NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL

[2018] NZLCDT 42

LCDT 034/17

IN THE MATTER OF	The Lawyers and Conveyancers Act 2006
BETWEEN	**AUCKLAND STANDARDS COMMITTEE NO. 2** Applicant
AND	**TIMOTHY JOHN BURCHER** Practitioner

CHAIR

Judge D F Clarkson

MEMBERS

Mr S Grieve QC

Mr G McKenzie

Ms C Rowe

Ms S Stuart

ON THE PAPERS

DATE OF DECISION 20 December 2018

COUNSEL

Mr N Williams and Ms E Mok for the Applicant

Mr D Jones QC for the Practitioner

RESERVED DECISION OF THE TRIBUNAL ON PENALTY

Introduction

[1] In our decision of 10 October 2018 we found Mr Burcher guilty of two charges, both at the level of unsatisfactory conduct.

[2] Counsel have agreed that this matter may be determined on the papers. Counsel are also, to a large measure, agreed on the appropriate level of penalty to be imposed.

[3] The major dispute between the parties relates to any award of costs against the practitioner under s 249 of the Lawyers and Conveyancers Act 2006 (the Act), in relation to the Standards Committee costs and also as to whether Mr Burcher should reimburse any of the costs which must be ordered against the New Zealand Law Society pursuant to s 257 of the Act.

Submissions for the Standards Committee

[4] The Standards Committee seeks that the Tribunal impose the following penalties:

(a) Censure.

(b) That the practitioner be ordered to take advice in relation to the management of his practice and make his practice available for inspection.

(c) That costs be ordered against the practitioner under s 249 of the Act.

(d) That the practitioner be ordered to reimburse the Tribunal costs ordered pursuant to s 257 of the Act.

[5] The details of the Tribunal's findings and its reasons are set out in our October decision and we do not propose to repeat these, but highlight some aspects to which counsel for the Standards Committee has drawn our attention.

[6] Mr Williams has reminded us that of the three Rule breaches alleged, we found two to have been established, one at what was described a "technical" level, but that the more serious was in relation to the misleading of Mr Eades who was overseeing the windup of the firm's nominee company.

[7] The Standards Committee are correct in drawing attention to this last matter in particular, since that was the most serious aspect of the charge as found. As set out in our October decision, Mr Eades had been appointed by the New Zealand Law Society and the practitioner had undertaken to cooperate with him in this role. His deliberate failure to advise of an important transaction was still a serious breach of r 11.1, even with full credit being given to the practitioner for the context of his failure.

[8] It must be kept in mind that the practitioner, at the very time when these failures occurred, was before the Tribunal in respect of more serious mismanagement charges relating to the nominee company, in respect of which he was later suspended for nine months.

[9] In relation to the second charge, unsatisfactory conduct was found at a somewhat lower level, again allowing for context and outcome. However, we did note that again the practitioner was displaying a lack of regard towards Mr Eades which was of "significant concern" to us.

[10] It was accepted that the second charge would not have been before the Tribunal but for the existence of the first charge which was pleaded at a higher level.

[11] The Standards Committee traversed in its submissions the generally understood penalty principles in legal professional disciplinary cases and provided the Tribunal with two precedents by way of comparison, *Auckland Standards Committee 1 v Tregenza*[1] a matter which involved a more serious false representation to the New Zealand Law Society (and another respondent); and *Canterbury Westland Standards*

[1] *Auckland Standards Committee 1 v Tregenza* [2016] NZLCDT 31.

Committee 3 of the New Zealand Law Society v Currie[2] which was concerned with somewhat different conduct.

[12] The Standards Committee applied the penalty principles to the current matter by submitting that there were the following aggravating features:

(a) That at the time of the conduct Mr Burcher was facing disciplinary proceedings in relation to his operation of the nominee company and had undertaken to cooperate with Mr Eades.

(b) That in relation to the second charge, at the time Mr Burcher partially refunded the deposit to the purchaser, he was on express notice from Mr Eades that he should not grant any further tolerance to the purchaser, but did so without checking with Mr Eades.

(c) That Mr Burcher's actions in breaching r 11.1 and misleading Mr Eades were deliberate, as found by the Tribunal.

(d) That the practitioner's breaches were not one isolated act but involved a series of breaches over a period of time, which displayed a lack of care and regard for his professional obligations.

(e) That the practitioner had overlooked the potential conflict between his own personal interests and those of his client Mr M, although the Standards Committee accepts that he offered to remedy the situation promptly by paying a pro rata share of the deposit to Mr M.

[13] The Standards Committee also accepts that there are the following mitigating features to be taken into account:

(a) That Mr Burcher was experiencing serious financial difficulties at the time of this conduct, and experiencing difficulties in his relationship with Mr Short.

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[2] *Canterbury Westland Standards Committee 3 of the New Zealand Law Society v Currie* [2015] NZLCDT 15.

(b) That the practitioner was put at a greater disadvantage in his subsequent dealings with Mr Eades, as a result of Mr Short's actions, and due to the missing authorities, which were later located by Mr Short's assistant.

(c) The practitioner apologised to Mr Eades promptly and acknowledged that Mr M should be paid a pro rata share of the deposit.

(d) None of the clients of the nominee company and in particular Mr M, took issue with the practitioner's conduct.

[14] In addition, the Standards Committee accepts that the conduct occurred three years ago and therefore cannot be characterised as recent.

[15] We would add in terms of mitigating features that the practitioner has encountered enormous difficulties, including many years of having to attempt to manage this project to some successful conclusion, without any assistance from his former partners, despite their joint involvement in the nominee company. We are satisfied that the practitioner was motivated to get the best possible results for his clients, in his actions and in his expenditure of his or his related interests' personal funds to the sum of $1.1 million.

[16] On the aggravating side of the equation also is the practitioner's previous disciplinary history which led to him pleading guilty to two charges of misconduct and two charges of negligence in 2015 in relation to the nominee companies' non-compliance with the Rules governing such companies. He was suspended by the Tribunal for a period of nine months from December 2015.

[17] The Standards Committee acknowledge that the practitioner has shown insight and remorse for his conduct, particularly his conduct in relation to Mr Eades.

Submissions for the Practitioner

[18] The practitioner accepts that the proposed penalty of censure is "an appropriate and proportionate penalty".

[19] Furthermore, he does not object to an order that he take advice in respect of the management of his practice although he suggests that it is "difficult to see how such a direction could be implemented in the broad terms advocated".

[20] For this reason the Tribunal sought clarification of the mechanics of such a penalty and it asked for the Standards Committee to nominate the particular person who would be responsible for that so that the Tribunal could make more specific orders.

[21] The parties have agreed that Mr Michael Foley will perform the supervisory role, and have now recorded specific parameters for his role.

Costs

[22] The Standards Committee seeks an order that the practitioner "make a reasonable contribution to the Committee's costs". A schedule of these costs have now been filed and they total $46,072.60.

[23] Counsel indicates that the total time spent on the matter was 234 hours, that the hearing lasted over two days and was relatively complex in its nature. Counsel for the Standards Committee also submitted that a good deal of the hearing time was occupied by Mr Burcher's evidence led by his counsel in order to set out the full context of the matter for the Tribunal's consideration.

[24] Mr Jones QC submitted that the findings of unsatisfactory conduct support his submission that "the allegations against the practitioner were over-stated and over-prosecuted …".

[25] This allegation is resisted by Mr Williams who disagrees with the characterisation. He points out there was only one particular of a charge not proved. (We would add that that particular involved, what was for the Tribunal at least, a relatively novel point and therefore, although we found against the Standards Committee in that respect it cannot be said to have been an improper allegation to have made in any way.)

[26] Mr Jones QC points the Tribunal to the letter provided to the Standards Committee on 16 September 2016 by the practitioner's solicitors. That letter set out in considerable detail the practitioner's version of events, and it has to be said that they largely align with the Tribunal's findings.

[27] It is somewhat unfortunate that the Standards Committee does not seem to have placed much weight on the matters raised in that letter. This is particularly so in respect of the lack of challenge by them of the allegations made by Mr Short to Mr Eades and the material provided by him to the Standards Committee, which has subsequently been established to have been quite incorrect. If there was cross checking about that material, it is not apparent to the Tribunal.

[28] However, despite the fact that the conduct was found to have been at the level of unsatisfactory conduct and not at a more serious level, it does not automatically follow that the matter should not have come to the Tribunal at all.

[29] Given the disciplinary history and the timing of this conduct which occurred while facing the earlier charges arising out of the nominee company operation – as did these charges – it was proper for the Standards Committee to place the matter before the Tribunal.

[30] The practitioner has been given the benefit of context in relation to his actions and we consider that the Standards Committee also ought to have the benefit of a full examination of the context in which it made its decisions to prosecute.

[31] We accept that the unsatisfactory conduct found was at the higher level of culpability.

[32] Section 249 provides the Tribunal with a broad discretion in awarding costs, as has been recently affirmed by the Court of Appeal in *Lagolago v Wellington Standards Committee 2.*[3]

[33] Further, the legislation provides that, even in a situation of full acquittal, there is a provision granting the Tribunal ability to award costs.

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[3] *Lagolago v Wellington Standards Committee 2* [2018] NZCA 406, 5 October 2018.

[34] This provision recognises the special nature of disciplinary proceedings and the public function of the professional body responsible for ensuring that standards of professional conduct are upheld.

[35] It has long been recognised that costs awards are not simply to be treated like civil litigation where the starting point is that costs follow the event.

[36] The current matter is a long way from acquittal, and although we have adopted a more sympathetic view of the context of the conduct than argued by the Standards Committee, we certainly consider the practitioner's responsibility for his deliberate actions ought to be reflected in a contribution to costs. He made a poor call not to tell Mr Eades, and there is no reason why other members of the profession ought to fully pay for the consequences of that decision.

[37] The same logic applies to the reimbursement of the Tribunal costs. Were the practitioner not to contribute at all, the full costs of the prosecution, and the responsibility of public protection and upholding of professional standards, would fall upon other practitioners. We do not consider that is proper in these circumstances.

[38] We have reduced the practitioner's responsibility significantly from what would have been a more usual award of full costs against him, for the reasons stated, and because we accept he has suffered very significant personal financial and other losses (in relation to the time and stress of the situation over a number of years) to reflect this and what it demonstrates, which we consider to be a strong loyalty to his clients.

[39] We consider that the practitioner ought to contribute the sum of $20,000 towards the Standards Committee costs and pay one-half of Tribunal costs.

Summary of Orders

1. The practitioner is censured in terms of the written censure attached to this decision.

2. The practitioner is to accept the inspection of his practice by Mr Michael Foley, as required and is to accept advice on the management of his practice as provided by Mr Foley from time to time.

3. The practitioner is to pay the sum of $20,000.00 towards the Standards Committee costs, pursuant to s 249 of the Act.

4. The New Zealand Law Society is to pay the Tribunal costs in the sum of $9,454.00, pursuant to s 257 of the Act.

5. The practitioner is to reimburse to the New Zealand Law Society, one-half of the Tribunal costs, pursuant to s 249 of the Act.

DATED at AUCKLAND this 20th day of December 2018

Judge D F Clarkson
Chair

CENSURE

Mr Burcher, once again, you have fallen below the high standards demanded by your membership of a professional organisation.

While the two findings of unsatisfactory conduct made against you reflect the particular context in which you found yourself, while endeavouring to achieve a good result for clients, your decision to take actions purely based on your own judgment (made under pressure) cannot be tolerated in the longer term.

As a member of a professional body with well-founded rules for protection of the public, a practitioner who purports to know better than those rules in particular circumstances cannot be regarded as an acceptable member of the profession.

While you have shown considerable commitment to your clients and have in some respects gone beyond what many would have attempted, to achieve a better outcome for them, this cannot justify your departure from rules which are intended to ensure all members of the public can trust their lawyer in every respect and can expect a high standard of adherence to professional conduct rules.

This Censure will remain part of your professional disciplinary record.