

**NEW ZEALAND LAWYERS AND
CONVEYANCERS DISCIPLINARY TRIBUNAL**

[2018] NZLCDT 34

LCDT 002/18

UNDER

The Lawyers and Conveyancers
Act 2006

BETWEEN

**NELSON STANDARDS
COMMITTEE OF THE NEW
ZEALAND LAW SOCIETY**
Applicant

AND

RODERICK ALLAN SMITH
Respondent

CHAIR

Judge D F Clarkson

MEMBERS

Ms A Callinan

Mr S Hunter

Ms C Rowe

Mr W Smith

DATE OF HEARING 28 September 2018

HELD AT Specialist Courts and Tribunals Centre, Auckland

DATE OF DECISION 5 October 2018

COUNSEL

Ms S Carter for the Applicant

No Appearance by or for the Respondent

DECISION OF THE TRIBUNAL

[1] The three charges brought against Mr Smith were heard by way of formal proof, because the practitioner had elected to take no steps in this matter. The charges are correctly summarised in the submissions of counsel for the Standards Committee as follows:

- “(a) That, in breaching High Court orders and directions, Mr Smith committed a disciplinary offence that constituted unsatisfactory conduct.
- (b) That, in misleading the Court, Mr Smith committed the disciplinary offence that constituted misconduct or in the alternative unsatisfactory conduct; and
- (c) That, in delaying paying costs and/or failing to pay costs ordered, Mr Smith committed a disciplinary offence that constituted unsatisfactory conduct.”

[2] All three charges arose out of Mr Smith’s conduct, on behalf of a client in one particular case over a period of years between 2010 and 2016.

[3] Mr Smith’s actions or inactions led to a personal costs order being made against him by a High Court Judge at the end of 2016. Mr Smith attributes what is an isolated set of complaints against him to the ongoing effects of a medical condition, but has failed at any stage to produce proper medical information in support of this contention.

Issues

[4] The issues that the Tribunal had to determine were as follows:

1. Did Mr Smith:
 - (a) Breach Rule 3, 10 or 13.2? and/or
 - (b) Did Mr Smith fall below the standard of competence and diligence expected of a reasonably competent lawyer? and/or

- (c) Would lawyers of good standing regard Mr Smith's conduct as unacceptable?¹
2. Did Mr Smith's conduct, in informing the Court that his failure to comply with directions was due to a medical condition, mislead the Court? If so:
- (a) Was this misconduct by a wilful and reckless breach of Rule 13; or?
- (b) Does this constitute unsatisfactory conduct either as falling below the standard of competence and diligence to be expected of a reasonably competent lawyer or as conduct which would be regarded by lawyers of good standing as unacceptable?
3. Did Mr Smith fail to pay all of the costs he was ordered?
- (a) And was his delay such as to constitute a breach of Rules 10 or 13.2?
- (b) Was his conduct such as would be regarded by lawyers of good standing as unacceptable?

Background

[5] The background to these charges relates to the practitioner's representation of Ms B in proceedings which were commenced in October 2010.² Little detail is provided to us about the progress in the Family Court but in March 2015 Her Honour Judge Walker transferred the proceedings to the High Court citing a number of reasons including "the inability of the District Court to enforce compliance and the lack of case management on the file to date".

[6] From that date until October 2016 the practitioner failed to comply with a number of sets of timetabling orders made in the High Court. We note that he was the

¹ Section 12 Lawyers and Conveyancers Act 2006 (LCA) and Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (the Rules).

² We draw on summary provided in submissions filed by Ms Carter in outlining this background.

subject of adverse comment by at least four Judges in relation to non-compliance and delays.

[7] Finally Mr Smith's non-compliance led to the adjournment of a 12-day fixture and following this an application was made by opposing counsel for a wasted costs order.

[8] In relation to Charge 1 the Standards Committee submit that Mr Smith "failed to discharge his professional obligations as follows":

- "(a) Mr Smith breached Rule 3 of the [Rules], by failing to act in a competent and timely manner when providing regulated services to Ms B;
- (b) Mr Smith breached Rule 10 of the Rules, by failing to promote and maintain proper standards of professionalism in his dealings;
- (c) Mr Smith breached Rule 11 of the Rules, by failing to administer his practice in a manner that ensures the duties to the Court and existing clients are adhered to, and that the reputation of the legal profession is preserved; and/or
- (d) Mr Smith breached Rule 13.2 of the Rules by acting in a way that undermines the processes of the court."

[9] In summary these failures are submitted to represent individually or cumulatively unsatisfactory conduct.

[10] The background to Charge 2 relates to a statement made to His Honour Heath J in a telephone conference on 12 October 2016, in the course of the above proceedings. For the first time Mr Smith asserted to His Honour that his failure to serve the briefs of evidence on time was due to a medical problem suffered by Mr Smith. Prior to that occasion, and on numerous occasions before a number of judicial officers, Mr Smith had blamed the failure of proper discovery by the opposing side as the reason for non-compliance and delay. However having made those assertions Mr Smith did not make any formal application for discovery to rectify the situation.

[11] Having heard from Mr Smith that there was a medical issue involved His Honour directed that Mr Smith file and serve a memorandum by midday the following day (13 October 2016) specifying the medical reasons and the trial was vacated. Mr Smith did not comply with that direction either.

[12] It was not until the hearing before His Honour Wylie J for the wasted costs application, following the hearing having been vacated, that Mr Smith filed an affidavit in which he described the medical problems to which he had referred.

[13] Mr Smith explained that in 2003 he had been diagnosed with meningococcal meningitis and placed in intensive care in Auckland Hospital. Mr Smith went on to describe his subsequent symptoms of lack of concentration, tiredness and headaches but explained that it was only in 2011 that he began to understand those symptoms might be related to the 2003 disease.

[14] He told the Court that he had never intended to wilfully breach directions and believed that he could get the case ready for trial but that “he underestimated his disability and overestimated his mental ability to carry out the tasks necessary to do so”.³

[15] However, instead of supporting that assertion by a proper medical report Mr Smith annexed to the affidavit a report from a therapist whom he had consulted some five years previously. The report in itself is straightforward enough in confirming Mr Smith’s reports of poor concentration and tiredness, but given that this was not from a doctor and indeed recommended that Mr Smith undertake a neuropsychological assessment to address his symptoms it did not carry great weight with the Judge.

[16] His Honour was not impressed that:

“The claimed medical condition was not put forward as an explanation until very late in the day. Earlier, Mr Smith had blamed the respondents for failing to comply with their discovery obligations. I am left with the distinct impression that Mr Smith has been less than frank in his explanations to the Court ... I do not place any great store in Mr Smith’s assertions that he was suffering from an adverse medical condition.”⁴

[17] In relation to Charge 3 the Standards Committee say that Mr Smith breached Rules 10 and 13.2 by failing to pay the costs which were then awarded by His Honour Wylie J against him in a timely manner. Indeed it was not until bankruptcy proceedings were instituted that Mr Smith paid some \$15,246.12 to the complainant.

³ Decision of Wylie J in *B v B & Ors* [2016] NZHC 3102 at [35].

⁴ See note 3 above at [35].

[18] It is Mr Smith's contention that this included the \$1,750 ordered against the third to ninth respondents as well as the \$12,642.12 awarded in costs to the first and second respondents (the complainant). The bankruptcy proceedings were withdrawn on this payment and thus they must be taken to at least the full satisfaction of the costs order in favour of the first and second respondents, on which the proceedings were based. The third to ninth respondents had not taken part in the proceedings so Mr Smith's contention that the payment included their costs order is rejected.

[19] The Standards Committee seeks a compensation order, if the Tribunal deems that proper in respect of this \$1,750.

Findings as to Liability

Issue 1 – Charge 1

[20] Unsatisfactory conduct is defined in s 12 of the LCA as follows:

In this Act **unsatisfactory conduct**, in relation to a lawyer or an incorporated law firm, means–

- (a) conduct of the lawyer or incorporated law firm that occurs at a time when he or she or it is providing regulated services and is conduct that falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent lawyer; or
- (b) conduct of the lawyer or incorporated law firm that occurs at a time when he or she or it is providing regulated services and is conduct that would be regarded by lawyers of good standing as being unacceptable, including–
 - (i) conduct unbecoming a lawyer or an incorporated law firm; or
 - (ii) unprofessional conduct; or
- (c) conduct consisting of a contravention of this Act, or of any regulations or practice rules made under this Act that apply to the lawyer or incorporated law firm, or of any other Act relating to the provision of regulated services (not being a contravention that amounts to misconduct under section 7); or
- (d) conduct consisting of a failure on the part of the lawyer, or, in the case of an incorporated law firm, on the part of a lawyer who is actively involved in the provision by the incorporated law firm of regulated services, to comply with a condition or restriction to which a practising certificate held by the lawyer, or the lawyer so actively involved, is subject (not being a failure that amounts to misconduct under section 7).

[21] We have found clear breaches of the practitioner's obligation to act competently and in a timely manner pursuant to Rule 3 and to observe his duty as an officer of the Court by not "acting in a way that undermines the processes of the Court", pursuant to Rule 13.2 is clearly conduct which falls within the s 12(a) and s 12(b) definitions and thus we make a finding of unsatisfactory conduct on Charge 1.

Issue 2 – Charge 2

Issue 2(a) – Wilful or Reckless?

[22] As to the allegation of misleading the Court, we do not consider that the Standards Committee has satisfied the onus of proof on it, that is to the balance of probabilities, that the practitioner in providing the certificate and information that he did, acted knowingly or with reckless disregard as to the accuracy of the information conveyed to the Court.

[23] We note that in *A v New Zealand Law Society*⁵ His Honour Collins J held:

"A disciplinary offence in respect of misleading or deceiving a Court requires a high level of culpability on the part of the practitioner. An inadvertent error in a submission does not provide a foundation for disciplinary proceedings. What is required is an intention on the part of the practitioner to mislead a Court or reckless on the part of the practitioner as to whether or not she or he misled the Court."

[24] Mr Smith provided the Court with information from a therapist that was not on the face of it misleading of itself. It was simply inadequate to establish the medical condition that he sought to advance. We do not consider it reaches the level of intentional recklessness set out in the above decision.

[25] Ms Carter accepted that the failure may have been in leaving the medical explanation until too late having provided other reasons for his delay and that it could be referred to "as an inferential misleading". However Ms Carter accepted that it needed to be at least recklessly misleading in order to be misconduct and the alternative of unsatisfactory conduct would otherwise be available.

⁵ *A v New Zealand Law Society* [2017] NZHC 1712 at [46].

Issue 2(b)

[26] We consider this offending, that is the inadequate and late explanation to the Court to fit more within the definition of unsatisfactory conduct both under subparagraph (a) and (b) of s 12 and we make a finding accordingly.

Issue 3(a) and (b) – Delay and/or Failure to Make Payment of Costs Orders

[27] Certainly we find this to be a breach of Rules 10 and 13.2. The practitioner clearly was not having regard to his obligations under s 4 of the LCA which reads:

Every lawyer who provides regulated services must, in the course of his or her practice, comply with the following fundamental obligations:

- (a) the obligation to uphold the rule of law and to facilitate the administration of justice in New Zealand:
- (b) the obligation to be independent in providing regulated services to his or her clients:
- (c) the obligation to act in accordance with all fiduciary duties and duties of care owed by lawyers to their clients:
- (d) the obligation to protect, subject to his or her overriding duties as an officer of the High Court and to his or her duties under any enactment, the interests of his or her clients.

[28] That he had to be moved to make payment under the costs order by a bankruptcy petition would certainly be, in our view, conduct which lawyers of good standing would regard as unacceptable and unprofessional.

[29] We find this to be unsatisfactory conduct also.

PENALTY

[30] Having conveyed our findings as to liability to counsel for the Standards Committee we then heard further submissions as to penalty. The Committee had sought a 12-month suspension but that was premised on a finding of misconduct rather than unsatisfactory conduct. Ms Carter accepted it would be open to the Tribunal to impose a lesser term of suspension than had been sought or other forms of penalty. She accepted that given that the practitioner had not renewed his practising certificate after June this year, that the suspension for a short term appeared

somewhat academic. Providing that public protection was achieved in another way, such as restrictions on practice, Ms Carter did not strongly advance suspension at this point.

Seriousness of Conduct

[31] In considering penalty we begin first with the seriousness of the offending. We have made three findings of unsatisfactory conduct against the practitioner. While we note this arose out of one case only, the length of the delays occasioned to his client, and the fact that the case had to be shifted to the High Court must have had a significantly adverse impact on the parties. We note that the practitioner says he always intended that the matter would resolve at a mediation and indeed this proved to be the case shortly after the abandonment of the fixture. However, the practitioner was no longer acting at this stage. The delays were sufficient to move His Honour Wylie J to impose a significant personal costs award against Mr Smith and that in itself is an unusual occurrence.

Aggravating Factors

[32] Ms Carter submitted for the Standards Committee that the practitioner's failure to engage in the process was an aggravating feature. We note that he actually did engage at Standards Committee level and at that point acknowledged unsatisfactory conduct. He has completely ignored the Tribunal process and therefore has made it difficult to assess his current fitness. That said we would regard his absence from the Tribunal process as more in the absence of a mitigating feature than an aggravating one. He has not taken any steps to delay or undermine the process in any way.

Mitigating Features

[33] This is a practitioner who has a 26-year unblemished record for which he is entitled to considerable credit. The conduct under consideration is in relation to one case only and we note his acceptance as to unsatisfactory conduct at Standards Committee level as a mitigating feature. Ms Carter was generous enough to suggest that the fact that he had paid the majority of the costs awarded against him (over \$15,000) was a mitigating feature despite the fact that this was under the threat of bankruptcy.

Comparison with Other Cases

[34] The Standards Committee placed before us a number of other decisions however we considered them all to be at a more serious level than the present case and therefore they do not provide a particular benchmark for this matter.

[35] Rather we, in assessing penalty maintain our focus on the purposes of the Act to maintain public confidence in the provision of Legal Services and to protect consumers of Legal Services.

Assessment of Penalty and Fitness

[36] Given the practitioner's lack of engagement and the absence of medical information, but his reliance on a medical condition as a reason for the conduct under scrutiny, we are concerned about the practitioner's ability to practise on his own account.

[37] While we do not consider the conduct is sufficiently serious to merit a period of suspension we do consider that the practitioner ought to be compelled to engage further, and provide medical information should he wish to practise on an unsupervised basis. For that reason we propose to impose a condition on his practice, pursuant to s 242(1)(g) that Mr Smith not practise on his own account or in partnership until authorised by the Tribunal to do so. That authorisation would involve him providing medical evidence that he suffers from no neurological or other cognitive difficulties that would impede his ability to deliver Legal Services.

[38] The Standards Committee has also sought a censure and costs which we consider are appropriate responses to the persistent professional failures evidenced by these charges.

[39] We do not propose to order compensation given that there is also an order for costs in force for the \$1,750 outstanding and we would be concerned to avoid duplication of orders.

Orders

1. The practitioner is censured in the terms attached to his decision in Schedule 1.
2. The practitioner is prohibited from practising on his own account whether in partnership or otherwise, until authorised by the Disciplinary Tribunal following the provision of evidence as set out in this decision (s 242(1)(g)).
3. The practitioner is ordered to pay the New Zealand Law Society costs in the sum of \$8,145.27 (s 249).
4. The New Zealand Law Society is to pay the Tribunal costs in the sum of \$2,347.00 (s 257).
5. The practitioner is to reimburse the New Zealand Law Society for the s 257 costs in full (s 249).

DATED at AUCKLAND this 5th day of October 2018

Judge D F Clarkson
Chair

CENSURE

Mr Smith, as detailed in the attached decision, you have breached your professional obligations in a number of ways. You have let down the Court, your client and yourself.

In persistently failing to meet timetabled Directions of the Court, you failed in your duty to uphold the Rule of Law and facilitate the administration of justice.

Once you had made an assertion as to the medical cause of your defaults, you were obliged to conscientiously take medical advice and accurately advise the Court and your professional body of any ongoing concerns. You have failed to do so.

You are a practitioner with an absence of disciplinary concerns up until this point. The Tribunal formally censures you and urges you to engage with your profession to seek support and whatever rehabilitation might be required.