

**ORDER FOR INTERIM SUPPRESSION OF NAME PURSUANT TO S 240 OF THE
LAWYERS AND CONVEYANCERS ACT 2006.**

**NEW ZEALAND LAWYERS AND
CONVEYANCERS DISCIPLINARY TRIBUNAL**

[2023] NZLCDT 6

LCDT 010/22

IN THE MATTER

of the Lawyers and Conveyancers
Act 2006

BETWEEN

**WELLINGTON STANDARDS
COMMITTEE 1**

Applicant

AND

MR V

Practitioner

CHAIR

Ms D Clarkson

MEMBERS OF TRIBUNAL

Ms M Noble

Ms G Phipps

Mr K Raureti

Ms L Taylor

HEARING 31 January 2023

HELD AT Tribunals Unit, Wellington

DATE OF FINAL SUBMISSIONS 24 February 2023

DATE OF DECISION 21 March 2023

COUNSEL

Mr R Moon for the Standards Committee

Mr J Morrison for the Practitioner

DECISION OF THE TRIBUNAL ON LIABILITY

Introduction

[1] Between 2019 and 2021, in the final years of his practice, Mr V, a very experienced lawyer, issued seven invoices which were inaccurate and, on the harshest assessment, “false and misleading”.

[2] Mr V concedes that he was, at best, thoughtless and sloppy when issuing the various invoices. He says this ought to be seen by the Tribunal as “unsatisfactory conduct”.

[3] The Standards Committee submits the conduct to be much more serious and asks for a finding on one of the alternative charges of “misconduct” or “negligence”.

Issues

[4] The issues which must be determined are:

1. Were the (admitted) defects in the invoices, and manner in which they were issued, so serious as to constitute either:
 - (a) a wilful or reckless breach of the rules?,¹ or
 - (b) conduct which lawyers of good standing would regard as disgraceful and dishonourable?²
2. If not, did the conduct amount to negligence or incompetence of such a degree or frequency as to reflect on Mr V’s fitness to practise or bring the profession into disrepute?³

¹ Section 7(1)(a)(ii) Lawyers and Conveyancers Act 2006.

² Section 7(1)(a)(i) Lawyers and Conveyancers Act 2006.

³ Section 241.

3. If not, is the practitioner's acceptance of unsatisfactory conduct an accurate reflection of the level of liability?⁴

Background and nature of the invoices under scrutiny

[5] Mr V has been a lawyer for 45 years, practising mainly in small centres either as a sole practitioner or in a firm with two to three partners.

[6] He is a practitioner who has worked hard and also served his local community providing *pro bono* assistance for a number of community organisations in the course of his career.

[7] He described to us how his working life changed in early 2019 when, his personal assistant and secretary retired and although a senior partner in the firm he was told she would not be replaced. The practitioner was expected to complete his own correspondence and documentation; he found this a struggle. He began to feel professionally isolated and alone and began to work quite a lot from home.

[8] It was Mr V's understanding that he could bill for his time working from home separately from firm work but he did not describe how he reached this understanding. He described himself as being not nearly as active as he had been in previous years.

[9] The invoices in question can be placed in three categories:

- (a) The first category, an invoice to the JM Estate, represented work which the practitioner had intended to do on a *pro bono* basis. The client objected and so Mr V told them to make a donation to a nominated charity in lieu of payment. However, the client requested an invoice for this \$600 donation and, foolishly, without thinking the matter through, Mr V complied. He simply used a Word precedent on his home computer, he says, without recognising the potential ramifications for this being in the name of his firm (including their GST number).

⁴ Section 12 Lawyers and Conveyancers Act 2006.

- (b) The second category of invoice was the only one where Mr V expected to be paid, and was for work carried out by him in his personal time. The amount was agreed and invoiced to the client. However, again, unthinkingly, he invoiced it in the firm's name although retained the payment himself. The full amounts represented by these two categories of invoices have been refunded by Mr V to the firm.
- (c) The third category of invoices involved much more significant work carried out by the practitioner in relation to a subdivision. The situation was a somewhat complicated one where, in order to assist one of his sons, Mr V agreed that as part of the son's input to the project,⁵ he would carry out the legal work without cost to the project, other than for disbursements. However, the accountant who was also assisting in managing this project for very old clients and friends of the practitioner, asked Mr V to provide invoices so that the work could be properly recognised, for transparency purposes.

[10] The son was to receive one of the sections in the subdivision. The arrangement was that the son would pay the market value for his section but this amount would later be abated by the market value cost of his own work and of his father's legal work. Mr V explained that his motivation in doing this work was to advance the interests of his son and that this was his desired form of payment. He also saw the arrangement as the best means of achieving the net profit outcome for the owners of the (unsubdivided) property, who were old clients and friends.⁶

[11] After preparing the invoices, Mr V provided these to the accountant. He said that the invoices were provided on the basis that there was never any intention they be actually paid and therefore he did not consider any ramifications of having issued the invoices, including whether GST might be claimable.⁷ Unfortunately, there was no covering email or other written documents which confirm the non-payment expectation.

⁵ The son also had other professional qualifications which contributed to the benefit of the project.

⁶ Mr V's evidence was that earlier assessments of the sale value of the property, without this subdivision, did not meet the owner's expectations or hopes.

⁷ GST was initially claimed although reversed later once the accountant was made aware that the invoice was not in fact paid.

[12] Although no benefit was received directly by the practitioner for his legal work, there was of course a benefit in his actions that accrued to his son's credit and that was to the practitioner's benefit in that it was his preferred form of payment.

[13] The Standards Committee point to the significant lack of care involved in the various steps taken by Mr V and draw attention to his knowledge and experience of his firm's billing practices, given his many years in practice specialising in this exact field. The Standards Committee also draw attention to Mr V's knowledge of the material inaccuracies in the invoices at the time they were sent (the "donation" invoice would seem a particularly clear example of this).

[14] The Standards Committee also point to the fact that the firm's email account was used to send the invoices and that there was no covering correspondence to explain the true position of the invoices to the recipients.

It is the Standards Committee's submission that looking at these three categories of invoices overall, the practitioner has committed a reckless breach of the rules or at the very least, negligence to a degree which would bring the profession into disrepute. In relation to the five invoices in the third category, as soon as the implications were raised with Mr V, he ensured that the accountant supervising the project was apprised of their true nature, that is that they were not intended to be paid but simply to go to his son's credit.

Discussion of liability levels

Issue 1

[15] "Misconduct" is defined under several heads. Two are pleaded in this case.⁸

[16] Section 7(1)(a)(i) comprises a class of misconduct measured against whether lawyers of good standing would reasonably regard it as disgraceful or dishonourable. This has been a matter of significant consideration by Tribunal members. The case was put to us on the basis that intent had to be proved. The sending of what were fictitious invoices and including GST is a serious matter. On balance having regard to the circumstances of this case, we did not feel that particular part of the charge

⁸ Section 7(1)(a)(i) and (ii) Lawyers and Conveyancers Act 2006.

was made out. The conduct was deceptive but the practitioner did not profit and there was no ill intent in rendering the invoice for a charitable donation. The invoice on firm letterhead was for actual work done but billed in the wrong way and by the wrong entity. The invoicing for the subdivision work was a poorly thought through strategy which was not without downstream implications. Mr V spoke often of relying on the advice of the project's accountant in formulating his strategies but, with respect, this does not replace the requirement that he meet his own professional obligations. However on balance and consistent with case law, we consider this subsection is more usefully applied where there is some moral opprobrium involved or conduct at the very serious end of the scale.

[17] A useful summary of the authorities and principles on “misconduct” is contained in the decision of this Tribunal in *O’Boyle*:⁹

[82] ... In New Zealand, in a case regarding a valuer, “Eichelbaum CJ reviewed the concept of professional misconduct generally and noted that across all professions the key element is whether the practitioner's conduct has shown some degree of unfitness to practise.”

[83] Considering the term “misconduct,” Webb et al observe:

“The words ‘disgraceful’ and ‘dishonourable’ add little (other than colour) to the term ‘misconduct.’ They do, perhaps, signal a degree of seriousness that the word itself, on a dictionary definition, would not convey. However, it is clear that misconduct is a very serious professional wrongdoing. This is, of course, confirmed by the contradistinction with unsatisfactory conduct, which (at the higher end) can itself be serious, but clearly not of a degree to reflect on fitness to practise.”

[84] In the Australian case of *Pillai v Messiter*, Kirby J observed:

“... but the statutory test is not met by mere professional incompetence or by deficiencies in the practice of the profession. Something more is required. It includes a deliberate departure from accepted standards or such serious negligence as, although not deliberate, to portray indifference and an abuse of the privileges which accompany registration as a medical practitioner.”

[85] Kirby J's dicta was adopted by the New Zealand Court of Appeal in *Complaints Committee No 1 of the Auckland District Law Society v C* where it was held that intentionality is not a necessary ingredient of misconduct. The Court stated:

⁹ *Auckland Standards Committee 4 v O’Boyle* [2021] NZLCDT 15.

“While intentional wrongdoing by a practitioner may well be sufficient to constitute professional misconduct, it is not a necessary ingredient of such conduct. The authorities referred to above (and referred to in the Tribunal decision) demonstrate that a range of conduct may amount to professional misconduct, from actual dishonesty through to serious negligence of a type that evidences an indifference to and an abuse of the privileges which accompany registration as a legal practitioner.”

[86] ...

[87] The s 7(1)(a)(i) test for misconduct is therefore apt for conduct that evidences an indifference to or abuse of the privileges of the practitioner. As Muir J notes, that does not mean a finding of misconduct will necessarily suggest strike-off, but it denotes a serious failing that surpasses mere unsatisfactory conduct. It will be more than mere negligence.

[Footnotes omitted]

[18] The second limb of s 7(1)(a) pleaded is of intentional or reckless contravention of the rules. This subsection has been considered in a number of previous cases as has the overarching view of the level of professional failure required to reach the standard of misconduct.

[19] Once again, the *O’Boyle* decision is of assistance in considering this subsection:

[88] The s 7(1)(a)(ii) test depends on a contravention of the rules. The contravention must be wilful or reckless. The term “wilful” denotes, among other meanings: “determined to take one’s own way; obstinately self-willed or perverse; done on purpose or wittingly; purposed, deliberate, intentional; not accidental or casual.” “Reckless” denotes, among other meanings, “careless, heedless; careless in respect of one’s actions; lacking in prudence or caution; careless in respect of some duty or task, negligent, inattentive; characterised or distinguished by (negligent carelessness or) heedless rashness.” Either adjective, “wilful” or “reckless,” intensifies the rule contravention required to bring the conduct up to “misconduct”.

[89] Mr Williams, in his opening written submissions referred to an Australian case in which an approach to wilfulness or recklessness is addressed in these terms: “[I]t will be enough if the solicitor ... is shown to have been aware of the possibility of what he was doing ... might be a contravention and then to have proceeded with reckless indifference as to whether it was or not.”

[Footnotes omitted]

[20] Mr V only intended that one, of all the invoices under scrutiny, be paid for services rendered by him and that his son would in effect receive the benefit of his

work as represented in the subdivision invoices. Having regard to Mr V's oft repeated statements that he was not a competent user of technology, and had recourse to the invoice precedent available to him on his system at home, namely the firm's invoice, we do not consider that his failings can be said to have reached the standard of recklessness or wilfulness discussed in the above authorities. His actions were more of the nature of careless ineptitude in Mr V not knowing how to use his firm's systems, not taking action to ensure that he was doing the work correctly himself or taking steps to ensure that he had administrative support he needed.

[21] There was, in our view, no ill-founded intent to circumvent or ignore his professional duties.

[22] We contrast our view of Mr V's conduct with the *Duff* decision,¹⁰ where the Tribunal found deliberate intention to avoid payment of GST rather than an "honest mistake" as was urged by the practitioner. None of the factors which we found to be compelling in reaching that finding are present in this case.

[23] Thus, we find that misconduct has not been proved to the standard required (balance of probabilities) by the Standards Committee. We turn now to consider whether his conduct established negligence as defined in s 241.

Negligence or Unsatisfactory Conduct? - Issues 2 and 3

[24] Section 241 includes negligence as:¹¹

241 Charges that may be brought before Disciplinary Tribunal

If the Disciplinary Tribunal, after hearing any charge against a person who is a practitioner or former practitioner or an employee or former employee of a practitioner or incorporated firm, is satisfied that it has been proved on the balance of probabilities that the person—...

- (c) has been guilty of negligence or incompetence in his or her professional capacity, and that the negligence or incompetence has been of such a degree or so frequent as to reflect on his or her fitness to practise or as to bring his or her profession into disrepute

¹⁰ *Otago Standards Committee v Duff* [2021] NZLCDT 25, at [37]–[51].

¹¹ Section 241 Lawyers and Conveyancers Act 2006 (LCA).

it may, if it thinks fit, make any 1 or more of the orders authorised by section 242.

[25] The High Court held in *Complaints Committee of the Canterbury District Law Society v W*¹² that:

... negligence must be of a degree: that tends to affect the good reputation and standing of the legal profession generally in the eyes of reasonable and responsible members of the public. Members of the public would regard the actions as below the standards required of a law practitioner, and to be accepted as such by responsible members of the profession. It is behaviour or actions which, if known by the public generally, would lead them to think or conclude that the law profession should not condone it, or find it to be acceptable. Acceptance by the profession that such negligence is acceptable would tend to lower the standing and reputation of the profession in the eyes of the general public.

[26] This approach was upheld on appeal.

[27] We consider that a reasonable member of the public, informed of the casual or thoughtless manner in which Mr V prepared and sent these invoices, especially when there was GST involved, without proper regard to their consequences, would consider the behaviour not only reprehensible and unacceptable but also a matter which ought to be properly sanctioned by his professional body. The standing of the profession would be lowered in the public mind were such not to occur.

[28] We consider that the number of invoices involved and the period of time over which they were issued, considered in the light of this lawyer's lengthy experience, and expertise in commercial and trust law, takes this conduct considerably beyond a straight breach of the rules or "unprofessional conduct", and into the level of negligence such as to bring the profession into disrepute. The rendering of an invoice, requires care and propriety from the person who has taken responsibility for the task and that was lacking in each instance.

[29] Having reached that view, we do not consider that a finding of unsatisfactory conduct, as urged by counsel for Mr V, is a proper reflection of the level of failure or professional deficit in this matter when the matter is considered in relation to other cases.

¹² *Complaints Committee of the Canterbury District Law Society v W* [2009] 1 NZLR 514, 533.

Determination

[30] We find the Standards Committee has established negligence as defined in s 241(c).

Directions

1. The Standards Committee is to file submissions on penalty within 21 days of the date of this decision.
2. The practitioner may have a further 21 days to file submissions in response.
3. Counsel are to consult with the Tribunal case manager as to whether a penalty hearing can be convened remotely or whether counsel seek a hearing in person.

DATED at AUCKLAND this 21st day of March 2023

DF Clarkson
Chairperson