THERE IS AN ORDER MADE PURSUANT TO S 240 LAWYERS AND CONVEYANCERS ACT 2006 FOR THE PERMANENT SUPPRESSION OF NAME AND IDENTIFYING DETAILS OF PRACTITIONER AND MEDICAL INFORMATION. PLEASE SEE ORDER 5 ON PAGE 6 FOR FULL SUPPRESSION DETAILS.

NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL

[2018] NZLCDT 19

LCDT 012/17

UNDER	The Lawyers and Conveyancers Act 2006
BETWEEN	**AUCKLAND STANDARDS COMMITTEE 2** Applicant
AND	**NAME SUPPRESSED** Practitioner

CHAIR

Judge D F Clarkson

MEMBERS

Ms A Callinan

Ms C Rowe

Mr W Smith

Mr I Williams

HEARING 1 May 2018

HELD AT Auckland District Court

DATE OF DECISION 14 May 2018

COUNSEL

Mr E McCaughan and Ms F Gourlay for the Standards Committee

Mr R Pidgeon for the Practitioner

DECISION OF THE TRIBUNAL ON PENALTY

Introduction

[1] The practitioner was found guilty of one charge of misconduct by the Tribunal, in its decision of 16 April 2018. That decision outlined its reasons for the finding that the practitioner had either wilfully or recklessly disregarded her obligations to comply with a formal s 147 notice.[1]

[2] At the conclusion of the hearing on 1 May we announced the orders made, which included a suspension imposed upon the practitioner and reserved our reasons for the orders. This decision provides those reasons.

Standard Committee Submissions

[3] Counsel for the Standards Committee sought a fine in the region of $5,000 and censure. It was acknowledged that normally offending at this level would attract a period of suspension but the Committee considered that because the practitioner is not currently practising a fine was a more appropriate penalty. After analysing the now well-established purposes of penalty imposition in the field of professional discipline, we were referred to three decisions which had related to failure to comply with Standards Committee investigations or orders.[2]

[4] Whilst it was recognised that *Fox* and *Hong* concerned Standards Committee orders, it was submitted that non-compliance with Standards Committee investigatory orders, as in *Parlane*, was no less serious.

[5] The Committee relied on *Parlane* to submit that the starting point of any penalty in such a case was suspension. While acknowledging the fact that the practitioner was not currently practising was not a bar to suspension, it was submitted that for

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[1] Lawyers and Conveyancers Act 2006.
[2] *Hong v Auckland Standards Committee No. 3* [2014] NZHC 2871 (although subsequently quashed by *Hong v Auckland Standards Committee No. 3* [2015] NZHC 2521 it was submitted that the analysis contained in the judgment of Gilbert J remained persuasive); *Auckland Standards Committee 2 v Fox* [2017] NZLCDT 26; and *Parlane v New Zealand Law Society* HC Hamilton CRI-2010-419-1209, 20 December 2010.

personal deterrence and denunciation, a fine would have more effect. It was acknowledged that there were mitigating factors for this practitioner.

[6] Finally, Mr McCaughan pointed out that the practitioner has still not located and provided all the material sought and thus, whether intentionally or not, she has effectively obstructed the inquiry into the complaint. This was referred to as the absence of a mitigating feature and contrasted with the situation in *Hong*, where the practitioner had, by the time of the appeal, complied with all of the outstanding Standards Committee orders.

Submissions for the Practitioner

[7] Mr Pidgeon noted that the practitioner has filed an appeal against the liability decision. Mr Pidgeon's submissions were therefore largely directed towards name suppression.

[8] Mr Pidgeon reminded us that the practitioner is an undischarged bankrupt and that she has an unblemished disciplinary record. She is only working part-time and it was submitted any fine would have to be at a nominal level and paid off over time.

Seriousness of the Offending

[9] As set out in our liability decision the Courts and Tribunal have repeatedly stated that the responsibility of a practitioner to cooperate with his or her disciplinary body is a fundamental one. Thus, any wilful or reckless failure to do so, as we have found in this matter, has to be regarded seriously.

[10] We consider that any penalty short of suspension would not properly reflect the seriousness of such lack of cooperation. Whilst we accept the mitigating features as set out by counsel, in particular the practitioner's strained financial circumstances and poor health, we do not consider that those circumstances can be allowed to dominate. We consider that general deterrence requires us to impose a period of suspension (which we did at the conclusion of the hearing) for four months from the date of the hearing.

Name Suppression

[11] The practitioner has provided a lengthy affidavit which annexes medical information in order to support her application for suppression of name and details which might lead to her identification. Having considered this material, and the submissions of both counsel we determined that it was proper for her name to be suppressed, having regard in particular to her health problems.

[12] We record that we have carried out the balancing exercise required by s 240 and determined that in this case the public does not require information about the practitioner's name for its protection, particularly in circumstances where the nature of the default does not relate to clients directly and the decision itself will be available for publication, in an anonymised manner.

[13] We note that because the practitioner has been suspended her name must be gazetted and the suppression therefore is limited to a suppression of more general nature.

Costs

[14] In our decision of 16 April, we noted the jurisdictional challenge which had been mounted by the practitioner and abandoned in November 2017 at the hearing. Because of that challenge, the Standards Committee seek that a relatively small proportion of the costs, which are attributable to that challenge, be awarded against the practitioner despite the fact that she is in receipt of a grant of Legal Aid.

[15] This was opposed by Mr Pidgeon who submitted that the jurisdictional process had been brought in good faith and that there was no misleading or deceptive conduct involved of the sort that might be considered to provide the exceptional circumstances needed to make an order under s 45 of the Legal Services Act 2011.

[16] Mr McCaughan however, relies on s 45(3)(a) and (d) in that the conduct of mounting a jurisdictional argument caused unnecessary costs to the Standards Committee and comprised "an unreasonable pursuit of one or more issues on which the aided person fails". Mr McCaughan submitted that the preparation of lengthy submissions was required because of the misguided jurisdictional argument and that

the Tribunal was convened unnecessarily to hear this argument, in advance of the substantive issues.

[17] We consider there is merit in Mr McCaughan's argument and make a declaration pursuant to s 45(4) that but for the Legal Aid grant the Tribunal would have ordered the costs of $5,290 in favour of the Standards Committee.

Orders

1. The practitioner will be formally censured (the censure will be delivered to the practitioner directly but does not form part of this decision).

2. The practitioner is suspended for four months from 1 May 2018.

3. There is a s 45(4)[3] "but for" costs order in favour of the Standards Committee for $5,290.

4. The s 257 costs are to be certified in the sum of $6,701 and are to be paid by the New Zealand Law Society.

5. The practitioner's name and identifying details are suppressed except in the Gazette notice of suspension. In addition, there will be suppression of all medical information including the report from Dr Woodcock and the file cannot be searched in relation to any of the medical information. This order is made pursuant to s 240.

DATED at AUCKLAND this 14th day of May 2018

Judge D F Clarkson
Chair

[3] Legal Services Act 2011.