

**NEW ZEALAND LAWYERS AND
CONVEYANCERS DISCIPLINARY TRIBUNAL**

[2023] NZLCDT 23

LCDT 018/22

IN THE MATTER

of the Lawyers and Conveyancers
Act 2006

BETWEEN

**AUCKLAND STANDARDS
COMMITTEE 2**

Applicant

AND

ROBERT JOHN BURTON

Respondent

CHAIR

Ms D Clarkson

MEMBERS OF TRIBUNAL

Mr S Hunter KC

Mr G McKenzie

Prof D Scott

Ms S Stuart

HEARING 5 April 2023

HELD AT Specialist Courts and Tribunals Centre, Auckland

DATE OF DECISION 26 May 2023

COUNSEL

Mr J Schwarcz for the Standards Committee

Mr A Gilchrist for the Respondent Practitioner

RESERVED DECISION OF TRIBUNAL ON PENALTY

Introduction

[1] Mr Burton has pleaded guilty to two charges of misconduct, the first relating to failure to comply with orders of the Standards Committee, and the second, failure to respond to enquiries or requests from the Standards Committee in a timely manner.

[2] Mr Burton has also accepted the facts underlying the charges so that the hearing and subsequent submissions concentrated on penalty only. This decision considers and determines penalty.

Background

[3] Mr Burton was the administrator and solicitor for an estate which was anticipated to have been wound up and finally distributed by October 2019. Following a complaint in December 2019 from one of the major beneficiaries (Ms L), the Standards Committee found Mr Burton guilty of unsatisfactory conduct and ordered that he distribute the estate within two months (the first order) and fined him \$5,000.

[4] When the first order was not complied with, a further complaint was made by Ms L and in January 2022, the Standards Committee made a second determination of unsatisfactory conduct (in failing to comply with the first order). The Committee ordered Mr Burton to complete the distribution of the estate by 7 February 2022 (second order) and pay a further fine of \$5,000.

[5] When Mr Burton failed to comply with the second order, the Committee opened an own motion investigation. In response to this, in April 2022, Mr Burton told the Committee of personal and professional stresses which had impinged on his ability to make the distribution ordered. He also noted that his dislike of Ms L had contributed to his unwillingness to make progress.

[6] The Standards Committee put in place a number of supports to assist Mr Burton in achieving the distribution, including appointing Mr Paul Collins to support Mr Burton with the process. Unfortunately, various attempts to connect with Mr Burton were to no avail and by the end of May 2022, Mr Collins had concluded that he was unable to advance the distribution of the estate. Three requests were made of Mr Burton:

1. To provide the name of three lawyers who could assist him in his practice;
2. To meet with the sub-committee of the Standards Committee; and
3. To engage with Mr Collins to advance the distribution of the estate.

[7] In total, 15 attempts were made to contact the practitioner.

[8] When Mr Burton failed to respond to any of these requests, the Committee referred the matter to the Tribunal in the form of the two charges referred to above.

[9] Finally, in December 2022, following the charges being laid, Mr Burton transferred the distribution of the estate to another practitioner. This was more than three years after the expected final distribution.

Penalty process

[10] In fixing a proportionate and appropriate penalty for the two established charges of misconduct, the Tribunal begins with an assessment of the seriousness of the misconduct itself.

[11] It then takes account of any aggravating factors or mitigating factors. The matter is then compared with similar penalties imposed on other practitioners in the past. Finally, the principles underlying penalty, including that of the least restrictive intervention and of the need for deterrence, both general and specific are applied, bearing in mind the purposes of the legislation, as outlined in s 3 of the Lawyers and Conveyancers Act 2006 (the LCA):

3 Purposes

- (1) The purposes of this Act are—

- (a) to maintain public confidence in the provision of legal services and conveyancing services:
- (b) to protect the consumers of legal services and conveyancing services:
- (c) to recognise the status of the legal profession and to establish the new profession of conveyancing practitioner...

Submissions of the Standards Committee

[12] The Standards Committee sought a two-month suspension of Mr Burton as an appropriate penalty for these charges and having regard to the various factors to be applied. Mr Schwarcz submitted that “non-compliance with disciplinary orders is generally a significant matter”, citing *Parlane*¹ and *Hart*.²

[13] Mr Schwarcz referred us to three cases where orders had been breached and suspension imposed as a consequence.³ In the *Hong* matter, on appeal a suspension of four months was imposed (reducing the Tribunal ordered suspension of 10 months). In *Kennelly*, two months suspension was imposed on a practitioner with a number of previous disciplinary findings against him. In *Name Supressed*, the practitioner was suspended for a period of four months following a finding of misconduct as a result of wilfully or recklessly disregarding a Section 147 Notice to produce documents.

[14] Mr Schwarcz submitted that it was an aggravating feature of the conduct that Mr Burton had repeatedly prevaricated and that his breaches were deliberate and purposeful.

[15] Mr Schwarcz pointed to the considerable efforts made by the Standards Committee to assist and engage with Mr Burton, noting his failure to engage.

¹ *Parlane v New Zealand Law Society* HC Hamilton 20 December 2010, Cooper J.

² *Hart v Auckland Standards Committee 1 of New Zealand Law Society* [2013] 3 NZLR 103.

³ *Hong v Auckland Standards Committee No 3* [2014] NZHC 2871; *Auckland Standards Committee 4 v Kennelly* [2022] NZLCDT 46; *Auckland Standards Committee 2 v Name Suppressed* [2018] NZLCDT 19.

[16] Mr Schwarcz also referred to Mr Burton's evidence that he worked 10-hour days and thus ought to have had sufficient time, had he chosen to give the distribution of the estate the priority it deserved.

[17] The Standards Committee advised the Tribunal of a previous disciplinary finding of unsatisfactory conduct against Mr Burton, in November 2022, in relation to the distribution of another estate. Of concern, that complaint was initiated by a beneficiary having failed to achieve response or action from Mr Burton over a two-and-a-half-year period.

[18] The Standards Committee accepts that this offending was effectively concurrent with the present matters.

[19] Finally, Mr Schwarcz pointed to the impact on the complainant. Although a number of apologies had been made by Mr Burton, these were not followed by action. Mr Burton's lack of engagement in these proceedings was also apparent. It required two directions from the Tribunal Chair to elicit a plea from Mr Burton, who did not engage counsel until the eleventh hour. Mr Burton did not appear to have an appreciation of the formality and seriousness of these proceedings.

Submissions of the practitioner

[20] On behalf of Mr Burton, Mr Gilchrist accepted that this had become a "mental block file". That, as well as the serious personal and medical issues with which Mr Burton has been grappling over the past few years, meant that he did not give it the priority it deserved.

[21] Mr Gilchrist submitted that there was no need for his client to be suspended, because he was not a risk to the public. There was no element of personal gain in the conduct. It is submitted that these charges have "...fully brought home....the issues around the management of his files and the need to change the way he practices".

[22] Further, as a sole practitioner, suspension will have a greater impact on his many longstanding and loyal clients. Mr Burton would have to bear the cost of a locum during any period of suspension.

[23] Medical evidence was adduced partly as explanation for Mr Burton's conduct and also as a mitigating factor. The evidence concerned both the practitioner and his wife. We were advised these issues have stabilised, and that Mr Burton has taken steps to reduce his workload.

[24] Mr Gilchrist submitted that both *Kennelly* and *Hong* were more serious than the present case. He urges us to apply the "least restrictive intervention" principle and stop short of suspending the practitioner.

Discussion of various factors

[25] In terms of seriousness, failing to engage with one's professional body and to promptly comply with any orders made by its disciplinary arms must always be treated seriously. Without respect and observance of the mechanisms to maintain professional standards, the system falls down. The consequence of failure to meet such actions or omissions with a significant response will reduce the level of public confidence in the legal profession.

[26] We do not propose to treat the previous unsatisfactory conduct finding as aggravating (having taken place contemporaneously with the present). But we are troubled that a pattern of behaviour may be emerging at the late stages of the career of this otherwise valuable and long-serving member of the profession. Mr Burton is 76 years old and has been in practice, (in a poorer socio-economic part of Auckland) for 52 years. He told us that he routinely had been working 10-12 hours a day, including at home in the evenings. Recently his long-term legal executive, on whom he relied considerably as a sole practitioner, died suddenly.

[27] Although he has occasionally referred files to other local colleagues, Mr Burton has obviously maintained an unrealistically high workload, a proportion of which is *pro bono*. With these matters in mind and having regard to Mr Burton's poor health even as recently as late last year, we explored with counsel at the hearing the possibility of some form of supervision of Mr Burton. The hearing was adjourned for inquiries to be made.

[28] We have subsequently been advised by counsel that Mr Burton has engaged the services of Mr Don Thomas. We have been provided with an affidavit from Mr Thomas setting out the specific arrangements for him to act as a locum during any period of suspension and thereafter to supervise Mr Burton's practice. He has already completed a review of it. Pending the completion of the penalty process, Mr Thomas has begun in the role of mentor and consultant.

[29] The Standards Committee has now agreed to Mr Thomas's proposed role, and the Tribunal endorses the arrangement.

[30] We take account of the mitigating factors of Mr Burton's poor physical health, and his commitment to the care of his wife during periods of her illness. We accept that at such times his focus moved away from his practice.

[31] We also consider he is entitled to considerable credit for his extraordinarily long and, until recently, unblemished career. It is clear from his evidence, and the reference from a long-term colleague, that he has made a huge contribution to his local community, rendering low fees, often *pro bono*, to many people who might otherwise be unable to access legal services.

[32] In terms of comparison with the *Kennelly*⁴ case, although Mr Burton's delay in carrying out instructions was longer, Mr Kennelly's disciplinary history and deliberate flouting of an order, demanded a stronger response.

[33] Mr Burton's willingness to be supervised by another practitioner, and his prompt attention to engaging Mr Thomas, also weigh in his favour. The arrangement ought to ensure that there will be no repetition of the procrastination which began this whole process, and thus is protective of the public.

[34] Even taking account of the "least restrictive intervention" principle, we consider that to maintain public confidence in the profession, and to deter other lawyers from thinking that orders of the Standards Committees can be treated lightly, a short period of suspension must be imposed. In doing so, we do not consider a fine is necessary

⁴ See above n 3.

and we take account of Mr Burton's modest financial circumstances in making costs orders.

Orders

1. Mr Burton is suspended from practice for a period of two calendar months, beginning at 5pm on 2 June 2023, pursuant to ss 242(1)(e) and 244 of the LCA.
2. At the conclusion of the period of suspension, under ss 156(j) and 156(l) of the LCA, Mr Burton is to make his practice available for inspection by Donald Bruce Thomas, Solicitor of Auckland, and to take advice from Donald Bruce Thomas in respect of the management of his practice for a period of no less than five hours a week for a period of six months from a date commencing one month after the date of this Order.
3. Mr Burton is formally Censured in the terms attached as Appendix 1.
4. Mr Burton is to pay the Standards Committee costs in the sum of \$29,818.55.
5. The New Zealand Law Society is to pay the Tribunal costs which are certified in the sum of \$3,136.00 (s 257, LCA)
6. Mr Burton is to pay to the New Zealand Law Society the s 257 costs above.

DATED at AUCKLAND this 26th day of May 2023

D F Clarkson
Chair

Censure

Mr Burton as a practitioner of 52 years standing, it is regrettable that this censure has to be administered. But it is necessary because you failed a member of the public, a beneficiary of the trust you were charged with administering. In doing so you also let yourself and your profession down. Timely attendance to professional duties is essential if lawyers are to maintain the public's confidence in them, to deal with important matters in the life of a client.

You are formally censured, this will form part of your professional record.