

**NEW ZEALAND LAWYERS AND
CONVEYANCERS DISCIPLINARY TRIBUNAL**

[2020] NZLCDT 16

LCDT 027/16 & LCDT 007/17

IN THE MATTER

of the Lawyers and Conveyancers
Act 2006

AND

IN THE MATTER

of **BRIAN ROBERT ELLIS**
Practitioner, of Auckland

CHAIR

Judge DF Clarkson

MEMBERS

Mr G McKenzie

Prof D Scott

Mr W Smith

Mr I Williams

ON THE PAPERS (by consent)

DATE OF DECISION 8 June 2020

COUNSEL

Mr R Marchant for the Standards Committee

Mr W Pyke for the Practitioner

DECISION OF TRIBUNAL ON PENALTY

Introduction

[1] This decision concludes the two final sets of charges relating to this practitioner which remain before this Tribunal. The practitioner was struck off by the Tribunal on 2 November 2018. That order was appealed, and in June 2019 the strike-off order was upheld by the High Court.¹

[2] These current matters were held over until the outcome of the appeal was known, following which counsel had further discussions. It had been indicated by counsel in November 2018 that an admission was made by Mr Ellis to Charge 2 of the amended charges in LCDT 007/17, and that a finding of misconduct could be made by consent. It was indicated that on that basis all remaining charges under that prosecution and under prosecution LCDT 027/16 could be withdrawn with the leave of the Tribunal.

[3] That finding, and the granting of leave can be formally recorded at this point.

[4] What remained for consideration then was a claim for compensation, sought by the Standards Committee, and the issue of costs overall in respect of the two matters.

[5] Further discussions confirmed that the Standards Committee were no longer seeking to pursue the compensation claim, and it was accepted that, given the matter was strongly contested by the practitioner and indeed by his client, that any issue of compensation was more properly dealt with in another jurisdiction.

[6] Further, it was agreed by the parties that in the circumstances, the practitioner now having been struck off (following an earlier period of suspension) that the appropriate penalty was one of censure and an award of costs.

¹ *Ellis v The Auckland Standards Committee* 5 [2019] NZHC 1384.

[7] This decision deals with the only remaining dispute which is the quantum of those costs.

[8] By way of further background, and relevant to the issue of costs, is that a decision was delivered by the Chair on 28 April 2017 in relation to both sets of proceedings following an application by the practitioner for particularisation of charges.

[9] That application resulted in an order that amended charges be filed in respect of each of the sets of proceedings, thus the practitioner was, to a large extent successful in his application.

[10] Finally, in the joint memorandum the parties agreed “... *that the admission to breach of the undertaking adequately reflects the misconduct in this case*”.²

Costs – Issues to be Considered

[11] For the practitioner Mr Pyke objects to costs in respect of the 027/16 proceedings since those charges were withdrawn. The second matter raised by him is that the legal work addressing the application for compensation ought also to be deducted. The invoices supplied to the Tribunal do not separate out this compensation work but there are separate invoices for the 2016 proceedings and for the amendment of charges drafting. We consider the latter certainly ought to be deducted from the overall costs sought which total \$11,336.

[12] The costs relating to the 2016 proceedings total \$2,208.

[13] It is agreed that the hourly rate charged by counsel for the Standards Committee is a reasonable one, the challenge is as to the above matters.

Discussion on Costs Quantum

[14] The Tribunal has a broad discretion in the fixing of costs. Section 249 states:

² Para [6] consent memorandum of counsel for the parties as to disposition of charges and seeking directions dated 16 November 2018.

249 Order for payment of costs

- (1) The Disciplinary Tribunal may, after the hearing of any proceedings, make such order as to the payment of costs and expenses as it thinks fit.

[15] It is generally accepted that, particularly where charges are proved, the burden of prosecution of a disciplinary offence against a practitioner should not fall to the profession itself. We consider that there are three areas in respect of the charges under consideration where a reduction of the costs sought should properly be made. Two of these are supported by a separate invoice but the final is not.

(a) There is an invoice for \$2,208 for the laying of charges in respect of the 027/16 matter

[16] We would not want to indicate that charges which are withdrawn should never be the subject of a costs order. Subsection (3) of s 249 provides that, even where charges are not proven, if they were considered justified and “it is just to do so”, there is power to award costs against the practitioner.

[17] In this case the withdrawal of charges in respect of both matters was a consequence of an overall agreed arrangement between counsel. We would not want to discourage counsel from arriving at proper and principled consent arrangements. However, we do consider, in this case some deduction ought to be made to reflect the fact that the practitioner ultimately faced and admitted one charge, not multiple charges.

(b) We do not consider that the costs incurred in drafting and filing amended charges ought to fall at the feet of the practitioner where the original charges have been found by the Tribunal to be somewhat defective

[18] Therefore at least \$552³ ought to be deducted. We also consider there may have been some duplication of attendances as recorded in Invoice 1016/1 since both this and the previously referred invoice refer to the same 2017 matter and both refer to a preparation of amended charges and particulars.

³ Invoice 1016/5.

(c) Finally, we do consider there ought to be some reduction of invoice 1016 and 1016/6 in relation to attendances for the compensation claim which was not ultimately pursued

[19] This is not separately specified in any invoice and thus we take a slightly broader brush approach to this reduction, in reaching an overall figure of costs which we fix at \$7,500 in favour of the Standards Committee.

[20] In addition, we consider the practitioner ought to meet the full costs of the Tribunal's 257 costs awarded against the New Zealand Law Society.

Censure

[21] The admitted charge of misconduct involves the breach of an undertaking to a bank. As such, it would normally attract a much sterner response than a censure.

[22] Because the practitioner has already been struck off, the more likely responses of suspension or even strike-off are not available. A fine was not sought by counsel for the Standards Committee and instead it was agreed between counsel that the appropriate penalty in all of the circumstances is one of censure. We set out the censure as follows:

Mr Ellis, as a former senior practitioner of many years' experience you will have, on many occasions, completed the standard undertaking to a bank where you are also acting for a borrower. While this role can be seen to be in conflict, it is tolerated by the profession and lending institutions because of the knowledge that all lawyers hold as to the sanctity of an undertaking, regardless of the client's specific interests. In particular, all lawyers recognise that the ongoing relationship between the legal profession and financial institutions relies on a degree of trust and confidence in the solemnity and enforceability of such undertakings. By your actions you have damaged that relationship and the ongoing reputation of, and trust in, the profession.

As we have indicated, this would normally result in your temporary or permanent removal from the profession, however that has already taken

place. We record a formal censure against you which forms part of your permanent record as a lawyer.

Orders

1. A censure is administered as set out above.
2. There will be a s 257 order that the costs of the Tribunal in the sum of \$2,393 will be paid by the New Zealand Law Society.
3. There will be an order that the practitioner pay the costs of the Standards Committee in the sum of \$7,500.
4. A further order of costs is made that the practitioner reimburse the New Zealand Law Society for the Tribunal's s 257 costs in the sum of \$2,393.

DATED at AUCKLAND this 8th day of June 2020

Judge DF Clarkson
Chairperson