NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL

[2020] NZLCDT 18

LCDT 014/18

IN THE MATTER OF	The Lawyers and Conveyancers Act 2006
BETWEEN	**AUCKLAND STANDARDS COMMITTEE NO. 2** Applicant
AND	**TIMOTHY JOHN BURCHER** Practitioner

CHAIR

Judge D F Clarkson

MEMBERS

Mr S Hunter QC

Ms C Rowe

Mr P Shaw

Mr I Williams

DATE OF HEARING 24 June 2020

HELD AT Auckland District Court

DATE OF DECISION 30 June 2020

COUNSEL

Mr M Hodge and Ms E Mok for the Standards Committee

Mr D Jones QC and Mr C Morris for the Practitioner

DECISION OF THE TRIBUNAL ON PENALTY

Introduction

[1] In its decision of 30 May 2019 this Tribunal found the practitioner guilty of one charge of misconduct. The charge was founded upon nine particulars and the Tribunal found each of those particulars to have been proven.

[2] On appeal the High Court upheld the finding of misconduct, but dismissed three particulars, and found two of the nine to be at the level of unsatisfactory conduct, leaving four particulars confirmed as "disgraceful or dishonourable",[1] and therefore misconduct.

[3] For clarity, there is only one charge proved at the level of misconduct. This decision concerns the proper penalty to be imposed on the practitioner in respect of that charge.

Principles Relating to Disciplinary Sanctions

[4] We begin by reminding ourselves of the purposes of the Lawyers and Conveyancers Act 2006 (Act), in particular s 3(1)(a) and (b):

> **3. Purposes**
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> (1) The purposes of this Act are –
>
> (a) to maintain public confidence in the provision of legal services and conveyancing services:
>
> (b) to protect the consumers of legal services and conveyancing services:

[5] The Supreme Court in *Z v Dental Complaints Assessment Committee:*[2]

> … The purpose of statutory disciplinary proceedings for various occupations is not to punish the practitioner for misbehaviour, although it may have that effect, but to ensure appropriate standards of conduct are maintained in the occupation concerned."

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[1] Section 7(1)(a)(i) of the Act.
[2] *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1.

[6] In the decision of *Auckland Standards Committee 1 v Fendall*[3] the High Court, referring to disciplinary proceedings against a lawyer stated:

> "The predominant purposes are to advance the public interest, which includes protection of the public, to maintain professional standards, to impose sanctions on a practitioner for breach of his or her duties, and to provide scope for rehabilitation in appropriate cases."

[7] We note further, that the maintenance of professional standards may require the penalty process to include denunciation of a practitioner's acts and to provide scope for both general and specific deterrence.

[8] The assessment of proportionate penalty begins with the assessment of the seriousness of the conduct. This was the primary focus of submissions at the hearing.

[9] Mr Hodge, on behalf of the Standards Committee, recognised that the appeal decision of His Honour Whata J did reduce the overall seriousness of the conduct. To reflect this view of the matter, the Standards Committee, who had previously sought that the practitioner be suspended for nine to 12 months, submitted that a suspension in the region of four to six months could more realistically be considered.

[10] Mr Hodge emphasised the inherent harm to the regulatory disciplinary system which is posed by a practitioner breaching orders of the Tribunal. Mr Hodge reminded the Tribunal that His Honour had still found disgraceful or dishonourable conduct in relation to four particulars, after careful analysis. He submitted that must surely be regarded as serious misconduct, and must be met with a firm response. Mr Hodge submitted that there must be a strong deterrent component in the penalty imposed, in order to maintain professional standards. Mr Hodge further submitted that nothing in the decision of Whata J suggested otherwise. At paragraph [95] His Honour said:

> "… As a preliminary observation, I agree that disgraceful and dishonourable conduct is not limited to intentional wrongdoing. But, it is clear from the authorities that the presence or absence of an intentional breach of expected standards, together with the presence or absence of harm (including financial and/or emotional harm) to a client or third person, will be relevant to the assessment (footnotes omitted). **Having said that, we are dealing here with the**

[3] *Auckland Standards Committee 1 v Fendall* [2012] NZHC 1825.

> **performance of legal work while suspended. Limited tolerance only is to be afforded to such conduct.**"[4] (emphasis ours)

[11] In referring to particulars nine, six, seven and eight, His Honour referred to Mr Burcher having "clearly crossed the bright line …".[5]

[12] Paragraph [101] is quoted in full because it has formed the basis for submissions from both counsel, the beginning and end of the paragraph being relied upon by Mr Hodge and the comments in the middle concerning how Mr Burcher might have avoided difficulties, were relied upon by Mr Jones QC on behalf of the practitioner:

> "[101] Mr Burcher's primary defence to this charge was that he was acting as a trustee. But the work he was undertaking was clearly, as he put it, in his capacity as a "solicitor/trustee". He has crossed the bright line here again and, given the scale and content of the work, it amounts to disgraceful conduct warranting censure. I acknowledge, however, that minor refinements to the approach taken, namely, the active engagement of a senior lawyer rather than a legal executive and the giving of instructions in a transparent way with a senior lawyer present, would have avoided this issue. It is a matter for the Committee (sic), but I consider this should be relevant to penalty. This is also where Mr Moore and Mr Darlow's evidence is particularly helpful.[6] While there has been a breach here, it might be said to be a breach of form rather than substance, particularly given the roles taken by solicitors/trustees in their role as trustees. It nevertheless should sound a salutary warning to solicitors/trustees to be careful insofar as their advice to the trust and their actions require the performance of legal work of any nature."

[13] Paragraph [109] of the decision also assists the Tribunal in assessing seriousness:

> "[109] I make two further observations. It is plain to me that Mr Burcher was acting at all times in the best interests of the persons for whom he was engaged in legal work, but he overstepped the mark in doing so. In addition, it appears that for the most part, Mr Burcher did not intend to breach the suspension order. While not exculpatory, the absence of intentional breach is relevant to the assessment of the seriousness of the breach, as is the fact that there was no harm done. In some cases that might mean the conduct does not amount to misconduct. In others, it will be, as here, relevant to penalty."

[14] In referring to "no harm" being done, His Honour clearly had in mind harm to Mr Burcher's clients. We accept without reservation, as did the Standards Committee that there was no criticism of the actual work done on behalf of Mr Burcher's clients. The issue of harm, as earlier referred to in the submissions of Mr Hodge, is to the

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[4] *Burcher v Auckland Standards Committee 5 of the New Zealand Law Society* [2020] NZHC 43, Whata J at [95].
[5] Above n 4 at [98].
[6] This evidence was not before the Tribunal.

credibility of the regulatory or disciplinary system. If orders can be breached without significant consequence, the entire disciplinary process is undermined.

[15] It would also undermine s 4 of the Act which sets out fundamental obligations of lawyers, the first of which is "*the obligation to uphold the rule of law and to facilitate the administration of justice in New Zealand*". Breaching an order imposed by one's disciplinary body is the antithesis of this obligation.

[16] Mr Jones characterises the Standards Committee's approach to Mr Burcher as punitive and submits that their penalty submissions are "*disproportionate to the amended findings now made as a result of the appeal*".

[17] Mr Jones submits that "*the Tribunal findings have been substantially and substantively diluted*". Unquestionably, the removal of three particulars in support of the misconduct, and reduction of two of the supporting particulars in seriousness is of considerable assistance to the practitioner.

[18] Mr Jones set considerable store by His Honour's reference to "…*form rather than substance*…".[7] That comment must be weighed against the learned judge's suggestion of the cure, which was to have "…*the* ***active engagement*** *of a senior lawyer…",* which with respect, imports a little more than "form" (emphasis ours).

[19] Mr Jones' submission that three of the four misconduct findings involved only "form" does not sit comfortably with His Honour's specific findings of disgraceful and dishonourable conduct in respect of the four particulars.

[20] The overall finding of misconduct, based on those four particulars, together with two further findings of unsatisfactory conduct, simply cannot be brushed aside in an assessment of seriousness. The finding on the charge overall was upheld.

[21] Having said that, we recognise that context is a vital consideration in assessing penalty and where on the spectrum of misconduct this conduct falls.

[22] We accept Mr Burcher's evidence that when these events occurred, over four years ago, he was part of a dysfunctional partnership. It was not a situation where he

[7] See [101] quoted in [12] above.

felt able to seek the support of his partners to assist him with his trustee role. There was, and remains, a high degree of suspicion between them, rather than trust.

[23] We do not find this conduct to be at the most serious end of the spectrum, but any breach of a suspension order has to be considered a serious matter. Mr Burcher crossed the line into carrying out legal work on a number of occasions over a six-month period. It was recorded by the High Court Judge as follows:[8]

> "Mr Burcher undertook legal work together with instructions to Ms M to carry the work out. There is no suggestion that Ms M was approached to give advice or add value to the instructions given to her. I also agree with the Tribunal that it should have been obvious to Mr Burcher he was engaged in legal work when he provided documentation of such detail in relation to sale and purchase and other dealings in property."

[24] We take account of the fact that this conduct occurred more than four years ago, and the context of the practitioner not charging for the work, which was undertaken to assist his clients.

Aggravating Features

[25] The fact that this is Mr Burcher's third appearance before the Tribunal is an aggravating feature. We note however that all of the conduct which has been the subject of disciplinary action took place over a few years only in the context of a lengthy career, and against the background of a dysfunctional and difficult partnership breakdown.

[26] Having said that, previous findings cannot be ignored and they distinguish Mr Burcher's situation from other cases where relatively lenient penalties have been imposed upon other practitioners,[9] both of which involved losses by clients but against a background of a long unblemished career, and did not involve breach of a Tribunal Order.

Mitigating Features

[27] We take account of the letters of support which have been written by Mr Burcher's colleagues, some of whom attended to support him at the hearing. He is clearly a

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[8] Above n 4, at [87].

[9] For example, as submitted by Mr Jones, *Auckland Standards Committee No. 2 v Dangen* [2019] NZLCDT 22 and *Waikato Bay of Plenty Standards Committee 1 v Monckton* [2014] NZLCDT 51.

practitioner who seems to inspire significant loyalty from his clients and who, as we have noted in an earlier decision relating to Mr Burcher, has gone to considerable lengths to promote his clients' interests.

[28] The Standards Committee submit that no harm being done to clients ought to present as an absence of an aggravating feature rather than a mitigating one. Mr Jones cites that approach as an example of the punitive approach taken by the Standards Committee to his client. We reject that submission. The protection of clients' interests, thereby avoiding harm to them, is a basic fiduciary obligation of every lawyer and indeed is encapsulated in the s 4 fundamental obligations. As such, it is difficult to see how it can be a mitigating feature.

[29] However, we do take account of this factor in terms of the protection of the public (which in turn bears on the nature of the disciplinary response). In noting Mr Burcher's care for his clients and his motivation for conducting himself as he did, we are able to assess that suspension does not need to be imposed on this lawyer for the purpose of protecting the public.

[30] We do regard it as a mitigating feature that there was no personal gain by Mr Burcher, since he did not charge for any of his attendances.

Other Factors

[31] Mr Jones placed significant emphasis on the crossover role of trustee and lawyer. He submitted it provided an explanation of Mr Burcher's transgressions, that the line was not always easy to discern but certainly was much clearer in hindsight.

[32] Further, Mr Jones urged us to provide the deterrent aspect of the penalty process by some form of statement of principle concerning legal and trustee work while suspended, rather than imposing a term of suspension on his client, with deterrence in mind.

[33] What we would wish to state to members of the profession is that, given the complexities of the dual role of lawyer and trustee, when a lawyer is suspended there has to be even more care taken by the lawyer so as not to breach the order. If there is any doubt in the lawyer's mind as to whether he or she is providing instructions as a

trustee, or carrying out legal work, then the conservative approach must be taken and another lawyer engaged to provide the trustee/suspended lawyer with advice and in order to carry out the legal work involved.

[34] We note, that in determining a proportionate penalty for Mr Burcher we have taken account of the personal costs to him of these proceedings, which have now occupied approximately two years.

[35] We also take account of the fact that a suspension imposed upon a sole practitioner is a particular burden, such as might not be so onerous for a practitioner in a larger practice.

[36] Finally, we take account of a significant contribution to costs, which we consider it is proper to order against Mr Burcher and that this is a further burden should he be removed from practice for a lengthy period.

[37] These matters support the shortening of the period of suspension from what might have been a longer starting point, as submitted by the Standards Committee.

Result

[38] Taking account of all of these factors and taking account of the cases of *Central Standards Committee 3 v Meyrick*[10] and *Auckland Standards Committees 3 and 4 v Banbrook,*[11] both of which involved more serious breaches, we consider the least restrictive intervention which can credibly be imposed upon Mr Burcher is that of two months suspension.

[39] The Standards Committee have indicated that they do not object to a deferral of the commencement date and the Tribunal is prepared to accommodate the practitioner's request in this regard. The two months suspension will commence on 1 August 2020.

[10] *Central Standards Committee 3 v Meyrick* [2018] NZLCDT 28.
[11] *Auckland Standards Committees 3 and 4 v Banbrook* [2017] NZLCDT 35.

Costs

[40] The total costs incurred by the Standards Committee in this matter are $31,632.80. It is accepted by counsel for the Committee that there were two particulars which ought not to have been pursued and which were not withdrawn until shortly before the liability hearing. In addition, it is accepted that the practitioner was partially successful on appeal and those costs are not included in the claim. The Standards Committee propose a discount of 25 per cent in respect of the particulars which they ought not to have pursued. Mr Jones, on behalf of Mr Burcher considers that the practitioner ought to bear none of the Committee's costs.

[41] Mr Jones also points out that three of the nine particulars were not established, that is one third of the supporting particulars. We accept that is a relevant factor, but point out that costs in disciplinary proceedings are of a different nature from those in civil proceedings, because they are brought, in part, for protection of the public.

[42] The practitioner and his counsel have both asserted that the proceedings have been very expensive for him, however no actual figures have been produced, nor has a detailed analysis of the practitioner's financial situation been provided to the Tribunal. On that basis we infer that the practitioner is in a position to pay an award of costs or at least come to an arrangement with the New Zealand Law Society over payment of any costs orders.

[43] The proceedings were properly brought, and we reject the submission that, apart from the unwarranted particulars referred to, the matter was in any way "over prosecuted".

[44] There is a suggestion that the hearing could have been shortened by the Standards Committee taking "an appropriately reasoned approach". Or indeed that the matter may have resolved without the need for a hearing. That does not sit well with Mr Burcher's own recent admission in writing to the Tribunal that although he must accept the High Court's findings (of misconduct), he struggles with the practical implications. There has never been any suggestion that the practitioner was prepared to accept the charge at the level of misconduct and thus the hearing was necessary. The suggestion by Mr Jones that the Standards Committee ought to have called their own expert evidence may well have lengthened rather than shortened the hearing.

1. Taking all of these matters into account we propose to order that the practitioner pay two-thirds of the Standards Committee costs.

2. In addition, the New Zealand Law Society is ordered under s 257 to pay the costs of the Tribunal of $11,154.00.

3. The practitioner is to refund the full Tribunal costs to the New Zealand Law Society.

Censure

[45] We record in this decision the Tribunal's formal censure of the practitioner. He has failed in his obligations to his profession to abide by an order made by his profession's disciplinary body following a guilty plea being entered by him in December 2016. In doing so, he has seriously fallen short in his professional obligations. This censure forms part of the practitioner's record.

Orders

1. Mr Burcher will be suspended for two months from 1 August 2020, pursuant to s 242.

2. Mr Burcher is censured for his misconduct.

3. Mr Burcher is to pay two-thirds of the Standards Committee costs.

4. The New Zealand Law Society are to pay the full Tribunal costs certified in the sum of $11,154.00.

5. Mr Burcher is to reimburse the New Zealand Law Society for the full Tribunal costs.

DATED at AUCKLAND this 30th day of June 2020

Judge D F Clarkson
Chair