

**NEW ZEALAND LAWYERS AND
CONVEYANCERS DISCIPLINARY TRIBUNAL**

[2022] NZLCDT 36

LCDT 012/21

IN THE MATTER

of the Lawyers and Conveyancers
Act 2006

BETWEEN

**AUCKLAND STANDARDS
COMMITTEE 3**

Applicant

AND

STEPHEN POTTER

Respondent

DEPUTY CHAIR

Judge J G Adams

MEMBERS OF TRIBUNAL

Ms G Phipps

Mr H Matthews

Ms M Scholtens KC

Prof D Scott

HEARING 3 October 2022

HELD AT Tribunals Unit, Wellington

DATE OF DECISION 12 October 2022

COUNSEL

Ms P K Feltham for the Standards Committee

Mr S Potter the Respondent

DECISION OF THE TRIBUNAL RE PENALTY

[1] We must determine what orders should follow our findings¹ of unsatisfactory conduct and misconduct against Mr Potter. Mr Potter's performance for the client was woeful. His client suffered adverse decisions and bankruptcy. On occasions Mr Potter failed to appear at court hearings. His service was dilatory and disorganised.

[2] Our liability decision notes that Mr Potter lacked support or guidance from a mentor, and that he failed to recognise and observe professional boundaries. What started as helping a friend out became something of a train wreck. Mr Potter was nominally employed by a sole practitioner, but we take the view that the arrangement provided neither Mr Potter nor the public with the oversight that Mr Potter needed.

[3] Mr Potter has much to commend him. Now 50 years of age, he entered law later than most. He overcame unusual hurdles to achieve standing as a member of the legal profession. He was once a competitive sportsman. He is resourceful, turning his hand to building (in which he holds qualifications) and gardening. He has succeeded with academic study and is currently studying for a Master's degree in law. He has thoughts of continuing to doctoral studies in his area of interest, Māori land law. He is devoted to his young daughter. He speaks engagingly about his academic and iwi interests.

[4] We engaged with Mr Potter at both hearings (16 May and 3 October 2022). He presents as personable and courteous. He has apologised for his shortcomings and has expressed gratitude to the Standards Committee for its submissions. Despite these creditworthy features, we worry about his capacity to practise safely.

[5] Despite having had earlier employment with a couple of sound law firms, Mr Potter's abilities to organise his practice and to achieve a necessary structure of oversight (supervision) seem indistinct, not well-engaged. We are in the dark about many relevant details, despite asking questions. For example, although we

¹ *Auckland Standards Committee 3 v Potter* [2022] NZLCDT 27.

understand he has an interest in a home, we do not know what interest, nor its value. Although we understand he runs a company (perhaps a building company) that employs people, we do not know the size of the business, nor have we seen any financial accounts. Although he still owes money to the New Zealand Law Society from previous Disciplinary Tribunal decisions, he was unable to tell us how much he owed, even as he accepted that we should order more. He does not intend to return to the practice of law within the next couple of years but would like to work as an employment representative. When asked how he might achieve oversight, he mentioned a lawyer who he said is his friend. That person does not (as far as we are aware) practise in the area of Mr Potter's interest.

[6] We would like to retain Mr Potter's opportunity of a legal career, but we must give weight to our obligation to consider the protection of the public. Mr Potter has not provided us with organised material. Despite his general courtesy, his capacity to organise himself adequately in the practice of law has not emerged. If he cannot marshal material in this forum, where his own interests are at stake, we wonder how he can manage it for clients.

[7] The Standards Committee refers to Mr Potter's own disciplinary record and precedents. Mr Potter's two earlier appearances before the Tribunal resulted in suspensions from practice for three months (2014) and eight months (2018). In 2014 he was also subjected to an order under s 242(1)(g)² prohibiting him from practising on his own account until authorised by the Tribunal. When that order was made, it was stated that "this is a cautious response, which might not need to be long term, but is protective of the public in the meantime."³ That order has not been discharged. It remains in force and is still required.

[8] Those earlier suspensions arose from foolish defaults. On the first occasion, Mr Potter failed to enable routine inspection of his trust account soon after he began sole practice. When it was inspected, nothing was found amiss. On the second occasion, he failed to pay costs awarded in the earlier proceedings. Worryingly, the characteristics of disorganisation and a tad of opposition (coming up short in compliance) continue in the present case.

² Lawyers and Conveyancers Act 2006 (the Act).

³ *Auckland Standards Committee 4 v Potter* [2014] NZLCDT 63 at [29].

[9] Mr Potter would like to avoid suspension but, on this occasion, his default is greater than on those. He says suspension might affect his ability to be a director of a public company. Once again, this is a vague gesture because he proffers no plan to take up such a position.

[10] The most apposite precedent offered by the Standards Committee is *Taia*⁴ which is ironic considering Mr Taia was Mr Potter's nominal employer at the time of the events leading to these charges. In that case, the common theme was failure to engage in a timely manner with requirements. The practitioner in that case was not practising at the time of the decision. Mr Taia was suspended for nine months on that occasion.

[11] The Standards Committee does not seek strike-off but seeks up to 12 months suspension. A third appearance before the Tribunal when a practitioner still presents as disorganised and with no evidence to support his representations is concerning. An understanding of the need for evidence (not mere assertion) is a basic competence expected of lawyers. Mr Potter owes the New Zealand Law Society \$20,444.03 from previous orders of the Tribunal. He has not applied himself to repaying that money with a commitment that is consistent with a desire to be a member the profession: he has been paying only \$20.00 per week, last payment 11 August of this year. This inevitably raises the question as to whether he is a fit and proper person to be on the roll of Barristers and Solicitors. After careful deliberation, we have accepted the submission of the Standards Committee that suspension is appropriate. We are of the view that a suspension is required in this case to mark the succession of grave defaults in Mr Potter's performance as legal advisor and representative for his client. We fix 12 months as appropriate in this case, noting the hurdles that he must overcome to practice, having not held a practising certificate and not practised since 2018.

[12] Mr Potter does not resist orders for costs of the Standards Committee and reimbursement of the Tribunal costs that the New Zealand Law Society must pay. He accepts that he should be ordered to repay \$5,800 to his client being money he received but failed to pay into a trust account.

⁴ *Auckland Standards Committee 5 v Taia* [2020] NZLCDT 39.

[13] We are concerned to manage Mr Potter's return to the law in a manner that will be safe for the public.

[14] We would like to welcome Mr Potter back into practice once he is able to do so. However, if he were to reappear on charges of similar gravity, the severe option of strike-off would be a real possibility. We stress, for Mr Potter, that his practice of law needs to be on a safe basis, that he must demonstrate willingness to accept the obligations that accompany the status and privileges of being a member of the legal profession.

[15] We make the following orders:

- (a) An order pursuant to ss 242(1)(e) and 244 of the Act, suspending Mr Potter from practice as a barrister or solicitor for 12 months commencing on the date of this decision.
- (b) We impose a condition on his suspension that, before he is issued with a new practising certificate he shall provide evidence to satisfy the Practice Approval Committee:
 - (i) firstly that he will have active ongoing supervision from an appropriate senior person or persons so that his practice will be monitored and scaffolded, and thereby ensure public confidence in his practice; and
 - (ii) secondly that he has a realistic prospect of paying his debts to the New Zealand Law Society.
- (c) An order requiring Mr Potter to pay the costs of the Standards Committee amounting to \$16,695.32, pursuant so s 249 of the Act.
- (d) An order pursuant to s 249 of the Act, requiring Mr Potter to reimburse the New Zealand Law Society for the s 257 costs, certified in the sum of \$9,896.
- (e) An order pursuant to s 156(1)(g) of the Act requiring Mr Potter to refund \$5,800 to the client the subject of the complaint.

[16] The order of 14 August 2014 (pursuant to s 242(1)(g) of the Act) prohibiting Mr Potter from practising on his own account, whether in partnership or otherwise, until authorised by the Disciplinary Tribunal remains in force. Had that order not been in force, we would have made such an order.

DATED at AUCKLAND this 12th day of October 2022

Dr JG Adams
Deputy Chairperson