NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL

[2020] NZLCDT 13

LCDT 028/19

IN THE MATTER	of the Lawyers and Conveyancers Act 2006
BETWEEN	**AUCKLAND STANDARDS COMMITTEE 2** Applicant
AND	**PETER FRANCIS AITKEN** Practitioner

CHAIR

Judge DF Clarkson

MEMBERS

Ms J Gray

Mr G McKenzie

Prof D Scott

Ms S Stuart

DATE OF HEARING 19 March 2020

HELD AT Specialist Courts and Tribunals Centre, Auckland

DATE OF DECISION 29 April 2020

COUNSEL

Mr P Collins for the Standards Committee

Practitioner in Person

REASONS FOR DECISION OF TRIBUNAL ON PENALTY

Introduction

[1] Mr Aitken has admitted one charge[1] of misconduct. The charge relates to his misappropriation of client funds and ongoing misuse and dishonest mismanagement of his trust account.

[2] Until the hearing itself, the practitioner had taken no steps in response to the proceedings and a formal proof hearing was directed.

[3] To his considerable credit, Mr Aitken appeared (unrepresented) at the hearing and, having declined legal advice, accepted the charge as accurate and true in its substance.

[4] The penalty phase of the hearing then proceeded, following which the Tribunal made an order striking Mr Aitken from the Roll of Barristers and Solicitors. We reserved the issue of costs and of written reasons which we now determine and articulate, respectively.

Background

[5] On or about 21 December 2018 the practitioner used clients' funds which were in his trust account, of $265,000, without authority from his client, and applied these towards the purchase of a property personally. These funds have not been repaid by the practitioner.

[6] In addition, from about June 2019 Mr Aitken has consistently overdrawn the Firm's Interest in Trust Ledger. In so doing he has utilised trust funds belonging to his clients to meet the financial obligations of his firm.

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[1] Annexed as Appendix I.

[7] By November 2019, when the charge was laid, the closing debit balance was $103,757.42. Updating evidence from the New Zealand Law Society inspector, Mr Kitching, has reduced this sum by $400.

[8] An interim order suspending the practitioner was made in November 2019 by the Tribunal, following which Mr Aitken's attorney has taken over the management of the practice, and in particular been responsible for assisting the New Zealand Law Society (NZLS) in contacting clients whose funds had been wrongly utilised by the practitioner and assisting them to make claims from the Fidelity Fund.

[9] At the hearing Mr Aitken addressed the Tribunal and provided some background information concerning how the situation had arisen. It would seem that for some years leading up to his decision to take the $265,000 in order to complete a purchase, Mr Aitken had been under considerable stress and had been professionally overloaded.

[10] In addition, it appears he advanced funds to a longstanding friend or associate who let him down shortly before the property purchase was due to settle. Mr Aitken referred to a number of other stressors, including the additional work involved in managing a former colleague's practice after the sudden death of that colleague.

[11] All of this information was helpful in providing some context which led to the misconduct admitted, but it did not, as accepted by the practitioner, provide any justification for his conduct.

[12] The wrongful utilisation of the trust account meant that the practitioner had also submitted untrue certificates of compliance to the NZLS for a number of months. The total deficit as a result of his misappropriations, as calculated at 6 March 2020 is $357,691.69.

[13] When confronted by the inspectors in November 2019, Mr Aitken acknowledged his actions and indeed volunteered the statement that this was "tantamount to fraud".

[14] Counsel for the Standards Committee refers to the relevant breaches of the Act and Regulations[2] which underpin the misconduct charge. That charge pleads both s 7(1)(a)(i) conduct "that would reasonably be regarded by lawyers of good standing as disgraceful or dishonorable", and s 7(1)(a)(ii) "that consists of a willful or reckless contravention of the … Act or regulations …".

[15] We consider both subsections are made out by the evidence, which discloses deliberate misuse of client funds, and we note the practitioner's acceptance of the charge.

Penalty Process

[16] This begins with the assessment of the seriousness of the offending, then takes into account any aggravating and mitigating features of the offending or of the practitioner, then, if appropriate, considers relevant authorities before making an assessment about a proportionate response.

[17] The Tribunal must, in assessing penalty, be mindful of the purposes of the Act which are the protection of the public and the maintenance of confidence in the provision of legal services.

[18] Penalty in professional discipline cases is not imposed for punitive purposes, although it is recognised that there can be punitive outcomes. Deterrence, both specific and general is to be considered.

[19] Finally, as set out in the *Daniels v Complaints Committee 2 of the Wellington District Law Society*[3] case the Tribunal must impose the least restrictive intervention which is available, having regard to the seriousness of the offending.

[20] This offending is at the most serious end of the scale.

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[2] Sections 110(1)(b), 111(1), 112(1)(a) of the Lawyers and Conveyancers Act 2006 (Act). Breaches of the Trust Account and Conduct and Client Care Rules were respectively Regulation 6(1) and (3), 9 and 10, 14(1), 17(1) and Rule 2.5, 10 and 11.

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

[21] We accept the submission that dishonesty offending involving the use of client funds will almost inevitably lead to strike-off. The trust reposed in practitioners by the public means that any breach of that trust must be met with the strongest possible response from the Profession's disciplinary body. We remind ourselves of the oft-quoted passage from *Bolton v The Law Society:*[4]

> "… The second purpose is the most fundamental of all: to maintain the reputation of the solicitors' profession as one in which every member, of whatever standing, may be trusted to the ends of the earth. To maintain this reputation and sustain public confidence in the integrity of the profession it is often necessary that those guilty of serious lapses are not only expelled but denied re-admission. If a member of the public sells his house, very often his largest asset, and entrusts the proceeds to his solicitor, pending re-investment in another house, he is ordinarily entitled to expect that the solicitor will be a person whose trustworthiness is not, and never has been, seriously in question. Otherwise, the whole profession, and the public as a whole, is injured. A profession's most valuable asset is its collective reputation and the confidence which that inspires."

[22] Mr Aitken crossed a boundary which must never be crossed by a lawyer.

Aggravating features

[23] The aggravating features of the practitioner's conduct are, firstly, the lengthy period of time (almost one year) over which it occurred.

[24] Secondly, in terms of previous findings against him the practitioner has two unsatisfactory conduct findings in 2017 and 2019.

Mitigating features

[25] In terms of mitigation, it would seem that until the practitioner came to notice for his conduct in 2017, he had conducted himself in a professional and blameless manner for almost 40 years.

[26] Mr Aitken referred us to his community contributions, and although these were not backed up by any documentary evidence, we have no reason to doubt the

[4] *Bolton v The Law Society* [1994] WLR 512.

practitioner's word that during his very lengthy career, practicing as he did in a small community, he was involved in pro bono work and in giving back to the community.

[27] While the practitioner is given credit for his previous lengthy service, good conduct and community contribution, and for attending the hearing, conducting himself with dignity and responsibility, there is no response to this type of serious and dishonest misconduct which would be adequate, short of strike-off.

[28] Five members of the Tribunal reached this view unanimously, as required by s 244 of the Act.

[29] In terms of that section, we find that, by reason of his conduct, the practitioner is no longer a fit and proper person to be a practitioner.

Costs

[30] The Standards Committee seek an order for payment of the costs incurred in bringing the charges, including the costs of obtaining an interim order of suspension against Mr Aitken. Invoices supporting a costs order in the sum of $16,350 have been provided to the Tribunal.

[31] Mr Aitken submitted that the sale of his house might yield sufficient funds to reimburse the fidelity funds for the client monies wrongly taken by him, but he did not consider there will be sufficient also to meet costs orders. He indicated he has no other assets than his home.

[32] This submission is somewhat speculative at the present time and we consider it to be in the power of the NZLS to make arrangements for payment of costs once the sale process is completed and more information available.

[33] Mr Aitken's conduct was deliberate and, as he acknowledged to the NZLS inspectors, he knew what he was doing was wrong. We do not consider it would be proper in these circumstances for the rest of his profession to bear the costs of the disciplinary proceedings.

[34] There will be an order that Mr Aitken pay the costs of the Standards Committee in the sum of $16,350. We also consider he ought to reimburse the NZLS for the order which the Tribunal is obliged to make against them for the Tribunal's own costs.

[35] In summary the orders we now confirm and made are as follows:

Orders

1. An order pursuant to ss 244 and 242(1)(c) striking the name of Peter Francis Aitken from the Roll of Barristers and Solicitors.

2. There is an order that Mr Aitken will pay the costs of the Standards Committee in the sum of $16,350, s 249.

3. There will be an order pursuant to s 257 that the NZLS pay the Tribunal costs of $2,492.

4. There will be an order that Mr Aitken reimburse to the NZLS the full Tribunal costs, s 249.

5. There will be an order suppressing the names of any clients which appear in the charge which is annexed to this decision.

DATED at AUCKLAND this 29th day of April 2020

Judge DF Clarkson
Chairperson

Appendix 1

Charge

Charge:

Auckland Standards Committee 2 charges the practitioner with misconduct pursuant to ss.7(1)(a)(i) and (ii), and s.241(a) of the Lawyers and Conveyancers Act 2006 (the Act);

Particulars:

1. On or about 21 December 2018 the practitioner utilised clients' funds in his trust account without authority, in the sum of $265,000, which he applied toward the purchase of a property personally. In doing so, he misappropriated those funds.

2. A corresponding trust account imbalance has remained unremedied since that time.

3. Since about June 2019 the practitioner has consistently overdrawn the Firm's Interest in Trust Ledger, utilising trust funds belonging to his clients to meet the financial obligations of his firm. By way of example:

    (a) The closing balance of the Firm's Interest in Trust Ledger for the month end August 2019 was $94,388.20;

    (b) The closing balance at the month end September 2019 was $62,241.50; and

    (c) On 15 November 2019 the closing debit balance was $103,757.42.

4. The trust account, and the Firm's Interest in Trust Ledger, remain in deficit.

5. These matters were not disclosed to the New Zealand Law Society in any monthly trust account compliance certificates issued by the practitioner under Regulation 17 of the *Lawyers and Conveyancers Act (Trust Account) Regulations 2008*.

6. In those circumstances the practitioner is in breach of:

    (a) Section 110(1)(b) of the Act, because he has failed to hold clients' trust money exclusively for his clients, to be paid to those clients or as those clients direct;

    (b) Section 111(1) of the Act, because he has not accounted properly to the clients for whom he held trust money;

    (c) Section 112(1)(a) of the Act, because he has not kept trust account records which disclose clearly the true position of the money held in his trust account;

    (d) Regulations 6(1) & (3), because the trust account and the firm's interest in trust ledger have been overdrawn;

    (e) Regulations 9 & 10, because the overdrawing of the firm's interest in trust ledger has occurred in circumstances of the purported deduction of fees, without proper authority;

    (f) Regulation 14(1), because he did not ensure that the trust bank account was reconciled with the trust ledger as at the end of every month;

(g) Regulation 17(1) because the trust account compliance certificates he issued during the period of the trust account overdraw were inaccurate and untrue;

(h) Rules 2.5, 10, and 11 of the *Conduct and Client Care Rules*:

(i) Issuing false certificates;

(ii) Failing to promote and maintain proper standards of professionalism in his dealings; and

(iii) Failing to administer his practice in a manner that ensured compliance with his professional duties and the maintenance of the reputation of the legal profession.