

**NEW ZEALAND LAWYERS AND  
CONVEYANCERS DISCIPLINARY TRIBUNAL**

[2019] NZLCDT 12

LCDT 014/18

**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 Hunter

Ms C Rowe

Mr P Shaw

Mr I Williams

**DATE OF HEARING** 28 and 29 March 2019

**HELD AT** Specialist Courts and Tribunals Centre, Auckland

**DATE OF DECISION** 30 May 2019

**COUNSEL**

Mr M Hodge and Ms E Mok for the Standards Committee

Mr D Jones QC for the Practitioner

## **DECISION OF THE TRIBUNAL**

### ***Introduction***

[1] Mr Burcher is charged with misconduct, or in the alternative, unsatisfactory conduct. He is alleged to have breached an order of the Tribunal, suspending him from practice as a lawyer, on nine occasions, over a number of months.

[2] Mr Burcher denies that he was providing regulated services and says that, in most instances, he was acting as a trustee and therefore a client, not a lawyer.

### ***Issues***

[3] The issues to be determined are:

1. Did any of the instances pleaded fall within the definition of the provision of legal services?
  - (a) In each instance, was the nature of the work or activity “legal work” or “conveyancing” as defined? And
  - (b) In each instance, was the work carried out “for another person”, particularly if Mr Burcher was a trustee?
2. If legal services are found to have been provided, does this constitute disgraceful or dishonourable conduct?<sup>1</sup>
3. Alternatively, if not, is it a wilful or reckless failure to comply with a condition on a practising certificate?<sup>2</sup>
4. If not, is it “unsatisfactory conduct” either because it is unbecoming or unprofessional behaviour, or a failure to comply with a condition on a practising certificate?

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<sup>1</sup> Section 7(1)(a)(i) Lawyers and Conveyancers Act 2006 (the Act).

<sup>2</sup> Section 7(1)(a)(iii) of the Act.

### ***Relevant Statutory Definitions***

[4] To fit within the definition of misconduct either within (i) or (iii) of subs 1(a) of s 7 the conduct of the lawyer must occur “... *at a time when he or she or it is providing regulated services* ...”. (emphasis ours).

[5] The Standards Committee, in its submissions, refers to the definition of “lawyer” in s 7 by referring to the definition in s 6 as “*a person who holds a current practising certificate as a barrister or as a barrister and solicitor*”. The Standards Committee submits that during a period of suspension a practitioner’s status as a lawyer continues. In support of that submission counsel refers to s 39(5) of the Act which requires the suspended practitioner to deposit his or her current practising certificate with the Society that had issued it. It is submitted that that provision is consistent with the notion that the practising certificate remains “current” during the year for which it has been issued, even if that includes a period of suspension.

[6] We accept that that interpretation is certainly arguable and indeed counsel for the respondent did not take the point that his client was no longer to be considered a “lawyer”.

[7] However, we note that in any event a broader view of lawyer can be sustained, by reference to s 241 of the Act which states that a charge can be heard “... *against a person who is a practitioner or former practitioner* ...”. (emphasis ours).

[8] “Regulated services” include both legal services and conveyancing services. The term “legal services” is defined in s 6 as “... *services that a person provides by carrying out legal work for any other person*”.

[9] “Legal work” includes:

- (a) the reserved areas of work:
- (b) advice in relation to any legal or equitable rights or obligations:
- (c) the preparation or review of any document that—
  - (i) creates, or provides evidence of, legal or equitable rights or obligations; or
  - (ii) creates, varies, transfers, extinguishes, mortgages, or charges any legal or equitable title in any property:
- (d) mediation, conciliation or arbitration services:

- (e) any work that is incidental to any of the work described in paragraphs (a) to (d).”

As may be seen from the word “includes” the definition is not exhaustive.

**“conveyancing—**

- (a) means—
- (i) legal work carried out for the purpose of effecting or documenting any transaction or prospective transaction that does or would create, vary, transfer, or extinguish a legal or equitable estate, interest, or right in any real property; and
  - (ii) legal work carried out for the purpose of effecting or documenting a sale or purchase of a business, whether or not land is involved; and
- (b) includes legal work carried out for the purpose of effecting or documenting —
- (i) a lease of land; or
  - (ii) the grant of a mortgage or charge over any interest in land; or
  - (iii) the creation of a trust affecting any real property or any interest in land; and
- (c) includes any legal services that are incidental to, or ancillary to, any work of a kind described in paragraph (a) or paragraph (b); and
- (d) includes, in particular, the presenting of any instrument for registration under the Land Transfer Act 2017 or the Deeds Registration Act 1908 and the carrying out of any other work required by either of those Acts to be performed by, or on behalf of, persons seeking to effect registration of instruments; but
- (e) does not include the legal work involved in the preparation or drafting of a will; and
- (f) despite paragraph (d), does not include the work (not being legal work) involved in an agent of a practitioner or incorporated firm presenting an instrument for registration under the Land Transfer Act 2017 or the Deeds Registration Act 1908.”

**“reserved areas of work means the work carried out by a person—**

- (a) in giving legal advice to any other person in relation to the direction or management of—
- (i) any proceedings that the other person is considering bringing, or has decided to bring, before any New Zealand court or New Zealand tribunal; or
  - (ii) any proceedings before any New Zealand court or New Zealand tribunal to which the other person is a party or is likely to become a party; or
- (b) in appearing as an advocate for any other person before any New Zealand court or New Zealand tribunal; or
- (c) in representing any other person involved in any proceedings before any New Zealand court or New Zealand tribunal; or

- (d) in giving legal advice or in carrying out any other action that, by section 21F of the Property (Relationships) Act 1976 or by any provision of any other enactment, is required to be carried out by a lawyer.”

“**regulated services** means—

- (a) in relation to a lawyer or an incorporated law firm,—
- (i) legal services; and
  - (ii) conveyancing services; and
  - (iii) services that a lawyer provides by undertaking the work of a real estate agent; and

...”

[10] As submitted by Mr Jones QC on behalf of the practitioner the scope and understanding of the phrase “... *carrying out legal work **for any other person*** ...” is very significant to the practitioner’s case. In essence, Mr Burcher claims to have been the client, conveying instructions to his legal executive, who then signed the correspondence and drafted the documents dictated. It is Mr Burcher’s argument that he was simply providing very detailed instructions on behalf of his trust client, as one of the trustees.

[11] This argument does not apply to the attendances for Mr H D and his trust (B W Trust) where, at the hearing, Mr Burcher rightly conceded that the position was different and he had effectively provided services for another person.

### **Background**

[12] There is little dispute between the parties about the factual background.

[13] On 18 December 2015 the Tribunal<sup>3</sup> suspended Mr Burcher from practice for a period of nine months commencing close of business 23 December 2015. This was following his guilty plea to two charges of misconduct and one charge of unsatisfactory conduct. Those charges related to numerous breaches of the Rules relating to solicitor’s nominee companies. Mr Burcher was the trust account partner and the partner primarily responsible for the running of the nominee company.

[14] There was a limited exemption to the suspension, in that the Tribunal permitted Mr Burcher to continue to assist Mr Bob Eades with the winding up of the nominee company, which was already underway.

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<sup>3</sup> New Zealand Lawyers and Conveyancers Disciplinary Tribunal.

[15] Following the Christmas break, the practitioner returned to the firm's premises on 13 January 2016, at which point he corresponded with the then general manager of the regulatory services of the Law Society, concerning the suspension order and what type of activities he was permitted to undertake.

[16] Ms Ollivier advised Mr Burcher "*the restrictions on suspended lawyers and those who have been struck off are similar even though suspension is just a temporary disqualification of a lawyer's entitlement to practise law*". She referred him to the relevant sections of the Act and enclosed a copy of a decision which had dealt with the question of what constituted "the provision of regulated services".

[17] In an email to Ms Ollivier which followed, Mr Burcher set out five sorts of activities with which he proposed to engage during the period of his suspension. In summary these were:

1. Assisting in a search for new premises for the firm.
2. Being involved in staff employment and general management of the practice.
3. Archiving of files and ensuring wills and trusts were up to date.
4. The pursuit of continuing legal education.
5. Assisting with the "final wind-down of a nominee company", as had been anticipated by the Tribunal in its decision.

[18] In response Ms Ollivier warned against supervision of staff but stated that "*general, not file specific, mentoring may be permitted*". Ms Ollivier went on to state the Society's expectation that "*... any contact with clients about updating wills/trusts would be carried out by other staff*" and finally she noted that "*care will need to be taken that other lawyers do not form the impression that you are continuing to practise although that seems unlikely from what you have described*".

[19] Approximately a week later Mr Burcher sent a further email inquiry to Ms Ollivier which appeared to have followed up from a phone call that day (26 January 2016). In it he points out he is the trustee of several trusts and attorney for various people:

“I presume I can still talk to the other trustees as long as I disclose that it is only about those specific matters that are not of a legal nature ... likewise if people need me to sign documents as their attorney if someone else is providing the legal advice I must surely be able to sign the document.”

[20] Ms Ollivier responded the next day:

“I cannot see any reason why you would need to resign as an attorney or trustee by virtue of your limited suspension and there is no reason why you could not sign documentation in your capacity as trustee/attorney. You may wish to advise any affected clients of your suspension.

I note your awareness that you would not be providing legal advice in that capacity.”

[21] Around this time, and in fact since Mr Burcher had returned to the firm following the Christmas break, in mid-January, his partner Mr Macdonald had become concerned that Mr Burcher was not abiding by his suspension and feared that Mr Burcher was continuing “business as usual”. He expressed this to him directly and followed it up by a letter on 26 January in expressing his concern about the situation. Mr Macdonald stated:

“You have been suspended. Despite that, you are in the office every day and not only are you making and receiving many phone calls but you are also giving tapes to (Ms M)<sup>4</sup> to do as well as spending a lot of time in her office directing her on her work. You are also dealing with clients’ funds and have provided a number of trust account records hand-written by you. I have already expressed my concern about the position.”

[22] Mr Macdonald went on to urge Mr Burcher to consider the position that he was placing his partner in and urged him to “take the suspension seriously” and “take some proper gardening leave”.

[23] Mr Macdonald warned Mr Burcher that if that did not occur and he did not stay away from the office that he would need to report the matter to the New Zealand Law Society.

[24] Clearly, Mr Macdonald was not satisfied that Mr Burcher had heeded his advice, because on 5 May 2016, he made a confidential report to the Law Society expressing concern that Mr Burcher was acting in breach of the suspension order.

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<sup>4</sup> Ms M, a legal executive of 20 years’ experience who had worked with Mr Burcher for a long time.

[25] Having completed the various procedural requirements, the Standards Committee tasked with considering the matter, appointed an inspector to review the matter and report back.

[26] In order to complete his investigation Mr McCombe reviewed not only the relevant files but also considered in excess of 500 pieces of dictation that the practitioner had made during the period in question and which was addressed to the legal executive Ms M.

[27] It was the conclusion of the investigator that the practitioner may have provided regulated services, and he identified specific examples, most of which are relied on by the Standards Committee in formulating the charges now faced.

[28] It is because the conduct, which is alleged to breach the suspension order is revealed directly from the practitioner's own dictation tapes, that there is little dispute about the actual nature of the transactions or the work involved.

[29] The practitioner points out that, of the over 500 pieces of dictation considered, only nine instances are cited in support of the alleged misconduct.

[30] In addition to the work disclosed first-hand by the dictation, Mr Burcher accepts that he attended a number of meetings as described by the Standards Committee. He states that he was at pains to point out to all parties with whom he dealt that he was attending such meetings in the role of trustee rather than solicitor.

### **Issues**

[31] In order to determine the issues, it is necessary to analyse the conduct disclosed for each of the nine alleged instances. It is the Standards Committee's submission that it is not necessary to establish that Mr Burcher provided regulated services but rather that his conduct was "sufficiently connected with the provision of regulated services" in the sense discussed in the *Orlov v The New Zealand Lawyers and Conveyancers Disciplinary Tribunal*<sup>5</sup> case.

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<sup>5</sup> *Orlov v The New Zealand Lawyers and Conveyancers Disciplinary Tribunal* [2014] NZHC 1987 at [96] to [112].

[32] Even if Mr Burcher did some of the legal work, and some was undertaken by his legal executive, Ms M, the charge may be established. The standard of proof required is on the balance of probabilities.<sup>6</sup>

*1. Correspondence on behalf of A Investments Limited on 15 January 2016<sup>7</sup>*

[33] Mr Burcher was a trustee for the V Trust, which was a major shareholder in A Investments limited. The correspondence, which was to go out in the name of Ms M (the legal executive), contained detailed comments on proposed changes to a draft management agreement.

[34] The nature of the dictation is such that it could simply be transposed as directed into an email or letter form by Ms M without any further action on her part. Mr Burcher in his evidence states that he was:

“... providing instructions as trustee to Ms M. I considered I was acting in the capacity as trustee and not as a lawyer providing regulated services. Given a lawyer, legal executive or whoever else in a firm has to act on the instructions of the client, I was in the position of the client and provided instructions accordingly.”

[35] Mr Burcher amplified this evidence in relation to this and other pieces of work, stating that a trustee such as himself can be highly skilled and experienced and therefore able to provide very detailed instructions as a client to the person providing the legal service who then merely had to transpose it and convey it to the opposing party.

[36] We did not find this to be a convincing argument. In this particular instance, the letter was sent for the benefit of A Investments Limited, a company in respect of which Mr Burcher was not a director. The company is another legal entity and therefore he was providing services for another person. Indeed, even if the activity is seen as being on behalf of the trust, which is difficult because the trust was not the identified client, Mr Burcher was acting as one of two trustees, not just himself.

[37] The services are clearly legal services ancillary or incidental to “advice in relation to any legal or equitable rights or obligations”, within the definition of “legal work”. We consider this particular to be proven.

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<sup>6</sup> Section 241 of the Act.

<sup>7</sup> Particular 11(b) of Charge.

[38] We are reinforced in our view by considering the decision of the LCRO<sup>8</sup>, Dr Webb, in *Shrewsbury v Rothestay*<sup>9</sup>. In that matter Dr Webb was considering precisely the question of “... *whether the work of an executor/trustee of an estate who is also the solicitor of the estate, is properly regarded as “work that is incidental” (to) the other established classes of legal work set out in s 6 of the Act*”. He compared comparable legislation from Australian jurisdictions, and noted a “...*general legislative intent that a finding of unsatisfactory conduct may be made in respect of any of the services that a lawyer offers in the course of his or her practice.*”

[39] He went on to comment that such approach was consistent with the legislative purposes of the Act to protect consumers of legal services:

“I also take into account the fact that the Lawyer’s (sic) and Conveyancers Act 2006 is at least in part a consumer protection measure. It would defeat that purpose if the legislation were interpreted to exclude from its scope functions which a lawyer routinely undertakes alongside the provision of legal services but these were not considered to be regulated services.”

2 & 3. *Dictation on 18 January 2016 to two other Solicitors*<sup>10</sup>

[40] This related to a follow-up matter, incidental to conveyancing which had been undertaken by the practitioner prior to his suspension the previous Christmas, and completed by Ms M in January. There had been an error on someone’s part about giving notice to a tenant.

[41] Clearly this attendance, like the previous one, is incidental or ancillary to conveyancing and thus falls within the definition of provision of legal services. The attendances were on behalf of a client T C Holdings for whom Mr Burcher had acted for some time. He points out that he did not complete the settlement which had occurred and has little recollection about the matter but “*I would have been briefing (Ms M) on the file so as to cause as little disruption to the client as possible*”. Mr Burcher stated that he did not consider that he was providing legal services and certainly had not intended to do so. We do not consider that that argument is sustainable in the face of the correspondence in question.

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<sup>8</sup> Legal Complaints Review Officer.

<sup>9</sup> LCRO 99/09.

<sup>10</sup> Particulars 12(a) and 12(b) of Charge.

[42] Both pieces of correspondence dictated demonstrate this particular has also been proven to the requisite standard.

*4. Letter on behalf of A Investments Limited<sup>11</sup>*

[43] This was a further letter on behalf of A Investments Limited where the practitioner was one of the trustees of the V Trust which was a majority shareholder of A Investments Limited. The letter comprises a detailed settlement offer involving considerable sums of money (over \$7 million) and sets out priority mortgage arrangements.

[44] The letter refers to a recent meeting between “our respective clients”. The analysis we have made in respect of number 1 applies to this correspondence also. We do not accept that Mr Burcher can purport to be acting as the client here (a company of which he is not even a director). The correspondence is clearly incidental to advice on legal rights or obligations, or as to reserved areas of work.

[45] This particular in support of the charge is also established.

*5. Further Dictation on 6 April 2016<sup>12</sup>*

[46] The practitioner sent a letter to Mr D thanking him for his instructions to review his trust documents and to prepare a new will. The letter enclosed a deed of retirement for Mr D as trustee and appointed Mr Burcher in his place. It also enclosed a new will and authorities to uplift deeds from the previous solicitors.

[47] In evidence Mr Burcher revealed that Mr D was an old family friend and was a new client of the firm. He clearly provided legal advice to Mr D and properly conceded this in cross-examination and closing submissions. Thus there was a clear breach of the suspension order in this instance also.

*6. Dictation around 26 May 2016<sup>13</sup>*

[48] Mr Burcher dictated an agreement to surrender and create rights of way, a height covenant and a storm water and sewerage easement in relation to properties in which

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<sup>11</sup> Particular 14(a) of Charge.

<sup>12</sup> Particular 14(b) of Charge.

<sup>13</sup> Particular 15(a) of Charge.

the three trustees of the J Family Trust had an interest. Mr Burcher was a trustee of this trust. Mr Burcher's evidence was that he "... *had fiduciary obligations to ensure that my knowledge as a professional trustee was utilised to the fullest possible extent ...*".

[49] The documents dictated run to a number of pages and represent a multiparty agreement intended to create legal rights and obligations. The dictation quite clearly sets out step by step and word for word what Ms M, the legal executive, was to construct in the agreement. Mr Burcher says:

"I instructed (Ms M) as to what I believed was the best course of action for the trust to undertake. It was then over to her to carry out or (if she saw fit) challenge my instructions. She is a highly skilled, very experienced legal executive and well capable of questioning instructions if she believed they were wrong or unreasonable ...".

[50] The evidence, as disclosed by the transcript of the dictation goes well beyond instructing Ms M as to "the best course of action for the trust to undertake". It goes well beyond mere client instructions. It involves detailed legal work which would require an experienced legal practitioner to prepare. It clearly fits within the definition of legal work. The fact that Mr Burcher is one of the trustees does not, once again, enable him to say that the work was not carried out for another person. The work was clearly carried out for the owners of the land who were the trustees of the J Family Trust, not just Mr Burcher.

[51] We find this particular to be established.

#### 7. *Dictation on 26 May 2016*<sup>14</sup>

[52] There was further dictation on 26 May 2016 in which the practitioner dictated the draft agreement for sale and purchase and a letter to solicitors in relation to property owned by the J Family Trust also. Clearly this was also conveyancing work or legal services incidental to conveyancing work and it falls into the same category as the previous instance. Again, this establishes the particular pleaded to the relevant standard.

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<sup>14</sup> Particular 15(b) of Charge.

8. *Dictation on 1 June 2016*<sup>15</sup>

[53] Dictation on 1 June 2016 of correspondence to solicitors, to be sent by Ms M, concerned the redrafting of the documents referred to in the previous two instances. Similar principles apply. This was conveyancing work and/or legal services provided to the three trustees of the J Family Trust. There is significant legal content and input by Mr Burcher which goes well beyond any suggestion of a client providing instructions. This particular is also established.

9. *Dictating a Statement of Evidence on 24 May 2016*<sup>16</sup>

[54] This brief of evidence related to repairs required to a property in Auckland of which A Investments Limited was mortgagee. There were Court proceedings and it seems the practitioner prepared this brief. He argues that he did so as a trustee of the majority shareholder in the investment company (which is also the subject of two of the earlier particulars).

[55] The Standards Committee submit the fact that anyone can prepare a brief of evidence does not mean that a suspended lawyer can properly do so. In support of that they refer the Tribunal to its decision in *Auckland Standards Committee 3 and 4 v Banbrook*<sup>17</sup> where, in accepting counsel's submission, the Tribunal endorsed the following:

“... the clear effect of this provision is that the suspended lawyer is not permitted to do any legal work during the period of their suspension, whether or not that work would require a practising certificate...”

[56] We find that in preparing a brief of evidence clearly the practitioner was acting for another person and was undertaking legal work incidental to reserved areas of work as defined in the Act.

[57] For completeness, in relation to all particulars, we do not consider the issue of charging (or not, in this instance) to be determinative. It is not a necessary ingredient for finding that legal services have been undertaken.

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<sup>15</sup> Particular 15(c) of Charge.

<sup>16</sup> Particular 16 of Charge.

<sup>17</sup> *Auckland Standards Committee 3 and 4 v Banbrook* [2017] NZLCDT 35.

[58] In summary, we find that the Standards Committee has proved on the balance of probabilities the nine particulars pleaded and therefore that Mr Burcher has breached, on each of these occasions, the order suspending him from practice.

### ***Expert Evidence***

[59] The Standards Committee did not call expert evidence, preferring to rely upon the fact that these matters were to be assessed before a specialist tribunal. We have commented in the past we do not regard expert evidence to be necessary or indeed particularly helpful, unless the matter is a controversial one of some complexity that requires expertise beyond that of the experienced lawyer members of the Tribunal.

[60] The practitioner called expert evidence from Mr C Moore, a very senior and well-respected practitioner.

[61] One of the points made by Mr Moore was that the practitioner had gone:

“... to some trouble to make sure that what he was doing was within the terms of the suspension so it’s not as if he just went into the office and ignored the order, he’s actually gone to some trouble, he’s contacted the Law Society, he’s been very clear about what he had to do, he’s read the *Harder* decision and he’s gone to some trouble, in my view, to make sure that he was acting appropriately ...”.<sup>18</sup>

[62] Certainly, the Tribunal gives credit to the practitioner for his contact with the New Zealand Law Society, however the initial contact and five areas of work set out were a far cry from what was actually undertaken by Mr Burcher subsequently and has been the subject of scrutiny as above.

[63] Mr Moore agreed with the analysis of Mr Burcher, which is that he had simply provided his services as a trustee and that he was better qualified than anyone to do so. However, when challenged, he accepted that if there was more than one trustee, the other person was being rendered a service for the trust and appeared to accept the concept that “the client” could not be only one of the trustees.<sup>19</sup>

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<sup>18</sup> NOE at page 97, lines 22-26.

<sup>19</sup> See our comments in [36].

[64] Mr Moore expressed the view that Mr Burcher had gone to considerable lengths to look after his clients and that was “extraordinary” and “wonderful”.<sup>20</sup> The use of such expressions raises some questions about the degree of independence of the witness.

[65] Even the attendances for Mr H D, having been conceded by Mr Burcher as providing legal services to another person, were referred to by Mr Moore as “a grey area”.<sup>21</sup> Later Mr Moore referred to Mr Burcher as having “overstepped the mark”<sup>22</sup> and added “*yes but I think he thought he was abiding by it and I think he’s made a mistake*”.

[66] Further evidence from Mr Moore was to the effect that the roles of a trustee and lawyer can “morph” and that the lines are “blurred”.<sup>23</sup>

[67] When it was put to him that those conclusions would lead to the point where a trust lawyer could simply continue to act as previously whilst suspended without much impact of the suspension order, Mr Moore responded, “*I think there is a fair degree of truth in that*”<sup>24</sup> and that that was the fault of the legislation.

[68] Mr Moore said that these comments would also translate to a lawyer’s role as a company director.

[69] With the greatest of respect to Mr Moore the Tribunal does not agree with his analysis of Mr Burcher’s actions.

## ***Issue 2 – Disgraceful or Dishonourable Conduct***

[70] It is useful to first consider the purpose of an order for suspension. These orders are not simply made for public protection, although this is sometimes a primary reason. At other times, an order of suspension may be to provide a practitioner with a time to reflect on his or her conduct. It is also an opportunity to take time to undertake further education or retraining. At times, it may be to provide the practitioner with an opportunity to rehabilitate in a more holistic sense, particularly if there is an underlying health problem involved in the practitioner’s misconduct.

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<sup>20</sup> NOE at page 100, line 21 and 22.

<sup>21</sup> NOE at page 102, line 32.

<sup>22</sup> NOE at page 104, line 8.

<sup>23</sup> NOE at page 104, line 32 and page 105, line 1.

<sup>24</sup> NOE at page 105, line 14.

[71] In the *Daniels v Complaints Committee 2 of the Wellington District Law Society*<sup>25</sup> decision, the discussion of suspension is well known:

“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.”

And:<sup>26</sup>

“A suspension is clearly punitive, but its purpose is more than simply punishment. Its primary purpose is to advance the public interest. That includes that of the community and the profession, by recognising that proper professional standards must be upheld, and ensuring there is deterrence, both specific for the practitioner, and in general for all practitioners. It is to ensure that only those who are fit, in the wider sense, to practise are given that privilege. Members of the public who entrust their personal affairs to legal practitioners are entitled to know that a professional disciplinary body will not treat lightly serious breaches of expected standards by a member of the profession.”

[72] Suspension is a penalty not lightly imposed on a practitioner. It recognises that it will have significant consequences not only for the practitioner but for his or her clients.

[73] As such a significant sanction, with multiple purposes, it must not be treated lightly by any practitioner. It was absolutely clear to Mr Burcher that he could not undertake legal work. His further inquiries of the New Zealand Law Society emphasised at least two matters. One, that he should not undertake file-specific or client related work and two, that he should take great care not to give the impression to the outside world, including other lawyers, that it was “business as usual”.

[74] Whilst we note Mr Burcher’s evidence that he was open with his clients about his suspension and attempted to clarify his role when attending meetings, it is clear that at least his partner Mr Macdonald was concerned that Mr Burcher was flouting the suspension order. Mr Macdonald said that two other lawyers spoke to him about the situation but they did not give evidence and we have not relied on this.

[75] As earlier stated, Mr Burcher’s attendances, as disclosed by his dictation to his legal executive went well beyond the parameters he had discussed with the New

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<sup>25</sup> *Daniels v Complaints Committee 2 of the Wellington District Law Society* [2011] 3 NZLR 850 at [22].

<sup>26</sup> See above n 21 at [24].

Zealand Law Society and well beyond assisting Mr Eades in the wind-up of the nominee company.

[76] We regard his “pushing of the boundaries” and attempting to justify his actions as merely those of a trustee, as a flouting of the order. As such it must be conduct which other lawyers of good standing would regard as disgraceful and dishonourable.

[77] The answer to the question posed in Issue 2 is “yes”.

### ***Issue 3***

[78] It is not necessary to address this aspect of the charge which was not advanced forcefully and was merely a subsidiary charge from the perspective of the Standards Committee.

### ***Issue 4***

[79] Finally, as we consider that Mr Burcher’s conduct is at the misconduct level, it goes without saying that it is not necessary for us to consider the lower standard of unsatisfactory conduct.

### ***Summary***

[80] The charge as brought is established in respect of each particular.

[81] Counsel are to file submissions as to penalty within 21 days of the release of this decision and are to liaise with the case officer to allocate a half-day penalty fixture.

**DATED** at AUCKLAND this 30<sup>th</sup> day of May 2019

Judge D F Clarkson  
Chair