ORDER FOR SUPPRESSION OF INFORMATION AS RECORDED IN PARAGRAPH [28], PURSUANT TO S 240 OF THE LAWYERS AND CONVEYANCERS ACT 2006

NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL

[2022] NZLCDT 20

LCDT 001/21

IN THE MATTER	of the Lawyers and Conveyancers Act 2006
BETWEEN	**AUCKLAND STANDARDS COMMITTEE 2** Applicant
AND	**HELEN HOLLAND** Respondent

DEPUTY CHAIR

Judge J G Adams

MEMBERS OF TRIBUNAL

Ms A Callinan

Ms M Noble

Ms G Phipps

Ms S Stuart

DATE OF HEARING 13 June 2022

HELD AT Remote hearing by MS Teams

DATE OF DECISION 27 June 2022

COUNSEL

Mr T Simmonds for the Standards Committee

Mr R Pidgeon for the Practitioner

DECISION OF THE TRIBUNAL RE PENALTY

[1] We found Ms Holland guilty of misconduct[1] for breaches of fiduciary duties, failure to maintain adequate records in managing her parents' estates and affairs, and failure to account. In doing so, we found that conduct was not consonant with her being a fit and proper person to practise as a lawyer. Our liability decision necessarily concerned past conduct. In contrast, our current task, determining penalty, looks forward. We must consider whether we assess her as fit to practise in the foreseeable future. As counsel agree, at stake is whether we should strike her off or suspend her for a substantial period.

[2] Strike-off is not necessarily the final stroke in a lawyer's career. A lawyer who has been struck off may re-apply if the lawyer can show they are once again fit and proper to practise law.

[3] Nonetheless, strike-off is the most severe response available to us. It is only available if we are unanimous. We should not, and would prefer not to, strike her off unless it is the least restrictive outcome. The need to impose the least restrictive outcome was explicitly noted in *Daniels*[2]:

> Tribunals are required to carefully consider alternatives to striking off a practitioner. If the purposes of imposing disciplinary sanctions can be achieved short of striking off then it is the lesser alternative that should be adopted as the proportionate response. That is "the least restrictive outcome" principle applicable in criminal sentencing. In the end, however, the test is whether a practitioner is a fit and proper person to continue in practice. If not, striking off should follow. If striking off is not required but the misconduct is serious, then it may be that suspension from practising for a fixed period will be required.

[4] In considering strike-off as a real possibility, as the High Court observed:[3] "The ultimate issue is whether the practitioner is not a fit and proper person to practise as a lawyer."

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[1] *Auckland Standards Committee 2 v Holland* [2022] NZLCDT 9, 3 March 2022.
[2] *Daniels v Complaints Committee 2 of Wellington District Law Society* HC (Full Bench) CIV-2011-485-227 at [22].
[3] *Hart v Auckland Standards Committee 1* [2013] 3 NZLR 103 at [185].

[5] So-called "penalty" orders of the Tribunal are not punitive in intent. They must be pitched to advance the public interest (including public protection), maintain professional standards, impose sanctions for breaches and provide scope for rehabilitation where appropriate.

[6] The following passage from *Daniels*[4] offers sound guidance:

> The starting point is fixed according to the gravity of the misconduct, and culpability of the practitioner for the particular breach of standards. Thereafter, a balancing exercise is required to factor in mitigating circumstances and considerations of a practitioner. Obviously, matters of good character, reputation and absence of prior transgressions count in favour of the practitioner. So, too would acknowledgment of error, wrongdoing and expressions of remorse and contrition. For example, immediate acknowledgment of wrongdoing, apology to a complainant, genuine remorse, contrition, and acceptance of responsibility as a proper response to the Law Society inquiry, can be seen to be substantial mitigating matters and justify lenient penalties…
>
> On the other side of the coin, absence of remorse, failure to accept responsibility, showing no insight into misbehaviour, are matters which, whilst not aggravating, nevertheless may touch upon issues such as a person's fitness to practise and good character and otherwise.

Gravity of conduct and practitioner's culpability

[7] We approve and adopt the Standards Committee's submission that the level of Ms Holland's misconduct is relatively serious. It involved multiple failings over a number of years; she breached her fiduciary duties to her siblings as residuary beneficiaries; she illegitimately obtained sizeable financial gain. Because the only available evidence on the point was her uncorroborated testimony, we were unable to make precise findings, but we accepted she had made loans of at least $415,000 to herself and her sister from her father's estate. Mr Simmonds, in written submissions, referred to many details from our liability decision, summarised in this portion:[5]

> [68] … Over a period of many years, she ignored clear fiduciary duties, promoted her own interests and, when called to account, she has been avoidant, obstructive, and plainly irrational. This is our firm, unanimous view.
>
> [69] In the present case, we find Ms Holland's conduct fell so short of basic standards and the qualities of integrity expected of those who are fit to be members of the profession that the public could have no confidence in her

[4] See above n 2 at [28].
[5] See above n 1.

> ability to perform reliably as a lawyer should. We find the charge of misconduct is amply proven.

[8] We described her conduct in making unsecured loans to herself and her sister as "reckless disregard" in the overall circumstances. Her ongoing failure to provide any account to her siblings continues to the present day. She was disciplined by the Tribunal in 2018 for wilfully or recklessly disregarding her obligations to comply with a formal s 147 notice in relation to these matters. She does not face double jeopardy here for that wrongdoing but her ongoing failure to put this right weighs as relevant in our assessment of her fitness to practise. She told the 2018 Tribunal that she could supply the information but has failed to do so. This not only hampered our ability to make precise findings, it deprives her siblings of knowledge about what became of the money.

[9] Until the hearing, Ms Holland claimed she owed no fiduciary duties to residuary beneficiaries in the two estates she administered. She claimed that she lacked understanding because she had only been a commercial litigator, not an estate lawyer. We do not accept that defence. If she did not know the basics of fiduciary duties, she demonstrates a fundamental lack that would be concerning in any practitioner.

[10] In short, we find her fully culpable for her wrongdoings, and for her ongoing obstructive behaviour in relation to the provision of information to her brother (the complainant), the Standards Committee and the Tribunal.

Mitigating features

[11] Ms Holland practised law for 35 years. During the subsequent five years, she has not held a practising certificate. She has had no disciplinary history other than the failure to comply with the s 147 notice which is a precursor to this charge. References from three employers, spanning much of her practising life, speak well of her and note an absence of complaints.

[12] Although her misconduct occurred outside the realm of regulated services, that is not a mitigating feature. It is simply an observation. Her behaviour fell within s 7(1)(b)(ii) of the Lawyers and Conveyancers Act 2006 (the Act) and, as Mr Simmonds submitted, there is no lesser standard of behaviour for private

business dealings. It is the way the conduct reflects, on fitness to practise, that counts. Mr Pidgeon submits that there will be no recurrence of the behaviour. The opportunity is spent. Against that, we cannot overlook the ongoing wrong of her failure to offer any information to account to her siblings, especially the complainant who received nothing from his father's estate.

[13] Ms Holland suffered a physical illness for which she had appropriate treatment in 2018, and in respect of which she remains under observation. Her psychologist expressed a view that "additional trauma would seriously compromise the success of … therapy", that therapy was completed some time ago. We can give no weight to his opinion because it is well outside his area of expertise and he references no data upon which we could verify his claim. Quite how this could steer us, as between the options of lengthy suspension or strike-off, we do not know. We are sorry Ms Holland suffered poor health but that does not amount to a mitigating feature in this case.

[14] We accept the psychologist's advice that Ms Holland suffers [deteriorating health] [redacted]. We take note of her deteriorating [health] [redacted] as assessed by Dr Woodcock.[6] This feature may be regarded as having a mitigatory aspect. It is also pertinent to our assessment of her fitness to practise in the foreseeable future.

Aggravating features

[15] We do not criticise Ms Holland for having vigorously defended the charge. On the other hand, it is evident that some of her defensive strategy indicated a lack of rationality, a feature that we commented on in our liability decision. Her jurisdictional argument to the 2018 hearing that this was merely a family matter, not something for the Law Society, was at complete odds with the plain terms of s 7(1)(b)(ii). Her argument, abandoned shortly before the 2022 liability hearing, that she owed no fiduciary duties to the residuary beneficiaries of the estates she was administering (one of them under Probate from the High Court), had an air of unreality about it. Her claim that the complainant had stolen relevant portions of the records was unconvincing and bizarre. (We refer to our discussion and findings in our 3 March 2022 decision.) These features trouble us in our assessment of her fitness to practise law.

[6] Woodcock 2018 report, p 2, p 9.

[16] Her ongoing failure to account at all is an aggravating feature.

[17] One of her referees, Mr Hucker, for whose firm she worked as a locum for six months during the absence of another practitioner, says she has told him of "her regrets as to and acknowledgement of how wrong her past conduct was" but we have looked for, and find no credible signs of remorse. In fact, she has shown us no indication that she understands what she has done wrong. Absent insight, remorse is unlikely. She has not apologised to those she has wronged and, at the risk of repetition, taken no step towards setting the record straight by providing information. It may be that her [redacted] contributes to this inertia, but we find she has not acknowledged, let alone dealt with, these grave matters.

Features that weigh in assessment of "fit and proper person"

[18] We agree with Mr Pidgeon that these cases are very much driven by their own facts and contexts. The principles are clear. Of the cases discussed, we agree that *Sorenson*[7] is most apposite. The practitioner had an unblemished record of 25 years. He paid out money to executors of a will (upon their instructions), knowing that his action would deprive legatees of their bequests. Peters J quashed the Tribunal's order for strike-off and substituted two years suspension and an order prohibiting the practitioner for practising on his own account until authorised by the Tribunal to do so.

[19] Unlike the situation in Sorenson, we do not regard what happened in Ms Holland's case as a "one-off." Her course of conduct in misapplying estate funds (including, to herself) occurred across a period of years and many transactions. She benefitted personally. Her failure to account continues, years later.

[20] For the purpose of assessing whether she is fit to practise in the foreseeable future, we have considered whether it is appropriate to view her misconduct in relation to her parent's estates as stemming from particular (and unlikely to be repeated) family circumstances and treat Ms Holland as an experienced commercial litigator with an unblemished record of 35 years who might seem to pose no appreciable risk to the general public.

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[7] *Sorenson v New Zealand Law Society (Auckland Standards Committee 2)* [2013] NZHC 1630.

[21] However, what concerns us more about Ms Holland's actions is not that the pattern of facts that led to her misconduct is likely to be repeated (because it is not), but that:

- her misconduct exhibits serious shortcomings in characteristics that the public expect in lawyers (that they will be honest, reliable, trustworthy, accountable);
- she appears to have failed to understand basic legal principles (concerning fiduciary duties);
- she has not demonstrated (and we cannot find) insight into her wrongdoing;
- she has demonstrated no remorse, nor any appreciable step to repair her wrongdoing;
- she has demonstrated significant lack of judgement to the extent that she would be unsafe to practise; and
- her [redacted] health is failing [redacted] so that she would be unsafe to practise.

[22] In our liability decision, we signalled the nature of the responses that would assist her case. This, again, was set out in the submissions for the Standards Committee and explored with counsel during the penalty hearing. We would very much like to find a path whereby Ms Holland could be brought back to safe practice. We have been unable to do so. In part, that is because of her lack of insight and remorse which are (as observed in the passage from *Daniels* quoted in paragraph [6] of this decision) relevant features in our assessment of her fitness to practise. Moreover, in that assessment, we cannot ignore that her [redacted] wellbeing has deteriorated markedly over the last four years. We must find an evidential basis for our assessment of whether she is fit and proper to practise. We cannot find a sound basis emerging upon which we can predict that she will be fit and proper to practise at any foreseeable time in the future.

[23] This is not to say that she will remain unable to demonstrate the requisite standard. We are obliged to make our assessment now. It is not proper for us to fudge that duty and rely on a hope or wish, unsubstantiated upon cogent evidence. There is no presumption to assist our assessment.

[24] Had we found a path from which Ms Holland could emerge as fit and proper to practise, we would have suspended her with conditions to achieve her return to the profession, recognising the contribution she could, with rehabilitation, offer in the practice of law. Regrettably, and with considerable sorrow, we have been unable to do so.

[25] Accordingly, Ms Holland shall be struck off pursuant to s 242(1)(c) and s 244 of the Act. We reach this position upon the basis that it represents the least restrictive option in the circumstances of this case.

[26] Ms Holland is legally aided. We agree with Mr Simmonds that there are no exceptional circumstances to engage s 45 Legal Services Act 2011 and therefore no order for costs can be made against her.

[27] The Tribunal costs to be paid by the New Zealand Law Society are certified in the sum of $9,330, pursuant to s 257 of the Act.

[28] There is an order for permanent suppression of the content of the medical reports (save for the portion quoted in para [13] of this decision), pursuant to s 240 of the Act.

DATED at AUCKLAND this 27th day of June 2022

Judge JG Adams
Deputy Chairperson