IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV 2018-404-000533
[2019] NZHC 619

BETWEEN	RONALD BRUCE JOHNSON Appellant
AND	CANTERBURY/WESTLAND STANDARDS COMMITTEE 3 Respondent

Hearing:	29 August 2018
Appearances:	P J Napier & N Pye for Appellant S Waalkens & M Mortimer for Respondent
Judgment:	28 March 2019

JUDGMENT OF VAN BOHEMEN J

This judgment was delivered by me on 28 March 2019 at 2.30pm
Pursuant to Rule 11.5 of the High Court Rules

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Registrar/Deputy Registrar

Solicitors:
Keegan Alexander, Auckland
Meredith Connell, Auckland

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Introduction

[1] Ronald Bruce Johnson has appealed two decisions of the New Zealand Lawyers and Conveyancers Disciplinary Tribunal in which the Tribunal:[1]

(a) Found Mr Johnson guilty of:

(i) Negligence in his professional capacity of such a degree as to bring the profession into disrepute; and

(ii) Two counts of misconduct relating to reckless breaches of the Lawyers and Conveyancers Act (Trust Account) Regulations 2008 (Trust Account Regulations) in one case, and wilful and reckless breach of the Trust Account Regulations in the other; and

(b) Censured Mr Johnson, suspended him from practice as a barrister and solicitor for a period of three months, and ordered that he pay costs.

[2] Mr Johnson says the Tribunal erred:

(a) In finding that he was guilty of high end negligence;

(b) In assessing the two sets of breaches of the Trust Account Regulations as constituting misconduct;

(c) In ordering that he be suspended from practice as a barrister and solicitor for a period of three months.

Relevant background

[3] The Hunt Family Trust (Trust) was established by deed on 1 July 2009. The Settlor was Mrs Ingalavoa Margaret Hunt, a Samoan woman in her mid-70s at the time of the Trust's establishment. Mrs Hunt, who has since died, had a limited command

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[1] *Canterbury / Westland Standards Committee 3 v Johnson* [2018] NZLCDT 5, *Canterbury / Westland Standards Committee 3 v Johnson* [2018] NZLCDT 21.

of English. The Discretionary Beneficiaries were Mrs Hunt, the Final Beneficiaries, and any issue of the Final Beneficiaries. The Final Beneficiaries were Mrs Hunt's four children: Deborah Cecilia Holtom, Maurice Peter Hunt, Matthew Neil Hunt (also known as Matthew Perrott-Hunt), and Hans Andrew Hunt.

[4] The trustees were Mrs Hunt, Mrs Holtom, and Ed Johnston & Co Trustees Ltd, a trustee company established by Mr Edward (Ed) Johnston, the Hunt family's solicitor who advised the family on the establishment of the Trust.

[5] Although the Trust Deed did not specify that the Trust had any particular purpose, the evidence of the Hunt family members was that the purpose was to provide a source of funds to enable Mrs Hunt to travel to Samoa and Australia to visit family. At the Trust's establishment, the trustees' intention was to transfer to the Trust an unencumbered property at 17 Home Street, Grey Lynn (the Grey Lynn property) that was owned by Mrs Hunt and was her residence.

[6] Neither Mrs Holtom nor Mrs Hunt went to Mr Ed Johnston's offices to sign the Trust Deed; the evidence suggests they may have sighted and signed only the signature page brought to them by Mr Maurice Hunt, who had an established relationship with Mr Ed Johnston.

[7] On 2 September 2009, Mr Ed Johnston asked Mr Johnson, then a salaried partner in a law firm in West Auckland, to act for Trust in relation to the purchase of 31 Edwin Freeman Place, a property in Ranui (the Ranui property).

[8] The referral was made by email sent at 3.59pm on 2 September 2009 by Mr Ed Johnston's assistant to Mr Johnson. The email stated:

> I would be pleased if you would act for "The Hunt Family Trust" in relation to the purchase of 31 Edwin Freeman Place.
>
> I confirm the agreement is not binding on your client until you are happy with the content of the agreement.

[9] Attached to the email was a copy of the agreement for sale and purchase for the Ranui property and a copy of the trust deed for the Trust. Although the email did not state the reason for the referral, Mr Johnson was aware that Mr Ed Johnston had a

conflict of interest because Mr Ed Johnston was the owner and vendor of the Ranui property, and Mr Ed Johnston's Trustee company was a trustee of the Trust, as was apparent from the documents sent with the email.

[10] The agreement for sale and purchase stated that the purchase price for the Ranui property was $300,000 and that the agreement was subject to finance being obtained by the purchaser at the purchaser's lending institution of choice in an amount required by the purchaser to complete the purchase.

[11] Later the same day, 2 September 2009, four members of the Hunt family – Mrs Hunt, Mrs Holtom, Mr Perrott-Hunt and Mr Maurice Hunt – called on Mr Johnson. The meeting between the family members and Mr Johnson lasted approximately 20 minutes.

[12] Mrs Holtom and the other family members say they had expected Mr Ed Johnston to be at the meeting and were surprised he was not there. Mrs Hunt had expected that Mr Ed Johnston, whom she had not met during the establishment of the Trust, would explain the nature of the Trust to her and the other family members. Mrs Holtom expressed surprise at the proposed purchase of the Ranui property which she said she had not known of before the meeting. However, after expressing her discomfort at the proposed purchase, Mrs Holtom played no further part in the meeting. It appears Mrs Hunt did not speak at the meeting.

[13] There is a conflict in the evidence over whether the agreement for sale and purchase had already been signed before the meeting, as Mr Johnson said, or whether it was signed at the meeting, as Ms Holtom and Mr Perrott Hunt said. The Tribunal held that it was unable to resolve this conflict but did not consider it necessary to do so. In any event, it is not in dispute that by the end of the meeting the agreement was signed – by Mrs Hunt and Mrs Holtom, whose signatures as trustees were necessary, and also by Mr Maurice Hunt and Mr Perrott-Hunt.

[14] On 24 September 2009, the ASB Bank wrote to Mr Johnson to confirm that the bank had agreed to provide finance of $400,000 to be secured by first mortgages over the Ranui property and over the Grey Lynn property.

[15] No independent valuation of the Ranui property was obtained but the evidence was that the property's rateable value at the time was $297,000, that is $3,000 less than the purchase price.

[16] The Ranui property was sold by the Trust in January 2011 for $300,000, that is, the same price paid by the Trust for its purchase.

Complaint to Law Society and Law Society investigations

[17] In March 2015, Mr Perrott-Hunt complained to the New Zealand Law Society about Mr Johnson's role in relation to a number of transactions entered into by the Trust on the advice of Mr Ed Johnston who by then had been struck off the roll of Barristers and Solicitors. Mr Perrott-Hunt said that Mr Ed Johnston had used the Trust as a vehicle to further his own interests at the expense of the trustees and of Mrs Hunt as settlor of the Trust, and that in his view Mr Johnson had facilitated this or was reckless to the truth of Mr Ed Johnston's conduct. Mr Perrott-Hunt did not identify the initial purchase of the Ranui property as one of the transactions that formed the basis of the complaint.

[18] On 2 July 2015, the Law Society appointed Mr Graham Bentley to investigate Mr Perrott-Hunt's complaint. In his report dated 20 January 2016, Mr Bentley said that, considering that Mr Johnson was aware of Mr Ed Johnston's ownership of the Ranui property, the transaction for the Trust's acquisition of the property should have been scrutinised as to price and financial viability and that Mr Johnson may have breached Rule 6 of the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (Conduct and Client Care Rules).

[19] Between 18 February 2016 and 10 March 2016, Mr King Yiu Michael Koo, an Inspector of the Law Society Inspectorate, undertook a general review of the trust account of Mr Johnson who by this stage had established his own law firm, Central Park Legal Ltd. In his report, Mr Koo said he found significant areas of non-compliance with the Lawyers and Conveyancers Act and the Trust Account Regulations.

Charges against Mr Johnson

[20] On 23 March 2017, the Canterbury Westland Standards Committee No 3 of the Law Society brought three charges against Mr Johnson:

> Charge 1:
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> Misconduct within the meaning of s 7(1)(a)(ii) of the Lawyers and Conveyancers Act in that Mr Johnson wilfully or recklessly contravened r 3 of the Conduct and Client Rules when giving advice to the trustees of the Trust about the purchase of the Ranui property.
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> Or alternatively, negligence or incompetence in Mr Johnson's professional capacity, and that negligence or incompetence was of such a degree or so frequent as to reflect on his fitness to practise or as to bring the profession into disrepute under s 241(c) of the Lawyers and Conveyancers Act.
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> Or alternatively, unsatisfactory conduct within the meaning of ss 12(a) or 12(c) of the Lawyers and Conveyancers Act.
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> Charge 2:
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> Misconduct within the meaning of s 7(1)(a)(ii) of the Lawyers and Conveyancers Act in that Mr Johnson wilfully or recklessly contravened rr 11(1), 11(2), 11(3)(b), 12(6), 12(7) and 17 of the Trust Account Regulations in his operation of the trust account of Central Park Legal.
>
> Or alternatively, negligence or incompetence in Mr Johnson's professional capacity, and that negligence or incompetence was of such a degree or so frequent as to reflect on his fitness to practise or as to bring the profession into disrepute under s 241(c) of the Lawyers and Conveyancers Act.
>
> Or alternatively, unsatisfactory conduct within the meaning of s 12(c) of the Lawyers and Conveyancers Act.

Charge 3:

Misconduct within the meaning of s 7(1)(a)(ii) of the Lawyers and Conveyancers Act in that Mr Johnson wilfully or recklessly contravened ss111(1), 112(1)(a), 112(1)(c) and 114 of the Lawyers and Conveyancers Act and rr 6, 9(1)(a) or 12(6)(b), 11(1), 11(2), 11(3), 12(1), 12(3), 12(6)(a), 12 (7) and 14 of the Trust Account Regulations.

Or alternatively, negligence or incompetence in Mr Johnson's professional capacity, and that negligence or incompetence was of such a degree or so frequent as to reflect on his fitness to practise or as to bring the profession into disrepute under s 241(c) of the Lawyers and Conveyancers Act.

Or alternatively, unsatisfactory conduct within the meaning of ss 12(a) or 12(b) of the Lawyers and Conveyancers Act.

[21] The Tribunal heard the charges against Mr Johnson in October and November 2017. By decision dated 9 March 2018,[2] the Tribunal found Mr Johnson guilty of:

(a) Negligence in his professional capacity of such a degree as to bring the profession into disrepute in relation to his advice to the Trust regarding the purchase of the Ranui property;

(b) Two counts of misconduct in relation to breaches of the Trust Account Regulations.

[22] After a hearing as to penalty held on 1 May 2018, by decision dated 22 May 2018,[3] the Tribunal imposed the penalties as set out in [1](b) above.

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2 *Canterbury / Westland Standards Committee 3 v Johnson* [2018] NZLCDT 5.
3 *Canterbury / Westland Standards Committee 3 v Johnson* [2018] NZLCDT 5.

Nature of appeal

[23] In accordance with s 253 of the Lawyers and Conveyancers Act 2006, the appeal is by way of re-hearing and the Court may confirm, reverse, or modify the Tribunal's decisions.

[24] In such an appeal, the Court must consider the merits of the case afresh and need not defer to the views of the Tribunal. However, the appellant bears the onus of persuading the Court to depart from the decision appealed against. When forming its own view, the Court is entitled to take into account that the Tribunal may have an advantage in terms of technical expertise and may also have had the opportunity to assess issues of credibility where witnesses have given evidence before it.[4]

Tribunal's decision on Charge 1

[25] In relation to Charge 1, the Tribunal considered the following issues:

(a) What was the scope of the retainer between the Trust and Mr Johnson?

(b) Did Mr Johnson fulfil his obligations to the Trust under the retainer?

(c) If not, at what level of culpability was Mr Johnson's failure?

The scope of the retainer

[26] In considering the scope of Mr Johnson's retainer, the Tribunal had regard to the following considerations:

(a) Mr Johnson said that the scope of his retainer was to advise the trustees on the purchase and to obtain and confirm finance and that he did this. He was satisfied that the Trustees understood the transaction.

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4 *Austin Nichols & Co Inc v Stichting Lodestar* [2007] NZSC 103, [2008] 2 NZLR 141 at [4]; *Complaints Committee No 1 of Auckland District Law Society v C* [2008] 3 NZLR 105 (HC) at [25].

(b) The evidence disclosed that Mr Johnson may not have spoken to the Trustees – as distinct from the two Hunt brothers – during the meeting except to check with Mrs Holtom whether she was comfortable, having seen from her body language that she appeared not to be.

(c) Mr Johnson was unable to confirm that either of the Trustees had advised him of the purpose of the proposed purchase which he had understood to be to derive a capital gain after renovations had been completed;

(d) Mr Johnson did not recall that one of the purposes of the Trust was to obtain travel funding for Mrs Hunt.

(e) Although Mr Johnson had had a number of previous referrals from Mr Ed Johnson where conflicts of interest existed, he had never before had a referral where Mr Ed Johnston was selling a property to a trustee and he was himself also a trustee. Nor had Mr Johnson had such a referral from any other lawyer.

(f) When asked in cross-examination about what he had done to ensure his clients were not being disadvantaged by their lawyer, Mr Ed Johnston, Mr Johnson had said that it was not his role to give advice with regard to the financial viability of the transaction and there was nothing to suggest that the property was not being sold at a fair price.

(g) Because Mr Johnson did not explore his clients' level of understanding of the Trust, he was unaware that neither Trustee had met Mr Ed Johnston before their meeting with Mr Johnson on 2 September 2009 and had apparently not received advice on their obligations as trustees.

(h) Mr Johnson could not recall whether he had discussed with the Trustees whether they had satisfied themselves that the purchase of the Ranui property was consistent with the goals of the Trust but said it would have been his practice to have canvassed that.

(i) Mr Johnson had been unable to recall whether he had canvassed with the Trustees why they were buying a property privately from Mr Ed Johnston rather than buying on the open market.

(j) Mr Johnson did not recall if he asked or even considered whether the Trustees had been influenced in any way by the relationship they had with Mr Ed Johnston.

[27] The Tribunal also had regard to the evidence of two expert witnesses, Mr Robert Eades and Mr Ian Haynes, both experienced practitioners, who gave evidence on behalf of the Standards Committee and Mr Johnson respectively.

[28] Mr Eades said that a lawyer in Mr Johnson's position should have gone into aspects involving the "wisdom of the transaction" to ensure the Trustees had entered into the agreement fully informed and on a considered basis and satisfied that the proposed purchase was for the benefit of the Trust and its beneficiaries. Mr Eades identified a number of matters which, in his opinion, should have been addressed by Mr Johnson in his meeting with the trustees. These included:

(a) What was the purpose of the Trust purchasing the Ranui property?

(b) Why were the Trustees buying the Ranui property by private treaty from their lawyer rather than on the open market through an agent?

(c) Were the trustees influenced by their relationship with Mr Edward Johnston or anything he had told them?

(d) Was the price sensible?

(e) As the Ranui property was being bought as an investment, had the existing or future rent been properly assessed?

(f) Was the transaction within the Trust's powers and generally in its interests?

[29] Mr Eades said the mere fact the Trust was purchasing from its own lawyer whose trust company was a trustee of the Trust should have been a signal that a proper investigation was required. Mr Eades also said he did not consider that a lawyer in Mr Johnson's position should limit his retainer to advising only on the conveyancing aspects of the transaction. In cross-examination, Mr Eades distinguished the present situation from others where he had given evidence in support of a more limited role of the lawyer in property transactions on the basis that those other situations did not involve the purchase of a property from the lawyer and fellow trustee of the trust making the purchase.

[30] Mr Haynes said that, unless expressly instructed to do so, a competent lawyer acting in a purchase would not consider it necessary to ascertain or offer advice on whether the purchase was a sound investment, whether the purchase price was reasonable or be satisfied that the purchaser could service outgoings including borrowing commitments. He considered these and the other matters identified by Mr Eades to be business, valuation and budgeting matters which fall outside the role of the lawyer who is engaged to provide legal advice and legal services.

[31] The Tribunal preferred the evidence of Mr Eades to that of Mr Haynes. It noted that Mr Haynes had proceeded on an assumption that the Trustees were comfortable with the purchase, based on his understanding that the Trustees had already signed the agreement for sale and purchase before they came to Mr Johnson's offices. The Tribunal noted that, in cross-examination, Mr Haynes had conceded that where there were commercially unsophisticated trustees, a potential clash of interests among the siblings and a lawyer who was selling them the property and was the other trustee, a competent lawyer might have decided to enquire further into the matter.

[32] The Tribunal also had regard to the law on retainers. It noted that counsel agreed that the leading statement on the duty to advise a client is the Privy Council's decision in *Clarke Boyce v Mouat* where it was said:[5]

> When a client in full command of his faculties and apparently aware of what he is doing seeks the assistance of a solicitor in the carrying out of a particular transaction, that solicitor is under no duty whether before or after accepting

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5 *Clarke Boyce v Mouat* [1993] 3 NZLR 641 (PC) at 648.

> instructions to go beyond those instructions by proffering unsought advice on the wisdom of the transaction. To hold otherwise could impose intolerable burdens on solicitors.

[33] The Tribunal also took account of subsequent decisions of the Court of Appeal in *Haira v Burbery Mortgage Finance & Savings Ltd (in receivership)* and *Gilbert v Shanahan* where the Court said:

(a) It did not regard *Clark Boyce* as establishing that a solicitor will never be under a duty to offer advice on the wisdom of the transaction, and that whether or not there is such a duty must depend on the circumstances as they develop and the terms of the retainer;[6]

(b) Solicitors' duties are governed by the scope of their retainer but it would be unreasonable and artificial to define that scope solely by reference to the client's express instructions and that matters that reasonably arose in the course of carrying out those instructions had to be regarded as coming within the scope of the retainer.[7]

[34] The Tribunal also took note of:

(a) The statement by the Privy Council in *Riley v Pickersgill* that the scope of the duty owed by a solicitor may vary depending on the characteristics of the client as they appear to the solicitor and where the Privy Council drew a distinction between a youthful client unversed in business affairs who may need explanation and advice from his solicitor before entering into a commercial transaction and an obviously experienced businessman for whom such advice would be pointless.[8]

(b) Relevant passages in the text *Ethics, Professional Responsibility and The Lawyer* concerning the scope of a retainer and circumstances that may bear on the extent of the duty to advise, including the client's

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6 *Haira v Burbery Mortgage Finance & Savings Ltd (in receivership)* [1995] 3 NZLR 396 (CA) at 406.

7 *Gilbert v Shanahan* [1998] 3 NZLR 528 (CA) at 537.

8 *Riley v Pickersgill* [2004] UK PC 14, 4 LRC 471 at [7].

> knowledge and sophistication, the absence of express terms limiting the general nature of retainer, and whether there is an unusual aspect to the transaction or the parties are unfamiliar with the nature of the transaction.[9]

[35] The Tribunal also took into account the submissions of Mr Napier, counsel for Mr Johnson before the Tribunal and before this Court, that the Standards Committee had overstated the risk to Mr Johnson's clients because the only way Mr Ed Johnston could be preferring his own interests was by selling the Ranui property at too high a price and there was no evidence that this was the case. The Tribunal also took note of, but did not accept, Mr Napier's submission that based on the evidence of Mr Haynes and dicta in *Bartle v G E Custodians*[10] holding that a solicitor is not required to give advice about the wisdom of the transaction, no fault could be found with Mr Johnson.

[36] The Tribunal concluded that Mr Johnson's retainer was a general retainer embracing advice on the significance of the purchase for the Trust and including whether the purchase was consistent with the trustees' duties. It also held that the character and experience of the clients increased Mr Johnson's duties in the unusual circumstances in which Mr Johnson was advising the trustees on the purchase of a property from another trustee. The Tribunal also held that because Mr Johnson had been provided with a copy of the Trust Deed as well as the agreement for sale and purchase the retainer must have extended to advising on trustee duties.

[37] The Tribunal noted that the retainer was not initiated by the clients but had been imposed on them because of Mr Ed Johnston's conflict of interest and that in those circumstances it was wrong to view the retainer as narrowly as Mr Johnson had suggested. It also found that the clients did not understand the nature of the conflict or the risks that were posed by it and that Mr Johnson's evidence fell well short of satisfying the Tribunal that the full circumstances of the transaction were canvassed by him or the real reason for his involvement and thus the scope of his retainer.

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9 Duncan Webb, Kathryn Dalziel and Kerry Cook *Ethics, Professional Responsibility and The Lawyer* (3rd ed, LexisNexis Wellington, 2016) at 5.4.1 and 7.5.

10 *Bartle v G E Custodians* [2010] 1 NZLR 802.

[38] Adopting submissions made by Mr Waalkens, counsel for the Standards Committee, the Tribunal held that:[11]

(a) Mr Johnson was not advising an experienced commercial party or even an experienced trustee where the scope of the advice sought could reasonably be expected to be restricted to the mechanics of the transaction.

(b) Mrs Hunt and Mrs Holtom were coming to Mr Johnson as trustees who owed duties as trustees and who were undertaking a significant financial investment which involved taking out a higher mortgage in order to fund development work. These were factors that bore on the trustees' duties. Advice about the purchase as it related to the trustees' duties was a legal matter, not a financial matter, and was a matter upon which Mr Johnson could be expected to advise.

[39] The Tribunal found that Mr Johnson had not fulfilled his obligations to the Trustees in respect of the retainer because the manner in which he had conducted the meeting on 2 September 2009 displayed a disregard for his clients' need to understand the conflicts involving their co-trustee and usual lawyer. The Tribunal also found that Mr Johnson had failed his clients by not speaking at least directly, and probably in private, to the two Trustees who were present and ascertaining the nature of Mrs Holtom's discomfort and surprise.[12]

[40] The Tribunal held that Mr Johnson's failure to ascertain if his clients had been influenced in their decision by the relationship with the vendor, who was their lawyer and co-trustee, set the case apart from the usual "wisdom of the transaction" cases and that he had contributed nothing in terms of independent advice that the Trustees could not have obtained from Mr Ed Johnson.

[41] For these reasons, the Tribunal found that Mr Johnson had failed in his obligation to his clients under r 3 of the Conduct and Client Care Rules to act

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11 *Canterbury / Westland Standards Committee 3 v Johnson* [2018] NZLCDT 5 at [106].
12 At [112].

"competently and in a timely manner consistent with the terms of the retainer". It held that this failure approached but did not quite reach a reckless contravention of r 3 but that the failure had been of such a degree as to bring the profession into disrepute. It regarded the failure as "high end" negligence and considered that were reasonable members of the public informed of these circumstances, they would consider that Mr Johnson had badly let his clients down and in turn brought the profession into dispute.

Grounds of appeal on Charge 1

[42] Mr Johnson says that the Tribunal erred in the following ways:

(a) In finding that he:

(i) Was under a duty to enquire of his clients whether they wanted to purchase the property at all;

(ii) Under a duty to explore valuation, financial and tax implications with his clients;

(iii) Did not give independent advice because he did not advise that they should not proceed with the purchase even though Mr Eades could not point to any problem with the purchase;

(iv) Did not give independent advice because it found that Mr Ed Johnston would likely have given the same advice;

(b) In finding that because he had been sent the Trust Deed, it was incumbent on him to give unsought advice as to trustees' duties rather than only satisfy himself that the Trust had the power to undertake the purchase;

(c) In accepting Mr Eades' evidence over that of Mr Haynes, especially when Mr Eades' evidence was not consistent with evidence he had given in previous cases;

(d) In not following *Bartle v GE Custodians*,[13] which Mr Johnson says is the definitive case on solicitors' duties in New Zealand;

(e) In finding that Mr Johnson had failed in his obligations to his clients under r 3 of the Conduct and Client Care Rules;

(f) In finding that Mr Johnson was guilty of high end negligence.

Analysis on Charge 1

[43] I consider that in relation to the grounds set out in [42](a) above, Mr Johnson has misstated the findings of the Tribunal. While Mr Eades addressed in his evidence a number of the matters stated in Mr Johnson's grounds of appeal, and while the Tribunal preferred Mr Eades' evidence to that of Mr Haynes, the Tribunal did not base its decision solely on Mr Eades' evidence.

[44] In particular, the Tribunal did not find that Mr Johnson:

(a) Was under a duty to enquire of his clients whether they wanted to purchase the Ranui property at all.

The relevant findings of the Tribunal were that Mr Johnson's duties were not limited to advising the Trustees on the mechanics of the transaction and included ensuring that the Trustees were aware of their duties as trustees and had considered whether the purchase of the Ranui property was consistent with those duties.[14] The Tribunal did not hold that Mr Johnson should have asked his clients whether they wanted to purchase the Ranui property at all.

(b) Was under a duty to explore valuation, financial and tax implications with his clients.

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13 *Bartle v GE Custodians Ltd* [2010] 1 NZLR 802 (HC).
14 *Canterbury / Westland Standards Committee 3 v Johnson* [2018] NZLCDT 5 at [106], [110].

Again, the relevant findings of the Tribunal were that Mr Johnson's duties were not limited to advising the Trustees on the mechanics of the transaction and included ensuring that the Trustees were aware of their duties as trustees and had considered whether the purchase of the Ranui property was consistent with those duties. The Tribunal also found that Mr Johnson had displayed a disregard for his clients' need to understand the conflicts involving their co-trustee and usual lawyer.[15]

While Mr Eades identified valuation, financial and tax matters as requiring some inquiry or thought on Mr Johnson's part, the Standard's Committee did not advance the case that each of those inquiries should have been pursued by Mr Johnson, and the Tribunal did not make its decision on that basis.[16] As already noted, the Tribunal held that the purchase of the Ranui property and the taking out of a higher mortgage had a bearing on the trustees' duties, and that advice about the purchase as it related to the trustees' duties was a legal matter and not a financial matter.

(c) Did not provide independent advice because he did not advise that they should not proceed with the purchase.

The Tribunal made no finding to this effect. Mr Eades addressed this issue in the affidavit he swore on 8 August 2017 in response to Mr Haynes' assertion that the Trust would have had an appropriate remedy against Mr Ed Johnston if he had not been acting in the Trust's best interests. In any event, Mr Eades' opinion was that the purpose of the independent advice was to prevent the Trust from proceeding with the transaction if it were likely to cause the Trust loss.[17]

(d) Did not give independent advice because it found that Mr Ed Johnston would likely have given the same advice.

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15 At [112].
16 At [68].
17 Paragraph 40(b) of Mr Eades' affidavit.

> The Tribunal found that Mr Johnson had added nothing useful to the state of his clients' knowledge that they could not have obtained from Mr Ed Johnston and he had thus added no value by being apparently independent.[18] That is a different proposition from that asserted by Mr Johnson and provides no basis for an appeal.

[45] In summary, none of the grounds in [42](a) is made out because the grounds do not accurately reflect the findings of the Tribunal. Furthermore, having considered the matters afresh, I consider that the findings that the Tribunal made with respect to these matters, in particular the findings that Mr Johnson's duties were not limited to advising the Trustees on the mechanics of the transaction and included ensuring that the Trustees were aware of their duties as trustees and had considered whether the purchase of the Ranui property was consistent with those duties, were appropriate and correct.

No duty to give advice as to trustees' duties

[46] This ground assumes Mr Johnson's advice was sought only on the conveyancing aspects of the transaction and not in relation to the duties of the trustees. There is no basis for that assumption. The email sent to Mr Johnson on 2 September 2009 asked Mr Johnson to act for the Trust in relation to the purchase of the Ranui property. The Tribunal recorded that Mr Johnson accepted that the emailed instructions had created "a pretty general retainer".[19] The email contained no limitation on that retainer.

[47] There were two evident reasons why Mr Johnson could not assume that the instruction as far as it related to the Trust Deed was limited only to ensuring that the Trust had the power to undertake the purchase:

(a) The clients were trustees and exercising their powers as trustees.

> The emailed instructions, in effect, gave Mr Johnson authority to withhold solicitor's approval from the transaction if he was not happy

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[18] At [115].
[19] At [38].

with "the content of the agreement". The "content of the agreement" is not limited to the mechanics of the transaction. In the circumstances of this case, I am satisfied that the "content of the agreement' includes the substance of the agreement which, in the case of a purchase by a trust, must include that the trust not only has the power to purchase the Ranui property but also that the purchase is consistent with the trustees' duties. This is particularly so when the purchase is by trustees who were clearly inexperienced in business matters. The fact that the Hunt brothers were present and may have been supportive of the purchase does not absolve Mr Johnson of his duties to the Trustees, who were his clients.

(b) The reason for the referral was that the Trust's lawyer was the vendor of the Ranui property and effectively the third trustee of the Trust through Mr Ed Johnston's trustee company. This is not a normal situation - as the Tribunal found and as Mr Johnson's own expert witness, Mr Haynes, accepted, albeit with some reluctance.

[48] To suggest that, in such circumstances, advice on the scope of the trustees' duties was "unsought" presupposes that the scope of a solicitor's retainer and, more generally, the scope of a solicitor's duties, are unaffected by the circumstances in which the retainer or duties arise. Neither proposition is supported by the authorities.

[49] This leads to the fourth substantive ground of Mr Johnson's appeal – that the Tribunal erred in law because it did not follow *Bartle v GE Custodians Ltd*, which I consider below.[20]

Preferring expert evidence of Mr Eades to that of Mr Haynes

[50] The Tribunal was fully entitled to prefer Mr Eades' evidence to that of Mr Haynes. It had the opportunity to hear the evidence of both experts. It noted that Mr Haynes made concessions in cross examination that modified his evidence to accord with a hypothetical put to him by Mr Waalkens and which the Tribunal

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20 *Bartle v GE Custodians* [2010] 1 NZLR 802 (HC).

considered matched the situation of the Trustees in the present case.[21] Mr Napier put to Mr Eades in cross examination the alleged inconsistency between the evidence Mr Eades gave in *Bartle* and that given in the present case, and Mr Eades explained why he considered the situations were different. It was open to the Tribunal to accept Mr Eades' explanation. It is also relevant that, as discussed below, the Court in *Bartle* held that the solicitor in that case did owe a duty of care despite Mr Eades' evidence in that case that a solicitor was not under an obligation to give advice on the wisdom of the transaction.

Failure to follow Bartle

[51] Mr Napier says that *Bartle* is the definitive case on solicitors' duties in New Zealand. I do not accept that submission. *Bartle*, which is a decision of the High Court, albeit of the then Chief High Court Judge, has to be seen in the continuum of decisions, including the Privy Council decision in *Clark Boyce* and the Court of Appeal's decision in *Gilbert v Shanahan*[22] which also considered the scope of solicitors' duties in New Zealand.

[52] *Bartle* was not about the scope of the retainer. The Court held that no retainer arose in the circumstances of that case.[23] Rather, the case concerned the scope of the duty of care owed by a solicitor in circumstances where there was no retainer but there was reliance on the solicitor's advice regardless.

[53] In considering the scope of the solicitor's duty of care, Randerson J had regard to authorities on the scope of a solicitor's retainer. Randerson J accepted that:[24]

> ... in general, a solicitor is not required to give advice (even to a client where a retainer exists) about the wisdom of a transaction in the sense that, for example, a property to be purchased is good value for money or that a transaction would be worthwhile.

[54] However, Randerson J went on to hold that where the Bartles came to the solicitor for advice on the risks associated with a proposed transaction, the solicitor

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21 *Canterbury / Westland Standards Committee 3 v Johnson* [2018] NZLCDT 5 at [93].
22 *Gilbert v Shanahan* [1998] 3 NZLR 528 (CA) at 537.
23 *Bartle v GE Custodians* [2010] 1 NZLR 802 (HC) at [135].
24 At [147].

owed a duty to warn the Bartles of the risks they faced because of the structure of the proposed transaction and because of the circumstances of the Bartles. Randerson J stated:

> [149] Since [the solicitor] knew the Bartles had few resources other than their home and were pensioners, it would have been obvious to [the solicitor] that they could not possibly meet their obligations in the event of Blue Chip's collapse. These matters clearly raised serious issues about the legal implications of the joint venture structure they were considering entering into. The situation is analogous to the duty imposed in a solicitor-client relationship to explain commercial matters which may be straightforward to business people but may not be obvious to the unsophisticated.

[55] In that respect, *Bartle* is consistent with the earlier authorities such as *Gilbert v Shanahan* and *Riley v Pickersgill* that were referred to by the Tribunal in their decision. I also consider that the Trustees' situation in the present case was not substantially different from that of the Bartles in that case. The Trustees may not have come specifically for advice on the risks associated with the transaction. However, they were sent by Mr Ed Johnston to get advice on the transaction because they were trustees and because Mr Ed Johnston had a conflict of interest. The trustee dimension was the reason why Mr Johnson had been asked to provide the advice.

[56] Mr Napier says the Tribunal erred in distinguishing *Clark Boyce* on the grounds that in that case there had been an express retainer limiting the advice. Mr Napier is correct that the Privy Council in *Clark Boyce* did not base its decision on, or even specifically discuss, whether the retainer in that case was general or limited. However, I am satisfied that the Tribunal was not in error in distinguishing *Clark Boyce* from the present case.

[57] The issue in *Clark Boyce* was not the scope of the retainer or the scope of the solicitor's duty in regard to the advice offered by the solicitor but whether the solicitor, who was also acting for the client's son on the same transaction, should have declined to act for the client and insisted that she obtain separate legal advice. However, the client had signed an acknowledgement that stated expressly that, notwithstanding the solicitor's advice that the client should obtain independent legal advice, she recorded and instructed the solicitor that she did not wish to do so. The acknowledgement also stated that the solicitor had fully advised the client of the legal implications and effects

of the mortgage the client had given over her house to secure a loan taken out by her son. The evidence also showed that the solicitor had made it clear to the client that she risked losing her house if her son defaulted on payment of the mortgage. Those were the circumstances against which the Privy Council made the statement set out at [32] above.

[58] The circumstances here are very different. They include that the clients were trustees, who were unsophisticated and inexperienced in business, who were confused about the purpose of the meeting, who, in Mrs Hunt's case, was limited in her understanding of English, and who, in Mrs Holtom's case, had doubts about the wisdom of the transaction. It should have been apparent to Mr Johnson that his duty as solicitor went beyond explaining the mechanics of the conveyancing transaction and included a duty to ensure that his clients – namely Mrs Hunt and Mrs Holtom, as distinct from the Hunt brothers – understood their duties as trustees in relation to the transaction. That included a duty, as held by the Tribunal, to ensure Mrs Hunt and Mrs Holtom understood the significant financial commitment and increased mortgage that the trustees were taking on or, as Randerson J put it in *Bartle*, a duty "… to explain commercial matters which may be straightforward to business people but may not be obvious to the unsophisticated".

[59] For these reasons, I do not accept that the Tribunal failed to follow *Bartle* or otherwise erred in law.

Rule 3 of the Conduct and Client Care Rules

[60] Mr Napier did not address this ground directly in oral submissions. It adds little to his client's case.

[61] Rule 3 of the Conduct and Client Care Rules states:

> In providing regulated services to a client, a lawyer must always act competently and in a timely manner consistent with the terms of the retainer and the duty to take reasonable care.

[62] The Tribunal's finding that Mr Johnson breached the Rule was consequent upon its finding that Mr Johnson had not fulfilled his obligations in respect of his

retainer. The finding of the breach of r 3 followed naturally from and was consistent with that findings.

Finding that Mr Johnson was guilty of high end negligence

[63] The Tribunal found that Mr Johnson's breach of Rule 3 of the Conduct and Client Care Rules was not reckless, but it considered that the alternative charge of negligence in Mr Johnson's professional capacity had been established because Mr Johnson's conduct had been of such a degree as to bring the profession into disrepute. It went on to state that it regarded Mr Johnson's conduct as "high end" negligence because reasonable members of the public informed of the circumstances would consider that Mr Johnson had badly let his clients down and had brought his profession into disrepute.[25]

[64] Mr Napier submits that the Tribunal was wrong in finding that Mr Johnson had been negligent in his advice and that, even if he had been negligent, that should not lead automatically to a disciplinary response.

[65] Under s 241(c) of the Lawyers and Conveyancers Act, if the Tribunal is satisfied that a practitioner "… 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," it may make one or more of the orders authorised by s 242.

[66] I am satisfied that the Tribunal's assessment that Mr Johnson had been negligent in failing to discharge his duties to the Trustees was justified. However, as the Court of Appeal confirmed in *W v Auckland Standards Committee 3*, not every act of negligence is such as to warrant disciplinary action. The use of the words "of such a degree" clearly indicate that an assessment of the degree of seriousness is required.[26]

[67] In *W v Auckland Standards Committee 3*, the Court of Appeal upheld the approach taken by the High Court in assessing whether the negligence in that case had

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25 *Canterbury / Westland Standards Committee 3 v Johnson* [2018] NZLCDT 5 at [119].
26 *W v Auckland Standards Committee 3* [2012] NZCA 401, [2012] NZAR 1071 at [41].

been of such a degree as to warrant disciplinary action. That was to approach the issue objectively and to consider whether reasonable members of the public informed of all relevant circumstances would view the practitioner's conduct as tending to bring the profession into disrepute.[27]

[68] The Tribunal's discussion in the present case somewhat conflated the two issues of whether Mr Johnson's failure in his duties to his clients amounted to negligence and, if so, whether that negligence was of such a degree as to warrant disciplinary action. It assessed whether he was negligent by reference to the test approved in *W v Auckland Standards Committee 3* for assessing whether negligence, if found, was of such a degree as to warrant disciplinary action. However, I do not consider that conflation led to any error. It is implicit in the Tribunal's decision that it found both that Mr Johnson had been negligent, and that the negligence warranted disciplinary action. That is implicit in the Tribunal's finding that Mr Johnson's conduct amounted to "high end" negligence. If negligence is considered to be "high end" negligence, it follows that the negligence warrants disciplinary action.

[69] Mr Napier submits that I should follow the approach taken in *Lagolago v Wellington Standards Committee 2*. In that case Clifford J held that while there had been a degree of negligence or incompetence on the part of the practitioner, he was not satisfied that the negligence would, objectively assessed, bring the profession into disrepute in the eyes of a reasonable member of the public. He reached that conclusion even though he accepted that the Disciplinary Tribunal had applied the correct test in terms of *W v Auckland Standards Committee 3*.[28]

[70] *Lagolago* concerned the conduct in contested proceedings of a practitioner who was held by the Tribunal to have failed to advise her clients properly on a settlement offer, to have conducted the proceedings negligently/incompetently, and not to have fully advised her clients on the merits of the proceedings. In considering the Tribunal's assessment of the practitioner's conduct, Clifford J expressed considerable reservations with the Tribunal's findings on some matters and with its assessment of whether the practitioner's failure to inform her clients of the weakness of their case

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27 At [45].

28 *Lagolago v Wellington Standards Committee 2* [2016] NZHC 2867 at [72] and [127].

amounted to negligence bringing the profession into disrepute.[29] He concluded that the practitioner, while neither as experienced nor as direct as she might well have been, did her best with a very difficult client, and that while a lawyer would say she could have been more open in acknowledging the obvious limitations of her clients' case, those failings did not, in Clifford J's view, constitute ones that would bring the profession into disrepute.

[71] There is little parallel between *Lagolago* and the present case. For the reasons already given, I do not have reservations with the Tribunal's findings that Mr Johnson's duties included ensuring that the Trustees were aware of their duties as trustees and had considered whether the purchase of the Ranui property was consistent with those duties. Nor do I have any reservations with the Tribunal's finding that Mr Johnson's failure to carry out those duties amounted to negligence. In that situation and where the Tribunal has applied the correct test, as set out in *W v Auckland Standards Committee 3*, for assessing whether the negligence had been of such a degree as to warrant disciplinary action, I see no reason for reaching a different conclusion from that reached by the Tribunal.

Appeal on Charges 2 and 3

[72] Under Charge 2, Mr Johnson was charged with misconduct for:

(a) Shortcomings in reporting to a client;

(b) Poorly maintained trust account entries for two clients;

(c) Recording payments that had not been made;

(d) Making payments on behalf of two clients without having or retaining the clients' authority to do so;

(e) Making incorrect monthly certificates to the New Zealand Law Society for December 2011 and February 2012 to July 2012.

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[29] At [95], [108] and [111].

[73] The Tribunal noted that the number of transactions was significant – 42 for the two clients concerned with tens of thousands of dollars involved and one payment being for $324,123.03. It was also concerned that Mr Johnson had not been updating his trust account records for periods of up to a fortnight with the consequent risk of obscuring an overdrawn trust account.[30]

[74] The Tribunal found the charge established and said it viewed the number of breaches and repeated failure to adhere to the Trust Account Regulations to demonstrate reckless disregard of the Regulations.[31]

[75] Under Charge 3, Mr Johnson was charged with misconduct for:

(a) Permitting client balances to go into debit;

(b) Not putting large client balances on interest bearing deposit;

(c) Allowing the float account to become overdrawn;

(d) Not maintaining journal entries for a period and not recording certain transactions in the journal;

(e) Failing to report to clients whose funds he had held for over a year;

(f) Entering balancing entries into his trust account ledgers.

[76] The Tribunal acknowledged that some of these were minor errors but the failure to reconcile the trust account was serious and was compounded by the filing of false monthly certificates with the Law Society, which Mr Johnson admitted.[32]

[77] The Tribunal noted Mr Napier's submission that no client funds had been lost or misappropriated but said it would be failing in its duty to protect the public if it did not take account of the total picture. It considered the number of breaches of the Rules

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30 *Canterbury / Westland Standards Committee 3 v Johnson* [2018] NZLCDT 5 at [123]-[124].
31 At [126]-[127].
32 At [132].

and Regulations over a significant period of time as demonstrating reckless disregard of the Rules and Regulations and held that the charge of misconduct had been established.[33]

Scope of appeal on Charges 2 and 3

[78] Mr Johnson admits the breaches alleged under charges 2 and 3; his appeal is limited to the Tribunal's findings that the breaches constituted misconduct. Mr Johnson says breaches of the Trust Account Regulation have been treated in similar cases as unsatisfactory conduct or, at worst, negligence.

What constitutes misconduct?

[79] Mr Napier submitted that for a finding of misconduct it had to be established that Mr Johnson's conduct was disgraceful or dishonourable or in reckless contravention of the Lawyers and Conveyancers Act or the trust accounting regulations. I do not accept that submission which is not consistent with a decision of the Full High Court in *Complaints Committee No 1 of the Auckland District Law Society v C*,[34] to which Mr Napier also refers. After reviewing the authorities, the High Court held 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.

[80] Mr Napier also said that in most cases relating to breaches of trust account regulations where there has been a finding of misconduct, there has been a misappropriation of client funds. While that may or may not be the case in a numerical sense, there are also cases where misconduct was found where there was no misappropriation of client funds. Examples are *Auckland Standards Committee No 4 of the New Zealand Law Society v Appleby* and *Auckland Standards Committee 2 v*

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33 At [137]-[138].

34 *Complaints Committee No 1 of the Auckland District Law Society v C* [2008] 3 NZLR 105 (HC) at [33].

Bogiatto,[35] which are also decisions discussed by Mr Napier. These cases demonstrate that every case has to be considered on its own terms.

[81] The question the Tribunal posed to itself under Charge 2 and Charge 3 was whether the breaches were wilful or reckless so as to amount to misconduct.

[82] With respect to Charge 2, it concluded that the number of breaches and the repeated failure to adhere to the trust account regulations demonstrated disregard of them. It also adopted the submission of Mr Waalkens that accurate filing of monthly returns is vital to maintaining the integrity of trust accounting and therefore the public's confidence in the procession.[36] In my view, those conclusions were appropriate. The Tribunal then found that misconduct had been established. Again, I consider that finding appropriate. Disregard of the Trust Regulations is at least indifference and is an abuse of the privileges of registration in terms of the High Court's observations in *Complaints Committee No 1 of the Auckland District Law Society v C* noted at [79] above.

[83] With respect to Charge 3, the Tribunal found that the failure to reconcile the trust account was serious and was compounded by the filing of false monthly certificates with the Law Society.[37] It was satisfied that this amounted to misconduct. I also consider that finding appropriate and consistent with the High Court's observations in *Complaints Committee No 1 of the Auckland District Law Society v C.*

[84] Mr Napier submitted to the Court – as he had to the Tribunal – that Mr Johnson's failures were not serious: "a collection of minor errors, including adding errors". Mr Napier also submitted that Mr Johnson "did not at any time give up attempting to comply with the regulations". I do not accept those submissions, any more than the Tribunal was prepared to accept Mr Johnson's efforts to minimise the seriousness of the errors by terms such as "human error", "honest mistake" and "oversight".

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35 *Auckland Standards Committee No 4 of the New Zealand Law Society v Appleby* [2014] NZLCDT 34; *Auckland Standards Committee 2 v Bogiatto* [2018] NZLCDT 2.

36 *Canterbury / Westland Standards Committee 3 v Johnson* [2018] NZLCDT 5 at [127].

37 At [132].

[85] While some of Mr Johnson's errors were minor – as the Tribunal accepted – others were undoubtedly serious, even if they did not involve a misappropriation of client funds. The number and scale of poorly maintained trust account entries were substantial and fell well short of the purposes of the Lawyers and Conveyancers Act under which the Trust Account Regulations were made. Those purposes include to maintain public confidence in the provision of legal services and to protect the consumers of legal services.[38] It would be inconsistent with those purposes to regard Mr Johnson's conduct as minor.

[86] As to the certificates, Rules 2.5 and 2.6 of the Conduct and Client Care Rules provide:

> 2.5 A lawyer must not certify the truth of any matter to any person unless he believes on reasonable grounds that the matter certified is true after having taken appropriate steps to ensure the accuracy of the certification.
>
> 2.6 If a lawyer subsequently discovers that a certificate given by the lawyer was or has become inaccurate or incomplete to a material extent, the lawyer must immediately take reasonable steps to correct the certificate.

[87] Mr Johnson's behaviour over a number of months in which he provided certificates to the Law Society which he knew to be incorrect fell well short of the conduct required by those Rules. For these reasons, I am satisfied that the Tribunal was correct in finding misconduct proved under both Charges 2 and 3.

Appeal against penalty

[88] Mr Johnson says the Tribunal was in error in ordering that he be suspended from practice as a barrister and solicitor for three months because the penalty was not the least restrictive in the circumstances and was unduly punitive.

[89] Underlying that contention is Mr Napier's submission that the Tribunal erred in imposing a single penalty that took into account all three charges on which Mr Johnson had been found guilty, rather than applying separate penalties in respect of Charge 1, on which Mr Johnson was guilty of negligence while a salaried partner

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[38] Section 3, Lawyers and Conveyancers Act 2006.

at a West Auckland firm, and in respect of Charges 2 and 3 which relate to Mr Johnson's conduct when practising on his own account at his own firm in central Auckland. Mr Napier submits that if Mr Johnson had been sentenced separately on the two sets of charges he would not have been suspended for three months because the conduct in each case was not sufficient of itself to warrant suspension.

[90] The Tribunal specifically rejected Mr Napier's submission that the three charges ought not to be considered cumulatively. It said that the Tribunal's invariable practice, which has been endorsed by the High Court in *Hart v Auckland Standards Committee 1 of the New Zealand Law Society*,[39] is to assess overall conduct, either under the heading of "seriousness" or under the overall assessment the practitioner's fitness to remain in practice as a lawyer. [40]

[91] Mr Napier does not challenge the decision in *Hart.* Nor does he say the Tribunal was wrong to follow it. Rather he says that to impose a single sentence with respect to unrelated charges fails to respect the sentencing principle that the Tribunal must impose the least restrictive outcome. That submission does not take into account the purpose of sentencing in disciplinary proceedings and is not consistent with the High Court's decision in *Daniels v Complaints Committee No 2 of the Wellington District Law Society*, the decision Mr Napier cites in support of the application of the sentencing principle of imposing the least restrictive outcome.[41]

[92] In *Daniels*, a Full Court of the High Court recalled that it is well known that the Disciplinary Tribunal's penalty function does not have punishment as its primary purpose, although orders will inevitably have that effect. As the Court said:

> [22] … The predominant purposes are to advance the public interest (which include "protection of the public"), to maintain professional standards, to impose sanctions on a practitioner for breach of his/her duties, and to provide scope for rehabilitation in appropriate cases. If the purposes of imposing disciplinary sanctions can be achieved short of striking off then it is the lesser alternative that should be adopted as the proportionate response. That is "the least restrictive outcome principle" applicable in criminal sentencing. In the end, however, the

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39 *Hart v Auckland Standards Committee 1 of the New Zealand Law Society* [2013] NZHC 33, [2013] 3 NZLR 103.

40 *Canterbury / Westland Standards Committee 3 v Johnson* [2018] NZLCDT 21 at [14].

41 *Daniels v Complaints Committee No 2 of the Wellington District Law Society* [2011] 3 NZLR 850 (HC).

> test is whether a practitioner is a fit and proper person to continue in practice.

[93] Later in its decision, the Court stated:

> [32] A tribunal, when determining ultimate fitness to remain in practise, whether limited by suspension, or by striking off, is entitled to review the entire conduct of the practitioner and transgressions the subject of the disciplinary proceedings, and the general behaviour of the practitioner.

[94] The Tribunal's approach to penalty accorded with that set out in *Daniels*. The Tribunal considered the purposes of penalty as discussed in *Daniels*. It considered the seriousness of the conduct. It considered aggravating and mitigating factors having regard to comparable decisions. It then made an overall assessment of fitness to practise, having regard to the conduct of Mr Johnson and the charges that were the subject of the disciplinary proceedings – as set out by the High Court in Daniels.

[95] Specifically, in terms of:

(a) Seriousness: The Tribunal had found "high-end" negligence under Charge 1 in circumstances where Mr Johnson had badly let his clients down, and misconduct under Charges 2 and 3 involving numerous breaches, minor and significant;

(b) Aggravating factors: The Tribunal found the non-compliance with the Trust Account Regulations was "widespread and prolonged" and Mr Johnson had only reluctantly and tardily conceded the falsity of the monthly certificates to the Law Society;

(c) Mitigating factors: The Tribunal acknowledged that no client funds had been lost, Mr Johnson had an unblemished record of 30 years of legal practice and had taken steps to correct the outstanding errors and to prevent a future recurrence, and had been provided with a glowing reference from a fellow practitioner and friend, although the Tribunal noted that in a protective jurisdiction such personal recommendations cannot be given as much weight as in other contexts;

(d) Comparable decisions: The Tribunal held that the decision in *Canterbury Westland Standards Committee No 1 v Grave*[42] was the most comparable, although it also made reference to the decision in *Appleby*;

(e) Overall assessment: The Tribunal considered the combined effect of Mr Johnson's conduct so serious that any penalty short of suspension would be an inadequate response by the Tribunal, a conclusion it reached unanimously and notwithstanding the principle of the least restrictive intervention.

[96] Mr Napier takes issue with various aspects of the Tribunal's decision-making. I comment on the most relevant:

(a) Mr Napier says the advice to the Trustees was not dishonest or reckless, was inadequate in terms of the issues it addressed, and was an isolated incident.

Comment: That may be so, but that does not lessen the findings that Mr Johnson breached his duties to his clients by failing to advise them of their duties as trustees.

(b) Mr Napier says the Trust account breaches were a case of a sole practitioner too busy or overrun by his manual trust accounting system to comply with the regulations, and the incorrect certifications were a case of poor judgment rather than a deliberate decision to lie to the New Zealand Law Society.

Comment: That is not an accurate characterisation of Mr Johnson's conduct or of the seriousness of what he did when completing false certificates. Falsifying certificates cannot be explained away as poor judgment.

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[42] *Canterbury Westland Standards Committee No 1 v Grave* [2016] NZLCDT 8.

(c) Mr Napier says there were no aggravating features to the negligence regarding the advice to Trustees; the incorrect certifications cannot be seen as active deception or of a wilful nature.

Comment: The Tribunal did not find any aggravating features in the advice to the Trustees. It rejected the attempts by Mr Johnson to minimise the seriousness of the false certificates, as does this Court.

[97] With regard to comparable cases, Mr Napier devotes a number of pages in his submissions to considering and distinguishing cases to which the Tribunal – as distinct from the Standards Committee – does not refer in its decision, notably *Auckland Standards Committee 2 v Parshotam* and *Auckland Standards Committee No 2 v Korver*.[43] I agree those cases are of marginal relevance and assistance in the circumstances of this case.

[98] Mr Napier accepts that the decision which the Tribunal considered to be most comparable in terms of seriousness of offending by a senior practitioner with an otherwise unblemished record, *Canterbury Westland Standards Committee No 1 v Grave*,[44] was similar to the present case but says that Mr Johnson's unblemished career was longer and suggests other minor factors that in his view make *Grave* a more serious case. Mr Napier overlooks, however, the essential difference that the Tribunal noted between *Grave*, where no period of suspension was ordered, and the present case – namely the two additional findings of misconduct against Mr Johnson relating to the trust account failures.

[99] Conversely, the Tribunal noted the difference between *Auckland Standards Committee 4 of the New Zealand Law Society v Appleby*,[45] to which Mr Napier also refers; namely, that while the trust account failures in that case were more serious than those of Mr Johnson, there was not the additional charge of negligence in that case. It is that difference that also distinguishes the present case from the various decisions to

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43 *Auckland Standards Committee 2 v Parshotam* [2016] NZLCDT 15; *Auckland Standards Committee No 2 v Korver* [2011] NZLCDT 22.

44 *Canterbury Westland Standards Committee No 1 v Grave* [2016] NZLCDT 8.

45 *Auckland Standards Committee 4 of the New Zealand Law Society v Appleby* [2014] NZLCDT 34.

which Mr Napier referred in his submissions to the Tribunal and to the Court in support of his contention that a period of suspension should not be imposed.[46]

[100] As the Tribunal made clear in its overall assessment, it was the combined effect of Mr Johnson's conduct, involving negligence in dealing with the Trustees of the Hunt Family Trust and the trust account misconduct, that led the Tribunal to conclude that a period of suspension was inevitable and appropriate. As I have already held, that approach was consistent with the High Court's decision in *Daniels* and with the Tribunal practice of considering the overall conduct of the practitioner under consideration. I do not consider that the Tribunal erred in that approach or that the penalty imposed of censure, three months suspension plus costs of $50,000 was unduly punitive.

Result

[101] Mr Johnson's appeal is dismissed.

[102] Mr Napier asked that if Mr Johnson is required to serve the period of suspension, he be given a month's notice to get his affairs in order. I consider that a reasonable request. Accordingly, I direct that Mr Johnson's period of suspension shall commence on 1 May 2019 and shall end on 31 July 2019.

G J van Bohemen J

[46] For example: *Auckland Standards Committee 2 v Jones* [2014] NZLCDT 52, *Auckland Standards Committee 2 v Bogiatto* [2018] NZLCDT 2, *Auckland Standards Committee 5 v Low* 2018] NZLCDT 7.