

**NEW ZEALAND LAWYERS AND
CONVEYANCERS DISCIPLINARY TRIBUNAL**

[2023] NZLCDT 21
LCDT 019/22, 020/22

IN THE MATTER

of the Lawyers and Conveyancers
Act 2006

BETWEEN

**WELLINGTON STANDARDS
COMMITTEE 2**
Applicant

AND

ALWYN O'CONNOR
Respondent

CHAIR

Ms D Clarkson

MEMBERS OF TRIBUNAL

Ms J Gray

Ms M Scholtens KC

Prof D Scott

Dr D Tulloch

HEARING 15 May 2023

HELD AT Remote hearing by MS Teams

DATE OF DECISION 17 May 2023

COUNSEL

Ms N Pender and Ms N Town for the Standards Committee

Mr G Paine for the Respondent Practitioner

DECISION RE APPLICATION
FOR REVOCATION OF INTERIM SUSPENSION ORDER

What this is about

[1] On 3 May 2023, the Tribunal found Mr O'Connor guilty of one charge of misconduct and one of negligence such as to reflect on the lawyer's fitness to practice.

[2] The Tribunal raised with counsel the possibility of an interim suspension order and, after taking instructions, Ms Pender made the application on behalf of the Standards Committee.

[3] After hearing from counsel, and further considering the matter, the Tribunal made an interim order suspending Mr O'Connor from practice as a lawyer, pending the penalty hearing. The order was deferred for seven days and took effect on 10 May 2023. Written reasons for the decisions were delivered on 8 May 2023¹.

[4] On 8 May, Mr O'Connor made an application to revoke the order, and at the same time he appealed the liability findings and the interim suspension order and sought a stay of the latter.

[5] The Standards Committee gave notice that it opposed the revocation of the interim suspension order.

[6] On 15 May, we conducted a (remote) hearing of the application under s 245(5) of the Lawyers and Conveyancers Act 2006 (the LCA). We refused the application and now give reasons for that refusal.

¹ An oral decision giving reasons for the Interim Suspension Order was delivered on 3 May.

Applicant's arguments

[7] Mr Paine submitted that Mr O'Connor posed no risk to the public because he was under "the competent supervision of his employer, Mana Law". Mana Law is effectively the sole practice, of Mr Paul Surridge. Mr Surridge has sworn an affidavit in support of Mr O'Connor. In that affidavit he confirms he is Mr O'Connor's employer and that Mr O'Connor worked part-time for him. Mr Surridge notes that he is "not computer literate" and that Mr O'Connor is. Mr Surridge has known Mr O'Connor for at least 10 years and confirms Mr O'Connor's own evidence that he does *pro bono* work as well as paid retainers. He also confirms that Mr O'Connor spends something like 70 per cent of his time on work for a body corporate, the statutory manager of which is Mr Gambitsis, who has also sworn an affidavit in support of the revocation application.

[8] Mr Surridge does not consider that the Tribunal's liability decision reflects the character of Mr O'Connor today.

[9] Importantly, Mr Surridge confirms that he is currently on "enforced leave", following a triple heart bypass operation at the end of March. He has apparently suffered complications and is on "(very restricted) work hours". He states that although he is unable to take on Mr O'Connor's files, he is able to supervise Mr O'Connor during his recuperation.

[10] Mr Paine advanced his submission that there is no risk to the public posed by Mr O'Connor, by stating "Mr O'Connor has nearly a decade in practise (sic) without complaints from clients, only by former friends who are clients".

[11] The second ground advanced by Mr Paine at the hearing was that the practitioner ought to be allowed to continue in practice, even in the face of what he conceded to be an "on the table" suspension following the penalty hearing, in order to complete his obligations to his clients and to the court. Mr Paine referred to "an appeal" in the Auckland District Court this week, but gave no further detail.

[12] It seems that Mr O'Connor has not managed to carry out the task of informing and assisting his clients to new lawyers in the seven days he was given before the

suspension order took effect. The suspension order was specifically deferred for these reasons.

[13] In support of this aspect of the application, there is the affidavit from Mr O'Connor himself and also the affidavit from Mr Gambitsis which confirms that, as court appointed administrator for a body corporate, there are a number of pieces of litigation involving the body corporate and another person who is described as a very difficult litigant and an opponent that many lawyers would wish to avoid. Mr Gambitsis affirms that the institutional knowledge held by Mr O'Connor is necessary in relation to these ongoing pieces of litigation. He does not set out the timeframe within which the "plethora of cases" are likely to be resolved.

[14] Mr Paine submitted that there had been no complaint about the quality of Mr O'Connor's technical legal work for clients. Such is not an accurate submission given the finding of serious negligence in the liability decision.

[15] Mr Paine submitted that it was a "question of pragmatism" in allowing Mr O'Connor to fulfil his obligations in a smooth and organised way rather than clients suddenly losing his services.

Standards Committee arguments

[16] Ms Pender pointed to the serious nature of the liability determination. She reminded the Tribunal that it made the order "based on its assessment of him in the hearing" which "showed him as not currently being a fit and proper person to practice".

[17] In her submissions, Ms Pender points to nine findings of the Tribunal that demonstrated Mr O'Connor's serious failures towards his clients. These included misusing client funds and treating them as his own, having a conflict of interest, without advising his client to obtain independent advice; failing to cooperate with the investigation and lying on oath to the Tribunal.

[18] Ms Pender referred the Tribunal to the decision in *Hart*.² We discuss this decision in the next section.

² *Hart v Auckland Standards Committee 1 of the New Zealand Law Society* [2012] NZAR 1085.

[19] In referring to the upcoming penalty hearing, Ms Pender told us that the Standards Committee would be seeking an order striking Mr O'Connor from the Roll and would "...rely on evidence of an aggravating nature relating to Mr O'Connor's background that is not currently before the Tribunal". We requested Ms Pender to elaborate on this particular submission and she advised us from the Bar that there were a considerable number of criminal convictions in Mr O'Connor's history, including for dishonesty and for the physical abuse and neglect of a three-year-old child.

[20] In support of this, Ms Pender has provided a criminal history list from the District Court. The criminal convictions report includes six names under which Mr O'Connor has apparently been known. We refer to convictions in July 2000 when there are four dishonesty convictions.³ The next convictions are in August of the same year and also evidence dishonesty (theft by failing to account and obtaining by false pretences). There is an earlier conviction, also in May 2000 for, again, use of a document for pecuniary advantage.

[21] The next set of convictions occurs on 5 July 2005 and comprises nine convictions for the use of a document for pecuniary advantage.

[22] In September 2006, Mr O'Connor was imprisoned for 18 months⁴ for three counts of assault on a child (and two other offences which were overturned on appeal). In June 2008, there was a further conviction (we understand arising out of the same circumstances as in 2006) whereby Mr O'Connor pleaded guilty to ill treatment or neglect of a child under 16 years.

[23] These convictions were disclosed to the New Zealand Law Society when Mr O'Connor sought admission to the Bar. He obtained support of senior members of the profession and in due course, admission was allowed, and a practising certificate granted.

³ Take/obtain/use document for pecuniary advantage, other false pretences (times two), theft of property (\$500 to \$5,000).

⁴ The original term was 6 years 9 months, but was modified after a retrial was ordered on the 2 other counts.

[24] What Mr O'Connor did not disclose was two previous bankruptcies. This emerged when he later sought permission to practise on his own account and, following advertisement, the bankruptcies were notified.

[25] Given the Tribunal's recent findings, Ms Pender considers that Mr O'Connor's criminal history ought to be revived and considered at the penalty hearing in due course.

[26] Ms Pender relies on the *Hart* decision as authority for the proposition that the discretion we are being asked to exercise ought to be "sparingly" exercised.

Relevant authorities

[27] In the decision of *Hart*, the practitioner had appealed the Tribunal's findings against him and its decision to strike him from the Roll. Mr Hart sought interim relief from the High Court in order that he could continue practising, pending the appeal being considered. In that way, although it followed a penalty hearing, it is closely analogous to the present situation.

[28] In that case also, the practitioner referred to the hardship to clients as justifying a stay of the suspension.⁵ His Honour Lang J acknowledged that there may be prejudice to existing clients and some disruption to court hearings.

[29] His Honour carefully analysed the rationale underlying section 244(3):⁶

The Act is protective in nature, in that two of its primary purposes are to maintain public confidence in the provision of legal services and to protect consumers of legal services. Once a properly constituted Tribunal has concluded that a person is not a fit and proper person to be a practitioner, the need to protect the public from that person becomes paramount. Parliament has sought to achieve that outcome by prohibiting such persons from practising law pending determination of any appeal against the Tribunal's order.

⁵ In the event of an order being made to strike off a practitioner, pending an appeal that order takes effect as an order for suspension. Section 244, LCA.

⁶ See above n 2 at [27].

[30] His Honour held that interim relief in the form of a stay of such suspension cannot be granted:⁷

...in circumstances where members of the public may be placed at risk. It follows that the Court will exercise the power to grant interim relief from suspension sparingly, and only in circumstances where it can be confident that any order it might make will not place members of the public at risk.

[31] His Honour went on to acknowledge the “significant hardship” for an appellant who is prevented from earning his or her livelihood but points out that Parliament must have been well aware of such an outcome:⁸

It clearly chose to introduce a regime designed to ensure that the community was protected notwithstanding the consequential hardship for an appellant and his or her clients.

[32] Mr Hart’s application was dismissed.

A discussion of relevant factors

[33] While accepting that Mr O’Connor’s clients, including his current *pro bono* clients and Mr Gambitsis, may have some difficulty in transitioning their matters to other lawyers, we consider that this inconvenience does not outweigh the risk to the public posed by the following factors:

1. The seriousness of the failures as found in the liability decision. These were connected with the use of client funds (in respect of which lawyers have clear and prescribed fiduciary duties and ethical obligations). The failures with respect to Mr Coles are exacerbated by the “robbing Peter to pay Paul” practice, as found in the liability decision, in that Mr O’Connor borrowed from another client to repay Mr Coles.

In his affidavit, Mr O’Connor states: “I do not owe any clients any money, nor would I ever borrow any money from a client. Similarly, I do not act for friends – current or historic”. This would seem to be entirely at odds with the findings in the liability decision,⁹ in that the discrepancy between the

⁷ See above n 2 at [28].

⁸ See above n 2 at [29].

⁹ *Wellington Standards Committee 2 v A O’Connor* [2023] NZLCDT 18 at [21] & [22].

transfers from Mr Coles' account and back into it left \$61.75 outstanding. In addition, there is a further \$22,251.39 of transactions from Mr Coles' accounts which have never been explained and remain outstanding. The Tribunal rejected Mr O'Connor's denials in relation to those sums and found that amount was never repaid to Mr Coles.¹⁰

2. The Tribunal made express findings about Mr O'Connor's lack of candour in his engagement with it and gave specific examples where it found he had lied under oath. As Ms Pender submits, "There is a risk that public confidence in the profession could be undermined if, despite these findings, the Tribunal permitted Mr O'Connor to continue acting as an officer of the Court".
3. The historical convictions for dishonesty offending lend considerable weight to the Tribunal's finding that Mr O'Connor is not a fit and proper person to practice.

Had Mr O'Connor not been found guilty of the misconduct described in these proceedings and had thoroughly reformed, it is likely that these convictions could have been left in the past. However, he appears to have done again what he has been convicted for in the past. It revives the relevance of the earlier convictions, in that a pattern has emerged. Although Mr O'Connor was given an opportunity to reform, he has failed to do so and, in doing so, abused the privileges of being a legal practitioner.

4. In addition, the Tribunal found negligent conduct towards another client which leads to concerns about his competence.
5. The Tribunal was struck by the manner in which Mr O'Connor conducted himself at and before the hearing:

- (a) He failed to be candid with the inspector. Omissions and lies were uncovered.

¹⁰ See above n 9 at [30].

- (b) Prior to the hearing, there was prevarication, delay and late filing of documents.
 - (c) Mr O'Connor made use of a medical certificate which, when amplified, gave explanations about his health which were the opposite description of those conveyed to the Tribunal by his counsel. This medical certificate was used to attempt to avoid appearing in person.
6. The penalty hearing is yet to take place, and it has been agreed that this ought to be heard as soon as possible in order that Mr O'Connor can then exercise his appeal rights. It is axiomatic in any case where serious misconduct is found to have involved the misuse of client funds and lack of accounting, that strike off will be the starting point. Ms Pender confirms in her submissions that the Standards Committee will be seeking strike off of this practitioner.
- That being the case, it is accepted by Mr Paine that a period of suspension will be "on the table" at least. Thus, the inconvenience to clients described will inevitably arise.
7. We are bound by the decision in *Hart* to exercise the relief from interim suspension "sparingly" and "only in circumstances not placing members of the public at risk". It is clear that hardship to the lawyer or clients did not override the paramount need to protect the public.¹¹

[34] We do not consider that the further evidence provided by Mr O'Connor in support of his application moves us in any way to depart from the determination on 3 May that he was not a fit and proper person to remain in practice. Indeed, the further information provided by Ms Pender only serves to strengthen the concerns about Mr O'Connor as a risk to the public.

¹¹ See above n 2 at [35].

Decision

[35] For all of the above reasons, we decline to grant the application to revoke or vary the interim suspension order. The order is affirmed.

DATED at AUCKLAND this 17th day of May 2023

D F Clarkson
Chairperson