr J's court appearances.

14 On 3 September 2015, 26 November 2015 and 18 August 2016, the Practitioner failed to attend scheduled court appearances on behalf of Mr J, or arrange for an agent to appear.

15 As at 29 August 2016, the date when a firm trial was scheduled to commence, the Practitioner had not appeared for Mr J at any of Mr J's court appearances, or otherwise met with Mr J in person, for over a year.

Preparation for trial

16 Disclosure was provided to the Practitioner in three main tranches on 29 September 2014, 13 October 2014 and 12 November 2014.

17 At no stage before 29 August 2016 when Mr J pleaded guilty to the charges did the Practitioner:

(a) provide Mr J with a copy of the disclosure or discuss it with him;

(b) show Mr J the complainant's evidential video interview or provide him with a copy of the transcript of that interview; or

(c) show Mr J the other witness statements.

18 At no stage did the Practitioner meet with Mr J at the Practitioner's office.

19 The only meetings between the Practitioner and Mr J took place at court, immediately before and/or immediately following scheduled court appearances. Those meetings generally lasted less than 30 minutes (with the exception of the meeting on 29 August 2016,

discussed below). The only issues discussed at meetings were the next scheduled court appearance and/or the Practitioner's fees.

20 The Practitioner did not discuss trial strategy with Mr J at any stage. In particular, the Practitioner did not seek or obtain instructions from Mr J about Mr J's version of events, possible defence witnesses, the possibility of non-party disclosure from Child, Youth and Family or ACC, or the defence for trial.

Entry of guilty pleas on 29 August 2016

21 Mr J's trial was due to commence on 29 August 2016. The Practitioner met with Mr J at Manukau District Court that morning (**meeting**).

22 During the meeting, the Practitioner:

(a) pressured Mr J to plead guilty to the charges rather than proceed to trial;

(b) told Mr J that he had no chance of successfully defending the charges;

(c) advised Mr J that, if he pleaded guilty, he would receive a sentence of six years' imprisonment, and would only be required to serve just over two years, but if he proceeded to trial and was found guilty, he would be sentenced to seven years' imprisonment and would be required to serve the whole term.

23 At no stage prior to or at the meeting did the Practitioner advise Mr J that he would receive a first strike warning under the three strikes regime set out in the Sentencing Act 2002 upon being convicted of the charges.

24 At the meeting, Mr J signed a document prepared by the Practitioner. That document recorded, "We are ready to proceed to trial and wish to plead guilty anyway".

25 In fact, as addressed above, the Practitioner was not properly prepared for trial for reasons including that he had not:

(a) obtained instructions from Mr J about various key issues, including Mr J's version of events for trial; or

(b) discussed key evidence with Mr J, including the complainant's evidential video interview and the other witness statements.

26 Mr J's matter was called before his Honour Judge McNaughton later on the morning of 29 August 2016. At that time guilty pleas were entered to the charges. Mr J was convicted of the charges and given a first strike warning by Judge McNaughton. Mr J was remanded for sentencing on 28 September 2016 (which was subsequently adjourned to 7 November 2016, and then 31 January 2017).

Application to vacate guilty pleas

27 On or around 30 September 2016, the Practitioner instructed an agent, barrister Mr N, to appear at the sentencing hearing for Mr J on 7 November 2016.

28 Mr N spoke to Mr J prior to the sentencing hearing. After speaking to Mr J, Mr N was not prepared to proceed with the sentencing hearing. The sentencing hearing did not proceed on 7 November 2016 and the matter was adjourned to 31 January 2017.

29 Mr J subsequently sought to advance an application to vacate his guilty pleas to the charges (**application**). The grounds of the application were that the Practitioner had provided Mr J with inadequate and incompetent legal advice. The Practitioner was given leave to withdraw as counsel for Mr J. After the Practitioner was given leave to withdraw, barrister Shane Tait was assigned to act for Mr J.

30 Mr Tait requested a copy of Mr J's file from the Practitioner. However, the Practitioner advised Mr Tait that he had lost the client file. Only limited documents were able to be located and provided to Mr Tait.

31 The application was heard before Judge McNaughton on 7 and 29 September 2017 and 30 November 2017. The Practitioner, Mr N, Mr J and Ms O each gave evidence at the hearing. The Practitioner filed three affidavits in relation to the application. The hearing was adjourned part heard on 29 September to enable further evidence to be obtained from the Practitioner and Mr N on a number of issues.

32 On 14 December 2017, Judge McNaughton issued his decision allowing the application to vacate Mr J's guilty pleas and setting his pleas aside. His Honour found that there had been a substantial miscarriage of justice. In his decision, the Judge concluded that there had always been an available defence to the charges, that Mr J had not received competent or correct legal advice, and that he had not pleaded guilty freely and on an informed basis. The Judge observed (at [121] and [124]) that:

> The inevitable inference is that [the Practitioner] quickly lost interest in this file after receiving no further payments past the case review stage. No effort was made to properly pursue the case for trial…The only conclusion I can come to is, that at the last moment, with a firm fixture imminent and no prospect of any further adjournments, [the Practitioner] pressured his client into pleading guilty by giving him misleading advice in relation to the trial Judge and his prospects of acquittal and the indicated sentences. He was never in a position to run the trial.

33 In reaching this decision, Judge McNaughton recorded that he did not accept the Practitioner's evidence on a number of issues, and that he considered the Practitioner's explanations to be "vague" and "not plausible". The Judge observed (at [65]) that the Practitioner had been "glib, discursive, careless as to matters of detail and ultimately a completely unconvincing witness".

Disposition of the charges

34 In July 2018, Mr J was found not guilty of the charges following a jury trial.

Practitioner's conduct

35 The Practitioner's course of conduct as set out above would be regarded by lawyers of good standing as disgraceful and/or dishonourable and/or amounted to a wilful or reckless breach of various requirements in Rules. In particular, the Practitioner:

(a) Failed to provide Mr J with information on the principal aspects of client service in breach of rr 3.4 and 3.5; and/or

(b) Failed to inform Mr J that he may be able to apply for legal aid in breach of r 9.5; and/or

(c) Failed to act competently and in a timely manner in relation to Mr J's legal matters in breach of r 3, including by:

(i) Failing to properly prepare for trial, including by not discussing or obtaining instructions regarding the disclosure, Mr J's version of events, possible defence witnesses, the possibility of non-party disclosure, or the defence for trial;

(ii) Failing to provide competent and timely advice on Mr J's prospects of conviction at trial;

(iii) Failing to appear at scheduled court appearances for Mr J and not arranging for an agent to appear at those appearances; and/or

(d) Subjected Mr J to pressure to plead guilty to the charges; and/or

(e) Failed to ensure that Mr J was fully informed of all the relevant implications of pleading guilty to the charges, in breach of r 13.13.1, including by:

(i) Failing to advise Mr J that upon conviction he would be subject to a first strike warning under the three strikes regime;

(ii) Failing to provide competent advice on the credit available for pleading guilty; and/or

(f) In breach of r 11:

(i) Failed to keep written records of his instructions on occasions when he instructed agents to appear at Mr J's court appearances; and

(ii) Failed to ensure Mr J's client file was properly stored, and ultimately lost Mr J's client file.