THE NAMES OF THE CLIENT, THE ESTATE, OTHER PERSONS CONNECTED WITH THE STANDARDS COMMITTEE CASE, PERSONAL MEDICAL AND FINANCIAL INFORMATION ABOUT THE RESPONDENT ARE NOT TO BE PUBLISHED. THESE ORDERS MADE PURSUANT TO S 240 LAWYERS AND CONVEYANCERS ACT 2006.

NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL

[2023] NZLCDT 50
LCDT 008/22

IN THE MATTER	of the Lawyers and Conveyancers Act 2006
BETWEEN	**AUCKLAND STANDARDS COMMITTEE 2** Applicant
AND	**PHILIP ANDREW SHEAT** Respondent

DEPUTY CHAIR
Dr J Adams

MEMBERS OF TRIBUNAL
Ms K King
Prof D Scott
Ms S Stuart
Ms N Taefi

HEARING 27 October 2023

HELD AT Specialist Courts and Tribunals Centre, Auckland

DATE OF DECISION 7 November 2023

COUNSEL
Mr M Mortimer-Wang for the Standards Committee
Mr H Waalkens KC and Ms S Beattie for the Respondent Practitioner

DECISION OF TRIBUNAL ON PENALTY

[1] Mr Sheat admits two charges of misconduct, one for inflating invoices and one for failing to send the invoices to his client. Over a period of 14 months, he generated five invoices that he later accepted were inflated by $19,500 excluding GST. He failed to send the invoices to his client and deducted his fees from a lump sum that had been retained in his trust account for that purpose. He had done work, but not to the value of his invoices. Although the lump sum had been retained for the purpose that was billed, he had no written authority to deduct the funds without alerting his client.

[2] The invoicing occurred between June 2018 and October 2019. Within the last month, Mr Sheat paid $19,500 to his late client's estate. He did not refund the GST component, suggesting it did not constitute a loss to his client. The Standards Committee has been unable to clarify that proposition.

[3] We must assess the gravity of the misconduct, adjust for aggravating and mitigating factors, and reach a proportionate outcome that addresses the purposes of the Lawyers and Conveyancers Act 2006 (LCA).

Gravity of the misconduct

[4] Mr Sheat admitted the misconduct as a "wilful" breach of Rule 9[1] which prohibits charging a fee that is not "fair and reasonable" having regard to the interests of both lawyer and client and the factors set out in Rule 9. The term "wilful" is the alternative to "reckless" in the s 7(1)(a)(ii)[2] definition of misconduct. Mr Mortimer-Wang submitted that Mr Sheat's admission of a "wilful" breach necessarily implied calculated dishonesty.

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[1] Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008.
[2] LCA.

[5] Elements of both calculation (or miscalculation) and dishonesty feature in Mr Sheat's misconduct but we do not find him guilty to the level imported by the harsh glare of the term "calculated dishonesty." His misconduct involved helping himself too liberally from his client's funds and doing so without his client's knowledge or authority. It involved over-reach and concealment.

[6] The retained sum was $56,000. The five invoices totalled $37,500 (excluding disbursements and GST). It follows from the extent of admitted overcharging that the combined invoices doubled a proper fee.

[7] There is nothing improper in the arrangement whereby Mr Sheat held funds against which to bill his work, but that arrangement necessarily places the client in a vulnerable position. The client is entitled, and obliged, to trust the solicitor to deal fairly with those funds. Overcharging breaches that trust. Subsequent failures to alert the client about the invoices and the serial, unauthorised transfers of funds to the lawyer capitalised on that vulnerability.

[8] The narrative character of these two charges builds from overcharging through to failure to account and, in combination, breach of the fundamental trust that clients should have in their solicitor who holds funds for which the solicitor must account. Concealment of invoicing enabled Mr Sheat to personally enrich himself from his client's funds. His client suffered loss. Because he was kept in the dark, the client could not complain about overcharging until, as happened in this case, he asked for his funds and found that only a few dollars over $2,500 remained.

[9] Mr Sheat cannot avoid the inference that he deliberately concealed his incremental depletion of his client's capital by withholding the invoices. We regard this as cynical and self-serving. As a seasoned lawyer, he knew he should account to his client. He had no authority to deduct his fees and simply helped himself. His later proposition that he had not wanted to bother an unwell client[3] does not square with the facts. He was unaware of his client's terminal condition until after the third invoice was generated. Mr Sheat's exculpatory observation is, at best, self-deceptive.

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[3] Agreed Summary of Facts at [26].

[10] We made a permanent order of non-publication in respect of Mr Sheat's personal financial circumstances. This does not prevent us from observing that the invoices relevant to this matter would have been obvious to him, a sole practitioner, in his monthly billing. He did not use time-costing, but we find that the repeated overcharging amounts, at best, to a significant blurring of his judgement in respect of this client.

[11] We find this course of misconduct to be grave. Any concealment of charging and unauthorised deduction of funds is serious; the concealment of overcharging adds to the gravity. We accept the submission that strike-off is engaged as a possible outcome.

[12] In *Twigley*,[4] where the practitioner was struck off, the Tribunal stated that "the integrity of the trust account and the duty of fidelity to the client has been breached on a number of occasions."[5] That comment pertains here even though this case has slightly lighter shades than *Twigley* where distinguishing features include that, in the present case, one client only is involved; and that the funds were invoiced for the purpose intended (albeit overcharged).

Aggravating and mitigating factors

[13] The actual loss to his client continued for more than four years, until about one month ago, when Mr Sheat finally paid the agreed overpayment to the client's estate. Oddly, he did not refund the GST portion on the overpaid fees, suggesting that the client had not suffered any loss of that portion. The client is deceased, and his estate has been unable to clarify the point for the Standards Committee. We fail to understand why Mr Sheat should determine that he should have the benefit of notional GST on the overcharged portion as against the overcharged client. We infer that his reparation has been grudging and minimalised.

[14] Mr Sheat has two prior disciplinary findings of unsatisfactory conduct at Standards Committee level, one of which pre-dated the current misconduct. In April 2017, he (and his firm) were found guilty of overcharging (a little over $137,000 rather

[4] *Wellington Standards Committee 2 v Twigley* [2016] NZLCDT 37.
[5] *Twigley* (above) at [89].

than a fair and reasonable fee of $90,000[6]). This adverse finding was the year before the first invoices in the present case.

[15] In mitigation, Mr Sheat has provided a number of character references and his own Curriculum Vitae. Mr Sheat has been a lawyer for more than 40 years. He has contributed to his profession by serving on Auckland District Law Society committees, giving seminars, and serving at Citizens Advice Bureau. He has been an active member of service clubs which included activities related to overseeing Youth Leadership Awards.

[16] Mr Sheat's referees have regarded him as a sound practitioner, sound in judgement and diligent in practice. They were surprised to learn of these charges. His relationships with them are reflected by their common concern for his wellbeing and his future. We accept that he has enjoyed a sound professional reputation. That reputation is necessarily dinted, although not completely lost, by the agreed facts in this matter.

[17] In reviewing his circumstances, we note Mr Sheat has suffered adversely by flood damage that caused his home to be red-stickered. Inevitably, this has added to his stresses over recent times.

[18] Mr Sheat has undertaken a Trust Account Supervisor course. This was by order of the Standards Committee.

What is an appropriate penalty response?

[19] Mr Sheat's conduct in this case is well short of the worst behaviour we see. It is not in the same band as those, like *Nguy,*[7] who misappropriate large sums from their trust accounts. In our view it is less grave than that in *Twigley* for the reasons noted above.

[20] In 2021, he was found in breach of trust accounting regulations. Because it post-dated the facts in this case, it cannot count as an aggravating factor, but it adds materially to our assessment of his fitness to practise safely, having regard to our duty

[6] Both sums include GST.
[7] *Auckland Standards Committee 2 v Nguy* [2021] NZLCDT 26.

to consider the welfare of consumers. Combined with his lack of time recording, his inattention to financial management of his trust account, and his failure to notice the gross overcharging in this case, exacerbated by his omission to inform his client about these essential facts, amount to a concerning laxity in behaviours that should be scrupulously observed so that clients can repose confidence in the lawyer.

[21] Mr Waalkens submitted that the conduct is not as serious as that in *Choi,*[8] where the practitioner was suspended from practice for six months, having created false documentation. We do not see that case as being on a similar continuum and, in any case, in *Choi* the practitioner's conduct was not undertaken for personal enrichment at the client's expense.

[22] Mr Mortimer-Wang observed in his penalty submissions[9] that "the active issue for penalty is whether it is appropriate to step back from strike-off and, if so, how far." One of our fundamental guides is to impose the least restrictive penalty orders. Another is to address the purposes of the Act by maintaining public confidence in the provision of legal services and to protect consumers.[10]

[23] We do not shrink from the finding that the shortcomings of candour and disinterestedness revealed by Mr Sheat's misconduct require suspension, if not strike-off. The proposition of monetary penalty advanced in the written submissions for Mr Sheat are quite inadequate to address the seriousness of the overall default and inattention to the interests of his client. They would be inadequate in terms of deterrence and in terms of the relative gravity of the misconduct.

[24] Given the combination of these charges and other stressors such as his red-stickered home, Mr Sheat has felt understandably somewhat low about these matters, but he has wisely not sought name suppression. We have made a non-publication order in respect of medical material provided. He is aware he will have to shoulder the burden of the orders we make. He would dearly like to continue practice.

[25] Mr Sheat appears to have practised soundly for most of four decades. Broadly, across the past eight years or so, there are signs of wear, that attention to detail has

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[8] *Auckland Standards Committee 1 v Choi* [2021] NZLCDT 20.
[9] 5 October 2023 at [21].
[10] Section 3, LCA.

not been sharp enough to be safe. Our concern for any future clients is not so much around technical legal issues but the risk of inattention to the detailed burdens of running a practice – from billing and accounting minutiae on – to their potential detriment.

[26] Looking at this matter in overview, we find it possible to achieve a proportionate outcome short of strike-off. However, we find it will be a necessary part of the penalty orders that Mr Sheat shall not be able to practise on his own account without our prior authorisation. In Mr Sheat's case, given his stage of life and the findings we have made, that will probably mean he will never practice again as a principal because our concern is that there needs to be oversight of his billing and trust accounting practices by an independent superior – in other words, an employer.

[27] Had we failed to consider an order that he not practise on his own account, we would have imposed a term of suspension from practice of at least 18 months. That would probably have meant the end of his legal career. We have considered, among other things, our duty to think of rehabilitation.

[28] The imposition of an order that he not practise on his own account, itself a significant order, opens the opportunity to configure our penalty orders differently. The restrictive order will be an ongoing order (unless it is later revoked which, in these circumstances, we think unlikely). Its effect adds to whatever period of suspension we impose.

[29] What period of suspension should we impose in those circumstances? It must fit the individual circumstances of this case: the characteristics of the misconduct; the lapse of fidelity to the client's right to be informed; the practitioner's own stage of life and salient characteristics.

[30] The misconduct, as we keep repeating, is serious. Misconducting oneself in relation to moneys in the trust account is always grave. These few grey tinges in this case do not relieve the misconduct to a level where gentle measures can suffice. The orders must mark our disapprobation sufficiently to satisfy the public (and right-thinking members of the profession – which includes most of them) and to deter those who may be tempted.

[31] We have formed a view that Mr Sheat, while remorseful to some extent, still harbours some sense that he was entitled to the fees. We think there is need for him to be required to reflect on his conduct, not only in what he admitted, but his sluggish move to rectify what he had done wrong. It is good that this matter was settled, involving the reshaping of the Standards Committee case but that came late in the piece. No payment was made to the wronged client (now an estate) until shortly before this hearing.

[32] Suspension carries with it the implication, correct in this case, that the misconduct is such that it brings into question the practitioners' fitness to practice. But suspension, because it is finite, implies that the heavy shadow can be lifted, after the term of the order. If we impose an additional order, preventing Mr Sheat from practising on his own account, part of that shadow will not lift. The combination ff the two orders is a significant and sombre penalty.

[33] Mr Waalkens, who appeared in *Choi*, submits that is a more serious case. We disagree. Nonetheless, we reckon that a suspension from practice of 6 months in this case (similar period to *Choi)* coupled with an order not to practise on his own account, along with other orders, will be a sufficient penalty response in this case.

[34] Although the Standards Committee has no sound base upon which to demonstrate that the estate lost money because of the GST on the overcharged fees, we cannot accept a starting point that Mr Sheat should be entitled to retain the GST component on fees he has presumably written off as overcharged. The client and his estate have been put to trouble and have been without the use of their funds for more than four years. We shall impose a compensatory order in favour of the client (estate) in the sum of $6,525 which shall bear interest, as set out in the order. The principal sum is comprised of notional GST of $2,925, and notional interest plus compensation for inconvenience $3,600.

Orders:

[35] We make the following Orders:

1. Mr Sheat is censured in the following terms (s 156(1)(b) and 242(1)(a) LCA):

   You have admitted misconduct by overcharging a client over several months and deducting fees without sending the invoices to the client. This misconduct brings the profession into disrepute. It showed a lack of care for our client whose interests you sacrificed to your own pecuniary advantage. It is more than a technical lapse, it is fundamental that a lawyer must keep their client informed of all relevant matters, not least of which is the management by the lawyer of the client's own money. You are censured accordingly.

2. Mr Sheat is suspended from practice as a barrister and solicitor for six months commencing on 4 December 2023 (ss 242(1)(e) and 244 LCA).

3. Mr Sheat is prohibited from practising on his own account, whether in partnership or otherwise, until authorised by the Disciplinary Committee to do so (s 242(1)(g) LCA).

4. Mr Sheat shall pay the client $6,525 in compensation, together with interest on that sum calculated from 1 December 2023, until payment, calculated in accordance with https://www.justice.govt.nz/fines/civil-debt-interest-calculator/ (ss 156(1)(d) and 242(1)(a) LCA).

5. Mr Sheat is ordered to pay the Standards Committee costs of $28,896.20 (s 249 LCA).

6. The New Zealand Law Society shall pay the Tribunal costs which are certified in the sum of $2,145 (s 257 LCA).

7. Mr Sheat is to reimburse the New Zealand Law Society for the full Tribunal costs in the sum of $2,145 (s 249 LCA).

8. The names of the client, the estate, other persons connected with the Standards Committee case are not to be published (s 240 LCA).

9. The personal medical and financial information about Mr Sheat is not to be published (s 240 LCA).

DATED at AUCKLAND this 7th day of November 2023

Dr J G Adams
Deputy Chair