**NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL**

[2019] NZLCDT 5

LCDT 007/18

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| **UNDER** | The Lawyers and Conveyancers Act 2006 |
| **BETWEEN** | **AUCKLAND STANDARDS COMMITTEES 2 AND 3** Applicant |
| **AND** | **NIGEL DAVID MASON** Practitioner |

**CHAIR**

Judge D F Clarkson

**MEMBERS**

Ms A Callinan

Mr W Chapman

Ms C Rowe

Mr W Smith

**DATE OF HEARING** 19 February 2019

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

**DATE OF DECISION** 8 March 2019

**COUNSEL**

Mr R McCoubrey and Ms E Mok for the Standards Committees

Mr A Jackson for the Practitioner

**RESERVED DECISION PROVIDING REASONS FOR ORDERS MADE ON 19 FEBRUARY 2019**

***Introduction***

[1] Mr Mason has pleaded guilty to two charges of misconduct. One of these relates to his acting in a situation where there was a clear conflict of interest and duty.

[2] The second charge relates to Mr Mason's non-compliance with previous cost and compensation orders imposed by Standards Committees following earlier findings of unsatisfactory conduct.

[3] This case is a sad one, because it concerns a practitioner with almost 40 years of unblemished practice in the profession up until quite recently, 2016.

[4] At that point the practitioner found himself in significant financial difficulties and struggled with the management of his practice. For the next two years, until he left legal practice in mid-2018, Mr Mason's standards fell below his earlier good professional conduct, which had not involved any disciplinary matters.

[5] The charges admitted by Mr Mason are recognised as serious, and the hearing was concerned with three primary areas of contention between the parties.

1. The length of the period of suspension to be imposed and whether there ought to be any backdating of the period;

2. Whether permanent name suppression ought to be granted; and

3. The costs contribution to be made by Mr Mason in the light of his impecunious circumstances.

***Background***

[6] In relation to the first charge, the transaction of concern was one in which the practitioner's wife purchased a home from one of Mr Mason's existing clients. This transaction came about because of an approach by the client to assist Mr Mason and his wife after she had heard that they had "fallen on hard times" and had had to sell their previous home. It was initially an approach to rent the property to Mr and Mrs Mason, but ultimately, Ms W who was elderly, decided she did not wish to be a "landlord" and preferred to sell the property to them for a small deposit, with an arrangement they could pay the capital back as they were able.

[7] The purchase price ultimately agreed (which Mr Mason contends to have been slightly higher than the market value) was $600,000 and the amount of vendor finance $590,000.

[8] Ms W, who from all accounts is an astute but rather private person, had apparently said she did not seek interest on the loan. The loan was structured therefore that interest was to be on demand only, and that demand had to be made at a certain time of the year.

[9] Thus, the terms were clearly very advantageous to Mrs Mason, the purchaser, and by association her husband, the practitioner.

[10] The practitioner's firm acted for both parties in the transaction. While there is a dispute on the evidence about the giving of informed consent to acting for both parties (and we note the agreement for sale and purchase included a waiver of independent advice by Ms W), this was not a discretionary matter because r 5.4.4 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (Rules) absolutely prohibits a lawyer entering into a property transaction with a client from acting where a conflict of interest arises. And:

> A lawyer is deemed to be a party to the transaction where the transaction is between parties with whom the lawyer or client has a close personal relationship.[1]

[1] Opening submissions of counsel for the Standards Committee at [5.10].

[11] With the Tribunal's leave the Standards Committee filed amended charges with particulars which had been agreed between the parties. For this reason also, we did not consider it necessary for any disputed facts to be heard.

[12] The breadth of the dispute is set out in the Introduction above. As well as the conflict of interest provisions of r 5, Mr Mason also accepts that he has breached r 6 which deals with conflict of duty.

[13] Rule 6.1 provides that a lawyer must not act for more than one client where there is "a more than negligible risk that the lawyer may be unable to discharge the obligations owed to 1 or more of the clients".

[14] Clearly the advantageous nature of the transaction to Mr and Mrs Mason, and the corresponding disadvantage to Ms W (albeit at her own urging) was a situation where there was a considerable risk of actual conflict of interest and therefore the practitioner could not observe his duty to both parties.

[15] In this case, although he attempted to distance himself from attendances on the vendor, Ms W, having delegated her representation to his legal executive, Mr Mason accepted that as the principal responsible for his legal executive, he must take responsibility and be seen as acting overall and was therefore acting for both parties.

[16] The fact that Mr Mason was also experiencing financial difficulties at the time of the transaction with his client is a relevant background factor.

[17] In addition, Mr Mason was Ms W's executor and a trustee of her family trust at the time of the transaction.

[18] It is the Committee's case, and accepted by the practitioner through his plea that he was:

> … Not independent and free from compromising influences or loyalties when providing services to Ms W during the transaction, and was not capable of exercising independent professional judgment on her behalf or providing her with objective advice (particularly regarding the term loan agreement), contrary to rr 5 and 5.3.[2]

[2] Opening submissions of counsel for the Standards Committee at [6.4].

[19] As already stated, this was not a situation where even informed consent would have been sufficient to permit the practitioner or his firm to act for both parties in this particular transaction.

*Circumstances of Charge 2*

[20] In April 2016 the Standards Committee found Mr Mason guilty of two charges of unsatisfactory conduct relating to defaults in payment to Inland Revenue, under his obligations with regard to the KiwiSaver and PAYE schemes. A fine and costs were imposed.

[21] Then in October 2016 three findings of unsatisfactory conduct were made by another Standards Committee concerning failures to competently supervise a legal executive and various communication failures. Mr Mason was ordered to pay compensation of $1,482.51, fined and ordered to pay costs.

[22] In December 2016 a further finding of unsatisfactory conduct was made for a failure to comply with the previous orders. Again, a fine and costs were imposed.

[23] In May 2017 a further finding of unsatisfactory conduct was made in relation to the failure to pay compensation earlier ordered, incurring yet a further fine and costs order.

[24] In September 2017 there was a further finding of unsatisfactory conduct in relation to Mr Mason's dealings with a barrister and breaches of rr 10, 10.1 and 10.7.1. A further fine and costs were imposed.

[25] Finally, in March 2018 a finding of unsatisfactory conduct was made for a communication failure which was found to breach rr 3 and 7 and a fine and costs imposed once again.

[26] The practitioner has not paid any of these amounts awarded against him and they have now been subsumed into his bankruptcy which was adjudged in August 2017.

[27] Mr Mason concedes that he ought to have been more proactive in informing the New Zealand Law Society of his financial circumstances and inability to pay.

***Penalty Assessment Process***

[28] As is well understood, this begins with an assessment of the seriousness of the conduct. It was accepted by Mr Mason's counsel that the misconduct admitted, at least in relation to Charge 1, was serious.

[29] While in this case the client does not appear to have been harmed, or suffered any loss, there was certainly potential for her to have been so. As submitted by Mr McCoubrey, the conflict was so obvious that Mr Mason ought to have recognised it and immediately taken steps to address the situation.

[30] Ms W was from all accounts an astute and well-informed person, who owned a number of properties and who would probably not wish to be described as "vulnerable". However, her stated lack of information and documentation for the transactions, together with her previous relationship with Mr Mason, placed her in a vulnerable position.

[31] With its "deterrence" function in mind, the Tribunal would certainly wish to send a message to other practitioners who might consider entering into arrangements with clients of a similar nature, that conduct of this sort will simply not be tolerated and will assuredly affect the practitioner's right to continue in practice.

[32] In relation to Charge 2, the Tribunal has been consistently clear that breach of Standards Committee orders are regarded as serious. The need for a practitioner to cooperate with and comply with all directions and orders of the various levels of disciplinary and regulatory bodies is a fundamental aspect of a lawyer's duty. It is reinforced by the obligations set out in s 4 of the Lawyers and Conveyancers Act 2006 (Act).

[33] In this matter we accept that Mr Mason's financial circumstances made it extremely difficult to meet the monetary penalties imposed on him. But he had at the very least an obligation to keep the New Zealand Law Society fully informed of his

financial circumstances and enter into payment arrangements. To simply go quiet is not an acceptable response.

[34] Mr Mason's subsequent bankruptcy has meant that these awards have been extinguished.

[35] We were asked to reimpose the compensatory order in favour of the client. We considered that this might not accord with the insolvency legislation and invited submissions from both counsel. Subsequently, counsel for the Standards Committee has withdrawn this request and no compensation is sought.

***Aggravating Features***

[36] We accept the submission of the Standards Committee that the six previous findings against the practitioner over a two-year period are aggravating features of his conduct which must be taken into account.

***Mitigating Features***

[37] We accept that the practitioner's guilty plea to both charges of misconduct is a mitigating factor.

[38] Mr Mason also engaged counsel, was cooperative with the process, and appeared at the hearing. All of these matters reflect well on him.

[39] Mr Mason is now aged 67 years and has relocated with his wife to another city to have a fresh start, away from the legal profession. He does not currently hold a practising certificate, it having been declined on his last application, by the New Zealand Law Society. He has not chosen to contest that and indicates he will not seek to practise law again. This has implications in relation to the need for public protection.

[40] Mr Mason's circumstances are quite impecunious. He is an undischarged bankrupt earning relatively low wages working as a caregiver for intellectually disabled people. He also has had some employment assisting an immigration agent.

[41] Although Mr Mason is to be commended for his efforts to obtain and retain employment, it is clear that in doing so he is coming into contact with two classes of highly vulnerable members of the public, the intellectually disabled and the new immigrant community. These matters are relevant when it comes to considering the issue of interim name suppression.

[42] Mr Mason has made full disclosure of his financial circumstances and those of his wife and we accept that his situation is, at his age, very tenuous.

***Suspension***

[43] Having taken all of these matters into account, we consider that nothing less than 15 months suspension would reflect the seriousness of what we consider to be the more serious of the two charges, namely the one relating to his conflict of interest and duties. We have already referred to the deterrent aspect of the penalty process. We also note that, having regard to similar cases which have been provided to us by counsel in submissions, 15 months suspension is the proper penalty to impose in this case.

[44] In contrast to some of the cases where practitioners have received credit for having voluntarily surrendered a practising certificate, Mr Mason has not been able to practise because the New Zealand Law Society refused his practising certificate renewal. We do consider that to be a distinguishing feature, but also consider that given the seriousness of the offending, there being not only the conflict charge but also the failure to comply with Standards Committee orders charge, that it would be improper to reduce the period of suspension.

***Name Suppression***

[45] To displace the starting point of openness, we have regard to the balancing exercise contained in the provisions of s 240 of the Act which states:

> **240 Restrictions on publication**
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> (1) If the Disciplinary Tribunal is of the opinion that it is proper to do so, having regard to the interest of any person (including (without limitation) the privacy of the complainant (if any)) and to the public interest, it may make any 1 or more of the following orders:

(a) an order prohibiting the publication of any report or account of any part of any proceedings before it, whether held in public or in private:

(b) an order prohibiting the publication of the whole or any part of any books, papers, or documents produced at any hearing:

(c) an order prohibiting the publication of the name or any particulars of the affairs of the person charged or any other person.

(2) Unless it is reversed or modified in respect of its currency by the High Court on appeal under section 253, an order made under subsection (1) continues in force until such time as may be specified in the order, or, if no time is specified, until the Disciplinary Tribunal, in its discretion, revokes it on the application of any party to the proceedings in which the order was made or any other person.

(2A) Subsections (1)(c) and (2) are subject to subsection (4).

(3) Subsection (1)(c) does not apply to, or in respect of,—

(a) any communications by or between any or all of the following:

(i) the Council of the New Zealand Law Society:

(ii) the Council of the New Zealand Society of Conveyancers:

(iii) an officer of either of the societies specified in subparagraphs (i) and (ii):

(iv) an employee of either of the societies specified in subparagraphs (i) and (ii):

(v) a Standards Committee:

(vi) an employee of a Standards Committee:

(vii) the Legal Complaints Review Officer:

(viii) the Disciplinary Tribunal:

(b) the publication pursuant to section 256 of a notice in the *Gazette*.

(4) For the purposes of exercising the Disciplinary Tribunal's powers under subsections (1)(c) and (2) to make or revoke, before the start of the hearing of the charge, an order prohibiting the publication of the name or any particulars of the affairs of the person charged or any other person, the quorum at any sitting of the Disciplinary Tribunal or a division of the Disciplinary Tribunal is, despite section 235(1), the 3-member quorum specified in section 235(5).

[46] We do not consider that Mr Mason's circumstances, as outlined by him have reached the necessary threshold to prevent publication and displace openness.

[47] It is accepted that the public interest in open process and the ability to access information about practitioners who have been disciplined is an important one not to be lightly departed from.

[48] We must consider against that, whether it is "proper" having regard to Mr and Mrs Mason's interests to do so. As indicated, Mr Mason has obtained employment and had, at the date of the hearing informed only one of his employers about the disciplinary charges faced by him. Mr Mason was most concerned that if this information was made available to his main employer, he might well lose his job. It had taken some months after relocation for Mr Mason to obtain employment, and the Tribunal completely understands and has sympathy with the position of a person at Mr Mason's age and stage attempting to start again in the workforce.

[49] However, it has often been pointed out that sympathy for the practitioner's personal plight cannot take precedence over the protection of the public. And in this case, as we have already noted, the two vulnerable communities with whom Mr Mason comes into contact are entitled, at least through Mr Mason's employers, to understand how Mr Mason has come to face these current difficulties. We understand from his counsel that the immigration advisor is aware of the situation.

[50] Mr Mason's counsel argued strongly for him that his role in caring for the clients of his employer did not put him in a position where he was giving financial advice or otherwise having any access to the clients other than to carry out personal and caregiver duties.

[51] We did not quite grasp the distinction that was being advanced or consider that it made the clients any less vulnerable.

[52] In other cases where permanent name suppression has been granted, it has normally been for reasons relating to the practitioner's physical or mental health or both. No such argument was advanced in this case.

[53] At the conclusion of the hearing we indicated to Mr Mason that we would continue the interim name suppression order which had been made pending the hearing for a further seven days to enable him to inform his employer should he so choose, and at the conclusion of the seven days the order would expire.

[54] Subsequently, Mr Mason sought to have the Interim Order further extended pending an appeal by him against penalty. We have granted that order, and the Interim Order is to continue until the appeal is heard or abandoned.

***Orders***

1. Mr Mason is to be suspended for 15 months from 19 February 2019, pursuant to s 242(1)(e) of the Act.

2. The interim suppression order is to remain in force until an appeal against this decision is heard or abandoned.

3. Costs are awarded under s 249 of the Act, to the Standards Committee in the sum of $12,000.

4. The Tribunal costs under s 257 of the Act are assessed at $3,879 and are ordered against the New Zealand Law Society.

5. Mr Mason is to reimburse the New Zealand Law Society for the s 257 costs in full, pursuant to s 249 of the Act.

**DATED** at AUCKLAND this 8th day of March 2019

Judge D F Clarkson
Chair