NEW ZEALAND LAWYERS AND
CONVEYANCERS DISCIPLINARY TRIBUNAL

[2013] NZLCDT 18

LCDT 033/12

IN THE MATTER	of the Lawyers and Conveyancers Act 2006
AND	the Law Practitioners Act 1982
BETWEEN	**OTAGO STANDARDS COMMITTEE** Applicant
AND	**JOHN MILNE,** of Christchurch, Retired Solicitor Respondent

MEMBERS OF TRIBUNAL

Mr D Mackenzie (Chair)
Mr M Gough
Mr A Lamont
Mr S Maling
Mr S Walker

HEARING at CHRISTCHURCH on 30 April 2013

APPEARANCES

Mr G Nation, for the Standards Committee
Dr D Webb and Mr R Kay, for the Respondent

REASONS FOR DECISION ON PENALTY AND RESERVED DECISION ON COSTS

Background

[1] Mr Milne faced four charges laid by the Otago Standards Committee. He admitted the charges and some of the particulars supporting the charges, but denied other particulars said to support the charges.

[2] Mr Milne's admission of the charges was formally noted when the Tribunal convened in Christchurch on 30 April 2013 to hear submissions on the charges and their particulars, and to deal with penalty.

[3] At the conclusion of that hearing, the Tribunal made findings regarding the disputed particulars, and in respect of the charges ordered that the name of JOHN DAVID MILNE be struck off the roll of barristers and solicitors.

[4] Costs under s 257 Lawyers and Conveyancers Act 2006 ("LCA") were certified at $4,900. The Standards Committee sought its own costs from Mr Milne, together with an order against Mr Milne to reimburse the New Zealand Law Society its costs incurred under s 257.

[5] The Tribunal reserved the question of costs at the hearing, and advised that it would give fuller reasons for its decision on penalty in due course. This determination now records the Tribunal's decision delivered at the hearing of 30 April 2013, sets out more fully its reasons, and delivers its reserved decision on costs.

The Charges

[6] The first charge ("Charge 1") Mr Milne faced was that he was guilty of misconduct under LCA based on the way he dealt with funds entrusted and/or lent to him which he had sought and received from 15 clients between 1 August 2008 and 31 May 2012.

[7] The particulars of Charge 1 alleged that he had sought and received funds from some 15 clients, and had breached LCA because he had: failed to pay monies received into a trust account[1]; failed to account properly for monies received to the person on whose behalf the monies were held[2]; failed to ensure monies received were not used to pay his other debts[3]; and failed to ensure monies entrusted to him earned interest for the persons from whom he had received the monies[4].

[8] Mr Milne denied[5] these particulars, saying that the relevant sections were inapplicable to him because all the monies paid to him were paid to him personally. In those circumstances, he said in his response, the monies were not received or held for and on behalf of any person.

[9] In another particular said to support this charge, it was alleged that Mr Milne had dishonestly received monies for purposes which were not authorised by the person who had entrusted the monies to him. Mr Milne denied this particular in its entirety.

[10] He also denied a further particular regarding this charge that he borrowed monies for his personal benefit in circumstances where he knew or ought to have known that there was a real risk he would not be able to repay those monies when legally required to do so.

[11] Other particulars, that he breached the fundamental obligations of a lawyer required to be observed under LCA: to be independent[6]; to observe fiduciary duties and duties of care[7]; and to protect the interests of his clients[8]; were all admitted by Mr Milne.

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[1] A breach of s 110.
[2] A breach of s 111
[3] A breach of s 113.
[4] A breach of s 114.
[5] In his formal response filed pursuant to r 7 Lawyers and Conveyancers Act (Disciplinary Tribunal) Regulations 2008.
[6] Lawyers and Conveyancers Act 2006 – s 4(b).
[7] Ibid, s 4(c).
[8] Ibid, s 4(d).

[12] Finally, Mr Milne, in the particulars supporting this charge, was said to have breached certain requirements of the Lawyers Conduct and Client Care Rules[9] and Trust Account Regulations[10].

[13] Under the Lawyers Conduct and Client Care Rules, breaches of: Rule 3.4(c) - advice on Lawyers Fidelity Fund coverage; Rule 3.5 - provision of client care and service information; Rule 5 – requirement to be independent; Rule 5.1 - ensuring a relationship of trust and confidence with clients; Rule 5.4 - conflict of interest procedures and requirements; and Rules in Chapter 7 relating to disclosure and communication obligations, were alleged.

[14] Mr Milne admitted all these particulars relating to the Lawyers Conduct and Client Care Rules, except Rules 3.4 (c) and 3.5 (saying that he believed he had provided full client care information to his clients), Rule 5.4.2 (saying he did not act for any client in any transaction in which he had an interest), and various Rules in Chapter 7 (saying he did not formally respond to those particulars of charge as they were not fully made out).

[15] In respect of alleged breaches of the Trust Account Regulations he denied the particulars as he had not been a principal at the relevant times and therefore could not be in breach of r 7.1(a) as alleged, and he noted that the other particulars recited ("*11.7 and part 11*") were incorrect as no such references were contained in the Trust Account Regulations.

[16] The second charge ("Charge 2") Mr Milne faced was also a charge of misconduct under LCA. This arose from the way he had dealt with funds held by him during the period 1 August 2008 to 31 May 2012, those funds having been entrusted and/or lent to him by some 20 clients.

[17] The particulars of this charge alleged that Mr Milne had breached LCA in a number of ways: failing to properly account for monies received to the persons on

[9] Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008.
[10] Lawyers and Conveyancers Act (Trust Account) Regulations 2008.

whose behalf the monies were held[11]; failing to protect monies received from being used to pay his other debts[12]; failing to ensure the funds entrusted to him earned interest for the person from whom he had received such funds[13]; breaching his fundamental obligation to be independent in providing legal services to his clients[14]; breaching his fundamental obligation to act in accordance with all fiduciary duties and duties of care[15]; and breaching his fundamental obligation to protect the interests of his clients[16].

[18] In respect of the breaches of ss 111, 113, and 114 LCA alleged against him, Mr Milne repeated what he had said regarding similar Charge 1 particulars, that the monies were paid to him personally and were thereby not held by him as a lawyer for or on behalf of any person. As a consequence, he said, the sections did not apply in respect of those funds.

[19] In his formal response to Charge 2 Mr Milne accepted that he had breached his fundamental obligations under s 4 (b), (c) and (d) LCA.

[20] The particulars of Charge 2 also alleged the same breaches of the Conduct and Client Care Rules and Trust Account Regulations as Mr Milne had breached regarding the clients involved in the Charge 1. Mr Milne responded to these particulars in the same way as he did in respect of Charge 1, admitting some and denying others, and for the same reasons, as noted regarding that first charge.[17]

[21] The next two charges faced by Mr Milne related to his conduct prior to the coming into force of LCA on 1 August 2008. Under LCA, conduct prior to its coming into force may be dealt with under its transitional provisions[18], but those transitional provisions only allow a proceeding commenced for historical conduct at a time when the Law Practitioners Act 1982 was in force, to reach back as far as 1 August

[11] A breach of s 111.
[12] A breach of s 113.
[13] A breach of s 114.
[14] A breach of s 4(b).
[15] A breach of s 4(c).
[16] A breach of s 4(d).
[17] Supra paragraphs [13] to [15].
[18] Section 351.

2002[19]. As a result the charges against Mr Milne, so far as they relate to his conduct prior to LCA coming into force, only cover the period from 1 August 2002 up to 1 August 2008, notwithstanding that there is evidence indicating that his conduct complained of began before 1 August 2002.

[22] Charge 3 is based on Mr Milne's conduct constituting misconduct as referred to in s 112 Law Practitioners Act 1982. The particulars in support of this misconduct charge allege that in respect of 11 clients from whom Mr Milne had sought funds and who had entrusted and/or lent to him monies during the period 1 August 2002 to 1 August 2008, he had: breached his obligation to be independent; breached his obligation to act in accordance with all fiduciary duties and duties of care; breached his obligation to protect the interests of his clients; and borrowed money for his personal benefit in circumstances where he knew or ought to have known there was a real risk he would not be able to repay those monies when required.

[23] Charge 3 was also supported by particulars alleging that Mr Milne's conduct had breached various provisions of the then applicable rules of professional conduct, and regulations and rules regarding solicitors trust accounts.

[24] In his regulatory response to the charge, while admitting misconduct, Mr Milne did not admit all the particulars. He admitted failure to act independently, failure to properly discharge his fiduciary duties and duties of care, and failure to protect the interests of his clients. He also admitted that he breached a number of the then applicable rules relating to: ensuring the relationship of solicitor-client which is based on trust and confidence was not abused[20]; avoiding a conflict of interest by borrowing from clients[21]; and his failure to properly advise clients regarding their investments[22].

[25] Mr Milne denied a breach of r 3 Solicitors Trust Account Regulations 1998, on the basis that the funds were paid to him absolutely and not for or on behalf of any person. He said in his regulatory response to the charges filed with the Tribunal that

[19] See s 351(2)(b).
[20] Rules of Professional Conduct for Barristers and Solicitors - rule 1.01.
[21] Ibid rule 1.03.
[22] Ibid rule 1.06.

meant the funds were not trust funds and therefore r 3 did not apply. He admitted a particular alleging a breach or r 6(1) in that he borrowed funds from clients in breach of that regulation.

[26] All of the particulars alleging breaches of the Solicitors Trust Account Rules 1996 were denied by Mr Milne. He said in his regulatory response that as the monies were all paid to him personally he was not obliged to deal with the monies as required by rules that would have otherwise been applicable if they were trust monies[23].

[27] In respect of the fourth charge of misconduct ("Charge 4"), also in respect of conduct at a time when the Law Practitioners Act 1982 was in force, Mr Milne admitted the charge, but again denied some of the particulars.

[28] The charge was that in respect of funds he held which had been entrusted and/or lent to him in the period from 1 August 2002 to 1 August 2008 by some 9 clients, he conducted himself in a way that breached the same provisions of the applicable rules and regulations as were noted in Charge 3.

[29] Mr Milne adopted the position he had taken regarding Charge 3. He admitted similar particulars as he had admitted in respect of Charge 3, and he denied the similar particulars as were denied by him in Charge 3. These admissions and denials were set out in his regulatory response filed with the Tribunal.

Submissions for the Standards Committee

[30] In his submissions, Mr Nation for the Otago Standards Committee, noted that the total amount currently due to Mr Milne's former clients and unaccounted for, approached $2.9m.

[23] Rules requiring that he: deal with funds in accordance with client directions (rr 3(1) and 3(2); keep trust account records in respect of the transactions involving the funds received (r 4.1); keep and provide proper financial records of payments, receipts, transfers, balances and statements in respect of such monies (rr 5.1, 5.2, 5.3 and 5.8).

[31] He noted that over a long period Mr Milne had failed to meet the standards of integrity, probity, and trustworthiness expected of a lawyer. Mr Milne had used funds received from clients for his personal benefit Mr Nation submitted, keeping any record of them outside his formal records and trust account, so that Law Society Inspectors were never aware of any of the arrangements. It was only when complaints began to be received from Mr Milne's clients regarding money they had given him to invest, and the Law Society consequently began an investigation, that Mr Milne's activities came to light.

[32] Mr Nation submitted that the admitted particulars spoke for themselves, and that it was right that Mr Milne should accept that he was guilty of the misconduct alleged in the four charges. So far as the denied particulars were concerned, Mr Nation said that the unchallenged[24] evidence before the Tribunal allowed the Tribunal to draw its own inferences regarding whether the funds were personal loans which Mr Milne could not repay, or funds invested with him for the purposes of his practice, and thus trust monies.

[33] In addition to the evidence about the obtaining of the monies by Mr Milne, Mr Nation noted that there was no evidence that the Law Society Inspectors had been able to find that Mr Milne had invested the funds he received, whether in an interest bearing account or with third party borrowers. There was no record of Mr Milne receiving any interest on the funds, and his personal bank accounts disclosed only personal use of the funds, not any loans, repayments, or interest payments involving third party borrowers. The inference was, Mr Nation suggested, that Mr Milne had taken the funds for his personal use and any interest or capital payments made by Mr Milne to persons who had provided funds to him were paid from the proceeds of further borrowing undertaken from other clients by Mr Milne.

[34] Mr Nation submitted that the particulars admitted were sufficient to support each of the misconduct charges, that those particulars denied by Mr Milne did appear to be correctly alleged given the unchallenged evidence, and that Mr Milne

[24] Mr Milne declined to provide any evidence in his defence, undertook no cross examination of witnesses for the Standards Committee, and indicated that he would not answer any questions. His counsel indicated that this was because there was a risk that Mr Milne may face criminal charges, and Mr Milne did not want to prejudice his position if he did face such charges.

was clearly not a fit and proper person to be a lawyer. He noted that Mr Milne accepted that striking Mr Milne's name from the roll was inevitable, and confirmed that was the sanction sought by the Standards Committee.

Submissions for the Practitioner

[35] For Mr Milne, Dr Webb acknowledged his client's admission of the charges, and noted that the fact that striking off was inevitable was also accepted by Mr Milne. The one area he wished to emphasise however related to Mr Milne's position that the monies he had received from clients were not monies received in the context of a solicitor - client relationship, but simply constituted personal loans to Mr Milne for his use as he saw fit. This was the basis of most of Mr Milne's denials regarding some of the particulars in support of each charge.

[36] Mr Milne's position was that he now found himself in a position where he was unable to repay the amounts provided to him, but he had not taken money that should have gone into a trust account and been subject to the controls, processes, and procedures that govern such money.

[37] Dr Webb submitted that an examination of the evidence of Ms D and Mr W supported the fact that they, as two of those persons who provided monies to Mr Milne, lent the funds to him personally, as acquaintances of Mr Milne, and not as funds provided to him as their lawyer in the course of his practice.

[38] Dr Webb pointed to the long-standing relationship between Ms D and Mr Milne. He submitted that while Mr Milne "*very occasionally*" acted as lawyer for Ms D, the relationship and the provision of funds to Mr Milne by Ms D was driven by longstanding friendship and represented a personal loan, rather than an investment by a client with their lawyer.

[39] In support of this proposition Dr Webb relied on various parts of Ms D's evidence. In part of his submissions[25] he stated that evidence from Ms D, to the effect that she could not remember whether she and Mr Milne were at his office

[25] Submissions of Counsel for John Milne dated 29 April 2013 handed up by Dr Webb, at paragraph 11.

when Mr Milne offered to arrange to ensure any spare cash she had got a good rate of interest if she gave it to him, was indicative of a social relationship rather than a solicitor client relationship. The tribunal notes that this is notwithstanding Ms D also saying in her evidence at this point that she "*thought he* [Mr Milne] *was making the offer as my lawyer*" [26].

[40] Dr Webb also submitted that the fact that sometimes Ms D saw Mr Milne at her home, and on other occasions she would go to his office to give him further funds to invest, indicated an informality that supported Mr Milne's suggestion that the arrangement was personal rather than professional.

[41] Ms D's evidence was that she thought the funds she had given Mr Milne were being used in connection with his business as a solicitor and that he was lending the money to other clients, and she noted that as time went on there was no specific information about the use being made of the money she had made available to Mr Milne. Dr Webb said that acknowledgement of lack of information supported his submission that the loans were personal rather than in the course of Mr Milne's practice, as "*the assumption that Mr Milne was using funds in connection with his business was unfounded".*[27]

[42] Dr Webb also submitted that the informal documentation provided to Ms D also suggested that the arrangement was a personal one, in that Mr Milne provided Ms D with hand-written interest receipts and records of amounts provided to him by Ms D. He also said that because Mr Milne visited Ms D to make payments when they could have been made by electronic means or post indicated a family friendship rather than client/lawyer relationship. This was notwithstanding evidence from Ms D that she considered she was Mr Milne's client at that time. Dr Webb suggested that Ms D was mistaken in that belief.

[43] The fact that Mr Milne had made assurances to Ms D about the security of amounts she had provided to him, and that he would not see her out of pocket, were also submitted by Dr Webb to indicate a personal care and concern as a friend

[26] Evidence of Ms D at paragraph 12, page 11, of Standards Committee Bundle.
[27] n 25 above, at paragraph 14.

rather than as a lawyer. That fact of a personal arrangement based on friendship rather than a solicitor/client relationship was also supported, Dr Webb submitted, by the fact that information provided by Mr Milne to Ms D was not on letterhead and signed by him in his express capacity as a lawyer.

[44] Similar submissions were made by Dr Webb regarding another client, Mr W, where Dr Webb suggested that Mr W's provision of monies to Mr Milne was in the form of personal loans to Mr Milne, or for his investment, rather than representing amounts accepted by Mr Milne as a solicitor from a client. In support of this submission Dr Webb noted that Mr W's evidence indicated that Mr W was under the impression that the loans would be guaranteed by Mr Milne's estate, indicating a personal arrangement.

[45] Dr Webb also noted that two cheques provided by Mr W to Mr Milne in June 2000 were made out to third parties, so Mr W could not have thought they were amounts being made available for Mr Milne's practice and to go through his trust account. The fact that Mr Milne, when receiving monies from Mr W, provided informal hand-written receipts, when signing made no reference to his position as a lawyer, and the informal nature of the arrangement (no detail regarding purpose of loan, addresses of parties, terms and conditions, security arrangements and similar), all also supported a non professional and personal arrangement Dr Webb submitted, rather than a formal investment by a client with his solicitor.

[46] All these things meant, said Dr Webb, Mr Milne was right to deny the particulars which alleged he had dealt with client money other than as required by the various rules and regulations applicable to lawyers. The monies were nothing more than personal loans in respect of which Mr Milne had unfortunately defaulted, he said.

Reasons for Tribunal's Decision

[47] At the conclusion of submissions from counsel on the day of hearing, the Tribunal withdrew to consider what it had heard and reach a view on the appropriate sanction. The Standards Committee sought strike off, and Mr Milne had

acknowledged that was appropriate notwithstanding his denial of some of the particulars supporting the four charges of misconduct which he had admitted.

[48] The Tribunal of course had to reach its own conclusion that Mr Milne was not a fit and proper person by reason of his conduct[28]. Reviewing all the evidence, and considering what counsel had submitted, the Tribunal had no difficulty at all in reaching that conclusion, and on resumption ordered that the name of JOHN DAVID MILNE be struck off the roll of barristers and solicitors.

[49] The charges related to an extended period of activity by Mr Milne over many years. Despite Dr Webb's extended submissions as to the fact that the funds were received as personal loans, rather than in the course of Mr Milne's practice, we found that the monies were provided to Mr Milne as a lawyer for the purposes of his practice and that they were not personal loans.

[50] The evidence of Ms D indicated quite clearly that she thought she was making money available to Mr Milne as part of his practice, not as a personal loan to a friend, completely separate from his practice. [29] The investment references in various receipts given to Ms D by Mr Milne would have reinforced her view.[30] On the facts in evidence before us that was a reasonable conclusion for her to reach, and entirely appropriate in all the circumstances.

[51] The informality of arrangements, with no use of formal receipts or letterhead, relied on as part of Dr Webb's submission that the loans were personal, is consistent with an inference that Mr Milne wanted to keep the matter hidden from Law Society Inspectors. His behaviour in not investing and earning interest on funds he received, despite advising that he could get good interest rates and indicating that loans had been made to third parties (of which auditors investigating post complaint could find no sign) supports that view.

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[28] Section 244(1) Lawyers and Conveyancers Act 2006.
[29] Affidavit of Ms D dated 4 December 2012 in the Standards Committee Bundle page 9, at paragraphs 12, 14, 19, 25.
[30] Ibid, exhibits E, F, H, K, L, and N.

[52] Other factors relied on by Dr Webb for the position his client took regarding the personal nature of the loans do not support that position either in our view. Visiting lenders rather than posting a cheque or arranging an electronic transfer goes no way to at all to supporting a claim that the loans were personal – that behaviour is equally consistent with ensuring audit trails are not obvious.

[53] The fact that on occasions cheques were provided to Mr Milne made out to third parties at his request, suggests a professional use of funds, rather than the contrary as submitted by Dr Webb. We note that on investigation, when these matters became known following complaints to the Law Society, the evidence of the Law Society Inspector was that there was no evidence that any third party loans had actually been made. The inference to be drawn is that Mr Milne made no such advances, but did intend that those providing funds to him should believe that the funds were for on-lending as part of Mr Milne's practice.

[54] We note also that many of the informal receipts provided by Mr Milne and before us in evidence supports a view that Mr Milne intended that those placing funds with him would think of it as part of a solicitor - client arrangement, rather than as a personal loan. For example, an early[31] receipt provided to Ms D by Mr Milne noted that he had obtained a loan acknowledgement for some of her funds from the third party named in the receipt, and expected to receive a further acknowledgement from another party, also named in that receipt, regarding other of her funds[32].

[55] It is not surprising that Ms D considered she was lending the funds to Mr Milne in the course of his practice, rather than making a personal loan to Mr Milne.

[31] Some advances by Ms D, as evidenced by some of the receipts, do not form part of the charges against Mr Milne to the extent they occurred prior to the period covered by the transitional provisions of the Lawyers and Conveyancers Act 2006. Those transitional provisions, which are set out in s 351, only allow disciplinary proceedings to be commenced in respect of conduct occurring from 1 August 2002. Nevertheless, early receipts are useful evidence when considering the continuing course of conduct adopted by Mr Milne in obtaining funds which are the subject of charges.

[32] Standards Committee Bundle at page 23.

[56] There were other receipts of a similar nature issued by Mr Milne, in which he referred to third parties as the borrowers of the funds provided to him by Ms D or Mr W[33].

[57] Apart from clients being referred to or directly named in the informal receipts issued by Mr Milne, there are other references in those receipts which indicate that the funds were provided to Mr Milne in the course of his practice rather than as personal advances to him. For example reference to funds being invested by Mr Milne[34], and a reference to him taking security[35], or that he had "*loaned* (sic) *three clients the sum of $10,000"* [36].

[58] Those persons giving Mr Milne the funds would have been misled by his statements as to how the funds were being used. It appeared that, as Ms D and Mr W indicated in their evidence, Mr Milne was taking the funds for use in the course of his practice, and that has now been shown to be untrue.

[59] The Tribunal did not accept Mr Milne's claim that he was simply taking the funds as personal loans to him on which he had now defaulted. That did not accord with the evidence noted, nor did it reflect the reasonably held belief of Ms D and Mr W as expressed in their evidence.

[60] Mr W said in his affidavit of 21 November 2012 filed in this matter[37], that he dealt with Mr Milne as a solicitor and that he understood monies he gave to Mr Milne were for Mr Milne in the normal course of his legal practice, rather than a personal loan as suggested by Mr Milne[38]. Mr W gave evidence of some funds being provided by way of cheques made out in the name of third parties whom he understood were clients of Mr Milne[39]

[33] Ibid, at pages 26, 30, and 51.
[34] Ibid, at pages 22, 28, 32, 53, 54, 55, and 56.
[35] Ibid, at page 24 and 29.
[36] Ibid, at page 30.
[37] Commencing at page 43 of the Standards Committee Bundle.
[38] Mr W's affidavit referred to at n 36 above at paragraphs 10 and 14.
[39] n 37 above at paragraphs 12 and 15.

[61] We note also other matters that tend to discredit Mr Milne's explanation of personal loans. If they were personal loans, then quite apart from the matters already noted, why did he feel the need to record in many of the informal receipts he issued that he personally guaranteed the payments of interest and principal? That is indicative of a position that there was a third party borrower with whom Mr Milne had invested the money in the course of his practice. This perpetuated the misleading position Mr Milne was portraying to his clients when obtaining funds from them.

[62] We consider also that with so many persons caught up in this matter, providing Mr Milne with funds, it strains credibility to suggest that all of them had such a relationship with Mr Milne that they lent him their money as a personal loan to him, and not as a placement of funds with their solicitor.

[63] The implications for Mr Milne, if he has diverted to his own benefit funds sought and received as a solicitor in the course of his practice, are quite different from the position he would face if he had borrowed funds personally but is now unable to make repayment in the normal course. We do not consider Mr Milne can reasonably claim personal borrowing. The evidence does not support such a position and we consider that the various trust accounting obligations applicable to lawyers did apply in respect of all funds received. The unchallenged evidence of the Law Society Inspector before the Tribunal[40] records the extent and nature of Mr Milne's activities.

[64] Mr Milne did not give evidence and did not challenge the Standards Committee evidence at the hearing because he may face criminal charges, and he wished to ensure he did not incriminate himself in any way. That of course is a matter for Mr Milne, but the Tribunal is left with unequivocal evidence that Mr Milne's conduct has involved the particulars alleged[41], and his admission of the charges is entirely appropriate.

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[40] Commencing at page 86 of the Standards Committee Bundle.

[41] One particular alleged in each charge, that Mr Milne dishonestly used the monies received for purposes that were not authorised, thereby committing a criminal offence, was not actively pursued by the Standards Committee as that was considered a matter for another forum. The Tribunal agrees that it is not necessary in the circumstances for the Tribunal to be involved in determining whether or not there has been a criminal offence, and we make no finding on that particular.

[65] As recorded at the hearing, some 35 of Mr Milne's clients in Canterbury and Otago have lost a total of nearly $2.9m. The funds have disappeared, and given that Mr Milne has been declared bankrupt, repayment by Mr Milne is not likely. This has been a gross breach of trust by Mr Milne, with dire financial consequences for those who gave him their money, many of them at a stage in their life where financial security is especially important.

[66] Quite apart from the losses suffered by those who trusted Mr Milne, he has by his activities severely damaged the trust and confidence the public must be able to have in their legal advisers.

[67] As a consequence, having concluded, with little difficulty, that Mr Milne was not a fit and proper person to be a legal practitioner, the Tribunal ordered that his name be struck off the roll of barristers and solicitors.

Costs

[68] The Standards Committee sought its costs, as well as reimbursement of the costs the Law Society has incurred under s 257 LCA, a total of approximately $27,000. At the hearing, the Tribunal reserved its position on costs.

[69] Given that Mr Milne is bankrupt, and in poor health and elderly (making it unrealistic to think that he has any capacity now or in the future to earn income), we do not consider an award of costs against Mr Milne is appropriate. One of the matters we are obliged to take into account is a practitioner's ability to pay[42]. Costs are not to be punitive, and Mr Milne could never be expected to be in a position to meet such an order for costs.

[70] The Tribunal declines to exercise its costs discretion against Mr Milne in those circumstances.

[42] *Kaye v Auckland District Law Society* [1998] 1 NZLR 151.

Suppression

[71] We record that at the hearing we made an order for suppression of the names and any identifying particulars of those referred to in evidence as having provided funds to Mr Milne.

DATED at AUCKLAND this 16th day of May 2013

D J Mackenzie
Chair