

**NEW ZEALAND LAWYERS AND
CONVEYANCERS DISCIPLINARY TRIBUNAL**

[2020] NZLCDT 23

LCDT 005/20

IN THE MATTER

of the Lawyers and Conveyancers
Act 2006

BETWEEN

**OTAGO STANDARDS
COMMITTEE**

Applicant

AND

CLAIR ISABEL ELDER

Respondent

CHAIR

Judge D F Clarkson

MEMBERS OF TRIBUNAL

Mr H Matthews

Mr B Stanaway

Ms S Stuart

Ms L Taylor

DATE OF HEARING 24 July 2020

HELD AT Christchurch District Court

DATE OF DECISION 5 August 2020

COUNSEL

Mr T McGuigan and Ms I van Woerkom for the Standards Committee

Mr J Cowan for the Respondent

DECISION OF THE TRIBUNAL

Introduction

[1] This decision gives reasons for the liability finding made following the hearing of this matter on 24 July 2020, and for the penalty then imposed.

[2] The penalty orders made were:

1. A fine of \$3,750, s 242.
2. A censure, to be delivered in writing, ss 156 and 242. (The censure is recorded at paragraph [32]).
3. An award of costs in favour of the Standards Committee of \$4,951, s 249.
4. The s 257 costs, amount to be certified, are to be paid by the New Zealand Law Society. (The s 257 costs are certified at paragraph [31]).
5. Reimbursement of the s 257 costs to the New Zealand Law Society was ordered against the practitioner, s 249.
6. The practitioner's application for non-publication of her name was declined, s 240.
7. Endorsing the agreed basis on which Ms Elder will cease operating her trust account, ss 156 and 242.¹

Issues

[3] The Issues to be determined are:

¹ As set out in submissions for the Committee, at paragraph [22], and recorded in Schedule A of this decision.

1. Was Ms Elder's conduct able to be characterised as disgraceful or dishonourable, so as to constitute misconduct under s 7(1)(a)(i)?
2. Was Ms Elder's conduct able to be characterised as a wilful or reckless disregard of her professional obligations under the Lawyers and Conveyancers Act (the Act) or the Rules of Conduct so as to constitute misconduct under s 7(1)(a)(ii)?
3. If not, did Ms Elder's conduct satisfy the definition of negligence or incompetence contained in s 241(c)?
4. If neither of the alternative charges is proven to the requisite standard, then Ms Elder's admission to the charge of "unsatisfactory conduct" will stand. In that event, what is the proportionate penalty to reflect the seriousness of the conduct?

Background

[4] The facts in this matter are agreed. There is one charge which is framed with the three alternatives of liability level supported by two particulars. The particulars relate to the breaches of two parts of an order made by a Standards Committee in relation to Ms Elder's operation of her trust account.

[5] Because the facts are agreed we draw on the submissions of counsel for the Standards Committee, summarising where appropriate:

- "5. Between June and September 2017, a review of Ms Elder's trust account records identified that it was, on occasion, overdrawn, though Ms Elder failed to disclose this fact in her certificates of compliance under regulation 17 of the Lawyers and Conveyancers Act (Trust Account) Regulations 2008 (the Regulations).
6. Due to previous instances of non-compliance concerning Ms Elder's trust account, the Committee initiated an own motion investigation into Ms Elder's non-compliance.
7. Following that investigation, Ms Elder was found guilty of unsatisfactory conduct by a notice of determination dated 17 August 2018. In respect of its findings, the Committee made orders which (inter alia) required Ms Elder to engage a trust account supervisor to undertake an inspection

of her trust account records within 30 days of the date of the determination (the Inspection Order).

8. Ms Elder failed to comply with the Inspection Order, though the Committee acknowledges she has since complied with its terms.”

[6] By way of background the Committee referred to previous dealings including previous breaches of regulations, in order to establish that “... *Ms Elder’s conduct displays a repetitive disregard for the Regulations and orders made by a Standards Committee*”:

“10. ...

- (a) In 2014, Ms Elder was warned that if she was late in filing her certificates of compliance with the New Zealand Law Society (NZLS) her non-compliance may be referred to the Committee.
- (b) Despite being warned of potential disciplinary action being taken against her, Ms Elder continued to file her certificates of compliance with the NZLS late between February 2013 and May 2015. Consequently, her non-compliance was referred to the Committee.
- (c) On 24 February 2016, Ms Elder was found guilty of unsatisfactory conduct due to repeatedly failing to file her certificates of compliance on time.
- (d) Despite being reprimanded by the Committee on 24 February 2016, Ms Elder’s non-compliance continued between June and September 2017. A subsequent trust account review report identified areas of non-compliance which Ms Elder had previously been warned about.
- (e) On 17 August 2018, the Committee found Ms Elder guilty of unsatisfactory conduct for a second time.”

[7] The 30-day period to comply with the Inspection Order expired on 17 September 2018. Then Ms Elder was reminded on 18 October of her non-compliance but did not respond:

“By 21 December 2018 (following notification that the Committee was undertaking another own motion investigation), Ms Elder acknowledged that she had failed to comply with the Inspection Order.”

[8] At that point she complied with the initial requirement to advise of a proposed inspection.

[9] Ms Elder's explanation for her conduct was that she had felt "*panicked and overwhelmed by the task*", that is the task of identifying a practitioner to inspect her trust account records. She further said, "*that the 30 day timeframe had completely escaped me by that point*".

[10] The second particular concerned failure to comply with an order directing Ms Elder to undergo a trust account supervisor course within six months of the date of the determination (the Education Order). Ms Elder has since completed that order and indeed enrolled in the first available course after she was reminded of her non-compliance on 20 February 2019. That was some six months after the determination and by this time she was already in breach of the order.

[11] Ms Elder's explanation was that she had conflated the six-month date with the 12-month deadline relating to the trust account inspection and reporting.

[12] It was not alleged that Ms Elder's breaches of the order were intentional or belligerent but merely that she had failed to give proper weight and regard to lawful orders of her disciplinary body.

[13] Somewhat unusually, following submissions to the Tribunal, Ms Elder sought to address the Tribunal directly and was sworn to give further evidence. Although this somewhat reversed the usual course of the disciplinary proceedings, s 252 authorises the Tribunal to determine its own procedure, and we were prepared to give Ms Elder this further opportunity to address us.

[14] Ms Elder stated that she always intended to comply with the orders and indeed had promptly paid the fine and costs which had been ordered but was overwhelmed by the task of finding a trust account supervisor. This was worsened when, after enquiry, a number of practitioners indicated they were unable to assist.

[15] Ms Elder acknowledges that she failed to prioritise this task and also did not check back to the terms of the order, which were crystal clear, directing her to attend a trust account supervisor's course within six months. Ms Elder stressed that her failure to meet deadlines "*in no way represents any disdain or disrespect for the Standards Committee's decision ...*". She confirmed that she understood the

importance and function of the regulatory arm of the legal profession. She referred to feelings of embarrassment and being overwhelmed, leading to her failing to properly diary-note the deadlines or prioritise these tasks over continuing to carry out tasks on behalf of her clients.

Discussion of the Issues

Issue 1

[16] Although this form of misconduct is pleaded in the charge it was not seriously argued that Ms Elder's conduct constituted disgraceful or dishonourable conduct. We certainly would not consider these epithets appropriate to describe the conduct of the practitioner in this case. The answer to Issue 1 therefore is "no".

Issue 2

[17] We were addressed at the hearing on the meaning of "reckless" in the present context. It was Mr McGuigan's submission that it was the background of a number of years of non-compliance with regulations culminating in two unsatisfactory conduct findings that elevated the practitioner's conduct to recklessness.

[18] It is clear that Ms Elder was aware of her obligations. The issue is whether conducting herself as she did, "burying her head in the sand" to quote the practitioner, constituted recklessness in relation to her professional obligations, particularly those in s 4 of the Act, which requires all practitioners to "*...uphold the rule of law and to facilitate the administration of justice...*" and is affirmed by obligations in the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008.

[19] On behalf of Ms Elder it was submitted that while she was a very experienced lawyer, a generalist in sole practice, that she did not have the advantages of either the technical systems or collegial support of a larger firm. There was no one to remind her of her deadlines or obligations. Mr Cowan submitted on behalf of the practitioner that her failure to pay sufficient regard to the order ought not to be regarded as flouting them and did not constitute conscious risk taking.

[20] In considering the matter we also had regard to the discussion of misconduct in *Complaints Committee No. 1 of the Auckland District Law Society v C*,² which adopted the words of His Honour Kirby P³ in discussing the responsibilities of a medical practitioner.

“The authorities.....demonstrate that a range of conduct may amount to professional misconduct, from actual dishonesty through to serious negligence of a type that evidences **an indifference to and an abuse of the privileges** which accompany registration as a legal practitioner.” (Emphasis ours)

[21] By a very fine margin we did not consider that the practitioner’s conduct reached that level of disregard for professional obligations. This is particularly so, as evidenced by her compliance with part of the orders (paying the fine and costs orders), while failing to pay proper attention to time limits on the other two important aspects of the orders made against her.

[22] There may not be many cases where disregard of an order of a Standards Committee can be regarded as less serious than misconduct, however we do consider this to be, by a fine margin, one of those cases. We find the practitioner to be guilty of unsatisfactory conduct at the highest end of the spectrum of conduct considered.

[23] We note that the practitioner did admit unsatisfactory conduct at an early stage of the proceedings.

Issue 3

[24] We do not consider that this falls within the definition of negligence or incompetence contained in s 241(c). The conduct in failing to observe the timeframe of the orders did not occur so frequently and was not so serious as to bring the profession into disrepute. Therefore, the answer to this issue is “no”.

² *Complaints Committee No. 1 of the Auckland District Law Society v C* [2008] 3 NZLR 105,118.

³ In *Pillai v Messiter (No.2)* (1989) 16 NSWLR 197.

Issue 4

[25] As we have outlined, we find the conduct to fit within the “unsatisfactory conduct” category and now move to consider proportionate penalty.

Penalty

[26] Although the Standards Committee did not seek a fine, in the event that unsatisfactory conduct was the conclusion, we considered that this failure on the practitioner’s part should be marked by the imposition of a modest fine, as well as the imposition of costs and a censure.

[27] We take into account the following further factors in considering penalty. There is the aggravating factor of there having been two previous unsatisfactory conduct findings in a relatively short length of time.

[28] However, against that are mitigating features such as the practitioner’s long career up until the first finding in 2016 and therefore her long service to the public. We also note that the practitioner is involved in community activities, some on a pro bono basis. In addition, Ms Elder promptly complied once reminded.

[29] A further mitigating feature, and relevant to the quantum of fine, is that there will be a financial cost to Ms Elder in giving up the management of her trust account to another practitioner.

[30] Furthermore, it was submitted that Ms Elder would need to borrow funds to pay any fine which was imposed, given that she will also be shouldering the costs of this prosecution. For those reasons we considered, following further submissions, that a fine of \$3,750 was appropriate.

[31] The s 257 costs of the Tribunal ordered and noted in paragraph [2] of this decision, are now certified in the sum of \$3,770.

Censure

[32] We deliver a censure to the practitioner in the following terms.

Ms Elder you have admitted a charge of unsatisfactory conduct which relates to non-compliance with the preventative orders of a Standards Committee following their earlier determination of a charge of unsatisfactory conduct on 17 August 2018. That earlier determination related to non-compliance with your firm's Trust Account responsibilities.

You have shown repetitive poor adherence to your compliance responsibilities generally and to the orders of the Standards Committee. It is simply not good enough, particularly for a practitioner of your abilities and years of practise.

In order for the profession to maintain the ability to largely self regulate, all practitioners are expected and expect of each other, strict adherence to orders made by a Standards Committee. In this regard you have demonstrably let yourself and your profession down.

You are formally censured.

DATED at AUCKLAND this 5th day of August 2020

Judge D F Clarkson
Chair

Terms for Ms Elder to cease operation of her trust account:

- (a) Ms Elder will cease operating her trust account, except as required to enable term deposits to continue until their expiry.
- (b) Ms Elder will appoint another solicitor with a trust account as settlement agent for any client matter requiring a trust account transaction. (Ms Jenny Beck has been nominated as the appropriate solicitor.)
- (c) Ms Elder will require the approval of the New Zealand Law Society in the event she wishes to operate a trust account in the future.
- (d) Ms Elder must complete any reasonable requirements that the New Zealand Law Society may wish to impose before approval is granted to operate a trust account in the future.