NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL

[2021] NZLCDT 25
LCDT 017/20

IN THE MATTER	of the Lawyers and Conveyancers Act 2006
BETWEEN	**OTAGO STANDARDS COMMITTEE** Applicant
AND	**QUENTIN DUFF** Practitioner

CHAIR
Judge D F Clarkson

MEMBERS OF TRIBUNAL
Mr S Hunter QC
Ms K King
Ms A Kinzett
Ms M Noble

HEARING 30 July 2021

HELD AT Specialist Courts and Tribunals Centre, Auckland

DATE OF DECISION 2 September 2021

COUNSEL
Mr R Moon for the Standards Committee
Mr J Farmer QC and Ms M Taylor-Cyphers for the Practitioner

DECISION OF THE TRIBUNAL ON LIABILITY

Introduction

[1] This decision concerns Mr Duff's conduct with respect to tax obligations arising in the context of his business affairs, outside his legal practice. In 2016, Mr Duff wrote to a prospective client of his property development company that a job could be completed for $150,000 as a "cashie". The message offered the client an alternative whereby payment could be deposited in a solicitor's trust account but said if that option was taken then "if we have to generate an invoice it will attract GST".

[2] The client duly paid $150,000 to the company. Mr Duff wrongly coded the payment as "Owner A Funds Introduced" and failed to account for the GST that should have been paid on it. On the other hand, when the company subsequently paid expenses, it claimed GST inputs and received refunds from the Inland Revenue Department (the **IRD**). In other words, only one half of the GST equation was declared to the IRD and Mr Duff (as sole shareholder) benefitted as a result. There is no dispute about these basic facts.

[3] The Standards Committee has charged Mr Duff with misconduct or, in the alternative unsatisfactory conduct, on the basis that his message to the client, particularly when viewed with Mr Duff's subsequent actions, demonstrated an intention to assist a person to avoid GST. They also charge Mr Duff with failing to account for and pay GST on $150,000 in a timely manner.

[4] Mr Duff is charged in his personal capacity so his conduct is scrutinised using a higher threshold for misconduct, namely, that it would justify a finding that (at the time) "… he (was) not a fit and proper person or (was) otherwise unsuited to engage in practice as a lawyer …".[1]

[1] Section 7(1)(b)(ii) Lawyers and Conveyancers Act 2006 (LCA).

[5] We wish to address at the outset an argument raised by Mr Duff's counsel, Mr Farmer QC, about the appropriateness of the charge and the Standards Committee's investigation. When lawyers are convicted of criminal offences outside their legal practice, this may reflect on their fitness and therefore result in disciplinary consequences. Mr Farmer fairly observes, however, that it is unusual for such matters – unrelated to legal work – to be considered first or solely in the disciplinary context.

[6] In the present case, Mr Duff's company has recently paid the outstanding tax and regularised the position with the IRD. The IRD, we were told in evidence, has chosen not to take any action against either the company or Mr Duff personally. If the IRD did prosecute Mr Duff for intentional wrongdoing, it would need to prove the charge to the criminal standard. In these circumstances, Mr Farmer says, it is unfair for Mr Duff to face a serious allegation (unconnected with his legal work) which will only need to be made out on the balance of probabilities.

[7] We have considered this argument carefully, but it cannot relieve us of our obligation to determine the charges laid by the Standards Committee. Parliament could have chosen to limit the Tribunal's jurisdiction to conduct in the course of providing legal services and other conduct resulting in criminal conviction. It did not do so. Instead, s 7(1)(b)(ii) of the Lawyers and Conveyancers Act 2006 (the **LCA**) requires us to consider conduct "unconnected with the provision of regulated services" that would justify a finding that a lawyer "is not a fit and proper person or is otherwise unsuited to engage in practice as a lawyer".

[8] We must therefore assess the charges laid by the Standards Committee and determine whether conduct falling within s 7(1)(b)(ii) has occurred. In doing so, we apply the civil standard but we are mindful of the seriousness of the charges and that we must be satisfied that they are clearly made out.

Issues

[9] The charges give rise to the following issues:

1. What did Mr Duff mean when using the word "cashie", and referring to holding funds without an invoice?

2. If the message is evidence of an intention to assist a person to evade tax, does that reach the level of misconduct?

3. If not, does the delay of almost five years in acknowledging and meeting liability for GST constitute unsatisfactory conduct, under s 12(c), as a contravention of the LCA?

Background

[10] In addition to his legal practice, Mr Duff had a property development company in which he was the sole shareholder and director. In 2016, Mr Duff was seeking to help a close friend undertake house renovations at a reduced price from earlier quotes that had been received. The messages quoted in the introduction, which were sent by WhatsApp, were followed up by a series of emails concerning the renovation job to be undertaken by Mr Duff's company.

[11] The messages began on 20 April 2016 and continued on 21 April when it was agreed between Mr P (Mr Duff's friend) and Mr B, the project director of Mr Duff's construction company (who was paid as an independent contractor), the basis of the construction work at the price quoted. After that all that needed to be confirmed was the finance arrangements with the bank.

[12] On 29 April 2016 Mr P paid to Mr Duff the agreed $150,000 for the "cashie" job.

[13] Mr Duff's company, Allen Kew Limited (**AKL**), operated a Xero accounting system. In the April 2016 Xero GST Audit report, it showed Mr Duff had coded the $150,000 paid into the company as "Owner A Funds Introduced", and under the heading "Details", "Quentin Duff" was entered. He coded this entry under a non-GST ledger code of the transaction ledger and thus it was listed in the GST Audit report as no GST payable with the detail referred to above. On the same date, also under the non-GST payable heading, was a transfer out of $15,000 to a bank account that Mr Duff identified to us as his own.

[14] Although, in answer to a question from one of the Tribunal members, Mr Duff referred to this amount as a contingency fund, lest there be some difficulty with the

renovation job, he coded the sum as a business expense, namely "Travel-International".

[15] There was no suggestion that this sum was in fact spent on international travel. In evidence Mr Duff said he was deliberately looking for categories that would fit within the non-GST definition.

[16] No sales or other revenue was recorded for the company for April 2016, but a number of GST expenses were claimed including what would appear to be relatively high entertainment costs.

[17] The balance of AKL's bank account before the introduction of the $150,000 from Mr P was only $55.97. This means the expenses, including the entertainment costs, which were paid for a period from 30 April onwards were being met from Mr P's funds.

[18] Although we note that this does not form part of the charges brought against Mr Duff, we simply record this as a notable concern as to his accounting and business practices.

[19] In a similar way Mr Duff's personal legal expenses of $6,670 were paid on 13 May 2016. On 16 May 2016, AKL paid Mr Duff's personal credit card bill of $9,000. Both these payments were made from AKL's account using some of the $150,000 funds. What is notable is that in respect of all expenses claimed including those properly attributable to Mr P's renovation job, a GST rebate was claimed on the expenses, despite the $150,000 not having been invoiced as a sales receipt at that time.

[20] Thus, Mr Duff's company had the benefit, in terms of its cash flow, of GST refunds on an ostensibly non-GST liable "sale".

[21] Mr Duff has not attempted to deny this process. Indeed, it is because GST was paid on the expenses relating to Mr P's job that Mr Duff denies that he can have been assisting his friend to evade the tax and therefore says the charges are not made out.

[22] In evidence before us, Mr Duff said that he understood that Mr P would need to be invoiced later and he expected that Mr P would pay further money at that time to

cover GST. There is nothing in the documents to support the notion that Mr P had agreed to pay more money later to cover GST. AKL did not in fact ever invoice Mr P and AKL itself did not pay GST on the $150,000 until after the Standards Committee had referred the matter to this tribunal. As noted above, AKL immediately treated the money as its own (rather than a deposit) and used it to meet expenses, including Mr Duff's personal expenses, that had nothing to do with Mr P's project.

[23] Although in the financial statements for the year ended March 2017 (prepared only recently), the $150,000 is included under "sales income" and in fact represented almost half of the annual income for AKL, the categorisation of the payment within the company's accounting records did not change until January 2021 after Mr Duff had received some professional accounting advice.

[24] Mr Duff had begun to be investigated in relation to the transaction under consideration here in mid-2019. In late 2019 Mr Duff approached his accountant Mr Ruddell to begin discussing work on the company's accounts which had clearly been neglected for some years.

[25] On 2 January 2021 the payment of $150,000 was re-categorised within the Xero accounts as "sales" – made up of $130,434.78 in income and $19,565.22 in GST. On 2 February 2021, AKL made a voluntary disclosure to the IRD acknowledging that the payment was GST inclusive and that the $19,565.22 was GST payable and had been since May 2016.

[26] Mr Duff openly acknowledged in his evidence before us that it was Mr Farmer, engaged as his counsel in respect of this disciplinary matter, who insisted that he reconcile and rectify his accounts so that his obligations were met.

[27] The Standards Committee suggests that in the absence of this investigation and his counsel's urging, the GST obligation might well never have been disclosed to the IRD as it was required to be.

[28] In evidence Mr Duff accepted the proposition that the usual meaning of the word "cashie" was a payment that was not expected to attract tax, either in the hands of the payer or the payee. Often in the past, this sort of payment would be in actual folding

notes. In this way the payer expected to meet a lower cost than had the payment been subject to tax, therefore a discount was achieved.

[29] However, Mr Duff maintains that in this particular instance he used the word (and he now accepts, unwisely) to mean simply a job where there would be no profit for his company and which was charged at cost. Mr Duff says the discount was thereby achieved by the non-profit element of the transaction rather than it being an attempt to evade tax or to assist Mr P to do so. He pointed to the fact that this sum was not hidden and was paid into a bank account rather than being in actual notes. Mr Duff's accountant, who gave evidence before us, confirmed that in his experience people do sometimes use the word "cashie" to refer to a discount rather than the evasion of tax (although he said he discourages this use of the term and that most people understand it to mean a payment which does not incur GST or other tax).

[30] Mr Duff contends that he cannot be guilty of assisting Mr P to have evaded GST because GST was paid on all of the items purchased for the job. The fact that this addresses only half of the equation relevant to GST will be discussed later in this decision.

[31] During his evidence Mr Duff was asked when he intended to recover the GST payable on the $150,000 invoice which would need to be raised at some point. For the first time in the history of this matter, which has been under investigation since 2019, Mr Duff said that he would have had to request further funds from Mr P. He did not say he had done so or attempted to do so, but said that, regrettably, his relationship with Mr P was over and Mr P would not speak with him. Mr Duff did acknowledge that the idea of a later demand for a separate GST payment was incompatible with the WhatsApp and email message trail.

[32] Mr Duff's counsel was critical of the Standards Committee for not calling evidence from Mr P directly concerning the meaning of "cashie" in this instance. The Standards Committee contended that it was Mr Duff's intention in using the word "cashie" which was relevant, and Mr P could not add greatly to that assessment by the Tribunal.

Discussion of the Issues

Issue 1. What did Mr Duff mean in his WhatsApp communications?

[33] In considering this issue we begin by looking at the words themselves and then consider other factors including the practitioner's subsequent actions and his business experience to determine the likely intention behind these words.

1. The Words

[34] The message of 20 April began with: "Bro Luke has come up with $150K as a "cashie"." Then there is a discussion about the work and timing. The message ends with the words "You can deposit the money into our solicitor's trust account if that gives you a sense of security. But if we have to generate an invoice it will attract GST".

[35] As noted in the background above, it is conceded that in common usage these words mean what they say, a payment not attracting tax. Mr Duff asked the Tribunal to accept that in this case it was a loose use of words to describe a transaction without profit for the builder (in this case AKL) and that subsequent failure to pay GST on the full amount of the transaction was an "honest mistake".

[36] This honest mistake and careless use of words explanation might be accepted by the Tribunal in the absence of other evidence.

[37] Mr Duff is an experienced businessman, having held directorships in approximately 15 companies. Furthermore, he has been a taxpayer and has been GST registered since at least 2000.

[38] Mr Duff has experienced difficulties in the past meeting taxation requirements to the IRD in a timely manner. Two of his companies have been liquidated by the IRD for non-payment of tax.

[39] In his evidence Mr Duff acknowledged these liquidations but said that he had personally met his obligations to the creditors.

[40] On examination, that explanation is not entirely correct. For example, in relation to The Bach Wellington Limited (in liquidation) the liquidator's report of July 2006 states

that the IRD received a distribution of 25 cents in the dollar on a proof of debt of $204,713.02. While there is a stated intention on behalf of the director/shareholder to settle debts directly with unsecured creditors, there is no evidence that actually happened.

[41] The Tribunal would have expected a practitioner with such a chequered history in relation to the IRD, particularly when the failure to declare that history (the company liquidations) had been the subject of a previous disciplinary finding against him, to have been punctilious in his handling of tax matters overall, and in his manner of discussing them.

2. Subsequent actions

[42] To the contrary, Mr Duff appears to have exhibited a cavalier approach to the management of the cash flow for Mr P's job. Within a short time of receiving the $150,000 he transferred $15,000 to his private bank account. In evidence Mr Duff said this was a contingency for Mr P's job, but he coded that amount in AKL's accounts as international travel and thus claimed it as a business expense. No explanation was given by Mr Duff as to why he would hold such a "contingency" in his personal bank account. The almost immediate transfer of 10 per cent of Mr P's money to Mr Duff personally is inconsistent with the argument that the $150,000 was a deposit or that AKL had agreed to undertake the job for Mr P without making any profit.

[43] Mr Duff's contention that GST was indeed paid by Mr P because it was paid on outgoings, ignores the fact that the GST on these payments was claimed as an input credit by AKL and refunded to it. Further, the payments were claimed as expenses and offset against income, thus reducing AKL's income tax liability.

[44] The Tribunal finds it difficult to understand how a person who has been GST registered for many years could think that engaging with just one-half of the transaction was a proper form of compliance with the rules surrounding GST.

[45] There was some discussion of Mr Duff's utilisation of AKL's accounts not only for his personal use but also for charges relating to his legal business. Mr Duff admitted these payments were not legitimate costs to AKL and should not have been charged or claimed as expenses of AKL. He also admitted that he should not have intermingled

the accounts but thought that as he would be claiming GST and also claiming the sums as expenses for income tax purposes, under one or other of his accounts, he did not think it mattered which account.

[46] In summary, Mr Duff treated the $150,000 received from Mr P as income of AKL which was immediately available to meet AKL's business expenses and in some cases his personal expenses. The sum was not set aside, in the manner of a deposit, to meet the costs of Mr P's project. GST refunds were claimed and paid to AKL by the IRD on this expenditure. All of this is inconsistent with the argument that the $150,000 was a deposit that could be invoiced and dealt with for GST purposes later. These actions detract considerably from the notion of an honest mistake.

3. Failure to pay GST on $150,000

[47] It was almost five years before the GST payable on this amount was paid and that only occurred following the Standards Committee's investigation. Once again, we consider that considerably diminishes the argument that this was a mere error on the part of the practitioner and not an intentional act.

[48] Mr Duff's wish to assist his friend in undertaking the house renovations appears to have overridden good sense and compliance with the law.

[49] The deliberate miscoding by Mr Duff of the amount into his Xero account as "Owner A Funds Introduced – Quentin Duff" is a further factor discrediting the notion of mistake. It was acknowledged by Mr Duff in evidence that he made a deliberate decision over this accounting entry and that he was specifically looking for a category which would not be GST liable. This is compelling evidence of deliberate intention rather than "honest mistake".

4. His belated evidence that he would seek a further payment from Mr P

[50] Similarly, we did not find this evidence credible. This is the first time in five years (since the tax liability arose) that such a notion has been put forward, appearing as it did in his oral evidence before the Tribunal. Given the attempts to avoid categorisation into a GST liable code and given the lengthy chain of messages concerning $150,000

being the total outgoing for this contract, this evidence can only be seen as self-serving and lacking substance.

[51] In summary, putting together the clear wording of the messages and the practitioner's subsequent actions and then lack of payment of GST until insisted on by his own counsel, in the face of his previous business experience and tax non-payment problems, we find that on the balance of probabilities to the high standard required for such a serious allegation that the practitioner did intend to assist in the evasion of GST payment.

[52] As submitted by Mr Moon we are not dealing with just one error, rather a collection of actions which compel the Tribunal to the view we have reached.

[53] As pointed out by Mr Moon, there is no evidence that Mr Duff has demanded the GST payment from Mr P nor received it from him. This supports the inference that this evidence reflects a subsequent justification rather than Mr Duff's intention at the time.

[54] We note Mr Moon's submission that the other miscoding across the bank statements and Xero reports provided by the practitioner detract from his credibility generally. Mr Duff would appear to have complete disregard for his duties as a Director under the Companies Act in terms of keeping separate legal entities apart and accounting properly for the expenses of one in isolation from the expenses of others. He paid and claimed expenses arising from his legal practice through AKL and the explanations given to the Tribunal were vague and unconvincing.

[55] A further matter which is submitted by Mr Moon as detracting from Mr Duff's credibility is that he asserted that the $150,000 was ring-fenced in this profitless transaction and then drawn as needed for materials and labour. To the contrary it was readily apparent from the accounts that it was used as working capital, the money immediately being used towards entertainment expenses and the $15,000 transferred to the practitioner's personal account.

[56] It took Mr Duff some years to have an accountant prepare returns for the company AKL and regularise its tax position. Mr Moon submits these are matters which should inform the Tribunal's finding on the second issue.

[57] We do not consider that failing to call Mr P diminishes the Tribunal's ability to make findings in this case. It is Mr Duff's intention that is under scrutiny and his subsequent actions. Mr P had no control or involvement in the preparation of the GST return or payment by AKL of the GST or indeed the failure to do so.

Issue 2 – Do these failures meet the "fit and proper person" test?

[58] We note that an assessment that a practitioner was not a fit and proper person at the time that the conduct occurred does not lead automatically to the finding that he or she is not currently a fit and proper person to be a lawyer.

[59] The concept of "fit and proper person" has recently been considered by the Supreme Court in the *Stanley* decision.[2] At [35] the majority of the Court said:

> "[35] The first point to note is the obvious one. That is, the fit and proper person standard has to be interpreted in light of the purposes of the Act. Those purposes broadly reflect two aspects. The first aspect is the need to protect the public, in particular by ensuring that those whose admission is approved can be entrusted with their clients' business and fulfil the fundamental obligations in s 4 of the Act. The second aspect is a reputational aspect reflecting the need to maintain the public confidence in the profession at the present time and in the future. This second aspect also encompasses relationships between practising lawyers and between lawyers and the court".

And at [36]*:*

> "[36] While some of the language is outdated, the essence of the first aspect is reflected in the judgment of Skerrett CJ in *Re Lundon*:
>
> > The relations between a solicitor and his client are so close and confidential, and the influence acquired over the client is so great, and so open to abuse, that the Court ought to be satisfied that the person applying for admission is possessed of such integrity and moral rectitude of character that he may be safely accredited by the Court to the public to be entrusted with their business and private affairs. "

In discussing the objective nature of the test as to 'fit and proper', the Court noted*:*

> "[40] …The High Court in *Re M* adopted the words used in *Incorporated Law Institute of New South Wales v Meagher* and said that the question is as to the applicant's "worthiness and reliability for the future". Further, as Lady Arden observed in *Layne*, what comprises fitness to practise must be referable to the good character appropriate to the particular profession. For an applicant for admission to the legal profession, as the authorities state, the appropriate

[2] *Stanley v New Zealand Law Society* [2020] NZSC 83.

> aspects of the fit and proper person standard are whether the applicant is **honest, trustworthy and a person of integrity."** (emphasis ours, references omitted*)*

[60] We consider that the practitioner's intention to assist Mr P to avoid the consequences of paying GST on the $150,000 and his complete disregard of his tax obligations and obligations as a company director mean that he was not at the time a fit and proper person to be a lawyer and that this high threshold has been met by the evidence presented by the Standards Committee. Thus we make a finding of misconduct.

[61] Mr Duff expressed in his evidence a view that ultimately it did not matter which of his entities he claimed business expenses under, since they were basically his. That ignores the basic accounting rule and legal responsibility that income is taxed having deducted the direct expenses that relate to the gaining of that income. Mr Duff paid and claimed many expenses that were properly personal ones through AKL, presumably because that is where the funds were at the time.

[62] It is extraordinary that a lawyer is not aware of how inappropriate that is and how lacking in responsibility as a taxpayer, obliged to keep proper tax records and separate accounting for each of his business entities. Mr Duff's evidence to the Tribunal which distorted the final financial position of his other companies which had been liquidated was also unsatisfactory.

[63] Mr Duff's deliberate miscoding of the funds which were introduced to AKL as "owner's funds" is another misstatement which not only detracts from his credibility but raises issues as to his fitness at the time. Similarly, his use of Mr P's funds which AKL was effectively holding on trust for a particular transaction, for unconnected entertainment and other purposes, such as personal legal fees, was highly irregular.

Issue 3

[64] Since we have found misconduct, there is no need to consider the issue of unsatisfactory conduct.[3]

[3] *J v Auckland Standards Committee 1* [2019] NZCA 614.

Further Matters

[65] We have carefully read the supporting affidavits that were filed by some of Mr Duff's colleagues. These referred to Mr Duff's positive qualities and said that Mr Duff has always properly accounted for his income as a lawyer and has not accepted under-the-table payments. We have no reason to doubt any of this. Our findings relate specifically to Mr Duff's conduct in relation to his dealings with Mr P and the tax obligations of AKL and not to Mr Duff's legal practice. We have been careful to say that our finding does not lead automatically to the finding that Mr Duff is not currently a fit and proper person to be a lawyer.

[66] We have also taken into account Mr Duff's evidence that his purpose in entering into the arrangement with Mr P was to help a friend. Again, we do not have reason to doubt that. This does not, however, detract from our finding that Mr Duff intended to assist a person to avoid the consequences of paying GST on the $150,000, and that AKL did not properly account for GST until the situation was corrected this year.

Directions

1. Counsel are to confer with the Case Manager to arrange a suitable date for a Penalty hearing of half a day.

2. Submissions as to penalty are to be filed by counsel for the Standards Committee 14 days prior to the allocated hearing date.

3. Submissions for the practitioner are to be filed seven days prior to the allocated hearing date.

DATED at AUCKLAND this 2nd day of September 2021

Judge DF Clarkson
Chairperson