NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL

[2018] NZLCDT 39

LCDT 020/17

IN THE MATTER	of the Lawyers and Conveyancers Act 2006
BETWEEN	**AUCKLAND STANDARDS COMMITTEE 5** Applicant
AND	**BRIAN ROBERT ELLIS** Respondent

CHAIR

Judge BJ Kendall (retired)

MEMBERS OF TRIBUNAL

Mr M Gough

Mr G McKenzie

Ms S Sage

Mr W Smith

DATE OF HEARING 24 October 2018

HELD AT Auckland District Court

DATE OF DECISION 2 November 2018

COUNSEL

Mr P Collins for the applicant

Mr W Pyke for the respondent

DECISION OF THE NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL CONCERNING PENALTY

[1] In our decision of 23 July 2018, we found a charge of misconduct against Mr Ellis established. His misconduct consisted of an accumulation of the following:

(a) His persistent failure to comply with his reporting obligations under reg 12(7) of the Trust Account Regulations;

(b) His failure to acquaint himself with his most basic of trust accounting responsibilities;

(c) His delegation of his trust accounting responsibilities which we found was wilful and reckless having regard to reg 16(4) of the Trust Account Regulations;

(d) His adverse dealings with his client's trust funds without the knowledge of or information to the client; and

(e) The deduction from those funds of a fee (over four years after last contact with his client) which he acknowledged was unjustified and contained elements of duplication.

[2] Mr Collins for the Committee submitted that the sanction of striking off was justified because Mr Ellis has met the statutory test that he is not a fit and proper person to be a practitioner (s 244(1)). Mr Collins relied on the following:

(a) The retention of a client's funds without authority explicable only by deliberate or wilful disregard for Mr Ellis' professional responsibilities. He submitted that such a trust account breach is in the most serious category of professional failings;[1]

[1] *Auckland Standards Committee 1 v Hackshaw* [2016] NZLCDT 18 at [13] and *Auckland Standards Committee 2 v Woodhouse* [2017] NZLCDT 16 at [8].

(b) Mr Ellis' past disciplinary history shows a pattern of serious professional failings in which he is a peril to his clients and to the public. This is especially so since 2012. Mr Collins drew our attention to the fact that two of the recent unsatisfactory conduct findings have similarities to the present case, involving adverse dealing with trust funds;

(c) An earlier disciplinary matter before the New Zealand Law Practitioners Disciplinary Tribunal (NZLPDT) in 2003 warned Mr Ellis that he was teetering on the brink of strike-off and that should anything further occur he would fall.[2] That case was unknown to counsel at the time of the penalty decision in LCDT 025/16 when the Tribunal stated that "nothing less than a period of suspension was a proper reflection of the offending history and of the misconduct itself";[3]

(d) That this current case and the 2003 NZLPDT case strengthen the compelling case for strike-off;

(e) The professional failings of Mr Ellis cover a wide area including matters relating to trust account responsibilities, breach of undertaking, breach of confidentiality, and breach of duties relating to conflict of interest.

[3] Mr Pyke for Mr Ellis submitted that a further period of suspension would give his client the opportunity for further reflection and a final chance to redeem himself professionally. Such a period of suspension would serve the public interest by emphasising to Mr Ellis that he must take more care over his professional obligations.

[4] He submitted that the conduct was not at the extreme end where we should decide that Mr Ellis is a risk to the public. Mr Pyke emphasised the following matters:

(a) That the client lost interest in the matter of instructions to Mr Ellis and did not contact him for some time. Mr Ellis did not actively ignore his client and only took up the file again in 2012. He should have done so earlier;

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[2] *Complaints Committee No. 2 Auckland District Law Society v Ellis* NZLPDT 12 March 2003, at [42-44], and [51].
[3] *Auckland Standards Committee 3 v Ellis* [2018] NZLCDT 25 at [7].

(b) That the essence of the charge is that Mr Ellis failed to ensure that his client's affairs were properly settled and finalised;

(c) That Mr Ellis made good by refunding monies on account of his legal fees;

(d) There is no criticism of the advice given to the client;

(e) That he let himself down by not following up on his client, having "dropped the ball".

Seriousness of the Conduct

[5] The starting point for fixing penalty is the seriousness of the offending. When making our finding of misconduct, we considered the cumulative effect of the breach of the regulations by Mr Ellis, his admission that his fee of March 2016 was substantially unjustified, and the length of time over which the breaches occurred.

[6] There is the additional factor that there are now seven findings against Mr Ellis. The Tribunal in LCDT 025/16 recorded that the previous offending was significantly aggravating.

Mitigating factors

[7] We have considered the submissions that Mr Pyke has made on behalf of Mr Ellis in support of a further period of suspension. As was the case in LCDT 025/16, where references were produced, we find that those references do not assist Mr Ellis, being the same references, which were produced then.

[8] Mr Collins has submitted that while the fact that Mr Ellis repaid the funds that he deducted in March 2016 might be a mitigating factor, the circumstances around repayment do not put Mr Ellis in a good light. Those circumstances are:

(a) The receipt in March 2016 by the client of a fee invoice, having not heard from Mr Ellis since July 2011, which she immediately disputed;

(b) Mr Ellis did not reply to further queries communicated to him in May and July 2016;

(c) Mr Ellis repaid the money in December 2016 only after the client had complained to the Lawyers Complaints Service;

(d) Mr Ellis has not paid the sum of $810.00 to his former client which was an invoice he agreed to reimburse his former client for at the time of the hearing.

[9] In considering the appropriate penalty to impose on Mr Ellis, we have had regard to the principles stated in *Daniels*[4] about the imposition of the least restrictive intervention. We must assess the fitness of Mr Ellis to remain a practitioner by reference to the factors set out in *Hart*: [5]

(a) The nature and quality of the misconduct to be established in the particular case;

(b) Previous disciplinary history including earlier misconduct of a similar type, which may be an indicator that striking off is the only effective means of ensuring protection of the public in future;

(c) Any evidence of remorse or insight;

(d) The need for deterrence;

(e) Considering any aggravating or mitigating features.

[10] We find unanimously as a panel of five that Mr Ellis is not a fit and proper person to remain a practitioner. We do so for the following reasons:

[4] *Daniels v Complaints Committee 2 of the Wellington District Law Society* [2011] 3 NZLR 850.
[5] *Hart v Auckland Standards Committee 1 of the New Zealand Law Society* [2013] 3 NZLR 103 at [181-189].

(a) His trust account breaches were very serious and extended over a period of years;

(b) The fee rendered in June 2016 was unjustified (as acknowledged by him) and closely bordered dishonesty;

(c) His prior disciplinary record is an aggravating feature in that not only are there seven findings against him, but those findings relate to similar conduct and display a pattern of disregard for principles, the rules and regulations and past decisions;

(d) That prior disciplinary history demonstrates that Mr Ellis lacks insight into his professional obligations;

(e) The Tribunal cannot have confidence that similar conduct will be avoided in the future. There is a risk of reoffending;

(f) There is a clear need for deterrence and protection of the public.

Costs

[11] Mr Pyke on behalf of Mr Ellis questioned that costs incurred by the Committee before the Legal Complaints Review Officer (LCRO) should be included in the costs award that the Committee is asking the Tribunal to order.

[12] After discussion, Mr Pyke has accepted the Committee's offer that its costs be reduced by $2,500.00.

[13] There is also an outstanding matter of the payment by Mr Ellis of $810.00 which he undertook to pay his former client at the time of the hearing of the charge and which he has not yet honoured. There will be an order that he do so within five working days of the release of this decision.

Orders

1. There is an order pursuant to s 242(1)(c) that the name of Mr Ellis be struck off the roll to take effect on the date of the release of this decision.

2. Mr Ellis is to pay $810.00 as agreed within five working days from the release of this decision.

3. Mr Ellis is to pay the cost of the prosecution in the sum of $31,600.00.

4. The costs of the Tribunal are certified at $8,918.00 under s 257 and are payable by the New Zealand Law Society.

5. Mr Ellis is to refund the Tribunal costs in full, to the New Zealand Law Society.

DATED at AUCKLAND this 2nd day of November 2018

BJ Kendall
Chairperson