NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL

[2013] NZLCDT 16
LCDT 020/12

IN THE MATTER	of the Lawyers and Conveyancers Act 2006 and the Law Practitioners Act 1982
BETWEEN	**WAIKATO BAY OF PLENTY 356 STANDARDS COMMITTEE** Applicant
AND	**CHARLES FLETCHER,** of Hamilton, Barrister and Solicitor Respondent

CHAIR

Judge D F Clarkson

MEMBERS OF TRIBUNAL

Mr W Chapman
Ms S Hughes QC
Ms C Rowe
Mr W Smith

HEARING at Auckland on 4 April 2013

APPEARANCES

Mr B Brown QC and Mr M Treleaven for the Standards Committee
Mr G Illingworth QC and Mr D Wood for the Practitioner

DECISION OF NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL

Charge

[1] The practitioner, Mr Fletcher, has pleaded guilty to one (amended) charge of professional misconduct as follows:

> "The Waikato Bay of Plenty Section 356 Standards Committee of the New Zealand Law Society **HEREBY CHARGES CHARLES FLETCHER** of Hamilton, Barrister and Solicitor, with misconduct in his professional capacity in which the misconduct took place as specified in the judgment of the High Court in *Eden Refuge Trust v Hohepa,*[1] and the judgment of the Court of Appeal in that case.

Background

[2] This is a matter which comes to be dealt with under the transitional provisions of the Lawyers and Conveyancers Act 2006 ("LCA") and involves events which occurred between November 2002 and March 2003.

[3] Pursuant to s 358 of the LCA this Tribunal exercises the role previously exercised by the New Zealand Law Practitioners Disciplinary Tribunal and has all of the duties and powers of that Tribunal under the Law Practitioners Act 1982.

[4] The reason for the significant delay in this matter being brought before the Tribunal was because these proceedings followed the conduct of litigation in the case referred to in the charge. The High Court decision in that matter was appealed to the Court of Appeal and that decision was not delivered until 30 March 2012. Following the release of that decision the charge was laid in this Tribunal in August 2012.

[5] The background which led to the civil litigation is relatively complicated and we do not propose to repeat the history, which is set out in paragraphs [7] to [34] in the judgment of the Court of Appeal, reported as *Fletcher v Refuge Trust.*[2]

---

[1] [2011] 1 NZLR 197.
[2] [2012] 2 NZLR 227.

[6] At the beginning of the Court of Appeal judgment it is recorded that the High Court had found against the practitioner as follows:

> "...
>
> (b) Breach of fiduciary duty, knowing receipt and dishonest assistance against Charles Fletcher, a lawyer practising as Fletcher Law in Hamilton, who acted for Mr Hohepa and the PWFM Trust."

Mr Hohepa and the PWFM Trust are former clients of the practitioner.

[7] In summary it was found in the High Court, and upheld in the Court of Appeal, that Mr Fletcher had facilitated a sole trustee of the PWFM Trust, Mr Hohepa, in misappropriating over $250,000 of Trust property.

[8] During the time that Mr Fletcher represented Mr Hohepa and the Trust, Mr Hohepa was resident in Spain and he did not subsequently return to New Zealand to face the consequences of the proceedings. Mr Hohepa and Mr Fletcher were found jointly and severally liable for a principal sum of $253,441.21 together with interest and scale costs. Taking account of his own legal costs in pursuing this matter to the Court of Appeal Mr Fletcher has in fact had to meet liability of approximately $1.3 million dollars as a result of his actions.

ISSUES

[9] To a large extent the argument to the Court of Appeal, and repeated before this Tribunal, focused on the nature of the dishonesty involved on Mr Fletcher's part, specifically, whether this was 'subjective' or 'objective' dishonesty.

[10] It was submitted by the Standards Committee of the Law Society that Mr Fletcher ought to be struck off even if the dishonesty in question could not be described as 'wilful and calculated'. They submitted that:

> "Striking off may still be appropriate especially where there has been a serious breach of a solicitor's fundamental duty to the solicitor's client."

[11] Counsel for the Standards Committee Mr Brown QC set out a number of areas where it was contended that Mr Fletcher's behaviour led to the conclusion that strike off was the only proper response.

[12] It was accepted that Mr Fletcher held himself out as an expert in the law of Trusts. Thus this situation where his behaviour facilitated the misappropriation of Trust funds by a sole trustee, by a series of transactions in which the practitioner acted, is inexplicable. Indeed Mr Fletcher himself contends that he has no idea how he managed to be so "wrong headed". His counsel submitted that his behaviour represented an "enigma", whereby in 37 years of otherwise proper practice these events occurred.

[13] At all times Mr Fletcher has denied any intention to behave, or assist a client to behave, in an intentionally dishonest manner. He submits that this is a crucial distinction when considering whether the public needs to be protected from him and whether the ultimate sanction of striking off the roll of Barristers and Solicitors needs to be imposed.

[14] For his part Mr Fletcher submitted that there had been "*a temporary lack of focus on his part*". In a lengthy affidavit filed only a day prior to the hearing Mr Fletcher had this to say:[3]

> "... Over a period of no more than a few weeks from December 2002 to February 2003, I lost my objectivity in the way I handled Mr Hohepa and his express instructions."

[15] He goes on to accept that the steps he took during that period *"... have rightly been the subject of criticism.*" He explains that he has had difficulty in accepting that he was taken in by Mr Hohepa and ought not to have trusted him, and expresses deep remorse. He says:[4]

> "It should not have happened and could not possibly happen again.

And[5]:

> "I genuinely acknowledge my mistake."

[16] Against these statements the Standards Committee asks to take account of the strong comments made about Mr Fletcher's behaviour and knowledge in the decisions of both the High Court and the Court of Appeal.

---

[3] At paragraph 15.4 affidavit Charles Fletcher 2 April 2013.
[4] At paragraph 15.9.
[5] At paragraph 15.12.

[17] At this point, we record that counsel agree that the Tribunal is entitled to rely on the findings of these two Courts because this is a decision quite different from that discussed in the decision of *Dorbu*[6] in which His Honour Brewer J found that s 50 of the Evidence Act prevented the Tribunal from accepting as evidence of facts, the civil judgment of another Court. In that matter, His Honour pointed out that the Tribunal has an independent obligation to determine the facts. This case is distinguishable from that situation because the findings of fact have been pleaded as part of the charge and accepted as such by Mr Fletcher's plea of guilty to this Tribunal. It was accepted by Mr Fletcher's counsel that in this situation Mr Fletcher was bound by the findings of the two respective Courts. Indeed, the reframed charge as it stands was initially suggested by senior counsel representing Mr Fletcher.

[18] The Tribunal has difficulty with the "brief lack of focus" argument for a number of reasons. Firstly it is not consistent with a number of other parts of Mr Fletcher's evidence where he attempts to make sense of his actions in acting for Mr Hohepa. He has made much of being taken in by Mr Hohepa, and of taking a number of years to come to that realisation. For example he gave evidence to the Tribunal, that he visited Mr Hohepa in Spain in 2005, which was some time after the proceedings against him and Mr Hohepa were issued. Mr Fletcher and his family spent some time with Mr Hohepa and his family and Mr Fletcher said that part of his purpose in visiting him was "to assess his bona fides".

[19] Mr Fletcher also put arguments both to the Law Society in 2006 and to the High Court in 2008 in relation to a deed of acknowledgement of debt he had drafted between Mr Hohepa and the Trust, relating to how he viewed Mr Hohepa. These arguments were described by Her Honour Duffy J as "untenable".

[20] Mr Fletcher also advanced his arguments in both Courts on the basis that even if he had knowledge that Mr Hohepa was misappropriating the funds such knowledge did not give rise to liability on his part. This argument, and its timing, would not seem to accord with a "brief lack of focus".

---

[6] Brewer J, Auckland High Court, 11 May 2011 CIV-2009-404-7381.

Findings of High Court as to Mr Fletcher's knowledge

[21] In commenting on the final element of the issue of liability for Mr Fletcher, Her Honour Duffy J began by referring to the decision of *Royal Brunei*[7] which has been followed by the Supreme Court in this country. In discussing that "dishonesty" meant "*simply not acting as an honest person would in the circumstances*", as an objective standard the Court in *Royal Brunei* went on to say this:

> "At first sight this may seem surprising. Honesty has a connotation of subjectivity, as distinct from the objectivity of negligence. Honesty, indeed, does have a strong subjective element in that it is a description of a type of conduct assessed in the light of what a person actually knew at the time, as distinct from what a reasonable person would have known or appreciated Further, honesty and its counterpart dishonesty are mostly concerned with advertent conduct, not inadvertent conduct. Carelessness is not dishonesty. Thus for the most part dishonesty is to be equated with conscious impropriety. However, these subjective characteristics of honesty do not mean that individuals are free to set their own standards of honesty in particular circumstances. The standard of what constitutes honest conduct is not subjective. Honesty is not an optional scale, with higher or lower values according to the moral standards of each individual. If a person knowingly appropriates another's property, he will not escape a finding of dishonesty simply because he sees nothing wrong in such behaviour.
>
> In most situations there is little difficulty in identifying how an honest person would behave. Honest people do not intentionally deceive others to their detriment. Honest people do not knowingly take others' property. Unless there is a very good and compelling reason, an honest person does not participate in a transaction if he knows it involves a misapplication of trust assets to the detriment of the beneficiaries. Nor does an honest person in such a case deliberately close his eyes and ears, or deliberately not ask questions, lest he learn something he would rather not know, and then proceed regardless."

[22] Following this citation Her Honour held as follows at paragraph [211]:

> "Mr Fletcher knew that Mr Hohepa was appropriating trust property. There was nothing about the circumstances of the appropriation that could suggest the appropriation was for trust purposes. Mr Fletcher has accepted that it was obvious to him at the time that once trust property was sent to Mr Hohepa in Spain, there was nothing to stop Mr Hohepa applying it for his own purposes. Mr Fletcher has also accepted that at the time he understood that trust funds sent to Mr Hohepa would become intermingled with Mr Hohepa's personal funds.
>
> ...
>
> All of this would have been obvious to an honest man and to an honest solicitor. Such persons do not knowingly participate in the type of transactions

[7] *Royal Brunei Airlines SDN Bhd v Tan* [1995] 2 AC 378 (PC).

> which have occurred. But Mr Fletcher chose to do so. It follows that, on an objective assessment of Mr Fletcher's conduct, the only available conclusion is that he acted dishonestly. It follows that liability for dishonest assistance is proven."

[23] Then in the Court of Appeal[8] the Court stated:

> "Mr Fletcher did not dispute that he was aware that Mr Hohepa was misappropriating the funds of the PWFM Trust, but argued that this knowledge did not give rise to liability on his part."

[24] After a discussion of the subjective and objective tests in respect of dishonest state of mind at paragraph [67] the Court of Appeal had this to say:

> "... In New Zealand a dishonest state of mind is determined by the application of an objective standard. A dishonest state of mind consists of actual knowledge that the transaction is one in which the assistor cannot honestly participate or a sufficiently strong suspicion of a breach of trust that it is dishonest to decide not to inquire, coupled with a deliberate decision not to make inquiry lest the inquiry result in actual knowledge.
>
> [68] Applying that approach to the facts of the present case, we are satisfied that Mr Fletcher had the requisite dishonest state of mind. The unchallenged findings by the Judge in her judgment at [211], which she found proved to "the highest degree of probability" and which we agree were soundly based on the evidence, clearly established the required dishonest state of mind. Mr Fletcher had actual knowledge that the transactions involving the disbursement of the funds belonging to the PWFM trust from the sale of the New North Road property were transactions in which he could not honestly participate."

[25] And at paragraph [70]:

> "We also consider that the evidence in this case met the alternative approach for the requisite dishonest state of mind endorsed by the Supreme Court in *Westpac*,[9] namely a sufficiently strong suspicion of a breach of trust that it is dishonest to decide not to inquire, coupled with a deliberate decision not to make inquiry lest the inquiry result in actual knowledge. Our view is based on the same evidence that led to the Judge's findings in her judgment at [211] and her statement at [153] that if she was wrong in her conclusion that Mr Fletcher would have been aware of Mr Hohepa's dishonest intentions that could only be because "he chose to close his eyes to the obvious". **We are satisfied that the evidence in this case established sufficiently strong suspicions of breaches of trust by Mr Hohepa which made it dishonest for Mr Fletcher not to inquire.**
>
> [71] **For completeness, we note that even if a subjective element were required for the requisite dishonest state of mind we would have found that element satisfied in this case.** Contrary to the submissions for Mr

[8] At paragraph 4 *Fletcher v Eden Refuge Trust & Ors* [2012] NZCA 124.
[9] *Westpac New Zealand Limited v MAP & Associates Limited* [2011] 3 NZLR 751.

> Fletcher, the Judge did ask and answer the question why Mr Fletcher had assisted Mr Hohepa to misappropriate the funds belonging to the PWFM trust. She expressly considered and rejected each and every one of Mr Fletcher's explanations for his actions. In doing so, she implicitly found that he had no honest motive for his actions in assisting Mr Hohepa to misappropriate the PWFM trust's funds." (emphasis added).

[26] Having regard to all of the above, including Mr Fletcher's statements, the Tribunal considers it must assess penalty on the basis of a solicitor who has behaved dishonestly, in relation to the events in question at least, in the course of a 37 year career.

Penalty considerations

[27] The Standards Committee referred the Tribunal to a number of authorities, the most relevant of which is the decision in *Dorbu v New Zealand Law Society*[10] which was the appeal from the penalty decision of the Tribunal, heard before a full Court of three High Court Judges. In that decision, at paragraph [35] the full Court referred to "some settled propositions" and to the authorities underpinning those propositions:

> "The question posed by the legislation is whether, by reason of his or her conduct, the person accused is not a fit and proper person to be a practitioner.[6] Professional misconduct having been established, the overall question is whether the practitioner's conduct, viewed overall, warranted striking off.[7] The Tribunal must consider both the risk of reoffending and the need to maintain the reputation and standards of the legal profession.[8] It must also consider whether a lesser penalty will suffice. The Court recognises that the Tribunal is normally best placed to assess the seriousness of the practitioner's offending.[9] Wilful and calculated dishonesty normally justifies striking off.[10] So too does a practitioner's decision to knowingly swear a false affidavit.[11] Finally, personal mitigating factors may play a less significant role than they do in sentencing.[12]"

---

[10] *Dorbu v Lawyers and Conveyancers Disciplinary Tribunal and New Zealand Law Society* [2012] NZAR 481.

"[6] Law Practitioners Act 1982, s 113 and Lawyers and Conveyancers Act 2006, s 244.

[7] Wellington District Law Society v Cummins [1998] 3 NZLR 363 (HC).

[8] Bolton v Law Society [1994] 2 All ER 486 (CA) at 492 and Complaints Committee of Waikato Bay of Plenty District Law Society v Osmond [2003] NZAR 162 (HC) at 14.

[9] Bolton v Law Society at 492.

[10] Duncan Webb Ethics, Professional Responsibility and the Lawyer (2nd ed, LexisNexis, Wellington, 2006) at 140.

[11] Bolton v Law Society at 491; Coe v NSW Bar Association [2000] NSWCA 13 at [10]-[11]; Re a Practitioner, ex parte Legal Practitioners Disciplinary Tribunal [2004] WASCA 115, (2004) 145 A Crim R 557 at [13] and [19]; and Barristers' Board v Young [2001] QCA 556 at [15]-[17].

[12] Ibid".

[28] In reviewing the Tribunal's conclusions about dishonesty the full Court recorded that, as in the present case, that practitioner submitted that he had acted in good faith at all times. The full Court had this to say:

> "The submission that he acted honestly is incompatible with the Tribunal's liability findings, which find abundant support in the record. Its liability findings on charges 4 and 7 alone compel the conclusion that the Tribunal was right to strike Mr Dorbu off. **His dishonesty was wilful and calculated. It extended to not one but two attempts to mislead the Court in affidavits**." (emphasis added)

[29] The distinguishing feature in this case is that the Higher Courts have stopped short of categorising Mr Fletcher's dishonesty as "wilful and calculated" and there is certainly no evidence of false affidavits or misleading the Court as existed in the *Dorbu* case (along with the number of other serious examples of misconduct).

[30] For Mr Fletcher, Mr Illingworth submitted that the practitioner's conduct in the past 10 years is hugely significant in terms of the Tribunal's assessment of his risk to the public in the future. Mr Illingworth urged us to accept that the practitioner now had an insight into his behaviour and that if his 37 years of practise were looked at overall, some significant credit could be given for that.

[31] Mr Illingworth also asked the Tribunal to give weight to the enormous financial burden that Mr Fletcher's offending has already imposed upon him, that is the $1.3 million cost of the judgment, interest and costs. That has been paid by the practitioner in full and thus he can be distinguished from other practitioners who have been seen to act dishonestly, in that he has put matters right to the last dollar.

[32] In considering the totality of Mr Fletcher's behaviour, Mr Brown, for the Standards Committee, urges that we also take account of the other side of this coin, that Mr Fletcher would seem to have pursued untenable arguments over a nine year period, thus delaying this matter and significantly increasing the costs over what he would have had to pay (approximately $250,000) had he simply accepted his responsibility from the outset. This, Mr Brown submits, can be considered under the "totality of conduct" heading referred to in the penalty decisions of *Daniels*[11] and *Hart.*[12] While we are cognisant of the fact that the practitioner litigated with full legal

[11] *Daniels v Complaints Committee No 2 of Wellington District Law Society* [2011] 3 NZLR 850.
[12] *Hart v Auckland Standards Committee 1 of New Zealand Law Society* [2013] NZHC 83.

advice, he is an experienced practitioner, who must take some responsibility for the outcome of the litigation. Put succinctly, he would have received more credit from the Tribunal if he had simply taken responsibility for the consequences of his defaults as a solicitor to the PWFM Trust, and put things right at the outset.

[33] While the practitioner was anxious to emphasise his 10 years of good conduct since these events as being relevant to the Tribunal, it is clear that to simply accept such as mitigating features, would be to invite practitioners in future to delay the hearing of disciplinary charges, within the framework of a regime where expeditious disposition is a key value of the legislation.[13]

[34] Having said that the Tribunal accepts that it is proper for regard to be had to the disciplinary history of the practitioner over the full 37 years during which he has practised, not merely those years preceding this complaint arising.

Other factors

[35] As has already been noted (within the *Dorbu* quotation above at paragraph [27]) matters in mitigation will not necessarily carry the same weight in assessing penalty as they would in a criminal sentencing exercise. That is because the purpose of disciplinary proceedings is not punitive but rather protective of the public and the profession and thus matters of mitigation, on the other side of the coin, cannot be given such weight in the light of a protective approach.

[36] We note that this is a practitioner who has made a significant contribution to the community in terms of pro bono work and strong community involvement, and involvement with his church, over a very lengthy period. We consider that there ought to be credit given to Mr Fletcher for those activities. They bring credit to the legal profession.

[37] We are also referred to previous disciplinary matters. There have been two adverse findings against Mr Fletcher. One of misconduct in 1988, following which he was censured and fined the sum of $1000. Secondly in March 2004, a finding of negligence such as to bring the profession into disrepute. The penalty for this

[13] Section 231(1)(a) and s 3(2)(b) of the Lawyers and Conveyancers Act 2006.

offending was a censure and fine of $2000 together with costs.

[38] During the hearing Mr Fletcher assured us that over the past 10 years there have only been complaints about costs, none of which have been upheld. Following the conclusion of the hearing the Tribunal sought further information from both counsel as to these previous complaints and any current complaints. We record that there have been seven complaints but these were assessed by the New Zealand Law Society as requiring no further action and we take no account of those. There is currently a complaint still being investigated and once again given that this matter is not the subject of any finding, we must put it to one side.

Decision

[39] The final analysis must be whether Mr Fletcher's conduct, over 10 years ago, is so serious as to require strike off because it renders him unfit to practise, or whether some less restrictive intervention (see *Daniels* decision[14] will properly reflect the seriousness of this matter.

[40] The Tribunal is required to reach a unanimous view that strike off is necessary to achieve the purposes of the Act. These are:

> **3 Purposes**
> (1) The purposes of this Act are—
>
> (a) to maintain public confidence in the provision of legal services and conveyancing services:
> (b) to protect the consumers of legal services and conveyancing services:
> (c) to recognise the status of the legal profession and to establish the new profession of conveyancing practitioner.

[41] The Tribunal did not reach the unanimous view that strike off was necessary to achieve these purposes despite the very serious nature of the misconduct in this matter. We considered that while it is accepted the practitioner was required to meet the financial burden imposed by the Court as a consequence of its findings against him, the fact that he has paid $1.3 million to ensure no person is now out of pocket as a result of his misconduct means that he ought to be seen in a different light from a lawyer who has not put the consequences of misconduct right in this way.

---

[14] *Daniels v Complaints Committee No 2 of Wellington District Law Society* [2011] 3 NZLR 850.

[42] However we consider that the misconduct is so serious that the response cannot be less than a lengthy period of suspension. In addition to that we have concerns about the practitioner's attempts to minimise his "error" and his lack of insight. For example, at the hearing it became known to the Tribunal that Mr Fletcher had accepted a public speaking engagement, shortly following the hearing, to lecture on the law of Trusts. Given that he was facing imminent strike off or likely suspension we considered that showed a marked lack of judgment on his part.

[43] We propose to impose a condition on his resumption of practice that he make reports on his practice and take advice in relation to the management of his practice for a period of at least two years.

Summary of orders

[44] The orders are made pursuant to the Law Practitioner's Act 1982 in terms of the transitional provisions of the Lawyers and Conveyancers Act in terms of paragraph [3] of this decision:

[a] The practitioner is suspended for a period of two years from 24 May 2013.

[b] The practitioner is censured.

[c] The practitioner is ordered to pay costs to the New Zealand Law Society in the sum of $19,554 pursuant to ss 106(g), (h) and (i).

[d] There are orders that Mr Fletcher, should he recommence his practice, he is to make it available for inspection, make reports on his practice on a three-monthly basis from the time of recommencement and take advice in relation to management of his practice as directed by the New Zealand Law Society, for a period of two years following his return to practise.

DATED at AUCKLAND this 15th day of May 2013

Judge D F Clarkson
Chair