PERMANENT SUPPRESSION OF THE NAME OF THE PRACTITIONER AS RECORDED IN PARAGRAPH [34] PURSUANT TO S 240 OF THE LAWYERS AND CONVEYANCERS ACT 2006.

NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL

[2022] NZLCDT 12

LCDT 016/20

IN THE MATTER	of the Lawyers and Conveyancers Act 2006
BETWEEN	**SOUTHLAND STANDARDS COMMITTEE** Applicant
AND	**P** Respondent

DEPUTY CHAIR

Judge J G Adams

MEMBERS OF TRIBUNAL

Hon P Heath QC

Ms M Noble

Ms G Phipps

Prof D Scott

HEARING 5 April 2022

HELD AT Auckland District Court

DATE OF DECISION 28 April 2022

COUNSEL

Mr P Collins for the Standards Committee

Mr W Pyke for the Respondent

DECISION OF THE TRIBUNAL RE CHARGES

Overview and outcome

[1] Upon consideration of this file's substantial body of written material, we were unable to make out what the Standards Committee thought it saw. Instead of discovering a practitioner ("P") who failed to act in the best interests of clients or engaged in multiple professional failings, as put by the Standards Committee, we saw a conscientious, caring practitioner who provided valuable and valued services. We find that P did not take advantage of their vulnerabilities.

[2] The Standards Committee became interested in that part of P's practice dealing with elderly clients. A key purpose of the Lawyer's and Conveyancers Act 2006 (the Act) is to "protect the consumers of legal services and conveyancing services."[1] Among the elderly are some who have particular vulnerability. Some of P's clients were socially isolated.

[3] The final form of the particulars appears in Appendix 1 to this decision. Triggered by a complaint that was not upheld, the Standards Committee commenced an own motion investigation. An Investigator carried out a scrutiny of P's practice comprising 38 ledger reviews and 17 file reviews. P's conduct concerning five clients, the estate of one of them, and another estate, comprised the subject of the charges. The charges ranged from unsatisfactory conduct and breaches of the rules through to misconduct. P's response robustly disproved a number of the alleged particulars. Consequently, some charges were withdrawn including the entirety of those relating to an elderly client (F) whose transfer to a rest home had been managed by P. As late as the morning of the hearing, a further charge was withdrawn as the result of P producing documents from P's file that had been held by the Law Society.

[4] The Investigator's report focused on possible vulnerabilities. For example, the officer questioned the purchase of a frame for a favourite country scene print for F,

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[1] Section 3(1)(a).

commenting that it "appeared to be an unusual purchase seeing as [F] would be staying in a retirement village with appropriate artwork."[2] The officer was equally critical of P for organising two custom-made chairs that F could easily sit in and rise from: "It appears to be an excessive purchase of two expensive chairs when all the needs of the individual were met by [name of retirement village]."[3] The Standards Committee had to decide whether these reported views warranted pursuit. Any underlying concern that P took advantage of F melted away at the hearing because the Standards Committee accepted that F was competent, and P had simply enabled him to achieve what he wanted.

[5] When five independent minds coalesce to the same contrary view, it indicates something is awry with (in this case) the Standards Committee stance. This decision confirms our dismissal of all the remaining charges (under s 240A(1)(a) of the Act) against P and explains why we took that course.

No case to answer

[6] As a result of some initial exchanges between members of the Tribunal and Mr Collins, during his opening, it became clear that the most serious particulars involving alleged misuse of an enduring power of attorney and overcharging were not sufficiently specific. That issue had been raised in Mr Pyke's written opening. When called upon to open orally, Mr Pyke indicated that he wished to make an application that there was no case for P to answer.

[7] The jurisdiction for the Tribunal to consider such an application was confirmed by the High Court in *Hall v Wellington Standards Committee (No. 2)*.[4] The High Court indicated that, when such an application was made, the Tribunal would usually have asked the practitioner to state whether or not he/she elected to call evidence.[5] In this case, P had sworn two affidavits in opposition to the charges and Mr Pyke had made it clear that P would be available for cross-examination. The Tribunal was aware of those facts before the no case to answer application was made.

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[2] Investigators report, BOD p 53, at [55].
[3] Investigators report, BOD p 55, at [64].
[4] *Hall v Wellington Standards Committee (No. 2)* [2013] NZAR 743 (HC) at [18]–[21].
[5] Ibid, at [20] and [21].

[8] In *Hall,* Woodhouse J held that the Tribunal had misdirected itself to the test to be applied. He took the view that it was necessary for the Tribunal "to weigh all of the evidence to determine whether it was sufficient to establish all of the elements of the particular charge".[6] Therefore, the test is one of evidential sufficiency.

[9] During the course of the hearing, we ruled that there was no evidential foundation for the particulars of overcharging. In short, there was no evidence as to what a proper fee might have been or to question what appeared to the Tribunal to be a very modest hourly rate charged by a senior practitioner in a specialised and difficult field involving communications with the elderly.

[10] We took the unusual step, in the context of the enduring power of attorney allegations, of allowing Mr Collins to cross-examine P on one aspect of the enduring power of attorney charges. The purpose of that cross-examination was to enable us to determine whether there was any basis for the Standards Committee to gainsay P's explanation that F had given full instructions to P on relevant issues and that P had communicated with medical and residential care officers merely as a conduit, due to his inability to write. That was done with the agreement of both counsel. After considering the evidence elicited under cross-examination, the Tribunal was satisfied that there was no basis for going behind P's sworn evidence that F was both competent to give instructions and P acted only as a conduit to facilitate communication of them.

[11] That left a number of more minor allegations of breaches of particular rules of the Lawyers & Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (the Rules), some of which were acknowledged by P in written evidence. It is unnecessary to go into the detail of these infractions. The legal question concerns the way in which the Tribunal should deal with such allegations in circumstances where the substratum for the charges of misconduct has evaporated.

[12] There is no jurisdictional impediment to the Standards Committee referring charges of that type to the Tribunal. The absence of any threshold for reference was confirmed by the Court of Appeal in *Orlov v New Zealand Law Society*.[7] On the face of it, breach of rules of the type accepted by P constitutes unsatisfactory conduct: see

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[6] *Hall v Wellington Standards Committee (No. 2)* [2013] NZAR 743 (HC at [22].
[7] *Orlov v New Zealand Law Society* [2013] 3 NZLR 562 (CA) at [53]–[55].

s 12(c) of the Act. There is no doubt that if a breach of a rule (or rules) is considered sufficiently serious the Tribunal could uphold a finding of misconduct or unsatisfactory conduct against a practitioner. However, is the Tribunal entitled to strike out such allegations if not satisfied that they (individually and collectively) are worthy of disciplinary sanction?

[13] In the latter situation, but in a more general sense, the Court of Appeal has held that not every breach of a rule requires a finding of unsatisfactory conduct. Delivering the judgment of the Court of Appeal in *Keene v Legal Complaints Review Officer*[8] Goddard J observed, as part of a discussion of the "framework of complaints", that where there had been a breach of the rules it was open to a Standards Committee to decide not to take any further action.[9] The Court of Appeal considered that, when reviewing a decision of the Standards Committee, the Legal Complaints Review Officer was entitled to exercise the same power.

[14] Section 242(1) of the Act sets out the powers that the Tribunal may exercise if satisfied that a charge has been proved. One of those powers is to make "any order that a Standards Committee has power to make under section 156 on the final determination of a complaint".[10] Because the powers are limited to ones that the Standards Committee could have exercised when finding the charge proved (as opposed to the present situation where the Standards Committee has brought charges for the Tribunal's consideration), the Tribunal lacks power to invoke s 152(2)(c) in order to determine that no further action should be taken on the charge.

[15] The *Orlov* approach to threshold seems to proceed on an underlying assumption[11] that the Standards Committee will not refer charges to the Tribunal that would not, if proved, justify a direction that no further action be taken. But, what of a situation in which the serious particulars have not been established and the Tribunal regards the lesser allegations as ones that do not justify disciplinary sanction? Is the practitioner to be visited with a finding of unsatisfactory conduct notwithstanding the Tribunal's view? While Mr Collins acknowledged that the Tribunal must have power to

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[8] *Keene v Legal Complaints Review Officer* [2019] NZCA 559.
[9] Ibid, at [23], with reference to s 152(2)(c) of the Lawyers and Conveyancers Act 2006.
[10] Lawyers and Conveyancers Act 2006, s 242(1)(a).
[11] *Orlov v New Zealand Law Society* [2013] 3 NZLR 562 (CA) at [54].

act in a way that would obviate the need for a disciplinary finding, we are required to consider the jurisdictional power to do so.

[16] It is apparent from *Keene*, that the Legal Complaints Review Officer retains the Standards Committee's ability to decide not to take further action in a suitable case. In other disciplinary contexts, where decisions of the complaints body are dealt with by a professional Tribunal on appeal, a similar jurisdiction exists.[12] It is only because the remaining particulars have been referred to the Tribunal for resolution, effectively, as a first instance body, that the particular problem has arisen.

[17] In our view, the answer to the conundrum lies in s 240A of the Act. Section 240A(1)(a) entitles the Tribunal to "strike out, in whole or in part, a proceeding" if it were satisfied that it "discloses no reasonable cause of action". Although the phrase "cause of action" is somewhat inapt to describe disciplinary charges, we consider that in context particulars that do not justify a disciplinary sanction can be struck out on that basis.

[18] Generally, the jurisdiction to strike out will be exercised on the basis of the evidence before the Tribunal and without cross-examination of the practitioner. Thus, care must be taken to ensure that the jurisdiction is not exercised in a case where full exploration of the evidence could lead to a conclusion that a disciplinary sanction was justified. The cases in which the power to strike out would be exercised will be rare. A similar approach should be taken to cases involving applications to strike out civil proceedings in the High Court, where the Court must be satisfied that there is no tenable basis on which the pleaded case could succeed.[13]

[19] Taking that caution into account, we have decided that there is no tenable basis on which it can be said that the particulars alleging breach of the Rules, if proved, should result in disciplinary sanction for either misconduct or unsatisfactory conduct. In our view, no disciplinary sanction is required. Accordingly, we are satisfied that there is no case for P to answer. P's remedy is an order striking out the relevant particulars under s 240A(1)(a) of the Act.

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[12] For example, see *Vosper v Real Estate Agents Authority* [2017] NZHC 453 at [68]–[77].
[13] *Couch v Attorney-General (on appeal from Hobson v Attorney-General)* [2008] 3 NZLR 725 (SC) at [30]-[33] (Elias CJ and Anderson J) and [114] (Blanchard, Tipping and McGrath JJ).

Reasons for our strike out decision

(a) Introductory comment

[20] In this decision, we address the alleged particulars in three groups: overcharging (including transgressing the boundaries of legitimate legal work) and misuse of Powers of Attorney and (what we saw as) minor rules infractions. We explain why we are satisfied that the proceeding discloses no reasonable cause of action in these cases.

(b) Overcharging

[21] This case has taken the Tribunal into an aspect of practise that is socially valuable. We are not surprised that P provided strong references from several estimable members of the profession each of whom has good reason for knowing of P's practise.

[22] The practitioner was charged with rendering fees that were excessive and contrary to Rule 9 of the Rules.

[23] P is a senior practitioner with considerable (over 40 years) experience in dealing with the elderly. P charged $280 per hour, one employee was charged at $75 per hour, another at $30 per hour. The Standards Committee accepts P's evidence that the time charged accorded with the records. There is no evidence to suggest the time records were inaccurate or untrue. No costs revision or other expert evidence was offered against which to measure the reasonableness of the fees. We would describe the hourly rate as extremely modest for the geographic location in which P practices. We accept Mr Pyke's submission that the attack on fees was merely impressionistic.

[24] Mr Collins sought to cross-examine P on the fees. He proposed to embark on a "probing" exercise, targeting lines in the various time records. No particulars had raised these as specific enquiries in advance, despite the Standards Committee clearly being on notice of this issue. The particulars did not detail in what way the fees were not fair and reasonable. In the case of F (and another client, W) the uncontested evidence was that they had approved the bills rendered during their lifetime (save for the last bill applicable to F). For example, the allegation that P made excessive

charges in arranging repairs to F's home pre-sale is, in part, answered by (the uncontested position that) the improvements resulted in considerable enhancement of the asset which consequently increased the funds available from sale for F's care. The critical feature, though, is that F was competent and approved the charges.

[25] After adjourning to consider Mr Collins' request, we ruled that it was unfair and oppressive to put the practitioner through a fishing expedition in an endeavour by the Standards Committee to make up for the lack of a coherent case on the papers. The problem faced by the Standards Committee was that its case relied on obtaining concessions from the practitioner in cross-examination. We note that complaints about fees must be made within two years unless special circumstances apply: See clause 29 of the Lawyers and Conveyancers Act (Lawyers: Complaints Service and Standards Committees) Regulations 2008. If cross-examination was permitted, P would face questions about conduct that occurred some time ago and, in some cases, more than seven years ago.

[26] The Tribunal brings to this case its combined wealth of experience of dealing with the elderly. Elderly clients often require longer interviews, they often need to be settled in order to fully discuss matters. Brisk turnaround may suit younger clients but the elderly sometimes require more. It takes time and expertise to explain options; to ensure they are understood; to overcome impediments such as hearing loss or other impediments; or to empower the client to make choices even where the effects of old age limit those choices. Where, as generally here, the clients were mentally competent, and had agreed to the fee scale, there was no reasonable basis upon which the Tribunal could find against P on fees.

(c) Powers of Attorney

[27] The Standards Committee case suggested impropriety in P's use of Powers of Attorney. A pivotal example was that of the client F (referred to above). At the relevant time, F was in his late nineties. He had a cancer on one eye. His options were to leave it be (with risk it may become physically distressing), to have the eye removed, or to attempt stereotactic radiotherapy treatment. The radiotherapy treatment (which had a 90 per cent success rate) was only available in Dunedin. Treatment in Dunedin would involve a plane journey for F. The Standards Committee did not challenge that

F was mentally competent. Their case, skilfully put by Mr Collins, was that P had more or less taken control of the matter and had subjected F to a dangerous journey, pretending to act under an Enduring Power of Attorney, thereby misleading health care professionals and cutting F out from making his own decisions.

[28] P's evidence and case was that P had simply acted as F's attorney in an ordinary sense. For example, F was physically hampered in signing the consent to the procedure at the hospital. He had signed Enduring Powers of Attorney in favour of P but they had not been activated in the sense that he had not been found to be, nor was he, lacking capacity. In the course of considering Mr Pyke's submission that there was no case to answer, we permitted Mr Collins to cross-examine P to test veracity in this discrete area. The cross-examination was instructive. We were convinced that P was truthful; that P was knowledgeable about F's affairs in detail; that P had behaved professionally and ethically. As a by-product, P's evidence shed light on the need to sometimes spend considerable time with such a client, and impressed as showing a detailed knowledge about the clients character and needs.

[29] In email correspondence with medical personnel, P mentioned that P held Enduring Powers of Attorney for F. This was true. The statement, if read in the most negative light, could have given an impression that P was acting on such a power but that is to read the chain of correspondence in an artificial way, in our view. P's evidence that F was competent, and that F asked P (for example) to sign the consent form, indicates that the medical personnel who needed to know, were aware of the true situation. The decision to follow this course of action was F's own considered view. P had not supplanted his agency but rather, had enabled the client to achieve what he wanted.

[30] F had suffered diminishing dexterity in his hands. Although he could sign cheques a year earlier, he was physically unable to sign documents at the relevant time. This is corroborated by his Care Plan which notes that he could not cut his own fingernails. To manage this issue, the hospital sent the form to P in advance. P went through the form with F. F was accompanied on the Dunedin trip by one of his former neighbours. On the day, the hospital sent the form to P who signed it as F's "attorney." In our view, P was entitled to do so. F had capacity to instruct P to do so. We find

nothing improper in P's action. Nor, upon reading the correspondence in total, are we left with any residual concerns.

[31] Because P was entitled to sign documents as attorney for competent clients, and P's veracity is not impeached, we are satisfied that the particulars alleging wrong-doing with Powers of Attorney discloses no reasonable cause of action and we therefore dismiss those particulars.

(d) Minor infractions

[32] In the ordinary course, where a compliance consultant or inspector discovers minor infractions that fall short of suggesting the practitioner is a danger to the public, the infractions are corrected. In this case, P, who has never had any prior disciplinary involvement, seems to run a practice that is generally tidy. The infractions that have surfaced are, in our view, the kinds of things that might arise in any busy practice without necessarily attracting alarm. In these comments, we are not promoting laxity. Strict compliance is the usual rule.

Result

[33] All of the charges are dismissed under s 240A(1)(a) of the Act.

[34] We record that, at the conclusion of the hearing on 5 April 2022, we permanently suppressed the practitioner's name, pursuant to s 240 of the Act. This was done without opposition from Mr Collins.

[35] We record that counsel are discussing costs and will call upon the Tribunal if necessary.

[36] The Tribunal costs are awarded against the New Zealand Law Society, pursuant to s 257 of the Act. The amount to be certified in due course.

DATED at AUCKLAND this 28th day of April 2022

Judge JG Adams
Deputy Chairperson

Appendix 1

Charges

[The particulars and charges were set out in 14 pages. We have summarised the relevant portions of the charges that were still "live" at the commencement of the hearing.]

Southland Standards Committee charges the practitioner with:

(a) Negligence or incompetence in P's professional capacity, and that the negligence or incompetence has been of such a degree or so frequent as to reflect on P's fitness to practice or as to bring the profession into disrepute, under s.241(c) of the Lawyers and Conveyancers Act 2006 (the Act), or, in the alternative;

(b) Misconduct within the meaning of ss.7(1)(a)(i) and (ii) and 241(a) of the Act,or, in the further alternative;

(c) Unsatisfactory conduct that is not so gross, wilful, or reckless as to amount tomisconduct, pursuant to ss.12(a), (b) and/or (c), and 241(b) of the Act.

Particulars

1. Background

2. Client F

2.1-2.2 – Attorney issues.
2.4(c) – Failed to deposit $520.70 in Trust account contrary to s 110(1)(a).
2(4)(g) and (h) – Attorney issues.
2(4)(i) – Invested his funds to obtain interest – Attorney issue. P had a duty to do so.
2(4)(j) – Fees.
2(4)(k) – Fees (rendered posthumously).
2(4)(l)(iii) – Attorney issue concerning his house sale.
2(4)(l)(iv) – House repairs – essentially attorney issue, client was competent and engaged.

3. Client G – All charges withdrawn.

4. Client M – Attorney issues, competent client.

$803.46 paid by client by EFTPOS placed in practice account and not placed in Trust account. Correctly credited to fees when billing. Contrary to s 110(1)(a); Reg 10 of Trust Account Regulations and Rule 9.3 CCCR. In our view, de minimis in context of this practice.

5. Client W

5.1-5.4 – Attorney issues, competent client.
5.7 – Fees.

6. Client Estate of B

6.2(a) – No letter of engagement discovered.
6.2(b) – Fees.

7. Estate F (same client as earlier mentioned)

7.2 – Advice to beneficiaries 3 month after Grant of Probate.
7.3 and 7.8 – Fees billed posthumously.
7.4 –Allegedly slow in distributing finds to beneficiaries.
7.5 – Fees.
7.6 – Late in obtaining IRD number for Estate.
7.7 – Slow in reporting to beneficiaries.

We note that no indication of gain to P is indicated in our assessment of these matters.