

**NEW ZEALAND LAWYERS AND
CONVEYANCERS DISCIPLINARY TRIBUNAL**

[2020] NZLCDT 38

LCDT 002/20

IN THE MATTER

of the Lawyers and Conveyancers
Act 2006

BETWEEN

**AUCKLAND STANDARDS
COMMITTEE 2**

Applicant

AND

NIGEL DAVID MASON

Respondent

DEPUTY CHAIR

Judge J G Adams

MEMBERS OF TRIBUNAL

Ms A Kinzett

Mr G McKenzie

Ms N McMahan

Prof D Scott

DATE OF HEARING 23 November 2020

HELD AT Specialist Courts and Tribunals Centre, Auckland

DATE OF DECISION 1 December 2020

COUNSEL

Ms E Mok for the Applicant

Mr A Jackson for the Respondent

DECISION OF THE TRIBUNAL RE PENALTY

[1] This decision gives reasons for our orders, made on 23 November 2020 for Mr Mason to be censured and suspended from practice for three months from 23 November 2020. Recognising that publication of his name is an ordinary incident of these matters, Mr Mason did not proceed with an application for name suppression.

[2] The amended charge of misconduct (s 7(1)(a)(ii)), which Mr Mason admitted, related to several shortcomings in the management of his trust account. When, in the context of his personal financial collapse, his firm ceased practice in October 2016, Mr Mason failed to close his trust account. Funds amounting to over \$600,000 remained in his trust account. By July 2017, he failed to reconcile the ledger and the trust account. Between July 2017 and April 2018, he failed to complete and submit quarterly and monthly certificates. The overall period of breach in managing his trust account properly extended from October 2016 to June 2018.

[3] No client funds were misappropriated. Despite his personal financial collapse which resulted in bankruptcy, Mr Mason did not touch client funds. What happened was that he became overborne by his circumstances, understandably somewhat low in mood, and he failed to manage his trust account. As a result, funds were not paid out to clients as soon as they should have been. There was a developing muddle in which the Law Society Inspector became involved.

[4] The main issue for the penalty hearing ultimately turns on whether a suspension was required and, if so, for how long. It is common ground that a censure was an appropriate component. Although punishment is not an aim of this process, we understood that publication of Mr Mason's name will distress him, particularly given that he values his long association, about 45 years, as a member of the profession.

[5] Mr Mason's circumstances preclude a fine as part of the penalty. We are satisfied that he owns no assets other than a motor vehicle, clothing, personal effects and furniture. He and his wife lost their home in Whangarei. They live in rented accommodation in Christchurch. Aged almost 69, he has New Zealand Superannuation, a job with a disability care organisation and part-time work with an immigration consultant. He is paying a debt to IRD over time and he pays \$40 per week to the Law Society in reduction of a debt. We find there is no room to make any substantial fine. A financial penalty would be crushing.

[6] Although he earlier thought he would not practise again, Mr Mason, whose bankruptcy ends in February 2021, would like to spend his remaining active years back in law. Whether that will be possible is not a matter for the Tribunal. What is important for us is to arrive at a penalty proportionate to the charge, Mr Mason's circumstances, the interests of the community and the profession.

[7] The charge of misconduct embraces a number of detailed shortcomings which were consequences of Mr Mason's inability to manage his trust account by closing it when his firm ceased, and by failing to pay out client funds and by failing to properly record transactions. Although we understand how this happened and continued, the breaches are not merely technical. The duty imposed on a solicitor to account scrupulously for money in a trust account is a fundamental obligation, one that the public are entitled to rely upon as a guarantee of security and fidelity. No client lost money in this case but clients did not receive their funds in a timely manner. That means that standards such as keeping adequate records and periodic reconciliations must be enforced. Where those standards are not adhered to, penalties must generally be imposed to encourage other practitioners to comply with the trust account requirements and to demonstrate fidelity to the public. In this case, we acknowledge that the shortcomings extended for a significant period, worsened, and cannot be discounted as merely technical breaches. Compassion for Mr Mason's circumstances should not divert us from recognising the importance of public confidence in the profession generally and specifically in the management of trust accounts.

[8] An aggravating feature of this case is that Mr Mason has seven previous disciplinary matters. None of them occurred before 2016, congruent with a view that his grip on his practice loosened from around the time when his financial affairs were falling apart. All the previous matters were dealt with by a Standards Committee except for a hearing in February 2019 when he admitted two charges of misconduct before the Tribunal. One related to acting in a transaction where there was a conflict of interest. The other concerned his failure to pay fines and costs to the Law Society. He was suspended for 15 months from February 2019.

[9] Mr Mason's defaults throughout the period of his worsening financial position and the eventual failure of his firm are extensive. In some instances, he was careless of the impact it had on clients. His failures to engage echo in the present case.

[10] Mr Jackson urged us not to inflate the period of suspension because of Mr Mason's inability to meet a fine. Mr Jackson suggested that if these matters had been before the Tribunal with the February 2019 charges, there may have been no additional period of suspension. Ms Mok noted, fairly, that the charges considered by the Tribunal in February 2019 were different in nature from those comprised within the charge we are considering.

[11] Although cases where there are no or fewer previous adverse disciplinary findings may result in a censure and fine,¹ we do not accept that the current charges could appropriately be dealt short of a period of suspension unless there were strong reasons otherwise. Mr Jackson's plea that we treat these as a "washup" of what was effectively dealt with in February 2019 does not address the different character of this charge. It is fair to ask what extra suspension may have been given had this charge been dealt with contemporaneously. And, from a prospective employer's point of view, two suspensions may seem more significant than one longer one. We can only deal with what is before us, trusting on our explanation of the reasons to provide a balanced representation.

¹ E.g. *Auckland Standards Committee 5 v Low* [2018] NZLCDT 7, *Auckland Standards Committee 4 v Appleby* [2014] NZLCDT 34, *Wellington Standards Committee 2 v Jones* [2014] NZLCDT 52.

[12] The Standards Committee, taking into account the nature and gravity of Mr Mason's conduct, his previous disciplinary history, and his personal mitigating circumstances, suggests "a short period of suspension in the vicinity of four to six months."² On balance, although broadly agreeing with the Standards Committee's approach, we settle on three months as an adequate period of suspension in this case. As Ms Mok's written submissions observe, "the penalty must be the least restrictive outcome to ensure the principles and purposes of disciplinary proceedings are met, in particular the maintenance of professional standards."³

[13] Accordingly, the penalties we impose are a censure and a term of suspension for three months from 23 November 2020.

[14] Ordinarily, we would order that the practitioner pay the costs incurred by the Law Society from the prosecution and those incurred by the Tribunal which the Law Society must reimburse. Because of Mr Mason's impecuniosity, we do not impose any costs order. The result is that the costs of this matter fall on lawyers throughout New Zealand who, just as Mr Mason has done over past decades, contribute to such costs through their annual practising certificate fees.

Orders

[15] At the conclusion of the hearing the Tribunal made the following Orders:

1. Mr Mason is suspended from practice for a period of three months, commencing 23 November 2020, pursuant s 242(1)(e) of the Lawyers and Conveyancers Act 2006 (the Act).
2. Censure (delivered in writing below).

Censure:

Nigel David Mason, you have pleaded guilty to a charge of misconduct by not managing your trust account after your firm ceased to operate.

² Submissions p 11.

³ Submissions p 11.

The duties imposed on solicitors to keep proper records and to account promptly to clients are fundamental obligations to ensure public confidence in the profession. Where these are not maintained, the reputation of the profession is brought into question.

For your failings in this matter, you are censured. This censure will remain on your record.

[16] The costs of the Tribunal are certified at \$1,752 and are payable by the New Zealand Law Society, pursuant s 257 of the Act.

DATED at AUCKLAND this 1st day of December 2020

Judge J G Adams
Deputy Chair