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NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL

[2022] NZLCDT 40
LCDT 020/21

IN THE MATTER	of the Lawyers and Conveyancers Act 2006
BETWEEN	**WAIKATO BAY OF PLENTY STANDARDS COMMITTEE 2** Applicant
AND	**WAYNE JOHN REVELL** Respondent

DEPUTY CHAIR
Dr J G Adams

MEMBERS OF TRIBUNAL
Mr S Hunter KC
Ms K King
Ms M Noble
Prof D Scott

HEARING 3 November 2022

HELD AT Specialist Courts and Tribunals Centre, Auckland

DATE OF DECISION 9 November 2022

COUNSEL
Mr M Mortimer-Wang for the Standards Committee
Mr W Revell the Respondent Practitioner

DECISION OF THE TRIBUNAL RE LIABILITY

[1] Mr Revell faces two charges. At the conclusion of the hearing on 3 November, we retired and, were shortly thereafter able to announce the outcome orally. The outcome is recorded at the end of this written decision which gives our reasons. It also records again the timetable orders we made to bring the matter to penalty hearing on 16 December 2022.

[2] Mr Revell admits the first charge – of being convicted of an offence punishable by imprisonment (for evading income tax for ten tax years) and the conviction reflects on his fitness to practise and/or tends to bring the profession into disrepute.

[3] The first charge concerned tax returns for the ten tax years 2007/8 to March 2017. Mr Revell, who had been in partnership, clung to the stance that his partner was responsible for all tax matters. This stance is not tenable, given the many approaches and demands he received from IRD from 2010 onwards. Despite those multiple warnings, Mr Revell ignored the mounting problem. He pleaded guilty on the day the trial was to commence (9 December 2019). He paid a substantial sum shortly before his sentencing date (which was 10 December 2020) and narrowly avoided a prison sentence.

[4] The second charge concerns, firstly, thirteen irregular transfers of money from his trust account to his practice bank account between 19 June and 19 August 2019.[1] Some of these were later reversed but the ledger notations were misleading. Secondly, he was obliged to retain a sum of $12,000 in his trust account pending completion of certain work. He allowed his trust account balance to drop below that sum on several occasions,[2] clearly in breach of his duty.

[5] The single issue we must determine is the level of gravity of Mr Revell's conduct in respect of the second charge. In his response document, Mr Revell admitted the

[1] Bundle pp 58 and 80; Affidavit of Ms Ashall 22 July 2021 at [4.5].
[2] Mr Revell accepted the table of 19 days when the trust account balance dropped below $12,000 between 19 June and 22 August 2019: Bundle p 73.

second charge, but only at the standard of unsatisfactory conduct while at the conclusion of the hearing, he accepted his conduct was reckless misconduct. The Standards Committee invites us to infer that these irregularities and defaults were wilful contraventions of the rules, amounting to wilful misconduct.

[6] Mr Revell claims those transactions amounted to a series of inadvertent errors. The Standards Committee, observing that the transfers to his practice account occurred at times when his practice bank account which had no overdraft facility, was about to be overdrawn, invites us to infer that Mr Revell consciously propped up his general account by using client funds without authority.

[7] Mr Revell commenced sole practice in October 2018. The irregular transactions (June to August 2019) occurred after he had been in sole practice for about eight or nine months. His practice was not substantially resourced financially. He had no office. At the hearing he accepted the proposition that his practice was running on a shoestring.

[8] The irregular transactions comprised, thirteen payments transferred by Mr Revell from his trust account to his practice account in 2019 as follows:

- 19 June $1,000.00;
- 10 July $200;
- 18 July $1,380.00;
- 9 August $1,035;
- 13 August $372.50, $375.50 and $375.50;
- 15 August $603.75 and $605.73;
- 16 August $652.50;
- 19 August $652.50, $372.50 and $200.00.

[9] Mr Revell says he made the transactions by a cellphone App with which he lacked experience. It was put to Mr Revell that the relevant banking App displays the respective account balances before the transaction can be confirmed. He said he could not recall that and claimed to have not been aware of the respective balances of his trust account and his practice account. He claims to have been "in a state of confusion" about what sums he might have been entitled to from his trust account. When, a few days after the 13 August withdrawals, he decided he had transferred in error, he minuted his ledger as "…invoice" when there was no such invoice. He could not explain in any rational way why two of the amounts were minuted fictitiously in the ledger as "invoice" whereas one was minuted "error that didn't reverse as intended".

[10] Mr Revell implied that he transferred funds while unsure whether he had authority. He says he thought he had paid filing fees out of his general account which should be reimbursed, he transferred sums, and then decided later that he had been mistaken, so tried to restore the position by transfers that were (in our view) misleadingly minuted. We comment that, although an occasional mistake is forgivable, to transfer money from a trust account while confused is not a proper practice.

[11] As to the defaults concerning the $12,000, Mr Revell claims he was shocked, when called upon to pay the final settlement sum, to discover there were insufficient funds in his trust account. He and his wife paid $3,557.98 into his trust account on 22 August 2019 to enable payment. Despite the number of occasions under examination, he denies any intentional default. Inferentially, he invites us to accept that he overlooked all the multiple overdrawings that appear when the trust account dropped below $12,000. We were not impressed by his suggestion that the money was not his client's money because it was retained to pay to another party, pending completion of some work. We find that the money was his client's pending settlement and that the nature of the funds as retention funds did not mitigate his duty to retain it wholly in his trust account. In this respect, we find Mr Revell's fidelity to his trust accounting duties was wanting.

[12] Although he had undertaken training and sat an examination about his trust accounting obligations, Mr Revell asks us to accept that these were isolated defaults. He denies any of them were undertaken to prop up his practice account.

[13] Mr Revell's practice account balance had fallen to $6.99 on 12 August 2019, the day before he transferred three sums totalling $1,123.50. Over the next two days, all of that was exhausted. The account was run down to $2.69 on 14 August. The spending then ceased. The bulk of the expenses were payments to Hamilton Cosmopolitan Club or Eastside Tavern. Some of the expenses involved withdrawals of cash at those locations via a debit card.

[14] During the hearing, Mr Revell introduced the new suggestion that the drawings may not have been solely by him because he says his wife also had a debit card for this account. He said they used his practice account as "an open slush fund." He produced no evidence to back up the proposition that he may not have been responsible for the drawings. He accepted that all transactions under review used the same debit card number which he accepted was his card.

[15] The mid-August 2019 period may well have coincided with the criminal sentencing of his former law partner, Mr Campion. Mr Revell said he was under stress and that those three days passed like one day. He volunteered that alcohol may have been involved. We infer that he spent a lot of money indulgently on himself over those few days.

[16] We are not persuaded that a medical procedure undertaken some weeks earlier materially affected Mr Revell's mental functioning at the relevant time. He produced no medical evidence of the procedure or of its effect.

[17] Our finding that will fix the gravity of the second charge must be determined on the balance of probabilities, taking heed of the importance of the finding to the practitioner. We do not approach this matter lightly.

[18] Although there is evidence to suggest Mr Revell is a poor recorder of trust accounting, hampered by his use of a manual system and demonstrating some gaps in his appreciation of the standards he should maintain, we have no evidence to suggest there have been further similar irregularities since August 2019. Were those transactions inadvertent or was he propping up his practice account with client funds? Was his conduct reckless or can we confidently find it to have been wilful?

[19] In final submissions, Mr Mortimer-Wang advanced the following factors as amounting to a basis upon which we can find the conduct to have been wilful:[3]

- Mr Revell had been schooled in the rules and understood his obligations.
- The number of occasions of default (irregular transfers, notation or allowing his trust account to fall below $12,000).
- The grouping of the transactions.
- The pattern of transactions that coincided with stress on his practice account.
- The notable spending, and the cessation of that spending just keeping his practice account in credit in the 12 August to 15 August period.
- The misrepresentations in his notations in the trust account ledger (e.g. referring to non-existent invoices), noting that these reconstructions occurred a few days later when he was allegedly trying to rectify mistakes, not conceal them.
- Mr Revell's discernible history of self-deception, minimisation and avoidance, especially in relation to his ongoing attempts, even in this hearing, to place primary blame for his ten years of income tax default on his former law partner.

[20] At the conclusion of the hearing, we were in no doubt about the level at which the misconduct should be found. On the central point, Mr Revell's evidence was unconvincing. Despite his assertions to the contrary, we find his actions were "wilful." Mr Mortimer-Wang referred us to the discussion regarding the meaning of "wilful" and "reckless" in *Zaitman v Law Institute of Victoria.*[4] An action is "wilful" where a lawyer, who knows something is a contravention of the relevant Act or regulations,

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[3] See, also *Pillai v Messiter [No 2]* (1989) 16 NSWLR 197 at 200, where Kirby J held that misconduct extended to "such serious negligence as, although not deliberate, would portray indifference and an abuse of the privileges which accompany registration" as a practitioner. See also, *W v Auckland Standards Committee 3* [2012] NZCA 401 and *Zaitman v Law Institute of Victoria* VSC No 5419 of 1994, 9 December 1994, pp 51 to 52 (on the distinction between wilful and reckless).

[4] *Zaitman v Law Institute of Victoria* VSC No 5419 of 1994, 9 December 1994, pp 51 to 52.

nevertheless intentionally does that thing. Here, Mr Revell knew that trust account monies must be held for the client who has paid them but nevertheless intentionally transferred trust monies to his practice account and spent them for this own benefit.

[21] Mr Revell may have subsequently blinded himself to the consequences of his actions but having heard him give evidence we find that he knew he was using trust monies at the time. He has breached the sections and rules referred to in the Standards Committee submissions, including s 110 of the Lawyers and Conveyancers Act 2006 (the Act) (obligation to hold money in trust account); s 112 (obligation to keep trust account records that disclose clearly the position of the money - and to keep records in such a manner as to enable them to be conveniently and properly audited); Regulations 6, 9, 11 and 12 of the Lawyers and Conveyancers Act (Trust Account) Regulations 2008. We find his level of default amounts to wilful misconduct under s 7(1)(a)(ii) of the Act.

[22] Accordingly, the first charge is made out and admitted. We find the second charge proved at the level of wilful misconduct.

[23] This matter is adjourned to a penalty hearing on 16 December 2022 (not before 12 midday). We record that we advised Mr Revell to instruct counsel who will be available to represent him on 16 December. The Standards Committee affidavits and submissions shall be filed by 23 November. Mr Revell's affidavits and submissions shall be filed by 7 December.

[24] There is an order pursuant to s 240 of the Act that any client of Mr Revell named in the Tribunal file is permanently suppressed.

DATED at AUCKLAND this 9th day of November 2022

Dr JG Adams
Deputy Chairperson