**NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL**

[2013] NZLCDT 22
LCDT 032/12

**IN THE MATTER** of the Lawyers and Conveyancers Act 2006

**BETWEEN** **TARANAKI STANDARDS COMMITTEE NO. 1**
Applicant

**AND** **HUGH EDWARD STAPLES HAMILTON**
Respondent

**CHAIR**
Judge D F Clarkson

**MEMBERS OF TRIBUNAL**
Mr W Chapman
Mr J Clarke
Ms P Walker
Mr I Williams

**HEARING** at Hastings on 13 May 2013

**APPEARANCES**
Mr M Hodge for the Standards Committee
Practitioner in Person

**DECISION OF THE NEW ZEALAND LAWYERS AND CONVEYANCERS DISCIPLINARY TRIBUNAL**

## *Introduction*

[1] The practitioner faced misconduct charges laid by the Taranaki Standards Committee No. 1 or perhaps more correctly, one charge laid on two alternative or supplementary grounds. The practitioner admitted the charge at an early stage but disputed some of the particulars in support of the charge.

[2] At the hearing, Mr Hamilton abandoned his dispute of the facts, conceding that the other witness was likely to have better recall of the events than he had at the time, given his own state of mind.

[3] Thus the matter proceeded effectively as a penalty only hearing at the conclusion of which the Tribunal, having considered the matter, made orders striking the practitioner from the roll of Barristers and Solicitors and making a consequential compensation order, while reserving the question of costs. The oral orders were to be supplemented by a reserved written decision. This is that decision.

## *Charge*

[4] **"Charge 1**

> Taranaki Standards Committee No. 1 of the New Zealand Law Society (**Standards Committee**) charges **Hugh Edward Staples Hamilton** of Taupo, former barrister and solicitor, with misconduct, in that:
>
> (a) At times when he was providing regulated services, he engaged in conduct that would reasonably be regarded by lawyers of good standing as disgraceful or dishonourable; and/or,
>
> (b) At times when he was providing regulated services, he wilfully or recklessly contravened provisions of the Lawyers and Conveyancers Act 2006 (**Act**) and/or the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 (**Rules**), namely:
>
> (i) Section 110 of the Act; and/or,

(ii) Rule 11.1 (misleading and deceptive conduct); and/or,

(iii) Rule 5.4 (conflicting interests); and/or,

(iv) Rule 6.1 (conflicting duties); and/or,

(c) He engaged in conduct unconnected with the provision of regulated services but which would justify a finding that he is not a fit and proper person or is otherwise unsuited to engage in practice as a lawyer; and/or,

(d) He engaged in conduct otherwise amounting to misconduct."

***Background***

[5] The practitioner was admitted in 1974, and therefore, prior to the events leading to these charges, had practiced for 37 years with no previous disciplinary matters. He practised in a small community and was involved in local Government very successfully. He ultimately became the Mayor of Central Hawke's Bay. In around 2000 or 2001 the practitioner, apparently from some misguided sense of loyalty to a deceased client, agreed to take over the guarantee of a lease of a brothel in Wellington, which had been run by his late client. This led to him ultimately having to become involved in the management of the business and by the period of 2005 to 2007 this required the practitioner to take out a number of loans, both from the bank and from his partners. His partners had requested that he extricate himself from this business but attempts to sell it proved unsuccessful.

[6] Somewhat parallel with this set of events a client of Mr Hamilton's had sought investment advice from him and wished to invest a portion of his capital in a less conservative manner. A shelf company formed by the firm, PB Limited, was utilised to allow the client to invest initially $50,000 and later a total of $100,000 in another brothel business to be run in parallel with the original one. Once again Mr Hamilton unwisely agreed to guarantee the lease. Neither business was successful, and to allay the client's concerns Mr Hamilton entered into a deed of acknowledgment of debt between the company and the client and his partner for the $100,000. The company shares which had initially been owned equally by the client and Mr Hamilton were then transferred into Mr Hamilton's name so that he was a 100% shareholder of PB Limited. That was in May 2009 and no payments were made

under that deed as we understand it prior to the next set of events. In the meantime Mr Hamilton attempted to have building work carried out on the properties in order to market them better for sale and thereby got himself further into debt.

***The Inter-Client Transaction***

[7] In late 2010 or early 2011 one of Mr Hamilton's other clients who was in the forestry business was experiencing some difficulties in transporting logs. Because Mr L, the first client who had invested in the brothel business, had a background in the transport business, Mr Hamilton considered he would be doing both a service by introducing them and seeing if they could assist each other in business.

[8] Discussions took place which resulted in the suggested loan by the forestry company to Mr L or his company to purchase a logging truck with a view that they would contract the logging transport to Mr L. The profits of this would allow Mr L to repay the loan.

[9] In order to complete this transaction Mr L called upon Mr Hamilton to repay the monies owed to him under the deed of acknowledgment of debt. Mr Hamilton replied that $50,000 would be deposited into Mr L's company, formed for the venture.

[10] In the meantime Mr Hamilton arranged with the accountant for the forestry company for an advance of $62,000 to be made. The accountant asked for the bank details of Mr Hamilton's firm's trust account in order for the payment to be deposited. Instead Mr Hamilton gave the accountant the bank details of PB Limited and the money was deposited there; $12,000 was used to pay an account for building repairs and then $50,000 was advanced to Mr L's company ostensibly as a repayment by PB Limited under the deed of acknowledgment of debt. The funds of course had come from the logging company, which knew nothing of the other arrangements between Mr Hamilton and Mr L. The matter came to light when the logging company deducted payments under the logging cartage contract to reflect the repayment of the $62,000 advance about which Mr L knew nothing. In other words Mr Hamilton diverted funds borrowed for one purpose in order to relieve himself or the company in which he had a 100% interest, of liability in the sum of

$50,000. Furthermore he then applied the balance of $12,000 for accounts owed by his company rather than again to the purpose for which they were borrowed.

[11] As can be seen in this series of transaction Mr Hamilton has breached the fundamental relationships of trust between himself and clients. He has been in a clear conflict of interest between his own interest and that of his clients without advising them or ensuring they obtained independent advice. Furthermore he has been in conflict of duties between two clients. Although he may have initially had good intentions in putting these clients together, once again there was no attempt to obtain independent advice or properly protect the clients and a breach of trust resulted.

***The Law***

[12] Section 3(1)(a) and (b) of the Lawyers and Conveyancers Act 2006 ("LCA") reads:

> "**3 Purposes**
>
> (1) The purposes of this Act are--
>
> (a) to maintain public confidence in the provisions of legal services and conveyancing services:
>
> (b) to protect the consumers of legal services and conveyancing services:
>
> ..."

[13] Section 4 deals with the fundamental obligations of lawyers:

> "Every lawyer who provides regulated services must, in the course of his or her practice, comply with the following fundamental obligations:-
>
> (a) the obligation to uphold the rule of law and to facilitate the administration of justice in New Zealand:
>
> (b) the obligation to be independent in providing regulated services to his or her clients:
>
> (c) the obligation to act in accordance with all fiduciary duties and duties of care owed by lawyers to their clients:

..."

[14] Section 110 of the LCA provides:

> "**110 Obligation to pay money received into trust account at bank**
>
> (a) A practitioner who, in the course of his or her practice, receives money for, or on behalf of, any person -
>
> ...
>
> (4) A person commits an offence against this Act and is liable on summary conviction to a fine not exceeding $25,000 who knowingly acts in contravention of subsection (1) or subsection (2)."

[15] In addition to compliance with the LCA practitioners are obliged to comply with the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008.

> "5.0 A lawyer must be independent and free from compromising influences or loyalties when providing services to his or her clients.
>
> **Independent judgement and advice**
>
> 5.1 The relationship between lawyer and client is one of confidence and trust that must never be abused.
>
> 5.2 The professional judgement of a lawyer must at all times be exercised within the bounds of the law and the professional obligations of the lawyer solely for the benefit of the client.
>
> 5.3 A lawyer must at all times exercise independent professional judgement on a client's behalf. A lawyer must give objective advice to the client based on the lawyer's understanding of the law.
>
> **Conflicting interests**
>
> 5.4 A lawyer must not act or continue to act if there is a conflict or a risk of a conflict between the interests of the lawyer and the interests of a client for whom the lawyer is acting or proposing to act.
>
> 5.4.1 Where a lawyer has an interest that touches on the matter in respect of which regulated services are required, the existence of that interest must be disclosed to the client or prospective client irrespective of whether a conflict exists.
>
> 5.4.2 A lawyer must not act for a client in any transaction in which the lawyer has an interest unless the matter is not contentious and the interests of the lawyer and the client correspond in all respects.
>
> 5.4.3 A lawyer must not enter into any financial, business, or property transaction or relationship with a client if there is a possibility of the relationship of confidence and trust between lawyer and client being compromised.

5.4.4 A lawyer who enters into any financial, business, or property transaction or relationship with a client must advise the client of the right to receive independent advice in respect of the matter and explain to the client that should a conflict of interest arise the lawyer must cease to act for the client on the matter and, without the client's informed consent, on any other matters. ..."

[16] Rule 6.1 states:

"**Conflicting interests**

6.1 A lawyer must not act for more than 1 client on a matter in any circumstances where there is a more than negligible risk that the lawyer may be unable to discharge the obligations owed to 1 or more of the clients.

6.1.1 Subject to the above, a lawyer may act for more than 1 party in respect of the same transaction or matter where the prior informed consent of all parties concerned is obtained.

6.1.2 Despite rule 6.1.1, if a lawyer is acting for more than 1 client in respect of a matter and it becomes apparent that the lawyer will no longer be able to discharge the obligations owed to all of the clients for whom the lawyer acts, the lawyer must immediately inform each of the clients of this fact and terminate the retainers with all of the clients.

6.1.3 Despite rule 6.1.2, a lawyer may continue to act for 1 client provided that the other clients concerned, after receiving independent advice, give informed consent to the lawyer continuing to act for the client and no duties to the consenting clients have been or will be breached."

[17] Rule 11.1 reads:

"**Misleading and deceptive conduct**

11.1 A lawyer must not engage in conduct that is misleading or deceptive or likely to mislead or deceive anyone on any aspect of the lawyer's practice."

[18] As can be seen from the above narration of events the practitioner clearly breached, as acknowledged by him, all of these fundamental rules and obligations.

[19] In doing so his actions strike at the very heart of the important relationship of trust between lawyer and client and for this reason the Standards Committee sought that he be struck off.

***Submissions of Standards Committee***

[20] We were referred by counsel for the Standards Committee, Mr Hodge, to the protective purposes underpinning the disciplinary regime for lawyers. This protection relates to the public as consumers generally but also as the need for the public to maintain confidence in the legal profession and in the manner in which it seeks to uphold its standards of conduct.

[21] We were referred to two recent High Court decisions where the principles, now well established have been set out: firstly in *Dorbu*:[1]

> "[35]The principles to be applied were not in issue before us, so we can briefly state some settled 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. Professional misconduct having been established, the overall question is whether the practitioner's conduct, viewed overall, warranted striking off. The Tribunal must consider both the risk of reoffending and the need to maintain the reputation and standards of the legal profession. 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. *Wilful and calculated dishonesty normally justifies striking off*. So too does a practitioner's decision to knowingly swear a false affidavit. Finally, personal mitigating factors may play a less significant role than they do in sentencing."

[22] And again in *Hart v Auckland Standards Committee 1*:[2]

> "[185] As the Court noted in *Dorbu*, the ultimate issue [when considering striking off] is whether the practitioner is not a fit and proper person to practise as a lawyer. Determination of that issue will always be a matter of assessment having regard to several factors.
>
> [186] The nature and gravity of those charges that have been found proved will generally be important. They are likely to inform the decision to a significant degree because they m ay point to the fitness of the practitioner to remain in practice. *In some cases these factors are determinative, because they will demonstrate conclusively that the practitioner is unfit to continue to practice as a lawyer. Charges involving proven or admitted dishonesty will generally fall within this category*."

[23] As submitted by the Standards Committee:

> "... The only inference that can be drawn is that Mr Hamilton's actions were deliberate and dishonest. In effect, he preferred his own financial interests above those of his client in applying that client's money."

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[1] *Dorbu v New Zealand Law Society* [2012] NZAR 481 HC.
[2] *Hart v Auckland Standards Committee 1* [2013] NZHC 83.

[24] The Standards Committee submits that Mr Hamilton is not a fit and proper person to be a practitioner.

[25] The Tribunal was made aware that there is a further complaint currently before the Standards Committee in relation to Mr Hamilton. This matter has not been progressed to a hearing at this point and the Tribunal takes no account of this complaint.

***Submissions for Mr Hamilton***

[26] Mr Hamilton represented himself in what can be described as a very dignified manner. He accepted that he had allowed himself "*to become badly conflicted*". He accepted that he had misled the forestry client and its accountant. He accepted that he failed to advise his client of the nature of the source of the $50,000 which purportedly was paid by PB Limited. He described how he had attempted to borrow heavily in order to escape the huge financial pressure under which he found himself and accepts that his judgment was clouded and his ability to perceive his breaches of professional standards was consequently impaired.

[27] In mitigation he asks the Tribunal to take account of the fact that he admitted the charge at the earliest opportunity to ensure that those concerned were inconvenienced as little as possible. Furthermore he resigned from his partnership within days of being confronted and had not subsequently renewed his practising certificate. Mr Hamilton stated that he did not intend to practice as a lawyer ever again and accepted that strike off was a likely consequence of his actions and indeed did not strongly resist this end, although indicating his preference that his career not end in this manner.

[28] Mr Hamilton advised the Tribunal that two thirds of the $62,000 amount borrowed from the forestry company had been repaid but that $20,000 was outstanding. He had been able to stave off a bankruptcy over the past year working as a business consultant and receiving minimal income.

[29] Furthermore in mitigation Mr Hamilton pointed not only to his clean disciplinary record but his lengthy record of community service. He was between 1989 and 1996

Mayor of Central Hawke's Bay and was awarded an honour for his services to local Government. He has been a member of a service club for many years. He asks that his strong record be taken account of. His financial circumstances are clearly parlous and his future outside the law uncertain.

***Decision***

[30] While we accept that many of the matters put before us in relation to his history of service as a lawyer and to the community are strongly mitigating we must remind ourselves that mitigating circumstances cannot override the consideration of protection of the public and the profession's reputation in disciplinary proceedings. We refer to the decision in *Bolton v Law Society*[3] where Sir Thomas Bingham said:

> "The most serious [lapse in professional conduct] involves proven dishonesty, whether or not leading to criminal proceedings and criminal penalties. In such cases the [solicitor's disciplinary] Tribunal has almost invariably, no matter how strong the mitigation advance for the solicitor, ordered that he be struck off the roll of solicitors."

[31] For all of the above reasons the Tribunal as a unanimous panel of five (pursuant to s 244 LCA) has reached the view that there is no option but that Mr Hamilton be struck from the roll of barristers and solicitors as he is no longer a fit and proper person.

[32] In assessing the quantum of costs we have taken into account Mr Hamilton's personal circumstances and the fact that in June 2011 he put in place proper steps to remove himself from practice and cooperated with the Law Society in respect of the charges laid, albeit with a period of disputed facts.

[3] *Bolton v Law Society* [1994] 2 All ER 486 at 492.

***Orders***

[a] The practitioner is struck off the roll of barristers and solicitors pursuant to s 242(1)(c) and s 244.

[b] There will be a compensation order pursuant to s 156(1)(d) in the sum of $20,000 to [name suppressed] on the basis that such payment is not to be in addition to any existing agreement to pay.

[c] Pursuant to s 249 costs of the New Zealand Law Society in investigating and prosecuting the practitioner are awarded in the sum of $15,000.

[d] Section 257 Tribunal costs are awarded against the New Zealand Law Society in the sum of $5,225.

[e] Pursuant to s 249 we order that the practitioner reimburse the sum of $5,225 to the New Zealand Law Society.

**DATED** at AUCKLAND this 28th day of May 2013

Judge D F Clarkson
Chair