NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL

[2014] NZLCDT 22

LCDT 040/13

IN THE MATTER	of the Lawyers and Conveyancers Act 2006
BETWEEN	**AUCKLAND STANDARDS COMMITTEE No. 1** Applicant
AND	**ROBERT BARRY WHALE** Practitioner

CHAIR

Judge D F Clarkson

MEMBERS OF TRIBUNAL

Mr M Gough

Mr G McKenzie

Ms S Sage

Mr W Smith

HEARING at Auckland

DATE OF HEARING 20 March 2014

COUNSEL

Mr P Davey for Standards Committee

Mr P Davison QC for the Practitioner

DECISION OF NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL

Introduction

[1] The practitioner admitted one charge pursuant to s 241(d) as set out below. The hearing thus focused on penalty and in particular the length of time of suspension from practise which ought to be imposed. Suspension had been previously agreed by the parties as the proper penalty. Indeed, they had proposed a particular period (namely seven months or "at least seven months" on the part of the Standards Committee). The Tribunal did not feel constrained to accept this proposal without further inquiry. Thus submissions were heard from both counsel and our decision reserved. We now deliver that decision.

Charge

[2] The admitted charge reads as follows:

> **Auckland Standards Committee 1 of the New Zealand Law Society** charges that **Robert Barry Whale** has been convicted of an offence punishable by imprisonment and the conviction tends to bring his profession into disrepute.
>
> **Particulars**
> On or about 23 May 2013 Mr Whale was convicted of four offences under s 58(3) of the Securities Act 1978 that he was a director of an issuer of securities and had signed registered prospectuses that were distributed and which included untrue statements as detailed in the indictment and summary of facts in respect of those offences.
>
> On or about 23 May 2013 Mr Whale was convicted of three offences under s 58(1) of the Securities Act 1978 that he was a director of an issuer of securities that distributed an advertisement that included untrue statements as detailed in the indictment and summary of facts in respect of those offences."

Background

[3] Mr Whale was admitted as a barrister and solicitor in 1970, although he does not currently hold a practising certificate, having not renewed his certificate as at June 2013.

[4] Mr Whale was formerly a partner in the commercial law firm of Jones Young Auckland. Dominion Holdings Finance Limited ("Dominion") and its subsidiaries: Dominion Finance Group Limited ("DFG"); and North South Finance Limited ("NSF"); were clients of Jones Young, specifically attended upon by Mr Whale and another partner, Mr Joyce, and undoubtedly other more junior staff members.

[5] Dominion primarily derived its income by way of dividends from DFG and NSF, while DFG derived its income from commercial and business lending, particularly on property transactions: and NSF, from financing property developments.

[6] Mr Whale was appointed (as a non-executive director) to the Board of DFG in May 2002 and subsequently to the Boards of Dominion and NSF in November 2003 and March 2006 respectively. He attended "combined" board meetings at all material times. He was the only lawyer on the board of directors and the brief biography of Mr Whale, published in the various prospectuses advised that: he had been a partner in several national based law firms since 1972, was a partner in commercial law firm Jones Young; specialised in commercial law and taxation; was a notary public (an office bestowed by the Archbishop of Canterbury on a select few); and was a director of many private companies.

[7] Mr Whale also regularly received instructions as solicitor for DFG and on limited occasions NSF, in relation to loan documentation and transactions, acting on almost all the key commercial transactions.

[8] In his capacity as a director of Dominion, DFG and NSF, Mr Whale signed prospectuses issued by the companies, attesting that the offer documents conformed with legal requirements. He did not personally review and ensure the accuracy of the offer documents but relied on the senior executives and professional advisers of the respective companies.

[9] In June 2008, the Dominion board announced concern about the ability of DFG and NSF to meet their ongoing payment obligations to their respective debenture holders. After the respective trustees denied approval for a moratorium, and (together with the companies bankers) restructuring proposals, DFG was put into receivership on 9 September 2008 and the date it was liquidated was in May 2009.

NSF was put into receivership on 8 July 2010 and was liquidated in December 2010. To date, investors have been paid 12 cents and 65 cents on the dollar respectively.

[10] It is accepted that the offer documents containing the untrue statements were in the market for approximately nine months during which in excess of $58 million of new investments was received for both companies.

[11] In respect of the overall picture, DFG had investments of nearly $175 million when placed into receivership and NSF $31 million of investments.

[12] Subsequently, the Dominion Group directors, including Mr Whale were indicted by the Financial Markets Authority on seven charges under s 58 of the Securities Act 1978 in relation to misstatement in prospectuses issued by the companies.

[13] On 31 May 2012, Mr Whale advised the Law Society (as part of his annual declaration disclosing any matter that may affect eligibility to practise) that criminal charges had been laid against him by the Serious Fraud Office ("SFO") and the Financial Markets Authority ("FMA").

[14] Mr Whale was acquitted in respect of the SFO charges. He pleaded guilty to, and was convicted of the seven charges preferred by the FMA.

[15] Mr Whale was sentenced in the High Court on 14 June 2013 to 12 months home detention, 250 hours community work and reparation of $75,000.

Submissions for the Standards Committee

[16] Because this matter had a very similar factual background to the decision in *Davidson*[1]*,* in which Mr Davidson was suspended for nine months, the Standards Committee sought an order for suspension of at least seven months. This recognised the difference between the two practitioners, in that Mr Whale admitted the charge whereas Mr Davidson had defended the charge. Mr Davidson's case was the first of the professional disciplinary matters arising out of the conviction of lawyers as professional directors under the (strict liability) Securities Act provisions.

[1] *Davidson v Auckland Standards Committee No 3* [2013] NZHC 2315.

As with Mr Davidson, Mr Whale was not found to have deliberately or dishonestly approved false statements but his conduct was held by the High Court to have amounted to "gross negligence".

[17] Mr Davey pointed to the fact that Mr Whale had admitted that he had not read the prospectuses before signing them nor even the trust deeds which set out the prohibitions or restrictions on related party lending.

[18] In evidence before us Mr Whale repeated the claim that notwithstanding his qualifications and experience, that he was expert in security documents in relation to borrowing but not in relation to raising funds in the market. In submissions to us Mr Davey quoted from the decision of His Honour Dobson J on sentencing:[2]

> "[18]…….. Notwithstanding those qualifications and experience, you claim not to have understood the constraint imposed under the trust deed on related party lending, and not to have personally assessed the truth of statements made in the offer documents for which you were responsible.
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> [19] From the perspective of potential investors assessing the offer documents, it would be entirely unexpected, and testing credibility, for a senior commercial lawyer with commerce and tax degrees to claim such a fundamental gap in the relevant knowledge required to discharge your duties as a director of a finance company. You were the only lawyer on the board. Investors were entitled to treat you as being on the board because you would have the expertise to understand the requirements under the Securities Act when raising money from the public. The effect of your stance at your trial before Lang J on the charges brought by the Serious Fraud Office (SFO) was that, whilst you were expert in documenting the process of lending the money out, you had no expertise in the documentation required for getting the money in. Lawyers might just understand that distinction, but it is one that would make absolutely no sense to potential investors assessing the qualifications of the directors responsible for the offer documents."

[19] Mr Davey went on then to review those aspects of the *Davidson* decision which discussed the purposes of suspension, as set out in *Daniels.*[3]

[20] It was submitted that an order for suspension ought to be imposed in the present matter in order "*to maintain the public's confidence in the profession's discharge of its obligation to discipline members* "(*Daniels)*.[4]

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[2] *R v Whale* [2013] NZHC 1436 [18] and [19].
[3] *Daniels v Complaints Committee No. 2 of the Wellington District Law Society* [2011] 3 NZLR 850.
[4] *A*t [142].

[21] Mr Davey also discussed how the High Court Judge in *Davidson* took into account the various mitigating factors referred to in sentencing for the underlying offence, as well as that practitioner's distinguished career and charitable work, the many references as to his good character and remorse. There was account taken of the very substantial reparation made by him, namely $500,000.

[22] In the present case Mr Whale's reparation order (which he says was as much as he could manage, given other commitments and the ownership of all major assets by family trusts) was $75,000. His Honour Dobson J referred to this offer of reparation as "underwhelming".[5]

[23] We note that in evidence he told us that the fees derived from documenting the lending for the Dominion Group had yielded his firm approximately $500,000 per year.

[24] It was submitted that the other distinguishing feature between Mr Whale's situation and Mr Davidson's related to the finding by His Honour Dobson J[6] that Mr Whale had been apparently dishonest to an inquiry from the company's auditors. His Honour refers to an email exchange between the practitioner and auditor. His Honour commented as follows:

> "[52]..……..Your 29 August 2008 response to an audit inquiry, to the effect that there were no additional party disclosures required, was flat out wrong, and you knew it to be. You have not faced any charge in relation to it and it is outside the period to which the present convictions relate …
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> [53]…..when weighed against what appears otherwise to have been a life including worthwhile service, it does not deprive you of credit for good character, but I am bound to consider that it does shave the extent of that credit available."

[25] When questioned before us we note that the practitioner was simply unable to explain why he had said this because he accepted it was wrong information and had no reason for saying so or any intention to be dishonest.

[26] In summary Mr Davey submitted because there were fewer mitigating features taken into account by His Honour Dobson J than had been applied in respect of Mr Davidson that a longer period of suspension than had been imposed on

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[5] Above, n2, at [55].
[6] Above, n2 at [52].

Mr Davidson might have been contemplated but that this was balanced by the admission of the charge at an early date.

Submissions for the practitioner

[27] In his submissions on behalf of Mr Whale, Mr Davison QC sought to persuade the Tribunal that the level of culpability of Mr Whale was significantly less than that of Mr Davidson because Mr Davidson was the Chairman of the board and Mr Whale merely a board member. He also referred to the greater scale of the collapse of BridgeCorp which was the company connected with Mr Davidson.

[28] Mr Davison emphasised the responsible approach taken by Mr Whale with a prompt admission of the charge before the Tribunal. Mr Whale had sworn an affidavit setting out his situation and the background to this charge and in it conceded that his conviction tended to bring the legal profession into disrepute "*because of the association of a member of the (legal) profession with companies whose offer documents were found to contain untrue statements*".

[29] Mr Davison emphasised his client's further statement that notwithstanding this concession, Mr Whale considered it was "*reasonable and appropriate for me to place reliance upon qualified and experienced people, be they my legal practice partner Mr Joyce or the senior executives of the companies*".

[30] Mr Davison reminded the Tribunal that the disciplinary proceedings were primarily in place to protect the public and that his client's misjudgement leading to the Securities Act convictions were of a kind that did not involve a "*moral failure*". He submitted that his client had been significantly penalised already and that nothing other than a suspension was required to mark the profession's disapproval of his actions.

[31] Mr Davison indicated his client would abide a decision of seven months suspension.

[32] An order as to costs was not opposed. Mr Davison further emphasised that his client was very humbled and embarrassed at his appearance having "*lived and practised by high standards*".

Discussion

[33] We have considered a number of features of this matter, both by way of comparison of the *Davidson* case but also as standalone features of the culpability of the lawyer in this matter.

[34] We note that in Mr Whale's case he was intimately involved in documenting the transactions of these finance companies because his firm handled the security documentation. We note in particular the comments of His Honour Dobson J[7] in this regard:

> "[23] Mr Whale, you had far closer relevant involvement with matters bearing on the untrue statements in the offer documents. You documented virtually all aspects of the related party transactions and accordingly had intimate knowledge of them and all the circumstances in which they were undertaken. An aspect of your defence to Crimes Act charges on this matter is that you were unaware of the obligation under the trust deed to report such transactions to the trustee for debenture holders, and were similarly unaware that potential investors would be misled by omitting reference to the related party transactions in the offer documents. Although the relevant failings by both of you puts your conduct in the sphere of gross negligence, yours had to be categorised as materially more serious, Mr Whale, than Mrs Butler because of that close involvement."

[35] Like His Honour we find it less than credible that the practitioner could understand such matters but claim ignorance of the document that raises the funds to be loaned.

[36] We have taken account of what must be regarded as an established finding of dishonesty by the High Court Judge, referred to above. That, in our view takes the matter beyond the *Davidson* situation. We note that the directors fees paid to Mr Whale were relatively modest but his overall personal benefit from the connection with the company was significant given the at least $500,000 in fees turnover provided to the firm by these companies.

[37] We were troubled by the number of occasions when the practitioner conceded that conflicts of interest had arisen in the course of his roles as both a director and a trustee of the Butler Family Trust (other directors of the company). He told us that he recalled telling Mr Butler at one point that he was uncomfortable "*wearing too many hats*". While Mr Whale told the Tribunal that he had considered resignation he did

[7] Above, n2 at [23].

not do so because, having discussed the matter with Mr Butler, the latter was comfortable with the conflict. The practitioner indicated he always resolved such conflicts in favour of his role as a director.

[38] We would not wish the practitioner to find himself in these situations of conflict when he returns to practice in the future.

[39] We do accept the submission that the practitioner has been responsible in entering an early plea, however it has to be said that given that this matter was preceded by the findings of the Tribunal, and the High Court on appeal, in *Davidson* there was no real defence available to him in any event, thus the credit for this plea ought not to be too weighty. Benefit to the practitioner will accrue from the reduced costs arising out of his admission of the charge.

[40] In the end we consider that in order to properly reflect the disapproval of the profession of the practitioner's actions in this matter, the damage occasioned to the profession having regard to the various findings of the High Court Judge in sentencing and the lower level of reparation made by this practitioner, we are not minded to accept the submission of either counsel that seven months suspension would be an adequate response.

[41] We consider that 12 months suspension is necessary to properly reflect the seriousness of this matter. In accordance with s 244 we record that this is the unanimous decision of the five Tribunal members presiding in this matter.

Orders

(1) The practitioner will be suspended from practise as a barrister and solicitor for a period of 12 months commencing at the date of the hearing, namely 20 March 2014.

(2) Mr Whale is to pay the costs of the New Zealand Law Society in the sum of $6,812.30.

(3) The New Zealand Law Society is to pay the Tribunal costs under s 257 in the sum of $3,137.

(4) Mr Whale is to reimburse the New Zealand Law Society for the Tribunal costs in the above sum.

DATED at AUCKLAND this 2nd day of May 2014

Judge D F Clarkson
Chair