NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL

[2018] NZLCDT 10

LCDT 003/17

UNDER	The Lawyers and Conveyancers Act 2006
BETWEEN	**WELLINGTON STANDARDS COMMITTEE 2** Applicant
AND	**IAN DAVID HAY** Respondent

CHAIR

Judge D F Clarkson

MEMBERS

Mr J Bishop

Mr W Chapman

Ms J Gray

Ms P Walker

HEARING 9 April 2018

HELD AT Tribunals Centre Wellington

DATE OF DECISION 17 April 2018

COUNSEL

Ms S Carter for the Standards Committee

Mr J Upton QC for the Respondent

DECISION OF THE TRIBUNAL ON PENALTY

Introduction

[1] Mr Hay was found guilty of one charge of misconduct comprised of disgraceful and dishonourable conduct and reckless breach of Rule 5.10[1], in the circumstances surrounding his guarantee of a $200,000 loan from the complainant to a company associated with him and failing to repay her.

[2] The submissions of counsel as to the appropriate penalty for this conduct could not be further apart. Ms Carter, counsel for the Standards Committee submits that the conduct, as found by the Tribunal, when viewed with the aggravating features, demands nothing less than strike-off as a proper disciplinary response.

[3] Mr Upton QC, urges us to only deliver a censure and impose restrictions on the practitioner's practice. He submits that would facilitate a loose proposal that if (and only if) the Tribunal permits Mr Hay to keep practising, a group of his friends/associates will loan him $200,000, which Mr Hay can then pay to the complainant, as some recovery of the losses he has occasioned her. This loan will apparently not be available if the lawyer is struck off or suspended and is thereby required to engage in some other means of gainful employment.

[4] The determination of penalty in disciplinary proceedings is a principled exercise with a clear framework. It begins with establishing the level of seriousness of the conduct or offending, then brings into consideration mitigating features, aggravating features, including prior disciplinary matters, before finally assessing the least restrictive intervention, having regard to the purposes of imposing penalty.

[5] Its particular and distinctive function, which is protective rather than punitive, is reflected in the account taken of a number of factors: the lesser attention given to personal factors relating to the practitioner; and the importance attributed to both

[1] Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008.

context of the offending (many cases being seen as fact-specific) and the conduct of the lawyer overall, so as to ascertain fitness to practise.

[6] All of these factors are weighed with a clear focus on the purposes of the LCA:[2]

> **Section 3**
>
> "(1) The purposes of this Act are–
>
> (a) to maintain public confidence in the provision of legal services …
>
> (b) to protect the consumers of legal services …
>
> …"

[7] The purposes of penalty are reinforced in one of the leading cases on penalty *Daniels*[3] at para [22] where the full Court stated:

> "It is well known that the Disciplinary Tribunal's penalty function does not have as its primary purpose punishment, although orders inevitably will have some such effect. The predominant purposes are to advance the public interest (which include "protection of the public"), to maintain professional standards, to impose sanctions on a practitioner for breach of his/her duties, and to provide scope for rehabilitation in appropriate cases."

Seriousness of Conduct

[8] As Ms Carter reminded us, the Tribunal found, in its liability decision, that the practitioner's conduct was "extremely serious misconduct".

[9] Because strike-off is sought, inevitably the issue of assessment of honesty arises. In his submissions, Mr Upton put to us: "*Importantly, the Tribunal did not find dishonesty on the part of Mr Hay* …".

[10] Whilst the Tribunal might not have used the actual word "dishonesty", we used such terms as "outrageous", "disgraceful" and "dishonourable" and "involving quite blatant obfuscation which did him no credit".

[11] Ms Carter used the word "deceit" in submitting that where elements of deceit or dishonesty are present that strike-off is usual. We consider that is an apt term to apply

---

[2] Lawyers and Conveyancers Act 2006.
[3] *Daniels v Complaints Committee 2 of the Wellington District Law Society* [2011] 3 NZLR 850.

to the conduct under consideration, as well as Mr Hay's subsequent conduct which will be referred to separately.

[12] His use of the funds borrowed from the complainant, largely to pay his own personal and other investment debts, rather than being applied to the "Queenstown development" which had been discussed with the complainant, was clearly deceitful.

[13] Further, as set out in a liability decision, his conduct in failing to disabuse the complainant of her belief that a property had been purchased and a development was taking place, in order to buy himself some more time, was also deceitful, by omission.

[14] The consequences to the complainant have been extremely grave. She obtained a judgment against Mr Hay for $227,293.15. However, none of this was repaid to her because Mr Hay was bankrupted in 2014.

[15] In summary, this is 'high end' misconduct.

Aggravating Factors

[16] While *Daniels*[4] made it plain that a robustly conducted defence is not an aggravating feature, but may deprive a practitioner of otherwise mitigating circumstances, we have to note that this practitioner's conduct went well beyond what could be described as "firm defence". We have found that he attempted to influence the complainant into dropping the complaint through intermediate parties. We regard this as an attempt to subvert the disciplinary process, which must be considered an aggravating feature.

[17] Further, when that did not succeed, Mr Hay attempted to mislead the Tribunal by having a witness file an affidavit on the basis of a misapprehension he had created by failing to show her the affidavit she was purporting to answer.[5]

[18] When confronted with this at the hearing, we consider that Mr Hay lied to the Tribunal about his intentions in relation to that evidence.

---

[4] See n 3 above.
[5] This is set out in our decision of 19 January 2018 at [47].

[19] In doing so he has repeated a pattern which was also revealed by the previous findings against him.

Previous disciplinary findings

[20] Mr Hay has three previous findings, two of which, are related and the subject matter of which also involved loans and the redoubtable Mr Skinner. At paragraph [12] of its decision of December 2014, the Standards Committee recorded: "*At the meeting with the Standards Committee Mr Hay confirmed that he had acted for Mr U in relation to the loan, after previously denying that this was the case. He also acknowledged that he was involved in an earlier 2006 loan between Mr U and Mr Skinner"*, thereby recording his initial misleading of the Committee. This echoes Mr Hay's initially inaccurate responses to enquiries by the Official Assignee on his bankruptcy, which are referred to in our liability decision.

[21] Mr Hay had also defended his lack of response to the Standards Committee, blaming a lack of file in that it had been retained by a barrister who had been previously instructed. After inquiries with the former barrister, the Standards Committee was satisfied that the file had indeed been in Mr Hay's possession when the Standards Committee sought information from it under s 147. The Standards Committee found that while it was "… *not satisfied that Mr Hay had deliberately withheld the S file, it did not consider that Mr Hay had provided a credible or reasonable explanation for his delay in locating and providing the file*". He had failed to provide the file for over nine months and there was a finding of unsatisfactory conduct entered.

[22] The other finding against him was in October 2014, when Mr Hay was found to have responded to a client's inquiries "… *with indifference and denial*", which again echo Mr Hay's treatment of the complainant in the present matter.

[23] Finally, we note that the first finding which related to discrepancies in his Trust account was in December of 2011, precisely at the time when he was obtaining funds from the complainant. It would seem that at this time his financial management was in disarray.

[24] As submitted by Ms Carter, the previous findings are relevant because they also demonstrate "a less than forthright attitude to cooperate with the disciplinary

process". That is an extremely generous description of the pattern of conduct which has emerged.

[25] We refer to the comments of the full Court in *Hart*,[6] when referring to the relevance of the practitioner's conduct in the penalty process:

> "[185] As the Court noted in *Dorbu*, the ultimate issue in this context is whether the practitioner is not a fit and proper person to practise as a lawyer. Determination of that issue will always be a matter of assessment having regard to several factors.
>
> [186] The nature and gravity of those charges that have been found proved will generally be important. They are likely to inform the decision to a significant degree because they may point to the fitness of the practitioner to remain in practice. In some cases these factors are determinative, because they will demonstrate conclusively that the practitioner is unfit to continue to practice as a lawyer. Charges involving proven or admitted dishonesty will generally fall within this category.
>
> [187] In cases involving lesser forms of misconduct, the manner in which the practitioner has responded to the charges may also be a significant factor. Willingness to participate fully in the investigative process, and to acknowledge error or wrongdoing where it has been established, may demonstrate insight by the practitioner into the causes and effects of the wrongdoing. This, coupled with acceptance of responsibility for the misconduct, may indicate that a lesser penalty than striking off is sufficient to protect the public in the future.
>
> [188] For the same reason, the practitioner's previous disciplinary history may also assume considerable importance. In some cases, the fact that a practitioner has not been guilty of wrongdoing in the past may suggest that the conduct giving rise to the present charges is unlikely to be repeated in the future. This, too, may indicate that a lesser penalty will be sufficient to protect the public.
>
> [189] On the other hand, earlier misconduct of a similar type may demonstrate that the practitioner lacks insight into the causes and effects of such behaviour, suggesting an inability to correct it. This may indicate that striking off is the only effective means of ensuring protection of the public in the future."

Mitigating Factors

[26] Ms Carter submits that there are no mitigating factors to assist the practitioner.

[27] However, there are two matters in the submissions of Mr Upton which could be said to fall under this heading. The first, is Mr Upton's submission that Mr Hay is a senior, experienced practitioner who works in "the lower end of the legal aid market" including criminal legal aid work. This submission is supported by a letter from Mr Hay's

---

[6] *Hart v Auckland Standards Committee 1 of The New Zealand Law Society* [2013] 3 NZLR 103.

current employer, who talks of the diminishing number of senior practitioners in Wellington working in this area. Mr Upton also supported the submission by a reference to the Tribunal's decision in *Taffs*,[7] in which the Tribunal significantly reduced the period of suspension of a West Coast practitioner because he was the only experienced trial lawyer doing legal aid work on the West Coast at that time.

[28] Wellington cannot be equated with the West Coast, and we consider that there is insufficient evidence that this practitioner's services are so valuable to the community that this ought to weigh heavily with the Tribunal.

[29] The second factor, which is presumably put forward as a mitigating one, is the rather vague and conditional offer put forward by Mr Hay and his counsel at the hearing about the possibility of a repayment to the complainant of $200,000.

[30] We sought to clarify this matter somewhat by having the practitioner give further evidence about it. In doing so, first, he was unwilling to name his "sponsors/lenders" and secondly, there did not seem to be any written record of such offers or indeed any guarantee that the full $200,000 would in fact be available if the Tribunal were prepared to endorse this sort of arrangement.

[31] It was absolutely conditional on the Tribunal not suspending the practitioner from practice. There was apparently no confidence in these unknown lenders that the practitioner would be able to be gainfully employed in any other way in order to service the debt.

[32] While we have considerable sympathy for the complainant in terms of the financial loss and stress she has been occasioned by this practitioner's actions, we cannot allow that concern to overwhelm a principled approach to the penalty process. To do so, would ignore the Tribunal's wider responsibility to uphold professional standards, protect the public and maintain public confidence in the profession and its disciplinary institutions. Put bluntly, the practitioner cannot be permitted to buy himself out of trouble, thereby subverting the disciplinary process.

---

[7] *Canterbury-Westland Standards Committee v Taffs* [2013] NZLCDT 13.

Fitness to Practise

[33] In the end it is the Tribunal's assessment of this, having regard to all of the factors, which must determine the outcome.

[34] We record that we have borne in mind "the least restrictive intervention" principle enunciated in *Daniels.*[8]

[35] In considering fitness it is always useful to return to the words of Sir Thomas Bingham in *Bolton*:[9]

> "Any solicitor who is shown to have discharged his professional duties with anything less than complete integrity, probity and trustworthiness must expect severe sanctions to be imposed upon him by the Solicitors Disciplinary Tribunal. Lapses from the required high standard may, of course, take different forms and be of varying degrees. The most serious involves proven dishonesty, whether or not leading to criminal proceedings and criminal penalties. In such cases the tribunal has almost invariably, no matter how strong the mitigation advanced for the solicitor, ordered that he be struck off the Roll of Solicitors … If a solicitor is not shown to have acted dishonestly, but is shown to have fallen below the required standards of integrity, probity and trustworthiness, his lapse is less serious but it remains very serious indeed in a member of a profession whose reputation depends upon trust. A striking-off order will not necessarily follow in such a case, but it may very well. The decision whether to strike off or to suspend will often involve a fine and difficult exercise of judgment, to be made by the tribunal as an informed and expert body on all the facts of the case."

[36] These very words were considered by His Honour Cooper J in another leading case on penalty, *Parlane*.[10] In that case His Honour was considering a case where there had not been a finding of dishonesty and discussed how fitness was assessed in those circumstances:

> "[104] The Tribunal's decision fell short of a finding that Mr Parlane had been dishonest. It may be that to characterise his behaviour as dishonest would not be accurate, although to make demands of a former client asserting entitlements which a practitioner must know he has no right to make must come close to dishonesty. Even if the behaviour is not so described, however, dishonesty is not a prerequisite for a finding that a practitioner is not a fit and proper person to be in practice. As the observations of Sir Thomas Bingham in *Bolton* indicate, short of dishonesty, conduct may fall so far below the required standards of integrity, probity and trustworthiness that a decision to strike off is justified."

---

[8] See n 3 above.
[9] *Bolton v Law Society* [1994] 2 All ER 486, at 491.
[10] *Parlane v New Zealand Law Society (Waikato/Bay of Plenty Standards Committee No. 2)* High Court Hamilton CIV-2010-419-1209, 20 December 2010, at [104].

[37] His Honour went on to find that, having regard to the conduct of the practitioner and seriousness of the charges and the response to disciplinary charges, the Tribunal had been right to find that he was unfit to continue in practice.

[38] We have carefully considered whether suspension would pose an acceptable alternative to strike-off. The culmination of all of the factors referred to lead us to conclude that it would not. The previous disciplinary findings against the practitioner have clearly not had the salutory impact that one would have hoped. We reject Mr Upton's submission that Mr Hay has gained a "real insight" into his conduct as a result of the hearing. We consider that it is not reflected by his current "offer" nor by his attempt to subvert the process of the Tribunal hearing.

[39] His conduct, in attempting to influence the complainant to withdraw the complaint, (which we note was one of the particulars of the charge found proved) and to attempt to mislead the Tribunal about that process, repeats a pattern of demonstrable deceit, to which the public cannot be exposed. From the time he acquired the complainant's funds and misapplied them, his evasion of her when it came to repayment, including a disingenuous suggestion that he did not know the repayment date, and then attempts to influence her to extend the loan by pressure being applied through Mr Skinner, lead to considerable disquiet about this practitioner continuing as a lawyer.

[40] We have reached the unanimous view as a Tribunal of five[11] that only strike-off will achieve the purposes of this particular disciplinary process.

[41] While we accept Mr Upton's submission that each case must be regarded in the light of its own particular facts, there is still a requirement for the Tribunal to demonstrate some consistency. While there are no cases entirely on point we consider that strike-off in these circumstances is consistent with earlier decisions of the Tribunal which have had regard to a practitioner's offending and conduct of the proceedings cumulatively.[12]

[11] Section 244.
[12] Such as *Hart* see n 5 above.

Compensation

[42] The complainant has lost in excess of $200,000 as a direct result of the practitioner's actions. We consider that she ought to be compensated to the maximum amount the Tribunal is permitted to award, namely the sum of $25,000.

Costs

[43] The Standards Committee costs of $33,095.74 are sought in full. The practitioner seeks that these be discounted to 50%. This hearing has involved three separate hearings. The liability hearing had to be adjourned part-heard at the practitioner's request because of difficulties over his witness, which in the end proved to be of his own making. We consider the costs are reasonable in all of the circumstances of this relatively complicated matter.

[44] Whilst we accept that the practitioner has just come out of bankruptcy and his circumstances are modest, there seems no principled reason why the profession ought to bear the costs of his misdeeds. We propose to order the Standards Committee costs in full.

[45] The Tribunal costs will be certified and these are also to be reimbursed by the practitioner to the New Zealand Law Society. The Society can make its own arrangements with Mr Hay for terms of repayment.

Orders

1. There will be an order under s 242 striking the practitioner from the roll.

2. There will be an order under s 156(1)(d) that Mr Hay pay compensation in the sum of $25,000 to the complainant.

3. Mr Hay is to pay costs to the Standards Committee in the sum of $33,095.74, s 249.

4. The New Zealand Law Society is to pay the Tribunal costs of $14,922.00 as certified by the Chair, s 257.

5. Mr Hay is to reimburse the New Zealand Law Society for the full amount of the s 257 costs, pursuant to s 249.

DATED at AUCKLAND this 17th day of April 2018

Judge D F Clarkson
Chair