**SUPPRESSION ORDER MADE ON APPEAL**

**NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL**

[2013] NZLCDT 7
LCDT 021/12

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| **IN THE MATTER** | of the Lawyers and Conveyancers Act 2006 |
| **BETWEEN** | **WAIKATO BAY OF PLENTY STANDARDS COMMITTEE NO 1** |
| **AND** | **H** |

**CHAIR**
Judge D F Clarkson

**MEMBERS OF TRIBUNAL**
Mr G McKenzie
Ms C Rowe
Ms S Sage
Mr W Smith

**DATE OF HEARING** at Auckland 28 February 2013

**APPEARANCES**
Mr L Clancy for the Standards Committee
Ms K Harkess for the Practitioner

**RESERVED DECISION OF NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL AS TO PENALTY AND SUPPRESSION ORDERS**

## *Introduction*

[1] Four charges of misconduct were brought against the Practitioner. The charges were, in the alternative, stated as *"misconduct",* "*conduct unbecoming*" and "*negligence or incompetence reflecting on fitness to practise*" respectively. Following discussions between the Standards Committee and the Practitioner the Practitioner admitted the four charges on the basis of "*negligence or incompetence reflecting on fitness to practice*". On this basis the Standards Committee did not seek to proceed with the alternative charges as to misconduct or conduct unbecoming

[2] The parties had further agreed a schedule of penalty orders to be sought, subject to the approval of the Tribunal.

[3] The only contested matter at the hearing was the question of whether the Practitioner's name and that of his firm ought to be suppressed permanently.

## *Background facts*

[4] These are contained in the particulars of the charges which are set out as follows:

> **1. First charge - conflict of interest (on or before 31 July 2008)**
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> (c) In the further alternative, negligence or incompetence in his professional capacity, and that negligence or incompetence has been of such a degree or so frequent as to reflect on his fitness to practise as a barrister or solicitor or as to tend to bring the profession into disrepute.
>
> **2. Second charge - conflict of interest (on or after 1 August 2008)**
>
> (c) In the further alternative, negligence or incompetence in his professional capacity, and that the negligence or incompetence has been of such a degree or so frequent as to reflect on his fitness to practise or as to bring the profession into disrepute.

**3. Third charge - acting contrary to the Complainant's best interests (on or before 31 July 2008)**

(c) In the further alternative, negligence or incompetence in his professional capacity, and that negligence or incompetence has been of such a degree or so frequent as to reflect on his fitness to practise as a barrister or solicitor or as to tend to bring the profession into disrepute.

**4. Fourth charge - acting contrary to the Complainant's best interests (on or after 1 August 2008)**

(c) In the further alternative, negligence or incompetence in his professional capacity, and that the negligence or incompetence has been of such a degree or so frequent as to reflect on his fitness to practise or as to bring his profession into disrepute.

**Background**

1 At all material times the Practitioner held a practising certificate as a barrister and solicitor issued under the Law Practitioners Act 1982 and, since 1 August 2008, under the Lawyers and Conveyancers Act 2006.

2 At all material times the Practitioner was a partner in the firm X (**Firm**).

3 In April 2000, the Complainant instructed the Practitioner to act for her on the purchase of a residential property at [redacted] (**Property**).

4 The vendor of the Property was [redacted] (**Vendor**).

5 The Property was a recent subdivision, with a newly built house on the land. The Vendor had undertaken the subdivision and the construction of the house. The Practitioner had previously acted for the Vendor.

6 The Practitioner also acted for the Vendor on the sale of the Property to the Complainant. The Practitioner arranged for a legal executive within the firm to carry out the conveyancing work for the Vendor on the sale.

7 An agreement for sale and purchase of the Property, in the form approved by the Real Estate Institute of New Zealand and the Auckland District Law Society (7th edition, July 1999), was prepared by the Practitioner and signed by the Vendor and Complainant, dated 3 May 2000 (**Agreement**).

8 The Agreement contained a standard vendor warranty that all necessary building permits and certificates (including a code compliance certificate) had been obtained.

9 The purchase price for the Property was $205,000. The purchase duly settled on 30 June 2000, with the Complainant taking possession from that time.

**First charge - conflict of interest (on or before 31 July 2008)**

10 In 2004, the Complainant became aware that a code compliance certificate had not been issued for the house on the Property. An application for a code compliance certificate was made by the Complainant, but declined by the [redacted] District Council (**Council**). The Complainant sought advice from the Practitioner about the issue.

11 The Vendor remained a client of the Practitioner and the firm. The Practitioner tried to resolve the matter by discussing it with the Vendor and then by making an application to the Department of Building and Housing for a determination regarding the Council's refusal to issue a code compliance certificate.

12 In doing so, the Practitioner acted for the Complainant from 2004 through to 2010, having acted for the Vendor in relation to the sale of the Property to the Complainant and while continuing to act for the Vendor.

13 In 2005, the Complainant advised the Practitioner that the house was leaking and required repairs and sought advice from the Practitioner to assist her in resolving the weathertightness issues. The Practitioner continued to advise the Complainant that an application to the Department for Building and Housing for a determination was the appropriate way of resolving these issues.

14 The application to the Department of Building and Housing was not progressed in a timely fashion. The application was finally made in 2009, with a final response from Department of Building and Housing in 2010.

15 The application was declined by the Department of Building and Housing on the basis that a notice to fix should issue and repairs be undertaken accordingly before code compliance could be established. The Complainant faces substantial repair costs to comply with these requirements and fix the weathertightness issues with the house.

16 In 2010, the Practitioner advised the Complainant that he had a conflict of interest and that he could not continue to act for her.

17 Between 2004 and 31 July 2008, the Practitioner was guilty of misconduct in his professional capacity or conduct unbecoming or negligence or incompetence of such a degree or so frequent as to reflect on his fitness to practise or as to tend to bring the profession into disrepute, in that, in breach of Rule 1.07 of the Rules of Professional Conduct for Barristers and Solicitors, the Practitioner did not:

(a) Advise the Complainant and the Vendor of the areas of conflict or potential conflict.

(b) Advise the Complainant and the Vendor that they should take independent legal advice and arrange such advice.

(c) Decline to act further for the Complainant and the Vendor in relation to these matters.

**Second Charge - conflict of interest (on or after 1 August 2008)**

18 The facts, matters and particulars set out in paragraphs 1 to 16 above are repeated.

19 From 1 August 2008 until 2010, the Practitioner was guilty of misconduct or unsatisfactory conduct that is not so gross, wilful or reckless as to amount to misconduct, or negligence or incompetence of such a degree or so frequent as to reflect on his fitness to practise or as to bring his profession into disrepute, in that, in breach of Rule 6.1 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, the Practitioner acted for the Complainant and the Vendor in circumstances where there was a more than negligible risk that the Practitioner may be unable to discharge the obligations owed to either or both of them.

**Third Charge - acting contrary to Complainant's best interests (on or before 31 July 2008)**

20 The facts, matters and particulars set out in paragraphs 1 to 16 above are repeated.

21 From 2004 onwards, the Practitioner did not adequately advise the Complainant on:

(a) The claims the Complainant may have had against the Vendor in relation to his failure to obtain a code compliance certificate.

(b) The time limits which would apply to any such claims.

22 From 2005 onwards, the Practitioner did not adequately advise the Complainant on:

(a) The claims the Complainant may have had against the Vendor in relation to the weathertightness issues with the house.

(b) The time limits which would apply to any such claims.

23 From 2004 onwards, the Practitioner instead advised the Complainant that applying for a determination from the Department of Building and Housing was the appropriate solution to the matters the Complainant had instructed him on. The Practitioner failed to progress an application in a timely fashion, such that it was only made in 2009 and finally determined in 2010.

24 Between 2004 and 31 July 2008, the Practitioner was guilty of misconduct in his professional capacity or conduct unbecoming or negligence or incompetence of such a degree or so frequent as to reflect on his fitness to practise or as to tend to bring the profession into dispute, in that, in breach of Rule 1.01 of the Rules of Professional Conduct for Barristers and Solicitors the Practitioner did not act in the Complainant's best interests, contrary to the required relationship of confidence and trust between solicitor and client.

**Fourth Charge - acting contrary to Complainant's best interests (on or after 1 August 2008)**

25 The facts, matters and particulars set out in paragraphs 1 to 16 and 21 to 23 above are repeated.

26 From 1 August 2008 until 2010, the Practitioner was guilty of misconduct or unsatisfactory conduct that is not so gross, wilful or reckless as to amount to misconduct, or negligence or incompetence of such a degree or so frequent as to reflect on his fitness to practise or as to bring his profession into disrepute, in that, in breach of Rule 6 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 the Practitioner did not act in the Complainant's best interests, contrary to his duty to protect and promote the interests of the Complainant to the exclusion of the interests of third parties.

[5] In his initial response to the charges the Practitioner denied some of the particulars and in his subsequent evidence before the Tribunal amplified on some of these details. Specifically it was his contention that he would definitely have advised the complainant that he acted also for the vendor when the property was purchased in 2000.

[6] He admitted that in late 2004 that no code compliance certificate ("CCC") had been issued by the council and that this was an obligation on the vendor in terms of the agreement for sale and purchase. He confirmed that he took no formal steps against the vendor to ensure that such was obtained. He confirmed that the vendor remained a client of the firm. The practitioner further confirmed that he applied to the Department of Building and Housing for a determination on the council's decision not to issue a CCC but that this was not filed until 18 May 2009. He stated that he considered the leaks in the building were due to guttering maintenance problems which would be addressed by the complainant herself.

[7] The practitioner confirmed that at a meeting in 2008 or 2009 with the complainant and her daughter he acknowledged that he acted for the vendor, but stated that this was already known by the complainant. This is contrary to the evidence of the complainant and her daughter, neither of whom were sought for cross-examination. He states that the complainant and her daughter insisted that he remain acting following this advice. The evidence of the complainant's daughter is that she considered that the practitioner was responsible for sorting the matter out and that he ought to continue acting in order to do so. At no time did the complainant

or her daughter, over this period between 2000 and 2010, receive independent advice.

[8] From these facts it is clear that from at least 2004 when the practitioner became aware there were problems with the building that he had a very clear and serious conflict of interest between his client the purchaser, and the developer client who had sold the house to the complainant.

[9] The complainant is an elderly widow now in her late 70s. The leaking problems, which began almost immediately after the property was occupied, and the lack of a CCC has caused enormous stress and distress to the complainant and to her family. Furthermore, she has now lost the opportunity of suing the builder and she has lost the opportunity of making a claim to the Weathertight Homes Tribunal because of the negligence of the practitioner in his inaction in this matter and his failure to refer her immediately to an independent solicitor. The estimates of repair (it is accepted that not all of this amount would necessarily have been the responsibility of the builder) is in the region of $180,000. The purchase price for the unit was $205,000.

[10] The consequences of this negligence are therefore extremely serious.

[11] It is also apparent that this conflict lasted for some six years during which the firm apparently had no processes for detecting a matter of such significant concern to its client, independent of a report of the information by the practitioner himself to his partners.

[12] Upon questioning by the Tribunal the practitioner revealed that the building developer client had over a period of approximately 15 years that the firm had been acting for him, built on average 10 to 15 houses per year. The firm would act on the purchase of the section and on the ultimate sale of the developed property, in this case at least and we are not aware of other occasions, also acting for the purchaser.

[13] Thus it can be seen that this vendor/developer was a particularly valuable client to the firm on an ongoing basis. While we do not consider that this is a situation where there was a deliberate decision by the practitioner to prefer the more valuable client over the complainant, we must assume that unconsciously at least, the practitioner will have been influenced by his desire to retain the valuable business

provided by the developer client to his firm. Certainly we consider there was a woeful lack of focus in respect of the dealings which the practitioner had with both parties to this dispute, which underlines the need for the Rules on conflict set out in the current Client Care Rules (Rule 5) and their predecessor Rules.

***Penalties sought***

[14] The agreed set of penalties submitted for the Tribunal's approval were as follows:

[a] Censure.

[b] A penalty of $10,000, s 242(1)(i).

[c] Compensation pursuant to s 156(10(d) in favour of the complainant in the sum of $40,000.

[d] The costs of the New Zealand Law Society (which amounted to $2,500).

[e] Reimbursement for the Tribunal's hearing costs pursuant to ss 249 and 257.

[15] We accept that these penalties which were agreed by the practitioner were proposed having regard to: the seriousness of the negligence in this matter; the losses to the complainant; and the litigation risks which might have been faced by her had the matter been properly handled on her behalf. We also take account of the fact that the Standards Committee has undoubtedly been mindful of the current circumstances of the practitioner and in particular his poor health, to which we shall refer in due course.

[16] The only area in which the Tribunal differs from the proposed penalties is in the area of compensation. Despite the complainant's willingness to be generous in this regard and accept the sum of $40,000 in respect of the losses occasioned by her we consider that in these circumstances the maximum ought to be awarded; that is $25,000 in respect of each charge, or a total of $50,000.

***Practitioner's personal circumstances***

[17] It is accepted by all that this is the first complaint that has been faced by this practitioner in some 35 years of legal practice.

[18] Mr H is a practitioner who has been strongly involved in his community and in particular, sporting organisations in the area where he resides and practices. The firm has provided ongoing support as sponsors in relation to sporting organisations in [redacted]. The practitioner is currently the [redacted]. He struck the Tribunal as a man who was genuinely conscientious and generous of his time and energies both in respect of his clients and the local community. It is most unfortunate that this matter blemishes the end of his career.

[19] The practitioner has undertaken to the Tribunal to hand in his practising certificate and not to seek a further practising certificate. This undertaking was sought because although the practitioner deposed to having retired from his practice for health reasons some six months ago, he gave evidence that he was still visiting the practice and assisting with client handover some two days per week. We did not consider that in the circumstances that took sufficient account of the serious nature of this offending, albeit largely unintentional. It did not fit with the submission that there is no element of public protection arising because the practitioner had permanently retired. Furthermore we do not consider it reflected well on his firm to effectively have continued (particularly acting for the developer client), as if nothing untoward had happened. We shall comment further about the firm's approach to this matter under the heading of suppression of name.

[20] Sadly for Mr H, some time after the events in question, namely in 2011, he suffered a serious (illness) [redacted] his health is simply not robust enough for him to continue in legal practice. We have great sympathy for the practitioner finding himself in this situation and of course without ongoing income. We have taken account of this in accepting, with the exception of the compensation figure referred to above, the penalties sought by the Standards Committee.

***Suppression of name***

> **3 Purposes**
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> (1) The purposes of this Act are-
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> (a) to maintain public confidence in the provision of legal services and conveyancing services:
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> (b) to protect the consumers of legal services and conveyancing services:
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> (c) to recognise the status of the legal profession and to establish the new profession of conveyancing practitioner.
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> **238 Hearings to be in public**
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> (1) Except as provided in subsections (2) and (3) and section 240, every hearing of the Disciplinary Tribunal must be held in public.
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> (2) If the Disciplinary Tribunal is of the opinion that it is proper to do so, having regard to the interest of any person (including (without limitation) the privacy of the complainant (if any)) and to the public interest, it may hold a hearing or part of a hearing in private.
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> (3) The Disciplinary Tribunal may, in any case, deliberate in private as to its decision or as to any question arising in the course of a hearing.
>
> **240 Restrictions on publication**
>
> (1) If the Disciplinary Tribunal is of the opinion that it is proper to do so, having regard to the interest of any person (including (without limitation) the privacy of the complainant (if any)) and to the public interest, it may make any 1 or more of the following orders:
>
> (a) an order prohibiting the publication of any report or account of any part of any proceedings before it, whether held in public or in private:
>
> (b) an order prohibiting the publication of the whole or any part of any books, papers, or documents produced at any hearing:
>
> (c) subject to subsection (3), an order prohibiting the publication of the name or any particulars of the affairs of the person charged or any other person.

[21] Mr H has sought that his name be suppressed given his unblemished professional record up to the time of these events and the fact that he practises in a small community where he would be readily identifiable as would his firm. The Standards Committee position is that it would abide the order of the Tribunal but pointed out that it was the practitioner's onus to displace the presumption of openness of disciplinary proceedings.

[22] The application is supported by affidavits from the practitioner, a partner in the firm, [redacted], and his general practitioner. The medical evidence confirms Mr H's own evidence [redacted].

[23] Section 240 provides that the identity of the practitioner or any other person may be suppressed if the Tribunal is of the opinion that it is:

> "... Proper to do so having regard to the interest of any person, the privacy of the complainant and the public interest."

[24] It is accepted that there is a presumption of openness but that this needs to be balanced against the practitioner's and other's private interests.

[25] In referring the Tribunal to the decision of *Hart v Standards Committee (No 1) of the New Zealand Law Society*[1] counsel went on to submit that:

> "... Reputational concern or embarrassment associated with an adverse disciplinary finding is not a sufficient interest to put the balance in favour of privacy."

[26] However, counsel pointed to the medical evidence that the additional stress associated with publication could adversely affect the practitioner's health and current recovery.

[27] Counsel went on to advance the interests of the firm [redacted].

[28] [redacted].

[29] We have considered recent decisions of the Tribunal where suppression of name has been allowed particularly where medical evidence has supported this, for example, *Standards Committee v ABC.*[2] However that was a case where there was a one-off inadvertent error which was immediately acknowledged by the practitioner with no negative consequences for any other person. This provides a considerable distinction from the present case.

[30] In upholding the High Court decision to deny suppression, in the matter of Hart, the Court of Appeal had this to say:[3]

> "....The public interest and open justice principles generally favour the publication of the names of practitioners facing disciplinary charges so that existing and prospective clients of the practitioner may make informed choices about who is to represent them. That principle is well established in the disciplinary context and has been recently confirmed in *Rowley*. The Act itself

[1] [2012] NZSC 4.
[2] [2011] NZLCDT 14.
[3] [2011] NZCA 676 at [18].

> is designed to promote public confidence in lawyers by an open approach to disciplinary matters".

[31] In the decision given in the High Court[4], His Honour Toogood J held:

> "[48] I am not persuaded that the concerns expressed by the plaintiff about reputational damage outweigh the public interest in open justice. I am particularly influenced by the presumption, in the Act, that hearings of the Tribunal must be held in public. I agree with the view of the Tribunal that support for this principle best achieves the statutory purpose of maintaining public confidence in the provision of legal services and the protection of consumers of legal services.
>
> [49] The plaintiff's claim to a high public profile does not assist him. He is not entitled to be treated any differently, on that account, from a junior practitioner who has no public profile."

[32] His Honour went on to refer, with approval, to the Tribunal's decision, where it referred to an earlier decision in *Hill*[5]. In that matter it was held that ss.238 and 240, must be read in connection with the Purposes of the Act as set out in s.3:

> [29] In *Hill*, the Tribunal said that it considered public confidence in the provision of legal services is maintained by the ability of the public to access and scrutinise information about disciplinary proceedings and the workings of the disciplinary process. The legislation was enacted, with a clear consumer focus, to reform the oversight of the provision of legal services.

[33] While the Tribunal has considerable sympathy for Mr H' medical condition, it has to be remembered that personal circumstances "...*cannot predominate in the exercise of a protective jurisdiction."*[6]

[34] The practitioner's negligence touched at the very heart of the relationship of trust between lawyer and client. The Tribunal considers Conflict of Interest, which leads to charges in a significant proportion of cases in the disciplinary jurisdiction, is an area to which the profession must pay particular attention. We consider that the public perception of the profession would not be enhanced or maintained, were the type of conflict such as occurred here not able to be fully aired because of the suppression of the name of the practitioner and firm. On balance, we consider the public interest in openness of these proceedings outweighs the practitioner's private interests.

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[4] CIV 2011-404-7750, Auckland High Court, 13 Dec 2011.
[5] Hawkes Bay Standards Committee v RH Hill [2010] NZLCDT 28.
[6] Sisson v Standards Committee of Canterbury Westland Branch NZLS [2013] NZHC 349, at [57], 28.2.13.

[35] We are prepared to continue the Interim Suppression Order for 7 days following the release of this decision in case Mr H wishes to take further steps in this matter.

[36] There will be a Final Suppression Order as to the names of the clients and identifying details.

[37] **ORDERS**

(a) Censure of the practitioner.

(b) A fine of $10,000 is imposed, s.242(1)(i).

(c) Compensation in favour of the complainant, in the sum of $50,000, s.156(1)(d).

(d) Reimbursement of the fees charged to the complainant in the sum of $640.

(e) Costs in favour of the NZ Law Society in the sum of $15,000, s.249.

(f) Costs of the Tribunal to be paid by NZ Law Society in sum of $2,500, s.257.

(g) The practitioner is to reimburse the NZLS the full s.257 costs of $2,500, s.249.

(h) There will be a final suppression order in respect of the names and identifying details of the clients referred to in this decision.

**DATED** at AUCKLAND this 18th day of March 2013

Judge D F Clarkson
Chair