

**NEW ZEALAND LAWYERS AND
CONVEYANCERS DISCIPLINARY TRIBUNAL**

[2019] NZLCDT 28

LCDT 004/19

IN THE MATTER

of the Lawyers and Conveyancers
Act 2006

BETWEEN

**AUCKLAND STANDARDS
COMMITTEE 5**

Applicant

AND

BOON GUNN HONG

Respondent

CHAIR

Judge BJ Kendall (retired)

MEMBERS

Mr S Hunter

Mr D Scott

Ms P Walker

Mr I Williams

DATE OF HEARING 30 September 2019

HELD AT Specialist Courts and Tribunals Centre, Auckland

DATE OF DECISION 11 October 2019

COUNSEL

Mr P Collins for the applicant

The respondent in person

**DECISION OF THE NEW ZEALAND LAWYERS AND CONVEYANCERS
DISCIPLINARY TRIBUNAL CONCERNING LIABILITY**

Introduction

[1] The applicant filed a charge against Mr Hong which was framed as misconduct pursuant to ss 7(1)(a)(i) and (ii), and s 241(a) of the Lawyers and Conveyancers Act 2006 (the Act). He was also charged in the alternative with unsatisfactory conduct pursuant to ss 12(a), (b) and (c), and s 241(b) of the Act.

[2] The charge alleges that Mr Hong, during the period 30 October 2017 until 25 January 2018 refused satisfactory access to his trust accounting system and facilities and to his trust accounting records having been asked to do so by a member of the New Zealand Law Society Inspectorate.

[3] His failure or refusal to cooperate with the inspector was contrary to his obligations under reg 29 of the Lawyers and Conveyancers Act (Trust Account) Regulations 2008 (the Regulations). That regulation requires Mr Hong to:

- (a) permit an inspector to perform the review of the trust accounts of his practice; and
- (b) produce to the inspector any trust account records of the practice that the inspector requires and to assist the inspector to take copies of those records; and
- (c) give the inspector any information relating to the trust account records of his practice that the inspector may require; and
- (d) take all practicable steps to obtain from a client any information relating to the trust money required from that client by the inspector.

[4] It was further alleged that Mr Hong's refusal to cooperate with the inspector was contrary to:

- (a) the obligation in s 112(1)(c) of the Act to keep trust accounting records in such a manner as to enable those records to be conveniently and properly audited and inspected;
- (b) the obligation in reg 11(1) of the Regulations to keep the trust accounting records in such a manner as to enable them to be conveniently and properly reviewed by the inspectorate;
- (c) the obligation implicit in s 112(1)(c) of the Act and reg 11(1) of the Regulations to provide access to those records to any member of the inspectorate; and
- (d) the obligation on all lawyers operating a trust account to provide reasonable access to an inspector, for the purpose of a trust account review, to ensure the maintenance of public confidence in the provision of legal services and to protect the consumers of legal services, under s 3(1)(a) and (b) of the Act.

[5] Mr Hong denied the charge and all particulars. He did not personally file an affidavit in support of his denial of the charge. Karen Chan, his legal executive and trust account administrator, swore an affidavit in his support. Mark Anderson, an independent trust account consultant, swore an affidavit having been instructed by Mr Hong to give expert evidence on aspects of his trust account.

The Charge

[6] Evidence in support of the charge was given by Philip Strang, the inspector employed by the New Zealand Law Society to conduct a review of Mr Hong's trust accounts. He set out the opposition he faced in his dealings with Mr Hong during the period from November 2017 through to January 2018 as being:

- (a) notifying an intention to visit on 7 November 2017 and being told on 6 November 2017 not to come to the office as Mr Hong was "*in the midst of shifting offices*";

- (b) having received some material on 7 November 2017, deciding to abandon the meeting and to try again later;
- (c) specifying on 19 December 2017 an intention to visit at 9am on 25 January 2018 and being told by Mr Hong that he was using his office as a workshop and that it was unsuitable for a visit;
- (d) abandoning the intended visit after receiving some further documentation and being refused a visit to the premises;
- (e) issuing a deadline on 24 January 2018 to produce requested files by 9.30am on 26 January 2018;
- (f) deciding, when the files were not provided, to write his report without making a visit and without obtaining full information.

[7] In his evidence before the Tribunal, Mr Strang stressed that his need to visit the premises and view files came about because of the following concerns he considered arose from his inspection and consideration of the materials that had been provided to him. They were:

- (a) the Excel trust account system operated by Mr Hong fell at the lower end of the scale in the context of the regulations, thus requiring closer inspection;
- (b) the Excel system used by Mr Hong was not conventional;
- (c) the entries in the Excel system were the equivalent of pencil and could be changed with no trace of that having been done;
- (d) the system did not have a receipting function, creating the necessity to check the entries in the manual receipt book against the entries in the system; and
- (e) disbursements that appeared not to be true disbursements.

[8] Mr Strang said that he had received a degree of cooperation from Mr Hong, but he needed to complete his assurance work (described as phase 2 of a trust account review) because the Excel system was not conventional.

[9] Mr Strang said that he tried to accommodate Mr Hong and at the same time meet the requirements of what he was required to do. He attempted to facilitate a compromise by suggesting that he pick up the files from Mr Hong's office or that Mr Hong deliver them to him at the New Zealand Law Society Auckland Branch offices in Shortland Street. He had requested that Mr Hong provide six files that had IBD balances. He was looking for the manner of the handling of those files and more widely for an assessment of how Mr Hong was administering client files.

[10] Mr Strang instanced examples of the assurance information he would have expected to see having viewed a file. He would be looking to see:

- (a) a client care exchange;
- (b) a reporting statement;
- (c) an interaction between the firm and its client;
- (d) compliant invoices;
- (e) a trustee's authority; and
- (f) proof that office expenses were being charged as disbursements.

[11] He said that he could not do any of that work and that the information that was provided to him was "*a pale explanation of what I would have expected*". The information from Mr Hong was "*wholly inadequate*".

[12] He said that he gave up and compiled his report in which he referred to Mr Hong's non-compliance.¹ Mr Strang went on to say that this was the first time in 15 years of inspectorate work that he had experienced such a level of non-cooperation, having never before met any resistance to a request for files.

¹ BoD pages 237 – 247.

[13] Mr Hong asked questions of Mr Strang. He put to Mr Strang that the regulations were only about records of the transactions. Mr Strang's response was that provision of the files was a necessary part of verification of balances; obtaining proof of what was happening (e.g. the tracking of over drawings) and to gain a representative view of the *modus operandi* of the trust account.

[14] Mr Hong put it to Mr Strang that what he had requested in respect of the files had nothing to do with trust account records. Mr Strang's response was that there was a statutory requirement for Mr Hong to comply with the request.

[15] Mr Hong called Mark Anderson who had filed an affidavit at the request of Mr Hong. His brief was to comment on aspects of Mr Hong's trust account system. Mr Anderson was a former inspector of trust accounts engaged by the New Zealand Law Society to conduct reviews of trust accounts. He said that he had conducted an average of 50 to 60 reviews per year over a 21-year span. He said that he had never experienced a refusal of any request made by him for a client file.

[16] Mr Anderson agreed with the concerns expressed by Mr Strang about the non-complying aspects of Mr Hong's trust accounting system particularly that there was no provision in the ledger accounts to show the running balance and that the transactions in the spreadsheet system were capable of being altered or deleted.

[17] Mr Anderson expressed full agreement with evidence given by Mr Strang. He also agreed with the basis of the charge that a lawyer is required upon the request of an inspector to give the inspector the whole file.

[18] In those circumstances, it has not been necessary to set out the detail of Mr Anderson's expert opinion.

[19] The concern for the Tribunal is that Mr Hong has chosen not to heed the advice of his own expert.

[20] The Tribunal heard from Ms Chan who had filed an affidavit in response to the charge. She is the person responsible for the control of the trust accounts of Mr Hong. She said that it is still the case that she is in charge of the trust account and that

Mr Hong does not want to be bothered with it. She said that both she and Mr Hong refused to meet with Mr Strang in November 2017 and again in January 2018. She admitted knowing the trust account regulations and that she understood the review process.

[21] Ms Chan said that her reply to Mr Strang about his request for files was done at Mr Hong's direction². That reply effectively declined the request for files.

[22] Mr Hong was sworn and emphasised his position to be that what Mr Strang had requested had nothing to do with trust account records and that if information requested was considered privileged then he would decline to make the file available. He did not accept that the question of client privilege was protected by reg 33(1) of the Regulations except for the situations provided for in reg 33(2).

[23] When asked if he disagreed with his own expert, he said he did. He then qualified his position by saying that an inspector could have the file except only for the sensitive files.

[24] When asked if his response would be the same after these proceedings, he said it would be unless he had a clear ruling.

Discussion

[25] Mr Hong filed a lengthy submission which we acknowledged and have considered. He chose not to enlarge on his position that he was not required to make client files available to the inspectorate. He maintained that client files were not part of the interpretation of reg 3 of the Regulations. His focus was on the financial aspects of his trust accounting system. He also repeated his position that client privilege supported his refusal to provide any client file which he considered contained "sensitive material".

[26] Regulation 3 of the Regulations provides for trust account records, in relation to a practitioner, to mean:

² BoD at p 137.

- (a) all records (including all books, papers, files, accounts statements, invoices or copies of invoices, documents, receipts and evidence of authority for payments, cheques, securities, and trust receipt forms used and unused) relating to the practitioner's trust accounts or to trust money received by the practitioner, whether kept in writing or on computer or machine or in any other manner; and
- (b) if any of those records are kept on computer, includes the relevant computer equipment and software.

[27] That client files are part of the interpretation of reg 3, is cogently demonstrated by the evidence of Mr Strang who said that the purpose of viewing client files was to see how the practitioner was administering client files and to assess if the handling of those files was representative of the wider pool of clients being handled. He instanced the need to check such matters as client care exchange, reporting statements, compliant invoices, client authority to deduct fees.

[28] Mr Strang's position regarding the viewing of files was unreservedly supported by Mr Anderson the expert retained by Mr Hong. Both stated that neither of them had ever experienced a refusal of a request to be provided with client files.

[29] The right that an inspector has to inspect client files is stated by Webb at para [8.8.3] where he says:³

Lawyers are subject to rigorous supervision by the Law Society. To ensure such supervision is effective the society has the power to inspect and investigate lawyers' affairs. Such inspections necessarily require the disclosure of clients' affairs, but are justified on the basis that such inspections are in the client's best interests to protect against dishonest or incompetent advisers. Further, the harm from the disclosure is minimal as the information disclosed remains confidential and, in most circumstances, goes no further than the inspecting officers. In such cases the disclosure is effectively required by law, so displaces the duty of confidence usually owed by a lawyer.

[30] We find that Mr Hong had a duty to make client files available to Mr Strang as requested. A practitioner's duty to cooperate is both clearly expressed and implied from the Act and Regulations. Cooperation is required. It was the evidence of both Mr Strang and Mr Anderson (Mr Hong's expert) that Mr Hong's behaviour was quite extraordinary in the light of the experiences of the many hundreds of investigations undertaken between them.

³ Webb on Ethics (2nd Edition) at para [8.8.3]. See also Dal Pont (6th Edition) at [9.95].

[31] Mr Hong's argument that he was entitled to refuse to make a client file available in circumstances where he considered client privilege to exist cannot be sustained. He is not supported in that view by Mr Anderson his own expert advisor.

[32] The concern that Mr Hong has about client privilege is fully answered by reg 33 of the Regulations where it states that the inspector must not disclose to any person any information obtained during a review of a practitioner's practice. There are exceptions to the rule which it is not necessary to discuss in this decision.

[33] We do not rule out that, in some cases, parts of a client file may be wholly unrelated to the inspectorate's review of the trust account and so do not need to be inspected. For example, Mr Strang and Mr Anderson both agreed that they would not necessarily need to see the pleadings files in a litigation matter. In such a case, however, we would expect the practitioner to cooperate with the inspectorate to identify the overall make-up of the client file – preferably at an on-site review – and to agree on those parts of the file that do not require inspection. We see this as an aspect of the duty on practitioners to enable their records to be properly and conveniently reviewed by the inspectorate.

[34] Mr Collins for the Committee submitted that Mr Hong's failure to provide client files to the inspector was professionally culpable and that the failure to do so reached the level of misconduct. He stressed the following matters:

- (a) that Mr Strang considered Mr Hong's failures to be serious in that he compromised a complete referral to the compliant service;
- (b) that the identified issues were unresolved leading to an inability to complete a full report;
- (c) that Mr Anderson was entirely at one with Mr Strang;
- (d) that Mr Hong is a very experienced lawyer who was not disengaged with trust account concepts as evidenced by his animated exchange with Mr Strang;

- (e) that Mr Hong can be taken to have known better and should have consulted others;
- (f) that Mr Hong displayed that he was head strong by saying that he would do the same again;
- (g) that reg 29 is clear as to what is required of a practitioner to cooperate with the inspectorate; and
- (h) that Mr Hong cannot be the judge of what an inspector may see.

Decision

[35] We find that the charge against Mr Hong is proved to the level of misconduct and that such conduct was wilful. We accept the submissions of Mr Collins. We add the following reasons for our finding:

- (a) Mr Hong obstructed Mr Strang's repeated requests for access to trust accounting records;
- (b) Mr Hong's refusal to allow Mr Strang to visit his offices or to make suitable alternative arrangements for Mr Strang to review the complete files was in breach of trust account regulations;
- (c) Mr Hong's refusal to allow Mr Strang to have access to client files was persistent;
- (d) Mr Strang's review of Mr Hong's trust accounts was compromised and his enquiry was frustrated; and
- (e) Mr Hong refused to accept the advice and opinion of his own expert, Mr Anderson. We gave some latitude, at the outset, to Mr Hong holding his opinion on the issue of privilege, albeit one that is contrary to accepted law. His obstruction came about when he still refused to accept what the inspector and his own expert were telling him.

[36] The applicant is to make submissions regarding penalty within 14 days of the date of this decision. Mr Hong is to respond within a further 14 days.

[37] The Tribunal will consider penalty on the papers unless either the applicant or Mr Hong requests a hearing.

DATED at AUCKLAND this 11th day of October 2019

BJ Kendall
Chairperson