SOME NAMES PERMANENTLY SUPPRESSED AS RECORDED IN PARAGRAPH [27] PURSUANT TO S 240 OF THE LAWYERS AND CONVEYANCERS ACT 2006.

NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL

[2022] NZLCDT 18
LCDT 026/21

IN THE MATTER of the Lawyers and Conveyancers Act 2006

BETWEEN **WELLINGTON STANDARDS COMMITTEE 2**
Applicant

AND **BRENDAN MCDONNELL**
Respondent

DEPUTY CHAIR
Judge J G Adams

MEMBERS OF TRIBUNAL
Mr H Matthews
Ms G Phipps
Ms M Scholtens QC
Prof D Scott

HEARING 17 May 2022

HELD AT Tribunals Unit, Wellington

DATE OF DECISION 13 June 2022

COUNSEL
Ms N Pender for the Standards Committee
Mr G Turkington for the Respondent

DECISION OF THE TRIBUNAL RE CHARGES AND PENALTY

[1] Mr McDonnell is charged because he failed to account for a sum of $25,000 which he paid out without authority. The unhappy context in which this matter arises is that Mr McDonnell, now aged 83, finally retired and in poor health, was in the twilight of his professional career when the unfortunate transaction occurred. Several adverse disciplinary findings across his final practising years suggest he was not functioning sharply in his professional practice.

[2] At the hearing, having earlier offered a blanket denial of the three alternative charges, Mr McDonnell admitted the least of them, unsatisfactory conduct. The hearing proceeded to determine if he was guilty of (the higher level of) misconduct and, at whatever level of culpability, to determine the appropriately penalty.

What are the facts?

[3] Mr McDonnell acted for a developer. A financier paid Mr McDonnell $125,000 to be applied to the deposit required for the developer's intended property acquisition. As negotiations advanced, only $100,000 was required for the deposit. In accordance with his authority, Mr McDonnell paid that $100,000 to the property owner from the funds provided by the financier.

[4] The developer requested Mr McDonnell to pay the remaining $25,000 directly to the developer for an engineer's report and Council charges. Mr McDonnell did so without authority from the financier who had no knowledge of this disbursement.

[5] For this hearing, Mr McDonnell belatedly took legal advice. He swore an affidavit, attended the hearing and was cross-examined. His position was:[1] "I did not doubt my authority to pay the $25,000 requested by [the developer] as it was related to the property expenses. It could have been made clearer in terms of the authority provided by [the financier]. Other things being equal I have no doubt that if the

[1] McDonnell affidavit 22 March 2022, para [16].

mortgage had proceeded, [the financier] would have been fully secured for his advances."

[6] We do not accept that gloss on the matter. The authority was limited to paying the deposit. The deposit was to be paid to the owner of the building. We find that Mr McDonnell smudged the need for precise authority, let alone the need to inform the financier. At best, relying on the developer's words, he may have thought that it was all advanced in the same general direction for the same general purpose, and it could all be sorted out as the transaction advanced and proper securities were signed.

[7] Mr McDonnell attempted to recover the $25,000 from the developer. The developer later withdrew instructions and Mr McDonnell lost all influence to remedy his default short of repaying the shortfall and suing the developer. He did neither of those things.

[8] Now, nearly six years later, the financier says he has not been paid any portion of the $25,000. That is the Standards Committee's position. Mr McDonnell suggests that position is uncertain. He has no direct knowledge. He relies on hearsay statements attributed to the developer who has not given evidence. The financier acknowledges he received some sums from the developer, but they related to different transactions. The evidential position is clear. The Standards Committee relies on firm evidence; the practitioner relies on vague gestures attributed to a source who does not emerge from the narrative as trustworthy. On the balance of probabilities, we find the financier is still short of the entire $25,000.

[9] As we understand Mr McDonnell's position, he claimed that the financier was responsible for the loss of the $25,000 because the financier changed the terms of the loan to dramatically increase the interest rate, a move which influenced the developer to turn to an alternative financier. We note that Mr McDonnell's professional obligations applied whatever flux may have subsequently occurred in commercial arrangements. Mr McDonnell's construction seeks to deflect our attention from the plain fact that he paid the $25,000 out of his trust account without authority (both as to payee and purpose). Mr McDonnell may have hoped it would all have been validated retrospectively but that sort of hope does not entitle a lawyer to ignore the limits of his authority.

[10] Mr McDonnell's stance about his error has been relatively passive and avoidant. He prepared documentation that we find was designed to smudge or conceal his error. His statement of 22 August 2016[2] noted the advance of $125,000 in a footnote but did not give an account as to how it was applied. Mr McDonnell was placed in a difficult position when faced in cross-examination with his omission to account because the proposition was, in credible terms, unanswerable.

[11] The financier pursued Mr McDonnell for repayment of the $25,000. Mr McDonnell appeared to make clear promises to pay. In his email of 21 December 2016 he said:[3] "I expect to have a call on the sale proceeds … for my fees and for the payment made to [the developer]. You will be paid then." In response to a 27 January 2017 email from the financier asking him to confirm their conversation in which Mr McDonnell had "confirmed that my outstanding $25,000 will be paid into my account within 2 weeks from today's date", Mr McDonnell replied within two hours:[4] "That's right."

[12] Mr McDonnell invites us to read those exchanges upon the basis that he only ever intended to convey his promise to pay from proceeds he recovered, not a promise to pay from his own pocket. However, under cross-examination, he admitted "I did have a liability to put it right." Contrary to Mr McDonnell's case on this point, we find the financier was entitled to understand the promises of 21 December 2016 and 27 January 2017 as promises by Mr McDonnell to pay him.

Is it misconduct?

[13] Section 111 of the Lawyers and Conveyancers Act 2006 (the Act) imposes an obligation to "account properly" for money held on behalf of another person. Mr McDonnell breached this obligation firstly by paying it out without authority (both as to recipient and purpose) and, secondly, by not informing the beneficial owner of the funds and, thirdly, by not repaying it (remedying his default).

[14] Rule 10.5 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care Rules) 2008 (the Rules) says "A lawyer must honour all undertakings, whether written or oral, that the lawyer gives to any person in the course of practice.

[2] Bundle, 24.
[3] Bundle, 25.
[4] Bundle, 26.

Rule 10.5.1 adds: "…This rule applies unless the lawyer giving the undertaking makes it clear that the undertaking is given on behalf of a client and that the lawyer is not personally responsible for its performance".

[15] We find that Mr McDonnell undertook to repay the sum to the financier. He did not make it clear that the undertaking was on behalf of his former client. We read his messages in December 2016 and January 2017 as plain promises to repay the financier. He failed to honour his undertaking, thereby breaching rule 10.5. That breach has continued for more than five years.

[16] A lawyer's undertaking should be promptly performed.[5] Failure to do so undermines public confidence in the legal profession whose members hold a privileged position and who are regularly entrusted with the management of funds for others.[6] Failure, as in this case, adversely affects consumers of legal services.

[17] We find that Mr McDonnell paid out the financier's $25,000 without authority. To that point, it was an error, not amounting to misconduct. But, having realised his error, we find that he failed to account properly and candidly to the financier. Moreover, he failed, and has continued to fail, to set the matter right. He failed to honour undertakings to repay the money. Those failures amount to wilful contravention of the Act or relevant practice rules. For the reasons given above, we characterise those failures as misconduct under s 7(1)(a)(ii) of the Act.

What penalty response should we order?

[18] The Standards Committee seeks censure, an order under s 242(g) of the Act prohibiting Mr McDonnell from practising on his own account, compensation to the financier of the $25,000, and costs.

[19] We treat the overall misconduct as moderately serious, particularly in failing to set right his default despite undertaking to do so.

[20] Mr McDonnell attracted eight adverse findings of unsatisfactory conduct between March 2011 and December 2019. Against that background, the present

[5] *Re C (a solicitor)* [1982] 1 NZLR 137.
[6] See s 3 of the Act.

finding of misconduct would ordinarily bring suspension (at least) into play. We have considered the circumstances of this case against other Tribunal penalty decisions.

[21] Mr McDonnell has not demonstrated remorse. Even at the hearing, when he reluctantly admitted liability to set it right, he attempted to dissuade us from ordering compensation. He has not demonstrated insight into the responsibilities that accompany being a member of the legal profession, the gravity of his misconduct, nor its effect on the victim of his default.

[22] We accept that Mr McDonnell has retired and will not practice again. He is elderly and unwell. He did not gain personally from his unauthorised payment of the funds although we could note that the financier has missed out on the use of his money from Mr McDonnell's ongoing failure to set it right.

[23] We accept Mr Turkington's submission that we should not impose an empty order under s 242(g). Ms Pender argued such an order could have symbolic value, but we find that to be unnecessary. In this case there is no prospect of rehabilitation because Mr McDonnell will not practise law again. Thus, there is no future need to protect the public. Our condemnation can satisfactorily be reflected in the terms of this decision, and in censure, compensation and costs.

[24] Mr Turkington sought an order for name suppression for Mr McDonnell under s 240 of the Act. In his case, we need to balance Mr McDonnell's private interest against the general public interest. Although Mr McDonnell has poor health, is permanently retired, and naturally wishes to avoid embarrassment to his family, there is no grave consequence of publication itself. The public interest lies in being able to scrutinise disciplinary proceedings, to satisfy itself that our processes are generally transparent, and that wrongdoing is treated seriously.

[25] Mr McDonnell's case for name suppression sits against his considerable previous disciplinary record, his lack of engagement with this process until the last stage, and his truculent failure to remedy his wrong for which a person who entrusted funds to him has suffered ongoing loss and disappointment. Publication of his name avoids mistaken suspicion falling on other retired lawyers. Absent any pressing reason for suppression, we take the view that the ordinary default of open disclosure should pertain in this case.

[26] Having considered his application against the statutory test, we decline to supress Mr McDonnell's name.

[27] We find Mr McDonnell guilty of misconduct under s 7(1)(a)(ii) of the Act and make the following orders:

1. We censure Mr McDonnell in the terms set out in the schedule to this decision, pursuant to ss 156(1)(b) and 242(1)(a) of the Act.

2. We order Mr McDonnell to pay the financier $25,000 in compensation pursuant to ss 156(1)(d) and 242(1)(a) of the Act.

3. The names of Mr McDonnell's client, the financier and other persons or entities connected to the matters at issue are permanently suppressed, pursuant to s 240 of the Act.

4. Mr McDonnell shall pay costs to the Standards Committee in the sum of $19,475.33, pursuant to s 249 of the Act.

5. Mr McDonnell shall reimburse the New Zealand Law Society in respect of the s 257 costs which are certified at $3,892.

DATED at AUCKLAND this 13th day of June 2022

Judge JG Adams
Deputy Chairperson

Schedule

Censure:

Mr McDonnell, your conduct in failing to account to the beneficial owner of moneys paid out by you without authority, and failing to honour undertakings to repay the sum, amounts to misconduct. Your misconduct is of a kind that corrodes public confidence in the integrity and probity of lawyers, especially when dealing with the moneys of other people. Accordingly, you are censured for this misconduct.