IN THE NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL

[2011] NZLCDT 19

LCDT 007/10

IN THE MATTER of the Lawyers and Conveyancers Act 2006

AND

IN THE MATTER of a lawyer

TRIBUNAL
Chair:
Mr D J Mackenzie

Members:
Mr M Gough
Mr A Lamont
Mr C Lucas
Mr C Rickit

COUNSEL
Mr H D P van Schreven for Canterbury Standards Committee No.1
Mr J Brandts-Giesen for The respondent

HEARING at Christchurch on 4 August 2011

RESERVED DECISION OF THE TRIBUNAL ON PENALTY, COSTS AND SUPPRESSION

Introduction

[1] By its decision of 20 April 2011, the Tribunal found a charge of professional misconduct against the respondent lawyer to be proven[1]. Submissions on penalty and costs were subsequently lodged by the parties. On 4 August 2011 the Tribunal convened to hear argument on these matters and an application by the respondent for permanent suppression of his name. At the conclusion of that hearing the Tribunal reserved its decision, and granted interim name suppression while it considered issues.

[2] The facts of the misconduct charge, and the Tribunal's various findings, are contained in its decision of 20 April 2011. In summary, the Tribunal found that the respondent had effectively been in sole charge of the estate of a deceased person following the death of the sole executor of that estate. The charge of misconduct found proven against the respondent involved him debiting a number of fee invoices against the estate in breach of Regulation 8 Solicitor's Trust Account Regulations 1998 ("R.8"), with one significant invoice, for costs and GST totalling $23,625, being found to be unjustifiable.

[3] In his defence of the charge, the respondent stated that he had complied with R.8 by sending invoices to the sole executor of the estate, and that the significant invoice of $23,625 represented an amount which the sole executor would have found acceptable. In response to the fact that the sole executor had been deceased at the relevant times, the respondent said he had not been aware of that fact at those times. The Tribunal found that the respondent had been well aware the sole executor had died, and that as well as not complying with R.8 in respect of a series of invoices against the estate, he had taken advantage of the situation to debit the fee invoice involving an amount of $23,625 which he could not justify.[2]

[4] The Tribunal found that in the circumstances the respondent's actions constituted more than simple non-compliance with R.8, and involved a calculated and dishonest approach intended to take advantage of his effective sole charge position regarding the estate.[3]

Position of the Standards Committee

[5] The Canterbury Standards Committee submitted that the appropriate sanction in the circumstances of this case was an order striking the respondent off the roll of barristers and solicitors.

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[1] Canterbury Standards Committee No.1 v X [2011] NZLCDT 9

[2] Ibid, at paragraph [40], where the basis of the finding that The respondent was aware of the fact that the sole executor had died, is summarised

[3] Ibid, at paragraphs [50], [55] and [60]

[6] The Standards Committee sought this regulatory response on the basis that the Tribunal had found that the respondent did not simply breach R.8, but that he took advantage of his sole charge position regarding the estate, and proceeded in a calculating and dishonest manner which facilitated the taking of an unjustified fee.

[7] Counsel for the Standards Committee also submitted that the respondent, following the findings made against him by the Tribunal on the substantive charge of misconduct, had continued to demonstrate a lack of insight into his position as a practitioner, and had not taken responsibility for what had occurred. In all the circumstances, the Standards Committee submitted, the Tribunal could properly conclude that the respondent was not a fit and proper person to be a legal practitioner.

The respondent's position

[8] For the respondent, it was submitted by his counsel that striking off would not be an appropriate response, as it was not necessary to do that to protect the public. This matter was said to be one episode in a largely unblemished career,[4] arising from a serious error of judgment at a time when the respondent was said to be adversely affected by mental health issues. Accordingly, it was submitted, the respondent should be considered a fit and proper person to practise as a barrister and solicitor.

[9] In making this submission, counsel for the respondent sought to rely on a decision of the High Court in *Leary v New Zealand Law Practitioners Tribunal*.[5] He submitted that this Tribunal should follow the approach of the High Court in *Leary*, and look forward when making a value judgment as to whether or not the respondent was a fit and proper person to practise as a barrister and solicitor, and not focus on his misconduct.

[10] In *Leary*, the High Court allowed an appeal against the refusal of an application made by a former legal practitioner for restoration to the roll. The restoration applicant was restored to the roll on the basis that the consideration of whether or not he was a fit and proper person to practise as a barrister and solicitor should be largely a prospective exercise, rather than the retrospective exercise that had been applied, with an undue focus on his previous misconduct.

[11] While we agree that assessing the need to protect the public will necessarily involve a forward looking assessment, *Leary* provides little assistance in this case. The decision as to whether or not the respondent is a fit and proper person has to be considered in the context of the recent adverse disciplinary finding we have made against him, and the associated consideration of what sanction may be applicable having regard to the public interest, as a

[4] There had been a previous disciplinary matter which had been proven against The respondent in recent years, which The respondent acknowledged, but the detail was not clear and the file was unavailable being inside the Christchurch Earthquake Red Zone

[5] CIV-2006-404-7227 in the Auckland Registry of the High Court (21 August 2007)

consequence of that finding. The situation in *Leary* was quite different, requiring the consideration of the rehabilitative progress of a person previously found not to be a fit and proper person following a disciplinary finding that had resulted in him being struck off some years prior.

[12] This is highlighted by the legislative requirement to consider the *"conduct"*[6] which has led to the enquiry as to whether or not a person is a fit and proper person to be a practitioner. The elements noted by the High Court in *Leary*, involving objective evidence of reform, and extended periods of proper behaviour since the striking off, cannot be adequately applied in the current situation.

[13] It was also submitted on behalf of the respondent that his conduct might have arisen as a result of an acute and untreated medical condition, and that, apart from the earlier disciplinary matter noted above occurring within the same relatively short time frame during which his mental health was said to be affected, his professional conduct was at all times satisfactory. It was also submitted that as a consequence of his treatment and recovery such conduct was unlikely to re-occur.

[14] For the reasons noted in our substantive decision,[7] we do not consider that the effects of his illness, as claimed by the respondent, satisfactorily account for his conduct. Also, the evidence and submissions on behalf of the respondent were that this was the only matter of concern which arose following close scrutiny of the respondent practice files and records by Law Society inspectors, covering a period of 10 years. If there was an acute and untreated mental health issue affecting the respondent in the way claimed, that could be expected to have shown up in other matters dealt with over the extended period involved, but it did not. Instead, his misconduct was limited to this estate matter the subject of disciplinary proceedings, where particular circumstances provided the respondent with the opportunity to take funds from the estate in the way noted.

[15] In our substantive decision we noted elements of opportunism, a calculated approach, and dishonesty, reflected in the charging of an unjustifiable fee to an estate in which the respondent knew he was effectively in sole charge, with no accountability for what he may have chosen to do. What he did choose to do was to take a relatively substantial amount from the estate, which amount he treated as fees, without any proper basis. He did not comply with R.8, something which facilitated the taking of those funds, as fees.

[16] The respondent's counsel classified this conduct as something that the respondent accepted was careless, arising from the respondent's "unwellness", but not calculating and dishonest conduct. We consider the evidence showed that the respondent's conduct was considerably more than careless, and we do not accept the claim that this matter has arisen because the respondent was unwell.

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[6] See S.113 (1) Law Practitioners Act 1982, and S.244 (1) Lawyers and Conveyancers Act 2006
[7] Supra, at paragraphs [51] and [52]

Discussion

[17] The Tribunal found in its substantive decision that the respondent's actions were calculated to take advantage of the position in which he found himself.

[18] He did not comply with R.8, which meant no-one involved with the estate would have any knowledge of what he had done regarding funds taken by way of fee deduction. When the subject of enquiry from the Law Society, The respondent went to some lengths to exculpate himself, including his implausible denial of knowledge that the sole executor had been deceased at the relevant times. To the Tribunal, that, together with his various claims and the evidence before this Tribunal, confirmed this was more than a simple failure to observe a requirement of the Solicitor's Trust Account Regulations.

[19] What has occurred here is not a simple matter of poor judgment or lack of care. Neither is it just a simple failure to comply with applicable regulations. The respondent's non-compliance assisted his attempt to escape detection of the fact that he had taken an unjustified amount from the estate, characterised as fees properly payable.

[20] *Bolton v Law Society*[8] remains definitive in matters of professional discipline, with proven dishonesty noted as invariably leading to striking off.[9] That ensures a wrongdoer has no opportunity to repeat the offence, ensuring public protection, and that public confidence in the legal profession is maintained.

[21] The legal profession is required to observe the highest standards of integrity, probity and trustworthiness. The public must be able to repose full trust and confidence in members of the legal profession. Accessing the estate's trust account funds, and taking them as fees which were unjustifiable, with the added factors of deliberate non-disclosure, and attempts to justify that with unsupportable claims of lack of knowledge that the sole executor had been deceased for some years, place the respondent's conduct in a serious category. There has been calculated dishonesty, with an attempt to ensure no-one had any knowledge of what the respondent had done.

[22] We note also some force in the Standards Committee submission that the respondent lacks insight into his professional responsibilities and has not accepted responsibility for what has occurred. The respondent, in his submissions, continued to maintain that he did not overcharge the estate, and that he was not aware of the death of the sole executor, matters the Tribunal found proven.

[23] It was also claimed in submissions on the respondent's behalf that the sole executor had "abrogated his responsibilities", a position we find has no basis in the circumstances of the misconduct found proven. If anything, it highlights

[8] [1994] 2 All ER 486
[9] Ibid, at 491

the breach of trust by the respondent, as the evidence before us at the substantive hearing showed that the sole executor had placed great reliance on the respondent's advice and assistance with the estate when the executor was alive.

[24] The respondent's submissions also suggested that the events may have been contributed to as a result of him wrongly taking for granted the competence of his staff solicitors.

[25] This failure to accept responsibility and lack of insight into his conduct by the respondent are relevant matters when we consider his fitness to practise. The full court in *Daniels v Complaints Committee No.2 of the Wellington District Law Society* noted that such matters may touch on the issue of fitness to practise.[10]

[26] In our view the respondent has to be removed from practice to protect the public and to maintain public confidence in the integrity of the legal profession. That is the unanimous view of the members of the Tribunal.

[27] For the respondent various sanctions were proposed by his counsel, including substantial fine and censure, or suspension. A period of nine months suspension was suggested, with the suspension not commencing until October 2011 and being limited to nine months. This was to facilitate a transfer of the respondent's practice to a staff member, who would not have the necessary trust accounting qualifications to practice on her own account until then, and to facilitate the respondent's current plan to retire from practice later in 2012.

[28] A fine is insufficient to ensure public protection. We consider that protection can only be achieved by removal of the respondent from practice. The preservation of the integrity of the profession also requires his removal from practice as a response to what has occurred.

[29] A deferred suspension, as suggested for the respondent, is not appropriate. If the respondent's conduct justifies suspension then there would be no proper basis to delay implementation for some months simply to facilitate the orderly transfer of his practice to a staff member. The respondent's practice attorney, in place to operate and supervise his practice in the absence of the respondent, could take that step if considered desirable.

[30] In any event, our view is that suspension for a period is an insufficient regulatory response given the serious nature of the respondent's misconduct, his attitude to his responsibility for that misconduct, and our view as to his fitness to practise.

[31] In respect of costs and expenses, the Standards Committee submitted costs and expenses totalling $17,560, shown on two invoices. The Committee confirmed that those costs were based on work charged at $300 per hour plus GST. Further fees accruing since those invoices were lodged with the

[10] CIV-2011-485-000227 High Court, Wellington, 8 August 2011, at paragraph 29

Tribunal, amounting to approximately $1,800, also at $300 per hour plus GST, were noted. The Tribunal considers the total costs and expenses amounting to $19,360 are reasonable.

[32] The Committee sought its costs and expenses as noted above, and also sought reimbursement of costs the New Zealand Law Society is obliged to pay to the Crown, as certified under S.257 Lawyers and Conveyancers Act 2006.

[33] The Tribunal has power to order the respondent to refund the fees taken from the estate. We do not consider that all the fees taken in breach of R.8 should be refunded, as while there was non compliance with R.8, work had been undertaken in respect of some invoices which justified the charges. However, we do consider the sum of $23,625, being the amount unjustifiably taken by The respondent from the estate's trust account, which we found was taken in a way that involved dishonesty, should be refunded to the estate by The respondent.

[34] For the respondent it was submitted that he acknowledged that he would be required to meet costs, as he accepted "*that costs will follow the event*." The respondent did not oppose the costs orders sought by the Committee, and also acknowledged that "*some of the fee be reimbursed*".

[35] As noted, the respondent sought permanent name suppression in light of the mental health issues he had originally raised at the substantive hearing of the charges which had been proven against him. We dealt with our view of the respondent's claim that mental health issues affected his conduct in our substantive decision,[11] and we have also referred to that in this reserved decision.[12] In summary, we do not consider that the respondent's conduct was the result of any mental health issues. Notwithstanding that position, the Tribunal indicated at the conclusion of the penalty hearing that it was prepared to consider the submissions made in support of permanent name suppression as part of its reserved decision. To preserve the respondent's position in the meantime, the Tribunal granted the respondent interim suppression pending its reserved decision.

[36] In doing so, the Tribunal warned the respondent that the interim order should not be taken as indicative of its likely decision on sanction. It was simply to preserve the position while the Tribunal considered all matters that had been raised. Given the sanction we intend to apply, which will involve the statutory requirement of publication of the respondent's name in the Gazette, the application for permanent name suppression becomes somewhat academic. However, we record that even if that statutory requirement was inapplicable, we would not grant permanent name suppression to the respondent. We see no adequate grounds to do so. There is an high level of public interest in being aware of proceedings in which a practitioner has been found guilty of serious misconduct, and we consider that the public interest requires no suppression of

[11] Supra, paragraphs [51] and [52] of that decision
[12] See paragraphs [13] and [14] of this decision

name in these circumstances. No factor raised by the respondent, including his claimed mental health issues, is sufficient to outweigh that position.

Decision and Orders

[37] The Tribunal's function, when applying a sanction that involves removing a practitioner from practice for proven misconduct, does not have as its primary purpose punishment, although we accept that the orders we may make will have some such effect, but is to ensure that a person unfit to practise is removed for the protection of the public.[13] The predominant purpose is to advance the public interest, and to maintain professional standards. Sanctions involving suspension or striking off ensure that only those fit to practise have that privilege.

[38] We have found serious misconduct by the respondent, involving dishonesty. There has been a deliberate departure from basic standards of integrity and probity. It is conduct that is contrary to standards required of legal practitioners, and is of a nature that undermines confidence in the legal profession.

[39] The issue for the Tribunal is to decide the appropriate sanction, and, having regard to the purposes of the professional disciplinary regime imposed by statute, to provide the necessary response for the proven misconduct in this case. Having regard to our view that the respondent's misconduct was serious, as well as his position with regard to acknowledgement of his conduct, we have a firm view that he is not a fit and proper person to practise.

[40] In these circumstances the public interest requires that the respondent be removed from practice with no opportunity to return unless he is able to show in due course that he is reformed, having regard to the principles established in *Leary*. Mere suspension for a period, as suggested on behalf of the respondent, would not meet that public interest requirement. The respondent's planned retirement next year, and his proposed undertaking not to seek a practising certificate next year, cannot avoid an order permanently removing him from practice, unless, if he so wishes, he is able to obtain restoration. Both the public and the profession should see that such misconduct will be at the cost of the right to practise.

[41] The respondent's conduct in taking advantage of the situation in which he found himself, in particular taking the funds he controlled, as fees which were unjustifiable, and his implausible claims that he had no knowledge of the death of the sole executor, indicate a level of dishonesty that requires removal from practice. While part of the misconduct allegation involved a breach of Regulation 8 of the Solicitor's Trust Account Regulations 1998, and that non compliance was proven, the serious misconduct is the unjustifiable taking of

[13] See Re Lundon [1923] NZLR 236,at 242

estate funds amounting to $23,625 by his invoice of 14 September 2007, countenanced as fees plus GST. In the particular circumstances The respondent would have been aware that there was no compliance with those regulations, and that the situation facilitated his taking of the unjustifiable fees.

[42] In our view striking the respondent off the roll of barristers and solicitors is required. As a result of his misconduct, we do not consider the respondent to be a fit and proper person to be a practitioner. That is our unanimous view. There has been serious misconduct and culpability. Removal from practice is also something that will help maintain public confidence in the legal profession.

[43] It is in the public interest that the respondent be removed from practice. There is a need for public protection having regard to the serious nature of his misconduct which we have found involved calculated dishonesty. In addition there is the fact of his failure to fully accept that his conduct represents a serious breach of the trust reposed in him as a member of the legal profession, and that what has occurred is his fault alone.

[44] Accordingly, the Tribunal ORDERS that the respondent:

(a) Be struck off the roll of barristers and solicitors;

(b) Pay Canterbury Standards Committee No.1 the sum of $19,360 in costs and expenses;

(c) Reimburse the New Zealand Law Society the amount it is required to pay to the Crown under S.257 Lawyers and Conveyancers Act 2006, as noted in paragraph [46]; and,

(d) Reduce the amounts he charged to the W Estate in breach of R.8, by refunding to that estate amounts taken under his invoice of 14 September 2007 as fees and GST, totalling $23,625.

[45] The interim order for the respondent's name suppression shall lapse at 3pm on the day after delivery of this decision to the parties.

[46] For the purposes of S.257 Lawyers and Conveyancers Act 2006, Crown costs are certified at $20,750.

Other matters

[47] There is one further matter the Tribunal wishes to note;

(a) As part of his submissions on penalty, an affidavit by Judith Marie Cheal was lodged on behalf of the respondent. Ms Cheal's affidavit sought to introduce further evidence to support the respondent's claim

that he did not sign a certain letter, by reference to her view of grammatical style used by the respondent and mode of attestation.

(b) Apart from the affidavit having doubtful probative value, and also, on its face conflicting with evidence before us at the substantive hearing,[14] it is inappropriate to file material in that way, constituting an attempt to introduce further evidence on the substantive issue, after the Tribunal has made its findings and issued its decision on the charge.

(c) We raise this to ensure that in future, parties dealing with matters before the Tribunal will be aware of what the Tribunal considers acceptable practice in such matters.

Dated at Auckland this 22nd day of August 2011

D J Mackenzie
Chair

[14] See the mode of signature on Complainants Bundle of Documents 42 and 43