NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL

[2022] NZLCDT 21
LCDT 017/21 and 018/21

IN THE MATTER	of the Lawyers and Conveyancers Act 2006
BETWEEN	**NELSON STANDARDS COMMITTEE** Applicant
AND	**GRAEME MARK DOWNING AND ALEXANDER ALAN REITH** Practitioners

CHAIR
Ms D Clarkson

MEMBERS OF TRIBUNAL
Mr F Pereira MNZM
Ms G Phipps
Mr T Mackenzie
Dr D Tulloch

HEARING 6 May 2022

HELD BY MS Teams

DATE OF DECISION 27 June 2022

COUNSEL
Mr P Collins for the Standards Committee
Mr A Darroch for the Practitioners

DECISION OF THE TRIBUNAL AS TO PENALTY

Introduction

[1] This decision determines the penalty to be imposed on two practitioners, Mr Downing and Mr Reith. Two counts of misconduct were established against each practitioner and one further finding of unsatisfactory conduct against Mr Downing.[1]

[2] The decision is of fairly narrow compass because counsel agreed on the four types of orders to be imposed, namely:

(a) Censure;

(b) Fine;

(c) Compensation for emotional harm;

(d) Contribution to costs.

[3] In respect of the last three, there was a disagreement as to proper quantum; and in respect of (c), whether there should be an additional category of compensation ordered, in respect of fees paid.

Process

[4] The manner of determining penalty is now well established. It begins with an assessment of the level of seriousness of the conduct.[2]

[5] The Tribunal must keep in mind the purposes of penalty orders, as set out in *Daniels*.[3]

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[1] Liability decision – *Nelson Standards Committee v Downing and Reith* [2022] NZLCDT 7.
[2] See *Hart v Auckland Standards Committee 1 of the New Zealand Law Society* [2013] 3 NZLR 103 [181]–[189].
[3] *Daniels v Complaints Committee 2 of the Wellington District Law Society* [2011] NZLR 850.

[6] The principles underlying the imposition of penalty are also set out in the submissions on behalf of the Standards Committee and are acknowledged by the practitioners.

[7] The purpose of the imposition of penalty orders is not a punitive one but is protective, in terms of the Act.[4] Specifically, s 3 prescribes: the protection of the public, the maintenance of professional standards and the maintenance of confidence of the public in the legal profession.

[8] There are also, analogous with the criminal law, particular penalty principles which are engaged. These include the need for general and specific deterrence, in order to maintain awareness of the consequences of departure from the professional standards expected of lawyers.

> General deterrence requires consideration of whether there is a need to signal to other members of the profession that adverse consequences will follow such conduct, and thereby deter them from the same conduct, in the interests of maintaining professional standards and public confidence in the profession.[5]

[9] We then considered aggravating and mitigating features of the conduct, and personal factors relating to the practitioners.

[10] We considered the need for consistency in the imposition of penalties, and were assisted by counsel by reference to other similar cases.[6]

Seriousness

[11] We accept the submission of the Standards Committee that "the findings of misconduct are serious but not at a level justifying their removal from practice either for a term of suspension or striking off", but that a "stern disciplinary response is nevertheless warranted".

[12] It was submitted by Mr Collins that penalty should be focused on deterrence and compensation to the complainant. We consider that as a proper assessment of the matter and of the tailoring of the type of penalty orders required in this case.

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[4] Lawyers and Conveyancers Act 2006 (the Act).
[5] *Legal Services Commissioner v Nomekos* [2014] VCAT 251.
[6] Recognising that each case is unique in its background circumstances and context, and that penalties must be carefully crafted to meet the individual circumstances as found by the Tribunal.

[13] The most serious of the professional failures to the client found in this case included the failure to ensure the complainant received independent advice on the Deed of Acknowledgement of Debt which enabled the registration of a mortgage to the firm, the breach of the duty to complete the retainer, and the professional failures to the client in respect of advice given.[7]

[14] We accept and take account of the fact that the failures connected with the Deed of Acknowledgment of Debt represent a 'one off' situation because this was the first time these practitioners had asked a client to complete such a deed. We accept Mr Darroch's submission that, in this, "their actions were serious but they were not dishonest or malicious".

Aggravating features

[15] We consider there are two aggravating features in relation to Mr Reith and three in relation to Mr Downing. In relation to Mr Reith, his previous disciplinary history includes two unsatisfactory conduct findings against him in 2014. We accept that these are becoming somewhat historical and do not bear any factual resemblance to the current situation. However, on the other hand they do demonstrate what might be described as a pattern, whereby various different aspects of Mr Reith's practice have now suffered from professional failings.

[16] In Mr Downing's case, however, although there is only one unsatisfactory conduct finding against him, it is more recent (October 2018), and it is also of a very similar nature to the unsatisfactory conduct finding which we have made against him in respect of his failure to provide (among other matters) balanced or "at worst" advice on the merits of the claim.

[17] The second aggravating feature is how belated was the action to remedy the situation of a mortgage being held over the complainant's property, which was only discharged, and the $5,000 payment refunded in late September 2021, in the face of these proceedings.

[7] More detail of these and other professional failures are contained in the liability decision, see above n 1.

[18] The third factor, which we considered applied to Mr Downing more evidently, as well as having an additional finding of unsatisfactory conduct against him in the present matter, was that we considered that he lacks insight or remorse about his actions, and to a considerable degree. We consider that Mr Downing's acceptances of (some of) the charges (and most of the facts) was somewhat begrudging.

[19] On the other hand, we considered that Mr Reith did sincerely regret his part in these actions and of course his involvement was for a much shorter period.

Mitigating features

[20] In Mr Downing's case, we do take into account his lengthy career and significant service to the profession as a senior office holder in the Law Society.

[21] In respect of both practitioners, we also accept that a strong mitigating feature is that they have written off the balance of the outstanding fees which is a significant amount – $39,835.62.

Compensation

[22] The Standards Committee seeks an order for compensation to be paid to Ms L. The Standards Committee suggests $5,000 each for compensation for emotional harm, and $13,967 for the fees paid to the firm. We will deal with each below.

(a) Emotional harm

Compensation s 156(1)(d)

[23] Section 156(1)(d) of the Act allows the Tribunal to make an order for compensation "where it appears to the Standards Committee that any person has suffered loss by reason of any act or omission of a practitioner". The maximum amount presently allowed under the rules is $25,000. There is common ground between the Standards Committee and practitioners that injury to feelings including

stress, distress, loss of dignity, anxiety and humiliation are able to be compensated under this section, consistent with the High Court decision in *Hong*.[8]

[24] The parties disagree on the appropriate sum. The Standards Committee seeks $10,000, the practitioners agree to a sum of $3,000.

Discussion

[25] Determining the appropriate award of compensation is an art rather than scientific exercise, as stated by the Court of Appeal in *Commissioner of Police v Hawkins*[9]:

> …claims for what amounts to damage to dignitary interests are complex and very important. Remedies scholars (and increasingly courts) rightly see this as a particularly important and developing area of the law, which invokes a recognition of the fundamental importance of human dignity as perhaps the legal value in the 21st century.[10]

[26] The Tribunal adopts the following principles as providing helpful guidance for compensatory awards under the Act.

- There must be a causal connection between the action of the practitioner and the damages sought. The Court in *Waikato District Health Board v Archibald*[11] when considering compensation for injury to feelings stated:

  > The key requirement is the need to establish a causal connection between the unjustified actions of the employer and the injury to feelings, loss of dignity and/or humiliation suffered.

- Actual cause need not be proved, as stated in *Marks v The Director of Health and Disability Proceedings*:[12]

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[8] *Hong v Auckland Standards Committee No. 5* [2020] NZHC 1599; at [208].
[9] *Commissioner of Police v Robert Craig Hawkins* [2009] NZCA 209.
[10] (See Hammond "Beyond Dignity" in Berryman and Bigwood (eds) The Law of Remedies: New Directions in the Common Law (2009)). One of the problems identified with attempts to rigidly "cap" awards in the developing dignity context is that the levels can ossify. At the same time, there has to be a sound basis for such awards, and there are very real conceptual and practical difficulties in establishing a spectrum as to where lines are to be drawn."
[11] *Waikato District Health Board v Archibald* [2017] NZEmpC 132 at [60].
[12] *Marks v The Director of Health and Disability Proceedings* [2009] NZCA 151.

> Once the breach of the Code is established, the relevant humiliation, injury to feelings and loss of dignity could be inferred from the circumstances of the breach.

- The award of damages is to compensate for the injury to feelings not to punish the practitioner.

- The conduct of the practitioner respondent may, however, exacerbate or mitigate the injury and to this extent will be relevant.

- There is a subjective element to the assessment. The assessment will be fact specific and personal to the person who has suffered the harm. This is often described as the "eggshell skull" principle. That one person might not have been as affected as another in the same situation does not impact on the damages awarded. The key question is the impact that was caused on the specific individual in question (*Waikato District Health Board v Archibald)*[13] and as stated in *Vento v The Chief Constable of West Yorkshire Police*:[14]

> [50] It is self evident that the assessment of compensation for an injury or loss, which is neither physical nor financial, presents special problems for the judicial process, which aims to produce results objectively justified by evidence, reason and precedent. Subjective feelings of upset, frustration, worry, anxiety, mental distress, fear, grief, anguish, humiliation, unhappiness, stress, depression and so on and the degree of their intensity are incapable of objective proof or of measurement in monetary terms. Translating hurt feelings into hard currency is bound to be an artificial exercise. ….
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> [51] Although they are incapable of objective proof or measurement in monetary terms, hurt feelings are none the less real in human terms. The courts and tribunals have to do the best they can on the available material to make a sensible assessment, accepting that it is impossible to justify or explain a particular sum with the same kind of solid evidential foundation and persuasive practical reasoning available in the calculation of financial loss or compensation for bodily injury...

[13] See above n 11 at [62].
[14] *Vento v The Chief Constable of West Yorkshire Police* [2002] EWCA Civ1871.

- There is no requirement for medical evidence or a diagnosis: *Andrews v Grand & Toy Alberta Ltd*:[15]

> The monetary evaluation of non-pecuniary losses is a philosophical and policy exercise more than a legal or logical one. The award must be fair and reasonable, fairness being gauged by earlier decisions; but the award must also of necessity be arbitrary or conventional. No money can provide true restitution.

- Injury to feelings is a real loss, *The Director of Proceedings v O'Neil*:[16]

> Humiliation may involve loss of dignity and certainly will involve injury to feelings of self-worth and self-esteem. Humiliation, we would have thought, would always involve a loss of dignity. A loss of dignity would always have involved in injury to feelings. That would include a feeling of pride in oneself and general contentment. Yet whilst injury to such feelings may involve humiliation that will not always be the case….
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> The feelings of human beings are not intangible things. They are real and felt, but often not identified until the person stands back and looks inwards. They can encompass pleasant feelings (such as contentment, happiness, peacefulness and tranquillity) or be unpleasant (such as fear, anger and anxiety). However a feeling can be described, it is clear that some feelings such as fear, grief, sense of loss, anxiety, anger, despair, alarm and so on can be categorised as injured feelings. They are feelings of a negative kind arising out of some outward event. To that extent they are injured feelings.

[27] In the Human Rights Tribunal decisions[17] and Employment Relations Act decisions, those bodies have adopted a practice of dividing awards into three bands as stated in *Waikato District Health Board v Archibald*:[18]

> Assessing compensation is an inexact science. This can cause difficulties in terms of ensuring a degree of consistency across like cases, while reflecting the individual circumstances of the particular case before the Court. In arriving at an appropriate figure I have considered the extent of the injury suffered by Mrs Archibald and where it sits in the spectrum of cases routinely coming before the Court. In this regard, I have found it helpful in this particular case to consider the challenging task of assessing compensation in terms of a broad analytical framework of three bands:

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[15] *Andrews v Grand & Toy Alberta Ltd* (1978) 83 DLR (3d) 452 at 475-476.
[16] *The Director of Proceedings v O'Neil* [2001] NZAR 59 at [28] and [29].
[17] See for example the erudite summary by Haines QC in *Hammond v Credit Union Baywide* [2015] NZHRRT 6 at [176] "From this general overview it can be seen that awards for humiliation, loss of dignity and injury to feelings are fact-driven and vary widely. At the risk of oversimplification, however, it can be said there are presently three bands. At the less serious end of the scale awards have ranged upwards to $10,000. For more serious cases awards have ranged between $10,000 to about (say) $50,000. For the most serious category of cases it is contemplated awards will be in excess of $50,000. It must be emphasised these bands are simply descriptive. They are not prescriptive. It is not intended they be a bed of Procrustes on which all future awards must be fitted."
[18] See above n 11 at [62].

- band 1 involving low level loss/damage;
- band 2 involving mid-range loss/damage; and
- band 3 involving high level loss/damage.

Consideration

[28] While we would not wish to be constrained in the exercise of our discretion in future matters, we do find some guidance from the "bands" analysis.

[29] The Tribunal considered that the feelings of a negative kind (for the complainant) arising out of the outward event of the practitioners' conduct were significant and prolonged.

[30] Ms L's unchallenged evidence was that she did not have the benefits of education or knowledge in the law having left school at the age of 15. At the time the professional relationship was terminated she was working as a shop assistant. She had confidence in, and relied on her lawyer, as she was entitled to do.

[31] Her situation went from one of confident advice from her lawyer to decline settlement offers less than any with six figures to the 11 December 2018 event of being put in the disempowering position of ambush to sign a Deed of Acknowledgement of Debt. This inevitably caused her stress.

[32] She received reassurances that interest would be written off but continued to be billed for interest despite being very clear that she had no means to pay.

[33] It appears that her claims of being unable to pay were disbelieved by her advisors (based on their view (based on gossip/second-hand information) of the value of her property and that she rented it out on Airbnb), despite her being clear that a friend was paying the bills and despite her sworn evidence in an affidavit prepared by her advisors of her disadvantaged circumstances. To be disbelieved in this way was inevitably a humiliating, demeaning and degrading experience for her.

[34] She experienced what she described as aggressive behavior from Mr Reith causing her stress. She was put in the bewildering situation of thinking she had provided security for the debt and would be represented, then slightly over a month

away from a judicial settlement conference was sent emails she experienced as confrontational, demanding payment.

[35] Her attempts to raise a loan were rejected by the bank and the reaction of Mr Reith during a call to advise him of her inability to raise a loan caused her to feel *"threatened and vulnerable…bullied and humiliated"*.

[36] Her lack of knowledge and vulnerability were taken advantage of in that she was made to prepare, sign and file her own notice of change of representation and address for service in circumstances when her lawyers should have been well aware of the need that they seek leave to do so.

[37] She was left unrepresented shortly before a judicial settlement conference or, as she put it, "*I was stranded without representation"*. The other parties were represented. She alone had no support in what would have an intimidating experience. She described preparing for the judicial settlement conference as "*a daunting prospect because I had to face my hostile sister and her lawyer while I was unrepresented myself"*. Members of the Tribunal know from their own experience and observations how lost, anxious and abandoned this self-represented litigant would have felt in those circumstances.

[38] Following this she received what she experienced as threatening emails and described this as feeling bullied. The threat of a mortgagee sale with the Property Law Act notice being served on her on 3 December 2019 were stressful occurrences. In noting this the Tribunal recognised that being pursued for a debt is stressful. In this case, this pursuit was connected to failures to ensure independent advice on the Deed, and the failures to give realistic advice as set out in the liability decision.

[39] The damages in this jurisdiction are limited to $25,000. The emotional harm in this matter was prolonged with the anxiety and fear of losing her home**.** The humiliation of not being believed and the stress of being bullied were significantly exacerbated by it being two lawyers against one vulnerable client.

[40] In *Hong,* damages of $8,000 were awarded reflecting the 12 years that the matter was hanging over the client and the attempts to evict him from his property.

[41] Although the period was shorter in this case the infliction of harm experienced was across a range of different spectrums of emotional suffering. The complainant experienced the harm privately and in front of others at the settlement conference. She had no experience of the legal profession and was entitled to be looked after not abandoned bullied and demeaned. As stated in *Hong*:[19]

> s 3 of the Act provides that the purposes are to maintain public confidence in the provision of legal services and to protect consumers of legal services. Practitioners occupy a privileged and important place in our legal system and society. Clients and the public are entitled to expect they will discharge their duties and adhere to the rules which come with membership of the profession. Where there is a failure to do so, a complaints process exists to identify and address it. That process includes, and should include, a power to award compensation to those who suffer loss arising from such failure. Whatever form that loss may take, the award of compensation is essential to maintain public confidence in the integrity of the profession and to ensure clients are properly protected where they suffer at the hands of their lawyer.

[42] The Tribunal is of the view that the sum of $10,000 is an appropriate award to reflect the degree of harm suffered. The harm was caused by the practitioners in different ways with neither appearing to more greatly impose the damage, consequently the award is shared equally that is $5,000 each.

(b) Further fee refund

[43] Essentially the Standards Committee submission is that the consequence of the misconduct, which was to leave Ms L without legal representation, has completely shorn the legal services of any value. In addition, the Standards Committee submits that where a practitioner acts without complying with the legal aid rule (as occurred here) then they should not be entitled to benefit from their breach.

[44] The respondents resist this aspect of the compensation claim. The respondents submit that there was value in the work carried out. They say that a signficant fee has already been written off ($39,835.62). They note the extent of work that was undertaken, including the work that was undertaken on the estate matters prior to the Family Protection Act claim. They note that it is not clear whether, and at what point, legal aid would have been available for that process.

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[19] Supra at [207].

[45] In *Wellington Standards Committee v Logan* the Tribunal was called on to consider a claim for compensation in relation to a mistake in preparing a will.[20] This resulted in a claim that a subsequent estate dispute had to be settled at a higher amount than it should have been. The claimed difference plus legal costs of the claimant for independent advice were sought.

[46] At [83] – [84] the Tribunal described the issue that arose:

> [83] …The increased value of the estate subject to the Family Protection claim arose as a result of the practitioner's error, and failure to correct the matter with some subsequent arrangement. He should compensate the party seeking compensation if that error resulted in settlement at a level that was higher than might otherwise have been the case. The difficulty for the Tribunal is that it cannot have any certainty that the level of the settlement was a consequence of the increased value of the estate arising from the practitioner's error and failure to take steps to correct the matter.
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> [84] What we can be certain about is that the cost of independent legal advice was incurred as a direct result of the error, so we are prepared to grant compensation in respect of that amount, $3,656.25. We are not prepared to order payment of compensation on the basis that the Family Protection claim settlement was higher than would otherwise have been the case if the value of the estate had not included a part share in the family home. There was no evidence (other than a mathematical calculation based on value of the home) that the settlement was required to be agreed at a level higher than would have been settled without part of the home being included. The requirement of the relevant section is that we be satisfied that the loss for which compensation is sought was suffered by reason of the practitioner's act or omission.

[47] We consider that much the same difficulties arise here. The statutory test requires that it appear that the *loss* was *by reason* (of any act or omission). We cannot be satisfied that this amount is a loss, and even if we were, that it was by reason of the practioners' conduct.

[48] Regarding the first limb of the argument (loss of value due to termination), we accept that a significant piece of work was required to be undertaken to obtain some order in the administration of the estate, because Ms L's sister, the named executor refused to apply for probate.

[49] Further, the work carried out by Mr Downing in the FPA[21] litigation did not then evaporate on his departure. It appears from the evidence that he had progressed the

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[20] *Wellington Standards Committee v Logan* [2012] NZLCDT 38.
[21] Family Protection Act 1980.

litigation to a late stage. This would have included, at the least, pleadings, procedural motions, any discovery, and at least two substantive affidavits. That work remained in place and formed the foundations for the trial. The further set of lawyers that assumed the file shortly before trial did not have to start from the beginning and there is no evidence that either Ms L or the Legal Services Agency incurred identifiable costs through having to start over. Indeed the account to the Legal Services Agency indicates that the services required were "submissions and preparation, research, attendance and hearing time".[22]

[50] The total fees originally charged across both matters (estate administration and FPA litigation) were quite reasonable in our view. Given the repayment and write-off that has already occurred of most of those fees, the balance left paid of $13,967, if analysed in the absence of the conduct failures, would represent a modest charge.

[51] The Tribunal therefore does not accept that this fee is a loss by reason of the practitioners' conduct.

[52] The second limb of the compensation argument is that a practitioner shouldn't retain fees incurred in breach of the rule requiring advice about legal aid.

[53] In theory, this issue presents a conundrum. If a practitioner can retain a privately charged fee when the client should have been entitled to legal aid, deterrence of such behaviour becomes undermined. On the other hand, if the fee has to be returned, this leaves the client (assuming the work done was satisfactory) in a state of betterment as they have not had to pay for their lawyer nor access legal aid (with the common occurrence of a civil debt or charge to follow).

[54] Fortunately, we do not need to determine that point here. The difficulty in the present case is that we cannot be satisfied that the breach of the legal aid rule caused a loss. It is not clear to us on the evidence whether and when Ms L would have obtained legal aid. Likewise it is not clear what the requirements of any grant would have been. There are too many contingencies to be satisfied that the breach of the rule caused a loss.

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[22] Exhibit NN to first affidavit of Ms L, dated 8 July 2021.

[55] We therefore decline to award compensation in the amount of the balance of fees paid.

[56] We have also considered whether the fees balance is better addressed under s 156(1)(f) of the Act – cancellation of fees.

[57] For the same reasons set out above we cannot accept that the balance of fees left, after a significant repayment, do not represent some value.

[58] Although we were invited to treat both practitioners equally, in all respects, for the reasons set out at paragraphs [16] to [19], we consider that Mr Downing ought to bear a slightly higher penalty. We have addressed this in the level of fines imposed.

Costs

[59] Some issue is taken with the costs, with an attempt at comparison to other cases. That is always a difficult exercise.

[60] This proceeding saw the prosecution of two practitioners across several charges. The charges and facts behind them were reasonably complicated. Some of the charges were denied. A full day hearing occurred, with evidence by all three parties.

[61] In those circumstances and having considered the patterns of costs across this Tribunal, we consider that the amount sought is not excessive.

[62] We consider that the practitioners ought to make a significant contribution to costs, but not on a full indemnity basis. This reflects the co-operative approach taken to the disciplinary process by them, in agreeing for their cases to be heard together, and in a more accessible venue. It also recognises that some of the costs (especially of the Tribunal) have been increased by delays as a result of the pandemic.

[63] We make the following orders:

Orders

1. We impose a Censure in the terms set out in Appendix I, pursuant to s 156(1)(b) of the Act.

2. Mr Downing is fined the sum of $10,000, pursuant to s 156(1)(i) of the Act.

3. Mr Reith is fined the sum of $7,000, pursuant to s 156(1)(i) of the Act.

4. Compensation order of $10,000 to be paid jointly, pursuant to s 156(1)(d) of the Act.

5. The practitioners are to jointly pay $30,000 towards the costs of the Standards Committee, pursuant to s 249 of the Act.

6. The Tribunal costs certified in the sum of $9,052 are to be paid by the New Zealand Law Society, pursuant to s 257 of the Act.

7. The practitioners are to jointly reimburse the s 257 costs to the New Zealand Law Society in full, pursuant to s 249 of the Act.

DATED at AUCKLAND this 27th day of June 2022

DF Clarkson
Chairperson

Appendix I

Censure

Mr Downing and Mr Reith, you have been found to have let your client down in a serious manner, by failing to complete your retainer with her.

As you both acknowledge, you also failed her in the manner in which you sought to secure payment of your fees. The focus you gave to that end, obscured your attention to your fiduciary obligations to Ms L.

The disciplinary process has been a chastening experience for you both. And this Censure, which will remain on your permanent record, will be a reminder to ensure that your conduct is not repeated.