NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL

[2019] NZLCDT 10

LCDT 006/18

IN THE MATTER	of the Lawyers and Conveyancers Act 2006
BETWEEN	**NATIONAL STANDARDS COMMITTEE** Applicant
AND	**GRANT DONALD SHAND** Respondent

CHAIR

Judge BJ Kendall (retired)

MEMBERS

Mr S Hunter

Mr W Smith

Ms S Stuart

Mr I Williams

On the papers

DATE OF DECISION 24 May 2019

COUNSEL

Mr M Hodge and Mr J Simpson for the applicant

Mr P Napier for the respondent

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

[1] In our decision of 25 January 2019, we found Mr Shand guilty of one of two charges at the level of unsatisfactory conduct which involved two discrete issues. Those issues were:

(a) failing to timeously provide all documents, upon request, to the new lawyers of his former client; and

(b) breaching confidentiality by disclosing to the public at large, confidential information obtained during the client relationship.

[2] The Tribunal found that a particular within the other charge was proved but that it did not require a disciplinary response.

[3] Counsel have agreed that penalty may be determined on the papers.

Submissions for the applicant

[4] The Standards Committee asks the Tribunal to impose penalties as follows:

(a) censure;

(b) fine in the vicinity of $3,000;

(c) that costs be ordered against Mr Shand under s 249 of the Lawyers and Conveyancers Act 2006 (the Act); and

(d) that Mr Shand be ordered to reimburse the Tribunal's costs ordered under s 257 of the Act.

[5] The details of the Tribunal's findings are set out in our January decision. It is not necessary to repeat them here other than to note that, in respect of issue (a) above, we observed that Mr Shand displayed a lack of application but that his delay in providing the documents did not have a direct bearing on his former client's rights and remedies.

[6] As to issue (b) above, we said that Mr Shand's public response to the remarks made against him was understandable, but that *"he did not consider the rules which make it a different situation".*

[7] Mr Hodge for the Committee has drawn our attention to the generally understood penalty principles in legal disciplinary cases. He referred us to *Z v Complaints Assessment Committee*[1] and *Auckland Standards Committee 1 v Fendall.*[2] Both decisions emphasised that the purpose of disciplinary proceedings is to ensure that appropriate standards of conduct are maintained.

[8] The Standards Committee submitted that the following matters were relevant to the consideration of penalty:

(a) neither area of conduct could be placed at the lowest end of unsatisfactory conduct;

(b) the lack of a proper response to repeated requests for the client file and the length of the delay were aggravating features;

(c) that Mr Shand breached the rule about confidentiality which is fundamental to the lawyer-client relationship and did so carelessly; and

(d) that Mr Shand's prior disciplinary history (while not calling for a higher penalty) meant that a more lenient approach could not be justified.

[1] *Z v Complaints Assessment Committee* [2009] 1 NZLR 1 at [97].
[2] *Auckland Standards Committee 1 v Fendall* [2012] NZHC 1825.

[9] The Committee sought a contribution to its costs under s 249 of the Act. It accepted that no more than modest contribution to its costs would be justified given our findings in respect of Charge One and that a significant portion of its costs related to Mr Bligh who was unable to give evidence.

[10] It also seeks an order for the reimbursement of the Tribunal's costs in the usual manner.

Submissions for Mr Shand

[11] Mr Napier accepts that censure of Mr Shand without the imposition of a fine is an appropriate penalty. He submitted that the level of culpability is low and relied on the Tribunal's finding in respect of the two issues we have described. He further submitted that there is little likelihood of reoffending and that Mr Shand's breaches did not impact on Mr Bligh. He did submit that, if the Tribunal was minded ordering Mr Shand to pay a fine, then $1,000 would be a more appropriate amount.

[12] Mr Napier strenuously opposed an order for costs being made under s 249. His principal argument was that most of the hearing time for the charges was taken up with the five issues under Charge One, all of which failed. He submitted that the Committee failed to seriously address its likelihood of success in all the charges following the decisions of Nation J which resulted in Mr Bligh losing his case and was found to have been untruthful.[3] This was further compounded by the fact that Mr Bligh was not going to give evidence before the Tribunal. He argued that these failures had the result that Mr Shand was required to attend a trial with resulting stress and expense that went with that. He emphasised that Mr Shand's exposure to costs was made worse given that he was willing to discuss a plea deal which the Committee did not follow up on.

[13] He submitted that there should be a costs order in favour of Mr Shand. His fall-back submission was that, if the Tribunal was not inclined to award costs to Mr Shand, then costs should lie where they fall.

---

[3] *Bligh v Earthquake Commissioner & Anor* [2018] NZHC 2102.

[14] Mr Napier relied on the same submissions to say that the Tribunal should order the Committee to meet the Tribunal's costs.

[15] Mr Hodge resisted Mr Napier's submissions. He submitted that the Tribunal has made findings on a number of issues which will be of assistance to the wider profession:

(a) the filing of a statement of claim for high end litigation will amount to "significant work" for the purpose of r 3.5 such that written client information must be provided beforehand;

(b) at the commencement of the lawyer-client relationship, practitioners have a duty to consider and advise on any evident risks arising from a litigation funding arrangement, but are not obliged to advise on risks which are remote (which include the termination of the litigation funding arrangement on the eve of trial and the risk of an adverse costs award);

(c) the duty to give such advice on a litigation funding arrangement is part of the ordinary duty to advise a client on matters incidental to a retainer, and will still arise where the client does not seek advice on the funding arrangement; and

(d) it may be preferable for practitioners to spell out the basis on which fees will be charged and will need to be paid by the client if third party funding is withdrawn, but this is not a matter of professional obligation.

[16] Mr Hodge referred us to the decision of the English Court of Appeal in *Baxendale-Walker v The Law Society,*[4] which set out principles applicable to costs awards against a regulator in a similar disciplinary framework and which he submitted are of relevance in this case where the Committee has been partially successful. Those principles are:

(a) The Tribunal has wide and important disciplinary responsibilities.

[4] *Baxendale-Walker v The Law Society* [2007] EWCA Civ 233.

(b) The legislation vests in the Tribunal a wide costs discretion.

(c) The possibility of a costs award against the Law Society is neither expressly prohibited nor discouraged by the Act.

(d) The ambit of the Law Society's responsibility in deciding whether to bring disciplinary proceedings is far greater than for a litigant bringing ordinary civil proceedings. The Tribunal is dependent on the Law Society to bring properly justified complaints of professional misconduct to its attention. Accordingly, the Law Society has an independent obligation of its own to ensure that the Tribunal is enabled to fulfil its statutory responsibilities. The exercise of this regulatory function places the Law Society in a wholly different position to that of a party to ordinary civil litigation.

(e) A cost order should only be made against a regulator if there is good reason for doing so (such as where the prosecution was entirely misconceived, without foundation, or borne of malice or some other improper motive).

(f) Success by a practitioner in defending a matter is not of its own a good reason for ordering costs against a regulator. In the context of whether costs should follow the event, the "event" is only one of a number of factors to be considered.

(g) A regulator should not be unduly exposed to the risk of financial prejudice if unsuccessful, when exercising its public function. Such exposure risks having a chilling effect on the exercise of regulatory obligations, to the public disadvantage.

[17] Mr Napier, while accepting the principles stated above, concentrated on the word "unduly" in principle (g). He submitted that the Committee, by proceeding against Mr Shand in the way it did, by not evaluating its position after the Nation J decisions and the unavailability of Mr Bligh, exposed itself for costs and that it was not undue.

[18] The principles set out in *Baxendale-Walker* above have been endorsed by the Tribunal in *New Zealand Law Society v Hall*[5] and in *Auckland Standards Committee 4 v Smith.*[6]

[19] The broad discretion that the Tribunal has in awarding costs was affirmed by the Court of Appeal in *Lagolago v Wellington Standards Committee 2.*[7]

[20] The Tribunal in its decision on penalty in *Auckland Standards Committee No. 2 v Burcher*[8] *(*20 December 2018) noted the wide discretion it has under s 249 and made the following observations:

(a) that the legislation provides that there is a provision granting the Tribunal ability to award costs even where there has been a full acquittal;

(b) that the legislation 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; and

(c) that 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.

[21] While we expressed some sympathy for Mr Shand in our January decision, we consider that his delayed action in respect of production of client documents and his deliberate media response carried out without reflection on the appropriate client confidentiality rules should attract a sanction.

[22] There is the additional fact that Mr Shand cannot claim an unblemished disciplinary record. He has been the subject of six unsatisfactory conduct findings at Standards Committee level between August 2011 and November 2017. There is

[5] *New Zealand Law Society v Hall* [2014] NZLCDT 17.
[6] *Auckland Standards Committee 4 v Smith* [2015] NZLCDT 46.
[7] *Lagolago v Wellington Standards Committee 2* [2018] NZCA 406.
[8] *Auckland Standards Committee No.2 v Burcher* [2018] NZLCDT 42.

also a previous appearance before the Tribunal in November 2013 when Mr Shand having admitted a charge of negligence or incompetence in his professional capacity under s 241(c), was censured, fined, ordered to pay compensation and costs.

[23] These matters do not attract a higher penalty but militate against Mr Napier's submission that a penalty of censure only should be imposed.

[24] Finally, we do not place any weight on Mr Shand's offer to plead guilty to certain charges. The relevant correspondence says only that Mr Shand "may consider" a "plea deal". The appropriate way for a practitioner to avoid the costs of a prosecution on charges for which he or she accepts liability is to admit those charges rather than merely offer to do so.

[25] We find that the Committee's offer to accept a substantially reduced order for costs is appropriate. Its costs are stated to be approximately $70,000. We consider that the appropriate order to make is that Mr Shand should pay $25,000 towards those costs.

[26] We consider that Mr Shand should refund to the Law Society the full amount of the Tribunal's costs. We do so having regard to the Society's responsibility for upholding professional standards. We do not consider that the Society should bear the Tribunal's costs for what has, at least in part, been a successful prosecution.

[27] We find that there is no need for protection of the public in respect of Mr Shand nor is his fitness to practise an issue. We do find that a fine is an appropriate penalty along with that of censure and costs.

[28] We accordingly make the following orders:

1. Censure in relation to delay in providing documents and breach of lawyer/client confidentiality, pursuant to ss 156(1)(b) and 242(1)(a) of the Act.

2. Fine of $3,000, pursuant to ss 156(1)(i) and 242(1)(a) of the Act.

3. That Mr Shand pay $25,000 towards the costs of the Law Society, pursuant to s 249(3) of the Act.

4. The Tribunal's costs are awarded against the Law Society and certified at $10,080, pursuant to s 257 of the Act.

5. Mr Shand is to refund the Tribunal's costs in full, to the Law Society, pursuant to s 249(3) of the Act.

DATED at AUCKLAND this 24th day of May 2019

BJ Kendall
Chairperson