NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL

[2018] NZLCDT 40

LCDT 003/18

IN THE MATTER	of the Lawyers and Conveyancers Act 2006
BETWEEN	**LEGAL COMPLAINTS REVIEW OFFICER** Applicant
AND	**ANDREW MacLEAN MORRISON** Respondent

CHAIR

Judge BJ Kendall (retired)

MEMBERS

Mr S Maling

Mr H Matthews

Mr K Raureti

Mr B Stanaway

DATE OF HEARING 29 October 2018

HELD AT District Court Auckland

DATE OF DECISION 27 November 2018

COUNSEL

Mr P Collins for the applicant

Ms I Rosic for the respondent

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

[1] In our decision of 9 August 2018, we found a charge of misconduct against Mr Morrison established. We found that the manipulation of Trust Deed Version 3 (Deed) was the result of a series of deliberate acts by Mr Morrison which created a fraudulent document and that his conduct in doing so was dishonourable.[1]

[2] In commencing our consideration of penalty, we remind ourselves of the primary objectives of The Tribunal as stated in the well recognised decision of the High Court in *Daniels v Complaints Committee 2 of the Wellington District Law Society.*[2]

> 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 the offending

[3] The starting point for determining the proportionate penalty is the seriousness of the conduct:[3]

> 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.

[4] Mr Collins for the Legal Complaints Review Officer (LCRO) submitted that the least restrictive disciplinary outcome would be the imposition of a period of suspension of two years after taking into account the following factors:

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[1] *Legal Complaints Review Officer v Morrison* [2018] NZLCDT 27 at [33].
[2] *Daniels v Complaints Committee 2 of the Wellington District Law Society* [2011] 3 NZLR 850 (HC) at [22].
[3] *Hart v Auckland Standards Committee 1 of The New Zealand Law Society* [2013] 3 NZLR 103 (HC) at [186].

(a) The methodical and deliberate nature of the wrongdoing, not explicable by impulse or panic.

(b) Mr Morrison's status as a very experienced lawyer with over 50 years in the profession, mostly as a partner.

(c) His persistence in denying the seriousness of the conduct, and attributing it to an inexplicable accident, which meant that he could not plead significant remorse or insight.

(d) The need for general deterrence.

(e) The fact that penalties of suspension have routinely been imposed by the Tribunal in cases involving instances of deception and falsification of documents by lawyers.

(f) The only significant factor is Mr Morrison's previously unblemished record in his lengthy career.

[5] Mr Collins submitted that, as the seriousness of the conduct is the starting point in consideration of the relevant factors, the Tribunal must consider that the falsification of the Deed was not a minor or incidental matter. It was not signed by the settlor although purported to be so. It was dated 10 February 2010 when in fact it was not signed by the two other trustees until early in April 2011.

[6] He further submitted that Mr Morrison was solely responsible for the manipulation of the Deed, involving (as the Tribunal found) four discrete steps of manual manipulation.

[7] Mr Collins emphasised that the manipulation of the document was a matter of economic significance to the sons of the settlor because of the way it discriminated between them.

[8] Mr Collins submitted that Mr Morrison's denial of responsibility was a significant aggravating factor in that it counted against any insight or remorse, insisting that the document was a result of an inexplicable accident.

[9] Mr Collins acknowledged that the absence of a past disciplinary record was a significant factor which supported a finding that suspension was an appropriate response.

[10] Mr Collins made the submission that general deterrence was another significant factor in this case as opposed to specific deterrence where Mr Morrison is at the end of his career. The aspect of general deterrence is relevant to the upholding of the professional standards, the reputation of the profession and protection of the public.[4]

[11] Mr Collins position was that a period of suspension for two years was the appropriate disciplinary response. He referred the Tribunal to decisions instancing periods of suspension where there was falsehood or deceit by lawyers not involving theft. He referred the Tribunal to *Otago Standards Committee v Davidson,*[5] *Standards Committee of the Otago Branch of the New Zealand Law Society v Klinkert,*[6] *Auckland Standards Committee 2 v Parshotam*,[7] *Wellington Standards Committees No. 1 and No. 2 v Sawyer,*[8] *and National Standards Committee v Shi.*[9]

[12] *Davidson* involved the deliberate backdating of a will to avoid an argument about testamentary capacity where a starting point of twelve months suspension was considered which was reduced because of admission of the charge, co-operation with the Committee, remorse, contrition, good character and reputation.

[13] *Klinkert* was a matter where the practitioner falsified her trust account so that a client's assets were concealed so that the maximum residential care subsidy could be obtained. The practitioner was suspended for six months down from a starting point of strike-off.

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[4] *Canterbury Westland Standards Committee v Horsley* [2014] NZLCDT 47.
[5] *Otago Standards Committee v Davidson* [2012] NZLCDT 39.
[6] *Standards Committee of the Otago Branch of the New Zealand Law Society v Klinkert* [2014] NZLCDT 60.
[7] *Auckland Standards Committee 2 v Parshotam* [2016] NZLCDT 15.
[8] *Wellington Standards Committees No. 1 and No. 2 v Sawyer* [2013] NZLCDT 47.
[9] *National Standards Committee v Shi* [2018] NZLCDT 2018.

[14] In *Parshotam*, the practitioner was suspended for nine months in circumstances where he falsely witnessed documents that he had not seen the client sign and then went on to falsely certify to Land Information New Zealand (LINZ) that he had witnessed the signing of the relevant documents.

[15] In *Sawyer,* there was an admission of misconduct for forging a client's signature relating to a land transaction. There was a charge of misconduct arising from negligence in a conveyancing transaction and a further charge of misconduct where the practitioner created retrospective self-serving file notes after the client had authorised another firm of lawyers to uplift the disorganised file. A total of three years suspension was imposed.

[16] In *Shi,* the practitioner was inexperienced, acted in a conflicted situation, and gave false certification to LINZ. She was suspended for 15 months. The Tribunal took into account her youth and inexperience along with the fact that she had faced up to her responsibilities which gave her the opportunity to go back to practise.

[17] Mr Collins final submission was that, while each case must be considered on its own facts, Mr Morrison's case was among the more serious of document falsification cases short of strike-off. He emphasised his key factors:

(a) Mr Morrison's status as a very experienced lawyer.

(b) The conscious and deliberative nature of the falsehood involving four separate steps.

(c) The seriousness of the conduct itself.

(d) Mr Morrison's failure to admit misconduct which showed a lack of insight and frank acknowledgement of the professional failings.

[18] The LCRO seeks an order censuring Mr Morrison in addition to suspension. He has recognised that the Tribunal has on occasions regarded the upper levels of

suspension and striking-off as adequately implying a censure of the practitioner.[10] He submits that, in this case, it is appropriate to censure Mr Morrison as well, to denounce the conduct in formal terms. Such a formal censure is an important part of the general deterrence aspect of the penalty jurisdiction in sending a message to the wider legal profession.

[19] The LCRO further seeks an order pursuant to s 156(1)(c) of the Lawyers and Conveyancers Act 2006 (the Act) that Mr Morrison apologise to the complainant. The submission is that the apology in this case is an important aspect of penalty because it would mark an acknowledgement of wrongdoing by Mr Morrison and of the consequences. Hitherto he has earlier insisted that falsification of the Deed occurred because of an innocent error or unexplained accident.

[20] An order for costs is sought under s 249(1) of the Act for reimbursement of the LCRO's costs and for reimbursement of the costs of the Tribunal payable by the New Zealand Law Society (s 257 of the Act).

Mr Morrison's penalty submissions

[21] Ms Rosic, counsel for Mr Morrison, commenced her submissions by addressing the seriousness of Mr Morrison's offending.

Seriousness of the offending

[22] Mr Morrison has accepted responsibility for the events albeit that he has asserted that they occurred by an inexplicable accident. Ms Rosic submitted that we should take into account the following matters when determining the seriousness of the conduct:

(a) That Mr Morrison's actions were not undertaken to achieve any particular result. His conduct was the needless error of an aged person, fatigued with a difficult file, and who was under professional and personal strain.

[10] *Davidson*, above n 5.

(b) His actions are in contrast to those cases where falsification occurred for a particular and identifiable purpose. Mr Morrison's actions were needless and not forming part of a deliberate or calculated plan to mislead or achieve a specified result.

(c) There was no element of personal gain or dishonesty.

(d) Mr Morrison did not conceal what had occurred, having made full disclosure of all his files.

(e) He has paid significant compensation with no resulting loss to the complainant.

(f) That while the misconduct involved four different steps, those steps were part of a standalone instance of falsification of a document and particularised in a single charge of misconduct.

(g) The subsequent use of the document forms part of the misconduct finding and is not a separate aggravating feature.

(h) The alleged deliberate uplifting of the Deed by Mr Morrison from the Bank of New Zealand (BNZ) was not subject to any findings by the Tribunal and adds nothing.

[23] Her submission was that a fine, or alternatively a short period of suspension of less than six months, was sufficient, supportable by relevant cases and represented the least restrictive outcome which would still achieve the purposes of the penalty process. She referred to *Daniels* where it was held that matters of good character, reputation and absence of prior transgression counted in favour of the practitioner.[11] She referred to *Davidson* where personal and professional factors were taken into account in mitigation of the length of suspension.[12]

[11] *Daniels*, above n 2.
[12] *Davidson*, above n 5.

[24] She advanced four matters which were mitigating factors.

Good character and reputation

[25] Mr Morrison tendered references from seven referees. His referees include a former Judge of the Supreme Court, a retired High Court Judge, two senior members of the bar, a former Chief Executive Officer of the New Zealand Dairy Board, an accountant, and two of Mr Morrison's former and current professional partners. All referees have known Mr Morrison personally and professionally over many years and in some instances for over 50 years. Those referees give unqualified support for his honesty, integrity and good character and say that to have acted as he has done in this matter would have been completely out of character.

[26] Ms Rosic further submitted that Mr Morrison's good character is evidenced by his approach before and after the issues concerning the Deed came to light. He disclosed his entire files to all relevant parties. It was that disclosure that revealed the problems with the Deed. Following that disclosure, Mr Morrison co-operated fully with the disciplinary process over the past four years. He paid a total of $446,635 to the estate and to the two sons to compensate for wasted cost in relation to the High Court proceedings. He has apologised to the complainant expressing genuine regret.

Absence of prior transgressions and contribution to the profession and the community

[27] Ms Rosic drew our attention to the fact that Mr Morrison has been a practitioner for 50 years with no previous disciplinary record or prior transgressions. His career up to this point had been long, unblemished and exemplary.

[28] Ms Rosic set out Mr Morrison's substantial contribution to the profession. He has served as a member, Vice President and then President of the Hawke's Bay District Law Society. He has served on the Hawke's Bay District Law Society Disciplinary Committee and the Council of the New Zealand Law Society.

[29] His contribution to the community over 50 years has been impressive. Ms Rosic detailed 17 matters showing his involvement in a number of charitable trusts and charitable and community organisations.

Personal and professional factors

[30] Ms Rosic made reference to the personal and professional strain that Mr Morrison was experiencing at the time. His firm was undergoing a restructure and there was a particularly high work load. On a personal level, Mr Morrison was supporting his son whose disabled child was for much of the time in intensive care. The child remains permanently and severely disabled.

Comparable cases

[31] Ms Rosic's submission is that a two-year suspension sought by the LCRO is out of step with the majority of cases involving document falsification where the ultimate period of suspension of six months or less, or no suspension has been imposed. She referred us to the following cases:

(a) *Canterbury Westland Standards Committee No 2 v Carmichael.*[13] The practitioner falsely completed and backdated an Authority and Instruction (A&I) by cutting the client's signature from an A&I already held for the client and glued it onto the false A&I form. The subsequent certifications made to LINZ were therefore false. The practitioner was censured and ordered not to practise on her own account.

(b) *Auckland Standards Committee 5 v Low.*[14] That case involved certifying to the New Zealand Law Society monthly that her trust account records were complete and accurate, when in fact they were not. The failures spanned several years. The practitioner was censured, fined $8,000, ordered to undertake training and to have her trust account supervised.

[13] *Canterbury Westland Standards Committee No 2 v Carmichael* [2017] NZLCDT 28.
[14] *Auckland Standards Committee 5 v Low* [2018] NZLCDT 7.

(c) *Auckland Standards, Committee 1 v Latton.*[15] The practitioner deceived his client by representing that he had sent a Calderbank letter to the other party when he had not. He backdated the letter and showed it to his client. He had a previous disciplinary record involving dishonesty in dealings with a client. He was suspended for one month. The Tribunal found his conduct to be at the lower end of seriousness. It took into account his underlying psychological condition and the subsequent insight he had gained into his functioning.

(d) *Canterbury Westland Standards Committee 1 v Horne.*[16] The practitioner supplied a materially false undertaking to the client's Kiwisaver provider. He also signed and certified as a "true copy of the original", a copy of the client's passport and a letter confirming the address of the client when he had not seen the originals of the documents. The Tribunal suspended him for three months.

[32] Ms Rosic also referred us to the decisions in *Davidson* and *Klinkert* where periods of six months suspension were imposed in each case.[17] Each case involved the falsification of documents.

[33] Ms Rosic relied strongly on *Wellington Standards Committee 1 of the New Zealand Law Society v Pine.*[18] The practitioner was a trustee of a family trust. He admitted a charge of misconduct where his actions involved the following:

(a) Inserting a false date on the trust deed.

(b) Allowing a trust deed to be witnessed improperly and failing to correct this when he knew of it.

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[15] *Auckland Standards Committee 1 v Latton* [2017] NZLCDT 14.
[16] *Canterbury Westland Standards Committee 1 v Horne* [2016] NZLCDT 36.
[17] *Davidson*, above n 5; and *Klinkert*, above n 6.
[18] *Wellington Standards Committee 1 of the New Zealand Law Society v Pine* [2015] NZLCDT 24.

(c) Allowing the name of another firm of solicitors to appear on the trust deed when he knew that the firm had not acted in relation to, and was not otherwise connected with, the preparation of the deed.

(d) Allowing an attorney to sign two A&I forms for an electronic transaction without adequately verifying that the attorney was authorised to sign under an Enduring Power of Attorney.

(e) Fabricating witness details on the two A&I forms.

(f) Misleading his employer as to the accuracy of the deed and the two A&I forms.

(g) Failing to obtain legitimate A&I forms prior to certifying an electronic mortgage with LINZ.

(h) Providing the deed to a bank, despite knowledge of all the matters, in order to allow its loan to be secured over a property.

[34] Having considered a starting point of 12 months, the Tribunal reduced the period of suspension and fixed a starting date taking into account the time which the practitioner had voluntarily ceased practice. The effective period of suspension was four months.

[35] Ms Rosic further submitted that the cases relied on by Mr Collins for the LCRO to support a longer period of suspension are significantly more serious than Mr Morrison's case. They involve repetitive serious breaches of professional obligations or multiple instances of misconduct. They also involve multiple charges, where the document falsification was elaborate. She contrasted Mr Morrison's conduct as involving a single instance of document falsification and a single finding of misconduct.

[36] She submitted that Mr Morrison's conduct did not involve wilful and calculated dishonesty. She argued that a period of suspension of two years would effectively end Mr Morrison's career given his age and would thus be tantamount to striking-off.

Other Penalties

[37] Ms Rosic submitted that a censure was not required in the event that we impose a period of suspension. Censure is evident in the regulatory response of suspension.[19] Publication of name required by s 255 of the Act would therefore adequately mark Mr Morrison's conduct.

[38] Ms Rosic further noted that Mr Morrison had already apologised to the complainant in writing, but would do so again if we considered it necessary.

[39] Mr Collins reply was that Mr Morrison could not rely on an absence of dishonesty. He submitted that the Tribunal's finding that Mr Morrison was "responsible for the manipulations resulting in the production of Version 3 and that he did so deliberately", could not be characterised as anything other than dishonesty. It was thus necessary to send a clear message about the seriousness of the conduct and that therefore a censure was appropriate in the circumstances.

[40] Mr Collins further urged that we should distinguish Mr Morrison's claims of being under resourced against the fact of his being overworked. He argued that Mr Morrison's practice was well established but that he was overworked.

[41] In respect of the submission that there was an absence of motive on the part of Mr Morrison, Mr Collins submitted that Mr Morrison adopted a self-serving aspect out of expediency.

[42] Mr Collins finally submitted that we should take into account that Mr Morrison downplayed the seriousness of his conduct which should be considered in the context of insight or remorse.

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[19] *Davidson*, above n 5, at [37].

Decision

[43] We have considered the matters of principle discussed in *Daniels* and *Hart.*[20] We agree with Mr Collins submission that the starting point is a period of suspension of 12 months. He argues that the period should be increased to two years after taking into account Mr Morrison's status as a very experienced lawyer, the conscious and deliberate nature of the falsehood involving four separate steps, the seriousness of the conduct itself and the refusal to admit misconduct which displayed a lack of insight and frank acknowledgement of professional failings.

[44] We note that Ms Rosic has recognised that a short period of suspension would be a sufficient penalty in Mr Morrison's case.

[45] We find that all but one of the aggravating features which the LCRO contends for are contained within the facts of the case. We consider that denial of responsibility, (variously recorded in this decision as not admitting misconduct, persistence in denying the seriousness of the conduct, and denial of responsibility),[21] is not an aggravating factor given that defending a charge is not an aggravating factor but may deprive the practitioner of being able to rely on a mitigating factor. [22]

[46] We do not find that there are other aggravating factors. There is no previous disciplinary record and no personal gain.

[47] We have taken into account the following matters which mitigate against a penalty of suspension for a period of 12 months. They are:

(a) Mr Morrison's misconduct was a single event which occurred late in his career.

(b) His history is otherwise unblemished.

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[20] *Daniels*, above n 2; *Hart*, above n 3.
[21] See [17(d)], [4(c)] and [8] above, in this decision.
[22] See *Daniels*, above n 2.

(c) He has made substantial and significant contributions to the profession and community over 50 years.

(d) Despite the finding that his actions were deliberate, he has made no apparent financial gain.

(e) There is no likelihood that he will pose a risk to the reputation of the profession in the future.

[48] Those mitigating factors are strong and deserving of recognition. For that reason, we find that a period of suspension of six months is the appropriate penalty to impose.

[49] We have not considered that it is necessary to censure Mr Morrison. Suspension in itself contains a notion of censure. We are satisfied that Mr Morrison has appreciated the consequences of his actions.

[50] We likewise do not consider that Mr Morrison should formally apologise to the complainant. In so deciding, we have had regard to the fact the he has already done so, is prepared to do so again if ordered, but, absent insight into culpability of his conduct, requiring yet another apology has an element of futility about it. We note too that he has paid substantial compensation of $446,635 to the complainant.

[51] Ms Rosic asks that the costs of the LCRO amounting to $40,761.98 be reduced. She submits that a reduction in a costs order is warranted because of the substantial payment Mr Morrison has made to the relevant parties. She submits that his defence to the charge was not unreasonable given that, at the outset, the Standards Committee concluded that a finding of unsatisfactory conduct was appropriate and which Mr Morrison accepted.

[52] We have decided that Mr Morrison should meet the full costs of the LCRO. The LCRO's position in this difficult case has been vindicated. Overall the conduct was at a level which warranted referral to the Tribunal. He is not to be penalised for defending the charge, but was always at risk of meeting these costs.

The Tribunal makes the following orders:

1. Mr Morrison is suspended from practice for a period of six months (pursuant to s 242(1)(e) of the Act).

2. Mr Morrison is to pay to the New Zealand Law Society the costs of the Legal Complaints Review Officer which are fixed at $40,761.98 (pursuant to s 249 of the Act).

3. The Tribunal costs are certified at $16,047.00 and are payable by the New Zealand Law Society (pursuant to s 257 of the Act).

4. Mr Morrison is to refund to the New Zealand Law Society the costs of the Tribunal in full (pursuant to s 249 of the Act).

5. The existing orders for non-publication are to continue in force pending the outcome of Mr Morrison's appeal to the High Court.

6. The order for suspension is not to come into force until the outcome of the appeal.

DATED at AUCKLAND this 27th day of November 2018

BJ Kendall
Chairperson