NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL

[2018] NZLCDT 25

LCDT 025/16

UNDER	The Lawyers and Conveyancers Act 2006
BETWEEN	**AUCKLAND STANDARDS COMMITTEE 3** Applicant
AND	**BRIAN ROBERT ELLIS** Respondent

CHAIR

Judge D F Clarkson

MEMBERS

Mr W Chapman

Mr P Shaw

Mr W Smith

Mr B Stanaway

HEARING 26 June 2018

HELD AT Specialist Courts and Tribunals Centre, Auckland

DATE OF DECISION 3 August 2018

COUNSEL

Mr P Collins for the Standards Committee

Mr W Pyke for the Respondent

DECISION OF THE TRIBUNAL ON PENALTY

Introduction

[1] This decision records the reasons for the penalties imposed by the Tribunal following the penalty hearing on 26 June 2018. Those penalties were as follows:

1. The practitioner was suspended from practising as a lawyer for six months and 12 days from that date.

2. A censure, which was to be recorded in this decision, was imposed.

3. Costs were awarded to the Standards Committee in the sum of $45,514.63.

4. Section 257 costs of the Tribunal were awarded against the New Zealand Law Society, as is mandatory.

5. The Tribunal directed reimbursement of those s 257 costs which are now certified at $7,816.00 to be made by the practitioner to the New Zealand Law Society.

[2] Mr Ellis was not present at the penalty hearing, he was absent overseas on a long-planned family holiday.

[3] Although he was responsibly represented at the hearing by Mr Pyke, we accept the submission of Mr Collins that it does speak volumes about the practitioner's degree of engagement with his professional body when it comes to issues of professional standards, as further amplified by his significant list of previous disciplinary findings.

Seriousness of the Conduct

[4] The starting point for fixing penalty is the seriousness of the offending. It is accepted by the Standards Committee (and we agree) that by itself this finding of

misconduct would not have moved the Tribunal to suspend the practitioner, had he had an otherwise blemish-free career.

[5] While it was of itself a serious conflict of interest, which ought to have been obvious to Mr Ellis, had this been a first offence some leniency would have been given. However, as is pointed out in Mr Collins' submissions, the practitioner has, over the past five to six, years been given the opportunity of numerous lower level penalties in relation to findings against him.

[6] Even putting to one side the 1998 proceedings[1] there are five findings against him by Standards Committees between April 2012 and July 2016. These have involved the imposition of fines, costs orders, refunds of fees and compensatory payments. None of this appears to have deterred the current offending.

[7] It has to be recorded that the previous offending is significantly aggravating and even paying full regard to the principles enunciated in *Daniels*[2] as to imposition of the least restrictive intervention, we determined that nothing less than suspension was a proper reflection of the seriousness of the offending history and of the misconduct itself.

Mitigating Features

[8] We noted that there were fulsome references provided by senior practitioners. However, we also note that the qualities of the practitioners which are referred to in these references relate to matters somewhat historical.

[9] Although conceding that suspension was consistent with the authorities provided to the Tribunal by Mr Collins, Mr Pyke advocated for a shorter period of suspension with follow-up supervision by a practitioner who has been supervising Mr Ellis over the past couple of months.

---

[1] *Ellis v Auckland District Law Society* [1998] 1 NZLR 750.
[2] *Daniels v Complaints Committee 2 of the Wellington District Law Society* [2011] 3 NZLR 850.

Costs

[10] There was a small issue taken by Mr Ellis with the quantum of costs which we have taken into account in calculating the award to the Standards Committee.

[11] Finally, there was a discussion as to when the suspension ought to begin. We accepted Mr Collins' submission, which was that the practitioner has known since March 2018 of the likelihood of suspension and chose to be absent during the time suspension could be imposed, and thus he ought to be responsible for the consequences.

[12] We now deliver the following censure as part of this decision.

Censure

Mr Ellis, it is regrettable that this censure was not able to be delivered in person because you chose to absent yourself from your penalty hearing. This Tribunal has found the charge of misconduct proved to the required standard. As part of the response to that finding the Tribunal proposes to censure you. A censure is a serious response. It is a written record that will remain always on your file to demonstrate to the public that the behaviour you have exhibited will not go unmarked by the disciplinary process which has, in part, a consumer protection role. It will remind other members of the profession that such behaviour will not be tolerated.

You have been found to have breached Rule 5 and Rule 6 as particularised in the Liability Decision. These are the Rules that tell you in general and specific terms how to deal with conflict when conflict exists. You recognised the possibility of conflict as early as 18 March 2015 when your letter of that date raised it with the complainant company and set out some of the grounds for your concerns. There were multiple parties that may or may not have had a commonality of interest. There were parties (not the complainant company) in which you had a personal interest as a director and, through your family trust, as a shareholder. The notes of meetings particularly in June/July 2015 refer repeatedly to the possibility of conflict and invitations to all parties at those meetings to take independent advice. Yet you did not consider the clear and unambiguous wording of the relevant Rules, and seemed to adopt the view that

so long as you raised the conflict issue, you could continue to act for all parties and be involved in negotiations that were likely to, and in fact did, prefer the parties in which you had a personal interest over (the complainant company) to which you owed a duty of independence, confidence and trust. So you paid lip service to recognising conflict, but did nothing to remove yourself from that conflict, as required by the Rules.

Such behaviour illustrates clearly why it is necessary to have rules that remind lawyers that they cannot prefer personal business interests over proper attention to client's affairs.

In failing to recognise that basic obligation you failed entirely to protect (the complainant company) properly, despite your protestations that you were only acting to produce an outcome that would be favourable to all. For that failure, Mr Ellis, you are censured.

DATED at AUCKLAND this 3rd day of August 2018

Judge D F Clarkson
Chair